LEGAL OPINION

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DIRECTIVE 2014/104/EU. PRIVATE ANTITRUST ENFORCEMENT, NEW LEGISLATION ON DAMAGE COMPENSATION

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This monthly feature originates from the partnership between Marketplace and ANDEC, and it is edited by Maurizio Iorio in his dual role of professional Attorney in Milan and President of ANDEC. In each issue he will address legal matters with a special focus on the electronics sector. Further details are available on the website: www.andec.it, while this feature published in Italian and French can be found on the website: www.avvocatoiorio.it

Directive 2014/104/EU (so-called 'Enforcement Directive'), adopted on 26 November 2014 and which should have been transposed in Italy by 27 December 2016 but whose implementation will very likely be delayed by several months, pursues the aim to achieve a more effective coordination between national legal systems within the EU with regard to compensation for damage resulting from conducts prohibited under antitrust laws.

National legal systems do in fact **show marked differences in the level of protection provided to victims of antitrust offenses, leading to distorted competition and affecting the smooth functioning of the single market**.

Thus the aim of Directive 2014/104/EU is to ensure that the enforcement of antitrust law by civil courts and national competition authorities respectively, **follows coordinated and effective rules, as they are both necessary enforcement tools for achieving the EU's objectives**.

In fact, recital 6[1] of the Directive provides as follows: "*To ensure effective private enforcement actions [...] and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules*". In particular, the most important aspects pursed by the Directive as regards the coordination between ordinary courts and competition authorities are the:

- disclosure of evidence in the file of the competition authority to the ordinary court in damages actions (Article 6);
- effects of infringement decisions by the competition authority in the damages judgement (Article 9);
- presumption of the existence of damages in case of cartels verified by the competition authority (Article 17).

Below I will examine each of these three points.

TARGETED AND LIMITED COURT ACCESS TO THE COMPETITION AUTHORITY'S FILE

Let us suppose that the competition authority has closed its proceedings following specific commitments − on the part of the entity (defendant) who had violated the relevant legislation − to remedy the consequences of its past conduct (so-called 'leniency programme') and that the damaged party (claimant) has brought an action for damages before the ordinary court, as in effect it falls within its exclusive competence. In fact, in such cases, the Directive states that national courts may, on application of the claimant, **request access to the competition authority's documentation relating to commitments undertaken by the defendant in the proceedings concluded before the said authority** for the exclusive purpose of verifying the existence of any settlement submissions and formal commitments, whilst it will not be accessible to ordinary courts for any other purpose (Article 6, para. 6 of the Directive [2]).[3]

In other words, the court may view the statements and settlement submissions regarding leniency programmes finalized with the competition authority and the related commitments undertaken by the defendant, but only to ensure that the statements and/or settlement submissions are actually as described by the Directive. Any other use will not be permitted in civil proceedings.

EFFECTS OF INFRINGEMENT DECISIONS BY THE COMPETITION AUTHORITY IN THE DAMAGES JUDGEMENT

A further collaboration aspect between civil courts and competition authorities concerns, in particular, the value of the convictions handed down by the competition authority in the context of civil proceedings for

1) The recitals are the 'whereas' statements that in each directive precede the actual legislative text organized into articles and paragraphs, and anticipate its content in more discursive terms with respect to the latter.

2) "*Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence:* (a) *leniency statements; and (b) settlement submissions*", Article 6, para. 6 of the Directive

3) The reasoning behind the general access prohibition referred to in para. 6 is to protect the effectiveness of public enforcement, which in a balance between the party's right to evidence and the confidentiality of information gives precedence to the latter.

damages, following the administratively sanctioned conduct. **The Directive, in fact, provides that national courts must regard as definitely ascertained an infringement established by a decision of the competition authority or an administrative court of appeal that has ruled in this respect**. It is clear from this legislative provision the character of privileged evidence attributed to convictions handed down by the competition authority. This means that, for the purpose of compensation claims, national courts will not be required to establish the existence of damage and can instead examine other aspects related to the causal relation between conduct and damage and subsequent quantification of the latter. This provision is the result of a tendency towards greater harmonization between civil and administrative jurisdictions, already sought in Italy by the Court of Cassation's case-law in relation to the character of privileged evidence of the decisions by the National Authority for Competition and Market (AGCM). This jurisprudential trend has played an important role in a system, such as the Italian one, whose starting point was (and in many ways still is) the 'dual-track' principle, namely the full autonomy between civil and administrative jurisdictions [4].

IN CASE OF CARTELS ASCERTAINED BY THE COMPETITION AUTHORITY, THE EXISTENCE OF DAMAGES IS PRESUMED

Another new aspect concerns the criteria for quantifying the damage that ordinary courts must apply.

In fact, the Directive introduces a presumption, subject to proof to the contrary, that the existence of a cartel is always a source of harm (while its extent remains to be proven by the damaged party): [5]

Therefore, anyone who believes to have suffered a damage due to the existence of a cartel, will no longer be required to prove in civil courts that the cartel produced harmful effects, since this fact is presumed by law to be true, but will only have to prove the quantum of the damages suffered − subject, of course, to proof to the contrary by the interested party. In addition, as regards the quantification of the damage, the Directive states that national courts have the power to equitably assess the damage if its determination is practically impossible to quantify on the basis of the available evidence [6].

CONCLUSIONS

In conclusion, these measures aimed at strengthening and harmonizing the application of the law on matters of compensation for antitrust infringements, constitute, as a whole, a legislation that should be kept in mind, even if to date – it is worth reminding – it has not yet been implemented by a national law.

This basically because any illicit conduct identified by the competition authority is as a consequence more consistently and effectively sanctioned also in civil proceedings for damages and because, thanks to the legal instruments put in place by the Directive, it allows more scope for sharing evidence between ordinary courts and competition authorities.

Historically, in fact, the data and documentation collected by the National Authority for Competition and Market have always been covered by secrecy that in Italy has been essentially justified by the principle of autonomy of courts (both ordinary and administrative); principle that even recently has some legal scholars say that "*in our legal system, in fact, the action before civil courts is not subject to a prior decision by the competition authority, in view of the autonomous relationships between administrative and judicial action, and the measures issued by the said authority are not binding to the ordinary court*" [7].

4) In this regard, the Court of Cassation's case-law spoke of 'privileged evidence', without, however, always connecting to this term a single meaning. In fact, in one case (judgement of the Court of Cassation No. 3640 of 13 February 2009) it is stated that the parties still have the possibility to provide evidence in support of the competition authority's assessment or against it, while in other judgments (Court of Cassation No 13486 of 20 June 2011 and No. 7039 of 9 May 2012) it is stated that to the sanctioned undertaking is not permitted *"in civil proceedings to challenge the elements constituting the existence of the infringement of the rules on competition on the basis of the same evidentiary material or the same arguments already rejected in that forum*", Court of Cassation No. 11904 of 2014.

5) Article 17, para. 2 of the Directive.

6) *"National courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available*" (Article 17, para. 1).

7) "*The action for compensation pursuant to Article 33 para. 2 of Law no. 287/1990: the burden of proof on the part of the consumer in case of an agreement restricting competition ascertained by the National Authority for Competition and Market",* from Civil Liability and Security, volume 4, 2015, page 1220 − Note from Filippo di Peio on the Court of Cassation decision No. 11904/2014, in which Peio goes on to say that "*from this follows the increasingly strong concern about the need to maintain unchanged the principle of autonomy between administrative proceedings and civil proceedings, in order not to preclude ordinary courts from examining the original conduct and evaluating the effectiveness of the assessment in respect of third parties who were not involved in the administrative proceedings, such as consumers. The Court of Cassation, however, on the basis of the principles of effectiveness and unity of the system, resolves the issue through the different perspective of the complementariness subsisting between the two forms of competition protection, allowing to consider as relevant the administrative measures in civil actions. In this sense, the Court of Cassation finds that, although it is true that the civil action does not presuppose the prior intervention of the competition authority, and that any decision of the competition authority is not binding on ordinary courts (even if they have passed the scrutiny of the administrative courts), at the same time it cannot be denied that the two forms of protection are acting in the same regulatory framework and for the same purpose: namely, to legally protect the right to free competition and the right to compensation for damage suffered* ".