Introduction

This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at www.iccwbo.org.

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.
Glossary

**Appeal**: a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU**: This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU**: This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award**: a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof**: The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel**: Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order**: a court’s or agency’s order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant**: the party who brings a civil suit in a court of law.

**Class action**: a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identical cases and who have suffered a prejudice from the same tort.

**Competition authority**: Any public authority, whether independent of forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages**: money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant**: a person sued in a civil proceeding.

**Discovery**: Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.
Directive 2014/104/EU: European Union Directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

Follow-on: A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

Immunity: Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

Infringer: Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

Joint-and-several liability: liability that may be apportioned either among two or more parties or to only one or a few select members of a group of Infringers upon the decision of a competition authority or a civil court.

Leniency: A competition law procedure that rewards companies that adopt anti-competitive conducts with Immunity or reduction of fine, if they inform a the competition authority of an infringement that it did not previously have knowledge of.

Limitation period: a statutory period after which a lawsuit or prosecution cannot be brought in court.

Passing-on defence: a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff’s claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

SME (Small—and Medium-sized Enterprise): categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

Stand-alone action: A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

Standard of proof: In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

Tort: A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.
Italy has implemented Directive no. 104/2014 of 26 November 2014 on actions for damages for infringements of EU and national competition law (the “Directive”) by the Legislative Decree no. 3/2017 (the “Decree”). The Decree entered into force on 3 February 2017, and later on, Article 1 of the Decree which is related to scope was amended on 19 November 2020. However, scope remains unaffected in its essence and the Decree continues to govern actions for damages for infringements of EU and national competition law.

1. Jurisdiction

The authority primarily in charge of enforcing competition law in Italy is the Italian Competition Authority (Autorità garante della concorrenza, the “ICA”). However, the ICA is only competent for public enforcement and not for private damages actions. Final infringement decisions of the ICA may be appealed before administrative courts. Such courts, in case of appeal, have no jurisdiction to rule on actions for damages for infringement of antitrust law.

In Italian competition law ordinary courts have jurisdiction as to claims for damages for infringements of EU and national competition law under the Decree.

Specialized commercial courts of Milan, Rome, and Naples have the exclusive jurisdiction as to such claims. The parties may not contract out this jurisdiction.

Seeking damages for infringement of competition law may take the form of, either stand-alone action, brought before the competent national court regardless of a preliminary procedure initiated before a competition authority, or as a follow-on action, brought before the competent national court but based on an earlier decision of a competition authority confirming the infringement. Alternative Dispute Resolution (“ADR”) is possible. Nevertheless, courts have jurisdiction if the parties do not reach a consensual solution to their dispute.
2. Relevant legislation and legal grounds

Since its entry into force (3 February 2017) the Decree is self-sufficient within its scope of application and its procedural or substantive provisions. Nevertheless and unsurprisingly for a decree implementing an EU Directive on liability, the Decree requires the application of ordinary Italian law as to the issues it does not govern directly.

Before the Decree these actions for damages were subject to tort law in the Italian Civil Code (the “ICC”), where compensation is due for any harm caused by others intentionally or by negligence.

Given the recent entry into force of the Decree (3 February 2017) and its non-retroactive application, most of the Italian court judgments provided in this database relate to claims that originate in facts having occurred before, and only some judgments are issued after the entry into force of the Decree. Court judgments issued before remain of interest at present, indirectly for the consideration they granted to the Directive (in its making or after its adoption, but before its implementation in Italian law by the Decree), directly as to the issues that the Directive and then the Decree do not directly govern. Such issues, for instance the scope and quantification of damages, remain governed by “ordinary” Italian law.

3. What types of anti-competitive conduct are damages actions available for?

The Decree applies to claims for damages by an infringement of competition law committed by a company or an association of companies. If the infringement and the harm alleged are confirmed, claimant is entitled to receive full compensation covering the damage, the loss of profit and the applicable interests.

Relevant infringements of EU or national competition law for the application of the Decree are anti-competitive agreements and concerted practices or abuse of dominant position, pursuant to Articles 101 or 102 TFEU or, in Italian law, Articles 2, 3, and 4 of Law no. 287/1990. The Decree also covers infringement of national competition law provisions of other Member States that pursue mainly the same objectives as Articles 101 and 102 TFEU. Needless to say, such infringements of foreign competition law are unfrequently raised before Italian courts.

In view of the joint and several liability of the corporations having co-infringed competition law, claimant(s) can seek full compensation from any of them until the loss is fully compensated. However, a derogatory regime concerns small—and medium-sized (“SME”) corporations (as defined by the EU Recommendation 2063/361) to the extent that they are subject to joint and several liability only with regard to their own direct and indirect purchasers if each corporation had 5% or less of the market share during the period of infringement and if a joint liability would cause an irreparable prejudice to the corporations’ economic stability. Such a derogatory regime does not apply, and the principle of joint liability applies, if parties having suffered harm, other than the SME’s direct and indirect purchasers, are not in the position to obtain full compensation, or if the SME had a leading role in the infringement.
4. What forms of relief may a private claimant seek?

First, punitive damages are not an option under Italian law.

Second, the relief for the harm suffered in direct causation from an infringement of competition law is financial compensation. Damages are quantified including actual loss (damnum emergens) and loss of profit (or lucrum cessans), plus the applicable interests. Overcompensation is not allowed. Should it be impossible to prove the actual extent of the damage, the court may decide to grant compensation on an equitable basis.\(^1\)

To obtain full compensation the claimant shall prove:

- in stand-alone actions: (i) the competition law infringement, (ii) the existence of the harm and its amount, (iii) the causal link between the competition law infringement and the harm;
- in follow-on actions: the harm and causation (see below).

The Decree goes further than ordinary Italian law by setting the rebuttable presumption of actionable damage as soon as an infringement of competition law is due to a cartel.

5. Passing-on defence

Compensation for harm caused by infringement of competition law is due whether the claimant is a direct or indirect purchaser. Defendant may invoke the passing-on defence but carries the burden of proof to demonstrate that the claimants passed on to purchasers or customers the whole or part of the overcharge arising from the infringement thus avoiding that loss which therefore cannot be claimed.

Beyond the obvious burden of proof, the Decree establishes the rebuttable presumption of pass-on overcharge where the indirect purchaser is able to prove that (i) the defendant has committed an infringement of competition law; (ii) this infringement has led to a surcharge for the defendant’s direct purchaser; and (iii) it has purchased goods or services relating to the infringement.

6. Pre-trial discovery and disclosure, treatment of confidential information

Italian courts may order disclosure of evidence by a party and third parties, upon a reasoned request submitted by one of the parties, in principle claimant. Article 3 of the Decree introduced into the Italian procedural system the possibility for a party to seek such disclosure by a court exhibition order to the other party, and the order is to identify the specific items or categories of the requested evidence by its “constitutive elements”, such as nature, the timeframe concerned, subject matter and content. Courts’ disclosure orders must be strictly proportionate to the decision to be adopted, in the light of the likelihood that the infringement occurred, the scope and the cost of exhibition and the rights of the disclosing party. If confidential information is involved in the request for disclosure, the

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\(^1\) In greater detail, see articles 1223, 1226, 1227 of the ICC, Article10 of the Decree.
judge shall adopt appropriate measures. The Decree clarifies that its disclosure rules do not affect legal privilege.

This disclosure procedure applies only to antitrust damages action. The ordinary regime (Article 210 of the Italian Code of Civil Procedure) requires the judge, before issuing a disclosure order, to assess whether the evidence is necessary.

Where the parties or third parties are not reasonably in the position to provide the evidence contained in the file instructed by the ICA then Article 4 of the Decree entitles national courts to order the disclosure of such evidence provided the disclosure be proportionate and the request for disclosure be specific as to, documents submitted to the ICA, the damages claim, the interest in pursuing a public law competition objective. Italian courts may not issue a disclosure order concerning leniency applications (as to the attached documents) and settlement submissions.

Pursuant to Article 7 of the Decree, final decisions (res iudicata, no longer subject to challenges) issued by the ICA or by an administrative court upon its review of a ICA’s decision, with regard to the existence (or absence) of an infringement of competition law constitute the final determination on such infringement with regard to respondent for the damages action before an Italian court. This final determination is limited to the factual analysis of the infringement of competition law, including the nature of infringement and its scope (material, personal, temporal and territorial). Inversely, if there is no final determination, the court has jurisdiction to decide about the existence of the harm, its quantification or the causation between the harm and the infringement of competition law. The same rule applies to a final decision from a National Competition Authority, or a court, of another EU Member State though with a significant difference: before the Italian court the evidence the decision provides as to the existence and scope of the infringement may be evaluated also in light of other evidence.

Under the pre-Decree regime, a final finding of infringement by the ICA constituted privileged evidence only as to the existence of such infringement as well as to its nature and scope. Such final finding by the ICA did not bind the court having jurisdiction on the damages claim, it was regarded as a particularly strong evidence in that respect although it could be overcome (For instance, in the Pfizer decision, Commercial Court of Rome, 24 July 2017, No. 15020, Ministry of Health and Ministry of Economy and Finance / Pfizer Italia S.r.l.)

7. Limitation Periods

Article 8 of the Decree sets out a limitation period of five years for damages actions stemming from an antitrust infringement. As to the time when the limitation period starts to run the Decree is further detailed than the ordinary regime in Italian law (Article 2935 ICC) and requires the limitation period not to run until the infringement of competition law has ceased and the claimant knows, or can reasonably be presumed to know, the following elements: (i) the conduct and the awareness it constitutes an infringement; (ii) the infringement has caused him a harm; and (iii) the identity of the infringer.

Moreover, the five-year time limitation period shall be suspended when the ICA or the EU Commission opens an investigation or a procedure on the same infringement of competition law covered by the claim for damages. Suspension will last until a year after such investigation or procedure is concluded.
8. **Appeal**

The judgments of the specialized commercial courts of Milan, Rome and Naples may be appealed before the competent Courts of Appeal, whose judgment are appealable, on matters of law only, before the Italian Supreme Court.

9. **Class actions and collective representation**

Under the Decree, not only individual private actions are admitted, but also class actions by two or more consumers and users that are in a contractual, as well as non-contractual, relationship to companies, producers, and that are affected by anti-competitive or commercial unfair practices. They can file the class action, also without legal representation, before the ordinary court.

10. **Key issues**

The Decree entered into force on 3 February 2017 and does not yet apply to most antitrust damages actions brought at present in Italy. Nevertheless, as mentioned above, some of the judgments included in the database show what can be fairly described as an anticipated application of the key provisions of the Directive, to the benefit of claimants as to circumstances not covered by the Decree since its entry into force. Evidence of infringement is crucial for claimants and the key provision concerning the binding effect of the ICA’s final findings of infringement of competition law was not part of Italian pre-Decree law.
ABOUT THE INTERNATIONAL CHAMBER OF COMMERCE (ICC)

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