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On the 20th of June 2014, Bocconi University hosted the conference "Antitrust & Information", organized in collaboration with University of Salento University and ASK Research Center.

The conference, by gathering together a lineup of distinguished panelists coming from the European Union and the United States, offered a varied array of economic and legal insights about the relationship between antitrust policy and information.

In particular, Andrea Pezzoli (Italian Competition Authority) commented the diverse economic roles that information can play in relation to the game of market competition and the rules that preside over its dynamics. Firstly, he argued that, since any competitive process can be deemed as a tool to fill the informational gaps that plague real markets, information may work not only as a crucial input, but also as a crucial output of any business practice. Secondly, Pezzoli recalled that information may serve to undermine the very same competitive process, by making markets more conducive to collusion. Thirdly, he observed that information can represent a good in itself that, accordingly, can also be sold and exchanged in dedicated markets: the so-called information markets. Finally, Pezzoli did not overlook the role that information plays when it comes to the enforcement of antitrust law. He remarked how competition authorities need information as to the market functioning and business practices to improve the effectiveness and the timing of the enforcement activities that they carry out.

Afterwards, it took over a complex and varied debate over the new challenges that the information economy is now urging.

Herbert Hovenkamp (University of Iowa) discussed many of the several issues connected to the relationship between competition policy and information technologies, that is to say, those technologies relating to the creation, dissemination and consumption of digital information. Among the others, he stressed how the “high fixed costs” combined with the “low variable costs” of these technologies divert our traditional way of inferring and assessing market power. In addition, looking at how antitrust law and patent law should interact in relation to the analysis of information technologies, he invoked more room for antitrust law. Then, Hovenkamp took a quite minimalist approach. In connection to the possibility of using Google search to manipulate and limit the information available to consumers, Hovenkamp suggested a simple
antitrust reaction: to guarantee consumers as many search engines as possible. As to the inefficiency that technological incompatibility produces for example in the market for e-books, Hovenkamp stressed how, over time, industries actually move towards either a shared or a dominant interoperability standard, even in the lack of any antitrust intervention. Finally, as to net neutrality, he pointed out how vertical integration between content and information technologies providers hardly represents an antitrust issue.

Mark Patterson (Fordham University), instead, remarked how current antitrust law does not pay enough attention to information goods and information markets. He argued that where information is sold for direct consumption, as tangible goods and services usually are, there is generally no problem. In contrast, distinct problems arise where information’s value lies not directly in its consumption but in its incorporation in other products or in its use in determining which other purchases to make. Examples of information incorporated in other products include technological standards and benchmark information like Libor interest rates estimates. And examples of information that is used in purchasing decisions for other products include product reviews and the results of search engines. Patterson acknowledged that different bodies of law, such as consumer-protection law or a derivative of it, could suit some of these informational problems. Yet, he suggested to however reform current competition law (as to market definition and the very same notions of free markets and competition) in order to tackle these informational problems, because these problems are specifically competition-related, rather than a product of the traditional concerns of consumer protection.

Finally, Rolf Weber (University of Zurich) made an exhaustive analysis of dominant information providers, as to the markets where they compete and of the practices that they endorse. First of all, he analyzed the specific economic features that characterize Internet markets, such as networks effects, switching costs, and entry-exit barriers. In particular, Weber pointed out how the gratuity of information makes the assessment of market power and the definition of the relevant markets a difficult task that should urge antitrust authorities to modify their traditional approaches. Moreover, Weber illustrated the diverse forms that exploitative and exclusionary abuses take when it comes to dominant information providers. Specifically, these firms may exploit their power by retaining information, directing consumers towards specific market choices and by making information search onerous. Similarly, they can leverage their power to shelter their position and exclude rivals, by limiting data portability and privileging their own services among the search engine results.

Fabiana Di Porto (University of Salento) focused on another set of issues, namely, the relationship between abuses of dominance and information sharing as it arises from the reading of EU case law. Firstly, she remarked how monopolists may infringe competition law retaining or misusing information. Secondly, Di Porto pointed out that many Article 102 of the
TFEU cases are adjudicated via remedies imposing an exchange of information or a duty to disclose information. Such behavioral remedies much resemble the traditional features of what we use to call “economic regulation”, as to the rationale of intervention, the employed institutional resources and the exercised powers. As a consequence, Di Porto suggested to call them ‘para-regulatory’ remedies, distinguishing them from pure antitrust actions. In addition, she argued that these para-regulatory remedies could conflict not only with the already existing information-based regulation, but also with the traditional suspicious approach that antitrust law takes when it comes to transparency and Article 101 of the TFEU.

In the aftermath, the conference turned exactly to Section 1 of the Sherman Act and Article 101 of the TFEU, by deepening the analysis of the role that inter-firm communications play in relation to collusion.

William Page (University of Florida) observed that rivals who wish to collude must make their intentions known to one another, negotiate their terms of joint action, and monitor the resulting understanding-tasks that require information, often conveyed by direct communication. Courts that wish to define, identify, and sanction cartels face a reciprocal informational problem. As a result, Page maintained that the definition of unlawful collusion must capture harmful instances of the practice in language that courts (and juries) can apply using evidence likely to come to light in litigation, all without imposing undue indirect costs, especially deterrence of efficient conduct. In addition, courts must make the necessary predictions based on economic theory, empirical generalizations about how rivals collude, and on the kind of evidence that collusion is likely to reveal. In pursuing this task, courts have concluded that price fixing is per se illegal, but that tacitly interdependent parallel conduct is per se legal. Accordingly, Page argued that the US definition of agreement within the meaning of Section 1 should require communication, but that courts can and should be clearer about their form and content.

Federico Ghezzi and Mariateresa Maggiolino (Bocconi University), instead, looked at the way in which EU antitrust law addresses information flows, granted the twofold aim of striking cartels in the bud and saving efficiency-enhancing transparency. Namely, they firstly clarified that exchanges of information may work either as gears of wider strategies, or as stand-alone arrangements. Whereas in the former case their competitive nature rests with the pro-competitive or anti-competitive nature of the wider strategies at stake, in the latter case exchanges of information are subject to a structured rule of reason that actually excludes over-deterrence. Secondly, Ghezzi and Maggiolino observed how exchanges of strategic information consist in the first building block of the notion of concerted practices to fix prices, share markets, or partition customers. The second building block of this notion is an almost un-rebuttable presumption that firms aware of that strategic information will use it to shape their decisions. Thus, Ghezzi and Maggiolino concluded that
the current EU notion of concerted practices is an effective tool to fight against cartels in the bud. To be sure, they observed that, though very effective, the EU toolbox still misses a tool, like the US invitation to collude doctrine.

Finally, the last two speakers focused on the role that intermediaries, such as online platforms, play in the dynamics of digital markets.

Marco Ricolfi (University of Turin) recalled how, at the very beginning of the digital experience, the Internet was generally conceived as the place of disintermediation, that is to say, as the place where every user and every provider could exchange information and content without relying on any kind of intermediation. Differently, now that some years have passed, thanks to network effects and dual markets, platforms took over as the real digital intermediaries with which users and providers must deal. According to Ricolfi, these platforms significantly limit cooperation and sharing in creativity – a problem, the latter, that copyright law should tackle.

Also Anne Flanagan (Queen Mary University) focused on online platforms, remarking how they represent bottle-necks for both entrepreneurs and consumers. In particular, these platforms can limit the amount and the quality of the information that goods providers can disclose and that consumers can get access to. However, unfortunately, antitrust law cannot always intervene against these practices. Accordingly, Flanagan argued that other bodies of law should address them, such as unfair competition and unfair trading practices. The latter, indeed, should apply not only to B2B but also to B2C relationships.

While we do live in an information society, for a very long time the many roles that information plays in relation to competition law have been neglected. By endorsing a bottom-up approach, the “Antitrust & Information” conference had the real merit to drive the most relevant ones under the spotlight.²

² Maggiolino M., “Antitrust and Information”, 20 June 2014, Bocconi University, Milan. DOI: 10.12870/iar-10208