
Ombretta Main e Andrea Venanzetti

1. INTRODUCTION

In the past months, two conferences were hosted by the Italian Competition Authority under the aegis of the Italian Presidency of the Council of the European Union: the European Consumer Day on 7-8 July and the European Competition Day on the 10th of October.

The events provided the opportunity to discuss past and future developments of EU cooperation in the enforcement of consumer protection legislation and European antitrust rules.

2. THE EUROPEAN CONSUMER DAY

In the area of consumer protection, the general conditions and framework for cooperation between national enforcement authorities are laid down by the Consumer Protection Cooperation (“CPC”) Regulation, which came into force in 2007. Simona Vicari, Undersecretary of State, in her introductory remarks at the European Consumer Day Conference, acknowledged the relevance of providing concrete means to safeguard consumers' collective interests across the EU in the context of a cooperation framework such as the CPC Regulation. As noticed by the European Commissioner for Consumer Policy, Mr. Mimica, who gave the keynote speech at the Conference, thanks to the mutual assistance mechanisms among national authorities foreseen by the CPC Regulation, a series of breaches committed by companies established in one EU country and harming consumers in another Member State have been stopped. Moreover, coordinated surveillance of on-line marketing activities, the so-called “sweeps”, has led to the correction of thousands of non-compliant websites. Finally, in line with the provisions of the CPC Regulation on coordination, last year, for the first time, national enforcement authorities agreed on a common approach against misleading practices concerning in-app purchases in on-line and mobile games, making an important step forward in the direction of uniform actions against violations of consumer rights in the Single Market.

Notwithstanding the progress in consumer protection cooperation so far achieved, in his keynote speech, Mr Mimica acknowledged the

1 Italian Competition Authority

need to further enhance the CPC framework in order to cope even more effectively with widespread EU-level infringements. According to a Report on the functioning of the CPC Regulation adopted by the European Commission in July 2014, better cooperation mechanisms would be important in order to address the new challenges generated by the digital economy and the development of new marketing models. In particular, on the basis of the said Report, Mr. Mimica highlighted the need: i) to improve the information base and information exchange among national authorities; ii) to reinforce the enforcement powers available to national authorities; iii) to create a framework for the development and follow-up of common enforcement approaches.

The view of Member States was represented by Zaiga Liepina, Deputy Secretary of State at the Ministry of Economy of Latvia. Ms Liepina thanked the EU Commission for its support in coordinating and enhancing the activity of national enforcers. A reform of the CPC Regulation is certainly needed, as highlighted in the report, with more minimum powers to national authorities and more efficient mechanisms of coordination at the European Level. Ms Liepina then described the relevant improvements in consumer protection in Latvia in the most recent years.

The reform of the CPC regulation was further discussed during the first roundtable of the Conference, chaired by Gianfrancesco Vecchio, Director General for Consumer Protection at the Italian Ministry of Economic Development, where representatives of national authorities and European Commission expressed their views about the most relevant areas in which the current cooperation framework could be strengthened and about possible ways to improve the efficiency of enforcement.

In particular, Salvatore Rebecchini, (ICA’s Commissioner) highlighted the importance of: i) expanding investigative and repressive enforcer’s powers; ii) strengthening the information flows across Member States, making “binding” (and no longer optional) the current system of alerts and surveillance, when national authorities start a proceeding that might be relevant in other Member States; iii) improving procedures for handling CPC relevant infringements by establishing common standards; iv) extending the application of the CPC Regulation to include intra-EU infringement of the Misleading and Comparative Advertising Directive (2006/114/EC, between traders, business to business).

In the same vein, Paola Testori Goggi, (European Commission/DGSanco) elaborated on three main opportunities that, in her view, the CPC cooperation framework should consider in order to reach its full potential: i) ensuring that the CPC framework can be effectively used to cover infringements to EU consumer law made across the Single market, irrespective of business organizational models; ii) ensuring that the current powers available to the CPC authorities correspond to the

---

compulsory minimum powers in the Regulation and that they are efficient; iii) encouraging businesses to be more proactive, for example providing the CPC network with relevant market information.

Finally, Anita Vegter (ACM’s board member) highlighted that in her country, the Netherlands, on-line shopping is very widespread and still growing. At a more general level, she also noticed that there is a trend towards the “Europeanization” of consumer markets, with large traders establishing subsidiaries in their main markets. Against this background, Mrs Vegter argued that it is important to have a uniform and consistent enforcement of EU rules, in order to prevent companies from moving to those countries where the level of consumer protection is perceived to be lower. To this end, the adoption of a higher minimum of common investigative and enforcement powers would be required. Moreover, a clarification of the scope of cooperation would be needed in order to include not only cross-border violation, but also EU wide consumer problems occurring in more than two Member States.

The above-summarized panel discussion, concerning the reform of the CPC Regulation, makes evident that there is ample convergence and a significant degree of consensus on the necessity to strengthen the current system of cooperation, in particular extending the scope of the Regulation and expanding enforcers’ investigative and decisional powers.

The remaining part of the Conference was devoted to the issues arising from the development of e-commerce. These issues were thoroughly discussed by representatives of traders associations, consumers associations and consumer protection agencies in the two panel discussions held on the 8 July.

Opportunities and challenges generated by e-commerce were considered in the first panel, chaired and opened by Despina Spanou, Director at DG Sanco, EU Commission. In the panel, it was first highlighted by Henrik Oe (Danish Ombudsman), how the new business models, with multinational firms carrying out parallel conducts in different EU jurisdictions, ask for more cooperation among national authorities: the joint CPC common action seems to be an efficient tools to address trans-border consumer protection concerns. Giovanni Calabrò (ICA’s Director General for Consumer Protection) highlighted ICA’s enforcement actions on e-commerce infringements and supported the need for a higher minimum level of enforcement powers for national authorities and for smoother procedures of cooperation among the same authorities. According to Roberto Liscia (President of Netcomm), e-commerce companies can profit, also from a competitive point of view if they comply with consumer protection rules, thus fighting illegal practices that hamper correct competition. Maria Pisanò (Director of ECC-Net Italy) pointed out that consumers are increasingly relying on e-commerce to exploit opportunities for better bargains – which, in turn, can spur economic growth. However, those new, potentially more efficient, consumption tools and models, are confronted with the unsatisfactory development of internet infrastructures and the diffusion of fraudulent conducts by some
traders which prevent consumers from taking full advantage of e-commerce benefits.

The interface between competition and consumer protection in online markets was addressed in the second panel, chaired and opened by Veronica Manfredi, (Director at DG Justice, EU Commission). Gabriella Muscolo (ICA’s Commissioner), who focused on the issues of multi-sided markets or platforms, argued that the current approach to these issues, mainly based on antitrust interventions, is not entirely satisfactory. It fails to take adequately into account some critical aspects to the protection of consumers participating to these platforms, like information asymmetry, consisting, more specifically, in the lack of cost transparency and in the ways their personal data are managed. Jason Freeman (Director at the CMA) argued that vigorous competition and consumer confidence are necessary pre-requisites for e-commerce to be a real driver of growth. He considered different commercial conducts which may hamper effective competition (for example hidden prices, fake inventory, lack of key product information, fake reviews, hidden terms) and identified possible remedies as drivers of competition and trust (among others, platform responsibility, payment control, transparency about the dealt) that should be underpinned by effective enforcement. Barriers to effective enforcement were also considered as well as areas for further reflection and ways forward.

Effective enforcement of consumer protection legislation and more cooperation among national authorities were also advocated by the representative of Eurocommerce, Fatma Sahin. Lamberto Santini, President of the Italian ADOC consumer association, recalled how consumer associations helped the ICA in stopping fraudulent activities on the web and asked for more enforcement actions and cooperation at the EU level to crack down illegal practices that harm consumers.

The ICA’s chairman, Giovanni Pitruzzella, in his concluding remarks, touched upon the three fundamental pillars of consumer policy: regulatory context, consumer education and enforcement regime. In particular, he argued that good regulation and consumer empowerment need to be complemented by an assertive, credible and reliable system of enforcement of consumer protection legislation, whereby effective powers exist to impose the swift discontinuation of detrimental practices and the punishment of wrongdoers. On this ground, he welcomed the upcoming review of the CPC Regulation which provides an opportunity to achieve a better, coordinated, more efficient system of consumer protection enforcement at the European level.

3. THE EUROPEAN COMPETITION DAY

Similarly to the European Consumer Day, the European Competition Day Conference provided the opportunity for evaluating achievements and challenges of European cooperation among antitrust authorities in the enforcement of competition rules. This topic was part of a more general discussion on competition and growth and on the role of...
European competition agencies in fostering growth and consumer welfare.

The Conference was structured in the following way: after Giovanni Pitruzzella’s opening remarks, keynote speeches were given by the Vice President of the European Commission responsible for Competition Policy, Joaquin Almunia, the Italian Minister for Economic Development, Federica Guidi, and by Antonio Tizzano, Judge at the European Court of Justice. Their speeches set the scene for the subsequent panel discussions on: i) “the European Competition Network - the way forward”; ii) “Competition and growth: theoretical and regulatory frameworks” and iii) “The role of competition agencies in fostering growth and consumer welfare”.

In his keynote speech, Joaquin Almunia dealt with two pillars of Europe’s competition policy, Regulation n. 1/2003 and the Merger Regulation n. 139/2004. He made a comparison between: i) the decentralized system of antitrust enforcement put in place by Reg. 1/2003, whereby national competition authorities apply art 101 and 102 of the TFEU to cases with intra-European trade relevance and, ii) the centralized regime depicted by the Merger Regulation for the review of mergers over certain turnover thresholds by the European Commission, while mergers below the said thresholds are subject to national control according to national rules. He acknowledged that during the last ten years both Regulations have served their purposes well: in the antitrust field, multiple enforcers have guaranteed a wider and more effective application of competition rules; in the mergers field, the EC has made sure that potentially problematic concentration would not create anti-competitive market structures while unproblematic mergers have been dealt with quite swiftly.

However, he argued that in both areas there is room for improvement, in terms of greater convergence in substance and in procedures, in order to achieve a genuine common enforcement area in Europe.

In particular, Mr Almunia put forward some ideas for a more consistent and effective decentralized enforcement of the European antitrust rules:

i) ensuring that National Competition Authorities are independent and that they are given adequate human and financial resources to carry out their responsibilities;

ii) providing all National Competition Authorities with the whole array of enforcement (investigative and decisional) powers required for effective enforcement;

iii) establishing some common basic principles in the field of fines.

Moreover, considering that national merger control regimes differ in procedure and substance, Mr Almunia argued that, in order to build a European merger area, further consideration should be given to the possibility of transposing the success of the ECN to the merger area, building a system in which the European Commission and the National Competition Authorities apply the same substantive law as they already do in antitrust.

Mr Almunia, (who was going to hand over his post to Mrs Vestager, current Commissioner for Competition), observed that it was up to
the next Commission to decide about the most appropriate ways to proceed as for the reforms of Reg 1/2003 and Reg. 139/2004.

The Italian Minister for Economic Development, Federica Guidi underlined the commitment of the Italian Government to an effective competition policy, in order to foster economic recovery and enhance consumer welfare. In particular, the Minister announced that the Annual Law for Competition was currently being drafted, taking into consideration the Report that the ICA submitted to the Government and to the Parliament in July 2014, advocating for pro-competitive reforms in several economic sectors.

The Minister welcomed the European Commission’s proposals to strengthen the enforcement of antitrust rules at the European level, by further enhancing and harmonizing investigative and decisional powers of national competition authorities in the EU.

Judge Antonio Tizzano traced the evolution of the case-law of the European Court of Justice with regard to the role of consumers (welfare) in competition law enforcement, arguing that the said role has become increasingly important. He also noticed how, in the absence of a European legislative framework, the ECJ’s rulings have shaped private enforcement of EU antitrust law, enhancing the role of consumers.

The first panel, chaired by Salvatore Rebecchini (ICA’s Commissioner), gathered several heads of Competition Authorities to discuss about achievements and future prospects of ECN, in view of the possible reform of Reg. n 1/2003. In his introductory remarks, Salvatore Rebecchini argued that, notwithstanding the uncontroversial success of ECN, CAs should not be complaisant and that they should look for improvements. In particular, according to the ICA’s Commissioner, further reflection might be needed on convergence in priorities and procedures. In fact, from a substantive point of view, there seem to be some diversities among CAs, as for the types of infringements most frequently pursued and the degree of economic analysis of cases. Moreover, on a procedural ground, there is room for more convergence in areas such as institutional set up of authorities, investigative tools and fines.

Alexander Italiener (Director General European Commission/DG Competition) observed that after ten years of Regulation 1/2003, it was indeed time to look back and see how the system had worked. According to the Communication adopted by the Commission in July 2014 on Ten Years of Regulation 1/2003, over the last decade, around 870 decisions has been taken by the ECN agencies. Decentralization of enforcement has made it possible to cover many more cases than the Commission would have done on its own. Alexander Italiener provided several examples of areas with good degrees of substantive convergence: food, payments, but also manufacturing industries, postal services and liberal professions. He argued also that within the ECN there is a common focus on fighting hard-core cartels which is underpinned by cooperation between NCAs and the Commission, also through exchanges of information.

According to Italiener, within the ECN there is a satisfactory degree of convergence on
He followed on from what Almunia had previously said, to notice that, unlike what happens in related areas such as telecoms or energy, in the field of competition, EU law does not address the requirements for the independence of NCAs. Moreover, there are no European rules requiring that NCAs be endowed with adequate financial and human resources, in order to fulfill their tasks. Also, European law does not set required enforcement powers. As a result, in some cases, NCAs are exposed to political interference, to lack of adequate staff and budgets, to the risk of being ineffective in their enforcement activity due to lack of adequate powers. Thus, possible future actions should focus on guaranteeing the independence of the NCAs and ensuring that all NCAs have a complete set of investigative and decisional powers, including the power to impose effective and deterrent fines.

Bodan Chiritoiu (Chairman of the Romanian Competition Authority) shared previous speakers’ views about the need for procedural harmonization. However, he argued that given existing legal and economic national specificities, there is some scope for NCAs to diverge as to the type of infringements they pursue.

Bruno Lassere, (chairman of the French Competition Authority) made some considerations on the design of agencies, the upgrading of NCAs’ toolbox and the new frontiers in enforcement, arguing throughout his speech that more convergence is important if it brings more effectiveness.

He supported the inclusion in the Regulation of a provision concerning the protection of CAs’ independence. Moreover, speaking about procedural convergence, he argued that an harmonization of standards in the field of interim measures, admissibility of evidence and fines would enhance effectiveness. Finally, he advocated an ambitious reform of Regulation 139/2004, arguing that converge in enforcement should be pursued not only in the assessment of anticompetitive behaviors - that is in the field of antitrust violations - but also in the evaluation of market structures - that is in the area of merger control. According to the chairman of the French Competition Authority, when a transaction is notified in several Member States, there should be the same substantive rules, the same tests, the same timetable.

Andreas Mundt (chairman of the German Competition Authority) underlined that ECN is a model for other areas of law and that the level of integration so far achieved within ECN is very significant. However, he highlighted the negative implications for effectiveness in enforcement and for transparency and predictability of enforcers’ action of existing procedural differences among agencies, in areas such as rights of defense, ways in which fines can be imposed, parent company liability. The chairman of the German Competition Authority urged the network to find a consensus on how fines are imposed and to create the conditions for this consensus to be made binding on Member States. He acknowledged that this is not only a task for the Commission but also for national legislators.
Petko Nikolov (chairman of the Bulgarian Competition Authority) illustrated the enforcement experience of his agency to argue that substantive convergence finds some limits in the local specificities of different countries. In terms of priorities for the future, he said that convergence in fining policy is very important but also that cooperation within ECN may be extended to mergers.

Finally, Jacques Steenbergen (chairman of the Belgian Competition Authority) considered that there is a broad consensus among heads of agencies on what the future agenda should be: in the next developments, focus will be on relationships between NCAs rather than between the EC and NCAs. He shared many of the points made by previous speakers, concerning sanctions, common standards of evidence, interim measures, need for NCAs to be given adequate resources to fulfill their tasks. He also underlined the importance of enhancing information exchange between NCAs on domestic cases, in order to learn from each other. Moreover, the chairman of the Belgian Competition Authority affirmed that it would be useful to abolish the distinction between cooperation within the ECN, under the umbrella of Reg 1/2003, and cooperation on mergers.

The second panel, chaired by Andrea Pezzoli (ICA’s Director General for Competition) was focused on the relationships between competition and growth. In his introductory remarks, Andrea Pezzoli argued that competition is crucial in driving productivity and growth, particularly in export led economies, as the Italian economy. Indeed, stimulus on aggregated demand might be insufficient if it is not linked with a higher productivity.

Gloria Bartoli (member of advisory board at Ministry of Economy) highlighted that competitiveness indicators play an important role in the context of European Macroeconomics imbalances procedures and that obstacles to competitiveness represent a major stumbling block to achieve growth. Competitiveness depends directly on productivity and this in turn on competition. Data concerning total factor productivity show how in Italy this indicator has decreased over the last two decades. Gloria Bartoli argued that important explanatory factors for this trend are inefficiency of civil justice, inefficiency of public administration and protection from competition of liberal professions. At a more general level, she argued that antitrust has a fundamental role in making sure that innovations translates into growth rather than in more rents for incumbents and less jobs.

Federico Etro (Professor of Industrial Organization at the University of Venice) followed up from Gloria Bartoli’s presentation to argue that there are quite a few empirical works about the positive relationships between competition and growth but very limited empirical literature concerning the link between competition policy and growth. Then he referred, in particular, to theoretical and empirical works by P. Aghion and R. Griffith, according to which there would be an inverted U relationships between competition and innovation. On this basis, Etro argued that strong competition policies may bring more growth in some sectors but not in others, depending on the level of competition already
achieved in the industry under antitrust scrutiny.

Magda Bianco, (Director at the Bank of Italy) focused on the underlying conditions to make competition a driver for growth. She highlighted the crucial role of institutions to ensure stability of legislative framework, low barriers to entry and exit and enforcement of contract.

John Fingleton (partner at Fingleton Associates) dealt with the link between competition and productivity growth and its implications for competition policy. He spoke about three types of effects of competition on productivity: i) incentive effects – incentives to reduce prices cause incentives to reduce costs, ii) selection effects – inefficient firms are replaced by more efficient ones, iii) innovation effects – existing business models are replaced by new businesses. He exemplified these effects by referring to the evolution of airline industry, petrol distribution in UK and telecommunication markets. Finally, he argued that competition policy need to focus more on the link between State protection and competition, on dynamic factors rather than static ones and on the consumer side of the market, possibly joining consumer and competition policy.

The last panel, chaired by Gabriella Muscolo (ICA’s Commissioner) focused on the role of public and private enforcers in fostering growth. In her introductory remarks, the ICA’s Commissioner argued that in time of crisis, somebody may cast doubts on the positive impact of competition on growth and on the role of Antitrust agencies. Moreover, CAs may be asked to play not only the role of decision makers, but also of policy makers. In Italy, the increasing relevance of advocacy in the ICA’s overall activity could be interpreted as an indicator of this trend. Thus, Gabriella Muscolo asked the panelists to give their views on: first, whether or not, in time of economic crisis, public and private enforcers have indeed a role in fostering growth; second how they pursue this objective.

Henk Don (ACM’s Commissioner) stated that competition is a crucial driver for growth; indeed recent research made by the Chief Economist’s team at the ACM, has shown that cartels have a substantial effect on Total Factor Productivity. Henk Don argued that in time of crisis, CAs advocacy activity is crucial in order to prevent the introduction of restrictive laws and regulations. Moreover, assisting firms, explaining what they can and can not do, particularly with regard to the antitrust viability of self-regulatory initiatives, is very important.

Jose Maria Marin Quemada (chairman of the Spanish National Authority for Markets and Competition) argued that the role of competition Authorities in time of crisis is substantially the same as in other economic phases. In his opinion, competition policy is directly concerned with welfare, not with growth. However, he acknowledged that National Competition Authorities could influence growth through Total Factor Productivity. In particular, advocacy can have an impact on institutional factors, like regulation or barriers to entry which in turn are important components of total factor productivity.

Dimitris Loukas (Vice-Chairman of the Hellenic Competition Commission) stated that
competition is an optimizer for the economy, promoting productivity and growth. Moreover, competition has long-lasting effects on economic performance, because it affects the incentive structure of economic actors. He argued that there is the need to explore complementarity of enforcement and advocacy to the fullest. Indeed, according to Dimitris Loukas, enforcement and advocacy go hand in hand since competition policy must ensure that markets are not distorted either by the anti-competitive behavior of private actors or by government measures. The experience of the Greek CA during the ongoing severe crisis is characterized by a renewed focus on advocacy, in order to promote structural reforms. Moreover, complementarity of actions is promoted in order to optimize likely effects.

Finally, Peter Roth (President of the UK competition Appeal Tribunal) spoke of his experience as private enforcer, illustrating a case dealt with by the Competition Commission in 2009 and challenged in front of the CAT. He gave account of some competition concerns regarding the BBA’s ownership of the 4 south-east airports in the UK, as identified by the Competition Commission in a Report published in 2009 at the end of a market investigation. The Competition Commission also identified structural remedies to address these concerns, namely the sale of Gatwick and Stansted airports to two different purchasers within two years.

Remedies were challenged in front of the CAT on the ground that the Competition Commission had failed to adequately analyze the loss of value of BAA caused by the timing set for the sales. CAT dismissed the challenge and in December 2009 the sale of Gatwick airport was completed. CAT was further involved in the implementation of remedies, particularly in the divestiture of Stansted, which was claimed by BBA not to be a proportionate measure in a period of economic downturn. However, in 2012, CAT established that there was no ground for complaint that the CC’s remedy was disproportionate provided that the company was given an opportunity to realize a fair market price for the business it had to sell. According to the speaker, the case shows that removing impediments to competition and fostering competitive markets in the interest of consumers is as important in a time of economic crisis as in time of overall prosperity.

In his concluding remarks, Sandro Gozi, Undersecretary of State, touched upon the relationship between competition policy and employment, in the context of an overall assessment of the “Europe 2020” growth strategy.