

Preface

This book assembles various contributions that are based on talks given at the 8th Conference of the Academic Society of Competition Law (ASCOLA), which was held at the University of Salento, Lecce (Italy) on 22–23 May 2013. By raising the thought-provoking question of ‘Competition Law as Regulation?’, ASCOLA’s 2013 conference, based on a call for papers, aimed at discussing the emergence of a ‘regulatory approach’ to competition law and thereby tried to advance scholarship on the relationships between competition law and regulation.

While there is a lot of literature on market regulation and regulated industries, legal and economic writing has not yet sufficiently addressed the more recent trend of competition law and competition law enforcement to develop mechanisms and tools that *go beyond* mere protection of competition against restraints, but try to improve the market conditions in a *forward looking approach*, which is more typical for market regulation. The 8th ASCOLA Conference reacted to this trend by launching a scholarly debate on its causes and consequences, as well as the advantages and disadvantages of this new ‘regulatory approach’ of competition law. Accordingly, the conference concentrated on what competition agencies and courts are doing when they apply competition law and not so much on what specialized regulatory agencies are doing. Like the conference, this book is highly topical and at the same time original, because by going beyond the traditional view that competition law is essentially an *ex post* intervention that only reacts to competition restraints whereas regulation intervenes *ex ante*, it provides a much more complex picture. Even authors who analyse the interaction of competition law with regulation in general (Kowalik-Bańczyk, Siragusa and Caronna, Svetlicinii and Botta) or in specific markets, such as telecommunications (Takigawa) from the point of view of a specific jurisdiction, reach the conclusion that regulation is far from disappearing. This insight helps us overcome the much simplified vision of regulation as gradually disappearing in the wake of sunset provisions and being replaced by *ex post* competition law enforcement.

The book addresses the topic in five parts. Part 1 explores the foundations of the complex relationship of competition law and regulation and provides definitions and declinations of the ‘regulatory approach’ of competition law. Part 2 is devoted to new forms of advocacy powers of competition agencies, namely ‘market inquiries’ and the ‘competition impact assessment’, and shows how agencies may do a lot more to promote competition and help regulation be pro-competitive than just condemning undertakings for violating competition laws. Parts 3 and 4 deal with competition law in regulated industries, although with different approaches. Part 3 focuses on such industries in general and develops a general approach to them, mostly against the backdrop of different jurisdictions, while Part 4 pertains to regulation and competition in the information and telecommunications markets, and compares specific national approaches with those of the US and the EU. Finally, Part 5 explores the intersection between competition law and regulation in IP-related markets.

Part 1 opens with a contribution by Mariateresa Maggolino defining what a ‘regulatory approach’ means. This consists of competition law not (anymore) being neutral with regard to market outcomes: instead, it proactively aims to bring markets to the competitive equilibrium. Accordingly, the ‘regulatory approach’ does not limit itself to pure *ex post* enforcement of legal prohibitions; rather, it may even include *ex ante* establishment of detailed rules that shape the market structure and define its economic outcome. Decisions with some regulatory flavour are hence decisions based on competition law that do not just eliminate an anticompetitive practice but modify the market.

When dealing with consent decrees and commitment decisions, some European duty-to-deal cases, and those rule-of-reason cases where competition law enforcers prohibit a practice holding that the parties in question could have concluded a less restrictive deal, one gets the impression that current competition law agencies and even judges do not escape from *bringing markets* to the competitive equilibrium. From a perspective of traditional competition law scholarship, such an approach can be viewed with scepticism and qualified as a sort of *regulatory distortion* of competition law.

But is it really so? Maggolino’s ‘it depends’ answer could not be better suited to open the debate. Her chapter conceptualizes the differences between competition law and economic regulation, so as to make sense of the dichotomy. This leads the author to reconsider a two-pole situation, where competition law and economic regulation pursue different goals and apply different means. The two archetypical poles of this

dichotomy are indeed best represented by the Chicagoan conceptualization of US antitrust law of the 1970s, on the one hand; and the diffuse US 'sector-specific, rate-and-entry' economic regulation, emerging in the 1960s, on the other. The latter is categorized as what we would nowadays call 'command and control' regulation, which sets entry conditions, defines (product, process or target) standards, prohibits some conduct or compels a certain course of action, or controls prices charged to consumers or profits earned by the industry. Maggiolino summarizes this extreme as one where 'independent authorities' would act to attain 'economic welfare', economic growth and the 'public interest' by making *ex ante* detailed decisions that 'fully ... manage and control private affairs'.

In contrast, the competition law pole is conceptualized as a tribute to neoliberalism that only prohibits those practices that harm 'the competitive *status quo*', i.e. neither the process nor the effect, but the *natural* functioning of the market, 'by looking at the performance of total welfare'.

If these are the two 'pure' versions of regulation and antitrust, melting starts – as Maggiolino claims – when competition law begins pursuing political and social goals and does not let the *natural* market work alone (e.g., when it starts changing the market structure or imposing positive obligations to act instead of merely banning certain conduct).

The preference competition law enforcers have long accorded to the Chicagoan position, according to Maggiolino, can be explained by its 'reassuring nature': due to the intrinsic limitations it poses on enforcers' discretion. This archetype is reassuring in that it seems to be neutral, because it preserves competition authorities from pandering to political ideals, ceding to external interference, and producing false positives when enforcing the law. However, Maggiolino deconstructs the neutrality claim of Chicagoan antitrust. Markets and their *status quo* are not neutral, nor are they value-free, and neither are their theoretical foundations (which is true for all the social sciences).

The following chapter by Adi Ayal reaches very similar conclusions by assessing the 'worrisome' trend of antitrust 'expansion' in deregulated markets as well as in markets characterized by networks and platforms serving as essential facilities in large parts of the modern economy. Ayal starts with a thorough description of regulatory concerns and the types of agencies used to implement them. He then distinguishes between competition and industry-specific regulation and elaborates on the characteristics they share and their main relevant differences. He further discusses regulatory failures, delving into a major challenge for the trends towards deregulation: that of economy-wide network effects and the anti-competitive implications of platforms and bottlenecks. The dynamics of

markets showing such effects challenge antitrust oversight, making it especially broad. Ayal discusses the dangers deriving from antitrust's over-inclusiveness, one being the antitrust agencies' lack of time and expertise to 'delve into details and assess market characteristics beyond the broad generalizations of micro-economic theory'. Like Maggiolino, Ayal also posits that such an expansion of antitrust oversight may be dangerous, if 'similar to any governmental regulation, antitrust has never been completely immune' to capture by private interests and to failure. The author's analysis, though, should not be taken to mean that antitrust oversight is harmful *per se*, or should always be avoided in favour of sector-specific regulation; rather, it points out inherent pitfalls and recommends context-specific examination.

In the third chapter of Part 1, Yane Svetiev adopts a teaching by Sparrow: that law enforcers in different domains are regulatory professionals and should 'glance sideways' at their regulatory peers. Dialogue between enforcers and regulators can thus benefit competition agencies, by enriching their enforcement activities with a 'broader range of "compliance-management and behaviour-modification techniques"', as well as regulatory structures that could be adapted to controlling or remedying certain types of harms more effectively compared to habitual reliance on inherited mechanisms in various legal and regulatory fields'. Indeed, Svetiev contends that current practices in the implementation of competition law by the European Commission and national agencies already display important features of the 'problem-solving approach'. For instance, this can be seen in the evolution of certain standard mechanisms for implementing competition policy, such as the deliberative peer review of solutions to competition problems within the European Competition Network (ECN) and the growth of remedial enforcement at both the EU and the national level. Concerning the latter, Svetiev underlines how an increasing number of prohibition as well as commitment decisions at the EU level impose on undertakings positive obligations to act to achieve a specific objective similar to problem-solving regulatory decisions.

Commitment-based remedies in particular are not simply an expression of regulation, Svetiev contends, but they 'dissolve the distinction between regulation, law enforcement and market conduct', not least because they 'extend in some respects the autonomy of business conduct of market actors, while simultaneously limiting it'. Once again, the traditional tenet that sees regulation in liberalized markets as a temporary phenomenon, and overwhelming antitrust only acting *ex post*, is overturned. In turn, competition law should be seen as 'a species of economic regulation' that, by making use of the 'problem-solving approaches ... either through deliberations with peer agencies or through dialogue with undertakings in

remedial enforcement – may seek to dissolve the distinction between *ex ante* and *ex post* implementation’. The main advantages of such an extended variety of tools consists in the ability to quickly adjust implementation strategies and to increase the chances, although not the discretion, to adopt decisions that are more effective and more transparent.

Adopting a regulatory approach to competition law poses challenges not only from a substantive point of view, but also from an institutional one. The contributions in Part 2 discuss the institutional challenges faced by competition agencies when they exercise their advocacy powers. In their chapter, Tamar Indig and Michal Gal analyse market inquiries by focusing on the powers competition authorities dispose of when they conduct market inquiries. In the following chapter, Nicoletta Rangone focuses on a relatively new sort of power that competition authorities are entrusted with, namely, the power to control anti-competitive or restricting regulation, enabling them to take part in the ‘competition assessment’ performed by regulators.

Market inquiries allow for in-depth studies of ‘market failures that do not necessarily result from competition law infringements’. By analysing the benefits and limitations of market inquiries in detail, Indig and Gal provide an insightful assessment of such powers. The theme is particularly relevant for the regulation/competition intersection because with market inquiries, competition agencies, much like regulators, may apprehend what the obstacles to competition are, ‘whatever their roots’ (be they market or regulatory failures), even if competition law was not infringed. Moreover, following investigations, competition authorities may, like regulators, adopt structural as well as behavioural remedies, but can also advise the legislature to change the regulatory framework. Market inquiries also allow competition authorities to proactively step into the market at a stage prior to the violation of competition rules; finally, decisions following market inquiries, like regulation, affect all participants in the market and not only those that are addressed by a competition law decision.

Should we then accept competition authorities performing market inquiries? Or should we limit them because they strengthen the ‘regulatory approach’? Do they really alienate competition agencies from their ‘core’ (antitrust enforcement) business? And, as Indig and Gal put it, do they effectively make competition agencies ‘move from eliminating anti-competitive conduct into the field of *increasing* competition’? Do market inquiries ‘break the lines between *ex post* and *ex ante* regulation’? As a general rule, Indig and Gal suggest that market inquiries should be conducted by competition authorities only if there is a ‘comparative

advantage' (i.e., if sector-specific regulators cannot effectively perform a market inquiry). More specifically, the solution depends on whether a *supervisory* model of market inquiry is available instead of purely an *advisory* one. In the former case, competition authorities are allowed to adopt measures instead of just proposing them to politicians.

Drawing from the legal literature on coordination mechanisms in shared regulated spheres, Indig and Gal recommend coordination of both advisory and supervisory forms of market inquiries with sector regulation. According to them, such coordination provides some promise for 'overcoming concerns of dysfunctions'. However, while such coordination is very welcome in the 'market analysis phase' (i.e., the first part of the market inquiry), as it allows for cost savings regarding information-gathering and helps to overcome budgetary constraints, it could be problematic when policy conclusions and remedies ought to be drafted (i.e., in the final part of market inquiries), because of the risks of capture, blame-shifting or cross-vetoes in the regulatory arena.

Discussing the merits and pitfalls of the advisory and supervisory models, Indig and Gal conclude that the choice between the two strictly depends on the existence of specific conditions. A supervisory model should be preferred whenever the market inquiry only deals with competition issues and does not imply a balance of competition and non-competition considerations. Also, it should be preferred if 'the inquiry is focused on the efficacy of some form of regulation or its scope; where the inquiry is anticipated to provoke strong pressure groups and change is critical to avoid welfare-reducing stagnation; and where a high level of corruption and a low level of professionalism can be assumed in higher levels of government'. On the other hand, the advisory model should be preferred if 'it is important to gain the acceptance of other regulators, the government or the public for the recommendations; or where the decision is multifaceted and involves not only competition but other considerations such as security, environmental concerns, employment or strengthening the weaker parts of society'.

In her chapter, Nicoletta Rangone explores the question of how best to increase the effectiveness of competition advocacy activities in order to improve competition-friendly regulation, an objective that is shared by both regulators and competition authorities. In this framework, three tools are analysed and compared: the use of competition concepts in rule-making; traditional regulatory advocacy interventions (such as advice, market inquiries, etc.); and 'competition impact assessment'. The chapter concludes that both *ex ante* and *ex post* competition impact assessment might be considered a new advocacy tool and probably the most effective among those entrusted to regulators. Its effectiveness is related to the

intrinsic characteristics of this tool, which is used before a formal rule-making is adopted; it is based on an economic analysis, and it always takes into consideration the option not to intervene through regulation. However, competition impact assessment's effectiveness depends on some procedural choices and upon the circumstance that it is not used in a formalistic or even ritualistic way. Rangone also underlines that the involvement of competition agencies in performing competition assessment might increase its effectiveness, even though some issues remain unsolved – one of the most important being how best to balance the role of regulators and competition agencies.

Part 3 is devoted to the general problems arising when competition law is enforced in regulated industries. As mentioned above, it was in the archetypical world of traditional antitrust (Chicago) versus traditional regulation that the notional distinction between the two categories was forged: competition law consists in *ex post* enforcement of rules, while regulation entails *ex ante* intervention prescribing positive obligations to act.

Mario Siragusa and Fausto Caronna picture a system where a 'regulatory drift' of competition law can be observed not only inside antitrust's substantive rules, but also in the law protecting consumers against unlawful unfair commercial practices (which, in the Italian system, is enforced by the same – competition – authority). It is the 'convergence' – not the melting nor assimilation – of the two tools, from a substantive though not institutional point of view, that makes regulation and competition law become 'complementary' in the eyes of EU Courts and the European Commission. In turn, 'complementarity' implies that sector-specific regulation and EU competition law can be enforced in parallel, in a cumulative way, as the *Deutsche Telekom* and *Telefónica* cases teach us. It follows that competition law must find a way to avoid jurisdictional conflicts and regulatory inconsistency. Indeed, the cumulative approach may lead to disproportionate outcomes, putting a heavy burden on the firms operating in regulated industries.

Moreover, divergent outcomes resulting from the application of EU competition rules and national regulation urgently need to be overcome. One possible solution, in Siragusa and Caronna's view, is the *lex specialis* principle as applied in the US (particularly in the *Trinko* and *Linkline* cases), whereby the availability of a regulatory remedy should pre-empt antitrust enforcement (it is the 'mutually exclusive' or antitrust immunity model). However, the authors caution that transplanting that principle into the EU legal system would not be an easy task, due to the principle of supremacy of EU competition rules over national regulation,

which would impede any attempt to disregard the application of competition law. The *lex specialis* principle would only work in the exceptional cases where there is precise coincidence between allegations made by a competition authority and the regulated conduct; because, conversely, where regulation requires anticompetitive conduct, firms should not be fined. To conclude, Siragusa and Caronna suggest enhancing coordination between competition authorities and regulators, through the adoption of memoranda of understanding, combined with the publication of the results of that coordination.

In the second chapter of Part 3, Krystyna Kowalik-Bańczyk investigates whether a regulatory approach to competition law is applied by the Polish competition authority. Within the ‘regulatory approach’, she distinguishes those cases where the authority applies competition law to regulated sectors from cases where it acts ‘as the regulator’. Theoretically, the author adheres to the traditional ‘sequentiality’ pattern, according to which – as already stressed by Siragusa and Caronna – regulation is in place in a given market only until competitive structures have emerged in the market. It follows that regulation is temporary and exceptional (although not special, as Siragusa and Caronna contend). However, Kowalik-Bańczyk admits that under specific circumstances (e.g., as regards services of general economic interest), competition law alone would probably not suffice and regulation should remain in place.

From a more practical perspective, Kowalik-Bańczyk finds cases of a ‘regulatory approach’ mainly in the authority’s commitment decisions; and, more specifically, as regards commitment decisions in cases on local monopolies and services of general economic interest where infrastructures and essential facilities are at stake and where competition law enforcement coincides with sector-specific regulation (telecommunications, transport, energy, etc.). In these situations, the authority is engaged in ‘opening markets to competition or surveying consumer welfare rather than just restoring competition’. Kowalik-Bańczyk contends that this approach is consistent with the very ‘roots of the American idea of regulation as a part of the law created to guarantee the state’s influence on “business affected with a public interest”’. In these specific circumstances, competition law intervention very much resembles regulation, in terms of the goals pursued and the tools employed.

However, Kowalik-Bańczyk recognizes that the overlap is only partial: firstly, regulation also pursues other public interests (e.g., the protection of the environment). Secondly, a distinction is to be made between the creation, establishment or development of competition on the one hand, and its protection on the other. Interestingly, though, the author does not attach excessive importance to this difference, as supporters of the

traditional ‘*ex ante* versus *ex post* intervention dichotomy’ advocate. By observing that the Polish authority enjoys the statutory powers of both ‘developing’ and ‘protecting’ competition, she argues that some proactive actions to introduce competition in a particular market is legitimate, at least in Poland.

Although legitimate, these doubled competences of the competition authority do present some pitfalls, which are only partially diminished by the self-restrictive attitude of the authority. Firstly, legal certainty for undertakings may be jeopardized because ‘commitments’ are ‘individual and voluntary’ and ‘are based on the mere plausibility of infringement of competition’. Secondly, because regulation has wider goals, para-regulatory decisions by the authority risk providing only limited protection to the non-competitive goals. Thirdly, regulators may perceive their work as a failure anytime the competition authority proactively intervenes in the same market, while the competition authority might not necessarily possess the required expertise to perform these interventions. Instead of engaging in institutional competition, Kowalik-Bańczyk advises the competition authority and the sector-specific regulators to cooperate, thereby safeguarding their respective sphere of independence.

In the third chapter of Part 3, Alexandr Svetlicinii and Marco Botta analyse the patterns of enforcement of Article 102 TFEU and the respective national rules on dominance in network industries by the National Competition Authorities (NCAs) of ‘new’ and candidate EU Member States. Their comparative study takes into consideration nine jurisdictions, namely, Albania, Bosnia and Herzegovina, Bulgaria, Croatia, the Republic of Macedonia, Moldova, Montenegro, Romania and Serbia. In spite of the different stages of EU integration, these jurisdictions share a number of common features. While the EU Commission enforces Article 102 TFEU in the context of its pro-market liberalization agenda, NCAs of the selected jurisdictions enforce it in order to protect final consumers. In particular, while the EU Commission focuses its enforcement strategy in network industries on exclusionary conducts and adopts both structural and behavioural remedies via commitment decisions, the NCAs of the selected jurisdictions mainly impose fines to sanction unfair commercial practices of incumbent operators. They thus rely on Article 102 TFEU as a means to ‘regulate’ network industries: by sanctioning as ‘excessive’ and ‘unfair’ the tariffs and contractual conditions adopted by incumbent operators, they often *de facto* ‘replace’ NRAs’ action.

The problematic relationship between regulation and competition law becomes especially visible when Svetlicinii and Botta analyse sectorial experiences. Here the Internet, broadband networks and information *per*

se become the stage where the complex relationship is tested in its multi-faceted appearances.

The main question that Rolf H. Weber addresses in the first chapter of Part 4 relates to the relationship between competition law and regulation in the digital sector of the Internet. Firstly, the author claims that with regard to the Internet it is still inappropriate to speak of regulation, given that the debate over its governance is still open and the solutions proposed vary substantially (ranging from ‘cyber-national-sovereignty’, with states eager to submit Internet management to governmental control, to supporters of a privately organized regime allowing the free flow of information without national interference). Mostly, the Internet is still about self-regulation by international standard-setting organizations (SSOs), while the nation-states are trying to harness it and set some rules based on net neutrality principles, security needs and other public interest rationales.

The online world is therefore a land of conquest for both governments and companies, the latter trying to make profits out of it, while governments try to guarantee widest access or to limit its use, especially when security issues are at stake. Ironically, both online firms and states can adopt commercial strategies or establish rules that shape the market by changing its structure. So, for instance, as regards private actors, a question may arise whether online sellers can exploit lock-in effects caused by high costs for switching from one platform to another and therefore foreclose the market for competing platforms. In the search engine market (Yahoo! and Google), issues of multi-sided markets, new gatekeepers and bottlenecks arise (or of multi-homing in the social networks market), putting at the forefront the question of whether long established standards of antitrust liability are still applicable. In a still unstable and changing world, no one-fits-all solution is emerging: thus, the EU is taking a harder line compared to the US competition authorities (as demonstrated by the diverging results of the Google investigations of 2010 and 2011). In Weber’s view, the reason for such divergence resides in Google’s super-dominant position (with 90 per cent in the search engine market), which exists in the EU and not in the US (70 per cent).

While the advertising market has not changed due to the advent of the Internet, the same is not true for social platform markets, where competitors struggle ‘for user attention’, and not just their wallet. In such markets, Weber contends, Schumpeterian competition prevails, with one giant replacing the other. Network effects (that create high entry barriers) and market concentration, however, tend to shape the web world. Should competition law or regulation intervene? In Weber’s view regulation is not legitimate and should therefore be excluded, provided that barriers to

entry ‘are not insurmountable nor non-transitory’ and because a mix of elements should be reflected in the product and/or service definition (such as data portability or the value of personal data, which seems to be increasing).

The author supports the notion that general competition law should normally apply, as the online world does not present any new forms of anticompetitive behaviour. However, he cautions that some adjustments are welcome with regard to the definition of the relevant product market and the assessment of market power. For instance, he stresses that the time dimension should be given special emphasis, since incumbents can more quickly be replaced in the online world.

In the second chapter of Part 4, Toshiaki Takigawa analyses the application of competition law in innovation-intensive industries, and especially as regards broadband networks, products and services (i.e., mobile devices and services). His first thesis is that, when dealing with innovation-intensive industries, competition law and competition law enforcement should adapt to the specificities of such markets. This applies, for instance, to the definition of market power, since market shares only provide a static picture, while these markets are characterized by dynamic competition. It follows that competition agencies need to put more emphasis on securing incentives to innovate than on controlling temporary pricing power. Takigawa mainly analyses unilateral conduct in broadband markets and advises antitrust agencies to apply a cautious approach to interventions against unilateral conduct. Agencies should avoid pursuing short-term static efficiency gains at the cost of diminishing dynamic efficiency. Yet he strongly argues that competition law should safeguard competitive pressure from potential market entry, as this incentivizes incumbents to innovate. Therefore, competition agencies should intervene in the market foreclosure strategies of dominant companies that have the potential of blocking market entry.

After an analysis of the evolution of US regulation of broadband access, moving from a ‘common carrier’ principle (whereby network operators are subject to interconnection and unbundling duties, no matter whether dominant or not) to ‘regulatory forbearance’ of 2005 (relaxing the afore-cited duties in the name of dynamic efficiency), Takigawa provides insights on the Japanese system. Here the telecoms regulator enforces both interconnection obligations and unbundling duties (as in the US) regarding both narrow and broadband networks operators. Both duties can be exempted, as in the US system, by the regulatory agency upon request from the carriers, and based on considerations of efficiency gains. The main difference resides in the statutory duty of the regulatory

agency to establish that a network operator is dominant any time a 50 per cent market share is attained or exceeded.

On the intersection between regulation and competition law, Takigawa strongly favours reliance on competition law rules to govern innovation-intensive broadband markets. The main arguments supporting this position are: firstly, the traditional view about competition law as an *ex post* intervention, as opposed to regulation that steps in *ex ante*, thus putting an excessive burden on individual autonomy; secondly, the argument that competition authorities are less prone to capture than regulators, since they apply the law across all sectors of the economy; and thirdly, the argument that these markets no longer exhibit the characteristics of a natural monopoly and that, by now, competitive structures have emerged in these markets.

The chapter continues with a thorough review of the leading cases in the US and Japan regarding unilateral conduct. Thereby, Takigawa highlights three policy implications regarding the enforcement of competition law in innovation-intensive industries: firstly, competition authorities are advised to use the requirement of market power 'as a safeguard against overregulation of unilateral (exclusionary) conduct'; secondly, they need to base their examination of a refusal to deal (or a price squeeze) regarding access to a broadband network on a standard that balances innovation incentives against chances of new entries; and thirdly, telecom regulators should be allowed to impose behavioural remedies for antitrust violations, provided that such remedies lead to administrative efficiency and that the same regulatory standard is shared between the competition authority and the telecoms regulator. In fact, the author recommends that, if regulatory standards differ, the competition law standard should prevail. However, as competition spreads across the industry, the competition authority should become the sole regulator of competition in the telecoms sector.

In the third chapter of Part 4, Fabiana Di Porto focuses on another set of cross-cutting issues: namely, the relationship between abuses of dominance and information sharing as it arises from EU, Italian and US case-law. Firstly, she explains how informational monopolists (or super-dominant firms) may infringe competition law by three different forms of 'informational abuses': (i) through actual or constructive refusals to exchange information; (ii) through the misuse of information provided to public regulators performing some pro-competitive regulatory procedures; and (iii) through collusion to provide misleading information (outside a regulatory procedure). Secondly, she points out that many cases on Article 102 TFEU (or national unilateral conduct rules in other jurisdictions) are enforced by imposing complex behavioural remedies

that mandate an exchange of information. Such behavioural remedies resemble much traditional regulation, as regards the rationale of intervention, the institutional resources employed (e.g., they require continuous monitoring of commitments, strong sectorial expertise and dedicated resources) and the powers exercised. As a consequence, she calls them ‘para-regulatory’ remedies, thereby distinguishing them from pure, traditional regulatory interventions. In particular, these para-regulatory remedies can conflict not only with already existing information-based regulation, but also with the traditional suspicious approach that competition law applies when it comes to transparency and the enforcement of Article 101 TFEU on restrictive agreements.

Finally, Part 5 of this book discusses the problematic relationship between competition and intellectual property. Both chapters in this part question whether competition law could be seen as a regulatory tool, namely, as regards strategic patent filings and standard setting. Emanuela Arezzo starts her analysis by noting that, in contrast to restrictive agreements, no further guidance is provided as to how EU competition law is to be applied to mergers and unilateral conduct involving intellectual property rights. According to her, especially in the field of unilateral conduct, there is a need for a common core of guiding principles concerning the intersection of competition law and IP, considering not only that ‘the number of abusive practices involving the use of IPRs has recently increased, but also that new kinds of practices have emerged, posing increasingly complex issues to analyse’. Among such new practices, Arezzo then focuses on so-called ‘strategic patent filings’, whereby dominant firms try to keep competitors out of the market by applying for patents, thereby achieving an artificial extension of market dominance based on IP protection. Cases of this kind particularly originate from the pharmaceutical sector. The assessment of these cases is particularly complex because, on the one hand, the act of strategic patenting relates to behaviour which may actually be legal under patent law. In addition, the question is whether even the very acquisition of an intellectual property right – in contrast to its use – can be considered an abuse of market dominance. Arezzo sets the scene by clarifying the relationship between market power and IPRs, and then analyses the potential anti-competitive effect of strategic patent filings. She then describes the interplay between competition law and IP law by differentiating between the ‘existence’ and the ‘exercise’ of an IPR and by providing a thorough analysis of the pertinent EU and Italian case-law (*AstraZeneca* and *Ratiopharm v. Pfizer*). Arezzo welcomes the intervention of competition law enforcers – as ‘IP watchdogs’ – in IP-related markets, which is needed to ‘constrain the

expansionist trend recently experienced by IP legislation and courts world-wide'. However, she also argues that competition law intervention in IP-related cases should remain balanced and should avoid incurring the risk of diminishing innovation. Especially strategic-patenting cases must be analysed much more thoroughly than traditional refusal-to-deal cases or, in general, cases where dominance does not arise from mere IP ownership but rather from a combination of the IP right and a complex set of market factors such as network effects. When such market-related 'plus-factors' are absent and dominance exceptionally arises only from IP ownership, the application of competition law will be in need of very careful consideration of the specific circumstances of the case. Intervention should only take place in the exceptional case where there is proof that the IP system has been misused for the exclusive purpose of restricting competition with no real consumer benefits in terms of innovation.

In the second chapter of Part 5, Björn Lundqvist looks at the relationship between competition law and the setting of technological standards by standard-setting organizations (SSOs). According to him, 'standard-setting collaborations' and 'unilateral conduct under standards' pose new challenges to competition agencies and regulators. Comparing the practice in the EU and the US regarding SSOs, Lundqvist claims that competition law should scrutinize more thoroughly the standard-setting procedures and the SSOs' organizational rules.

Lundqvist is well aware that using competition law to control standard-setting processes and rules and the activity of SSOs would mean, especially in the US system, setting an unusual rule of primacy of competition rules over regulation. However, he also argues that, in principle, competition law should not scrutinize standards *per se* unless they pose an anticompetitive harm by themselves. So, for instance, for the sake of legal certainty and clear guidance, safe harbours should be identified for those standard-setting collaborations whose anticompetitive effects are limited; competition law immunities, in both the EU and the US, should be accepted for those SSOs that comply with sound principles of good governance and transparency.

For the standard-setting world, and following most prominent case-law, Lundqvist supports the idea that competition law can intervene if the market is able to support competing standards and if the SSO has been misused in the standard-selection phase, or the SSO's governance rules have been gamed, provided that that such conduct has the potential to exclude competitors.

This also means that competition law should not intervene where an SSO sets an 'infrastructure standard' or an 'interoperability standard' under the condition that such markets can only hold one standard. Precisely in these cases, however, Lundqvist explains the major role

competition law has to play in guaranteeing that individual members of SSOs respect the rules set by the SSO. In sum, Lundqvist suggests that competition agencies should oblige SSOs, as bodies of private self-regulation, to design their organizations and procedures in a competition-compliant manner. Thereby, competition agencies obviously act as regulators of SSOs.

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