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XVI Treviso Antitrust Conference – highlights and main takeaways

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1. On 6 and 7 June 2024, the bi-annual "*Antitrust between EU Law and National Law*" conference took place in Treviso, Italy. Since 1992, the Treviso Antitrust Conference has provided an opportunity to discuss and reflect on the most pressing issues in the field of competition. The initiative, which was launched following the entry into force of the so-called Italian antitrust law (Law No. 287/90), has met every two years since, marking its sixteenth edition this year.

This year's conference once again enjoyed the participation of the principal representatives of the 'antitrust community'. This high-level participation is, indeed, the hallmark of the Treviso Antitrust Conference, which provides a space for encounter and mutual exchange between those who work in the field, often on opposing sides. Presidents, members and senior officials of the European and national antitrust authorities, corporate lawyers, expert economists, judges of the EU and Italian courts, lawyers, academics and representatives of consumer associations have always been among the conference's speakers and attendees.

2. The President of the Italian Antitrust Authority (AGCM), Roberto Rustichelli, kicked off the conference again this year, with an opening speech outlining the main features of the Authority's activities and future developments, and picking up on some of the topics discussed in the Annual Report recently presented at the Chamber of Deputies.

The conference continued with a round table between presidents and members of antitrust authorities, which gave rise to a constructive discussion on the best practices and policy priorities of the various entities involved. In addition to the AGCM, whose commissioner Elisabetta Iossa chaired the round table, the French, Austrian, Romanian, Swiss and Belgian authorities were all represented.

The subsequent sessions of the conference addressed the main issues currently under debate in the antitrust field. This particular moment is exceptionally rich in reform proposals and wide-ranging reflections on competition and competitiveness issues, in a global context that sees Europe confronted with enormous economic and geopolitical challenges. In this context, mention can be made, for instance, both to Enrico Letta's Report on the future of the single market, published in April 2024, and Mario Draghi's Report on European

competitiveness, which, although still being drafted, was presented by Draghi himself in a speech a few weeks ago in La Hulpe (Belgium). The two documents are united by the objective (an essential one, in my opinion) of outlining an overall strategy to give the European Union the necessary tools to face the economic giants in the global arena, China and the United States *in primis*. At the same time, they propose solutions that only partly overlap. On the one hand, the Letta Report aims above all at adequately exploiting the instruments already existing in the framework of the European single market, even though it also pushes to some degree to modernise the regulation of merger control. On the other hand, the Draghi Report seems to prefigure an ambitious change of pace in the European integration process as a whole, partly on the basis of his criticism of the current regulatory and policy configuration of the European Union in the economic and industrial sphere.

3. The conference speakers, particularly in the first session, chaired by AGCM Commissioner Saverio Valentino, also focused on the most significant reforms recently introduced by the European and national legislatures, as well as, in some cases, by the antitrust authorities.

A first set of innovations concerns the area of merger control, which was addressed by several speakers during the first session, from both the EU and the national perspective. The speakers essentially aimed to assess whether the new approaches adopted by antitrust authorities are suitable to strike a fair balance between the risks of under-enforcement arising, most notably, from the emergence of new forms of market power, on the one hand, and the need to avoid excessive burdens on mergers that do not give rise to competition issues, on the other.

As regards the EU level, the panel on antitrust developments and reforms provided an opportunity to take stock of the application of the Commission's communication, dated March 2021, providing *Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*. Through this communication, the European Commission took a new stance on the interpretation of Article 22 of the EU Merger Regulation in the absence of any amendment of the same Regulation. The topic is hotly debated, in both theoretical and practical terms, and is also the object of cases pending before the EU Courts, notably (but not exclusively) in the framework of the so-called 'Illumina/Grail saga'. It may well be that the necessary clarity and legal certainty will be provided by the European Court of Justice in its judgment in joined cases C-611/22 P and C-625/22 P, *Illumina v Commission*. The judgment, expected in September 2024, is much awaited, particularly in the wake of the opinion delivered on 21 March this year by Advocate General Emiliou, who strongly criticized the Commission's new interpretation.

At the national level, antitrust authorities are generally dealing with similar issues. In Italy, the legislature amended the national antitrust law in 2022, adding a new paragraph 1-*bis* to Article 16 thereof, in order to allow the AGCM to assess 'below-thresholds' merger operations. The AGCM, in turn, issued a communication in December 2022, recently amended by a new communication published in March 2024, with the aim of clarifying its interpretation and application of the new provision. However, the 'contours' of the new rule are still not completely clear: the speakers at the conference focused especially on the most problematic aspects of the application of Article 16, para. 1-*bis*, of Law No. 287/90, highlighting the main areas of uncertainty within the new framework. Chief among these is that undertakings involved in a merger operation can no longer simply rely on the relevant turnover thresholds, but must also consider other elements of each operation, which increases the difficulty of carrying out an effective self-assessment. Moreover, the new powers of the AGCM include the possibility to request a notification until six months after the 'closing': when this happens, the procedure for completing the assessment on the part of the Authority may take several more months, with the consequence that a potentially long period of uncertainty will affect the position of the undertakings involved in the operation. In any event, it is reasonable to expect that the development of a growing set of cases based on the new provision (which has been applied to less than ten operations so far) will help market players and competition law experts to better understand the Authority's approach to the main operative aspects of the relevant legal framework.

4. In Italy, the trend towards reinforcement of the role of the AGCM was recently confirmed by the legislature, *inter alia* through the adoption of the so-called Asset decree-law of August 2023, which endowed the Authority with new powers. The AGCM can now impose structural measures at the outcome of sector inquiries, with the potential to have very significant impact on entire economic sectors. Although the powers at issue were introduced by the legislature with specific regard to the field of passenger air transport services, an opinion of the Council of State requested by the same Authority resulted in the expansion of their scope: as a result, such powers can be exercised in any sector.

This topic was addressed in particular by Guido Stazi, Secretary General of the AGCM, who offered insightful reflections on the sector inquiries carried out by the Authority from 1991 to the present day, on the main features of the new legal framework, and on the applicable procedure connected with the abovementioned new powers, which was outlined and clarified by the Authority in a communication issued in May 2024. The speech made an interesting comparison with other Authorities having similar powers, notably the UK Competition and Markets Authority (CMA), which has been entrusted with the power to carry out far-reaching 'market investigations' since 2002. The Secretary General of the AGCM also made reference to the broad debate on the opportunity to introduce new competition tools, involving not only national competition authorities, but also the European Commission.

5. The recent developments summarised above paint a picture of antitrust authorities increasingly inspired by purposes and instruments that sometimes fall outside the competition law toolbox, under a traditional *ex post* perspective, and tend to be more regulatory in nature. Among other things, this allows for *ex ante* interventions in markets where it may be difficult to identify antitrust violations, such as oligopolistic markets, in which the generally high level of transparency may facilitate 'coordinated' conduct by operators.

The European Regulation known as the Digital Markets Act (DMA), which has recently become fully applicable, is also part of the *ex ante* regulatory perspective: as is well known, it aims to combat conduct by large digital platforms which may be harmful to competition. In this way, it aims to play a complementary role with respect to antitrust rules. This amounts to a real revolution, which is justified considering the emergence of new markets and the sheer size reached by some of their players, and which fits into the framework of the European Commission's strategy for the creation of 'digital sovereignty' at the European level.

These developments have rekindled the longstanding debate on the relationship between competition and regulation, which was echoed, more or less explicitly, in the remarks of several speakers at the Treviso Antitrust Conference.

The complexity of the issue makes it particularly difficult to take a firm position on it, and to define in clear and specific terms a new balance between *ex post* and *ex ante* instruments.

That being said, in my view, the need to carry out a comprehensive reform of EU competition law is becoming more and more urgent. Indeed, updating the EU general antitrust provisions seems a necessary step, considering that the core of these provisions was elaborated in the late nineteenth century, in Canada and the US – a radically different context, from an economic, geopolitical, industrial, and infrastructural point of view. Reforming these provisions could enable legislators and antitrust authorities all over the EU to give due consideration to, for example, the technological advancements made in recent years and the complex phenomenon of globalisation. At the same time, the need to preserve the 'kernel' of antitrust law, while avoiding political interference, must not be underestimated.

Proposals and calls for reform are not surprising: competition law must aim at safeguarding the economy, consumers and, ultimately, citizens. With such objectives in mind, the idea of updating and adapting competition law to the developments of the current world context should be welcomed.

Of course, in launching the process of reform, we cannot underestimate the risk – which is perceptible in the concrete, *inter alia*, to lawyers in the context of their daily dealings with companies – of sacrificing European

undertakings to pursue an abstract idea of competition, which would not be in line with the current economic and social framework at the European and global level.

6. Other sessions of the conference were devoted to the relationship between competition and sustainability, to procedural aspects and intersections between antitrust and other regulations, and to consumer protection, which is not only an important European Union policy, but also a central prerogative of the AGCM and many other antitrust authorities. Ms. Ana Gallego Torres, Director-General of DG Just of the European Commission, who opened the panel on consumer protection, stressed the fact that competition policy and consumer policy are complementary and mutually supportive. She also outlined the main features and most recent initiatives of the Consumer Protection Cooperation (CPC) Network, which brings together the consumer protection authorities of the 27 Member States of the EU, plus the European Economic Area countries (Iceland, Norway, and Liechtenstein).

The other speakers of the same session addressed topical aspects of consumer policy, at both the EU and national levels, including green claims and greenwashing, the issues arising in the framework of digital markets, with particular regard to the conduct of 'influencers', and the notion of 'average consumer' relevant for purposes of EU law. This last issue is currently in the spotlight, since it is the subject of preliminary ruling proceedings pending before the European Court of Justice, following a reference for a preliminary ruling made by the Italian Council of State (case C-646/22, *Compass Banca*).

7. A thorough reflection on antitrust matters cannot avoid dealing with economic issues, and these were also examined in-depth during the Treviso Antitrust Conference. In particular, they came up during an *ad hoc* session marked by a lively discussion between prominent economists, all experts in the field, moderated by Antonio Buttà, Chief Economist of the AGCM. Economists have an undeniably essential role to play to ensure the correct and effective application of competition law. The many issues covered by the economists who spoke at the conference included competition in labour markets, a topic which is assuming growing importance in the action of antitrust authorities, both in the United States and in the European Union. In particular, Michele Avagliano (Compass Lexecon) spoke on this topic, laying out the main areas on which antitrust authorities are concentrating their efforts to increase competition for workers between employers, namely: (*i*) non-compete clauses, which are assessed in a very strict way, for instance, by the US Federal Trade Commission; (*ii*) mergers that increase buyers' power; and (*iii*) no-poach and wage fixing agreements. It bears noting that the European Commission is also carefully considering the matter, as demonstrated by its issuance of a policy brief on antitrust in labour markets in May this year. The same trend can be seen in the UK and in some of the EU Member States, which shows an increasing awareness of the potentially critical issues posed by the wage-setting power enjoyed by many – or even most – undertakings.

8. The conference concluded with a stimulating session devoted to the private enforcement of antitrust law, which refers to the set of tools available to private individuals for the judicial protection of rights that may have been infringed by anti-competitive behaviour. James Keyte (Fordham Competition Law Institute, New York), Vito Meli (Head of Competition Department 1 of the AGCM), Peter Roth (Judge of the High Court of England and Wales), Piero Fattori (Gianni & Origoni) and Giorgio Afferni (University of Genoa) spoke on the subject, moderated by Silvia Giani, President of the specialised Section on Enterprise 'A' of the Court of Milan. The session, in addition to providing important points of comparison with the United States (the 'homeland' of private antitrust enforcement) and the United Kingdom, now outside the European Union, presented, among other things, an opportunity to take stock of how the rules introduced a few years ago at the European and national level to regulate antitrust damages judgments are being applied (the Damages Directive of 2014 and its implementation, which took place, in Italy, with Legislative Decree no. 3/2017). The application, in my opinion, reveals some basic inconsistencies in the European approach, characterised by the frequent

'cumulation' of public and private enforcement tools, with the inherent risks of a troubling 'multiplication' of negative consequences for companies, including high-impact consequences.

One of the several potential ways to address these problems could be to include the hypothetical amounts of money that may be claimed in future actions for damages among the elements taken into account by antitrust authorities for the quantification of fines, on a presumptive basis. Needless to say, an innovation of this kind would not eliminate all the unresolved issues, but it could be, at least, a first step towards greater coherence in the EU antitrust enforcement system.

Finally, one of the problems that has arisen in the practice before the Italian courts, is the difficulty of finding a sufficient number of economists with antitrust backgrounds, who may be called on to perform the functions of court-appointed experts. This could be due, *inter alia*, to the possible conflicts of interest that may arise when an economist is already assisting plaintiffs or defendants in other, related cases – a scenario rendered more likely in the event of a series of follow-on actions all based on the same decision of an antitrust authority.

As I underlined in my brief remarks introducing the conference, this difficulty can entail serious consequences, and may even lead national courts to appoint as expert economists who do not have a specialisation in antitrust matters and, consequently, may not be in a position to provide accurate answers to the complex technical questions that normally arise in the investigation phase of antitrust damages actions. This, in turn, may result in situations of over-compensation or under-compensation, which are expressly to be avoided, pursuant to the Damages Directive and the relevant transposition measures adopted at national level.

9. These and other issues were discussed by the more than 50 distinguished speakers and 300 attendees during the traditional two-day event in Treviso. The sessions were held at the prestigious Casa dei Carraresi venue, made available by the Cassamarca Foundation, which has always supported the initiative, and its President, Professor Luigi Garofalo.

All that remains is to set the date for the next edition of the Treviso Antitrust Conference, scheduled for 2026. There can be no doubt that, given the constant and inexorable evolution of antitrust law and policy, there will be no shortage of new topics to address, ideas to share and synergies to foster.

Meanwhile, the book collecting the proceedings of the XVI Conference is under preparation: it will be published in the next months, in line with tradition, by Bruylant-Larcier.