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ANTITRUST LAWS BETWEEN PUBLIC AND PRIVATE LAW

1. Introduction

Like any classification, partition, categorization, the distinction between public law and private law exists to the extent that we, lawyers, want it to exist. We create it; so much so that, as we heard from the works presented at the Conference in recent days, this distinction not only has had ups and downs throughout history, recent and less recent, but in some countries it does not even exist.

We, the lawyers, want and use this distinction for several reasons: in part out of habit and tradition, in part for systematic reasons, in part to justify certain choices or different solutions and in part for political and cultural reasons.

We are indeed used to equate public law with the rules that are designed to respond to the organizational and administrative needs of the State, or even public order needs, or to protect interests that go beyond those of the individual person and that involve society as a whole.

Just think, for example, of the debate on the public or private nature of family law that took place after World War II: it was not just a legal question, but also a political and cultural-social issue on the value to be given to family, marriage, filiation, the *status* of children born out of wedlock or in the marriage, etc.

The relevance and usefulness of this public/private distinction has been discussed for decades; nevertheless it has relentlessly continued to exist.

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Yet it is increasingly being called into question by a series of national and Community measures, mostly new legislation but also case law, which reduce and trim down the boundaries to the extent of wondering whether the distinction still has any meaning or provides any benefit at all.

2. The distinction in antitrust law

This gradual convergence between what we are used to consider as the two main branches of law, is especially evident in the field of *Antitrust Law,* where we are seeing a process that goes from simple interaction, collaboration or synergy to genuine mutual integration to the extent that borders are becoming blurred if not even erased.

Antitrust Law provides a very extensive series of new rules or old rules that are being revised and rebuilt; new needs are highlighting how ephemeral and fleeting the distinction between public and private law can be, and how rules that have always been considered typical of public law might get confused with others that have always been considered as typical of private law, giving rise to forms of interaction between public and private law that would have been unthinkable only a few years ago.

Paradoxically, it is precisely in a field like Antitrust Law which, as we shall see, seems to be based on a clear distinction between *public* and *private*, that we find one of the most significant and evident examples of how this distinction is being called into question, of how the two areas are "contaminating" each other.

As I said, we lawyers are accustomed to consider as part of public law roughly all the rules that govern society interests, while ascribing to private law all the rules that pertain to the protection of individual rights and interests.

Now, precisely in relation to this fundamental criterion, the question has to be asked: is Antitrust Law, modern competition law, public or private law? Do its rules protect individual rights (businesses, consumers, citizens) or collective rights (free competition, market)?

The solution is not obvious.

Just think, for example, that in Italy, until the "year zero" of Antitrust law, i. e. until 1990 with the entry into force of Law no. 287/90 ("Rules for the Protection of competition and the market"), the only and few provisions dealing with competition were contained in the Italian Civil Code. Among these, art. 2596 of the Italian Civil Code regarding *restrictive competition arrangements,* and art. 2597 of the Italian Civil Code concerning the *obligation to contract for monopolistic enterprises,* can be considered as the most relevant with regard to the competition issues to be addressed in recent years.

Yet those two provisions are essentially of a private nature, the application of which was (and is) entrusted to the ordinary courts.

In the US legal framework, the *Scherman Act* antitrust law has mostly developed in civil courts as a result of the actions brought by competitors.

David Gerber himself stated that, in the United States, "Antitrust actions in disputes between private entities ... have often played a prominent role compared to that of public authorities in the application of competition rules". On the contrary, in Continental Europe

"competition law originally developed as an administrative tool, as a means for the State to intervene in market dynamics in order to safeguard public interests". "The rigid distinction that inspired the legal thought of continental Europe, between rules for the protection of public interests and rules for the protection of private interests, had the effect of pushing competition rules into the public law domain, especially in the administrative sector, given that competition rules had not been conceived as a private matter and therefore they could not be applied in court for the protection of subjective legal positions. Thus, competition law developed within the realm of administrative law and has henceforth been placed within the latter's scope of action".[1]

As more specifically regards Italian law, this view is fully confirmed by Law 287/1990, which was conceived as a way for the State to control the conduct of business undertakings in order to ensure a free, open, competitive and non-discriminatory market, as repeatedly asked by the European Commission.

3. Competition rules between public enforcement and private enforcement.

3.1. The contribution of case law

Thus, while the mould in which Antitrust law has been placed is that of public/administrative law, this has nevertheless not prevented it from evolving and absorbing some typical private law elements. This shift of antitrust rules towards an opening to private law aspects has characterized all European states and has been heavily influenced by the activity of the European Commission and the European Court of Justice.

I am referring to the evolution that has taken place over the last 15 years, both in Europe and in Italy, in the interaction between private enforcement and public

[1] D. Gerber, Il risarcimento del danno da condotta anticoncorrenziale: Stati Uniti ed Europa a confronto, Quaderni del Centro di Documentazione Europea, Trento, 2010, pp. 10 ff.

enforcement, between actions for damages for breach of antitrust rules and cognizance and repressive activities of the Italian Anti-trust Authority -Agcm- (in Italy) and the Commission (in Europe) with respect to anticompetitive practices and abuse of dominant positions.

From a historical point of view, the keystone of the new relationship between public and private law, between administrative and ordinary courts and between public and private enforcement is represented by the Courage[2] ruling issued fourteen years ago, on 20 September 2001, with its famous statement "anyone can claim damages for loss caused by a contract or a conduct liable to restrict or distort competition".

Actually that sentence, which has become a *de facto* principle of Community law, was formulated with reference to the request for compensation arising precisely by the entity who had been a party to an anti-competitive agreement (and the true reason for the stay decision by the English court was to clear up the doubt on the possibility of legally and financially protecting also those who had contributed to the breach of a compulsory rule).

However, it was subsequently, to some extent used for a purpose other than its original one; the principle that anyone can claim damages for loss caused by breach of competition laws was indeed later used not only in favour of the party who had been a party to an anti-competitive agreement but, in general, in favour of any party, whether individual or company, that had suffered a loss as a result of the unlawful conduct of colluding businesses.

Thus, that sentence was subsequently used to open the doors to the private enforcement of antitrust law and to set the stage for some fundamental Community legislation, among which we specifically recall Regulation 1/2003 on the modernization of Antitrust law and the recent Directive 2014/104 on actions for damages due to infringements of antitrust laws.

As stated in another fundamental paragraph of the Courage judgment "Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community".

Thus, the right to compensation for breach of Antitrust law supports and strengthens the sanction of nullity envisaged by Article 101.2 of the Treaty,

[2] Court of Justice, *Courage vs. Crehan,* C-453/99. [2001] ECR I-6297. ECLI:EU:C:2001:465

thereby completing the private law response of Community legislation to unlawful distortions of competition.

The message that comes from the *Courage judgment* is twofold.

On the one hand, it suggests that the civil action, the recovery of damages, i.e. private law, can help achieve the aims of *public enforcement,* of administrative control, i.e. of public law;

On the other hand, it suggests that private protection is not an end in itself, its aim is not exclusively to compensate the damage; in other words compensation of loss due to breach of *antitrust* law is not an end but a means through which the state can strengthen the protection of the market and competition.

3.2. Contribution of the EU legislation

If the keystone to the relationship between public and private law in the Antitrust field is represented by the *Courage* v. *Crehan* ruling, EC Regulation no. 1/2003, represents the consolidation of this conjunction, of this marriage between public and private.

In the wake of the view expressed by the Luxembourg courts, the Regulation textually states: "National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States".[3]

Even more interesting are the statements contained in Directive 2014/104[4] which, for the first time, sets out some important and fundamental rules regarding the action for damages in case of breach of Antitrust laws.

Art. 1 of Directive 2014/104 expressly states that its purpose is to set out "rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning", only to point out in the second part that these rules consist in "ensuring equivalent protection throughout the Union for anyone who has suffered such harm".

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[3] Regulation no. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now 101 and 102] recital no. 7.

[4] Directive of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, to be implemented by 27 December 2016.

Now, in hindsight, the objective of fostering undistorted competition in the internal market and removing obstacles to its proper functioning, is exactly the objective that the Commission and the national authorities intend to achieve through the means provided by articles 101 (cartels) and 102 (abuse of dominant position) of the TFEU (as well as through their national laws as regards purely internal cases).

This means that, through Directive 2014/104, the prohibition of cartels and abuses of dominant position is no longer just a tool available to administrative institutions to ensure the protection of public interests enforceable before the European Commission (and the Court of Justice) or before the national competition authorities (and the administrative jurisdictions), but also a tool for individuals, citizens and businesses to make use of civil actions, to be exercised of course before the ordinary courts rather than the authorities or the administrative courts.

3.3. The priority of administrative law

As is known, the actions for damages due to infringements of competition law can be broken down in *Follow-on* actions[5] and *stand-alone* actions.[6] Again, in this case the distinction reflects the two-faced nature (public/private) of the enforcement system in the field of competition rules, which are prone to a parallel and independent enforcement by competition authorities (national and Community) and by national courts.

We have already pointed out the importance of such complementary enforcement, from the standpoint of both the effectiveness of antitrust rules and their overall deterrent effect.

[5] *Follow-on* actions are based on an unlawful distortion of competition ascertained by the (national or community) authority through a definitive ruling. Thus *follow-on* civil actions chronologically follow the measure issued by the Authority. As we shall see, the relation that links the private action to the administrative measure goes beyond the mere temporal element, having a more incisive influence on specific substantive and procedural aspects of the action.

[6] *Stand-alone* actions, on the contrary, are brought by the claimant in the absence of any prior ascertained infringement of competition rules by the administrative authorities. Thus, it will be up to the National court seized to ascertain the alleged infringement of competition rules and, possibly, award damages to the victim. Obviously *stand-alone* actions are theoretically more complex than those that follow (and are based on) an unlawful infringement of competition rules that has been ascertained by a highly specialized body such as the Antitrust Authority, which moreover has rather strong powers of investigation and inspection.

Yet the benefits of the *public & private enforcement* interaction are not confined to the (general) system level, but are also evident at the individual level (in the individual legal action).

Consider, for example, the relative ease of an action for damage (at least as regards ascertaining the infringement) when the competition authorities have already issued a definitive measure on the substantial case on which the claim is based (anti-trust offence).

However, in stand-alone actions, national courts are not left completely alone in handling the difficulties inherent in antitrust cases. In keeping with the principle of cooperation between the Commission and national courts, in all cases of infringements of EU competition rules, the national courts may, in accordance with article 15.1 of Regulation 1/2003, ask the Commission to transmit the "information in its possession or its opinion on questions concerning the application of the Community competition rules". Furthermore, "Where the coherent application of Article 101 or Article 102 of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States. With the permission of the court in question, it may also make oral observations."[7]

A similar cooperation has been confirmed, internally, between the antitrust authorities of the Member States and the *national courts of their respective Member States.*

The rules just mentioned apply, of course, both to *follow-on* and *stand-alone* actions, although it is precisely in this latter type of case that they are especially relevant.

The two-fold (public/private) nature that characterizes the enforcement of competition rules necessarily implies the need to establish minimum coordination mechanisms between administrative and judicial authorities. Indeed, the parallel enforcement of competition rules implies a potential overlap of the activity of the two bodies called upon to issue a ruling, in different ways and at different times, on the same substantive issue.

More specifically, when a party that has suffered a breach of competition laws seizes the national courts requesting protection for his/her prejudiced subjective right, in applying Articles 101 and 102 of the TFEU, the national courts perform a

[7] See Art. 15 of cited Regulation 1/2003.

specific function, which is different from the enforcement made in the public interest by either the Commission or the national competition Authority.[8]

From this perspective, the public and private actions strengthen, each in their own way, the overall effectiveness of the competition rules enforcement system in the single market. The two enforcement modes are characterized by a substantial diversity of objectives and goals, which is reflected, *inter alia*, on the level of powers assigned to the Authority and the Courts, on the specific modes and times of the action.

For example, only the national courts have the power to declare the nullity of a contract under Article 101.2 of the Treaty or to grant compensation for the pecuniary damage suffered by the victim.

Following the enforcement decentralization of Community competition rules, coordinating administrative and judicial activities has become even more relevant.

Thus, the issue of the priority role of administrative law, precisely consists in determining if and to what extent the national court that is called to apply Article 101 or Article 102 of the Treaty to a specific case, should consider itself (legally) bound by a previous decision of the administrative authority (national, Community or of another Member State).[9]

The issue of defining the priority relationship between administrative and judicial decisions can be considered internally (as in the case of a measured issued by a national authority with respect to that of the courts of the same Member State), or at the Community level (in the case of a measure issued by the European Commission compared to that of the courts of any other Member State), or at intra-Community level (in the case of the decision of a national competition authority with respect to that of the court of another Member State).

Community legislators are aware of these risks, so much so that Recital 22 of Regulation 1/2003 states that "in order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided".

Art. 16 of Regulation 1/2003 (entitled *Uniform application of Community competition law)*, codifies the rules developed by the Court of Justice in the *Delimitis* and *Masterfood* cases, and outlines the *Community* coordination mechanism between

[8] See judgment of the First Instance Court, 18 September 1992, T-24/90, *Automec vs. Commission,* [1992] ECR II-2223, paragraph 85.

[9] The issue is relevant, of course, for *follow-on* actions only.

the Commission's work and the action of national courts: the latter, in applying Article 101 or 102 of the Treaty, cannot make decisions that conflict with those already taken by the Commission.

Therefore, at Community level, if there is a previous Commission *Decision,* the uniform application of Articles 101 and 102 of the Treaty should be ensured by the fact that the national courts may not take decisions that are in conflict with the Commission's Decision (subject to the right to submit an application to the Court of Justice for a preliminary ruling on the validity or the interpretation of said Decision).[10]

At the internal, national level, the relationship between the decisions of the regulatory authorities and those of the national courts has only recently been addressed and solved, based on Directive 2014/104 on damages for infringements of competition law provisions.

Note, in fact, that the effective and uniform application of competition rules in the single market necessarily requires recognition at the intra-Community level of the binding force of national competition authority measures, provided that the measure *at issue* has definitive value, i. e. it can no longer be appealed.

Taking cue from the German legislation, which in recent years has made the most progress at European level on this specific issue and, specifically the reform of the Competition Law *(GWB),* Art. 9 of the aforementioned Directive 2014/104, entitled "Effect of national decisions", requires Member States to 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".

The purpose of this provision is, of course, to prevent the two Authorities (antitrust authority and ordinary courts) from reaching divergent or even opposite solutions; regardless, a decision taken in administrative proceedings intended to protect the market and competition produces binding effects also in court proceedings seeking to recover the damage suffered individually.

[10] Art. 16.1 of Regulation 1/2003 which states that "This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty". On the other hand, if no decision has yet been made by the Commission in proceedings which it has initiated, the national courts must assess whether it is appropriate to suspend the proceedings brought before them (art. 16.1 of Regulation 1/2003).

This requirement for a uniform assessment of companies' conduct in this field is also felt as regards decisions issued by a foreign regulatory authority; here, however, the solution is slightly different, in that the decision of the Authority although not binding on the court of another State, shall by the latter be assessed as *non-final evidence,* as a kind of rebuttable presumption: "Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties". (art. 9, paragraph 2, Directive 2014/104).[11]

4. Competition and consumer protection

The distinction between public and private spheres, between public and private interests, which underlies the public/private dichotomy is therefore increasingly blurred, less clear-cut.

This is because what was once considered as a predominantly public interest is today also a private interest and, conversely, what was once considered as a private interest is now also a collective interest.

This aspect is especially evident in the relationship between *competition and consumer protection*.

While we are used to consider the provisions on consumer protection as falling within the realm of private law, certainly influenced by the numerous contractual rules, control provisions over their clauses, protection approaches in favour of the weaker party, etc. there are nevertheless many aspects of this subject that cannot be classified just as easily.

[11] Actually, even before Directive 2014/104 and in the absence of a position taken by the law, the Supreme Court, confirming the independence of the civil courts with respect to the administrative authority, had recognized, especially in view of the remarkable specialization of the Italian Antitrust Authority and its unquestionable independence as an institution, that the authoritative character of its decisions may constitute the basis for the trial courts to formulate rebuttable assumptions regarding the ascertainment of competition rules. According to the Court, in order to prove that competition rules have been breached, the injured party has "the burden to attach [...] the administrative measure ascertaining the anti-competitive agreement [...] and it will be up to the court to deduce whether there is a causal link between such agreement and the alleged damage, including through high logical probability criteria or by means of presumptions, while not failing to assess the evidence provided by the insurer and aimed at disproving the presumptions or at demonstrating different causal factors [...]"; see Civil Court of Cassation, 2 Feb. 2007, section III., no. 2305, Ch. V.

This is reflected on what is widely considered as the dual role or, rather, the *dual function* of the Antitrust Authority.

Indeed, today[12] the Italian Antitrust Authority (AGCM) is also responsible for dealing with unfair commercial practices put in place by businesses against consumers, as incorporated in general terms and conditions or forms, templates and models prepared by companies, the vexatious nature of contractual clauses[13] as well as the recent provisions of Legislative Decree 21/2014[14] on consumer rights.

Now, while it is true that issues relating to the validity of a clause which is deemed vexatious, or relating to compensation for damage suffered by consumers or companies are entrusted to the ordinary courts, it cannot go unnoticed that the action of the administrative authority is also addressed to assessing contractual relationships, which may lead to the elimination of the effects that are contrary to law.

As regards unfair trade practices, for example, Directive 2005/29 states that each State is free to choose whether to entrust *enforcement* powers to the courts or to an administrative authority (art. 11, para. 1 of the Directive).

In our legal system (following the US example), responsibility has been entrusted to the Italian Antitrust Authority. This choice, made through legislative decree 145/2007, also confirms, with regard to this matter, the dual nature of competition rules which combine the protection of public interests (competition and the market) and private interests (consumers and the individual enterprises).

From the point of view of AGCM powers, it should be recalled that they are not simply to "*inhibit* the continuation of unfair trade practices but also to *eliminate the effects* of the unfair conduct" (art. 27, paragraph 2 of the *Consumer Code).*

Thus, it is undeniable that in carrying out the task entrusted to it, the Authority carries on an assessment of contractual, mutually binding relationships between individuals or between enterprises, which has inevitable repercussions on any civil action for damages for which the courts have jurisdiction.

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[12] More precisely with Legislative Decree 146 of 2 August 2007, implementing Directive 2005/29 *concerning unfair business-to-consumer commercial practices* which replaced Articles 18-27 *of* the *Consumer Code.*

[13] Art. 37- *bis of* the *Consumer Code,* introduced by art. 5, paragraph 1, decree law No. 1 of 24 January 2012, *urgent measures for competition, infrastructure development and competitiveness,* converted with amendments by Law 27 of 24 March 2012.

[14] Implementing Directive 2011/83.

Even more obvious is the reference of art. 37- *bis* of the *Consumer Code*[15] according to which "the Antitrust Authority ... declares the vexatious nature of the clauses included in contracts between businesses and consumers that are entered into through adherence to the general terms and conditions of contract or by signing forms, models or templates".

Hence, being empowered to examine whether contractual conditions significantly affect the balance of rights and obligations of the parties, the administrative authority and the administrative courts are given the authority to verify how negotiating activities are implemented.[16]

5. Conclusions

The arguments illustrated above show, first of all, that Antitrust law needs private law rules in order to express itself to its greatest potential. They also show that *Private Antitrust Enforcement* has to use public law in order to more effectively enforce private law and the protection of private rights.

Thus, *Antitrust* Law promotes public/private conjunction to increase its effectiveness and to more incisively achieve its objectives.

On the one hand there are private remedies (damages) that are used to enhance the effects of antitrust policy; on the other, there is an Antitrust Authority that intervenes in an individual relationship in order to determine whether that relationship gives rise to unfair or contrary-to-good faith conduct, or if the contractual balance is compromised, and to, then, correct the asymmetry between the parties.

Due to the complexity of the issues and their intertwining with countless and constantly changing rules, practices, needs and requirements, it is not easy to identify the cause of this phenomenon of "repositioning" of the rules of public/private law in the modern legal system.

In my view, we can venture a reply by stating that the strong socio political change experienced in recent decades, from World War II onwards, is at the origin of the described phenomenon.

A change that, moreover, has affected the position of the individual, of each person with respect to the public power, the institutions, politics, the economy and society in general.

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[15] Introduced by art. 5 decree law No. 1 of 24 January 2012.

[16] On the subject see V. Lopilato, Tutela pubblica e privata della concorrenza, in: G. Pellegrino, A. Sterpa (eds), *Giustizia amministrativa e crisi economica*, Rome, 2014.

In other words, the individual is becoming increasingly less of a subject and more of a citizen, increasingly driven to participate in the complex mechanism by which power is exercised, aware that his destiny as a person, citizen, consumer, investor, in short, his economic fate, is closely linked not only to the production of rules by its political representatives but also to the proper functioning of such rules.

A well-known Supreme Court ruling confirms this new awareness and emblematically sums up the sense of change. I am referring to the Court of Cassation judgment *no. 2207 of 4 February 2005,* which states that "Antitrust Law 287/90 is not just a law for enterprises, it is the law of market players, i. e. for anyone who has such an interest in preserving its competitive nature that they can allege a specific damage as a result of a breach or reduction of such competitive nature."

In this evolutionary process, Community law has definitely played the main role.

Suffice it to say that the rules aimed at creating a single market and, therefore, *primarily*, the competition rules as well as the ensuing rules on the free movement of goods, persons, services and capital, as systematically formulated in the Treaty and as interpreted by the Court of Justice, are addressed not only to the States nor only to individuals, but to them jointly.

As a result, European jurists got used to the idea that a rule can be applied as much "vertically" as "horizontally", as much as an organizational/ruling provision as a provision that regulates individual relationships.

Hence, rules that, just as market safeguard rules, inherently overcome the distinction between public and private spheres.

In essence, Antitrust law teaches us that the notions of State and market, authority and autonomy, public and private are not necessarily in opposition but they complement each other and can interact to achieve shared purposes.

In this sense, it is increasingly difficult to pinpoint a clear-cut boundary between public law and private law in the antitrust area, assuming such area still exists.