## PREFACE

The positive effects of a strong and effective competition are unanimously recognised and become particularly important in view of the need for the European economy to get back to a growth path, fostering trust, investments and job creation.

Antitrust law is an essential tool to safeguard and promote competition, while bringing concrete benefits to undertakings, consumers, as well as to the economy in general.

The XII Conference of Treviso on "*Antitrust between EU law and National law*" provided an ideal forum for debate on the main current antitrust issues, which were examined from a variety of points of view and relating to the most different sectors of the economy. In this context, antitrust law did not fail to show its vitality to the spotlight of the numerous participants, coming from many parts of the world and strongly interested in this subject matter, who followed the Conference with a palpable enthusiasm.

The Conference took place in Treviso on May 19th and 20th, 2016, in the elegant setting of the Casa dei Carraresi, owned by Fondazione Cassamarca; we first and foremost thank the Honourable Dino de Poli, President of the Fondazione Cassamarca, for having once again hosted this event in the beautiful scenery located in the heart of Treviso which has characterized the meeting for over twenty years.

Just like its previous editions, the Conference, an extraordinary opportunity for the interaction between practitioners of competition law, stands out for the quality and quantity of speakers who contributed, also thanks to their divergent cultural and professional backgrounds, to precious and high-quality reflections, greatly enriched by the respective Chairpersons who fuelled the debate among Conference participants.

Conference attendees included European and international leaders in the field of competition, representatives of the antitrust authorities, as well as outstanding academics, experienced professionals, practitioners, company lawyers and institutional representatives.

The themes of discussion were followed with keen interest by all participants whose wide-ranging diverse legal backgrounds created a rich platform for debate; therefore, once again, the Treviso Conference

has proved to be an occasion for reflecting on the most topical antitrust law issues as well as a forum to propose and elaborate ideas.

The Conference was opened by Professor Giovanni Pitruzzella, Chairman of the Italian Antitrust Authority (also "IAA"), with a keynote speech focused on the relations between antitrust and innovation in the current economic scenario.

Professor Pitruzzella highlighted that innovation and competition are closely linked: on the one hand, competition is a driver of innovation; on the other, as proved by the dynamics of the digital market, innovation can bring significant pro-competitive changes.

Innovation is led by companies' ambition to do better than competitors and by the fear of doing worse; on the contrary, in the economic systems where there are barriers to entry and less competition, innovation is significantly more limited. The most relevant issue that antitrust authorities are facing nowadays is surely the necessity to keep together innovation and competition in both digital and traditional markets. In this light, Professor Pitruzzella recalled the main intervention of the Italian Antitrust Authority over the last years: the attention of the IAA focused on economic sectors with higher growth potential, such as telecommunications, infrastructures, energy and services.

With regard to the network infrastructure, it is relevant to consider that the IAA conducted, jointly with the Authority for Communication industry in Italy (AGCOM), a market investigation on the ultra-broadband field, which showed the necessity to create an ultra-broadband infrastructure that relies heavily on the use of optical fiber, as well as the need for any network development solution to fully ensure competition among internet access service providers. It is relevant to say that this market study provided some proposals that were taken into account by the Government for the development of the Italian strategy for ultra-broadband. This surely represents an example of profitable interaction between industrial policy, the IAA's decisions and the actions by the sector regulator.

Finally, Professor Pitruzzella pointed out that innovation affects also merger control. The main task in this context is to keep mergers from giving rise to market power strong enough to damage competition. Subject to this condition, a merger creates synergies that can produce beneficial effects on firms' ability to innovate.

In this vein, Chairman Pitruzzella highlighted the necessity of a legislative intervention in the Italian merger control procedure and, specifically, on turnover thresholds. With high turnover thresholds, as the

current ones in Italy, the IAA analyzes only few concentrations and loses control of the markets. Merger control is therefore fundamental since, through the analysis of a concentration, it permits the analysis of the relevant markets involved and of their competitive dynamics.

The first session of the Conference, focusing on the main current issues in antitrust law, was chaired by Mario Siragusa, partner at Cleary Gottlieb Steen & Hamilton.

Speakers focused on the most relevant issues stemming from the current economic scenario, with particular reference to the problems arising in the assessment of power in information markets, the standard of review and evaluation criteria after the judgments *KME* of the European Court of Justice and *Menarini* of the European Court of Human Rights, the recent developments in the public procurement sector, the abuse of rights and abuse of dominance in strategic patenting.

The second session, chaired by Gabriella Muscolo, Commissioner of the Italian Antitrust Authority, focused on the recent developments in private enforcement and damages compensation after the entry into force of Directive 2014/104/EU. Speakers tackled several issues, including the international aspects of private enforcement and the new challenges for national judges concerning actions for compensation of antitrust damages, the main questions arising from the implementation of the Directive. The innovations introduced by Directive 2014/104/EU are of paramount importance, and therefore some of them will be examined in more detail below.

Andrea Pezzoli, Chief Competition Directorate General of the Italian Antitrust Authority, chaired the third session devoted to the relations and interactions between antitrust and new technologies. Among the issues dealt within this third session, speakers focused on the most relevant issues arising from digital markets, E-commerce, Information & Communication technology, Smarter Cities, and recent developments in the credit cards sector.

The fourth session focused on antitrust and companies' compliance, and was chaired by Nicola Verdicchio, Chief Legal Officer of Pirelli & C. The session was characterized by a sequence of opinions and comments expressed by experienced high-ranking professionals, in-house lawyers and academics, on how antitrust compliance should be implemented by companies.

In a context whereby the degree of undertakings' responsibility has grown, antitrust compliance programs represent organizational and procedural key tools from a preventive point of view, as capable of

preventing anti-competitive behaviors and obtaining a reduction of the penalties applied.

The fifth session was chaired by Sir Nicholas Forwood, partner at White & Case, and focused on the latest developments in merger control practice at both European and national level. Speakers specifically concentrated their attention on merger control in the energy sector, the IT sector and the telecommunication sector.

The last session, chaired by Roberto Ravazzoni, Professor of Economics and Management at the University of Modena and Reggio Emilia, dealt with the most innovative antitrust issues and was entitled "*The future of antitrust*".

Among the issues dealt with in this sixth session, speakers analyzed the enforcement of competition rules in the sharing economy, self assessment for companies in light of the recent trends of the Italian Antitrust Authority, the big data in the framework of antitrust enforcement and the evolving relationship between criminal and competition law in Italy.

The closing remarks were delivered by Philippe Coen, Honorary President of the European Company Lawyers Association (ECLA), who highlighted his hope to work among professionals on building more trust, because this is what we need for the competitiveness of undertakings, for the economy, for the big data, for the small data and for the self-assessment.

One of the main issues tackled during the XII Treviso Antitrust Conference, and which it is worthwhile to focus on in this introduction, is the private enforcement of competition law after the entry into force of Directive 2014/104/EU of the European Parliament and of the Council, of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (hereinafter, also the "Directive").

This Directive – which all the Member States were obliged to transpose by 27th December 2016 – introduces several innovations in a number of respects, trying to strike a balance between the support for competition damages actions and the defense of the prerogatives of public enforcement of antitrust law. This attempt has been only partially successful, as the speakers of the second session of the Conference showed.

Some criticism was put forward, for instance, with regard to the little consideration given by Directive 2014/104/EU to stand-alone actions,

which do not seem to be sufficiently encouraged by the provisions laid down in the EU legislative act. This represents a significant difference with the US system – the 'homeland' of private antitrust enforcement – where stand-alone actions play a key role in fighting infringements of competition provisions. In that system, several rules are intended to stimulate damages actions, such as the well-known treble damages remedy. Directive 2014/104/EU expressly rules out this type of remedy, providing that Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain *full compensation* (Article 3(1) of the Directive), which, however, "*shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages*" (Article 3(3) of the Directive).

A widespread opinion among experts is that Directive 2014/104/EU appears to be conceived mainly in order not to hinder the public enforcement of competition law, rather than to really foster private damages actions. This is particularly evident with reference to the rules governing the handling of evidence collected in the context of (*i*) leniency statements and (*ii*) settlement submissions, with the sole exception of the submissions that have been withdrawn. In fact, pursuant to Article 6(6) of the Directive, 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 the abovementioned categories of evidence. The absolute prohibition set out in the said provision oversteps the case law of the European Court of Justice (ECJ) concerning the access to documents relating to a leniency procedure for persons seeking to obtain damages for infringements of EU competition law. In *Pfleiderer* (14 June 2011, Case C-360/09) and *Donau Chemie* (6 June 2013, Case C-536/11), the ECJ had entrusted national courts with the task of determining the conditions under which such access must be permitted or refused by weighing the interests protected by EU law. The EU legislator has now definitively set the balancing of the interests at stake, so that a case-by-case approach is no longer permitted. While the full protection of leniency applicants can be easily understood in view of the usefulness of leniency procedures, there is no doubt that this solution will not help to develop the private enforcement of competition law in the European.

More generally, the rules governing evidence hold an important place in the structure of Directive 2014/104/EU, given that the whole Chapter II of the Directive is dedicated to the "*disclosure of evidence*" in the context of antitrust damages actions. A distinction is made between

evidence that lies in the control of the defendant or a third party and evidence included in the file of a competition authority. In any case, Member States shall ensure that national courts are able to order the disclosure of the following elements, described in very precise terms: "*specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification*" (Article 5(2) of the Directive). Moreover, the disclosure of evidence shall be limited to that which is proportionate, considering the legitimate interests of all parties and third parties concerned, and taking into account: (*a*) the extent to which the claim or defense is supported by available facts and evidence justifying the request to disclose evidence; (*b*) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure (the so-called "fishing expeditions"); (*c*) whether the evidence whose disclosure is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information (Article 5(3) of the Directive). Additional proportionality requirements are laid down in Article 6 of the Directive, with specific regard to evidence included in the file of a competition authority.

This set of conditions entails substantial implications for the applicants' position in the proceedings, namely an extremely heavy burden of proof, in addition to the structural information asymmetry between the parties which characterizes antitrust damages actions. This clearly distinguishes the EU *disclosure of evidence*, as designed by the Directive, from the *discovery* provided for in Rule 26 of the US Federal Rules of Civil Procedure, which obliges all the parties to provide to the other parties, under court supervision, a copy – or a description by category and location – of all documents related to the case (even if contrary to their own interests). One can therefore assume that actions for damages for infringements of competition law in the EU are still far *from easy*, also after the transposition of the Directive in the Member States, since procedural rules do not seem sufficiently strong to remedy the abovementioned information asymmetry.

In the same vein, another 'missed opportunity' of Directive 2014/104/EU relates to the so-called collective redress, an issue on which the Directive is silent, as the Member States were not able to reach any agreement on this point. With specific reference to cases where damages are distributed among many individuals, class actions can be an effective

tool to encourage the 'victims' of an antitrust violation to engage in actions for compensation before national courts. In the absence of this procedural mechanism, private parties can usually decide not to bring judicial proceedings, in view of the costs of individual actions.

The last topic I would like to mention concerns the rules governing the effect of national decisions. Pursuant to Article 9(1) of the Directive, 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. As far as the Italian legal order is concerned – but the same applies to other Member States –, this provision entails nothing less than a 'procedural revolution', irrespective of the concrete ways of transposing it into national law. Indeed, according to the case law of the Italian Supreme Court (*Corte di Cassazione*), the defendants in damages actions can call into question the findings contained in the decisions of the Italian Antitrust Authority, though subject to strict conditions. The aforementioned provision of the Directive deprives the defendants of this possibility, thus creating a problematic gap in the protection of procedural rights. In fact, it should be remembered that, in Italy, the so-called 'technical aspects' of the decisions of the IAA do not fall within the borders of the power of judicial review of the administrative courts. The Directive, considering these decisions as irrefutably established, could raise sensitive issues of constitutionality, with particular regard to the fundamental right to effective judicial protection safeguarded by Articles 2 and 24 of the Italian Constitution.

For all the above reasons, there is no doubt that Directive 2014/104/EU, as well as its implementation into the Member States of the EU, will be at the heart of the antitrust law debate for a long time yet.

In conclusion to my brief introduction to this publication, firstly I would to thank the promoters of this XII Treviso Antitrust Conference, which significantly contributed to the positive outcome of the meeting: European Lawyers Union (U.A.E.), the Associazione Italiana per la Tutela della Concorrenza – member of the Ligue Internationale du Droit de la Concurrence (LIDC), the Associazione Italiana dei Giuristi d'Impresa (AIGI), the European Company Lawyers Association (AEJE-ECLA), the Associazione Antitrust Italiana (AAI) and the Jean Monnet Centre of Excellence, Università degli Studi of Milan.

Secondly, I wish to thank all the sponsors, which, once again, enabled us to keep the participation fees unchanged.

Finally, I wish to express my gratitude to all the speakers, who have contributed with their efforts to the publication of the Conference proceedings within such a short time frame.

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