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Antitrust Damages, European Competition Law and Judges: Private and Public Enforcement. Articles 101, 102 and 107 of TFEU and National Judges (REFJ1224)

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Room 9-10
Spanish Judicial School
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15:00 h Quantifying Antitrust Damages by National Courts
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Part II

Antitrust Damages Actions

Quantifying damages before national courts

The Italian perspective

Gabriella Muscolo

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Summary: 1. Introduction: evidence-related issues in antitrust private litigation. 2. Mitigating burden of proof in antitrust cases. 3. Parties' asymmetric information and access to evidence. 4. Standard of proof in assessing damages: from equity to Economic evidence. 5. Conclusions: overcoming Judges epistemic deference face to Economists. Towards a forensic Economics.

1. Introduction: evidence-related issues in antitrust private litigation.

As the antitrust cases are fact-intensive and the antitrust judge is also a fact finder, he/she has to face three main evidence -related critical issues in private litigation.

The first two questions raise in the investigation phase: the first one is mitigation of the burden of the proof and relays on substantial rules ; the second one is parties' asymmetry and their access to evidence, and procedural rules on collection of evidence are concerned..

The third question regards the decision-making phase and the evaluation of evidence: it is standard of proof required for the assessment of the case.

2. Mitigating burden of proof in antitrust cases.

On the first question, in the Italian system, following the general rule in art. 2697 of the Civil Code, the burden of proving the breach of antitrust rules, the link of causation and the amount of damages is allocated to the claimant.

However, in collecting evidence, both law and case law mitigate the burden of the proof for the claimant.

For example, even if there is no general provision for disclosure of information in pure antitrust cases, if the case also involves IP issues, the Italian IP Code, article 121.2, and art. 156 of Copyright Law provide for discovery, i.e., the Court may issue an order to the alleged infringer or to third parties, to disclose documents, information and data for the identification of the entities involved in the infringement and implementing art. 6 of EC Directive 48/2004 (the so-called enforcement directive), as well as TRIPS.

In cases focused on the nexus between IP and competition, art. 121.5 of the IP Code permitting a technical expert designated by the judge to receive documents which have not yet been produced in Court, may also be resorted to.

3. Parties' asymmetric information and access to evidence.

On the second issue, the parties' asymmetric information about relevant facts and evidence is the main obstacle to the enhancement of private litigation: a mechanism of disclosure, such as proposed by the White Paper would be welcome. It follows the model of mild discovery adopted by the EC Directive 48/2004 on the enforcement of IPRs.

Access to evidence may be facilitated in follow-on action; the parties themselves have only limited access to the file, but the Court may request the AGCM directly pursuant to art. 211 of the Procedural Code.

Before an Italian Court the decision of the AGCM ascertaining a breach of *antitrust* rules is considered as a strong piece of evidence, but it has not the value of legal proof and does not reverse the burden of proof for the infringement.

For example, in the Court of Appeal of Milan, 26 November 1996, T*elsystem vs Sip* case, a follow-on action for compensation of damages in a leading case of exclusionary abuse of dominant position, the Court has autonomously ascertained the infringement, reaching the same conclusions as the AGCM.

The Italian Supreme Court in the decision 13 February 2009 n. 3640 *Inaz Paghe vs Associazione Nazionale Consulenti del Lavoro* has established that the decisions made by National Competition Authority represent "privileged evidence" i.e. a strong piece of evidence for the following damages action. Nevertheless, such evidence is rebuttable and it is possible to contrast the result of the NCA evaluation by means of some different and contrary piece of evidence.

The position of the Italian Government, of the Italian High Judiciary Council (Consiglio Superiore della Magistratura), of the Italian Supreme Court and of the AGCM is not in favour of the White Paper proposal of binding, cross border effects of NCA decisions for National Courts; such position is inconsistent with the Italian legal system and, in case of extensive interpretation, it may even run counter the Italian Constitution.

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4.Standard of proof in assessing antitrust damages: from equity to Economic evidence

Moving to the third issue, in dealing with evidence, a competition law Judge usually handles peculiar sources of evidence: documentary evidence is rare in a case of infringement; evidence given by witnesses is perhaps the most difficult to evaluate.

Presumptions and circumstantial evidences acquire a great relevance in ascertaining facts. On this issue Italian Courts can refer to ECJ 2006, Case C-44/02 *Dresdner Bank and others vs Commission*, on the role of *indicia* in meeting the standard of proof. For Italian case-law on the relevance of presumptions, backed by the conclusions reached by AGCM, *see* Supreme Court 13 February 2009 No. 3640, *Inaz Paghe* already quoted.

However, in antitrust litigation the favourite tool is economic evidence. The use of Economics in antitrust cases raises two main questions: the first one is about the role of the Judge face to the Economist, due to the epistemic asymmetry between the two of them and of the epistemic deference of the first face to the second one. The second problem is the need of a Forensic Economics in which the expert acts a translator to the Judge who is the gatekeeper of the case.

Articles 61 and following and articles 191 and following of the Code of Civil Procedure rule on the use of experts and apply also to antitrust cases. In the Italian system experts are appointed by the Court and are expected to provide

the judge with a written expertise. Parties can appoint their own experts, who are not cross-examined.

Experts are frequently called to ascertain technical facts in antitrust cases – and also for calculating damages - but the judge shall guide the experts in case management and the expert's conclusions are not binding for the Court. However, in case the judge should decide to challenge the expertise, he is supposed to justify his decision.

In pure antitrust cases a simplified "but for" analytic approach has been the preferred model for compensating damages in Italian cases (see Court of Appeal of Milan 11 July 2003, *Bluvacanze v I Viaggi del Ventaglio* and the *Inaz Paghe* and *Telsystem* cases, already quoted, in which experts have been appointed by the court, as well as the Court of Appeal of Turin judgment of 7 February 2002, already mentioned, in which the Court has calculated damages without appointing experts).

The Court can also provide for the payment of a lump sum on the record of the case. Damages have been calculated based on article 1226 of the Civil Code, which gives the court a discretionary, equitable power to set damages in case where no clear references exist, in the vast litigation following AGCM decision of 28 July 2000, case 1377, *RC Auto,* also taking into account the overcharge paid by the plaintiffs that the AGCM had considered to be equivalent to 20% of the premium.

The claimant has to prove the existence of damages and the link of causation also in case of equitable evaluation, which in any case lowers the standard of the proof vis-à-vis the calculation of the exact amount of damages incurred.

The Commission is now publishing the Guidance Paper on the quantification of harm in antitrust damages actions, a no binding, and not interfering with national rules and practices, instrument assisting Courts in assessing damages and eventually helping parties in settling disputes.

The Guidance Paper provides for an insight on different methods and techniques for quantifying harm caused-both to competitors and consumers- by a rise in prices or exclusionary practices on the base of a but for analysis, helping the judges in constructing the counterfactual scenario, also relying on a certain number of assumptions.

Italian institutions and associations (Italian Supreme Court, Associazione Italiana Giuristi Europei- AIGE) have taken part in the public consultation on the Guidance Paper.

The Guidance Paper can help the Italian Judge in guiding the economic expert in the choice of different models proposed, and legitimate the claim for the use of forensic science in expertise. It also facilitate ADD le evaluation and the challenging of the expert's conclusions by the judge.

The guidelines are supposed to increase the standard of the proof on the amount of damages, to reduce equitable and discretionary calculation and to limit the risk of overcompensation or undercompensation.

In Italian case law the existence of an administrative penalty imposed either by the European Commission or by AGCM is generally not taken into account by the Courts when awarding damages but the AGCM in certain cases will take into account the compensation paid or to be paid by the company in calculating fines.

4. Conclusions: overcoming judges epistemic deference face to Economists. Towards a forensic Economics.

As a conclusion, the use of Economics in antitrust cases raises two main questions: the first one is about the role of the Judge face to the Economist, due to the epistemic asymmetry between the two of them and of the epistemic deference of the first face to the second one.

The second problem is the need of a Forensic Economics in which the expert acts a translator to the Judge who is the gatekeeper of the case: this is still developing in Italy.