

# *PUBLIC AND PRIVATE ENFORCEMENT OF EU COMPETITION LAW IN THE AGE OF BIG DATA*

Milan, 30<sup>th</sup> November – 1<sup>st</sup> December 2023

## *The Multilevel Governance Framework of Competition Law: Powers and Responsibilities of National Judges*

MARINA TAVASSI

*Former president of the Milan Court of Appeal,  
Former president of the Specialised Section for Enterprises*



Co-funded by  
the Training of National Judges  
Programme of the European Union



# The Multilevel Governance Framework of Competition Law:

## Public and private enforcement

### Different Functions

- *public enforcement - private enforcement,*  
they perform complementary functions
- *Public enforcement:* investigation and deterrence
- *Private enforcement:* compensation for damages and civil law problems (nullity of contracts and agreements, their consequences)

# Protection of competition

## 1<sup>st</sup> PILLAR

**PUBLIC ENFORCEMENT**

**PUBLIC INTERVENTION**

**Commission - AGCM -**

**Administrative Tribunal of Latium –  
Counsel of State**



**Sanction**



**It can be commensurate with the social costs or benefits deriving from the unlawful conduct implemented**

## 2<sup>nd</sup> PILLAR

**PRIVATE ENFORCEMENT**

**PRIVATE INITIATIVE**

**(Ordinary Civil Judges)**



**Damages compensation**



**It is commensurate with the harm suffered by the victims**

# PRIVATE ENFORCEMENT

## STAND-ALONE ACTIONS

Without a decision of the NCA

## FOLLOW-ON ACTIONS

After the decision of the NCA

- INDIVIDUAL ACTIONS
- COLLECTIVE ACTIONS

## DIRECT PURCHASERS

PURCHASERS OF THE SUBJECTS THAT  
ARE AUTHORS OF ILLEGAL AGREEMENTS  
- CONCERTED PRACTICES - OR ABUSE OF  
DOMINANT POSITION

## INDIRECT PURCHASERS

CONSUMERS OR PURCHASERS OF THE  
DIRECT PURCHASER GOING DOWN  
THE DISTRIBUTION CHAIN

# MODERNISATION PACKAGE – REGULATION N. 1/2003

- **No more administrative act is required in order to not apply the prohibition of restrictive agreements under Art. 81.3**
- **Agreements satisfying specific conditions are effective since their stipulation**
- **"Legal exception" is to be invoked by anyone interested in**
- **Any statements in this regard can be made just in case of judiciary or administrative litigations**
- **Limitation period shall be interrupted**
- **Withdrawal of the benefit of a block exemption by national Authority**

# COMMISSION NOTICES

(O.J. C 101, 27.04.2004)

- **Co-operation within the network of Competition Authorities**
- **Co-operation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC**
- **Handling of complaints by the Commission under Articles 81 and 82 EC**
- **Informal guidance relating to novel questions concerning Arts. 81- 82 that arise in individual cases (guidance letters)**
- **Guidelines on the effect on trade concept between the Member States contained in Art. 81 and 82 EC**
- **Guidelines on the application of Art. 81.3**
- **Regulation N. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant Art. 81-82 EC (O.J. L 123, 27.04.2004, p.1824)**

# REGULATION No 1/2003

## BEFORE

Implementation of  
Art. 81.1 and 81.2  
Art. 82 by National  
Authorities and Courts

Exemption granted to the  
Commission Art. 81.3

A sort of monopoly

Suspension by National  
Authorities and Courts

Authorization exemption  
system

Notification system

## AFTER

Implementation of Arts.  
81 and 82 in full by the  
judges

System of  
decentralization

System of directly  
applicable exception

## EFFECTS

- **Real involvement of National Judges and Authorities**
- **Reduction of Commission burden**
- **Resulting opportunity to focus on its institutional issues**
- **Role of leader played by the Commission in order to obtain a consistent enforcement of European competition law**
- **Overtaking the abuses of notification system**



# Directive 104/2014

## ***FOLLOW-ON ACTIONS – BINDING EFFECT OF NCA DECISIONS***

Directive 104/2014 (Art. 9) “the decision (of NCA or judges of appeals) is deemed to be **irrefutably established** for the purposes of an action for damages brought before their national courts under Articles 101 or 102 TFEU or under national competition law”

**More than a ‘privileged proof’ (Ital. Supr. Court, judg. no. 3640 of 2009) → now it shall have binding force**

**Just for decision of the NCA of the same State**

**NO BINDING EFFECT OF NCA DECISION for the judges of all the other Member States:  
only ‘prima facie’ evidence**

**BINDING EFFECT OF NCA DECISION for the judges of the same State: only positive decisions  
- not negative ones**

**only those applying Articles 101 and 102 TFEU**

**not in relation to the assessment of damage or causal link.**

# Transposition of the Directive 2014/104 into the Italian system

- **Particular provisions of the Italian law transposing the directive:**
- **Article 18 of Lgs. D. no. 3/2017:** the territorial jurisdiction for the competition damages actions has been brought **before only three courts** (Specialised Courts for Enterprises): Milan for the north of Italy, Rome for the center and Sardinia, Naples for the south and Sicily.
- **Article 14.3 of Lgs. D. no. 3/2017:** in order to quantify damages, judges can ask the **assistance of the NCA (AGCM)**, formulating specific requests on the guidelines on the quantification of damages. The NCA may refuse its assistance if necessary to safeguard the effectiveness of public enforcement of competition law.

# **DIGITAL MARKETS ACT and DIGITAL SERVICES ACT**

## **The EU Commission's role**

- **The Commission has centralised the role of controller once again**
- **There is no space for the national Authorities except for a collaborative role towards the Commission**
- ✓ **Why this choice?**
- **Because undoubtedly the topic has cross-border characteristics inherent to the peculiarity of the digital system**

# DMA and DSA

## The Judges' role

- **there are no different roles assigned to the judges in the two regulations in comparison with those assigned by the Reg. no 1 of 2003**
- **The new regulations mirror the same limits to the role of judges that had been introduced by Reg. no. 1/2003 for Commission decisions and by Dir. 104/2014 for NCAs decisions**

# ***FOLLOW-ON ACTIONS***

## **JUDGE CAN:**

**USE THE INVESTIGATION MATERIALS ACQUIRED BY NCA (Art. 14.3 Law n. 287/1990)**

**USE THE INFORMATION ELEMENTS, useful for ascertaining the so-called "distorting effects" of violations (to assess damages and causal link)**

## **ACQUISITION METHOD:**

**spontaneous production of the parties and/or request by the judge pursuant to art. 213 c.p.c.**

# ROLE OF THE COMMISSION *AS AMICUS CURIAE*

**Required by the judges**

(Art. 15 Reg. 1 and points 21-26 of  
the Notice Commission / Judges)

**Art. 39 DMA , Art. 82.2 DSA**



**Information**

**Opinions**

**At Commission  
own initiative**



**Written**

**Observations**

**Oral**

**Observations**

(subject to authorization)

# Relevant aspects for compensation of damages

Temporal scope: the national measures for the transposition shall not apply retroactively and shall **not apply to actions for damages of which a national court was seized prior to 26<sup>th</sup> December 2014** (art. 22 of the Directive).

➤ **Commission's Guidelines of 13<sup>th</sup> June 2013**, Communication on the quantification of damages in actions based on breaches of Articles 101 and 102 of the TFEU and practical guide (2013 / C 167/07 of 13.6.2013)

➤ **Commission Guidelines of 1<sup>st</sup> July 2019**, Communication from the Commission, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (**passing-on**)

# Power of the Courts in competition trials

- grant compensation for damages
- decide on claims for payment or contractual obligations
- declare the nullity *ex Art. 101.2 TFEU* (Art. 81.2 CE) and assess its consequences
- adopt precautionary interim measures
- grant protection under European law and national law
- condemn to pay legal fees and recoverable costs
- invite the parties to settlement (in Italy through delegated mediation, Art. 5 Lgs. Decree no. 28/2010)



# REQUIREMENTS FOR DAMAGES COMPENSATION

**Assessment of  
*an debeatur***

**Violation**  
**Fault / subjective element**  
**Existence of damage**  
**Link of causation**

**Assessment of  
*quantum  
debeatur***

**loss of profits**  
**actual damages**  
**damage caused by loss of  
opportunities**  
**damage to the image**

# LIQUIDATION IN EQUITY

Art. 1226 c.c. – Art. 2056, 2° para, c.c.

- **Damage *in re ipsa*? (thesis defined as “aberrant” from Cass. n. 2302 of 2007, Cass. n. 20695 of 10.9.2013)**
- **The damage must be proven according to the general principles that regulate the consequences of an illicit act (from Cass. n. 21123 of 2023, Cass. n. 21586 of 2023, Cass. n. 25921 of 2015)**
- **Proof of the existence of a damage actually suffered**
- **Where the proof of the amount of damages is impossible or extremely difficult to give, it is possible to resort to equitable settlement**
- **In any case, the criteria used for equitable liquidation must be expressed.**

## **TRANSFER OF THE OVERCHARGE – PASSING-ON (Arts 12-16 Dir. 104; Arts 10-13 Lgs. D. n.3/2017)**

- **Compensation for the actual damage should not exceed the overcharge suffered (withouth prejudice to the victim’s right to claim compensation for loss of profits).**
- **The right to compensation for damages also belongs to indirect purchasers.**
- **The effective transfer of the overcharge is presumed when the indirect purchaser *“has purchased goods or services of the infringement of competition law, or bought goods or services deriving from the same ones or incorporating them”*.**

# THE MOST CRUCIAL POINT IN RELATION TO THE DAMAGE AND ITS QUANTIFICATION: THE BURDEN OF PROOF

- Directive 104 of 26 November 2014
  - relative presumption about the existence of the prejudice caused by a cartel (Art. 17: *“It shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut that presumption”*)
  - the author of the infringement can overturn this presumption
- competition law litigation is characterised by an information asymmetry
- **proof-proximity principle** (which indicates that the burden of proof belongs to the person in possession of the proof)

# THANK YOU FOR YOUR ATTENTION !



Co-funded by  
the Training of National Judges  
Programme of the European Union

