

THE BINDING EFFECT OF NCA DECISIONS UNDER THE DAMAGES DIRECTIVE: RATIONALE AND PRACTICAL IMPLICATIONS

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Abstract: *This article analyses the practical implications of the implementation of Article 9 of the Antitrust Damages Directive, which gives decisions issued by National Competition Authorities (“NCAs”) a key role in “follow-on” damages actions. After setting the scene, by giving a short overview of the legal status prevailing before the Directive and of the institutional process that led to its adoption, the authors propose a critical analysis of Article 9 of the Directive and put forward some considerations on the main practical issues that can surface in its implementation. In this respect, a number of critical points are identified and discussed, most notably in connection with due process rights for defendants and, more generally, potential “interoperability” issues between civil and public proceedings.*

1. INTRODUCTION

The adoption of Directive 2014/104/EU on antitrust damage claims on 26 November 2014

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(Directive)² marks a fundamental cultural shift in the perception prevailing in most Member States (including Italy) that antitrust law is an area where enforcement is predominantly publicly driven. The Directive’s objective is to build a true two-pillar system, where public and private enforcement work as complementary tools to ensure the overall effectiveness of competition rules and enhance their deterrence³.

The Directive represents the culmination of a process which was started by the Court of Justice with the recognition of the direct effect of Articles 101(1) and 102 TFEU⁴ and the explicit endorsement of damages claims as a means to increase their effectiveness⁵, and which was continued by the legislator with the modernisation of antitrust enforcement carried

² Directive 2014/104 of 26 November 2014 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, [2014], OJEU L 349/1.

³ See Recital 6 of the Directive. See also CASSINIS, *Public e private enforcement, azioni collettive e Libro Bianco della Commissione sulle azioni di risarcimento danni da violazioni antitrust*, in *Responsabilità delle imprese e interessi collettivi: in margine alle class actions*, Proceeds of XV National Conference of Studies of Alba, 29 November 2008, Gangemi, 2009.

⁴ Case C-127/73 *BRT v Sabam*, EU:C:1974:25.

⁵ Case C-453/99 *Courage and Crehan*, EU:C:2001:465, paras. 26-27.

out through Regulation (EC) No. 1/2003 (Regulation 1/2003)⁶.

The Commission obstinately pursued the adoption of the Directive with the aim of striking the right balance between the incentive of bringing private claims and the protection of public prosecution tools that are essential in pursuing cartels, most notably the leniency programmes, with a view to reaching an “*optimal overall enforcement of EU competition rules*”⁷. Among the rules that aim to facilitate private enforcement whilst enhancing procedural efficiency and legal certainty, Article 9 of the Directive gives decisions issued by National Competition Authorities (“NCAs”) a key role in “follow-on” damages actions, i.e., actions brought as a consequence of a competition authority finding an infringement of EU antitrust rules. An NCA decision finding an infringement is considered irrefutably established in civil actions brought in the same Member State and *prima facie* evidence in other Member States. As will be explained below, Article 9 of the Directive marks a significant development in most Member States but is far from being uncontroversial.

The binding effect of NCA decisions has been the subject matter of other contributions published in this review by distinguished

authors⁸. This paper aims at complementing them by offering a different perspective, based on the consideration of practical issues than can surface in the implementation of the Directive. In light of this, this paper does not indulge in a thorough analysis of the status of the law preceding the adoption of the Directive, but, after briefly setting the scene by reminding the most significant developments that predates the adoption of the Directive, focuses attention on the potential consequences of its implementation. More specifically, in the following paragraphs we: (1) give a very short overview of the legal status prevailing before the Directive; (2) analyse briefly the institutional process that led to the adoption of Article 9 and the rationale of the provision; (3) propose a critical analysis of Article 9 of the Directive; and (4) put forward some considerations on the main practical implications of its implementation.

2. THE STATUS QUO

2.1 The Status of Commission Decisions: Masterfoods and Article 16(1) of Regulation 1/2003

As explained below, Article 9 of the Directive is modelled on the binding effect of the

⁶ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition contained in Articles 81 and 82 of the Treaty, OJEC (2003) L 1/1.

⁷ http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf Competition Policy Brief on the Damages Directive (Issue 2015-1, January 2015).

⁸ See NAZZINI, *The Effect of Decisions by Competition Authorities in the European Union* and PANZANI, *Binding Effect of Decisions Adopted by National Competition Authorities*, both published in the *Italian Antitrust Review*, Vol. 2, No. 2 (2015), as proceeds of the conference “Rapporto tra Public e Private Enforcement alla luce della Direttiva 2014/104/UE”, Rome, 28 May 2015.

Commission's decisions on national courts. In the system of parallel competences to apply EU competition law, the *Masterfoods* ruling⁹, later codified by Article 16 of Regulation 1/2003, provides that when national courts rule on agreements, decisions or practices under Article 101 or 102 TFEU which are already the subject of a Commission decision, they cannot issue decisions that run counter to the decision adopted or contemplated by the Commission. The principle that national courts should avoid rulings that conflict with Commission decisions finds its origins in the *Delimitis* ruling¹⁰, in which the Court of Justice underlined that the Commission “*is responsible for defining and implementing the orientation of Community competition policy*”¹¹ and that, in a system of parallel competences, in order not to breach the general principle of legal certainty, national courts must avoid issuing decisions that would conflict with a decision contemplated by the Commission¹².

As a corollary to this primacy principle, the Court of Justice added that, pending an appeal, national courts can decide to stay proceedings to avoid issuing a decision that runs counter to a Commission decision. This faculty becomes a duty when the outcome of a dispute before a national court depends on the validity of the

Commission decision and, therefore, on the outcome of its judicial review¹³.

The rationale lies on the special responsibility attributed to the Commission by Article 105 TFEU to ensure the application of the principles under Articles 101 and 102 TFEU. This responsibility is particularly important in a system of parallel competences to ensure legal certainty and the uniform application of EU competition rules. As national courts are not entitled to rule on the validity of Commission decisions, because the TFEU confers this competence exclusively on the Court of Justice, they have a “duty not to run counter” to them based on their obligation of sincere cooperation under Article 4(3) TFEU.

This primacy accorded by caselaw (and later by an EU regulation) to administrative proceedings over national court proceedings had no precedent in our legal system and raised serious criticisms of its incompatibility with the Italian constitution¹⁴. In response to these criticisms, it has been argued that Article 16 does not impose a positive binding effect but a “negative duty of abstention”¹⁵ on national courts, which retain the possibility to have recourse to a

⁹ Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd*, ECLI:EU:C:2000:689.

¹⁰ Case C-234/89 *Stergios Delimitis v Henninger Bräu AG* : ECLI:EU:C:1991:91.

¹¹ *Delimitis*, para. 44.

¹² *Delimitis*, para. 47.

¹³ *Masterfoods*, paras. 55-57.

¹⁴ E.g., TOSATO, *Il processo di modernizzazione*, in TOSATO, BELLODI, *Il nuovo diritto europeo della concorrenza*, Milan, 2004, p. 47; PACE, *I fondamenti del diritto antitrust europeo*, Milan, 2005, p. 309. For an opposite thesis, see Adinolfi, Article 16, in *L'applicazione del diritto comunitario in materia di concorrenza*, edited by Adinolfi, Daniele, Nascimbene, Amadeo, Milan, 2007, p. 198.

¹⁵ See KOMNINOS, *Effect of Commission decisions on private antitrust litigation: Setting the story straight*, CMLR 2007, N. 44, p. 1387.

reference for a preliminary ruling on validity under Article 267 TFEU and are, therefore, “positively” bound only by decisions of the EU courts. Other commentators are of the opinion that the constitutional doubts can be overcome by considering that the national courts are bound by Article 16(1) of Regulation 1/2003, which acts as a “*norma in bianco*”, completed on a case-by-case basis by reference to the content of the Commission’s decision¹⁶. National courts seem to have ignored the debate by accepting Article 16 of Regulation 1/2003 as a superior rule in antitrust enforcement without raising constitutional issues.

With regard to the scope of Article 16(1), it is commonly accepted that it concerns only Commission decisions that apply substantive law within the system of Regulation 1/2003, i.e., decisions finding an infringement (Article 7), interim decisions (Article 8), decisions finding inapplicability (Article 10) and decisions withdrawing exemptions (Article 29(1))¹⁷. By contrast, Article 16(1) does not apply to commitment decisions (Article 9) that do not take a position on infringement¹⁸. Likewise, decisions rejecting complaints based on a lack of Community interest do not entail a formal position on infringement and do not prevent national authorities from applying Article 101

and 102 TFEU¹⁹. Informal positions expressed in what are known as ‘comfort letters’ are also *a fortiori* excluded, given that they are not binding on the Commission.

While it is commonly accepted that the prohibition “to run counter” only refers to the Commission’s assessment of the relevant substantive law, e.g., the finding of an infringement, and not to the consequences of its assessment (such as the damage and its causal link with the unlawful conduct), the exact scope of the actual “finding of an infringement” that is binding on national courts is more controversial. Nazzini analyses at length the relevant caselaw and indicates which parts of the Commission decision are to be deemed binding²⁰. In essence, these are limited to the parts of the decision that can be challenged before the Court of Justice, i.e., the operative part and any findings that form the essential basis for it or are an integral part of it²¹. Similarly, the personal scope of the decision’s binding effect is limited to its addressees. Nazzini also argues that the effect of any adverse decision should be binding on complainants and other third parties that challenged the EU decisions²². This seems correct but of little practical use given that it

¹⁶ FATTORI, *Art. 16 Regolamento 1/2003*, in MARCHETTI, ÜBERTAZZI, *Commentario breve alle leggi su proprietà intellettuale e concorrenza*, Padua, 2007.

¹⁷ HIRSCH, MONTAG, SACKER, *Competition law: European Community Practice and Procedure*, London, 2008.

¹⁸ See Recitals 13 and 22 of Regulation 1/2003.

¹⁹ See Recital 18 of Regulation 1/2003.

²⁰ NAZZINI, *The Effect of Decisions by Competition Authorities in the European Union*, cit., Section 2.2.

²¹ Case T-474/04 *Pergan Hilstoffe für Industrielle Prozesse GmbH v Commission*, ECLI:EU:T:2007:306, para. 73; and order in Case C-164/02 *Netherlands v Commission*, ECLI:EU:C:2004:54, para. 21.

²² See NAZZINI, *The Effect of Decisions by Competition Authorities in the European Union*, cit., Section 2.3.

would essentially relate to the Commission's findings of inapplicability under Article 10 of Regulation 1/2003, which have never been relied on to date.

Another question is whether the national court's duty to avoid conflicts is confined to the very same cases, i.e., the same conduct perpetrated by the same parties, or whether this duty extends to the same type of conduct perpetrated by other undertakings. This question arose in the much-commented *Crehan v Innpreneur* before the English courts²³, a very atypical case where the Commission had found in past decisions that lease agreements between certain beer suppliers and pub tenants infringed Article 101 TFEU by contributing to the cumulative foreclosure effect of a network of similar agreements in the market. The English courts had to decide whether the Commission decision was binding on a beer supply agreement that contributed to the cumulative effect of the network of similar agreements, even though the parties had not been involved in the Commission proceedings. Relying on the opinion of A.G. Cosmas in *Masterfoods*²⁴, the House of Lords, ruling in the last instance, decided that in those circumstances the Commission decision should not be awarded deference, because Article 16(1) could only apply to an identical case²⁵. Consequently, the

Commission's findings had merely the status of admissible evidence, which, although persuasive, could be challenged by the defendant, who did not take part in the Commission proceedings and would otherwise be denied a fair trial.

The ruling, which split legal opinions²⁶ but accurately reflected the content of Article 16(1) and of the Commission's cooperation notice²⁷, marks a clear preference for due process rights over the consistency of application of EU law in a case in which the type of agreement and markets were precisely the same as those sanctioned by the Commission. It draws a meaningful line between binding effect and the status of "persuasive evidence"; a dichotomy which is central to the debate preceding the adoption of the Directive in Italy, as explained below.

2.2 Effect of NCA Decisions on National Court Proceedings before the Directive

Although in most Member States no primacy rule similar to *Masterfoods* exists in relation to

national court, such that a risk of conflict arises when the binding authority of the national court decision conflicts with the grounds and operative part of the Commission decision (Opinion of AG Cosmas, para. 16).

²³ See, in the last instance, *Inntrepreneur Pub Company (CPC) et al. v Crehan (HL)*, [2006] UKHL 38. Annotation by HANLEY in 44 CML Rev. (2007), p. 817.

²⁴ Opinion in *Masterfoods*, ECLI:EU:C:2000:249.

²⁵ According to AG Cosmas, Article 16(1) only applies when the legal and factual context being examined by the Commission is "completely identical" to that before the

²⁷ *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*, (2004/C 101/04), OJEC (2004) C 101/54, para. 8.

NCA decisions²⁸, in some countries the law provides a similar mechanism, with a view to improving coordination and procedural efficiency. For instance, in the United Kingdom national law gives binding effect to decisions of the Competition and Market Authority (CMA) that have become final²⁹. In Germany, national law was amended in 2005 to give binding effect to decisions issued by the Commission or the *Bundeskartellamt* or any other NCA within the EU³⁰.

In Italy, as a result of a series of damage claims originating from a decision adopted by the *Autorità Garante della Concorrenza e del Mercato* (“AGCM”) in the sector of motor vehicle liability insurance³¹, it is now settled caselaw

that findings in AGCM decisions have the status of “privileged evidence” of the facts assessed therein³², which means that the findings of the AGCM are presumed to be true. The presumption is in principle rebuttable, but is one that deserves very high consideration by the court³³. The scope of the presumption was first limited by the Italian Supreme Court (*Corte di Cassazione*) to infringement findings, similar to Article 16(1) of the Regulation 1/2003; however, the scope was progressively extended to all assessments and findings contained in a AGCM decision³⁴. As a result, national civil courts have given particularly persuasive authority even to findings relating to the effects (and not only to the mere existence) of illegal

²⁸ In France, Portugal and Spain only Commission decisions have a binding effect on national courts, under the terms of Regulation 1/2003.

²⁹ Under Section 58A, Competition Act 1998: “Unless the court directs otherwise or the Director has decided to take further action in accordance with section 16(2) or 24(2), a Director’s finding which is relevant to an issue arising in Part I proceedings is binding on the parties if (a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or (b) the decision of an appeal tribunal on such an appeal has confirmed the finding”. For a more complete review see NAZZINI, *The Effect of Decisions by Competition Authorities in the European Union*, cit., Section 3.

³⁰ Article 33, para. 4, *Gesetz gegen Wettbewerbsbeschränkungen* - GWB Federal Law Gazette (*Bundesgesetzblatt*, BGBl.) 2005, Part. I, 1954 -1969 and subsequent amendments (BGBl. 2005, Part I, 2676-2681).

³¹ We refer to AGCM proceedings no. I/377, which resulted in decision no. 8564 of 28 July 2000, Bull. No. 30/2000 confirmed in the last instance by the Council of State (*Consiglio di Stato*), Division VI, 23 April 2002, judgment no. 2199 (Foro it., 2002, III, col. 482 with annotations by SCARSELLI, *Brevi note sui procedimenti amministrativi che si svolgono dinanzi alle autorità garanti e sui loro controlligiurisdizionali*, FRACCHIA-VIDETTA, *La tecnica come potere*, PAROLESI, *Sul nuovo che avanza in antitrust:*

l’illiceità oggettiva dello scambio di informazioni, OSTI, *Brevi puntualizzazioni in tema di collusione oligopolistica*).

³² The first ruling by the Italian Supreme Court (*Corte di Cassazione*) in which the probative value of AGCM decisions was described in these terms is *Fonsai v Nigriello*, judgment no. 2305 of 2 February 2007, Foro it., vol. I, 2007, p. 1097, annotation by PALMIERI, *Cartello fra compagnie assicuratrici, aumento dei premi e prova del pregiudizio: il disagiata cammino dell’azione risarcitoria per danno da illecito antitrust* and PAROLESI, *Il danno antitrust in cerca di disciplina (e di identità?)*. The notion of privileged evidence was further examined in the caselaw of the Italian Supreme Court in *ANCL v Inaz Paghe*, judgment no. 3640 of 13 February 2009, Riv. Dir. Ind. 2009, II-586. See also Italian Supreme Court, judgment no. 5942 of 14 March 2011, Foro it., 2011, I, 1724 and Italian Supreme Court, judgment no. 6347 of 21 March 2011, Foro it., 2011, I, 1723.

³³ CORTESE, *Private Antitrust Enforcement – Status Quo in Italy*, *Europäische Zeitschrift für Wirtschaftsrecht: EuZW.- Vol. 23.2012*, 19, p. 730-733.

³⁴ *Ex multis*, Italian Supreme Court, judgments nos. 13486 of 20 June 2011; 10211 of 10 May 2011, Foro it., 2011, I, 2685; and 17702 of 29 August 2011.

conduct³⁵. One implication is that defendants suffer certain limitations in demonstrating the absence of damage or causal link between the damage and the infringement, as they are precluded from relying on the same arguments and data as submitted during the administrative proceedings before the AGCM, but need to provide precise indications on situations and conducts specific to their relationship with the claimant³⁶.

As the notion of “privileged evidence” has been established by caselaw, it does not correspond to either of the two typical procedural categories “legal evidence (*iuris et de jure*)”, which can be rebutted via an ad hoc procedure only³⁷, or “simple evidence (*juris tantum*)”, rebuttable with evidence of the same

nature and level³⁸. Although it is clear that even privileged evidence is rebuttable, a certain level of uncertainty remains as to its boundaries, particularly in terms of the rights of defence of the party against which the privileged evidence is used³⁹. In this respect, an important implication that has been drawn by the Italian Supreme Court in some instances is that the defendant is prevented from using in civil court proceedings evidence that was discarded by the AGCM during administrative proceedings⁴⁰.

It is important to clearly distinguish the status of privileged evidence from the duty to avoid conflicts with a decision under Article 16(1) of Regulation 1/2003. One fundamental difference is that the status of privileged evidence can be extended even to AGCM decisions that relate to similar cases⁴¹ (such as the lease agreements contributing to the foreclosure in *Crehan v Inntrepreneur*). Moreover, as a matter of procedure, unlike in a case of application of Article 16(1) of Regulation 1/2003, Italian courts are under no obligation to stay

³⁵ In many cases resulting from the AGCM decision in the civil motor liability case, the assessment of the effects has been used by the national courts to quantify the damage. See also RORDORF, *Il ruolo del giudice e quello dell’Autorità nazionale della Concorrenza e del Mercato nel risarcimento del danno antitrust*, La Società 7/2014. In this respect, it is noteworthy that in its landmark Avastin decision (1760 - Roche-Novartis/Farmaci Avastin e Lucentis, 27 February 2014, Bull. no. 11 of 17 March 2014) the AGCM included a detailed analysis of the effects of the anticompetitive practice in terms of higher costs for the national health service, which could easily be used as a reference in damages claims.

³⁶ See e.g. Italian Supreme Court, judgments nos. 10211/11, 11610/11, 13486/11, 17362/11 and 7039/12. See also RODORF, *Il ruolo del giudice e quello dell’Autorità nazionale della Concorrenza e del Mercato nel risarcimento del danno antitrust*, cit.

³⁷ For instance, with regard to public deeds or authenticated private deeds under Articles 2700 and 2702 of the Italian Civil Code, which can be overturned only by questioning their truthfulness through a specific action (*querela di falso*).

³⁸ Without prejudice to the general “prudent appraisal” criterion inspiring the assessment of evidence under Article 116(1) of the Italian Code of Civil Procedure.

³⁹ To that effect, FRIGNANI, *La difesa disarmata nella cause follow on per danno antitrust*, in *Mercato, Concorrenza e Regole*, 2013, no. 3, p. 445.

⁴⁰ See Italian Supreme Court, judgment no. 5942 of 14 March 2011, *Foro it.*, 2011, I, 1724 and Italian Supreme Court, judgment no. 6347 of 21 March 2011, *Foro it.*, 2011, I, 1723. This caselaw seems hardly consistent with the *Nigriello* and *Inaz Paghe* caselaw mentioned above, which granted full autonomy to the national court in assessing the evidence.

⁴¹ Court of Milan, decisions of 13 February 2013, in *Okcom v Telecom Italia* and of 27 December 2013, in *Brennercom v Telecom Italia*.

proceedings until the AGCM issues its decision or until the review court rules on that decision⁴².

Although the implementation of the Directive will significantly change this settled context, the caselaw on privileged evidence may still play a role in the new system for decisions issued by NCAs of other Member States, as discussed further below (see Section 4).

3. THE INSTITUTIONAL PROCESS LEADING TO THE DIRECTIVE

3.1 The Green and White Paper

The institutional process that led to the adoption of the Directive started in December 2005 with a Commission Green Paper⁴³, which identified the main obstacles to a more efficient system for bringing damages claims for infringements of EU antitrust law and put forward several options for debate. The Commission's initiative was built on the landmark decisions of the Court of Justice in *Courage v Crehan*⁴⁴ and *Manfredi*⁴⁵, which revamped

the discussion on the need to enhance private antitrust enforcement in the EU. These rulings drew national courts' attention to the importance of ensuring the full effectiveness of Articles 101 and 102 TFEU, by compensating any individuals' losses incurred as a result of antitrust infringements. The modernisation process revolving around Regulation 1/2003 was also at the source of the initiative. This regulation affects national courts' decentralised enforcement of EU competition law by: (i) attributing direct effect to Article 101(3) TFEU, thereby giving national courts the power to apply EU antitrust rules in full (Article 1); (ii) requiring the application of Articles 101 and 102 TFEU in parallel with national competition provisions whenever trade between Member States is affected (Article 3(1)), thereby subjecting them to the modalities and constraints imposed by the primacy of EU law⁴⁶; and (iii) introducing mechanisms to ensure coordination and cooperation between the Commission and national courts (Article 15). The Green Paper was endorsed by the European Parliament in 2007⁴⁷ and was followed in 2008

⁴² See Court of Appeal of Rome, decision of 16 January 2001, *Stream SpA v Telepiù*, in *Giur. Comm.*, 2002, II, p. 362, "non trattandosi, per quanto concerne l'attività del Garante, di procedura contenziosa in sede giurisdizionale (come previsto dall'art. 295 c.p.c.) è fuori luogo richiedere la sospensione del procedimento, specie considerata l'ontologica diversità degli interessi posti alla base delle rispettive procedure".

⁴³ *Green Paper - Damages actions for breach of the EC antitrust rules*, COM(2005) 672, 19 December 2005.

⁴⁴ Case C-453/99, *Courage and Crehan* cit.

⁴⁵ Joined cases C-295/04 to C-298/04 *Manfredi v Lloyd Adriatico et al.*, ECLI:EU:C:2006:461.

⁴⁶ ADINOLFI – DANIELE – NASCIBENE – AMADEO, *L'applicazione del diritto comunitario della concorrenza – Commentario al regolamento (CE) n. 1/2003 del Consiglio del 16 dicembre 2002*, Milan, 2007; PACE, *Diritto europeo della concorrenza – Divieti antitrust, controllo delle concentrazioni e procedimenti applicativi*, Padua, 2007; TAVASSI, *Il regolamento CE n. 1/2003: verso una devoluzione di competenze in materia di concorrenza dalla Commissione Europea alle autorità garanti ed ai giudici nazionali* in *Rivista del commercio e degli scambi internazionali*, 2004, 315.

⁴⁷ *European Parliament legislative resolution of 25 April 2007 on the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights* (COM(2006)0168 – C6-0233/2005 – 2005/0127(COD)).

by a White Paper setting out concrete proposals⁴⁸. The White Paper's primary objective was to make it easier for victims of antitrust infringement to obtain compensation for any losses suffered, while preserving a strong and effective public enforcement system⁴⁹. The White Paper triggered a heated debate particularly as to whether the Directive should include a collective redress mechanism specific to antitrust damage claims⁵⁰, which significantly delayed the issuance of a legislative proposal.

It was not until 12 June 2013 that the Commission formalised a proposal for a directive (Proposal)⁵¹, which was significantly

modified by the Council⁵². Further changes were agreed on in the context of the trilogue⁵³, until the Parliament adopted the text on first reading during the plenary session of 17 April 2014, which was later confirmed by the Council on 10 November 2014⁵⁴. The Directive was signed into law on 26 November 2014, and Member States are required to implement it in their national law by 27 December 2016.

3.2 The Proposal to Make NCA Decisions Binding on National Courts

With specific regard to the status of NCA decisions in civil proceedings, the initial intention in the White Paper was clearly to construe the provision on the model of the "primacy rule" enshrined in Article 16(1) of Regulation 1/2003. Accordingly, the proposal was to adopt a rule whereby "*national courts that have to rule in actions for damages on practices under Article [101 or 102] on which an NCA in the ECN [European Competition Network] has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding*

⁴⁸ *White Paper of 2 April 2008 on damages actions for breach of the EC antitrust rules* (COM (2008) 165).

⁴⁹ *Staff Working Paper of the White Paper*, paras. 17-21 "As confirmed in the 2005 Staff Working Paper, the aim is not to substitute public enforcement, or parts thereof, with actions for damages. The role of the public authorities will continue to be of crucial importance in detecting anti-competitive practices such as cartels, where the special investigation powers vested in the public authorities are indispensable for effective and efficient enforcement of competition law. When assessing the different options put forward for discussion in the Green Paper, and then identifying the measures contained in this White Paper, the Commission has borne in mind the need to maintain a strong and effective public enforcement system".

⁵⁰ This option was eventually abandoned and included in a horizontal initiative for the purpose of creating a common set of principles providing uniform access to justice via collective redress within the Union and a horizontal initiative based on common principles to specifically but not exclusively deal with the infringement of consumer rights. See *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law* (2013/396/EU), [2013], OJEU L 201/60.

⁵¹ *Proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404 final.

⁵² Council, 3 December 2013, *Adoption of the general approach*, 2013/0185 (COD).

⁵³ Council, 24 March 2014, 8088/14 - *Analysis of the final compromise text with a view to agreement*.

⁵⁴ *European Parliament legislative resolution of 17 April 2014 on the proposal for a directive of the European Parliament and of the Council 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* (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)).

an infringement, cannot take decisions running counter to any such decision or ruling?

The Commission in the White Paper, drawing a parallel with its own decisions, explained that it saw no reason “*why a final decision on Article 101 or 102 taken by an NCA in the European Competition Network (ECN), and a final judgment by a review court upholding the NCA decision or itself finding an infringement, should not be accepted in every Member State as unrebuttable proof of the infringement in subsequent civil antitrust damages cases?*”. Importantly, the Commission drew no difference according to whether NCA decisions were relied on within or outside the courts’ own Member State.

The White Paper’s suggestion was confirmed in the Proposal’s Article 9, which introduced a rule essentially replicating the wording of Article 16(1) of Regulation 1/2003⁵⁵. The Commission clarified that, similar to this provision, the duty not to run counter to NCA decisions would be without prejudice to national courts having recourse to Article 267 TFEU on preliminary rulings, if required. Two fundamental differences remained, however, with Article 16(1) of Regulation 1/2003: (i) the binding effect of NCA decisions would be triggered only when NCA decisions became

final, i.e., when the defendant had exhausted all appeal avenues⁵⁶; and (ii) recourse to Article 267 TFEU would be limited to interpretation, as the Court of Justice lacks jurisdiction to rule on the validity of national acts.

The White Paper and the Proposal raised criticisms, including from Member States’ authorities⁵⁷, particularly regarding the binding effect of decisions issued by NCAs of other Member States. As explained, only two Member States accord a specific procedural status to NCA decisions in court proceedings; for most of the other Member States, including Italy, doing so would raise significant doubts of a constitutional nature regarding the independence of judiciary and separation of powers⁵⁸. Some respondents to the consultation launched by the Commission also observed that the provision could lead to potential breaches of Article 6 of the European Convention of Human Rights (ECHR) and the equivalent Articles 47-48 of the European Charter of Fundamental Rights

⁵⁵ Article 9 of the Proposal reads as follows: “*Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty?*”.

⁵⁶ In all Member States, NCA decisions are subject to judicial review. NCA decisions are considered final when they can no longer be reviewed, i.e., decisions that were not appealed within the applicable time limits and thus accepted by their addressees, and those that were confirmed by the competent review courts (see footnote 9 of the White Book).

⁵⁷ See, for instance, comments received from the Danish, French and Italian authorities, on http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html.

⁵⁸ As explained by Panzani in this same review, the main criticism related to the fact that the NCA decision is not a judicial decision but an administrative act and accordingly could only have the value of privileged evidence on the facts to be ascertained (PANZANI, *Binding Effect of Decisions Adopted by National Competition Authorities, cit.*, Section 2).

in relation, for instance, to Member States where a party has no opportunity to be heard before an independent tribunal, where decisions are not issued by independent authorities or are subjected to a limited standard of judicial review, or where legal privilege is not recognised⁵⁹. More generally, until greater uniformity of procedural safeguards could be achieved, the proposal to mutually recognise the binding effect of NCA decisions was seen as premature.

In this situation, the Council unsurprisingly changed the text of Article 9 with the main aim of differentiating the status of decisions used in court proceedings in the same Member States, confirmed as “*irrebuttable*”, and those used in other Member States, downgraded to “*prima facie evidence*”. An analysis of these provisions is set out below.

4. A CRITICAL ANALYSIS OF ARTICLE 9 OF THE DIRECTIVE

4.1 The Binding Effect of Final Infringement Decisions Adopted by the NCA of the Same Member State

Article 9, first paragraph, reads as follows: 1. “*Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under*

⁵⁹ See, for instance, comments received from the UK Competition Law Association.

Article 101 or 102 TFEU or under national competition law”.

The Directive, therefore, not only limits the binding effects to the decisions adopted by the NCA of the same Member State, it also clearly departs from the wording of the original Proposal, which was modelled on Article 16(1) of Regulation 1/2003 and prevented court decisions from “running counter” to NCA decisions. Article 9(1) of the Directive thus only accords binding effect to the “positive” finding of infringement by a decision, with the national courts remaining free to rule on the unlawfulness of a conduct in the residual cases⁶⁰ where the same conduct is found compatible with Articles 101 and 102 by an NCA⁶¹.

The modification introduced by the Council probably reflects the different rationale of Article 9 of the Directive compared to Article 16 of Regulation 1/2003. Whilst Article 16 of Regulation 1/2003 is an expression of the principles of primacy and uniformity of application of EU competition law, the primary purpose of Article 9 of the Directive, as clearly emerges from its recitals⁶², is to facilitate

⁶⁰ As the exemption system was abolished by Regulation 1/2003, the Commission has never had recourse to Article 10 decisions to declare an agreement or practice compatible with Articles 101-102 TFEU and this type of decision has also become very rare at national level.

⁶¹ See CHIEPPA, *Il Ruolo delle Autorità Nazionali della Concorrenza nel rafforzamento del Private Enforcement*, in RAFFAELLI, *Antitrust between EU law and National law/Antitrust fra diritto Nazionale e diritto dell'Unione Europea*, Brussels, 2014.

⁶² See Recital 34 in particular.

private actions for damages and improve procedural economy for claimants by preventing facts already assessed by NCAs from being reviewed again.

That the issue of uniform application of EU competition rules is secondary in Article 9 compared to the obligation arising from *Masterfoods* is rather logical: in light of the Commission's responsibility "for defining and implementing the orientation of Community competition policy"⁶³, it is understandable that conflicts with Commission decisions jeopardise the consistent application of EU competition law. The same cannot be said of potential conflicts with NCA decisions, given that they have not the same responsibility as the Commission and, instead, have taken in the past rather different approaches in applying Articles 101 and 102 TFEU to the same or similar practices, notwithstanding the existence of the ECN and the rules governing its functioning⁶⁴.

Despite their different rationale, similarities between Article 9 of the Directive and Article 16(1) of Regulation 1/2003 or the *Masterfoods*

doctrine undoubtedly exist, and it is therefore not surprising that similar criticisms of a constitutional nature have been raised concerning the new provision, particularly regarding the potential inconsistency with the independence of the judiciary⁶⁵. These criticisms can arguably be rebutted by reference to the same counterarguments as those mentioned above with reference to the *Masterfoods* caselaw: national courts maintain the possibility to refer the question to the Court of Justice whenever there is a doubt as to the compatibility of the NCA decision with EU competition rules, although in this case only to obtain a ruling on the interpretation of EU law rather than on the validity of the decision. Still, national courts would be enabled to depart from NCA decisions as a result of the Court of Justice's decision⁶⁶. Moreover, as, unlike in Article 16(1) of Regulation 1/2003, only final decisions can have a binding effect, the Directive assumes that the NCA decision has

⁶³ *Delimitis*, cit., para. 45.

⁶⁴ The case of online hotel booking is exemplary on how coordination between NCAs is still unsatisfactory and should be improved. Booking.com has assumed consistent commitments with three NCAs (in Italy, France and Sweden), under the Commission's supervision, on the terms of its online travel agency contracts with hotels (with regard to Italy, see I779 - Mercato dei servizi turistici - Prenotazioni online, Bull. no. 14 of 27 April 2015). The *Bundeskartellamt* has taken the view that the very same terms offered as a commitment infringed Article 101 TFEU, based on an earlier decision whereby it sanctioned a competitor of Booking.com, HRS, for the same conduct.

⁶⁵ For an examination of these criticisms, see BARIATTI, PERFETTI, *Prime osservazioni sulle previsioni del Libro bianco in materia di azioni per il risarcimento del danno per violazione delle norme antitrust della Commissione e del Codice del consumo quanto alle relazioni tra procedimenti antitrust e giurisdizione*, in ROSSI DAL POZZO, NASCIBENE, *Il private enforcement delle norme sulla concorrenza*, Milan, 2009.

⁶⁶ Although the preliminary ruling on interpretation, unlike that on validity, does not have *erga omnes* effects, the decision is nonetheless binding on the national court hearing the case in which the decision is given (a.o. Case 29/68 *Milch-, Fett- und Eierkontor GmbH v Hauptzollamt Saarbrücken*, ECLI:EU:C:1969:27). The court will therefore have the duty not to apply the national rule/act if it is incompatible with EU law in light of the Court of Justice's decision. It is for the national court to decide whether it is sufficiently enlightened by the ruling to correctly apply EU law or if a further reference is needed (*Ibid.*).

been (or could have been) subjected to judicial review on appeal.

It is also true that our legal system is not entirely alien to the spillover of findings from sanction proceedings into compensation proceedings. Under Article 651 of the Italian Criminal Procedure Code, despite the independence between criminal, civil and administrative proceedings, a final decision issued by a criminal court binds the civil and administrative courts when ruling on compensation for damage, in relation to the establishment of the facts amounting to a crime, its criminal unlawfulness and the defendant's conduct. The wording is not very different from Recital 34 of the Directive, insofar as it attaches a binding effect to the material and personal scope of the decision, and to the legal classification of the infringement (see below). The decisive difference is that criminal proceedings are judiciary and decisions are adopted following an adversarial debate. Conversely, NCA decisions, at least in Italy, are adopted by the same body that acts as prosecutor and, under the Directive, may become binding without having been reviewed by a court. Moreover, although it is true that the Strasbourg Court confirmed that the Italian system complies with the ECHR as administrative courts have full jurisdiction to review AGCM decisions in law and fact⁶⁷, the same ruling also acknowledges

that the administrative proceedings before the AGCM do not per se satisfy the requirements under Article 6(1) of the ECHR. Problematic issues may therefore arise when the administrative decision becomes final without being appealed, which can occur for various reasons (e.g., following a settlement⁶⁸ or a leniency application, or simply due to a lack of economic resources). In that scenario, the parties who have not benefitted from a full adversarial procedure are precluded from challenging the existence of the infringement when called to compensate the damage arising out of it. This risk cannot be overcome by the right of national courts to refer a preliminary question of EU law, given the specific features of this procedure, which cannot be likened to a trial, and the fact that the Court of Justice's review will be confined, as observed above, to the interpretation of EU law.

Another existing case of interference between administrative and judicial proceedings in Italy is Article 140-bis of the consumer code, which provides that the judge who is reviewing the admissibility of a class action may stay the court proceedings if the same facts are being investigated in independent administrative

review by a judicial body that has full jurisdiction. The characteristics of this body include, according to the same judgment of the European Court of Human Rights, the power to quash the decision under review in all respects on questions of fact and law. The judicial body must have jurisdiction to examine all questions of fact and law relevant to the dispute brought before it (para. 59).

⁶⁸ This option is not yet available in Italy but could be introduced in the future to align the Italian procedure with that of the European Commission.

⁶⁷ European Court of Human Rights, Ruling no. 43509/08 *Menarini Diagnostics S.r.l. v Italy*. According to the ruling, decisions made by administrative authorities which do not themselves satisfy the requirements under Article 6(1) of the ECHR must be subject to subsequent

proceedings. However, this provision, which represents an atypical solution in Italy, does not go as far as allowing the independent administrative authority's decision to have a binding effect⁶⁹.

With regard to the scope of Article 9(1) of the Directive, with the aim of providing clear guidance to national courts and parties, the legislator precisely defines at Recital 34 what findings of the final administrative decision are considered irrefutably established: the “*nature of the infringement*” i.e., its legal classification and “*its material, personal, temporal and territorial scope*” as determined by the NCA or court reviewing the decision. This precision is welcome to the extent that it definitively puts an end to the debate on the “*notion of conflict*” that gave rise to *Crehan v Innentrepreneur* in England. Under the Directive, the national courts' duty to abide by the NCA decision is clearly limited to identical cases, in that it requires full correspondence between the conduct subject to review as well as its legal classification, its perpetrators, its duration and its geographical location. This solution seems the most logical given the extensive effects NCA decisions will have on rights of defence as a result of the Directive, as discussed below.

Finally, it should be highlighted that a clerical error is likely to have occurred in the formulation of the provision, given the reference to actions for damages “*brought before their national courts under Article 101 or 102 TFEU*

or under national competition law” (emphasis added). The use of “*or*” seems to imply that the provision applies also to NCA decisions based exclusively on national competition law. This is, of course, outside the powers of the EU legislator and inconsistent with the reference in Article 9 (3) “*to the rights and obligations of national courts under Article 267 TFEU*”; it is clear from the Directive and its recitals that the provisions refer to cases of parallel application of EU competition rules under Article 3 of Regulation 1/2003 and not to the exclusive application of national law⁷⁰. In any event, this is a marginal issue, at least in Italy, considering that, following the entry into force of Article 3 of Regulation 1/2003, NCA decisions based exclusively on national law are very rare.

4.2 The Status of Prima Facie Evidence of Infringement Decisions Adopted by NCAs of Another Member State

Paragraph 2 provides a differentiation of the status of NCA decisions when the follow-on action is brought before the court of a different Member State. The provision reads as follows: “*Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be*

⁶⁹ RODORF, *Il ruolo del giudice e quello dell'Autorità nazionale della Concorrenza e del Mercato nel risarcimento del danno antitrust*, cit.

⁷⁰ See, in particular, Recital 34, last sentence: “*Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established*”.

assessed along with any other evidence adduced by the parties”.

According to the statement in Recital 35 of the Directive that decisions adopted in other Member States can be assessed “as appropriate, along with any other evidence adduced by the parties”, decisions adopted by NCAs of other Member States seem to fall within the category of “simple evidence” (*iuris tantum*) under Italian law, rebuttable with evidence of the same nature and level. As highlighted above, Article 9 has been significantly amended in the context of the trilogue, as the Council was reluctant to afford the same treatment to all NCA decisions within the ECN. This choice seems appropriate in light of the lack of a formal and substantive harmonisation of the rules and procedures applying to NCAs within the EU. Indeed, as the Commission acknowledged in its recent communication “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”⁷¹, not all national laws contain specific safeguards to ensure the independence and impartiality of NCAs, and some Member States have weakened NCAs by merging them with other regulators or by withdrawing resources. Moreover, procedural tools and even remedies differ considerably across the EU, and judicial review procedures

and standards are very different from one Member State to another⁷².

Given these circumstances, the Proposal’s assumption that “throughout the EU, undertakings enjoy a comparable level of protection of their rights of defence, as enshrined in Article 48(2) of the EU Charter on Fundamental Rights”⁷³ was challenged during the legislative process⁷⁴ on the basis of the potential incompatibility of Member States’ review standards with the requirement in the *Menarini* ruling⁷⁵. Despite the ultimate possibility to refer a preliminary question to the Court of Justice for the interpretation of EU competition rules, the lack of uniform standards for reviewing antitrust infringements led the legislator to opting for the weaker “*prima facie* evidence” status. This is, of course, only a “minimum requirement”, as suggested

⁷¹ COM(2014) 453 available on <http://ec.europa.eu/competition/antitrust/legislation/regulations.html>. See in this respect MEROLA, PETT, RIVAS (eds) *10 Years of Regulation 1/2003: Challenges and Reform - GCLC Annual Conference Series*, [2015] Bruylant.

⁷² The Commission recently concluded a public consultation to gather views on how to ensure that NCAs: (i) can act independently when enforcing EU competition rules and have the resources and staff needed to do their work; (ii) have an adequate competition toolbox to detect and tackle infringements; (iii) can impose effective fines on companies that break the rules; and (iv) have leniency programmes that encourage companies to come forward with evidence of illegal cartels and work effectively across Europe. A summary report of the replies is available on: http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html.

⁷³ See Commission Proposal, point 4.3.1.

⁷⁴ See CHIEPPA, *Il Ruolo delle Autorità Nazionali della Concorrenza nel rafforzamento del Private Enforcement*, in Raffaelli, *Antitrust between EU law and National law/Antitrust fra diritto Nazionale e diritto dell’Unione Europea*, cit.

⁷⁵ European Court of Human Rights, Ruling No. 43509/08 of 27 September 2011, *Menarini Diagnostics S.r.l. v Italy*, cit.

by the words “at least”, leaving the Member States free to adopt legislation that grants a binding effect even to these decisions; however, this possibility is unlikely to be exploited by many countries, which will have to first adapt to the change brought about by the recognition of a binding effect to the decisions of their own NCAs.

In Italy, the question may arise as to whether the Italian Supreme Court’s caselaw on privileged evidence can be of any use for the “at least *prima facie* evidence” status to be accorded to antitrust decisions adopted in other Member States. Some authors suggest the probative value of “privileged evidence” may be very similar, if not the same, to the value the Directive accords to foreign NCA’s decisions⁷⁶. In this respect, however, we note that the presumption currently applying to AGCM decisions under the “privileged evidence” caselaw, although rebuttable, has been given very high consideration by Italian civil courts, and is therefore very difficult to overturn for defendants. Conversely, it is to be expected that national courts will inevitably be less deferent towards administrative authorities of other Member States, which, according to the Directive can be assessed “*as appropriate, along with any other evidence adduced by the parties*”, thus suggesting that their status should not be privileged compared to other evidence. In any event, we expect that the defendants will have ample room to raise objections to their use in court proceedings, for instance on the basis of

⁷⁶ NAZZINI, *The Effect of Decisions by Competition Authorities in the European Union*, cit., Section 4.2.1.

the failure to comply with rights of defence during foreign administrative proceedings, fundamental rights, the non-compliance of the competition authority with the Commission’s decision-making practice, etc.

5. SOME THOUGHTS ON THE POTENTIAL IMPLICATIONS OF ARTICLE 9

The Directive’s implementation process is ongoing and the Italian system has taken steps to adapt to the new rules. Indeed, on 9 July 2015 the Parliament mandated the government to adopt legislative decrees for its enactment into Italian law⁷⁷. Moreover, in a recent decision, the Italian Supreme Court had the opportunity to refer to the Directive’s principles, despite the fact it has yet to be enacted in Italy⁷⁸.

In this rapidly evolving context, the application of the new “rule of precedence” introduced by Article 9 of the Directive, which has the potential to become a provision that is widely relied on, has many possible practical implications.

First, from an administrative standpoint, the Directive will likely lead to an increase in litigation not only before civil courts but also

⁷⁷ Law no. 114 of 9 July 2015. No legislative proposal has yet been put forward as at the date of publication of this article.

⁷⁸ Italian Supreme Court, judgment no. 11564/2015 of 25 March 2015.

before administrative courts, as undertakings will be incentivised to challenge antitrust decisions to discourage or delay potential claims. This is all the more true in the case of cartels, where defendants who do not challenge administrative decisions are immediately exposed to compensation claims for the entire damage arising from the infringement, given the principle of joint and several liability provided under Article 11 of the Directive.

The above risk will be exacerbated if the caselaw on *lis pendens* between civil and administrative court proceedings relating to the infringements established in NCA decisions evolves along the lines of *Masterfoods*, as described above, i.e. in the sense of requiring national judges to stay proceedings until the appeal of NCA decisions is pending. Presently, the caselaw in Italy has excluded any requirement to stay proceedings pending such review by an administrative court, suggesting that such a stay would be inappropriate⁷⁹. Following the implementation of Article 9 of the Directive, it cannot be excluded that the EU or national caselaw will make it more compelling for national courts to stay civil proceedings until the relevant NCA decision becomes final. If this caselaw development does occur, addressees of NCA decisions will be even more incentivised to appeal them so as to delay the trial.

On a more general note, the Directive and its Article 9, in particular, pose challenging questions of compatibility with due process and

issues of “interoperability” between civil and public proceedings. The main concern relates to the fact that, even following the judicial review of an NCA decision by administrative courts, it is not guaranteed that the findings of antitrust authorities’, be they national or European, are fit to establish facts justifying the award of damages⁸⁰. Judicial control of administrative courts is intrinsically different from civil court procedure, as cases are not built from scratch before the court but the review is limited to checking the accurateness of the fact-finding activity carried out by the NCA, often outside of a true adversarial procedure. Facts are not examined again by the administrative court other than from the standpoint of their logical and consistent reconstruction by the authority in the framework of a review of the legality of the administrative decision⁸¹ and, critically, the

⁸⁰ Although this also applies to the Commission decisions, the extension of a binding effect to NCA decisions, assuming this will imply a more frequent reliance on administrative antitrust decisions by national courts, will have much broader consequences than the application of Article 16 of Regulation 1/2003.

⁸¹ The dissenting opinion of Judge Pinto de Albuquerque in *Menarini* (cit.) offers an interesting perspective. Judge Pinto de Albuquerque held that the texts governing the different courts, and their decisions, made it clear that they could not exercise and had not exercised the full jurisdiction required by Article 6(1), merely conducting the “weaker” control of legality. In practice, said Judge Pinto de Albuquerque, under the Italian system the facts were established by the competition authority and the parties had little chance of contesting them before the courts. Fundamental concepts such as the relevant market, abuse of dominance, or the notion of agreements restricting competition were essentially outside the effective control of the courts, which in practice “had to bow before the all-powerful administrative authorities”. Moreover, in the present

⁷⁹ See footnote 40.

ability to exercise full jurisdiction is limited, at least in the EU and Italian systems, to the calculation of the fine. Against this background, and considering the discretionary and rather broad approach of the Commission and other NCAs in defining the relevant aspects of the decision that are considered irrefutably established under Recital 34 (the nature of the infringement and its material, personal, temporal and territorial scope), their automatic endorsement in civil proceedings may lead to results that are at odds with the defendants' rights of defence and due process. Indeed, the standard of proof in administrative proceedings is arguably much lower than in civil proceedings with regard to, for instance, the classification of the infringement (e.g., as an agreement or concerted practice), its duration, e.g., single and continuous infringements which can be negatively proved by the absence of evidence of a break-up event⁸², or the personal

case, the Italian courts had merely gone through the motions of controlling the decisions, often simply repeating the findings of the competition authority. That approach in his opinion did not comply with Article 6(1).

⁸² As ruled by the General Court “*the notion of an overall plan means that the Commission may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in that infringement, provided that that undertaking participated in the infringement prior to and after that period and provided that there is no proof or indicia that the infringement was interrupted so far as concerns that undertaking. In that case, it will be able to impose a fine in respect of the whole of the period of infringement, including the period in respect of which it does not have evidence of the participation of the undertaking concerned*” (Joined cases T-147/09 and T-148/09 *Trelleborg Industrie SAS and Trelleborg AB v Commission*, ECLI:EU:T:2013:259, para. 87). Moreover, the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anticompetitive purpose is not such as to

liability of companies belonging to the same undertaking, in respect of which the Commission (and NCAs) enjoy absolute discretion and can rely on presumptions.

Despite the fact that these elements are not intended to influence the determination of the causal link and the quantification of damages⁸³, a concrete risk exists, in our view, that their automatic transfer into civil proceedings, along with the general (albeit rebuttable) presumption, in cases involving cartels, that the infringement has caused harm (Article 17(2) of the Directive), will result in civil courts adopting the same or similar standards as administrative authorities for all aspects of their review except for the quantification of damages⁸⁴. This would not be a welcome outcome given the substantially different purposes and rationales of private and public enforcement: while a certain unbalance in favour of the prosecutor can be tolerated in proceedings pursuing the public interest, it seems unfair to transfer this unbalance to private claims, where neither party should be

relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings (a.o. Case T-334/94 *Sarrió SA v Commission*, ECLI:EU:T:1998:97, para. 118).

⁸³ Given the use of the adverb “only”, the list contained in Recital 34 of the Directive must be considered exhaustive.

⁸⁴ This has already been happening for some time in Italy, where the Supreme Court has adopted a presumption regarding the causal link in antitrust damages proceedings in follow-on actions based on an AGCM decision (Italian Supreme Court, judgments nos. 10211/11, 11610/11, 13486/11, 17362/11 and 7039/12).

put at an advantage. To adequately protect defendant's due process rights, national judges will therefore need to perform a rigorous logical separation of their reasoning when they assess the existence of the harm and its causation, as the latter two steps fall outside the scope of Article 9 of the Directive and should be appraised using the ordinary categories of civil law.

Looked at from another perspective, the convergence brought about by the Directive and the wide recourse to civil litigation could also lead to a welcome result: the NCAs could be incentivised to adapt their decision-making practice in light of the binding effects it will have on civil proceedings, thus using more rigorous standards for all the elements that are intended to play a decisive role in compensation claims. In particular, this could lead NCAs to ultimately give up or reconsider their wide use of presumptions that have been harshly criticised for being *de facto* impossible to rebut during administrative antitrust proceedings (for instance on parental liability) and, more generally, to use more adversarial methods to establish facts that defendants will not be able to challenge before the civil courts.

Some commentators observed, based on the White Paper's proposals, that the binding effect of NCA decisions may harm not only the fundamental rights of defendants but also those of claimants⁸⁵, who will not be able to

question the material, personal, temporal and territorial scope of the infringement even when they have not participated in administrative proceedings. In this respect, however, the scope of the binding effect has been limited to the NCAs' "positive" infringement findings, with the consequence that civil courts should, in principle, remain free to extend the scope of the unlawful conduct giving rise to damage beyond the findings of the NCA decision⁸⁶. Therefore, claimants should not be precluded from demonstrating, for instance, that an infringement was longer than established by the NCA, or that other companies took part in the cartel. However, even from this perspective, a risk exists that the implementation of the Directive could trigger deference or at least a certain automatism between the NCA findings and the facts assessed by the civil courts, with the consequence that claimants could find it particularly difficult to establish anything which is not covered by the administrative decision.

In light of the above, a certain convergence or at least cross-fertilisation between the tools and legal categories used in administrative and civil proceedings is not to be excluded. Article 9 and the Directive in general will raise difficult issues of "interoperability" between these proceedings, which, even if addressed by the national legislator, will likely require a significant interpretation effort by national courts and, most notably, by the Court of Justice, which seems

⁸⁵ V. BARIATTI, PERFETTI, *Prime osservazioni sulle previsioni del Libro bianco in materia di azioni per il risarcimento del danno per violazione delle norme antitrust della Commissione e del Codice del consumo quanto alle relazioni tra procedimenti antitrust e giurisdizione*, cit.

⁸⁶ See CHIEPPA, *Il Ruolo delle Autorità Nazionali della Concorrenza nel rafforzamento del Private Enforcement*, in Raffaelli, *Antitrust between EU law and National law/Antitrust fra diritto Nazionale e diritto dell'Unione Europea*, cit.

likely to assume a key role in the interpretation of the provision under Article 267 TFEU.

the growing recourse to negotiated solutions with competition authorities through settlements, leniency applications and commitment decisions.

6. CONCLUSION

The Directive and its Article 9, in particular, pose challenging questions of compatibility with due process for defendants and, more generally, raise issues of “interoperability” between civil and public proceedings.

The implementation of the Directive is likely to deeply influence both the way civil courts deal with damage claims and the way NCAs and administrative courts establish facts that will become binding on civil courts. It can therefore be expected that very specific caselaw will develop in connection with tort law in competition cases. From this perspective, the “*Legge Delega*” empowering the government to implement the Directive legislation very appropriately demands that litigation resulting from antitrust infringements governed by the Directive be concentrated in a limited number of courts.

In the face of the challenging issues and tensions with fundamental rights that are likely to arise, one thing seems quite sure: the Directive (and its implementing legislation) will provide national courts the possibility to submit a vast number of referrals for preliminary rulings to the Court of Justice. Hopefully the judges in Luxembourg will seize this opportunity to regain a leading role in competition law, which they have seemed reluctant to play recently, also due the fall of competition cases referred to Luxembourg and

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