

# THE ITALIAN DECREE IMPLEMENTING THE DIRECTIVE ON ANTITRUST DAMAGES: SHADES OF LIGHT ON TEMPORAL APPLICATION AND PRODUCTION OF EVIDENCE

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**Abstract:** *This article considers the temporal application of Decree No. 3/2017 implementing Directive 2014/104/EU in Italy. It also addresses a few nuanced but relevant discrepancies between the Decree and the Directive in terms of production of evidence.*

## 1. INTRODUCTION

The Directive 2014/104/EU (“Directive”)<sup>2</sup> reaffirms the *acquis communautaire* on the right of anyone who has suffered harm caused by antitrust infringements to claim full compensation.<sup>3</sup> The Directive aims to ensure a level playing field in antitrust actions for damages throughout the EU and avoid forum

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<sup>2</sup> Directive 2014/104/EU of the European Parliament and of the Council 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] OJ L349/1, entered into force on 25 December 2014.

<sup>3</sup> Directive, Recital 12 and Article 1.

shopping, while leaving some discretion to the Member States in its implementation.<sup>4</sup>

Despite the EU and EEA EFTA Member States were required to transpose the Directive into their legal systems by 27 December 2016,<sup>5</sup> as of 13 November 2017 only twenty-five out of the thirty-one States have communicated to the European Commission that they have fully transposed the Directive.<sup>6</sup>

In Italy, the Directive has been transposed by Legislative Decree No. 3 of 19 January 2017 (“Decree”), published on the Italian Official Journal on 19 January 2017 and entered into force on 3 February 2017 (“Implementation Date”).

The Decree largely but not entirely mirrors the Directive, as discussed below.

<sup>4</sup> The Directive only provides for a minimum standard of harmonization. By way of example, Spain by means of its Royal Decree No. 9/2017 implementing the Directive has taken the opportunity to expressly regulate parental liability, while the Directive was silent on this aspect (see Article 71(2), letter b), of Law No. 15 of 3 July 2017).

<sup>5</sup> Directive, Article 21.

<sup>6</sup> As of 13 November 2017, based on public sources, Bulgaria, Greece, Portugal, Iceland, Liechtenstein and Norway have not implemented the Directive yet (see [http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html) last updated on 13 November 2017).

This article considers the temporal application of the Decree, which raises interesting questions in particular at these initial stages of its entry into force (Section 2). It also addresses certain procedural issues in connection to production of evidence, given some discrepancies between the relevant provisions of the Decree and those of the Directive (Section 3).

## 2. TEMPORAL APPLICATION OF THE DECREE

The Directive provides that:

a) any national transposing measures adopted in order to comply with substantive provisions of the Directive shall not apply retroactively; and

b) any national transposing measures adopted in order to comply with provisions of the Directive other than the substantive ones (i.e. procedural provisions) shall not apply to actions for damages of which a national court was seized prior to 26 December 2014.<sup>7</sup>

In the absence of clear cut rules in the Directive defining the perimeter of substantive and/or procedural provisions,<sup>8</sup> Member States enjoyed some discretion when implementing the Directive in determining whether the relevant provisions had substantive or procedural nature.

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<sup>7</sup> Directive, Article 22.

<sup>8</sup> The Directive only contains a generic reference to procedural rules “ensuring the effective exercise” of the right to a full compensation (Directive, recital 4)

In principle, provisions that may be applied retroactively should be circumscribed as much as possible, given the general principle of non-retroactivity of the law.

The Decree correctly adopts a restrictive approach and precisely identifies procedural provisions.<sup>9</sup> These are limited to the production of evidence<sup>10</sup> and the suspension of the limitation period in the context of a consensual dispute resolution process.<sup>11</sup> Substantive provisions shall be determined on a residual basis.

The Decree specifies that procedural provisions apply to antitrust damage actions brought after 26 December 2014.<sup>12</sup> In practice, this would be possible only where the relevant terms for the exercise of such procedural rights have not elapsed yet in the context of the relevant case.<sup>13</sup>

Although the Decree does not include any express provision on the temporal application of its substantive provisions, it seems clear from the general principle of *tempus regit actum*.<sup>14</sup>

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<sup>9</sup> Decree, Article 19.

<sup>10</sup> Decree, Articles 3-5.

<sup>11</sup> Decree, Article 15(2).

<sup>12</sup> Decree, Article 19.

<sup>13</sup> By way of example, provisions on production of evidence should be applicable to antitrust actions for damages brought after 26 December 2014, as long as the parties are still entitled to submit requests for production orders, that is until the lodgement of briefs under Article 183, paragraph 6, No. 2 of the Italian Civil Procedure Code.

<sup>14</sup> Constitution, Article 25(2), Law No 689 of 24 November 1981, Article 1(2) and Preliminary Provisions to the Civil Code, Article 11.

and the relevant provisions of the Directive<sup>15</sup> that substantive provisions shall not apply retroactively.

Substantive provisions of the Decree should thus only apply to conducts occurred after the Implementation Date.

Possible issues may arise where the anticompetitive conduct occurred over a period of time. In this respect, one could think about different scenarios:

- i) conduct started after the Implementation Date. In such a case, the substantive provisions of the Decree would apply;
- ii) conduct ended before the Implementation Date. In such a case, the substantive provisions of the Decree would clearly not apply;
- iii) conduct started before and ended after the Implementation Date. Such a case is less clear cut.

In this respect, we would in principle envisage the following two options:

- a) applying the previous substantive regime to the entire conduct in question;<sup>16</sup> or

b) applying the previous substantive regime to the portion of conduct occurred before the Implementation Date, and the substantive provisions of the Decree to the portion of conduct occurred after the Implementation Date.

A third hypothetical option would be envisaging an extensive application of the substantive provisions of the Decree to conducts occurred before the Implementation Date. However, this would plainly conflict with the non-retroactive application principle. As such, it does not seem a viable option.

While we can expect some debate on the issues above, in the absence of a specific indication in the Decree that substantive provisions also apply to infringements that have continued after the Implementation Date, we would encourage a strict application of the principle of non-retroactivity.

One could think by way of example about the implications in cases involving a punctual (non-lasting) conduct with continuous effects, or a continued conduct, or a single and continuous infringement. In the former case there seems to be little doubt that the substantive provisions of the Decree would not apply in a scenario where the conduct occurred before the Implementation Date, even when the effects lasted after the Implementation Date, for the reasons anticipated above.

In less clear-cut cases, the applicable set of substantive provisions will ultimately have to be determined in light of the specific nature of the relevant conduct and circumstances of the case. One should however consider whether the hypothetical application of two distinct sets of

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<sup>15</sup> Directive, Article 22.

<sup>16</sup> By way of example, interestingly, the UK Legislator in transposing the Directive (see The Claims in respect of Loss or Damage arising from Competition Infringements, Competition Act 1998 and Other Enactments [Amendment] Regulations 2017, which came into force on 9 March 2017) has clarified that substantive provisions apply only to the extent that a claim relates to loss suffered on or after the implementation date of the transposing regulation as a result of an infringement that commenced on or after the implementation date.

substantive rules to the same continued conduct, or even more so to a single and continuous infringement, is in principle feasible or appropriate, also in light of the principle that the law should be applied in the most favourable way to the accused (*in dubio pro reo*).<sup>17</sup> In this respect, one could think, by way of example, about the inherent difficulties stemming from a bipolar temporal application to the same continued conduct or to a single and continuous infringement of the provisions on the presumption of harm in cartels,<sup>18</sup> or on the binding effect of the decision of the Italian Competition Authority.<sup>19</sup> It will be interesting to see how case law will develop in this respect.<sup>20</sup>

Interesting questions in terms of temporal application of the new substantive regime arise also in connection to the statute of limitation, and specifically its suspension under Article 8(2) of the Decree.

Under the Decree the duration of the limitation period applicable to private antitrust claims remains unchanged and equal to five years,<sup>21</sup>

consistently with the general limitation period for tort matters under Italian law.<sup>22</sup> The Decree spells out that the limitation period starts running from when both the competition law infringement has ceased and the claimant knows or can reasonably be expected to know of the infringement, the fact that the infringement caused harm and the identity of the infringer.<sup>23</sup> This is consistent with settled Italian case law according to which the limitation period starts running when the harm has become objectively perceivable and detectable by the injured party,<sup>24</sup> i.e. when the injured party is (or, using reasonable care, should be) aware of the damage caused by the competition law infringement and its unlawful nature.<sup>25</sup> Certain case-law has clarified that, unless proven otherwise, in follow-on cases the starting date is generally deemed to coincide with the date on which the ICA's decision ascertaining the infringement is published in its weekly bulletin.<sup>26</sup>

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<sup>17</sup> Code of Criminal Procedure, Article 530(2). Such principles of criminal law are relevant for competition law purposes also in the light of the *Menarini* (*A. Menarini Diagnostici S.R.L. v Italie* [Requête No. 43509/08] judgment of 27 September 2011 of the European Court of Human Rights).

<sup>18</sup> Decree, Article 14(2).

<sup>19</sup> Decree, Article 7(1).

<sup>20</sup> The specialised business divisions (namely *sezione specializzata in materia di impresa*) of the Milan, Rome and Naples courts hold jurisdiction on private antitrust actions (Decree, Article 18).

<sup>21</sup> Decree, Article 8(1). In other jurisdictions the implementation of the Directive has involved the extension of the limitation period: see, for instance,

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Germany and Poland where the limitation period has been increased from 3 to 5 years.

<sup>22</sup> Italian Civil Code, Article 2947. Like Italy, also the Netherlands and the UK have maintained their respective 5 and 6 years existing limitation periods, respectively.

<sup>23</sup> Decree, Article 8(1) in line with Directive, Article 10(2).

<sup>24</sup> Italian Civil Code, Article 2947.

<sup>25</sup> See, *ex multis*, Court of Cassation, decisions Nos 576 of 11 January 2008, 9524 of 20 April 2007 and 2645 of 21 February 2003.

<sup>26</sup> See Court of Cassation, decisions Nos 26685 of 28 November 2013, 26188 of 6 December 2011, 27527 of 10 December 2013 and 8110 of 3 April 2013; Court of Appeal of Milan, decision of 14 November 2008; and Court of Appeal of Naples, decision of 17 January 2008.

This is the moment when the existence of the unlawful conduct is officialised *erga omnes*.<sup>27</sup>

The main news introduced by the Decree in this respect is the *suspension* of the limitation period during an investigation by a competition authority and for one year after the decision has become final<sup>28</sup> or the proceedings are otherwise terminated.<sup>29</sup> This means that companies engaging in anti-competitive conducts could be susceptible to antitrust damage actions for much longer a period than in the past.

While it might be in principle open to debate whether provisions on the limitation period are substantive or procedural in nature, the choice made by the Italian legislator is clear in that they are substantive in nature. They are in fact not included among the procedural provisions specifically identified by the Decree.<sup>30</sup> Had the Italian legislator intended to grant retroactive effect to one or more provisions in connection to the limitation period, one would have

expected that it would have done so explicitly, as it was the case in other jurisdictions.<sup>31</sup>

The suspension of the limitation period envisaged by the Decree should thus not find retroactive application.<sup>32</sup>

### 3. PRODUCTION OF EVIDENCE

One of the most significant (and of most immediate application) news of the Decree is the introduction in Italy of a set of rules facilitating access to evidence, largely along the lines of the Directive. These new rules, which to a large extent mirror the Directive, are somewhat alien to the civil procedural rules of many Member States, including Italy.<sup>33</sup>

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<sup>27</sup> Lucio D’Amario and Alice Galbusera. “*The Directive on Antitrust Damages Actions from an Italian Perspective*.” *GCLR* 4(2016): 131.

<sup>28</sup> Under the Decree a decision becomes final when an infringement decisions cannot be, or can no longer be, appealed by ordinary means (Decree, Article 2(1)(h)).

<sup>29</sup> Decree, Article 8(2). According to the Directive the limitation period shall be suspended or, depending on the national law, interrupted, if a competition authority takes action for investigation purposes (Directive, Article 10(4)). While the Italian legislator has opted for the suspensory effect, by way of example, the Finnish legislator has opted for the interruption of the limitation period pending an investigation by the Finnish competition authority.

<sup>30</sup> Decree, Article 19.

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<sup>31</sup> Interestingly, the Dutch legislator has expressly determined that – even if they are substantive in nature – the new rules on the length of the limitation period apply to all existing and future claims unless actions were brought before the Dutch courts before 26 December 2014. While the approach appears to deviate from the principles laid down in the Directive, such rules (but not those on the suspension of the limitation period) thus apply in the Netherlands also to infringements started before the implementation date.

<sup>32</sup> This is in line with the approach followed by the UK legislator. In fact, as reported above in the UK the new limitation regime is subject to the prohibition on retroactive application and only claims arising from conducts commenced after the implementation of the UK regulations transposing the Directive will be subject to the new statute of limitation regime (Pt 10 and reg. 21 and 22).

<sup>33</sup> Rupert Bellinghausen, Tom Cassels, Kirstin Schwedt and Daniella Strik. “The future of cartel damages litigation in the UK, the Netherlands and Germany after the implementation of the Damages Directive.” *GCLR* 3(2017): 104.

The Decree lays down rules aimed at enabling interested parties to gain access to evidence, subject to proportionality, confidentiality, legal professional privilege and other limits.<sup>34</sup> Provisions on production of evidence are procedural in nature<sup>35</sup> and apply both to follow-on as well as to stand-alone antitrust actions for damages.

These new and specific rules on production of evidence in antitrust claims recall those under Article 121 of the Intellectual Property Rights Code. They do not replace, but rather complement, the tools offered by Articles 210 and 213 of the Code of Civil Procedure,<sup>36</sup> even though in practice one can now expect little recourse to Articles 210 and 213 in antitrust damage actions, given the wider scope of the new tools offered by the Decree.

According to the Decree, upon a reasoned request of a party who has presented facts and evidence reasonably available to the counterparty or a third party which are sufficient to support the plausibility of its claim or defence, a court can order the production of the relevant items of evidence or categories of evidence which lie in the control of the counterparty or a third party.<sup>37</sup>

In practice, Italian courts could order the production of specified items of evidence or categories of evidence upon request of a party, but only following a strict scrutiny including in terms of necessity and proportionality.

In turn, a request for production should at least spell out:<sup>38</sup>

a) the relevant items of evidence or *categories of evidence*.<sup>39</sup> Given that fishing expeditions shall be prevented,<sup>40</sup> items of evidence or *categories of*

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<sup>34</sup> Decree, Article 4 and also Directive, Articles 5-6 and recital 15. See also Correnti, A. “Il danno antitrust tra private e public enforcement; le prospettive dopo il recepimento della Direttiva 2014/104/UE: luci e ombre.” *GiustiziaCivile.com*, 30 March 2017. Pending the transposition of the Directive, the Court of Cassation in its Cargest decision seemed already supportive of a broader use of the means for obtaining and admitting evidence under the rules applicable at the time (Court of Cassation of 4 June 2015 No. 11564). See also Court of Cassation of 1 April 2016 No. 6366.

<sup>35</sup> While in most jurisdictions including Italy rules on production of evidence are considered procedural in nature, by contrast, the German legislator has considered applications for production of evidence under substantive law.

<sup>36</sup> Recourse to Articles 210 and 213 of the Code of Civil Procedure is generally of limited help in practice, given that the requesting party must precisely indicate what the documents/items of which production is sought are and describe their contents, as well as the reasons why they are relevant for the decision of the case.

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<sup>37</sup> Decree, Article 3(1). See the comments to Articles 3-4 of Bonatti R. and Article 5 of Ferraro F. included in P. Manzini, “L’esibizione e l’utilizzo delle prove del fascicolo dell’Autorità garante della concorrenza.” *Il risarcimento del danno nel diritto della concorrenza – commento al d.lgs. 3/2017*. Torino: Giappichelli, 2017, and also Caiazza, R. “The legislative decree of implementation of Directive 2014/104/EU on antitrust damages actions.” *IAR – Italian Antitrust Review* 2(2016): 104-124.

<sup>38</sup> See also Correnti, A. “Il danno antitrust tra private e public enforcement; le prospettive dopo il recepimento della Direttiva 2014/104/UE: luci e ombre.” *GiustiziaCivile.com*, 30 March 2017.}

<sup>39</sup> Decree, Article 3(2).

<sup>40</sup> See, *ex multis*, Court of Cassation, decisions Nos. 5091 of 15 March 2016, 15129 of 5 July 2007 and 26943 of 20 December 2007. See also Directive, Recital 23.

evidence should be clearly identified by the applicant,<sup>41</sup>

b) the reason(s) why such items of evidence or categories of evidence cannot reasonably be obtained through other means,<sup>42</sup>

c) a plausible assertion, on the basis of facts and evidence which are reasonably available to the applicant, that it has suffered harm caused by the defendant,<sup>43</sup> and

d) proportionality reasons.<sup>44</sup> To this aim, domestic courts shall *inter alia* consider (i) the extent to which the claim or defence is supported by available facts and evidence justifying the request to produce evidence; (ii) the scope and cost of production, and (iii) whether the evidence whose production is sought contains confidential information.<sup>45</sup>

Those from whom production is sought are entitled to be heard before the court orders production of evidence.<sup>46</sup>

The reference (not only to items of evidence but also) to *categories of evidence* is another

significant news introduced by the Decree in terms of production of evidence, given that the production of *categories of evidence* is not contemplated by the ordinary tools available in the Italian legal system.<sup>47</sup>

Where a request for production aims at obtaining production of a *category of evidence*, that category should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents whose production is requested, the time during which they were drawn up, or other criteria.<sup>48</sup> Categories of evidence should be defined as precisely and narrowly as possible, on the basis of reasonably available facts.

The above significantly differentiates the tools now available under the Decree from the more extensive discovery available in common law systems.

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<sup>41</sup> Decree, Articles 3-6.

<sup>42</sup> Decree, Article 3(1).

<sup>43</sup> Decree, Article 3(1).

<sup>44</sup> Decree, Article 3(3).

<sup>45</sup> Business secrets and confidential information need to be protected appropriately. Italian courts should therefore have at their disposal a range of measures in this respect, including by way of example the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form.

<sup>46</sup> Decree, Article 3(5).

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<sup>47</sup> See Court of Cassation, decision No.26943 of 20 December 2007 where the court clarified that a production order could be granted only in relation to documents/items of evidence whose existence has been proved by the claimant, who must also be able to provide useful elements relating to their contents/significance, so that the court is able to determine whether to order their production and admit them into evidence or not.

<sup>48</sup> Decree, Article 3(2) in line with the Directive, Recital 16.

### 3.1 Production of evidence included in the Italian Competition Authority's file: grey and black lists

Italian courts may also, within certain limits, order the production of documents included in the Italian Competition Authority's file.<sup>49</sup>

Firstly, the principle of subsidiarity of the evidence applies in this respect. Production of evidence included in the file of the Italian Competition Authority could in fact be ordered only where no party or other third party is reasonably able to provide such evidence.<sup>50</sup> The implication is that in order to successfully apply for the production of documents included in the Italian Competition Authority's file, the interested party would have to show the above, including, by way of example, by pursuing where possible the order for production route against its counterparty or other third parties.<sup>51</sup>

In any case, the production of evidence included in the Italian Competition Authority's

file is subject to certain intrinsic limits in connection to black list documents<sup>52</sup> and grey list documents.<sup>53</sup> Black lists documents cannot at any time be disclosed, while grey list documents can be disclosed only once the Italian Competition Authority has closed its proceedings.

In this respect, it is worth noting that the approach in the Decree deviates to some extent from the Directive.

#### 3.1.1 Wider scope of grey list evidence

According to the Decree, the grey list includes (i) information rendered in the context of the Italian Competition Authority's investigation, (ii) information that the Italian Competition Authority has drawn up and sent to the parties in the course of its proceedings and (iii) settlement submissions, where applicable, that have been withdrawn.<sup>54</sup>

As to (i) above, the Decree refers to "*information rendered in the context of the proceedings of a competition authority*"<sup>55</sup> (emphasis added), as opposed to the Directive, which makes reference to "*information that was prepared by a natural or legal person specifically for the proceedings of a competition authority*".<sup>56</sup> This was a deliberate choice of the Italian legislator.

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<sup>49</sup> Decree, Article 4. For ease of reference, in this article we refer to the Italian Competition Authority. However, the same reasoning applies to the European Commission and the other EU national competition authorities (see notion of "*competition authority*" set forth in the Decree, Article 2(1), letters d) and e)).

<sup>50</sup> Decree, Article 4(1).

<sup>51</sup> Where national courts order the production of evidence included in the Italian Competition Authority's file, both Articles 4 and 3 of the Decree apply (Decree, Article 4(2)). Thus, even if not expressly mentioned in Article 4 of the Decree, confidentiality and legal professional privilege protections shall be given full effect also in the context of production of evidence included in the Italian Competition Authority's file. Interested parties might also have to be heard by the competent national court.

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<sup>52</sup> Decree, Article 4(5). In brief, the black list includes leniency statements and settlement submissions.

<sup>53</sup> Decree, Article 4(4).

<sup>54</sup> Decree, Article 4(4), letters a) to c).

<sup>55</sup> Decree, Article 4(4), letter a).

<sup>56</sup> Directive, Article 6(5)(a).

The Italian legislator has therefore intentionally taken a more conservative approach than the Directive, with the aim to avoid that not only information prepared specifically for the Italian Competition Authority but also other evidence could be produced in court pending the administrative investigation. In fact:

a) the notion of “*information*” is sufficiently wide to include documents, including pre-existing documents;<sup>57</sup>

b) the Decree does not clarify how the concept of “*information rendered in the context of the proceedings of a competition authority*” shall be interpreted. While it remains to be seen how this will be addressed in the case law, the intent of the Italian legislator to deviate from the approach taken in the Directive is clear. There is therefore little doubt that such concept should be wide enough to include not only information prepared specifically for the proceedings of the Italian Competition Authority (such as replies to requests for information), but also other documents. These could include, by way of example, documents seized in the course of dawn raids.<sup>58</sup> We are conscious that

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<sup>57</sup> While the Decree does not define the concept of information, it does so for the concept of “*pre-existing information*” as “*evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority*”. Decree, Article 2(1)(o). Please note that this provision mirrors the Directive, Article 2(17).

<sup>58</sup> Barletta, A. “Violazione di norme antitrust: aspetti processuali della nuova disciplina sui giudizi di risarcimento.” *RiDaRe – Risarcimento Danno e Responsabilità* 25 July 2017 appears to support a different approach according to which “*domestic courts can order the disclosure of documents drafted or prepared before and independently from the ICA’s investigation (white list)*”.

such an approach would determine a significant shrinking of the category of white list documents. However, one should consider the deliberate approach of the Italian legislator, as well as the temporal element, keeping in mind that production of grey list documents may become possible once the administrative proceedings before the Italian Competition Authority come to a close.

### 3.1.2 *Wider limits on the use of evidence*

The Decree seems to deviate from the Directive also with respect to the limits on the use of evidence obtained through access to the file of the Italian Competition Authority.<sup>59</sup>

The Decree states that evidence included in the grey and black lists is admissible in actions for damages within the limits applicable to their respective category “*irrespective of the means by which they are obtained, also through access to the file of a competition authority*”.<sup>60</sup>

As also indicated in the Explanatory report accompanying the draft decree of 27 October 2016,<sup>61</sup> the implication of the wording used by the Italian Legislator is that evidence included in the grey and black lists shall follow the rules applicable to the categories to which they belong, irrespective of the ways in which such evidence

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<sup>59</sup> Decree, Article 5 and Directive, Article 7.

<sup>60</sup> Decree, Article 5(1). Instead, the Directive makes reference to “*evidence which is obtained by a natural or legal person solely through access to the file of a competition authority*”, Directive, Article 7(1).

<sup>61</sup> Explanatory note of the Government accompanying the draft Decree sent to the President of the Senate on 27 October 2016, p. 9.

has been obtained. This means that items of evidence included in the black list cannot at any time be disclosed in the course of antitrust damage actions, while evidence included in the grey list can be disclosed only after the Italian Competition Authority has closed its proceedings, irrespective of who holds such evidence and the ways in which such evidence was obtained (whether through access to the Italian Competition Authority's file or otherwise).<sup>62</sup>

In practice, pending the proceedings before the Italian Competition Authority, in order to avoid the risk of forfeiture of the right to apply for disclosure orders of evidence included in the grey list, the Decree provides for the opportunity for domestic courts to suspend the case until the proceedings before the Italian Competition Authority is closed.<sup>63</sup> We would envisage that Italian courts will make large use of such tool.

#### 4. CONCLUSIONS

We would expect that the temporal application of the substantive provisions of the Decree will be a hot topic in court in the next future, when it comes to continued conducts initiated before and ended after the Implementation date. In this respect, while in some cases the identification of

the applicable law will largely depend on the specific conducts at stake, a strict application of the principle of non-retroactivity should be encouraged, including with respect to the applicable statute of limitation.

In terms of production of evidence, the approach adopted by the Italian Legislator mirrors largely but not entirely the one in the Directive. In particular, the more conservative approach adopted in Italy in connection to the (wider) scope of grey list evidence and the (wider) limits to the use of grey and black lists evidence are welcome news.

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<sup>62</sup> In case of breach of the limits on the use of evidence provided for in Article 5, Italian court impose fines from € 15,000 to € 150,000 (Decree, Article 6(4)).

<sup>63</sup> Decree, Article 4(8).

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