BINDING EFFECT OF DECISIONS ADOPTED BY NATIONAL COMPETITION AUTHORITIES

Luciano Panzani\(^{1,2}\)

1. INTRODUCTION

It’s recognized that the private enforcement of competition law interacts with the public enforcement performed by the European Commission and the NCAs. Some procedural features of the public enforcement may have an influence on the actions for damages and vice versa. This raises several issues that concern all actions for damages in antitrust, both individual and collective.

The decisions reached by specialised administrative authorities on infringements of EU competition law could be binding for follow-on damages actions or they could just represent evidence that should be taken into account during follow-on actions. In the former case, the claimants in a follow-on action for damages have only to prove the harm suffered and the existence of a causal link between this harm and the infringement, but do not have to provide evidence that the infringement took place. In the latter case the decision represents a strong piece of evidence in favour of the existence of the infringement, but the defendants can rebut it.

Before the Enforcement Directive had been enacted, it was controversial if such decisions should be binding or not. It was observed that on one hand there was the claim that making these decisions binding in follow-up damages actions was positive because:

i) it saved judicial resources, as it is not necessary to perform a new investigation on the alleged infringement;

ii) gave an incentive for firms to settle rather than litigate.

On the other hand it was argued that antitrust violations, at EU level and in many Member States, are ascertained through an inquisitorial system in which the prosecutorial function is combined with the adjudicative function. Since this system is more prone to biases, damages actions would be less ‘fair’ if they took the conclusions of these investigations for granted.

2. THE ACTUAL SITUATION

Currently, under Article 16 of Council Regulation (EC) No 1/2003, if the European Commission has adopted a decision finding that one or more undertakings have violated

\(^1\) President of the Court of Appeal of Rome.

competition law, a national court ruling on an action for damages, brought against one or more of the same undertakings on the basis of the same infringement, must take the existence of that infringement as proven. In some Member States national law similarly provides that the decisions on cases concerning violations of EU competition law reached by the NCA of that Member State are binding for the courts who decide on follow-on damages actions. For example, section 58A of the UK Competition Act confers a binding effect on decisions of the OFT and of the CAT. In Germany section 33 of the Competition Act goes even further and confers a binding effect not only on all the decisions reached by the Bundeskartellamt, but also on those reached by all the other NCAs in the EU. In other Member States, instead, (e.g. Italy) a final decision by the NCA of the same country represents only _prima facie_ evidence that can be rebutted. Hence the decisions reached by the European Commission are binding for all national courts, whereas the legal value of the decisions reached by NCAs varies across Member States and differs depending on whether the NCA is from that Member State or not. The solution reached in art. 9 (2) of the Directive is a compromise.

A uniform approach to this issue within the EU is needed to give all EU consumers and companies the same level of legal certainty and to limit any form of forum shopping. At the same time firms’ right of defence should not be unfairly restricted. Hence it may be considered appropriate to render the decisions made by the NCAs binding, provided that the defendants had been given the same opportunities to defend themselves during the administrative proceeding that they would have had before the European Commission.

Coming back to the Italian discipline, the problems arising from this choice were discussed already in 2007, in the document approved by the Italian Supreme Court Working Group with reference to the Discussion Paper prepared by the Commission on the adoption of the White Paper on Private Enforcement. It was then observed that to extend the binding nature of the decisions of the Commission, already established by art. 16 of Regulation 1/2003, to decisions of National Authorities would have led to the Italian courts effects similar to those provided by art. 651 Code of Criminal Procedure. This law concerns efficacy of the criminal judgment of conviction in the civil or administrative proceedings for refunds and damages.

It was observed that under Italian law the decision of the NCA is not a judicial decision, but an administrative act, issued by a body who is not a judge, to appeal before the administrative judge. This act doesn’t state in the judgment for damages before the ordinary courts. These decisions were considered by the Italian Supreme Court as a precedent particularly authoritative, but not binding for the civil Court. The Court had the burden of examining issues already decided by the Antitrust Authority and to motivate expressly about it.

It was then suggested that a reasonable solution was to attribute to the final decision of National Authorities value of privileged evidence on the facts to be ascertained. This was also the Italian Government suggestion.
3. THE ENFORCEMENT DIRECTIVE

The Enforcement Directive opted for a different solution. The Directive considers the final decision adopted in accordance with articles 101 or 102 TFEU by a National Authority or the final decision rendered by a court of appeal, as irrefutable proof of the infringement in subsequent civil proceedings for damages. 34th Recital says:

“To enhance legal certainty, to avoid inconsistency in the application of Articles 101 and 102 TFEU, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, the finding of an infringement of Article 101 or 102 TFEU in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such a finding should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, cover only the nature of the infringement and its material, personal, temporal and territorial scope as determined by the competition authority or review court in the exercise of its jurisdiction. Where a decision has found that provisions of national competition law are infringed in cases where Union and national competition law are applied in the same case and in parallel, that infringement should also be deemed to be irrefutably established”.

This principle does not apply to the decision of a National Authority other than that of the Member State before whose courts the damages action takes place. 35th Statement observes that for this hypothesis: “Where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 TFEU to which the action relates, it should be possible to present that finding in a final decision by the national competition authority or the review court to a national court as at least prima facie evidence of the fact that an infringement of competition law has occurred. The finding can be assessed as appropriate, along with any other evidence adduced by the parties”.

These principles are expressed in this way by art. 9 of the Directive:

“1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU”.

With regard to the decisions of the NCA of other Member States and judgments delivered on appeal, it must be recalled that the Commission in Working Paper left to the Member State the possibility of invoking the clause of public policy, considering not binding the decision or the foreign judgment when
principles of due process and the right to defense were not respected. The solution adopted in the Directive is much softer because the decision of the NCA in another Member State takes the simple value of evidence that must be evaluated along with any other evidence obtained during the proceedings.

4. CONCLUSIONS

To consider the decision of the NCA binding before the National Court can pose delicate problems concerning the possible violation of the principles set out in Art. 6 ECHR in the procedure which takes place before the AGCM. With the judgments Menarini and Grande Stevens the Strasbourg Court affirmed the principle that the penalties imposed by an independent authority, like the Competition Authority, may be qualified as criminal sanctions, having regard to the interests protected, the afflictive character and the entity of sanctions. Once this classification has been adopted, which is independent of the internal discipline of national law, the principles of fair trial provided by art. 6 ECHR must be applied. Therefore the Italian qualification of sanctions for infringement of competition law as administrative penalty law is irrelevant.

To verify if principles of art. 6 ECHR have been respected the Strasbourg Court emphasized the party's right to have full communication of procedural documents and of the evidence acquired and to address before an agency independent of the department which has made the inquiry. The ECHR has qualified as Court on several occasions, including NCA different from AGCM, the body charged with monitoring the compliance with the rules on competition and the applicability of the principles established by art. 6. In Menarini case also stated that the possibility of appeal before an independent Court, in front of which was guaranteed the full exercise of the right of defense, as well as the publicity of the hearing, was worth to remedy any defects of the proceedings forward AGCM.

The solution given by the ECHR to the Menarini does mean that the AGCM decisions may not be challenged for art. 6 ECHR infringement? In the opinion of Italian scholars this conclusion would not be entirely obvious, having regard to the jurisprudence of the Council of State which recognized a sphere of technical discretion in judgment of AGCM, which may not be subject to review before the administrative judge. In particular, this would be the Authority's opinion on the scope of the relevant market. And it was doubted whether such a recognized sphere of discretion is incompatible with the respect of art. 6 ECHR.

It should be emphasized that these doubts of contrast with the provisions of art. 6 are still less relevant than in the penalty proceedings forward to Consob, that the ECHR has expressly recognized violate the principles laid down in art. 6, and forward to the Bank of Italy, where the appeal before the Court of Appeal hearing is held in non-public (although the change of the legal framework is imminent approval).

The transposition of the Directive thus involves a direct intervention to overcome the possible margins of incompatibility between
the discipline of the proceedings before the AGCM and principles of art. 6. Failing this intervention, the Court hearing the damages case may raise questions of interpretation before the Court of Justice as the principles of the ECHR have been, at least in part, deemed applicable even under European law. Alternatively the Italian Court could raise the question of constitutionality under Article 117, co. 1 Const. The Court could raise violation of the constraint given by Italy to comply with international obligations undertaken by agreements. The significance of the case should follow from the binding character of the infringement decision of the AGCM.