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The International Comparative Legal Guide to:
Cartels & Leniency 2011

A practical cross-border insight into cartels and leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

In the Italian legal system, cartels are prohibited pursuant to Article 101 TFEU and Article 2 of Law No. 287 of October 10, 1990, laying down "Rules for the Protection of Competition and the Marketplace" (the "Law"). As stated in Article 1 of the Law, its legal basis is Article 41 of the Constitution, which enshrines the principle that private economic enterprise is free, although "it may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity".

A violation of the cartel prohibition constitutes an administrative offence and a tort. Companies guilty of cartel conduct may thus be subject to administrative sanctions and/or be exposed to civil damages claims. Violations of the cartel prohibition are not subject to criminal sanctions.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 101 TFEU applies to cartel conduct likely to affect trade between Member States, whereas Article 2 of the Law only applies to cartel conduct which does not fall within the scope of Article 101 TFEU, i.e., to cartels with essentially local effects or scope. However, pursuant to Article 3(1) of Council Regulation (EC) No. 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU] ("Regulation No. 1/2003"), where the *Autorità Garante della Concorrenza e del Mercato*, i.e., the Italian Competition Authority (the "ICA"), applies Article 2 of the Law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) TFEU which may affect trade between Member States within the meaning of that provision, it shall also apply Article 101 TFEU to such agreements, concerted practices or decisions.

Article 2 of the Law prohibits any agreement, decision or concerted practice having as its object or effect to appreciably prevent, restrict or distort competition within the domestic market or a substantial part of it. By way of example, Article 2 refers to cartel conduct consisting in: (a) directly or indirectly fixing purchase or selling prices or any other trading conditions; (b) impeding or limiting production, markets, investment, technical development or technological progress; (c) sharing markets or sources of supply; (d) applying objectively dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage without an objective justification; or (e) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the ICA, a five-member independent administrative agency. The ICA's members are appointed jointly by the Speakers of the Senate and the Chamber of Deputies from candidates of "well-known independence, who have held public offices of great responsibility and relevance". Each of the five serve for a seven-year, non-renewable, term. The ICA Staff, namely the Investigation Directorate having jurisdiction by industry, carries out the investigations of alleged cartel conduct. The five members sitting as the College adopt final decisions, which may find an infringement, order the cartel members to terminate it and, possibly, impose a fine on them. Cartel decisions in the telecom and insurance sectors must be adopted after hearing the non-binding opinion of the respective industry regulator (i.e., the *Autorità per le Garanzie nelle Comunicazioni* and the *Istituto per la Vigilanza sulle Assicurazioni Private e d'Interesse Collettivo*).

The ordinary civil court having jurisdiction entertains damage claims based on a violation of the cartel prohibition. Under Article 33(2) of the Law, petitions for declaratory relief (i.e., for a declaration that an agreement hindering competition is null and void), actions for damages and requests for interim relief relating to infringements of Article 2 of the Law must be brought before the court of appeals (*Corte d'Appello*) having territorial jurisdiction. Such court has jurisdiction at first and last instance, i.e., its decisions are subject to review by the Court of Cassation on questions of law only. 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 Article 101 TFEU (see section 8 below).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Pursuant to Article 14(1) of the Law, the ICA's decision to open proceedings sets: (i) the date of termination of the proceedings, by which the College must adopt its final decision, in which sanctions may be imposed (see section 3 below); as well as (ii) the time limit within which the representatives of the companies involved may be heard at their request. Any third parties having a direct interest in

the end result of the proceedings may request to intervene in the investigation. The addressees of the ICA's decision to open proceedings and any intervener may file written submissions and documents as well as have access to the case-file. Article 8 of the Presidential Decree No. 217 of April 30, 1998 (the "Decree") clarifies that the ICA is entitled to exercise the investigative powers entrusted with it only after notifying the decision to open proceedings to the company involved, typically at the outset of an on-site inspection.

Where it deems to have acquired sufficient evidence of the collusive practice in question, the ICA issues a statement of objections ("SO"), by which it notifies the companies involved and any complainant of its objections against the cartel members. At the same time, the ICA fixes the date of closure of the investigation (i.e., the last day on which the ICA may exercise its investigatory powers and the parties, the interveners and the complainants, if any, may get access to the case-file). The final hearing before the College of the parties and third parties concerned typically takes place on the date of closure of the investigation. The SO must be served on the parties and third parties involved at least 30 days before the date of closure of the investigation. The companies involved may file written submissions in response to the SO and documents no later than five days before the date of closure of the investigation.

1.5 Are there any sector-specific offences or exemptions?

Italian law does not provide for any sector-specific offences or block exemptions from the cartel prohibition.

1.6 Is cartel conduct outside Italy covered by the prohibition?

To the extent that cartel conduct which takes place outside Italy has effects within the Italian territory or a substantial part of it, such conduct falls within the scope of application of Article 2 of the Law and, possibly, Article 101 TFEU, if it affects trade between Member States. As a consequence, such conduct may be investigated and sanctioned by the ICA. The Law arguably is not applicable to companies established in Italy that engage in cartel conduct affecting only foreign trade, including where the anticompetitive agreements or practices take place within the domestic territory.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Not applicable
Carry out compulsory interviews with individuals	Only with regard to a company's legal representatives and in the course of an unannounced search of business premises or a hearing	Not applicable
Carry out an unannounced search of business premises	Yes	Not applicable
Carry out an unannounced search of residential premises	No	Not applicable
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Not applicable
■ Right to retain original documents	No	Not applicable
■ Right to require an explanation of documents or information supplied	Yes	Not applicable
■ Right to secure premises overnight (e.g. by seal)	Yes	Not applicable

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The ICA may exercise its investigative powers only after it serves on the companies involved, typically at the outset of an on-site inspection, the decision to open proceedings, which must clearly indicate the presumed facts that it intends to investigate.

For companies established outside of Italy, service of process of the ICA's decisions to open proceedings is accomplished through the diplomatic channel, which takes considerably longer than notification by the ICA officials before the commencement of a dawn raid. Accordingly, where a dawn raid is staged to take place simultaneously at the premises of several companies, companies established outside of Italy are not raided, even with the assistance of the local NCA staff.

2.3 Are there general surveillance powers (e.g. bugging)?

The Decree lays down the relevant procedural rules for the enforcement of the Law, including the cartel prohibition.

The list of investigative powers provided for in the Decree is exhaustive and does not include the exercise of any type of general surveillance powers such as bugging, telephone tapping, or trailing individuals allegedly involved in cartel conduct.

2.4 Are there any other significant powers of investigation?

No, there are not.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The ICA does not have the power to search residential premises.

Officials of the relevant ICA's investigation directorate carry out searches of business premises, with the assistance of the Tax Police (*Guardia di Finanza*). Although the raided company's legal advisors may assist it, the inspection cannot be delayed by the company's request to wait for their arrival to the premises.

2.6 Is in-house legal advice protected by the rules of privilege?

Italian law protects the confidentiality of communications between a lawyer, who is a member of the Bar of an EU Member State and the client. To the extent that these communications are exchanged in the exercise of the client's right of defence, they are covered by professional legal privilege and cannot be used by the ICA for the purposes of a cartel investigation.

However, pursuant to Italian law, membership of the Bar is incompatible with, *inter alia*, the status of employee. Accordingly, in-house lawyers, who are employees of the company for which they work, cannot be members of the Bar, and, therefore, their communications and/or advice are not covered by the rules of privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The undertakings concerned are obliged to cooperate actively with the ICA, which implies that they must make available to the ICA any and all information in their possession, only insofar as it relates to the subject-matter and the purpose of the investigation, as described in the decision to open proceedings (see above, question 2.2). The use of information obtained by the ICA in the course of a cartel investigation for purposes other than that for which it was requested, is prohibited, although such information may provide circumstantial evidence which may, in some cases, be used to decide whether or not it is appropriate to initiate a separate antitrust procedure.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The ICA may impose sanctions of up to approx. €25,822 against companies that refuse or fail, without objective justification, to provide the information or produce the documents requested by the ICA in the exercise of its investigative powers. The same applies by analogy to companies refusing to submit themselves to on-site inspections. Moreover, fines of up to approx. €51,645 may be imposed against companies that provide misleading information to the ICA.

To date, companies have been fined for providing misleading information in only one instance: by a decision issued on July 23, 1993, two members of the Italian freight forwarders association Fedespedi were fined in the amount of approx. €15,490 each.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Pursuant to Article 15(1) of the Law, where the ICA finds an infringement of the cartel prohibition, it orders the companies involved to put an end to the infringement within the deadline that it establishes in its final decision. Moreover, in case of serious violations of competition rules, such as cartels, the ICA may also impose on the undertaking involved a fine of up to 10% of the total turnover realised in the financial year prior to the notification of the final decision. The notion of total turnover must be interpreted as referring to total worldwide turnover (see *Tribunale Amministrativo Regionale per il Lazio* (Regional Administrative Tribunal of Latium, the "TAR"), Judgment No. 9203 of October 29, 2003, *Philip Morris & ETI/ICA*).

With regard to fines imposed on associations of undertakings for infringements that they have committed, it is the ICA's practice to calculate the amount of the fine based on the association's revenues or membership fees, rather than the members' turnover, as allowed in the EU legal system under Article 23(4) of Regulation No. 1/2003.

In setting the amount of the fine, the ICA must take into account the gravity and duration of the infringement. In its recent decisions, the ICA has been increasingly relying on the principles set out by the European Commission in its 1998 and 2006 Guidelines on the method of setting fines. The ICA has not adopted separate guidelines in this matter.

Furthermore, Article 31 of the Law refers to the principles laid down by Law No. 689 of November 24, 1981 ("Law No. 689/1981"), insofar as they are compatible with the Law. According to Article 11 of Law No. 689/1981, the specific actions taken by the author of the infringement to eliminate or reduce its effects, its personality and economic conditions must also be taken into account in the calculation of the amount of an administrative financial penalty, such as that provided for by Article 15(1) of the Law.

The highest collective fine imposed by the ICA on the members of a cartel to date amounts to €361.4 million (see Case I377, *RC Auto*, decision of July 28, 2000, Bull. No. 30/2000; the said fine was levied on 38 insurance companies for their participation in a price-fixing conspiracy in the third-party auto liability market), whereas the highest cartel fine levied on a single company to date – namely ENI S.p.A. for its participation in anti-competitive arrangements concerning the supply of jet fuel to airports – amounts to €117 million (see Case I641, *Rifornimenti aeroportuali*, decision of June 14, 2006, Bull. No. 23/2006).

Listed below are total fine amounts imposed by the ICA in certain more recent cartel decisions, in which it established a violation of the cartel prohibition:

- €301.03 million on the six members of a cartel in the jet fuel sector (including ENI S.p.A., see above; June 14, 2006);
- €56.9 million on eight industrial gas producers (April 26, 2006; decision annulled by the *Consiglio di Stato* (Council of State), Judgment No. 1006 of March 7, 2008, *Rivoira a.o./ICA*);
- €30.668 million on eight companies for colluding in the wooden chipboard panel market (May 17, 2007; total fine reduced to €26.132 million by the TAR, Judgment No. 2312 of February 6, 2008, *SAIB a.o./ICA*);
- €23.9 million on two suppliers of liquefied petroleum gas cylinders and small tanks (March 24, 2010);
- €13.3 million on six companies and two associations of undertakings operating in the battery recycling industry for market sharing and other collusive conduct (April 29, 2009);
- €12.5 million on 26 pasta producers and two associations of undertakings for price fixing (February 25, 2009);
- €11.3 million on two water utility companies for bid rigging (November 22, 2007; decision annulled by the TAR, Judgment No. 6238 of May 7, 2008, *Acea and Suez/ICA*);
- €9.9 million on 15 companies coordinating their bids for local public transport contracts (October 30, 2007; the TAR (see Judgment No. 6215 of June 26, 2008, *TEP a.o./ICA*) and the *Consiglio di Stato* on appeal (see Judgment No. 2089 of April 3, 2009, *TEP/ICA*) later annulled the fines imposed by the ICA on three undertakings and reduced the amount of the fine imposed on another one);
- €4.374 million on the five members of a cartel in the marine paint sector (January 25, 2007; total fine reduced to €2.1 million by the TAR, Judgment No. 14157 of October 10, 2007, *Hempel/ICA*); and
- €3.996 million on four suppliers of ostomy medical products (August 3, 2007; total fine reduced to €1.6 million by the TAR, Judgment No. 5578 of April 16, 2008, *Bristol-Myers Squibb a.o./ICA*).

3.2 What are the sanctions for individuals?

No criminal or administrative sanction may be imposed on individuals involved in cartel infringements under the Law. However, conduct relevant for the purposes of determining whether the cartel prohibition has been violated can also constitute a crime (e.g., where a bid-rigging cartel results in criminal interference with public tender procedures). Where the ICA discovers a case involving bid-rigging, it must refer the proceedings against individuals to the public prosecutor, whereas the corresponding proceedings against companies, if any, stay with the ICA.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

According to Article 11 of Law No. 689/1981, when setting fines, the ICA must take into account, *inter alia*, the economic conditions of the undertakings concerned. As clarified by the ICA, a reduction in the basic amount of the fine on the ground of the undertaking's inability to pay may be granted, pursuant to §35 of the European Commission's 2006 Guidelines on the method of setting fines, solely on the basis of objective evidence that imposition of the fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value (Case I657, *Servizi aggiuntivi di trasporto pubblico nel Comune di Roma*, decision of October 30, 2007, Bull. No. 41/2007; in Case I694, *Listino prezzi della pasta*, decision of February 25, 2009, Bull. No. 8/2009, the basic amount of the fines imposed on 16 companies was reduced by 30% on the ground that in the previous three fiscal years they had reported trading losses likely irretrievably to jeopardise their economic viability).

3.4 What are the applicable limitation periods?

Pursuant to Article 28 of Law No. 689/1981, the ICA may collect the monies owed by the infringers within five years of the date on which the violation was committed. In case of continuous illegal conduct, such as cartels, the statutory limitation period starts running on the day on which such conduct ceases. No statute of limitation exists for the ICA's powers to investigate and find a cartel infringement, without imposing fines.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Not applicable.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

According to the general principles of civil liability, an employer may claim damages, including legal costs and any financial penalties imposed by the ICA on the employer for its participation in a cartel infringement, from its employees, whose wilful or negligent conduct caused the employer's involvement in that infringement.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

On February 15, 2007, the ICA adopted its first leniency programme, thus introducing in the domestic competition regime a system of partial or total exoneration from the penalties that would otherwise be applicable to companies reporting their cartel membership (*Comunicazione sulla Non Imposizione e sulla Riduzione delle Sanzioni ai sensi dell'Articolo 15 della Legge 10 Ottobre 1990, N. 287;* the "Leniency Notice").

Under the Leniency Notice, full immunity from fines is available to the first cartel participant coming forward to report the illegal activity, by spontaneously providing the ICA with information or documentary evidence, provided that the following cumulative requirements are met:

- in the ICA's opinion, given the nature and the quality of the applicant's submission, the information or evidence provided is decisive to find a cartel infringement, possibly through a targeted inspection; and
- the ICA does not already have in its possession sufficient information or evidence to prove the existence of the infringement.

No immunity is available where the ICA already knows about the existence of the cartel when the applicant comes forward, including on the basis of a previous immunity application for the same infringement. Nevertheless, even in such a scenario, the ICA may grant a reduction, generally not exceeding 50%, in the fine that would otherwise be imposed on the applicant, where the applicant provides the ICA with evidence that, due to its nature or level of detail, significantly strengthens the evidentiary set already in the ICA's possession, thus appreciably contributing to the ICA's ability to prove the infringement.

In order to determine the appropriate amount of the fine reduction, the ICA will take into consideration the value of the evidentiary materials provided by the applicant, the timeliness of its cooperation, in light of the stage of the investigation procedure, as well as the degree of any cooperation offered by other undertakings. Moreover, in case of disclosure of previously unknown facts bearing directly on the gravity or duration of the cartel, the ICA will not take them into account when setting the amount of any fines to be imposed on undertakings providing evidence relating to such facts.

Irrespective of whether immunity or a simple fine reduction is applied for, the leniency applicant must also:

- cease its participation in the infringement immediately after submitting its application, unless it is otherwise agreed with or requested by the ICA; and
- cooperate fully and on a continuous basis with the ICA for the entire duration of the procedure, including by:
  - timely providing the ICA with all relevant information and evidence that comes into its possession;
  - timely answering to any request for information that may contribute to establishing the relevant facts;
  - making its employees and, to the extent possible, its former employees available for interviews with the ICA staff, where necessary; and
  - refraining from destroying, altering, or hiding relevant information or documents, or informing anyone of the existence of a leniency application or its content before the statement of objections is issued, unless the ICA consents to such disclosure.

In its decision of May 17, 2007, mentioned above, the ICA applied the Leniency Notice for the first time, granting immunity from fines to three companies belonging to the Trombini group for reporting the existence of a cartel in the wooden chipboard panel industry, to which, Trombini claimed, it was compelled to participate by the ringleader company. What is noteworthy is that Trombini started to cooperate with the ICA at the end of 2003, even before the cartel agreement was put into effect and at a time where no leniency programme existed in Italy. Moreover, Trombini submitted its leniency application in December 2006, only one day before the Authority published for comments the Leniency Notice in draft form. Incidentally, the reason for Trombini's decision to cooperate with the ICA was arguably its reliance on an isolated 1997 precedent, in which the ICA decided – on the basis of the objective of Article 15 of the Law – not to impose a fine on one of the participants in the cartel of explosives for civil use, on account of its cooperation to the investigation and its decision to discontinue its involvement in the infringement even before the opening of the investigation. In the *Wooden Chipboard Panel* case, the ICA decided to grant immunity to Trombini directly on the basis of Article 15(2-*bis*) of the Law, i.e., the enabling provision on the basis of which the Leniency Notice was later adopted. Although arguably the ICA's decision lacked a proper legal basis, at least in strictly technical terms, it must be welcomed to the extent that it showed the ICA's willingness to make its leniency policy a success story. To date, the ICA has applied the Leniency Notice only in another case (Case I700, *Prezzi per il GPL da riscaldamento regione Sardegna*, decision of March 24, 2010, Bull. No. 12/2010), concerning a price-fixing cartel among suppliers of liquefied petroleum gas cylinders and small tanks, the ICA granted immunity to ENI (the holding company of one of the participants to the cartel), which provided the ICA with documentary evidence of the meetings of the members, showing that the infringement had a broader extension (both geographically and with reference to the relevant products) than the ICA held in its decision to open the investigation procedure. It is noteworthy that ENI submitted its leniency application only after the ICA's rejection of the commitments that the company had offered with a view to have the ICA close the procedure without a finding of infringement (see question 6.1 below).

The ICA is known to have adopted, but not published, special internal rules of procedure for dealing with leniency applications. Unlike at the European Commission's DG Competition, the ICA Staff do not make policy statements in newsletters or law reviews and seldom participate as speakers in conferences and seminars, so it is fair to predict that the learning curve in this matter will probably be flat and long for the business and practitioners alike.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The Leniency Notice lays down a discretionary marker system, whereby an immunity applicant's place in the queue can be protected for a limited period of time, while it gathers all the required information and evidence to support the application. Upon the applicant's reasoned request, the ICA may grant it a marker and determine the deadline within which the applicant has to 'perfect' the marker by submitting the information required to meet the evidential threshold for immunity.

If the applicant perfects the marker within the set period, the information and evidence provided shall be deemed to have been submitted on the date when the marker was granted. Where the marker is not perfected timely, the evidence provided by the undertaking can only be assessed for the purpose of granting a fine reduction.

Companies intending to file a fine reduction application may not apply for a marker.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Under the Leniency Notice, a prospective applicant planning to submit a corporate leniency statement in oral form needs to provide adequate reasons for its request in order to obtain the ICA's authorisation, which is broadly discretionary. The applicant's oral statements are taped and transcribed by the ICA Staff. The fact of applying orally does not exempt the applicant from the obligation to provide the ICA with all the relevant documentary evidence in its possession. The ICA Staff's transcript of a leniency applicant's oral statement is subject to very limited access (see question 4.4 below).

4.4 To what extent will a leniency application be treated confidentially and for how long?

Under the general rules of procedure, access to the ICA's case file is granted also to complainants and any other "persons having a direct concern", even other than the addressees of the SO (e.g., any interested consumer associations; see question 1.4 above). However, third parties, including those that have been admitted to intervene in the investigation procedure, are barred from access to written, or the transcripts of oral, leniency statements and the supporting documentation. Moreover, the other parties to the investigation may have access to the leniency statements only after the date of notification of the SO, provided that they undertake not to make copies of the statements, and to use the information contained therein only for the purposes of judicial or administrative proceedings for the application of the competition rules at issue in the ICA's investigation (and the ICA may postpone the other parties' access to the documentation supporting the leniency statements to the date of notification of the SO).

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The obligation of full and continuous cooperation with the ICA (see question 4.1 above) applies until the date of adoption of the final decision.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No "leniency plus" or "penalty plus" policy exists under the current ICA's leniency programme.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

No leniency procedure exists for individuals reporting cartel conduct independently of their employer.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea-bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Pursuant to Article 14-*ter* of the Law, within three months of the date on which the ICA has notified the opening of an investigation into possible antitrust infringements, the companies concerned may offer commitments in order to eliminate the anticompetitive nature of the investigated conduct. If the ICA finds that the commitments proposed by the parties are suitable to meet the concerns expressed in its preliminary assessment, it may make those commitments binding on the companies concerned, closing the proceedings without finding an infringement. The commitment procedure was introduced in August 2006 and, since then, most of the ICA's investigations have been closed on the basis of Article 14-*ter* of the Law. However, consistently with the Commission's approach in the application of Article 9 of Regulation No. 1/2003, the ICA refused to entertain commitments offered by companies participating in secret horizontal restrictive agreements, which as such constitute very serious infringements (see Cases I695, *Listino Prezzi del Pane*, decision of June 4, 2008, Bull. No. 22/2008, and I694, *Listino Prezzi della Pasta*, decision of February 25, 2009, Bull. No. 8/2009). Nonetheless, as the ICA held in its 2007 decision concerning the marine paint cartel, where the commitments offered by all or some of the cartel members are rejected as inadequate and/or insufficient, the parties to the proceedings may expressly request that those commitments be reassessed as a mitigating circumstance justifying the reduction of the basic amount of the fines, in particular where at least one of the behavioural undertakings offered has already been put into effect (see Case I646, *Produttori Vernici Marine*, decision of January 25, 2007, Bull. No. 4/2007).

No settlement or plea bargaining procedure exists.

7 Appeal Process

7.1 What is the appeal process?

Pursuant to Article 33 of the Law, the addressees of an ICA infringement decision may apply to the TAR for its annulment within 60 days of the date of notification. The TAR's judgments may be appealed to the Council of State. In competition cases, the average duration of the judicial proceedings before either Court is 12 months. The operative part of the Court's decision is published within a week of the date of the hearing.

The nature and the scope of the administrative courts' power of review of the legality of the ICA's exercise of its discretion in the evaluation of complex economic situations have been discussed at length in the Council of State's case law (see Judgments Nos 926 of March 2, 2004, *Gemeaz Cusin/ICA*; 280 of February 3, 2005, *Codacons/ICA*; 1271 of March 10, 2006, *ICA/Telecom Italia*; and 1397 of March 16, 2006, *Assobiomedica/ICA*). In its view, the accuracy of the findings of fact made by the ICA can be fully reviewed by administrative courts; this entails their power to assess the proofs collected by the ICA and the exculpatory evidence offered by the parties, since the courts' access to the facts is unrestricted. As far as the ICA's technical discretion is concerned, if judicial protection is to be effective, it cannot be limited to a merely external review but must allow the court to perform a thorough and penetrating "intrinsic" control, if need be by applying rules and technical information that belong to the same specialised subject matter concerned by the ICA's decision. The administrative judge's review must extend to the control of the (economic or other type of) analysis made by the ICA, so as to reassess any technical choices made and proceed to the application to the case in point of the proper interpretation of the "undetermined legal notions" (such as 'relevant market' and 'agreement in restraint of competition') that are referred to in the competition rules. The task of verifying whether the powers conferred on the ICA have been exercised correctly, which the reviewing court is entrusted with, is subject to no limitations, the only constraint being that the judge cannot express its own autonomous choices and, by doing so, directly exercise the power that the legislator reserved to the ICA.

Pursuant to Article 23 of Law No. 689/1981, the TAR and the Council of State also have unlimited jurisdiction to review cartel decisions whereby the ICA has fixed a fine. Accordingly, they may cancel, reduce or increase the amount of the fines levied by the ICA.

7.2 Does an appeal suspend a company's requirement to pay the fine?

An appeal against an ICA decision imposing a fine for a cartel infringement does not suspend the appellant's obligation to pay the fine. The appellant may, however, request that the court order the suspension of the operation of the decision by way of an interim measure, which requires proof that the payment of the fine would cause it serious and irreparable damage and that its appeal is *prima facie* well founded.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Pursuant to Article 63(3) of Legislative Decree No. 104 of July 2, 2010, which has laid down the 'Code of the Administrative Process', in appeal proceedings for annulment of ICA cartel decisions, witness testimony is admitted solely in written form. Accordingly, cross-examination of witnesses is not allowed.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Pursuant to Article 33 of the Law, courts of appeal have jurisdiction over competition damage claims based on Article 2 of the Law. They decide on first and last instance and their decisions are subject to review by the Court of Cassation on questions of law only. Pursuant to the Code of Civil Procedure, the lower civil courts (tribunals and petty claims courts) have jurisdiction over competition damage claims based on Article 101 TFEU. Pursuant to Articles 120 and 134 of the Code of Industrial Property Rights, the specialised sections for industrial property rights instituted within the tribunals and courts of appeals have jurisdiction, at first and second instance, respectively, for private actions relating to the exercise of industrial property rights and based on Italian or EU competition law. Finally, consumers' class actions must be brought before the tribunals of the main Italian judicial districts, based on the place of the defendant company's registered office (see question 8.2 below).

Based on general civil liability principles, a plaintiff claiming

antitrust damages must prove that: (i) the defendant intentionally or negligently violated the law; (ii) the plaintiff suffered damages; and (iii) a direct causal link exists between the defendant's conduct and the alleged damages. We note, in this respect, that in follow-on actions the plaintiff may face a lighter burden of proof, to the extent that the ICA's and the administrative courts' findings – although they do not have, in strictly technical terms, a binding legal effect upon the civil court having jurisdiction over the damage action, meaning that the defendants are given an opportunity to provide evidence to the contrary – have value as preferred mode of proof of the infringing conduct, according to a recent ruling by Court of Cassation (Judgment No. 3640 of February 13, 2009). Moreover, pursuant to Article 16(1) of Regulation No. 1/2003, national courts cannot take decisions running counter to a decision adopted by the European Commission.

Recoverable damages in antitrust actions are limited to the plaintiff's actual loss (i.e., 'out of pocket' loss plus loss of income and interest thereon). Multiple punitive damages are not available.

Any natural or legal person having full legal capacity can bring damage actions in court, provided that the plaintiff personally has a cause of action and the defendant (be it established within or outside of the EU) has a sufficient jurisdictional nexus to Italy. According to the case law, indirect purchasers, too, have standing to sue for antitrust damages (Rome Court of Appeals, March 31, 2008; Turin Court of Appeals, July 6, 2000). Private damage claims based on competition law infringements are governed by the principles of Italian tort and contract law.

An application for a preliminary injunction may be brought prior to, or during, the proceedings on the merits. If the preliminary injunction does not anticipate the effects of the final judgment (i.e., the interim suspension of a contract, which anticipates the effects of a nullity action) but merely aims at preserving its effectiveness (i.e., the seizure of the defendant's bank accounts, which aims at preserving the effectiveness of a damage action, but does not anticipate its effects), proceedings on the merits must commence within 60 days of the issuance of the interim injunction.

8.2 Do your procedural rules allow for class-action or representative claims?

Pursuant to Article 140-*bis* of the Italian Consumer Code, as from January 1, 2010, it has been possible for the first time to bring class actions in Italy. The new rules apply to any breaches of contract or torts that occurred after August 15, 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 member – seeking damages or declaratory relief for a violation of rights that is "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.

The class action procedure contemplates two stages. First, following an opening hearing, the court decides on the admissibility of the action, that, for this purpose, must satisfy the following requirements: (i) the action is not manifestly unfounded; (ii) there is no conflict of interest between class members; (iii) the rights claimed by the class members appear to be identical; and (iv) the first claimant seems able adequately to protect the interests of the class. 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 civil court deems the class action to be admissible, it will issue an order setting out: (i) the rules for the notification of the proceedings to the other members of the class; (ii) the characterisation of the rights that are at stake in the proceeding; (iii) the deadline for the exercise of other consumers' or users' right to opt in; and (iv) 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.

8.3 What are the applicable limitation periods?

The limitation periods for private competition damage claims based on tort or breach of contract are, respectively, five and 10 years. According the Court of Cassation, 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, i.e., that the damage was caused by an antitrust infringement (Court of Cassation, Judgment No. 2305 of February 2, 2007, *SAI/Nigriello*).

8.4 Does the law recognise a "passing on" defence in civil damages claims?

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 to the extent that it had wilfully participated in an anti-competitive agreement with the intent to pass the overcharge on to final customers (Turin Court of Appeals, July 6, 2000).

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Pursuant to the general civil procedure rules, 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 (which 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 condition that it gives reasons for so doing.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The main cases of cartel litigation in which Italian civil courts have

awarded damages are the following:

– In *Piccoli/Isoplus*, damages for breach of contract were awarded to an agent whose business proposals had been systematically turned down by Isoplus as a result of a market-sharing agreement, which the principal had entered into with certain competitors (Bari Court of Appeals, November 22, 2001).

– In *Bluvacanze/I Viaggi del Ventaglio a.o.,* 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. Bluvacanze provided evidence of a meeting among the three defendants, following which two of them notified the former of their intention to stop providing it with travel packages. The plaintiff also provided some press statements by the defendants, declaring that they were dissatisfied with Bluvacanze's policy to grant customers an additional 10% discount, by reducing its commission fees. Therefore, although there was no direct proof of the boycott, the court found that the indirect evidence submitted by the plaintiff was sufficient to presume its existence.

The court awarded Bluvacanze 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, on an equitable basis, as compensation for the harm the collective boycott had caused to its reputation (Milan Court of Appeals, July 11, 2003).

– In *Inaz Paghe/Consiglio Nazionale dei Consulenti del Lavoro*, 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 to authorised employment consultants. The court found that the defendants strongly recommended not to buy the plaintiff's product and offered replacement products to the plaintiff's clients.

The court awarded damages based on loss of profits arising from the contracts terminated by the clients of the plaintiff as a result of the collective boycott. In order to identify these contracts, the court compared the number of contracts terminated in the two-year periods 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 (as calculated by the court-appointed expert) by the number of contracts terminated due to the boycott, assuming a potential residual contractual 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 (Milan Court of Appeals, December 11, 2004).

– In the context of consumer actions for damages arising from a price-fixing conspiracy among insurers in the third-party auto liability market, as previously established by the ICA, certain petty claims courts and courts of appeals awarded damages based on a fair estimate of the over-price paid by the plaintiffs, which was found to amount to 20 per cent of the total premiums (corresponding to the premiums' average annual price increase during the duration of the cartel, according to the ICA).

– 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. 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 ICA's investigation; as to the loss of profit, the court established that it was equal to 40 percent of the plaintiff's turnover in the 12 months prior to the implementation of the anticompetitive agreement by the defendants (Rome Court of Appeals, March 31, 2008).

We are not aware of any substantial damage claim based on a cartel infringement having been settled out of court.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The adoption of the Leniency Notice in 2007 (see section 4) still represents the most significant development in the field of cartels and leniency, although the ICA has applied the said notice in only one case to date (see question 4.1). The amendment to the Leniency Notice adopted in May 2010, that restricted access to leniency statements only to the other parties to the investigation, is likely to make the Italian leniency programme more attractive in the future.

9.2 Please mention any other issues of particular interest in Italy not covered by the above.

As mentioned above (see question 8.2), in July 2009 the Consumer Code was amended to introduce consumer class actions, which can be brought *inter alia* to pursue allegations of "anti-competitive activities", as of January 1, 2010.

It is also noteworthy that, in the only known case so far of antitrust negative declaratory actions brought before Italian courts of law, a court has recently rejected the plaintiffs' request to declare: (i) 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 EC Court of First Instance; and (ii) 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, despite the fact that 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 Regulation No. 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 or other circumstances allowing the court to assess whether damage claims could possibly be made against them (Milan Tribunal, May 8, 2009).

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