On the optimal use of commitment decisions under European competition law

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A B S T R A C T

In Europe, competition authorities have the power to close antitrust cases with “commitment decisions” after the concerned firms have offered agreed remedies. We show that the optimal use of this instrument is governed by a tradeoff between deterrence of potentially anticompetitive practices and early restoration of effective competition. We relate the optimal policy to the distribution of firm profit and consumer harm among cases. We find, however, that the optimal policy is generally not enforceable when the authority cannot credibly announce its policy prior to the firms’ strategic decisions. The lack of authority credibility may translate into insufficient or excessive use of commitment decisions.

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1. Introduction

The enforcement of competition law relies on both formal and informal procedural instruments. Antitrust authorities do not always adopt formal decisions that establish infringements and impose financial sanctions and/or injunctions. They also close cases after the concerned firms have offered an agreed remedy. This is commonly done in the United States through consent decrees or consent orders. In Europe, the regulatory framework in force from 1962 to 2003 was silent about this issue and there were relatively few cases settled this way at that time.¹ The modernization of the European legal framework, that occurred in 2003, introduced a formal way to close a case, referred to as a “commitment decision”. Under the commitment procedure, a firm suspected of implementing anticompetitive practices may offer to bring them to an end in exchange for fine immunity and the European Commission may formally close the case under investigation:

“Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings.” Regulation 1/2003, Article 9(1)

The major innovation compared to the earlier framework is that commitment decisions now render the agreed remedies legally binding on the concerned firm, thus “creating legal certainty and ensuring that effective competition is continuously preserved.”² In 2013, the European Commission had the first opportunity to show how seriously it takes the failure to comply with accepted commitments, imposing a €561 million fine on Microsoft on this ground.³

In contrast to American consent decrees, commitment decisions do not need an a priori validation by an independent court and therefore constitute a powerful enforcement instrument at the disposal

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¹ A counter-example is the IBM case in 1984, see Scherer (2003).

² Antitrust Manual of Procedures, Chapter 16, §6, March 2012, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU.

³ In 2009, Microsoft had committed to offer Internet users a browser choice screen enabling them to easily choose their preferred web browser, and the Commission had made these commitments legally binding on Microsoft until 2014. In March 2013, the Commission has found that Microsoft failed to roll out the browser choice screen from May 2011 until July 2012, thus preventing 15 million users in the EU from seeing the choice screen during this period. (Decision Case AT.39530 of 6 March 2013.)
of the European Commission. The purpose of this article is to examine the optimal use of this instrument and its interaction with formal infringement decisions. We show that the optimal enforcement policy solves a tradeoff between deterrence of potentially anticompetitive practices and early restoration of effective competition.

We place the emphasis on two issues: the unobserved heterogeneity among antitrust cases; the authority’s ability or inability to credibly announce its enforcement policy. We show that the commitment procedure is potentially helpful in screening out heterogenous competition cases and characterize the optimal policy mix when the authority can commit to enforce the announced policy. We show, however, that the optimal policy is generally not credible when the authority is allowed to deviate ex post from the announced policy and derive the possible outcomes in this context. We explain the tension between the authority’s ex ante and ex post incentives, and illustrate the implied distortions in terms of deterrence, frequency of trials and commitment decisions. Before presenting our findings in greater detail, we explain our main modeling assumptions regarding the concerned practices and the commitment procedure itself.

First, we restrict attention to unilateral practices implemented by firms with strong market power, which have been the main focus of commitment decisions so far. Examples of such practices in recent cases include exclusive supply, tying, target rebates, and various types of vertical restraints. The procedure more rarely applies to multilateral practices and has explicitly been ruled out for secret cartels.

Second, we allow the potential cases to differ in terms of both the incremental profit generated by the practice and its impact on consumers. The heterogeneity across cases reflects all the environmental parameters and market conditions that determine the economic impact of business practices such as the ones mentioned above. We assume that the practice is always profitable for the concerned firm but make no assumption on whether the practice harms or benefits consumers for each particular case. More precisely, we allow the practice to benefit consumers in some instances, reflecting the possibility of efficiency gains that may (at least in part) be passed on to them. We assume, however, that enforcement is socially desirable. We do not constrain the correlation between profit gains and consumer harm. Highly profitable practices are not necessarily associated with the highest harm to consumers.

Third, as regards the informational setting, we assume that firms have a better knowledge of the market environment, and hence of the incremental profit to be generated by the practice, than the competition authority. Competition practitioners know how difficult it is to estimate the effect of a business practice, in particular because it requires identifying the counterfactual situation that would have prevailed had the practice not been implemented. Accordingly, we assume that the profit gain and consumer harm due to the practice remain unknown to the enforcers throughout the proceedings. Even though a competition authority or a court can adjust the fine for observed characteristics of the practice, there certainly remains a great deal of unobserved case heterogeneity that cannot be taken into account when setting the fine. In this paper, we do assume that the fine is fixed for a given practice.

Fourth, we summarize the enforcement policy by the probability of initiating the commitment procedure after a potentially anticompetitive practice has been detected. In practice, the procedure starts when the European Commission informs the defendant firm of its competition concerns by a written document called “Preliminary Assessment”. The concerned firm has one month to formally submit its commitments. The Commission then publishes the proposed commitments in the Official Journal of the European Union, inviting comments from interested third parties—the so-called “market test”. We assume that the enforcement policy can depend on observable variables such as the sector or the type of practice, but not directly on the unobserved consumer harm. As regards the commitment procedure, we consider, in line with Article 9(1) cited above, that commitment decisions cannot involve the payment of a fine and that the firm can only offer to bring the practice to an end. Our findings are threefold. First, we derive the firm’s behavior in response to a given enforcement rule. When the commitment procedure is not available or if the authority credibly promises never to use it, the firm faces only the threat of trial (measured by the expected fine) and implements the practice only when it generates a sufficiently high profit. The level of the fine thus leads to partition the set of potential cases into two groups. The commitment procedure offers a new screening instrument that allows to refine the partition with the creation of a third group: firms that derive moderate gains from the practice engage in it, but offer to end it if they receive a preliminary assessment. We find that the commitment procedure weakens deterrence, and eliminates it completely if commitment decisions are used for all detected cases. Firms are (at least weakly) better off under a higher probability of commitment decisions.

Second, we derive the optimal enforcement policy assuming that the authority is able to credibly announce the frequency of commitment decisions. We show that the optimal policy depends on how the consumer harm varies with the incremental profit generated by the practice. A systematic use of commitment decisions is optimal when the consumer harm weakly increases with the incremental profit, i.e. when the most harmful cases tend to be the most profitable, and hence the most difficult to deter. On the opposite, no use of the commitment decision is optimal when the consumer harm decreases with the incremental profit. When the most detrimental cases are located in the middle of the range of profitability, the authority faces a binary choice: either deterring as many cases as possible or giving up deterrence altogether and ensuring an early termination of the practice. In this case, a higher level of fine makes it more likely that the authority chooses the former option (no use of the commitment procedure). Hence, the availability of the new procedure does not change the usual and intuitive result that a higher level of the fine is associated with greater deterrence. In contrast, when the most harmful cases correspond to extreme values

5 Antitrust Manual of Procedures, Chapter 16 §13. Other negotiated procedures apply to secret cartels, such as the leniency and settlement procedures, see e.g. Motta and Polo (2003) and Assone and Motta (2010).
6 The characteristics of the concerned practices – heterogeneous cases, possibility of efficiency gains that can outweigh anticompetitive effects – should lead to evaluate them under the rule of reason rather than prohibit them per se. However, asymmetric information on these characteristics makes the rule of reason unfeasible in our model.
7 Third parties have a month to submit observations. See points 4.3 and 4.4 of the Commission notice on best practices for the conduct of proceedings concerning articles 101 and 102 TFEU, OJEU 2011/C 308/06, and chapter 16 of Antitrust Manual of Procedures. See Cook (2006). Most member states of the European Union have set up similar procedures, see Viafont (2007) and Schweitzer (2012).
8 In contrast, American consent decrees may involve partial remedies (United States v. Microsoft Corp., 253 F.3d 34 (D.C.Cir. 2001)). See Furse (2004). In the current paper, we rule out partial remedies, assuming that remedies are indivisible in the sense of Shavell (1993) that analyzes a nonmonetary judgment equivalent to an order to do something. Souam and Viafont (2011) considers partial remedies and partial fine reductions.
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