International
Comparative
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Cartels & Leniency 2021

A practical cross-border insight into cartels & leniency

14th Edition

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis of the cartel prohibition is of an administrative nature. A cartel constitutes an administrative offence and no criminal liability is triggered unless the conduct also falls within the scope of a criminal law provision (please see question 3.2).

1.2 What are the specific substantive provisions for the cartel prohibition?

The relevant provisions are Article 101 of the Treaty on the Functioning of the European Union ("TFEU") and Article 2 of the Italian Competition Law 287/90 ("L. 287/90"). The latter largely reflects the provisions of Article 101(1) TFEU and prohibits agreements between undertakings, concerted practices or decisions by associations of undertakings that have as their object or effect, the prevention, restriction or distortion of competition within the national market, or a substantial part of it, including conduct such as price-fixing, output limitation, market-sharing and discrimination among trading partners. The main difference with the corresponding EU law provision is the absence of the requirement of "effect on trade between Member States", which is the jurisdictional standard for conduct to be subject to EU law rather than domestic Italian law.

A peculiarity of Italian antitrust law is that the Italian Competition Authority ("*Autorità Garante della Concorrenza e del Mercato*", "ICA") cannot apply both national and EU law to the same infringement: when opening a case, they have to choose between applying Article 2 L. 287/90 or Article 101 TFEU to the case.

1.3 Who enforces the cartel prohibition?

The ICA is the authority acting as both an investigative and decision-making body. Unlike certain jurisdictions, competition enforcement powers are not shared with any other authority and the ICA is the only administrative body responsible for competition law enforcement. However, in certain circumstances, the ICA may be required to seek the opinion of specific sector regulators. For instance, pursuant to Article 1, para. 6, lett. c), n. 11 of Law n. 249/1997, if the proceedings before the competition authority involve undertakings active in the communication sector, the former shall seek the opinion of the sector regulator ("AGCOM") within 30 days.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Under Article 6(1) of Decree n. 217/1998 ("Decree 217/98"), which lays down the procedural rules for antitrust proceedings, competition investigations are formally opened by means of a decision of the ICA's Board.

The decision to open proceedings is notified to the undertakings allegedly involved in the infringement and to the complainants who have a direct, immediate and current interest (Article 6(4), Decree 217/98). Frequently, this decision is notified to the undertakings under investigation together with the parallel decision to carry out an inspection. However, the decision to open proceedings must be notified to the parties as soon as the ICA acquires full knowledge of the unlawful conduct. In a recent judgment of January 2020, the Council of State ("*Consiglio di Stato*") upheld the Regional Administrative Court of Lazio's ("TAR Lazio") judgment finding that the ICA breached the rights of the parties by notifying the opening of the decision four years after receiving the complaint and one year after the ICA was in possession of all the elements subsequently used in support of its decision.

Article 7 of Decree 217/98 allows the undertakings under investigation, complainants and third parties admitted to the proceedings, to file written submissions and documents and to have access to the investigation file (with the exception of confidential information) during the course of the proceedings. The undertakings under investigation and the complainants admitted to the proceedings can also request to be heard by the ICA's officials.

Where the ICA's Board considers that it has acquired sufficient evidence, it will authorise the issue of a statement of objections ("*Comunicazione delle risultanze istruttorie*", or "CRI")

(Article 14(1), Decree 217/98). The undertakings under investigation and the complainants admitted to the proceedings can file written submissions in response to the CRI (Article 14(4), Decree 217/98).

If the undertakings under investigation so request, a final hearing takes place before the ICA's Board (Article 14(5–9), Decree 217/98). Complainants and other third parties admitted to the proceedings may be allowed to participate in the final hearing (but do not have a "right" to participate) and may be heard separately in order to safeguard confidentiality, if they so request.

Minutes of the final hearing, including the main statements made by the parties, are drawn up.

After the final hearing, the ICA adopts a final decision.

1.5 Are there any sector-specific offences or exemptions?

According to Article 4(1) L. 287/90 (which closely mirrors Article 101(3) TFEU), agreements or categories of agreements prohibited under Article 2 L. 287/90 can be authorised, for a limited period, if they lead to an improvement of the goods or services on the market, resulting in substantial benefits to consumers. These potential beneficial effects are assessed, taking into account the need to guarantee to the undertakings concerned the necessary level of international competitiveness, as well as a possible increase in production, improvement in the quality of production or distribution, or technical and technological progress. In any case, no exemption will be granted in connection with restrictions that are not strictly necessary to the attainment of these objectives, or that can eliminate competition in respect of a substantial part of the market.

Article 4(3) of L. 287/90 still provides for a system of individual exemptions of agreements or categories of agreements via prior notification to the ICA pursuant to Article 4(1) of L. 287/90. In practice, applications under Article 4(3) (as well as those under Article 13 of L. 287/90 for negative clearance decisions) are usually dismissed by the ICA due to the fact that the notified agreements fall within the scope of Article 101 TFEU, and not within the scope of the corresponding national provision.

As for the rest, the ICA relies on the block exemptions adopted by the European Commission when applying national rules. Therefore, the ICA is unlikely to take action against an agreement that meets the conditions of an EU block exemption regulation.

In addition, under Article 8(2) of Law 287/1990, national competition provisions do not apply to undertakings entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, only insofar as this is indispensable to perform the specific tasks assigned to them.

Finally, according to Article 20 (5-*bis*) of Law 287/90, the ICA may, at the request of the Bank of Italy, authorise an agreement in derogation of the prohibition provided by Article 2, in the interests of the efficiency of the payments system, for a limited period of time and taking due account of the criteria provided by Article 4(1).

During the COVID-19 crisis, following the EC's communication of 8 April 2020, the ICA issued a communication on 22 April 2020, explaining the general criteria for the assessment of cooperation agreements aimed at tackling issues in the shortage, distribution and transportation of essential goods and services in the emergency phase (e.g., pharmaceutical and other health-related products). Although this communication stems from an emergency situation and will not set a precedent, the ICA explained that it will provide indications by comfort letters on the compatibility of certain agreements with Law 287/90.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

To the extent that an anticompetitive conduct taking place outside Italy has effects within the Italian territory or a substantial part of it, such conduct falls within the scope of L. 287/90 or Article 101 TFEU if it affects trade between Member States. As a consequence, such conduct may be investigated and sanctioned by the ICA.

However, cases where companies established in Italy engage in cartel conduct affecting only foreign trade (including where the anticompetitive agreements or practices take place within the domestic territory) are outside the scope of L. 287/90.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A
Carry out an unannounced search of business premises	Yes	N/A
Carry out an unannounced search of residential premises	Yes, but not allowed when such premises are not used for the business activities under investigation.	N/A
■ Right to 'image' computer hard drives using forensic IT tools	Yes	N/A
■ Right to retain original documents	Yes	N/A
■ Right to require an explanation of documents or information supplied	Yes	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes	N/A

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

To complete the preliminary assessment regarding a potential breach of competition law, the ICA relies on the voluntary cooperation of the undertakings involved. It has formal powers to

request information and carry out inspections only after it has notified the party of the formal opening of the proceedings.

2.3 Are there general surveillance powers (e.g. bugging)?

There are none.

2.4 Are there any other significant powers of investigation?

According to Article 14 L. 287/90, the ICA can produce expert reports and economic and statistical analyses and consult experts on any matter relevant to the investigation.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

During the inspection, ICA officials are assisted by the Italian Customs and Excise Police ("*Guardia di Finanza*"), but searches are carried out by the ICA officials. Officials are under no obligation to wait for legal advisors to arrive, though in practice they do so for about 30 minutes.

2.6 Is in-house legal advice protected by the rules of privilege?

Communication with in-house lawyers is not protected by legal professional privilege, unless they are limited to copying the advice received by external lawyers.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Communications between external qualified lawyers and clients are protected by legal professional privilege. During an inspection, companies may be assisted by lawyers to avoid the acquisition of documents which are covered by legal privilege or which are not directly related to the subject matter of the proceedings.

In addition, as with EU law, those under investigation have the right not to reply to questions that would entail admission of the infringement (privilege against self-incrimination).

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Under Article 14(5) L. 287/90, the ICA may fine anyone who refuses or fails to provide the information or exhibit the documents requested by the ICA without justification, of an amount up to EUR 25,821 or up to EUR 51,643, in the event that they submit untruthful information or documents, in addition to any other penalties provided by current legislation.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Pursuant to Article 15 of L. 287/90, if the investigation reveals an infringement the ICA sets a deadline within which the undertakings and entities concerned are to remedy the infringement. It may also impose fines of up to 10% of the worldwide turnover realised by each undertaking during the previous financial year. The criteria for setting fines are set out in the ICA's decision n. 25152/2014 "*Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1 of Law no. 287/1990*" (the "Fines Notice").

If the infringement persists despite the prohibition (and the fine), the ICA can impose a fine of no less than double the penalty already imposed, again with a ceiling of 10% of the turnover. It shall also set a time limit for the payment of the fine. In cases of repeated non-compliance, the ICA may decide to order the undertaking to suspend activities for up to 30 days.

In a recent judgment of April 2020, the Council of State confirmed the annulment by the TAR Lazio of an ICA decision that fined the Italian National Lawyer's Council ("*Consiglio Nazionale Forense*" or "CNF") for failure to comply with a previous infringement decision (*Consiglio di Stato*, 2764/2020 and TAR Lazio 11169/2016). The Council of State clarified that proceedings for failure to comply with infringement decisions essentially constitute proceedings to ascertain the existence of antitrust infringements. In particular, the Council of State considered that the ICA failed to ensure that the two fines imposed on the CNF were proportionate to the nature of the infringements and it therefore held that the ICA had breached the *ne bis in idem* principle. Moreover, the ICA had also breached the CNF's right of defence, insofar as it did not issue a statement of objections for the second infringement and the representatives of the CNF were heard only by ICA's officials and not during a final hearing before the ICA's board.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

There are no sanctions for individuals under Italian competition law. However, individuals who are involved in bid rigging in the context of public procurement procedures may also commit a criminal offence (under Articles 353, 353-*bis* and 354 of the Italian Criminal Code). Criminal liability may also be triggered by speculative conduct aimed at limiting the output or increasing the prices of raw material, food products or first-need products (Article 501-*bis* of the Italian Criminal Code). The sanctions include both fines and imprisonment.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

According to point 31 of the Fines Notice, the ICA may, upon a reasoned request to be submitted before the CRI (please see question 1.4), reduce the fine, in consideration of the effective limited ability to pay of the party concerned. To this end, the applicant must submit documents and evidence capable of proving that the application of the fine according to the Fines Notice would irremediably affect the applicant's profitability and result in its exit from the market.

The TAR Lazio (TAR Lazio, *I, 15 dicembre 2017, n. 12407, 12420, 12418, 12419, I780 – Mercato del calcestruzzo in Veneto*) confirmed that financial hardship can be a mitigating factor in the assessment of the fine in the presence of net losses for the last three financial years.

In a recent judgment of June 2019, the Council of State confirmed that the failure to consider the undertaking's effective

ability to pay may breach the principle of proportionality between the means and the objective of the fine (*Consiglio di Stato*, 4335/2019). The Council of State annulled the decision under appeal, in light of the fact that the ICA had not taken due account of the undertaking's precarious circumstances and in particular of the ongoing liquidation of its assets. It therefore ordered the ICA to re-calculate the fine.

3.4 What are the applicable limitation periods?

The ICA cannot impose fines on conduct that ended five years prior to the adoption of the decision. In case of a continuous infringement, the limitation period starts running from the day on which the anticompetitive conduct ceases.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

This is not applicable in Italy.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Such liability would follow the rules of the Civil Code for actions for damages against members of the administrative board and the auditors (Civil Code, Articles 2392 and 2407).

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

This is an evolving issue. Until 2017, the ICA had opened proceedings or extended their subjective scope to the parent company only in the presence of elements that pointed to a direct involvement of the latter. It must be noted, however, that the appeal court (TAR Lazio, the Regional Administrative Court that has jurisdiction over appeals), when reviewing the ICA decisions, made clear on a number of occasions that "in cases where the parent company holds 100% of the share capital of the subsidiary who is liable for an infringement, it must be presumed that the parent company can exercise decisive influence on the subsidiary and that it has effectively exercised it" (TAR Lazio 125/2013; but also TAR Lazio 8771/2013).

In 2017, the ICA appears to have changed its approach by opening or extending proceedings against the parent company by mere virtue of the fact that it controlled the subsidiary involved in the alleged infringement (see, e.g., decision n. 26688/2017 in case I806 – *Affidamento appalti per attività antincendio boschivo*). In February 2019, the ICA imposed fines totaling EUR 67 million in this case and referred to EU case law (judgment of 12 July 2018 in case T-419/14, *The Goldman Sachs Group, Inc. v European Commission*) in order to justify the application of fines to pure holding companies.

In December 2018, in a car financing cartel case (case I811 – *Vendita auto tramite Finaziamenti)* the ICA imposed for the first-time fines on parent companies based on the exercise of decisive influence over their subsidiaries, which were not wholly (or almost wholly) owned. However, in light of the novelty of such approach, the ICA decided not to impose the payment of the fines by these mother companies jointly and severally with their partially owned subsidiaries.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The ICA has had a system of partial or total immunity from fines for companies reporting their membership to horizontal secret agreements since 2007 (the "Leniency Notice", last amended by ICA decision n. 24506/2013). The Leniency Notice can also apply to vertical aspects of cartels.

According to the Leniency Notice, full immunity from a fine is granted to the first cartel participant who reports by its own initiative the illegal activity to the ICA, by providing information and documentary evidence. Immunity is granted if the following requirements are met: (i) the information or evidence provided must be decisive in discovering a cartel infringement, possibly through an inspection; (ii) the ICA does not already have sufficient information or evidence to prove the cartel; and (iii) the formal conditions for access to the leniency programme are satisfied. These formal conditions are listed under Article 7 of the Leniency Notice and consist, basically, in ending participation in the illegal activities (unless the ICA otherwise requests), cooperating with the ICA in a continuous and complete manner and not informing anyone of the submission of a leniency application.

A reduction of the fine, normally not exceeding 50%, may be granted to cartel participants who submit evidence that significantly strengthens, by its very nature or its level of detail, the evidence already in the possession of the ICA, thereby appreciably contributing to the ICA's ability to prove the alleged infringement. The other conditions attached to leniency pursuant to Article 7 of the Notice must also be met. In order to determine the appropriate level of reduction of the fine, the ICA will take into account the timeliness of the cooperation provided by the undertaking (in relation both to the stage of the proceedings and the level of cooperation provided by other undertakings) and the evidentiary value of the material submitted.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The ICA, upon receiving an adequately reasoned request from a leniency applicant, may set a deadline for the completion of the application, in order to enable the undertaking to acquire all the necessary evidence. To this purpose, when filing the request for a marker, the undertaking shall provide:

- the business name and address of the applicant and of other parties to the cartel;
- a description of the cartel, including its nature, geographic scope, duration and the affected product(s); and
- details of any other leniency applications which the applicant has submitted or intends to submit, in relation to the same cartel, to other competition authorities, within or outside of the EU.

If the application is completed within the deadline set by the ICA, it will be deemed to have been submitted in its entirety on the date when the deadline was set. The evidence submitted by the applicant, together with its request for a marker, may otherwise be assessed for the purposes of a reduction of the fine.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The ICA may, upon receipt of a reasoned request, allow applications

to be submitted orally. In this case, statements by company representatives shall be recorded on suitable media and put into writing by the ICA.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

As against parties to whom a decision to initiate proceedings has been addressed, access to any oral or written disclosure statements of the applicant company's representatives is deferred until communication of the CRI. After that, addressees may gain access to the disclosure statements on condition that none of the information contained therein shall be copied by any means, whether mechanical or electronic, and that such information is used for no purpose other than in the context of legal or administrative proceedings regarding the competition provisions concerned by the administrative proceedings before the ICA.

As against parties to whom a decision to initiate proceedings has been addressed, access to any documents attached to the application or as a complement to the disclosure statements may be deferred until communication of the CRI.

Third parties, including other participants in the proceedings, shall be denied access to disclosure statements and any annexed documents.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The obligation to cooperate fully and on a continuous basis with the ICA does not cease until a final decision is adopted.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

While there is no such policy in place, an undertaking under investigation can obtain a reduction of up to 50% of the basic fine if, during the investigation, it reveals information and submits documents that pertain to a different infringement for which it can benefit from immunity (point 24 of the Fines Notice).

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

There are no provisions applicable to this specific case.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There is no settlement procedure under Italian competition law. However, under Article 14-*ter* L. 287/90, the parties can offer commitments to the ICA. If those are capable of removing the anticompetitive aspects of the conduct under investigation, the ICA may accept the commitments and close the investigation without finding an infringement. Commitments must be submitted to the ICA within three months from the notification of the decision opening the proceedings, although this term is not mandatory and commitments are often accepted after the deadline provided by the law.

Commitments are usually not accepted by the ICA in relation to the most serious types of infringement, such as market allocation or price-fixing.

7 Appeal Process

7.1 What is the appeal process?

Pursuant to Article 33(1) L. 287/90 and Article 135(1)(b) of the Italian Code on administrative proceedings (Legislative Decree n. 104/2010), the TAR Lazio has exclusive jurisdiction over appeals from decisions of the ICA. Decisions subject to appeal may include not only final decisions establishing the existence of an infringement but, in certain cases, also decisions dismissing a complaint or commitment decisions, given that they lay down the ICA's position and bring a change in the legal position of the claimant. By contrast, as confirmed by the Council of State in a judgment of July 2018, any defect of procedural decisions issued by the ICA must be challenged in the appeal against the final decision.

The decision of the ICA can be appealed before such court within 60 days from its notification. The judgment of first instance can be appealed before the Supreme Administrative Court, namely the Council of State, within 30 days from its notification or three months from its publication. Exceptionally, the judgments of the Council of State may be appealed before the Italian Supreme Court ("*Corte di Cassazione*") for jurisdictional and competence issues or for revocation.

In 2017, the average duration of proceedings between the lodging of an action and the adoption of a decision was less than one year before the TAR Lazio and less than one year and three months before the Council of State.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No. However, the party can apply for a suspension until the definitive judgment is issued if payment would cause it irreparable damage. In the recent appeal proceedings against the ICA's decision in case I811 – *Vendita auto tramite Finaziamenti*, the TAR Lazio suspended the payment of the fines for a total of EUR 678 million.

Also, should the administrative court annul the finding of an infringement, and consequently the fine, the company will of course be entitled to claim its money back. The application is to be made to the Ministry of Economic Development, which is in charge of actually returning the money, and to the ICA, for mere approval of the request.

7.3 Does the appeal process allow for the cross-examination of witnesses?

No, the appeal process does not allow for cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Italy has implemented Directive 2014/104/EU concerning actions for damages for infringements of competition law by means of Legislative Decree n. 3/2017. Damages claims may be brought by any natural or legal person who has suffered a loss following an infringement of national competition law or of Articles 101 and 102 TFEU. Save for the adaptations required under Legislative Decree n. 3/2017, actions would follow the standard procedure in civil courts.

The competent courts with exclusive jurisdiction in Italy over the actions for antitrust damages will be the specialised business divisions ("*Tribunale delle imprese*") of the Courts of Milan, Rome and Naples.

Though delivered in the context of an alleged abuse of a dominant position, a judgment of the Supreme Court (*Corte di Cassazione*, judgment n. 11564/2015) plays an important role in reducing the burden of proof on claimants bringing stand-alone actions, even before the implementation of Directive 2014/104/EU. The Supreme Court held that national courts must order full disclosure by the defendant in case of evidence incompletely submitted by a plaintiff where there is a "plausible" indication of an antitrust infringement.

8.2 Do your procedural rules allow for class-action or representative claims?

On 18 April 2019, the Italian parliament approved Law 31 of 12 April 2019 "*Provisions on class actions*", which came into force on 19 April 2020. The newly introduced rules do not apply retroactively to ongoing proceedings or to unlawful conduct which occurred before the law came into force. Therefore, the provisions of Article 140-*bis* of the Consumer Code will continue to apply to proceedings pending when the law comes into force.

The new Law significantly widens the scope of application for class actions, making it easier for claimants to fulfil the admissibility requirements. It also provides specific incentives for claimants to bring class actions by adding burdens on respondents and encouraging settlement agreements.

Class actions will no longer be limited to consumer protection matters, and collective redress may be sought through simplified proceedings. Actions may be brought by each class member or by non-profit organisations or associations, registered on a public list at the Ministry of Justice, whose purpose is to protect infringed rights.

The new Law sets forth a new *ad hoc* opt-in procedure. Eligible class members will have a longer time frame to opt in and may do so either after the court's decision on the admissibility of the action or even after the court's decision on the merits. At the same time, respondents are now entitled to specifically object to the merits of each opt-in application.

The specialised business divisions of the court where a given defendant has its registered offices will be exclusively competent for the new class actions.

8.3 What are the applicable limitation periods?

Legislative Decree n. 3/2017 provides for a five-year limitation period, which does not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know, of the behaviour and the fact that it constitutes an infringement of the competition law, that the infringement caused it harm and the identity of the infringer. As confirmed by the Supreme Court in its judgment of February 2020, the new rules on limitation periods only apply as of the entry into force of Decree 3/2017, given that they must be qualified as substantive as opposed to procedural rules and therefore do not apply retroactively (*Corte di Cassazione*, Sez.Civ. I, n. 5381/2020). Additional special rules on the beginning of the limitation period apply to damages actions brought against small or medium-size enterprises ("SME") or against undertakings or persons who have been granted immunity from fines by a competition authority under a leniency programme.

The five-year limitation period is suspended when a competition authority opens an investigation or proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end one year after the infringement decision has become final or after the proceedings are otherwise terminated.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The provisions of Directive 2014/104 on passing on are implemented by Title IV of Legislative Decree n. 3/2017.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The winning party may fully recover the expenses and costs from the losing party. However, the court may also decide on an equitable judgment on this point, which usually means that each party would bear its own costs.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The number of damages claims brought in Italian civil courts is low. Between 1990 and 2016, there have been 128 judgments adjudicating on the merits on such claims, of which 44 have been from follow-on claims and 84 from stand-alone actions.

On 10 May 2019, the Milan Court rejected claimants' attempts to use a swift settlement-like procedure set out in the Italian Code of Civil Procedure (Article 696-*bis*) in a follow-on case to the European Commission decision imposing fines on a truck cartel (*TORCHIANI/TECNOFOODPACK/IVECO*). This relatively new procedural tool is designed to aid an upfront assessment of the harm with a view to agreeing a settlement between the parties and thereby avoiding lengthier litigation. However, the Court rejected its application to cartel damages claims on the grounds that it is insufficient to assess the complexity of the liability and harm of follow-on claims from cartels. This judgment cannot be appealed and this means that follow-on actions can be pursued under the ordinary litigation route in Italy.

There have not been any class actions in 2019 as of yet but it is expected that the number of class actions will increase, with the enactment of the Law 31 of 12 April 2019 "*Provisions on class actions*", as claimants will benefit from updated redress proceedings.

In February 2020, the Court of Rome issued a non-final judgment in an action for damages in follow-on litigation for an

alleged abuse of dominance in the provision of wholesale access services, which had been found and fined by the ICA in 2013. Pursuant to Article 14 of Legislative Decree n. 3/2017, the Court asked the ICA to provide its guidance on the appropriate benchmarks to estimate the alleged antitrust damages.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

In September 2018, the ICA adopted a set of Guidelines on Compliance Programmes, setting out the criteria that will govern the granting of reduced penalties to companies that introduce an antitrust compliance programme or that have one in place at the time antitrust proceedings commence. The Guidelines set out a stringent process for assessing compliance programmes with a view to reducing fines, as follows:

- up to 5% where companies introduce substantial changes to manifestly inadequate compliance programmes after ICA proceedings have commenced and within six months from the opening of proceedings;
- up to 10% where compliance programmes adopted before the opening of ICA proceedings did not function in a completely effective way but the undertaking adequately amended the compliance programme within six months of the opening of proceedings; and
- up to 15% in cases where the compliance programme has prompted the reporting and termination of an antitrust infringement before the opening of proceedings.

The Guidelines also provide guidance on the adoption of compliance programmes in the context of a corporate group and on the nature of compliance programmes that may constitute a basis for reduced fines. In particular, in case of antitrust proceedings involving a parent company, both the programmes adopted and implemented by the parent company and the subsidiary parties to the proceedings will be considered. In any case, the adoption of a compliance programme by the parent company will not be considered sufficient to exclude the liability of the parent company for the anticompetitive conduct of its subsidiary.

For example, in December 2018 the ICA applied a 10% reduction of the fine in a car financing cartel case to companies, which had in place compliance programmes and had introduced substantial and adequate amendments to them after the opening of proceedings (case I811 – *Vendita auto tramite finanziamenti*). In January 2020, the ICA granted a 5% reduction to three out of four parties to the proceedings in a cartel case between telecom operators (case I820 – *Fatturazione mensile con rimodulazione tariffaria*) in order to reward them for the introduction of amendments to their antitrust compliance programmes, following the opening of the investigation.

On 22 April 2020, the ICA issued a Notice providing guidelines on the assessment of cooperation agreements in the context of the COVID-19 emergency. The Notice focuses on temporary cooperation agreements aimed at favouring the production and fair distribution of essential services and goods that may be subject to shortages due to a sudden rise in their demand, in particular in the pharmaceutical, agri-food and health sector. In light of the exceptional nature of the situation, indications by the ICA in this context will not set a precedent and will be provided informally or, at the Authority's discretion, through *comfort letters* relating to the compatibility of each specific cooperation project with Law n. 287/90.

In May 2020, the ICA applied the Notice for the first time and examined a cooperation project between the *Associazione Distributori del Farmaco* and *Federfarma* (two Italian pharmaceutical trade associations) for the distribution of single-use surgical masks through pharmacies and parapharmacies. The ICA consulted the European Commission in the framework of the ECN and, due to the exceptional health emergency situation and the limited duration of the cooperation agreement, it decided that there was no evidence at this stage to justify further investigation. Concomitantly, the ICA also approved a moratorium scheme for consumer credit drawn by *Assofin* (Italian association of mortgage and consumer credit).

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

An interesting judgment of the Grand Chamber of the Supreme Civil Court (*Corte di Cassazione*, judgment n. 16601/2017) addresses in an innovative manner the issue of compatibility of punitive damages with the general principles of Italian law. The dispute did not revolve around competition law, but on the recognition of a US judgment on liability for defective products, which envisaged punitive damages. In principle, this judgment could not be recognised under Italian law as punitive damages have traditionally and consistently been considered contrary to public policy. On this occasion, however, the Court stated that compensation may nowadays not only aim to restore a loss, but may perform different functions, including "punitive reparation": this is no longer incompatible with the Italian legal system.

Whilst punitive damages are in theory acceptable in the Italian legal system, they are not an engrained concept and they cannot be imposed in the absence of a specific legislative provision. It is up to the legislator, therefore, to decide in which cases it is possible to envisage punitive compensation.

In the specific case at issue, the Court admitted that it is theoretically possible to recognise a foreign judgment envisaging punitive damages, provided that the Italian judge is able to ascertain that such liability was imposed on the basis of a clear rule in the legal system of the foreign state.

The judgment is relevant in two respects: first, because it opens the doors to the recognition of foreign judgments imposing punitive damages; and second, because it states clearly that punitive damages are no longer contrary to the general principles of Italian law. Considering that the Italian Government is planning to amend the recently adopted legislation on damages claims for antitrust infringements, it may draw inspiration from this judgment to introduce a new incentive to such actions.

On 1 July 2019, the European Commission adopted with immediate effect the "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" (the "Passing-on Guidelines"). The Passing-on Guidelines intend to provide national courts, judges and other stakeholders in damages actions for infringements of Articles 101 and 102 TFEU with practical and non-binding guidance. In particular, they outline how to calculate the extent to which overcharges resulting from anticompetitive practices have been passed down the supply chain of the purchasers of the goods or services subject to the anticompetitive practice. On 20 July 2020, the European Commission adopted a communication on the protection of confidential information by national courts in proceedings for private enforcement. The Communication follows a public consultation which the Commission carried out in 2019, which confirmed the need for additional guidance on disclosure of evidence in damages claims proceedings. The Communication provides a series of measures and guidance

on effective protective measures that national courts may use to protect confidential information in these proceedings, while considering the specific circumstances of the case.

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