PREFACE

Antitrust laws almost worldwide find their origins in US law, one of the first jurisdictions to adopt a proper "modern" system of competition law between the late 19th century and the beginning of the 20th century. This applies in particular with respect to the European regulations contained in the Treaty of Rome signed in 1957 and to the Italian competition rules regulated by Law n. 287/1990. The latter basically reproduces the European laws and states expressly that it must be interpreted following the principles developed at European level.

This phenomenon of spontaneous harmonization of substantive antitrust rules has had many advantages, the main definitely being that of allowing people faced with a new antitrust law to easily recognize the outlines of the various concepts provided and not defined in the same (e.g. dominant position, abuse of dominant position, agreements, relevant market and so on). This has led to a huge benefit for all practitioners involved in the operative enforcement of antitrust law (judges, lawyers, in-house counsels, businessmen) since they did not have to wait for a judicial interpretation in order to understand new regulations, which could sometimes be too long, thus granting considerable certainty of the applicable law.

Another important advantage has been that of providing antitrust authorities almost worldwide with a basically common language that allowed them to cope better with multinational undertakings that act quickly and efficiently on a global level. This is evidenced by the success obtained by the International Competition Network (ICN), a network of national and international competition authorities with a specialized forum for maintaining regular contacts and addressing practical competition concerns. The ICN came to life in Naples thanks to the significant contribution of Professor Giuseppe Tesauro, then President of the Italian Competition Authority and now President of the Italian Constitutional Court; since then, meetings of the ICN often take place all over the world and have achieved an effective coordination across the global antitrust community.

In this positive context, some rumors have however sporadically been raised, questioning the very common matrix of substantive antitrust law
and inquire whether it has become obsolete in a world of increased international trade.

In fact, antitrust laws were designed in a world where boundaries rigidly separated States, where the problem was to contain the “national champions”, communications were difficult and technology was very different from today; but now, we live in the era of globalization, the relevant markets are increasingly global, companies are more and more multinational corporations, communications are fast and easy, and technology has evolved at astonishing levels.

Well, in such a changeable context, it is under questionable whether antitrust laws of the late Nineteenth Century can still be considered adequate; it can be argued that antitrust regulations are framework rules, that their interpretation varies with the economic, technological and communications environment in which they must be applied, but perhaps this response is now outdated.

This issue needs to be subject to a more serious in-depth analysis and we can expect that it will be examined in the coming years.

Certainly, during the XI Conference of Treviso on “Antitrust between EU law and National law”, the antitrust laws in force, examined from a variety of points of view and relating to the most different sectors of the economy, did not fail to show their vitality to the spotlight of the many 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 15th and 16th, 2014 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 culture and professional backgrounds, to a precious and high-quality antitrust debate, greatly enriched by the respective Chairpersons who fuelled the debate among Conference participants.

Conference attendees varied. From European and International competition leaders in the field, 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 discussion of 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 work carried out by the Authority over the last year and on the essential role covered by competition policies in times of financial and economic crisis.

Particularly, Chairman Pitruzzella underlined how the promotion of strong competition enforcement is a powerful energizer for the economy whose effects can be direct in terms of lasting benefits to both companies and citizens alike. In fact, competition enforcement is essential for innovation which brings economic growth, considering that companies naturally want to improve processes and diversify their goods and services only in a market with competitors. For that reason, the IAA over the last years has focused its attention on economic sectors with higher growth potential such as the telecommunications sector, the health sector, the energy sector, transport and services.

To this end, it is worthy to mention that at the end of 2013 the Italian Antitrust Authority fined Telecom Italia about 104 million Euro for abusing its dominant market position in the telecommunications sector. The company, owner and manager of the country’s largest landline telephone network, abused its dominant position held in the provision of wholesale access to the local network and broadband markets hindering the expansion of competitors in markets for voice telephony services and broadband internet access.

Likewise, the Italian Antitrust Authority has intervened several times in cases concerning the transport sector, energy markets and commercial services. In this respect, noteworthy is the *Coop-Esselunga* case in which the Italian Antitrust Authority stated that Coop Estense had abused its dominant position by acting in an obstructive and dilatory way, aimed at jeopardizing the administrative procedures necessary for its main competitor, Esselunga, to obtain the required authorization to start a commercial activity and to open two sales outlets in the Modena area. The IAA's decision has been confirmed by the Council of State with an important judgment firstly confirming the Antitrust Authority’s
total fine of €4.6 million Euro imposed on Coop Estense, and secondly introducing an important principle with respect to the concept of exclusionary abuse of dominant position. Particularly, the Supreme Court stated that in order to find a violation of Italian Law No 287/1990 concerning the abuse of dominant position, it was sufficient that the abusive conduct by the undertaking holding a dominant position had the potential effect of restricting competition. In the case at stake, the Council of State found that Coop Estense’s conduct, through the misuse of administrative tools and procedures, constituted an abuse of its dominant position since it could potentially lead the public administration to adopt decisions that were ultimately harmful for the competition.

With his opening speech, the Head of the Italian Antitrust Authority announced an important initiative from the Italian antitrust enforcement point of view: in the wake of *Commission Guidelines on the method of setting fines*, the Italian Authority launched a public consultation on the Guidelines that set out the general criteria to calculate the amount of the administrative fines that the Authority can impose in case of violations of the national or European competition rules. According to Professor Pitruzzella, the hope of the initiative is firstly to ensure predictability and transparency in order to increase the effectiveness of the fining policy pursued by the Italian Antitrust Authority, and secondly to introduce companies to the respect of antitrust rules and to the use of a compliance programme. Noteworthy is the decision to clearly define the method of setting fines in the case of behavioral anomalies which might indicate bid rigging; thus, also considering that fighting bid rigging in public procurement has become one of the main priorities for the Italian Competition Authority, as the *Vademecum* (guide) on infringements of competition law in the context of public bids published in October 2013 has shown.

The first Conference session, focusing on the analysis of recent developments in the field of public and private antitrust enforcement at national and European level, was chaired by Jacqueline Riffault-Silk, Judge of the Court of Cassation of Paris and President of the Association of the European Competition Law Judges (AECLJ).

Among the issues dealt with in this first session, speakers focused on the text of the Directive on antitrust damages recently adopted by the European Parliament with the aim of removing practical obstacles to compensation for all victims of infringements of EU antitrust law. As emerged during the Conference debate, one of the main goals of the Directive is to encourage private enforcement of antitrust laws by facilitating
follow-on damages actions in national courts and removing obstacles for victims to obtain compensation for the harm that they suffered as a result of infringements of Articles 101 and 102 TFEU; as of today, less than 25% of the infringement decisions that were taken by the European Commission have been followed by follow-on damages actions, and the majority of these actions tend to be brought only in few Member States where the rules are perceived to be more favorable. Indeed, national procedures are widely diverging and, as a result, victims are more or less likely to obtain compensation depending on the Member State in which they live or do business.

The Directive includes measures both to optimize the interplay between public and private enforcement, complementary tools to create a stronger enforcement of EU antitrust rules overall, and to avoid any undue interference of private damages claims with effective public enforcement. Particularly, focus was made on problems related to the disclosure of evidence parties need and its impact on leniency statements and settlement submissions, to rules on limitation periods (i.e. the period of time within which victims can bring an action for damages) and to the nature of a final decision of a national competition authority finding an infringement. The Conference debate on private and public enforcement was not only treated from an EU point of view, but centred the analysis also on the role of national competition authorities, with a special focus on the Italian one, in the enhancement of private enforcement.

The second session, dedicated to antitrust issues in new technologies and chaired by Jean-Francois Bellis, also brought to the fore a number of salient issues in the field.

The blend of speakers of this session enriched the debate on the relationship between competition and intellectual property, friends and foes, a hot topic also due to the increasing number and significance of relative issues, such as effects of unilateral refusal to license intellectual property rights, intellectual property rights licensing practices and extension of intellectual property rights beyond their statutory term on competition. Moreover, debates also centered around the role of standardization agreements, whose primary objective is the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply, and, in particular, on those concerning essential patents and connection with competition law.
Indeed, the creation of standards, on the one hand produces substantial benefits to consumers (i.e. it reduces transaction costs; it ensures the compatibility and interoperability of products of different manufacturers; and it increases consumer choice and convenience) and positive effects on the market. On the other hand, it could provide an occasion for collusion, deception and strategy, and consequently could represent a risk to a free and fair competition in the market. In such a situation, it is very important to prevent the risk of collusion between the standard and antitrust law.

Mario Siragusa introduced a debate concentrated on the new frontiers of antitrust which analyzed, inter alia, the relation between antitrust and regulation, with special attention to the energy sector and its related services, as well as issues concerning the most recent developments in EU Merger control.

The debate on the interaction among regulatory frameworks (which characterizes a certain number of sectors) and European and national competition rules, instilled an interesting discussion, considering that in Europe, unlike US, regulatory approval does not remove an undertaking’s liability for infringing EU competition rules.

The session’s debate went ahead with an analysis of the role of the European Commission on merger control over the last few years and now to make it more effective.

The most relevant and topical antitrust issues in the pharmaceutical sector were specifically dealt with in a session, presided by Filippo Arena, Capo di Gabinetto of the Italian Antitrust Authority, with a debate enriched by the combination of different perspectives of this important topic in the antitrust world. Therefore, the session brought to the fore the most recent developments and the role in the sector of national and international competition authorities from an Italian, European, U.S. and Indian point of view, thus confirming the international level of the meeting.

The pharmaceutical sector portrays the typical tension between competition and intellectual property rights, and certain types of patent settlements might have huge negative effects on consumers and public health care, and therefore raises strong antitrust concerns.

Among the issues dealt with in this hotly debated session, focus was made on different approaches endorsed by the European Commission (“per se rule”) and the US Supreme Court (“rule of reason”) with respect to “pay-for delay settlements”, which are agreements that may lead to a
delay of generic entry in return for a payment by the originator company to the generic company.

The case *Roche-Novartis*, launched in Italy through the Italian Competition Authority’s initiative, was a recurrent theme of the entire session. In the case at stake, peculiar for a number of different reasons, the Italian Antitrust Authority found that the pharmaceutical companies Roche and Novartis had established an alleged collusive strategy aimed at preventing the off-label promotion of Avastin, a drug manufactured and distributed by Roche, within the Italian market, in order to foster the promotion of Lucentis, a more expensive drug produced by Novartis and licensed by a Roche Group company. Given the seriousness of the infringement and the estimated amount of damage that the Italian National Health Service would have suffered and would suffer in the future because of the illicit collusion, the Italian Competition Authority fined Roche and Novartis a total of over 180 million euros.

The chance wanted that several session speakers had actual hands-on experience in this key case and this livened the debate further fuelling a lively discussion.

The increasing role of State Aids emerged in a dedicated session chaired by Massimo Scuffi, President of the Court of Aosta, focusing on the comprehensive ambitious State Aid reform programme announced by the European legislator in May 2012. The Commission, when announcing its intention to reform State Aid control, identified three main and closely linked objectives: to support sustainable growth and to contribute to improve the quality of public spending by discouraging aid that does not bring real added-value and distorts competition, to focus more on cases with the biggest impact on the internal market, and lastly, to streamline procedure in order to deliver decisions within business-relevant timelines. The Conference debate on State Aid brought to the fore the implementation of State Aid modernization over the last two years not only from a general point of view, but also with respect to specific sectors such as Research, Development, Innovation and Tax Law.

The last Conference session, entirely dedicated to antitrust in the automobile sector and chaired by Stefania Bariatti of the State University of Milan, brought to the fore the relationship between competition and IP rights and the recent developments in the sector, with a special focus on its case law.

In particular, the fascinating debate focused on the case of marketing of replica automobile spare parts whose design and trademark are
protected by Community Registrations, offering to consumers an alternative choice at definitively lower prices than those charged by manufacturing companies.

The topic of this session brought some key reflections on consumers with the hope of finding as soon as possible a common solution. Indeed, for many years there has been a lively discussion at European level on whether the use of replica motor vehicle spare parts produced by third parties for repairing complex products, is a design right infringement or simply desirable competition.

Consequently, attention was dedicated to the legal context and to recent case law concerning the role of the “Repair Clause”, aimed at opening up the spare parts market. According to European legislation, Member States could maintain existing legal protection on the use of spare parts for repair with the possibility of modifying this protection only if the modifications lead to the liberalization of the market for such parts.

In this respect, many Member States (such as Italy) have already liberalized their national automobile spare parts markets and have implemented a Repairs Clause providing for a defense when using motor vehicle spare parts for the purpose of repair, while others (such as Germany) do not provide it and continue to allow protection and enforcement of design rights covering spare parts.

In conclusion to my brief introduction to this publication, firstly I would to thank the promoters of this Conference which significantly contributed towards achieving 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; and secondly, I wish to express my gratitude to all the speakers who have contributed with their efforts in the publication of the Conference proceedings within such a short time frame.

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