

A first look at Legislative Decree 3/2017, finally allowing legal action for damages in case of breach of antitrust law in Italy

Italy now has legislation allowing legal actions to seek compensation for damages caused by violations of anti-competition law, starting from 3 February 2017 when Legislative Decree no. 3 of 19 January 2017 ("Decree") will come into force.

The Decree implements Directive 2014/104/UE and governs individual and collective claims by plaintiffs who have suffered damages as a result of a breach of antitrust law by a company or associations of companies, and allows commencement of these actions both in instances where the Italian Competition Authority ("ICA") has already ruled on the breach of law and as stand-alone claims.

This briefing note summarises the principal provisions of the Decree.

I) Discovery and Evidence

This legislation aims to balance the injured person's right to acquire and to use in the context of court litigation proceedings the evidence included in the records of ICA review proceedings against the public interest in the effective application of the law governing market competition.

The Decree provides that, upon motion by a litigant, the Court may order the litigants or a third party to produce specific elements of evidence or categories of evidence as deemed appropriate, and may take measures to ensure that any confidentiality thereof is preserved, taking into account:

- The extent to which claims for compensation or defences are supported by facts and available evidence that justify the order to produce;

- The scope and the costs of the production, especially if third parties are involved;
- Whether the evidence for which production is requested contains confidential information, and especially third-party confidential information.

The Decree distinguishes three categories of evidence:

- A) Evidence for which production can be ordered by the Court even while the proceedings are still pending before the ICA;
- B) Evidence that can be produced only after the conclusion of the ICA proceedings, such as:
 - Information provided by legal or physical persons in the context of the ICA proceedings;
 - Information that the ICA has drafted and notified to the parties in the context of proceedings before it;
 - Settlement proposals that were later revoked.

In relation to this type of evidence the Court must assess,

following the proportionality principle, whether:

- The request is sufficiently specific as to the nature, object or contents of the documents submitted to the ICA or included in the records of the review proceedings;
 - The litigant is requesting production in relation to a claim for damages resulting from a breach of competition law;
 - The effective application of competition law must be safeguarded as a matter of public policy.
- C) Evidence that can never be produced in the context of civil proceedings, such as evidence that regards representations and declarations linked to a clemency application/programme or a settlement proposal.

To strengthen the injured person's right to effective litigation, administrative fines can be imposed in case of non-compliance with obligations and Court orders relating to evidence.

II) Effects of the decision of the ICA on the litigation

The Decree considers that a breach of competition law has occurred when a final decision or ruling, which is no longer subject to challenged or appeal, has been issued by the ICA or by a Court.

The final, non-challengeable decision of the ICA or the final, non-appealable ruling of the Court is deemed to be factual evidence of the existence of the unlawful conduct, of the offender and of how the unlawful conduct was performed.

The Court's role then is to ascertain whether damages exist, to quantify any such damages, and to ascertain the existence of a causal nexus between the damages and the breach identified by the ICA.

III) Identification of the injured person

The Decree provides that the offender will be liable, in principle, towards any person who has suffered damages as a result of the breach of antitrust laws, including direct

purchasers, who purchased the goods object of the breach directly by the offender, and indirect purchasers, who purchased from a third party the goods object of the breach.

IV) Time bar

Consistently with the general principles of Italian law, a claim for compensation of damages as a result of a breach of antitrust law is time-barred after five years, and such five-year term begins as from:

- The date the antitrust violation has ceased; and
- The injured person is aware of the existence of the conduct, of the identity of the offender, and of the fact that the conduct is an antitrust violation and has caused damages.

The time bar period tolls if the ICA commences review proceedings, and the five-year period is therefore suspended for the duration of the proceedings and for one additional year after the date when the decision ascertaining the antitrust violation becomes final.

V) Joint and several liability

The Decree provides for joint and several liability of all the businesses that have contributed to cause the damage, who will be required, jointly and severally, to compensate the damages, and thus the injured person can seek full compensation from any one of the co-offenders.

Nevertheless, the Decree sets out two exemptions from the principle holding jointly and severally liable all the co-offenders: one for small and medium-sized enterprises (SMEs)¹, and a second one for those businesses that have been granted immunity in the context of a clemency programme.

The exemption for SMEs provides that a SME will be jointly and severally liable only towards its direct and indirect purchasers on condition that its market share was less than 5% while the violation persisted and that a joint and several

¹ Pursuant to Art. 2 of the Annex to Recommendation 2003/361/CE, "The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, or an annual balance sheet total not exceeding EUR 43 million."

liability standard will cause irreparable economic damage to its operations.

Regardless of whether the two above conditions are met, a SME will be jointly and severally liable towards injured persons other than direct and indirect purchasers if:

- I. The injured persons cannot seek full compensation for damages by the other businesses involved in the same antitrust violation;
- II. It had a leading role in the context of the violation or forced other businesses to take part in the violation;
- III. It is ascertained to be recidivist.

The second exemption provides that beneficiaries in the context of a clemency programme will be jointly and severally liable towards their direct or indirect purchasers or suppliers and towards other injured parties only where full compensation for their damages cannot be obtained from the other businesses involved in the same antitrust violation.

VI) Quantification of damages

Quantification of damages caused by antitrust violations will follow the general principles under the law and the applicable provisions of the Italian Civil Code with governing what damages can be compensated, how compensation is to be paid and how to take into account

any contributory actions by the injured person in the context of the violation.

Moreover, to limit the difficulties involved in proving the violation, the existence of damages in case of a cartel is presumed, with such presumption being rebuttable by the offender with evidence to the contrary.

Finally, the Decree provides that the Courts may seek the assistance of the ICA for the quantification of damages, by submitting to the ICA a specific request in relation thereto.

VII) New rules on jurisdiction

Claims for compensation of damages, claims seeking a declaration of invalidity and petitions seeking urgent measures in connection with a breach of anti-competition law under Law 287/1990 and for violations of EU antitrust law, including in cases where one of the parties is a company with registered office outside of Italy, fall under the mandatory jurisdiction of the Special Division for Enterprises of the Courts of Milan, Rome or Naples, depending on the place where the offence occurred.

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