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The International Comparative Legal Guide to:

Competition Litigation 2009

A practical insight to cross-border Competition Litigation

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Chapter 19

Italy

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1 General

1.1 Please identify the scope of claims that may be brought in Italy for breach of competition law.

With respect to breaches of EC or national competition law, according to the circumstances, plaintiffs may seek interim relief, damages, declaratory relief (*e.g.*, that an agreement hindering competition is null and void or that certain conduct is legal or illegal) or restitution (*e.g.*, of the overcharges paid as a result of the breach). Defendants may also challenge the enforceability of anticompetitive agreements.

1.2 What is the legal basis for bringing an action for breach of competition law?

Actions for breach of EC competition law are based directly on Articles 81 and 82 of the EC Treaty. Article 33(2) of Law No. 287 of 1990 (*i.e.*, the Italian competition law) provides a legal basis for private actions for breach of national competition law. Moreover, all private actions for breach of competition law are generally governed by contract law or civil liability principles.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

As reported above, the legal basis for competition law claims derive both from EC and national competition law. Articles 2 and 3 of Law No. 287 of 1990 mirror Articles 81 and 82 EC and, in principle, apply only to infringements falling outside the scope of EC law (*i.e.*, conduct which is not likely to restrict intra-Community trade).

1.4 Are there specialist courts in Italy to which competition law cases are assigned?

In Italy, private competition law litigation is not assigned to a single specialist court.

Private actions based on EC competition law must be brought before the lower civil courts (*Giudici di pace* and *Tribunali*), pursuant to general civil procedure rules. Lower civil courts are also competent to decide on unfair competition cases based on competition law principles, as well as to apply special competition rules on telecommunications and broadcasting or national legislation on abuses of economic dependence. Furthermore, in the course of ordinary legal actions, lower civil courts may have incidentally to consider matters involving the application of national competition law.

Courts of appeals have exclusive jurisdiction on national competition law cases. According to a recent and solidly-reasoned court order, the courts of appeals should decline jurisdiction over infringements falling within the scope of EC competition law (Milan Court of Appeals, 15-24 May 2007). However, there is prior judicial precedent to the contrary.

Pursuant to Articles 120 and 134 of the 2005 Code of Industrial Property Rights, private actions based on EC or national competition law and relating to the exercise of industrial property rights must be lodged with the sections specialising in industrial property rights instituted within the competent civil courts.

Courts of first instance (*Tribunali*) have jurisdiction on representative damages or restitution actions brought by consumer associations with respect to competition law infringements.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Any legal or natural persons who suffered damages due to a breach of competition law have standing to bring an action before the Italian courts, provided they have an actual interest in doing so (Court of Cassation, 4 February 2005, No. 2207).

The Italian Parliament has recently allowed representative damages or restitution actions on behalf of consumers with respect to, among other things, breaches of competition law (Law No. 244 of 2007, Article 2, para. 446). The standing to bring such actions has been recognised only to qualified associations of consumers (registered with the Ministry for Economic Development) or to *ad hoc* committees that are adequately representative of the collective interests they seek to protect. The new law provides for a two-step procedure, with an initial phase for a judicial assessment of the defendant's liability, and a subsequent phase for the quantification of damages owing to the individual consumers or users who have opted into the collective action or have otherwise intervened in the proceedings. The new law is currently expected to become effective as from July 1, 2008.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Private actions based on EC or national competition rules may be

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brought before Italian courts if they refer to infringements taking place or producing effects in the Italian territory.

In order to identify the territorially competent court, general civil procedure rules provide that, if the defendant is a natural person, damages action may be brought before the court of his place of residence or domicile; whereas if the defendant is a company, damages actions may be brought before the court of the place where the company has its headquarters, or a branch and an agent authorised to act for it in court proceedings. In addition, regardless of the nature of the defendant, a claim for damages may also be brought before the court of the place where the alleged obligation arose or must be performed (*i.e.*, depending on the circumstances, the place where the allegedly restrictive agreement was executed or, in actions for damages based on torts, the place where the wrongful conduct took place or the harm occurred, which may be the residence or headquarters of the plaintiff).

Special rules apply for consumer actions, which may be brought before the court of the place of residence or domicile of the consumer. Finally, representative actions must be brought before the court of the place where the defendant has its headquarters.

1.7 Is the judicial process adversarial or inquisitorial?

The civil judicial process in Italy is adversarial.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes, interim remedies are available in competition law cases.

2.2 What interim remedies are available and under what conditions will a court grant them?

Plaintiffs may apply for the adoption of any interim measure that appears to be the most suited remedy to guarantee provisionally the effectiveness of the final judgment in the case.

Interim measures can only be granted if the plaintiff brings evidence of a *prima facie* case and proves that its rights are likely to be irreparably damaged during the course of ordinary civil proceedings.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

Plaintiffs may be granted compensation for the damages suffered as a consequence of the defendant's breach of competition law. Pursuant to general civil liability principles, courts will grant damages if the plaintiff proves that: (i) the defendant intentionally or negligently violated competition law rules; (ii) the plaintiff suffered damages; and (iii) a direct causal link exists between the defendant's conduct and the alleged damages.

Plaintiffs may also obtain declaratory relief. For instance, they may seek a declaration that all or part of an agreement hindering competition or embodying an abuse of dominant position is null and void. Alternatively, they may ask a court to declare that certain conduct is legal or illegal, provided there is genuine disagreement.

Depending on the circumstances, plaintiffs may also claim restitution of any sums paid as a result of anticompetitive agreements.

Civil courts have no power to enjoin antitrust infringements permanently in their final judgments.

3.2 If damages are an available remedy, on what basis can a court determine the amount of the award? Are exemplary damages available?

Plaintiffs may be granted damages only to compensate for the harm actually incurred, *i.e.*, for 'out of pocket' loss, loss of profits and interest thereon. Accordingly, punitive or exemplary damages are not available and are deemed to be contrary to Italian principles of public order.

Where the existence of the damage has been established but it is objectively impossible or significantly difficult to prove precisely its amount, the court may award a fair estimate of damages. The judge may also request the assistance of an expert to quantify the damages.

In Italy, plaintiffs have often obtained damages for breaches of competition law. The following are among the most notable cases.

In *Telsystem*, damages were awarded to a potential new entrant into the leased lines market, whose market access had been prevented by the incumbent telecom operator's refusals to supply leased-line interconnectivity. The court commissioned an expert's report to calculate the plaintiff's loss of income (Milan Court of Appeals, 18 July 1995 and 24 December 1996). The damage liquidation was based, inter alia, on the principle that in a free-market economy monopolist rents, such as that of a first mover on the market, eventually tend to be neutralised by competition.

In *x-DSL/x-SDH* several data transmission operators and Internet providers claimed loss of income due to the incumbent telecom operator's refusal to supply them with wholesale x-DSL/x-SDH services at reasonable prices (Rome Court of Appeals, 11 December 2002 and 11 September 2006). In order to quantify damages, the court multiplied the plaintiffs' market shares in a neighbouring market by the dominant company's turnover obtained from the provision of retail x-DSL/x-SDH services and awarded damages at 10 percent of the resulting amount.

In *Bluvacanze*, to award lost income to a travel agency, the court confronted the turnover achieved by the claimant before and after the collective boycott it had been put through by several tour operators disgruntled with its aggressive discount policy (Milan Court of Appeals, 11 July 2003). In particular, the court awarded damages as a percentage of the turnover achieved by the travel agency during the previous year, multiplied by the annual increase rate of the market for travel packages in the year in which the infringement had taken place. The percentage was equal to the normal profit margin that the travel agency would have earned, less the discount that it used to grant to its customers. The court also awarded additional damages, calculated on an equitable basis, as compensation for the harm the collective boycott had caused to the claimant's reputation.

In *Inaz Paghe*, following a collective boycott organised by employment consultant associations, a software provider was awarded damages for the loss of profits caused by the termination of supply agreements with its clients (Milan Court of Appeals, 10 December 2004). In order to quantify the loss of profits, the court calculated the number of boycotted contracts and multiplied this figure by the average profit that the plaintiff made for each client (calculated by the court-appointed expert), assuming that, in the absence of the boycott, the boycotted contracts would have lasted two or three more years. The court calculated the number of boycotted contracts by comparing the number of contracts terminated in the two-year period before and after the boycott to the number of contracts terminated during the two-year boycott.

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However, since the plaintiff failed to prove that the boycott had also prevented it from acquiring new clients, the court did not award any damages for the alleged loss of potential clients.

In *Valgrana* the plaintiff was awarded damages on the basis of a fair estimate of the harm suffered from illegitimate decisions of the consortium for the protection of Grana Padano cheese, which imposed a restriction of the quantities that could be produced (Turin Court of Appeals, 7 February 2002). The court quantified the loss of profits by calculating the extra quantity that the plaintiff would have continued to produce during the period of the infringement in the absence of the defendant's anticompetitive practice and multiplied the amount by the plaintiff's average profit per ton. The sum was then reduced to take into account the estimated fall in prices that would very likely have resulted from the increase of the quantity supplied.

In the context of consumer follow-on actions for damages arising from an information-exchange conspiracy among insurers in the third-party auto liability market, several courts awarded damages. Loosely basing their assessment on data included in the Italian Competition Authority's decision condemning the cartel, most courts calculated damages as a fair estimate of the overprice paid by the plaintiffs, amounting to 20 percent of the premiums paid.

In *Gruppo Sicurezza*, the plaintiff was compensated for profit lost and harm to reputation deriving from to the defendant's exclusionary abuse (Rome Court of Appeals, 4 September 2006). The court calculated the loss of income by making a fair estimate of the profits that the defendant derived from the clients taken away from the plaintiff and assuming that the plaintiff would have supplied these clients for a three-year period. In addition, the court also awarded damages on an equitable basis for the costs that the claimant bore to enlarge its production capacity in order to supply the clients that were ultimately taken away by the defendant.

In *Avir v. ENI*, the court granted the claimant restitution of the overprice paid to ENI as a result of its abuse of dominant position. In particular, the court found that the incumbent gas operator's price increases did not bear a reasonable relation to the cost of gas (Milan Court of Appeals, 16 September 2006). Upholding the court's expert's arguments, the court compared the increase of ENI's gas prices to the trend of gas quotations at the London Commodity Exchange during the disputed period. The difference between the two growth rates was found to constitute an abusive overcharge and awarded to the claimant as restitution (including pre-judgment interest). The court also decided that additional damages were to be quantified by a separate judgment.

In *International Broker* a broker was granted damages in a follow-on action brought against oil companies which participated in a restrictive agreement in the production and distribution of bitumen (Rome Court of Appeals, 31 March 2008). The court awarded both actual loss and loss of profit. Actual loss was calculated as the costs borne by the plaintiff in gathering the evidence of the infringement and in participating in the administrative proceeding before the Italian Competition Authority. The court then held that the loss of profit was equal to 40 percent of the claimant's turnover in the one-year period preceding the implementation of the anticompetitive agreement.

3.3 Are fines imposed by competition authorities taken into account by the court when calculating the award?

When calculating the amount of damages to be awarded, courts do not take into account fines imposed by competition authorities.

4 Evidence

4.1 What is the standard of proof?

Judges are free to weigh any evidence provided by the parties. In some instances, however, the value of specific means of proof is dictated by law (*e.g.*, a party's confession proves the confessed facts, provided it concerns disposable rights of the confessing party). Judges may also base their findings of fact on strong, precise and conclusive circumstantial evidence.

The Court of Cassation has maintained that the causation link between a cartel and the damages suffered by consumers may be presumed, based on the laws of probability, because downstream contracts are normally the means by which the cartel is put into effect (Court of Cassation, 2 February 2007, No. 2305). Therefore, in such circumstances plaintiffs may obtain damages awards simply by (i) proving the existence of a cartel (possibly through prior findings by a competition authority, if any), (ii) providing a copy of their contract with one or more of the participants in the cartel, and (iii) providing a reasonable estimate of the overcharge they paid as a result of the cartel. The Court expressly noted that the presumption in favour of the plaintiff is, however, refutable.

4.2 Who bears the evidential burden of proof?

The burden of proof lies with the plaintiff, who must prove the facts on which the claim is founded.

4.3 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

Plaintiffs may prove their claims by presenting all of the types of evidence normally admitted in civil proceedings, including witness testimonies, documents and expert opinions.

At their discretion, courts may appoint experts whose role is usually limited to assisting the court in the evaluation of evidence already provided by the parties in matters requiring specific technical expertise. The parties may also appoint their own experts, who are entitled to introduce their observations and contradict the findings of the court's expert.

4.4 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

Discovery is not available in Italian civil litigation. Moreover, it is unclear whether individuals' general right of access to documents held by the public administration may be exercised by claimants in civil actions to have access to confidential documents held by the Italian Competition Authority.

In the course of civil proceedings, courts may order one of the parties or a third party to submit documents (which must be reasonably identified by the party applying for a disclosure order) or request documents from the Italian Competition Authority's file.

4.5 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Pursuant to general civil procedure rules, if witnesses do not attend a hearing to which they have been summoned, the judge may order

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that they be forced to appear before the court and, if they had no valid reason not to attend the hearing, they can also be fined up to €1,000. However, individuals subject to professional secrecy may legitimately refuse to testify.

Witnesses are interrogated directly by the judge. Cross-examination is therefore not allowed in Italian civil proceedings. However, when applying for a witness summons, the parties must indicate the facts on which they want the witness to be interrogated and may request the judge to ask him specific questions.

4.6 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Pursuant to Article 16(1) of EC Regulation No. 1/2003, national courts cannot rule counter to a Commission's decision which renders a judgement on the same facts. The Authority's decisions and decisions of competition authorities from other countries are not binding on the judge, but they may create refutable presumptions.

4.7 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Any document and any piece of evidence on which the parties intend to rely must be filed with the court's registry and is inserted into the judge's file, to which each party is granted full access. However, the judge may not order an inspection or submission of documents of one of the parties or of a third party if this could cause serious harm to them (the possible negative outcome of the case is not, however, a consideration in making such evaluations).

Accordingly, each party in the case has full access to all of the documents produced by the other parties or by third parties during the process. Third parties, however, do not have access to the file, but may request a copy of the court's judgment. Confidential information contained in documents produced before the court is therefore fully available to the parties and might also be subsequently used in other proceedings.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

Pursuant to Article 8(2) of Law No. 287 of 1990 (which reflects Article 86(2) EC), the substantive provisions of national competition law do not apply to companies which are entrusted by law with the operation of services of general economic interest, in so far as this is indispensable for performing the specific tasks assigned to them.

Moreover, a public interest defence seems to have been recognised by the ECJ in *Wouters*, where it held that restrictive practice could be considered not to infringe on the ban on restrictive agreements, since it was necessary to ensure that the ultimate consumers of legal services and the sound administration of justice were provided with the necessary guarantees in relation to lawyers' integrity and experience.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

In Italy, the passing on defence is not explicitly recognised. However, since, pursuant to general tort rules, a plaintiff may only seek compensation for damages actually suffered, provided that it did not concur in causing them, courts would normally take into account a passing on defence. In Indaba, the court found that a travel agency could not claim the antitrust damages that it had intentionally passed on to final consumers (Turin Court of Appeals, 6 July 2000).

Correspondingly, courts have also recognised, albeit incidentally, that indirect purchasers have legal standing to claim antitrust damages (Turin Court of Appeals, 6 July 2000; Rome Court of Appeals, 31 March 2008).

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

Actions brought to obtain declaratory relief are not subject to a statute of limitations. Damages actions are subject to a limitation period of ten or five years, depending on whether they are based, respectively, on a breach of contract or on tortious liability. The limitation period for competition law damages actions starts running when the claimant is - or, using reasonable care, should have been - aware of both the damage and its unlawful nature, *i.e.* that the damage is the result of an antitrust infringement (Court of Cassation, 2 February 2007, No. 2305).

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Claims brought to obtain interim relief in competition law matters are normally decided upon within four to five weeks from the filing of the application.

Ordinary actions before the lower courts and the courts of appeals have an average duration of two to three years at each level of jurisdiction. This time frame may become considerably longer in the event of an appeal to the Court of Cassation. It is not possible to accelerate proceedings.

At present it is difficult to predict what the typical duration of class action proceedings will be, since this kind of action was introduced in Italy only few months ago.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example if a settlement is reached)?

The parties do not need the permission of the court to discontinue the action brought before it.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

As a general rule, the unsuccessful party is ordered to pay all costs. However, where each party succeeds on some matters and fails on others, or where the court deems that there are other valid reasons, the court may order that the costs be shared or that each party bear its own costs.

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8.2 Are lawyers permitted to act on a contingency fee basis?

Contingency fee agreements have recently been permitted in Italy. However, pursuant to bar rules, attorneys are obliged to charge fees that are proportionate to the amount of work performed and may therefore be prohibited from entering into agreements pursuant to which they would risk not being paid at all.

8.3 Is third party funding of competition law claims permitted?

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

9 Appeal

9.1 Can decisions of the court be appealed?

Lower courts' judgments may be appealed to the upper courts. Accordingly, judgments by the *Giudici di pace* may be appealed to the *Tribunali*, whose decisions can in turn be appealed to the Court of Cassation on matters of law only; when *Tribunali* act as courts of first instance, their judgments may be appealed to the courts of appeals. Finally, the judgments of the courts of appeals may be appealed to the Court of Cassation on questions of law only, even where the courts of appeals have jurisdiction at first and last instance.

10 Leniency

10.1 Is leniency offered by a national competition authority in Italy? If so, is (a) a successful and (b) an unsuccessful applicant for leniency given immunity from civil claims?

On 15 February 2007 the Authority adopted a leniency programme. Leniency applicants are not granted immunity from civil claims, regardless of whether their application is successful or not.

10.2 Is (a) a successful and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

The Authority's communication on leniency does not provide specific protection for the evidence disclosed by leniency applicants. Accordingly, upon request from one of the parties to the civil proceeding, a judge might order a leniency applicant to bring that evidence before the court.

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