

**DIMINISHING ENFORCEMENT: NEGATIVE EFFECTS  
FOR DETERRENCE OF MISTAKEN SETTLEMENTS  
AND MISGUIDED COMPETITION PROMOTION  
AND ADVOCACY**

Working Paper IE Law School

AJ8-187-I

05-07-2012

Francisco Marcos

Professor of Law  
Fellow, Center for European Studies/IE  
IE Law School  
[francisco.marcos@ie.edu](mailto:francisco.marcos@ie.edu)

**ABSTRACT:**

Competition policy is conceived to preserve and promote free market competition. It is fleshed out through a mix of tools that are used to further consumer welfare by preserving and promoting the efficient functioning of markets. Courts, administrative authorities and governments play different roles in the execution of competition policy. However, relatively recent developments have increased the number of tools in the shed of competition law enforcement.

This paper criticizes certain uses, mistaken or misguided, of settlements, advocacy and promotion by competition authorities. These are two very different settings in which the deterrent feature of competition authorities' enforcement actions may suffer a deathly blow. If wrongly used, both may endanger the deterrent principle upon which competition law is built. The basic point of departure is that the new tools might be diminishing the effectiveness of 'regular' competition law enforcement—which shall not be left in the shed to rust.

**KEYWORDS:**

Public enforcement, deterrence, settlement, antitrust, consent decrees, commitment decisions, competition policy, competition law, competition advocacy, sanctions, fines, compliance.

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Editado por el IE Law School, Madrid, España

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## 1. INTRODUCTION

Finding and detecting anticompetitive violations is not an easy task. Public agencies in charge of enforcing competition laws worldwide have a hard time trying to detect and investigate violations of competition rules. The evolution of administrative practices and the consolidation of substantial experience and capacity in mature agencies have given rise to new, more flexible and efficiency-oriented enforcement (and *quasi*-enforcement) mechanisms aimed at reducing the burden on competition authorities and at trying to allow for more cheap and speedy enforcement of competition law.

Modern competition laws provide enforcement agencies with several tools that might be used in investigating and disposing of cases. Traditional fines and sanctions against violations and the ensuing actions for damages and related civil claims<sup>1</sup> (hereinafter, the ‘regular’ enforcement of competition laws) have been complemented with other tools that facilitate detecting violation, speed investigations or case disposals. Leniency programmes are a paramount example of this new or alternative approach to competition enforcement. Settlement procedures (particularly “express” or simplified settlement procedures) are also clearly relevant in this respect.

Additionally, ‘hard’ or ‘heavy-duty’ enforcement tools have been complemented with ‘softer’ or ‘more friendly’ instruments that competition agencies may use to promote and advocate the virtues of free competition and further the aims of competition laws.

To be sure, in general terms, this diversity of mechanisms seems desirable, particularly as regards the increased flexibility that competition authorities have to address competition restrictions and market failures following different strategies and attempting to set clear priorities and to regulate the amount of effort (in terms of resources) invested in the different facets of competition law enforcement. However, as the enforcement systems get more diverse and complicated, a reflection on the proper uses and cross-effects between the several enforcement tools (‘regular’ and otherwise) is required.

After concisely reviewing the aims of competition policy and its basic features as the general framework of the paper (*infra 1*), ‘regular’ competition law enforcement is presented as the main channel through which the aims of competition policy are furthered (*infra 2*). The main outcome of such enforcement activities is the deterrent effect sanctions have in business, discouraging future anticompetitive actions. Thereafter, this paper will describe some of the tools that modern competition authorities have at hand to perform their enforcement task. Leniency programmes have succeeded worldwide as a way of providing violators with incentives to confess the existence of cartels to enforcement agencies (*infra 2.1*). In the same vein, settlements are praised as an instrument that may allow agencies to save resources without diminishing its enforcement returns (*infra 2.2*).

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<sup>1</sup> This paper focuses on the use of relatively new enforcement tools by competition agencies. Consequently, civil claims and actions for damages will only be taken into account to a limited extent.

On the other hand, ‘pure’ enforcement functions (‘regular’ and otherwise) have been complemented with the recognition and development of advocacy and promotion functions to competition agencies (*infra* 3). Competition advocacy and competition promotion give agencies wide leeway to preach the virtues of competitive markets and didactically explain other governmental entities and market agents the adverse effects for social welfare of favouring or pursuing anticompetitive behaviour (including eventually sanctions that may apply to violators).

However, with such a rich arsenal, it is submitted that there is a certain risk of mismanaging the tools that competition agencies have at hand. This paper will argue how the improper use of some of the tools available to competition authorities may go against the deterrent value competition rules require in order for competition policy to be minimally effective (*infra* 4). Specifically, it will consider how mistaken settlements within enforcement proceedings (*infra* 4.1) and misguided competition advocacy (*infra* 4.2) may undermine deterrence and jeopardize the attainment of the prime competition policy objectives<sup>2</sup>.

## 2. COMPETITION POLICY OBJECTIVES AND TOOLS.

Competition policy is aimed at increasing social welfare by preserving and furthering free competition in markets<sup>3</sup>. Generally speaking, consumers gain when markets are allowed to function freely, as competitive market pressures push firms to become more efficient, and to produce and provide consumers the products and services they want, pressing prices down and encouraging innovation.

Modern competition policy provides enforcement authorities with several tools to preserve and promote market competition and to further the social welfare objective. Other policies should be used for protecting different economic or social goods that may be considered valuable (fairness, economic freedom, small-mid size firm protection, privatization and market liberalization, market integration, etc.)<sup>4</sup>. Using competition policy for those purposes may lead to misunderstandings and distortions diminishing its success in practice.

Through the establishment of a set of rules and prohibitions against anticompetitive restraints in markets, competition law is the main tool of competition policy. ‘Core’ competition or ‘antitrust’ law is build over a set of rules against unilateral or multilateral restrictions to market competition<sup>5</sup>. Deterrence is the key value in core competition law<sup>6</sup>, as the

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<sup>2</sup> Reflections and policy recommendations of this paper may be applicable to any competition agency worldwide. Even though it is written from the perspective of a national competition agency within the EU, references to other competition agencies or systems are made and, therefore, it is submitted that some of the ideas may have wide application.

<sup>3</sup> For all, see WISH & BAILEY (2012); HOVENKAMP (2005) or POSNER (2006).

<sup>4</sup> See GINSBURG (1988: 1278).

<sup>5</sup> In a broader sense, competition law comprises rules on unilateral and concerted or collusive practices, merger control, control of State aid, rules applicable to public and privileged undertakings, rules against public restrictions of competition and sectorial rules of competition (in agriculture, transport, banking, insurance, etc.). However, the focus of this paper is in the

effectiveness of the prohibitions depends greatly on the incentives it provides for proper behaviour through the threat of sanctions if its rules are infringed. The coercive or punitive nature of these activities is geographically described as vertical (top-down) and repressive approach (*command-and-control model*)<sup>7</sup>. Enforcement proceedings by competition agencies against anticompetitive practices that violate the competition rules may lead to the imposition of a sanction and could be followed by private enforcement claims of those damaged by the anticompetitive acts (the ‘classical’ or ‘regular’ competition enforcement mechanism). Although private actions are aimed at compensating such damage, undoubtedly they also increase the deterrent force of competition law prohibitions (since the aggregate financial exposure of violators may be substantially increased)<sup>8</sup>.

A key issue in competition law enforcement is the incompleteness of competition rules that profoundly alters the enforcement scenarios and may diminish the deterrent effect of ‘regular’ competition enforcement by excessively burdening competition authorities (i.e. by reducing so much the probability of detection and conviction that even extremely high sanctions result in under-deterrence). This is also made further more complex by the detection difficulties and gathering of evidence<sup>9</sup>. Therefore, the evolution of enforcement methods has largely focused on mechanisms that can alleviate these difficulties and that can complement deterrence with additional incentives for companies to bring evidence forward (i.e. leniency programmes) or to cooperate with the authorities, accepting the imposition of sanctions and other remedies on reduced levels of evidence (i.e. settlement proceedings, primarily aimed at reducing the burden of proof, and corresponding risk, to enforcement agencies) (see *infra* 2). The general trend towards the use of these tools is graphically described as *horizontal and cooperative supervision* (self-regulation, voluntary compliance and covenants)<sup>10</sup>.

Undoubtedly, ‘regular’ competition law enforcement is the main instrument towards the aim of increasing social welfare by preserving and furthering free competition in the marketplace, but it is not the only one<sup>11</sup>. It may be the most formalistic, technical or juridical, but there are also other policy tools aimed at diffusing and promoting the culture of market competition without using legal coercion. The institutions in charge of administering competition policy

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‘core’ competition law rules applicable to undertakings that, *grosso modo*, correspond to the US concept of antitrust law. All references to competition law in this paper are made to ‘core’ competition law prohibitions applicable to undertakings.

<sup>6</sup> JOSKOW (2002): US antitrust policy is primarily a deterrent system, not a regulatory tool. In some jurisdictions, the mandate for competition authorities to make markets more competitive (i.e., to improve with their actions the conditions of competition) may be questionable. See, for example, MONTI (2004: 191) asserting the negative role and deterrence-based character of the Commission’s mission according to the EC Treaty.

<sup>7</sup> OTTOW (2009:4)

<sup>8</sup> According to the EUROPEAN COMMISSION (2008): “*Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules*”

<sup>9</sup> See STUCKE (2008: 1016-1917). This difficulty is even stronger for private enforcement claims, see SARRA & MARRA (2000: 371-376).

<sup>10</sup> OTTOW (2009:6), specifically referring to the practice of the Netherlands Competition Authority (*NMa*).

<sup>11</sup> Bear in mind that some authors refer to “competition policy” as a synonym of “competition law”, without attending to the difference made in the text; see, for example (both supporting a more economics based approach to competition law enforcement) ETRO (2006), HAY (1993), MOTTA (2004) and REY (2003). For a view, regarding US competition policy, that parallels the one in the text, see KAUPER (1978, 1-8 and 27-28)

have at hand several instruments that may be used to fight for free competitive markets. Competition advocacy and promotion are softer, or ‘more friendly’ or persuasive ways to further competition policy goals (see *infra* 3).

As anticipated, the rest of the paper will be dedicated to unearthing the effects of all new and alternative tools for the enforcement of competition law on the basic deterrence that has so far been aimed at by ‘regular’ enforcement devices.

### 3. COMPETITION LAW ENFORCEMENT.

Effective enforcement of competition rules is essential for deterrence. The deterrent value of competition law prohibitions works as a guarantee of general compliance by business firms<sup>12</sup>. If violations of competition rules are not pursued and adequately sanctioned, the incentives not to obey these rules increase considerably.

However, deterrence of violations and compliance may be not the only objectives of enforcement<sup>13</sup>. There may be other goals that motivate the enforcers when carrying on their task. Effective enforcement is also aimed at providing a competitive level playing field in markets, allowing business firms to predict the enforcer’s actions, increasing transparency and furthering accountability and providing compensation for harm caused by anticompetitive actions.

Since their inception more than a century ago, the enforcement of competition rules worldwide has been subject to relevant changes in every system to make it more effective. Every once in a while enforcement systems are finely tuned to adjust them to changing markets and business realities or to fight in a more efficient manner against the most egregious anticompetitive violations<sup>14</sup>.

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<sup>12</sup> See BAKER (2003: 40-42) and the survey by OFT (2007). See also BLOCK, NOLD & SIDAK (1981), finding deterrent effect of enforcement on the decision to collude using data from the U.S. bread industry. CLARKE & EVENETT (2003: 717-724) find deterrent effect against the “vitamins cartel” in those countries with active cartel enforcement regimes. On the other hand, even merger review by competition agencies has been found to have a deterrent effect in merging parties, see SELDESLACHTS, CLOUGHERTY & BARROS (2009).

<sup>13</sup> Besides, the deterrence feature is a complex one: social norms and individual moral control may further add towards deterrence if the antitrust prescriptions are internalized as mandatory and that will only be if a prior successful enforcement (i.e., sanctions) record exists. Partially, the claims of (social) responsibility and solidarity of the horizontalisation trend take this for granted.

<sup>14</sup> The European Commission shows perhaps the best example of a recent reform aimed at increasing its effectiveness (through the modernization reform in 2004 and other relevant organizational changes) see LOWE (2008). The UK adopted a major reform of its competition law system in 1998 and 2002 (and its currently being amended again), Germany in 2005, Spain in 2007, and France in 2008. It may well be considered that the EU reform has heavily influenced the others, see EYRE & LODGE (2000). Likewise a major reform in the US federal enforcement system of antitrust laws was enacted in 1914 through the *Federal Trade Commission Act*. The sanctions and fines prescribed have also been adapted in each system every once in a while.

Although private enforcement of competition prohibitions is an alternative in many jurisdictions, almost every country has an administrative agency, which is in charge of investigating and prosecuting violations of competition rules.

As mentioned before, in their task of competition law enforcement, competition agencies face difficulties in detecting violations. Traditionally, third party complaints or *ex officio* market investigations by agencies have been the main source of leads towards potential violations.

### **3.1.- Leniency Programmes.**

Nowadays, many competition agencies worldwide have leniency policies to detect hardcore anticompetitive violations. Leniency policies, along with a properly designed fining system, have proved useful in the fight against cartels<sup>15</sup>. However, leniency policies have proved to be extremely successful when there was a previous rigorous and strict prior enforcement track and reputation by the authorities, with a past record of fines imposed that build and increase the reputation for deterrence of the competition agency.

Leniency programs provide a legal framework for self-reporting by cartel members, which are incentivized by pardoning or lowering the fine. This is sacrifice competition enforcement systems are willing to make in exchange for obtaining information concerning a cartel. There is a clear trade-off being made. Successful leniency programs have a positive effect on increasing *general or indirect deterrence* by boosting the number of cartel cases investigated and prosecuted by the authorities and by destabilizing cartels, but simultaneously there is a reduction in *specific deterrence* by diminishing the actual punishment of some of those that were apprehended (pardon or fine reduction to the individual firm that had confessed, unless it was the ring leader). In sum, although leniency programs do not decrease businesses' perception that competition laws are enforced and that there is a risk of detection and punishment when they are violated, undoubtedly such perception would be not shared by the self-reporting firm that applied for leniency.

### **3.2. Settlements in Competition Law Enforcement.**

After a potential competition law violation is detected, agencies may face strong and weak enforcement cases, varying according to the incompleteness of competition rules and the investigating difficulties. Competition agencies' latitude in case selection and prioritisation varies according to each legal system<sup>16</sup>. But every system provides some procedural flexibility

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<sup>15</sup> For a summary of these developments in the EU context see MORGAN (2009: 2-4). See MOTTA & POLO (2001) for some theoretical reflections on the organization of leniency programs. AUBERT, REY & KOVACIC (2006) propose a model that would further increase detection through a bounty system (either rewarding firms or individuals within firms for providing evidence against cartels).

<sup>16</sup> Some legal systems require agencies to investigate and pursue any complaint filed ("*must-do jurisdictions*"), at least to ascertain where there are indicia enough of a violation of antitrust rules being committed.

to agencies in investigating potential violations and case disposing. Agencies have limited resources and, when deciding what cases they should investigate harder, they need to prioritise.

On the other hand, the system of sanctions needs to be designed adequately, preserving the deterrent value of sanctions (by eventually including criminal sanctions). Additionally it needs to be proportionate, transparent and predictable. Anticompetitive behaviour should be made unprofitable by increasing potential violators' exposure to fines.

Bargaining with potential violators over the case may help authorities at easing case disposal, freeing resources that may be used in investigating or prosecuting other more meritorious cases. Currently, many competition systems allow competition agencies such bargaining, although the requirements for the negotiation and the possible content of the bargain vary across jurisdictions.

Modern public enforcement proceedings in different jurisdictions contemplate settlement as one of the possible outcomes of proceedings derived from breaches of competition law<sup>17</sup>. Instead of following the fully-fledged adversarial procedure in which a statement of objections is filed against the defendant, who responds to it, and there is a final decision by the competition authority, the later and the defendant conclude an agreement that settles the dispute (*law enforcement by negotiation*).

Settlement is inspired in plea-bargaining in other contexts (criminal proceedings). It streamlines the proceedings and dramatically reduces (if not eliminates) the incentives to appeal. Furthermore, private claims may be discouraged as settlement may lead the claimant not being able to gather enough evidence against the potential violator (in subsequent follow-on actions).

A settlement is an agreement in which the defendant either accepts the finding of the infringement (*nolo contendere*) or abstains to contest the accusation made against him, nevertheless accepting certain remedies or fines.

Occasionally, the settlement may involve a waiver of some procedural rights of the defendant. Indeed, the agreement is reached in exchange for the defendant abstaining from contesting the accusation made by the competition authority or admitting the infringement, accepting remedies and/or penalties.

In terms of case management and incentives, the adoption of settlement policies by competition authorities is somehow related to the leniency policies abovementioned (*supra*

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<sup>17</sup> In EU Competition law, article 9 of Council Regulation (EC) n° 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4 January 2003, 1–25) provide the basic legal framework for settlement procedures regarding enforcement of articles 81 and 82 of EC Treaty. It is further developed in Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant Article 7 and Article 23 of Council Regulation (EC) n° 1/2003 in cartel cases (OJ C167, 2 July 2008, 1-6). The US influence in the adoption of these rules and procedures is underscored by GEORGIEV (2007), who robustly claims that neither procedural nor substantive tailoring has preceded their transplant to the EU system (deviating from standard EU administrative law traditions and principles), sparking off several potential distortions.

2.1). Both policies are aimed at saving resources of competition agencies. Both have to do with investigating and disposing of cases by the authorities, and both may decrease the deterrence effect of competition prohibitions. In leniency the issue is to detect anticompetitive behaviour, and for that reason some deterrence may be lost (*specific deterrence*)<sup>18</sup>, but not all (*general deterrence*). The risk of diminishing overall deterrence may be greater in settlement: the general perception of diminishing threatened cost of punishment may grow (leaving it below the gain of committing a violation)<sup>19</sup>.

Once the competition rules violation is detected, from the agency perspective, the issue is to spend wisely in building the case against the infringing firms. Leniency is only for cartels. Generally speaking, settlement is available for both cartels and other infractions (chiefly, abuses of a dominant position). The same way leniency is expected to lead to more violations being detected and more fines (deterrence), settlement is expected to lead to additional cases being investigated and resolved (that compensate the diminution in fines due to commitments). Besides, availability of settlement may enhance the prosecution of non-easy cases (difficult to prove), as settlement encourages investing resources in them, because there would be an easier exit for them through settlement.

On the other hand, settlement is also beneficial for settling firms that avoid the reputation damage caused by uncertainty and adverse publicity while a lengthy investigating proceeding is pursued against them by the agency<sup>20</sup>.

Rules on commitment decisions or settlement may give the authorities a wide leeway to either look for an agreement or continue the proceedings in search of a fine. Considerable discretion by the authorities in administering the settlement policy seems desirable, and settlement should never be a right of parties. However there should be some clear and defined framework for settlement practice by the authorities to prevent excessive discretion or opacity in their decisions that may decrease both specific and general deterrence of antitrust enforcement. For that reason, the following principles should inspire the design of a settlement policy by competition agencies:

**a)** Settlements should be discarded in clear-cut and serious infringements, where there are strong indicia or even proof of a violation, because the competition authority would risk too much deterrence value for administrative savings and early termination of the case<sup>21</sup>.

**b)** In the rest of the cases, settlements should be restricted to those cases in which the benefits in terms of earlier termination of the violation and savings of the cost of proceedings outweigh the loss of deterrence in punishing the violations of the antitrust prohibitions<sup>22</sup>.

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<sup>18</sup> At least for the leniency applicant itself, who will not be punished. Maybe for that reason (although there may be others) some leniency programs do not give amnesty to ring-leaders (which otherwise would be moved to organize a cartel to later on denounce it).

<sup>19</sup> To compensate for the reduction in deterrence by settlement, SHAVELL & POLINSKY (2008: 436) suggest the level of overall sanctions have to be increased.

<sup>20</sup> See , for example, the calculations made for Dutch Listed Firms from 1998-2008 by VAN DEN BROEK, KEMP, VERSCHOOR & DE VRIES (2012).

<sup>21</sup> That is the reason behind the last sentence in the recital 13 of Regulation 1/2003, “Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.”

c) Too early settlement should be avoided as it presents greater risk of negative effects to deterrence<sup>23</sup>. Too late settlements would also lack sense: if resources have already been invested, the authority might as well give the case a shot and go to trial.

d) Market tests of the settlement proposal through opinions by third parties are useful in the assessment of soundness and terms of settlement (only for behavioural and structural commitments)<sup>24</sup>. Third party insights may provide useful information and data to the authority regarding the prospective impact of settlement in markets, however competitors' role should be limited in settlement discussions to prevent their strategic participation in settlement bargaining with the sole purpose of annoying rivals.

e) Settlement policy and practices should be made as transparent and public as possible (after having regard to the parties concerns regarding confidentiality of the information disclosed)<sup>25</sup>. Likewise remedies agreed in settlement (either structural or behavioural) should be easy to monitor and have passed the market test. Competition authorities should disclose any guidelines on its settlement policy, the terms of the each negotiation and the contents of the settlement agreements concluded. Uncertainty about settlements should be avoided to prevent any public suspicion on the plausibility and content of settlements.

Additionally, specific details (conditions and procedures) of the settlement policy, and the required terms of the settlement agreement need to be carefully established and detailed in legal rules<sup>26</sup>.

The unavoidable exercise of administrative discretion in this matter should be followed by adequate justification and reasoning by the competition authority, discarding any criticism that "*enforcement may be for sale*"<sup>27</sup>. Settlement should be conceived as a procedural and technical instrument at the disposal of the administrative authorities, and should always be kept as an enforcement tool, overshadowing any political implications it may have. Competition agencies should be transparent and consistent in their settlement practices, leaving out any potential claim of unfairness. Independence of the administrative agency in

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<sup>22</sup> Truly other indirect losses may arise apart from losing deterrence, as darkening the law, disgorgement of illicit gains and facilitation of follow-up-actions, although these look less relevant, see WILS (2008: 344).

<sup>23</sup> Because of this, article 9.1 of EU Regulation 1/2003 requires a preliminary assessment of the case by the Commission before it can consider the possibility of starting negotiations that may lead to a settlement. In settlements of cartel cases according to new article 10a) of Regulation 1/2003 [(added by Commission Regulation n° 622/2008, of 30 June 2008, amending Regulation (EC) n° 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1 July 2008, 3-5)] the Commission is required to follow the investigations that will enable the drafting of a Statement of Objections.

<sup>24</sup> See, for example, article 27.4 of EU Regulation 1/2003: "*Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.*"

<sup>25</sup> See KOVACIC (2001: 847-848). Additionally, *ex post* assessment of market impact of settlements may increase agencies legitimacy and reputation see KOVACIC (2005: 511-510).

<sup>26</sup> Particularly as regards the consequences of the breach of the settlement agreement (if domestic laws do not impose harsh consequences, undesirable outcomes can be generated and it would be preferable not to have settlements at all).

<sup>27</sup> See SANDEL (2012: 65).

enforcement of competition law and in the management of settlement policy is essential to avoid any political or interest-group interference in its decisions on the matter<sup>28</sup>.

#### 4. COMPETITION PROMOTION AND ADVOCACY.

Aside of competition law enforcement, in a parallel development, modern competition policy provides agencies with other tools for increasing social welfare through furthering competitive markets<sup>29</sup>. Grouped under the vague heading of *competition promotion*, agencies are granted several inquiry and reporting powers that seek to extend competition culture in areas in which it may not be popular and promoting a competitive environment for economic activities<sup>30</sup>. As a by-product those sector enquiries may detect restraints or distortions that lead to new enforcement cases. As it may be problematic, these situations need to be handled with care by the agency, without confusing the appropriate tools being used in each case.

Both competition promotion and competition advocacy provide formidable tools to preach the benefits of competitive markets in areas in which, for different reasons, anticompetitive distortions or protections may abound<sup>31</sup>. These tools open competition agencies policy-making and regulatory activities aimed at extending the competition culture.

There is great agency's discretion in the execution of these policies. Whilst competition prohibitions are formulated in mandatory and prescriptive terms, promotion and advocacy rules may even be not defined in writing, or rather written in enabling terms: agencies may act on these areas but they are not obliged to do so<sup>32</sup>.

Political considerations, which should not be ignored, play greater role in agencies' actions pursuing competition promotion and advocacy. It belongs to their sole domain to decide whether they should enquiry or report on a specific market or act against certain public

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<sup>28</sup> It may well be that the relevance of politics and antitrust ideology cannot be overcome in certain cases, see WALLER (1998a: 230-233). In his own words, "*Once the veneer of law enforcement is stripped away, the politization of antitrust proceeds unabated*", WALLER (1998b: 1448)

<sup>29</sup> It is true that "*it is worth asking why a state should give the function of advocacy to a competition authority*", EVENETT (2006: 495), however, most of countries do, and even in those that don't, experience so far tells that agencies may assume that function. The potential risk of schizophrenia of a competition authority pursuing advocacy initiatives that contradict its enforcement actions or problems due to different scope of actions may arise in certain settings, EVENETT (2006: 503-505).

<sup>30</sup> More specifically, *competition advocacy* is aimed at eliminating anticompetitive public regulations or protections.

<sup>31</sup> It is maybe the best available recommendation for developing or transition economies, see RODRÍGUEZ & COATE (1997) and DABBAH (2003:65). See also, a critical perspective on this idea by EVENETT (2006), concluding: "*The conventional wisdom on competition advocacy was found to be wanting in a number of respects. This is not to say that such wisdom is fatally flawed and consequently reader should not conclude that competition advocacy should necessarily be abandoned or that it is fundamentally misconceived. Rather considerably more thought is needed to better identify the forms of successful competition advocacy, why such advocacy works, and the benefits that flow from it*" (id. 514).

<sup>32</sup> "*Countries differ markedly in the extent to which legislation defines the ends and means of the competition advocacy functions of competition authorities. Furthermore, nothing in the above definition suggests that this function need be enshrined in legislation, even though it is in some jurisdictions*", EVENETT (2006: 497). In similar terms, DABBAH (2003: 65): "*can be based on both explicit (statutory) and implied (informal) grounds*".

restraints or distortions of competition. Truly, third party claims can provide valuable hints or insights leading to agency's actions or decisions, but there is no such a thing as a private right of action to require the agency to promote competition.

Conventional promotion and advocacy activities by competition agencies have been quite successful. Their actions have been very intense trying to influence policy-making by the legislative, especially in regulated industries<sup>33</sup>.

Competition agencies have drafted reports on market enquiries in several sectors detecting obstacles to competition, which may have lead to recommendations, and to the voluntary removal of such obstacles by public and private actors involved. Occasionally, agencies may have detected public regulation at the root of restrictions or distortions in markets, and have succeeded in removing them after encouraging their revocation or modification<sup>34</sup>.

However, promotion and advocacy should not be used when competition law enforcement is feasible. 'Substitutive' advocacy is the worst advocacy. In those occasions, no matter where may be an overlapping concern for promoting or advocating competition culture, if the conduct at hand fits in the prohibition, political considerations should not drive the agency out of the enforcement arena<sup>35</sup>. Respect to the rule of law and the preservation of the deterrent value of competition prohibitions require that the agency start a 'regular' enforcement action. It is true that through promotion and advocacy the agency may be able also to eliminate a restriction or distortion in the competitive working of markets, but this would not address the harm that this may have caused so far (either through punishment or through compensation). Doing otherwise would not only undermine the aims of competition law, undermining deterrence, but also would generate substantial uncertainty in predicting the enforcement actions of the agency<sup>36</sup>.

## **5. IMPROPER USES OF COMPETITION POLICY TOOLS THAT DIMINISH (AGGREGATE) DETERRENCE.**

Competition policy provides agencies with wide leeway in their use of the tools they have at hand. Agencies have broad discretion in deciding whether to use 'regular' competition law enforcement (including settlement and reductions of fines) to fight anticompetitive restrictions in markets. The combined use of these tools leads to a transformation in the way the administrative agency acts and influences business conduct and administrative regulation (along with other instruments in merger review and issuance of communications and

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<sup>33</sup> See GINSBURG (1988: 1278) and KAUPER (1978: 21-26)

<sup>34</sup> See, in the USA, STUCKE (2008: 955-963).

<sup>35</sup> Indeed, the political character of competition promotion and competition advocacy may well lead to questioning of the foundations of competition and competition policy, see again STUCKE (2008: 964-1009). In general, see PITOFSKY (1979).

<sup>36</sup> STUCKE (2008: 1013-1014).

guidelines<sup>37</sup>). Besides, if those tools are used properly, they invest the agency with greater power to promote competitive market behaviour<sup>38</sup>.

Depending on several circumstances, ranging from clarity of law, evidence available against the potential violator and agency resources, competition agencies may decide if they start an investigation and infringement procedure concerning some conduct that might be considered to have infringed the competition rules. Although in principle agencies have a duty to enforce those rules challenging all violations of the prohibitions, they have certain discretion in organizing and prioritizing cases. Additionally, incompleteness of the prohibitions gives agencies considerable room in deciding, first of all, whether a violation has occurred.

However, one of the main principles that should guide competition agencies in adopting their decisions is that the agency's enforcement reputation and track-record of fines imposed (and eventually confirmed by courts) are key for successful future settlements and to competition promotion and advocacy<sup>39</sup>.

Therefore, it is submitted that neither settlement nor advocacy or promotion should be used as an alternative when enforcement action is possible. Giving up to ordinary law enforcement and punishment when feasible also poses the problems of unpredictability of agencies actions and incoherence<sup>40</sup>.

### **5.1. The Problem of Rushed or Mistaken Settlements.**

Administrative agencies in charge of public enforcement of competition law should consider settlement as an outcome of its investigations only if it does not diminish the general deterrent force of enforcing the competition prohibitions.

Although potential violators may have every reason to ask for settlements of the cases pending against them, agencies should take all settlement applications with care. Potential violators may well consider that reaching an agreement in which they compromise not to adopt anticompetitive conduct in future (without even recognizing they've committed it in the past) will suffice for the competition agency to drop any charges against them. However, if the authorities have elements of proof on which they could build a case, they should do investigate and prosecute it, unless the resources required to acquire condemning evidence are

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<sup>37</sup> In some specific contexts, for example EU competition law, the relevance of this type of soft law and informal legal instruments is paramount, see PETIT & RATO (2009).

<sup>38</sup> See WALLER (1998b: 1394-1417)

<sup>39</sup> See ICN (2002: iv): "*Enforcement is strengthened by an active advocacy, and advocacy is less effective in the absence of enforcement powers or when enforcement lacks credibility.*"

<sup>40</sup> See WALLER (1998a), his picture is bleaker due to consideration of multiple enforcers available from U.S. (including private plaintiffs): "*the final outcomes of cases work against any consistency or logic in how we punish antitrust violations*" (id., 236).

excessive or the illegality of the conduct is not crystal-clear<sup>41</sup>. Keeping and maximizing the deterrent force of competition law through ‘regular’ enforcement and fines should be the guiding principle for agencies in their decision<sup>42</sup>. The decision to start and follow the settlement procedures is a very delicate one for young and non-established competition agencies, lacking a credible enforcement and fining record<sup>43</sup>. Political considerations should never be allowed to enter into the decision whether to settle a case or not.

## 5.2. The Problem of Misguided or “Substitutive” Promotion and Advocacy.

Some of the activities on competition promotion and advocacy may be “close neighbours” of enforcement actions by agencies<sup>44</sup>. Anticompetitive actions may occur in areas in which there may be legal rules or public policies that seem to give them coverage. The same thing may occur, lacking any public intervention or coverage, in certain industries due to doubts regarding the illegality of some action or behaviour due to the incomplete character of competition prohibitions.

In those cases, promotion or advocacy should not be considered as an alternative to enforcement actions if the later are possible. Promotion or advocacy should not be a “safety valve” for dealing with complex cases due to political or other reasons<sup>45</sup>.

If there is a private anticompetitive action that squarely fits within the prohibitions, agencies should refrain from viewing it as a public promoted or initiated restraint to competition<sup>46</sup>. Enforcement actions could be followed by other policy-making or regulatory actions seeking at eliminating any possible trace or root of such private action in the regulation, but that should not be confused with the enforcement proceedings against the private anticompetitive action itself.

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<sup>41</sup> But even in those cases it may be considered that continuing the enforcement action (investigation and resolution) may be a better outcome if it allows for clarification of the legal rules or standards applicable, see KOVACIC (2001: 848).

<sup>42</sup> OECD (2008:3): “a competition authority has to resist the temptation to use settlements to quickly clear an agency’s docket and get rid of “difficult” cases”.

<sup>43</sup> OECD (2008: 3-4): “this instrument should be used cautiously early in the development of a jurisdiction’ anti-cartel enforcement efforts, before credible sanctions have been established and courts have been persuaded to approve or impose high fines”.

<sup>44</sup> EVENETT (2006: 495) considers that the inter-temporal and contemporaneous relationships among them are a possibility “and that each activity can sometimes substitute for and sometimes complement the other”, though he does not make an explicit endorsement of that practice. See also, DABBAH (2003:64): “Certain links seem to exist between competition advocacy and enforcement of antitrust law”, and later “competition advocacy seems to be a more effective means to ensure that the law is understood and observed than antitrust law enforcement. [...] Holding traditional antitrust law enforcement like an article of faith should not necessarily mean however that competition advocacy will be relegated to a marginal law. At all events, competition advocacy can enlarge the benefits that may accrue from antitrust law enforcement. Hence, competition advocacy can be seen to be complementary to antitrust law enforcement –if not necessarily an alternative”..

<sup>45</sup> DABBAH (2003: 64) talks about competition advocacy as a “safety valve in a system of antitrust law” in different terms: “that would ensure against not only anti-competitive practices, but also lobbying and economic rent-seeking behaviour by various interest groups, which seem to be common in the field of antitrust policy”.

<sup>46</sup> Only those cases in which private parties actions are forced or mandatory according to the law should be considered part of the public restraints.

## 6. CONCLUSIONS

Within the overall framework of competition policy, administrative agencies are given several tools they may use to preserve competitive markets furthering social welfare.

'Regular' competition law enforcement is the main instrument enforcement agencies use to achieve that goal. In many jurisdictions, private enforcement of competition law violations before courts complement public investigations and enforcement actions by the agencies. As any law enforcement action, agencies' decisions in this matter are of coercive nature, and regularly conclude with sanctions to firms and individuals. These sanctioning decisions have a deterrent effect as they induce compliance with competition rules by business firms. Adequate sanctions are an effective way of discouraging future violations of the rules.

Moreover, settlement within the enforcement procedures before the administrative agency is conceived as an efficient way to dispose of cases, allowing agencies to close their investigations and reach an agreement with the potential violators, to the benefit of everyone (the parties and the society). Generally, settlement policy and practice are regulated in detail in order to provide a clear, transparent and predictable framework in which agencies actions take place.

Competition promotion and advocacy by competition agencies is a less formal tool that they may use to extend competition culture and challenge public regulation that favours anticompetitive behaviour. It can truly be said that these other tools (settlements, promotion and advocacy) somehow soften the competition agencies actions in their fulfilment of their tasks. They show agencies "friendly face", and they may eventually diminish the deterrent effect of 'regular' enforcement actions and fines.

This paper argues that settlements, promotion and advocacy should not be considered as a substitute of 'regular' enforcement actions. Specially, they should never be used in cases in which there is a violation of competition prohibitions and the agency has some supporting evidence. This claim applies with greater strength in case of younger agencies without a strong and solid enforcement reputation and track-record of fines imposed.

Overall, this paper makes some policy recommendations against improper uses of these 'friendly' competition policy tools, alerting against possible consideration of political biases within the law enforcement procedures. Agencies worldwide face a relevant challenge, as political issues should be kept aside of competition law enforcement. If they are not up to it<sup>47</sup>, they may well risk their enforcement reputation, dramatically reducing the deterrent value of fines and jeopardizing their prospects of effectively pursuing the basic goals of competition policy.

## REFERENCES

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<sup>47</sup> However, at the end, it may well be that private damage claims succeed in partially correcting improper competition policy decisions.

BAKER, JONATHAN B. (2003): “The case for Antitrust Enforcement”, *Journal of Economics Perspectives*, vol. 17/4, 27-50.”

BLOCK, MICHAEL KENT, FREDERICK CARL NOLD & GREGORY J. SIDAK (1981): “The Deterrent Effect of Antitrust Enforcement”, *Journal of Political Economy*, vol. 89(3), 429-445.

CLARKE, JULIAN L. AND SIMON J. EVENETT (2003): “The deterrent effects of national anticartel laws: evidence from the international vitamins cartel”, *Antitrust Bulletin*, Fall, 689-726.

ETRO, FEDERICO (2006): “Competition Policy: Toward a New Approach”, *European Competition Journal*, vol. 2/1, 29-54.

EUROPEAN COMMISSION (2008): *White Paper on Damages Actions for Breach of the EC antitrust rules*, COM(2008) 165, 2.4.2008

DABBAH, MAHER M. (2003): *The Internationalisation of Antitrust Policy*, Cambridge University Press: New York, repr. 2005.

EVENETT, SIMON J. (2006): “Competition Advocacy: Time for a Rethink?”, *Northwestern Journal of International Law and Business*, vol. 26, 495-514.

EYRE SEBASTIAN & MARTIN LODGE (2000): “National tunes and a European melody? Competition law reform in the UK and Germany”, *Journal of European Public Policy*, Vol. 7 (1), March, 63 – 79.

GEORGIEV, GEORGE STEPANOV (2007): “Contagious Efficiency: The Growing Reliance on U.S.-Style Antitrust Settlements in EU Law”, *Utah Law Review* 2007, 971-1037

GINGSBURG, DOUGLAS H. (1988): “The Appropriate Role of the Antitrust Enforcement Agencies”, *Cardozo Law Review*, vol. 9, 1277-1290.

HAY, DONALD (1993): “The Assessment: Competition Policy”, *Oxford Review of Economic Policy*, vol. 9(2), summer, 1-26.

HOVENKAMP, HERBERT (2005): *The Antitrust Enterprise: Principle and Execution*, Harvard University Press, Cambridge (Mass.).

ICN (2002), *Advocacy and Competition Policy Report*, Advocacy Working Group of the International Competition Network (available [www.internationalcompetitionnetwork.org/media/library/conference\\_1st\\_naples\\_2002/advocacyfinal.pdf](http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/advocacyfinal.pdf))

JOSKOW, PAUL (2002): “Transaction Cost Economics, antitrust rules and Remedies”, *Journal of Law, Economics and Organization*, vol. 18(1), 95-116.

KAUPER, THOMAS E. (1978): "Competition Policy and the Institutions of Antitrust", *South Dakota Law Review*, vol. 23, invierno, 1-29.

KOVACIC, WILLIAM E. (2001): "Evaluating Antitrust Experiments: using ex post assessments of government enforcement decisions to inform competition policy", *George Mason Law Review*, vol. 9(3), primavera, 847-849.

KOVACIC, WILLIAM E. (2005): "Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities", *Journal of Corporation Law*, vol. 31, 503-507.

LOWE, PHILIP (2008): "The Design of Competition Policy Institutions for the 21<sup>st</sup> Century", *Competition Policy Newsletter*, n° 3, 1-11 (available at [http://ec.europa.eu/competition/publications/cpn/cpn2008\\_3.pdf](http://ec.europa.eu/competition/publications/cpn/cpn2008_3.pdf)).

MONTI, GIORGIO (2004): "New Directions in EC Competition Law", in *European Union Law for the Twenty-first century: Rethinking the New Legal Order*, (T. Tridimas & P. Nebbia, eds.), vol. 2. Hart, Oxford (UK), 177- 194.

MORGAN, ELEANOR J. (2009): "Controlling cartels-Implications of the EU policy reforms", *European Management Journal*, vol. 27, 1-12.

MOTTA, MASSIMO (2004): *Competition Policy: Theory and Practice*, Cambridge University Press.

MOTTA, MASSIMO & MICHELE POLO (2003) "Leniency Programs and Cartel Prosecution", *International Journal of Industrial Organization*, vol. 21/3, march, 347-379.

OECD (2008), *Plea Bargaining and Settlement of Cartel Cases*, policy Brief, september.

OFT (2007): *The deterrent effect of competition enforcement by the OFT*. A Report prepared for the OFT by Deloitte, nov., OFT 962.

OTTOW, ANNETJE (2009) "Enforcement by Regulators Through Self regulation and compliance programs", working paper presented at ACLE Conference "To Enforce and Comply: Incentives inside corporations and agencies", 5-6 March (available at [http://www.uu.nl/SiteCollectionDocuments/REBO/REBO\\_RGL/REBO\\_RGL\\_EUROPA/Acle%20paper%20prof.%20Ottow.pdf](http://www.uu.nl/SiteCollectionDocuments/REBO/REBO_RGL/REBO_RGL_EUROPA/Acle%20paper%20prof.%20Ottow.pdf)).

PETIT, NICOLAS & MIGUEL P.L. RATO (2009): "From Hard to Soft Enforcement of EC Competition Law - A Bestiary of 'Sunshine' Enforcement Instruments", in *Alternative Enforcement Techniques in EC Competition Law: Settlements, commitments and other novel instruments* (Ch. Gheur, & N. Petit, eds.), Bruylant, Brussels,183-220.

PITOFSKY, ROBERT (1979) "The political content of antitrust", *University of Pennsylvania Law Review*, vol. 127, 1051-1075.

POSNER, RICHARD A. (2001): *Antitrust Law*, Second Ed., University of Chicago Press, Chicago (Ill.).

REY, PATRICK (2003): “Towards a Theory of Competition Policy”, in *Advances in Economics and Econometrics: Theory and Applications - Eight World Congress* (M. Dewatripont, L. P. Hansen & S. J. Turnovsky, dirs.) vol. II, n°36, Cambridge University Press, 82-132.

SANDEL, MICHAEL (2012) *What money can't buy. The moral limits of markets*, Allen Lane, London.

SARRA, ALESSANDRO AND ALESSANDRO MARRA (2008): “Are Monetary Incentives Enough to Boost Action for Damages in the European Union? On the Relevance of Incompleteness of Laws and Evidentiary Requirements”, *World Competition*, vol. 31(3), 369-388.

SELDESLACHTS, JO, JOSEPH A. CLOUGHERTY & PEDRO PITA BARROS (2009): “Settle for Now but Block for Tomorrow: The Deterrence Effects of Merger Policy Tools”, *Journal of Law and Economics*, Vol. 52, No. 3 (August 2009), 607-634.

POLINSKY, A. MITCHELL & STEVEN SHAVELL (2008): “The Theory of Public enforcement of Law”, in *Handbook of Law and Economics* (A. Mitchell Polinsky & S. Shavell, dirs.) vpñ. 1, 403-453.

SPRATLING, GARY R. (2001): “Detection and Deterrence. Rewarding informants for reporting violations”, *George Washington Law Review*, vol. 69 (5/6), 789-823.

STUCKE, MAURICE E. (2008): “Better Competition Advocacy”, *St. John's Law Review*, vol. 82, 951-1036.

VAN DEN BROEK, STIJN, RON G.M. KEMP, WILLEM F.C. VERSCHOOR & ANNE-CLAIRE DE VRIES (2012), “Reputational Penalties to firms in antitrust investigations”, *Journal of Competition Law & Economics*, vol. 8/2 , 231-258.

WALLER, SPENCER WEBER (1998a): “The Incoherence of Punishment in Antitrust”, *Chicago-Kent Law Review*, vol. 78, 207-236.

WALLER, SPENCER WEBER (1998b): “Prosecution by Regulation: The Changing Nature of Antitrust Enforcement”, *Oregon Law Review*, vol. 77, 1383-1449.

WILS, WOUTER P. J. (2008): “The use of Settlements in Public Antitrust Enforcement: Objectives and Principles”, *World Competition*, vol 31/3, September, 335-352.

WISH, RICHARD & DAVID BAILEY (2012) *Competition Law*, 7<sup>th</sup> Ed., Oxford University Press.