

Private enforcement of antitrust – the Italian perspective

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Introduction

Private enforcement of antitrust rules is not a new issue in Europe. Indeed, the willingness of the Commission to boost the activity of member states' domestic courts in the competition field was already made public in the 17th Report on Competition Policy dating back to 1987.¹

Two years later, the Commission also underlined this issue in a press release following its intervention in a dispute that—in the Commission's opinion—should have been brought before a domestic court, giving the litigating parties the possibility of an award for damages, an option that the Commission did not (and still does not) have.²

After 18 years, private enforcement within member states remains largely underdeveloped throughout the European Union (only 12 successful cases have been brought before national courts since the entering into force of EC Competition law in 1962³) for a series of reasons that vary depending on each country. The Commission believes that private enforcement should play a pivotal role for antitrust enforcement. Moreover, the implementation of Regulation 1/2003, which eliminates the Commission's monopoly over Article 81(3) of the Rome Treaty (setting forth exceptions to the general prohibition of anti-competitive agreements), should act as a facilitator for antitrust enforcement by private plaintiffs before national courts.

In light of the new regulatory framework, which was part of the so-called Modernisation Package, it is our opinion that in Italy there are the conditions for a substantial increase in private damages actions for breach of competition law. This is also the result of parallel growth in effective administrative enforcement by the domestic competition authority (Autorità Garante della Concorrenza e del Mercato, AGCM) that has rapidly obtained large international recognition and is now entering in its maturity phase since its establishment in 1990.

State of the art

Courts

Italian Antitrust Law No. 287/90 (IAL) has basically reproduced the content of Articles 81 and 82 of the Rome Treaty in its Articles 2 and 3.

According to Article 33.2 IAL, the court having jurisdiction for awarding damages, interim relief and nullifying illegal agreements relating to violations of Italian antitrust rules is the territorially competent Court of Appeal. This provision has the effect of shortening the proceedings involving the violation of domestic antitrust rules, skipping the step before the ordinary first instance civil courts, generally the forum for such claims (ie, *tribunale* and *giudice di pace*). Decisions of the Court of Appeal may then be challenged only before the Corte di Cassazione, based in Rome, which acts as court of last instance.

Paradoxically, a different scenario is faced by the plaintiff when claiming damages arising from violations of Articles 81 and 82 of the Rome Treaty. These actions, on the basis of general rules of Italian Civil Procedure, are caught by the jurisdiction of the territorially

competent first instance courts, while the Court of Appeal and the Corte di Cassazione will act, respectively, as second and third instance court against these decisions.⁴

The drawbacks of this set-up are evident, given that such concurrent competence may likely determine uncertainty, since usually it is not immediately clear to the damaged party if domestic or European competition rules (or both) have been infringed and—consequently—if the claim has to be filed with a first instance court or a Court of Appeal. In case the violation should be at both levels, it may be necessary for the plaintiff to artificially file two separate and independent actions, which may theoretically conclude with two different verdicts.

Notwithstanding the existence under the Italian rules of Civil Procedure of general remedies allowing the Court of Appeal to suspend the pending proceeding⁵, it would be desirable to concentrate the forum for antitrust actions in the hands of one judicial authority, simplifying the burden for the plaintiff.

In addition, it must be noted that neither the first instance courts, nor the Courts of Appeal are 'specialised' courts, ie with specific competence in antitrust matters and, in particular, are not sufficiently acquainted with complex economic analysis. This limits effective enforcement, except for courts operating in large cities (eg, Rome or Milan) that—through a 'learning by doing' approach may have acquired specific expertise. We expect this situation to change in the future as a result of training programmes for national judges on direct application of Article 81 and 82, for which an ad hoc budget has been recently allocated by the European Parliament to the Commission.

Recent developments in Italian case law brought some news in this domestic forum shopping framework, clarifying certain aspects on the standing of consumers before national courts for damage claims based on Article 33.2 of IAL. The wording of Article 33.2 merely states that the competent court for dealing with damage claims, interim relief and nullifying actions is the Court of Appeal, without specifying if only certain categories of claimants are entitled to appear before such Court. In a recent decision⁶, the Corte di Cassazione stated that the forum of the Court of Appeal as first instance court remains excluded when the claim is brought by consumers and not by an 'undertaking directly operating in the market'. We do not go into the details of the issue that has been deeply debated among Italian scholars, but the decision of the Court appeared to us unjustified and lacking appropriate grounds. Indeed, more recently, the joint body (Sezioni Unite) of the Corte di Cassazione⁷, discussing the issue of consumers' standing in a claim referring to a cartel in the car insurance sector, has finally asserted that the case should have been brought before the Court of Appeal, expressly granting to consumers the possibility to stand in courts on the basis of Article 33.2 of IAL⁸. The Corte di Cassazione eliminated the high degree of uncertainty existing in Italy as to the courts competent to hear claims brought by consumers on the basis of competition law infringements. In fact, the decision expressly stated that IAL, "is not the law of business operators only, but of all the subjects existing on the market," therefore including consumers, whose purchases performed in the mar-

ket represent the last phase of any process started with the production of goods or services.

Damages

In order to obtain compensation of damages, the plaintiff must give evidence before the court of (i) the existence and (ii) amount of damages suffered, of (iii) the misconduct of the defendant and of (iv) the causal link between such misconduct and the claimed damages.

The absence of clear criteria for the determination of damages represents—in our view—one of the major obstacles for the increase of private judicial enforcement in Italy.

According to the provisions of the Italian Civil Code⁹, the allowed damages consist of ‘actual damages’ (*danno emergente*) and ‘lost profits’ (*lucro cessante*). In proving these, the claimant has to show the existence of the causal link between the damages suffered and the alleged anti-competitive behaviour. Great difficulties arise in connection with the determination—with a reasonable degree of certainty—of the amount of both kinds of damage.

Actual damages include legal fees and other costs incurred for providing evidence on behalf of the defendant, such as market research and experts’ fees, but also cover the repairing costs for the consequences of the antitrust violation and returning to the status quo ante (activities and expenses too fluid to be determined with absolute certainty).

An even more grey quantification is the one of lost profits directly deriving from the breach of competition rules by competitors. Indeed, there are too many external factors (market trends, general economic situation, marketing strategy of the company, etc) that should be taken into account and the adoption of a general rule for determining lost profits does not seem possible, unless it is differentiated by specific objective and subjective elements (kind of violation, sector in which the alleged anti-competitive behaviour occurred, etc).

From this perspective, reference to the US system may be very helpful for finding the most appropriate methodology to calculate damages, and concepts like the ‘before and after’, the ‘yardstick’ and ‘but for’ theories—even if far from giving a liquidation with mathematical certainty—are extremely valuable when the plaintiff cannot clearly give evidence of specific losses of business or customers. However, whether or not such methodology will be adopted rests upon the will of the judge.

Indeed, the decisions adopted on point by Italian courts and dealing with the communications sector (ie the Telecom/Albacom and the Telsystem/SIP cases), refer to the ‘but for’ theory, ordering the incumbent to pay damages suffered by another operator due to the abuse by Telecom Italia of its dominant position.¹⁰ In detail, for the Telecom/Albacom case, the lost profits have been calculated by applying the market share held by the plaintiff in the year preceding the competitive infringement to the sales of the incumbent in the subsequent year (please note that incumbent’s sales have been considered as the entire market, given the substantial exclusion of competitors at the time of the infringement). Details of the analysis carried out by experts in the Telsystem/SIP case are not available but it appears that the ‘but for’ theory was used in connection with the before and after theory.

In the third case in which damages have been awarded in Italy (Bluvacanze/Ventaglio-Turisanda-Hotelplan), the court relied again on the ‘but for’ condition combined with the ‘before and after’ theory, making reference to the sales of the plaintiff during the months preceding the violation, increased on the basis of the market trend surveyed in the previous year.¹¹

Standard of proof

The plaintiff has to give proof of the causal link existing between the damage suffered and the anti-competitive behaviour of the defendant. Article 1223 of the Italian Civil Code allows compensation of

damages that are direct and immediate consequence of the antitrust violation.

Among the consequences of this set-up, it must be noted that the liability of the defendant should be, in principle, limited to the consequences that may be ordinarily foreseen at the date in which the violation was put in place, and not to any and all possible damages that, even indirectly, may have been caused by such misconduct.

The task of giving evidence of the damages suffered is made more difficult by the substantial lack of investigative powers of the Italian courts. Indeed, as the parties are obligated to provide clear and objective evidence of the alleged facts, the courts, which must base their decision on such evidence, have very limited and rarely used investigative powers, playing an ancillary role with respect to evidence submitted by the parties.

Among the most relevant available means there is the appointment of experts by the court¹², the free examination of the parties by the judge to clarify the content of the claim or of other documents submitted¹³, the inspections on the persons and things held by them¹⁴ and the request of information to the Public Administration to obtain official documents and information related to the case¹⁵ (this last provision could be used to request key information collected by AGCM under its investigations, but, to our knowledge, has never been applied under this context).

The general principles applicable to the standard of proof under Italian procedural law require that the parties give evidence of the alleged facts through specific means expressly provided and regulated by the law. Usually, in the course of civil proceedings, documentary proof is the most common type of evidence, but also witnesses, presumptions and declarations under oath are admitted.

In addition, apart from specific exceptions¹⁶, the judge must evaluate the evidence submitted by the parties in the course of the proceeding.¹⁷

For the purpose of providing pieces of evidence in antitrust cases, the opinion of experts is often crucial, especially when economic assessment is fundamental and represents the only instrument to prove elements ascertainable through technical knowledge.

The parties may appoint technical experts and produce their reports to the court that will freely evaluate them. Moreover, as mentioned above, the court may by its own initiative appoint experts and collect expert evidence within the context of its investigative powers. This may help to reduce the disadvantage of having generalist courts lacking specific expertise in economic analysis ordinarily related to antitrust cases.

Based on experience, what usually happens is that the parties submit the experts’ reports supporting their own claims to the court and the latter, in order to evaluate the conclusions of the parties’ experts, appoints its own consultant. Please note that in any case the court is not bound by the findings of its own experts and may issue a final decision that does not take into account the technical opinion of party- or court-appointed experts.¹⁸

Finally, in order to give evidence of the misconduct of the defendant, the parties may rely on the decisions adopted by the AGCM or other administrative authorities, if deemed relevant. These decisions are treated in principle as normal pieces of evidence submitted by the parties, in compliance with the provisions of Article 2697 of the Italian Civil Code, according to which anyone wishing to assert a right before a court must prove the factual elements on which the right is based. Therefore, administrative decisions are not binding and ordinary courts may also decide to completely disregard them even if—in practice—especially economic assessment’s findings are generally taken in great consideration. The same principle will apply with respect to decisions of other domestic competition authorities, which will be freely evaluated by Italian courts.

On the contrary, under the uniform application of Community

Competition Law principles, as set forth by Article 16 of Regulation 1/2003, Italian domestic courts, when dealing with Articles 81 and 82, will have to conform to the Commission's decisions.

The private enforcement to come

As of today, the use of private enforcement in Italy is—as in many other EU member states—extremely limited and needs to be improved. Indeed, an increased activity of ordinary courts would be a strong deterrent for potential infringing companies and would substantially help the administrative enforcement. Under this scenario, private litigation may have a complementary role with the one of the AGCM, which may focus its activity on the most serious infringements.

In addition, it has been expressly acknowledged¹⁹ that private enforcement bears additional advantages for plaintiffs, if compared to the activity ordinarily carried out by national competition authorities. First of all, victims of anti-competitive activity may be awarded compensation for the damages suffered—if any—and may recover the costs of legal fees in successful cases. Under a procedural viewpoint, it is worth noting that private claims are independent from administrative claims and can be brought separately or even as follow-on cases after decisions of the domestic authority. Private actions following the administrative—condemning—decision are the most recurrent in Italy, where rulings of the AGCM, even if not binding on national courts, can be submitted by plaintiffs as evidence for proving the alleged damages suffered, at least under an economic perspective.

Autonomous private litigation (in lack of a previous AGCM ruling) should also be promoted as a complementary means of antitrust enforcement by private parties for those cases in which the AGCM cannot or is not inclined to act. It is clear that intrinsic problems are connected with independent private litigation, especially because the *onus probandi* will be particularly difficult and expensive.

In order to facilitate a wider use of private remedies, various initiatives may be pursued and, independently from the fostering initiatives that will be pursued to implement the Green Paper on Antitrust Private Enforcement, that should be soon issued by the Commission, we may identify potential options for private enforcement in Italy.

A first step could be the adoption of opt-in class actions allowing a consumers' association to bring actions in court for anti-competitive behaviour. Under the current procedural law regime, the plaintiff must have suffered a 'direct' injury as a consequence of the antitrust violation and the consumers' association can at most prove to hold a general legitimate interest, not entitling them to obtain monetary compensation under Article 33.2. The introduction of class actions in Italy, at least on a opt-in basis, may promote private litigation, given that it would allow sharing of costs (usually significant in antitrust cases) and convince even plaintiffs for minor claims to adhere to large and already structured actions rather than pursuing their own independent cases. Given the major structural differences with the US litigation system, adjustments would be necessary, such as preliminarily financing the action with an opt-in fee to be paid by joining plaintiffs, which would be collected and used to cover defendant's legal expenses in case of loss.

We are all aware of the distortions likely connected with class actions in the US, usually acting as a magnet for litigation, especially when defendants' pockets are deep. However, to prevent the drawbacks that may derive from their introduction, it may be possible to rely on the (already existing) possibility of obtaining a condemnation for groundless action.²⁰ This remedy may be adopted by the defendant in case it would be immediately clear and evident that the plaintiff(s) recklessly promoted the claim without having actually suffered any damages.

Finally, it is very important to note that the introduction of class actions is to be coordinated with the application of leniency programmes.²¹ In fact, given the independence of private enforcement from EC or domestic administrative proceedings, the immunity from fines that may be granted under the Leniency Notice of February 2002 would not prevent damaged entities from starting actions for recovering damages. In Italy, leniency programmes are still not available even if long awaited and desired by the AGCM²² and their introduction should also take into account these aspects.

Another facilitating factor could be identified in the clarification of the private claims' forum issue, especially when such claims are brought under Article 33.2 of IAL by consumers. As a preliminary step, the concentration in the hands of the Court of Appeal of the competence for any claim brought in Italy and referring to antitrust issues, either connected with Italian law or EC competition rules, would be very helpful in light of a general simplification. Such simplification could ease the use of private enforcement and would also lead to reliance on the activity of a more specialised court, accustomed to dealing with economic analysis usually implied in competition cases. In addition the final word of the Sezioni Unite of the Corte di Cassazione, which has given standing in courts to consumers on the basis of Article 33.2 IAL, will help consumers having an active role in private enforcement of antitrust rules—given that they are the weak party in the market, usually suffering the negative consequences of lessening of competition. In fact, it is standard practice for intermediate operators to pass-on the overcharges faced as a consequence of anti-competitive behaviours in an upstream market.²³

Other options may be pursued in order to increase private enforcement in Italy, such as a wider use of expert evidence (which is already allowed under Italian Civil Procedure) although we believe that the first two elements we have identified above (class actions and special courts) should be the starting points of a private enforcement's promotional programme in Italy. In fact, clarification in the existing environment may be an invaluable boosting factor, setting forth the conditions for increased awareness of the possibilities given to market operators by national and EC competition law, which may also act as deterrent, forcing potential infringing companies to comply with existing rules.

Notes

- 1 17th Competition Report, 1987, page 54.
- 2 Press Release IP/89/884.
- 3 Ashurst Report, Executive Summary, page 1.
- 4 Decisions of the Corte di Cassazione do not affect the merit of the case.
- 5 Article 295 of the Italian Code of Civil Procedure.
- 6 Corte di Cassazione, 9 December 2002, No. 17475.
- 7 Corte di Cassazione, Sezioni Unite 4 February 2005, No. 2207.
- 8 Decisions of the Corte di Cassazione are not strictly binding in the Italian legal system but, if rendered by its joint body (Sezioni Unite), are rarely disregarded by lower courts and provide orientation also for future decisions of the Corte di Cassazione itself. Indeed, the principles stated by the Corte di Cassazione, Sezioni Unite on February 2005 have been reaffirmed in a more recent decision of the same Court, No. 17398, issued on 26 August, 2005.
- 9 Article 1223 of the Italian Civil Code.
- 10 The Telsystem/SIP case was decided by the Court of Appeal of Milan with two judgements of 18 July 1995 and 24 December 1996. The Albacom/Telecom case was decided by the Court of Appeal of Rome on 20 January 2003.
- 11 Court of Appeal of Milan, 11 July 2003.
- 12 Article 61 of the Italian Code of Civil Procedure.
- 13 Article 117 of the Italian Code of Civil Procedure.
- 14 Article 118 of the Italian Code of Civil Procedure.
- 15 Article 213 of the Italian Code of Civil Procedure.

- 16 Declarations rendered under oath in the course of a civil proceeding before a court give full and complete evidence of the facts declared without the possibility for the judge to disregard them. Another exception is faced by the judge when dealing with presumptions, which allow the parties to give indirect evidence of certain facts through deductions based on different, related, facts.
- 17 Article 116 of the Italian Code of Civil Procedure.
- 18 Under these circumstances, the judge will nevertheless have to motivate the reasons for disregarding the expert's opinion.
- 19 See Mario Monti's speech made on 17 September 2004 in Fiesole, at 8th IBA Annual Competition Conference.
- 20 Article 96 of the Italian Code of Civil Procedure.
- 21 Leniency programmes currently do not exist in Italy.
- 22 See Giuseppe Tesauro, Introductory speech of the Chairman on the AGCM activity of the previous year, 2002.
- 23 Passing-on theory in Italy has been expressly applied only once (Court of Appeal of Turin of 6 July 2000, VIH Srl/Juventus FC) and, as a consequence, the Court denied the damages' request to the plaintiff

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