

PHD LAW AND ECONOMICS – XX CICLE

HORIZONTAL ANTICOMPETITIVE AGREEMENTS: A LAW AND ECONOMIC ANALYSIS OF THE CHOICE OF REMEDIES.

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ABSTRACT

Both at European Union level, as well as in the single Member States, the entitlement of businesses and consumers to operate and live in a system which guarantees freedom of competition is protected in two ways. The first possibility is through the operation of a public agency, an independent regulatory commission, or an independent administrative authority, in charge of investigating and punishing conducts deemed to be in violation of competition law (public enforcement). The second one is to protect the entitlement through a liability rule, meaning that consumers and business are allowed to ask for injunctive relief or claim for damages if they have suffered a loss as a result of the anti-competitive behavior of others. The latter possibility can be defined as private enforcement of competition law, meaning the direct application of antitrust rules in civil disputes before national courts. The first part of the present study deals with the reasons why private enforcement let alone could not be able to achieve an optimal level of deterrence i.e. the expected sanction faced by undertakings wishing to adopt an anticompetitive conduct is just sufficient to deter that conduct without deterring also purely legal actions.

Then it is analyzed the main reason why public enforcement let alone could not be able to achieve an optimal level of deterrence. This is essentially represented by the fact that since the probability of detection/conviction is low, and public resources are limited, the optimal sanction would be remarkably higher than actual harm in order to satisfy the above optimality condition.

In this respect, *private enforcement effectively acts as a complement to public enforcement in a second-best context*, where the optimal solution is impossible to achieve. Private enforcement contributes to more effective deterrence by: (i) increasing the probability of detection p ; and (ii) adding (or replacing) damage awards to the prospective fines imposed by public enforcers – depending on whether a private suit is stand-alone or follow-on. The analysis then continues focusing on the main mechanisms who can aptly contribute to make private actions against cartels more effective in Italy, while minimizing the related costs (litigation costs, administrative burdens, error costs, harmonization costs).

Finally, in the last part, considering the widespread effects of international hard-core cartels, the issue of the pro and cons of harmonization of private enforcement are depicted.