Italy

DDPV Studio Legale

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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The infringement of the antitrust law provisions in Italy (and in particular both the national antitrust law No. 287/90 and the EU provision pursuant to Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") could give rise to the enforcement action of the Italian Antitrust Authority ("IAA") and legitimise a civil action by any entity who believes it has suffered damage by an undertaking that has violated an antitrust law provision.

In this case, the subject who has suffered the antitrust offence can apply to a Civil Court to obtain recognition of the antitrust law violation and the compensation of the damage caused by the latter.

With actions before the national Civil Court concerning an antitrust provision violation, the plaintiff may claim:

a) Compensation for damage; such actions can be based on a (definitive) decision of the EU Commission or the IAA ("**follow-on actions**"), in which case the ascertainment of the existence of a breach of antitrust law is facilitated by the decision of these authorities. In the absence of any previous IAA or EU Commission decision, which ascertained the antitrust law violation, the claimants that allege a breach of antitrust law before a Civil Court have to provide evidence of the antitrust infringement ("**standalone action**").

b) In both follow-on and standalone civil claims, the plaintiffs must demonstrate the damage suffered and the causal link between the antitrust law violation and the loss suffered.

c) The mere ascertainment of the antitrust violation (positive and negative ascertainment of an antitrust violation).

Actions for nullity of a contract or provision that infringes antitrust law (e.g. a non-compete clause): any interested party can request Civil Courts, also by way of counterclaim, to declare that an agreement restricting competition is null and void, pursuant to Article 101(2) of the TFEU and/or to Article 2(3) of Law 287/90.

The plaintiff, in the same proceeding or in an autonomous one, could ask the Civil Court to urgently obtain precautionary measures aimed at preventing the production of the negative effects that the unlawful antitrust conduct could cause (e.g. requesting the Court to deal on a non-discriminatory basis with a monopolist who holds an essential resource).

In the context of civil actions, it should be noted that the Courts do not apply punitive damages; the Courts are bound to compensate the damages that the plaintiff is able to demonstrate it has suffered.

1.2 What is the legal basis for bringing an action for breach of competition law?

Actions for breach of competition law can be based on Articles 101 and 102 of the TFEU and/or on Articles 2 and 3 of Law 287/1990, prohibiting agreements restricting competition and abuse of dominant position.

Legislative Decree No. 3 of 19 January 2017 ("Lgs. 3/2017"), which transposed Directive 2014/104/EU ("Damages Directive"), provides specific rules concerning antitrust damages actions.

Fundamental principles of civil law relating to tort liability and customary tort lawsuits, specifically Articles 2043 and subsequent ones in the Civil Code. Additionally, the relevant procedural regulations established in the Code of Civil Procedure (recently modified by the Legislative Decree dated 10 October 2022, No. 149).

The action proposed before the Courts for violation of the antitrust law can be brought by entities who have an interest in the action (Article 100 of the Italian Civil Procedural Code ("CPC")), thus any subject who claims to have suffered damage caused by an antitrust violation (e.g. a higher price caused by a cartel or damage connected to an exclusive abuse).

A person/entity that does not demonstrate that she/he/it has a specific interest in the action is not entitled to act for an antitrust claim.

In addition, an association of undertakings or consumer association could be legitimate in an antitrust civil claim. Consumers have standing to sue in an antitrust civil action. However, in each claim the plaintiff must demonstrate its specific interest to act.

The action aimed at ascertaining an antitrust violation can also be submitted to the Court by an entity that has an interest in the mere positive or negative assessment of the antitrust infringement (e.g. a company that wants the Court to clarify that its behaviour does not give rise to an antitrust violation or that it has not produced any damage to a certain kind of third party – negative assessment).

A person who is afraid of suffering damage from an antitrust offence is entitled to take action to obtain precautionary measures (asking the Court to forbid certain behaviours) even when the damage has not yet materialised.

Consumer associations (except for class actions – see question 1.5) may, in principle, be entitled to act before Civil Courts on the condition that they prove that their associates have suffered damage from the claimed antitrust violation. In the event that the association does not demonstrate that at least one of its associates has suffered damage from the alleged antitrust violation, association can only request the ascertainment of the offence but not the quantification of any damage.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

Civil antitrust actions can concern violations of both national antitrust rules aimed at protecting competition (Law 287 of 1990) and the TFEU rules on competition directly in force in Italy. The national Courts, therefore, can apply the European rules on vertical agreements and the *de minimis* rules as well as the provisions of Article 101.3 of the TFEU. There are no regional regulations governing competition law, and it should be noted that Article 117 of the Italian Constitution (recently amended by Article 3 Cost. Law 18 October 2001, No. 3) provides that antitrust law can be regulated by national law only and not by regional law provisions.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

"Specialised Divisions of Enterprises" of Civil Courts have jurisdiction on antitrust law claims. Since the entry into force of Lgs. 3/2017 (3 February 2017), only three of such Specialised Divisions are competent for antitrust civil claims, namely the ones of Milan, Rome, and Naples (Article 18 of Lgs. 3/2017).

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

Mechanisms for multiple claimants are admissible in Italy if the entities that promote the action have homogeneous interests; i.e. they claim individual damage connected to the same antitrust offence contested in Court (please see question 5.3).

The Italian legal system provides for class actions, including for breach of competition law, based on an opt-in mechanism. The rules concerning class actions have been recently reformed. The new provisions laid down in Articles 840 *bis* to 840 *sexiesdecies* of the CPC entered into force on 19 April 2020 and will apply to conduct taking place after that date.

As regards conduct that took place before 19 April 2020, class actions will continue to be regulated by Article 140 *bis* of the Italian Consumer Code (Legislative Decree No. 206 of 6 September 2005).

A class action claim can be submitted to a Civil Court by a group of consumers or by a consumer association or entities recorded in a public registry managed by the Italian Ministry of Justice, but not by undertakings or professionals (e.g. lawyers or law firms).

The action is admissible under the condition that the requests of individual consumers who promote the action have homogeneous interests.

Once the action is provided, the judge assigns a deadline for the publication of the class action in order to encourage the adhesion of other consumers interested in the proceeding, as they could claim damages suffered by the alleged antitrust violation, which is to be ascertained in the class action.

The costs of publication (as well as legal fees) are borne by consumers – or by the association.

Consumers can join the class action at any phase of the judicial proceeding and, on the basis of the provision entered into force on 19 April 2020, a consumer who has not participated in the class action proceeding has the right to require the restoration of the damage caused by the antitrust violation ascertained by the Court at the completion of the class action proceeding after the issuance of the decision, when the proceeding has ended.

The relevant aspect of the Italian class action is that the judge, after having ascertained the antitrust violation and the causal link with the damages claimed by consumers, can only liquidate the specific damages suffered by individual consumers who have joined the action; for example, if a cartel caused a 20% price increase for a given product, the judge will be able to liquidate 20% of the value of the purchased products documented (e.g. with the purchase receipt). Therefore, the judge will not be able to liquidate further damages except for those of which specific evidence has been provided by the plaintiffs. For example, if a national cartel among undertakings concerning a given product has caused a 20% increase in the price of the product, and the companies involved in the cartel have earned a 20% extra profit calculated on the sales turnover of the product, the Court cannot liquidate the entire "damage to the market"; however, the Court can legitimately liquidate the damages connected to the evidence that specific consumers have submitted to the Court (20% of the purchase price of the specific product that the consumer demonstrates he/she has purchased).

This principle entails a strong disincentive to the use of the class action in Italy, especially with regard to antitrust violation concerning a vast number of low-value consumer products.

An antitrust class action has been instituted in Italy. Commencing in 2011, it was initially filed with the Genova Court, addressing damages stemming from a cartel evaluated by the IAA, specifically concerning tariff issues within certain ferry companies (IAA, 18 October 2011, I743, *Tariffe Traghetti da/per la Sardegna*). Nevertheless, the Court temporarily suspended the proceedings due to objections raised by the implicated ferry companies regarding the IAA's penalties. Subsequently, the proceedings were terminated following the annulment of the IAA decision before the administrative Court.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

Pursuant to Article 18 of Lgs. 3/2017, an action for antitrust damages can be brought before the Courts of Milan, Rome, and Naples only.

The Milan Courts have jurisdiction over the judicial districts of Brescia, Milan, Bologna, Genoa, Turin, Trieste, Venice, Trento and Bolzano.

The Rome Courts have jurisdiction over the judicial districts of Ancona, Firenze, L'Aquila, Perugia, Rome, Cagliari and Sassari.

The Naples Courts have jurisdiction over the judicial districts of Campobasso, Naples, Salerno, Bari, Lecce, Taranto, Potenza, Caltanissetta, Catania, Catanzaro, Messina, Palermo and Reggio Calabria.

The claimant could alternatively apply to the Court closest to: i) the place where the offence occurred; ii) the place where the company that suffered the antitrust violation is located; and iii) in the event that these criteria do not allow for the identification of the competent Court (e.g. in the case of several plaintiffs resident in various parts of the national territory or with residences/headquarters outside Italy), the Court where the proceeding started for the first time.

The majority of antitrust claims in Italy are lodged before the Court of Milan.

In the event that an antitrust claim (concerning a multinational violation that also has an impact on the Italian territory) has been submitted before a non-Italian EU Court, the rules of Regulation (EU) No. 1215/2012 are applicable.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The costs of antitrust civil trials in Italy are relatively low compared to other jurisdictions. Claimants should only pay a modest Court fee when lodging their suit (a few hundred or thousand euros, depending on the claim value), and are rarely required to provide a deposit as a condition for bringing the claim, even where the legal basis of the claim does not appear grounded at first.

The Courts are highly specialised with long experience of antitrust damages litigation even before the entry into force of Lgs. 3/2017.

Among other disincentivising elements, judgment times in Italy are much higher than the average timings of other EU Courts.

The national Courts are bound by very stringent rules on the calculation of damage restoration, making it much more complex to prove the damage or obtain recognition of the entire damage suffered by the market as a consequence of the antitrust violation. For an example of the strict approach of the Court to granting damages, see the Trib. Milan Dec. No. 4592 of 23 April 2018, *Dari Medical v. F. Hoffmann – La Roche*.

Also, Italian class activity also appears to be an inadequate tool to sufficiently compensate all of the damages caused by an antitrust violation.

It should be noted that in the past some cases, the companies involved in a cartel with European-wide effects, have submitted a claim to an Italian Court aimed at ascertaining the absence of compensable damage probably considering the higher average time of the Italian civil proceeding than the average time of a civil proceeding in other EU jurisdiction Courts (Trib. Milan, 8 May 2009, *ENI and others v Pirelli Tyres and others*).

1.8 Is the judicial process adversarial or inquisitorial?

The judicial process is adversarial.

The judicial proceeding is based on a summons where the plaintiff must submit the evidence of the damage and the causal link between the antitrust violation and the damage for which compensation is requested. The judge is bound by the evidence provided by the parties during the procedure (information documents regularly submitted by the parties and available in the trial's file).

In concise summary, it is worth noting that subsequent to the reform of civil procedure (Legislative Decree No. 149/2022, commonly referred to as the Cartabia reform), the initial document for a civil summons is mandated to incorporate all corroborative evidence, pertinent documentary substantiation, and any requests for investigation (including witnesses and technical consultations). Conversely, under the previous framework (prior to the reform), the evidentiary phase, submission of supplementary documents, and investigative requests could be deferred to a subsequent phase of the proceedings.

Under the newly established procedural regulations: upon receipt of the summons and the scheduling of the primary hearing (which cannot occur within 120 days following the service of the summons, or 150 days if the defendant is situated beyond Italy's borders), the respondent is obliged to lodge their defences, exculpatory evidence, and any investigative solicitations within 70 days from the inaugural hearing date. Essentially, the reform compels the plaintiff to encompass all evidence substantiating their claim within the initiating document, whereas the defendant must, within 70 days from the first hearing, not only formulate their defence but also furnish and present the evidentiary materials buttressing their defence.

1.9 Please described the approach of the courts in your jurisdictions to hearing stand-alone infringement cases, including in respect of secret cartels, competition restrictions contained in contractual arrangements or allegations of abuse of market power.

We have encountered a relatively limited number of standalone cases brought before the Italian Court. In most of these instances, the Court has dismissed claims for restitution due to insufficient evidence of antitrust violations. This insufficiency often relates to the absence of evidence concerning a dominant market position or the application of specific contractual conditions aimed at undermining competition as prescribed by an agreement. While recognising that information asymmetry may prompt the Court to request evidence and documentation from the defendant, the Court underscores the importance of the plaintiff presenting a minimum level of evidence to substantiate the antitrust infringement claim.

In the majority of scenarios, the Court has determined that the plaintiff has not met the necessary threshold of evidence to establish the antitrust violation, resulting in the dismissal of the claim. For example, in the case of Trib. Milan No. 10329 of 30 December 2022 *AGF S.R.L./ADIDAS*, which exclusively addressed abuse of dominance, the claim was rejected due to insufficient evidence demonstrating dominance (see also the dismissal of the case due to lack of evidence regarding market definition in alleged abuse of dominance in Trib. Milan No. 8365 of 25 October 2022 *Coprem/Bonna Sabla*, Trib. Milan No. 3458 of 20 April 2022, *Rs Italia/Gruppo Inox*; Court of Appeal Milan No. 2701 of 21/09/2021 *Digital World Television/Sky Italia* involving exclusionary abuse, specifically the refusal to grant access to a satellite TV platform).

In certain cases, the Court dismissed the case due to a lack of evidence regarding the abusive conduct of a dominant firm (Court of Appeal of Milan No. 3410 of 05/08/2019, *Voiceplus and others/Telecom Italia*).

In these aforementioned cases, the conspicuous absence of even rudimentary evidence concerning the antitrust violation was evident. Broadly speaking, a discernible deficiency exists in standalone actions regarding the provision of evidence of antitrust infringements. Conversely, the Court tends to adopt a stringent approach concerning the evidence pertaining to antitrust infringements. For instance, in claims concerning the abuse of dominance, the Court requires evidence of a dominant position within a specific product and geographic market (Cass. 3638/2009; Cass. 14394/2012; Cass. 11564/2015; Cass. 29237/2019).

If the plaintiff fails to present substantial evidence of an antitrust violation, the Court refrains from issuing discovery orders or other measures intended to further ascertain the presence of an antitrust violation (Cass. 29237/2019).

Conversely, recent instances of successful standalone cases include: Trib. Rome No. 8201 of 05 June 2020 *Ats – Automazione Traffico Semafori/Faac and Hub Italia*, which involved alleged abuse of dominance supported by evidence, resulting in the grant of restorative measures; Trib. Milan No. 12344 of 6 December 2017 *Next Mind/Vodafone Italia*, involving refusal to deal, where a modest restorative award was granted; Trib. Rome No. 19637 of 14 October 2019 *Medov Civitavecchia/Port Mobility*, with provided evidence of abuse and damage, resulting in the grant of restorative measures.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Yes (see question 2.2).

2.2 What interim remedies are available and under what conditions will a court grant them?

According to Article 669 *bis ff.* of the CPC, interim measures of any kind can be required by the Court in order to avoid serious and irreparable damage to the entity requesting the measure (e.g. obligation to deal or to supply imposed on a monopolist or to a holder of an essential facility) or harm that can be caused or aggravated by an actual or highly foreseeable antitrust violation.

The judge can provisionally order the seizure of products, publications of communications in newspapers, as well as any measure that is suitable to prevent or block the negative effect of the alleged antitrust violation.

The prerequisites for obtaining the emergency measure are: (i) convincing evidence of the antitrust violation – *fumus boni iuris* (e.g. an exclusionary abuse of a dominant position ascertained by an antitrust authority); and (ii) evidence that the antitrust violation is causing or it is likely that it will provoke a serious and irreparable damage to the entity requesting the measure – *periculum in mora* (e.g. an unlawful refusal to deal that will lead the claimant to fall into bankruptcy or to suffer unrecoverable market shares or losses).

The party that is requesting the measure must demonstrate the irreparability of the damage that is intended to be avoided with the requested precautionary measure, thus that the damage in any case could not be restored at the conclusion of the ordinary civil trial.

For example, the precautionary measure may be granted if the alleged antitrust violation not only causes economic harm but can also jeopardise the survival of the claimant's undertakings (i.e. heavy negative effects that could force the claimant's undertaking to definitively reduce investments, workforce, etc.).

3 Final Remedies

3.1 Please identify the final remedies that may be available and describe in each case the tests that a court will apply in deciding whether to grant such a remedy.

The main final remedy in a national private enforcement proceeding is the recognition of the antitrust violation and of the damage suffered.

The Court may also order to an undertaking that the ascertained antitrust violation must cease. The Court can also order other specific measures.

It is important to note that the Court can only order measures that have been specifically required by the plaintiff in the introductory act of the judicial proceedings.

These measures are admissible insofar as they are necessary for the defence of the plaintiffs (e.g. to impede the continuation of the damage suffered by the plaintiffs and caused by the antitrust infringement ascertained by the Court). For example, the judge cannot issue measures generally aimed at restoring the level of competition in the market that are not strictly related to the plaintiff's interests and claims in that specific trial.

The Court can therefore, within the limits indicated above, impose not only a negative order (that the unlawful conduct must cease), but also positive measures.

The Civil Courts have the power to declare, both *ex officio* and at the request of any interested party, that an anticompetitive agreement is null and void.

A Civil Court could also establish that an agreement between undertakings does not constitute an infringement of competition rules.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases that are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

In the Italian legal system, a subject (company or consumer) who suffers damage from an antitrust violation can obtain restoration for the damage that he/she proves to have suffered to his/her patrimony; punitive damages are not provided in Italy.

The restorable damages concern both the emerging damage (e.g. the higher price paid due to a price cartel) and the loss of profit; for example, the turnover reduction caused by an exclusionary abuse, or by a margin squeeze policy, etc.

The Supreme Court (Corte di Cassazione) has simplified the calculation of the consumer damage in a decision concerning a cartel in the motor insurance market by setting the amount of the award as a percentage of the insurance premium paid by consumers (Italian Supreme Court – Corte di Cassazione – judgment No. 11904/2014).

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

The fines imposed by the Commission, by the IAA or by other national authorities do not affect in any way the civil proceeding and the calculation of the damage; obviously, if the IAA has imposed remedies to reduce the negative effects of the antitrust offence, these remedies could have an impact on damages that the antitrust violation would produce after the issuance of the IAA's decision; with the consequence that, if the measures imposed are respected and effective, they could have an indirect impact on the damages calculation (which obviously includes all damages produced up to the Civil Court's decision).

4 Evidence

4.1 What is the standard of proof?

In antitrust civil proceeding cases concerning an antitrust law violation already ascertained by a definitive decision (i.e. a decision that cannot be reviewed or annulled) of the European Commission or the IAA (follow-on action), there is full proof of the existence of the antitrust law violation, pursuant to the provisions of Article 7 of Lgs. 3/2017, which transposed the Damages Directive and Article 16 of Regulation (EC) No. 1/2003.

This means that the plaintiff is not required to demonstrate the antitrust law violation (already ascertained by the EU Commission or by the IAA in a definitive decision), but only the damage suffered and the causal link between the damage and the antitrust violation.

The Tribunals (preliminary ruling, Dec. 4 October 2018, No. 9759, *Cave Marmi Vallestrona/Iveco* see also Trib. Naples No. 1906 of 23/02/2022, *TRANS S.R.L. E A./IVECO S.P.A*) ruled on the binding effects of Commission settlement decisions, stating that they have the same binding force as infringement decisions.

The decisions of other EU antitrust authorities are significant evidence in favour of the plaintiff but do not impede the Court from deciding otherwise with reference to the existence of the antitrust law violation, which is different to the EU Commission and IAA decisions that bind the Italian Courts with regard to the ascertainment of the antitrust violation.

With reference to the foreclosure for the national judge to re-evaluate the antitrust violation ascertained in an EU Commission and IAA decision, many doubts were raised regarding the compliance of this rule with several national constitutional principles, which impose a total independence of judges from decisions of other non-judicial bodies (the Italian Constitutional Court stated that the IAA is not a Judicial Court – Dec. No. 3 2019). For this reason, it is to be considered that this foreclosure will not be applied by the Italian Courts in an absolute sense, not excluding the power of the Court to evaluate any new evidence and facts that did not emerge in the EU Commission or IAA proceedings, and/or the definite decision that allows the Court to evaluate the facts and to ascertain the antitrust violation in a way that could not perfectly comply with what has been ascertained by the Commission and the IAA in the decision.

In a judgment set before the new Decree regime was introduced, the Court of Appeal of Milan cast doubt on whether IAA's decisions should have binding force in civil proceedings. The judgment suggested that national Courts could have several genuine reasons to depart from the IAA infringement decision assessment (such as the need to consider new events and facts – Court of Appeal of Milan, 2 January 2017, *Brennercom*).

The Court of Rome did not apply Article 7 of Lgs. 3/2017, which only came into effect after the judicial proceedings. Therefore, it did not consider the IAA's infringement decision as binding in relation to the nature of the infringement as well as its material and territorial scope (Court of Rome, 24 July 2017, No. 15020, *Ministry of Health and Ministry of Finance/Pfizer*).

The IAA and EU Commission's decisions, as well as other EU antitrust authorities' decisions, do not bind the Court in any way regarding the determination and quantification of the compensable damage; however, it happens in practice that the Commission and the IAA, in analysing the antitrust violation, provide an analysis of the impact of the violation on the market, and some criteria for identifying the damage – for example, in the motor insurance cartel case, the IAA identified a possible percentage of extra profit caused by the collusion that the Court took into consideration as a starting point for the calculation of the damage suffered by each consumer (Italian Supreme Court – Corte di Cassazione – judgment No. 11904/2014).

The decisions of other EU antitrust authorities could provide strong pieces of evidence of the antitrust infringement and, however, have a sounding proof value (although these decisions do not bind the Court with regard to the ascertainment of the antitrust law violation).

In standalone cases (therefore in the absence of a prior decision by any antitrust authority), the plaintiff must also provide proof of the antitrust violation, which is particularly difficult as these violations are often proven by documents held by the entities that actually committed the violation; thus, documents and information are not easy to find and consult (on the issue of evidence discovery, see question 4.5).

The Supreme Court, even before Lgs. 3/2017 had been implemented, stated that a direct link could be presumed to exist between a cartel and the damages suffered by consumers because downstream contracts between parts of the cartel and consumers are usually the means by which a cartel is implemented (Supreme Court, 31 October 2016, No. 22031, M.M. & Figli S.n.c., A. e S.M./Reale Mutua Assicurazioni).

A recent judgment by the Italian Supreme Court (Judgment of 30 December 2021, No. 41994) resolved a longstanding dispute among lower Courts concerning the validity of contracts that enforce anticompetitive agreements. The debate stemmed from 2005 when the Bank of Italy, functioning as the competition authority at that time, identified anticompetitive clauses within the standard bank guarantee provided by the Italian Bank Association ("**ABI**"). Notwithstanding this finding, banks persisted in utilising these clauses, leading to legal actions aimed at nullifying these contracts. The Supreme Court's decision now validates these contracts, excluding clauses explicitly marked as anticompetitive *per se*. Numerous claims seeking to declare null and unenforceable bank agreements incorporating these clauses were rejected (among other cases, Dec. Trib. Milan No. 308 of 18/01/2023, *R.D.C.G.A./Credit Agricole*).

4.2 Who bears the evidential burden of proof?

The plaintiff must provide full evidence of the damage claimed; in theory, there are no presumptive mechanisms for calculating the damage. Article 2697 of the Italian Civil Code states that whoever asserts a right in judicial proceedings must prove the facts on which such right is based. This provision is also applicable in antitrust claims.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Please see question 4.1.

Italian case law prior to the entry into force of Lgs. 3/2017 had already developed a presumption relating to the decisions of the IAA, which were considered as "privileged evidence": the plaintiff could rely on such decisions, but the defendant had the possibility to provide evidence to the contrary. However, Lgs. 3/2017 took one step further, eliminating the possibility for the defendant to adduce evidence to the contrary.

4.4 Are there limitations on the forms of evidence that may be put forward by either side? Is expert evidence accepted by the courts?

There are no particular limitations for evidence; witness evidence is possible on specific questions proposed by the party and authorised by the Court (the Court must authorise the witnesses' evidence and the questions to be proposed to the witnesses).

The Court could authorise the technical advice of professionals (normally, the Court in an antitrust litigation appoints a technical expert to assist the Court in the analysis of the case).

The parties could also appoint technical experts to collaborate with the technical expert appointed by the Court.

The technical expert has the authority to petition the Court for additional documents and information that are pertinent to the formulation of the technical report. Nevertheless, the experts appointed by the Court are not empowered to absolve the parties from their obligation to substantiate their case. They cannot mandate the submission of documents or information designed to establish the principal facts (1) presented as the foundation of the claim, and (2) relevant to the counterarguments that the parties are tasked with proving (Italian Supreme Court, 1 February 2022, No. 3086)

The report of the technical expert appointed by the Court is not binding for the Court (the Court could issue a final decision that is not (fully) coherent with the conclusions of the technical expert's report; however, in doing so, the Court theoretically has to explain in the decision the reasons why it has decided not to fully follow the expert's report.

The Court of Appeal of Milan (2 January 2017, *Brennercom*), in the context of a follow-on action, granted damages related to abusive price discrimination from a dominant firm. The Court confirmed that technical expert reports play a crucial role

in cases involving complex economic assessments, in particular with regard to the assessment of a causal link and the calculation of damages.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

As a general rule, Article 210 of the CPC states that the Court, at the request of one of the parties, may order the other party or a third party to produce in Court a document or other object which it considers necessary for the proceeding.

With specific regard to antitrust claims, Articles 3–6 of Lgs. 3/2017 (implementing Articles 5–8 of the Damages Directive) regulate the disclosure of potential evidence allegedly owned by the defendant or by a third party and the ability of the Court to have access to the file of a competition authority.

Article 3 of Lgs. 3/2017 states that, in claims for damages based on an infringement of competition law, upon a reasoned request by the plaintiff, the Court may order the defendant or third party to disclose relevant evidence which lies in their control, provided that, pursuant to the third paragraph of the same provision, the order complies with the limit of proportionality.

Pursuant to Article 6 of Lgs. 3/2017, the Court can impose fines (ranging from €15,000 to €150,000) on parties, third parties, and their legal representatives in the event of non-compliance with the disclosure order.

Hence, parties are subject to an additional "procedural" penalty as the Court can draw adverse evidential inferences from a party's refusal or failure to comply.

Article 4 of Lgs. 2/2017 regulates the order of disclosure addressed by the Court to a competition authority, which can be issued when neither the parties nor third parties are reasonably able to provide such evidence, always following the principle of proportionality.

In the follow-on civil proceedings, a potential plaintiff has the right to have access to the file of the IAA proceedings if it intends (and has a legitimate interest) to act in civil proceedings for damages against the undertaking that has violated the antitrust law, as ascertained in the IAA's decision. Thus, normally a plaintiff could already have part of the file of the IAA proceeding, especially if it previously participated in the IAA's investigation (e.g. as the complainant).

The disclosure of (i) leniency statements, and (ii) settlement submissions (addressed to the competition authorities applying settlement procedures) is always excluded.

Even before the entry into force of Lgs. 3/2017, the Italian Supreme Court had a proactive approach to antitrust private enforcement, fostering a broad interpretation of the existing provisions (Article 210 of the CPC) relating to the gathering of evidence and the burden of proof. Regarding standalone cases, the Supreme Court held that, in line with the Damages Directive and even before it was transposed into national law, Civil Courts must take into due account the information asymmetry among the parties in access to evidence. It also held that Civil Courts must guarantee the effectiveness of the right to antitrust damages through a less strict interpretation of procedural rules on disclosure and Court-appointed experts (Corte di Cassazione, 4 June 2015, Dec. No. 11564, *Cargest*).

The Court of Milan, also following the Supreme Court *Cargest* judgment, has remained quite conservative in using discovery power requests (Trib. Milan No. 8365 of 25/10/2022 *Coprem/Bonna Sabla*). In these judgments, the Court did not exercise the discovery power requested by the plaintiff, also considering that the claimant had not provided the minimum essential information needed to at least distinguish the relevant market the antitrust violation would have impacted (see answer in point 4.1).

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Once the Court has admitted the evidence and approved the questions to be asked, the witness is required to participate and respond under oath with regard to the truth of the facts he/she reports.

It is mandatory for the witness to participate, and if he/she does not attend the hearing where he/she is required to testify in the absence of valid reasons, he/she may be fined an amount between €100 to €1,000 (Articles 255 and 257 *bis* of the CPC) and could be forced to testify through public force.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

With regard to an IAA decision or decision of the antitrust authorities, please see the answer to question 4.1. According to Article 16 of Regulation (EC) No. 1/2003, national Courts cannot take decisions running counter to (i) a decision adopted by the European Commission, or (ii) a decision contemplated by the Commission in proceedings it has initiated.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

Article 3(4) of Llgs. 3/17 (implementing Article 5(4) of Damage Directive) provides that when a Court disclosure order could concern confidential information, the Court is required to provide for specific protective measures, including: imposing an obligation of secrecy; identifying the persons authorised to have access to documents; redacting sensitive passages in documents; holding camera hearings; and requesting experts to make non-confidential summaries of the relevant information.

Thus, the Court, in the context of the data provided by the parties, has to pay attention in the event that the information provided a party contains sensitive commercial information and has to be disclosed to other parties' attorneys or technical experts.

This is a delicate balance that must protect trade and industrial secrets on the one hand, whilst on the other hand allow the parties to guarantee the rights of defence.

A Court cannot prove an accusation supported by documents or information that has not been made available to the party against whom that information is used.

The Court in the final decision can apply measures aimed at preserving the disclosure of confidential (privacy) and sensitive data (e.g. to aggregate sensitive commercial information), provided that these measures allow a full right of defence of the parties (even in a possible appeal of the Court decision).

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

It is possible for the IAA to become an active party to assist the

Court in civil proceedings (amicus curie); however, this instrument has never been applied in Italy.

Article 15 of Regulation (EC) No. 1/2003 allows national Courts to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of EU competition rules.

The IAA may submit comments to Courts in relation to the proportionality of disclosure of evidence (Article 4(7) of Lgs. 3/2017, transposing Article 6(11) of the Damages Directive).

The Courts may seek the assistance of the IAA on the quantification of damages (Article 15(3) of Lgs. 3/2017, implementing Article 17(3) of the Damages Directive).

4.10 Please describe whether the courts in your jurisdiction have a track record of taking findings produced by EU or domestic *ex-ante* sectoral regulators into account when determining competition law allegations and whether evidential weight (non-binding or otherwise) is likely to be given to such findings.

To the best of my knowledge, there are no known instances of civil actions for antitrust damages exclusively grounded in specific decisions of sectoral regulators. Frequently, the determinations made by sectoral regulators (such as those related to telecommunications, energy, transported gas, and regulation of the aviation sector) have been considered by the IAA to establish the existence of an antitrust violation. This violation is rooted in both the breach of competition laws and the infringement of sectoral rules as applied by the respective sectoral Regulator.

Consequently, in subsequent cases seeking compensation for damages, determinations issued by sectoral regulators have been utilised as evidence supporting the alleged wrongdoing or as proof for quantifying damages. A notable instance is exemplified by the Court of Appeal Milan decision No. 2554 of 2 September 2021 in the *SEA/Korean Airlines case*, a follow-on scenario involving allegations of excessive pricing abuse associated with the breach of specific regulatory provisions established by ENAC (the Italian Aviation authority) concerning tariffs for the use of certain airport facilities.

In specific standalone actions, sectoral rules and determinations from sectoral regulators can facilitate the demonstration of antitrust violations, as illustrated by Dec. Trib. Milan No. 12344 of 6 December 2017 *Next Mind/Vodafone Italia*.

It should be noted that the significance attributed to these regulatory decisions as evidentiary support does not entail any privileged status, akin to the pronouncements issued by the IAA or the EU Commission in relation to antitrust matters.

5 Justification / Defences

5.1 Is a defence of justification/public interest available?

It is not possible to adduce a public interest justification.

The defendant may rely on Article 101(3) of the TFEU to invoke an exemption to the prohibition of anticompetitive agreements, although only in standalone actions, given the evidentiary value attributed to the decisions of competition authorities in follow-on actions (please see question 4.1).

A specific exceptional provision of the Italian antitrust law (Article 8(2) of Law 287/90) allows an exemption of the Italian competition rules (national provision of the agreement against competition and abuse of dominance, Articles 2 and 3 of Law 297/90) to undertakings managing services of general economic interest or having the character of legal monopoly if certain strict conditions are met.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

Article 12 of Legislative Decree 3/2017 establishes a rebuttable presumption regarding the passing on of damages. This presumption applies if the indirect purchaser can demonstrate the following: the defendant engaged in a competition law violation; this violation led to an overcharge for the direct purchaser from the defendant; and the indirect purchaser acquired the goods or services subject to the competition law violation or obtained goods or services derived from or containing them.

The passing-on defence argument was also permissible prior to the enactment of Legislative Decree 3/2017 (Court of Milan, 27 June 2016, No. 7970, *Swiss/SEA*). It serves to indicate that the antitrust violation did not result in any harm to the plaintiff. In a precedent where the plaintiff successfully invoked the passing-on defence, reference can be made to Dec. Court of Appeal of Milan, Section I, No. 3439, dated 3 November 2022, *Volare/Kai and S.E.A.,* which pertains to a follow-on case. Furthermore, relevant to this context is Dec. Trib. Milan No. 988, dated 24 March 2022, *Aeroporti Di Roma/Tamoil Ifitalia, Alitalia, and S.E.A.*

The downstream customers who incurred the damage can seek redress for such harm, albeit through a distinct specific claim filed with a Civil Court. Consequently, indirect purchasers possess the legal standing to initiate legal proceedings.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

In the event of an action for compensation of damages for an antitrust violation committed by several companies (e.g. a cartel or an abuse of collective dominance), the injured party (plaintiff) can, theoretically, sue only one of the jointly liable undertakings responsible for the antitrust violation. However, the defendant undertaking, within the term of its first defence brief (*comparsa di risposta*), may also require the Court to involve one or more undertakings that are jointly liable for the antitrust violation (Article 269 of the CPC). Moreover, the defendant plaintiff can require (within the first hearing of the trial) the involvement of other undertakings not sued at the start of the trial (e.g. when the defendant in its first defensive brief states that the damage claimed by the plaintiff has been totally caused by other undertakings jointly liable for the antitrust violation) (Article 269.2 of the CPC).

In principle, the Court may refuse to grant such request; however, it normally grants the request with the participation of the other undertakings in the proceedings if: (i) it is necessary to ensure the respect for the rights of defence of the defendant (e.g. when it does not dispose of key information regarding other undertakings); and/or (ii) it avoids carrying out separate proceedings for the ascertainment of the same antitrust infringement, which could cause inefficiencies.

For a decision concerning the need to involve in the same trial all jointly liable undertakings involved in a cartel ascertained by an EU Commission decision, see the order issued by the Court of Milan, Specialised Division of Enterprises "A", on 18 April 2018, in case *Beltrambini and others v. Iveco,* by which Iveco was authorised to call the other addressees of the European Commission's decisions in the Trucks case into the proceedings as co-defendants.

The co-infringers are allowed to voluntarily join the proceedings pursuant to Articles 105 and 267 of the CPC.

The Court can also order the party to integrate contradictory proceedings and require the plaintiff to also sue the other

undertakings that allegedly put in place the antitrust infringement, if the Court believes that their presence in the trial is essential to fully decide the case (Article 102 of the CPC).

It should be remembered that a Court decision cannot be binding for entities that are not parties to the proceedings; therefore, for example, if only one of the undertakings which participated in a cartel is party to the trial, the Court's final decision will not be binding and cannot be executed against the other undertakings (which were part of the cartel) which have not been specifically sued. In this case, the defendant that has been specifically sued and that has been ordered by the Court to compensate the plaintiff for the damage of a cartel, can autonomously, in a different trial, sue the other undertakings (parties of the cartel not specifically sued) for recover from them the damages (or a part of the damages) it was ordered to restore on behalf of the parties of the cartel not sued.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

The limitation period is five years from the identification of the antitrust violation, as stipulated by Article 8 of Legislative Decree 3/2017 and Article 2947 of the Italian Civil Code. The commencement of this limitation period is contingent upon the cessation of the competition law breach and the plaintiff's awareness (or reasonable expectation of awareness) of the following elements: (i) the specific conduct and its infringement of antitrust law; (ii) the resulting harm suffered by the plaintiff; and (iii) the identity of the infringing party.

Nonetheless, the limitation period encounters suspension for one year when the IAA initiates an investigation concerning the antitrust violation forming the basis of the damages claim. The suspension period commences upon the finalisation of the IAA's decision on the infringement or upon the termination of the investigation by other means (Article 8.2 of Decree No. 3/2017).

The Supreme Court of Cassation (Cass. No. 5381/2020) affirmed that the one-year suspension of the limitation period provision does not apply to antitrust damages claims initiated before 26 November 2014 (the date of the Damages Directive's adoption). Consequently, in such cases, the limitation period initiates from the commencement of the IAA's investigative proceedings.

The Courts have consistently maintained that statute of limitation rules possess a substantive nature and are therefore not retroactive (Trib. Milan, 4 October 2018, No. 9759, *Cave Marmi Vallestrona/Iveco*; see also Dec. Trib. Naples No. 1906 of 23 February 2022, *Trans/Iveco*; Court of Appeal of Rome No. 5936 of 25/09/2018, *Fastweb/Wind Tre*; Court of Appeal Milan No. 1541 of 26/03/2018, *Bt Italia/Vodafone Italia*).

The limitation period can be interrupted by an entity purportedly enduring damage from an antitrust infringement through the submission of a registered letter with acknowledgment of receipt, dispatched to the undertaking(s) alleged to have breached antitrust laws. This letter should contest the violation and request compensation for damages.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

The average duration of a claim is between 18 months and two to three years for the first instance procedure, two to three years for the second instance appeal, and around two to three years for the appeal before the Supreme Court (*Corte di Cassazione*).

Interim procedures could have duration of six months to one year.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example, if a settlement is reached)?

The plaintiff can, at any time, withdraw the judicial proceedings; under CPC rules, the judicial proceedings go ahead on the plaintiff's initiative. In the event of a settlement, the plaintiff is entitled to give up the action at any time during the proceedings.

The settlement of disputes between the parties is often encouraged by the Court itself. Article 185 of the CPC provides that the Court, at the first hearing or before the closure of the investigation phase, could propose a settlement or conciliation proposal to the parties, where possible, when the dispute "*…can be solved easily and quickly*".

However, considering the complexity of any antitrust claim, it is unlikely that this provision will be used in antitrust cases.

Article 15 of Lgs. 3/2017 provides that, when the parties have opted for a consensual settlement of the dispute, they may submit an application to the Court to obtain a suspension of the proceedings for up to two years (Court of Milan, Specialised Division of Enterprises "A", order of 10 May 2019, *Torchiani/Tecnofoodpack/Iveco*).

In a civil procedural context, in a case that reached a resolution through the mutual agreement of both parties, potentially in pursuit of a settlement, at an advanced stage of the legal proceedings, attention is drawn to Dec. Trib. Milan 1 July 2021 No. 5757 *Vodafone Italia Telecom Italia*. The subject matter of this case concerned an alleged abuse of wholesale services by Telecom against Vodafone. Subsequently, both parties opted to withdraw their respective claims (and counterclaims), with no obligation for compensation of legal costs.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

The rules referred to in question 7.1 also apply in the case of class actions, if the consumer association has also received from the consumers the authority to act to settle the case.

The new regulation on class actions (please see question 1.5) regulates the binding nature of the settlement agreement between the participants in the class action. In particular, Article 840 *quaterdecies* of the CPC provides that until the case is discussed orally, the Court may submit a settlement or conciliation proposal to the parties: each party can declare its willingness to adhere to the proposal.

After the ruling upholding the claims, the joint representative of the members may reach a settlement agreement with the respondent company, which will be binding on all the claimants who do not raise objections.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

Even if the costs of the judgment paid by the unsuccessful party have been specified to the Court, the Court does not grant the

real costs incurred by the victorious party; the Court often calculates the costs on the basis of the professional attorney fees fixed by a national decree (DM 55/2014 as amended by Article 13.6 of Law 2012 No. 247, upgraded by DM No. 37/2018) and based on the value of the claim.

Normally, the attorney fees fixed by DM No. 37/2018 are significantly lower than the real costs borne by the parties in the proceedings, especially in complex antitrust cases.

8.2 Are lawyers permitted to act on a contingency fee basis?

Contingency fees are not permitted under Italian law. Specifically, Article 13, Paragraph 4 of the Law No. 247 of 31 December 2012 prohibits agreements wherein the lawyer's fee consists of the entirety or a portion of the subject matter of the dispute.

Conversely, parties have the freedom to structure lawyers' fees by linking them (such as based on time spent) to a percentage of the dispute's value, or they can establish a fixed fee (as outlined in Article 13, Paragraph 3 of the Law No. 247 of 31 December 2012).

8.3 Is third-party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Third-party financing is not prohibited by Italian law, and although it remains relatively uncommon, certain companies offering litigation funding or management services have recently entered the Italian market. Due to the absence of specific regulations governing third-party funding, contracts related to it will be subject to the general principles of Italian contract law.

9 Appeal

9.1 Can decisions of the court be appealed?

In civil proceedings, the first instance judgment may be challenged before the Court of Appeal within 30 days from the day the decision was served by one of the parties to the other ("**Formal Notification**"); otherwise, in the absence of any Formal Notification, the appeal may be brought within six months from the publication of the judgment.

Judgments pronounced at the appeal stage or in a single instance may be challenged before the Supreme Court within 60 days from the Formal Notification of the judgment. Pursuant to Article 327 of the CPC, in the absence of a Formal Notification, appeals to the Supreme Court may be brought within six months from the publication of the judgment. The decisions of the Court of Appeal can be challenged before the Supreme Court for violation of the law. It should be noted that a decision of the Court of Appeal cannot be challenged before the Supreme Court for a simple lack of reasoning (illogicality) except in the case of the total absence of reasoning.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Leniency is provided in the national system; however, total general immunity provisions for civil actions in favour of the leniency applicant are not provided in Italy, since this restriction would actually violate the constitutionally guaranteed right of defence.

According to Article 9 of Lgs. 3/2017 (implementing Article 11 of the Damages Directive), an immunity recipient is jointly and severally liable only: (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of antitrust law.

Moreover, it is expressly stated that, in any event, the amount of contribution of a successful immunity applicant shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

In accordance with Article 4(5) of the Lgs. 3/2017 and Paragraph 15 of the Commission's 2020 Communication addressing the safeguarding of confidential information in the context of private enforcement of EU competition law by national Courts, the Courts are prohibited from compelling a party or a third party to divulge evidence associated with leniency or settlement programmes.

11 Anticipated Reforms

11.1 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

The Damages Directive has resulted in an increase in antitrust damages actions in Italy.

As these antitrust cases have been concentrated in the three specialised Courts of Milan, Rome, and Naples, these Courts have been able to achieve an improved track record in antitrust cases, increasing their skills in antitrust matters.

The rules on the disclosure of evidence, the binding effect of decisions of the IAA, the provisions governing limitation periods, and the exceptions to the general rule of joint and several liability are noteworthy changes in civil antitrust claim proceedings in Italy.

11.2 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

The provisions of Lgs. 3/2017 are very similar to the ones of the Directive it implements, with some minor adaptations aimed at ensuring coordination with substantive and procedural pre-existing provisions of Italian law.

There are no practical differences between the disciplines before and after the reform. For example, before the reform the Courts, with reference to the probative value to be attributed to the IAA's and EU Commission decisions, stated that decisions with regard to the evidence of the ascertainment of antitrust law violations (in a follow-on action) was strong evidence (*prove privilegiate*).

11.3 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

With regard to transitional law, Article 19 of Lgs. 3/2017 provides that some of its provisions, having procedural nature, apply only to actions for damages for breach of competition law brought after the date of entry into force of the Damages Directive (26 December 2014). Namely, such provisions are Articles 3, 4, and 5 of Lgs. 3/2017 (corresponding to Articles 5, 6, and 7 of the Damages Directive), relating to the disclosure of evidence, and Article 15(2) of Lgs. 3/2017 (corresponding to Article 18(2) of the Directive), relating to the possibility of suspending proceedings for up to two years where the parties thereto are involved in consensual dispute resolution. On the other hand, the provisions of the Damages Directive and of Lgs. 3/2017, having substantial nature, including those on limitation periods, do not apply retroactively, pursuant to Article 22(1) of the Directive.

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DDPV is a boutique law firm (with offices in Rome and Milan) that assists its clients in connecting with antitrust investigations of the EU Commission and the Italian Antitrust Authority ("**IAA**") for alleged violations of Articles 101 and/or 102 TFEU (i.e. agreements against competition, abuse of dominant position) or Articles 2 and 3 of the Italian Antitrust Law.

DDPV's Antitrust department also assists clients in appeal proceedings against the EU Commission and IAA antitrust decisions before the lower and higher domestic and European Courts (*Tribunali Amministrativi Regionali* ("**TAR**"), Consiglio di Stato, EU General Court and Court of Justice), as well as in private antitrust enforcement litigation and litigation concerning the abuse of economic dependence.

DDPV also has vast experience in the drafting and submission of merger filings before the national antitrust authorities (including multijurisdictional filings) and the EU Commission (CO and RS forms), as well as in antitrust audit-compliance programmes and State aid issues.

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