Author Notes (will be ignored by conversion and will not be published):

XXX

Prelim:

Private antitrust litigation in Italy: overview

Luca Toffoletti and *Alessandro De Stefano*, NCTM

Indicate below if an Internal TOC is required:

Yes

Resource History:

Abstract:

A Q&A guide to private antitrust litigation in Italy.

The Q&A provides a high level overview of the legal basis for bringing private antitrust litigation actions; parties to an action; limitation periods and forum; standard of proof and liability; costs and timing; pre-trial applications and hearings; alternative dispute resolution; settlement or discontinuance of an action; proceedings at trial; available defences; available remedies; appeals and proposed legislative reform.

To compare answers across multiple jurisdictions, visit the private antitrust litigation *Country Q&A Tool*.

This Q&A is part of the *Private Antitrust Litigation Global Guide*.

The private antitrust litigation global guide serves as a single, essential, starting point of practical reference for both clients and practitioners in considering the various merits of commencing, defending or settling antitrust claims.

Question Set:

Legal basis for bringing private antitrust litigation actions

Question Body:

1. Can stand-alone and/or follow-on actions be brought in the context of private antitrust litigation? If so, what is the legal basis for bringing such actions?

Answer Body

Stand-alone actions

It is possible to bring stand-alone actions. Stand-alone actions are available for both bi- and multi-lateral, as well as antitrust, infringements. In practice, stand-alone actions are more common for unilateral antitrust infringements, in particular when the dominant position is not disputed (for example, if the defendant has a monopoly), or if it has already been established in a previous decision by the Italian Competition Authority (ICA) related to different matters.

In the Italian judicial system *res judicata* has effect only between the parties. Therefore, a claimant cannot rely on a final decision rendered by a court on the same infringement (for instance, a cartel) against one or more defendants. In addition, all the judgments or decisions rendered by the Italian courts are not binding if they are still subject to appeal.

Legislative. The specific statutory rules in this field are:

- Article 33, paragraph 2, Law No 287/1990 (according to which actions for damages for infringements of the Competition Law can be initiated before the civil judge).
- Articles 3, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of Legislative Decree No 3/2017 (Decree), which has transposed in Italy the Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the member states (Directive), laying down the rules applicable to action for damages for infringement of both the European and the Italian Competition Law.

Non-legislative. Stand-alone actions are mainly construed as tort actions and are regulated by the general principles set out in the Italian Civil Code (*Article 2043, Italian Civil Code* (ICC)).

Adversarial or inquisitorial. Antitrust actions are governed by the Italian Code of Civil Procedure (ICCP) based on an adversarial model.

Follow-on actions

Follow-on actions are available for both multi-lateral (for example, cartels), as well as unilateral (for example, abuses of dominant position) antitrust infringements. Most of the follow-on actions brought before Italian courts concerned the insurance, energy, and telecommunications sector.

As already mentioned for stand-alone actions, a claimant cannot rely on a final decision rendered by a court on the same infringement (for instance, a cartel) against one or more defendants. In addition, all the judgments or decisions rendered by the Italian courts are not binding if they are still subject to appeal.

Before the Decree was adopted, it was held that the findings contained in the final (and not subject to appeal) decisions of the ICA should be considered as privileged evidence (*prova privilegiata*) (among others, *Supreme Court No 3640/2009, No 5941/2011* and *No 5942/2011*). Under the Decree, the final decisions (that are not subject to appeal) of the ICA will have a binding effect (*see* *Question 9*).

Legislative. The specific statutory rules in this field are the above-mentioned Article 33, paragraph 2, Law No 287/1990 and the Decree.

Non-legislative. See above, *Stand-alone actions*.

Adversarial or inquisitorial. See above, *Stand-alone actions*.

Question Set:

Parties to an action

Question Body:

2. What must be demonstrated to commence an action?

Answer Body

Stand-alone actions

To commence a stand-alone action, the claimant must demonstrate:

- The defendant breached competition law.
- There is a direct causation between the breach and the loss the claimant suffered.
- The breach was the defendant's fault.
- The amount of loss suffered.

Causation is regulated by Article 1223 of the ICC and requires that the loss (for which the compensatory damages are awarded) must be the immediate and direct consequence of the unlawful conduct (*see also Article 14, paragraph 1, Decree*). The Supreme Court has further explained that the causal link between the unlawful conduct and the loss must be carried out in two steps (*Supreme Court, No 2305/2007*):

- First, it must be assessed whether the link exists based on a high degree of probability.
- The second step consists of investigating whether other events which were external and independent from the claimant would have caused the same damage.

In the *Bluvacanze* case, the first step was decisive in excluding the liability of one of the participants in the boycotting cartel. The lack of the implementation of the cartel's decisions was considered a "fracture" that excluded the existence of causation (*Court of Appeal of Milan, 11 July 2003, Bluvacanze*). In the *Inaz Paghe* case, the court specifically ordered the independent expert to investigate if there were alternative reasons for the claimant's decrease in business *(Court of Appeal of Milan, 11 December 2004, Inaz Paghe*). The existence of fault is rarely debated in antitrust actions since it tends to be implied from the infringement of antitrust rules. For the amount of loss to be calculated, see *Question 37*.

The Decree has now introduced a rebuttable presumption of damages in case of cartels. This innovative presumption (which does not cover the actual amount of damages) is limited to cartels. This is because of their secret nature which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm.

As to standing, after a long debate, in 2005 the Italian Supreme Court eventually stated that anyone is entitled to bring a legal action against anti-competitive behaviours (*Supreme Court No 2207/2005: see also No 2305/2007*). Moreover, the Italian courts have established that third parties (in particular, indirect purchasers) have standing to bring antitrust actions. In particular, in the *International Broker* case (*Court of Appeal of Rome, 31 March 2008*), where a broker successfully claimed damages against a cartel of refining companies and not against the distributors with which the claimant had maintained direct contractual relationships.

In accordance with this case law and the Directive, Article 1, paragraph 1 of the Decree provides that any individual (that is, any natural or legal person and entity without legal personality) can claim damages for loss caused to him by an infringement of the European and/or Italian competition law provisions.

Follow-on actions

The same applies to follow-on actions as for stand-alone actions. See above, *Stand-alone actions*.

Question Body:

3. Is it possible to bring actions on behalf of multiple claimants (for example, collective actions)?

Answer Body

Stand-alone actions

Multiple claimants. According to Article 140-bis of the Italian Consumer Code, consumers may bring a class action to protect their interests, provided that they are homogenous. Anti-competitive practices are expressly included among the admissible claims.

Opt-in or opt-out. The class action is based on an opt-in model. Both consumer organisations and individual consumers are allowed to bring a class action. The *res judicata* provision for class action judgments operates a distinction between future individual actions and future collective actions. Consumers who did not participate in the class action can bring individual actions. However, the first class action judgment renders other class actions against the same defendant and based on the same facts inadmissible.

Admissibility. After the claimant has served the first pleading, the court at the initial hearing assesses whether the action is admissible. The class action is rejected if:

- It is clearly groundless.
- There is a conflict of interest among the members of the class.
- The court does not recognise the rights of the class members to be homogenous.
- The proponent is deemed unsuitable to represent the interests of the class.

With the order that declares the class action admissible, the court establishes the terms and formalities to be observed by the proponent to notify potential members of the class about:

- Their right to participate.
- The time by which it is possible to adhere to the class action.
- The scope of the rights enforced in the proceedings.
- The criteria used to admit to the class the consumers wishing to participate

Follow-on actions

The same applies to follow-on actions as for stand-alone actions. See above, *Stand-alone actions*.

Question Body:

4. On what basis will a court or tribunal assume jurisdiction with respect to a claim?

Answer Body

Stand-alone actions

Claimants can bring an action against legal entities domiciled within the Italian jurisdiction.

The ordinary rules on jurisdiction apply, including Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation) and the EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (Lugano Convention).

It is therefore possible to sue a defendant domiciled outside the Italian territory, establishing the jurisdiction of the seat of the claimant as being the place where the damage occurred (*Article 5.3, Brussels Regulation*). Under Article 6.1 of the Brussels Regulation, this defendant can be used as an "anchor defendant" to sue other defendants who have their seats in different member states. The Italian courts have not considered the possibility of suing a subsidiary (who was not a party to the proceedings) of a company directly involved in a cartel, of an infringing decision issued by the Commission or other national authority domiciled in Italy, in a follow-on litigation. Therefore, it remains to be seen whether, and to what extent, the case law established by the UK courts in *Provimi*, *Copper Tire* and *KME* to use a subsidiary as the anchor defendant can be successful for attracting damages actions before the Italian courts.

In case the defendant is not domiciled in the EU or in a state that is a party to the Lugano Convention, the jurisdiction of the Italian courts is regulated by a Convention between Italy and the state where the defendant is domiciled, or in absence of any Convention, by the Law No 218/1995. If a claim arising from anti-competitive conducts falls within the scope of an agreement between the parties to resolve disputes by arbitration, the Italian courts lack the jurisdiction. In previous decisions, Italian courts have expressly acknowledged the arbitrability of antitrust claims (*Court of Appeal of Milan, 13 September 2003, Madaus v IBI; Court of Appeal of Milan, 15 July 2006, Terra Amata v Tensacciai*).

It has never been discussed by the Italian courts whether, according to *Shevill* (*Case C–68/93*), the claimant in an antitrust action can recover from a defendant, sued under Article 5.3 of the Brussels Regulation, only the damages suffered within the Italian jurisdiction. This limitation is likely to apply and this may affect the decision to bring an action before the Italian courts when a relevant portion of damages has been suffered by the claimant outside the Italian territory.

Follow-on actions

The same applies to follow-on actions as for stand-alone actions. See above, *Stand-alone actions*.

Question Body:

5. Can actions be brought against individuals (such as directors of corporate entities), whether domiciled within, or outside of, the jurisdiction?

Answer Body

Stand-alone actions

In principle, natural persons may be sued for competition law infringements. However, there are no precedents of actions brought against individuals.

Follow-on actions

See above, *Stand-alone actions*.

Question Set:

Limitation periods and forum

Question Body:

6. What are the relevant limitation periods for stand-alone and/or follow-on actions? When do these start to run? Can these be extended?

Answer Body

Stand-alone actions

Antitrust damages actions (both stand-alone and follow-on) are tort actions and therefore have a five-year limitation period (*Article 2946, ICC*). The five-year period begins when the infringement ceases and the claimant becomes aware, or should have been aware (taking reasonable care), of the behaviour constituting the infringement, the fact that the infringement caused the claimant harm and the identity of the infringer (*Article 8, Decree*).

According to Article 2943 of the ICC, the limitation period may be interrupted when a lawsuit, a notice for performance, or an arbitration notice is served on the defendant. The limitation period is also interrupted by the recognition of the claim by the debtor (*Article 2944, ICC*). If the time limitation is interrupted, the time that has run is not counted, and the time limitation begins to run anew from the last day of the interruption (*Article 2945, ICC*). The limitation period may be suspended in certain situations depending on the relationships between the parties (for example between spouses during marriage), but it is unlikely that may occur in antitrust actions. The statutory limitation period set out by the law cannot be extended upon agreement between the parties.

Follow-on actions

The same principles applicable to stand-alone actions apply to follow-on actions.

In two decisions of the Supreme Court in follow-on actions brought by consumers against members of a price fixing cartel it was established that the statute of limitations starts to run when the ICA's decision is published (*Supreme Court No 2305/2007* and *No 26188/2011*). In subsequent decisions where the claimants were undertakings rather than consumers, the starting

day for calculating the limitation period was generally considered the day of the publication of the decision launching the investigation (*Tribunal of Milan, 1 October 2013, Teleunit v Telecom; Tribunal of Milan, 15 April 2014, Uno Communications v Telecom; Tribunal of Milan, 14 October 2014, Fastweb v Vodafone*).

To facilitate follow-on actions, Article 8, paragraph 2 of the Decree now provides that:

- The limitation period is suspended if the ICA initiates a proceeding in respect of an infringement of competition law to which the action for damages relates.
- The suspension ends one year after the infringement decision has become final or after the proceeding is otherwise terminated.

Question Body:

7. Where can an action be commenced? Are there specific courts or tribunals before which stand-alone and/or follow-on actions may be brought?

Answer Body

Stand-alone actions

Under the Decree, Companies Tribunals of Rome, Milan and Naples have jurisdiction for handling antitrust damages actions (based on both Italian and EU Competition Law). They have special jurisdiction both for stand-alone and follow-on actions.

Class actions must be brought before the court sitting in the principal town of the region where the defendant has its registered office, save for smaller regions (the Tribunal of Turin has jurisdiction for Valle d'Aosta, the Tribunal of Venice for Trentino-Alto Adige and Friuli-Venezia Giulia, the Tribunal of Rome for Marche, Umbria, Abruzzo and Molise, and the Tribunal of Naples for Basilicata and Calabria) (*Article 140-bis, paragraph 4, Consumer Code*).

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

8. Where actions can be brought before different courts and tribunals, what are the comparative advantages and disadvantages of bringing actions in each forum?

Answer Body

Stand-alone actions

Not applicable (*see Question 7*).

Follow-on actions

Not applicable (*see* *Question 7*).

Question Set:

Standard of proof and liability

Question Body:

9. What is the standard of proof?

Answer Body

Standard of proof

The general standard of proof applied in civil law proceedings is that of the balance of probabilities (also known as the "*preponderance of the evidence*"). For most of the evidence, the principle of "free evaluation" applies. For some evidence, the evidentiary value is dictated by the law. For instance, the confessions, or facts, resulting from a public deed must be considered fully proven. The Decree now provides that an infringement of competition law ascertained by a final decision of the ICA (which can no longer be appealed before a national court) is deemed to be irrefutably established for the purposes of an action for damages brought before Italian courts. The binding effect of the final decision of the ICA covers the nature of the infringement and its material, personal, temporal and territorial scope (but not the causal relationship between the alleged harm and the infringement of competition law, and the existence of a damage). Presumptions can be used provided that they are serious, precise and consistent.

Burden of proof

The general rule is set out in Article 2697 of the ICC, according to which the burden of proof is allocated on the claimant.

In order to establish the extent of the damage (*quantum damni*), the courts usually appoint economic experts who have specific technical expertise. Even where the courts grant the expert the power to gather useful elements which go beyond the allegations and evidence brought by the parties, that power does not imply a discharge of the burden of proof that lies with the claimant.

Rebuttable presumptions

As already mentioned, the Legislative Decree No 3/2017 has introduced a rebuttable presumption of damages in case of cartels. It also provides that a final infringement decision adopted by a National Competition Authority of another member state (even if not binding on the judge) is a means of proof as regards the nature of the infringement and its material, personal, temporal and territorial scope. However, its findings can be assessed by the judge as appropriate together with any other evidence adduced by the parties.

The fault of the defendant is presumed in unfair competition cases (*Article 2600, ICC*). It is discussed whether such a presumption can apply by analogy to antitrust cases.

Question Body:

10. Is liability on a joint and several basis?

Answer Body

If several undertakings infringe the competition rules jointly (for example, in the case of a cartel), those co-infringers are jointly and severally liable for the entire harm caused by the infringement (*Article 9, Decree*). Therefore, each co-infringer is liable to compensate for the harm in full and the injured party can require full compensation from any co-infringer. Each co-infringer can recover from other co-infringers if it has paid more compensation than its share.

There are two exceptions to the above-mentioned joint and several liability principle under the Decree:

- If the infringer is a small or medium-sized enterprise (SME), it is liable only to its own direct and indirect purchasers if:
    - its market share in the relevant market was below 5% during the infringement; and
    - the application of the rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

    However, the exception does not apply if the injured parties cannot obtain full compensation from the other infringers, if the SME has led the infringement or has coerced other undertakings to participate, or if the SME has previously been found to have infringed competition law.
- If full compensation cannot be obtained from the other undertakings that were involved in the same infringement, any immunity recipient is jointly and severally liable to:
    - its direct or indirect purchasers or providers; and
    - other injured parties.

    The amount of contribution of the co-infringer which has been granted immunity from fines under a leniency programme cannot exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

The two exceptions introduce a relevant and innovative derogation from the general principle of joint and several liability, under which a co-infringer who has compensated for the damage has recourse against each of the others in proportion to the degree of fault of each and to the relevant consequences (*Article 2055, ICC*). If there is a doubt, the degree of fault attributable to each is presumed to be equal.

The principle of joint and several liability has been already applied in the *International Broker* case, where the Court of Appeal of Rome concluded that the members of a price fixing cartel in

the bitumen industry were jointly and severally liable for the damages suffered by the claimant (*Court of Appeal of Rome, 31 March 2008*).

Question Set:

Costs and timing

Question Body:

11. What are the recent trends in relation to the costs of bringing an action before the relevant courts / tribunals?

Answer Body

Stand-alone actions

No specific regime of costs exists for private antitrust litigation. The mandatory minimum tariffs system has been repealed in order to foster competition in the market of professional services (*for the latest reforms, see Article 9 of Decree Law No 1/2012, converted by Law No 27/2012*). Therefore the amount of the legal fees depends on the agreement between the party involved in the litigation and his lawyer. If there was no agreement between the parties, the court can rely on the non-binding criteria set out in Ministerial Decree No 55/2014. It does not seem that this reform will have a substantial impact on the costs related to antitrust actions, which will remain very limited compared to those of other major jurisdictions.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

12. What is the applicable principle regarding the apportionment of the costs of the action? Is there a "loser pays" approach to costs?

Answer Body

Stand-alone actions

The general rule set out by Article 91 of the ICCP provides that the costs associated with the action must be borne entirely by the unsuccessful party. However, as an exception to the "loser pays" principle, the court may decide that each party bears its own costs if (*Article 92, ICCP*):

- There are exceptional circumstances.
- The legal issues are complex and unusual.

- There are conflicting court precedents in respect of those issues.
- The judge deems that any other "justified reason" exists for each party to bear its own legal costs.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

13. Can parties insure against costs risk associated with an action?

Answer Body

Stand-alone actions

Since the litigation costs are fairly limited, "after the event insurance" or coverage of a similar nature are not used in Italy.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

14. Can a third party fund the costs of bringing an action?

Answer Body

Stand-alone actions

There is no specific provision in the Italian judicial system that deals with third party funding matters and there is no specific prohibition against a third party funding the costs of bringing an action within the jurisdiction. Again, since the litigation costs are not relevant, third party funding is not used in Italy. It remains to be seen in the future how the costs to bring class actions will be funded by proponents. It is possible that third party funding will be used by proponents to avoid a declaration of unsuitability to represent the interests of the class.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

15. Can claimants assign their claim to a third party funder?

Answer Body

The Italian system does not foresee mechanisms such as the bundling of claims used by an entity like the Cartel Damage Claims (a Belgian company that was successful in German case based on bundled claims) to bring actions on behalf of the victims of antitrust infringements. The prevailing opinion is that these mechanisms are not permitted under Italian law, but there are no previous decisions in this respect.

Question Body:

16. Can parties engage legal representation under either a "conditional" fee arrangement, or a "damages-based" fee arrangement?

Answer Body

Stand-alone actions

Contingency fees are prohibited by Article 13.4 of Law 27/2012.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

17. If it possible for a defendant to a claim to bring an application for security for costs?

Answer Body

Not applicable.

Question Body:

18. What is the current trend, if any, regarding the period of time from commencing an action to a subsequent first instance judgment by a competent body?

Answer Body

Stand-alone actions

The time period of a trial depends on a number of different factors and it is difficult to be predicted in advance. Other than the complexity of the case and the necessity to appoint an independent expert, other relevant factors include the work load of the court. However, since the antitrust cases are heard in a specialised court, the duration of the entire legal proceedings are normally shorter

than the average duration of commercial cases. Generally, first degree proceedings last between 24 and 36 months. There are notable exceptions, such as in the *Italian Torpedo* case, where the claimant ENI (one of the members of the BR/ESBR (rubber) cartel sanctioned by the Commission) filed a pre-emptive action asking the Italian judge for a declaration of non-infringement. The aim of the claimant was to exploit the slow Italian litigation procedure and at the same time to stay the damages action pending before the English High Court on the basis that proceedings for a declaration of non-infringement had already been launched in the Italian courts. The first hearing was called on 30 June 2008 and the final judgment was delivered on 29 April 2009 (*Tribunal of Milan, 8 May 2009, case ENI and others v Pirelli Tyres and others*).

Follow-on actions

See above, *Stand-alone actions*.

Question Set:

Pre-trial applications and hearings

Question Body:

19. Where statements of case are lodged with the relevant court or tribunal, can third parties seek to obtain copies?

Answer Body

Stand-alone actions

Third parties cannot obtain copies of documents contained in the file.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

20. Can a claimant seek interim measures?

Answer Body

Stand-alone actions

Interim measures are intended to avoid irreparable harms that may be suffered by the claimant during the time necessary to obtain the final judgment. Such measures are usually requested by the claimant when time is of the essence and a corresponding complaint submitted to the ICA is unlikely to trigger its intervention within the period of time necessary to avoid the irreparable

damage. Despite the ICA having the power to issue interim measures to protect the claimant during the period necessary to complete the investigation, the timing of the intervention of the ICA is typically uncertain.

Interim relief may be granted if the claimant shows the existence of two elements:

- *Fumus boni iuris* (that is, is it shown that there are factual and legal grounds establishing a prima facie case).
- *Periculum in mora* (that is, is interim relief necessary to avoid serious and irreparable damage to the party seeking the relief).

Both of these elements must be shown by the claimant.

It is possible to obtain interim relief on a "quia timet" basis, as far as the interim measures are necessary to prevent damage which is considered serious and irreparable.

In the experience of the Italian Courts, the claimant often failed the demonstration of the *fumus boni iuris* element. Competition cases are particularly fact-intensive and it is often difficult for the claimant to show the necessary evidence to obtain the measures requested in the context of the summary proceedings. In fact, successful interim measures proceedings mainly concern cases of abuse of dominant position where the claimant could rely on previous decisions of the ICA finding the dominance of the defendant and therefore having to show only the abuse.

In contrast, the *periculum in mora* element is generally considered by the courts *in re ipsa* (that is, it is considered intrinsically existent due to the nature of the conducts at issue). Most of the time, the antitrust infringements affect the competitive position of the victim in terms of loss of customers, or generally of goodwill. These are considered irreparable damages because they cannot be easily quantified. As a consequence, there are few cases where the interim relief sought by the claimant was not awarded because of the lack of *periculum in mora*. They mainly concern disputes where the alleged anticompetitive conduct was already terminated. The content of the interim measures awarded by the courts usually consists in a cease and desist order where the defendant is enjoined from engaging in those conducts found anticompetitive on the basis of a preliminary assessment. A significant limit for the courts is the lack of power to create new contractual arrangements. As a consequence, the courts can impose the performance of an agreement unlawfully terminated (for instance, because the termination is the object of a boycotting cartel or an abuse of dominant position), but they cannot impose an obligation on the defendant to enter into a new agreement with the claimant (for instance, as a result of a refusal to a deal constituting an abuse of dominant position), or substitute a provision agreed by the parties with one compliant with the antitrust law.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

21. Can a defendant seek to dispose of all or part of the action prior to a full trial?

Answer Body

A defendant cannot apply to "strike out" all or part of a stand-alone or follow-on action, so as to dispose of the action prior to a full trial, but if the defendant raises a preliminary issue sufficient to dispose of the entire claim (such as a lack of jurisdiction, lack of standing, and so on), it may require the court to decide it without any investigation on the merit.

A defendant cannot apply to obtain summary judgment for all or part of a stand-alone or follow-on action, so as to dispose of the action prior to a full trial. The Italian courts can decide only on preliminary issues sufficient to dispose of the entire case.

Question Body:

22. Can a defendant seek to stay an action (for example, pending the outcome of an investigation by a competent competition authority, or an appeal)?

Answer Body

Staying a claim

A stand-alone action cannot be stayed if there is an ongoing investigation of the ICA into the same alleged infringement, since under the current system the future decision of the competition authority is not binding for the court. Under Article 296 of the ICCP, the parties can request that the court suspends the trial for three months for justified reasons. The trial may also be stayed by a decision of the court if it is necessary to resolve a preliminary issue (*Article 295, ICCP*). In antitrust cases such an issue is typically represented by a pending investigation before an antitrust authority relating to the same facts, or in follow-on cases an appeal brought before the Administrative Courts or the European Courts by the defendant. However, in such situations the Italian court is not obliged to suspend the trial. In fact, civil and administrative proceedings relating to the application of Italian antitrust rules are considered autonomous and independent from one another.

Conversely, since the national courts will avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated, the national courts may assess whether it is necessary to stay its proceedings pending the proceedings before the Commission (or the proceedings for annulment of the Commission's decision before the EU courts) (*see Article 16 of Regulation (EC) 1/2003, and Tribunal of Milan, 18 April 2015, Pirelli v Prysmian*).

Question Body:

23. Can a party seek to have a specific issue (such as limitation) tried as a preliminary issue in advance of a full trial?

Answer Body

No, a party cannot seek to have a specific issue tried as a preliminary issue in advance of a full trial.

Question Set:

Evidence and legal privilege

Question Body:

24. Are existing findings of fact and/or infringement in a decision or judgment of a competent authority or body binding in the context of an action?

Answer Body

Competition authority decisions

See *Question 9*.

Judgments

Previous decisions of the courts are not binding in other disputes among different parties despite the fact that they might concern the same facts and infringements.

Question Body:

25. What is the evidential status of findings of fact and/or infringement in a decision or judgment of a body in a third country?

Answer Body

See *Question 9*.

Question Body:

26. If discovery is available, what is the general procedure for discovery, and what documents would need to be disclosed?

Answer Body

The victims of antitrust infringements typically face difficulties in supporting their claims with evidence, in particular in the case of secret cartels. To alleviate this task, Article 3 of the Decree provides that (upon reasoned request of a party) the courts can order the counterparty or third parties the disclosure of specified items of evidence or categories of evidence that are in their availability if:

- The requesting party has given sufficient evidence of the plausibility of its claim.
- The disclosure is relevant to the action.
- The disclosure is proportionate, balancing the interests of all parties concerned.
- The request does not concern attorney-to-client correspondence.

If such items of evidence contain confidential information, the courts can adopt any measure to protect such confidential information from being disclosed during the litigation. Those measures may include:

- Redacting sensitive passages in documents.
- Conducting hearings in camera.
- Restricting the persons allowed to see the evidence.
- Instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.

The Italian system already had a provision allowing a similar disclosure. On the request of a party, the courts may order the counterparty or third parties the disclosure of specified documents or further means of proof, which are deemed to be relevant to the decision of the case (*Article 210, ICCP*). However, the Italian courts have used this power in very few cases in the context of antitrust damages actions (*Tribunal of Milan, 27 June 2018*).

The main innovation of Article 3 of the Decree with respect to Article 210 of the ICCP is the wider scope of the disclosure, which may concern not only specific documents or other means of proofs, but also entire categories of evidence.

It is expected that Article 3 of the Decree encourages the courts to use the power (also in the light of the recent judgement of the Italian Supreme Court) according to which the courts should *ex officio* interpret extensively the provision on disclosure set out in Article 210.

In a further attempt to stimulate private enforcement, in case of follow-on actions, the courts may order (upon reasoned and detailed request of a party) the ICA to disclose certain documents included in its file if this order would not undermine the effectiveness of the public enforcement of competition law (*Article 4, Decree*). In line with the Directive, the provision further clarifies that:

- Leniency statements and settlement submissions cannot at any time be disclosed (*black list*).

- The following may be disclosed only after the National Competition Authority has closed its proceedings (grey list):
    - information prepared specifically for the proceedings of the National Competition Authority,
    - information that the ICA has drawn up and sent to the parties in the course of its proceedings; and
    - settlement submissions that have been withdrawn;
- Any other evidence not falling within the above-mentioned categories can be disclosed at any time (*white list*).

The Italian system already had a provision allowing a similar disclosure. The courts can request documents from the ICA if it has them and they are relevant to the decision of the case (*Article 213, ICCP*). However, even this power has been rarely used in the past by Italian judges (*Tribunal of Milan, 30 October 2013; Tribunal of Palermo, 15 July 2011*). The provision of the Decree on disclosure of documents in the availability of a National Competition Authority may encourage the courts to use that power.

The Italian system does not provide for pre-trial discovery.

Question Body:

27. Can a party oppose the provision of any documents not in their possession or control?

Answer Body

The defendant during the civil proceedings may oppose the claimant's request made to the court to disclose documents.

The defendant makes his arguments in the written pleadings for the presentation of the evidence or even orally, upon the request of the judge. The main arguments to obtain the rejection of the claimant's request are:

- The request is generic (it does not precisely identify the documents to be disclosed).
- The request is exploratory (the claimant is not able to identify the exact evidence that can be found in the documents requested).
- The execution of the request harms the rights of the defendant (because, for example, the documents contain confidential information such as business secrets and commercial strategies and so on).

Question Body:

28. Can parties rely on legal privilege to withhold documents from inspection?

Answer Body

The defendant can oppose the claimant's disclosure request by arguing that certain documents are covered by legal privilege and the disclosure may harm his right of defence (*Article 3, paragraph 6, Decree No*). To date, legal privilege has not been used in previous civil cases.

Legal privilege applies only to correspondence exchanged between the party and his external counsel. There are no precedents, but it is likely that the conditions set out by the Court of Justice, particularly in *Akzo, C-550/07 P*, will apply.

Question Set:

Alternative dispute resolution

Question Body:

29. Can the parties seek to resolve the action through alternative dispute resolution?

Answer Body

It is possible for the parties to seek to resolve the action through alternative dispute resolution. Legislative Decree No 28/2010 subsequently repealed by Law 98/2013 implemented Directive 2008/52/EC on mediation in civil and commercial matters (Mediation Directive). This piece of legislation established in particular:

- An accreditation system for mediators and mediation providers.
- A duty for lawyers to inform their clients in writing about the option or requirement to mediate.

The other main features of the law on mediation are:

- Participation in a mediation procedure will pause the statute of limitations once for a maximum of four months.
- Mediation settlement agreements can be made enforceable when they are presented to and approved by the court.
- Parties who mediate are entitled to a tax credit, to full exemption from stamp duty and to a partial exemption from the tax registration applicable to the settlement agreement (up to EUR50,000).

- The mediation procedure must be completed within three months from the submission of the request.

- Costs and fees of the mediation are established by the ADR provider and may vary depending on the value of the dispute.

The law does not prevent the parties from submitting their dispute to any ADR provider or independent mediator operating outside of the accreditation system and without its benefits (enforceability, tax incentives).

In certain matters, the plaintiff has to submit the issue to an accredited mediation provider before going to court. Compulsory mediation may also be ordered by the judge (even in appellate proceedings), or provided for in a contract clause. For compulsory mediations, the costs are fixed and substantially reduced, and if the opposing party fails to appear for the mediation attempt, the applicant will be required to pay only a small administrative fee. Compulsory mediation is not provided for antitrust actions.

When the parties cannot reach an agreement in a voluntary or compulsory mediation, the mediator can make a settlement proposal that the parties are free to accept or decline. In voluntary mediations, the court can take into account the refusing party's absence as an argument of proof.

As with any issue brought to an alternative dispute resolution procedure, the main advantages will be showing good will, preserving a commercial relationship and exploring the business interests of the other party, while the main disadvantages will be the time and resources invested.

The judge may suspend (upon request of the parties) the proceedings for up to two years where the parties are involved in consensual dispute resolution concerning the claim covered by that action for damages (*Article 15, paragraph 2, Decree*).

According to Article 16 of the Decree, after a settlement:

- Non-settling co-infringers cannot recover their contribution for the remaining claim from the settling co-infringer.

- If the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer (if such possibility has been expressly excluded under the terms of the consensual settlement).

- When determining the amount of contribution that a co-infringer can recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, the judge must take into account any damages paid under an earlier consensual settlement involving the relevant co-infringer.

Question Set:

Settlement or discontinuance of an action

Question Body:

30. What are the tactical advantages and disadvantages associated with making an offer of settlement?

Answer Body

Stand-alone actions

Advantages. Negotiations are carried out by lawyers and are covered by legal privilege. The settlement is usually proposed by the defendant to avoid the court passing a judgment that can be used by other potential victims to bring similar claims.

Disadvantages. Typically, the defendant is in the position to decide the best course of action once the independent expert has issued his report containing his opinion on causation and/or quantification of damages.

Follow-on actions

See above, *Stand-alone actions*.

Question Body:

31. Is permission required from the relevant court or tribunal to settle any action prior to or during trial?

Answer Body

Permission is not required from the relevant court or tribunal to settle any action prior to or during trial.

In case a settlement is reached during the trial, the only costs awarded by the court are those incurred by the independent expert. Normally the parties regulate the apportionment of legal costs in the settlement agreement.

The relevant court is no longer able to make any order or adopt any decision.

The same applies to collective actions.

Question Set:

Proceedings at trial

Question Body:

32. Are actions heard by a jury?

Answer Body

No, actions are not heard by a jury.

Question Body:

33. How is confidential information protected during the course of proceedings?

Answer Body

Only the final hearing of the trial is public and it is not compulsorily held but scheduled at the request of the parties. All the other hearings are private and the case file can be accessed only by the parties. The judgment is public and the court does not prepare a non-confidential version for publication.

However, when the court orders the disclosure of documents, it may also grant measures to protect confidentiality.

Question Body:

34. What evidence is admissible?

Answer Body

All the means of proof provided by the ICCP are admitted in private antitrust actions, including:

- Documents.
- Findings from criminal law proceedings (whose probative value is debatable and there is a question as to whether it should be treated as simple circumstantial evidence or whether it should have full probative value).
- Witness testimony (the witness may be compelled to appear at trial, where cross-examination is not permitted and only the judge may ask questions directly to the witness: these questions are proposed by the other party and the court remains free to formulate further questions ex officio).

- Expert evidence (the expert may be requested to appear before the court to provide clarifications on his/her findings, but parties cannot cross-examine the independent expert).

As previously mentioned, the court may also order the parties to disclose documents or request the ICA to provide documents (*see* *Question 26*).

Question Set:

Available defences

Question Body:

35. Is a "passing-on" defence available?

Answer Body

The "passing-on" defence is admissible and it has been expressly acknowledged by the Italian courts in some cases.

In *Indaba v Juventus* (*Court of Appeal of Turin, 6 July 2000*), a travel agency agreed with Juventus Football Club to sell tickets for the 1997 Champions League final match in Munich only bundled with travel packages including services such as transportation, local assistance and excursions. The travel agency sued Juventus for antitrust damages. The court found that Juventus had abused its dominant position in the relevant market for the sale of those tickets by imposing excessive prices and the bundle between the tickets and the travel package. However, no damages were awarded because the excessive prices of the travel packages had been transferred by the claimant to the final consumers.

In *Unimare v Geasar* (*Court of Appeal of Cagliari, 23 January 1999*), a provider of handling services at Olbia Airport claimed that Geasar had abused its dominant position through a variety of conduct including through the increase of the fees charged to the claimant. The court incidentally noted that it would not have awarded such damages, since the increase of the fees had been transferred by the claimant to its clients.

In *Swiss Air v SEA* (*Tribunal of Milan, 27 June 2016*), the Swiss airline company claimed that SEA (that is, the management company of the airports of Milan) had abused its dominant position by charging excessive prices for the rental of certain spaces at Milan's Malpensa airport. The court found that SEA applied excessive prices to Swiss Air, but no damages were due because the overcharge was entirely passed on by Swiss Air to its passengers.

The Decree has now introduced detailed rules concerning the passing-on. In particular, the Decree sets out rules on the following:

- The passing-on defence (*Article 11*). The defendant can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting

from the infringement of competition law. The burden of proving that the overcharge was passed on is on the defendant.

- The passing-on offence (*Article 12*). Any indirect purchaser can claim and obtain compensation, when the overcharge imposed by the infringer of competition law is passed on by its direct counterparty, by raising its own prices. The burden of proving the existence and scope of such a passing-on is with the claimant. However, there is a rebuttable presumption of passing-on where the claimant has shown that the:
    - the defendant has committed an infringement of competition law;
    - the infringement has resulted in an overcharge for the direct purchaser of the defendant; and
    - the indirect purchaser has purchased the goods or services that were the object of the infringement, or has purchased goods or services derived from or containing them.

Question Body:

36. Are any other defences available?

Answer Body

As a general rule, the defendant may rely on all defences available in the context of civil liability claims.

It is unclear whether there is a possibility to sue the parent company and not only the subsidiary that directly engaged in the anticompetitive conduct. Despite the fact that the parent company and its subsidiary are considered an economic unit for the application of antitrust law, if the claimant is not able to show that the subsidiary was instructed and actually directed by the parent company, the latter may successfully use the corporate shield that it would generally apply in an ordinary tort action.

Question Set:

Available remedies

Question Body:

37. Are damages available, and if so, on what basis are damages awarded?

Answer Body

Damages

The victims of antitrust infringements may seek a compensation, which can only cover the actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*), plus the payment of interests (*Article 1, paragraph 2, Decree*). Over-compensation or multiple compensation are not admitted. In other terms, the damages awarded should place the claimant in the position that they would have been in, had the antitrust infringement not taken place. From the application of this principle it follows that the public penalties imposed by an antitrust authority on the defendant are irrelevant.

The judge may request support from the ICA in determining the quantum of damages (*Article 14, paragraph 3, Decree*). Moreover, as previously mentioned, the courts usually appoint an economic expert in order to establish the extent of the damage (*quantum damni*).

Interest

See above.

Question Body:

38. How are damages quantified?

Answer Body

The Italian courts have normally assessed the damages using a "but for" approach. In the *Bluvacanze* (*Court of Appeal of Milan, 11 July 2003*), *Inaz Paghe* (*Court of Appeal of Milan, 11 December 2004*), *Valgrana* (*Court of Appeal of Turin, 7 February 2002*), *Agenzia del Territorio* (*Court of Appeal of Milan, 4 April 2012*; *Supreme Court, No 21481/2013*) and *International Broker* (*Court of Appeal of Rome, 8 May 2006*) cases, the court compared the actual situation during the period when the infringement produced the negative effects, to the situation on the same market before the infringement produced those effects. In those cases, the calculation was based on the accounting data submitted by the parties.

In *Telsystem* (*Court of Appeal of Milan, 26 November to 24 December 1996*) the abuse of dominant position prevented the claimant from starting a new business. The "but for" approach was based on the business plan of the claimant and interestingly the court also considered the loss of chances that would have derived from the advantage Telsystem had in being the first operator to enter into the market.

In *Albacom* the abuse of dominant position consisted in restricting access to the market for services of data transmission through the new technology "x-DSL" (*Court of Appeal of Rome, 20 January 2003, Albacom v Telecom*). The damages were calculated on the basis of the market share of the claimant in the retail data transmission services market before the launch of the "x-DSL". In this case the "but for" method was based on the assumption that the claimant would have maintained its market share constant in the new market created by the introduction of the more innovative technology.

In *Gruppo Sicurezza* (*Court of Appeal of Rome, 4 September 2006*) the damages were calculated estimating the incomes that the claimant would have realised from the provision of services for a period of three years to the clients taken away by the dominant undertaking.

The *Avir* case has been the only one where the yardstick method has been used (*Court of Appeal of Milan, 16 September 2006, Avir v ENI*). The case concerned an abuse of dominant position consisting in excessive prices charged by ENI to the claimant. For assessing the damages the court compared the growth of the prices charged by ENI with the trend of gas quotations at the London Commodity Exchange during the period of infringement.

In the *SEA* cases the damages have been calculated as the difference between the excessive prices charged by SEA (the management company of the airports of Milan) and the price set by the Italian regulator for the rental of certain spaces in the airport (*Tribunal of Milan, 26 May 2016*; *Tribunal of Milan, 29 February 2016*; *Tribunal of Milan, 9 November 2015*).

In the thousands of judgments following the ICA's decision concerning a cartel on the insurance against third-party auto liability, the courts have in most cases granted consumers damages equal to the estimated overcharge caused by the cartel (for example, 20% of the premiums paid) (*Court of Appeal of Naples, 29 July 2013*; *Court of Appeal of Rome, 18 February 2013*; *Court of Appeal of Salerno, 29 July 2009*).

Question Body:

39. Are any other remedies available?

Answer Body

The court can order the publication of the judgment if it might contribute to compensating for the damage caused. In *Bluvacanze* the request for publication was rejected by the court because the infringement had stopped three years before the date of the judgment and therefore it would not have provided any compensatory effect (*Court of Appeal of Milan, 11 July 2003*).

The judge can also impose a periodic penalty payment to the unsuccessful party if it fails to undertake remedial action or incurs unjustified delays in bringing the antitrust infringement to an end.

Further remedies available are:

- Declaratory actions, for the nullity of agreements infringing competition law.
- Negative declaratory actions, aimed at obtaining a declaration that a certain conduct does not amount to an infringement of competition law.

Question Set:

Appeals

Question Body:

40. Is it possible to appeal the judgment of the relevant court or tribunal?

Answer Body

The judgment of the tribunal may be challenged before the Court of Appeal, which has the power to carry out a full review on the merits. In turn, the judgment of the Court of Appeal can be appealed before the Supreme Court, but its scope of review is mainly limited to questions of law.

Question Set:

Reforms

Question Body:

41. Are there any reforms proposed or due regarding the legal regime applicable to private antitrust actions?

Answer Body

There are no proposed or due reforms regarding the legal regime applicable to private antitrust actions.

Question Set:

Contributor profiles

Luca Toffoletti, Equity partner

NCTM Studio Legale

T +39 02 725511
F +39 02 72551501
E *l.toffoletti@nctm.it*
W *www.nctm.it*

Professional qualifications. Italian Bar, admitted 1995

Areas of practice. Competition law; litigation.

Non-professional qualifications. JD University of Milan, 1991, cum laude; Yale Law School, Visiting Scholar, 1994; Università Bocconi, PhD in commercial law, 1999; Researcher in commercial law, University of Milan 2000 to date; currently teaching competition law and economics at Faculty of Law, University of Milan

Recent transactions

- Acting for Telecom Italia in follow-on damages actions against Vodafone.
- Acting for Linde Medicale in an ongoing cartel investigation before the ICA.
- Assisting various multinational companies in antitrust compliance programs.

Languages. Italian, English

Professional associations/memberships. Associazione Antitrust Italiana (AAI)

Publications. Authored several articles on antitrust law including a monograph on antitrust and technical progress.

Alessandro De Stefano, Salary partner

NCTM Studio Legale

T	+39	02	725511
F	+39	02	72551501
E			*a.destefano@nctm.it*
W			*www.nctm.it*

Professional qualifications. Italian Bar, admitted 2010

Areas of practice. Competition law; litigation

Non-professional qualifications. University of Rome Sapienza, JD, 2005; University of Vienna, Erasmus, 2002; ISUFI - University of Lecce, PhD in Law & Economics, in cooperation with the Ludwig-Maximilians-Universität, 2010; Visiting Scholar, Max-Planck-Institut Munich, 2008-2009

Recent transactions

- Acting for Telecom Italia in follow-on damages actions against Vodafone.
- Acting for several oil companies in follow-on actions before the Tribunal of Rome and Milan.
- Assisting various multinational companies in antitrust compliance programs.

Languages. Italian, English, German

Publications. Authored several articles on antitrust law.