

CURRENT CHALLENGES TO COMPETITION LAW AND POLICY

This thesis presents three papers on three different competition law enforcement cases. These three cases have caught the author's attention because of the intrinsic novelty of the challenges they pose to predominant competition law and policy. In addition, their scrutiny inevitably allowed for a more general reflection on the evolving role of competition law in modern legal systems, especially in the European law framework. This chapter plays an introductory role in that it sets the tone for the following case studies, but beyond that, it functions as an executive summary of the entire thesis. Furthermore, it intends to give an account of the aforementioned more general reflections on the role of competition law in modern legal systems.

Competition laws are nowadays in place in all the developed countries and emerging economies. They have developed at country level in order to ensure a sound and fair competition in national markets. The particular names that these laws have taken on in the different nations usually reflect what is the country-specific bigger threat to a full-fledged competition in the respective national economy. For instance, the US antitrust law and the German Bundeskartellrecht reveal a common fear of collusion of firms that leads to concentrated market power, while the Chinese and the Russian "anti-monopoly" laws appear to be more concerned with single conducts of dominant players, traditionally ex-legal monopolists.

The historical origin of this law can be traced back to the English common law of restraint of trade that have inspired the US Sherman Act, adopted in 1890. At the end of World War II, the USA suggested the implementation of similar law also in the Europe under reconstruction. Therefore, the first European competition dispositions can be found in the European Coal and Steel Community agreement signed by France, Belgium, Italy, Germany, the Netherlands and Luxembourg. Only six years later, the same six states officially founded the European Economic Community with the ratification of the Treaty of Rome. The European competition law rules are part of the European law

since its earlier existence and can be traced back to the 1957 Treaty. They are also the only norms of the Treaty that refer to subjects other than Member States, namely European businesses. Nowadays, the US antitrust law and the European competition law represent the main systems of reference in the development of this type of legislation and its application.

While their statutory languages sounded incredibly similar, their policy goals and enforcement usually differed quite substantially. Historically, the US antitrust systems had to deal with the dismantlement of trusts that held the American economy hostage, while the European competition law got assigned the additional policy task of creating and protecting the European single market integration. Moreover, the US enforcement has always been more receptive to instances and arguments from sources other than the law (e.g. the economic analysis), thanks to the facilitating structure of the common law application. In contrast, the European enforcement has traditionally applied a more formalistic approach based on a rigorous interpretation of the wording of the law, as it is proper of the civil law tradition to which most of the European countries (especially the initial founders) belong. Different weights attached to the private or to the public interest in the two antitrust philosophies on both sides of the Atlantic also contributed to a divergent outcome in terms of preference for the private (in the case of the US) or the public enforcement (in Europe).

The economic globalization, made possible by the new ICT means, has deeply changed markets and their way of making business since the beginning of the new century. These changes impacted on the antitrust systems as well due to increased cooperation in international trade and yet despite the national scope of competition laws. First of all, they led to a convergence in the US and European competition policy and its enforcement. That convergence was due to the similarity of the challenges with which both markets had to deal, but also due to the need of not penalizing national firms on the global market by a too differently stringent law application. This trend is evident in the emergence of a shared US and EU preference for a more economic approach to antitrust issues that should minimize the still existing enforcement differences over time, reducing them to a divergence of minor policy sub-goals rather than totally opposite outcomes as happened in the past. The adoption of this policy

approach is testified by the recent tendency to issue very similar policy statements on the same topics on both sides of the Atlantic.

Secondly, having a competition law became an essential asset for any country that would like to compete globally. Therefore, competition law surged from the status of "special", market-dedicated, technical legislation between the public and private law spheres, up to acquire the status of essential law for any institutional actor that aspires to play a significant role in the global economy. Moreover, its now long-standing application made its clauses and standards familiar also to the traditionally more resistant civil law systems that, at the beginning, even tended to confuse it with the more established unfair competition rules, though with a recognized slight "economic regulation" flavor. Lately, antitrust application has been unexpectedly assigned to tasks that resemble more closely those of the residual standards or general clauses of the legal systems rather than those of a specific law. It may sound like a provocative statement, but the three papers presented in this thesis are actually examples of this new tendency in the innovative resort to competition law to fulfill aims that traditionally fall beyond its scope.

The first case refers to the patent failure that represents a problem, especially for high-tech markets, on a global scale. The second case belongs to the Europe-specific context, dealing with the financial crisis and integration of the single market. Finally, the third is a European private enforcement case that deals with a matter that has not been clearly settled yet by the Supreme Court, therefore it might re-invigorate a comparative debate.

1. Competition law as a remedy for the anticompetitive (mis)use of other rules from different branches of law: the case of abusive patent litigation

The case of abusive patent litigation in high-tech markets is not new, but it recently degenerated furthermore. Therefore, the paper's primary aim is to investigate the current functioning of the patent system in those markets. In order to do so, it analyses the recent so-called patent bubble that animated the mobile Internet hi-tech industry. First, it correlates the contractual dimension of the bubble, i.e. the huge patent portfolio acquisitions that took place in 2011,

to its judicial dimension, i.e. the following numerous patent lawsuits among industry's incumbents and new entrants. The paper more carefully analyses the lawsuits involving Samsung and Apple in ten jurisdictions around the world to argue for the emergence of a new litigation model according to which producing entities assert own patents in a troll-like manner. Under this litigation model, the strategic use of IPRs can significantly distort the competition in the industry. Together with the losses typically associated to an anticompetitive exclusionary practice, the detriment of the social welfare is enhanced by the significant amount of resources wasted in unnecessary excessive litigation. The paper shows that recent IP law and policy attempts to reform the system have been too soft. It also argues that antitrust remedies for this problem cannot fix it once for all. Antitrust authorities cannot do more than issuing specific guidelines on the assessment of the abusive use of IPRs among competitors. This could help in antitrust case-by-case intervention but without a patent system reform the problem cannot be eradicated. Hence, the paper concludes with a desperate call for a patent law reform that could be able to remodel the IP system that was designed for the first industrial revolution and has unsuccessfully tried to fit into the new business world that the digital revolution is nowadays writing. More concrete proposals are those that argue for a switch from a property to a liability rule.

This case exemplifies the use of competition law to stem harms caused by the misuse, gap or lack of specific regulation that lead to business strategic misconducts. In the context of quickly evolving markets, these episodes are not rare and, both in the US and in Europe, this failure of the patent system has been temporarily fixed through sporadic antitrust interventions. This solution can work at the beginning, but it is not sustainable in longer-term perspective for the sake of high-tech markets, major drivers of growth and innovation in modern societies.

2. Competition law as a residual (emergency) law for sectors in which an effective harmonized law is missing: the case of state aid policy for the financial sector during the crisis.

The second paper deals with the European financial crisis management provided by the European Commission's state aid policy. Three main phases of such crisis-specific enforcement of competition rules can be distinguished, namely the rescue, restructuring and banking union eras. The analysis tries to isolate the main lessons from the recent state aid policy for the financial sector and comment on the new financial institutional architecture for the after-crisis Europe. On the basis of this comparison, the conclusive arguments recommend to design and enforce the single supervisory mechanism and the single resolution mechanism in a way that would allow them to be joined by as many European Union countries as possible and not just by euro-area ones, for the final benefit of the integrity of the single market for financial services.

The EU Commission's state aid policy approach at issue have provided a uniform framework for the Member States to tackle the distress suffered by the European financial institution at the bursting of the crisis. In the absence of a harmonized regulation on the resolution of distressed institutions, an emergency, but uniform, use of state aid policy seemed to be the second best solution to adopt. Indeed, the Commission intervention provided a firm but flexible approach in a timely manner that contributed to prevent the collapse of the sector and, at the same time, preserved a level playing field in the internal market for financial services.

3. Competition law enforcement as a way to harmonize the European private law: the case of umbrella claims.

The *Kone* decision of the European Court of Justice established the possibility of awarding damages for harm stemming from umbrella pricing. Thereby, on the one hand, this interpretation raises the cost of cartellization and, on the other hand, it expands the scope of the European antitrust private enforcement. The curious case of umbrella claims is the last step in the arduous path towards the definition of European antitrust damages. The paper comments on the decision and reviews the economic and US antitrust law literatures in order to give a preliminary assessment of its quality. Furthermore, it intends to investigate the

likely impact of an "indirect" rule on the compensation of "indirect" harm in the national enforcement systems, as well as the eventual effect on the interpretation of the principle of causation. The conclusions highlight the existence of a perpetual trade-off between national legal uncertainty and effectiveness of EU rules, which characterizes the application of EU law when both the lack of uniformity of national systems and the failure of the process of harmonization *de facto* delegate policy- and law-making to the ECJ. The harmonizing role of the ECJ interpretation of EU law has been already broadly assessed by many commentators. The ECJ preliminary ruling activity has the upside of being faster than the ordinary legislative process that often suffers from the difficulty of reaching the necessary political consensus, even though this is a guarantee of a more democratic choice. In some very sensitive "national" or substantial matters, the harmonization method often fails or simply takes too long to be fully beneficial, taking into account the cost of its duration. This is for instance the case of the impossible mission of harmonizing the European private law, namely in the area of property, contract and liability. The third case presented in this thesis assumes a greater importance under this perspective. If the *Kone* preliminary ruling would ever manage to inform a new interpretation of a dogma of the Romanistic laws as causation, for the sake of the effectiveness of the EU law and in a EU-uniform manner, it would represent a case for competition law enforcement to even become a driver of integration through enhanced European private law harmonization.

I acknowledge that the more general reflection presented in this summary might stretch the reasoning on the current role of competition law in the modern legal systems a bit too far. The intention was not just to portray the situation, but rather to extrapolate a pattern. The trend unequivocally signals how competition law nowadays plays a pivotal role in addressing market problems. Corporate and international trade law used to be the champions in this field and have now to share the podium with it and have to stop treating it as a younger stepsister.

The use of the antitrust as a primary filter to detect and to fix market malfunctioning due to non-traditional sources of threat to competition -

because of their attitude of resulting also in anticompetitive practices - is a reality both in the US and in EU. Furthermore, in Europe, competition law is still fundamental in preserving the internal market level playing field, especially in those sectors where an effective harmonization still lacks, as it is the case of financial (and non-financial) services. Finally, the private enforcement of competition law may also foster European integration by indirect means, like eventual spillover effects in terms of harmonization of principles relevant to damages actions.

Moreover, I would like to highlight that what becomes a feature of the EU competition enforcement - because it successfully deals with a problem in the internal market - might become also a tool of the antitrust systems that are inspired by the EU model or by mixed EU-US models. Also, through the above-recalled tendency of convergence among the EU and US systems, it might even lead to a new US approach. This is a further reason to look carefully at the actual aftermath of *Kone*. To check whether its eventual effects on European national judges might revive the interest of the US Supreme Court for ruling on the matter, eliminating uncertainty and reviewing also its interpretation of causation in damages actions. This potential scenario would ascertain the ability of competition law to drive further harmonization beyond its original national boundaries, even if in very mediate and non-institutional terms. But such a result would also highlight the overt relevance of its influence on modern legal thinking.