

## THE LEGISLATIVE DECREE OF IMPLEMENTATION OF DIRECTIVE 2014/104/EU ON ANTITRUST DAMAGES ACTIONS

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**Keywords:** Private Enforcement; Antitrust Damages Action; Disclosure of Evidence; Presumption of Damage; Passing on

**Abstract:** *Purpose of the following analysis is to briefly examine the most relevant provisions of Italian Legislative Decree implementing Directive 2014/104/EU on antitrust damages actions with particular regard to the new rules that will be introduced in the Italian legislative framework on private antitrust enforcement (in particular concerning the disclosure of evidence, the binding effect of the decisions of national antitrust authorities, the time limitation rules, the presumption of the recurring of damages in case of cartel infringement).*

### 1. INTRODUCTION

Directive 2014/104/EU “on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance” was signed into law on 26 November 2014.

EU Member States were required to implement the Directive into their national legal systems by 27 December 2016<sup>2</sup>.

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Purpose of the Directive is to facilitate individuals and companies pursuing damage claims for breaches of EU competition law before national courts across the EU. In order to reach that goal, judicial procedures all over Europe shall be harmonized to a minimum level<sup>3</sup>. The Directive aims at:

- i) giving victims easier access to evidence they need to prove the damages;
- ii) recognizing the presumption of the recurring of damages in case of an antitrust violation;

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<sup>2</sup> State of the implementation of the Directive as of 20 January 2017, based on the information provided on the Commission site:

[http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html):

- i) States where stakeholder consultation is ongoing: Croatia, Estonia, Malta, Norway, Poland, Romania, Slovenia, Spain.
- ii) States where the draft new legislation is pending before the Government: Portugal, United Kingdom.
- iii) States where the draft new legislation is pending before the Parliament: Austria, Bulgaria, Czech Republic, Germany, Lithuania, The Netherlands.
- iv) States which have adopted legislation: Denmark, Finland, Hungary, Italy, Latvia, Luxembourg, Slovakia, Sweden.

<sup>3</sup> National legislations can maintain their own or even adopt further rules in addition to the ones set forth by the Directive, which reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of EU competition law, as long as they comply with the case law of the European courts and the principles of effectiveness and equivalence (established in the well-known ECJ *Courage Crehan* and *Manfredi* judgments).

- iii) giving victims more time to make their claims;
- iv) recognizing probative value to national competition authorities' (NCA) decisions;
- v) encouraging the use of consensual settlements.

In almost all Member States, domestic laws and conservative courts interpretation have refrained or at least discouraged injured parties from claiming damages arising from antitrust violations before the national judge. However, United Kingdom, Germany and The Netherlands are known as claimant-friendly jurisdictions and several major cases have been or are being carried out in front of their courts. Their legal systems are to a certain extent already in conformity with the provisions of the Directive, thus they will require relatively small changes.

On the contrary, the Italian legislation (and legislations of the majority of other Member States as well) required several and substantial amendments.

With specific regard to Italy, art. 2 of Law n. 114 of 9 July 2015 ("Legge Delega") gave mandate to the Government for the implementation of the Directive, providing that the new provisions be applied to damages actions resulting from the violation both of artt. 2 and 3 of Law n. 287/90 and of artt. 101 and 102 TFUE. Such provisions will also apply to claims brought by means of class actions

(art. 140 *bis* of Consumers' Code)<sup>4</sup>. Law n. 114 of 9 July 2015 also mandated the Government to reduce the number of courts competent to adjudicate antitrust damage actions.

The Legislative Decree of implementation (the "Legislative Decree") was finally approved on 14 January 2017 and published on 19 January 2017<sup>5</sup>.

It is important to point out that, although most of the provisions of the Legislative Decree are a mere translation of the Directive corresponding provisions, the Government took this occasion to better clarify some legal institutes and derogation to the same as well as to precisely define the borders of the administrative judicial review of the Italian NCA, Autorità Garante della Concorrenza e del Mercato ("AGCM"), public enforcement decisions.

Hereinafter, we will examine the most relevant provisions of the Legislative Decree and how they implement the corresponding provisions of the Directive, with a particular emphasis on the new procedural provisions, the most important innovation for the Italian legal system.

As mentioned, for the structure of the Legislative Decree, the Italian legislator has

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<sup>4</sup> This provision fills for Italy a major gap of the Directive since, despite the expectations, it does not contain any harmonized rule on collective actions.

<sup>5</sup> Legislative Decree n. 3 of 19 January 2017. The Council of Ministers had approved on 27 October 2016 the draft Legislative Decree, the very last day of validity of the delegation. The draft had then been transmitted to the Parliament Commissions for their obligatory opinion, all favourable although the Justice Commission had suggested some minor amendments.

decided to follow and respect the scheme of the Directive.

## 2. RIGHT TO FULL COMPENSATION (ARTICLE 1 OF THE LEGISLATIVE DECREE / ARTICLE 3 OF THE DIRECTIVE)

The Legislative Decree, in line with the Directive, establishes the principle that any natural<sup>6</sup> or legal person or even entity without legal personality who suffered the consequences of an antitrust violation has the right to full compensation, which includes

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<sup>6</sup> Prior to the adoption of the Legislative Decree, the possibility for consumers to claim damages had been discussed by Italian case law for a long time. Before the *RC Auto* case (Supreme Court, Section III, decision No. 15538, 17 October 2003), which finally established the principle according to which also consumers can claim damages for anti-competitive practices, the Supreme Court had given a narrow interpretation of the protection for individuals for damages under antitrust rules. According to the Court “*the competitive rules are only and directly addressed to the undertaking, which suffered the harm. Although individuals can indirectly get the advantages of the free market, they are not legitimate to bring damages actions before the Court*” (Supreme Court, Section I, decision No. 1811, 4 March 1999). Similarly, in the *Axa* case (Supreme Court, Section I, decision No. 17475, 9 December 2002), the Court stated that the Court of Appeal had no jurisdiction to judge a damages action from a final consumer, since article 33 of L. 287/1990 provides only for the “*ordinary action*” of awarding damages.

Having regard to examples of other Member States, pursuant to French law, the right of action is available to all those who have a legitimate interest in the success or dismissal of a claim, i.e. the clients of the infringer and also indirect victims such as consumers or undertakings clients of the direct victim. In Germany, individuals are entitled to bring private damage actions.

actual loss, loss of profit and interests from the time the harm occurred until the compensation is actually paid.

Punitive damages are therefore excluded from the definition of “compensation” under the Directive. This is a clear policy statement to distinguish the EU and Italian approach from the one adopted in the United States, where treble damages are available. In conformity, the Legislative Decree establishes that the damage redress shall not contemplate any overcompensation.

However, in this respect, it should be noted that, by decree n. 9978 of 16 May 2016, the United Sections of the Supreme Court have been asked to decide upon the legality of punitive damages with respect to Italian public order (denied so far by Italian case law). This may become relevant at a later stage since the Directive provides only for a minimum level of harmonization, thus national legislations may impose higher standards, also in terms of damages quantification. The Directive does not seem to prohibit such approach since it establishes only that “*full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other type of damages*” (art. 3.3).

Higher damage standards, as well as the opt-out rather than the opt-in regime for class actions, territorial or nationality limits in order to be part of the claimants class, national or world-wide opt-out effects of damage actions and consensual settlements, may become decisive factors in the forum shopping planning that claimants will later perform in

assessing in which jurisdiction a damage redress action should be started or a consensual settlement should be agreed<sup>7</sup>. This may appear now an immaterial issue, but the scenario could change radically if another Member State decided to amend its legislation in order to introduce some sort of punitive damages<sup>8</sup>.

The basic principles set out in the Directive and the Legislative Decree were already present in the Italian legislation, nevertheless the statement in the Legislative Decree is useful in order to solve certain current uncertainties of Italian courts decisions as to the qualification/quantification of the damages when the injured party is both a customer and a competitor of a dominant company, having regard to the interaction between *damnum emergens* and *lucrum cessans*<sup>9</sup>.

With reference to the scope of the violation, Article 2 of the Legislative Decree clarifies what the term “*competition law*” means under Italian legislation. This stands for all the provisions that, if violated, enable the victims

to start damages actions. These provisions are articles 101 or 102 TFEU, articles 2, 3 and 4 of Law No 287 of 10 October 1990 and also any provision of other Member States that “*predominantly pursue the same objective as Articles 101 and 102 TFEU*”.

### 3. DISCLOSURE OF EVIDENCE (ARTICLE 3 OF THE LEGISLATIVE DECREE / ARTICLE 5 OF THE DIRECTIVE)

Giving victims of antitrust violation an easier access to evidence they need to prove the damage is a crucial goal of the Legislative Decree, as dictated by the Directive.

In fact, actions for damages for infringements of EU or national competition laws typically require a complex factual and economic analysis and the evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, i.e. not sufficiently known by, or accessible to, the claimant. Therefore, as underlined by Recital 15 of the Directive, “*it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence*”. At the same time, disclosure of evidence should not detract from the effectiveness of the enforcement of competition law by a competition authority, thus particular attention should be paid to preventing ‘*fishing expeditions*’, i.e. non-specific or overly broad searches for information that are unlikely to be of relevance for the parties to the proceedings. In other words, private enforcement goals should be necessarily balanced with public enforcement ones.

<sup>7</sup> To be ratified by a national court and then be subject to recognition and enforcement by foreign courts (see in general for Italy art. 64-67 of Law 31 May 1995, n. 218 and, within the European Union, EU Regulation n.1215/2012 of 12 December 2012, art. 59).

<sup>8</sup> In terms of recognition and enforcement in Italy of the related decision, as for the case under examination of the United Sections of the Supreme Court.

<sup>9</sup> In substance, in margin squeeze cases. For example, by the recent decision n. 9109/2015 taken by the Court of Milan in the dispute between two competitors in the telecommunication market, on the basis of the approach taken by the court appointed Expert, the Court did not recognize any difference between actual loss (overcharge) and loss of profit (loss of chance) and adjudicate damages on equitable basis in a single amount.

Pursuant to the Legislative Decree, in conformity with the Directive, courts **may** order disclosure of evidence to the other party of the dispute or even third parties. The disclosure shall refer to specified items of evidence or relevant categories of evidence identified as precisely and as narrowly as possible. It should be noted that the institute of “*category of evidence*” represents an absolute innovation to the Italian legal system. As specified by art. 3.2 “*The category of evidence is identified by reference to common features of its constitutive elements such as the nature, the time during which they were drawn up, object or content of the items of evidence the disclosure of which is requested, falling within the same category*”.

The order of disclosure of evidence has to be proportionate to the decision to be adopted and national judges will have to consider the likelihood that the alleged infringement occurred, scope and cost of disclosure, confidentiality rights of the disclosing party.

When ordering the disclosure of confidential information<sup>10</sup>, national courts shall impose effective measures to protect the same<sup>11</sup>.

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<sup>10</sup> The Legislative Decree adopts the definition of art. 13 of DPR n. 217/1998 i.e. personal, commercial, industrial and financial information of a confidential nature relating to individuals or undertakings and documents containing commercial secrets.

<sup>11</sup> Such measures could include the possibility of redacting sensitive passages in documents, conducting non-public hearings, restricting the persons allowed to see the evidence, instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.

The Legislative Decree recognize that legal privilege shall not be affected by these disclosure rules<sup>12</sup>.

The above provisions introduce a sort of anglo-saxon style discovery<sup>13</sup> in the Italian procedural laws which is really innovative as the claimant does not need to previously prove the existence of the document(s), differently from the current regime set forth by artt. 210 and 213 of Code of Civil Procedure under which the claimant is required to prove first the existence of the document before the judge can order its disclosure. However, the relevance of the documents of which disclosure is sought in respect to the judicial decision to be adopted will remain a necessary element also under the new rules.

The new rules do not replace the above mentioned current provisions (artt. 210 and 213 Code of Civil Procedure) and represent special procedural rules applicable only to antitrust damage actions.

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<sup>12</sup>This provision appears to apply to any communication, but only with external lawyers, not to in-house counsels, in line with the ECJ case law. It appears redundant for Italian standards given that any communication between such lawyers and their clients, not necessarily related to the defense of the relevant case, is already privileged under the current national rules.

<sup>13</sup> But Legislative Decree (art. 3.1, as the Directive – art. 5.1) requires nonetheless a grounded party’s application for a disclosure order unlike in the UK where the judges seem to have more discretionary powers to order disclosure if needed for a proper decision of the claim or in the US where the discovery pre-trial phase can involve any material which is “*reasonably calculated to lead to admissible evidence*”, a much broader standard than the requisite of relevance that the court should ascertain prior to issuing the order under the Legislative Decree.



The party represented in the action or even a third party, including the NCA, in respect of whom the disclosure application is filed, has the right to be heard by the court before the order is adopted. It is not clear how the mechanism will work in practice, i.e. who has the duty to inform the third party of the disclosure application. However, it has been established that any application for disclosure together with the relevant documents must be communicated by the court to AGCM, so that the latter may submit its observations to the court if so wishes<sup>14</sup>.

#### 4. ACCESS TO THE FILE OF COMPETITION AUTHORITIES AND LIMITS ON THE USE OF EVIDENCE OBTAINED THROUGH THE SAME (ARTICLES 4, 5 OF THE LEGISLATIVE DECREE/ARTICLES 6, 7 OF THE DIRECTIVE)

The need to balance private enforcement interests with public enforcement ones is stronger when the disclosure refers to evidence included in the file of a competition authority, as recognized by the same Directive<sup>15</sup>.

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<sup>14</sup> In the UK for example the current rule, even before the implementation of the Directive, it is already that the parties in an antitrust damages claim in court must serve any brief with the local NCA, the Competition and Markets Authority.

<sup>15</sup> Pursuant to the Directive “to ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is

Disclosure shall be authorized where no party or third party is reasonably able to provide that evidence (“*principio di sussidiarietà del mezzo di prova*”) and it has to be proportionate. The assessment of the proportionality of the request is more meticulous than the one requested by art. 5, as national judges will have to consider: 1) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents; 2) whether the party requesting disclosure is doing so in relation to an action for damages before a national court and 3) the need to safeguard the effectiveness of the public enforcement of competition law.

The Legislative Decree refers, in line with the Directive, to three different categories of evidence, each corresponding to three different regimes of disclosure.

More in detail, information prepared for the public enforcement procedure by the parties, EU Commission or AGCM and settlement submissions that have been withdrawn can be subject to disclosure only after the end of the public enforcement procedure (grey list), therefore being inadmissible in actions for damages before then. If a procedure is pending before the Commission or AGCM, in order to deal with evidence from the grey list, the judge may decide to suspend the civil case. This option has not been expressly provided for by the Directive, but the Italian legislator

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*necessary to regulate the coordination of those two forms of enforcement in a coherent manner, for instance in relation to the arrangements for access to documents held by competition authorities” (Recital 6).*

appropriately included it in the Legislative Decree<sup>16</sup>.

On the contrary, access to evidence having as object corporate leniency statements and settlement submissions is prohibited (black list) and such category of evidence is always inadmissible in actions for damages. It should be noted that the Directive literally refers to corporate leniency statements and settlement submissions “*obtained by a natural or legal person solely through access to the file of a competition authority*”, while the Legislative Decree does not provide the same limit as it refers to evidence obtained by the parties even through access to the file of a competition authority<sup>17</sup>. It should be noted that neither the Directive nor the

Legislative Decree clarify if the terms “*corporate leniency statement*” strictly refer to the leniency application or include all or in part the documents attached to the same. The issue is relevant in respect to the procedural consequences regarding documents that, although attached to the leniency application, pre-exist to it and can be procured otherwise.

Other kind of evidence can be accessed at any time (white list) and can be used in an action for damages also before the end of the public enforcement procedure, but if obtained through access to the file of AGCM, only who obtained it or a natural or legal person that succeeded to that person's rights can use it.

Access to the files of AGCM is possible regardless of the fact that the related evidence was mentioned or not in its decision. The applicant must only prove its legitimate interest in accessing the file for use of the evidence in a connected judicial case.

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<sup>16</sup> “*Tale causa di sospensione, vale a dire sospensione facoltativa del processo, pur non essendo espressamente prevista dalla direttiva, ne coglie lo spirito e la finalità di conciliare il private enforcement con il public enforcement*” (“*Such a discretionary suspension of the procedure, even if it is not specifically required by the Directive, complies with its purpose to balance private enforcement with public enforcement*”) Explanatory Report of the Legislative Decree, p. 8.

<sup>17</sup> It should be noted that during the discussion of the scheme of the Legislative Decree before the Parliament Commissions, it had been suggested to adopt the wording set forth by the Directive as reference is made to “*evidence obtained solely through access to the file of a competition authority*”. The Legislative Decree carries such wording just in the heading of the article and with reference to documents of the “white list”, while the text refers to evidence obtained by the parties “*even through*” access to the file of a competition authority with regard to evidence of the grey list and of the black list. Thus, the Decree appears not in line with the Directive on this point since a less favourable treatment of access and use of the evidence appears to have been established for documents that a claimant may procure other than through access to the file of a competition authority, if such documents are also present in such file, which may unduly limit its right of defence.

## 5. PENALTIES (ARTICLE 6 OF THE LEGISLATIVE DECREE/ARTICLE 8 OF THE DIRECTIVE)

The Legislative Decree recognizes, as mandated by the Directive, that in order to prevent the destruction of relevant evidence and to ensure that court orders as to disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties.

Pursuant to the Legislative Decree, national courts shall impose on parties, third parties and their representatives<sup>18</sup> penalties in a range of Euro 15.000 to 150.000 in the event of: 1) failure or refusal to comply with the disclosure order of any national court; 2) destruction of relevant evidence<sup>19</sup>; 3) failure or refusal to comply with the obligations concerning the protection of confidential information; 4) breach of the limits on the use of evidence in trial. With reference to the behavior of the parties, conducts under 1) and 2) shall also give to the court the possibility to draw adverse inferences, such as assuming the relevant facts to have been proven while conduct under 4) shall give the court the chance to dismiss claims and defenses in whole or in part.

It should be noted that fines of this type (except those under 2 above) are not currently provided by Italian legislation while the possibility to draw adverse inferences from the parties' behavior is established by art. 116 Code of Civil Procedure, but rarely used.

## 6. EFFECT OF NATIONAL DECISIONS (ARTICLE 7 OF THE LEGISLATIVE DECREE/ARTICLE 9 OF THE DIRECTIVE)

In order to increase the effectiveness and efficiency of actions for damages<sup>20</sup>, the Legislative Decree recognizes that final and conclusive AGCM decisions (i.e. 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 the 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. Before Italian courts, NCA decisions of other EU Member States (or the judgments issued pursuant to their judicial review) shall be only *prima facie* evidence of the infringement.

It is also provided that in the judicial review of the AGCM decisions, the administrative courts shall have the power to fully verify the facts and technical profiles (of non-controversial

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<sup>18</sup> The provision is not entirely clear, but the word “also” used by art. 6.5 and the fact that it would mean otherwise the application to the corporate entity and its legal representatives of a double penalty for the same violation (in principle not allowed by the legal system in absence of an unambiguous law provision), the correct interpretation appears to be that the penalties should apply to the representatives on joint and several basis with the represented party.

<sup>19</sup> Type of offence already sanctioned by art. 490 of Italian Penal Code concerning the destruction and concealment of public deeds and private agreements.

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<sup>20</sup> As underlined by the same Directive which stresses that in order to “enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement” (Recital 34).



nature<sup>21</sup>) on which such decision is based. This last provision will certainly cause a debate among the scholars in respect to its legitimacy since it could be said that it is beyond the delegation powers conferred upon the Government by the *Legge Delega* (n. 114 of 9 July 2015). However, although it concerns the public enforcement decisions rather than the private enforcement rules established by the Directive, the provision does not appear to violate art. 76 of the Italian Constitution (which establishes the limits of the legislative powers delegated to the Government). In fact art. 2 of the *Legge Delega* is sufficiently broad to ensure to the Government wide discretionary powers<sup>22</sup>, which are just limited by the respect of the ultimate *ratio* of the delegation law<sup>23</sup>. In fact, it has been established by the Constitutional Court jurisprudence that, in order to coordinate the implementation of the European directives with the pre-existing national legislation, the delegation includes the power to modify the national rules, if necessary.

In the case at issue the provision of art. 7.1 of the Legislative Decree has the ultimate purpose to ensure the effectiveness of the damage claims for breaches of EU competition law, which actually constitutes the *ratio* of the same Directive, while insuring at the same time the legitimacy and correctness of the public enforcement decision<sup>24</sup>. Therefore, this legal

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<sup>24</sup> In addition, it should be noted that the provision under art. 7, par. 1 only codifies into law the most recent case law on the limits of administrative review of AGCM decisions. In fact, by several decisions it has been clarified that administrative judges have the power to fully verify the facts as well as the technical profiles of non-controversial nature (thus excluding for example the definition of the relevant market) on which the AGCM decision is based. See Corte di Cassazione, decision n. 1013/2014, *Acea-Suez* “*il sindacato di legittimità del giudice amministrativo sui provvedimenti dell’Autorità comporta la verifica diretta dei fatti posti a fondamento del provvedimento impugnato e si estende anche ai profili tecnici, il cui esame sia necessario per giudicare della legittimità di tale provvedimento; ma quando in siffatti profili tecnici siano coinvolti valutazioni ed apprezzamenti che presentano un obiettivo margine di opinabilità – come nel caso del mercato rilevante (...) – detto sindacato, oltre che in un controllo di ragionevolezza, logicità e coerenza della motivazione del provvedimento impugnato, è limitato alla verifica che quel medesimo provvedimento non abbia esorbitato dai margini di opinabilità sopra richiamati, non potendo il giudice sostituire il proprio apprezzamento a quello dell’Autorità Garante ove questa si sia mantenuta entro i suddetti margini*” (“*In their judicial review of the legitimacy of the AGCM decision the Administrative Courts shall investigate not only the facts on which the decision is based, but also any relevant technical profiles. However, when such technical profiles involve discretionary evaluations – as for example the definition of the relevant market – such review should be limited to verify if the decision taken by the authority is reasonable, rational and congruent and if the authority has not exceeded the abovementioned discretionary limits, as the Administrative Courts shall not replace their own assessment to the one of the Authority*”); Consiglio di Stato n. 3849/2014 “*Auditel*” and n. 4248/2014 “*Compagnia Michele Murino*”. Consiglio di Stato, decisione n. 2479/2015, *A428-Wind/Fastweb/Condotte Telecom Italia*, “*il sindacato di legittimità del giudice amministrativo sulla discrezionalità tecnica dell’Autorità è pieno e particolarmente penetrante (in superamento della distinzione tra forte e debole) e si svolge tanto con riguardo ai*

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<sup>21</sup> During the discussion of the scheme of the Legislative Decree before the Parliament Commissions, it had been suggested that this additional statement appeared too vague and should have been therefore eliminated.

<sup>22</sup> *Ex plurimis* Italian Constitutional Court, decisions n. 15/1999, n. 163/2000, 340/2007, 98/2008.

<sup>23</sup> Italian Constitutional Court, decisions n. 41/1993, 427/2000. Moreover, it has been stressed that when implementing a European directive, the Government is bound not only by the “*legge delega*”, but above all by the directive itself (Italian Constitutional Court, decision n. 132/1996), as further interpreted by the case law of the Court of Justice (Italian Constitutional Court, decision n. 285/1983).

provision, very innovative in the context of the Italian administrative judicial procedure, appears indeed within the delegated powers in the light of, and as a coordination with, the new rule on the binding force of the AGCM decision upon the national judges as well as of the “*due process*” principle as interpreted and applied by the European Court of Human Rights<sup>25</sup>.

Some national legislations already recognize binding character to decisions of national competition authorities. For example, in Germany the decisions of both the EU Commission and NCA of this and other Member States are already binding on national courts while in France decisions of the local NCA already constitute a non-rebuttable presumption of a competition law breach in the context of follow-on class actions (*actions de groupe*) as recently implemented in the French legal system.

In Italy case law already considered the decisions of AGCM as “privileged evidence” of the alleged conduct (rebuttable by the defendant), but it should be noted that *de facto*

all Italian courts have so far followed the AGCM decisions as to the existence of the infringement.

The Explanatory Report accompanying the scheme of Legislative Decree (“Report”) specifies that the binding effect of AGCM decisions is compatible with the constitutional principles (article 101, para. 2 of the Italian Constitution) since it represents only a limitation of the infringer procedural right, in the damage action, to provide contrary evidence as to the existence of the infringement. Evidence that the infringer has the right to file in the procedure before AGCM or in the judicial review of the latter decision before the administrative judges, having in both cases full rights of defense. Even more now that the law itself establishes that the administrative judges have the power to fully verify the facts and technical profiles on which AGCM decision is based.

In my opinion, the consequence of such approach is that the infringer is now entitled to file with the administrative law judges even new facts and elements. This appears an irreversible trend set by the case law of international courts whenever a sanction is applied and the national reviewing court has, and must have, unlimited jurisdiction powers<sup>26</sup>.

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*vizi dell'eccesso di potere quanto attraverso la verifica dell'attendibilità delle operazioni tecniche compiute* (“The judicial review of the legitimacy of the AGCM decision performed by the Administrative Courts upon the technical assessment of the Authority is full and pervasive (overcoming the distinction between strong and weak) and regards both the recurring of an abuse of power as well as the verification of the reliability of AGCM discretionary evaluations of technical profiles”).

<sup>25</sup> European Court of Human Rights of 4 March 2014, *Grande Stevens vs. Italy* (nn. 18640/10, 18647/10, 18663/10, 18668/10 e 18698/10) and of 27 September 2011, *Menarini Diagnostics s.r.l. vs. Italy* (n. 43509/08).

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<sup>26</sup> As recently recognized, in addition to the European Court of Human Rights judgments cited above, by the European Court of Justice in the decision of 21 January 2016, Case C-603/13 P: “the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 TFEU and 102 TFEU which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas

Apparently inspired to the above principle, the Report specifies that the judge is not bound by the AGCM decision when it has become final and conclusive because the deadline for the administrative judicial review has expired (i.e. when no judicial review has taken place) if the judge deems the decision to be clearly vitiated (“*irrimediabilmente viziato*”), whatever this may mean and with the rather ample discretion that it may leave to the judges. However, this statement is not present in the Legislative Decree (or in the Directive) and it represents an interpretation which will be subject to the courts evaluation (in line with the interpretation that EU courts may later give to the corresponding provision of the Directive<sup>27</sup> if called to intervene).

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*raised by the appellants and taking into account all the elements submitted by the latter, whether those elements pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as those elements are relevant to the review of the legality of the Commission decision” (par. 72).*

<sup>27</sup> A provision whereby a national judge is prohibited to adopt a decision conflicting with a decision taken by the EU Commission was already included in the EU Regulation 1/2003 (art. 16). Previously, the ECJ had established the same principle on the basis of a general duty of “*sincere cooperation*” among public authorities, such as the Commission and national courts, in a well known judgment (14 December 2000, case C-344/98, *Masterfoods Ltd v HB Ice Cream Ltd*, stating that “*Where a national court is ruling on an agreement or practice the compatibility of which with Articles 85(1) and 86 of the EC Treaty (now Articles 81(1) EC and Article 82 EC) is already the subject of a Commission decision, it cannot take a decision running counter to that of the Commission, even if the latter’s decision conflicts with a decision given by a national court of first instance. If the addressee of the Commission decision has brought an action for annulment of that decision, it is for the national court to decide whether to stay*

## 7. TIME LIMITATION RULES (ARTICLE 8 OF THE LEGISLATIVE DECREE / ARTICLE 10 OF THE DIRECTIVE)

As specified above, giving victims of an antitrust violation more time to make their claims is another goal of the Directive in order to make the private enforcement more effective. This provision represents one of the major rules of harmonization of Member States’ legislations and may prevent the use of time-serving forum shopping.

Accordingly, the Legislative Decree provides a limitation period of at least five years after having knowledge of the infringement and in particular of the behavior itself, its legal qualification, the harm caused to the injured party and identity of the infringer. A five year limitation period seems to confirm the consolidated opinion that antitrust infringements give raise to an extra-contractual liability for damages<sup>28</sup>, but it leaves open the issue of if and when the claimant may act at the same time or alternatively under a contract by characterizing the damages suffered as contractual<sup>29</sup>.

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*proceedings pending final judgment in that action for annulment or in order to refer a question to the Court for a preliminary ruling”.*

Pursuant to such judgment, a lively debate started among the constitutional laws scholars, mainly in Germany, about the compatibility of such statement with the traditional approach adopted in almost all Member States of equal standing of the three public powers: legislative, administrative, judiciary.

<sup>28</sup> As the Report states openly.

<sup>29</sup> With a much longer limitation period equal to ten years and which may be even more convenient in terms

The limitation period starts to run from the end of the infringement.

The initiation of AGCM (or Commission) procedures shall suspend the limitation period<sup>30</sup>. The suspension shall end at the earliest one year **after** (the Italian version of the Directive was badly translated as it provides that the suspension period may not go beyond one year - “*non può protrarsi oltre un anno*” - but the Legislative Decree adopts the right term) the infringement decision has become final and conclusive or after the related procedures are otherwise terminated.

The above requirements are likely to lead to extremely long limitation periods in practice and an increased risk for businesses that antitrust damages actions could be brought many years after involvement in any infringement has ceased due to the duration of NCA procedures first and then the duration of the judicial review of such decisions before the administrative courts of first and appeal instance.

Such provisions cause a radical change of Italian legislation, as pursuant to the current rules (artt. 2947 and 2935 of the Civil Code)

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of evidence due to the known case law whereby, in case of breach of contract, the claimant is called to prove the mere non-performance of the contractual obligations of the counterparty. In addition, for contractual actions the application of EU Regulations on the jurisdiction and applicable law may be invoked, if more convenient.

<sup>30</sup> The Legislative Decree establishes the “*suspension*”, not “*interruption*” of the limitation period. Thus, the time period before the initiation of the AGCM procedure must be taken into consideration in the overall time limitation period calculation.

limitation period of five years starts in any case from the knowledge of the violation and damage (or from the time knowledge could have been obtained by using ordinary diligence)<sup>31</sup>.

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<sup>31</sup> Italian case law has discussed the starting date of the time limitation period in respect of the so-called “*hidden damages*”. By decision n. 2305/2007, the Supreme Court eliminated the degree of uncertainty. Indeed, it confirmed that according to article 2947 Civil Code the limitation period starts only from the moment when the claimant is aware of the damage (the so-called *esteriorizzazione del danno*). The Supreme Court thus set out an important rule according to which there can be “two-phases” of infringement, more specifically, when the damages occurred and the moment when the claimant becomes aware of them. In France, the limitation period in commercial, competition and civil matters is five years as of the knowledge of the facts on which the claim is based. According to Dutch law, the time limits for damages actions are either five years from the day the claimant becomes aware of the damages and the identity of the person responsible for the damage (the so-called “*short stop*”) or twenty years after occurrence of the damage (the so-called “*long stop*”). Following to the changes brought by the Consumer Rights Act (CRA), the minimum limitation period prescribed in England, Northern Ireland and Wales is of 6 years from the date when the facts related to the infringement occurred. In Germany the regular limitation period is three years from the end of the year in which (1) the claim arose and (2) the claimant obtains knowledge of the circumstances giving rise to the claim and of the identity of the defendant, or would have obtained such knowledge if he had not shown gross negligence.



## 8. JOINT AND SEVERAL LIABILITIES (ARTICLE 9 OF THE LEGISLATIVE DECREE/ARTICLE 11 OF THE DIRECTIVE)

Pursuant to the Legislative Decree, infringers shall be jointly and severally liable for the damages caused when they jointly violated antitrust law. Each infringer should compensate for the complete harm caused and a claimant may seek compensation from any of the co-infringers until his damage is fully compensated. Exceptions to this rule are provided in case of small or medium-sized enterprises<sup>32</sup>, leniency applicants and parties to a consensual settlement. As a derogation to the above exception, small or medium-sized enterprises (SMEs) and leniency applicants can be held liable vs. the injured parties other than their direct or indirect purchasers only when the latter cannot obtain redress from the other co-infringers<sup>33</sup>. For a SME, other conditions are that its market share has remained below 5% during the entire infringement period and

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<sup>32</sup> The category of micro, small and medium-sized enterprises is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million (Commission Recommendation 2003/361/EC, article 2).

<sup>33</sup> Such moment is not better defined by the Legislative Decree (or by the Directive) nor it is indicated which evidence should be given of the related facts. Thus, this uncertainty will be solved by the courts interpretation as it is likely to lead to controversies.

the joint liability would cause an “*irreparable prejudice*” of its economic stability and the total loss of value of its activities. The immunity shall not apply if the SME was an infringement leader or has obliged other undertakings to participate to the infringement or has committed previous infringements.

Pursuant to current Italian legislation, the principle of joint and several liability is already provided by art. 2055, par. 1 of the Civil Code<sup>34</sup> unlike the exception for leniency applicants and SMEs.

It should be noted that the above requirements are likely to lead to risk of asymmetries coming from market structures and average size of operators for countries with high number of SMEs.

## 9. PASSING ON DEFENCE AND INDIRECT PURCHASERS (ARTICLES 10, 11, 12, 13 OF THE LEGISLATIVE DECREE / ARTICLES 12, 13, 14, 15 OF THE DIRECTIVE)

In order to facilitate the burden of proof of the claimant the Legislative Decree recognizes, in line with the Directive and with certain limits, a presumption of pass on<sup>35</sup>.

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<sup>34</sup> The principle of joint and several liability in antitrust violations had been recognized already by case law (Court of Appeal of Rome, n. 1337/2008, *International Broker c. La Raffineria di Roma e altre*).

<sup>35</sup> Passing-on actions are not admitted in the United States having regard to the complexity of providing evidence of it and risks of multiple liability. In Europe



More in detail, the Legislative Decree<sup>36</sup> provides that: a) compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer<sup>37</sup>; b) as a general rule indirect purchasers have to prove the pass on of the overcharge in order to substantiate their claims; c) there is a rebuttable presumption of pass on at the recurring of 3 conditions i.e. 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; d) passing on defense is admitted whereas the burden of proof of the

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passing-on is already set forth under German law. The defendant bears the burden of proof to show that the claimant was able to pass on its damages to its own customers. As it is very difficult for the defendant to meet such burden of proof, the court is allowed to estimate the amount of damages which have been passed on if the defendant has shown and proven verifiable facts that a passing on of damages was likely.

<sup>36</sup> Before the adoption of the Legislative Decree, in Italy there was no definitive certainty on the admissibility of passing-on defence. However, in the *Juventus FC SpA* case (*Indaba Incentiva Company s.r.l. v. Juventus F.C. S.p.a.*, Court of Appeal of Turin, 6 July 2000), the Court had to rule on a complex case of private antitrust litigation. More specifically, the claimant, *Indaba Incentiva 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 supplies of tickets for a football match. The claimant was co-participating in the anti-competitive 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.

<sup>37</sup> Principle already recognized by the abovementioned decision of the Court of Appeal of Rome, n. 1337/2008.

pass on of the damages remains upon the defendants<sup>38</sup>.

Pursuant to article 13 (art. 15 of the Directive), to avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, in assessing whether the burden of proof resulting from the application of Articles 11 and 12 is satisfied, Italian courts are able to take due account of actions for damages (also in other 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. National courts may also take account of “*relevant information in the public domain resulting from the public enforcement of competition law*”. The Report underlines the complexity deriving from the practical application of such set of rules. For actions brought exclusively before Italian courts, the concentration of the competence to hear such actions in three courts only (as later explained) will certainly help, otherwise it will be inevitably care of the interested party to bring to the attention of the national court evidence of the existence of similar actions before other courts by using all possible procedural instruments.

The ordinary national procedural rules and those of Regulation (UE) N. 1215/2012 apply with regard to the courts competence in case of *lis pendens* and consolidation of the various

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<sup>38</sup> The principle has been recognized by the Court of Milan, decision n. 7970/2016, *Swiss International Airlines c. SEA*.

actions in one single case or before the same court (*connessione* and *riunione*).

With specific regard to the impact on current Italian rules, it should be mentioned that the general rule that the indirect purchasers have to prove the pass on of the overcharge is already present in the Italian legislation as under it any claimant has to prove the infringement, causal link and damage, while the rebuttable presumption of pass on at the recurring of 3 conditions is an innovation. The pass-on exception to be proven by the defendant is already established by art. 2697 CC par 2.

## 10. QUANTIFICATION OF HARM (ARTICLE 14 OF THE LEGISLATIVE DECREE/ARTICLE 17 OF THE DIRECTIVE)

The Legislative Decree aims at overcoming the fact that quantifying harm implies a complex factual analysis consisting in a hypothetical comparison between the actual position of the damaged party with the position it would have had in absence of the infringement (the so called “counterfactual scenario”).

For this reason, the Legislative Decree, once again in strict conformity with the Directive, introduces the presumption that cartel infringements caused harm, whereas the defendant could still rebut this presumption. Such a presumption represents a radical innovation as pursuant to the current legislation damages are determined on the basis of the principle of causality (damages have to be an immediate and direct consequence of the

infringement). However, it is not entirely clear what this provision will mean since the claimant is nonetheless required to prove the causal link between the infringement (the illegal behavior) and the damages he suffered individually as well as the quantification of such damages. Thus, the provision appears in practice to reverse the burden of proof as to the abstract and general capability of such illegal behavior to cause damages. Certainly not a minor outcome in the light of the great difficulty in proving, for example, the effects of an infringement on the price level of a certain good or service in the infringement period, due to the many other factors that may have had an impact on such level, difficulty so transferred upon the defendant.

The Legislative Decree refers for the quantification of harm to the provisions of articles 1223, 1226 and 1227 of the Italian Civil Code and does not expressly implement the provision (art. 17.1 of the Directive) according to which national courts should be empowered to estimate the amount of harm if it is practically impossible or excessively difficult for the claimant to precisely quantify the harm suffered on the basis of the evidence available. However, reference to art. 1226 should be sufficient since such article gives to the court the power to make an equitable assessment whenever the damage may not be precisely proven by the claimant. It should be noted that Art. 1226, as interpreted by Italian courts, requires the claimant to prove first the actual existence of the harm before the judge can estimate it. This requisite appears in line with the Directive since its art. 17.1 specifies that the judge should be empowered to estimate the

damages “if it is established that a claimant suffered harm”, although impossible or excessively difficult to quantify. Certainly, the presumption that cartel infringements caused harm shall play a strong role also in the courts evaluation of the existence of the individual harm suffered.

Article 14, par. 3 of the Legislative Decree provides that AGCM should<sup>39</sup>, upon request of a national court, assist that national court with respect to the determination of the quantum of damages, save when such an assistance is considered to be not appropriate having regard to the need to safeguard the effectiveness of the public enforcement of competition law (i.e. ongoing leniency proceedings before AGCM). This assistance will not replace the faculty of the judges to appoint a court expert, usually adopted for the assessment of antitrust damages and having become an essential instrument for the completion of such difficult task, to the point that the Italian case law has progressively extended its borders beyond the traditional range of application<sup>40</sup>.

<sup>39</sup> Pursuant to the Directive a NCA does not appear to be bound to give its assistance to a court as art. 22 literally states that “a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damage”. The Legislative Decree seems to have eliminated a degree of discretion of AGCM by adopting a more restrictive approach with a positive duty in this respect save for the reasons of protection of the public enforcement, if any.

<sup>40</sup> “Il giudice è chiamato a rendere effettiva la tutela dei privati che agiscono in sede giurisdizionale (...) mediante un'interpretazione estensiva delle condizioni stabilite dal codice di rito in tema di esibizione di documenti, richiesta di informazioni (v. anche l'art. 15 del Reg. CE n. 1/2003) e, soprattutto, di consulenza tecnica d'ufficio” (“in order to ensure an effective legal protection to the claimant, the Court shall apply an extensive interpretation of the conditions required by the Code of Civil Procedure with reference to

## 11. CONSENSUAL DISPUTE RESOLUTION (ARTICLES 15, 16 OF THE LEGISLATIVE DECREE / ARTICLES 18, 19 OF THE DIRECTIVE)

The Legislative Decree aims at facilitating the use of consensual dispute resolution mechanisms and increasing their effectiveness in order to encourage infringers and injured parties to agree on compensation for the harm caused by a competition law infringement, thus reducing uncertainties (again in line with the principles established by the Directive).

To this purpose, pursuant to article 15 par. 2 of the Legislative Decree, the judge can suspend the pending trial up to two years when the parties have submitted their controversy to a consensual dispute resolution procedure.

It is also provided that AGCM may consider any compensation paid, as a result of a consensual settlement and prior to its decision imposing a fine, to be a mitigating factor in

*the documents disclosure order, the request of information and the report of the court appointed expert*” (Supreme Court, Section I, 4 June 2015, decision No. 11564), particularly when the assessment requires “l'ausilio di speciali cognizioni tecniche, essendo in questo caso consentito al C.T.U. anche di acquisire ogni elemento necessario a rispondere ai quesiti, sebbene risultante da documenti non prodotti dalle parti” (“the knowledge of technical aspects, in such a case the court appointed expert shall obtain every element relevant for the solution of the case, even if resulting from documents not provided by the parties.”) (Supreme Court, Section III, decision No. 3191, 14 February 2006). When the report of the court appointed expert refers to aspects which can be assessed only by recurring to specific technical expertise, the report can “costituire fonte autonoma di prova” (“be considered itself as evidence”) (Supreme Court, Section II, 30 January 2003, decision No. 1512) “

assessing the fines to be levied from the infringers.

Pursuant to art. 16, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm and any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers. However, if the non-settling co-infringers are not able to pay the compensation, then the settling co-infringer could be called to pay the remaining damages unless expressly excluded by the settlement terms.

Articles 15, par. 1 of the Legislative Decree specifies that “*consensual dispute resolutions*” include mediation, arbitration<sup>41</sup>, out-of-court settlements and resolutions for consumer associations.

## 12. STARTING DATE OF APPLICATION OF RULES GOVERNING THE TRIAL (ARTICLE 19 OF THE LEGISLATIVE DECREE/ARTICLE 22 OF THE DIRECTIVE)

Art. 22 of the Directive provides under par.1 that any national measures adopted in order to comply with its substantive provisions do not apply retroactively while under par. 2 that any national measures adopted in order to comply with procedural provisions do not apply to actions for damages of which a national court

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<sup>41</sup> It should be noted that the category of “*consensual settlement*” instead does not include arbitration decisions.

was seized prior to 26 December 2014 (entry into force of the Directive).

The Legislative Decree implements expressly such last provision. The distinction between substantive and procedural provisions may be difficult to draw in some cases and give rise to controversies. However, maybe for this reason, the Legislative Decree identifies precisely which provisions shall apply retroactively to damages actions started after 26 December 2014, namely articles 3 “Disclosure of evidence”, 4 “Disclosure of evidence in a folder of the National Competition Authority”, 5 “Limits with the use of evidence” and 15, para. 2 “Consensual dispute resolution”<sup>42</sup>.

Art. 22.1 of the Directive has not been expressly implemented by the Legislative Decree, but the principle of non-retroactivity of the substantive provisions of a new law is already a general principle of the Italian legal system (art. 11 Preliminary Provisions of the Civil Code).

## 13. CONCENTRATION OF COURTS COMPETENCE (ART. 18 OF THE LEGISLATIVE DECREE)

Last, but not least, article 18 of the Legislative Decree deals with the competence of courts

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<sup>42</sup> United Kingdom proposes to implement art. 22 by establishing that also procedural provisions of the Directive will apply only to claims and competition proceedings related to loss or damage suffered on or after 27 December 2016, thus adopting a more restrictive approach of that envisaged by the Directive.

designated to hear antitrust private claims, now concentrated in the *Tribunali delle Imprese* of Milan, Rome and Naples (and related Court of Appeals for the appeal phase), each with its own large defined territorial competence, as required by art. 2 of Law n. 114 of 9 July 2015. The choice, mandated by the Legge Delega, appears to aim at providing antitrust damage actions with a court setting more specialized, rapid and efficient<sup>43</sup>. The concentration in three specialized courts only will certainly help to achieve such goals and to deal in a more uniform and coherent way with actions that are often, by their own nature, massive and complex because of the potential number of injured parties and difficulties in the analysis of the related facts and economics. It will also help in avoiding the inherent risks of multiple actions before many different courts, such as conflicting or asymmetric evaluations of the same facts and economic consequences arising from the infringements.

## 14. CONCLUSIONS

Until now unsuitable rules of civil procedure as well as the slowness of trials have had a negative impact on the filing of lawsuits in Italy for the compensation of harm suffered as a consequence of an infringement of competition

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<sup>43</sup> See Impact Assessment Analysis about the Legislative Decree for the implementation of Directive 2014/104/EU, p. 3.

law. As a result, few cases have been started<sup>44</sup>, mainly for abuse of dominance between sizeable companies with an high degree of knowledge of antitrust issues and sufficient resources, very few on a massive level for anticompetitive agreements<sup>45</sup> (only one by means of class action rules).

The Legislative Decree shall provide the courts with more and better procedural tools and clear substantive rules to the purpose to hear and decide antitrust damages actions. In this respect, the related Impact Assessment Analysis of the Italian Government stated that through the Legislative Decree the number of damages actions and the number of compensations is likely to increase considerably<sup>46</sup>.

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<sup>44</sup> Only from 50 to 60 cases appear as pending before the Italian courts from 2014 to 2016 according to the Impact Assessment Analysis about the Legislative Decree for the implementation of Directive 2014/104/EU, p. 3 (mainly before the Milan courts).

<sup>45</sup> With the exception of the huge number of individual cases for immaterial amounts following the decision in year 2000 of AGCM in the case RC Auto – I377.

<sup>46</sup> “*Verosimilmente, il numero delle stesse [cause risarcitorie così dette follow on], supererà quello delle cause risarcitorie stand alone, anche alla luce del rafforzamento del carattere vincolante assunto dall'accertamento definitivo delle violazioni da parte dell'Autorità Garante, a fronte della valenza di prova privilegiata che, secondo la consolidata giurisprudenza della Cassazione, essa assume allo stato. In generale, alla luce degli strumenti di raccordo tra public enforcement e private enforcement e di agevolazione dell'accesso alla prova introdotti dallo schema di decreto a tutela dei diritti del consumatore, è ragionevole attendersi un potenziamento della tutela nell'ambito del private enforcement*” (“*Most likely, the number of follow-on procedures will exceed the stand-alone ones, also taking into account that AGCM decisions finding an infringement will become binding, while at the moment case law considers the same as privileged evidence. Generally the coordination between public and private enforcement and the easier access to evidence provided by the*



Unfortunately, the Legislative Decree was drafted and approved without having been exposed to a stakeholders consultation as many other Member States have done and, as mentioned above, the major part of it appears a mere transposition of the Directive provisions. Thus, there are some points which remain unclear and the Italian courts will be called to fill up such gaps with their own interpretation and case law.

However, the possibility to have a more friendly environment for antitrust damage actions in terms of procedural rules, judges expertise, speed and predictability, combined with the judicial costs, still lower in respect to the other major EU Member States<sup>47</sup>, may play an important role in increasing the number of actions, thus contributing to the effectiveness of the second pillar of the antitrust rules enforcement and to the ultimate benefit of consumers<sup>48</sup>. Furthermore, it can also induce potential claimants in multi-jurisdictional

infringements<sup>49</sup> to choose Italy as a suitable jurisdiction where to bring their actions.

Finally, a successful application of the new rules may also encourage the Italian legislator, in the future necessary reforms to the civil procedure, to adopt the same innovative rules to any litigation for similar matters (damages redress for illegal acts with massive consequences<sup>50</sup>), with great advantage for the modernization of the Italian judicial system and better capacity of attraction of foreign investments. Unfortunately, a decision that was deliberately not taken in drafting the Legislative Decree with the consequence that only the damage actions for antitrust violations shall have the benefit of a better procedural frame.

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*scheme of Legislative Decree will reasonably strengthen private enforcement effectiveness*"), Impact Assessment Analysis about the Legislative Decree for the implementation of Directive 2014/104/EU, p. 3.

<sup>47</sup> While it is not yet sure that Brexit will cause any harm to UK as a suitable jurisdiction given the current absence of clearness about the way such country will regulate the application of EU rules before its courts in the future (for example by adopting a national legislation whereby the EU rules are nonetheless enforceable before UK courts).

<sup>48</sup> It is well known that in the US, where private enforcement of antitrust rules has a much longer tradition, the private actions for damages are by far more numerous than the cases brought by the administrative authorities under the public enforcement procedures.

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<sup>49</sup> Where the infringers could be sued alternatively in various different jurisdictions because of the impact of the infringement from a substantive viewpoint, but also of the presence of a local subsidiary (the so called “*anchor defendant*”) according to the procedural laws or case law of certain Member States. See also Regulation (UE) N. 1215/2012, art. 8.1, for the similar jurisdictional rules within the European Union.

<sup>50</sup> For example, damages arising from the violation of the rules on liability for defective products as well as sectoral regulations governing financial and similar massive products.

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