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Italy

COMPETITION LITIGATION

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This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Italy.

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ITALY
COMPETITION LITIGATION

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

The typical causes of action which can be relied upon to bring a competition damages claim are those provided for by

- Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 2 of Law no. 287 of 10 October 1990 ("the Italian Competition Act"), which prohibit agreements and concerted practices having as their object or effect the prevention, restriction or distortion of competition, and
- Article 102 TFEU and Article 3 of the Italian Competition Act, which prohibit the abuse of a dominant position.

An additional cause of action that can be relied upon as the basis of damages claims in matters where there is an imbalance in the contractual or economic strength of the parties is the so called abuse of economic dependence, provided for by Article 9 of Law no. 192 of 18 June 1998. This prohibits the abuse of a client's or supplier's state of economic dependence, such as, focusing on the exemplary list provided for by Article 9, the refusal to sell or refusal to buy, the imposition of unjustifiably burdensome or discriminatory contract conditions, or the arbitrary interruption of established commercial relations.

The concept of economic dependence is concerned with the relative power of an undertaking against its counterparty within a specific relationship (e.g. in light of sunk investments or other lock-in effects). This implies that the legal threshold for a finding of economic dependence is lower than what is required for a finding of dominance under Articles 102 TFEU and 3 of the Italian Competition Act, as it does not require market definition and dominance analysis.

Interestingly, after recent amendments to Article 9 of Law no. 192 of 18 June 1998, economic dependence is presumed, absent evidence to the contrary, in the case of digital platforms playing "a key role in reaching end users or suppliers, also thanks to network effects or availability of data".

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

The procedural formalities required to commence a competition damages claim are relatively simple and are the ordinary ones provided for in the Italian Code of Civil Procedure. More specifically, the requirements of a writ of summons are listed under Article 163 of the Code and include the indication of the factual and legal grounds of the claim, the related claims/requests to the court and an indication of the evidence which the claimant intends to rely upon.

Even if claimants may supplement their allegations and evidence at a later stage, their writ of summons shall contain the bulk of their factual allegations and legal arguments and shall allow defendants to comprehend and defend against the claim. This implies that writs of summons tend to be fairly long documents in competition damages cases.

As a general principle (Article 2697 of the Italian Civil Code), claimants bear the burden of allegation and proof in relation to the facts constituting the grounds for the claim. Conversely, defendants bear the burden of alleging and proving the facts on which their objections are based (see Question 8 for further details on the applicable standard of proof in Italy).

In competition damages cases, however, this traditional allocation of the burden of proof only remains applicable to stand-alone actions, i.e., actions concerning conducts which have not yet been the subject matter of final decisions of competition authorities.

For follow-on actions, Article 7 of Legislative Decree no. 3 of 19 January 2017 ("Decree no. 3/2017"), which

implements Directive 2014/104/EU ("the Damages Directive"), states that once a decision of the Italian Competition Authority finding for a violation of competition law has become final, the plaintiff is only required to provide evidence of a causal link between the violation, as established by the Italian Competition Authority's or the European Commission's decision, and the alleged existence and amount of the damages suffered.

Similarly, binding effects apply to decisions of the European Commission under Article 16 of Council Regulation (EU) no. 1/2003, stating that national courts, when ruling on agreements, decisions or practices under Articles 101 or 102 TFEU which are already the subject of a Commission's decision, cannot take decisions that counter to the decision adopted by the Commission.

These principles significantly ease the burden of allegation and proof on claimants in follow-on actions, as writs of summons can extensively refer to the findings of the Competition Authority in their writs of summons.

As we will see with further detail below in answering Question no. 14, in view of the relatively compressed timeline currently provided for by the Italian Code of Civil Procedure to supplement the evidence attached to the writ of summons, it is good practice for plaintiffs to prepare the economic evidence on damages they wish to rely upon in advance of the case. Such evidence would inform the arguments of the writ of summons and would be available for filing in the short timeframe currently available.

3. What remedies are available to claimants in competition damages claims?

The first remedy available to claimants in competition damages proceedings is the full compensation of the damages suffered (see Question no. 4 for further details on the point).

Additionally, plaintiffs may bring claims to obtain a declaration of invalidity of agreements or parts thereof which constitute a violation of competition law, as well as cease-and-desist orders addressing any ongoing infringement.

Interim measures, including cease-and-desist orders or other measures considered appropriate to prevent irreparable harm, can be sought before a decision on the merits, when the applicant establishes a *prima facie* case ("fumus boni iuris") and the risk of irreparable harm ("periculum in mora") in the timeframe required to obtain a decision on the merits.

Italian law also provides for additional measures, such as the publication of the decision under Article 120 of the Italian Code of Civil Procedure, as a remedy for the non-economic loss suffered by the claimant.

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Italian law provides that claimants are entitled to obtain full compensation for all damages suffered. Under Article 1 of Decree no. 3/2017, such compensation "includes actual losses, lost profits and statutory interests".

The calculation of actual losses and lost profits can be a complex exercise in competition damages cases, as courts are required to identify what the competitive conditions would have been absent the infringement and what costs and revenues the injured party would have incurred or obtained in such a counterfactual scenario. Courts typically rely on independent experts to assist with this quantification (see Question no. 13 below for further details).

Depreciation, from the harm until the actual payment of the damages, is also taken into account and can be calculated under a number of different methodologies. By way of example, in recent decisions of the Court of Milan in competition damages claims, depreciation was calculated on the basis of the opportunity cost of the injured party, with WACC ("weighted average cost of capital") methodologies (i.e. calculating on the basis of statistical data the average revenues that the injured companies would have generated had they had been able to use the damages amount since the time of occurrence of the damages).

The impact of depreciation and interests on the overall amount of damages can be significant, considering that damages are typically awarded after many years since the cartelized sales.

In addition to economic losses, judges may also consider any moral prejudice potentially suffered by the claimant. Punitive damages are not provided for under Italian law.

In the event that several undertakings have engaged in the anti-competitive conduct, Italian law recognizes joint and several liability for the damages caused. See Question no. 19 for further details on the allocation of contribution across several defendants.

An exception is provided under Article 9 of Decree no.

3/2017, where the joint and several liability of small and medium-sized companies ("SMCs") is limited to their direct and indirect purchasers, under the conditions that (i) the relevant market share of the company during the violation remained below 5%; and (ii) the standard regime of joint liability would cause irreparable harm to the company.

If both conditions are met, the contribution required to the SMC may not exceed the extent of damages that the SMC caused to its direct and indirect purchasers or suppliers.

SMCs remain jointly and severally responsible towards the other injured parties that are unable to obtain full compensation from the other undertakings involved in the same violation (see Question no. 5 for further details on the applicable rules on limitations in such instances).

Identical provisions apply in respect to leniency receivers.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

Article 2947 of the Italian Civil Code provides that the default limitation period for damages resulting from tort liability is five years.

Implementing Article 10 of the Damages Directive, Article 8 of Decree no. 3/2017 provides for two cumulative requirements, one objective and one subjective, for such five-year limitation period to start running:

1. the competition law infringement must have ended;
2. the plaintiff must have knowledge – or should be reasonably presumed to have knowledge – of the infringement and, in particular, of (i) the conduct and its unlawfulness, (ii) the harm the conduct has caused to them, and (iii) the author of the infringement.

An exception is provided in relation to SMCs and leniency receivers under Article 9(4) of Decree no. 3/2017, stating that the limitation period for injured parties that are not direct or indirect purchasers of the SMC or leniency receiver starts running towards the SMC or leniency receiver when it is established that they cannot obtain full compensation from the other entities involved in the same infringement of competition law.

Suspension and interruption of the limitation period

Under Article 8(2) of Decree no. 3/2017, if public enforcement proceedings are started in relation to an anticompetitive conduct, the limitation period is suspended for the duration of the proceedings of the competition authority. Such suspension lasts until one year after the decision on the violation has become final, or after the proceedings have otherwise been terminated.

Once an action for damages is brought, it interrupts the limitation period.

Additionally, Article 15(1) of Decree no. 3/2017 provides that the limitation period may also be interrupted by resorting to alternative dispute resolutions ("ADR") mechanisms (e.g. mediation, assisted negotiation agreements, arbitration proceedings), under the rules applicable to each ADR mechanism.

6. Which local courts and/or tribunals deal with competition damages claims?

Under Article 18 of Decree no. 3/2017, only the Commercial Chambers of three Italian courts (Milan, Rome and Naples) can now hear competition damages claims.

Commercial Chambers were first established in 2003, with the purpose of having specialized chambers to hear intellectual property cases. The competence of the Commercial Chambers has been broadened over the years, but intellectual property cases still represent a big portion of the overall volume of cases they currently handle.

Competence is established based on the domicile of the defendant or based on where the alleged harmful event occurred, the latter being the place where the claimant purchased the goods or used the services affected by the overprice (hence, normally, the place where the claimant is based).

The concurring criteria allow for a certain degree of forum shopping. As a general rule it can be considered that the Commercial Chamber of the Court of Milan is to be regarded as competent for claims filed by at least one plaintiff or filed against at least one defendant based in the North of Italy, the Commercial Chamber of the Court of Rome for claims filed by at least one plaintiff or filed against at least one defendant based in Central Italy and Sardinia and the Commercial Chamber of the Court of Naples for claims filed by at least one plaintiff or filed against at least one defendant based in Southern Italy and Sicily.

In actual practice, the Commercial Chamber of the Court

of Milan hears the majority of competition damages cases.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

Essentially identical principles apply under EU Regulation no. 1215/2012, the Lugano Convention and Law no. 218/1995, which respectively apply to parties within the EU, within the EEA and outside the EEA. In all instances, Italian courts have jurisdiction when the defendant is domiciled in Italy, when the harmful event occurred or may occur in Italy or, in cases involving more than one defendant, when one of the defendants is domiciled in Italy, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Under Article 5 of the Italian Code of Civil Procedure, jurisdiction is established based on the legal and factual situation at the time of filing, and in accordance with the allegations of the plaintiff.

Jurisdictional issues are rarely relevant in follow-on damages actions stemming from decisions of the Italian Competition Authority, where the competition law infringement typically concerned, and possibly had effects on, the Italian market.

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

Applicable law

Under Article 6(3) of Regulation EC No. 864/2007 (“Rome II Regulation”), the law applicable to competition damage claims is the law of the country where the market is, or is likely to be, affected. If the market is affected in more than one country, the claimant may base its claim on the law of the court seized if he or she has brought his or her claim before the courts of the state where the defendant is domiciled and the market in that EU member state is affected. Where the claimant sues more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition affects also the market in the Member State of that court.

Applicable standard of proof

As a general rule, each party bears the burden of proof of the facts upon which it bases its claims or objections. For competition damages claims, this means that the claimant bears the burden of proof of the alleged infringement of competition law, the causal link between that infringement and the damage for which compensation is sought, as well as the existence and the amount of the damages allegedly suffered.

As already discussed under Question no. 2, however, the burden of proof on the claimant is significantly eased in follow-on damages actions, where claimants only need to provide evidence of the existence and the amount of damages. This burden of proof is eased even further in follow-on damages actions concerning cartels, as Article 14(2) of Decree no. 3/2017 provides for a rebuttable presumption that “infringements consisting of cartels cause harm”. As a consequence, plaintiffs will not be required to prove the existence of damages, but only the amount thereof. The author of the violation bears the burden of submitting “contrary evidence to rebut this presumption”.

In terms of the applicable standard of proof, Italian jurisprudence applies the so-called “preponderance of the evidence” standard, where the court must choose the option which has a higher degree of logical probability compared to the other(s).

As we will see below in addressing Question no. 13, in follow-on damages actions courts typically appoint a technical advisor (typically competition economists or accountants, selected on the basis of the expertise required by the individual case) to assess the economic evidence provided by the parties or otherwise acquired in the proceedings through inspections or disclosure orders and provide a report on the existence and the amount of the damages. Absent obvious flaws in the report, this document constitutes the starting point for the discussion before the court, which is not required to take a decision based on the parties’ possibly entirely divergent positions and economic evidence, but can also rely on the independent assessment provided by the independent economic advisor it has appointed.

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

Under Article 7 of Decree no. 3/2017, which implements Article 9 of the Damages Directive, and Article 16 of Council Regulation (EU) no. 1/2003, infringement decisions of the Italian Competition Authority or of the European Commission, once final, are binding for the parties which are the addressees of the decision, which can no longer challenge the existence and the nature of

the infringement and its material, personal, temporal and territorial scope. As already seen when addressing Question no. 2, final decisions of the Italian Competition Authority are not binding as far as the damages suffered by the plaintiff seeking compensation, as well as the existence of a causal link with the infringement, are concerned.

An evidentiary value, even if not binding, is also attributed to final decisions issued by national competition authorities (i.e., as defined in Article 2, letter d), authorities appointed by another Member State of the European Union as responsible for the enforcement of Articles 101 and 102 of the TFEU) or Judges from different Member States finding for a violation of competition law.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

Private damages actions may commence and go ahead even in parallel with public enforcement proceedings. When this occurs, the provisions for stand-alone actions apply (see Questions no. 2 and no. 12 for further details on the allocation of the burden of proof in such instances).

According to Article 4 of Decree no. 3/2017, in order to preserve the effectiveness of public enforcement, when proceedings are pending before the competition authority, the Judge may suspend the proceedings up until the public enforcement proceedings are concluded. Italian case law, however, is not yet settled on this point, having the courts ordered suspension in some cases but not in others. As a practical matter, in pure cartel damages follow-on litigation, claimants typically wait for the decision of the Italian Competition Authority to become final before taking action to seek the compensation of damages.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

Class Actions

Article 1 of Decree no. 3/2017 expressly allows for antitrust damages to be sought with collective actions, which are now regulated by Articles 840-bis to 840-sexiesdecies of the Italian Code of Civil Procedure.

Pursuant to Article 840-bis of the Italian Code of Civil Procedure, class actions may be brought for "homogeneous individual rights", either by each member of the class or by organizations or associations registered in a special list held by the Ministry of Justice. The action brought may then be joined, prior to commencement of the preliminary investigation of the case or after the decision declaring the class action admissible, by the bearers of homogeneous individual rights.

As of today, Italian law on class actions only provides for an "opt-in" mechanism. Members of the class are therefore required to join the proceedings in order to benefit from a successful outcome, while those who decide not to join the class will not be bound by the related decision. No specific threshold needs to be met.

Other mechanisms

Litigation funds are playing an increasing role in competition damages litigation in Italy and are exploring tools for aggregating competition damages claims to ensure the efficient management of actions involving multiple injured parties.

Competition damages claims can be aggregated either through the acquisition of the credits of the injured parties by a special purpose vehicle ("SPV") set up for handling the project or through the joinder of multiple claimants in one individual action. As limited case law still exists on the validity of such acquisitions of credits under Italian law, we currently perceive a preference towards the joinder of multiple claimants in one individual action.

This is also because the joinder of multiple claimants in one single "group action" presents a number of practical advantages, the main ones being the fact that the case is brought in the name of the injured parties, avoiding that the defendant can try to present the action as an expression of speculative litigation. Also, acting through the injured parties ensures their commitment and their cooperation in the lifetime of the project.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

Under Article 10 of Decree no. 3/2017, in accordance with established jurisprudence of the Court of Justice of the European Union and the Damages Directive,

competition damages may be claimed by any injured party, including indirect purchasers of goods and services of the author of the violation. Compensation for actual damages at a given level of the supply chain, however, shall not exceed the overcharge suffered at that level, without prejudice to the right of the injured party to claim compensation for the lost profits resulting from the full or partial transfer of the overcharge.

Accordingly, Article 11 of Decree no. 3/2017 provides that the defendant may object that the overcharge has been passed on by the claimant, through an increase in its downstream prices. This defense (i) prevents the claimant from achieving unjustified compensation which would not correspond to damages actually incurred and (ii) avoids the duplication/multiplication of damages that would result from actions for compensation brought by direct and indirect purchasers at different levels of the value chain.

The burden of proof in relation to the existence and the relevance of the pass on rests on the defendant and may also be met by means of disclosure requests directed at the claimant or third parties.

Specific rules on the burden of proof are then provided for indirect purchasers, considering the frequency with which price increases are passed down the supply chain and the difficulty indirect purchasers face in proving the actual amount of damages incurred.

More specifically, under Article 12 of Decree no. 3/2017, indirect purchasers may prove the existence and magnitude of the price transfer by also relying on disclosure requests to the defendant or third parties. Additionally, such transfer is presumed for indirect purchasers that are able to prove that (i) the defendant committed an infringement of competition law (ii) which resulted in an overcharge for the defendant's direct purchaser and (iii) the claimant has purchased good or services that were affected by the competition law infringement (or contained/derived therein/therefrom). Such presumption may be rebutted by the defendant.

In terms of economic evidence and principles, Italian courts often refer to the Commission's practical guide on the quantification of harm caused by anti-competitive agreements (Communication 2013/C 167/07) and to the Commission's Guidelines on how to estimate the share of overcharge which was passed on to the indirect purchaser (Communication 2019/C 267/07). The principles and methodologies established therein are of direct relevance for proceedings in Italy.

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is typically used in competition damages litigation in Italy.

Under Article 61 of the Italian Code of Civil Procedure, judges appoint a Court Technical Advisor ("CTA") when the assessment of the facts of the case requires technical knowledge.

The CTA is appointed by the Judge. In competition damages cases, Judges at the Commercial Chambers typically appoint as CTAs senior competition economists or accountants, depending on the type of case and the inputs received from the parties on the point. When possible, Judges ask the parties to provide joint lists of candidates who are conflict free, possess the required skill and are viewed by both parties as suitable CTAs. Judges who may also appoint multiple CTAs, if appropriate (e.g. because different sets of skills or expertise are required) or suggested by the parties (e.g. to facilitate an agreed selection process).

CTAs do not work in isolation. Instead, they interact with the parties through written submissions and meetings. To this end, parties typically appoint their own technical advisor to interact with the CTA.

CTAs are guided by the specific instructions assigned to them by the Judge. They are bound by a duty of impartiality and by the right of due process, which requires CTAs to provide both parties with equal opportunities to interact with them and reply to the other party's arguments.

At the end of their investigations and having interacted with the parties' technical advisors, CTAs issue a report addressing the specific question(s)/task(s) assigned to them by the Judge. The parties can then comment on such report and CTAs have to take a position on the observations submitted by the parties. In competition damages proceedings, CTAs are typically assigned a deadline of around 9 months to submit their report and their replies to the parties' observations on the report. Reasonable extensions of the deadline are possible when needed, upon the request of the CTA.

The conclusions reached by the CTA are not binding and the court may dissent with the expert by offering an adequate explanation of the underlying reasons. In actual practice, the assessment of the available evidence and the economic methodologies adopted by the CTA in the report typically represent the starting

point for the decision making process of the court.

In terms of evidentiary powers, somewhat reflecting the practices developed by Commercial Chambers in intellectual property damages cases, CTAs in competition damages cases are typically allowed to run direct investigations on the accounting documents of the parties. This is typically done with a certain degree of cooperation by the parties, under the assumption that the court could issue extensive disclosure orders if need be.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

The Italian Code of Civil Procedure has recently undergone significant changes with the purpose of simplifying court procedures and speeding up the judicial resolution of disputes. Below the focus is on the current regime, applicable to proceedings commenced after 28 February 2023.

With the exception of class actions discussed under Question no. 11, merits proceedings for competition damages claims are commenced by service of a writ of summons on the defendant. The writ of summons must indicate a proposed date of the first hearing, which has to be at least 120 days later than the date of service of the summons (150 days in case of foreign defendants).

Within 70 days before the first hearing, the defendant must file the statement of defense, setting out all procedural and substantive defences and bringing any potential counterclaim.

15 days after submission of the statement of defence, the Judge must carry out preliminary formal checks and set deadlines for the submission of three rounds of briefing notes as follows:

- 40 days ahead of the first hearing, a round of briefing notes to file potential amendments to the claims and for the claimant to reply to the defendant's statement of defense,
- 20 days ahead of the first hearing, a second round to submit new evidence and evidentiary requests,
- 10 days ahead of the first hearing, a third and final round to file evidence and evidentiary requests in rebuttal.

After all of the above activities have been carried out, the first hearing is held as a case management conference for discussing procedural issues and establishing the calendar of the case.

In competition damages cases, absent procedural issues which may require an immediate decision, and unless the case is either obviously unsupported by sufficient evidence or of a dimension that advises against complex evidentiary activities (which may be disproportionate and may advise for the equitable assessment of the economic harm), Judges typically appoint Court Technical Advisors ("CTAs"), who have broad powers to receive and collect evidence from the parties and deliver their opinion to the court on the question(s)/task(s) assigned to them by the Judge (see Question no. 13 for more details on the role and the activities of CTAs).

Throughout the evidentiary phase of the case, the core of the evidence and arguments presented by the parties (and the CTA, who delivers a written opinion) is in writing. Oral evidence in the form of witness evidence may be relied upon, but it is rarely needed in competition damages cases.

After the filing of the report on damages by the CTA, the Judge typically assigns deadlines for the parties to file respective final written submissions aimed at presenting their respective cases. Each party can request a final oral hearing before the panel of three judges that will decide the case.

According to Article 275 of the Italian Code of Civil Procedure, the court should issue a first instance decision within 60 days of the abovementioned final hearing, but complex cases may take up to 6 months.

As discussed in relation to Question no. 13, the assessment of the available evidence and the economic methodologies adopted by CTAs in their written report typically represents the starting point for the decision making process of the court and for the submissions of the parties.

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

In view of the new structure of civil proceedings in Italy, speed of resolution of cases is expected to improve significantly. The expectation is that competition damages cases, absent complex procedural objections, will take approximately 2 to 2.5 years to reach a first instance decision before the Commercial Chamber of the Court of Milan (proceedings before the Commercial Chambers of the Courts of Rome and Naples have a slightly longer timeframe).

Compliance with this timeline should be facilitated by the fact that a large portion of existing procedural complexities has recently been resolved by the Court of Milan, the Court of Justice of the European Union and Decree no. 3/2017. Management of competition damages proceedings should therefore be streamlined going forward.

Appeal proceedings typically last between 1.5 and 2 years and do not automatically stay the effects of the first instance decision, which is provisionally enforceable. The appellant may obtain a stay of the first instance decision by filing a motion with the Court of Appeal, provided that the grounds for appeal appear *prima facie* grounded or that enforcement may cause serious and irreparable harm. The scrutiny of motions for stay is rather strict (and stays are rare in relation to judgments limited to monetary damages, absent risk of insolvency of the party which is expected to receive payment).

Appeal decisions are also provisionally enforceable and may be stayed by the Court of Appeal that issued the decision if an appeal is filed with the Supreme Court (see below). The criteria to grant a stay are the same as those for first instance decisions and the level of scrutiny is strict (stays are, again, rare).

Following the appeal decision, a third level of "appeal" is available by filing a motion before the Supreme Court. Appeals to the Supreme Court are only possible on points of law. The Supreme Court typically reaches a decision in 2-3 years.

16. Do leniency recipients receive any benefit in the damages litigation context?

Under Article 9 of Decree no. 3/2017, the joint and several liability of leniency receivers is limited to their direct and indirect purchasers. Leniency receivers are jointly and severally responsible towards other injured parties only if the latter are unable to obtain full compensation from the other undertakings involved in the same violation (see Question no. 5 for further details on the applicable rules on limitations in such instances).

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

As discussed in relation to Questions no. 13 above, Italian courts heavily rely on the inputs received from the experts they appoint as CTAs in relation to the quantification of damages. CTAs typically adopt the methodology they think is more appropriate for the case in question and the court runs a sanity check, to ensure that the methodology is reasonable and has been properly applied. Multiple methodologies have been applied over the years in cartel damages cases to quantify the overcharge, depending on the available data sets.

Injured parties are entitled to seek, and have obtained in past cases, compensation in relation to any harm suffered, either directly or indirectly, as a consequence of the competition law infringement. Umbrella effects are recognized in accordance with established case law of the Court of Justice of the European Union. Similarly, courts have recognized other typical types of damages, such as post-cartel overcharges in situations where prices did not go back to the competitive level after the cartel was dissolved (so-called lingering effects which can often be found in cartel cases, due to the time it takes for prices to go back to competitive levels).

For a recent example where both types of damages have been recognized, see Court of Milan, decision no. 3914 of 15 May 2023.

Additionally, Article 17 of the Damages Directive states that courts can equitably estimate the amount of damages suffered by the claimants. Such equitable power is subject to the following conditions: (i) it is established that the claimant suffered harm; and (ii) it is practically impossible or disproportionately difficult, also in view of the dimension of the case, to quantify the harm suffered based on the evidence available.

The recourse to equitable quantification is often particularly favourable for the claimants. Even in the absence of extensive economic evidence on the amount of the overcharge, courts have e.g. recognised damages in the range between 10% and 20% of the purchase price in various follow-on cartel damages cases. The most recent examples are a number of decisions concerning the truck cartel, where courts equitably estimated the overcharge which remained on the transport companies in 15% of the purchase price.

18. How is interest calculated in competition damages cases?

Interests are not compounded and are calculated from the day when the damages occurred, until the day of payment of the damages awarded (see among others Supreme Court, Joint Chambers, decision no. 1712 of 17 February 1995). The Ministry of Finance determines on a

yearly basis the default interest rate to be applied.

In addition to late interests, claimants are also entitled to seek depreciation damages (see Question no. 4 for further details). Yearly interests are calculated on the appreciated amount.

19. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

As a general rule, Article 2055 of the Italian Civil Code provides that multiple defendants are all jointly and severally liable for damages arising from an act for which they are collectively responsible. Under paragraph 2 of such provision, each defendant who may be requested to pay the full amount of damages may later seek proportional reimbursement from each of the other defendants in proportion to the respective share of responsibility. In case of doubt, the degree of responsibility attributable to each party is presumed equal.

See Question no. 4 for further details in case of joint and several liability of small and medium-sized companies and leniency receivers.

20. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

No summary judgment mechanisms are available under Italian law.

21. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

A complex mechanism is provided for class actions under Article 840-quaterdecies of the Italian Code of Civil Procedure. The settlement only binds the parties which opted in. We are not aware of any instances in which such mechanism has been used in actual practice.

22. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

The Italian legal system offers a strong level of protection for confidential or secret information. Italian courts routinely grant requests aimed at preserving the confidentiality of highly sensitive commercial or technical information that the parties or the court might need to refer to in the course of a case.

More specifically, Article 3 of Decree no. 3/2017 provides the court with the power to adopt a number of measures to preserve confidentiality. Namely, the Judge may:

- Impose a duty of confidentiality upon the parties and/or counsels thereof;
- Provide for the redaction of confidential documents;
- Hold closed-door hearings;
- Limit the number of persons allowed to view specific evidence (e.g. setting up a confidentiality club);
- Request experts to review the confidential documents and prepare a summary of the confidential information in a non-confidential form.

The parties in competition damages litigation can also seek broad disclosure orders directed against the other party, to obtain relevant evidence of the infringement or the amount of damages. Alternatively, as discussed above in relation to Question no. 13, courts can allow CTAs to run any required investigation and this often includes direct investigations on the accounting documents of the parties. This is typically done with a certain degree of cooperation by the parties, under the assumption that the court could otherwise issue extensive disclosure orders.

Under Article 4 of Decree no. 3/2017, the disclosure order can also be directed at the evidence in the file of the competition authority provided that (i) the parties are not reasonably able to produce such evidence, and (ii) the request is proportional, taking into account whether the request is addressed at specific documents in the file of the competition authority. Such disclosure can be ordered even prior to the completion of the proceedings before the competition authority.

Courts cannot order the disclosure of evidence related to leniency or settlement applications.

23. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

Court fees in Italy are negligible and, in cases where it is not possible to exactly calculate the amount due, they are set in a fixed amount (around EUR 1k). Costs for the expert appointed by the court to calculate damages can be more significant and partly depend on the amount of damages which is awarded. This means that the cost risk associated with the expert appointed by the court is positively correlated with the outcome of the case. Costs for the expert appointed by the court are typically provisionally borne by all parties, in equal shares. With the decision on the merits, the losing party is then usually ordered to reimburse the share borne by the winning party.

As to adverse cost reimbursements, the general rule in Italy is that the losing party is ordered to reimburse fees and costs incurred by the winning party, which are however calculated on the basis of statutory tables which typically only allow the winning party to recoup just a fraction of its real costs. By way of example, statutory fees for cases of EUR 2m in value amount to around EUR 35k. In case of multiple defendants, as a general rule each one would be entitled to have its costs reimbursed if the action is dismissed.

The risk of a full dismissal (and hence of an order of cost reimbursement) in follow-on damages actions is in any event low. This is even more so in cartel damages actions, where even the existence of the damages is presumed and the case is typically only about the amount of the overcharge (and in general of the damages) and the share of such overcharge which has been passed on downstream.

Also, even in those rare cases where the case was dismissed for lack of evidence in recent years, after implementation of the Damages Directive, the claimants as far as we are aware were never ordered to reimburse the costs of the winning party.

24. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

Third parties are permitted to fund competition litigation. There are no restrictions on this, and third party funders cannot be held responsible for the opponent's costs. However, such liability is typically regulated in the funding agreement.

Lawyers are not permitted to act on a contingency or conditional fee basis. However, success fees are allowed.

25. What, in your opinion, are the main obstacles to litigating competition damages claims?

We do not see obstacles to competition damages litigation which are specific to the Italian litigation system. The complexities mirror those facing all competition damages claimants across continental Europe, resulting from the difficulty in having access to reliable data sets, the difficulty in developing accurate methodologies to make efficient and reliable use of such data sets, and in general the difficulty in running complex economic analysis before the courts.

The important role that Court Technical Advisors ("CTAs") play in Italian litigation is actually a significant facilitating factor, allowing for the application by the CTAs of complex economic methodologies, which are illustrated in the independent report prepared by the CTAs for the court, which is then the basis for the decision making process (see Question no. 13 for further details on the role of CTAs).

Another facilitating factor results from the progressive increase in dimension of collective damages cases (as a result of various trends, including the increasing role of litigation funds), which allow the parties to invest in the case and use increasingly more sophisticated econometric tools, facilitating a more informed decision making process of the CTAs and the court.

An objective obstacle to the possibility of litigating competition damages claims on behalf of consumers or, in general, downstream injured parties derives from the features of the class action regime in Italy, which is a purely opt in system and makes it unlikely that competition damages claims on behalf of consumers which suffered minimal injuries can become a relevant factor of competition damages litigation in Italy. This in turn reduces the complexities deriving from the existence of multiple parallel actions brought by players on multiple layers of the value chain.

26. What, in your opinion, are likely to be

the most significant developments affecting competition litigation in the next five years?

The most significant development in competition damages litigation in Italy in the next five years will certainly be an exponential increase in the number of cases. After recent legislative changes, Italy is an increasingly favourable environment for claimants. The volume of cases and decisions favourable to claimants is increasing and the methodologies applied by the courts to quantify damages are becoming increasingly sophisticated.

An additional important facilitating factor allowing successful competition damages litigation in Italy is the central role played by Court Technical Advisors ("CTAs"), typically senior competition economists and accountants appointed by the court to prepare – through close interaction with the parties' advisors – a report on damages. CTAs now typically make use of complex economic methodologies, which are then the basis for the decision making process of the court.

A related trend will be the increase of third party litigation funding. Recognizing the increasingly favorable environment to competition damages litigation, an increasing number of international litigation funds have established offices in Italy in the last 2 years and are increasingly involved in financing competition damages litigation in Italy.

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