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I. INTRODUCTION

The European Commission believes that—given the procedural asymmetries between plaintiffs and defendants—public enforcement of antitrust law by national competition authorities may have a significant impact on the actual possibility of claimants to successfully bring forward private lawsuits. Further, the absence of a clear probative value of NCAs' decisions in such follow-on cases today is deemed to represent one of the obstacles to an effective system of antitrust damages actions at the Member States level.

As a remedy thereto, the current draft of Article 9 of Commission's Proposal for a Directive on actions for damages ("Proposal"[2]), if enacted in the European Union, would require Member States to:

> ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, [courts] cannot take decisions running counter to such finding of an infringement.

I believe that this provision seriously undermines rights of defense in civil antitrust proceedings. Given the unique administrative model of enforcement implemented by most European jurisdictions, the above statutory rule risks jeopardizing due process and right to a fair trial in the context of the private enforcement stage; to wit, in a judicial setting where defendants usually face monetary consequences potentially more significant than the already increasingly high sanctions levied by antitrust agencies.

In this note I shall try to explain why.

II. THE INTERPLAY BETWEEN PRIVATE AND PUBLIC ANTITRUST ENFORCEMENT: THE RATIONALE BEHIND ARTICLE 9

Article 16 of Regulation 1/2003 stipulates that the Commission's findings of infringements of European antitrust law (Articles 101 and 102 TFUE) are binding upon national courts in follow-on actions, so that the latter cannot take decisions running counter to the rulings adopted by the Commission.

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[2] *Proposal for a Directive of the European Parliament and of the Council 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*, COM(2013) 404 final - 2013/0185 (COD).

Article 9 of the Proposal not only confirms such an approach in relation to decisions taken by national competition agencies ("NCAs"), but reinforces and complements it: throughout the European Union, NCAs' final decisions—under EU and national antitrust law[3]—would become binding in national follow-on actions.[4]

The idea that findings of infringements by an NCA should be taken as *res judicata* in follow-on actions for damages anywhere in the European Union is modeled after the same rationale embedded in Article 16 of Regulation 1/2003. The underlying objective is that a strong interaction between public and private enforcement of antitrust law is beneficial to the overall administration of competition rules. Indeed, as the U.S. experience shows, protection of victims' rights in private action increases deterrence and, thus, compliance.

The principle, as such, is not new. In the 2005 *Green Paper*[5] and the ensuing 2008 *White Paper*[6] on damages actions for breach of antitrust rules, the Commission had already envisaged several options aimed at alleviating plaintiffs' burdens of proving their cases in civil actions for damages, the goal being to use findings made in the "public" enforcement proceeding so as to ease plaintiff's case in private antitrust litigation.

In the *Green Paper*, for example, the Commission had, for the first time, suggested that a provision had to be introduced in Member States' legislations pursuant to which infringement decisions by the NCA were to be made binding on civil courts or, alternatively, that a reversal of the burden of proof was justified where such an infringement decision existed.[7]

According to the Commission, granting binding effect upon NCA decisions would ensure a more consistent application of Articles 101 and 102 TFEU by different national bodies in any given EU jurisdiction, to the benefit of increased legal certainty. Moreover, binding effect would significantly strengthen the effectiveness and procedural efficiency of actions for antitrust damages, because it would prevent a re-litigation of the facts in the follow-on action. In the context of the latter, the civil judge would be essentially left with the task of assessing causation and quantifying the amount of damages to be redressed.

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[3] As a matter of fact, while the *White Paper* attributed binding nature only to national decisions applying EU antitrust law, the Proposal states that decisions taken by NCA under their national competition laws are also to be binding upon national judges in follow-on actions: "The same should apply to a decision in which it has been concluded that provisions of national competition law are infringed in cases where national and Union competition law are applied in the same case and in parallel" (*See* Recital 25 to the Proposal).

[4] Article 9 refers to "final infringement decision(s)" by national competition authorities or by review courts. Article 4(1), when defining terms used in the Proposal, states that "'final' infringement decision means an infringement decision of a competition authority or review court that can no longer be reviewed." Article 9 refers only to infringement decisions, ruling out—e.g.—closing investigations as a result of commitments being given by the parties and being accepted by the NCA.

[5] COM(2005) 672, December 19, 2005.

[6] COM(2008) 165, April 2, 2008.

[7] *White Paper*, at 5 states that "the Commission sees no reason why a final decision (….) taken by an NCA (…) and a final judgment by a review court upholding the NCA decision or itself finding an infringement, should not be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases."

In summary, then, the scope of Article 9 of the Proposal would be to "enhance legal certainty, to avoid inconsistency in the application of those Treaty provisions, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers."[8]

According to the Explanatory Memorandum accompanying the Proposal, Article 9 proves to be a necessary procedural instrument in private antitrust enforcement because the possibility for the infringing undertaking to re-litigate the same issues in subsequent damages actions would be otherwise inefficient, cause legal uncertainty, and lead to unnecessary costs for all parties involved and for the judiciary.[9] If, in the context of a follow-on action, defendants were to be allowed to call into question the existence of the infringement found by an NCA, this would lead to a retry of the case, with an inevitable duplication of costs, deferred justice, and increased imponderability for the victim's action for damages.[10]

III. THE CRITICISM OF THE PROPOSAL

I think a two-fold criticism is to be raised against Article 9.

On the one hand, from a practical perspective, it is not a remote fear that—despite the harmonizing purpose of the Proposal—such a rule may become the subject matter for lawyers' procedural tactics aimed at "arbitraging" upon the various judicial systems. For example, a decision finding an infringement of antitrust law rendered by—let's say—a French NCA would automatically bind an Italian or German court that was to be subsequently requested by plaintiffs to adjudicate the issue of damages in a related follow-on action.

This could open the door to forum-shopping strategies. One could, for example, think of a bifurcation of public and private enforcement proceedings so as to: (a) trigger public enforcement proceedings in jurisdictions known for being "plaintiffs friendly" and/or having a system of appellate judicial review which leaves ample deference to NCA decisions finding an infringement (e.g. Italy); while, once a decision is obtained, (b) private enforcement actions would be lodged before national courts which offer highest chances of maximizing recovery of damages (e.g. the United Kingdom).

On the other hand, from a purely legal point of view, I see a serious risk that the combination of a public enforcement stage, which is administered by an NCA and not by judges in most Member States, together with the binding nature of an NCA's decisions, could seriously undermine rights of defense also at the follow-on private antitrust phase.

On this aspect, the Commission seems to be confident that no material threat to due process may ensue. As regards the protection of procedural rights of defendants, the Commission indeed maintains that the adoption of Article 9:

> does not entail any lessening of judicial protection for the undertakings concerned, as infringement decisions by national competition authorities are still subject to judicial review. Moreover, throughout the EU, undertakings enjoy a comparable level of protection of their rights of defence, as enshrined in Article

[8] Recital 25.
[9] At 9.
[10] At 6.

> 48(2) of the EU Charter on Fundamental Rights. Finally, the rights and obligations of national courts under Article 267 of the Treaty remain unaffected by this rule.[11]

Yet, when the assessment of the facts and evaluation of the legal implications stemming therefrom follows the EU model (independent agency subject to multiple layers of judicial review by ordinary or administrative courts), the attribution of a binding nature to an NCA's decisions—as Article 9 of the Proposal suggests—should be measured against the extent of such judicial review; and to how, in practice, the latter review is run by courts in their daily activity.[12] If appellate judges are empowered to merely monitor the legality of NCA's decisions, lacking (or being reluctant to exercise) the ability to fully second-guess or retry *ex novo* the case, then the right to a fair antitrust trial at the "upstream" public enforcement stage is not wholly safeguarded.

It goes almost without saying that the more appellate judges refrain from accurately reviewing NCA decisions and effectively re-examining and re-evaluating the evidence and the applications of the legal standards, the less protection is afforded to defendant undertakings, and that a proposal like Article 9 risks spilling these concerns over possible follow-on private actions.

In other words, if Article 9 were to be implemented in Europe, in most jurisdictions defendants would face a vicious procedural circle, pursuant to which their right to a fair trial would be denied (or, at least, not wholly safeguarded) both at the administrative level as well as at the subsequent civil litigation stage that typically ensues thereafter. If competition decisions are, to a smaller or larger extent, immune from judicial review on the merits, damages awarded by a civil judge would become the poisonous fruit of the poisonous administrative proceeding they relate to.

The issue is somewhat novel. Until a decade ago, the end of the antitrust "public" proceeding (or of the relative appellate phase) marked the end of antitrust litigation; nowadays, the exhaustion of public enforcement triggers the beginning of private lawsuits.

True, the system of public antitrust enforcement is, in principle, legitimate, as Article 263 TFEU provides for a review of mere "legality" against the decisions of the Commission,[13] while Article 261 TFEU and Article 31 of Reg. 1/2003 provide for unlimited jurisdiction only in relation to fines.

Yet, it is widely perceived among practitioners (and some courts) that the model of European antitrust enforcement raises problems; even more so if one considers the increased

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[11] Explanatory Memorandum, at 16.

[12] As AG Sharpston stated in *KME*, what matters is not the form, rather the substance, of antitrust judicial review: "[W]hat is of greatest importance is the way in which the General Court actually carried out its review, the way in which it described that review being less relevant…." (Opinion of Advocate General Sharpston delivered on 10 February 2011, at ¶. 73.

[13] In his disssenting opinion in *Menarini Diagnostics s.r.l. v. Italy*, (ECtHR, Sep. 27, 2011), Judge Pinto de Albuquerque implicitly suggested that even a more radical reform of the EU competition model would be required, so as to avoid the "usurpation of judicial prerogatives" by antitrust authorities. In his opinion, appellate antitrust courts should be able to retry *ex novo* antitrust cases, because "Sur le plan des principes, l'application des sanctions publiques déborde les fonctions traditionnelles de l'administration et doit relever d'un juge. Si la vérification des conditions de fait de l'application d'une sanction publique pouvait être réservée à un organe administratif, sans un contrôle postérieur rigoureux de la part des tribunaux, lesdits principes auraient été totalement faussés."

level of enforcement across Europe, coupled with the seemingly unstoppable upward trend in fining policies.

A question then ensues: Without prejudice to the issue of whether it is time for a revision of Article 263 TFEU, is it really opportune and judicially safe to strengthen the effects of NCAs' decisions so as to make them binding in follow-on actions? Said in other terms, is it really sound lawmaking to be duplicating these concerns at the Member States' level?

My simply answer is: No—at least as regards those national jurisdictions which do not allow for antitrust enforcement to be administered by a full-fledged court in the first place and/or which do not afford for actual full jurisdiction on the merits by appellate courts.

Italy is a good example thereof.

Public antitrust enforcement in Italy is entrusted to an independent agency, the *Autorità Garante della Concorrenza e del Mercato* ("Autorità"). The Autorità belongs *latu sensu* to the public administration and its decisions are considered to be administrative in nature. As such, rulings of the Autorità are subject to review before Italian administrative courts, namely the *Tribunale Amministrativo del Lazio* (the lower level administrative court, seated in Rome, "*Tar Lazio*") as court of first instance, and the *Consiglio di Stato* (likewise based in Rome) as the ultimate appellate judicial venue.

Now, the Italian system of judicial enforcement is shaped in perfect coherence, at least from a statutory perspective, with the EU model:

1. **Judicial review on the legality of the finding of an infringement**: On appeal, *Tar Lazio* and *Consiglio di Stato* rule on the legitimacy of decisions of the Autorità finding an infringement of antitrust law. They examine whether the decision of the Autorità is factually supported and legally sound. The review thus undertaken is on the legality of the administrative act itself, i.e., the decision of the Autorità. The judge does not retry the case, nor substitute his/her decision for that of the Autorità but, if he/she thinks that the latter is procedurally or substantially flawed, annuls it.

   Akin to the review undertaken by EU Courts vis-à-vis Commission's decisions, this is usually referred to as "extrinsic review," since it is addressed to the legality of the administrative act rather than re-examining the "intrinsic" merit of the underlying subject matter.

2. **Unlimited jurisdiction as to fines**: Conversely, Italian appellate administrative courts have *unlimited jurisdiction on fines*, meaning that—just as occurs under Article 263 TFEU and Article 31 of Regulation 1/2003—they may cancel, reduce, or increase the sanctions levied by the Autorità. This review therefore goes to the merits of the antitrust decision, calling into question the assessment of a fine and/or the amount thereof. Accordingly, this action is commonly referred to as "intrinsic review."

Initially, decision reviews of the Autorità by appellate administrative courts were confined to a tripartite test of legality (competence, legality, misuse of powers). Judges on appeal would screen the legality of decisions rendered by the Autorità by examining the evidence

gathered by the latter during the antitrust proceeding, checking the reasoning given in the decision, and—against those elements—ascertaining whether or not the opinion of the Autorità was manifestly contradictory, whether the legal reasoning embraced in the decision was openly unreasonable, or whether the decision was based on erroneous assumptions of fact.

In other terms, judges were asked to review whether or not the administrative decision of the Autorità had seriously misapplied the law or grossly misperceived the facts pursuant to generally applicable principles of competence, legality, and misuse of powers. Decisions could be challenged before administrative judges if a manifest error was shown to have tainted the decision of the Autorità or its proceedings.

Across the years, Italian jurisprudence evolved, at least theoretically bringing judicial review of antitrust decisions to a further stage. Courts therefore embraced the idea that appellate judges could re-consider how the Autorità made use of the so-called undefined judicial concepts (i.e., complex economic assessments under the EU jargon); and that, as a consequence, judicial review by administrative courts could not be constrained in relation thereof: "[A]ppellate judges can review without limits all technical conclusions reached by the Autorità, including those related to market definition."[14]

However, in recent times, there seems to have been a retreat from these positions. The Council of State has swung the pendulum back, and in a number of recent decisions has refrained from reviewing the findings of the Autorità, deferring to a greater degree to the Autorità and its evaluations.[15]

If that is the prospect looming on the horizon, Article 9 would certainly alleviate plaintiffs' rights in follow-on actions, but at the expense of due process and of defendants' rights.

IV. CONCLUSIVE REMARKS

As already stated, it is an established principle that public and private antitrust enforcement should complement competition law administration. And it is likewise accepted that, to promote utmost respect of competition laws, protection of rights of defense may suffer certain restrictions, at least if seen against the classic model of enforcement (and defendants' protection) afforded under criminal law.

The fact that a single NCA may find an infringement, although technically embracing the dual role of prosecutor and judge, is already a very significant threat to due process. Article 9 magnifies such an effect.

The Commission is, in good faith, pursuing the goal of uniformity and enforcement-efficiency. That, in and of itself, is welcome. But, in a judicial system of law, such a pursuit cannot come to the point that "the (legitimate) ends justify the (illegitimate) means." If reaching certain goals implies any serious violation of rights of defense then we should carefully debate whether EU legislation is going too far. Moreover, as recent litigation shows, the role of antitrust plaintiffs is not necessarily played by individual consumers but, more often than not, by large corporations who claim to have suffered damages as a result of anticompetitive conducts. Therefore, some of

[14] *Consiglio di Stato*, Judgment of Feb. 8, 2007, n. 515.
[15] *Consiglio di Stato*, Judgment of May 21, 2012, n. 2575.

the arguments raised by the Proposal for justifying Article 9 are probably misconstruing the reality and, consequently, affording plaintiffs additional protections they may not really need. Nowadays, antitrust actions are not necessarily the battle of David against Goliath, but involve equally big and financially strong entities.

Finally, if the enforcement of antitrust law is given the ancillary procedural tools that the Proposal is envisaging—especially, but not only, with regards to Article 9—one should probably consider putting on the table an even further provoking thought: Wouldn't Europe be more coherent by adopting a full-fledged criminal model of enforcement?

Just as Schumpeter noted that brakes on cars enable us to drive faster, one sometimes has the impression that the fact that antitrust law is not criminally enforced at the EU level and in most Member States paradoxically works to the detriment of defendants' rights. In a criminal law setting, companies would face criminal trials but would likewise be given criminal law protections. Plaintiff's rights to sue shall be safeguarded indeed. But defendants must be granted a fair trial and the opportunity to litigate each and any aspect of their alleged liability. By tipping the scale in favor of plaintiffs in private enforcement actions, Article 9 amounts to a sort of procedural "affirmative action" statute: as such, it is at odds with due process.