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

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ABSTRACT: Competition policy is conceived to preserve and promote free market competition. It can be fleshed out through a mix of tools that are used to further consumer and social welfare through preserving and promoting the efficient functioning of markets. In different countries, courts, administrative authorities and governments themselves play different roles in the execution of competition policy and in the fulfilment of its goals.

On the one hand, competition policy uses prohibitions of anticompetitive actions and merger control as a legal instrument to fight or prevent market restraints by private agents. Public and private competition law enforcement leading to sanctions and/or actions for damages (i.e. the 'regular' enforcement of competition law) is the main manifestation of competition policy.

However, relatively recent developments have increased the number of tools in the shed of competition law enforcement. It has gone past 'regular' enforcement and currently also foresees settlements as a tool to introduce flexibility in the prosecution of competition violations. Settlements are conceived as procedural devices in public antitrust enforcement that provide a shortcut to allow for the speedy conclusion of inquiries and administrative proceedings in those cases that would be costly and inefficient to pursue. If properly used, recourse to settlements may allow competition authorities to save costs and resources in pursuing risky proceedings with an uncertain outcome. From that perspective, the effects of antitrust settlements may seem socially valuable. However, an often overlooked effect is that settlements may also dilute the deterrent effect of 'regular' enforcement. A similar reasoning or discussion underlies the objectives and operation of leniency programs (another of the relatively recent tools for competition enforcement, at least in most EU member States), although several striking differences exist between leniency and competition settlements.

On the other hand, softer new tools have also been developed. Under the headings of *competition promotion* and *competition advocacy* a variable set of instruments are created for competition authorities to create and spread the culture of free market competition in areas that have traditionally been exempted from market forces or competition. Advocacy is mainly targeted towards anticompetitive governmental regulations, whilst promotion is aimed at easing and favouring the rooting of competition policy in sectors that for whatever reason have suffered entry barriers and anticompetitive restrictions in the past.

This article criticizes certain uses, mistaken or misguided, of settlements, advocacy and promotion. These are two very different settings in which the deterrent feature of competition authorities' enforcement actions may suffer a deathly blow. Paradoxically, if wrongly used, both may endanger the deterrent principle upon which competition law and policy are 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.

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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 oriented at reducing the burden on competition authorities and at trying to allow for more efficient 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[2] (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.

[2] 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.

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*). 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*).

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 promotion give agencies wide leeway to preach the virtues of competitive markets and didactically explain other governmental entities and market agents the adverse effects (including sanctions) of favouring or pursuing anticompetitive behaviour.

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[3].

1. COMPETITION POLICY OBJECTIVES AND TOOLS.

Competition policy is aimed at increasing social welfare by preserving and furthering free competition in markets[4]. 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.)[5]. Using competition policy for those purposes may lead to misunderstandings and can diminish its success in practice.

Through the establishment of a set of rules and prohibitions against anticompeittive 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.[6] Deterrence is the key value in core competition law, as the effectiveness of the

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[3] 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 European Union, useful references to other competition agencies or systems are made.

[4] For all, see HOVENKAMP (2005) or POSNER (2006).

[5] See GINSBURG (1988: 1278).

[6] In a broader sense, competition law comprises rules on unileral 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, etc.). However, the focus of this paper is in the '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.

prohibitions depends greatly on the incentives it provides for proper behaviour through the treat of sanctions if its rules are infringed. 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).

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 underdeterrence). This is also made further more complex by the detection difficulties and gathering of evidence[7]. 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 accept 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).

Undoubtedly, 'regular' competition law enforcement is the main instrument towards that aim, but it is not the only one[8]. 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 have at hand several

[7] The idea is underlined in the private enforcement context by SARRA & MARRA (2000: 371-376). See also STUCKE (2008: 1016-1917).

[8] 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), 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)

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.

2. 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[9]. If violations of competition rules are not pursued and sanctioned, the incentives not to obey these rules increase considerably.

However, deterrence of violations and compliance may be not the only objectives of enforcement[10]. 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

[9] 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, merger review by competition agencies may also have a deterrent effect in merging parties, see SELDESLACHTS, CLOUGHERTY & BARROS (2007).

[10] 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.

adjust them to changing markets and business realities or to fight in a more efficient manner against the most egregious anticompetitive violations[11].

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.

2.1. 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[12]. 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.

2.2. Settlements in Public 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'

[11] The EU 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 (2009). The UK adopted a major reform of its competition law system in 1998 and 2002, Germany in 2005, Spain in 2007, and France has just done so. 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*.

[12] 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).

latitude in case selection and prioritisation varies according to each legal system[13]. But every system provides some procedural flexibility 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[14]. 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*").

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[13] 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.

[14] In EU Competition law, article 9 of Council Regulation (EC) nº 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) nº 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.

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 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* 2.1). Indeed, 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 missed[15], but not all. The risk of diminishing deterrence is greater in settlement: the perception of diminishing threatened cost of punishment may grow (leaving the later below the gain of violation).

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

[15] 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).

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.

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.

As general principles, the following ideas should inspire the design of the 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[16].

b) In the rest of the cases, settlements should be restricted to those cases in which the benefits in the 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[17].

c) Too early settlement should be avoided as it presents greater risk of negative effects to deterrence[18]. Too late settlements would also lack sense: if resources

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[16] 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*."

[17] Truly other indirect loses 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 (WILS 2008, 344).

[18] 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 nº 622/2008, of 30 June 2008, amending Regulation (EC) nº 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.

have already been invested, the authority might as well give the case a shot and go to trial.

d) Market test 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)[19]. 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)[20]. 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[21].

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*". Settlement should be conceived as a procedural and technical instrument at the disposal of the

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[19] 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*."

[20] See KOVACIC (2001: 847-848). Additionally, *ex post* assessment of market impact of settlements may give increase agencies legitimacy and reputation, see KOVACIC (2005: 511-510).

[21] 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)

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 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[22].

3. COMPETITION PROMOTION AND ADVOCACY.

Aside of competition law enforcement, in a parallel development, modern competition policy provides agencies with other tools for increasing consumer welfare through furthering competitive markets[23]. Gathered 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. As a by-product those sector enquiries may detect restraints or distortions that lead to new enforcement cases. More specifically, *competition advocacy* is aimed at eliminating anticompetitive public regulations or protections.

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[24]. These tools

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[22] It may well be that the relevance of politics and antitrust ideology cannot be overcome in certain cases, see WALLER (2003: 230-233). In his own words, "*Once the veneer of law enforcement is stripped away, the politization of antitrust proceeds unabated*", WALLER (1998: 1448).

[23] 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).

[24] 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*

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[25].

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 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 or advocate for 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 legislatives and in regulated industries[26].

Competition agencies have drafted reports on market enquiries in several sectors to detect 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[27].

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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).

[25] "*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*".

[26] See GINSBURG (1988: 1278) and KAUPER (1978: 21-26)

[27] See, in the USA, STUCKE (2008: 955-963).

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[28]. Respect to the rule of law and the preservation of the deterrent value of competition prohibitions require that the agency proceeds in pursuing a regular enforcement action. It is true that through promotion and advocacy the agency may be able to eliminate a restriction or distortion in the competitive working of markets, but this does 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[29].

[28] 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).

[29] STUCKE (2008: 1013-1014).

4. IMPROPER USES OF COMPETITION POLICY TOOLS THAT DIMINISH 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 guidelines). Besides, if those tools are used properly, they invest the agency with greater power to promote competitive market behaviour[30].

Depending on several circumstances, ranging from clarity of law, evidence available against the potential violator and agency resources, competition agencies decide if they are starting an investigation and violation procedure regarding 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 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.[31]

Therefore, it is submitted that neither settlement nor advocacy or promotion should be used as an alternative when enforcement action is advisable. Giving up to ordinary law enforcement and punishment when feasible also poses the problems of unpredictability of agencies actions and incoherence[32].

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[30] See WALLER (1998: 1394-1417)

[31] 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*."

[32] See WALLER (2003), 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).

4.1. The Problem of 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 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 it, unless the resources required to acquire condemning evidence are excessive or the illegality of the conduct is not crystal-clear[33]. Keeping and maximizing the deterrent force of competition law through 'regular' enforcement and fines should be the guiding principle for agencies in their decision[34]. The decision to start and follow the settlement procedures is a very delicate one for young and non-established agencies, lacking a credible enforcement and fining record[35]. Political considerations should never be allowed to enter into the decision whether to settle a case or not.

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[33] 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).

[34] 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*".

[35] 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*".

4.2. The Problem of Misguided Competition Advocacy and Promotion.

Some of the activities on competition promotion and advocacy may be "close neighbours" of enforcement actions by agencies[36]. 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[37].

If there is a private anticompetitive action that squarely fits within the prohibitions, agencies should refrain from viewing it as a public or governmental restraints. 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. Only those cases in which private parties actions are forced or mandatory according to the law should be considered part of the public restraints.

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[36] 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 a 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"..*

[37] 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*".

CONCLUSIONS.

Within the overall framework of competition policy, administrative agencies are given several tools they may use to preserve competitive markets furthering consumer 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 agency. 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 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 rules and the agency has evidence of it. 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. It they are not up to it[38], 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.

[38] However, at the end, it may well be that private damage claims succeed in partially correcting improper competition policy decisions.

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