Italy: Cartels

Francesca Sutti and Alessandro Boso Caretta
DLA Piper Italy

Anti-competitive behaviour such as price fixing, sharing markets and horizontal agreements between undertakings aiming to agree commercial strategies and policies are considered the most harmful infringements of competition law.

Over the last 12 months both the Italian Competition Authority (ICA) and the administrative courts have had the opportunity to assess in depth a number of cartel cases. They have taken the opportunity to state which principles should be followed by undertakings in order to avoid anti-competitive behaviour.

Due to a change of president and the award of new competences and powers, the ICA was engaged in a massive internal reorganisation and as a result no new cartel investigations were launched during the first semester in 2012 with the unique exception of that against certain professional bars. However, the ICA's new president, Mr Pitruzzella, has disclosed his contemplated strategies to fight against cartels.

Mr Pitruzzella has stated that in principle, no commitments will be accepted in cartel cases. This statement found confirmation in the draft Guidelines on the ICA's website which was edited on May 16 2012 for comments by any interested parties.

The president has also frequently stressed the crucial role of leniency applications in cartels to make the ICA aware of infringements that would otherwise not be brought to light.

Finally, it is worth mentioning that Mr Pitruzzella stressed the importance of compliance programmes as an instrument to avoid unlawful behaviour. Indeed, he stated that the ICA will evaluate the opportunity to grant undertakings a reduction in the fine they receive if they can demonstrate that they have effective compliance programmes which are not simply performed in a ‘formalistic’ and standardised manner.

**Legislation: overview**

Similarly to article 101 (1) of the Treaty on the Functioning of the European Union (TFEU), article 2 (2) of Law No 287 of 10 October 1990 (Competition Act) prohibits agreements that directly or indirectly fix purchase or selling prices or any other trading conditions, share markets or sources of supply.

The ICA and national civil courts are responsible for the enforcement of the cartel prohibition in Italy. In January 2012, special sections were established within the Italian civil courts for the enforcement of national and European competition law. The jurisdiction enjoyed by the ICA and the courts is determined by the ‘effect rule’. Article 2 of the Competition Act applies to cartels which have anti-competitive effects; this may in particular include the prevention, restriction or distortion of competition on the Italian market. Article 2 applies irrespective of whether the conduct occurred abroad, or is put in place by undertakings which are not based in Italy. Article 101 TFEU applies when the cartel may affect trade between member states (most recently, the ICA applied article 101 in the case 1722 Sea Agents in the Port of Genoa, see below).

Cartels in breach of article 2 of the Competition Act and 101 TFEU are void and unenforceable; administrative fines are applicable and damages actions can be pursued by third parties.

Pursuant to article 15 of the Competition Act, the ICA may decide, depending on the gravity and duration of the infringement, to impose on each undertaking a fine of up to 10 per cent of the undertaking’s turnover from the previous financial year.

The ICA’s decisions may be challenged before the Administrative Court of Latium (TAR Lazio). The decisions of which may be appealed before the Supreme Administrative Court (Consiglio di Stato).

Third parties which have suffered a prejudice as a result of the unlawful behaviour can bring private actions before civil courts to be indemnified for the loss they have suffered. Private actions for damages can either be based on the ICA’s decision (as a follow-on action) or independent from it (as a stand-alone action). In any event, the civil courts are not bound by the ICA’s decisions, as they benefit from rebuttable proof and defendants can rely upon evidence to rebut the decision. Italian law does not provide for punitive damages, instead it only provides for compensatory damages.

Both the civil courts and the ICA are also granted the power to order interim measures.

Although there are no criminal sanctions in the Competition Act, certain cartel activities may be caught by Italian criminal law provisions. In particular, article 501 of the Italian Criminal Code provides criminal sanctions (including imprisonment for up to three years) for ‘market manipulation through the misuse of price sensitive information’. According to article 501 bis of the Italian Criminal Code individuals can be convicted (and liable to imprisonment from six months to three years and fined up to €25,822) for ‘speculations on prices and quantities of raw materials and basic food products’. Article 507 of the Italian Criminal Code provides imprisonment (of up to three years) for individuals involved in ‘boycotts’. Finally under article 353 of the Italian Criminal Code, bid rigging attracts criminal sanctions (including imprisonment from six months to five years).

The ICA has the power to terminate proceedings if, within three months from the start of the investigation, the companies under investigation offer commitments to correct the anti-competitive conduct. In this situation, according to article 14 ter of the Competition Act, the ICA can make the commitments binding and close the proceedings without making an infringement finding. However, according to case law, acceptance of commitments is unlikely in cartel cases because these are considered to be amongst the most serious infringements of Italian competition law and therefore they should attract the highest fines. This policy has been specifically restated by the ICA in the recently adopted Guidelines on the commitments procedure (a public consultation was launched in May 2012).

**Recent changes or proposal for change**

Through the recent introduction of article 21 bis of the Competition Act, the so-called ‘Save Italy’ Law Decrease of 6 December 2011, No. 201 as brought into effect by Law 22 December 2011, No. 214 provided the ICA with a new power to lodge an appeal for the annulment of any legislative or regulatory act adopted by any public administrative body, which restricts competition. This rule enhances...
the ICA’s power to enforce competition law at a preemptive level by eliminating/preventing the adoption of national rules that facilitate collusive practices such as cartels. Although this is not directly connected with an undertakings’ behaviour, a wide application of this new power may nevertheless have an impact on companies. For example, companies in a cartel investigation may have less chance of arguing that the conduct originated solely from the implementation of national law. The same holds true for mitigating circumstance when the anti-competitive conduct has been authorised or encouraged by public authorities or by legislation.

This trend is clearly exemplified in the ICA’s recent intervention in the transport sector. Following a non-binding recommendation to the Italian Transport Ministry not to adopt the Decree setting minimum costs for freight forwarding services by land, the ICA appealed against such Decree arguing that it allows a price-fixing cartel among freight forwarders.

The outcome of such an appeal could be of some relevance for freight forwarders that are active in Italy. Should the Decree be annulled, they could no longer claim that the minimum tariffs were imposed by law, thus escaping antitrust liability. However, on the other hand, if the ICA’s appeal is rejected, freight forwarders applying such minimum tariffs fall into the safe-harbor of non-applicability of Italian competition law.

**The Italian leniency programme in the light of recent case law**

According to article 15 of the Competition Act, in 2007 the ICA adopted Guidelines on the non-imposition and reduction of fines in leniency applications. The Italian leniency programme mainly follows the European Competition Network (ECN) model and it differs in certain aspects from the leniency treatment granted by the European Commission (EU Commission).

The first company which informs the ICA of the existence of a secret cartel and provides decisive evidence to enable the ICA to carry out targeted inspections, can obtain full immunity from fines. Other undertakings which subsequently provide information and evidence relating to the cartel, may qualify for a reduction in the fines which would otherwise be imposed. Generally, the reduction will not exceed 50 per cent of the fine. This differs from the EU Commission’s leniency programme regulation, which provides for a range of discounts based on the order of arrival. In Italy although timeliness is a relevant factor, there is no such incentive to ‘race for the court’.

For example, in the cosmetics cartel (see below I701 *Vendita Al Dettaglio Di Prodotti Cosmetici*), Procter&Gamble qualified as the third leniency applicant and was granted a 40 per cent discount in the sanction awarded; whereas, in the international freight forwarders cartel, DHL qualified as the third leniency applicant but was granted a 49 per cent reduction.

In order to determine the appropriate level of fine reduction, the ICA takes into account the time at which the evidence was submitted, having regard to the phase of the proceedings and the level of cooperation provided by other undertakings, and the evidentiary value of the information and documents which are submitted. This means that providing evidence at an early stage of the proceedings will be better rewarded, at least in principle.

Leniency applicants are not entitled to simply report unlawful behaviour. Instead they have to confess their participation in the secret cartel and support their statements with evidence (see eg, TAR Lazio 8945, 17 November 2011, *Vendita Al Dettaglio Di Prodotti Cosmetici*).

Useful indications on the priority of leniency applications simultaneously filed both with the Commission and the ICA have been recently provided (March 2012) by the Administrative Court of Latium within the appeals against the ICA’s decision I722 *Logistica Internazionale*, fining 19 freight forwarders and a trade association.

The main point made by the Administrative Court of Latium originated from the appeal of DHL, which first applied for leniency with the EU Commission and then with the ICA. The court ruled that a leniency applicant with the EU Commission does not automatically qualify for leniency in other European member states.

The ruling stresses a very important point for companies wishing to fix their priority in multi-jurisdictional requests for leniency. This is that leniency applicants should file applications with all the national competition authorities possibly involved.

**The sanctions**

The Competition Act awards the ICA the power to impose sanctions in cases of antitrust infringements. Pursuant to article 15, where the ICA ascertains that there has been an antitrust infringement, it shall order the undertakings concerned to terminate the infringement and ‘in the most serious cases it may decide, depending on the gravity and the duration of the infringement, to impose a fine of up to ten per cent of the turnover of each undertaking or entity during the prior financial year.’

Pursuant to article 31 of the Competition Act, the general regulation of the administrative sanctions contained in Law No. 689/1981 applies to the fines imposed by the ICA insofar as it is compatible with the Act. The case law has clarified that rules in Law No. 689/1981 sets the general criteria to calculate the amount of the fine, while the Competition Act and Regulation No. 287/1998 regulates the proceedings in which the fines are imposed.

Article 1, section 4 of the Competition Act states that Italian competition rules shall be interpreted in accordance with the principles of EU competition law. In accordance with this provision, the ICA has refined its methods to calculate the amount of fines by applying the EU Commission Guidelines. Like the EU Commission, the ICA first determines the basic amount of the fine in proportion to the value of the sales relating to the infringement. After that it multiplies this number by reference to the number of years the infringement lasted. Finally, it applies the aggravating and/or mitigating circumstances provision. In addition to the mitigating circumstances provided for in the Guidelines, according to article 11 of Law 689/1981 the ICA may reduce fines for commitments offered by the parties which are aimed at eliminating or reducing the effects of infringement.

However the ICA is not always consistent in its application of EU competition law. In the case of I722 *Logistica Internazionale* it deviated from the Guidelines when determining the reduction in the fine for financial hardship. It did so by granting the reduction even though the company only made losses in the previous fiscal year, whereas under EU law there must have been three consecutive years of losses.

In 2011, the ICA concluded eight proceedings regarding potential infringements of article 2 of the Italian Competition Act and/or article 101 TFEU. In five cases it ascertained that there had been an infringement and imposed fines on the undertakings involved. The fines imposed on a single undertaking ranged from €500 up to €23 million.

In the case of I735 *Manutenzione Impianti Termici Comune Di Potenza* the associations of undertakings were fined only €500 each because the agreement was encouraged by the municipality

102 The European Antitrust Review 2013
of Potenza and the parties suspended the agreement as soon as the proceeding started.

The highest fine in 2011 was €23 million but this was then reduced by the Administrative Court of Latium. This fine was imposed on a company in case I722 Logistica Internazionale, where the basic amount of the fine was set at a level of 5 per cent of the value of the sales relating to the infringement. This percentage was the highest the ICA imposed that year.

The trend of increasing the basic amount of the fine was confirmed by the ICA in 2012. In the case I733 Servizi di Agenzia Marittima, the basic amount reached a level of 10 per cent of turnover.

The setting of the basic amount of the fines by the ICA has been under the scrutiny of the administrative courts. In the appeal of the I701 Vendita Al Dettaglio Di Prodotti Cosmetici case, the Administrative Court of Latium granted a 25 per cent reduction in the basic amount of the fine because of lack of evidence on the alleged effects of the infringement on the market. The ICA asserted that companies did implement the price increases set within the anticompetitive meetings. However, as this was not supported by sufficient evidence, the Administrative Court of Latium reduced the fine by 25 per cent. Similarly, in the appeal regarding the I646 Produttori Di Vernici Marine case, the Supreme Administrative Court confirmed that the lack of elements demonstrating that the cartel had some effects on the market was worth a 30 per cent reduction in the basic amount of the fine.

Again in case I733 Servizi di Agenzia Marittima, the ICA imposed on all the undertakings an increase in the fine to the amount of 15 per cent with the aim of acting as a deterrent.

In accordance with article 261 TFEU, article 134 of the Italian code of administrative procedure states that the sanctions imposed by the ICA are subject to full judicial review by the administrative courts. The administrative courts may cancel, reduce or increase the fine. However, the jurisdiction of the courts finding an infringement is limited to a legality control.

In the Menarini case, the Italian system of judicial review of the decisions of the ICA was held to be compatible with article 6 of the European Convention of Human Rights by the European Court of Human Rights. This is because the Administrative Court went beyond a formal technical judicial review of the decision of the ICA and assessed the ICA's appreciation of the facts.

Private enforcement
In its last Annual Report the ICA stated that ‘in order to ascertain cartel cases the public enforcement appears structurally more able than the private enforcement’.1

Indeed, 2011 followed the trend of previous years. The number of actions related to anti-competitive agreements in Italy was still very limited. In the period 2007/2011 the ICA ascertained over 60 cases of cartels or anti-competitive agreements. However, with the exception of some rare cases,4 no significant follow-on actions were launched before the Italian Courts. In light of the above, the Italian legislator has tried to improve the private enforcement.

In 2011/2012 the Italian legal framework concerning antitrust private enforcement was subject to two reforms. First of all, article 2 of Law Decree No. 1 of 24 January 2012 introduced the ‘Tribunale delle imprese’. This article has the aim to extend the jurisdiction of the divisions of the court specialised on industrial property in order to create divisions specialised on undertakings. The aim is to concentrate the legal disputes before a reduced number of courts (12 Tribunals instead of 164),4 with the object of reducing the time taken to conclude proceedings involving medium and large sized companies and thus improving their competitiveness on the market.

Following this reform, the new Tribunal has jurisdiction over the claims for the enforcement of private rights provided for by the Competition Act and by EU antitrust law (including claims for annulment, damages and interim measures).

It is essential to note that the jurisdiction of the new Tribunale delle imprese will have regard only to the actions launched after the
entry into force of Law No. 27 of 24 March 2012 which brought the above mentioned Law Decree into effect.

In its 2011 Annual Report the ICA has highlighted the necessity to improve the procedures for collective redress specific to antitrust infringements. According to the ICA, where illegal conduct causes scattered and low-value damage to a multitude of individuals and where the individual cost of pursuing redress might not be proportionate to the damage suffered, efficient and effective schemes for collective actions are considered as a vital component of a well-functioning judicial system.

Collective redress schemes exist in Italy. Pursuant to article 140-bis of Legislative Decree No. 206 of 6 September 2005, No. 206 (Italian Consumer Code), as from January 2010, class actions were introduced into the Italian legal framework.

Under this article, class actions may be brought by any consumer or user seeking damages or declaratory relief for a violation of rights that is identical to those suffered by other consumers or users that arise from certain actionable breaches of contract or torts, including anti-competitive behaviour.

In Italy this kind of instrument has been used rarely and mainly with reference to unfair commercial practices. In order to acknowledge the input of the ICA and try to revitalise class actions based on antitrust infringements, the above mentioned article 140-bis of the Italian Consumer Code was amended by article 6 of the Law Decree No. 1/2012.

This amendment related to the scope of legal protection guaranteed by class actions. The Decree made better provision for class actions arising out of the violation of collective interests. In addition, it replaced the requirement that the infringed rights should be identical with the requirement that the infringed rights should be homogeneous, in order to be enforceable by class actions.

The new wording appears to better harmonise procedural rules with substantive rules and could facilitate bringing class actions because the criterion of homogeneity appears to be easier to be met than the previous one based upon the concept of identity.
Francesca Sutti
DLA Piper Italy
Francesca Sutti is a partner and co-heads the competition group within the regulatory department in Italy. With more than 15 years of professional experience, Francesca has always focused only on antitrust law both European and Italian.

Her broad experience ranges from providing consultations on a day-to-day basis on the diverse issues arising from the clients’ activities on their dominant position on the market, to dawn raids and investigation proceedings in general.

Francesca regularly defends clients before both the European Competition Commission and the Italian Competition Authority, as well as civil and administrative courts. She also has broad experience in setting up a tailor-made compliance programme designed to train people and limit companies’ responsibilities. She is author of some publications about her sector and she is regular speaker at seminars.

Alessandro Boso Caretta
DLA Piper Italy
Alessandro Boso Caretta is a partner based in our Rome office and co-heads the competition group within the regulatory department in Italy.

He specialises in regulation and competition, both on transactional and contentious matters, with a focus on network industries. He has extensive experience in assisting and representing clients in proceedings before regulatory and antitrust authorities as well as in regulatory and antitrust advising and litigation. His practice also covers consumers’ protection issues, including the areas of unfair commercial practices and class action.

He regularly speaks at conferences on competition law and regulated markets.