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Summary

The present work represents the conclusion of the research activity carried out within the Ph.D. in Law in Economics at the LUISS University of Rome and, as a visiting student, at the Universities of Rotterdam and Hamburg.

This thesis is composed by three distinct papers, focused on three different topics. They share the same methodological approach and a common objective, consisting in analyzing, by means of he tools provided by Law and Economics, the structure of specific fields of the modern legal frameworks and their efficiency under an economic perspective.

The perspectives of analysis adopted in each of the three papers are very different, but at the same time complementary.

The first paper is strictly theoretic. Departing from few basic assumptions of the discipline of Law and Economics, it tries to set up an approach for legal rulemakers and enforcement authorities to produce optimal legal rules.

The second paper constitutes the logical follow-up of the first one. In fact, it embodies an attempt of empiric validation of the theoretical approach developed there, by carrying out the analysis of several concrete case-law in the field of Tort Law belonging to three different legal systems, both civil law and common law ones.

Finally, the last paper reverses the perspective by adopting a bottom-up approach: departing from the analysis of the relevant case-law, it reconstructs the approach adopted by EU authorities in treating the issues of refusal to license in the field of Competition Law.

1. *Convergence of Rules and Standards due to Courts' learning effect – A theoretical model*

Legal process is a complex puzzle of three separated stages, rulemaking, private agents' behavior and enforcement of law. These stages are not isolated one from each other, rather they give rise to a complex network of relations and mutual influences that deeply impact on the optimal application of law commands in the society and therefore on the maximization of social welfare.

This paper focuses the attention on one particular knot of the mentioned network of relations, namely how the rulemaking process impacts on the efficient enforcement of law.

Law commands may be framed either as rules or standards. More in detail, a continuum of intermediate choices exists between the two pure extremes. Each point along the continuum represents a different degree of differentiation of law and involves a typical set of costs and benefits as well as a different impact on enforcement of law. Enforcement is not a costless process and the amount of such costs is influenced by the initial framing of law commands.

The choice of framing law as one of the two mentioned alternatives is not only a matter of style, rather it involves substantial consequences on the efficient functioning of the legal framework. In particular, the application of rules or standards involves sets of costs and benefits that are often at odds one with the other and, moreover, it involves a choice on where to place such costs and benefits along the stages of the legal framework. For instance, a rule-like command involves higher costs for rulemakers, but lower costs and lower uncertainty for private agents and enforcements authorities. Moreover, standards may imply lower probability of judicial errors, but the costs of investigation may be potentially infinite.

In the light of this, efficient lawmakers, when called to regulate this or that subject, should engage in a cost-benefit analysis to assess what should be the form of law that minimizes social costs.

The aim of the paper is to determine whether an optimal degree of differentiation of law that minimizes the social costs of enforcement exists and how the choice of rulemakers between rule-like and standard-like commands does affect the amount of social costs of enforcement. Such analysis is carried out under a static perspective by means of a qualitative model that minimizes a function of social costs generated by the enforcement of law. The aim of the model is to find out whether an optimal point along the continuum of rule-like and standard-like commands that minimizes the social costs of enforcement exists.

2. *From theory to empirical practice: do Courts really experience learning effect in applying law? Evidence from Tort Law*

In the previous paper, it has been shown that the choice between rules standards is not a clear-cut dualism between two extremes, rather it involves a more complex decisional process whose outcome is the individuation of a point along a scale of differentiation of law between rule-like and standard-like shapes that minimizes the social costs. More in detail, the mentioned work pointed the attention on one particular knot of the legal process' network, namely how the choice at the rulemaking stage between rule-like and standard-like commands does affect the efficient enforcement of law.

The analysis has been developed by means of a theoretical model that minimizes a function of social costs generated by the enforcement of law. The model showed that it is possible to achieve an optimal degree of differentiation of law that minimizes the social costs of enforcement.

As said, this analysis is merely theoretical and based on a static perspective. But does such path of convergence really takes place in the real world?

Given the possibility to detect the optimal shape of law that minimizes social costs of enforcement, the ideal next step is to analyze whether courts, by repeatedly applying commands over time engage in a learning effect that lead them to judicially build optimally differentiated commands, regardless of the initial framing of law.

The underlying hypothesis is that courts develop optimal decisional skills that lead them to overcome, through the use of judicial tools as legal excuses or interpretation of law, the obstacles generated by the initial framing of law and to trigger a judicial-made convergence of rule-like and standard-like commands towards the optimal degree of differentiation.

This paper constitutes the ideal prosecution of the described work, aiming at demonstrate whether or not Courts are really able to engage in a learning process and trigger such convergence.

Whether such process takes place, it will be analyzed by passing through the application over time by three distinct Courts' systems of one pure rule and one pure standard in the field of tort law with particular regard to the issue of safety on workplaces. On the side of convergence of rule towards standards, the action of New Jersey (USA) and Italy Supreme Courts in the application of commuting injuries regulation is considered. On the side of convergence of standards towards rules, the duty of employers to provide a safe workplace as applied by UK courts is analyzed.

The main results are that, whilst a path of convergence of the pure rule towards an optimal hybrid shape may be observed, a symmetric process on the standard's side seems not to arise.

3. *Refusal to supply an IPR: L'approccio antitrust comunitario tra passato, presente e futuro*

Antitrust discipline, intellectual property rights and regulation.

These are the three categories of rules that the modern legal and economic systems adopt in order to reach the target of perfect competition and the maximization of social welfare.

Such tools, however, deeply differ one from each other in terms of approach, interpretative criteria and operative processes, as well as different is the path they follow to reach the same aim, and in extreme cases they may also be in contrast.

One typical example of such differences is given by the interaction between antitrust rules and IPR systems, whereas the first seems to condemn what the second is aimed to protect.

It is the case of "refusal to license" practices, intended as the behavior triggered by IPR-holding firms consisting in refusing to grant to other firms – typically competitors in the same or adjacent markets - access to the protected knowledge.

If the refusal is practiced by a dominant firm, there may be grounds – as it is in several legal systems - for antitrust intervention in order to prevent dominant firms' behavior to foreclose competition in the reference markets. Such intervention typically consists in imposing to the dominant firm a duty to license the IPR to the requesting competitors under fair conditions.

The aim of this paper is to reconstruct the approach adopted by EU Competition authorities in dealing with refusal to license practices and to analyze, under a Law and Economics perspective, what consequences the mentioned approach may have on the overall economic system.

The analysis is carried out by analyzing the relevant case-law, as well as the legislative documents, in order to assess what have been the interpretative criteria and operative processes developed by the EU Commission in the subject at hand.

At the same time, the work will have a look to the other side of the Atlantic Ocean in order to determine how US antitrust Courts deal with refusal to license practices and will set up a comparison between the two approaches.

Finally, the attention will be focused on an alternative and relatively recent approach to the interaction between antitrust and IPRs, the Predatory Innovation doctrine.

The main results show that the EU authorities developed an approach such that, within a general conceptual framework that recognizes a kind of "limited sovereignty" to IPRs over antitrust that finds its limits only in exceptional circumstances, it strongly reduces dominant IPR-holders' freedom to (not) license protected knowledge. In other words, even if the general principles may be fair, the operative praxis has deeply deviated from the original intentions.