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Theory, legislation and practice of economic disputes resolution in the eu countries' courts

di Maurizio Mensi*

Summary

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Abstract

This article provides an overview on commercial dispute resolution mechanisms across Europe. To this end, it provides a description of the mechanism applied in a selected number of countries and for some specific matters (with particular reference to the review of regulatory and competition authorities' decisions).

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1. European Justice Scoreboard

The legal system effectiveness is key to promote economic growth.

Among the 185 countries examined by *Doing Business* (a project of World Bank, which analyses the regulatory and judiciary systems of different countries), 87 of them have a commercial court, section, or specialized judges that deal with commercial litigation.

Some studies show that the existence of specialized courts improves the efficiency of justice, since these courts can resolve commercial disputes more rapidly at lower costs (for example, judges could become more expert in the management of the trade disputes). Often the commercial courts apply procedures intended to facilitate a quicker resolution of the case. Data from *Doing Business* show that, in countries where courts or specialized commercial sections are present, disputes are resolved five months earlier than in other countries.

To this end, on March 27, 2013 the European Commission launched a new tool to promote the development of effective legal systems across Europe: the "*European Justice Scoreboard*", which is intended to provide objective, reliable and comparable data on the functioning of the legal systems in all the EU 27 Member States.

The 2013 European Justice Scoreboard is focused around business-friendly parameters. In particular, it employs indicators which show how commercial disputes are dealt with by the courts. It also covers administrative courts, as they play an important role in a business environment, for example, with regard to the review of decision adopted by regulatory and competition authorities (See infra).

2. *Locus standi* before courts (EU, civil, administrative)

Locus standi is a pre-requisite to bring an action before civil and administrative courts in most countries, as well as in the European Union legal system.

In general, only natural and legal persons have standing, provided they have a *direct personal interest in the action*. Otherwise, the action is declared inadmissible *ex officio* by the court.

In some countries *locus standi* of public bodies is subject to specific rules. For instance, in France public authorities have standing only before the administrative courts. In other countries, public authorities have usually standing before civil (and commercial) courts whether they act in their private capacity and not in the exercise of public power (*imperium*). In the latter case, they usually go before administrative courts.

3. The Commercial Courts in France, Belgium, Germany, England and Wales, Spain, Italy

In the European history, the first commercial courts appeared in Italy during the middle-age. These courts had jurisdiction on trade disputes and applied the merchants' own customs. They dealt with commercial disputes within the framework of the guild, applying summary and inexpensive proceedings.

A genuine model of commercial jurisdiction emerged only in the 16th century in France, when the state tried to develop a business-friendly environment. The 1807 Commercial Code brought mere adjustments to the *Ancien Regime*'s system. During the 19th century the economic evolution and the development of manufacturing and industrial activities, and later the banking system, called for the constant need to adjust the system. The French system has been used as a model in continental Europe. Follows an overwiev on the current systems of a selected number of European countries.

France

Under French legislation, the main criterion for allocating the cases is the dispute's economic value.

The monocratic "local district" court ("*Tribunal d'Instance*") is competent for disputes up to a value of € 10.000; the higher court ("*Tribunal de*

Grande Instance") is competent for cases above that threshold and it is composed generally by a panel of three judges (or one only judge, if the proceedings at issue is a "*référé*", *i.e.* an urgent procedure, or for disputes falling within the jurisdiction of the Judge of commercial rents, or if the parties to the case agree).
Other supplementary criteria allocate the competence between these two courts. For example, patent and trademark related matters are dealt with only by some "*Tribunal de Grande Instance*", whereas the "*Tribunal d'Instance*" has exclusive jurisdiction over certain specific disputes, such as those between landlords and tenants.

Other bodies are in charge of economic disputes in France. For instance, the "*Conseils de Prud'Hommes*", partially composed by lay men, have exclusive jurisdiction over all conflicts between employers and employees. The tribunal of proximity ("*Juridiction de proximité*") has jurisdiction in civil cases, for personal lawsuits or actions related to movables up to a value of €4.000.

The commercial courts, composed by non-professional judges, have exclusive jurisdiction over all disputes between merchants, banks or companies (including unfair competition disputes) and for commercial transactions. 132 Commercial Courts, composed by about 3200 volunteers (traders, entrepreneurs), manage each year between 170 and 200 thousand litigation. In addition, the Registry of the commercial courts is in charge of the commercial register, which collect and disseminate information about merchants, individuals or corporations.
These rooms and courts are composed by a judge or by two judges appointed under the same conditions as those of the commercial courts. Finally, in the districts of the metropolitan area where there is no commercial court, it is the "Tribunal de Grande Instance" competent to deal with business issues.

Belgium
Belgium is the only EU country with specialized commercial courts presided by professional judges (conversely French commercial courts are composed by lay men). Honorary judges are appointed by the King and could not carry-on other elective public functions.
More precisely, Belgium has 27 ordinary courts of first instance and 263 specialized courts, including 23 commercial courts.
The Belgian commercial courts have a broad jurisdiction (See: Art. 573 of the Belgian Judicial Code). In particular, these courts settle commercial disputes between traders which do not fall within the competence of the "small claims judge" or of the "courts of police". In addition, the commercial courts have special jurisdiction on some disputes between not merchants (See: Art. 574 of the Judicial Code). As in Germany and France, the Belgian commercial courts are in charge of the trade register.

Germany
In Germany, the situation is very similar to France: the *"Amstgericht"* (municipal) judge is monocratic, while the *"Landgericht"* (regional) court is composed by three judges. The allocation of cases depend on the value of the dispute.
There are 777 general courts of first instance and 256 specialized courts of first instance, including 119 labour courts, 51 administrative courts, 68 insurance and/or social welfare courts, and 18 other specialized first instance courts.
Usually, in the regional courts are present commercial chambers. These chambers are composed by a professional judge and two elected (and unpaid) judges. Disputes are referred to these commercial chambers on application of either party.

England and Wales

In England and Wales there are 627 courts of first instance, with general jurisdiction, included 219 county courts.

The county courts, often referred to as "small claims courts", deal with civil matters such as: debt repayment, including enforcing court orders and return of goods bought on credit, personal injury, breach of contract concerning goods or property, family issues such as relationship breakdown or adoption, housing disputes, including mortgage and council rent arrears and re-possession.

The high courts and the courts of appeal deal with more important civil disputes. The most important commercial disputes are adjudicated by the tribunal of commerce, special section of the division of Queen's bench in the high court. The judges of the commercial court are former lawyers specialized in commercial law. Often, spontaneously or under request of the judge, the parties recurr to mediation or arbitration.

Spain

Spain's judicial organization is composed by:

1. monocratic courts: "small claims judges", courts of first instance, mercantile courts, criminal courts, administrative courts, social courts, juvenile courts; and
2. collegiate courts: provincial courts, high courts, national court, and supreme court.

Monocratic courts (save "small claims judges", located in municipalities) are at the top of legal districts, while collegiate courts operate in the provinces, the Autonomous Regions and at the national level in the case of the Supreme Court and the National Court.

Italy

In Italy, disputes are allocated to ordinary (civil) courts or to administrative courts, depending on the subjective position of the plaintiff.

The administrative judge is competent for the protection of legitimate interests (or legally protected interests). Legitimate interests refer to the exercise of public power, and regard the proper exercise of administrative powers *vis-à-vis* the citizens. Hence, administrative courts review the acts adopted by the public administration, and are crucial for the business, since they are also competent for disputes related to public services and for the review of Independent Authorities' acts. In those latter cases the administrative judges have exclusive jurisdiction.

In some cases (*i.e.*, in the sector of electronic communications, See: Arts. 23 and 24, Leg. Decree No. 259/2003) disputes between operators may be also resolved by the competent Independent Authority under an alternative dispute resolution mechanism.

The civil judge is competent for the protection of individual rights (personal and economic rights of private and legal entities).

The distinction between individual righst and legitimate interests is present in other jurisdictions in continental Europe (*e.g.*, France, Belgium). However, there is no such distinction in EU Law. The qualification of subjective juridical situations under national law is indifferent for EU Law, being the target of the latter the effectiveness of the jurisdictional protection.

4. The case of Italy: the new specialized Sections for Undertakings at Tribunal of first instance and Court of Appeal (Law No. 27/2012

In 1888, after a long debate began immediately after the unification of the country, the special commercial courts, which had been introduced during the Napoleonic period, were suppressed and their competence was allocated to ordinary civil courts.

In Italy, the value of the dispute allocate the jurisdiction of first instance between the "small claims judge" and the tribunal. Most important

disputes are allocated to special sections, including disputes relating to companies or bankruptcy.
There are 1.231 courts of first instance with general jurisdiction: 165 tribunals, 220 tribunal - detached branches, 842 "small claims judges". In addition, there are 87 specialized courts of first instance, including 29 juvenile courts.
There are 26 courts of Appeal, 3 court of appeal-detached branches, and 29 criminal courts. There is one Supreme Court located in Rome.
The recent Law Decree No. 1 of 2012, converted into Law No. 27/2012, which amended the Legislative Decree No. 168/2003, expanded the jurisdiction of the pre-existing Tribunals' 12 specialized sections on industrial and intellectual property matters by granting them competence over all commercial disputes starting from March 20, 2013.
The 12 specialized sections are composed only by professional judges and are based in main tribunals and courts of appeal (*i.e.*, Bari, Bologna, Catania, Firenze, Genova, Milano, Palermo, Napoli Roma, Torino, Trieste, Venezia). The President of each tribunal/court of appeal assigns the judges to these specialized sections, on the basis of their preferences, attitudes and specialization.

Specialized sections are now competent for disputes arising from: unfair competition, IP, class actions against companies, disputes between partners (or between shareholders and the company, or relating to shareholders agreements), transfer of company shares, and public procurement (in case of civil jurisdiction). New sections are not competent for banking and financial services, bankruptcy, and tax matters, which continue to be dealt by the ordinary courts. The President of the court could however assign to the new sections other types of disputes.
In parallel, the Legislator has increased legal fees in order to limit abuse of process. Some commentators have complained that the level of legal fees is too high and could limit access to justice.
Overall, the aim of the recent legislative intervention has been establishing a business-friendly system of justice, and improving the legal system efficiency by means of specialized judges, which could rapidly deal with complex disputes and ensure uniformity and consistency in the application of the law.

Currently, to reduce the courts' workload and speed-up the solution of disputes, the government is evaluating the possibility to impose a mediation attempt as a pre-requisite to bring an action to court.

According to Doing Business in Italy 2013 (World Bank Project), in the Italian judicial districts, where the number of pending cases is relatively high, there is less availability of credit, the average interest rate is higher and the rate of failure is greater.

In the 13 Italian judicial districts examined by *Doing Business*, the resolution of a "standard" trade dispute requires an average of 41 trial phases, lasts 1400 days and costs around 26.2% of the litigation value. The Italian performance is well below other EU countries, where the average is 32 procedural steps in 547 days, with a cost of around 21.5% of the value of the dispute (for instance, the resolution of a dispute represents 9.7% of the value in Luxembourg, 14.4% in Germany and 17.4% in France).
In Italy, legal fees are the main component of costs: they amount to 17.2% of the value of the dispute, considerably more expensive than in Germany (6.6%), France (10.7%) and Spain (12.7%). Until March 2012, attorneys' fees were determined by the bar association.

There are however significant differences across the performance in the country. In Turin (North-West) a dispute is resolved in 855 days at a cost of 22.3% of the value of the dispute,

while in Bari (South), for example, are required 2.022 days at a cost equal to 34.1% of the litigation value. The same type of process would last 390 days in France, 394 in Germany and 510 in Spain.
The World Bank report stresses the need for a reform of the civil justice system in Italy, and suggests to apply solutions adopted in other countries with similar problems (*e.g.*, innovative case management systems, monitoring of judges activities and workload, methods for the reduction of backlog cases, promotion of e-justice, and greater specialization of the courts).

5. Best practices in Italy

In 2001, the President of the Turin court launched the *"Strasbourg Program,"* a plan intended to reduce the backlog and to quickly resolve all cases still pending after three or more years.
The President has given three major directives to judges and registrars: 1) to give priority to elder cases, 2) to physically classify and label all the files ("targatura") on a chronological basis, and 3) to follow the principle of "*first in, first out*". The President has also adopted a set of guidelines intended to encourage judges to play a pro-active role during the trials, to draft short and concise judgments, to set a timetable for the proceedings at the first hearing, to prefer shorter hearings and oral reports to the exchange of written briefs. In addition, the President has defined individual goals for judges and has monitored their performance. Following the introduction of those practices, in 2010 the cases older than three years were only 5% of all pending cases in Turin. Turin has become a "*best practice*", and in July 2011 the Ministry of Justice ordered all courts to present a plan for the reduction of the backlog on the basis of its example.

In the Milan court, telematic process for injunctions has proved very successful and its use has been extended throughout the country. Telematic process allows the production of documents online, electronic communication between the parties and the court, and the electronic exchange of official documents and other features.

In sixteen states around the world commercial litigations are in digital format and the management of the case by the court is automatic. The Republic of South Korea is a good example. Since 2006, it has extended the use of digital solutions in courts or "*e-courts*" (digital courts), and the judges have benefited from the adoption of telematics systems to provide access to a more precise electronic registers and to record the hearings. Since May 2011, lawyers may bring a litigation in a digital form before the civil courts. Thanks to the e-court program, legal documents can be submitted on line, and the decisions records of the court, including the judgments, can be accessed remotely at any time.

6. The procedure

Most of EU countries follows the same basic rule: a legal action is brought before the court where the defendant is domiciled, or where a legal entity has its principal place of business (France) or it is registered (Germany). When there are several defendants, the plaintiff is free to choose the jurisdiction of any of them, often subject to certain conditions.
In contractual disputes and tort matters, the same rules apply: what matters is the place of delivery of the contractual item or service (France and Germany), and for torts the place where the tort was committed or where the damage was suffered.
In Germany it is also possible to bring an action before the court of the place of "habitual residence" (for students or workers), or where the assets of the defendant are located, of where (succession matters) the deceased was domiciled.

Subject to any exclusive jurisdiction, for commercial litigation parties could also agree *inter se* a different forum.

7. National courts as "Guardians" of EU Law: Opinion No. 1/09 of the European Court of Justice

On March 8, 2011, pursuant to Art. 218 of the Treaty on the Functioning of the European Union ("TFEU"), the European Court of Justice (sitting in full Court) delivered the Opinion No. 1/09 on the compatibility of the Draft Agreement creating a unified patent litigation system with the Treaty on the European Union (TEU) and the TFEU.

The Opinion is of paramount importance because the European judge emphasises the role of national judges in the EU judicial system. The Opinion shows how fundamental the position of national courts has become in the European integration process within the framework of the preliminary ruling procedure. Their cooperation with the ECJ nowadays amounts to being an "essential" character of the EU legal order.

First, according to ECJ, as for EU trademark, the jurisdiction could rest on national courts. In this judiciary model, Community trademark disputes are submitted to "Community trademark courts", that Member States are obliged to set up in their territories pursuant to Regulation No. 207/2009 (Articles 95 ff.).

As a result, national courts would rule on infringements and validity disputes on EU patents for the whole territory of the Union (or just for the territories of the Member States participating to the enhanced cooperation).

In comparison to previous case law, the European judge provided a new reading of Art. 19(1) TEU, as a provision referring also to national courts. In its interpretation it requires Member States to ensure that the right to effective judicial protection is duly respected when Member States set up judicial remedies for issues covered by EU law. It is for the Member States to establish an effective system of legal remedies and procedures that ensure respect for the right to effective judicial protection.

8. Judicial Review in the commercial context

The judicial review of regulators' acts is also key for business. An increasing number of governmental departments and independent agencies/authorities oversees the efficient working of different economic sectors, such as TV and radio broadcasting, financial services, public utilities, banking, trade and industry, agriculture, and the gaming industry. These bodies make decisions, which may have far reaching consequences on the respective markets.

Independent authorities have no immunity from the rule of law. Executive decisions adopted by these authorities may not only alter the operation of private business, but they may also substantially affect the position of individuals who should be entitled to test their rights and obligations against the legal frameworks of each economic sector. This has significantly enhanced the role of the courts as the guardians of law and protectors of individual rights.

9. The liberalization of economy by National Regulatory Authorities (NRAs)

States often play a dual role in the economy - market regulator and commercial operator - particularly in the telecommunications, energy, trasports and water sectors. The State could thus be often a major market player and an arbitrator.

To tackle this issue, from 1990, EU law has requested a full administrative separation of responsibilities for ownership/management of public companies (Ministry of Economy and Finance) and for market regulation, assigned in every Member State to NRAs. This responsibilities' separation is key for creating a level playing field for public and private companies and for avoiding distortion of competition. Nonetheless, the "State-entrepreneur" is still strongly present in European countries, as if it had to

play a ''permanent'' role in the country's development. Anyway, it has to respect competition law and State aid rules, in order to avoid anti-competitive distortions.
In the EU, network industries' liberalization has thus been accompanied by the creation of national regulatory authorities (NRAs). NRAs are part of a specific institutional model which was deliberately chosen to bolster EU liberalization policy: they are meant to be independent from market players and, to a large extent, from national legislatures and executives.
Given the relevance of the regulated sectors, NRAs play a relevant role in the economies of EU Member States. From a legal and political perspective, however, NRAs do not and cannot exist in a *vacuum.* NRAs must fit within the existing legal order, which implies that they should be accountable for their actions both politically – through mechanisms which respect their independence – and legally – through appeals and judicial review of their decisions.
Judicial review is intended to submit the actions of the NRAs to the supervision of courts, as it is the case for the rest of the administration. The review of NRA decisions is a matter left to Member States.
Just to give an idea, in Italy there is a variety of regulatory bodies.

COMPETITION
- Competition Authority (Law No. 287/1990)
-

REGULATION
- Authority for Energy and Gas (Law No. 481/1995)
- Authority for Communications (Law No. 249/1997)
- CONSOB - financial market authority (Law No. 216/1974)
- Privacy and Data Protection Authority (Law No. 675/1996)

10. The enforcement and review of NRAs decisions

In practice, the harmonization of substantive law at EU level has greater influence than the diversity of national procedural laws. Accordingly, the degree of divergence between the Member States is more limited than one might have expected at first sight. Furthermore, it is also apparent that Member States have by large taken a horizontal approach to the enforcement and review regimes: we may observe that solutions tend to converge across sectors and Member States.
Enforcement and review regimes of NRA decisions must find a balance between three policy objectives:
1) the protection of market players' and interested parties' rights,
2) the regulatory regime's effectiveness, and
3) the enforcement and review process' efficiency.

11. Italian NRAs characteristics

In the Italian experience, NRAs *inter alia* regulate access to market, ensure services universality and quality, supervise companies' financial stability, set service tariffs, investigate on possible licensees' misbehavior, and rule the repeal of licences or pecuniary sanctions pending judiciary appeal by faulty companies.
NRAs are thus in charge of a variety of objectives. For instance, the Authority for electricity and gas (AEEG, Law No. 481 of 1995) and the Authority for Communications (AGCOM, Law No. 249 of 1997) have been created with two overriding objectives: introduce liberalization, and guarantee cultural, political and social pluralism in the media sector .
Every NRA is governed by a specific law (there is not a "framework" law for all NRAs), as there are different EU directives on the specific sector- market.
Their Members (in most cases, 3 or 5, including the Chairman) should be independent and professionally competent in the sector. Their man-

date is for 7 years not renewable. Once designed, members cannot be removed by Government, except for serious reasons.
Members of NRAs are appointed in some ways, albeit almost always with the intervention of the Parliament.
Members of Consob (the financial regulator) (3 members and the Chairman) are appointed upon proposal of the President of the Council of Ministers, while those of the Competition Authority, the Authority for the Supervision of Public Contracts (3 members and the Chairman) and the Authority for the Protection of Personal Data (3 members and the Chairman) are appointed by the two Spokespersons of the Parliament.
Members of the Authority for Electricity and Gas (4 members and the Chairman) are appointed by the Spokespersons of the Parliament, after advise by the Council of Ministers, upon proposal from the Minister responsible and after consulting the competent parliamentary committees.
The Authority for Communications (4 members and the Chairman) shall be appointed by Parliament, while the Chairman by the President of the Council of Ministers.
In the Italian legal system, as in other European countries, NRAs are not considered as a part of the judiciary system, and their activities are subjected to the jurisdictional review.

12. Market regulation and Competition

In accordance with the principle of procedural autonomy of the Member States, EU Directives do not contain precise rules as to the legal nature of the appeal proceedings and the appeal bodies. They provide only that there should be an effective appeal mechanism, that the appeal body, which may be a court, has to be independent of the parties involved, and that it has to have the appropriate expertise available to it to enable it to carry out its function effectively.
To carry on such review, the judges have to "specialize" very rapidly, trying not to be conditioned, on one hand, by a sort of diffidence towards NRAs and, on the other hand, by a certain deference in controlling acts qualified by a high level of technicality (avoiding to be "captured" by the regulated entities).
In all the jurisdictions under review, appeals against NRAs' decisions are lodged before courts. The proceedings are brought before various kinds of courts:
1. civil courts, such as the *Cour d'appel de Bruxelles*, the *Cour d'appel de Paris*, *the Oberlandesgericht Düsseldorf*,
2. administrative courts, such as the *Conseil d'Etat* in Belgium and France, the *Verwaltungsgericht Köln* in Germany, the *Rechtbank te Rotterdam* and the *College van Beroep* in the Netherlands, the Administrative court of the Queen's Bench Division in the High Court of England and Wales, the Administrative Regional Tribunal in Italy,
3. specialized courts, such as the *Conseil de la concurrence* in Belgium, the Competition Appeal Tribunal in the United Kingdom.

Those specialized courts have different composition from other courts. Their members' background is focused on not merely legal expertise.
The *Conseil de la concurrence* in Belgium is composed of auditors and counsellors, which are not required to have a law degree. The auditors must pass an exam to assess their knowledge of competition law and economics. The counsellors must pass an exam to assess their knowledge of procedural law, competition law, accountancy law, and economics.
Cases before the Competition Appeal Tribunal in the UK are heard by a panel composed by three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics and other related fields.

Another important institutional issue is the number of judges that review NRAs' decisions: a smaller number of judges leads to a higher degree of specialization of the appellate court but also to a higher concentration of decisional power on the regulation of network industries.

13. Private or public law litigation?

The proceedings before the administrative courts are usually considered as public law cases.

The "*Rechtbank te Rotterdam"* considers that even when they rule on disputes between firms, NMa's decisions are public law decisions of an administrative body. Private law relations are excluded from the jurisdiction of the "*Rechtbank te Rotterdam"* and the "*College van Beroep"*. Private law relations are also excluded from the jurisdiction of the "*Conseil de la concurrence"* and the "*Conseil d'Etat"* in Belgium.

If appeals are lodged before civil courts, that does not imply that such appeals are considered as private law cases. The *Cour d'appel de Bruxelles* rules that the appealed decisions are administrative decisions, which are subject to public law appeals ("*recours objectifs/objectieve verhalen*"). However, since this court belongs to the civil court structure, claimants may invoke private law relations, such as contractual rights, to support their appeals.

The proceedings before the "*Oberlandesgericht Düsseldorf*" are also governed by administrative law, so that appeals are considered as public law cases. The situation is different before the "*Cour d'appel de Paris"*. This court has jurisdiction only on appeals against decisions of the French NRA that settle disputes between firms. In France, the NRA is not a party to the appeal proceedings in this context, but merely attends the proceedings in order to provide its observations to the Court. The appeal before the *Cour d'appel de Paris* is thus considered as a private law litigation.

On the basis of Art. 4, par. 1, of the Directive 2002/21/EC, the European Court of Justice has rendered some judgments on interested parties' *locus standi* against NRAs' decisions in the electronic communications sector.

The first judgment on February 21, 2008 stated that the term "*affected*" used by the abovementioned Directive must be interpreted as comprising not only the concerned dominant company which is the addressee of the regulatory decision, but also users and competitors which are not themselves addressees of that decision but the rights of which could be adversely affected by it. The second judgment on April 24, 2008 stated that national courts must interpret and apply the domestic procedural rules so that an NRA decision may be challenged before the courts not only by the addressee, but also by other parties whose rights are potentially affected by the decision at stake.

In essence, according to the ECJ, the Directive only provides a minimal harmonization of national rules on *locus standi*. The Member States could adopt more "favorable" rules that extend standing to a wider range of parties. National laws still show therefore some divergences as to the parties that have the right to appeal NRA's decisions.

The protection of competition is part of the genetic code of the European Law (the European Treaties), given that the antitrust legislation has represented the polar axis and the primary exclusive legislative competence of the Community law system since the very beginning of EU integration.

The founding Treaty of Rome provided the European Union with a common and uniform regulation, as successively modified and implemented, for the protection of competition. Recent national legislations of liberalizations are expression of a general tendency, on the one hand to a strong reduction of public measures restrictive of the access to markets, on the other hand to a softening of the State's role in the market.

The basic idea of antitrust is that competition enhances general welfare, protects consumers,

and promotes economic efficiency, whereas dominant positions might cause a progressive reduction in economic welfare. In this context, the consumers' protection has long been seen as an additional and derived effect of competition in the free market.
As mentioned, the liberalization process has determined the emersion of a new administrative function, *i.e.* the market regulation, entrusted to neutral subjects (the NRAs), aimed at promoting competition in the newly-liberalized markets.
At least in theory, there should be no conflict or overlap between regulatory law and antitrust law and between NRAs and competition authorities. Sector-specific NRAs usually pursue specific public interests such as standards of public services, supervision on tariff levels, market transparency, sound and prudent activity of financial intermediaries, and freedom and secrecy of communications, which are different from competition objectives. When also NRAs pursue the latter, however, the EU judicature asks for a coherent application of sector-specific and competition rules.

14. Judicial review in competition law at European and national level

Judicial review on the acts of an antitrust authority cannot be reasonably confined within the boundaries of a single legal system.
The analysis must necessarily start with the EU process of harmonization of competition law which, since the beginning of the EU integration, has seen the Commission and the Court of Justice performing a leading role in the growth of the national antitrust authorities. The national judges in charge of competition decisions' appeals have thus became part of a system comprehending the jurisdictions of all member States, which uses the case law of the European Union as a reference frame.
This process of harmonization is part of a wider phenomenon of interaction among the single national administrative legislations, intended to stimulate a cross-dissemination between the various legal systems.
The EU courts perform a control of legality on the acts of the Commission in the competition field, which is extended to the merits only with regard to fines imposed on companies for antitrust abuses.
In practice, within the boundaries of legality control, EU courts have opted for a judicial review which, without limiting itself to a formal verification of the compliance with procedural rules, comes to a full assessment of the fact and of the requirements for the application of the antitrust rules (*i.e.*, of the rules prohibiting agreements restricting free competition and abuses of a dominant position).
In case of complex economical evaluations, the judge must restrict himself to reconsidering the evaluation performed by the Commission, verifying the respect of the procedural rules and the completeness of the motivation, the material exactness of facts and the lack of an abuse of power or of a gross error in evaluation, without substituting its own evaluation to that of the Commission. The Court of Justice expressly denies the possibility of a substitutive control of the judge on complex technical evaluations carried out by the Commission.

15. Public and private enforcement closely intertwined

Judges should ensure together the protection of market players ("Menarini" case law). The interplay between judicial review of decisions adopted by competition authorities and the protection of individual juridical situations has been recently assessed by the European Court of Human Rights in a case related to the Italian legal system.
In "Menarini" (case 27/9/2011) the Court held that the Italian competition enforcement system complies with Art. 6(1) of the European Convention on Human Rights and Fundamental Freedom (ECHR) because the Italian administrative courts have jurisdiction over all the is-

sues of fact and law raised by the applicant, including the review of the evidence relied on by the competition authority, the appropriate exercise of the discretionary powers of the authority, and the adequacy and proportionality of the fine.
Menarini concerns public enforcement, but its effects spill over in the area of private enforcement in the form of positive externalities since, to comply with ECHR, both the competition authority and the administrative judge should perform a more accurate job (particularly, they should produce better motivated and grounded decisions, which could be used by complainants in private litigation concerning the recovery of antitrust damages).
As mentioned, under the EU law there is no distinction between individual rights and legitimate interests. The national qualification of subjective juridical situations however constitutes a matter to which the EU law system is indifferent, being the target of the latter the effectiveness of the jurisdictional protection in any case.
The provision of the administrative judge's exclusive jurisdiction on NRAs' decisions does not constitute therefore a breach of EU law, considering the similarities between the appeal of annulment provided for by Article 263 TFEU and the Italian action of annulment against the administrative acts.

16. Commission's Green Paper (2005) and Comparative Report about claims for damages (2004)

In the *Green Paper – Damages actions for breach of the EC antitrust rules* (2005), followed by a *White Paper* (2008), the Commission considered that, while European Law requires an effective system for damages claims related to antitrust infringements, this area still presents a picture of "total underdevelopment". The ECJ has ruled that, in the absence of European rules, it is for the legal systems of the Member States to provide for detailed rules for bringing damages actions.
In the *Green Paper* the Commission did not take a stand on the issue of specialized courts, but considered that, given the complexity of damages actions for infringement of antitrust law, use of expertise in court is particularly important to ensure efficient proceedings.
In the *Study on the conditions of claims for damages in case of infringement of EC competition rules – Comparative Report* (2004) the Commission considered that the lack of expertise of the ordinary courts (which are in most Member States competent to deal with such antitrust damages claims) hampers the effectiveness of private enforcement of competition law. Such expertise could come from a variety of tools, such as the creation of courts specialised in competition matters and/or the training of judges.

17. Competition Jurisdictions in some EU Member States

- Italy
  - Tribunals' specialized sections on commercial litigation are competent for antitrust damages (ref. Law No. 27/2012)
- Germany
  - District Courts and Higher Regional Courts are competent for antitrust damages claim
  - No specialized courts are available (only commercial panels within the courts are specialized)
- UK
  - The Chancery Division of the High Court is competent for competition cases (only in England and Wales)
  - The Competition Appeal Tribunal is a specialized court competent for damages claims
- Spain
  - Mercantile Courts are specialized courts competent for claims

for damages based on antitrust infringements

- France
  - Commercial Courts, Civil Courts, Administrative Courts and Criminal Courts are competent for competition cases
  - No specialized courts are available
- Poland
  - Civil Courts are competent for claims for damages
  - No specialized courts are available
- Sweden
  - General Courts are competent for claims for damages
  - No specialized courts are available
- Irland
  - Circuit Court and High Court are competent for actions for damages in respect of breaches of Irish competition law. District Court, Circuit Court and High Court are competent for actions for damages in respect of breaches of EU competition law.
  - No specialized courts are available
- Lithuania
  - Ordinary Civil Courts are competent for claims for damages
  - No specialized courts are available
- Romania
  - Ordinary Courts are competent for claims for damages
  - No specialized courts are available

18. The judicial review on the acts of the Antitrust Authority and the Private Antitrust enforcement

Until the adoption of Law No. 27/2012, a peculiarity of the Italian system was that the plaintiff in antitrust damages cases had first to identify the competent court. To this end, he/she had to check whether the alleged antitrust infringement has a merely national or an EU dimension (it is an EU-wide infringement where it may affect trade between Member States).

If the infringement was only covered by national antitrust law, then the plaintiff had to bring his action directly before the Court of Appeal, which is territorially competent, thus "skipping" the judge of first instance.

This exclusive competence of the Court of Appeal was introduced by Article 33 of the Italian Competition Act (Law No. 287 of 1990) in order to provide a panel of more experienced judges, and to introduce a type of exceptional fast track since, in the Italian legal system, a Court of Appeal's judgment cannot be reviewed on the merits, and may only be challenged on questions of law before the Supreme Court, which is the highest court in Italy for civil matters.

There was however a risk of forum shopping or harsh litigation on procedural issues since for damages arising from breaches of EU Competition law the court of first instance was competent according to ordinary rules. Hence, the competence was split between the two judiciary levels on the basis of the invoked rules.

This unsatisfactory situation has been resolved by Law No. 27 /2012 (Art. 2, "Tribunal for Undertakings") which gave the competence for all antitrust damages claims to the newly established Specialized Sections operating at every Tribunal or Court of Appeal (competent also for Copyright, Company Law, Public Procurement). In this way, there is still a sort of specialized court, without forcing the plaintiff to embark in procedural issues litigation.

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