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Private Enforcement: Where Do We Stand? - An Overview of Recent Case Law

# THE ITALIAN SUPREME COURT'S "PRE-EMPTIVE STRIKE" IN THE IMPLEMENTATION OF THE DAMAGES DIRECTIVE

**Chiara Noto** [1]

## 1. INTRODUCTION

This note seeks to shed some light on certain innovative considerations in the Italian Supreme Court's ruling of 4 June 2015 in the *Comi and Others v. Cargest* case (the "Ruling")[2] and on the possible impact that it could have on antitrust damages actions in Italy.

The Ruling appears to be of particular interest in that it represents a milestone judgment in Italy, with specific regard to the judicial practice related to the collection of evidence in action for damages, especially in the so-called stand-alone actions.

## 2. FACTUAL BACKGROUND

Fifty-two wholesalers had brought a competition damages action against Cargest, the exclusive manager of the main wholesale food market in Rome. The main argument brought by the plaintiffs was that Cargest had abused its dominant position by imposing excessively burdensome and discriminatory contractual conditions for the rent of commercial spots at the wholesale market.

With reference to the market definition, the wholesalers claimed that the relevant market, in which Cargest had abused its dominant position, was the market for the management and lease of trading premises located in that specific wholesale market. The argument upon which they relied in order to support such claim concerned the lack of substitutability with similar markets located outside Rome, mainly due to higher transport costs and other barriers to entry.

The Court of Appeal of Rome rejected the claimants' arguments stating that they had provided only generic allegations without providing sufficient evidence of the alleged market definition and, consequently, of the abuse. The Court further explained that for such a claim to succeed the evidence should have included more detailed particulars and technical aspects, such as specific examples of the alleged lack of substitutability and a comparative analysis between the various commercial alternatives available to wholesalers.

[1] Italian Competition Authority.

[2] Supreme Court, *Comi and Others v. Cargest*, 4 June 2015, No. 11564.

## 3. THE SUPREME COURT RULING

The Supreme Court overturned the Court of Appeal's ruling (in the part where it dismissed the claimants' action) on grounds that there was a lack of evidence with particular regard to the definition of the relevant geographic market.

In particular, the Supreme Court specifically criticized the Court of Appeal's decision arguing that it had reviewed superficially the matter of the burden of proof without taking into due account the specifics related to stand-alone antitrust actions,[3] where victims of antitrust infringements have to face a higher evidential barrier than with follow-on actions, where the claimants can benefit from wide investigative powers of the Italian Competition Authority (hereinafter also "ICA").[4] Indeed, National Competition Authorities (hereinafter also "NCA"), and therefore the ICA, are equipped with significant investigative powers[5] and have the standing to bring proceeding, whereas a Court may only use the instruments provided for by the Civil Procedure Code (*e.g.*, expert witness, access to documents pursuant to Article 210, request for information under Article 213 and inspection in accordance with Article 118).

Articles 101 and 102 TFEU produce direct effects on relationships between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under EU law.

The tools to address anticompetitive conducts are based on Articles 101 and 102 TFEU, which have direct effect in the relationships among private individuals granting subjective rights that National Courts and NCAs must protect. The latter play a key role in ensuring the direct effect of competition law via public enforcement means. Nevertheless, Member States have a duty to provide effective private enforcement tools and, therefore, also interpret extensively the provisions in the Civil Procedure Code for this purpose.

The Supreme Court recalled the principle that anyone who suffers harm as a result of an infringement of EU competition law is entitled to claim compensation and highlighted that in this kind of claims, according to Regulation

[3] For an insight on the peculiarity of burden of proof in antitrust damages actions see R. CAIAZZO – *L'Azione risarcitoria, l'onere della prova*, in *Dizionario Sistematico della Concorrenza*, edited by di Lorenzo F. Pace, 2013, pp.324 ff.

[4] On the evidential barrier faced by the victims of antitrust infringements in stand-alone see, *ex multis*, F. VALERINI, *Il giudizio di merito nell'azione antitrust*, in Dizionario Sistematica della Concorrenza, edited by Lorenzo F. Pace, 2013, p.239 R. CAIAZZO – L'Azione risarcitoria, l'onere della prova, in Dizionario Sistematico della Concorrenza, edited by di Lorenzo F. Pace, 2013, pp.324 ff., cit.

[5] See Articles 10(4) and 12 ff.

(EC) No 1/2003, "*national courts have an essential part to play*".[6]

According to the Supreme Court, these principles correspond to those spelt out in Directive 2014/104 EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, which seeks to guarantee the principle of effective judicial protection (hereinafter also "Damages Directive). Pursuant to Article 4 of the Damages Directive, "*Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favorable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.*" Furthermore, according to recital No. 14 of the Damages Directive, "[a]*ctions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.*"

By way of conclusion, the direct effect of European and national competition laws is pursued through homogeneous tools of public and private enforcement. With reference to the latter, the right of compensation for all victims of infringements of EU and national antitrust laws requires Member States to set up procedural rules enabling victims to exercise effectively this right.

In this scenario, the Court is required to enforce the protection of individuals who appear before it to claim compensation for alleged breaches of competition law. Courts, therefore, should take into account the asymmetry among the parties in their access to evidence and, with particular reference to stand-alone actions, judges should not limit their work to a rigid application of the burden of proof rules. On the contrary, Courts should *ex officio* interpret extensively the provisions of the Italian Civil Procedure Code set forth in Articles 210, 213 and 218; in particular, this would result in an effective exercise of the inquiry powers by taking into due account the principle of adversarial respect and, at the same time, without prejudice to the claimant's burden to bring strong indirect evidence, even if not detailed, but sufficient to indicate a "*plausible*" antitrust violation.

[6] On the role that national courts should play in stand-alone actions see M. LIBERTINI, *Diritto della Concorrenza dell'Unione Europea*, Milano, 2014, 463 ff.

## 4. CRITICAL REMARKS AND CONCLUSION

The Supreme Court's ruling could be regarded as a landmark decision in the Italian legal system. It is clear that the ruling represents a significant and, at least in part, unexpected step forward in the private enforcement of EU competition law in Italy, indeed encouraging private parties – who claim to have suffered damages as a result of infringements of competition law[7] – to file an antitrust action.

First of all, this ruling refers multiple times to the provisions set forth in the Damages Directive which make it easier for victims to get access to evidence.[8] Bearing in mind that Member States are required to implement the Damages Directive in their respective legal systems by 27 December 2016, it seems clear that the judges of the Italian Supreme Court have sought to anticipate the effects of such legislative implementation; the impression is indeed that they did not hesitate in taking a proactive approach and, in light of the Damages Directive, they have effectively invited first instance judges not to limit their task to a rigid application of the rules governing the burden of proof but, on the contrary, proceed with an *ex officio* extensive construction of the instruments currently provided for in the Civil Procedure Code.[9]

The Ruling provides precise guidelines with reference to the domestic application of the rules judges should observe in order to grant an effective judicial protection to victims of antitrust violations. In this context, the most relevant tools currently provided for in the Civil Procedure Code are: i) the inspection order, ii) the request for information to the Public Administration, and iii) the experts witnesses.[10] In particular, Article 210 of the Code of Civil Procedure seeks to facilitate the claimants' access to documents held by the ICA, as it entitles the Court, on request of the claimant, to "*order the defendant or a third party* [including the antitrust authority] *to disclose a document or another evidence* [*i.e.*, as mentioned outlined, specific evidences pointed to by the parties] *the acquisition of which is deemed to be necessary for the proceedings*".[11] Nevertheless, this power is different from the English law "discovery", which (also) covers categories of evidence which could be, but not necessarily are in practice, available to the recipient of the order. The judge may also *ex officio* request public administration entities, such as the ICA,

[7] A. TOFFOLETTO, *Il risarcimento del danno nel sistema delle sanzioni per la violazione della normativa antitrust*, Milano, 1996, p. 261 ss.

[8] The Damages Directive was approved with amendments by the European Parliament on 17 April 2014, signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014.

[9] For the role of the judges in private enforcement of competition law see M. CARPAGNANO, G. BENACCHIO, *Il Private Enforcement del diritto comunitario della concorrenza: ruolo e competenze dei giudici nazionali*, CEDAM, 2009.

[10] L. PROSPERETTI, *Prova e valutazione del danno antitrust*, in Mercato concorrenza regole, 2008, p. 533 ff.

[11] See, *ex multis*, Supreme Court., Sec. VI, 23 August 2011, No. 17602; Supreme Court, Sec. III, 2 February 2006, No. 2262; Supreme Court, Sec. I, 17 May 2005, No. 10357.

to disclose information pursuant to Article 213 of the Code of Civil Procedure, provided however that such information is strictly related to the activity of the public administration. In both Articles 210 and 213, the Court's request to the ICA to provide the information may not replace the need for the parties to bear their respective burden of proof, as the Court has only the power of collect information, strictly related to the activity or documents of the ICA, which are otherwise unavailable to the parties to the proceedings. Therefore, the ICA may not express opinions or undertake investigations on behalf of the Court. Finally, with reference to the experts witnesses, at its discretion the Court may appoint an expert to assist in matters requiring specific technical expertise (for example, the definition of the relevant market or liquidation of damages) as provided for by Artt. 61 ff and 191 ff. of the Civil Procedure Code. The expert witness is an instrument that allows the Court to rely on a third party's technical competence which is otherwise unavailable, in light of which the Court may reach a better understanding of the facts submitted by the parties to the proceedings.[12] In few cases, the expert witness can be considered as a proper proof of certain facts the ascertainment of which requires specific technical competences.[13] In light of the above, therefore, it is clear that this evidentiary tool is really useful for the quantification of damages in competition cases, which often entails specific expertise or knowledge to determine the precise amount.[14]

But the Supreme Court, with a view to alleviating the burden of proof, goes even further. It suggests that in the future, where claimants would otherwise need to prove something impossible (so-called "*probatio diabolica*")[15], the Courts will accept strong indirect evidence, even if such evidence is not detailed, so long as it is instrumental to show a "plausible" antitrust violation. In fact, particularly in stand-alone actions, the enforcement of the right to claim for damages largely depends on reducing certain complexities underlying national rules on the burden of proof. On the contrary, in follow-on actions the scenario is significantly different. First of all, the Commission decisions are binding pursuant to article 16 of the Regulation EC No. 1/2003. Secondly, according to the prevailing case law in Italy, inspired by the suggestion of the White paper on damages actions for breach of the EU antitrust rules,[16] the ICA's decisions have a high probative value: they qualify as "*prova privilegiata*"[17], *i.e.*, it

[12] Supreme Court, Sec. I, 5 July 2007, No. 15219.

[13] Supreme Court, Sec. III, 19 January 2006, No. 1020.

[14] Supreme Court, Sec. I, 20 June 1996, No. 5718.

[15] See. R. RIZZO, *La funzionalizzazione del principio dell'onere della prova nella prospettiva dell'illecito antitrust,* in *Dir. civ. cont.*, 2015.

[16] {SEC(2008) 404} {SEC(2008) 405} {SEC(2008) 406}.

[17] See, *inter alia*, Supreme Court, Sec. III, judgment of 2 February 2007, No. 2305; Supreme Court, Sec. I, judgment of 13 February 2009, No. 3640; Supreme Court, Sec. III, judgment of 22 February 2010, No. 4261; Supreme Court, Sec. III, judgment of 14 March 2011, No. 5942; Supreme Court, Sec. III , judgment of 14 March 2011 No. 5941; Supreme Court, Sec. III, judgment of 20

is for the defendant to show against that the claimant's asserted right, thus effectively resulting in shifting the burden of proof from the claimant to the defendant. Thirdly, by virtue of Article 9(1) of the Damages Directive, once the latter will be implemented, the final decision of a NCA or a review court will have binding effects for the purposes of an action for damages brought before the national courts under Article 101 or 102 of the TFEU or under domestic competition law.

December 2011, n. 27570; Supreme Court, Sec. III, judgment of 26 January 2011, No. 17700; Supreme Court, Sec. III, judgment of 18 October 2012, n. 17884; Supreme Court, Sec. III, judgment of 9 May 2012, No. 7040; Supreme Court, Sec. I, judgment of 22 May 2013, No. 12551; Supreme Court, Sec. I, judgment of 28 May 2014, No. 11904; Supreme Court, Sec. III, judgment of 14 August 2014, No. 17972; and Supreme Court, Sec. III, judgment of 23 July 2014, No. 16786.