TABLE OF CONTENTS

PREFACE

The importance of protecting competition – as a guarantee of the proper functioning of market dynamics – is now widely recognized. The current context of the global pandemic crisis, far from calling into question this fundamental objective, confirms its topicality and strategic importance for the support and recovery of our economy.

That is also one of the main reasons why we decided to organize the XIV Treviso Antitrust Conference in 2020, in accordance with its biennial tradition, notwithstanding the difficulties arising from the health emergency. In light of such difficulties, we 'transformed' this edition (originally scheduled for 21-22 May 2020 in the prestigious venue of the *Casa dei Carraresi* in Treviso, where the conference has taken place since 1992) in an abbreviated online conference, held on 29 October 2020.

We have been forced to take this decision, after having tried to postpone the 'in-person' conference, due to the persistence of the pandemic crisis. This entailed the necessity to adapt the original programme, reducing substantially – and with regret – the number of speeches: the invited speakers have fully understood the situation, showing great willingness to make their best endeavours to ensure the Conference's success. This was true both for the abbreviated online Conference, necessarily with a limited number of speakers, and for the publication of the present volume, which, in line with tradition, collects the papers of all the invited speakers (hence including also the ones that, while not taking an active part in the online conference, still provided their valuable contributions in writing).

In light of the above, I am particularly pleased to present this edition's proceedings, which I hope will contribute to the intense and continuous debate on competition law and policy, thanks to the insightful papers prepared by the authors in their capacity as leading experts in this field.

The online Conference was attended by more than 500 participants with different cultural and professional backgrounds: in-house lawyers, commissioners and officers of various Antitrust Authorities, academics, judges, lawyers, economists, and so on.

In my introductory remarks, I remembered with emotion Hon. Dino De Poli, former President of the Cassamarca Foundation, who passed away in August 2020, recalling that he had always been a sincere and generous friend of the Treviso Antitrust Conference, since the very beginning, as witnessed by his support and presence in all the editions.

The first session, titled "*Digital Markets & Antitrust: where do we stand?*", was presided and coordinated by Gabriella Muscolo, Commissioner of the Italian Antitrust Authority, who put forward some thought-provoking observations, outlining the main issues tackled by the different speakers, to whom she then gave the floor. The speakers developed such issues, under the guidance of the President of the session, in light of their respective professional experiences as: public enforcer (Henri Piffaut, Vicepresident of the French *Autorité de la concurrence*); specialized judge (Marc Bosmans, President of the *Market Court* of Belgium); in-house lawyer particularly aware of antitrust issues (Alessandra Bini, Senior Counsel and Head of Legal Department of IBM Italy); academic (Renato Nazzini, Professor at King's College, London); attorney who has been practising for many years before Antitrust Authorities and Courts in Europe (Jean-François Bellis, Founding Partner of Van Bael & Bellis, Bruxelles) and in the United States (Scott Martin, Partner of Hausfeld, New York).

The topic of digital markets is without doubt extremely relevant, as the huge development of such markets is transforming the dynamics of internal and cross-border trade and economy. The increased importance of digital markets has certainly provided numerous benefits for consumers, but at the same time has raised new challenges for competition policy. For instance, in the context of the digital economy, a central role is played by digital platforms, disposing of resources and data of strategic importance, which may lead to call into question, inter alia, the 'borders' of the notions of relevant market, market power and dominant position. Moreover, the prospects of collusion between algorithms pose new challenges to the interpretation, application and enforcement of several concepts underlying the prohibition of agreements restricting competition.

These and other issues were tackled by the speakers, who developed reflections, inter alia, on the use and management of Big Data by a multinational company in the IT sector, on the continuing importance of the lessons that can be drawn from the famous Microsoft case, on the problematic analysis and assessment of mergers in the digital field, on the complex antitrust issues arising in the telecommunications network

sector, on the relations between US competition law and the so-called Big Tech companies.

The second session, titled "*Reforms and the future of Antitrust*", covered several topics concerning the reforms already in the pipeline and the future prospects of antitrust law and policy: issues to which the Treviso Antitrust Conference has always devoted particular attention. This section was coordinated by Barry Hawk – previously Director, for many years, of the Fordham Competition Law Institute – who has recently published an important volume entitled "*Antitrust and Competition Laws*" and whom I defined, in my introductory remarks, as "*the living embodiment of antitrust*".

The various speeches dealt with the most discussed antitrust issues with a perspective on future developments. A special focus was given, first, to the challenges of innovation at the time of the pandemic crisis, with a thorough presentation by President Marina Tavassi, who, especially in the field of competition, needs no introduction. Subsequently, Antonio Matonti (Director of Legislative Affairs Area of Confindustria, the Italian organization of manufacturing and service companies) examined the problems concerning the relation between competition and industrial policies, while Ginevra Bruzzone (Area Head – Enterprise, Competition and Regulation of Assonime, the association of Italian joint stock companies) concentrated on the heated debate, currently underway, relating to the advisability of new competition rules in the European Union.

Finally, Mario Siragusa (Senior Counsel of Cleary Gottlieb Steen & Hamilton) and James Keyte (Director of Global Development at Brattle Group – New York, and Director of the Fordham Competition Law Institute) discussed with passionate words, on the basis of their decades of experience in the antitrust field, the main lines of development of competition law in the EU and in the United States.

The participants in the Conference, connected from different countries around the world, have thus had the opportunity to attend two extremely stimulating sessions, with high-level speakers discussing most topical issues, about which the Presidents of the two sessions fostered a lively debate.

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Drawing inspiration from the enriching contributions given by the speakers at the XIV Treviso Antitrust Conference and by the authors of the papers collected in the present volume, I would like to make some

further remarks on two issues: the challenges that competition law is facing with regard to digital markets and the current status of private antitrust enforcement in the EU.

The first issue, as anticipated, has become a truly 'hot topic', being the subject of a debate that engages the whole antitrust community.

The rapid digitalization of our society and economy, further accentuated by the Covid-19 pandemic, has generated a significant and widespread development of the services provided on digital markets, such as online marketplaces, online social networking services, online search engines, operating systems, or software application stores. As a result, the main service providers on digital markets, managing online platforms on which the majority of transactions between end-users and business users take place, have been strengthened by the increased use of their services. Moreover, such service providers can benefit, in particular, from the network effects that they are able to produce, thanks to their ability to attract ever more users and to maintain them as their number and intensity of use grows.

Of course, digital services are significantly contributing to societal and economic transformations across the world and have brought important innovative benefits by opening new business opportunities, facilitating cross-border trading, the development of new technologies, and so on. However, such developments are not 'free of charge': as anticipated, they brought to light new risks, both for competition and for individuals using such services.

With particular regard to competition, it should be noted that, as a matter of fact, the services offered by the main online platforms are often free, or paid for only through the provision of personal data of users, and that large providers increasingly act as "gatekeepers" between business users and consumers. This framework may result in barriers to entry, due to obstacles that are difficult to overcome by potential competitors, who need to gather significant investments to reach a minimum user base, necessary to enter the market and compete in a sustainable way.

The aforesaid problems may bring to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of consumers.

The European Commission considers that, whereas Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, the scope of these provisions is limited to certain instances of market power (such as dominance on specific markets) and anti-competitive behaviour, while their enforcement does not always allow intervening with the speed

that would be necessary to address the practices at stake in the most timely and effective manner. Furthermore, Article 102 TFEU does not seem always sufficient to deal with all the problems associated with the so-called 'gatekeepers', given that a gatekeeper may not necessarily be a dominant player, and its practices may not be covered by article 102 TFEU if there is no demonstrable effect on competition within clearly defined relevant markets.

In this changed market scenario, antitrust shows its limits, thus making it necessary to introduce a series of interventions to modify, inter alia, those aspects which are not suited to the digital context. After all, such inadequacies should not come as a surprise, considering that, more generally, the main antitrust provisions were elaborated, as is well known, at the end of the 19th century in Canada and in the US, in a completely different context, from the economic, geopolitical, industrial and infrastructural point of view. The recent developments further prove the need to update the current legislation, and therefore the proposals for reform must be welcomed, provided that they manage to take into account not only the complex features of today's world, but also the fundamental aims of competition law, that is safeguarding the economy, consumers and, ultimately, citizens.

The need to adapt antitrust rules in order to meet the challenges of digital markets has led the European Commission to present, on 15 December 2020, two legislative proposals aimed, on the one hand, to increase the protection for users of online services, namely the Digital Services Act (*Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC*) and, on the other hand, to introduce rules for digital platforms which have a significant influence on the access and the performance of the activities of online platforms, on search engines and social networks, influencing their dynamics and prices, namely the Digital Markets Act (*Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector*).

In particular, with the proposed Digital Services Act, as currently formulated, the Commission has recognized the increasingly important role of companies that provide services through the internet and has intended to guarantee proportionate and homogeneous protection for their users in the internal market. The Digital Service Act defines clear duties and responsibility for providers of intermediary services, and in particular online platforms, such as social media and marketplaces. It

seeks to improve users' safety online and improve the protection of their fundamental rights by setting out clear due-diligence obligations for certain intermediary services, including notice-and-action procedures for illegal content and the possibility to challenge the platforms' content moderation decisions. Furthermore, in order to ensure a safer and more transparent online environment for consumers, it introduces an obligation for certain online platforms to receive, store and partially verify and publish information on traders using their services.

The Digital Market Act, on the other hand, aims to improve competition in digital markets by introducing rules directly applicable ex ante to the gatekeepers. These rules provide to apply obligations and prohibitions aimed at preventing practices of gatekeepers that limit contestability or are unfair, such as the obligation to allow business users to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper, or to refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers.

As is well known, the Commission has also proposed the adoption of a "New Competition Tool", aimed at integrating antitrust policy and rules (Articles 101 and 102 TFEU) with the objective of protecting competition *vis-à-vis* the evolution of the modern economy of digital and non-digital markets. This proposal addresses, in particular, gaps in the current EU rules, identified on the basis of the Commission's experience, allowing a timely and effective intervention against the structural problems that characterize some markets (including the digital one) profoundly modified by the emergence, as already noted, of the main companies operating on the web.

Some Member States are moving in the direction indicated by the European Commission with the aforementioned proposals, such as Germany, where at the beginning of 2021 a change in antitrust law came into force. As a result of this amendment, the German Antitrust Authority (*Bundeskartellamt*) gains enhanced powers of investigation with regard to undertakings and becomes able to better control mergers on digital markets; moreover, the scope of the notion of 'relative market power' is extended, in order to include among the beneficiaries of the relevant provision not only small and medium-sized enterprises, but also large undertakings, which may be in a position of dependence in spite of their dimensions, for instance when they deal with a 'gatekeeper' platform.

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Also the field of private enforcement has been marked, in recent times, by significant developments, particularly following the entry into force of Directive 2014/104/EU, the so-called "Damages Directive", and its implementing rules enacted by the various Member States of the EU.

The Directive, adopted as a result of a long process started with the notorious *Courage* judgment of the European Court of Justice back in 2001, has given rise to great expectations and hopes among operators and, notably, among consumer associations. However, as acknowledged by an increasing number of observers, such expectations have remained largely unfulfilled so far.

This is due to several reasons, one of which is a common misunderstanding on the main objectives of the Damages Directive. While it is widely recognized that EU competition law has traditionally been based essentially on public enforcement, which has played a prominent role as compared to private enforcement, it is perhaps sometimes forgotten that such unbalance is not really altered by the Damages Directive. Indeed, the Directive, confining itself to touch upon some limited aspects of damages actions, is primarily aimed – at a closer look – at *avoiding to jeopardise the public enforcement* of EU antitrust law. Such approach is clearly shown, in practical terms, by several provisions of the same Directive unequivocally aimed at strongly protecting the public enforcement of EU competition law. Suffice it to mention, as an emblematic example, the rule granting absolute protection – from any kind of disclosure of evidence included in the file of a competition Authority – to leniency statements and settlement submissions.

Of course, the adoption and implementation of the Damages Directive have indeed stimulated interest in private enforcement of antitrust law: most probably such legislative measure is one of the main reasons why, in recent years, antitrust damages actions are on the rise across the EU. However, the new framework does not ensure a comprehensive coherence of the system; to the contrary, it poses several problems and leaves many questions unanswered.

This is connected with the second main reason why the demands of the operators expecting a significant reinforcement of antitrust damages actions, to a considerable extent, have not been met: namely, the relevant difficulties that arise when the rules laid down in the Directive in abstract terms are put into practice before national courts.

Let us take as an example the provision establishing the joint and several liability of undertakings which have infringed competition law through joint behaviour (Article 11 of the Damages Directive). The rule according to which each of those undertakings is bound to compensate for the harm in full – and the injured party has the right to require full compensation from any of them – may seem quite straightforward in theory, but becomes much more problematic in practice. Indeed, the defendant undertakings are confronted with serious problems when they are sued individually with reference to products and services relating also to other participants in the relevant conducts, especially when such products and services are particularly complex. In these situations, a request of the defendant aimed at calling the other relevant undertakings into the lawsuit should be granted by the court, as has already happened in several cases. This is justified, in particular, on the grounds that, on the one hand, in the lack of an extension of the scope of the lawsuit, the abovementioned problems would risk calling into question the respect of fundamental rights of defence of the defendant undertaking; on the other hand, a third-party call usually allows a significant increase in the comprehensive efficiency of antitrust damages litigation, avoiding the start of subsequent lawsuits aimed at establishing the proportions of liability of the various undertakings involved in the conducts at stake.

In sum, the private antitrust enforcement cases that are developing before the national courts of the Member States demonstrate, if this were necessary, the incorrectness of the assumption – rather common among claimants – according to which an alleged antitrust infringement should lead to an award of damages *automatically*, i.e. without any need to establish the existence of a damage suffered by the plaintiff(s), its quantification, its imputability, the absence of passing-on, and so on.

Clearly, the new provisions, when put to the test, do not (and cannot) lead to that effect. Indeed, the Damages Directive and its national implementing rules still imply an essential role of national courts (if need be, in 'dialogue' with the European Court of Justice, through the preliminary ruling procedure laid down in Article 267 TFEU), before which many elements of the infringements and the damages need to be deeply scrutinized, in order to ensure a correct balance between the positions of the plaintiffs and the defendants, taking into due consideration the peculiarities of each case.

The hope is that at least some of the shortcomings of the EU private enforcement system can be addressed by a new intervention of the European legislator: a prospect that the same Damages Directive envisages

in its Article 20, which mentions the possibility for the Commission to present, along with the report on the application of the Directive due by 27 December 2020, a legislative proposal. Until now, the Commission did not seize this opportunity, and the report released last December is quite disappointing, insofar as it does not elaborate on the various issues raised by the abovementioned Article 20, due to the alleged lack of sufficient information at this stage.

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The success of the XIV Treviso Antitrust Conference, despite these times of difficulty and uncertainty, encourages us to continue working and reflecting on the numerous issues constantly arising in the antitrust field.

As in previous years, I wish to express my sincere gratitude, first, to the promoters of this edition of the Conference, which have renewed their support to the event: the European Lawyers Union (UAE), the *Associazione Italiana per la Tutela della Concorrenza* – member of the *Ligue internationale du droit de la concurrence* (LIDC), the *Associazione Italiana dei Giuristi d'Impresa* (AIGI), the European Company Lawyers Association (AEJE-ECLA), the *Associazione Antitrust Italiana* (AAI) and the Jean Monnet Centre of Excellence, *Università degli Studi* of Milan.

My warmest thanks also to the sponsors, which, once again, believed in the Treviso Antitrust Conference and supported us by providing vital support to the organization of the event.

Finally, a special word of thanks also to all the contributors to the present volume: not only for promptly sending their papers, but also for understanding the very particular context in which we were forced to organize the XIV edition of the Conference and then prepare the proceedings.

I would like to conclude by wishing us to see each other, this time in person, at the XV edition of the Conference, scheduled for May 2022, in Treviso. In this way, it will be possible to combine once again the richness of the scientific contributions with the pleasure to meet many members of the antitrust community, coming from different parts of the world, thus taking advantage of the opportunity to develop, with renewed enthusiasm, ideas, exchanges, friendships and projects for the future.

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