THE FUTURE OF ANTITRUST: CONCERN FOR THE REAL INTERESTS AT STAKE, OR ETIQUETTE FOR OLIGOPOLISTS?
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1. The Huawei decision and its shortcomings.

The Huawei decision1 is affected by a paradoxical shortcoming. I will try to explain why.

The question referred to the Court concerned the possible existence of an abuse of a dominant position in the conduct of holders of FRAND – pledged standard essential patents (patents essential to a standard developed by a standard-setting organization), applying for an injunction to stop the activity of (unlicensed) users of their technology. A question, as it is obvious, whose answer immediately affects the possibility of a new maker entering the market and that is potentially able to influence the degree of competition from which consumers will benefit 2.

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2 The point is acknowledged (but not taken into the consideration it deserved) in the Opinion of Advocate General Wathelet, in Huawei, see par. 74, and especially note 51: “… where the SEP-holder uses actions for a prohibitory injunction as leverage to increase licence fees, contrary to the FRAND commitment, the prices of LTE standard-compliant products and services are indirectly and unfairly affected, to the detriment of the consumers of those products and services”. In fact, it is obvious that downstream consumers are harmed when excessive royalties are passed on to them: J. Farrell, J. Hayes, C. Shapiro, T. Sullivan, Standard Setting, Patents, and Hold-Up, 74 Antitrust L.J. 2007, 603, 605; S. Mitchell, Microsoft and Apple Patents “Push Up Price of Android”, PC PRO (Aug. 4, 2011): “Google’s patent war with Apple and Microsoft could lead to price increases for Google’s Android phones and less handset choice”; J. Lee, An Unfrandly Game: Preventing Patent Hold-Up by Improving Standardization, 10 J. Bus. & Tech. L. 2015, available at: http://digitalcommons.law.umaryland.edu/jbtl/vol10/iss2/7, 375, 391: “The consumer loses financially, as it has to pay for higher prices for this patent infringement litigation and personally, as the number of product options decreases”.

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The question is obviously rooted in the context of the antitrust law, where consumers’ interest should be paramount. One would therefore have expected that the starting point of the Court’s reasoning would be an analysis of the problems connected with the competitiveness of the markets in which Standard Essential Patent are present and, especially, with the ways in which SEPs can harm or benefit consumers. Nevertheless, a serious reference to the consumer interest, which should have been the pole star of the whole reasoning, is totally absent throughout the Court’s opinion. Not just that. Consumer interest, in addition to being verbally ignored, seems to be totally out of the horizon of the Court’s concerns. The Court cares about delineating the etiquette that courtly patent holders and courtly potential users ought to respect in their interaction. Nothing is said about the consumers’ interest in enjoying the benefits of greater competition.

The result is a decision under which if the patent holder behaves rudely whilst the potential user behaves in a polite and courteous manner (by strictly complying with all the formal moves required by the etiquette established by the Court), consumers shall benefit from increased competition. In the opposite case of a polite patent holder and a rude potential user, consumers shall suffer the monopoly power of the patent owner and its licensees.

This is a result that I deem paradoxical: the satisfaction of the consumers’ interest made dependent on the respective rudeness and politeness exhibited in the given circumstances by the two contenders, the patent holder and the potential user. I maintain that this paradoxical result is not the occasional consequence of a situation that exhibits in turn some paradoxical features (a patent becomes essential not – or not just - on its merits, but as a result of an agreement among competitors). The distorted perspective (mistakenly ignoring real consumer interests) inspiring the opinion of the Court in Huawei is the result not of an accident, but of the conceptual evolution that characterized the antitrust law over the past decades.

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3 The fact that the reference to the Court of Justice made by the Dusseldorf Court originated from a problem of interpretation of the so-called Orange Book defence, that can be used by defendants in patent infringement actions in German courts, does not seem to me a valid excuse for the way in which the Court of Justice set the problem.


5 European Commission, Standard-essential patents, Competition policy brief, June 2014, 3: “Standard-setting (or standardisation) is generally achieved by means of an agreement between undertakings, often competing on the same market, and so is subject to Article 101 TFEU. Given their positive economic effects, standardisation agreements are generally compatible with Article 101 TFEU, even if they are agreements between competitors to adopt a single technology in favour of others.”
This connection may appear astonishing, given that during the last few years consumer interest, has apparently dominated the antitrust policy, whose professed principal concern has been the maximization of the consumer welfare. So, before returning to the specific problems of Huawei, I will try to explain how the theory which posits consumer welfare as the goal of the antitrust law can lead to ignoring or distorting the real problems of the protection of the interests of the consumers.

2. The antitrust goals and the “efficiency theory”.

As every scholar knows (and some, as this author, remind) nearly half a century ago the traditional and, in some sense, natural goal of the antitrust law (preserving the competitive structure of the markets) was replaced by another ambiguous and rather cryptic goal, the pursuit of “efficiency”. This shift in perspective is notoriously associated with the triumph of the so called Chicago school of antitrust, whose roots date back to the fifties/sixties of the last century and whose maturity was reached in the seventies. The ideas of the Chicago School, and especially the focus on efficiency, have had a tremendous success in the US.

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6 W. Davies, The Politics of Externalities: Neo-liberalism, Rising Powers and Property Rights, Network Grant, ESRC Rising Powers Programme, 2010-2011, 7: “By the 1970s, a new vision of anti-trust had emerged from the Chicago School, that was purely dedicated to the maximisation of efficiency (measured as consumer welfare), and agnostic as to whether this was best pursued by markets or by monopolistic hierarchies. Highlighting the efficiencies of industrial concentration has been the major contribution of Chicago Law and Economics to US, and subsequently European, competition policy.”


9 The paradoxical reasoning of Bork (the cornerstone of the Chicagoan efficiency theory) is well summed up by B. Lynn, Cornered: The new monopoly capitalism and the economics of destruction, John Wiley & Sons, 2009, 138: “… if antitrust law exists to serve the consumer, and if consumers are best served by getting more for less, and if the best way to get more for less is to encourage business to be “efficient,” and if the best way to be efficient is to build up scale and scope, then ergo, monopoly is the best friend of the consumer.”

10 J. Markham, Jr., Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the “Too-Big-To-Fail” Phenomenon, 16 Fordham j. Corp. & Fin. L. 2011, 278: “In the last two decades of the Twentieth Century, antitrust law embraced this narrow, Chicago School, doctrinal approach to antitrust law and accepted the optimization of allocative efficiency of firms and markets as the dominant antitrust policy.” On the influence of the Bork’s book on the U.S. Supreme Court, see especially G. Priest, Bork’s Strategy and the Influence of the Chicago School on Modern Antitrust Law, 57 The Journal of Law & Economics, 2014, 1.
have shaped antitrust policy becoming in a way “commonsensical”\textsuperscript{11}, certainly influencing the evolution of European antitrust law too\textsuperscript{12}.

In the last two decades or so, some thesis advanced by the Chicago scholars have been amended or even challenged, so we speak now of a Neo-Chicago or a Post-Chicago\textsuperscript{13}. What exactly is implied by this transition from a tight Chicagoan orthodoxy to an evolved, or changed, theoretical perspective, seems controversial and difficult to establish\textsuperscript{14}. However, I think that at least one feature of the original Chicago thought still dominates the economic approach (and remains in any case a key point of reference with which all the views on the goals of antitrust law, even those less sympathetic, have to contend). I mean the belief that: a) efficiency is the main, or the sole, goal of antitrust law and b) this goal can guide the interpretation and the enforcement of antitrust law unambiguously, sheltering it from the influence of any (arbitrary) political evaluation.

I intend to criticize this belief and to highlight the serious limitations of the conception (which I will refer to, from now on, as the “efficiency theory”\textsuperscript{15}) that conceives of efficiency as the most important, if not the sole, normative objective of antitrust law. A conception quite widespread in the U.S. and in the European scholarship, and which seems to be shared, in its general terms, even by Neo- and Post-Chicago.

3. The empty notion of efficiency and the problematic notions of consumer welfare and of total welfare.

\textsuperscript{11} Even among the not entirely sympathetic scholars. See e.g. H. SCHWEITZER, Efficiency, political freedom and the freedom to compete - comment on Maier – Regard. The Goals of Competition Law, (D. Zimmer, ed.), Edward Elgar, 2012, 196, 181: “there are few who would contest that efficiency and consumer orientation are among the relevant aspirations of competition law. What is more: efficiency criteria and consumer interests are clearly relevant as a matter of positive EU law”.

\textsuperscript{12} D. BARTALEVICH, The Influence of the Chicago School on the Commission’s Guidelines, Notices and Block Exemption Regulation in EU Competition Policy, 54 Journal of Common Market Studies, 2016, 267, 279; L. PARRET, ‘Shouldn’t we know what we are protecting? Yes we should! A plea for a solid and comprehensive debate about the objectives of EU competition law and policy, 6 European Competition Journal, 2010, 339, 357-358; A. WEITBRECHT, From Freiburg to Chicago-the First 50 Years of European Competition Law, European Competition Law Review 2008, 81, 85 “...a process of Americanisation began and the Commission gradually adopted its own version of the consumer welfare approach developed by the Chicago School…”


\textsuperscript{14} In fact the relationship between Chicago and Post-Chicago is rather controversial. Some commentators minimize the differences between the two schools: e.g., J. MARKHAM, (nt. 10), 278–81, maintains that “Post-Chicago School antitrust is the stepchild of Chicago School antitrust.…” it “departs from the Chicago School views mostly around the margins.”; B. Kobayashi, T. MURIS, Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century, 78 Antitrust Law Journal, 2012, 505, arguing that “…the contributions of the “Post-Chicago” school to antitrust doctrine and policy are limited”;

\textsuperscript{15} D. BUSH, Too Big To Bail: The Role of Antitrust in Distressed Industries, 77 Antitrust Law Journal, 2010, 277, 279 296: this “Post-Chicago ” view of economics still examines the world through the lens of efficiency and consumer welfare. Thus, while the movement towards a Post-Chicago world is a promising turn for some, it still ignores political considerations and continues the Chicago focus on efficiencies and firm size as not being necessarily evil”. J. WRIGHT, Abandoning Antitrust’s Chicago Obsession: The Case for Evidence-Based Antitrust, 78, Antitrust Law Journal, 2012, 301, 302: “The Neo-Chicago School could be interpreted as arising largely as an exercise in marketing — rebranding the Chicago School… In the end, the Neo-Chicago School offers little if any true product differentiation from its predecessor”.
The critique to the efficiency theory can usefully start from the obvious observation that efficiency is not only a concept susceptible of multiple meanings but also a substantially empty notion. Nothing is efficient in the vacuum, abstracting from a given goal. What is efficient in reaching a given end (say, the satisfaction of my preferences) may often be inefficient in pursuing another goal (say, the preservation of my health). So, in order to give content to the notion of efficiency we have to define a specific goal. Only afterwards, can the degrees of efficiency of each of the possible ways for reaching the chosen goal be evaluated and, perhaps, measured.

With reference to antitrust law, the candidates for carrying out the function of giving content to the notion of efficiency by defining a specific goal, are two quite different (and, in their turn, problematic) notions, that of (efficiency as) maximizing the total welfare or that of (efficiency as) maximizing the consumer welfare. The theoretical difference between the two perspectives is that in the latter (consumer welfare) only the well-being of consumers counts, whilst in the former (more coherently, but less reasonably, as we will immediately see) what counts is the effect of the considered practice on society at large.

The problem of defining the practical differences between these two notions of efficiency, and even more that of choosing between them, is rather complex.

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16 Qualifying efficiency as “economic efficiency” does not solve the problem. Not even the concept of economic efficiency can do without the definition of a precise goal. The decision of introducing capital intensive technologies may be economically efficient if the goal is that of increasing the profits of firms, but may be economically inefficient from the viewpoint of the protection of the interests of the employees. Among the most recent, see, S. SALON, Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard, 22 Loyola Consumer Law Rev, 2010, 336; R. BLAIR, D. SOKOL, The Rule of Reason and the Goals of Antitrust: An Economic Approach 78 Antitrust L.J. 2012, 2, 4.

17 On the role of consumer welfare in competition enforcement across the global competition community, see International Competitive Network, Competition Enforcement and Consumer Welfare – Setting the Agenda (2010). On the role of consumer welfare in the European Union, see the then Commissioner N. KROES, European Competition Policy-Delivering Better Markets and Better Choices, Speech 05/ 512 (2005): “Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies”. See also the European Commission’s press release (3rd December 2008) announcing the Article 82 guidance paper headed Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings.

18 Much of the time these goals produce in practice the same results and are therefore indistinguishable: H. HOVENKAMP, Distributive Justice and Consumer Welfare in Antitrust 9 (2011), available at http://ssrn.com/abstract=1873463: “The volume and complexity of the academic debate on the general welfare vs. consumer welfare question creates an impression of policy significance that is completely belied by the case law, and largely by government enforcement policy. Few if any decisions have turned on the difference. In fact, antitrust policy generally applies both tests...”). For more nuanced views A. MEISEE, Reframing the (False) Choice Between Purchaser Welfare and Total Welfare, 81 Fordham Law Review, 2013, 2197, 2199 (The choice between these two standards often will not matter for antitrust doctrine. At the same time, there is a subset of conduct that a “purchaser welfare” standard would condemn, but that a “total welfare” approach would leave unscathed and even applauded); J. JACOBSON, Another Take on the Relevant Welfare Standard for Antitrust, The Antitrust Source, 2015, “In most antitrust cases, the choice of welfare standard really does not matter, as the same results
Both perspectives try to give content to the notion of efficiency by recurring to the notion of “welfare maximization”, and in both the crucial datum, on which the antitrust evaluation of the relevant practices should depend, is the fact that the practice in question increases or decreases the welfare of the individuals concerned. The reference to the goal of “maximizing welfare” is their common theoretical core.

What I intend to criticize in this essay is just the idea that the goal of maximizing welfare can give precise content to the notion of efficiency and that the functioning of antitrust laws can be defined and limited by these two conceptual references (efficiency and welfare maximization). The criticism I will move to the idea that all antitrust ends boil down to the pursuit of something called “efficiency” applies to both theories, to that which uses the notion of consumer welfare and (in a sense, a fortiori) to the one that uses the notion of total welfare.

Thus, there is no reason of dwelling here on the problems of the more or less subtle differences between the two views.

The main criticism that can be levelled against the efficiency goal understood as maximizing (consumer or total) welfare, is that this end does not provide any clear indication, for the majority of the relevant antitrust practices have different effects on different individuals, mostly increasing the well-being of some and decreasing that of others, with no possibility of establishing whether the algebraic sum is positive or negative. 20

The occurrence of this phenomenon (different effects on the well-being of different individuals) is blatantly obvious if we adopt the total welfare criterion. Changes in market power of a given corporation have effects on the customers and the shareholders of the corporation, but also on the competitors, on the employees and on almost any other individual in the considered society. For instance, a merger between two oil companies may reduce the needed workforce and thus the costs of the resulting firm, potentially benefiting the shareholders and, if the reduction of costs translates in a reduction of prices, the consumers. In this case, it is rather obvious, however, that the merger may harm the competitors (if they exist); may harm the dismissed employees or even all employees, if the firm becomes a monopolist (and, therefore, from the viewpoint of its employees, a monopsony); may harm the environmentalists who regret that a decrease in the oil price can delay the development of renewable energy sources, etc.

will hold regardless of the standard applied”; for different views B. ORBACH, The Antitrust Consumer Welfare Paradox, 7 Journal of Competition Law & Economics, 133, 164 (The differences between the total surplus standard and consumer-oriented standards are substantial…); R. BLAIR, D. SOKOL, Welfare Standards in US and EU Antitrust Enforcement, 81 Fordham L. Rev., 2012, 2497 (it is total welfare rather than consumer welfare that should drive antitrust analysis).

20 Technical flaws and limitations of the notion of consumer or total welfare (other than that that inspires the criticism carried out in the text) are illustrated in J. COBSON, Another take on the Relevant Welfare Standard for Antitrust, The Antitrust Source, August 2015, p.5. See also J. DREXL, On the (a)political character of the economic approach to competition law, in Competition Policy and the Economic Approaches. Foundations and Limitations, edit. J. DREXL, W. KERBER, R. POIDSUN, Cheltenham/ Northampton, 2011, 312- 337.
In this case, indeed quite simple, how the variations of well being experienced by each member of the various mentioned categories (and of the others potentially involved, the suppliers of the merged firms, for example) can be reliably measured? How can the algebraic sum of all these variations be calculated? We face here a calculation problem which is clearly insoluble, not only for practical reasons (lack of information about the amounts of the increases and decreases of welfare) but for deep theoretical reasons related to the well-known impossibility of adding or subtracting changes in well-being experienced by different individuals.

Even if we adopt the other alternative, and focus on the consumer welfare, leaving aside the welfare of the other potentially affected categories, the problems arising from the impossibility of adding up the increases and the decreases of well-being experienced by different people are far from disappearing.

In this perspective (only consumers count) it is obviously easier to imagine cases in which all, or almost all, are harmed by a practice (the so called “naked restraints” may provide some examples). But given that consumers have different, and often conflicting, interests, values, beliefs and ultimately preferences it is easy to realize that the majority of the practices relevant for antitrust law usually benefit some consumers and harm others.

The point can be illustrated by starting from some specific cases, especially those involving conducts for which the efficiency theory has urged (and mostly got) an approach favouring the recognition of their legality.

We can illustrate the point starting with an example provided by Kodak, a symbolically “thick” case, in which purchasers of Kodak machines were forced to buy Kodak’s repair services and to service the copiers exclusively with the manufacturer’s original parts. One of the main problems was that of the ability of consumers to take into account (when purchasing the copier) the future costs of parts and services over the copier’s lifetime. Disregarding the peculiarities of the case (that was rather complex) we can note that in cases like this we usually have both, consumers able to exactly forecast these costs, who are consequently able to evaluate the convenience of the whole purchase (machine plus service), and, possibly, to benefit from the low price of the machine, and other consumers who miscalculate the future costs of the service and who, tempted by the low price of the machine, may make a very bad deal (for them).

We can then establish a first variable, which can ground the different effects that the same
practice may have on various classes of consumers. It is the fact that different consumers have different ability of rationally calculating and forecasting, an ability which can be crucial to the wellbeing of consumers facing commercial offers that can prove convenient or harmful according to the occurrence, or non occurrence, of some future events.

In addition to differences in abilities, differences in preferences may be even more relevant. In the simplest cases, where only the price is considered, we can easily imagine that all consumers would prefer paying the lowest prices for the best quality (see however what will be observed below). In other, more complicated, cases, the assumed equality of preferences may not be upheld. Mostly relevant, especially in vertical restraints, is the difference between the preferences of the marginal consumer and those of the infra-marginal ones, for example with reference to the balance between retail price and level of services.

More in general, differences among the preferences of various classes of consumers can be relevant in many cases. An example is that of quality changes: in these cases the problem arising would be “how to balance a price increase that affects all consumers against a quality improvement that only some consumers demand”. Another example is provided by tying contracts, whose natural effect is that some combinations of goods become very expensive or disappear from the market (think of ships and sails: if ships are sold only with the sails produced by the seller, it becomes very difficult to have a ship made by A equipped with the sails made by B, or vice versa). We can easily imagine that some consumers will benefit from the (supposed) efficiencies made possible by the tie-in, but we cannot rule out the existence of other consumers who would have preferred a more expensive (in hypothesis), but for them more satisfying combination.

Another relevant factor (besides abilities and preferences) could be the attitude towards risk. Take for example the case of predatory pricing. We face here an alternative: preventing the dominant firm’s rebate of the price, or allowing the establishment of a price that, in case of the dominant firm’s succeeding in foreclosing the market, will be replaced by a monopolistic price yet higher than the price which existed before. Looking at the case from the viewpoint of the “consumer welfare” it is easy to discover that usually two different classes of

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25 W. Comanor, Vertical Price Fixing, Vertical Restrictions, and the New Antitrust Policy, 98 Harv. L. Rev. 1985, 983, 991…societal gains or losses from changes in the product depend on the preferences of all consumers, not merely those at the margin. To the extent that such alterations fail to reflect the preferences of infra-marginal consumers, the interests of consumers in general may not be served”.

26 P. Rey, Vertical restraints—an economic perspective, Revised draft report (2012): 1, 14 “Firms and consumers may however disagree here on the desirable amount of retail services: the reason is that firms are primarily interested in the additional consumers they can attract by providing these services; they thus focus on marginal consumers, and tend to neglect the impact on infra-marginal consumers. Thus, if for example marginal consumers are willing to pay more for better services, whereas infra-marginal consumers would favour lower services and prices, then the firms may choose to increase the level of services (and the retail price, so as to cover the cost) even though doing so hurts the majority of consumers and decreases total welfare”. More in general, F. Scherer, The economics of vertical restraints, 52 Antitrust Law Journal, 1983, 687-718.


28 In addition, we can note that it is acknowledged that variable proportion tying contracts benefit some consumers while they harm others, H. Hovenkamp, (nt. 19), 14.
consumers are present: risk adverse consumers, who prefer the status quo (and therefore the prohibition of any minimally dangerous attempt to monopolization) and risk taking consumers, who are eager to exploit the possibility of a decrease in the market price even at the risk of thereby encouraging a monopolization process. Given that the decision makers have no certainty about what will happen in the future (and even less about what may take place in markets dominated by large “predator” enterprises) and furthermore given that errors are statistically inevitable, it is evident that at the moment in which the decision makers choose whether to repress a practice of predatory prices, they will end up giving more weight to the preferences and to the well-being of one or of the other category of consumers.

We may further complicate the problems by introducing a “time factor”: how long will the low price last before the predator is able to recoup? How long will it take, before new competition moderates the monopoly price? The relevance of the time variable is evident: some consumers can more or less easily afford a year of monopolistic prices, for others nine months are already too much, and so on.

This perspective can be easily extended to other cases. The conflict between risk taking and risk adverse consumers arises in all the cases in which the evaluation of the challenged conduct requires, as it is absolutely normal in antitrust matters, forecasts about the future performance of the market. As, for example, in the case of a merger which increases both efficiencies and prices. In this case we are likely to have consumers who trust in the ability of future competition to compel a decrease of the prices and consumers who are not eager to take this risk. More in general, we can easily imagine that besides the consumers who are only interested in the increase of productive efficiency vaunted as a consequence of the merger, other consumers may legitimately be more concerned about the concentration of long-term economic and political power determined by the merger.

We examined cases in which consumers have different abilities, or preferences, or attitudes towards risk. There are eventually cases in which consumers can be imagined identical and nevertheless the reference to consumer welfare is still useless. An example is price discrimination, which involves charging different prices to different groups of consumers for the same good. Here we have a group benefitting from cheaper prices, whilst other consumers face higher prices. Usually, when price discrimination is prevented, the lower price (that charged in the first market) increases, whilst the higher price applied in the second market decreases. In other words, the non discrimination price lies usually in between the two prices under price discrimination. Therefore, consumers in the first market are made worse off, whilst consumers in the second market are made better off. The existence of an increase or a decrease of consumer welfare can not be established with absolute certainty.

29 Note that the distinction is likely to stem much less from psychological attitudes, than from economic reasons linked to the different income of the different consumer.

30 An exception may be provided by the possibility that the “…discrimination makes it possible to sell to markets that would not be served at all under single price monopoly”, see R. SCHMALENSEE, Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination, 71 Am. Econ. Rev., 1981, 242, 246.
4. How the efficiency theory made the antitrust myopic.

The above considerations show that the most important practices can usually benefit some consumers while harming others. Obviously this fact does not imply that all those practices are, from the antitrust viewpoint, equal, and that no good reason exists for prohibiting them. The point here is not that of denying that practices exist that, all things considered, are more favourable to consumers than others. The point is simply that even the practices more favourable to some consumers, may hurt a (more or less numerous, meritorious, worthy of consideration, etc.) group of other consumers. The consequence is that the final judgment is non technical (measuring whether consumer welfare increased or decreased) but political (evaluating the group of consumers that deserves protection and why). Every judgment on the welfare effects of a practice is unavoidably political in the sense that it ends up giving more value to the gains of some and lower value to the losses of others. It is a judgment of convenience about certain expected results and of preference for the interest of some people.

This does not imply the irrelevance of the welfare of consumers and of other individuals involved. The simple point is that increases and decreases of welfare cannot be calculated, but have to be evaluated according to the the size of the group of the holders of the sacrificed interest, the worthiness of such interest, the magnitude of the sacrifice imposed, the amount of benefit received by the preferred interest holders, etc. The efficiency theory hides the real nature of the antitrust evaluations by bragging as technical, judgments that are in fact political, and by making the antitrust blind to the most important factors which should guide its enforcement.

It is rather paradoxical that the goal of maximizing consumer welfare has been (and still is) presented as the goal able to give to coherence and certainty to the enforcement of antitrust law, where, instead, the notion of “consumer welfare” is undetermined. In the presence of consumers with conflicting interests the decision maker who wants to maximize “consumer welfare” should be able not just to sum up the increases and decreases that each decision might imply on the well-beings of the different consumers, but to weigh and balance the consequences that each possible solution may have on that of different consumer groups. This huge problem is usually avoided by simply replacing real consumers with a generic notion of consumer, imagined as a sort of “representative agent”. Consumers are portrayed “as a coherent, homogeneous and predictable mass” 31, with the consequence of imagining the community comprising all consumers or, if you want (given that we are all consumers) the whole society, as a “big person”, as an organism within which we can imagine trade-offs between different needs, but not conflicts between different interests. As with reference to a human body no one could imagine an interest of the brain conflicting with the interest

of the stomach, so the efficiency theory is unable to perceive (even less to manage) a conflict between the interests of different classes of consumers. As Rawls 32 noted for the utilitarianism, the efficiency theory ignores the separateness and distinctness of persons.

This reasoning comes at a price. The use of a notion of welfare which instead of promoting an analysis of the real situation of different groups of individuals, assumes that all differences can be superseded, in the blurred figure of a representative consumer, or, worst, in a conception of the whole society as an organism, is totally unacceptable and condemns the antitrust to ignore everything but the satisfaction of a mythical Leviathan.

The efficiency theory operates in fact as a blinder 33, making the antitrust blind to the complexity of the actual market and to the social, macroeconomic and systemic consequences of its enforcement.

5. A “disembedded” antitrust, blind to any social consequence.

One of the most claimed virtue of the efficiency theory is that of having freed antitrust law from the influence of arbitrary evaluations, by excising “fairness from the antitrust lexicon” 34 and disputable political objectives (as the protection of small business, the containment of private economic power, the defence of an economically pluralistic society, etc.) from the list of the goals of the law 35.

As I have already noted, the merit of having provided the enforcement of antitrust law with neutrality and certainty is totally usurped, for efficiency is a debatable objective and the enforcement of the law in accordance with this objective is no less uncertain and arbitrary than its enforcement in the light of the other goals branded as “political”.

Apart from this, we may wonder about the consequences of the exclusion of the “political” goals, and whether this exclusion is in fact a virtue.

From the viewpoint of the definition of the goals, the shift to the efficiency theory may be described (evoking a notion rich of theoretical implications) as a phenomenon of “disembedding”: the disembedding of antitrust law from the social structure, freeing its enforcement from any form of social concern.

I am aware that the relationship between economic and social values is in antitrust, even more than elsewhere, a very delicate matter. A coordination between the two orders of values can prove very problematic and it may also be maintained that the coordination is not

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33 A. FOER, (nt. 15), 22.
34 T. HORTON, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 McGeorge Law Review, 2013, 823, 824; D. BUSH, *Too Big To Bail: the Role o Antitrust in Distressed Industries*, 77 Antitrust Law Journal, 2010, 277, 279: any discussion of other motivations for antitrust enforcement, including concern about concentration of political power into the hands of a few large (multi-national) corporations, has been eliminated from antitrust discourse.
35 F. BAXTER, *Responding to the Reaction: The Draftsman’s View*, 71 Calif. L. Rev. 1983, 618, 619 “… nonefficiency goals are too intractable to be used as enforcement standards”.
a task of the antitrust law, but a result that can be reached only through the combined intervention of many different institutions.

I think, however, that a complete disembedding of the antitrust law from social values and social concerns, has huge costs that are very well illustrated by the reflections of the author to whom we owe the most famous formulation of the concepts of embedded or disembedded economy.

In his most famous work Polanyi wrote “To allow the market mechanism to be sole director of the fate of human beings and their natural environment indeed, even of the amount and use of purchasing power, would result in the demolition of society.”36 This judgment is based especially on the fact that the market treats as commodities some “essential elements of industry”, labour, land and money, which are not commodities, in the sense that they are not produced for sale.37

This phenomenon, the fact that “the commodity description of labor, land and money is entirely fictitious” 38, is the main source of the costs of disembedding antitrust law. By denying any weight to any kind of social needs, a disembedded antitrust law gives up every possibility of regarding labor, land and money not as commodities but as “human activity”, “nature” and “purchasing power”, respectively. In this way it participates in producing the effect of a disembedded economy, namely that, using Polanyi’s expression, of the demolition of society.

Leaving aside nature and money, it is easy to illustrate the point with reference to the fictitious commodity “labour”. As is well known, one of the most celebrated virtues of a competitive market is that of apportioning factors between different uses in accordance with the preferences of the consumers. If consumers prefer to ride horses rather than walk (and are able to pay for this luxury) the competitive market will provide incentives to breeding and selling horses to consumers. When consumers decide they prefer to go by car, the competitive market will provide incentives to slaughtering the existing horses that cannot be reused for more profitable purposes, and to manufacturing cars. And so on.

The problem reported by Polanyi is that the same logic cannot be applied to the workers employed in breeding horses and now made redundant by the use of robots in manufacturing cars. In Polanyi’s words “ … the alleged commodity "labor power" cannot be shoved about, used indiscriminately, or even left unused, without affecting also the human individual who happens to be the bearer of this peculiar commodity. In disposing of a man’s labor power the system would, incidentally, dispose of the physical, psychological, and moral entity "man" attached to that tag.”39

37 Id., 75.
38 Id., 76.
39 This is the reason why competition has the devastating effects on social cohesion highlighted by Polanyi and underestimated, or even ignored, by the current apologists of the market (even by those usually more attentive,
Antitrust law, in assuming efficiency as its sole goal, takes the responsibility of creating the conditions for the occurrence of just what is described by Polanyi. Efficiency, understood as optimal apportionment of factors according to the preferences of consumers, cannot be reached unless all resources, labour included, are treated as commodities. Treating labour as a commodity means that the needs of the human individuals who provide labour power are not taken into account and that those individuals have to be ready to be used at the least possible cost, to become superfluous, to be eliminated from the market, etc. In the end, they have to be ready to compete with one another like the different units of any other commodity.

May be, as I said, that this is not a problem that it is for antitrust law to solve. The question however remains whether it is appropriate that the issue be completely forgotten.

6. An antitrust blind to macroeconomic consequences.

One of the goal explicitly pursued, and largely achieved, by the proponents of the efficiency thesis, was that of decreasing the number of conducts forbidden by antitrust law. In fact, many agreements and practices previously considered unlawful, were rehabilitated by the adherents to the efficiency thesis and considered as “per se” legal or subjected to a rule of reason evaluation very burdensome for the plaintiff, thereby becoming basically legal. The overall result has been a marked reduction in the application of the antitrust.

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40 On the effect of unregulated monopoly power directly harming workers, see P. Krugman, Robots and rubber barons, The New York Times, Dec. 9, 2012: “We don’t talk much about monopoly power these days; antitrust enforcement largely collapsed during the Reagan years and has never really recovered. Yet Barry Lynn and Phillip Longman of the New America Foundation argue, persuasively in my view, that increasing business concentration could be an important factor in stagnating demand for labor, as corporations use their growing monopoly power to raise prices without passing the gains on to their employees”.

41 D. Bush, (nt. 14), 297 the focus on traditional notion of efficiency “emphasizes price-fixing conspiracies as the dominant goal of antitrust, while ignoring mergers and other practices which might stifle innovation or other types of efficiencies”


43 M. Whitener, Editor’s Note: The End of Antitrust?, Antitrust, Fall 2007, 5: “The rhetoric and arguably, the enforcement records of the agencies — outside the cartel arena — are less activist now than at any time in recent years.”; D. Ginsburg, Bork’s “legislative intent “ and the courts, 79 Antitrust Law Journal, 2014, 941, 950: “…judicial adherence to the consumer welfare standard has significantly narrowed the range of conduct within the condemnation of the Act.”; N. Giocoli, Old Lady charm: explaining the persistent appeal of Chicago antitrust, 6: “The outcome-based paradigm of the Chicago School was intended to minimize antitrust law, constraining its range to policing inefficient outcomes”; M. Stuck, Lessons from the Financial Crisis, 77 Antitrust Law Journal, 2011, 313, 337: the importance of antitrust in the United States diminished during the Reagan administration and never recovered; D. Bush, (nt. 14), 297.
The efficiency theory however claimed that the reduced application of antitrust law that it was proposing, would have increased, rather than diminished, the competitiveness of the market. In a substantial reversal of the traditional conception of the function of antitrust law, markets were imagined by the adherents to the efficiency theory as normally and naturally tending to increased efficiency and consumer welfare. In this vision, antitrust law should intervene only in the few and abnormal cases in which the spontaneous tendency of the market meets any obstruction. According to the scholars who share this vision, out of the cases of markets abnormally obstructed by any extraordinary factor, the intervention of antitrust law, far from ensuring the competitiveness of the market, will end up damaging it, along with consumer interest.

The paradoxical slogan, and prediction, of the efficiency theory is: less antitrust, more competition. Restricting application of antitrust law will result (this is the promise of the efficiency theory) in having more competitive markets and a greater dissemination of the benefits typically ensured by competitive markets.

Did the economic evolution actually occurred in the recent decades of application of the efficiency theory recipe, validate this theory, along with its prediction and its promise? It does not seem to be so.

We can start from a fact whose occurrence in the last decades is beyond question, the fact that in this period of time inequality increased dramatically and consumers do not seem to have become collectively richer, as promised by the efficiency theory adherents.

Can we establish a causal link between lax antitrust enforcement, increase in market concentration and inequality rise? The first step (from lax antitrust to more concentration) can be easily established. We can note that the creation of the biggest firms is usually the effect of mergers much more than of internal growth, and antitrust would have all the weapons for fighting this phenomenon.

44 T. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 Mc George L. Rev. 2014, 823, 830: “The Chicagoans believed that absent government interference and the injection of political, moral, and social goals into antitrust analyses, markets would naturally lead to increased efficiency and consumer welfare”.

45 Economic evolution whose main features, as described by The White House, Council of Economic Advisers, Issue Brief, April 2016, *Benefits of Competition and Indicators of Market Power*, Apr. 2016, https://www.whitehouse.gov/sites/default/files/page/files/20160414cea competition issue brief.pdf, are: “1) increasing concentration across a number of industries, 2) increasing rents, in the form of higher returns on invested capital, across a number of firms, and 3) decreasing business and labour dynamism”.


47 On the increase in concentration, see: T. Francis, R. Knutson, *Wave of Megadeals Tests Antitrust Limits in U.S.*, The Wall Street Journal, updated Oct. 18, 2015 (A growing number of industries in the U.S. are dominated by a shrinking number of companies); T. Horton, (nt. 44), 838 and note 111 (noticing a “… dramatic increase in concentration”).


50 The four largest U.S. banks (J.P. Morgan Chase, Bank of America, Wells Fargo and Citigroup) were the result...
effectively\textsuperscript{51}, without any need of envisaging new rules imposing deconcentration or other forms of “slimming”.

The second step is the most contested by the followers of the efficiency thesis. One of the cornerstone of the Chicago school, and of the efficiency thesis in general, is that markets are competitive regardless of the number of competitors, because entry barriers are supposed as typically small. Even a market with only one firm may be in this vision competitive, when it is contestable (entry in the market is quick and easy). In this case the firm, albeit monopolist, shall price competitively.

I think that what happened during the last decades does not fit the fairy tales of contestable markets \textsuperscript{52} (or of the extra profits fraternally shared between shareholders and employees). What really happened was a reduced application of antitrust law accompanied by high levels of concentration, increases in prices \textsuperscript{53}, high profits\textsuperscript{54} and, eventually, by an increase of inequality just of the kind that can be theoretically predicted as a consequence of less competition\textsuperscript{55}.

Given that a solid theoretical relationship can be established between poorly competitive markets, supernormal profits and rising inequality\textsuperscript{56}, it seems at least very likely (if not even certain) that, lacking a strong antitrust enforcement, the supposed natural trend of the markets towards competitiveness has not been able to shelter consumers from monopolistic

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\item \textsuperscript{51} Weapons that in recent years have not been used: see J. KOWKA, Mergers, Mergers Control and Remedies: A Retrospective Analysis of U.S. Policy, MIT Press, 2005, 121: “All in all, both investigations and policy actions appear to err on the side of permissiveness, with the result that too few mergers are challenged, and too few of those that are challenged are subject to either adequate remedies or opposition by the antitrust agencies”.
\item \textsuperscript{52} A really contestable market is, in fact, a bit like a Phoenix. Even the contestability of the airline markets (once referred to as exemplary case) has been recanted. See E. BAILEY, W. BAUMOL, Deregulation and the Theory of Contestable Markets, 1 Yale Journ. Of Reg., 1984, 111, 127; S. BORENSTEIN, Aline Mergers, Airport Dominance, and Market Power, 80 Am. Ez. Rev., 1990, 400 (noting that airport dominance limits entrants’ ability to attract passengers); S. BORENSTEIN, Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry, 20 Rand J. Econ. 1989, 344 (limited effect from potential competition); E. FRIEDMAN, AIRLINE ANTITRUST: GETTING PAST THE Oligopoly Problem, 9 U. Miami Bus. L. Rev. 2001, 121.
\item \textsuperscript{53} The average outcome for the observations on postmerger prices made by J. KOWKA, (nt. 51), 155, is an increase in 4.3 percent.
\item \textsuperscript{54} Too much of a good thing: Profits are too high. America needs a giant dose of competition, The Economist, Mar. 26, 2016; The problem with profits: Big firms in the United States have never had it so good. Time for more competition, The Economist, Mar. 26, 2016.
\item \textsuperscript{55} The rise of inequality was originated especially by a shift of economic rents towards capital. J. STIGLITZ, The Price of Inequality: How Today’s Divided Society Endangers Our Future, W. W. Norton & Company, 2012. In fact “the share of income going to capital has risen and the profit rate has risen” (J. FURMAN, P. ORSZAG, A Firm-Level Perspective on the Role of Rents in the Rise in Inequality, Presentation at “A Just Society” Centennial Event in Honor of Joseph Stiglitz Columbia University), which is just what a functioning competitive mechanism should prevent.
\item \textsuperscript{56} On the ways in which high market concentration may increase inequality, see: J. BAKER, S. SALOP, ANTITRUST, Competition Policy, and Inequality, 104 Gen. J. Online, 2015, 1, 9: “The returns from market power go disproportionately to the wealthy: increases in producer surplus from the exercise of market power accrue primarily to shareholders and the top executives, who are wealthier on average than the median consumer”; see also A. LEIGH, A. TRIGGS, Markets, monopolies and moguls: The relationship between inequality and competition, 49 Australian Economic Review, 2016, 389; S. VAHEESAN, The Evolving Populisms of Antitrust, 93 Neb. L. Rev., 2014, 370.
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exploitation. A vigorous antitrust enforcement could have contributed to ensure a broader distribution of the fruits of economic growth, thereby lessening the regressive wealth transfer occurred in the last three or four decades.

7. An antitrust blind to systemic consequences.

The emphasis on efficiency was accompanied by a shift of focus, from the consideration of the whole market structure, to the analysis of the effects of each specific practice. This is consistent with a more general shift of attention from the market to the individual transaction which characterizes neoliberal law as a whole.57

In the antitrust law field, one of the specific (and tragic) effect of this shift has been the neglect of the general negative effects that the presence of very big firms can have on the functioning of the market, effects that the simplistic reference to efficiency, in the reductionist conception of maximizing welfare, is not able to grasp and to evaluate.

This is not the place to dwell on all forms of inefficiency related to the size and to the market power of business enterprises, from the so called X inefficiency58 to the adverse impact on the incentives to innovate 59 (of the same monopolist and of the potential entrants).

It is sufficient here to recall the systemic problems posed by the rising market concentration and by the creation of firm too big to be allowed to fail. The financial crisis has shown that in a very concentrated market, the “hypothetical” existence of a strong competitive tension is not able to prevent the risks, especially in terms of lower market resilience 60, that are consequence of excessive concentration per se.61

Confidence that a minimum level of (supposed) market competitiveness is enough to prevent any trouble, led us to a financial crisis, which has been strongly exacerbated by the presence of firms “too big to fail” whose establishment had escaped out of control in terms of antitrust law 62 (and, eventually, out of any control whatsoever). An antitrust blindly focused on the short-term impact of mergers proved unable to grasp the complexity of the phenomena.63

61 The negative effect of the market concentration in itself, regardless of the degree of competitiveness is very clear with regard to the financial services industry, but it is not exclusive to this market: M. STUCKE, Lessons from the Financial Crisis, 77 Antitrust law journal, 2010, 313, 316.
62 R. KRAMER, Mega-Mergers in the Banking Industry (Apr. 14, 1999), available at http://www.justice.gov/atr/public/speeches/214845.pdf.” We heard numerous complaints that Citigroup would have an undue aggregation of resources—that the deal would create a firm too big to be allowed to fail. But, we essentially viewed this as primarily a regulatory issue to be considered by the FRB”. Especially with the paradoxical coexistence of a (supposed) intense competition (a fact that in the vision of the efficiency theory is in itself sufficient to rule out antitrust interventions) and high profits. J. CROTTY, If
and the longer-term risks and costs posed by the increase in concentration.

8. The antitrust enforcement: not a matter of “consumer welfare”, but a matter of balancing the interests of some consumers against the interests of other consumers.

Now we can go back to the general problems of the interpretation of antitrust law and to that specific to Huawei.

The efficiency theory admits that often, especially when (as it is in Huawei) innovation is involved, the evaluation of possible anticompetitive conducts is not a matter of calculating and adding, but a matter of balancing and weighing. Today is commonly accepted that antitrust interventions promoting static efficiency may erode the firms’ rents that stimulate and finance innovation thereby contrasting with the goal of sustaining and promoting dynamic efficiency. In the efficiency theory vision, a balancing is needed between boosting the so called dynamic efficiency, with the possible consequence of tolerating the exploitation of market power positions that are supposed necessary to induce innovation, and preserving the allocative efficiency, that would require the demolition (or, at least, the reduction of the profitability) of the market power positions.

financial market competition is intense, why are financial firm profits so high? Reflections on the current ‘golden age’ of finance, 12 Competition & Change, 2008, 167-183.

64 M. Stucke, (nt. 61), 322.
65 D. Crane, Rationales for Antitrust, The Oxford Handbook of International Antitrust Economics 1, 2014, 1.5 (acknowledging that in some instances antitrust interventions may improve economic efficiency in the short run but stymic innovation in the long run); M. Schilling, Towards Dynamic Efficiency: Innovation and its Implications for Antitrust, 60 The Antitrust Bulletin, 2015, 191,192, antitrust laws must pursue “an appropriate balance between short-run static efficiencies such as reducing costs and maximizing consumer surplus (productive efficiency and allocative efficiency) with longer-term efficiencies that arise from innovation”; G. Gundlach, D. Moss, The Role of Efficiencies in Antitrust Law: Introduction and Overview, 60 The Antitrust Bulletin 2015, 91, 95 (“…different operationalizations of the efficiency standard are advanced in antitrust based on different weights to be given to each type of efficiency…”); W. Kolasky, A. Dick, The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 2003, 207, 247-48: ”The dynamic efficiency principle, most closely associated with Austrian economist Joseph Schumpeter, suggests that the short-run costs associated with allocative and productive inefficiencies stemming from market power can more than be offset by benefits from encouraging dynamic efficiencies through ‘creative destruction’”; D. J. Sidak, D. Teece, Dynamic Competition in Antitrust Law, 5 J. Competition L. & Econ., 2009, 581; See A. Devlin, M. Jacobs, B. Peixoto, Success, Dominance, and Interoperability, 84 Ind. L.J., 2009, 1157, 1196-97;

66 At the beginning the central idea of the efficiency theory was that of maximizing the (consumer or total) welfare by improving the allocation of existing resources. The dominant conception of efficiency was essentially static. Bork (nt. 8), 91, 104-106, considers productive efficiency (which is a type of static efficiency, G. Gundlach, D. Moss, 93) but is not concerned with dynamic efficiency, innovation, etc. (Schumpeter is not even present in the subject index). Very soon it was yet necessary to come to terms with the obvious consideration that the “true” maximization depends much more on creation of new resources (especially by technical progress) then on simple reallocation of those existing. Hence the evolution, towards an increased importance of innovation, perceived by someone as the “tectonic rumbles shaking the very ground that has supported antitrust since the mid – 1970”, so R. Peritz, Dynamic efficiency and US antitrust policy, Post-Chicago Developments in Antitrust Law, Edward Elgar, 2002,108.

67 Basically, the theoretical model underpinning the intellectual property laws (market power as a means to compensate and stimulating innovators) is generalized and extended to any form and kind of innovation and in fact the tension between static and dynamic efficiency becomes more apparent in cases involving the exercise
This way of framing the relevant balancing as a balance between static v. dynamic efficiency, is rather misleading. Consistent with the flawed theoretical vision which inspires the efficiency theory, the relevant balancing is presented as if it originated from a trade-off between two different alternatives regarding the satisfaction of the needs of just a same, unique, person. Society at large, or consumers, are imagined as a single individual who has to goals is therefore framed as an evaluation of the different effects that each choice can have on the unique interest of the same individual.

I maintain instead that the ascertainment of antitrust violations, including the specific case of the conflict between patent and antitrust, involves a balancing not of effects but of conflicting interests pertaining to different classes of consumers.68

The flawed assumption of the efficiency theory is that all consumers are equally interested both in encouraging innovation and in preserving competition. Given this assumption, the existence of a universally shared goal (that of having as much innovation as possible, consistent with the preservation of a given degree of competitiveness) can be imagined, and the patent/antitrust conflict can be understood as a matter of looking for the right mix of incentives and disincentives.

The assumption of a universally shared goal is in my opinion untenable. We are not all equally interested in innovation69 and, above all, as we will immediately see, we are not interested in the same type of innovation

Notoriously innovation is fostered by two different mechanisms, that impact very differently on the interests of different classes of consumers70. The first is the competitive process itself,
where firms innovate as competition forces them to do so, given that the firms that do not innovate (or do not rush to imitate the innovations made by other firms) are most likely doomed to be expelled from the market. Where this mechanism obtains, firms innovate for fear of the punishment that the market imposes on the firms that do not do so. A second mechanism is the incentive provided by the possibility to create innovations that competitors cannot imitate. Here firms innovate because they are attracted by the premium (the extra-profit) that the market mechanisms, possibly boosted by the establishment of intellectual property rights, guarantee to firms in a monopolistic position.

A difference between the two mechanisms is that whilst innovation generated through competition is funded by the gains guaranteed to the innovating firms by the erosion of the profit margins of firms that are not able to innovate with the same speed, innovation produced by monopolistic positions is financed by consumers. In this context, the assumption that the latter mechanism increases the level of innovation provided by the first (an assumption which is by no means certain), is very far from implying that the “monopolistic” mechanism meets the interests of all consumers. In fact, in the patent

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72 “It is competitive pressure that forces firms to run as fast as they can in an innovation race just to keep up with the others”, W. Baumol, The Free-Market Innovation Machine, Princeton University Press, 2002, 50;

73 Even if one accepts the view that innovation must be encouraged by ensuring special reward to innovators, the problem of keeping a certain degree of competitiveness remains. First of all, because “the incentive to perform R&D depends not on the rents of a successful innovator per se but rather on the innovator’s incremental rents” therefore a monopolist enjoying monopoly rents has a weaker incentive to innovate, P. Aghion, C. Harris, P. Howitt, J. Vickers, Competition, Imitation and Growth with Step-by-Step Innovation, 68 Review of Economic Studies, 2001, 467, at 468. Secondly, because lacking competitive pressure, the majority of the benefits of innovation are likely to be captured by the monopolist in the form of additional economic profits, see M. Reksulak, W. Shugart, R. Tollison, Innovation and the Opportunity Cost of Monopoly, 29 Managerial and Decision Economics, 2008, 619, at 623.

74 J. Barnett, Property as Process: How Innovation Markets Select Innovation Regimes, 119 Yale Law Journal, 2009, 386, quoting the famous statement delivered in 1958 by Fritz Machlup to a Senate subcommittee (“if we do not have a patent system, it would be irresponsible...to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible... to recommend to abolish it”) and noting that “while we certainly have a considerably improved theoretical and empirical understanding on localized points of interest ” the Machlup’s statement “still characterizes our current understanding of the net social value of the intellectual property system as a general matter”.

75 “It is clear that the innovation compensated by the monopoly profits favours those consumers that can afford to pay the extra-profit, while it harms those consumers that cannot afford the innovation at a monopoly price. It harms namely categories of people that cannot access that resource supplied on the market” M.
system, patent holders appropriate, along with the patented inventions, the innovation that is “latent” in the common knowledge and the inventions that would have been made in any case, also in the absence of the patent incentive. Therefore we can easily imagine that many consumers may prefer the innovation granted by the mechanism of competition, which proceeds (hypothetically) more slowly, but is less expensive for them, than the faster (in hypothesis), but more expensive innovation that is fostered by the search for profitable market power positions. With a consequent, obvious conflict between the interests of the two groups of consumers.

I maintain in conclusion that reference to innovation is not able to provide the basis for the construction of a higher principle capable of transforming a conflict between interests and principles, into a conflict between effects. The conflict between the protection of a patent holder and the defence of an appropriate level of rivalry among competing firms, is not akin to an intra - individual conflict of incompatible goals. On the contrary, it is a conflict between different classes of consumers bearing opposing interests. The balancing between protecting the patent holder and defending the competitiveness of the market, is therefore not a balancing of effects, but a balancing of interests pertaining to two different social groups.


Influenced by a widespread culture that has concealed all material conflict of interests, the Court in Huawei thought that the description of a series of moves and countermoves were

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F. Machlup, Knowledge. Its creation, Distribution and Economic Significance, Vol. III, Princeton, 1984, 164: “many of the inventions filed with the patent office may have been made in any case that is also in the absence of a patent system and many others would have been made only a little later, so that the patent incentive could be credited at best for the gains due to the earlier emergence of the invention”.

Is therefore not true which is so often repeated, namely that the patent owner appropriates something not existing before. The patent system deprives the public domain of the benefit of the slower (in hypothesis), but inevitable progress that would still occur even in the absence of the patent system. The magnitude of this effect depends largely on the requirements for patentability. The appropriation of latent knowledge that characterizes the system of non obviousness would have been much more difficult in a system requiring a “flash of creative genius”. The problems related to this aspect of the patent protection are well discussed in the famous Thurman Arnold’s opinion in Potts v. Coe, 145 F.2d 27 (D.C. Cir. 1944): “… we apply the fundamental principles of the patent law to the actual facts of the complex modern technology of corporate research laboratories. These principles are (1) that a discovery which is the result of step-by-step experimentation does not rise to the level of invention; (2) that invention must rise above the level of accomplishment of the ordinary skilled technicians engaged in the art….. Unless we do so the patent law may become a cloak under which a corporate group may prevent the independent use of modern technical information by obtaining patents on the step-by-step progress of scientific knowledge”.

“...to argue that antitrust intervention is horribly dangerous because one cannot exclude that an intervention today may probably hinder or postpone innovations in the future, is not far away from asking consumers today to pay the bill for hoped-for innovations of already very powerful companies which will probably never materialise” C. Ewald, Competition and Innovation: Dangerous Myopia of Economists in Antitrust? 4 Competition Policy International, 253, at 262, (2008).
able to solve the problem, as if its task was that of dictating the rules of a ballet. So the European Court did not even address the fundamental question that should have been answered. The question here is not whether to protect the interest of Huawei (the patent holder) thereby boosting innovation, or of ZTE (the maker) thereby promoting competition. The real important question is whether in this specific case the consumers who prefer less innovation, intensely competitive markets and cheaper goods, or the consumers who prefer more innovation, even at the cost of having less competitive markets and, consequently, higher prices, are more worthy of protection. Further choices, as that of ensuring the patent holder higher (lower) royalties or stiffer (more lax) protection, depend on this basic judgment.

As any judgment based on balancing even the antitrust balancing in general and that in Huawei in particular, should be subjected to the “Law of Balancing” which, in its simplest and more efficacious description, implies that “the greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other.” In the present context, correctly defined as a field of conflicts between the two categories of consumers that we have described before (consumers preferring a fast and expensive, and others preferring a slower and cheaper, innovation) we should consider that giving the patent holder the right of seeking an injunction, that can prevent the entry in the market of a new potential maker, carries out an extraordinary degree of non-satisfaction of the interest of the latter group of consumers. In this hypothesis the consumers have to bear a situation of market power without even having the possibility of resorting to a second best (compared to the patented product) alternative, excluded by the fact that it is not technically possible to make devices which comply with a standard without infringing the respective SEPs. This extreme level of non-satisfaction, if acceptable at all, should be permitted only in the most exceptional cases in which the importance of satisfying the opposed interest is enormous, which occurs just where the technical value of the standard essential patent is in itself very large, where its technical superiority to non-patented products (or to other patents) is very high, and where its commercial value is not simply due to the fact that it was chosen as a SEP.

In conclusion, in cases of injunctions requested by holders of FRAND – pledged SEPs against makers ready to pay a fair royalty, the general rule that accessing the court is a fundamental right ensuring the rule of law and “it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position...” should be, simply, reversed. The abusive nature of applying for an

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79 An injunction notoriously would have “devastating effects” on the implementer’s business (see e.g. D. GERARDIN, Frand arbitration: the determination of fair, reasonable and non-discriminatory rates for seps by arbitral tribunals, Competition Policy International, September 2016.
80 ITT Promedia NV v. Commission, T-111/96, EU:T:1998:183; Huawei v ZTE, 46 – 47. See also European Commission, Case AT.39985 - Motorola - Enforcement of GPRS standard essential patents, 29 April 2014, C(2014) 2892 final, par.278 “Finally, a patent holder, including a holder of SEPs, is generally entitled to seek and enforce injunctions as part of the exercise of its IP rights. The seeking and enforcement of injunctions cannot therefore,
injunction by a patent holder in a dominant position arising from the fact that its patent has been chosen as SEP, ought to be excluded only in the exceptional cases of patents on very important inventions.

in itself, constitute an abuse of a dominant position. The exercise of an exclusive right by its owner may, however, in exceptional circumstances and absent any objective justification involve abusive conduct. The list of exceptional circumstances is not exhaustive.”