Antitrust damages directive implemented in Italy – Italy on the map for damages actions

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In January 2017 the Italian Government adopted a legislative decree (hereinafter the "Decree")1 which implements the EU's antitrust damages directive (Directive 2014/104/EU, hereinafter, the "Directive"). The Decree will entry into force on February 3, 2017.

Damages actions in Italy will increase and be heard before the courts in Milan, Rome and Naples, at chambers specialised in business litigation. Companies involved in antitrust cases should be aware that Italy is now on the map for damages claims in Europe, in addition to the usual suspects such as the United Kingdom, Germany and The Netherlands.

The Directive

The Directive was signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014. All 28 EU Member States were obliged to transpose the Directive into national law by 27 December 2016.

The primary aim of the Directive is to remove the legal uncertainty and the geographic disparities in the enforcement of the right to compensation across the European Union. In order to do so, the Directive introduces a common regulation for claims for damages that are caused by infringements of competition law.2

The pivotal rules brought about by the Directive can be summarized as follows:

a. Under the Directive Member States are required to ensure that anyone who is a victim of infringement of antitrust rules is able to receive full compensation for actual loss and for loss of profit (Article 3 of the Directive).

b. Upon request of the claimant who has presented a reasoned justification for the disclosure, national courts can order the disclosure of evidence relevant to a claimant’s claim for compensation from the defendant. The claimant has to present a reasoned justification for the disclosure. Counter-limitations shall also be put in place in order to comply with the principle of proportionality and in order to safeguard the confidentiality of some information such as statements or document submitted within a leniency or cooperation program or in a cartel settlement proceeding (Article 5 of the Directive).

c. The finding of an infringement by a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before courts of the same Member States in which the infringement occurred and should not be re-litigated. Where the action for damages takes place in the same Member State as where the authority or the court made the finding, the finding will therefore constitute full proof of the infringement. Instead where the claim is brought in a different Member State, the finding of infringement will be deemed to be at

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1 Legislative decree No. 3/2017, published on January 19, 2017 in the Italian Republic Official Journal, General Section No. 15. The Decree was approved by the Government on January 14, 2017 without any amendments to the draft proposal submitted to the Council of Ministers on 27 October 2016.
2 As reported in Recital No 9 of the Directive, "It is necessary, bearing in mind that large-scale infringements of competition law often have a cross-border element, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights that they derive from the internal market. It is appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law. An approximation of those rules will help to prevent the increase of differences between the Member States' rules governing actions for damages in competition cases".
least as prima facie evidence of an infringement and as appropriate, may be assessed along with any other evidence adduced by the parties (Article 9 of the Directive).

d. If an infringement has caused price increases and the overcharge was passed on to the claimant, also those who are at the end of the distribution chain will be entitled to claim compensation. In principle, indirect purchasers have a right to claim compensation of damages from the infringer, but the burden of proving the existence and the scope of such passing-on will rest with the claimant (Article 14 of the Directive).

e. The Directive establishes a rebuttable presumption that cartels cause harm, thus lessening the evidentiary burden on claimants. Member States are however required to ensure that infringers have the right to rebut this presumption. In the quantification of harm, procedural rules should be applied which do not render the right to damages practically impossible or excessively difficult. National courts are empowered to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to quantify the harm on the basis on the evidence available (Article 17 of the Directive).

The implementation of the Directive in Italy

The Decree, as outlined under Article 1 (“Scope and subject matter”), sets out the rules aimed at ensuring that anyone who has suffered harm caused by an infringement of competition law by a company can effectively exercise the right to claim full compensation for that harm. Moreover, Article 1, in compliance with Article 2 of the Law of 9 July 2015, no. 114 (Delegation to the Government for the transposition of European directives and the implementation of other acts of the European Union – European Enabling Act),\(^3\) prescribes that also class actions resulting from the infringement of competition law, as regulated under Article 140-bis of the Italian Consumer Code, fall under the provisions of the Decree.

Article 2 of the Decree reproduces the definitions set out under Article 2 of the Directive. Some definitions however have not been transposed because they refer to concepts already clearly defined under the Italian legal framework (e.g., the definition of “infringement of competition law”, “action for damages” and of “claim for damages”){\(^4\)}\(^{\text{4}}\) It should also be noted how several definitions have been adapted to the peculiarities of the Italian legislative framework (e.g., the definition of “competition authority”, of “consensual dispute resolution”, and of “agreement that settles the dispute”).

Articles 3 (“Right to full compensation”) and 4 (“Principles of effectiveness and equivalence”) of the Directive are not transposed in the Decree since they lay out principles which are already deeply entrenched in the Italian constitutional framework.\(^5\)

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\(^3\) Law 9 July 2015, No. 114 (Delegation to the Government for the transposition of European directives and the implementation of other acts of the European Union – European Enabling Act 2014) available at: https://goo.gl/WjiXxO.

\(^4\) Some definitions, such as that of “Competition Law” have required more complex adjustments to fit into the Italian legal framework. This definition has to be drafted also in implementation of the delegation principle expressed in Article 2, § 1, letter b) of Law No. 114/2015, which authorizes the extension of the application of the provisions adopted pursuant to Directive 2014/104/EU to claims for damages arising from violations under Articles 2 and 3 of Law 10 October 1990, no. 287, as well as to claims for damages arising from violations under those Articles 2 and 3 applied in parallel with Articles 101 and 102 of the Treaty on European Union. See the Explanatory Report available at the following link: https://goo.gl/J5y9Q.

\(^5\) Legislative decree which implements Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the
Articles 3 ("Order of disclosure"), which aims to ensure equality of arms of claimant and defendant in the right to a fair trial before the competent judge), 4 ("Exhibition of evidence included in the file of a competition authority"), which aims to strike a fair balance between the private interest in having access to useful information and the public interest in granting an effective application of competition rules by the competition authority), 5 ("Limits on the use of evidence obtained solely through access to the file of a competition authority") and 6 ("Penalties") of the Decree which implement respectively Articles 5 ("Disclosure of evidence"), 6 ("Disclosure of evidence included in the file of a competition authority"), 7 ("Limits on the use of evidence obtained solely through access to the file of a competition authority") and 8 ("Penalties") of the Directive reflect the general intent of the Directive of granting a more effective exercise of the right to claim full compensation for the harm suffered from the infringement of competition rules.

Article 7 of the Decree transposes into the Italian legal system one of the key changes introduced by the Directive, namely the one concerning the effects of national decisions in private enforcement cases. This provision reflects the general aim of the Directive to optimize the interaction between public and private enforcement as a means to ensure maximum effectiveness of the competition rules. In particular, Article 7 of the Decree implements the principle established under Article 9 of the Directive in affirming that, for the purposes of an action for damages, an infringement of competition law found by a final decision of the Italian Competition Authority or by an Italian review court is deemed to be irrefutably established. Moreover, Article 7 of the Decree, explicitly transposes also the principle laid out under recital 34 of the Directive in providing that the effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction but not as regards the causal link and the existence of damage.

Consistently with the Directive, Article 7 of the Decree provides also that where a final decision finding the infringement of competition law is taken either by a competition authority or by a review judge of another Member State, the final decision can be adduced as evidence of the nature of the violation and of its material, personal, temporal and territorial scope which may be assessed along with any other evidence adduced by the parties. The probative value of decisions issued in another Member State is therefore lower than the value accorded to decisions of national authorities. Overall, by means of this Article, a principle already established under the Italian case-law is eventually established also at the normative level.

Also Articles 8 ("Limitation periods"), 9 ("Joint Liability"), which transposes the favour accorded under Article 11 of the Directive to small and medium-sized enterprises while omitting to reproduce the principle expressed at

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8 This is consistent with the principle established under recital 35 of the Directive: "where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the national competition authority or the review court to a national court as at least prima facie evidence of the fact that an infringement of competition law has occurred. The finding can be assessed as appropriate, along with any other evidence adduced by the parties".

9 Among others, Court of Cassation decision nos. 3640 of 2009, 3942 of 2011, 6047 of 2011, 9116 of 2014, 11904 of 2014 in which the Italian Supreme Court, in order to ensure the effective exercise of the right to compensation for damages suffered by victims of antitrust offenses and given the difficulties of allegation and evidentiary especially for stand-alone actions, affirmed the principle that infringement decisions of the ICA constitute "privileged evidence" in follow on compensation claims.

10 For further details about the compatibility of Article 7, § 1, of the Decree, see the Explanatory Report supra footnote 4, p. 11.
paragraph 1 of the same Article as it is already deeply entrenched in the Italian legislative framework),

10 (“The right to full compensation and passing-on of overcharges”, which ensures that compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and which establishes procedural rules aimed at avoiding overcompensation), 11 (“Passing-on defence”), 12 (“Indirect purchasers”) and 13 (“Plurality of actions”) of the Decree seem to accurately transpose the principles established in Articles 10 to 15 of the Directive.

The same can be said with respect to Articles 14 (“Assessment of the harm”, which, in order to lessen the burden of proof of the claimant, establishes a rebuttable presumption that cartel infringements cause harm), 15 (“Effects of consensual dispute resolution”) and 16 (“Effects of consensual settlements on subsequent actions for damages”) of the Decree which transpose Articles 17, 18 and 19 of the Directive.

Article 17 of the Decree prescribes changes to Italian Competition Act (Law 287/1990) in application of Article 2, para. 1, let. a) of the Italian European Enabling Act. Article 1, paragraph 2 of Law no. 287 of 1990 is therefore rewritten, in order to provide that the Italian Competition Authority applies, even in parallel and in relation to the same case, Articles 101 and 102 of the Treaty on European Union and Articles 2 and 3 of the Italian Competition Act. The parts of the above-mentioned Article 1 that are incompatible with the new wording of paragraph 2 will therefore be suppressed.

Article 18 of the Decree, in application of Article 2, para.1, let. c) of the Italian European Enabling Act, provides that the damages proceedings in Italy will be heard at courts in Milan, Rome and Naples, at chambers specialised in business litigation. The decision to concentrate private enforcement cases within a limited number of chambers is mainly justified by the need to favour the specialization of the judges dealing with these specific proceedings.


It should also be noted that Articles 16 (“Guidelines for national courts”), 20 (“Review”), 21 (“Transposition”), 23 (“Entry into force”) and 24 (“Addressees”) of the Directive do not need to be transposed. No similar provisions can therefore be found in the Decree.

Conclusions

Overall, the Decree seems to be compliant with the Directive in laying out provisions which govern the right to claim full compensation for the harm suffered from the infringement of competition rules. Indeed, all the pivotal rules brought about by the Directive have been accurately transposed within the Italian legal framework. It certainly remains to be seen (i) how these rules will be applied by the Italian Courts and, (ii) to what extent the implementation of the European legislation at the national level will boost antitrust private litigation in Italy as elsewhere in the European Union.

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11 Article 11, paragraph 1 of the Directive provides that “Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.”
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