MAIN DEVELOPMENTS IN EU AND ITALIAN COMPETITION LAW - III ITALIAN NATIONAL ANTITRUST ASSOCIATION CONFERENCE

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On the 24th and 25th of September 2015, the third Italian national conference organised by the Italian Antitrust Association was held.² The event drew together leading names in the antitrust arena, proving once again to be a benchmark for the discussion and analysis of the issues that stand at the forefront of debate in this field.

The conference involved a number of members of the legal profession, universities, institutions and the world of business and the economy and looked at three main areas, which are the subject of lively debate: i) the latest developments in EU and Italian antitrust law, ii) the latest developments in public enforcement and iii) private enforcement of antitrust law.

President of the Italian Competition Authority Giovanni Pitruzzella opened the first session, highlighting the role played by the Italian Antitrust Association in ensuring an on-going and profitable debate and setting out the most significant antitrust issues in Italy. Kris Dekeyser, from the European Commission, then illustrated the Commission's priorities over the next few years, focussing in particular on recent developments regarding the creation, by 2017, of the digital single market by bringing down the regulatory and legislative barriers currently in place between the various Member States.³

With the introductory stage completed, the conference continued with an analysis of the most recent developments in Italian antitrust law. The focus here was on the recent adoption by the Italian Competition Authority of guidelines regarding the calculation of fines.⁴ In the panel's view, these guidelines mark an important reversal of the approach adopted in

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² The conference materials, together with information about the work carried out by the Italian Antitrust Association, can be found at http://www.associazioneantitrustitaliana.it/.
³ The creation of a single digital market in which all EU citizens have the right to conduct business online where there is fair competition has to be one of the most ambitious projects on the European Commission's agenda.
⁴ See decision by the Italian Competition Authority dated 22 October 2014, Guidelines on the application of the criteria for calculating administrative fines imposed by the Authority pursuant to Section 15, paragraph 1, of Law No. 287/90.
the past, introducing criteria that the Authority has independently bound itself to observe in order to deal with the demand for greater deterrents and transparency in terms of the fining policy followed.\footnote{The conference raised interesting points regarding the first instances of application of these new Guidelines. In the speakers' view, an analysis of the decision-making practice followed by the Italian Competition Authority would suggest that, the practice of imposing fines having been tightened as a result of the guidelines' adoption, it is increasingly the case that the fines levied by the Authority total the maximum amount prescribed by law, i.e., 10\% of the turnover recorded by the business involved (as established by Section 15 of Law No. 287/90). As a result, fines are being charged at a flat rate and are not 'tailored' to any particular extent to the specific offender.}

Another issue under the spotlight was the relationship between abuse of a dominant position and abuse of the law. Based on the most recent case law of the Council of State\footnote{See judgments dated 12 February 2014, No. 693, Pfizer and 8 April 2014 No. 1673, Coop Estense.}, the prohibition in Italy on abuse of the law has mainly been applied in relation to conduct observed in regulated sectors, or sectors governed by ad hoc administrative provisions, which is lawful from a regulatory point of view but amounts to an abuse of the law from an antitrust standpoint, because the intention underlying the conduct is to exclude a competitor from the market and the effects thereof are restrictive. Some speakers expressed the view that what follows from this is an extension of the boundaries of the abuse of law, which could be damaging in terms of legal certainty.

Having examined the position in Italy, the focus shifted to the main developments over the last twelve months in EU practice and case law.\footnote{See decision by the court of first instance of 12 June 2014, case T-268/09, Intel, the conclusions submitted by Advocate General Kokott on 21 May 2015 in case C-23/14, the Post Danmark II case, recently decided by the Court of Justice of the European Union, and the European Commission's decisions of 4 February 2015, AT.39861 - Yen Interest Rate Derivatives, of 9 July 2014, AT.39612 - Perindopril (Servier) and of 1 September 2014, M.7217 Facebook/WhatsApp.} Of the most topical issues, the conference first of all examined the approach most recently adopted in relation to the role of the 'facilitator' of agreements,\footnote{Given fresh impetus only a very short time ago with the judgment of the European Court of Justice of 22 October 2015, case C-194/14, Treuhand.} looking in particular at the European Commission's decision in the IC\textsuperscript{AI}P case and to the judgment issued by the EU Court in the Treuhand case.\footnote{See decision by the European Commission of 4 February 2015, AT.39861 - Yen Interest Rate Derivatives.} On the basis of this interpretative guidance, in order to establish liability on the part of the facilitator (or co-perpetrator) for the infringement, it must be demonstrated that, in conducting itself as it did, the intention of the business in question was to contribute to achieving the objectives pursued jointly by all the participants and that it was aware of the steps that the other businesses had planned or adopted in order to achieve those objectives.\footnote{See ruling of 6 February 2014, case T-27/10, AC-Treuhand AG v Commission.}
The panel also discussed the legality of Most Favoured Nation clauses (known as MFN's), which have recently been put under the spotlight by the Italian Competition Authority and by other European competition authorities. The European Commission is also addressing this issue in relation to the formal Amazon e-book investigations. Launched in June 2015, the investigations concern certain clauses in contracts entered into by Amazon with its editors which give the right to be informed of more favourable contractual terms and conditions offered to competitors, as well as the right to secure terms and conditions that are, at the very least, on a par with those offered to other competitors. The aim of these investigations is to establish whether the abovementioned clauses are in line with the law.

Having dealt with the most recent developments where Italian and EU antitrust law are concerned, discussion then turned to developments in the private enforcement of antitrust law. There was an in-depth discussion of the main problems presented, in terms of application, by the implementation and interpretation of Directive 2014/104/EU on damages for infringements of the competition law provisions. Particular attention was devoted to the provisions regarding the effectiveness of rulings by the competition authorities in claims for damages as a result of antitrust infringements and the rules governing limitation.

The first of these issues generated particular interest, given that, as matters currently stand, the civil courts already rely heavily on decisions made by the Italian Competition Authority, with the result that, along with the need to implement the directive comes a valuable opportunity for careful consideration of the extent to which these rulings are in fact binding. Therefore, the discussion focused on the wording of Article 9 of the Directive, which requires Member States to ensure that the final decision by a competition authority adopted in a Member State may, “in accordance with national law, be presented before their national courts as prima facie evidence at least that an infringement of competition law has occurred”.

In terms of the limitation period applicable to claims for damages, Member States are required to adopt periods of at least five years and to ensure that the limitation period is suspended or interrupted where a competition authority launches antitrust proceedings in relation to the infringement pleaded in the claim for damages.

Discussion here concluded with a comparative analysis of the effects of implementation of the Directive in the various Member States, with the panel concluding that the particular characteristics of these EU rules call for transposition that is faithful to the EU legislation.

During the next stage of the conference, two sessions were held in parallel, dealing with the relationship between antitrust law and the

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12 See proceedings I/779 - Tourist services market - online hotel bookings, decided with commitments following complex steps involving cross-border coordination.
13 IP/15/5166.
pharmaceutical and telecommunications sectors.

Having noted the unique nature of the pharmaceuticals sector, which is a heavily regulated area, discussion focused on EU and Italian case law and practice. Whilst on an EU level, matters that come to the attention of the European Commission tend to involve the relationship between antitrust law and intellectual property rights in pharmaceuticals, with pay-for-delay cases being one example, here in Italy the sector is mainly involved in cases involving abuse of law. One such matter that came up for discussion was the Aspen case. Here, the allegedly unlawful conduct took the form of an application for a review of the category to which the medicines produced by the business belong and an application for those medicines to be included in the class of non-refundable drugs, so that the price could be established independently. In the Authority’s view, the thinking behind this conduct was to secure additional profits at the expense of the Italian National Health Service and could be classed as abusive.

The session dealing with the telecommunications sector identified the need for competition authorities to be more sensitive to the particular characteristics of this field, especially when evaluating concentrations. Where concentrations that affect the mobile telephone market are concerned, the conclusion reached was that a more careful analysis of objectives is called for, such as the safeguard of technological progress. From this standpoint, the limits of a method of control over concentrations, which places too much weight on short term price levels rather than on the long-term benefits for the consumer, were highlighted.

Two further parallel sessions were then held.

In the first session, which looked at the use and effectiveness of leniency, settlements and commitments, discussion focused on commitments, highlighting the benefits in terms of the possibility of avoiding a finding of infringement and penalties as a result as well as the drawbacks linked to the wide margin of discretion afforded to the antitrust authorities when carrying out their assessment. The second session dealt with the controversial topic of minority shareholdings. Having acknowledged the lack of regulations in this area, the debate between the panellists and those in the audience centred on the need for specific provisions or for already existing provisions to be put to different application.

Finally, the plenary session at the end of the conference took stock of developments in antitrust law in Italy, France and Germany over the last 25 years, carrying out a comparative analysis.

The conference provided a valuable opportunity for those involved in antitrust law

14 See in particular, proceedings A/431 - Ratiopharm/Pfizer; A415 - Syngia Agro/Bayer-Helm; A/364 - Merck-Active Ingredients.
15 See proceedings A/480 – Aspen drugs price increase.
16 As demonstrated by approximately fifteen sets of investigations into restrictive agreements and abuse of a dominant position, which were closed with commitments in 2014/2015.
to discuss the most recent developments in this field, providing the ideal arena for a thought-provoking and productive exchange designed in particular to identify areas for further attention or improvement in the near future.