

CONFERENCE ON “TOWARDS THE IMPLEMENTATION OF DIRECTIVE 2014/104/EU ON ANTITRUST DAMAGES” UNIVERSITY LUISS GUIDO CARLI, ROME, 11 SEPTEMBER 2015

Valeria Falce¹ – Gustavo Olivieri²

The implementing process of the Private Enforcement Directive (Dir. 2014/104/EU) is in progress.

This ends a tortuous path that started from the Green Paper of 2005 and the White Paper of 2008, finally coming to an articulated legal framework aimed at harmonizing the enforcement of competition rules within the Union.

The path forward is clearly outlined and consists in achieving more effective competition application both at a public and at a private level.

The suggested method is clearly defined as well, focusing on the need to remove the asymmetry information that usually affects businesses, consumers or public authorities suffering damages resulting from anti-competitive behavior.

To this end, the Directive recognizes the binding nature of antitrust decisions ascertaining a violation for the civil court which

then can consider the facts and the negative value of the censured conduct as proven; it introduces a powerful system of presumptions and lightens the burden of proof on the plaintiff side; it applies a discovery system that broadens the opportunity for evidence disclosure; it encourages settlement for the damage amount.

With the view to foster complementary nature between public and private enforcement, the Directive imposes some specific limits to the disclosure of evidence that may be included in the file of a competition authority, thus incentivizing whistle-blowing and leniency programs.

The *quid novi* of some of the EU measures on the one hand and the latitude left to the Member States when incorporating them in their own set of rules on the other hand, require the Legislator to operate a wise balance between the interests involved in accordance with the principle of proportionality.

A further challenge will be to overcome the fragmentation of the national systems and to prevent the risk of arbitration and forum shopping leading to actions based on protection and guarantees granted.

In the forthcoming implementation process, therefore, a key role will be played by the competition authorities, that will evaluate the

¹ Professor at European University, Rome.

² Professor at University LUISS – Guido Carli, Rome.

evidence to be admitted in the civil action, its relevance and the balance between the conflicting interests. The competition authorities will therefore play a unique role: to filter and link between general principles and specific cases, in order to help safeguard the principles of proportionality and assure effective judicial protection of the individual rights recognized by the Union.

The above issues have been discussed in Rome at Luiss Guido Carli University on the 11th of September within a Conference organized with the European University of Rome as part of the Master in Competition Law and Innovation and under the patronage of the Italian Antitrust Authority.

The Conference, scientifically coordinated by Gustavo Olivieri and Valeria Falce, as respectively Director and Scientific Coordinator of the Master, aimed at providing the national Legislator with sound insight and possible solutions for the difficult task that awaits him.

To such end, the President of the Italian Antitrust Authority, Prof. Giovanni Pitruzzella, took the floor first, emphasizing the relevant task that both the Directive and the implementing legislations shall be asked to pursue in order to strengthen the deterrent role played by public and private antitrust against conducts aimed at jeopardizing effective competition on the market.

It was then the turn of Prof. Alberto Maria Gambino, Director of the Department on Human Science of the European University of Rome, who detailed the difficult mission that the implementing Legislator shall promote,

consisting in balancing the objectives legitimately pursued at EU level with the fundamentals of the Italian legal system.

Following the above introductory remarks, the Director of the Master in Competition Law and Innovation, Prof. Gustavo Olivieri (LUISS Guido Carli University) identified the main issues to be discussed over the course of the Conference. In this respect, he made it clear that, shall the Directive be compliant with the right to compensation as defined in the existing Italian regulatory framework, the implanting process shall be likely to have a significant impact under a number of profiles, including the one on evidence, quantification of damages and relationship between judicial authorities and public authorities.

The keynote speakers, Prof. Richard Wish (King's College, London) and Prof. Josef Drexl (Max Planck Institute for Innovation and Competition, Munich), commented on the opportunities as well as the limits of the Directive. First, they recalled the key novelties of the Directive, including the ban to access to leniency statements, the effect of decision of national competition agencies, the claims of indirect purchasers, the passing on defence, the collective redress and the issue of opt-in/opt-out. Second, Prof. Wish and Prof. Drexel entered into the specifics of the British and the German private enforcement systems, offering valuable insights.

In the following Round Table, chaired by Cons. Massimo Scuffi (President of the Tribunal of Aosta), Cons. Roberto Chieppa (General Secretary at the Italian Antitrust Authority) took first the floor, examining the main steps of the implementing procedure as

well as the role that the Authority is playing and will be asked to play in the new scenario. He identified the driving trajectories of the Directive and then detailed those features that the Italian Legislator shall adapt to the National fundamentals.

The floor was then left to Prof. Bruno Sassani (University of Rome Tor Vergata), who scrutinized some of the controversial provisions of the Directive under a domestic law perspective (i.e. binding nature of the competition law authority decisions, system of presumptions, burden of proof and allegations, access to files and its limits, solidarity issues, prescription provisions etc). Indeed, in Prof. Sassani opinion, some of the ambiguities of the Directive depend on rough translations and as such shall be reconciled thanks to a systematic interpretation.

Prof. Alberto Heimler (SNA) then verified to which the Directive shall effectively foster private enforcement at large, questioning if its architecture risks jeopardizing the final intentions pursued at the EU level. The conclusion he reached was skeptical, meaning that, in his opinion, the decentralizing technique promoted at EU level will be unlikely to succeed. As a result, in the new scenario, it will be more convenient and effective to activate the public enforcement rather than the private one.

It was then the turn of Prof. Valeria Falce (European University of Rome and Scientific Coordinator of the Master in Competition Law and Innovation) who focused on legal privilege, underlying how the English and the French version of the Directive seem to entail a fresh analysis of its ambit and scope. Besides, Prof.

Falce reviewed the rules governing legal privilege within IP enforcement at International, Community and National, suggesting that also these provisions shall be considered in the implementing process with the view to avoid conflicting results.

The economic analysis “on” and “within” competition law decisions was the topic addressed by Dr. Andrea Pezzoli (General Director at the Italian Antitrust Authority). According to the General Director, a sound economic approach shall be even more relevant in the new environment, contributing to a more effective convergence between public and private enforcement.

The Round Table was enriched by the stakeholder perspective.

From the enterprise side, Dr. Marcella Panucci (General Director at Confindustria), while endorsing the objectives pursued by the Directive, focused on the respect of proportionality as the guiding principle to implement the Directive in Italy. From the consumer side, Luisa Crisigiovanni (General Secretary at Altroconsumo) deemed the Directive as a starting point to ensure an effective protection and recognized some of the limits of collective redress.

As a closing remark, Prof. Gustavo Ghidini (University LUISS Guido Carli and Co-Director of the Master in Competition Law and Innovation) summed up the concerns resulting from a serious analysis of the Directive and advanced the creation of an informal working group as a possible and useful solution.