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Second session- Intellectual Property Rights

DISCOVERY IN IP LITIGATION: A MODEL FOR EVIDENCE DISCLOSURE IN ANTITRUST PRIVATE LITIGATION?

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Abstract

Private litigation in the antitrust field, as well litigation in the field of Intellectual Property, is particularly fact-intensive, the main consequences being the focusing on facts and evidence and the role of the judge as a finder of facts, highly skilled in managing the collection of evidence and evaluating them, with the aim of choosing the most plausible among the stories

submitted by the parties and giving a rational justification to his/her decision on the required standard of proof.

The White Paper identifies the asymmetric information on the relevant facts -- both basic and economics facts - by the parties in antitrust litigation, and their difficult access to evidence, as the main obstacles to an effective private enforcement of antitrust law and a full compensation of those damages caused by the breach of antitrust rules. The evidentiary issue emerges as a core question in the process for improving private antitrust litigation.

In this framework, I shall review the proposal which was chosen by the White Paper among the different options listed in the Green Paper, excluding those interfering with the burden of proof, *id est* a disclosure mechanism, introducing a sort of European discovery, milder than the discovery provided by common law systems and shaped on the model of articles 43 and 47 of the Trips Agreement and of articles 6 and 8 the EC directive 48/2004 (so-called enforcement directive) in the IPRs sector, implemented in Italy by articles 120 and 121 of the legislative decree 30/2005 (Intellectual Property Code).

The presentation focuses on the requirements for discovery in antitrust litigation provided by the White Paper, and on its limits. It deals specially with the protection of confidential information and the effects of non-compliance with the disclosure order. It also aims at comparing the use of discovery in antitrust cases with its use in IP cases, illustrating the requirements and the limits of the latter according to IP law and to the recent Italian case-law.

As a conclusion the presentation underlines the differences between the model of discovery adopted by the enforcement directive and the one proposed by the White Paper: in both cases, the continental law trial procedure seems to be less suitable than the common law one to discovery, as it does not provide for a pre-trial phase and for a concentration of the hearings.

Furthermore, in antitrust conflicts, asymmetric information by the parties operates as an obstacle not only in collecting evidence on the relevant circumstances but also, and specially so, in describing the facts: it therefore occurs more frequently in that context than in IPRs infringement cases, in which serial facts can be detected and the law itself provides for a list of relevant information which can be acquired by the means of the discovery.