THE ITALIAN SUPREME COURT OF CASSATION EASES THE EVIDENTIAL BURDEN ON PRIVATE CLAIMANTS TO BRING ACTIONS FOR ANTITRUST DAMAGES IN ITALY

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Antirust, Competition & Trade Regulation Alert

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The Italian Supreme Court of Cassation (the "**Court**") has recently issued a landmark judgment that significantly reduces the burden of proof on claimants to bring stand-alone actions for antitrust damages, i.e., independent antitrust claims that are brought in the absence of an antitrust authority's decision.
The Court held that national courts must order full disclosure by the defendant in case of evidence incompletely submitted by a claimant where there is a "*plausible*" indication of an antitrust infringement.

This judgment is expected to substantially increase the chances of success of stand-alone actions brought against companies for alleged antitrust infringements, thereby considerably increasing the number of those claims.

BACKGROUND

The Court's ruling is largely based on the EU antitrust damages directive (Directive n. 104/2014) (the "**Directive**"), which must be transposed into the national system of all EU Member States by 27 December 2016. The Directive aims to promote the recourse to private enforcement of antitrust rules. In particular, it seeks to establish easier access to evidence for the parties in antitrust damages actions.

Under Italian law, private antitrust litigation is primarily governed by civil law rules and falls under the jurisdiction of companies courts, which are specialized sections of tribunals and appellate courts that generally sit in the capitals of the Italian regions.

In Italy, damages actions for antitrust infringements can be started either following the Italian Antitrust Authority's decision ("**IAA**") (i.e., follow-on actions) or in the absence of any decision (i.e., stand-alone actions). The advantage for follow-on actions is that claimants can rely on the evidence collected by the IAA during the proceedings to sustain their claims. By contrast, in stand-alone actions the claimant must discharge the evidential burden without being able to rely on the findings of the IAA. This explains why stand-alone actions are rare; they are both more difficult to bring and more uncertain in terms of probability of success.

THE IMPACT OF THE JUDGMENT

The Court's judgment substantially eases the burden of proof on the claimant in stand-alone actions. The claimant now only needs to demonstrate that there is a "*plausible*" indication that a company has infringed

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antitrust rules. According to the Court, the national court must order full disclosure by the defendant, as well as technical reports from independent experts.

The underlying rationale for the judgment is that the claimants in stand-alone claims suffer from an "*asymmetry of information*", as the claimant is generally unable to use the information and data held by the alleged antitrust infringer. As a result, the claimant does not have full access to the evidence in order to sustain its claim, particularly the economic and technical assessments, which are often very complex and expensive to prepare.

IMPLICATIONS FOR COMPANIES

Although less developed than in other jurisdictions (e.g., the UK, Netherlands and Germany), private enforcement has been steadily growing in recent years in Italy; more than fifty cases are currently pending before the companies courts in Milan and Rome.

As a result of the ruling, companies will face increased exposure to antitrust claims. National courts will be able to order a defendant to disclose information and documentation so as to enable the claimant to demonstrate the alleged infringement and to quantify the amount of damages.

Consequently, the new judgment is likely to represent a substantial incentive for potential claimants to bring damages actions against alleged antitrust infringements in Italy. This will also result in a significant increase in the number of stand-alone actions in the near future.

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