



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Working Session

“Damage claims in competition matters: The dawn of a new era?”

Antitrust Commission
Litigation Commission

Munich, 2016

National Report of Italy

Francesco Carloni, Alessandro Di Mario

K&L Gates GP, Company
Rue de l'Industrie 26/38, 1040 Brussels
T +32 2336 1900

Francesco.carloni@klgates.com;
Alessandro.DiMario@klgates.com

General Reporters:

Sebastian Janka, Noerr LLP, Munich, Germany
Simone Gambuto, Macchi di Cellere Gangemi, Rome, Italy
Anouk Rosielle, Boekel N.V., Amsterdam, the Netherlands
Dina El-Gazzar, Stewarts Law LLP, Leeds, United Kingdom

27 November 2015

Please find here some useful information for drafting your report. Following these basic rules will ensure consistency among all our reports as well as a convenient experience for our readers.

STYLES

- There are two different levels of headings you may use. See example below.
- Your body text needs to be Garamond, Size 12.
- If you need to display a list, you may use bullet points or letters in lowercase.
- For the use of footnote, you can use the style available here¹.

- **Headings**

Heading 1, Font: Garamond, Size 14, Bold

Heading 2, Font: Garamond, Size 12, Bold

- **Body text**

Read here your body text in Garamond, Size 12.

- **Lists**

A list can be displayed with letters in lowercase:

- a. Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
- b. et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.
- c. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

or with bullet points:

- Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
- et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.

¹This is a footnote.

- Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

You can also use indentation to add extra levels to your lists.

- Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
 1. et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.
 2. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

BIBLIOGRAPHY

If you add a bibliography at the end of your report, please use the style below.

- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

NAMING YOUR FILE

When saving your report, please name the document using the following format: "National Report (country).doc". The General Reporter in charge of your session will take care adding the Working session/Workshop reference once this is available.

Example: National Report (France).doc

GENERAL DISCLAIMER

Please do not forget to include in your report the following disclaimer:

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees

that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.

QUESTIONNAIRE

DISCLAIMER – PLEASE READ BEFORE ANSWERING THE QUESTIONNAIRE BELOW

The list below is intended as a guideline to compiling an overview of the status quo and developments in private enforcement proceedings in the national reporters' respective jurisdictions. It is left to the discretion of you as the national reporter to decide for each of the questions below if answering it is possible and will lead to useful information on the topic in your jurisdiction. The general reporters suggest that the national reporters answer those questions that they deem relevant and noteworthy for their national report. If a question is not answered, please indicate the reason for not including it in your national report.

CHAPTER I: STATUS QUO OF PRIVATE ENFORCEMENT (ITALY)

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

the General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA

1. **How would you summarize in few lines the status quo of private enforcement in your jurisdiction?**
 - a. **[For Non-EU Member States] Can individuals (or only consumer organisations) file an antitrust damage claim? Who can bring an antitrust damages claim? (i.e. are there any requirements or limitations to standing in private enforcement proceedings?)**

N/A.

If yes, what is the legal basis (codified or case law) and are they able to submit both stand alone and follow-on actions?

N/A.

- b. **[For EU Member States] Can individuals file an antitrust damage claim regardless of the implementation of Directive 2014/104/EU (private enforcement Directive)?**

Yes. Under Italian law, private antitrust litigation is primarily governed by civil law rules and mainly 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.

If yes, are they able to submit both stand alone and follow-on actions?

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. However, the recent Court of Cassation's judgment No. 11564/2015 has significantly eased the burden of proof for standalone actions (see below under Chapter IX.29).

2. **[For EU Member States] Has your country already implemented/started implementing the private enforcement Directive?**

- **If No: Do you believe that your country will meet the deadline?**

No. With Law No. 114/15, the Italian Parliament delegated the implementation of the Directive to the Government, and outlined the main elements that the Legislative Decree will need to contain. It is expected that Italy will be able to transpose the private enforcement Directive into national law by 27 December 2016.

Even before Directive's implementation in the Italian legal system, domestic civil courts already refer in their rulings to the principles established by the Directive. By way of illustration, in the recent Court of Cassation ruling No. 11564/2015, the Court's judgment relied on the principles put forward by the Directive. The Court's ruling substantially eases the burden of proof on the claimant in stand-alone actions (see below Chapter IX.29).

- **If Yes: Please give the status quo of the implementation by highlighting in few lines what you consider the most important aspects of the implementation of the private enforcement Directive into national law in your country.**

N/A.

CHAPTER II: COURT AND PROCEDURE

3. What is (are) the court(s) in charge of antitrust private enforcement?

a) Is there a specialized court specifically for antitrust based claims?

If No: are there specific chambers for antitrust claims within the civil/commercial courts?

N/A.

If Yes: is the court composed only by judges, also economic experts and/or other persons?

Yes. The courts in charge of antitrust private enforcement are composed of judges. At its own discretion, the court may appoint an expert to assist in matters requiring specific technical expertise (for example, definition of the relevant market or liquidation of damages).

In particular, the courts in charge of antitrust private enforcement are:

- The specialized sections of tribunals and courts of appeals (company courts).
- Lower civil courts.

Specialized sections of tribunals and courts of appeals (company courts)

Pursuant to Article 2 of Law Decree No. 1 of 2012, as converted into law by Law No. 27 of 2012, antitrust law disputes mainly fall under the jurisdiction of companies courts, which are specialized sections of tribunals and courts of appeals that generally sit in the capitals of the Italian regions (Lombardy and Sicily, unlike other regions, each have two companies courts in their territory; Valle d'Aosta does not have any).

The company courts replaced the existing courts' sections in the field of industrial and intellectual property. Such a change streamlined the review process which was based on a double track jurisdiction depending on whether the action concerned the violation of national antitrust rules (jurisdiction of first instance assigned to the Courts of appeal) or the EU

antitrust rules (jurisdiction of the Courts of first instance, with the possibility to challenge the Court of first instance's decision before the Court of appeal).

The companies courts are responsible for: (i) petitions for declaratory relief (e.g., for a declaration that an agreement breaching antitrust rules is null and void); (ii) actions for damages and requests for interim relief relating to infringements of the Law No. 287 of 1990 (the “**Italian Competition Act**”); and (iii) private actions based on Articles 101 or 102 of the Treaty on the Functioning of the European Union (“**TFEU**”) or national equivalent and relating to the exercise of industrial property rights.

Lower civil courts

Under Italian civil procedure rules, lower civil courts also have jurisdiction with respect to: (i) certain claims related to the violation of the Italian Competition Act such as unjust enrichment claims or claims for the court to determine the price in a contract for services or works, where the court finds that the agreed contract price is the result of anti-competitive conduct and is therefore null and void; (ii) actions based on alleged violations of unfair competition law; (iii) petitions for declaratory relief and actions for damages due to the creation or maintenance of dominant positions in the telecommunications and broadcasting sectors; and (iv) actions brought pursuant to Article 9 of Law No. 192 of 1998, i.e. the abuse of economic dependence.²

b) May the court impose interim measures?

Yes. Plaintiff may obtain interim remedies, including temporary injunctions and any other remedy deemed appropriate to preserve his or her rights until a final judgment is issued.

c) May the trial proceed in parallel and independently of a National Competition Authority investigation?

Yes.

If so, how likely it is that the court suspends the case up to the National Competition Authority decision?

² The abuse of economic dependence may occur in the context of refusal to sell/buy, imposition of burdensome or discriminatory clauses, arbitrary interruption of business relations, where company A is economically dependent on company B which would abuse of this circumstance by imposing an excessive imbalance to its advantage in the rights and obligations in the agreement with Company A which is forced to accept because lacks alternatives on the market. This contrasts with the abuse of dominant position since the abuse of economic dependence does not preserve competition on the market but just the balance of the specific contractual relations between the contracting parties.

Neither the Italian Competition Act nor any other regulations provide criteria to coordinate private actions brought before different jurisdictions. There is the risk that parallel proceedings might concern the same parties and the same conduct resulting in a risk of conflicting decisions.

Also, civil courts are not bound by the IAA's decisions. As a result, they have full discretion in deciding whether to suspend proceedings pending a possible judicial review of the IAA's decision from which the private action may have originated.

However, where an antitrust infringement has been identified by a decision of the European Commission, Italian courts will consider themselves bound by the findings made in that decision pursuant to Article 16 of Regulation 1/2003. An Italian court may therefore opt to stay proceedings brought in reliance on a European Commission decision where that decision is subject to appeal before the European courts so as not to reach a judgment that is irreconcilable with the outcome of the appeal.

d) Is the decision subject to appeal?

Yes.

If Yes, does the 2nd (and/or 3rd) instance court assesses both the merit of the case and the law?

Companies courts' rulings may be appealed to the courts of appeals both on the facts and on questions of law. The courts of appeals' judgments can be appealed to the Court of Cassation on questions of law only where it is contended that a breach of the rules concerning jurisdiction has occurred.

4. What nexus with the jurisdiction is required to bring a private action to a court within your jurisdiction (and to keep it there)? Is there room for forum shopping (eg, is an "anchor defendant" sufficient (cf ECJ, C-352/13))?

The Italian Competition Law applies to any antitrust infringements taking place or having effect in the Italian territory. Also, private actions based on EU antitrust rules (alone or in combination with the provisions of the national antitrust rules) may be brought before Italian courts.

General rules on jurisdiction apply on the basis of the defendant's place of residence or domicile (for a natural person) or the place where the defendant company has either its registered office or a branch and an agent authorized to act for the defendant in court proceedings. An action can also be brought before the court of the place where the alleged obligation arose or must be performed (i.e., the place where the allegedly restrictive agreement was executed or, in actions for damages based on torts, the place where the harm occurred).

There are also special rules for consumer class actions which must be brought before the tribunals of the main Italian judicial districts depending on the place of the defendant company's registered office.

Besides these conditions, it is not possible to engage in "forum shopping". It should be noted that under the EU Regulation 44/2001 the action may be brought in any of the jurisdictions in which the defendants are domiciled. Also, as regards damage actions based on torts, EU Regulation 44/2001 enables the plaintiff to bring its action in any of the EU Member States concerned by harmful event.

5. How long does a single (or collective) antitrust private enforcement action in first instance usually take?

Actual duration will depend on many factors, including the number of defendants involved in the litigation (for claims relating to cartels large several parties are typically joined into the litigation and this will impact the duration of the proceedings) and the complexity of the evidential phase (for instance, it may require the appointment of an accounting expert to quantify the damages suffered by the plaintiff).

The average duration of ordinary actions before the lower and the appellate courts is two to three years at each level of jurisdiction. The timeframe may be lengthened significantly in the event of an appeal to the Court of Cassation. Petitions for interim relief in antitrust matters are generally adjudicated quicker (within four to eight weeks from the filing of the application).

Under Italian civil procedure rules and at the plaintiff's request, it is possible to expedite the proceeding if the single-judge lower court has jurisdiction and the action may be decided on the basis of a summary investigation. This type of proceedings is characterized by a substantial simplification of formalities and trial hearings and submissions. However, the judge can decide to revert to a standard proceeding.

6. Who bears the legal costs (court fees, the own representation costs and the representation costs of the opposite party)?

The unsuccessful party is ordered to pay all costs, including attorneys' fees. Where each party succeeds on some and fails on other grounds or where the circumstances are exceptional, the court may order that the costs be shared or that each party bear its own costs.

7. In your jurisdiction, are there any alternative funding options or fee arrangements that can be put in place by the plaintiff (for example conditional fee or damages based agreements)? Please outline and give examples if so. What rules on the assignment/bundling of claims exist in

your jurisdiction that could allow third parties to buy claims from cartel victims?

No.

8. Beside antitrust private actions, does your jurisdiction dispose of a collective redress system?

Yes.

- **If Yes, how it is applicable to antitrust private enforcement, (e.g. direct/indirect purchasers, consumers and/or clients)?**

As of 1 January 2010, under Article 140-bis of the Consumer Code, 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 may be brought by any consumer or user, on his or her own, through associations mandated by him or her, or through committees of which he or she is a member. However, the rules on class actions do not apply to claims on behalf of individuals acting within the scope of their trade, business or profession, including their employment contract, or parties who are not individuals.

Accordingly, any consumer or user group seeking damages or declaratory relief can initiate a class action in connection with infringements or damage that are "homogeneous" as between the group. Consumers who have bought cartelized goods (irrespective of whether from the same cartel member) should be permitted to bring their claims as a class action.

- **Do collective redresses operate through an opt-in or an opt-out system? In case of an opt-out system, how is the class defined?**

Class actions operate an opt-in system. Consumers may elect to join a class action if they consent expressly to their rights being determined as part of those proceedings. Conversely, consumers that do not decide to join the class are not bound by the outcome of the class action.

- **How is it coordinated with the individual actions' framework?**

Under Article 140-bis(14) of the Consumer Code, a defendant should not face more than one class action with reference to the same facts. As far as non-class proceedings are concerned, simultaneous private actions concerning the same matter are not permitted. In the event of a conflict

between two or more courts having territorial jurisdiction, the court where the first application was filed has jurisdiction over the matter.

CHAPTER III: EFFECT OF NATIONAL DECISIONS, BURDEN OF PROOF, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

9. Are National Competition Authority decisions relevant for individual antitrust claims, in particular

- as presumption / proof of the infringement in the follow-on case? (f.i. does it matter for the division of the burden of proof between parties if the action is a follow on damages case or a stand-alone action? If so, please elaborate on any difference with regard to the burden of proof)

The IAA's findings are not binding on the civil court having jurisdiction over a follow-on damage action. However, the IAA's findings create a rebuttable presumption with respect to the existence of the infringement. As a result, in order to refute such a presumption, the defendant should provide evidence that has not already been unfavourably assessed by the IAA. By contrast, a decision by the European Commission will be considered binding proof of liability by Italian courts.

- in terms of the *quantum* of the compensation?

There is no presumption concerning the existence or the size of the overcharge caused by an infringement that is automatically applicable.

- for the limitation period?

As far as follow-up actions are concerned, where the plaintiff and the defendant are both active in same relevant market, the limitation period starts running no later than the date of adoption of the IAA's decision to initiate the investigation into the defendant's conduct.

A party who contends that the limitation period has expired must prove the moment at which the plaintiff obtained (or should reasonably have obtained) knowledge of the infringement and/or damage suffered. According to the Court of Cassation, this might be presumed when the injured party acquires or could have acquired using ordinary diligence knowledge further to the establishment of an infringement by an antitrust authority.

- else?

N/A.

10. What are the relevant limitation periods (taking into account question 9 above)?

Generally, the limitation periods for damage actions based on tort or breach of contract are five and ten years, respectively. The limitation period for antitrust damage actions starts running when the claimant is – or, using reasonable care, should be – aware of the fact that the damage was caused by an antitrust infringement.

11. What is the liability regime as regard parents for the infringement of their subsidiaries?

Joint and several liability.

12. Please describe limits and scope of joint and several liability for antitrust infringements performed by undertakings (in particular between cartellists) in civil litigation. Does this differ from liability vis-à-vis the authorities?

Italian courts are able to apportion liability to pay antitrust damages between defendants according to the assessment of their fault for the damage caused. If the plaintiff brings an action for damages against all companies involved in an antitrust infringement, each infringing company is held jointly and severally liable for the full amount of the plaintiff's damages.

Under Italian civil liability principles, in cases of joint and several liability, where a defendant pays more than its share of the damages, it can in turn seek a contribution from other defendants or sue other defendants for indemnification of its costs. The defendants' relative responsibilities must be determined in proportion to the seriousness of each defendant's conduct and the materiality of its conduct's effects. If such allocation is not possible, all defendants are held liable for an equal amount of damages.

CHAPTER IV: DISCLOSURE OF EVIDENCE

13. What evidence is admissible in individuals' actions for antitrust infringements?

- **Is there any pre-trial discovery procedure available?**

N/A.

- **Is there any evidence protected by legal privilege?**

Yes. Consistent with the EU Legal Professional Privilege doctrine, Italian law protects the confidentiality of communications between an external lawyer who is a member of the bar of an EU Member State and the client.

To the extent that such communications are exchanged in the exercise of the client's right of defence, they are covered by Legal Professional Privilege (e.g., they cannot be used by the IAA for the purposes of an investigation). However, exchanges with in-house lawyers are not protected.

14. Can the court order the discovery of evidence to defendants or to third parties? Please describe its limits and scope.

All evidence generally admitted in civil liability proceedings, including witness testimonies, documents and expert opinions, is admissible in private antitrust proceedings.

At the party's request, courts may also order one of the parties or a third party to submit relevant documents, which must be reasonably identified by the party applying for a disclosure order, or request documents from the IAA's file (see below under Chapter IV.15). A party applying for a disclosure order must: (i) describe the documents requested in as much detail as possible so as to demonstrate such disclosure will not result in a "fishing" expedition; and (ii) indicate that the requested documents are not otherwise available to it.

15. Do the claimants and/or courts have access to the National Competition Authority's files? If so, also during a pending investigation? Please describe its limits and scope.

Yes. Although the IAA does not allow access to documents containing trade secrets, generally, access can be granted when such documents provide the evidence of the infringement or contain essential information for the requesting party's rights of defence. In such circumstances, access is in any event limited to the relevant essential information.

Under general rules of procedure, access to the IAA's case file is granted to complainants and any other "*person who has a direct concern in the matter*" who has requested and been granted leave to intervene in the investigation procedure (e.g., consumers' associations).

The civil court may also request the IAA to disclose any documents included in its case file. There are, however, certain limitations in connection with the access to leniency materials in the IAA's case file. Written or oral leniency statements, including any document annexed to such statements, are not accessible. The other parties (i.e. other than the leniency applicants, third parties having been granted permission to intervene in the proceedings) can access the IAA's case file only after the statement of objections has been served to the defendant(s) so long as they undertake not to make any copies (whether mechanical or by any other means) of the leniency statements and to use such information only for the purposes of the judicial or administrative proceedings concerned by the IAA's investigation.

CHAPTER V: THE PASSING-ON OF OVERCHARGES

16. Are indirect purchasers entitled to claim compensation, and which limitation do they face?

Yes. Indirect claims are in principle admissible.

17. Are victims of “umbrella damages” entitled to protection against antitrust infringements and to compensation in court?

“Umbrella damages” refer to claims concerning damages allegedly suffered due to the surcharge applied by non-cartelists who, independently and rationally, adapted to a price increase resulting from a cartel by increasing their own prices. Based on the Court of Justice of the European Union’s ruling of 5 June 2014 in *Kone AG and Others v ÖBB-Infrastruktur AG*, EU Member States are pre-empted from having in place domestic regulations which “categorically exclude” umbrella pricing claims deriving from breaches of EU antitrust law.

18. Is the passing-on defence allowed?

The passing-on defence is not expressly recognized. There have been a limited number of cases dealing with the passing-on defence. The Court of Cassation found that the possibility of passing on higher prices does not exclude that damages corresponding to the sales volume lost due to the downstream price increase be awarded to the plaintiff. In another case, a lower court found that the overcharge paid by the plaintiff could not be relied on as a basis for determining the antitrust damages since the plaintiff failed to discharge its burden of proof.

CHAPTER VI: DAMAGES

19. What form of compensation can be granted by national courts for antitrust violations?

Antitrust damages and restitution may be available as compensation, depending on the circumstances surrounding the case. Generally, antitrust damages include the entitlement to full compensation therefore extend not only to the actual loss due to anti-competitive conduct, but also to the loss of profit resulting from any reduction in sales, and encompass a right to interest. If needed, the court may award a fair estimate of damages or request the assistance of an expert (e.g. for liquidation of damages based on loss of income where the injured company could not enter the market).

In particular, can national courts accord punitive damages or treble damages or compensatory function exclusively?

No. Punitive or treble damages or compensatory function exclusively are not available.

CHAPTER VI: QUANTIFICATION OF HARM

20. What do individuals have to prove in court in order to successfully obtain compensation for antitrust damages, who bears the burden of proof?

The burden of proof lies with the plaintiff, who must prove the fact on which their claims are based. The defendants must offer evidence in support of their objections or counterclaims.

Generally, the court may weigh any evidence provided by the parties. As regards certain evidence which is mandated by law – e.g. in case of a party’s confession the court has no discretion as regards the value of irrefutable proof of the confessed facts so long as the confession concerns disposable rights of the confessing party.

The court may base its findings of facts on circumstantial evidence. In particular, regarding cartels in the form of a concerted practice, the courts have considered the existence of a parallel behaviour among the undertakings as sufficient evidence, provided that contact among the undertakings is proved (e.g., the participation of undertakings at meetings where sensitive information was exchanged (“external factors”) and that the parallel conduct is not alternatively justifiable from a rationale viewpoint (“internal factors”).

21. Is there a difference between stand alone and follow-on actions?

No, in principle. Although any finding made by the IAA or by the administrative courts reviewing the case is not binding on the civil court having jurisdiction over a follow-on damage action, it nevertheless provides the plaintiff the advantage of relying on a rebuttable presumption that the anti-competitive conduct took place.

In follow-on actions, plaintiff can rely on the evidence collected by the IAA during the proceedings to sustain their claims. It is not easy to rebut the evidentiary presumption. For instance, courts have noted that even if the presumption is rebuttable it has been stated that the existence of the causal link can only be challenged on the basis of circumstances which specifically concern the relationship between the plaintiff and the defendant, and not simply by referring to circumstances affecting the market in general.

By contrast, in stand-alone actions the plaintiff 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. However, this trend is expected to change in the near future due to the Court of Cassation recent ruling describe below in Chapter IX.29.

22. How is damage quantified?

See above response to Chapter VI.19 above.

23. What defence is recognized, if any, for defendants (besides the passing-on defence (question 18 above), if applicable)?

Generally, defendants may avail themselves of any defence that is typically used against civil liability claims.

24. What is the role of economic experts, if any?

See above the responses to Chapter II.3(a) and Chapter VI.19 above.

25. What other types of experts are typically engaged in your jurisdiction?

Any expert that can assist in matters requiring specific technical expertise.

26. In case of follow-on claims, are the fines imposed by the national – or supranational – competition authority taken into account in evaluating the quantification of damages?

No. The fines imposed by the IAA are not taken into account when quantifying damages.

CHAPTER VII: ALTERNATIVE DISPUTE RESOLUTION

27. Is there any form of alternative dispute resolution available in your jurisdiction?

Yes.

If yes, in which form, and how do they coordinate with the civil and criminal proceedings regarding antitrust infringements?

The parties may enter into out-of-court settlements or submit to arbitration.

There are two types of arbitration:

- The binding arbitration, where the parties submit a case to arbitrators, who will decide on the basis of the Civil Procedural Law and whose ruling will have the same binding effects of the ruling of a court.

- The informal arbitration, where the parties decide to submit a case to arbitrators, whose rulings will have the force of an agreement between the parties.

A legislative change recently adopted increased the relevance of arbitration and out-of-court settlements among the parties, in order to decrease the workload of civil courts. In particular, Law 162/2014 introduced the so-called “assisted negotiation” and the “arbitration of lawyers”. The parties can use the former before the case is brought to court. In the “arbitration of lawyers”, the parties can decide to submit a case (already started before a judge) to a panel of lawyers.

CHAPTER VIII: SETTLEMENTS

28. Please briefly set out the settlement mechanisms (if any) in your jurisdiction, for instance:

- settlements requiring court approval;
- settlements outside of proceedings;
- timing of settlement;
- etc.

Given the confidential nature of settlement discussions, there is no publicly available information. In the case of successful class actions, the court may *inter alia* establish criteria to determine damages and grant the parties a period not exceeding 90 days to settle the amount of damages. If the parties reach an agreement before the expiration of the deadline, such agreement is signed by the judge and becomes binding. If no agreement is timely reached, the court shall award an exact amount of damages to each consumer or user who has opted into the class action.

CHAPTER IX: RECENT CASE LAW

29. Please give an example of noteworthy cases or authorities in your jurisdiction rendered in the last 18 months which are relevant to the content of this questionnaire.

As mentioned above in Chapter I.4(b), the Court of Cassation’s judgment No. 11564/2015 has significantly reduced the burden of proof on claimants to bring stand-alone actions for antitrust damages.

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.

According to the Court, the plaintiff now only needs to demonstrate that there is a “*plausible*” indication that a company has infringed antitrust rules. As a result, 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 plaintiff in stand-alone claims suffers from an “*asymmetry of information*”, as the plaintiff is generally unable to use the information and data held by the alleged antitrust infringer. As a result, the plaintiff 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.

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.

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. 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.
