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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Italy --

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

Please contact Ms. Naoko Teranishi if you have any questions regarding this document [phone number: +33 1 45 24 83 52 -- E-mail address: naoko.teranishi@oecd.org].

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-- Italy --

1. Introduction

1. The roundtable on the relationship between public and private enforcement is particularly timely for the Italian Competition Authority that, similarly to other European NCAs, is currently involved in the process of transposition into the national system of the Directive 2014/104/EU governing actions for damages from the violation of competition law provisions (the “Damages directive”).

2. The Authority sees public and private enforcement as largely complementary. In this respect the implementation of the new rules on damages action should promote a greater recourse to private enforcement, that has so far been less prominent than public enforcement, thus strengthening the effectiveness of competition law enforcement.

3. The Italian Competition Authority has been extensively involved in the process that led to the approval of the Directive and is now taking part in the transposition process, offering technical support in order to ensure that the transposition, in the spirit of the Directive, preserves the complementarity between public and private enforcement. In the last few months discussions have been taking place among the institutions directly involved in the drafting of the national norms that will transpose the Directive in the Italian legal framework. In particular the discussions focused on the criteria that should inform the transposition, the legal instruments that should be used and the main issues where coordination among the Directive provisions and the national legislation is needed.

4. The contribution will give a brief picture of the current situation with respect to private enforcement in Italy, mindful of the fact that the system is undergoing some relevant changes once the norms of the Directive are transposed in the national law. It will then give an overview of the state of the art in the process of the transposition. Finally it will list the key issues where the changes introduced with the Directive might mainly affect the activity of the Competition Authority.

2. Overview of private enforcement in Italy

5. In recent years, private enforcement of competition rules has been steadily developing in Italy, with more than fifty cases currently pending before the civil courts in Milan and Rome.

6. Since 2012, all antitrust cases are heard by specialised sections in the first instance courts (Tribunali delle Imprese). Overcoming the previous fragmentation of competences, such choice facilitated the emergence of common interpretative trends and a significant increase in the overall quality of delivered judgements. Further concentration of antitrust cases in a limited number of such specialised sections is currently being considered in the context of the transposition of the EU Directive on antitrust damages actions.

7. The legal framework for private enforcement in Italy relies on the interaction between EU and national legislation.

8. Articles 101 and 102 TFEU produce direct effect in relations between individuals and create rights and obligations which the national courts must safeguard. The European Courts jurisprudence has clarified on several occasions the extent of the right for private litigants to claim damages for harm suffered through a breach of the competition rules¹. More recently, the ECJ reaffirmed the crucial role of national courts in balancing the rights of individuals wishing to access leniency materials in the agency’s

¹ See among others “Courage and Crehan”, case C-453/99 and “Manfredi”, case C-295/04.

file to seek redress for antitrust damages on the one hand, and the integrity of public enforcement on the other.²

9. In addition, Regulation n. 1/2003 provides further clarifications on the interplay between public and private enforcement of Articles 101 and 102 TFEU as well as provisions on cooperation between the Commission and national courts aimed at facilitating the uniform application of EU Competition Law.

10. As for national legislation, according to the Italian Competition Law (Law no. 287 of October 10th, 1990, hereinafter the “Competition Act” or “CA”), the participation in a cartel and the abuse of a dominant position in the market constitute administrative offences. The public enforcement of these rules is entrusted to the Italian Competition Authority. Moreover, these provisions are directly enforceable in national courts in the context of private actions.

11. Italian law provides no ad hoc rules in respect of antitrust damages. In this respect antitrust law differs, for instance, from two other important fields of Italian business law, providing special rules on damages (and on methods of assessing their quantification), i.e.: unfair competition law and intellectual property law (³). Indeed, art. 33 paragraph 2 of the CA recalls the general remedies as specified in art. 2043 ff. of the Italian civil code (“any malicious or negligent act that causes unfair damages to others obliges the one who committed the fact to compensate the damage”), as well as the action of nullity which could be brought in order to quash a restrictive agreement .

12. Private actions for antitrust damages can be started: a) subsequent to a Competition Authority’s decision (follow-on actions), or b) in absence of any public enforcement procedure (stand-alone actions). In general terms, stand-alone actions are much more uncertain in terms of probability of success as the plaintiff is required to offer evidence of the anticompetitive conduct. The burden of proof is lower, in practice, when the private actions follow a decision of the Competition Authority, since Italian Courts in most cases tend to align with the decisions issued of the Competition Authority, although currently they are not bound by administrative decisions (⁴). Indeed, according to the Italian Supreme Court, the competition agency’s decisions enjoy a privileged evidentiary status, which the plaintiff can rely on to support its claim (Corte di Cassazione, judgements n. 3640 of 13 February 2009; n. 5941 of 14 March 2011; n. 5327 of 4 March 2013).

13. Generally speaking, the Italian legal system acknowledges a form of compensation for equivalent (“*risarcimento per equivalente*”). It recognises to the plaintiff the possibility to be fully restored for the damages suffered as if the anticompetitive conduct restraining free competition had never been performed. Thus, once the court has ascertained the existence of a right to compensation, the claimant is entitled to be

² See “Pfleiderer”, case C-360/09 and “Donau Chemie”, case C-536/11.

³ With reference to unfair competition, according to Art. 2600 of the Civil Code, if the anticompetitive conduct are held in fault or intentionally, the author must restore damages deriving from said conduct. Moreover, once the conduct is qualified as unfair, the fault is presumed. With reference to intellectual property law, Art 125 of legislative Decree n. 30 of February 10th 2005 (Intellectual Property Act) introduced a special rule for the quantification of damages: besides the general criteria of quantification provided for by art. 1223, 1226 and 1227 of the Civil Code, it is possible to take into account the profit of the violator.

⁴ Moreover, according to the Italian Supreme Court (Corte di Cassazione, ruling n. 2305 of February 2nd 2007, *Fondiarria SAI SpA v. Nigriello*), whilst it is sufficient to allege the assessment of the competition infringement by the Competition Authority in order to prove the existence of an illicit conduct, in any case private actions for damages before the civil courts do not depend upon the assessment of the competition infringement by the Competition Authority since such an allegation is not required by the law for the plaintiff.

fully restored both for the actual damages (“*damnum emergens*”) and the loss of profits (“*lucrum cessans*”).

14. As the Italian Supreme Court has stated on several occasions, since “antitrust law is not only the law of entrepreneurs but also the law of market players as well as anybody which holds an interest to preserve” competition in the market place (see among others the “Unipol” case, n. 2207/05) the standing to file an action for damages shall be recognised to “all those that can give evidence of a specific prejudice stemming from” a competition restraint. Accordingly, also the consumers who claim to have been damaged by an anticompetitive conduct of an undertaking may bring a civil action to seek compensation for those damages. Individuals can also seek a declaration of nullity of an agreement restricting competition.

3. The transposition of the European Directive into the national system

15. Since last January, representatives of the Italian Competition Authority took part in meetings with other institutions involved in the works for the transposition of the Directive (namely the Department for European Policies, the Ministry of Justice and the Ministry of Economic Development) in order to foster a successful transposition of the Damages Directive, through a comprehensive approach and by the deadline established in the Directive, i.e. 27 December 2016.

16. The participation of the ICA in the transposition process is aimed at sharing with the other institutions involved (in particular the Ministry of Justice) its technical expertise on competition law proceedings in view of a transposition of the norms of the Directive that ensures a balanced relationship between public and private enforcement. In this respect the ICA supported the decision to transpose the Directive into the national legislation through a specific section on private enforcement to be inserted in the Competition Act.

17. The discussion also touched upon the criteria that should be followed by the legislator in the transposition. These were stated in the “European Delegation Bill” which includes a legislative delegation for the implementation of the Directive. The Senate has approved the Bill on May 14th, thus mandating the Government to implement the Directive by following certain principles and criteria which can be resumed as follows:

“a) amend article 1 of the Competition Act 1990 in order to allow the parallel application of articles 101 and 102 TFEU and corresponding provisions in national competition law;

b) ensure that the implementing provisions apply to actions for damages arising from violations of Articles 101 and 102 TFEU, national competition law, as well as actions for damages arising from violations of both national competition law and Articles 101 and 102 TFEU;

c) ensure that the implementing provisions apply also to collective actions for damages under Article 140-bis of the Consumer Code, arising from violations of competition rules;

d) review the competence of specialised sections within civil courts, concentrating all disputes arising from violations of competition rules before a limited number of courts, taking into account their catchment areas and their even distribution on the national territory.”

18. The Bill is currently being scrutinised by the House of Representatives. Should the House approve the bill, the Government will have six months to adopt the legislative decree amending the Competition Act 1990 following the Parliament’s guidelines.

4. Key issues in the interaction between public and private enforcement

19. Among the many novelties that the Directive will introduce in the national system we would like to focus on two issues that require particular coordination efforts between national judges and the ICA.

20. The first one is evidence disclosure (section 5,6 and 7 of the Directive) in particular with respect to access to the files of competition authorities.

21. The possibility to access the evidence collected in the course of the proceedings of competition authority is crucial to ensure the effectiveness of damages actions in view of the difficulties involved in the collection and analysis of the evidence, particularly in cartel cases. On the other hand there is the need to safeguard the effectiveness of public enforcement and in particular leniency programs.

22. The Directive innovates the current legal framework. In particular, as for the disclosure of evidence, the Italian legal system does not provide for a pre-trial discovery whereas the new provisions will introduce a model of discovery which will apply under court's supervision.

23. The Directive requires an assessment of the proportionality of the disclosure request. When carrying out such assessment, the court shall consider the legitimate interests of all parties concerned, thus balancing competing interests. In addition, national courts shall assess the reasonability of the request to disclose evidences in terms of logical links, scope and costs –especially in order to prevent fishing expeditions- as well as protection of confidentiality (a balancing test which mirrors the Pfleiderer judgment's rationale).

24. Specific provisions refer to the disclosure of evidence included in the Competition Authority's file. Indeed, when assessing disclosure requests concerning information and documents in the file of the competition agency, national courts are explicitly required to consider the need to safeguard the effectiveness of public enforcement. Accordingly, national courts may only request the disclosure of such evidence, if no other party is reasonably able to provide that evidence. The competition agency, acting by its own initiative, may express its views as to the proportionality of any disclosure request, by submitting observations to the judge before whom disclosure is being sought. Of course, smoother and reliable mechanisms of information exchange need to be in place, in order to allow the agency to intervene timely before the courts (as for any such *amicus curiae* interventions).

25. Some information in the agency's file is granted special protection. Information in the grey list – such as the statement of objections and the replies to information requests issued by the agency - may be disclosed only after the Competition Authority has closed its proceedings. Leniency statements and settlement submissions shall not in any case be disclosed (*black-list*). The disclosure of evidence in the file of a competition authority that does not fall into any of the previous categories may be ordered in actions for damages at any time.

26. The special rules on disclosure stated in the Directive ensure, in the ICA's view, the right balance between competing objectives by providing different rules according to categories of documents and identifying documents that can never be disclosed (*black-list*). Limitations on the use of evidence obtained through access to the agency's file also reflect the legislator's choice to evenly attune the interests of those seeking compensation and the protection of the enforcement tools of competition authorities.

27. The ICA acknowledges that judges play a crucial role in the assessment of the necessity and proportionality of evidence disclosure and in this respect the transposition of the Directive in the national legislation should not raise particular issues.

28. In the past some interpretation issues had raised with respect to disclosure of confidential documents and information. The Authority has recently overcome its initial reluctance to disclose business secrets, and currently provides requesting courts with all documents⁵ included in the file specifying that some of the documents are subject to special confidentiality rules and ensuring that they are kept confidential when transferred in the civil proceedings file.

29. The transposition of the rules of the Directive into the national legislation will not, therefore, be particularly problematic, although some technical issues will need to be addressed (for example, so far the documents in the file have been transferred to the judge only after the conclusion of the Authority's investigation. Access to documents "at any time" envisaged in the Directive for the white list, might require some coordination in view of the procedural rules of antitrust proceedings).

30. The other issue that the ICA is considering with attention in the transposition of the Directive is the assistance that it can provide to the courts in the quantification of damages (Article 17.3 of the Directive). In the Authority's view both the request of assistance from the judge and the decision of the Authority on the appropriateness of the request should remain discretionary.

31. Some problems may indeed arise with respect to stand alone actions where the involvement of the Authority in cases that have not been assessed might be very resource intensive.

32. Fruitful assistance to national courts may also take the form of reasoned explanations concerning the documents in the antitrust investigation file (which is often rather large and technical).

33. Finally, the Authority considers that an harmonious development of private antitrust enforcement could be facilitated by providing national courts with dedicated training programmes on specific aspects of competition law and policy. The agency has recently concluded a training programme on "Enforcement of EU competition rules in national courts", which was jointly organised with the Supreme Administrative Court, the Italian Judicial Academy and the French Autorité de la Concurrence. The programme worked as a forum for judges to exchange and compare professional experiences, and created a valuable channel for dialogue with the competition agency. A new training project will be launched in October.

⁵ Leniency statements – that were not involved in the court requests received by the Authority – would of course be excluded.