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"The impact of Directive 104/2014 on private actions. Competition law enforcement and open issues"

"**The relationship between public and private antitrust enforcement, general and institutional aspects** "

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I. Cooperation from Regulation EC 1/2003 to Directive 2014/104 EU

The "European antitrust community" – as such defined by Giuseppe Tesauro – has long awaited the adoption of Directive 2014/104 EU on antitrust damages actions (hereinafter, the "Directive").

More in particular – in a context of growing awareness by the antitrust community of the complementarity between public and private antitrust enforcement in order to reach an effective application of the competition rules – the expectations mainly regarded the cooperation mechanisms between the Commission and National Competition Authorities (hereinafter, "NCAs"), on the one hand, and The National Courts, on the other hand.

Recital 6 of the Directive provides that: "*To ensure effective private enforcement actions under civil law and effective public enforcement by competition*

authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules." For this reason the renewed system has been defined as a "*two pillars*" one.

The cooperation principle had already been affirmed in Regulation 1/2003 EC on the modernisation of EC competition rules as stated in articles 15 and 16 of that same regulation, respectively titled "*Cooperation with national courts*" and "*Uniform application of Community competition law*". However, the incomplete implementation in practice of the mentioned norms in the totality of Member States has generated the need to elaborate new cooperation mechanisms between public and private enforcement.

In Italy the Directive's implementation process is in an advanced stage. A dedicated Commission has been established within the Government and has already examined the text and spotted the critical issues. On July 9th 2015, moreover, Law n.114 has been issued by the Parliament who delegated the government the competences to adopt - pursuant to the procedures, principles and criteria set forth in articles 31 and 32 of Law n.234, December 24th 2012 - the legislative decrees for the implementation – *inter alia* – of the Directive.

In this scenario, the implementation of the new rules on the cooperation between the Italian Competition Authority (hereinafter, the "ICA") and the Courts for enterprises (and Courts of Appeal) represents one of the primary tasks for the national legislator.

The ICA is intensely committed also in the so-called "descending" phase of the adoption of such rules.

II. The cooperation mechanism between public and private enforcement provided by the Directive

The first group of cooperation instruments is contained in Chapter III of the Directive dedicated to the "*Disclosure of Evidence*". The first relevant norm is the one contained in article 6, para. 7, which provides that national courts may request assistance from the competent NCA in the assessment of the nature of the information referred to in paragraph 6, for the purpose of ensuring that their contents refers to a leniency program or commitments and is thus included in the so-called black list (i.e., documents which may never be disclosed by the competent NCA in order to protect the effectiveness of public enforcement).

The second relevant provision is article 6 para. 11, according to which the NCAs - to the extent that the competent NCA is willing to state its views on the proportionality of disclosure requests - may, acting on its own initiative, submit observations to the national court before which a disclosure order is sought. It represents a declination of the faculty to present observations as *amicus curiae* already provided by art. 15 of Regulation 1/2003 EC to which reference is made at recital 30 of the Directive.

However, such norm, in order to be effective, requires the implementation of an information mechanism relating to outstanding proceedings and the submission of the disclosure request in order to avoid the non-application of the provision, as it happened in Italy in relation to mentioned article 15 para. 3. Indeed, the Italian legislation does not provide for any form of information flow and the ICA is thus not able to know when to intervene with regard to the proportionality test.

The third relevant mechanism set forth by the Directive is the one contained in the chapter dedicated to the "*Quantification of harm*" by article 17 para. 3 on the assistance by NCAs to National Courts with regard to the determination of the quantum of damages. Such assistance is subordinated to the request of a national court and is left to the discretion of the competent public enforcer.

Such provision has a great significance also with regard to evidentiary profiles due to the fact that (i) quantification of harm is one of the elements where the information asymmetry between the parties in antitrust process is greater and (ii) the

qualified assistance by NCAs may represent an effective tool in order to ensure a higher evidentiary standard.

The fourth cooperation mechanism is the one governed by article 9 of Chapter three -dedicated to the "*Effect of national decisions, limitation periods, joint and several liability*" – which provides for the binding effect of NCAs decision for the Courts. The present intervention will particularly focus on such provision.

III. Effects of NCAs decisions

As a preliminary remark, it is the case to underline that the actual formulation of article 9 has been object of a lively debate. Without any claim to being exhaustive on such topic, we will just resemble the main arguments supporting the opposite positions.

The thesis in favour of the binding effect was based on procedural economy reasons descending from the assumption that the binding effect of the decision in follow-on cases would have eliminated the need to carry out new investigations in order to assess the violation and moreover would have given undertakings greater incentives to transact instead of litigate.

The position of those who were contrary to the binding effect of NCAs decisions, underlined how in the EU legal framework and in that of many member States antitrust violations are ascertained through inquisitory systems thus implying the risk that damages actions would result less equitable if the conclusions of such procedures have to be considered binding without having the chance of questioning such investigations/decisions.

In the pre-existing Italian system there were no norms prescribing the binding effect of ICA's decisions for the courts. In the Supreme Courts case law it has been constantly affirmed– since ruling n.2305, February 2nd 2007, up until ruling n.16786, July 23rd 2014 - that ICA's decisions shall be considered as "privileged evidences".

In a recent decision (COMI and others v. Cargest, Supreme Court n. 11564, June, 4th 2015)[1] the Court reaffirmed the nature of privileged evidence of the ICA decisions, and, going further in its ruling, stated that in *stand-alone* cases, the mechanical application of the *onus probandi incumbit ei qui dicit* principle determines a limitation of the right to damages suffered by undertakings concerned with the antitrust violation due to the great information asymmetry they face in access to proof.

The Court, in the same decision, has moreover highlighted how NCAs investigative powers are more effective than those provided to private parties by the procedure codes. The Supreme Court, finally, stated that - pursuant to the EU law principle of cooperation between national courts and the NCAs, prescribed by art. 15 of Regulation EC 1/2003 and the Directive - the judge has to acquire useful data and information in order to reconstruct the reported anticompetitive conduct, interpreting extensively the requirements established in the civil procedure code concerning the disclosure of documents, requests of information and the independent experts

With regard to the procedural economy rationale, ruling n.5327, January 16th 2013, shall be recalled in that it puts forward an extension of the extra-system binding effect. The decision at stake, indeed, after having reaffirmed the evidentiary privileged nature of the ICA decisions, states that: (i) the assessment of a violation of competition law implies a presumption in favor of the claimant and shifts the *onus probandi* on the defendant; (ii) the presumption shall also cover the existence of the causality nexus and the existence as well as the quantum of the consumer's damages; (iii) the defendant cannot overcome the presumption with the same arguments and evidences already used in the administrative procedure *vis a vis* the ICA; (iv) the arguments and evidences must refer to the defending undertaking and cannot rely upon the general situation of the market. Such decision may be easily criticized under several aspects.

In the Italian case law effects of ICA's decision refer to the standard of evidences that must be assessed by the court in its decision but they do not imply a

[1] The Supreme Court overturned the Court of Appeal's ruling (in the part where it dismissed the claimants' action) on grounds that there was a lack of evidence with particular regard to the definition of the relevant geographic market.

shift of the evidentiary burden which rests on the claimant. Moreover, the ICA's decisions do not concern the damages and the causality nexus between the cartel and the damages suffered by the consumers. Finally, on the one hand, no argumentation or proof on the damages and the causality nexus is proposed *vis a vis* the ICA and, on the other hand, the defendant holds the right to again bring its argumentations and evidences in front of the Court. In conclusion, antitrust litigation does not tolerate an excessive simplification on proof-related matters also in cases of follow-on actions brought by consumers.

Article 9 paragraph 1 of the Directive provides that: "*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*."

Paragraph 2, moreover, states that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may be presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred. To national judges is thus attributed the faculty of using a foreign NCA's decision as evidence and no obligation is set forth in that sense. In any case we are dealing with a rebuttable presumption subject to the proof of the contrary. Finally, it has to be pointed out that such provision has a "*minimum harmonization"* nature and thus Member States are free to implement stricter norms, as for example, attribute the character of the *prima facie* evidence also to non-final decisions.

Article 9 is shaped on the basis of article 16 of Regulation EC 1/2003, which sets forth the prohibition for national courts to take decisions in contrast with the Commission's ones. Moreover, it is the case to point out that, some Member States already had rules establishing the binding effect of NCA decisions – of the same Member State – i.e., the UK (section 58 of the Competition act) and Germany (section

33 of the Competition Act) with the peculiarity that - in this latter State - the norm goes further providing for cross border binding effect.

The rationale underlying to article 9 of the Directive – which has a multi-directional nature – are (i) the increase of efficiency of the whole antitrust enforcement system descending from the prohibition to duplicate the assessment of the violation, and (ii) the mitigation of the burden of proof resting on the claimant in order to prove the existence of a violation in follow-on cases.

The exclusion of the cross-border binding effect of the decisions adopted by NCAs of other Member States depends on the present lack of uniformity between the different national systems. The "*Explanatory Memorandum*" of the Commission illustrates, moreover, how the jurisdictional control of NCAs decisions eliminates the risk to diminish the jurisdictional protection for the involved undertaking and to violate its right of defence and the principle of due process as expressed by article 48 para. 2 of the Charter of Fundamental Rights of the European Union and article 6 of the ECHR.

This latter topic is one of the most debated in the Italian framework and was the object of a highly significant ruling by the ECHR on the Menarini Case (MENARINI DIAGNOSTICS S.R.L. c. ITALIA, N. 43509/08). At the origin of the ruling there was a decision adopted by the ICA in which Menarini was sanctioned with a 6 mln € fine for having concluded an agreement in violation of art. 2 the Italian Competition Act (I461 – Test diagnostici per il diabete). The decision was later confirmed both by the TAR Lazio and the Consiglio di Stato. Menarini thus filed a claim to the ECHR questioning the legitimacy of the judicial review exercised by the administrative courts in cases involving "technical discretion" like the ones sanctioned by the ICA.

In the assessment of the standard of the judicial review of administrative decisions by part of administrative Courts, the ECHR has highlighted how – in the case at stake – the Italian judges have duly analyzed the factual and legal elements upon which the sanction was issued, the use of discretionary powers by the ICA as

well as the soundness and proportionality of the decision adopted by the ICA also in relation to the application of technical notions.

With particular regard to the sanctions, moreover, the Court pointed out that the Italian judges carried out a "*pleine jurisdiction*" control (including the merit of the case), in that they could have proceeded with a new quantification of the sanction where they would have found any violation of the proportionality principle. On such basis, the Court concluded that the decision of the ICA has been subject to an adequate control by the "*organes judiciaries de pleine jurisdiction*" thus excluding any violation of art. 6 para 1 of the ECHR.

In this same context it is worth mentioning ruling n.1013 of January 20th 2014 by the Joint Chambers of the Italian Supreme Court which - by confirming the legitimacy of the judicial review by the Italian administrative courts - affirmed that when the technical elements of the ICA's decision include evaluations and estimates which present a certain degree of discretion – e.g., in the assessment of the relevant market - the mentioned review shall consist of a control of rationality, logic, and coherence of the contested decision's motivation as well as the evaluation of whether that same decision has not exceeded the abovementioned discretion limits.

This latter ruling does not cite either the Menarini case or the preexisting positions expressed by the ECJ (C-501/11 P, *Schindler Holding Ltd and others v. Commission,* 18th July 2013 e C-510/11, *Kone oyi and others v. Commission,* 24th October 2013) which ruled that the administrative discretion is not immune from a full judicial review.

The provision eventually puts forward a number of interpretative matters which in part had already been faced in the implementation of art. 16 of mentioned Regulation 1/2003. The first one is that related to the scope of the binding effect of NCAs decisions: it seems now clear that it is limited to the assessment of the violation and does not extend to the causality nexus with the damages suffered as well as to the existence and the quantification of the harm which fall outside the scope of the decision of the public enforcer. More controversial remains instead the issue

concerning whether the binding effect regards not only the assessment of the facts but also their legal qualification. Finally the definition of follow-on action is discussed with particular regard to its subjective scope.

IV. Conclusive remarks

In conclusion, the proposed system has been defined as a two-pillars one, based both on public and private enforcement, but nevertheless it remains centered on the former: the crucial norms in this regard are the ones concerning the access to information in the hands of NCAs and on the binding effects of NCAs' decisions for the Courts.

This option appears satisfactory only if limited to a transition phase, in which private enforcement lacks of a full implementation in all the Member States; but nevertheless the interpreter should avoid a reconstruction of the system as based on a mere parallelism between public and private enforcement which operate independently and interact only in exceptional circumstances, with the consequence of reducing the effectiveness of both of them.

On the contrary an optimal reconstruction of the system shall be grounded on the principle of cooperation between courts and NCAs, as already stated by Regulation EC 1/2003, in a context of complementarity between public and private enforcement which may ultimately only reinforce the effectiveness of antitrust rules.