Cartel Regulation

Contributing editor
A Neil Campbell

2019

GETTING THE DEAL THROUGH

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A Neil Campbell
McMillan LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

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87 Lancaster Road
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Cartel Regulation 2019

Nineteenth edition

Getting the Deal Through is delighted to publish the nineteenth edition of *Cartel Regulation*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Belgium.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, A Neil Campbell of McMillan LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
November 2018

Italy

Rino Caiazzo and Francesca Costantini
Caiazzo Donnini Pappalardo & Associati

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

On 10 October 1990, Parliament adopted Act No. 287, the Competition and Fair Trading Act (the Act) (as amended by Act No. 57 of 4 March 2001 and by Act No. 248 of 4 August 2006, which established rules on market liberalisation and regulation).

Before 1990, Italy did not have full antitrust legislation, although anticompetitive conduct was sometimes punished under provisions of the Civil Code. The Act meets the requirements of article 41 of the Italian Constitution, which protects and guarantees the right of free enterprise and brings Italy's legislation into line with EU law. The main purposes of the Act are to foster and protect market conditions that allow economic entities equal opportunities to compete and gain access to the market, and to protect consumers by encouraging lower prices and improving the quality of products through the operation of market forces.

Moreover, on 14 January 2017 Italian Legislative Decree No. 3/2017 implementing Directive 2014/104/EU on antitrust damages actions was adopted. As explained later, the decree has introduced several relevant rules, both of a substantial and of a procedural nature.

The borderline between the scope of EU legislation and national legislation is clear and precisely determined as to concentrations, but is less clear with regard to agreements impeding competition and alleged abuses of a dominant position. EU law applies wherever effective competition in the Common Market, or a substantial part of it, is significantly affected. In recent years, the European Union has tended to concentrate its efforts on cases of greater relevance to the EU, leaving the authorities of individual member states to deal with cases of mainly national concern. Furthermore, under article 1 of the Act, as amended by Decree No. 3/2017, the Competition Authority may simultaneously apply provisions of the Act and TFEU with reference to the same case.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The authority designated to investigate cartel matters is the National Competition Authority (the Competition Authority), which is an independent technical body. The Competition Authority is responsible for enforcing the Act, and hence for controlling agreements that impede competition, abuses of dominant position and concentrations. It is also empowered to enforce the legislative provisions on misleading and comparative advertising, and on the abuse of economic dependence (in the latter case, if the abuse is relevant in respect of the protection of competition and the market).

The Competition Authority has jurisdiction to apply competition rules in almost all fields of the market, with some exceptions.

As provided by article 20(4) of the Act, in relation to matters (including cartels) concerning insurance companies, the Competition Authority, before adopting a decision, is required to request the opinion of the Institution for the Supervision of Insurances. The opinion, however, is not mandatory.

In the electronic communications market, the Competition Authority applies competition rules, but it is required to request the opinion of the Electronic Communications Regulator, AGCOM, with regard to proceedings involving companies operating in such market. Again, this opinion is not mandatory.

The Competition Authority is an independent organisation with the status of a public agency, and is required to submit reports to Parliament and the government. It is a collegiate body currently composed of three members appointed jointly by the chairpersons of the Senate and the Chamber of Deputies, who make decisions by majority vote.

The Competition Authority has a directorate general for competition, which is responsible for handling competition cases. The Secretary General of the Competition Authority is appointed by the Minister of Industry acting on a proposal by the chairperson of the Competition Authority, and is responsible for overseeing the organisation and operations of the staff and of the offices.

The Competition Authority's decisions can be appealed before the administrative courts (of first and second instance).

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

On 14 January 2017 Italian Legislative Decree No. 3/2017 implementing Directive 2014/104/EU on antitrust damages actions was finally adopted. The decree has affected national legislation, both substantively and procedurally.

Having regard to cartel regulation, changes have been introduced, inter alia, with reference to:

- Limitation rules: pursuant to previous regulation the limitation period (in order to take an action for the compensation of damages caused by a cartel) was five years starting from the time of knowledge of the damage. Following the implementation of the directive the limitation period is five years after having knowledge of the infringement, starting from the termination of the same.
- Quantification of harm: pursuant to the decree there is a presumption that cartel infringement causes harm. This principle was not recognised in previous legislation.
- Passing on: the decree introduced a rebuttable presumption of the passing on of damages produced by a cartel for indirect purchasers on the recurrence of three conditions (see question 22). Pursuant to previous legislation – article 2697 of the Civil Code – an indirect purchaser should demonstrate damage and a causal link between the damage and the alleged conduct.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 2 of the Act prohibits all agreements between undertakings, decisions by associations of undertakings or concerted practices (even if taken in compliance with statutory regulations) that may have as their object or effect the prevention, restriction or distortion of competition within the national market, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;

- limit or control production, markets, technical development or investment to the detriment of consumers;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The Authority has applied a per se rule in condemning cartels, stating that when agreements between undertakings even only potentially reduce competition substantially within the national market or in a substantial part of it, they are prohibited (article 2 of the Act). The actual restrictive effects of the conduct are taken into account when determining the fine to be imposed on the undertakings. Intention of the restrictive competitive effects is not required for a finding of a liability, as the case law has specified that just the intention of the conduct is required in this respect.

Vertical agreements may also be prohibited under article 2. The Authority, however, has often applied a rule of reason when investigating distribution agreements and other kinds of vertical arrangements. Moreover, the adoption of EC Regulation No. 2790/99, establishing the new block exemption regulation concerning vertical agreements (now replaced by Regulation No. 330/2010), also caused the Authority to definitively abandon a formal assessment of vertical restraints under article 2 of the Act, and to focus instead mainly on the market power of the undertakings concerned. In this regard, in case No. I/487, *Sagit Contratti Vendita e Distribuzione del Gelato*, of 31 October 2001, relating to the notification of a distribution agreement pursuant to article 13 of the Act (which states that the companies entering into an agreement may notify it to the Authority), the Authority took the economic approach as set forth in articles 2 and 3 of Regulation No. 2790/99. In particular, the Authority established that, because the market-share of the undertakings concerned was above the 30 per cent threshold, it was necessary to assess whether the vertical agreement at issue constituted a breach of article 2 of the Act.

This is consistent with article 29 of Council Regulation No. 1/2003 (referred to by recital 14 of Regulation No. 330/2010), which states that, where the vertical agreements to which the exemption provided for in article 2 applies have effects incompatible with the conditions laid down in article 101(3) of the Treaty on the Functioning of the European Union (TFEU) in the territory of a member state or in a part thereof, the competent authority of that member state may withdraw the benefits of application of such Regulation. The Authority established that it was also necessary to assess the opportunity to withdraw the block exemption benefit concerning the aforementioned vertical restraints owing to the existence of a large number of exclusive relationships in the same market.

Following the modernisation of EC competition law pursuant to Council Regulation No. 1/2003, the enforcement of article 101(3) TFEU provisions on cartels has been decentralised so that it is now applied by national competition authorities and national courts. Accordingly, the Authority has to assess the existence of harm to trade among member states before examining the case under article 101(1) TFEU and allowing for an exemption under article 101(3) TFEU. This new task is likely to boost either horizontal cooperation between the Authority and other national competition authorities or vertical cooperation between the Authority and the Commission. Since the new rules came into force, the Authority has opened most investigations on cartels under article 101 TFEU rather than article 2 of the Act.

In Decision No. 15604, dated 14 June 2006, the Authority concluded that gas companies operating in the supply market for jet fuel had entered into a horizontal agreement on pricing and distribution that violated article 101 TFEU. The following fines were imposed: ENI, €117 million; Esso, €66.6 million; Kuwait, €46.8 million; Shell, €53.3 million; Shell IAV, €3.1 million; Tamoil, €19.6 million; and Total, €8.8 million.

In Decision No. 16404, dated 25 January 2007, the Authority concluded that companies operating in the supply market for marine paints had entered into a horizontal agreement for the purpose of defining the conditions for participation in tenders for the supply of paints to ship owners and shipyards. According to the Authority, the parties had exchanged confidential information on prices (minimum and average ones), the percentage of rebates to apply and, finally, had agreed on market partitioning. The following fines were imposed: BOAT, €1.08 million; IP, €1.08 million; Hempel, €324,000; Sigma, €756,000; and Jotun, €1.13 million.

In Decision No. 16835, dated 17 May 2007, the Authority concluded that company groups operating in the market for chipboard panels had entered into a horizontal agreement for the purpose of partitioning the market. According to the Authority, the companies had coordinated their commercial strategies and, in particular, fixed prices, price increases and other contractual terms to be applied to customers, as well as a list of customers to which price increases should not apply. The agreement also concerned import–export policies and the fixing of product characteristics. The following fines were imposed: Sacic Legno, €2.52 million; Sit, €3.02 million; Sia, €5.54 million; Sama, €7.06 million; Gruppo Frati, €6.96 million; Fantoni, €3.28 million; Saib, €1.76 million; and Xilopan, €529,200.

On 22 November 2007, the Authority concluded that Acea and Suez had entered into a horizontal agreement by coordinating their commercial strategies and by exchanging information on their participation to public tenders; the two companies participated in public bids for water services by setting up an ATI (temporary group of companies) even though they had all the requirements to participate in the bid on their own. The Authority deemed that this behaviour had the purpose of limiting competition in the bids and, therefore, partitioning the market. The following fines were imposed: Acea, €8.3 million; and Suez, €3 million (case No. I/670).

On 26 February 2009 (case No. I/694), the Authority concluded that 26 companies operating in the market of the production of pasta (representing almost 90 per cent of the whole Italian market) had entered into a horizontal agreement to agree an increase of pasta prices to be applied to distributors. The agreement took place between October 2006 and March 2008 by means of an exchange of information during meetings organised by the trade union of the companies involved. The Authority ascertained that prices applied by the companies to distributors had increased by more than 50 per cent, which had been passed on by distributors to consumers (the retail price, in fact, increased by 36 per cent). By coordinating their conduct, both smaller companies (affected by higher production costs) and bigger companies were able, notwithstanding the increase of their prices, to freeze their market share as the distributors (before the general increase) were obliged to accept the new conditions. The Authority, when fixing the penalties, also took into consideration the relevant increase of the price of raw materials and the general worsening of the companies' performance in recent years. The overall amount of the penalties imposed was equal to €12.5 million.

In January 2010 (case I716), the Authority concluded proceedings initiated against the National Psychologists' Register by accepting the commitments offered by the parties.

The Authority had ascertained that the psychologists enrolled in the Register had entered into a horizontal agreement to fix their minimum tariffs. The Psychologists' Deontological Code provided that the tariffs should be fixed by taking into account the importance and dignity of the profession and by referring to the parameters fixed by the Code to calculate the right tariff amount. It was also provided that the violation of the Code's provisions should result in disciplinary sanctions.

The Authority assessed that such provisions affected competition on the market, as the tariffs should be freely fixed between the parties at the beginning of the professional relationship.

The National Psychologists' Register offered commitments to the Authority that consisted of amending the Code by repealing those deontological provisions pertaining to the minimum tariffs and to the importance and dignity of the profession. The Authority accepted the commitments and did not impose any fine.

On 15 June 2011 (Decision No. 22521), the Authority concluded that 22 company groups operating in the market of overland forwarding had entered into a horizontal agreement for the purpose of partitioning the market. The Authority ascertained that the companies and their trade association had fixed increases in price by means of an unceasing exchange of information. During meetings at the trade association, companies had informed each other of their costs and had agreed increases in price to be applied to consumers. Once such increases had been fixed, the association circulated application memoranda, so that those companies that did not participate in the meetings could also act

in accordance with the agreed conditions. As a result of such concerted practice, companies could increase their prices, being confident that their competitors would adopt the same increases. The Authority ascertained that the alleged conduct had completely altered market conditions so that a price increase of 50 per cent had occurred. The Authority found that all the main operators in the market had continuously participated in the agreement between 2002 and 2007, and imposed penalties in the amount of €76 million. Schenkel, which claimed for admission to the leniency programme, did not incur any penalty, as it had spontaneously informed the Authority of the secret cartel, while Agility and DHL obtained a reduction in the fine of 50 per cent and 49 per cent, respectively. Finally, Alpi Padana and Spedipra did not incur any penalty owing to the operation of the statute of limitations.

On 16 March 2012 (Decision No. 23338), the Authority sanctioned 15 shipping agents and two trade associations for a secret cartel that lasted five years (from February 2004 to December 2009). The Authority ascertained that the companies had fixed the prices for agency services (ie, preparation and issue of documents, such as bills of landing for exported goods and 'delivery orders' for imported goods), known as 'fixed duties', in violation of article 101 TFEU. According to the Authority, a complex agreement was carried out. On the one hand, during several meetings of the Port Committee, the companies had coordinated the price of fixed duties and (from 2008) the loyalty discount to be applied to forwarding agents. On the other hand, trade associations had reflected companies' decisions into the agreements entered into between 2004 and 2007 by means of memoranda that recommended that all the associates be compliant with the agreements.

The Authority ascertained that the cartels raised anticompetitive effects into the whole market of maritime transport. In fact, even if the concerted activity was carried out by companies operating in the Port of Genoa, many documents acquired during the investigation revealed that the concerted prices were also applied for transactions taking places in other Mediterranean ports, such as Gioia Tauro and La Spezia, and in the Italian port system in general. The total amount of the sanctions was equal to €4 million. Two companies received a reduction of the fine as a result of their cooperation during the proceedings. Many companies had also offered commitments, which the Authority rejected.

In Decision No. 24405 (case I743), dated 11 June 2013, the Authority concluded that four companies operating in the market for maritime passengers' transportation had entered into a concerted practice to raise the 2011 summer season prices by up to 65 per cent on specific routes (Civitavecchia–Olbia, Genova–Olbia, Genova–Porto Torres). The Authority ascertained the conduct by taking into account the parties' parallel behaviours, concluding that concentration was the only plausible explanation for higher prices and dismissing the alleged justifications of the parties (such as increasing petrol costs and companies' financial losses). The following fines were imposed: Moby, €5,462,310; GNV, €2,370,795; SNAV, €231,765; and Marinvest, €42,575.

On 30 May 2013 (Decisions No. 24377, 24378, 24379; cases I749, I750, I753), the Authority ascertained that three notary's councils in the Milan, Bari and Verona districts had repealed recent provisions for the liberalisation of tariffs by reintroducing uniform tariffs for notaries' deeds, under threat of disciplinary sanctions to the associated notaries.

In Decision No. 24823 (case I760) dated 27 February 2014, the Authority imposed a total fine of over €180 million on the pharmaceutical companies Roche and Novartis for an alleged cartel in relation to the treatment of eyesight diseases.

The collusion concerned two pharmaceutical products: Avastin, intended for cancer treatment, and Lucentis, used for the treatment of eyesight diseases.

Although registered only for the treatment of certain forms of cancer, in certain countries (including Italy), Avastin has also been used 'off-label' (ie, used for a purpose other than that for which the product has been authorised for sale) to treat common eyesight diseases. The incentive for off-label use of Avastin resulted from the circumstance that the cost of an Avastin treatment was far lower of a Lucentis-based treatment (€81 versus €900).

Avastin and Lucentis were based on two different active substances developed by the same US company, Genentech, which then licensed Avastin to Roche and Lucentis to Novartis. Genentech was subsequently acquired by Roche. This resulted in a situation where both companies had an interest in the sale of Lucentis, Novartis by earning sales revenue and Roche by earning licence fees.

According to the Authority, since 2011 Roche and Novartis had engaged in a 'complex collusive strategy' to create obstacles to the off-label use of Avastin and to push demand towards Lucentis, by alleging that the off-label use of Avastin could be dangerous to patients. The Authority considered this conduct to further limit competition that had developed between the products. Moreover, as Roche did not require an 'on-label' registration of Avastin for ophtalmic use, only Lucentis was reimbursed by the Italian healthcare system: as a consequence, the Authority found that the damages of the cartel (in terms of health-care expense in excess) amount to several hundreds of million euros per year.

In light of the seriousness of the infringement, the Authority imposed fines on Roche and Novartis of €90.5 million and €92 million respectively.

The decision represents a very significant hardening of the Authority's fining policy. The Authority, adhering to the Commission Guidelines on the calculation of fines, applied a basic amount set at 25–30 per cent of the value of sales of the goods concerned (in the past the Authority used to limit itself to 5–10 per cent). Moreover, contrary to the Authority's normal practice in this case fines were imposed on parent companies.

In Decision No. 25422 (case I779) dated 21 April 2015, the Authority accepted the commitments offered by Priceline Group's companies Booking.com BV and Booking.com (Italy) and closed, with respect to these companies, the investigation opened on 7 May 2014.

In more detail, the Authority opened an article 101 TFEU investigation against two online travel agencies, Expedia and Booking.com. The investigation referred to some clauses inserted in the agreements concluded by Expedia and Booking.com with their hotel partners which prevented the latter from offering on their own websites or through competing platforms and other channels better rates and conditions than those advertised on the Expedia and Booking.com sites (MFN clauses).

The Authority pointed out some monitoring tools adopted by Expedia and Booking.com that were thought to strengthen compliance with such clauses, for example, the use of price comparator sites, such as Kayak and Trivago, owned by the two companies. Moreover, monitoring was also strengthened by some contractual provisions which in case of non-compliance empowered Expedia and Booking.com to lower the ranking of the non-compliant hotels that are published on their sites.

Pursuant to the Authority such a strategy was likely to produce restrictive effects on the Italian market of online travel agencies.

During the investigation, Booking.com submitted commitments consisting of a significant reduction of the scope of the MFN clauses. The revised MFN clauses will only apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, leaving them free to set prices and conditions on other competing platforms and on their direct offline channels, as well as in the context of their loyalty programmes. The commitments apply, starting from 1 July 2015, to all bookings made by consumers with regard to hotels located in Italy and will have a duration of five years. The Italian Competition Authority concluded that such commitments are suitable to address the competition concerns related to Booking.com's behaviour.

In its turn Expedia informed the Authority that starting from 1 August 2015 it had modified its MFN clauses, similarly to Booking.com (the revised MFN clauses just apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, leaving them free to set prices and conditions on other competing platforms and on their direct offline channels). Having regard to the above policy change, the Authority, by Decision No. 25940, dated 23 March 2016, closed the proceedings against Expedia.

By Decision No. 25966 (case I790), dated 19 April 2016, the Authority imposed fines for a total amount of €66 million on Sky Italy, RTI-Mediaset, Infront Italy and the Serie A National Football League (the Football League) for the 'allocation agreements' between Sky and Mediaset on the television rights to the 2015–2018 seasons.

In June 2014 when the Football League auctioned the broadcasting rights relating to Serie A's next three seasons, it divided the offer into five packages. At the end of the procedure, Sky should have been entitled to matches contained in packages A and B on satellite platforms and digital terrestrial, respectively, for which it submitted the best bids, while Mediaset – offering the best bid for package D – should have been entitled to broadcast the remaining games on all platforms.

After the bidding process, however, the final allocation structure was different as the League decided to assign: only the satellite package A to Sky; the digital terrestrial package B to Mediaset (despite the fact that its offer was nearly €150 million lower than the Sky offer); and the package D to RTI, which in turn transferred this package on to Sky.

Following the investigations, the Authority found that the rights' allocation resulted from a concerted agreement between the competitors, promoted by the Football League.

The Authority considered the agreement to constitute a violation of article 101 TFEU, restrictive by 'object' and thus very serious, aiming at conditioning and altering the outcome of the competitive bid, while also foreclosing potential new entrants in the relevant market.

Mediaset was fined of a sanction equal to €51 million, while Sky, which initially took position against the other parties' initiatives and then kept a cooperative attitude in relation to the Authority, a sanction of €4 million.

By Decision No. 26705, dated 25 July 2017 (case I793), the Authority fined 11 cement manufacturers, a cement distributor and a trade association more than €184 million for fixing prices and exchanging sensitive information. The Authority found that for five years between 2011 and 2016, the main cement manufacturers (representing 85 per cent of the Italian cement market), their trade association (AITEC) and a cement distributor (TSC) had actively colluded with one another in violation of article 101 TFEU by coordinating price increases and then monitoring the respective market shares for compliance. The evidence gathered during the proceedings revealed that all the operators had concerted simultaneous price rises to be communicated to customers in advance and had also verified the actual implementation of the concerted prices by each competitor. Key to facilitating this anticompetitive behaviour was the involvement of the trade association, AITEC, which had allowed its members to discuss prices during the course of its meetings and had also circulated monthly statistics on cement production to help the companies monitoring their respective market shares. Finally, the Authority determined that a cement distributor, TSC, had facilitated the implementation of the infringement by circulating new price lists among the cement manufacturers.

By Decision No. 27102, dated 28 March 2018, the Authority closed the investigation opened against Telecom Italia and Fastweb for alleged violation of article 101 TFEU regarding their joint fibre optic cooperative venture, also involving the incorporation of a jointly controlled company named Flash Fiber. Flash Fiber aims to build fibre optic networks using FTTH architecture in Italy's 29 largest cities already covered by FTTC by 2020. Pursuant to the original project, use of the networks would have been granted by the company to Telecom and Fastweb on an exclusive basis. According to the Authority the cooperation agreement, while being promoted to the purpose of enabling a more efficient development of innovative technological infrastructure (in line with the objectives set forth by the 'Italian Ultrabroadband Strategy' government plan), could potentially prevent, restrict or falsify competition on the national wholesale markets for access to fixed networks, retail broadband and ultra-wide band telecommunications services.

In more detail, the Authority has examined whether the joint venture would have been capable of restricting competition in breach of article 101 TFEU by way of coordination of the parent companies' strategies with regard to their strategic commercial decisions on two Italian markets: (i) the market for fixed broadband wholesale access, and (ii) the market for broadband and ultrafast-broadband retail telecommunication services. Telecom, in fact, is dominant in the first market, with a market share equal to 96 per cent, while Telecom and Fastweb are the first operators in the second market, with a market share of 40 per cent and 27 per cent respectively. Moreover, both the operators are vertically integrated. According to the Authority the joint venture, resulting in exclusive cooperation for a long time, between the first two vertically integrated operators on the market, could have determined their coordination and, therefore, the reduction of static and dynamic competition on the market. In fact, both operators would have been forced to exclusively use the services provided by the joint venture for the provision of their offers on the retail markets and had also undertaken not to enter into cooperation agreements with competitors of the joint venture. On the another hand, the transaction could result in the wholesale input foreclosure to the detriment of Telecom and Fastweb competitors. Moreover on the market for broadband and ultrafast-broadband retail telecommunication services, the joint venture could have encouraged the coordination of the retail prices of the parties. In June 2017 both Telecom and Fastweb presented six commitments to the Authority, which, as a result of the market test phase, has accepted the same. The commitments include the implementation of the FTTH network within a precise timetable (30 per cent by 2017; 70 per cent by 2018; 85 per cent by 2019; 95 per cent by 2020); the removal of the preemptive right on the network capacity of Flash Fiber; the introduction of autonomous offers of VULA and NGA bitstream services by Telecom and Fastweb on non-discriminatory terms; backdating of the closing date of Flash Fiber to 2035; modification of co-investment agreements; and measures to prevent the exchange of commercially sensitive information between the parties through Flash Fiber.

According to the Authority, such commitments are necessary to overcome the competitive concerns and will favour the development of infrastructural competition in the markets of fixed network telecommunications.

Finally, the Act does not contain criminal law provisions.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no block exemptions under the law. However, when certain conditions are met, the Authority may authorise agreements or categories of agreements that restrict competition for a limited period of time (article 4 of the Act). To qualify for this exemption, the companies concerned must show that the agreements improve conditions of supply in the market, that the limitations on competition are absolutely necessary to obtain these positive effects and that the improved conditions of supply deliver a substantial benefit to consumers (eg, by reducing prices or providing goods or services that would not otherwise be available). However, the exemption may not involve the authorisation of restrictions that are not strictly necessary for the aforementioned purposes, nor may it allow competition to be eliminated in a substantial part of the market.

In addition, pursuant to paragraph 2 of article 4, the Authority may subsequently, after giving notice, revoke the exemption when the party concerned abuses it or when any of the conditions on which the exemption was based are no longer met.

On 1 July 1996, the Authority published an application form to encourage the voluntary submission of negative clearance notifications and exemption applications.

Special rules are provided for banking, insurance, broadcasting and publishing.

With specific regard to regulated markets, case law has specified that a regulated conduct is exempted from the compliance to competition law principles only if the need to comply with regulation rules does not leave to the company any margin of autonomy, not even with reference to the modalities of fulfilment.

6 Application of the law

Does the law apply to individuals or corporations or both?

Anticompetitive agreements include concerted practices and resolutions adopted by associations of undertakings and consortia. Furthermore, the law applies not only to corporations, but also to any entrepreneur, including individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 2 of the Act prohibits agreements between undertakings that have as their object or effect the appreciable prevention, restriction or distortion of competition within the national market or a substantial part of it. It is the effects of the conduct on the Italian market and not where it occurs that places it under the jurisdiction of the Act. Therefore, even if the conduct occurred abroad, but produced anticompetitive effects in the Italian market, it is punishable under article 2.

8 Export cartels

Is there an exemption or defence for conduct that only affects customers or other parties outside the jurisdiction?

The Act applies to conduct that has as its object or effect the restriction of competition within the national market or a substantial part of it. Therefore, if conduct does not affect the Italian market or customers, the same conduct will be analysed under the jurisdiction of the Commission or the competition authority of another EU member state.

Investigations

9 Steps in an investigation

What are the typical steps in an investigation?

An investigation may be initiated by the Authority itself, or by a written declaration or notice brought to the Authority's attention by a party, which may be:

- a company that claims to have been damaged by the alleged anticompetitive behaviour;
- a consumer or consumers' association; or
- a public authority (such as the competent ministry) in areas of business in which the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, restricted or distorted.

The declaration or notice must be signed. The investigation cannot be initiated on the basis of an anonymous allegation.

However, an investigation may also be initiated by companies whose practices may be subject to inquiry where they notify the Authority that either a concentration or an agreement (either vertical or horizontal) has occurred.

While the pre-merger (or concentration) notification is mandatory, the notification of an agreement is voluntary. In this respect it is worth noting that, pursuant to article 13 of the Act and article 3 of DPR No. 217 of 30 April 1998 (containing the procedural rules), companies that enter into an agreement may notify the Authority. In such case, the Authority shall open a formal investigation within 120 days of the notification being received. Otherwise, the Authority may not start any further investigation of the agreement unless the notification was inaccurate or incomplete.

Under the EU modernisation rules (Regulation No. 1/2003, article 3), whenever the Authority applies the national antitrust rules, it will be required to apply article 101(1) and (3) TFEU at the same time if there is harm to trade among member states.

Pursuant to article 12 of the Act, after assessing the data in its possession and the information brought to its attention by the public authorities or by any other interested party, including bodies representing consumers, the Authority conducts an investigation to ascertain whether there is any infringement of the prohibitions provided in articles 2 and 3.

Pursuant to article 14 of the Act, the Authority notifies the undertakings and entities concerned that an investigation is starting.

Article 14-bis of the Act (added by Legislative Decree No. 223 of 4 July 2006 as amended by Act No. 248 of 4 August 2006) provides that, where the conduct allegedly in breach of the Act is likely to produce a relevant and irreparable damage to competition, the Authority (after having checked, by a summary investigation, the existence of the violation) may adopt interim measures.

The owners or legal representatives of the undertakings or entities may make representations in person or through an attorney within the deadline set at the time of notification, and may file submissions and briefs at any stage during the course of the investigation. Article 14-ter of the Act provides that within three months from the opening of a procedure, the companies under investigation may also offer commitments to the Authority to correct the anticompetitive conduct. After an evaluation of the suitability of the commitments, also based on an open market test, the Authority may make the commitments binding and close the proceedings without an adjudication of the alleged violations. If the companies do not honour the commitments, the Authority may levy administrative fines of up to 10 per cent of the companies' turnover. The Authority may reopen the proceedings if there is a change in a factual element in the case, the companies engage in behaviour contrary to the commitments made or the Authority's decision is found to be based on incomplete, inexact or misleading information. The rules applicable to this procedure are set forth in the Notice adopted by the Authority by the decision of 12 October 2006.

Once the investigation is closed, the Authority notifies the interested parties by means of a statement of objections of the results. The interested parties shall be notified at least 30 days before the conclusion of the case. The interested parties may submit their briefs until five days before the final hearing before the Authority.

An investigation concerning a possible cartel is normally completed within 240 days of the start of the investigation.

Decisions of the Authority are taken by a majority of votes of the panel.

10 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Authority may at any stage during the investigation:

- request undertakings, entities and individuals to supply any information in their possession and make available any relevant documents;
- call witnesses to give oral testimony before the authority;
- conduct inspections of the undertaking's books and records and make copies of them, availing itself of the cooperation of other government agencies where necessary;
- produce expert reports and economic and statistical analyses; and
- consult experts on any matter relevant to the investigation.

Searches and seizures ordered by the Authority may be carried out through an investigative body, the Guardia di Finanza, and do not need to be authorised by a judge or magistrate.

Any information or data regarding the undertakings under investigation is wholly confidential and may not be divulged, even to other government departments. The Authority may fine anyone who refuses or fails to provide the information or exhibit the documents referred to in subsection 2 without justification. The fine can be up to €25,822, which is increased up to €51,645 in the event that inaccurate information or documents are submitted, in addition to any other penalties provided by current legislation.

International cooperation

11 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

The Authority is a member of the International Competition Network (ICN) and the European Competition Network (ECN).

The ICN is a competition authority forum that is open, on a voluntary basis, to all national and multinational competition authorities entrusted with the enforcement of competition law. The ICN is the only international body devoted exclusively to competition law enforcement. The main purposes of the ICN are to provide antitrust authorities with a specialised, yet informal, venue for maintaining regular contact and addressing practical competition issues, and to improve worldwide cooperation. By enhancing convergence and cooperation, the ICN aims to promote more efficient, effective antitrust enforcement worldwide.

However, the ICN does not exercise any rulemaking function and will only issue recommendations on best practices. It will be left to the individual antitrust agencies to decide whether and how to implement the recommendations through unilateral, bilateral or multilateral arrangements, as appropriate.

The ECN is regulated by specific EC rules and is the common organisation that facilitates the application of European antitrust provisions at national level, as well as the cooperation among the antitrust authorities of the member states and the European Commission.

Moreover, it should be noted that, following the increasing development of internet commerce and services, and the subsequent delocalisation of the supply of goods and services, coordination between member states is becoming more and more frequent. For example, the investigations against Booking.com and Expedia (please see question 4) have been conducted by the Italian Authority in collaboration with the National Competition Authorities of France and Sweden, with the coordination of the European Commission, and the commitments

offered by Booking.com have been evaluated and accepted by all the three authorities.

12 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

As specified above, the Authority is a member of the ICN. The ICN facilitates procedural and substantive convergence in antitrust enforcement. In particular, it promotes cooperation between different national authorities by the exchange of information and coordination of investigations to eliminate unnecessary and duplicative procedural burdens. The ECN facilitates the application of European antitrust provisions at national level as well as cooperation among the antitrust authorities of EU member states and the European Commission.

Moreover, the Authority is a member of the various advisory committees set up by the Director-General for Competition of the European Commission to receive the non-binding opinions of the antitrust authorities of different member states with regard to draft decisions on EU cases relating to agreements, abuses of dominant position and concentrations.

Cartel proceedings

13 Decisions

How is a cartel proceeding adjudicated or determined?

Antitrust matters, including cartels, are adjudicated before the Authority. However, private actions to obtain the annulment of anticompetitive contracts or the award of damages are adjudicated before the ordinary judicial courts (explained below).

14 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The burden of proof rests with the Authority. With reference to private actions for the compensation of damage before the ordinary judicial courts, Decree No. 3/2017 (article 7) recognises that final and conclusive decisions of the Authority (ie, not further subject to appeal), or the judgments issued pursuant to their judicial review before the administrative courts, will have binding effect for antitrust damages before national judges. The binding effect is limited to the factual analysis of the infringement of competition law, it does not cover the existence or amount of harm nor the causal link, whose evidence rests with the plaintiff. Moreover, the decree has introduced the presumption that cartel infringements cause harm, whereas the defendant could still rebut this presumption. The claimant is nonetheless required to prove the causal link between the infringement (the illegal behaviour) and the damage suffered individually as well as the quantification of this damage.

Pursuant to the well-established case law of the Authority and administrative courts, 'smoking gun' evidence (such as confessions or cartel's written evidence) is not required, since direct proofs are very rarely found for this kind of infringement. The presence of serious, precise and coherent clues of the existence of the cartel is necessary to prove the illegal behaviour.

For example, regarding cartels in the form of a concerted practice, the courts have considered the existence of a parallel behaviour among the undertakings as sufficient evidence, provided that contact among the undertakings is proved (eg, the participation of undertakings at meetings where sensitive information was exchanged ('external factors') and that the parallel conduct is not alternatively justifiable from a rationale viewpoint ('internal factors').

15 Circumstantial evidence

Can an infringement be established by using circumstantial evidence without direct evidence of the actual agreement?

Administrative courts' case law has ascertained that a cartel may be established by using circumstantial evidence without direct evidence of the actual agreement. Indeed, it has been clarified that the recurrence of a cartel or concerted practice may be inferred by a certain number of coincidences and clues that, if considered as a whole, can constitute evidence of a violation, also taking into account that direct proof of the infringement is often difficult to find, especially in the case of secret cartels.

16 Appeal process

What is the appeal process?

According to article 33 of the Act, appeals against administrative decisions of the Authority fall within the exclusive jurisdiction of Tar Lazio (the administrative court).

An appeal was initially essentially limited to a review of the legality of the decision on the basis of specific grounds, such as lack of jurisdiction, infringement of law and abuse of power. The latter may, however, involve a review of the reasoning and completeness of the motivation for the decision being challenged. The court may also verify the correctness of the factual grounds upon which the decision is based. In this respect article 7 of Decree No. 3/2017 now specifies that in the judicial review of Authority decisions, the administrative courts shall have the power to fully verify the facts and technical profiles (of non-controversial nature) on which such decision is based.

It should also be noted that, as a general principle of administrative law, the outcome of this review may only be an annulment of the decision and not a different decision, except for the quantification of the fines, which may be reassessed.

Moreover, the judgments of the administrative court of first instance may be challenged before the Consiglio di Stato (the highest court, charged with the judicial review of administrative actions). However, there is no stay of execution pending this appeal, as judgments of the administrative court of first instance are immediately enforceable. Nonetheless, the Consiglio di Stato may decide, under article 111 of Legislative Decree No. 104/2010, to grant this suspension should serious and irreparable damages result from the execution of the judgment on the appealing parties.

Pursuant to article 2 of Law Decree No. 1/2012 (which entered into force on 22 September 2012), private actions involving annulment proceedings, claims for damages and petitions for emergency measures to be adopted in respect of infringements of the provisions of the Act and of article 101 TFEU must be filed before the Companies' Tribunals (a specialised division of the court of first instance having territorial jurisdiction). It should be noted that article 18 of Decree No. 3/2017 has provided that courts designated to hear antitrust private claims are now concentrated in the Companies' Tribunals of Milan, Rome and Naples (and related Court of Appeals for the appeal phase), each with its own large defined territorial competence.

Sanctions

17 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

There are no criminal sanctions for cartel activity provided for in the antitrust legislation. However, article 501 of the Criminal Code provides that whoever, in the exercise of his or her business, either through speculative practices or otherwise, hides, interrupts the supply of or buys raw materials or primary goods or foodstuffs so as to noticeably alter the prices of these and to cause them to become scarce, shall be sentenced to imprisonment (from six months to three years) and shall be fined up to €25,822.

It follows that if a cartel is involved in the above-mentioned activities, some criminal issues may arise.

Criminal sanctions are also provided in the event of boycotts. Individuals involved in boycotts may be sentenced to up to three years in prison (article 507 of the Criminal Code).

18 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Act provides for administrative sanctions. Pursuant to article 15 of the Act as modified by article 11 of Act No. 57 of 5 March 2001, if the investigation provided for in article 14 reveals infringements of the Act, the Authority shall set a deadline within which the undertakings and entities concerned must remedy such infringements. In the most serious cases it may decide, depending on the gravity and duration of

the infringement, to impose a fine of no more than 10 per cent of the turnover of each undertaking or entity for the previous financial year. Time limits shall be laid down within which the undertaking must pay the fine.

In the case of non-compliance with restraining orders, the Authority shall impose a fine of no higher than 10 per cent of the turnover or, in cases where the penalty has already been imposed, a fine of no less than double the penalty already imposed, with a ceiling of 10 per cent of the turnover. It shall also set a time limit for payment of the fine. In cases of repeated non-compliance, the Authority may decide to order the undertaking to suspend activities for up to 30 days.

19 Guidelines for sanction levels

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established? What are the main aggravating and mitigating factors that are considered?

Sentencing criteria are provided for in article 15 of the Act. When determining the fines, the Authority shall take into account the duration and seriousness of the violation, and may impose fines of up to a maximum of 10 per cent of the turnover realised by the interested company during the year preceding the beginning of the investigation. Furthermore, the following criteria for the setting of administrative fines are provided for by article 11 of Act No. 689 of 24 November 1981:

- the seriousness of the violation;
- actions carried out by the fined party to eliminate or reduce the effects of the violation;
- the fined party's previous behaviour; and
- the economic conditions of the fined party.

The Authority also makes reference to the Commission Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003.

On 22 October 2014, the Authority adopted new Guidelines on methods of setting fines aimed at defining, even on the basis of guidelines and recommendations of the administrative judge, a specific calculation method of the penalties associated with infringement of competition rules.

The purpose of the Antitrust Authority's decision was to make its deterrent policy more effective, by rendering its decision-making process more transparent and predictable.

In the Guidelines, the Authority first of all specifies that the basic amount of the fine shall be established by multiplying a percentage (up to 30 per cent) of the sales of goods and services related to the infringement for the duration of the same. It also establishes a minimum percentage, normally not less than 15 per cent of the value of sales, for the most harmful restrictions of competition (ie, for secret price-fixing cartels, market sharing and output-limitation horizontal agreements). Criteria for assessment of the gravity of the offence include the following elements: competitive conditions in the relevant market (for example, the level of concentration and the existence of barriers to entry); prejudice against innovation; the actual implementation of the infringement; and the degree of the actual economic impact.

The Authority also provides for the possibility of adjusting the basic amount of the fine with an additional penalty, the size of which would range between 15 per cent and 25 per cent of the value of sales, regardless of the duration of the infringement and of its effective implementation (entry fee).

The Authority establishes specific mitigating and aggravating circumstances, for example further reduction of up to 50 per cent of the basic amount of the fine may be applied if during the investigation the undertaking provides information and documentation that is deemed to be crucial to the identification of other infringements (other than the infringement in the current proceeding) and may be legitimate grounds for conditional immunity from penalties, in accordance with the leniency programme (the Amnesty Plus programme). Moreover, the Authority may increase the penalty by up to 50 per cent if, during the last financial year prior to the issue of the infringement decision, the undertaking concerned recorded a particularly high global turnover compared to the value of sales related to the infringement or if it belongs to a group of significant economic size. Case law has identified the recidivism and the fact of being the promoting party of the cartel as specific aggravating circumstances, while the filing of remedies and cooperation by the company during the proceedings shall be considered as mitigating factors. See also below the immunity rules under the leniency programme.

20 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No, but the Authority may decide to order the undertaking to suspend its general activities for up to 30 days.

21 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

There are no criminal sanctions for violations of antitrust law in Italy, only administrative and civil sanctions. The Competition Authority pursues the 'public enforcement' of competition law in the public interest and applies administrative sanctions. Private parties, on the other hand, are entitled to the 'private enforcement' of competition law. Depending on the actual circumstances of the case, they may bring a claim in court and be awarded damages that are in fact civil sanctions.

Thus, administrative sanctions and civil sanctions may indeed be pursued in respect of the same conduct, although by different subjects and on different legal bases.

Private rights of action

22 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Pursuant to Decree No. 3/2017 any person who believes he or she has been damaged by a cartel may bring a suit against the companies involved in the alleged anticompetitive conduct.

Victims of a cartel must, as a minimum, receive full compensation of the real value of the loss suffered. The entitlement to full compensation therefore extends not only to the actual loss due to anticompetitive conduct, but also to the loss of profit resulting from any reduction in sales, and encompasses a right to interest.

This principle also applies to indirect purchasers (ie, purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them in the distribution chain). In order to facilitate the burden of proof of the claimant, Decree No. 3/2017 recognises a presumption of passing on, providing that:

- compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer;
- as a general rule, indirect purchasers have to prove the passing on of the overcharge to substantiate their claims;
- there is a rebuttable presumption of passing on with the recurrence of three conditions (ie, when the claimant proves the infringement, this infringement resulted in an overcharge for the direct purchaser and the purchased products or services were the object of the infringement); and
- the passing on defence is admitted whereas the burden of proof of the passing on of the damages remains with the defendants.

In addition, damage to reputation has been considered relevant. Punitive damages are not awarded.

Before the adoption of Decree No. 3/2017, in Italy there was no definitive certainty on the admissibility of passing on. The right of a party to compensation for harm caused by a cartel, irrespective of whether it is a direct or indirect purchaser from the infringer, was recognised by the decision of the Court of Appeal of Rome in case No. 1337/2008, *International Broker v La Raffineria di Roma e altre*.

In addition, the admissibility of the passing on defence was recognised by the Court of Milan in Decision No. 7970/2016, *Swiss International Airlines v SEA* and in the *Juventus FC SpA* case (*Indaba Incentiva Company srl v Juventus FC SpA*, Court of Appeal of Turin, 6 July 2000). More specifically, the claimant, Indaba Incentive Company, was in the market of tourism services and sporting events and brought proceedings against Juventus FC SpA, claiming that it had committed an abuse of dominant position in the supply of tickets for a football match. The claimant was co-participating in the anticompetitive practice and was victim at the same time. For these reasons, according to the court, a party who co-participated in transferring prices is not able to claim damages.

23 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

On 23 July 2009, Parliament passed a law instituting class actions (Law No. 99/09, which amended the new article 140-bis in the Consumers' Code originally contained in Law No. 244/2007, which never entered into force). Article 140-bis of the Consumers' Code provides that each consumer may take action before the civil courts against companies to apply for the payment of damages and the restitution of the amounts due as a result, inter alia, of anticompetitive behaviour. The court first decides the admissibility of the request (although it can suspend its decision if a proceeding concerning the same issue is pending before the Authority), and then determines whether the infringement occurred and the amount due or the criteria to be taken into consideration to determine such amount.

The new provisions came into force in January 2010 and apply to anticompetitive conduct occurring after 15 August 2009.

Only one class action has been initiated for an antitrust violation since the class action provisions entered into force. It was initiated by an association of consumers claiming damages for the unfair raising of prices for the transportation of maritime passengers a few months after the opening of the antitrust proceedings for the concerned cartel. The Genoa Court admitted the claim, and more than 7,000 consumers have already adhered to the action. However, the case is of a 'follow on' type and meanwhile the administrative courts have definitively quashed the Authority's decision. Thus, the action is unlikely to proceed.

The Parliament is examining proposals for a material change of the current class action rules in order to make the procedure more viable and effective for the plaintiffs.

It should be noted that provisions set forth in Decree No. 3/2017 also apply to claims brought by means of class actions.

Cooperating parties

24 Immunity

Is there an immunity programme? If yes, what are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

Paragraph 2-bis of article 15 (added by Legislative Decree No. 223/2006 as amended by Act No. 248 of 4 August 2006) provides that in certain cases the fine can be cancelled or reduced. On the basis of such rule of law, the Italian Antitrust Authority adopted an Immunity and Leniency Programme on 15 February 2007 (Decision No. 16,472) following a public consultation. The Immunity and Leniency Programme applies to secret cartels only. The first company to spontaneously inform the Authority of a secret cartel (whistle-blowers) will be awarded full immunity from fines if they submit decisive evidence on the cartel that the Authority does not possess. Companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings. The request must be submitted to the Authority in writing or orally. If a company does not have all the evidence readily available, it may still lodge the request and ask for a term by which it will provide full evidence (marker). If the Authority turns down the request for immunity or leniency, companies may withdraw the documentation supporting their application. In order to be admitted to the leniency, further conditions shall be met: the company shall terminate the anticompetitive conduct after having presented the petition for the leniency; during the proceedings, the company shall cooperate with the Authority in a continuing and effective way; and the company shall not inform anybody of its intention to apply for the leniency.

25 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after an immunity application has been made? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Parties that cooperate after the immunity application – those who are not first in – may be awarded a reduction in their fine of up to 50 per cent if they offer qualified evidence. Companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings. Rules on procedure are the same as those applicable to the parties who are the first in to cooperate.

26 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Companies going in second may be awarded a reduction in their fine of up to 50 per cent if they offer qualified evidence.

If a second-in company offers information on a different, previously unknown offence in which it is involved, it may benefit from full immunity in the latter case, but not in the one in which it is second in. There are no specific differences between going in second versus third, but the promptness of the cooperation carried out by the company is taken into account by the Authority when determining the level of reduction of the fine.

27 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

If a company has sufficient evidence to request immunity, the best time to approach the authorities is as soon as possible and even before the Authority initiates the proceedings. No deadlines exist, but upon the request of a company seeking immunity (a marker), the Authority may fix a deadline within which such a company shall submit all the evidence requested thereto. If the company does not comply with such a term, the evidence provided shall be evaluated by the Authority in the context of a reduction of the sanction.

28 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

Pursuant to article 7 of the Immunity and Leniency Programme (updated on 31 July 2013 by Decision No. 24560), companies applying for full leniency as well as those applying for a fine reduction must satisfy some specific cooperation duties to be admitted to the programme. In particular, an undertaking must cease its behaviour upon leaving the cartel, unless the Authority requests or permits the company not to do so in order to keep the investigations secret, and must fully and continually cooperate with the Authority for the entire duration of the proceedings. For the company, such cooperation involves, inter alia:

- the duty to immediately provide all the relevant information and evidences;
- the obligation to remain at the Authority's disposal, to immediately answer any request, to act to permit the Authority to hear its employees and to secure information and documents before employees' dismissal or discharge;
- a prohibition to cancel, modify or hide relevant information or documents; and
- a prohibition to inform anyone (except other antitrust authorities or external legal experts under a duty of confidentiality) of its intention to file a leniency application as well as of the existence or the object of a filed application until the investigation is notified to the parties, unless the Authority permits it.

Update and trends

By Decision No. 27015 dated 7 February 2018 the Authority opened an investigation into a price collusion agreement allegedly put in place by the major telecommunication operators Tim, Vodafone, Wind Tre and Fastweb.

Such proceedings follow the entry into force of Decree-Law No. 148/2017, which laid down the obligation for the telecommunication operators to bill their customers on a monthly basis (instead of once every four weeks). The Telecommunication Authority released Guidelines about the compliance of operators with the new system.

In January and February 2018, Tim, Vodafone, Fastweb and Wind Tre (in order to be compliant with the new rules) sent a letter to their customers informing them about the new monthly billing system. Further, they specified that the yearly expense would be divided into 12 instead of 13 invoices and therefore it would result in an increase in the monthly cost for customers.

The fact that the letters sent by the operators were similarly drafted and that all of them referred to the concept of annual costs and to the reduction of the number of invoices (though these issues were not considered in the Telecommunication Authority Guidelines), were seen by the Authority as evidence of an anticompetitive conduct. According to the Authority, in fact, the parties agreed to coordinate their economic strategy in order to preserve the increase in tariffs determined by the initial change in invoicing frequency (from one month to four weeks) and at the same time to prevent any price competition among them.

The Authority identified the relevant product markets in the retail market for the provision of telecommunication mobile services and the retail market for the provision of telecommunication fixed services. By the decision taken on 21 March 2018 the Authority resolved to adopt certain precautionary measures ordering the operators to suspend the implementation of the agreement and to define their own services' offer independently from their competitors. The proceedings are expected to end by 31 March 2019.

29 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Applicants (and subsequent cooperating parties) may request the Authority to keep certain documents or sections thereof confidential, provided that such a request is well grounded (the document contains trade secrets, commercial strategies, personal information, etc). The Authority will assess whether the request is grounded and whether it needs to show the documents or sections thereof to prove the cartel. The Authority will inform the interested party of its conclusions on the confidentiality request. If the request is upheld, the Authority will keep the documents confidential and shall not disclose them to the parties involved in the proceedings or to third parties.

Access (by the parties involved in the proceedings) to the confession provided is postponed until the Authority notifies the parties of the statement of objections.

Access (by the parties involved in the proceedings) to documentation provided may be postponed until the Authority notifies the parties of the statement of objections.

By Decision No. 21,092 of 6 May 2010, the Authority also specified that third parties, even if granted access to the proceedings, cannot have access to the confession and to the related documents.

If the Authority decides to turn down the immunity or leniency application, applicants may withdraw the documentation provided to support their application.

30 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity? What, if any, judicial or other oversight applies to such settlements?

No. The Authority can only accept commitments (see above).

31 Corporate defendant and employees

When immunity or partial leniency is granted to a corporate defendant, how will its current and former employees be treated?

Not applicable.

32 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An applicant for leniency must file a request with the Authority. Such request may be submitted by the corporate defendant as well as the company's counsel. In addition, the Authority has made available a specific telephone and fax number to facilitate communications by interested parties.

33 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case

34 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

Defendants have right of access to any documents produced or permanently retained by the Authority in the course of the proceedings, with the exception of those documents containing personal, commercial, industrial and financial information of a confidential nature relating to the individuals or to the undertakings involved in the proceedings. Nonetheless, if the charges are based on such documents, they must be disclosed to defendants, at least with regard to the portions containing evidence of the infringement or essential information for the defence of the undertaking concerned.

It is also provided that the Authority may defer access to the documents requested until it has been ascertained that they are relevant for the purposes of acquiring evidence of infringements, in any case, not beyond the date of notification of the statement of objections (while the confession provided pursuant to a leniency request must be postponed until the Authority notifies the parties of the statement of objections).

35 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to obtain independent legal advice?

There are no personal sanctions against employees; therefore, the issue of conflict of interest does not arise.

36 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Pursuant to the general principles of the professional code of ethics, counsel may not represent parties where there may be a conflict of interest. In other cases, no specific rule is provided.

37 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Not applicable.

38 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

The issue is controversial.

In this respect the Provincial Tax Court of Milan has recently admitted the chance for companies to deduct antitrust fines as business expenses for tax purposes (Decision No. 136/32/02).

The Tax Court stated that since an anticompetitive practice is likely to increase a company's revenues, there is a 'causal link' between such an unlawful practice and its taxable income. Consequently, according to the Court, the amount of a fine imposed for such an unlawful practice is sufficiently linked to the business activity of the company to be deductible for tax purposes. In this respect the Italian Supreme Court in its decision of 21 January 2009, held that business expenses are deductible provided they are 'functionally linked' to an activity that is potentially able to generate income. According to the Tax Court, the concept of an 'activity that is potentially able to generate income' should be construed to include unlawful activities.

However, the position taken by the Tax Court is in contradiction with the most recent case law of the Italian Supreme Court. For instance, by Decision No. 5050/2010, the Italian Supreme Court stated that antitrust penalties are not deductible for tax purposes since an administrative penalty imposed by the Authority is the punitive consequence of a violation of a rule prohibiting certain business practices. A sanction that punishes the exercise of an unlawful activity cannot be considered as a productive activity and, therefore, is not a business expense that can be deducted from the company's income.

39 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Fines imposed in other jurisdictions are not taken into consideration. Within the jurisdiction, the rule of ne bis in idem applies; thus, a company cannot be fined twice for the same illegal conduct (irrespective of the identity of the damaged parties).

Regarding private damage claims, indirect purchasers (ie, purchasers who had no direct dealings with the infringer) are also entitled to claim damages, but the damages cannot be duplicated. In this respect, pursuant to article 13 of Decree No. 3/2017, to avoid actions for damages by claimants from different levels in the supply chain from leading to multiple liability or to an absence of liability of the infringer, in assessing whether the burden of proof is satisfied, Italian courts are able to take due account of actions for damages (also in other EU member states) that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain and of the decisions taken with reference to such actions.

40 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way to get the fine down is to act quickly. A corporation that is a member of a cartel or party to a prohibited horizontal agreement should cease the behaviour and by adhering to a compliance programme inform the Authority as soon as possible. The amount of the fine may also be proportionate to the duration of the conduct, thus it must be ceased immediately if a case is started by the Authority. The Authority is more inclined to be lenient with companies or undertakings that have taken concrete steps to limit the effects of their illegal practice.

The Authority is particularly strict in cases where the companies acted through associations representing the industry in question. It is therefore recommended that active steps to leave the association or at least to signal a refusal to adopt the association's illegitimate practices be taken.

Caiazzo Donnini Pappalardo & Associati
CDP STUDIO LEGALE

Rino Caiazzo **rino.caiazzo@cdplex.it**
Francesca Costantini **francesca.costantini@cdplex.it**

Via Ludovisi 35
00187 Rome
Italy

Tel: +39 06 4522401
Fax: +39 06 45224044
www.cdplex.it

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