

# **Toward an integration of the economic and legal approaches to antitrust enforcement**

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# Plan

- 1) Economic theory of crime: Insights from the basic model**
- 2) Deterrence and the role of the proportionality principle in enforcement**
- 3) The cost of enforcement:**
  - Improving the deterrence model**
  - The impact of new instruments and new approaches in competition law enforcement**
- 4) The cost of sanctions: the procedural context of civil enforcement**
- 5) Conclusions**

# A Simple Economic Model

**Damage**                     $D=f(O_{(ps)})$

**Enforcement cost**       $C= C( O_{(P,S)}P)$

**Cost of sanction**         $bpsO_{(P,S)}$

**Supply of offences**      $O= O_{(P,S)}$

**Policy objective:** **Minimize social cost of violations**  $D=f(O_{(ps)})+ C( O_{(P,S)}P)+bpsO_{(P,S)}$

**1st Condition of optimality:** P and S must be chosen in such a way that « crime does not pay » (only risk seekers will commit crime)

**2nd Condition of optimality :** the marginal cost of enforcement and sanctions must be equal to the marginal revenue

# Optimal sanctions for antitrust violation

For crime “not to pay”, the expected gain from the violation must be equal to zero or negative.

In a competitive environment monopoly profits are equal to 0.

Assume  $\pi(\text{ac})$  = profits from the anticompetitive practice

$p$  = probability of getting caught

$f$  = fine

To discourage a risk averse or risk neutral firm from engaging in an anticompetitive activity we must have:

$$p (\pi(\text{ac}) - f) + (1 - p) (\pi(\text{ac})) < 0$$

which gives:

$$p f > \pi(\text{ac})$$

Or  $f > \pi(\text{ac}) / p$

Taking the total reduction in consumer surplus (greater than the extra-profit of the violators) and multiplying it by the inverse of the probability of detection and punishment would lead to an economically efficient fine.

# **Optimal sanctions for antitrust violation**

**It is possible to introduce separately the probability of detection and the conditional probability of being found guilty once one has been charged (cf Harris, Ehrlich etc....). The latter will depend on procedural provisions.**

**The optimality conditions remain roughly the same.**

# Insights from the economic model

Sanctioning antitrust violations according to their **gravity or seriousness** or nature is **not economically relevant**.

**Sanctions should « ceteris paribus » be lower in abuse of dominance cases and in cases of vertical restraints cases (or in cases where one applies a rule of reason), because of the risks of false positive.**

**Note: ENRICO LEONARDO CAMILLI : « OPTIMAL AND ACTUAL FINES IN CARTEL CASES: THE EUROPEAN CHALLENGE »**

**“In order to achieve (...) optimality, the basic framework on penalties should be a quantitative one, rather than qualitative. In other words, the quantity of the penalty has to be linked to the measure of the effect that the infringement provoked, rather than on the quality of the action undertaken.”**

# Insights from the economic model

**It is the overall level of sanctions (together with the probability of detection and conviction) which determines the deterrent effect of an enforcement system.** It make no difference whether payments are made to the government budget or to consumers. But we must remember that different types of sanctions may entail different costs and that competition authorities have some control over administrative sanctions but not over private suits.

**Note:** In the worldwide *Vitamins* cartel, the amount of fines and private damages paid in the US was roughly US\$ 2 billion *vis à vis* the 855 million Euros paid to the Commission in the European case, not to mention the imprisonment of nine executives.

In the worldwide *Graphite electrodes* case: even if the estimates of the affected market are similar (more than two billion Euros in the EU, US\$ 2 billion in the US ), the EU fine represents only 11% of the affected market, while the US fine represents more than 24%, without taking into account jail sentence for two executives.

# Insights from the economic model

**T**

he sanctions for antitrust violations should be closely linked to the volume of trade affected and to the ability of violators to raise price above marginal cost. Hence, **competition authorities should endeavour to gather elements on those variables.**

**Note: ENRICO LEONARDO CAMILLI : « OPTIMAL AND ACTUAL FINES IN CARTEL CASES: THE EUROPEAN CHALLENGE »**

“the gross gain principle should be the basic point, even if measured by means of proxies; indeed **an inquiry on the affected commerce is a reasonable burden to be asked to the enforcing agency, at least to have a measure of the overall effect of the cartel and of the role played by each participant....**the determination of the mark-up, but above all a precise determination of the probability of conviction, are much more (difficult), and the agency will be inevitably forced to use gross estimates. The **starting point remains however the quantitative link between sanction and effects produced**, because otherwise the achievement of the deterrent effect will be a matter of chance, rather than the aim of the (enforcement) system”

# Insights from the economic model

**There can be such a thing as overdeterrence or fines that are too high (even in the case of cartel behavior).**

Nonthika Wehmhörner: “Optimal Fining Policies”

**“Fines that are higher than the harm caused by a particular type of conduct may discourage firms to engage in conduct, which increases total surplus. For example, Posner (1976) mentions the possibility of firms spending large amounts on advertising that neither serves to inform consumers better nor improves the product. If firms could be convinced to limit their advertising expenditure, costs would fall. By cooperating in advertising or research, or by merely sharing important information, a cartel may be able to reduce costs. In order to sustain these gains, Sproul (1993) points out that horizontal price-fixing may serve the purpose of preventing firms from competing away the benefits that induce firms to cooperate to generate these cost savings. Finally, Martin (1999) shows that joint profit maximisation requires output to be distributed among firms so that marginal costs are the same for all firms. To the extent that the high-cost firm reduces its output and accepts a lower market share, the units produced at a lower cost represent an efficiency gain.”**

# Insights from the economic model

**The existence of ceilings on sanctions in absolute value (US) or in percentage of turnover (EU) can have perverse effects on deterrence. Such ceilings are, in most cases, economically unjustified.**

**J.A.H. Maks, M.P. Schinkel and I.A.M. Bos “Perverse incentive effects of bounding fines for infringements of competition law: the Dutch case”**

**(In the Netherlands) the fine (F) must be equal or smaller than € 450,000 or than 10% of the total sales of the firm in the previous year. (...) This criterion is striking, not only because it is unclear where exactly these maxima come from, but also because it tends to affect smaller firms more than it does larger ones. 10% is applied in the European Union as well as in Ireland and Finland (...) the 10% maximum harms the principle of equivalence (...) there are countries, like Denmark, that work without such a constraint.**

# Insights from the economic model

The deterrent effect of an enforcement system depends on several, partly interdependent, variables. Furthermore, economic agents respond to incentives. Therefore any innovation leading to modification of a variable in an enforcement system is likely to lead to responses by economic agents which will affect other variables. Those interdependences have to be studied carefully.

**ENRICO LEONARDO CAMILLI : « OPTIMAL AND ACTUAL FINES IN CARTEL CASES: THE EUROPEAN CHALLENGE »**

**“the coherence of the entire sanctioning system is of paramount importance, since all the elements are closely interrelated, and the change of one parameter is likely to have effect on all the setting. For that reason matters like the private damages and the standing to claim them, the international or domestic feature of the infringement, the type and quantity of investigative tool, the availability of criminal sanctions are to be taken into account when the question on the optimal fine is addressed”.**

Since individuals respond to incentives, they are likely to respond to positive signals as well as to negative signals.

**Note: The US Federal Sentencing Guidelines have been associated with the increased use of what are known as “carrots,” in other words, specified rewards for good corporate behavior.**

# I) Minimizing the social cost of violations

$$D = f(O(p,s)) + C(O(P,S)P) + bpsO(P,S)$$

# Optimal Sanctions

“According to Werden and Simon (1987), **firms would need assets six times higher than annual sales for a firm to pay the optimal fine.** As a consequence, they conclude that most price fixers should go to prison.

Craycraft, Craycraft and Gallo (1997) analyze the effect of the firm's ability to pay the fine levied and find that all firms in their sample of 262 price-fixing firms between 1955 and 1993 were able to pay the actual fine imposed. However, only 47, or **18% of the sampled firms were able to pay the “optimal” fine.** All 262 firms were able to pay the fine actually levied as well as the maximum fine out of cash on hand, defined as cash immediately available, and short-term investments, i.e. treasury bills. Paying the fine out of cash on hand and short-term investments denies stockholders payment of a cash dividend and also affects payment to short term creditors”.

# Economic and legal Issues

- 1) Is deterrence compatible with proportionality ?**
- 2) Can optimal fines be considered excessive because they have no relationship with gravity or actual harm ?**
- 3) Can similar violations be treated differently depending on the amount of harm they create? (see Sissel Jenseny Lars Srgardz May 27, 2010, Optimal enforcement with heterogeneous cartels)**
- 4) Should violations which do not create harm ( for example practice which have the object or may have the effect) be treated more leniently ?**

# Deterrence Retribution Incapacitation and Proportionality

a “sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.”

**Proportionality – the notion that the punishment should fit the crime – is inherently a concept tied to the penological goal of retribution. “It becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight,” – not to mention giving weight to the purpose of California’s three strikes law: incapacitation.**

**In the present case, the game is up once the plurality has acknowledged that “the Constitution does not mandate adoption of any one penological theory,”**

# Proportionality and deterrence: a dissenting voice

The philosophical theories discussed (...) show that the **proportionality principle should not be characterized as a retributivist notion.**

The principle of proportionality is, rather, a theoretically ubiquitous belief about the limits of morally acceptable punishment.

**Philosophers have been uniformly reluctant to give up the intuitive commitment to proportionality even when it has proven difficult to reconcile with their fundamental theoretical principles, such as utility.** We should be similarly reluctant when interpreting the Eighth Amendment.

# Proportionality

**To the gravity of the violation ?**

**To the injury suffered ?**

**To what is suitable to achieve the objectives of the law?**

**To what is strictly necessary to achieve the objectives of the law ?**

**To what is legitimate?**

**To the inverse of the probability of sanction for violators ?**

# Is the model of optimal sanctions relevant to the legal context ?

**Promote economic competition ?**

**Promote fairness in competition?**

**Goal of the law?**

**Deterrence ?**

**Incapacitation ?**

**Retribution ?**

**Rehabilitation ?**

**Goal of the sanctioning mechanism ?**

# Proportionality: US Constitution 8th Amendment

**“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”**

**The Excessive Fines Clause thus “limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’”**

**(1993) *Austin v. United States*, 509 U. S. 602, 609–610.**

# Proportionality principle in the US

-1892 Supreme court decision of O'Neil v. Vermont

-1900 Weems v. United States: The Court held that the punishment was cruel and unusual because it was disproportionate to the offense for which Weems was convicted. The prohibition on cruel and unusual punishment incorporates the **“precept of justice that punishment for crime should be graduated and proportioned to the offense.”**

- 1962 Robinson v. California: Whether a punishment is cruel and unusual depends on its relationship to the offense for which the punishment was imposed: **“To be sure, imprisonment for ninety days (for the crime of being addicted to narcotics) is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be answered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”**

# Proportionality principle in the US

**Concurrence of Justice Douglas :** “A punishment out of all proportion to the offense may bring it within the ban against ‘cruel and unusual punishments’ ... [T]he principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.”

**2008 Kennedy v. Louisiana:**““in cases of crimes against individuals”, the death penalty is only a proportionate punishment “for crimes that take the life of the victim.”. Hence a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments ».

# US v. Bajakajian (1998)

The statute directs a court to order forfeiture as an **additional sanction** when “imposing sentence on a person convicted of a willful violation of §5316’s reporting requirement.

The **United States** argues, that the forfeiture of currency under §982(a)(1) “**also serves important remedial purposes.**” Brief for United States 20. The Government asserts that it has “an overriding sovereign interest in controlling what property leaves and enters the country.” *Ibid.* It claims that full forfeiture of unreported currency supports that interest by serving to “dete[r] illicit movements of cash” and aiding in providing the Government with “valuable information to investigate and detect criminal activities associated with that cash.”

Deterrence, however, has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss. <sup>22</sup>

# US v. Bajakajian (1998)

Because the forfeiture of respondent's currency constitutes punishment and is thus a "fine" within the meaning of the Excessive Fines Clause, we now turn to the question of whether it is "excessive."

**The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. See *Austin v. United States*, 509 U. S., at 622–623 (noting Court of Appeals' statement that "the government is exacting too high a penalty in relation to the offense committed"); *Alexander v. United States*, 509 U. S. 544, 559 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was 'excessive' must be considered").**

# US v. Bajakajian (1998)

Until today, however, we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. **We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.**

A normal measure of proportion. See 1 N. Webster, *American Dictionary of the English Language* (1828) (defining **excessive as “beyond the common measure or proportion”**); S. Johnson, *A Dictionary of the English Language* 680 (4th ed. 1773) (“**[b]eyond the common proportion**”).

If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional.

# **US v. Bajakajian (1998)**

**The harm that respondent caused was also minimal.**

**(...) There was no fraud on the United States, and respondent caused no loss to the public fisc.**

**Had his crime gone undetected, the Government would have been deprived only of the information that \$357,144 had left the country.**

**The Government and the dissent contend that there is a correlation between the amount forfeited and the harm that the Government would have suffered had the crime gone undetected. We disagree. There is no inherent proportionality in such a forfeiture. It is impossible to conclude, for example, that the harm respondent caused is anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking \$12,000 out of the country in order to purchase drugs.**

# US v. Bajakajian (1998)

In *United States v. Bajakajian* (1998) the Supreme Court ruled that it was unconstitutional to take \$357,144 from a person who failed to report his taking of more than \$10,000 in US Currency out of the United States. It was the first case in which the Supreme Court ruled a fine to violate the Excessive Fines Clause.

« Comparing the gravity of respondent's crime with the \$357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense. It is larger than the \$5,000 fine imposed by the district court by many orders of magnitude and it bears no articulable correlation to any injury suffered by the Government.... For the foregoing reasons, the full forfeiture of respondent's currency would violate the Excessive Fines Clause ».

**Enforcement cost**

$$C = C(O(P,S)P)$$

# Interaction between p and f

**Empirical work has shown that the conditional probability of being found guilty once charged, depends partially on the severity of punishment.**

**STEPHEN CALKINS CORPORATE COMPLIANCE AND THE ANTITRUST AGENCIES' BI-MODAL PENALTIES** "In 1990 the Antitrust Division indicted a group of Tucson, Arizona dentists for price-fixing. That shot rebounded back against the Division when the trial judge acquitted two dentists and granted the third a new trial. Although the Ninth Circuit vacated the acquittals, **the Court expressed grave discomfort at the prospect of punishing dentists' practice-related conduct with criminal convictions**, and the Division settled the cases. The Division may not have felt compelled to take such a dramatic step if a lesser but still punitive option were available".

# Interaction between f and procedural guarantees (C)

In 1973, one commentator, (...) described the cumbersome internal procedure by which Commission decisions are taken. (...) The topic has acquired especial urgency today for several reasons.

First,(...) **more cases are being investigated, prosecuted and decided**, so more companies, and their lawyers, have had the experience of defending themselves in Brussels.

A separate, but related, phenomenon is the level of fines which are imposed for breaches of Articles 81 and 82 EC. Tens of millions of Euros may now seem mild, hundreds of millions are not uncommon, and the billion mark has been passed. In one sense, **it is predictable that the huge level of the fine creates outrage among those who have been found guilty, but in a more detached sense, it is perfectly appropriate for the legal profession and legal scholars to consider whether the procedures which generate such penalties are apt for such huge responsibilities.**

Ian Forrester, Due process in EC competition cases: A distinguished institution with flawed procedures, December 2009

# **A number of leads followed to reduce the cost of enforcement**

- 1) Leniency**
- 2) Plea bargaining**
- 3) Negotiation of commitments**
- 4) Move from a form based to an effect's based approach: reducing the cost of type I and Type II errors**
- 5) Procedural innovations**
- 6) Agency assessments**

# Leniency

# Leniency

## 1) Goal:

To **reduce the cost** of the investigation by increasing the information of competition authorities and reducing the procedural risks they face in the fact finding part of proceedings

## 1) Issues:

- 2)
  - a) How effective are leniency programs ? Do they have unwanted by effects on cartel formation?
  - b) Do leniency programs weaken the investigatory capacities of competition authorities ?
  - c) Is there a risk of conflict between leniency programs and the desire to promote civil enforcement)

# “Effects of leniency programs on cartel stability”

Decreasing the cost of enforcement is an important goal (hence the necessity to assess whether leniency programs actually achieve this goal and to eliminate perverse effects that they may have

Evguenia Motchenkova

We find that **in most cases leniency reduces duration of cartel agreements but this result is not unambiguous**. In case leniency programs are not too strict and fines are proportional to the accumulated illegal gains from price-fixing the result is as follows. Under strict antitrust enforcement, the possibility to self-report and be exempted from the fine increases the incentives for the firms to stop cartel formation, and, hence, reduces the duration of cartels. However, **when penalties and rate of law enforcement are low, introduction of leniency programs may, on the contrary, facilitate collusion**.

# Strategic protection of leniency programs ?

## Interaction between leniency programmes and actions for damages

**It is important, for both public and private enforcement, to ensure that leniency programmes are attractive.** Adequate protection against disclosure in private actions for damages must be ensured for corporate statements submitted by a leniency applicant in order to avoid placing the applicant in a less favourable situation than the co-infringers. Otherwise, the threat of disclosure of the confession submitted by a leniency applicant could have a negative influence on the quality of his submissions, or even dissuade an infringer from applying for leniency altogether.

COMMISSION OF THE EUROPEAN COMMUNITIES, **WHITE PAPER on Damages actions for breach of the EC antitrust rules**, Brussels, 2.4.2008

# Strategic protection of leniency programs ?

## Interaction between leniency programmes and actions for damages

**The Commission (...) puts forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners.** This would help to make the scope of damages to be paid by immunity recipients more predictable and more limited, without unduly sheltering them from civil liability for their participation in an infringement. The immunity recipient would have to bear the burden of proving the extent to which his liability would be limited.

COMMISSION OF THE EUROPEAN COMMUNITIES, **WHITE PAPER on Damages actions for breach of the EC antitrust rules**, Brussels, 2.4.2008

# Strategic protection of leniency programs?

## US Amicus Curiae in Empagran

Second, **plaintiffs' (...) theory** (that “the cartel raised prices around the world in order to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage,” and therefore that “the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad.” *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003 (...)) **would “undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty.”**

**The same consequence would follow for the Department of Justice’s antitrust criminal amnesty program** because, in the United States’ experience, any expansion in the scope or uncertainty of cartel members’ potential civil liability in U.S. courts creates a disincentive to seek criminal amnesty. (...) And when cartel members forgo, or hesitate to seek, amnesty, the government loses its most potent weapon for cracking international cartels

**From a form based approach to an  
economics based approach to antitrust  
enforcement**

# Reducing the cost of type I and Type II errors

The economics-based approach guarantees that the statutory provisions do not unduly thwart pro-competitive strategies. **An effects-based analysis takes fully into consideration the fact that many business practices may have different effects in different circumstances: distorting competition in some cases and promoting efficiencies and innovation in others.** A competition policy approach that directly confronts this duality will ensure that consumers are protected (through the prevention of behaviour that harms them) while promoting overall increased productivity and growth (since firms will not be discouraged in their search for efficiency).

# Compatibility of the Civil Law Tradition with the Economic Approach to Antitrust Enforcement

**-Laws have to be complete, coherent and clear**

**A bad law, if clear, is better than a complex law no matter how relevant:**

**« If the power of interpreting laws be evil, obscurity in them must be another, as the former is the consequence of the latter<sup>1</sup> »**

**« Law is viewed ( in civil law countries) not as a process for the perception and resolution of problems, but as a set of established rules and institutions <sup>2</sup>»**

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1) Beccaria « Of Crimes and Punishments »

2) John Henry Merriman; The Civil Law Tradition, Stanford University Press

# Common Law / Civil Law

« From the time the Sherman Act was passed in 1890, it has been understood as a “common law” type of statute, a statute setting forth very general propositions, that the Judges in common law fashion would implement and develop on a case by case basis.

Other countries do not entrust so much of the actual formulation of competition policy to the judges. Instead, administrative agencies and expert authorities develop the fundamental rule and the judges come in at a later stage, applying it in an appellate fashion and in other ways. Judicial review is a more standard model ».

Diane Wood, Judicial Enforcement of Competition Law, OECD, Competition committee, 1997

# **Bringing Economic Expertise to the Courtrooms to reduce error risks**

- 1) Training judges ? (what is the specificity of competition law ?)**
- 2) Specialized Courts ? (not always politically acceptable)**
- 3) Concentration of cases ? (effectiveness depends on career management of judges)**
- 4) Should economists become judges ? (a unique experience)**
- 5) More extensive use of experts, including court appointed experts ? Use of the Daubert rules**
- 6) Procedural arrangements:, hot tub technique , etc....**

# Issues

**-Is the legal uncertainty likely to increase and if so what is the consequence on consumer welfare? Cf paper Katsoulacos & Ulph**

**-Will courts and competition authorities make more errors under an effect's based approach? (Ability of courts to understand economic reasoning ( in non cartel cases). What can be done to avoid this problem ?**

**-Level and distribution of the costs of establishing violations with an effect's based approach**

**Cost of sanction**

**bpsO(P,S)**

# Insights from the economic model

To have a deterrent effect, a system of antitrust law enforcement, needs to be predictable (to allow a calculation of the benefits and costs of the violation). Hence the degree of discretion of competition authorities or courts in sanctioning anticompetitive practices should be limited. Their decisions should be transparent and consistent over time and over analytically similar cases.

Note: ENRICO LEONARDO CAMILLI : « OPTIMAL AND ACTUAL FINES IN CARTEL CASES: THE EUROPEAN CHALLENGE »

“the transparency of the criteria applied in the determination of the sanction, and their publicity, are fundamental, in order to strengthen the deterrent effect on the rational criminal’s cost-benefit analysis. **The surprise-effect is not a valuable good, rather uncertainty leads just to underweight the real amount of the fine at the crucial moment of the cost-benefit analysis about engaging on the cartel or applying for the leniency**”

Note Damien Geradin and David Henry “The EC fining policy for violations of competition law: An empirical review of the Commission decisional practice and the Community courts’ Judgments”, Paper prepared for the conference Remedies and Sanctions in Competition Policy *Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States* (February 17-18, 2005)

“it is often difficult to understand the logic of the fines imposed by the Commission. **Identical factual scenarios will be treated differently, while different factual scenarios will be offered the same treatment** ».

# Insights from the economic model

**Francisco Marcos “THE ENFORCEMENT OF SPANISH ANTITRUST LAW: A CRITICAL ASSESSMENT OF THE FINES SETTING POLICY AND OF THE LEGAL FRAMEWORK FOR PRIVATE ENFORCEMENT ACTIONS”**

**“(in Spain), the lack of guidelines to set the fines makes the task of the DCT (...) difficult (...). Most of the decisions of the DCT are laconic and lack any justification on this point. **There is a huge uncertainty regarding the amount of the fine a firm may be expected to pay for an antitrust violation. (...) The proportionality principle that should inspire punishment actions by the DCT is clearly at risk. (...).**”**

**In 1999 Telefónica was condemned by the DCT for practices of monopolization against British Telecom (mainly through price discrimination) in the market of digital phone lines rental for international communications, imposing Telefónica a fine of almost 3,5 million euro. The DCT’s decision was partially reversed by the *Audiencia Nacional* in 2002 - which confirmed it on the merits-for defects on the calculation of the amount of the fine.**

**Afterwards, Telefónica was condemned in 2000 by the DCT because certain marketing practices of the company in the market for fixed telephone services (which was recently open to competition) were considered an abuse of dominant position. The DCT imposed a fine of almost 8,5 million euro. The decision did not deal to reason how it did arrived to that amount and that lead to the partial reversal of DCT’s decision because of lack of reasoning as to amount of the fine.”**

# Pros and cons of different types of sanctions

**Administrative sanctions: who pays them ?**

**Criminal sanctions (jail terms) : Do they increase deterrence ?  
standard of proof applicable ?  
Implications for costs**

**Commitments, injunctions : cost of monitoring**

**Civil sanctions: duality of purpose, are they useful complements ?**

**New sanctions: ex Director's disqualifications ( are they pro or anti-competitive) ?**

# The (legally) constrained environment of civil enforcement

Not all economic harm can be compensated.

Under Civil Code Article 1382 (as in some other European countries), only injuries that are caused by the violation can be compensated, and the **harm must be (i) directly related to the violation, (ii) current, and (iii) certain.**

As to the direct relationship, under French law, **consumers would probably not be able to claim that they have been the victims of, say, a successful exclusionary practice by a firm holding a dominant position,** even if the exclusion of competitors meant that the intensity of competition in the market was lower than it would have otherwise been. Indeed, in such cases the courts would be likely to find that the harm to consumers is only indirectly related to the violation.

# The (legally)constrained environment of civil enforcement

**Not all economic harm can be compensated.**

**Similarly, the suppliers of an input to a product in a cartelised market would probably not be successful in claiming damages against the cartel members, despite the fact that they may have suffered harm from the cartel (since the restriction in output meant that the cartel members purchased less input than they would have had the market been competitive), because they may have difficulties establishing that they are the direct victims of the antitrust violation.**

**Hence some of the indirect damages described by Han, Schinkel and Tuintra cannot be compensated**

# The (legally)constrained environment of civil enforcement

Under **French civil law** a number of **legal principles** must be kept in mind.

First, there should be **no enrichment without cause**;

Second, we apply the principle ‘**non bis in idem**’ (comparable to ‘**no double jeopardy**’ in other jurisdictions);

Third, French civil law includes the principle of ‘**integral compensation of harm**’, which means that victims should be compensated for the exact value of the damage they have suffered (no more, no less).

The first principle (in conjunction with the second) explains why it is held that defendants in antitrust civil cases should be given the opportunity of a **passing-on defence**. Otherwise, victims (such as distributors or retailers) who have passed on to the final consumers the price overcharge inflicted on them by a cartel or an abusive practice could claim damages for the full overcharge they have been subjected to and enrich themselves without cause,

# **The (legally)constrained environment of civil enforcement**

**The possibility of a passing-on defence, combined with the third principle (integral compensation), vastly complicates the economic analysis in damages claims resulting from antitrust violations affecting commercial partners.**

**Indeed, the combination of these principles requires that the percentage of passing-on must be precisely assessed (which in turn requires an investigation into the competitive conditions in the downstream market).**

# The (legally)constrained environment of civil enforcement

French jurisprudence holds that **the assessment of harm (and of compensation) from a violation is a question of fact** (unlike the UK, where the assessment of compensation is a question of law). French civil courts therefore have considerable discretion to assess damages. Their assessment is subject only to a very narrow review by the **Supreme Court** (Cour de Cassation) under the **abuse of discretion standard**—trial courts cannot refuse to award damages when they have established that a violation caused injury, or assess the amount of damage without consideration of the specificities of the case. Beyond this, courts have full discretion.

In their decisions, **French civil courts do not have to specify the factual elements that they take into consideration or the reasoning they use to assess the amount of injury from an antitrust violation and the compensatory amount of damages.**

# The (legally)constrained environment of civil enforcement

At the procedural level, there are differences across countries concerning the role of the judge in civil cases.

In France, the parties are fully in charge of determining the scope of the case, the facts that they want to bring to the attention of the court and their demands. The role of the judge is limited to the legal assessment of what the parties bring to the proceedings. This implies that the burden of proof rests fully on the parties. If they do not provide the court with the relevant information, there is nothing the judge can do.

This contrasts with Germany where the judge has a duty to alert the parties on the weaknesses of their arguments or of the means of proof they bring to the proceedings or with the UK, where the parties, their counsels and their experts have a 'duty to assist the court' which supersedes their obligations to their clients.

# Conclusions

- 1) The deterrence model is a useful starting point and offers valuable insights**
- 2) But it should be developed to better take into account the positive and negative interactions between variables (which are much more complex than the naive model suggests).**
- 3) The economic model of optimal enforcement will remain irrelevant in terms of public policy if it is not developed in a way which acknowledges that the goal of a sanction may not be (only) deterrence and that competition law must be consistent a set of long established general legal principles ( which may vary from country to country).**

# Conclusions

- 4) **To become more relevant in the policy debate economists should study further and better integrate the legal procedural constraints and possibilities in the enforcement mechanism of competition law and establish how to optimize enforcement given those constraints and possibilities**
  
- 5) **Finally the fact that competition authorities behave strategically ( in refusing to assess damages but in calling for higher fines in the name of deterrence or in favoring leniency programs over other enforcement mechanisms) should be factored in the analysis**