ITALY IMPLEMENTS EU DIRECTIVE ON DAMAGES FOR BREACHES OF COMPETITION LAW

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By: Francesco Carloni, Giampaolo Salsi, Roberto Podda, Vittorio Salvadori di Wiesenhoff

INTRODUCTION

On 14 January 2017, following the approval by the competent parliamentary committees, the Italian Government has definitively adopted Legislative Decree n. 3 of 2017 ("**Decree**") implementing in Italy Directive 2014/104/EU on antitrust damages actions ("**Directive**"). The Directive aimed at making easier for victims of antitrust violations to claim compensation for the damages they have suffered due to such infringements (the so-called private enforcement). The Decree has now been published in the Official Journal of Italy and became law to all effects.

As previously reported, the Decree reproduces the content of the Directive, with some amendments necessary for a correct transposition into national law.

Although less developed than in other jurisdictions (e.g., the UK, the Netherlands and Germany), private enforcement has been steadily growing in recent years in Italy. The new legislation is expected to substantially increase the number of claims for damages for antitrust infringements in the country.

BACKGROUND

The Directive was officially signed into law on 26 November 2014 and published in the Official Journal of the European Union ("**EU**") on 5 December 2014.

It was adopted with the aim of making it easier for victims of antitrust violations to claim compensation, by harmonizing the relevant procedures all over the EU. The Directive had to be transposed in the EU Member States' legal systems by 27 December 2016.

The Directive gives victims easier access to evidence needed to prove the damage suffered and more time to make their claims. This is expected, in particular, to help smaller companies and consumer groups exercise in practice the right to recover their losses stemming from antitrust breaches.

According to the European Commission ("**Commission**"), the Directive will achieve more effective enforcement of the EU antitrust rules, by 'fine-tuning' the interaction between private damages claims and public enforcement. Moreover, it is also designed to preserve the attractiveness of the enforcement tools used by EU and national competition authorities (e.g. leniency and settlement programs).

In particular, the Directive introduced the following new rules to facilitate private enforcement:

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- National courts are entitled to order companies to disclose evidence in cases where victims claim compensation for damages;
- A final decision of a national competition authority finding an infringement constitutes proof of that infringement before courts of the same Member State;
- Victims have at least one year to claim damages after the infringement decision by a national competition authority has become final;
- In cases where the contested infringement has caused price increases and these have been 'passed on' along the distribution chain, the right to claim compensation is recognized to those who suffered the harm in the end; and
- A clarification is provided of the interplay between court actions and consensual settlements between victims and infringing companies, expected to make settlements easier.

The Decree largely mirrors the structure of the Directive and expressly includes the so-called class actions in the scope of application of the new rules. In Italy, consumers (including consumers' associations) may bring class actions for damages allegedly suffered as a result of certain breaches of contract or torts that occurred after 15 August 2009. Class actions operate an opt-in system where consumers may elect to join a class action if they consent expressly to their rights being determined as part of those proceedings. By contrast, consumers that do not decide to join the class are not bound by the outcome of the class action.

Some amendments to the original text of the Directive were necessary for its implementation into Italian law. In particular: (i) the inclusion of a clear identification of the damages that can be compensated, using the notions provided under Italian law (i.e. *danno emergente*, the actual loss, *lucro cessante*, the loss of profits, and interests); (ii) some definitions contained in the Directive were not transposed as they are already included in other national provisions, while other definitions had to be articulated further (e.g. the definition of 'competition law', which is defined as including both Articles 101, 102 of Treaty on the Functioning of the EU and Law 287/1990, the Italian Competition Act); and (iii) the need for the claimant to clearly identify, under national procedural rules, the facts and the evidence that the counterpart may be asked to disclose.

According to the Decree, the actions for compensation of antitrust damages will be brought before the specialized sections of the courts in Milan, Rome and Naples.

RELEVANCE FOR COMPANIES

The implementation of the Directive in Italy is expected to substantially increase private enforcement in the country.

Following the final adoption of the Decree, companies become more exposed to claims for antitrust damages and face claimants with a strengthened litigation position. This is particularly the case for the disclosure of evidence, which the courts can request from the defendant.

Consequently, the new legislation is likely to incentivize claimants to bring damages actions against antitrust infringements in Italy. In particular, cases such as the follow-on damages actions recently brought against truck

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manufacturers (found to have participated in a cartel) will be more frequent in Italy following the adoption of the Decree.

The new scenario also needs to be read in the context of the recent Court of Cassation's judgment No. 11564/2015, which significantly reduced the burden of proof on claimants to bring stand-alone actions for antitrust damages (i.e. actions brought in the absence of any decision for the antitrust authority). In that occasion, the 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.

KEY CONTACTS



FRANCESCO CARLONI
OFFICE MANAGING PARTNER, BRUSSELS

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM



VITTORIO SALVADORI DI WIESENHOFF
PARTNER

MILAN
+39.02.3030.2948
VITTORIO.SALVADORI@KLGATES.COM



ROBERTO PODDA
PARTNER

MILAN
+39.02.3030.2923
ROBERTO.PODDA@KLGATES.COM

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