Executive summary and overview of the national report for Italy

Section I – Summary of findings

Private damages actions for breach of competition law in Italy are not frequent. We are aware of only three successful actions brought pursuant to Law 287/90 by and between undertakings before the *Corte d'Appello* of Milano and of Roma. The actions brought before the *Corte d'Appello of Milano* were respectively decided in 1996 (the Telsystem v. SIP case) and in 2003 (the Bluvacanze v. Turisanda and others case). The action brought before the *Corte d'Appello of Roma* was decided in 2003 (the Albacom v. Telecom case). All these actions were brought for breach of national competition rules pursuant to Article 33.2 of Law 287/90. In two cases (the Telsystem v. SIP case and the Albacom v. Telecom case), damages were awarded after that the *Autorità Garante della Concorrenza e del Mercato* ("AGCM") had found the defendants in breach of national competition rules (namely Article 3 of Law 287/90) whilst in the third case (the Bluvacanze v. Turisanda and others case) damages were awarded for breach of Article 2 of Law 287/90, without the AGCM having investigated the case.
Successful actions have been brought between 2001 and 2003 by individuals (namely insurance policy-holders) before the lower court (i.e. the *Giudice di Pace*) pursuant to the ordinary procedural rules (and not to Article 33.2 of Law 287/90) as a consequence of the AGCM's decision which imposed fines to several insurance companies for having been found in violation of national competition rules (namely Article 2 of Law 287/90). Such actions have however raised a lively debate of scholars particularly based on the restrictive interpretation of Article 33.2 of Law 287/90 given by the *Corte di Cassazione* in its judgement of 9 December 2002 no. 17475 with reference to the standing of individuals/consumers to bring actions for breach of national competition rules pursuant to Article 33.2 of Law 287/90.

The large majority of competition based actions (normally brought independently from any pending proceedings before – or existing decisions of - the AGCM) of which we collected evidence were unsuccessful attempts ended at the preliminary stage of *interim* proceedings.

General rules of the Civil Code and of the Code of Civil Procedure govern damages actions for breach of competition rules. An explicit provision on jurisdiction is provided for by Article 33.2 of Law 287/90 in case of breaches of national competition rules only. This Article 33.2 provides for an exception to the ordinary rule of double level of jurisdiction on the merits by granting to the *Corte d'Appello* jurisdiction as first instance court on violations of national competition rules only. Therefore Article 33.2 of Law 287/90 substantially provides for a distinction between the courts competent to decide in first instance on breach of national competition rules and those courts competent, according to the ordinary procedural rules, to decide on violations of EC competition rules. This renders the proceedings in court started by the plaintiff for breach of national competition rules shorter than courts proceedings regarding breach of EC competition rules which as such are governed by general ordinary rules.

Any other aspect of damages actions for breach of competition rules is governed by general substantive and procedural rules.

No specialised courts exist. In this context, it should however be noted that a draft bill of law for the unification of the laws on certain Intellectual Property rights, currently under scrutiny by the Government, provides to extend the exclusive jurisdiction of the Intellectual Property divisions instituted in a number of Italian courts to Intellectual Property related issues of national competition law.

In general terms, any natural or legal person is entitled to claim damages in court. No explicit provision on identification of persons entitled to claim damages for breach of competition rules is provided. As far as the standing of individuals/consumers to bring actions in these cases, the general principle applies that individuals may claim damages if a direct link exists between the infringement and the damage. As aforesaid, the *Corte di Cassazione* in its judgement of 9 December 2002 no. 17475 substantially denied the standing of consumers to bring actions before the *Corte d'Appello* pursuant to Article 33.2 of Law 287/90. The issue is still open and possibly subject to the review of the *Sezioni Unite* of the *Corte di Cassazione*.

The infringement of competition rules is generally qualified as giving rise to tort liability pursuant to article 2043 of the Civil Code. This provides for monetary compensation of damages and, to this effect, it implies that plaintiff must prove: (i) the existence of the damage; (ii) the causation link between the defendant's unlawful conduct and the damage; (iii) the defendant's fault and (iv) the extent (amount) of damages suffered.
Therefore, also fault should be proven by the plaintiff, although there is a prevailing doctrine in favour of the application by analogy of the presumption of fault provided for in connection with unfair competition actions whilst the case-law seems to consider the proof of fault to be implicit in the finding of the unlawful conduct.

It is up to the parties to the proceedings to submit to the judge any means of evidence within the *numerus clausus* provided by law. The judge decides the case only on the basis of evidence submitted by the parties and cannot in principle base his judgement on evidence other than that submitted by parties. The judge does not have major autonomous investigative powers.

In particular, the judge is in general hindered from ordering the production of categories of documents and may order production only of individual pieces of documentation specifically indicated by the parties. Moreover, the judge may use experts only as aides when he needs to supplement, with specific technical knowledge, his knowledge of facts as proven by the parties. Experts may not provide evidence of facts or constitutive elements of the action (such as the causation link, the defendant's fault), except for limited exceptions. The AGCM's decisions

have constituted the core evidence or have in any event preceded the courts' judgement when damages were awarded to the plaintiff, thereby *de facto* substituting the experts' role (in particular with respect to the economic assessment).

As far as any possible grounds of justification, the fact that the defendant was found to have passed onto consumers the overcharge deriving from an abuse of a dominant position in the upstream market was used by courts to dismiss the plaintiff's claim for damages, where the plaintiff was a middleman distributing the defendant's products.

Proving evidence of the amount of damages suffered is considered by authors as a problematic task in damages actions for breach of competition rules. This is mainly due to the fact that, under general rules applicable to damages actions, damages awarded by the court must be strictly related to the actual loss suffered by the plaintiff thus having a compensatory function only (any punitive function excluded).
The economic model used by courts for assessing damages suffered by the plaintiff in the Telsystem, Albacom and Bluvacanze cases has been the "but-for" model.

The time necessary for the parties to obtain the final judgement (i.e. that of the *Corte di Cassazione*) may prove on average quite long, notwithstanding the exclusion of one level of jurisdiction provided for by Article 33.2 of Law 287/90 - which however does not apply to actions for breach of EC competition rules.
Costs of the proceedings may prove significant for the parties, especially in the event that a complex activity of taking of evidence is required.

There are essentially five elements which, in our view, may provide scope for facilitating the private enforcement of competition rules: (i) need for uniformity of rules on jurisdiction and, consequently, for elimination of distinction between courts competent for breach of national competition rules and courts competent for breach of EC competition rules as well need for specialisation of the competent courts; (ii) need for explicit and clear rules on the standing in court for bringing (damages) actions for breach of competition law, with particular reference to the standing of individuals/consumers to bring actions against undertakings in violation of competition rules pursuant to Article 33.2 of Law 287/90; (iii) need for a clear provision of law of the rebuttable presumption of fault; (iv) need for facilitating the taking of evidence phase by widening judge's powers, including those to order the production of categories of documents and to appoint experts and use their findings as evidence; (v) need for clear identification of the criteria for application of the passing on theory.

Section II – status quo and forthcoming reforms – action for damages

A.	Legal Basis	
(i)	Is there an explicit statutory basis?	Yes. Article 33.2 of Law 287/90 limited to damages actions for breach of national competition rules and exclusively for jurisdiction purposes.
(ii)	Is this statutory basis different from other actions for damages?	Yes. It is an exception to the ordinary procedural rule on double level of jurisdiction since it provides for the sole jurisdiction of the *Corte d'Appello* as first instance court.
(iii)	Is there a distinction between EC and national law in this regard?	Yes. The jurisdictional exception provided for by Article 33.2 of Law 287/90 does not apply to breach of EC competition rules for which lower courts (i.e. *Giudice di Pace* or *Tribunale* depending on the value of the claim) are competent in first instance according to the ordinary procedural rules.
B.	Competent court	
(i)	Which courts are competent?	*Corte d'Appello* as first instance court for breach of national competition rules pursuant to Article 33.2 of Law 287/90; *Giudice di Pace* and *Tribunale* as first instance courts and *Corte d'Appello* as second instance court for breach of EC competition rules; *Corte di Cassazione* as the supreme court of appeal in respect of the *Corte d'Appello* and of the *Tribunale* when this latter acts as a second instance court for appeals of decisions issued by *Giudice di Pace.*
(ii)	Are there specialised courts for private enforcement of competition rules?	No. Under governmental scrutiny a draft bill of law extending the jurisdiction of IP specialised courts to IP related competition issues.
C.	Standing	
(i)	Limitations on standing of natural or legal persons, including those from other	No limitations in general. Standing of individual consumers is not clearly established by Italian case law.

jurisdictions?	
(ii) What are the connecting factor(s) required with the jurisdiction in order for an action to be admissible?	Connecting factors based on general rules of the code of civil procedure (Articles 18 to 36), on Regulation 44/2001 and Law 218/95 and on the conflict of law rules (Law 218/95) for non EU member states.
(iii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?	No. Bill of law on class actions pending in Parliament.
D. Procedural and substantive conditions	
(i) What forms of compensation are available?	Monetary compensation. Other (minor) forms of compensation (such as publication of the judgment) may be available.
(ii) What are the other forms of civil law liability (if any)?	None in principle.
(iii) Does the infringement have to imply fault?	Debate. In general, "objective fault"/"presumption of fault".
(iv) If so, is fault based on objective criteria?	De facto yes.
(v) Is bad faith (intent) required?	No.
(vi) Can negligence be taken into account?	Yes.
E. Rules of evidence	
a. General	
(i) Burden of proof and identity of the party on which it rests?	Burden of proof on the plaintiff.
(ii) Standard of proof	None but to take into account the principles of "*types of acceptable evidence*" " and of freedom of judge to evaluate the evidence submitted by the parties.
(iii) Limitations concerning form of evidence	All forms of evidence admissible in principle within the limits of the "*types of acceptable evidence*" principle. Evidence of contracts through witnesses statements subject to limitations.
(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis parties	No.
(v) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis third parties	No.
(vi) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis competition authorities (national, foreign, Commission)	No.
b. Proving the infringement	
(i) Is expert evidence admissible?	Yes, but limited to experts appointed by the judge. Subject to limitations.
(ii) To what extent, if any, is cross examination permissible?	Not permissible.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?	Not binding but may be used as evidence, as it occurred with reference to the AGCM's decisions.
c. Proving damage	
(i) Are there any specific rules for evidence of damage?	No. General principles applicable.
d. Proving causation	
(i) Which level of causation must be proven: direct or indirect?	Direct.
F. Grounds of justification	
(i) Are there grounds of justification?	In theory yes. In practice hard to apply to competition based claims.
(ii) Is the 'passing on' defence taken into account?	Yes (case-law).
(iii) Are 'indirect purchaser' issues taken into account?	Yes (case-law).
(iv) Is it relevant that plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement?	It may be relevant (case-law).
G. Damages	
a. Calculation of damages	
(i) What economic or other models are used by courts to calculate damage?	"But for condition" (case-law).
(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?	Assuming that jurisdiction in Italy has been established, no obstacle in awarding damages for injury suffered more widely than on the national territory.
(iii) Are ex ante (time of injury) or ex post (time of trial) estimates used?	Ex ante estimates used subject to monetary adjustments in the final determination of damages.
(iv) Are there maximum limits to damages?	No maximum limits. Subject however to the general principle that damages may not be awarded in excess of the plaintiff's actual injury.
(v) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?	Damages assessed on the basis the actual damage and of profit lost by the plaintiff.
(vi) Are punitive or exemplary damages available?	No.
(vii) Are fines imposed by competition authorities taken into account when settling damages?	No.

b. Interest	
(i) Is interest awarded from the date the infringement occurred the date of the judgment or the date of a decision by a competition authority?	Interest awarded on the basis of a complex process. In tort liability cases, interest is in general awarded from the date of the injury,
(ii) What are the criteria to determine the levels of interest?	In tort liability cases, the level of interest is determined on the basis of the interest rate that by operation of law accrues on any liquidated amount of money. In contractual liability cases, the level of interest may be higher.
(iii) Is compound interest included?	No.
H. Timing	
(i) What is the time limit in which to institute proceedings?	In general: 5 years from the date of the verification of the event in tort liability based claims; 10 years from the day on which the right may be exercised in contractual liability based claims.
(ii) On average, how long do proceedings take?	On average around 2 to 3 years in first instance and the same period of time for appeal proceedings before the *Corte di Cassazione*. Proceedings before first instance courts according to the ordinary rules may range between some months (if before *Giudice di Pace*) to 2 to 4 years (if before *Tribunale*).
(iii) It is possible to accelerate proceedings?	Yes.
(iv) How many judges sit in actions for damages cases?	Three for *Corte d'Appello.* One for *Tribunale* and *Giudice di Pace*. Five judges before the *Corte di Cassazione* extendable to nine in case of jurisdiction of the special division *Sezioni Unite*.
(v) How transparent is the procedure?	Little transparency. Hearings are not public, except for the final hearing for the oral discussion of the case(which, in practice, in not held, as the parties confine themselves to the written defences).
I. Legal costs	
(i) Are Court fees paid up front?	Yes.
(ii) Who bears the legal costs?	The losing party in general unless otherwise decided by the judge.
(iii) Are contingency fees permissible?	No.
(iv) Are contingency fees generally available for private enforcement of EC competition law?	No.
(v) Can the plaintiff/defendant recover costs?	Legal costs may be recovered: subject to limitations.
(vi) What are the different types of litigation costs?	As provided for in the professional tariff.
(vii) Are there any national rules for taxation of costs?	Yes.
(viii) Is any form of legal aid insurance available?	Yes.

(ix)	What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?	Difficult to indicate. They may sensibly vary.
J. General		
(i)	Are some of the answers to the previous questions specific to the private enforcement of competition rules?	The issue of competent court under Article 33.2 of Law 287/90.
(ii)	If the answer to the previous question is yes, in what way do they differ from general private enforcement rules?	Ordinarily *Corte d'Appello* as second instance court. Passing on theory usually does not apply.
(iii)	EC competition rules are regarded as being of public policy. Does that influence any answers given?	No.
(iv)	Are there any differences according to whether defendant is public authority or natural or legal person?	In principle no differences. Possible exceptions regarding competent courts in public-services related litigation.
(v)	What are the key differences, if any, from region to region within the Member State as regards damages actions for breach of national or EC competition rules?	No differences.
(vi)	Is there any interaction between leniency programmes and actions for claims for damages under competition rules?	No precedents in this respect. In any event, no statutory basis for such interaction.
(vii)	Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction	Issue of the validity of downstream contract; relieves available in *interim* proceedings.
(viii)	Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon	To be provided.
Section III: Means to facilitate private enforcement of Articles 81 and 82 EC		
(i)	Which of the above elements of claims for damages as applied in each Member State and accession country provide scope for facilitating the private enforcement of Articles 81 and 82 EC?	- need for simplification and specialisation of the competent courts; - need for clear rules on the standing on courts and for the recognition of class actions; - amelioration of the taking of evidence phase; - wider use of expert evidence; - explicit provision of the rebuttable presumption of fault; - clear identification of the criteria for the application of the passing on theory.
(ii)	How could that be achieved?	Amendments to Italian procedural and substantive law, also by way of legislation adopted at EC level.
(iii)	Are alternative means of dispute resolution available?	No ADR. A recent governmental project for an extensive reform of civil procedure provides for the introduction of ADR
(iv)	If so, to what extent are they successful?	N/A