

# Private Antitrust Litigation

in 24 jurisdictions worldwide

# 2014

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# Italy

Mario Siragusa, Marco D'Ostuni and Cesare Rizza

Cleary Gottlieb Steen & Hamilton LLP

## Legislation and jurisdiction

### 1 How would you summarise the development of private antitrust litigation?

Private antitrust litigation in Italy is significant and increasing, possibly also due to:

- more general awareness of the advantages of judicial remedies, following the initiatives of the European Commission (the Commission) such as the 2008 White Paper on damages actions for breach of EU antitrust rules, the June 2013 proposal for a European directive on this matter (first circulated as a draft in 2009) and the 2013 communication on antitrust damages quantification;
- the exclusive power of civil courts to grant interim relief measures upon request by private parties; and
- a clear recognition in the case law of the Court of Cassation that consumers are entitled to bring private actions based on Law No. 287 of 1990 (the National Competition Law).

Several factors might spur further development of private antitrust litigation, particularly follow-on actions to cartel decisions: the as yet untapped potential of the 2007 leniency programme of the Italian Competition Authority (the Authority), applied in only four cases to date; the recent enactment of legislation on consumer class actions (article 140-bis of the Italian Consumer Code; see questions 19–26); the 2012 simplification of jurisdictional rules (see question 3), which could limit the number of private actions rejected on grounds of inadmissibility; and the apparent change in the Authority's policy regarding the use of the commitment procedure, by virtue of which, where the parties to an investigation offer suitable commitments to meet the concerns expressed by the Authority in its preliminary assessment, the procedure may be closed, without a finding of infringement by a final decision making those commitments binding on the companies concerned (the Authority has applied its policy in 10 out of 11 abuse of dominance investigations opened in 2010, but only in three out of seven cases in 2011, and three out of 10 cases in 2012).

### 2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust litigation is primarily governed by general civil law and procedure. Article 2 of Law Decree No. 1 of 2012, as converted into law by Law No. 27 of 2012 (the 2012 Decree), sets forth a special jurisdictional and venue provision, discussed in question 3.

Based on general civil liability principles, indirect claims seem to be also admissible (Appello Roma, 31 March 2008 and obiter in Appello Torino, 6 July 2000).

### 3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Pursuant to article 2 of the 2012 Decree, competition law disputes mainly fall under the jurisdiction of companies courts, which are specialised sections of tribunals and courts of appeals that generally sit in the capitals of the Italian regions (Lombardy and Sicily, unlike other regions, each have two companies courts in their territory; Valle d'Aosta does not have any). In particular, companies courts have jurisdiction over:

- petitions for declaratory relief (eg, for a declaration that an agreement hindering competition is null and void), actions for damages and requests for interim relief relating to infringements of National Competition Law;
- private actions based on articles 101 and/or 102 TFEU; and
- private actions based on the National Competition Law and/or articles 101 and/or 102 TFEU and relating to the exercise of industrial property rights.

However, pursuant to general civil procedure rules, lower civil courts have jurisdiction with respect to:

- claims related to the violation of the National Competition Law other than those mentioned above, such as unjust enrichment claims or claims for the court to determine the price in a contract for services or works, where the court finds that the agreed-upon contract price is the result of anti-competitive conduct and is thus null and void (Court of Cassation, No. 25880/2010);
- actions based on alleged violations of unfair competition law, certain of which may be characterised as antitrust infringements;
- petitions for declaratory relief and actions for damages due to the creation or maintenance of dominant positions in the telecommunications and broadcasting sectors; and
- actions brought pursuant to article 9 of Law No. 192 of 1998 (abuse of economic dependence).

Moreover, in the context of civil actions not based on antitrust claims, lower civil courts may have to consider incidental questions involving the application of National Competition Law (for example, objections to the enforceability of a contract claiming nullity for violating the ban on restrictive agreements; Tribunale Roma, 8 August 2012; Tribunale Milano, 25 January 2012; Appello Trento, 1 March 2011).

Although the Court of Cassation for a long time supported the opposite solution, since 2005 it has been uncontroversial that consumers may bring actions for damages based on National Competition Law. In particular, the court stated (No. 2207/2005 and No. 2305/2007) that, by its very nature, National Competition Law is intended to protect anyone, including consumers, whose interests may be affected by antitrust infringements. Individual consumer actions must be brought before a companies court, whereas, pursuant to article 140-bis of the Consumer Code, consumer class actions fall within the jurisdiction of the tribunals of

the main Italian judicial districts, based on the place of the defendant company's registered office (see question 25).

Neither National Competition Law nor any other statute provide criteria to coordinate private actions brought before different jurisdictions. Hence, parallel proceedings might concern the same parties and the same conduct, with the ensuing risk of conflicting decisions.

Interim measures may be granted according to article 700 et seq of the Civil Procedure Code. A plaintiff may request an interim measure if it fears that its rights are likely to be irreparably damaged during the course of the ordinary civil proceedings.

As far as the substantive provisions are concerned, declaratory actions may be based on article 2(3) of the National Competition Law or article 101 TFEU, pursuant to which forbidden agreements are null and void for all purposes, or on article 3 of the National Competition Law or article 102 TFEU, which prohibit abuse of market power.

In theory, negative declaratory actions should also be admissible (for example, by a dominant company seeking a declaration that certain conduct does not amount to abusive behaviour under article 3 of the National Competition Law or article 102 TFEU, with a view to pre-empting possible third-party claims for damages based on such conduct). However, in the only known case of an antitrust negative declaratory action in Italy, the court rejected the plaintiffs' request to declare:

- the non-existence of a cartel infringement established by the Commission, pending actions for annulment of the Commission's decision that its addressees brought before the General Court of the EU; and
- in any event, that the cartel in question did not cause a price increase for the relevant products or any other damage to the defendants.

Although the Commission's decision had not established that the conduct had a market impact, the court took the view that the plaintiffs were in fact requesting it to rule counter to a decision adopted by the Commission, which would have been prohibited by article 16(1) of EC Regulation 1/2003. Furthermore, the court refused to grant declaratory relief on the ground that the plaintiffs failed to indicate, in respect of each defendant or group of defendants, specific facts or circumstances allowing the court to assess whether damage claims could possibly be made against them (Tribunale Milano, 8 May 2009).

Based on general civil liability principles, a plaintiff claiming antitrust damages must prove that the defendant intentionally or negligently violated National Competition Law or EU antitrust rules, the plaintiff suffered damages, and a direct causal link exists between the defendant's conduct and the alleged damages. Depending on the underlying facts, antitrust infringements may also give rise to damage actions based on contract liability (eg, being a party to a cartel may induce a company to act in bad faith towards its customers or distributors).

Consumers may also rely on consumer protection provisions, such as article 1(2)(e) of Law No. 281 of 1998 on consumers' and final users' rights, pursuant to which these categories of persons enjoy a fundamental right 'to honesty, transparency and fairness in contractual relationships'. An infringement of this right is actionable, for example, by claiming damages against a company selling goods or providing services where the sale price was raised because of an anticompetitive agreement between the company and its competitors (Giudice di pace Lecce, 30 January 2003).

- 4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction?

Private antitrust actions may be filed in connection with any possible violation of National Competition Law or articles 101 and/or 102 TFEU. No prior finding of infringement by any competition authority is required.

#### Damages

Damages have been awarded in cases involving abuses of market power or cartels. For instance, in *Telsystem* and *x-DSL/x-SDH*, damages in tort were awarded to potential new entrants whose market access had been prevented by the incumbent telecom operator's refusals to supply them with services they needed to enter the market (Appello Milano, 18 July 1995 and 24 December 1996 and Appello Roma, 11 December 2002 and 11 September 2006).

In *Piccoli v Isoplus* breach of contract damages were awarded to an agent whose business proposals had been systematically turned down by Isoplus as a result of a market-sharing agreement it had entered into with certain competitors (Appello Bari, 22 November 2001).

In *Valgrana* the plaintiff, a producer of Grana Padano cheese, was awarded damages for the harm it suffered from illegitimate output-limitation decisions adopted by the Consortium for the protection of Grana Padano, the industry association of which it was a member (Appello Torino, 7 February 2002).

In *Bluwacanze* damages in tort were awarded to a travel agency that had been collectively boycotted by several tour operators in retaliation for the aggressive discounts the agency offered to its customers by renouncing part of its commissions (Appello Milano, 11 July 2003).

In *Inaz Paghe* damages in tort were awarded to a software provider that had been collectively boycotted by national and local employment consultant associations in retaliation for encroaching on activities allegedly reserved to authorised employment consultants (Appello Milano, 11 December 2004).

In numerous follow-on actions, damages in tort were awarded to consumers who paid higher premiums to insure their cars against third-party liability because their insurance companies participated in an information exchange cartel (eg, Appello Salerno, 20 December 2008, upheld by Court of Cassation No. 8091/2013; Appello Napoli, 30 March 2007, upheld by Court of Cassation No. 8110/2013).

In *Gruppo Sicurezza* an airport security service provider sued the managing body of the Fiumicino airport for damages, claiming to be the victim of exclusionary abuse (unlawful interference with the plaintiff's customers, which led them to terminate their contracts with the plaintiff). Gruppo Sicurezza was awarded damages for loss of profit and harm to reputation (Appello Roma, 4 September 2006).

In *Avir v ENI* the court found that the incumbent gas operator had abused its dominant position by imposing unfair prices: the claimant was awarded restitution of the overcharge paid, in addition to damages (Appello Milano, 16 September 2006).

In *International Broker* the court awarded damages to a broker for the loss of profit suffered when the main local oil refining companies aligned prices through participation in a joint venture for the production and distribution of bitumen (Appello Roma, 31 March 2008).

In *Agenzia del Territorio* several companies were awarded damages in tort for the loss of profit they suffered as a consequence of restrictions on the commercial utilization of data, abusively imposed by the agency entrusted with the maintenance of the national land registry (Appello Milano, 4 April 2012).

In *Okcom* the court awarded damages in tort for the actual loss suffered by the plaintiff (a phone service provider) when the

dominant mobile phone operator on the wholesale market put a margin squeeze in place for the termination of phone calls on its own network (Tribunale Milano, 13 February 2013).

#### Interim relief

Dominant companies have been ordered to stipulate supply agreements through interim measures in only a handful of cases (see, for example, Appello Milano, 29 April 1995, and Appello Roma, 12 February 1995). On the other hand, a defendant may be ordered to cease and desist from continuing its allegedly unlawful behaviour (eg, from further participating in alleged cartel activities) until a final judgment is issued (Appello Milano, 13 July 1998 and 29 September 1999). Arguably, ordinary civil courts (as opposed to companies courts) have jurisdiction over requests for interim relief related to violations of National Competition Law, where the interim relief sought by the applicant is not ancillary to petitions for declaratory relief or actions for damages (Appello Torino, 18 June 2001, *mutatis mutandis*).

#### Nullity

Only agreements that directly eliminate, restrict or distort competition are null and void under article 2(3) of National Competition Law, not agreements entered into downstream by one or more of the parties to the upstream cartel (Court of Cassation, No. 9384/2003; TAR Lazio, No. 1790/2003). However, based on dicta in Court of Cassation No. 2207/2005 and No. 2305/2007, some commentators argue that downstream agreements are part of the anti-competitive agreement and, as a result, may also be found null and void. In *Avir v ENI*, the Milan Court of Appeals found that gas supply agreements through which the incumbent gas operator had abused its dominant position by imposing excessive purchase prices were null and void, in part because they were contrary to the prohibition of such abusive conduct laid down in article 3(a) of National Competition Law (Appello Milano, 16 September 2006).

Private antitrust actions are very unlikely to originate from violations of merger control rules. Pursuant to National Competition Law, the Authority has the exclusive power to vet and prohibit mergers through a mechanism of prior notification by the merging parties similar to the EU merger control system. Therefore, in principle, private litigation could arguably take place only in the event that the merging parties did not comply with a prior Authority decision by implementing a prohibited merger or by violating the terms of a conditional authorisation with remedies. However, in the only precedents available: on the one hand, the Turin Court of Appeals ruled that it had jurisdiction to decide upon the violations of the bans on restrictive agreements and abuse of dominance, which the defendant allegedly committed through consummation of a merger cleared by the Authority (Appello Torino, 7 August 2001); on the other hand, the Milan Court of Appeals stated that the Authority has the exclusive power to verify compliance with its own merger control decisions (Appello Milano, 24 May to 3 June 2004), thereby virtually precluding private litigation within the ambit of merger control.

- 5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

National Competition Law applies to any antitrust infringements taking place or having effect in the Italian territory. In addition, private actions based on EU competition rules (alone or in combination with the provisions of National Competition Law) may be brought before Italian courts.

Pursuant to the general rules on jurisdiction, a private action may be brought before the court of the defendant's place of residence or domicile, if the defendant is a natural person, or the place where the defendant company has either its registered office or

a branch and an agent authorised to act for the defendant in court proceedings. In addition, an action may be brought before the court of the place where the alleged obligation arose or must be performed (ie, the place where the allegedly restrictive agreement was executed or, in actions for damages based on torts, the place where the harm occurred, which is usually the residence or registered office of the plaintiff). If the claim is to be filed against several defendants who are domiciled in different EU member states, pursuant to EC Regulation 44/2001 the action may be brought in any of these jurisdictions. Moreover, as regards damage actions based on torts, pursuant to EC Regulation 44/2001, if the harmful event occurred in more than one EU member state, the plaintiff may bring its action in any of the EU member states concerned.

Special rules apply to consumer class actions (see question 25), which must be brought before the tribunals of the main Italian judicial districts, depending on the place of the defendant company's registered office.

- 6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Under general procedural rules, both natural and legal persons (including those from other jurisdictions) may be sued for antitrust violations.

#### Private action procedure

- 7 May litigation be funded by third parties? Are contingency fees available?

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.

Outcome-based fee arrangements have been permitted by law since 2006. However, since the ethical rules of the Italian Bar oblige attorneys to charge fees that are proportionate to the amount of work performed, 'no-win, no-fee' arrangements would seem to be of questionable enforceability.

- 8 Are jury trials available?

No.

- 9 What pretrial discovery procedures are available?

Pretrial discovery is not available in civil litigation, including for private antitrust actions.

- 10 What evidence is admissible?

All evidence normally admitted in civil liability proceedings, including witness testimonies, documents and expert opinions, is admissible in private antitrust actions (see below). Courts may also order one of the parties or a third party to submit relevant documents, which must be reasonably identified by the party applying for a disclosure order, or request documents from the Authority's file. For example, in the above-mentioned *International Broker* litigation, upon request by the Rome Court of Appeals, the Authority produced a copy of the minutes of a hearing of the defendants' representatives as well as a copy of the documents seized in a dawn raid at the defendants' premises. Similarly, in a follow-on action brought by a new entrant in the market for ferry transport of trucks and passengers with car vehicles on the Genoa-Palermo route against the incumbent operator, which the plaintiff claimed abused its dominance by means of an aggressive exclusionary policy, the court upheld the plaintiff's request and ordered the Authority to produce a number of documents included in its case file (Tribunale Palermo, 15 July 2011; the

Authority had concluded its investigation in May 2010 after accepting commitments from the dominant ferry operator). On the other hand, in a follow-on action brought against one of the leading Italian mobile telephony operators, which in the Authority's view was suspected, like its two largest competitors, of abusing its position of single dominance on the market for phone calls termination services on its own mobile network by charging rivals higher termination rates than its own commercial division, the Milan Tribunal dismissed the plaintiff's request for a disclosure order on the grounds that, since the court-appointed expert would have had access to the defendant's relevant documents, it was not necessary to grant the plaintiff direct access to the same documents (Tribunale Milano, 10 November 2011; the Authority had concluded its investigation into the defendant's conduct in May 2007 after accepting commitments, and found in its final decision that the two other operators had infringed article 102 TFEU; see question 15).

**11** What evidence is protected by legal privilege?

Italian law protects the confidentiality of communications between a lawyer who is a member of the Bar of an EU member state and his or her clients. To the extent that such communications are exchanged in the exercise of the client's right of defence, they are covered by professional legal privilege (eg, they cannot be used by the Authority for the purposes of an investigation). However, pursuant to Italian law, if a lawyer has the status of employee, then he or she cannot be a member of the Bar. Accordingly, in-house lawyers, who are employees of the company for which they work, cannot be members of the Bar; thus their communications and advice are not privileged.

The Authority does not allow access to documents containing trade secrets, unless they constitute the evidence of the infringement or contain essential information for the defence of the party that requested access to them. In these cases access is in any event limited to the relevant essential information.

In civil proceedings, if a party intends to rely on a document containing trade secrets, such a document must be included in the case-file, which is fully accessible to each of the parties to the proceedings. The court may not order an inspection or submission of documents in the possession of one of the parties, or of a third party, if this could cause serious harm to them (the possible unfavourable outcome of the proceedings not being a relevant factor in the framework of the court's assessment). Each party to the proceedings has full access to all of the documents produced by the other parties or by third parties. Confidential information contained in documents produced before the court is, therefore, fully accessible to the parties and may also be subsequently used in other proceedings. Third parties, on the other hand, do not have access to the file, and may only request a copy of the judgment.

**12** Are private actions available where there has been a criminal conviction in respect of the same matter?

Antitrust infringements cannot give rise to criminal liability under Italian law.

However, the same conduct can sometimes infringe both antitrust rules and criminal law (eg, where participation in a bid-rigging cartel results in criminal interference with public tender procedures). Private antitrust actions are not barred by a criminal conviction in respect of the same matter. Nonetheless, if the civil proceedings are instituted after delivery of the first instance criminal judgment, they must be suspended until the judgment of a criminal conviction becomes *res judicata*.

**13** Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

As a matter of principle, the evidentiary value of any evidence or findings in criminal proceedings should be assessed on a case-by-case basis by the civil court in the context of a parallel private antitrust action. Moreover, principles of *res judicata* require that the definitive findings in criminal proceedings in which the parties involved in a parallel private antitrust suit participated (or could have participated) be given *res judicata* consideration in the private action.

With respect to evidence gathered by the Authority, under general rules of procedure access to the Authority's case file is granted to complainants as well as any other 'person who has a direct concern in the matter' and has requested and been granted leave to intervene in the investigation procedure (eg, consumer associations, despite the fact that the statement of objections is not addressed to them). Moreover, at the request of a party to a private litigation, the civil court may request the Authority to disclose any documents included in its case file (see question 10; Appello Roma, 31 March 2008, and Tribunale Palermo, 15 July 2011).

However, as regards documents filed by leniency applicants, third parties, including those that have requested and been granted leave to intervene in the procedure, are barred from accessing written or oral leniency statements, as well as any document annexed to such statements. Moreover, the other parties to the investigation may have access to the leniency statements only after the date of notification of the statement of objections, provided that they undertake not to make copies of the statements and to use the information contained therein only for the purposes of judicial or administrative proceedings for the application of the antitrust rules at issue in the Authority's investigation. Finally, the Authority may decide to postpone the other parties' access to the documentation supporting the leniency statements until the date of notification of the statement of objections. Other than to this extent, leniency applicants are not protected from follow-on litigation.

**14** In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Under general rules of civil procedure, the court must stay the proceedings in cases where its decision depends on the decision of another court.

Furthermore, under article 16(1) of EC Regulation 1/2003, national courts cannot take decisions running counter to a decision adopted by the Commission (see question 3). Therefore, where a private enforcement action follows a Commission decision that is subject to judicial review, the defendant may ask the judge to stay the proceedings pending the action for annulment of that decision.

On the other hand, civil courts are not bound by the Authority's decisions (see questions 15 and 25). Accordingly, they have full discretion in deciding whether to suspend proceedings pending a possible judicial review of the Authority's decision from which the private action may have originated.

It should be noted, however, that in the case of a class action (see questions 19–26), the court may suspend the proceedings at the admissibility stage if the facts on which the action is based also form the object of either an investigation of an independent enforcement agency such as the Authority, or judicial review proceedings pending before an administrative court.

**15** What is the applicable standard of proof for claimants and defendants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

As far as the standard of proof is concerned, the court may weigh any evidence provided by the parties, except where the value of a given means of proof is specifically mandated by law (for example, a party's confession is by law irrefutable proof of the confessed facts, provided it concerns disposable rights of the confessing party). The court may base its findings of fact on circumstantial evidence, provided that evidence is strong, precise and conclusive.

The burden of proof lies with the claimants, who must prove the facts on which their claims are founded. The defendants, on the other hand, must offer evidence in support of their objections or counterclaims.

With respect to causation, the Court of Cassation takes the view that, based on the laws of probability, a direct link may be presumed to exist between a cartel and the damages suffered by consumers, because downstream contracts between cartel participants and consumers are normally the means by which the cartel is put into effect (No. 2305/2007). As a result, the claimant is only required to prove the existence of a cartel (possibly relying on prior findings by the Authority, if any), provide a copy of the agreement it entered into with one or more of the cartel participants and provide a reasonable estimate of the overcharge paid as a result of the cartel. In follow-on actions, even though the court expressly noted that the presumption in favour of the claimant is rebuttable, it also stated that the existence of the causal link can only be challenged on the basis of circumstances which specifically concern the relationship between the claimant and the defendant, and not simply by referring to circumstances affecting the market in general (No. 5327/2013). Moreover, the defendant may refute the existence of a causal link between the alleged antitrust infringement and the damages claimed by the plaintiff, by proving that the latter has in fact succeeded in passing on the overcharge attributable to the illegal conduct to its own customers (ie, indirect purchasers) and, thus, has not suffered any damage (see also question 35).

At its discretion, the court may appoint an expert to assist in matters requiring specific technical expertise (for example, definition of the relevant market or liquidation of damages).

Any finding made by the Authority or by the administrative courts reviewing the case is not binding on the civil court which has jurisdiction over a follow-on damage action. However, according to the Court of Cassation (No. 3640/2009), the Authority's and the administrative courts' findings have value as a preferred means of proof of the infringing conduct (ie, they create a rebuttable presumption with respect to the existence of the infringement). As a result, in order to refute such a presumption, the defendant should provide evidence that has not already been unfavourably assessed by the Authority (No. 10211/2011).

Furthermore, the Milan Tribunal recently established, in a damage action following a decision by the Authority which accepted the commitments offered by the defendant and made them binding without finding any infringement, that even the statement of objections issued by the Authority could provide circumstantial evidence of the disputed antitrust violation, although no infringement was found by the decision closing the proceedings. In that case, however, the Authority issued the statement of objections in an investigation against three companies, two of which were subsequently fined, whereas the other company (the defendant in the private action) offered commitments which were accepted by the Authority. The Milan Tribunal thus found that, since the same infringement described in the statement of objections had been confirmed in the final decision issued against the two other companies, it was reasonable to assume that the defendant had also participated in the same infringement (Tribunale Milano, 10 November 2011).

No presumption concerning the existence or the size of the overcharge caused by an infringement is automatically applicable.

**16** What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

Petitions for interim relief in antitrust matters are normally adjudicated within four to eight weeks from the filing of the application.

The average duration of ordinary actions before the lower and the appellate courts is two to three years at each level of jurisdiction. The time frame may be lengthened considerably in the event of an appeal to the Court of Cassation.

Pursuant to articles 702-bis et seq of the Civil Procedure Code (as introduced by Law No. 69 of 2009), where a single-judge lower court has jurisdiction and the action in question may be decided on the basis of a summary investigation, the plaintiff may request accelerated proceedings. This type of proceedings is characterised by a significant simplification of formalities, as well as fewer hearings and written submissions. Nevertheless, if the judge takes the view based on the parties' pleadings that more than a summary investigation is required, the accelerated proceedings may be converted into ordinary ones.

It is not yet possible to predict the typical timetable for consumer class actions under the new legislation, which only entered into force in January 2010, since to date only two consumer class actions have come to a final ruling at first instance (Tribunale Milano, 13 March 2012, and Tribunale Napoli, 18 February 2013).

**17** What are the relevant limitation periods?

Declaratory actions are not subject to a statute of limitations. The limitation periods for damage actions based on tort or breach of contract are, respectively, five and ten years. As clarified by the Court of Cassation (No. 2305/2007), the limitation period for antitrust damage actions starts running when the claimant is – or, using reasonable care, should be – aware of both the damage and its unlawful nature (ie, that the damage was caused by an antitrust infringement).

**18** What appeals are available? Is appeal available on the facts or on the law?

Companies courts' rulings may be appealed to the courts of appeals both on the facts and on questions of law. The judgments of the courts of appeals may be appealed to the Court of Cassation on questions of law only.

### Collective actions

**19** Are collective proceedings available in respect of antitrust claims?

As mentioned, as of 1 January 2010 consumers may bring class actions, pursuant to article 140-bis of the Consumer Code, for damages allegedly suffered as a result of certain breaches of contract or torts that occurred after 15 August 2009.

In particular, class actions may be brought by any consumer or user, on his or her own, through associations mandated by him or her, or through committees of which he or she is a member. These class actions may seek damages or declaratory relief for violations of rights that are 'homogeneous' to those of other consumers or users and that arise from certain actionable breaches of contract or torts, including, inter alia, 'anti-competitive activities'.

However, since a consumer or user is defined as 'any individual who is acting for purposes falling outside his trade, business or profession' (article 3(a) of the Consumer Code), the rules on class actions do not apply to claims on behalf of individuals acting within the scope of their trade, business or profession, including their employment contract, or parties who are not individuals.

There are two stages in the class action procedure. First, following an opening hearing, the court decides on the admissibility of the action (see question 21). At this stage, the court may suspend the proceedings if the facts on which the class action is based also form the object of either an investigation of an independent enforcement authority, or review proceedings pending before an administrative court. If the court deems the class action to be admissible, it issues an order setting out:

- the rules for the notification of the proceedings to the other members of the class;
- the characterisation of the rights that are at stake in the proceedings;
- the deadline for the exercise of other consumers' or users' right to opt in; and
- the rules governing the ensuing investigatory phase.

If the court issues a final ruling in favour of the plaintiffs, it may either: (i) award a fair estimate of damages to each of the individual consumers or users who have elected to opt into the class; or (ii) establish criteria to quantify damages and grant the parties a period not exceeding 90 days to settle the amount of damages. In the latter case, if the parties reach an agreement before the expiration of the deadline, such agreement is signed by the judge and becomes enforceable. If no agreement is timely reached, the court, following the request of at least one of the parties, shall award a precise amount of damages to each consumer or user who has opted into the class action.

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**20** Are collective proceedings mandated by legislation?

Consumer class actions are not mandated by legislation. Individual consumers and users have the right to bring private antitrust litigation on an individual basis, including where class action proceedings have already been commenced based on the same illegal conduct and against the same defendants.

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**21** If collective proceedings are allowed, is there a certification process? What is the test?

Pursuant to article 140-bis(6) of the Consumer Code, for a class action to be admissible the following requirements must be satisfied:

- the action is not manifestly unfounded;
- there is no conflict of interest between class members;
- the rights claimed by the class members appear to be homogeneous; and
- the first claimant seems able adequately to protect the interests of the class.

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**22** Have courts certified collective proceedings in antitrust matters?

There appears to be only one consumer class action related to an antitrust infringement, but the court has not yet decided on its admissibility (action pending before the Genoa Tribunal with respect to an alleged price cartel between ferry companies operating on several routes connecting the Italian mainland to Sardinia).

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**23** Can plaintiffs opt out or opt in?

As noted, Italian consumer class actions are based on an opt-in system.

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**24** Do collective settlements require judicial authorisation?

Under general civil procedure principles, settlements do not require judicial authorisation. However, pursuant to article 140-bis(15) of the Consumer Code, any settlements reached between certain parties to the proceedings do not affect the rights of consumers or users

who have opted into the class action but have not expressly agreed to the settlement.

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**25** If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

Article 140-bis(4) of the Consumer Code sets out special criteria for allocating territorial jurisdiction among Italian tribunals. In most cases, a class action may be brought only before the court sitting in the principal town of the Italian region where the defendant company has its registered office. However, in nine of the 20 regions, the territorial jurisdiction of certain other tribunals has been extended (eg, a class action in relation to a company having its registered office in the Region of Marche or Umbria would be brought before the Court of Rome). Pursuant to article 140-bis(14) of the Consumer Code, a defendant should not face more than one class action with reference to the same facts. Accordingly, if, prior to the expiry of the deadline to opt into a class action, further class actions are brought with reference to the same facts, these subsequent actions shall be joined to the first one. Any other class action initiated after the expiry of the said deadline shall be declared inadmissible.

Similarly, as regards non-class proceedings, simultaneous private actions concerning the same matter are not permitted. In the event of a conflict between two or more courts having territorial jurisdiction, the court where the first application was filed has jurisdiction.

Conflicts of jurisdiction may also arise between a civil court and an administrative court that exercises judicial review over a decision delivered by the Authority. In such an instance, although suspension of either proceeding is not mandatory, the most reasonable course of action appears to be for the civil judge to stay the proceedings and wait for the outcome of the other case. However, it should be noted that the civil judge is technically not bound by the terms of the administrative judgment.

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**26** Has a plaintiffs' collective-proceeding bar developed?

Since the legislation on consumer class actions entered into force in January 2010, only two actions to date have come to a final ruling at first instance (see question 16). As a result, no plaintiffs' collective-proceeding bar has developed yet.

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**Remedies**

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**27** What forms of compensation are available and on what basis are they allowed?

Both damages and restitution may be available as compensation, depending on the circumstances (for example, restitution may be claimed in the event that an agreement is found to be null and void for violation of antitrust rules; Appello Milano, 16 September 2006).

Damages allowed in antitrust actions are limited to the plaintiff's actual loss ('out of pocket' loss plus loss of income). Multiple damages are not available. Plaintiffs can only claim damages actually incurred. Where a precise amount cannot be proven, the court may award a fair estimate of damages. The judge may also request the assistance of an expert.

Liquidation of damages based on loss of income is especially difficult to carry out where the injured company could not enter the market due to the antitrust infringement. In the *Telsystem* case (see question 4) the court commissioned an expert's report to calculate the lost income of a potential new entrant into the leased lines market that failed to have market access because of the dominant company's refusal to supply leased-line interconnectivity. The damage calculation was based, inter alia, on the principle that in a free market economy every monopolist rent, such as that of a first



mover on the market, tends to be neutralised by competition within a certain time frame, and in order to award damages it is necessary to determine such time frame in the relevant market.

In *Valgrana* (see question 4) the plaintiff was awarded damages on the basis of a fair estimate of the harm suffered. Its loss of profit was calculated by considering the extra volumes of Grana Padano cheese that the plaintiff would have otherwise produced during the term of the infringement and multiplying such volumes 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 total market supply.

In *x-DSL/x-SDH* (see question 4) several data transmission operators and internet providers (together with the Italian trade association of internet providers) claimed they had lost income due to the dominant company's refusal to supply them with x-DSL/x-SDH services. The court multiplied the plaintiffs' market shares in the data transmission or internet services market by the dominant company's turnover obtained from the provision of x-DSL/x-SDH services and awarded damages of 10 per cent of the resulting amount.

In *Bluwacanze* (see question 4) the court calculated the loss of income suffered by a travel agency that had been boycotted by several tour operators due to its aggressive discount policy. The court confronted the turnover achieved by the claimant before and after the collective boycott. In particular, the court awarded damages as a percentage of the turnover that the travel agency had achieved during the previous year, multiplied by the annual increase rate of the relevant market for travel packages in the year in which the infringement took place. Such percentage was equal to the normal profit margin that the travel agency would have earned, less the discount that it used to grant to its customers. The court also awarded additional damages to the travel agency, calculated on an equitable basis, as compensation for the harm the collective boycott had caused to its reputation.

In *Inaz Paghe* (see question 4) the court awarded damages based on loss of profit arising from contracts terminated by the clients of a software provider as a result of a collective boycott organised by national and local employment consultant associations. In order to identify these contracts the court compared 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. It then multiplied the average profit for each client (identified in the opinion rendered by the court-appointed expert) by the number of contracts terminated due to the boycott, assuming a potential residual contractual duration of two to three years. The court did not award any damages for potential new customers that the plaintiff had allegedly not been able to win due to the boycott, as it considered that the plaintiff's allegations were not adequately proven.

In the context of consumer follow-on actions for damages arising from a price-fixing conspiracy among insurers in the third-party auto liability market (see question 4), a number of petty claims courts and courts of appeals (eg, Appello Salerno, 20 December 2008, upheld by Court of Cassation No. 8091/2013; Appello Napoli, 30 March 2007, upheld by Court of Cassation No. 8110/2013) awarded damages based on a fair estimate of the overcharge paid by the plaintiffs, amounting to 20 per cent of the total premiums (such percentage was held to correspond to the premiums' average annual price increase during the existence of the cartel, according to the Authority).

In *Gruppo Sicurezza* (see question 4) the loss of profit suffered by the plaintiff was calculated by making a fair estimate of the profits that the defendant would have obtained from the customers taken away by the defendant, on the assumption that the plaintiff would have provided them with its services for a three-year term. In addition, the court awarded damages on an equitable basis for the costs that the claimant bore to enlarge its production capacity in order to supply those prospective customers.

In *Avir v ENI* (see question 4) the court granted the plaintiff restitution of the overcharge paid to the defendant, finding that the incumbent gas operator abused its dominant position by applying price increases that did not bear a reasonable relation to the cost of gas. Upholding the court-appointed 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 the same amount was 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* (see question 4) the court awarded the plaintiff both actual losses and loss of profit. The former was calculated as the total costs borne by the plaintiff in gathering the evidence of the infringement and participating as complainant in the Authority's investigation. The court established that the loss of profit was equal to 40 per cent of the plaintiff's turnover in the 12 months prior to the implementation of the anti-competitive agreement by the defendants.

In *Agenzia del Territorio* (see question 4) the court-appointed expert calculated the loss of profit awarded to the claimants by comparing the EBITDA they derived from the services affected by the infringement with the theoretical EBITDA they could have gained in the absence of the infringement, on the assumption that they would have had the same earnings enjoyed prior to the defendant's misconduct.

In *Okcom* (see question 4) the court awarded the actual loss suffered by the plaintiff as a consequence of the abusively high termination tariffs charged by the defendant. The loss was calculated as the difference between the wholesale tariffs paid by the plaintiff and the retail tariffs that the defendant offered to its retail clients. The court refused to award loss of profit and harm to the claimant's reputation on the grounds that the claimant had not provided adequate evidence of such damages.

**28** What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

As noted, a plaintiff may obtain interim remedies, including temporary injunctions and any other remedy deemed appropriate to preserve the plaintiff's rights until a final judgment is issued. As a matter of principle, civil courts have no power to enjoin the defendant permanently from repeating the anti-competitive conduct in their final judgments, unless the antitrust violations are also qualified as unfair competition acts pursuant to article 2598 of the Italian Civil Code. In order to obtain an interim remedy, the claimant must provide sufficient factual and legal grounds to establish a prima facie case (*fumus boni iuris*), as well as the risk of imminent and irreparable damage (*periculum in mora*).

**29** Are punitive or exemplary damages available?

No. In the Italian legal system plaintiffs can only claim damages actually incurred.

**30** Is there provision for interest on damages awards and from when does it accrue?

In the case of tort liability, legal interest on damages awarded to the plaintiff accrues as of the date on which the infringement was committed. In the case of contract liability, legal interest will accrue only from the date on which the damages claim was filed with the court. The current legal interest rate in Italy is 0.75 per cent per annum.

**Update and trends**

Private antitrust litigation in Italy is significant and increasing, possibly also due to:

- more general awareness of the advantages of judicial remedies, following the initiatives of the European Commission such as the 2008 White Paper on damages actions for breach of EU antitrust rules, the June 2013 proposal for a European directive on this matter and the 2013 communication on antitrust damages quantification;
- the exclusive power of civil courts to grant interim relief measures upon a request by private parties; and
- a clear recognition in the case law of the Court of Cassation that consumers are entitled to bring private actions based on Law No. 287 of 1990.

Several factors might spur further development of private antitrust litigation, particularly follow-on actions to cartel decisions: the as yet untapped potential of the 2007 leniency programme of the Italian Competition Authority, applied in only four cases to date; the recent enactment of legislation on consumer class actions; the 2012 simplification of jurisdictional rules, which could limit the number of private actions rejected on grounds of inadmissibility; and the apparent change in the Italian Competition Authority's policy regarding the use of the commitment procedure, which seems to have become a much less frequently used enforcement tool in abuse of dominance cases than it was in the first phase after its introduction in 2006.

**31** Are the fines imposed by competition authorities taken into account when settling damages?

No. The fines imposed by competition authorities are not taken into account when settling damages.

**32** Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The unsuccessful party is ordered to pay all costs, including attorneys' fees. However, where each party succeeds on some and fails on other matters, or where the circumstances are exceptional, the court may order that the costs be shared or that each party bear its own costs.

Fees are settled by the court and their amount depends on the seriousness and number of the issues dealt with, as well as on certain parameters applicable to members of the Bar, which the Ministry of Justice adopted in August 2012 in lieu of the tariff previously in force. These parameters are based on the monetary value of the dispute and the level of the court hearing the case. The maximum and minimum numerical thresholds resulting from the application of the parameters are expressly defined as 'non-binding' on the court settling the fees.

**33** Is liability imposed on a joint and several basis?

Where an action for damages is brought against all the undertakings involved in an antitrust infringement that caused the harm suffered by the plaintiff, each co-conspirator is held jointly and severally liable for the full amount of the plaintiff's damages (Appello Roma, 4 September 2006; id, 31 March 2008). In this respect, it is irrelevant that the plaintiff's suit may have been based on different types of claims against the individual defendants (for example, because one or more of the co-conspirators are liable in tort and one or more of the others for breach of contract).

Under general civil liability principles, in cases of joint and several liability, where a defendant pays more than its share of the damages, it can in turn seek a contribution from other defendants or sue other defendants for indemnification of its costs. The defendants' relative responsibilities must be determined in proportion to the seriousness of each defendant's fault and the materiality of its conduct's effects. Where such allocation is not possible, all defendants are held liable for an equal amount of damages.

**34** Is there a possibility for contribution and indemnity among defendants?

There is no case law on point. Under general contract law principles, contribution and indemnity provisions according to which a party to an agreement undertakes totally or partially to indemnify the other party from any liability for damages that the latter may incur with regard to third parties, as a result of a finding that the agreement is unlawful, are enforceable. However, if the co-defendants are unable to show a legitimate interest in agreeing to such an obligation, the indemnity provision may be held null and void for lack of contractual cause or as contrary to public policy.

It follows that any contribution and indemnity provision in an agreement falling within the scope of article 2 of the Competition Law is likely to be unenforceable as contrary to public policy, to the extent that the co-defendants were aware of the agreement's anti-competitive object or effects (that is, if the parties could reasonably be expected to be aware that the agreement was *prima facie* illegal).

Moreover, since any agreement that violates competition rules may be declared null and void in its entirety, the risk exists that the very contribution and indemnity provisions contained therein may likewise be declared unenforceable, and the underlying claim be found to not be actionable.

**35** Is the 'passing-on' defence allowed?

The passing-on defence is not expressly recognised. However, pursuant to general civil liability principles, a claimant may only seek compensation for damages it actually suffered and only where it had no part in causing them. There are very few precedents. In 2000,

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the Turin Court of Appeals found that a travel agency could not be granted damages because it had wilfully participated in an anti-competitive agreement with the intent to pass the overcharge on to final customers (Appello Torino, 6 July 2000). More recently, the Court of Cassation found that the possibility of passing on higher prices does not exclude the award of damages corresponding to sales volume lost due to the downstream price increase (No. 29736/2011).

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**36** Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

Defendants may avail themselves of any defence that is normally used against civil liability claims.

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**37** Is alternative dispute resolution available?

The parties may reach out-of-court settlements or submit to arbitration. Because of the confidential nature of these transactions no statistics or reports are available.

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