

V Convegno Antitrust di Trento
16/18 aprile 2015

***Past present and future of
antitrust private enforcement***

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Outline

- Introduction
- The past in Europe
- The present
- The future

INTRODUCTION



- Past for the presentation means before the directive was approved
- Present is the situation we live today and the expected next steps with the directive
- Future is what is expected to happen beyond the directive

INTRODUCTION (US vs EU)

- The US vs EU comparison
 - The US system proceeded to privatize competition enforcement
 - Incentive given is the recovery of treble damages
 - You prove you suffered one and recover three
 - More incentives In re Illinois Brick
 - No need to prove you suffered an actual loss
 - The legal system helps the process
 - Contingency fees (No cure no pay) Used in salvage for many years
 - Class actions



INTRODUCTION (US vs EU cont)

- Administration helps
 - i.e. if a company is in financial trouble to pay parties who suffered damage due to having to pay a fine for an antitrust infringement, the administration is ready to return the fine money.
- Immunity applications, system and impact on private enforcement
 - Immunity different from immunity and leniency
 - The only leniency on the other side is the leniency plus
 - The complexities
 - The impact on private actions, “detrebling”

INTRODUCTION (EU vs US)

- The EU much much later went for an administrative enforcement system
- Only started thinking about damages only recently
- Some of us were concerned already in 1999
- The system in place for many years has been exclusively about public enforcement



INTRODUCTION (EU vs US cont)

- Commission very (too??) happy about leniency system, even more than just immunity.
- Fundamental question
 - How many cartels does the Commission uncover?
- EU system based mostly on follow on actions
 - requiring prior public enforcement



The past

- Roman law
- First lack of visibility of antitrust
- Second antitrust too special
- A too administrative view
- Legal limitations, procedural obstacles
- Solutions and cases

The past. Roman law

- Essence of damage
- Compensation
- Last recourse
- Requirements
- Limits
- Basic civil law



The past. Lack of visibility of antitrust

- This may not be for the courts but rather for the administration to decide
- Far too complex presentation
- Lack of understanding by companies



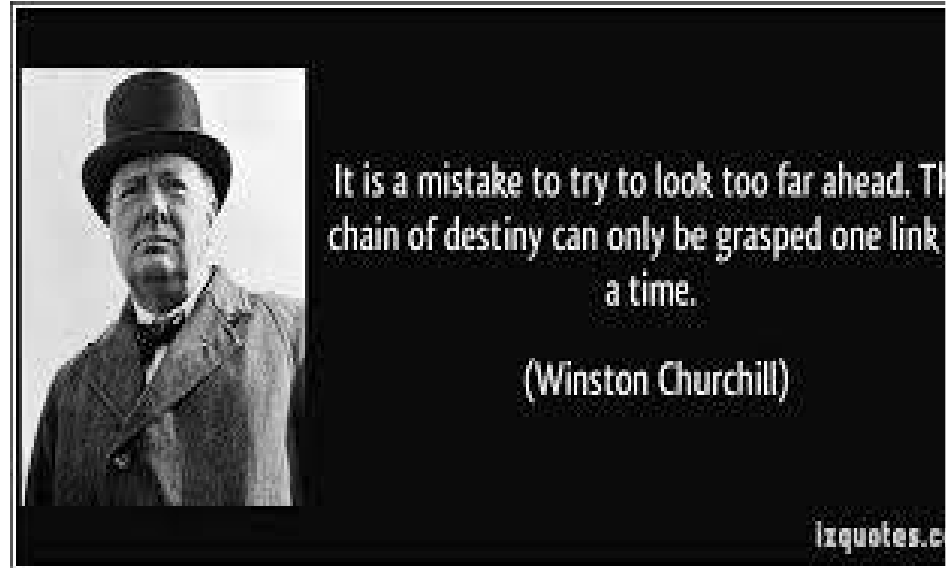
The past. Antitrust too special

- Sorcery??
- Is a gross average any easier?
- Is a medical negligence case any easier?



The past. Legal limitations, procedural obstacles

- In Spain prior declaration at all levels of infringement
 - Origin of my concern
 - An abuse of dominance case that took place in 1992
 - Competition authority decision in 1995
 - Appeals Court judgment in 1997 on appeal
 - Supreme Court judgment in 2003 on appeal
 - First instance court judgment in 2005
 - Appeals court judgment in 2007
 - Supreme Court judgment 2009
 - I lost my patience in 1999



The past. Solutions and cases

- Damages limited
- Interim measures
- Injunctions
 - Italy & UK
 - Telecom
 - Spain
 - Football tv rights, then led to damages judgment of € 40 million



The present

- The influx of the green and white papers
- Still too special, and too administrative
- The damages calculations
- The issues about nullity
- The use of injunctions and interim measures
- Discovering the strength of antitrust private enforcement
- The directive impact (not an analysis of the directive provisions)
 - Criticism on focus of directive
 - Criticism on specialty and administrative application
 - Positive aspects of the directive
 - Need to harmonize? The “eurochocolate” and the “euro antitrust action”

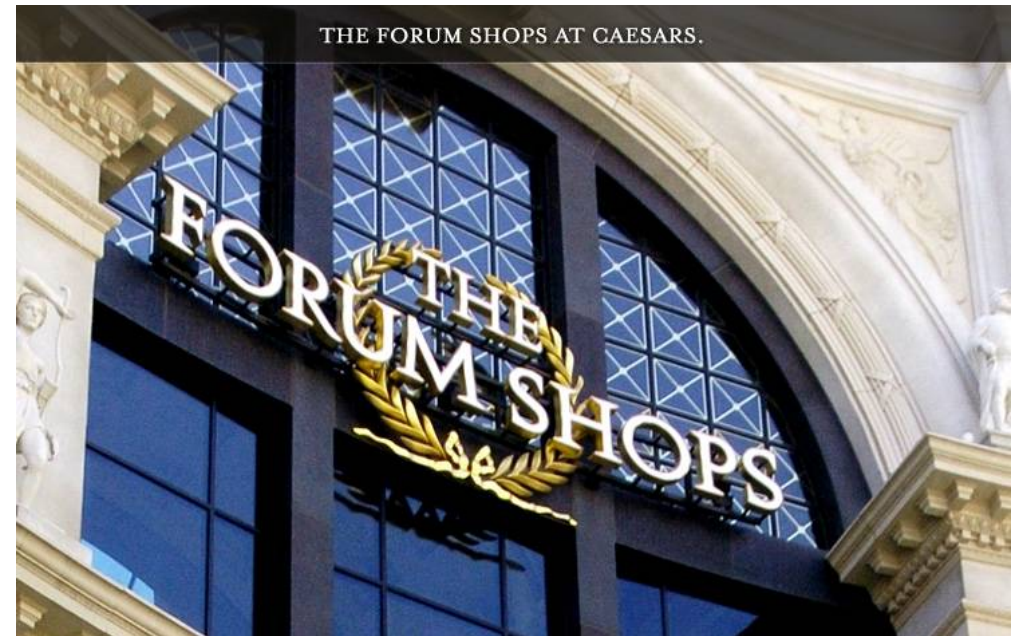
The present influx of green and white

- 2005 Green paper
- 2008 White paper
- Commissions proposals
- The EU Court intervention
 - Courage 2001
 - Manfredi 2006



The present still too special & administrative

- One main concern “forum shopping”
- Antitrust complexities
- Real complex issues
- Withcraft?
- Administrative matter
 - Certainly for state aid?



The present, damages calculation

- The complexities
- Damage iuris tantum or iuris et de iure, or both
- The notice
 - Welcome
 - Experience required



$$p = \frac{W}{3} \left[F(0) + \sum_{i=1,3,5\dots}^{num\ seg-1} 4F(iW) + \sum_{i=2,4,6\dots}^{num\ seg-2} 2F(iW) + F(x) \right]$$

The present the curse of para. 2 of 101

- What it was meant?
- In the Constitution?
- EU case law
- Pronuptia ?? To find in the pubs.. Courage??
- Is not the case law reluctant to absolute nullity?
- What about annullability?



The present, injunctions and interim measures

- A bit of reality
- What do injunctions and interim measures mean?
- Is it the solution?
- Personal experience



The present the strenght of private enforcement

- The studies (2004 Commission study)
 - 2013 Comparative private enforcement and consumer redress
 - Professor Rodger (Michele Carpagnano Italia, Francisco Marcos, España)
- Number of cases
- Amount of damages
- Mediation and other issues

The present

- Possible actions to undertake by the EU Commission
 - To speed up publication of its decisions
 - To help private action by clarifying fining policy
 - To state private action “fines”
 - To assist private actions through finance



The present. The directive

- Criticism on focus of directive
- Criticism on specialty and administrative application
- Positive aspects of the directive
- Need to harmonize?
 - The “eurochocolate” and the “euro antitrust action”



The future

- The likely effects of the directive and the recommendation
 - The path of private litigation after and beyond the directive
 - The path of administrative enforcement
 - Impact in other areas

The future (1) Civil law impact

- Follow on actions
- **Stand alone actions**
- **Interim measures**
 - Continuous action (classic damages theory) “The dripping ceiling”
- The effects on limitation periods
- Nullity, the “infringers”, the “fear” and “nullity and fulfillment”
- Mediation and arbitration
- Increased knowledge on damages

The future (2) Civil law impact (cont)

- The complexity of passing on in EU vs the US brick
 - EU systems, administrative, civil, judicial and languages
- Class or group actions
 - National or European?
 - Beyond antitrust?
- **A forgotten issue? The particular case of state aid cases**

The future

- The likely effects of the directive and the recommendation
 - Increased litigation
 - Increased information
- The path of private litigation after and beyond the directive
 - Follow on actions
 - Guided by Directive
 - Stand alone actions
 - Autonomy on development
 - Increase

The future

- Interim measures
 - Indispensable, a must.
- Continuous action (classic damages theory) “The dripping ceiling”



State aid law private application

- **The forgotten issue**

- What are the remedies for victims of state aid
- Complexity of the subject matter
 - Sometimes, divide simple and complex cases
 - Simple cases should have a speedier solution
- EU Court of Justice to reach final consequences
 - If there is an infringement there should be a consequence
- Right now a victim can chose to get the attention of the EU Commission or the judge
 - Civil judges reluctant
 - Complex administrative matters involved



The future (3) Administrative law impact

- Settlements
- Immunity and leniency, revisited?
- Fining policy adjusted
- Inapplicability decisions
- Real compliance programmes
- Increase of NCAs coordination
- Real “amicus curiae” (Pierre Fabre)

The future (and 4) Impact on other areas

- The impact on people
 - Collective actions
 - Labour relations
 - Shareholders
- Criminal law will be studied
- Public tenders consequences
- Life will go on and antitrust will become normal
- Other areas of economic life will see the impact (consumers and environmental)



Future. The impact on people

- Collective actions
 - Increase
 - Competition, better not to harmonize
 - A European one?
- Labour relations
 - Labour contracts
 - Impact on directors' revenues
- Shareholders
 - Liability claims
 - Disclosure



Future. The impact on people

- Criminal law will be studied
- Public tenders consequences

TENDER OPPORTUNITY

