Responsive Competition Law Enforcement: Lessons from the Greek Competition Authority

Stavros MAKRIS*

According to the conventional view competition law differs from regulation in that it is applied ex post*, through proscriptions, and in a 'crime-tort' fashion. From this angle, when competition enforcers intervene* ex ante*, in a prophylactic manner, and employ prescriptive tools, they inappropriately transform competition law into 'regulatory antitrust'. The present study challenges this view arguing that modern competition law intervention has moved beyond the crime-tort enforcement model and aspires to be 'responsive'. This means that modern enforcers intervene* ex ante *and* ex post*, use prescriptive and proscriptive tools, and impose restorative and prophylactic remedies to ensure that the law is applied effectively. The works of the Greek Competition Authority offer a case study to illustrate this point. This authority has been utilizing a plurality of tools and enforcement strategies to enhance compliance and deterrence, and apply the law responsively. However, enforcement that aspires to be responsive may create problems of over-enforcement or under-enforcement, be vulnerable to regulatory failures or undermine Rule-of-Law principles. For this reason, this study draws on responsive regulation theory to make fourteen recommendations on how to address these challenges and ensure truly responsive enforcement.*

Keywords: competition law, enforcement, remedies, regulation, regulatory theory, competition policy

1 INTRODUCTION

This study challenges the conventional view concerning the distinct nature of competition law vis-a-vis regulation. According to this view competition law differs from regulation in that it is applied *ex post* and through proscriptions rather than *ex ante* and through prescriptions.[1] While it regards regulation as proactive and market-shaping, this approach views competition law as a more reactive way of intervening in the market, a tool that only applies when a restrictive object or

* (Dr) Lecturer in Competition Law, University of Glasgow (stavros.makris@glasgow.ac.uk). Pursuant to the ASCOLA Transparency and Disclosure Declaration the author wishes to declare that the present article draws on work conducted for the Hellenic Competition Commission. The opinions expressed within are solely the author's and do not reflect the opinions of the Authority. The author would also like to express his thanks to Magali Eben, Giorgio Monti, and David Reader for their thoughtful suggestions. Any errors are the author's own.

1 Pablo Ibáñez Colomo, *On the Application of Competition Law as Regulation: Elements for a Theory*, 29 Y.B. Eur. L. 261 (2010), doi: 10.1093/yel/29.1.261.

Makris, Stavros. 'Responsive Competition Law Enforcement: Lessons from the Greek Competition Authority'. *World Competition* 46, no. 2 (2023): 205–244.

effect is established.[2] Under this line of reasoning, competition law should not be transformed into regulation, as this would be incompatible with its nature. Such a transformation would lead to the abomination of 'regulatory antitrust'.[3] The practical implication of this theory is, therefore, that competition law should not intervene proactively in the market (i.e., prescriptively and/or *ex ante*). On the contrary, competition law should exclusively aim to detect and punish anticompetitive practices that have already occurred. This style of "correct" competition law enforcement has been labelled in the literature as the 'crime-tort model'.[4]

Hence, the conventional view starts from a descriptive premise about the nature of competition law as a passive tool of market interference, and boils down to a normative claim on how enforcement should be conducted: to act in line with competition law's non-regulatory nature, enforcers should only focus on actual anticompetitive effects. The more enforcers place emphasis on the 'capability to restrict competition', and the more loosely they interpret the notion of 'potential anticompetitive effects', the more preventive and regulatory they become. In such a case their intervention acquires a regulatory flavour and should be condemned as inappropriate market-engineering. Under this approach, therefore, competition law enforcement should be primarily punitive and rely on infringement decisions that identify and punish past violations, while the latter should be considered to occur predominantly when a practice has a negative impact on the market.[5]

However, modern National Competition Authorities (NCAs) have at their disposal a wide array of enforcement tools of varied intensity and develop strategies that go beyond the narrow contours of the crime-tort enforcement model. Essentially they have the tools to apply the law 'responsively' and they often aspire to be 'responsive enforcers'.[6] This term draws on the respective regulatory theory[7] and refers to enforcers that do not perceive the legal rules as mere prohibitions, but as 'reasons for action'.[8] Such enforcers care not only about legality but also about

---

2 Alan Devlin, *Antitrust as Regulation*, 49 San Diego L. Rev. 823 (2012).

3 Niamh Dunne, *Commitment Decisions in EU Competition Law*, 10 J. Competition L. & Econ. 399, 417–419 (2014), doi: 10.1093/joclec/nht047. Malgorzata M. Sadowska, *Energy Liberalization in Antitrust Straitjacket: A Plant Too Far?* 3–10 (Social Science Research Network 2011), http://papers.ssrn.com/abstract=1806530.

4 For a detailed description of this model *see* Daniel Crane, *Antitrust Antifederalism*, 96(1) Calif. L. Rev. 1, 32 (2008); Niamh Dunne, *Antitrust and the Making of European Tort Law*, 36(2) Oxford J. Legal Stud. 366, 376–377 (2015), doi: 10.1093/ojls/gqv027; Ioannis Lianos, *Value extraction in digital capitalism: Towards a law and political economy synthesis for competition law*, 1(4) Transformative Law of Political Economy in Europe 852 (2022).

5 Harry First, *Is Antitrust Law?*, 10 Antitrust 9 (1995).

6 Stavros Makris, *EU Competition Law as Responsive Law*, 23 Cambridge Y.B. Eur. Legal Stud. 228 (2021), doi: 10.1017/cel.2021.9.

7 Ian Ayres & John Braithwaite, *Responsive Regulation* (Oxford Socio-Legal Studies OUP 1995).

8 H. L. A. Hart, *The Concept of Law* 79–110 (OUP 1961).

legitimacy; they seek not only to punish past violations but also to solve problems, and therefore intervene not only in a punitive but also in a prophylactic manner employing a wide variety of enforcement tools and strategies aimed at both punishment and persuasion.[9]

To illustrate the point, this study discusses the various tools available to the Hellenic Competition Commission (HCC) and the various strategies this authority has recently employed. The key takeaway of the analysis is that the HCC disposes of a wide range of enforcement tools – e.g., commitments, interim measures, settlements, sector investigations, market interventions, and infringement decisions – allowing it to intervene in the market not only *ex post* and punitively, but also *ex ante* and prophylactically.[10] Consequently, the Greek authority has the capacity to enforce the law responsively, and to a certain extent, has behaved as a responsive enforcer by using a mixture of participatory[11] or consensual, negotiated mechanisms,[12] and punitive tools (i.e., infringement decisions). Such intervention is not a one-off operation (as the crime-tort model would suggest), but a continuous and organized pro-competition enterprise aimed at ensuring compliance and deterrence.

The Greek authority is not an outlier, as other authorities (e.g., the French, Spanish, German, and UK NCAs) can - and frequently do - intervene in the market in a similar manner. In other words, most competition enforcers in modern times adopt a 'responsive attitude': they are mission-oriented, focused on problem-

---

[9] Several publications provide evidence on the effectiveness of responsive regulation Natalie Schell-Busey, Sally S. Simpson, Melissa Rorie & Mariel Alper, *What Works? A Systematic Review of Corporate Crime Deterrence*, 15(2) Criminology & Pub. Pol'y (2016), doi: 10.1111/1745-9133.12195; John Braithwaite, *In Search of Donald Campbell: Mix and Multimethods*, 15(2) Criminology & Pub. Pol'y (2016), doi: 10.1111/1745-9133.12198; Mary Ivec & Valerie Braithwaite with Charlotte Wood & Jenny Job, *Applications of Responsive Regulatory Theory in Australia and Overseas: Update*, 23 RegNet Occasional Paper, School of Regulation and Global Governance (2015).

[10] Ioannis Lianos, *Competition Law Remedies in Europe: Which Limits for Remedial Discretion?*, in *Handbook of EU Competition Law: Enforcement and Procedure* 362 (Ioannis Lianos & Damien Geradin eds, Edward Elgar 2013); Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 Buffalo Law Rev. 101(2004). The HCC used the theory of prophylactic remedies in its Art. 11 decision on press distribution, available at https://www.epant.gr/en/enimerosi/press-releases/item/1576-press-release-market-investigation-in-the-press-distribution-sector-hcc-second-interim-report.html.

[11] The term 'participative competition law' should be attributed to the Nobel Prize-winning economist Jean Tirole, at http://qz.com/1310266/nobel-winning-economist-jean-tirole-on-to-regulate-tech-monopolies (27 Jun. 2018). *See also* Vikas Kathuria, *The Rise of Participative Regulation in Digital Markets*, 13(8) J. Eur. Competition L. & Prac. 537–548 (2022), doi: 10.1093/jeclap/lpac046.

[12] J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 Yale L.J. 60 (1985), doi: 10.2307/796237; Douglas Ginsburg & Joshua Wright, *Antitrust Settlements: The Culture of Consent*, George Mason University Law & Economics Research Paper Series 13–18 (2013); Florian Wagner-von Papp, *Best and Even Better Practices in Commitment Procedures After Alrosa: The Dangers of Abandoning the 'Struggle for Competition Law'*, 49 Com. Mkt. L. Rev. 959 (2012), doi: 10.2139/ssrn.1956627.

solving, and employ a multiplicity of tools and strategies to ensure that competition in the market is not restricted and works for consumers and society at large.

Against this backdrop, the present study argues that we need to abandon the crime-tort model as a framework for understanding modern competition law enforcement. Similarly, we should recognize the artificiality of juxtaposing competition law with regulation on the basis that the former is only applied *ex post* and in a prescriptive manner. In this regard, the responsive enforcement model could offer a better descriptive device for grasping the 'law in action'.[13] In addition, this model can provide some principles for assessing modern competition law enforcement. In other words, instead of asking whether enforcers apply the law in a regulatory manner or not, this model asks to what extent competition law enforcement is 'really responsive'.[14] Instead of condemning *ex ante* and prescriptive intervention and condoning *ex post* and proscriptive enforcement, this model interrogates whether the authority utilized effectively the various tools at its disposal to realize the core mission of the law, namely the protection of competition in the market.[15]

This approach suggests that modern competition law enforcers, when they utilize a variety of *ex ante* and *ex post*, proscriptive and prescriptive tools and aspire to behave responsively, face three main challenges: (1) the risk of type I (false positive) and type II (false negative) errors,[16] (2) the risk of regulatory failures,[17] and (3) the risk of using their discretion in ways that undermine fundamental rule of law principles. The ultimate purpose of this study is to demonstrate that problems of this kind should concern the legislators and/or enforcers rather than a schematic and largely outdated, categorical distinction between competition law and regulation. To address these challenges, it is proposed here, that enforcers could use Ayres' and Braithwaite's pyramid of responsive enforcement with some tweaks. On this basis, this study proposes fourteen recommendations for truly responsive enforcement.

The study unfolds as follows. Section 2 analyses the enforcement tools and practices of the HCC, suggesting that the Greek authority could be viewed as a responsive enforcer. Section 3 explains the inadequacies of the conventional view and the crime-tort model and puts forward the claim that modern competition law intervention is both *ex ante* and *ex post*, prescriptive and proscriptive, and therefore aspires to be responsive to the law's core mission. Section 4 presents the key

---

13 Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

14 Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71(1) Mod. L. Rev. 59 (2008), doi: 10.1111/j.1468-2230.2008.00681.x.

15 Giorgio Monti, *EC Competition Law* 16–18 (Cambridge University Press 2007).

16 Arndt Christiansen & Wolfgang Kerber, *Competition Policy With Optimally Differentiated Rules Instead of 'Per Se' vs. Rule of Reason*, 2(2) J. Competition L. & Econ. 215 (2006), doi: 10.1093/joclec/nhl009.

17 Graham K. Wilson, *Social Regulation and Explanations of Regulatory Failure*, 32 Pol. Stud. 203 (1984).

challenges of modern competition law enforcement. These challenges become visible once we move beyond the crime-tort model, and we accept the responsive elements of modern enforcement. Section 5 draws on responsive regulation theory to articulate fourteen recommendations on how these challenges could be addressed.

2 THE HELLENIC COMPETITION AUTHORITY AS A RESPONSIVE ENFORCER

Over the period of 2002–2020, the HCC issued 122 infringement decisions. Furthermore, from 2019 to 2023 the HCC conducted thirty-five dawn raids, more than any other authority over the same period, with the exception of the Czech enforcer which conducted seventy-nine dawn raids.[18] The Spanish and the German authorities performed twenty-eight raids; the French authority nineteen; the Italian authority fifteen, and the British authority seven. These data suggest that the HCC remains vigilant and invested in safeguarding the deterrent effect of competition rules which, as shown in section 5 below, can only be ensured if enforcers are not hesitant to use the most stringent enforcement tools where necessary.

In addition, between 2020 and 2023, the authority significantly reduced the average duration of pending cases. Indicatively, the duration of a pending case was reduced from approximately eight years in September 2019 to 1.2 years in December 2021 and to one year and eight months in December 2022.[19]

Simultaneously, the HCC has been paying particular attention to ensuring compliance via soft enforcement instruments. In particular, the HCC issued updated guidelines for the strengthening of the deterrent effect of competition law, focusing, among other points, on the bolstering of its fining powers.[20] The HCC also published an updated 'Competition Guide for Associations of Undertakings', intended to serve as a 'code of conduct' for the associations in question, and an updated 'Guide for Contracting Authorities: Detecting and Preventing Collusive Practices in Public Procurement Procedures', providing instructions on what companies should refrain from doing when it comes to public procurement procedures. Both guides provided examples and practical instructions on what undertakings should and should not do. Furthermore, the HCC published

[18] It should be noted that the Czech NCA counted each investigation into an individual undertaking as a single dawn raid, whereas most authorities count dawn raids per case. Under this counting, the HCC has conducted more dawn raids than any other authority over the same period.

[19] HCC, Annual Report 2021, p. 45, available at https://www.epant.gr/en/enimerosi/publications/annual-reports.html

[20] HCC, Guidelines on the calculation of fines pursuant to articles 25 and 25B of L. 3959/2011, available at https://www.epant.gr/en/legislation/calculation-of-fines.html.

a comprehensive and practical guide for designing competition-stimulating public policies.[21] This guide is particularly innovative as it is addressed to law-making bodies and other public authorities.

Moreover, in the period from 2018–2022, the HCC conducted sector inquiries into basic consumer goods and super-markets,[22] the fintech sector,[23] e-commerce,[24] private health services and related insurance services,[25] and waste management and recycling.[26] The HCC has also frequently used commitment decisions and cartel settlements, while it has extensively harnessed the fruits of a streamlined leniency programme. Furthermore, under the amended (via L. 4886/2022) Greek Competition Act, the HCC may also utilize settlements in abuse of dominance and vertical restraints cases.[27] The authority has also conducted market investigations into the press distribution sector,[28] the construction sector,[29] and the petroleum industry.[30]

Beyond these, the authority has been investing in improving its technical infrastructure. For example, in March 2021, the HCC introduced a secure digital

---

21 HCC, Guide for stimulating competition through the design of public policies, available (in greek) at https://www.epant.gr/enimerosi/dimosieyseis/odigoi/item/2528-odigos-gia-dimosies-politikes.htm.

22 HCC, *Sector Inquiry into Basic Consumer Goods* (05 Mar. 2021), available at https://www.epant.gr/en/enimerosi/sector-inquiry-into-basic-consumer-goods.html; HCC, *Final Report: Sector Inquiry in the Field of Production, Distribution and Marketing of Basic Consumer Goods and in Particular Food Products as Well as Cleaning and Personal Hygiene Products* (17 Mar. 2021), available at https://www.epant.gr/files/2021/supermarkets/exec_sum_supermarkets_final_en.pdf.

23 HCC, *Sector Inquiry into Fintech* (27 Dec. 2022), https://www.epant.gr/en/enimerosi/sector-inquiry-into-fintech.html; HCC, *Interim Report on the Sector Inquiry into Financial Technologies Under Article 40 of L. 3959/2011 Executive Summary*, available at https://www.epant.gr/files/2021/fintech/executive_summary_Interim_report_Fintech.pdf.

24 HCC, *Sector Inquiry into E-commerce* (02 Nov. 2022), available at https://www.epant.gr/en/enimerosi/sector-inquiry-into-e-commerce.html

25 HCC, *Sector Inquiry into Health Services* (01 Dec. 2022), available at https://www.epant.gr/en/enimerosi/health.html.

26 HCC, *Sector Inquiry into Waste Management* (03 Aug. 2021), available at https://www.epant.gr/en/enimerosi/wastemanagement.html.

27 Article 29A of the new law updates the existing settlement procedure so as to include abuse of dominance cases. The previous settlement procedure was applicable only to cases of anticompetitive horizontal agreements; it was introduced by the HCC in 2016 and it was modelled on the corresponding EC's settlement procedure. Under the new provision the HCC will set up a procedure under which undertakings accepting liability for infringing Arts 101 or 102 TFEU (and their national equivalents) could qualify for settlement. At a later stage, the HCC will clarify the conditions that the undertakings will have to meet to secure a settlement and receive a maximum 15% reduction of the possible fine. In case the bilateral negotiations between the HCC and the undertaking(s) prove to be fruitless any admission of guilt on behalf of the undertaking will be automatically revoked and deemed inadmissible before the HCC or the national courts. Where a settlement is achieved the HCC decision will certify the infringement.

28 HCC, *Decision on the Regulatory Intervention in the Press Distribution Market Under Article 11 of L. 3959/2011*, available at https://epant.gr/en/decisions/item/2514-decision-768-2022.html.

29 HCC, *Press Release – Market Investigation in the Construction Sector*, available at https://epant.gr/en/enimerosi/press-releases/item/2301-press-release-market-investigation-in-the-construction-sector.html.

30 HCC, *Press Release – Regulatory Intervention in the Petroleum Industry*, available at https://www.epant.gr/en/enimerosi/press-releases/item/2446-press-release-regulatory-intervention-in-the-petroleum-industry.html.

environment for the anonymous reporting of information (whistleblowing). This system offers complete anonymity to those who wish to report information related to unlawful practices (i.e. cartels, and abuses of dominance) through an accredited company located abroad, with which the European Commission (hereafter, the Commission) and other NCAs (e.g., the German, Swedish, Danish NCAs) are already cooperating and which has no relationship with the HCC. Under this system, the information will be stored in a secure environment without the registration of the user identification, and the HCC will receive only the text of the information. In 2022, the HCC put in place a second such platform, specifically designed for use by tender-launching and contract-awarding bodies. These contracting authorities are in a position to receive information and/or complaints regarding anticompetitive behaviour in the context of public tenders and assist the HCC in uncovering illegal practices in public procurement procedures. Hence, under this infrastructure not only citizens and undertakings but also contracting authorities can provide the HCC with information related to anticompetitive conduct.

In parallel, the HCC has been investing in enhancing its epistemic capabilities. For instance, the HCC has sought to become a trailblazer in developing a technological-digital structure and in using computational means in its investigations. It has already designed and implemented its own data collection platform, the HCC Data Analytics & Economic Intelligence Platform.[31] This platform creates a permanent infrastructure for future HCC investigations, as it permanently connects existing databases, updated in real-time, with a central platform, which is also configured to detect anti-competitive practices through advanced screening. Such a tool facilitates and improves data collection, processing, displaying, and analysis, and allows the HCC to monitor multiple market sectors. The platform was presented to the public in April 2021 and has already been used by the HCC for various investigations.

Moreover, the HCC is pursuing a policy of strategic transformation to be able to adequately meet the challenges of the twenty-first century and increase its effectiveness through the use of new techniques stemming from computational means.[32] In this context, the HCC presented a report entitled 'Computational Competition Law and Economics – An Inception Report', examining the impact of the use of Big Data, Artificial Intelligence, machine learning, and deep learning in competition law enforcement.[33] The aspiration of the HCC is to use computational techniques and software screening tools to investigate collusive conduct and anticompetitive practices, such as excessive and exclusionary pricing. In parallel,

---

[31] HCC, *Data Analytics and Economic Intelligence*, available at https://www.epant.gr/enimerosi/dimosieyseis/media/item/1365-hcc-data-analytics-and-economic-intelligence.html.

[32] HCC, *Computational Competition Law and Economics*, available at https://www.epant.gr/en/enimerosi/computational-competition-law-and-economics.html.

[33] *Ibid*.

the authority has been investing considerable efforts in expanding or deepening its institutional cooperation with other domestic agencies and other competition authorities.

Moreover, the HCC played an instrumental role in the modernization of Greek Competition Law. In January 2022, a new legislative proposal aimed at modernizing Greek competition law and adopting Directive 2019/1 (European Competition Network+ Directive) was approved by the Parliament, concluding a two-year legislative process. The amendment introduced numerous improvements to the existing Law 3959/2011 (Greek Competition Act) and constitutes a bold move focused on enhancing the HCC's capacity to cope with the challenges of the twin transition towards a more digital and greener economy.

One of the most important provisions of the amended Act is the newly added Article 1A. Inspired by, among others, section 5 of the US Federal Trade Commission Act, Article 1A expressly prohibits two types of unilateral conduct, with significant negative effects on competition: (1) invitations to collude and (2) price signalling (i.e., disclosing information on prices, rebates, benefits or credits related to the products or services supplied or purchased by the undertaking in question, where such disclosure: (a) restricts effective competition on the Greek market, and (b) does not constitute standard commercial practice). The HCC played an instrumental role in the introduction of this new provision, and it remained active after the provision entered into force. In particular, the HCC launched a public consultation on draft guidelines for the implementation of Article 1A of the amended Greek Competition Act setting out, in detail, the main legal and economic principles based on which the HCC will assess invitations to collude and price signalling practices. These guidelines constitute a soft enforcement mechanism aimed at enhancing compliance: they present the types of information that are likely to restrict competition in a price signalling context, the concept of a 'normal business practice', as well as the potential justifications for both types of conduct. The authority published its final guidelines after taking into consideration the feedback submitted by the various stakeholders and after having informal consultations with the European Commission.[34]

The new law also introduced a novel enforcement instrument that seeks to make competition law greener. By virtue of Article 37A, the President of HCC may, following a proposal by the General Director, issue a letter of no action ascertaining that a practice or an agreement falls outside the scope of Articles 101 or 102 TFEU (and their national equivalents) or that it fulfills the Article 101(3) TFEU criteria (and its national equivalent) when the said practice or agreement pursues a public

[34] HCC, Guidelines on the implementation of Article 1A, available at https://www.epant.gr/en/legislation/1aen.html.

interest, and especially sustainability. Such a letter could be revoked if: (1) there is a material change in any of the facts on which the letter was based, (2) new essential evidence comes to light, or (3) if the letter was based on incorrect or misleading information. This letter is not binding on the HCC or the Greek Courts, and the criteria and procedure associated with its issuance were finalized by the HCC by the issuance of Guidelines.[35]

This provision is reminiscent of the comfort letters that the Commission issued under Regulation 17/62 and seems to provide the necessary leeway for the HCC to streamline competition law in the interests of sustainability objectives.[36] In other words, this provision enhances HCC's ability to facilitate private sustainability initiatives. The EU has recognized that private initiatives may be beneficial for achieving greater sustainability and to complement legislative measures,[37] and several authorities and commentators worry that undertakings may be reluctant to enter into such agreements out of fear that they would infringe competition law.[38] For this reason also, the Dutch enforcer (Authority for Consumers and Markets, hereafter the ACM) has issued detailed guidelines that could help undertakings to carry out their own self-assessment and more readily identify the circumstances in which sustainability agreements can bring benefits that offset the restrictions of competition.[39]

The HCC undertook the groundwork for the introduction of this provision and laid the foundations for its intended use even before its adoption. Specifically, the HCC issued a Staff Discussion Paper where it discussed, in detail, which sustainability agreements may be excluded from the scope of Article 101(1) TFEU, which agreements are unlikely to restrict competition, and how Article 101 (3) TFEU could be applied in this regard.[40] The Greek enforcer also issued, in collaboration with the ACM, a Technical Report on Sustainability and Competition[41] and - at the time of writing - is in the course

---

35 HCC, Decision No 789/2022 - No-action letter, available at https://www.epant.gr/en/legislation/no-action-letter.html,

36 Selçukhan Ünekbaş, *The Resurrection of the Comfort Letter: Back to the Future?*, 22 Jean Monnet Network on EU Law Enforcement Working Paper Series (2022).

37 Council and European Parliament Resolution on Environmental Agreements of 17 Jul. 1997, [1997] OJ C286/254; Council Resolution of 7 Oct. 1997 on Environmental Agreements [1997] OJ C321/6; European Commission, A European Strategy for Plastics in a Circular Economy COM(2018)28 final.

38 Giorgio Monti & Jotte Mulder, *Escaping the Clutches of EU Competition Law: Pathways to Assess Private Sustainability Initiatives*, 5 Eur. L. Rev. 635, 636–644 (2017); Fair Trade Advocacy Office, *EU Competition Law and Sustainability in Food Systems: Addressing the Broken Links* 30–33, 40–44 (2019).

39 ACM, *Guidelines: Sustainability Agreements: Opportunities within Competition Law* (2021), available at https://www.acm.nl/en/publications/second-draft-version-guidelines-sustainability-agreements-opportunities-within-competition-law.

40 HCC, *Draft Staff Discussion Paper on Sustainability Issues and Competition Law* (2020), available at https://www.epant.gr/en/enimerosi/competition-law-sustainability.html.

41 HCC, *Press Release – Technical Report on Sustainability and Competition* (2021), available at https://www.epant.gr/en/enimerosi/press-releases/item/1287-press-release-technical-report-on-sustainability-and-competition.html.

of setting up an Advice Unit[42] and developing a sustainability 'sandbox' (i.e. a safe space allowing industry experiments on sustainable business formats without immediately triggering the prescribed regulatory consequences), which would allow the industry to explore various pathways (e.g. forms of cooperation, permanent market changes, etc) to promote sustainability goals more quickly and efficiently.[43] Hence, the HCC has already put significant effort into shaping a new approach to competition law and sustainability. It has enhanced its epistemic capacity, and prepared the terrain for the smooth implementation of Article 37A.

Last but not least, the attempt of the HCC to introduce an innovative provision aimed at taming ecosystem power should be mentioned. Specifically, the HCC proposed a new provision, Article 2A, which would have prohibited the abuse of a position of power in an ecosystem with strategic importance for competition.[44] This provision was not adopted in the final draft of the bill yet it could have aushered in significant improvements to the existing framework by allowing the HCC to address the anticompetitive effects of 'ecosystems' (i.e., entities which are characterized by highly complementary relationships, and which offer a coherent and often financially integrated option and pose high sunk costs to complementors).

Under this draft provision, which was essentially a proposal of the HCC, the authority would have been able to issue a cease-and-desist order or adopt remedies against the abusive practices of ecosystems, alongside the further possibility of negotiating remedies via a commitment procedure. In addition, this provision would have complemented traditional competition law and the Digital Markets Act and was not intended to substitute or replace them.

The term 'ecosystem' was understood to refer to: (a) a complex of interconnected and - to a significant degree - interdependent economic activities of different companies, aimed at providing products or services that affect the same group of users, or (b) a platform that connects economic activities between

---

42 The Advice Unit will be comprised of experts from different regulatory authorities who could provide informal advice on sustainability-related initiatives.

43 HCC, *Sustainability Sandbox* (2021), available at https://www.epant.gr/en/enimerosi/sandbox.html, https://sandbox.epant.gr/en/. The Sustainability Sandbox created a supervised space for experimentation to promote innovative business initiatives. Its aim was to enhance legal certainty and reduce the regulatory risk for 'green' investments, in furtherance of the wider public interest objective of sustainable development and in compliance with competition law. Companies would be invited to submit business proposals through the sandbox, which will be fully evaluated ex ante by the HCC. Following this examination, the HCC may, in certain cases, issue a 'no-enforcement action letter' to interested parties. Based on this letter, parties will be able to implement their proposal under the supervision of the HCC within a specific time frame.

44 For this proposal the HCC relied on the academic work of the President of the authority on ecosystem power. Michael G Jacobided & Ioannis Lianos, Ecosystems and competition law in theory and practice, 30(5) Industrial and Corporate Change, 1199 (2021), available at https://doi.org/10.1093/icc/dtab061Jacobides.

different companies, aimed at providing products or services to the same or different groups of business or end users.[45] The position of power was defined as an economic state of affairs that allows an undertaking to behave to a significant degree independently from its rivals, consumers, and users as per established case law.[46] In determining whether an undertaking has a position of power within an ecosystem, the HCC would consider, inter alia, whether: (1) it controls the resources and infrastructure necessary for the economic activity of other enterprises, (2) it is able to establish rules governing the functioning of the ecosystem and the third-party access in it, and (3) its users depend on its intermediary services to access product and services markets and there is no equivalent alternative. The status of 'strategic importance' would have been granted to the ecosystems in which nonparticipation would significantly affect the effective conduct of business for a third party.[47]

The proposed amendment would have filled a regulatory gap and captured the behaviour of search engines, social networks, e-commerce-based and IoT platforms that are characterized by network and portfolio effects, data asymmetries, and multi-product and multi-actor interrelations. This would have afforded the HCC the ability to ensure a level playing field in digital markets and to maintain competitive and open markets for innovative start-ups and small and medium enterprises. In addition, the notion of 'ecosystem' instead of 'gatekeeper' would have the added value of capturing not only intermediation power (i.e., harvest information about consumers and thereby shape their behaviour or otherwise take advantage of it) but also panopticon power (i.e., positional power that enables the dominant actor to harvest information about their competitors) and bottleneck power (i.e., controlling a bottleneck, which can be enhanced by customer lock-in). Hence, the fact that the proposal was

---

45 The term 'platform' was designed to capture: (1) any entity that operates either as an intermediary for transactions between interdependent end-user and business user groups or between interdependent groups of business users, or (2) any infrastructure for developing and providing different but interrelated products and services.

46 Case C-27/76, *United Brands Company and United Brands Continental v. Commission* [1978] ECR 207, paras 65, 113; and Case C-85/76, *Hoffman – La Roche & Co v. Commission* [1979] ECR 461, paras 38–39.

47 In determining the strategic importance of an ecosystem, three (indicative) criteria would have played a role: (1) whether it has significant economic power, market share or income in one or several sectors of the Greek economy, (2) whether it provides access to either sensitive competition-related data and information or to significant resources necessary to a significant number of business users to connect with end-users (ecosystem-dependent business users), and (3) whether it undertakes important activities for third party access to supply and sales markets in Greek territory. An ecosystem would be presumed not to have strategic importance if there are four additional ecosystems that operate independently and provide users with a viable alternative. *See* new draft Greek Competition Law Act, (in Greek), available at http://www.opengov.gr/ypoian/?p=12356.

dropped[48] in the end seems to be a missed opportunity.[49] Be that as it may, this legislative proposal illustrates the multi-faceted modes of intervention of the HCC and its proactive reflexes.[50]

3 THE INADEQUACIES OF THE CONVENTIONAL VIEW AND THE CRIME-TORT MODEL

The previous section showed that the HCC has at its disposal a wide range of enforcement tools, intervenes in the market in a continuous, organized manner (and not in a one-off fashion), uses competition rules as 'reasons for action' and as a problem-solving device, and employs regulatory remedies. The Greek enforcer is not an outlier, as most if not all modern NCAs operate in a similar manner. On this basis, it is argued here that the crime-tort enforcement model does not properly describe the ways modern authorities apply the law, the richness of their interventions, and the different possibilities open to them.

Building on these observations, this section makes a broader point. Traditionally, competition law is distinguished from regulation on the basis that (1) it is applied *ex post* while regulation *ex ante*; (2) it consists of a limited set of prohibitions whereas regulation could entail far-reaching and detailed provisions on what private actors should do and should refrain from doing (e.g. Digital Markets Act); (3) it aims to restore competition in the market, whereas regulation aims to shape the structure of the market or engineer market outcomes.[51] According to this view, competition law is a less intrusive tool of market interference[52] that prohibits a limited set of practices when they have (or are likely to have) negative impact on competition.[53]

---

[48] Perhaps a concern with Art. 2A was that it remained silent as to what are the exact practices that will be considered abusive. As a result, certain stakeholders expressed their concerns about the ensuing legal uncertainty. However, this would not pose a problem as the HCC would have issued guidelines explaining its approach to the provision before implementing it.

[49] It should be noted that several competition authorities have or are moving towards this direction. *See* for instance Department of Digital, Culture, Media & Sports and Department of Business, Energy & Industrial Strategy, A new pro-competition regime for digital markets (2020), available at https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets. *See* new s. 19a of German Competition Law, available at https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf. For an interview of the President of the HCC discussing this issue *see* https://braveneweurope.com/the-counterbalance-ioannis-lianos-taking-on-vest.ed-interests-in-greece

[50] HCC, *Ecosystems & Competition Law* (2021), https://www.epant.gr/en/enimerosi/publications/media/item/1596-ecosystems-competition-law.html.

[51] Ibánez Colomo, *supra* n. 1, at 263–276; Dunne, *supra* n. 3, at 421–423, 426–432; Sadowska, *supra* n. 3, at 7–17; Crane, *supra* n. 4, at 20; Lianos, *supra* n. 10, at 374. Crane, *supra* n. 4, at 33, 42.

[52] Niamh Dunne, *Fairness and the Challenge of Making Markets Work Better*, 84(2) Mod. L. Rev. 230 (2021), doi: 10.1111/1468-2230.12579.

[53] For the distinction, *see* Friedrich von Hayek, *Law, Legislation and Liberty, Vol.2: The Mirage of Social Justice* 128 (University of Chicago Press 1978); Friedrich von Hayek, *The Constitution of Liberty* 224 (The University of Chicago Press 1978).

Yet, the way competition rules are interpreted by the EU Courts and the variety of remedial responses allowed by them suggest that this conventional view is less convincing than what it appears at first glance. Hence, the fact that competition law intervention can be both *ex ante* and *ex post*, proscriptive and prescriptive should not come as a surprise. On this basis, it is proposed here to abandon the crime-tort model that condemns or condones certain forms of intervention on the basis of whether they were 'regulatory' or not, in favour of a responsive enforcement model that actually interrogates whether competition law intervention was successful in realizing the law's core mission, i.e., the protection and promotion of competition. To support this argument subsection (3.1) explains the hybrid nature of competition rules, subsection (3.2) shows why 'regulatory' remedies lie at the heart of modern competition law enforcement, and subsection (3.3) discusses Google Shopping [in italics] as an illustrative example of both propositions.

3.1 The hybrid nature of competition rules

While it is true that the main provisions of every competition law system consist in prohibitions and the core mission of the law is to deal with practices that are capable of or amount to competition harm, it would be incorrect to suggest that competition law can be distinguished from regulation on the basis of the above-mentioned criteria. The Court of Justice of the European Union (CJEU) makes extensive use of presumptions to establish a violation of Articles 101 and 102 TFEU and has explicitly mentioned that both provisions have a preventive character.[54] On this basis it could be argued that the interpretative structure of Articles 101 and 102 TFEU blurs the distinction between *ex ante* and *ex post* intervention.

There is no doubt that Article 101(1) TFEU prohibits not only agreements or practices that have already produced anticompetitive effects but also agreements or practices that *could* potentially have restrictive effects,[55] or are capable of restricting competition.[56] In particular, certain agreements or concerted practices will be prohibited irrespective of their effects if they have shown to have a restrictive object. In the words of the Court 'the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition "by object" is the finding that

---

[54] Andriani Kalintiri, *Analytical Shortcuts in EU Competition Enforcement: Proxies, Premises, and Presumptions*, 16(3) J. Competition L. & Econ. 392–433 (2020), doi: 10.1093/joclec/nhaa013.

[55] Case C-234/89 *Delimitis v. Henninger Bräu AG*, ECLI:EU:C:1991:91, paras 14–16, 30.

[56] Case C-209/07 *Beef Industry Development and Barry Brothers*, ECLI:EU:C:2008:643, para. 17; Case 8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit (T-Mobile Netherlands BV)*, EU:C:2013:160, para. 35.

such coordination reveals in itself a sufficient degree of harm to competition'.[57] Thus, certain types of agreements or concerted practices could be by their very nature so injurious to competition that it can be inferred beyond reasonable doubt that they will have a negative impact on the functioning of competition.[58] Put it differently, certain practices can be deprived of any plausible procompetitive explanation and thereby warrant a presumption of unlawfulness.[59] In such cases there is no need to assess their concrete anticompetitive effects,[60] while the absence of effects will not absolve the parties.[61] Hence, if an agreement or a practice is found to restrict competition by object, an investigation of its actual or potential effects would be redundant.[62] It is, therefore, not required in such cases that competition was *actually* hindered, restricted or distorted, nor does a direct link between the practice and higher prices has to be established.[63]

Consequently, if the Commission manages to convince the Court that a particular practice or agreement is presumptively anticompetitive (e.g., pay-for-delay settlements under certain conditions) a clear signal will be given to the market participants on what they should refrain from doing. Similarly, if a certain type of agreement is found not to be a restriction by object (e.g., interchange fees), such a finding will equally shape the market. In this sense, the restriction by object concept blurs the line between *ex ante* and *ex post* intervention.

But what about the notion of 'restriction by effect'? Does it always lead to *ex post* intervention? As shown below even this notion does not always lead to *ex post* enforcement. Hence, if we were to adopt the conventional view and the crime tort model we would be led to the implausible conclusion that this notion too has a regulatory flavour as it has in fact an *ex ante* element.

---

57 Case C-67/13-P, *Groupement des cartes bancaires (CB) v. European Commission*, ECLI:EU:C:2014:2204, para. 57.

58 Case C-209/07 *Beef Industry Development*, *supra* n. 56, para. 15; Case C-32/11 *Allianz Hungária Biztosító and Others*, 14 Mar. 2013, EU:C:2013:160, para. 34.

59 Case C-307/18 *Generics (UK) and Others*, ECLI:EU:C:2020:52, paras 103–107; Stavros Makris, *Procompetitive Effects in EU Competition Law*, in *Antitrust and the Bounds of Power – 25 Years On* 117, 123–125, 129, 131–132, 139 (Oles Andriychuk ed., Hart Publishing 2023).

60 Opinion of Advocate General Bobek in Case C-228/18, *Gazdasagi Versenyhivatal v. Budapest Bank Nyrt. and Others (Budapest Bank)*, ECLI:EU:C:2020:265, paras 81–83.

61 It should be noted, however, that in order to determine whether an agreement or practice has as its object the restriction of competition, the Court will take into account the economic and legal context in order to assess whether the agreement or practice at issue is actually capable of preventing, restricting or distorting competition within the common market. *See* Case C-307/18 *Generics (UK) and Others*, *supra* n. 59, para. 103.

62 *Ibid.*, para. 58.

63 If the analysis of the content of a form of coordination between undertakings does not show that it is sufficiently harmful to competition, its effects must be examined and, in order to prohibit it, there must be evidence that competition has in fact been either prevented, restricted or appreciably distorted. *See* Case 8/08 *T-Mobile Netherlands BV*, *supra* n. 50, paras 31, 39 and 43; Case C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v. Commission and Others*, EU:C:2009:610, para. 58.

In particular, the Court has said that for a practice to be found to restrict competition by effect establishing potential effects will suffice.[64] This analysis consists of three main steps. First, the plaintiff would have to show that the agreement is capable of restricting competition (e.g., rivalry) that would have otherwise existed by comparing the conditions in the market with and without the agreement (the so-called counterfactual test).[65] Second, if an overall procompetitive agreement contains certain suspicious clauses, then the relevant question would be whether this agreement would have been concluded in the absence of such clauses. If, for instance, the suspicious clauses are found to be objectively necessary for the procompetitive agreement to exist, then they would not be found to restrict competition (the so-called ancillarity doctrine).[66] Third, in case the clause(s) at stake is (or are) found not to be objectively necessary to attain a legitimate or procompetitive aim, a full-blown effects analysis would have to be conducted.

This third step involves defining the relevant market by identifying the relevant competitive constraints and ascertaining a mechanism through which anticompetitive effects could be incurred. Such a mechanism can take two forms: anticompetitive effects could be incurred either via collusion (i.e., absorption of a source of competitive pressure or reduction in the incentives to compete) or via exclusion (i.e., removal of a source of competitive pressure or inhibiting a competitor's ability to compete).[67] Importantly, even under a full-blown analysis it would be sufficient to establish that concrete anticompetitive effects are likely to condemn an agreement. In other words, the purpose of this analysis is to show that the agreement is unlikely to have any procompetitive virtues

---

[64] Case C-234/89 *Delimitis, supra* n. 55, paras 13–25. In other words, the purpose of the effects analysis is to demonstrate whether a practice or agreement that has not been found to restrict competition by object has a negative actual or potential effect on competition.

[65] Case 161/84 *Pronuptia de Paris GmbH v. Pronuptia de Paris Irmgard Schillgallis (Pronuptia),* EU:C:1986:41, paras 16–17. In other words, if the defendant shows either that the conditions of competition would have been the same with and without the agreement because, for instance, of the risks and/or the level of the investments involved in a project, the agreement will not be considered as restricting competition. The impact of a practice on competition is to be assessed in the 'actual context' in which it is implemented. Case 56–65 *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.) (Société Technique Minière)* ECLI:EU:C:1966:38, at 249, 250; Case C-7/95 P *John Deere Ltd v. Commission of the European Communities* ECLI:EU:C:1998:256, para. 76; Case C-238/05 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL and Administración del Estado v. Asociación de Usuarios de Servicios Bancarios (Asnef-Equifax)* ECLI:EU:C:2006:734, para. 49; Case C-307/18 *Generics (UK) and Others*, *supra* n. 59, para. 116.

[66] Case 42/84 *Remia BV and others v. Commission,* EU:C:1985:327, para. 19 (suggesting that a non-compete obligation may be necessary for the buyer to agree to the acquisition of a business to the extent that it is, it would not restrict competition, whether by object or effect); Case 161/84 *Pronuptia de Paris GmbH*, *supra* n. 65, paras 16–17 (having discussed the economics of franchise agreements, the Court determined that, in order for the overall agreement to take place certain ostensibly restrictive clauses aimed at preserving the know-how of the franchisor and the uniformity and reputation of their formula were necessary. On this basis it found that there was no violation of Art. 101(1) TFEU (at the time Art. 85(1) EC).

[67] Case C-234/89 *Delimitis, supra* n. 55, paras 24–27, 30–32.

and likely to have a negative effect on the parameters of competition (i.e., price, output, choice, quality, innovation).[68] Therefore, even under an effects analysis the authorities would intervene to punish an 'inchoate offence', a 'criminal attempt' and not a 'fully committed crime'.

Yet, contrary to a restriction by object, which can be also described as an 'inchoate offence', in the case of restrictions byeffect the plaintiff would have to show more preparatory steps, since the practice is of a more ambiguous nature. These observations explain why AG Bobek opined that:

> [T]he object/effect dichotomy is, by and large, a procedural device meant to guide the competition authority on the analysis to be carried out under Article 101(1) TFEU depending on the circumstances of the case … The difference in the analysis required of the authority in the two situations is more of degree and depth than of kind. The two types of analysis are simply different ways, in the light of the knowledge and experience acquired by the authority, to answer one and the same question: whether the agreement at issue may prevent, restrict or distort competition in the internal market.[69]

This bifurcation between by-object and by-effect anticompetitive practices could be also traced in the Article 102 TFEU case law.[70] Naked restrictions, exclusive dealing,[71] tying,[72] loyalty rebates,[73] and predatory pricing (i.e., pricing below average variable cost)[74] could qualify as by object abuses, whereas selective price cuts,[75] standardized rebates,[76] refusal to deal[77] and margin squeeze[78] could be categorized as by-effect abuses.

---

68 Pablo Ibáñez Colomo, *Anticompetitive Effects in EU Competition Law*, 17(2) J. Competition L. & Econ. 337–342 (2020), doi: 10.1093/joclec/nhaa031.

69 Opinion of AG Bobek in Case C-228/18, *Gazdasagi Versenyhivatal*, *supra* n. 60, paras 27, 32.

70 Richard Whish & David Bailey, *Competition Law* 206 (OUP 2020).

71 Case C-85/76, *Hoffman – La Roche & Co, supra* n. 46, paras 89–90; Case C-413/14 P *Intel Corp. v. European Commission (Intel)* ECLI:EU:C:2017:632, para 138; C-377/20 *Servizio Elettrico Nazionale and Others (ENEL)* ECLI:EU:C:2022:379, paras 138–139.

72 Case T-201/04 *Microsoft Corp. v. Commission of the European Communities (Microsoft)* ECLI:EU:T:2007:289, paras 43–45, 842, 846–859.

73 Case C-549/10 P *Tomra Systems and Others* v. *Commission* EU:C:2012:221, paras 70 and 71 (noting that 'in that regard, it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition').

74 Case C-62/86 *AKZO Chemie BV v. Commission (AKZO)* EU:C:1991:286, paras 71–72.

75 Case C-209/10, *Post Danmark A/S v. Konkurrenceråd (Post Danmark I)* ECLI:EU:C:2012:172, paras 20–28.

76 Case C-23/14 *Post Danmark A/S v. Konkurrenceråd (Post Danmark II)* ECLI:EU:C:2015:651, paras 7, 20, 32, 37.

77 Joined Cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities (Magil)* ECLI:EU:C:1995:98, paras 49–55; Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG (Oscar Bronner)* ECLI:EU:C:1998:569, paras 27–47.

78 Case C-280/08 P *Deutsche Telekom AG v. European Commission* ECLI:EU:C:2010:603, paras 148, 155–185, 199, 234–236 253-259; Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB (TeliaSonera)* EU:C:2011:83, paras 60–77.

For instance in *Intel*, Intel's payments to customers who agreed to delay or cancel the marketing of competitor's products were described as 'naked restrictions' of competition.[79] Similarly Irish Sugar's purchases of a competitor's sugar from customers in order to replace it with its own sugar[80]; AstraZeneca's misuse of regulatory procedures[81]; and Lithuanian Railways' dismantling of a section of rail track to prevent a customer from using a competitor's services[82] were also found to be naked restrictions. Furthermore, exclusivity rebates could be considered as a by-object abuse according to *Hoffmann Laroche*.[83] This presumption of unlawfulness remains good law even after *Intel* since the latter case 'merely' introduced a clarification according to which the defendant can rebut the said presumption if they show that the rebate scheme at stake is incapable of excluding an as efficient competitor.[84]

Predatory pricing is also presumptively unlawful regardless of its concrete anticompetitive effects. If the plaintiff establishes that the dominant undertaking's prices are below average variable cost, this conduct would be considered as prima facie abusive. No proof of the possibility of recoupment of losses suffered by the dominant undertaking would be required to establish that such a pricing policy is abusive.[85] This inability to justify predation by proving the lack of a dangerous probability of recoupment suggests that in the Court's view pricing below average variable cost (AVC) is presumptively unlawful because it cannot be a credible source of procompetitive gains.[86] Of course it would be possible for the dominant undertaking to justify its conduct by demonstrating that it is objectively necessary or accompanied by offsetting procompetitive effects. Yet, such a defence is not likely to succeed.[87] Be that as it may, the fact that predation (i.e., below AVC pricing) is presumptively unlawful irrespective of its concrete effects suggests that it could be classified as a by-

---

79 Commission Decision of 13 May 2009 relating to a proceeding under Art. 82 of the EC Treaty and Art. 54 of the EEA Agreement (COMP/C-3 /37.990 – Intel), paras 1641–1681, upheld on appeal Case T-286/09 *Intel v. Commission*, EU:T: 2014:547, paras 198–220 (this practice was not discussed on further appeal to the Court of Justice).

80 Case T-228/97 *Irish Sugar plc v. Commission,* EU:T:1999:246, paras 226–235.

81 Case T-321/05 *AstraZeneca AB v. Commission,* EU:T:2010:266, paras 352–613; Case C-457/10 P *AstraZeneca AB and AstraZeneca plc v. European Commission,* EU:C:2012:770, paras 36–52, 55–60, 74–100, 105–113, 129–141, 147–156.

82 Case T-814/17 *Lietuvos geležinkeliai AB v. Commission,* EU:T:2020:545, paras 76–283.

83 Case C-85/76 *Hoffman – La Roche & Co, supra* n. 46, paras 89–91.

84 Case C-413/14 P *Intel, supra* n. 71, paras 136–144.

85 Case C-202/07 P *France Télécom v. Commission*,ECLI:EU:C:2009:214, para 110.

86 *Ibid*., para 112 ('lack of any possibility of recoupment of losses is not sufficient to prevent the undertaking concerned reinforcing its dominant position so that the degree of competition existing on the market, already weakened precisely because of the presence of the undertaking concerned, is further reduced and customers suffer loss').

87 Communication from the Commission, Guidance on the Commission'senforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance Paper) OJ C 45, 24 Feb. 2009, para 74.

object abuse. Such abuses indicate that Article 102 TFEU has also a preventive character and an *ex ante* dimension.

According to the Court of Justice (CJ)'s case law, if it is not the object of a dominant firm's conduct to harm competition, a finding of abuse is warranted only if actual or potential anticompetitive effects are demonstrated.[88] For example, selective price cuts will be found abusive only if, without objective justification, they produce an actual or likely exclusionary effect on as-efficient competitors.[89] A refusal to deal will be prima facie abusive if access to an input or a facility is indispensable; if the refusal would eliminate all downstream competition; and if it is incapable of being objectively justified.[90] In margin squeeze cases the legal test is two-fold. First, it should be examined whether given the wholesale and retail price charged by the dominant undertaking an equally efficient rival could not profitably offer their products (or would have to sell at a loss); and second, whether the margin squeeze is likely to exclude equally efficient competitors.[91] Yet, in the absence of any effect on the competitive situation of competitors, the Court said, such a pricing practice cannot be classified as an exclusionary practice.[92] Hence to find an abuse the authority or the court would have to examine if the pricing practice at stake hinders 'the ability of competitors at least as efficient as the dominant undertaking to trade on the downstream market'.[93]

Even in such by-effect cases, though, actual or potential consumer harm is not required to establish restrictive or distorting effects. Showing harm to the structure of competition will suffice to infer consumer harm and find a breach of Article 102 TFEU.[94] As noted in *Servizio Elettrico Nationale and Others (ENEL),* a competition authority is not required to show that a practice has the capacity to harm consumers. The authority will satisfy its burden of proof by demonstrating that a practice is likely to undermine competition, by using resources or means other than those governing an effective competitive structure.[95] Consequently, to establish a by-effect abuse, the plaintiff must show that the practice pursued by the

---

88 Case C-52/09 *Telia Sonera, supra* n. 78, para 64; Case C-209/10 *Post Danmark I, supra* n. 75, para 26; Case C-23/14 *Post Danmark II, supra* n. 76, para 29. In several cases, the Commission sought to produce anticompetitive effects. *See* Case T-201/04 *Microsoft, supra* n. 72, paras 1031–1090; Case T-612/17 *Google LLC, formerly Google Inc. and Alphabet, Inc. v. European Commission (Google Shopping)* ECLI:EU:T:2021:763, paras 368–395, 401–442, 432–459.

89 Case C-209/10 *Post Danmark I, supra* n. 75, paras 22, 25.

90 Case C-7/97 *Oscar Bronner, supra* n. 77, paras 41–46.

91 Case C-280/08 P *Deutsche Telekom AG, supra* n. 78, paras 177–183; Case C-52/09 *TeliaSonera, supra* n. 78, at 31–34, 61–77. The cost and prices of the dominant undertaking are the relevant benchmark and only exceptionally those of competitors (para 46). Demonstrating concrete or actual effects is not necessary, but at least a potential effect affecting as efficient competitors needs to be established (paras 64, 66, 72).

92 Case C-52/09 *TeliaSonera,* n. 78, para 66; *Deutsche Telekom AG, supra* 78, para 254.

93 Case C-52/09 *Telia Sonera, supra* n. 78, paras 54–55, 67.

94 Case C-377/20 *ENEL, supra* n. 71, para 44.

95 *Ibid*., paras 47, 53.

dominant undertaking is capable of having actual or potential anticompetitive effects. Yet, the plaintiff is not required to establish actual effects; it suffices to show that the conduct in question is capable of restricting competition and/or to demonstrate potential effects depending on the category of abuse.[96]
In the words of AG Rantos in *ENEL:*

> 'it is not necessary, in order to establish an infringement of Article 102 TFEU, to show that the conduct in question *actually* produced anticompetitive effects in the case at hand, it being sufficient to show that it was *capable of producing such effects*. A competition authority is solely required to demonstrate the harmful potential of the conduct complained of, irrespectively of whether anticompetitive effects actually materialised. Indeed, it would be contrary to the *ratio* of that provision, which is also *preventive* and *forward-looking* in nature, if it were necessary to wait for the anticompetitive effects to occur in the market before a finding of abuse could lawfully be made' (emphasis added by the author)'.[97]

This view, which reflects established case law,[98] was also adopted by the CJ in the case in question:

> That being said, it must be borne in mind that the characterisation of a practice of a dominant undertaking as abusive does *not* mean that it is *necessary* to show that the result of a practice of such an undertaking, intended to drive its competitors from the market concerned, *has been achieved* and, accordingly, to prove an *actual exclusionary effect* on the market. The purpose of Article 102 TFEU is to penalise abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, *irrespective* of whether such practice has proved *successful* (*see*, to that effect, judgment of 30 January 2020, České dráhy *v.* Commission, C-538/18 P and C-539/18 P, not published, EU:C:2020:53, para. 70 and the case-law cited) (emphasis added by the author).[99]

---

[96] *Ibid.*, paras 50, 53.
[97] Opinion of AG Athanasios Rantos in *ENEL*, *supra* n. 71, para. 110.
[98] *Ibid.*, para. 112 'In the *TeliaSonera* judgment, the Court of Justice expressly stated that 'the fact that the intended result, namely the displacement of those competitors, is not ultimately achieved does not preclude the practice in question from being characterized as abusive within the meaning of Article 102 [TFEU]'. Similarly, in Tomra, the Court of Justice held that 'for the purposes of proving an abuse of a dominant position within the meaning of Article 102 TFEU it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect'. Following the same line of reasoning, with regard to conduct relating to a discount scheme, the Court pointed out, in *Post Danmark II*, that the purpose of assessing whether a given discount scheme is capable of restricting competition is 'to determine whether the conduct of the dominant undertaking produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests'. In this light, 'it follows that fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified' and, consequently, 'in order to fall within the scope of that article [Art. 102 TFEU] the anticompetitive effect of a rebate scheme ... must be probable, there being no need to show that it is of a serious or appreciable nature'. Moreover, in *Intel*, the Court specifically referred to the need to assess whether the rebate was 'capable of restricting competition', listing a number of elements relevant to that assessment. Finally, in *Generics (UK)*, the Court of Justice recalled that 'if such conduct is to be characterised as abusive, that presupposes that that conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects'.
[99] Case C-377/20 *ENEL*, *supra* n. 71, para. 53.

Accordingly, the approach of punishing 'inchoate offences' could be traced not only in Article 101 TFEU but also in Article 102 TFEU case law. A unilateral behaviour pursued by a dominant undertaking would be considered presumptively unlawful if it is capable of producing anticompetitive effects. No actual exclusionary effect or actual consumer harm needs to be demonstrated. The rationale behind this approach is that Article 102 TFEU has a 'preventive' aspiration and is 'forward-looking in nature'. It would be hard to square this approach with the crime-tort model and the conventional wisdom of competition law being *ex post* and proscriptive in nature.

Consequently, the general interpretative architecture of Articles 101 and 102 TFEU suggests that two forms of *ex ante* intervention are available: condemning practices as restrictive by-object or as having potential anticompetitive effects. Condemning a practice on the basis of its actual restrictive effects is of course a possibility yet enforcers or plaintiffs are not required to go that far. Hence, in competition law most offences are to a larger or lesser degree 'inchoate offences', 'torts actionable per se' and not 'torts requiring damage'.[100] It would seem paradoxical, therefore, to argue that competition law intervenes only *ex post* in the marketplace.

3.2 Regulatory remedies at the heart of modern competition law enforcement

The complexity of most competition problems requires that the authority's intervention should take place not only through the prohibition of a practice and/or the imposition of a fine, but also through other remedies that can effectively address the problem in question. Competition law remedies in principle are restorative as they seek to put the infringement to an end and compensate the victims of the anticompetitive behaviour.[101] Such remedies seek to restore 'the plaintiff's rightful position, that is, the position that the plaintiff would have occupied if the defendant had never violated the law' or 'to restore the defendant's rightful position, that is, the position that the defendant would have occupied absent the violation'.[102] In other words such remedies have a punitive function and seek to cure a 'wrong' the infringer has committed, 'in contravention of some legally-recognized right of the plaintiff'.[103] Restorative remedies, however,

---

[100] Richard Posner, *The Rule of Reason and the Economic Approach: Reflections on Sylvania Decision*, 45(1) UCLR 1, 14–15 (1977), doi: 10.2307/1599199 (stating that 'in fact, all legal analysis operates under per se rules').

[101] A. D. Melamed, *Afterword: The Purposes of Antitrust Remedies*, 76 Antitrust L.J. 359 (2009). Taking illegal gains away from the law violators and 'restoring those monies to the victims' constitutes a principal goal of competition law remedies. R. Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 Geo. L.J. 169, 170 (2022).

[102] D. Laycock, *Modern American Remedies: Cases and Materials* 2 (S Little Brown 1994).

[103] M. Tilbury, M. Noone & B. Kercher, *Remedies: Commentary and Materials* (London: LBC Information Services 2000).

may seek not only to terminate the unlawful conduct, but also to reverse its effects, and restore competition. Hence, restorative remedies are aimed at restitution and/or compensation and punishing wrongdoers (or deter future wrongdoers).[104]

Competition law remedies, however, may also have a prophylactic (preventive) aim. They might seek to ensure that 'there remain no practices likely to result in distortions of competition and infringements in the future',[105] and create incentives 'to minimize the recurrence of just such anticompetitive conduct'.[106] Such remedies focus on rearranging the incentives of market participants or the conditions of the market so as to address the root causes of the competition problem at hand. Hence, they might pursue purposes of specific or even general deterrence.[107] In this case competition law intervention is not simply aimed at repairing the competition harm (restorative role) but should at eliminating practices that are likely to result in distortions of competition in the future (prophylactic role).[108]

The Commission's enforcement practice is ample with examples of restorative remedies that seek to stop anticompetitive behaviour and repair actual competitive distortions or consumer harms, and prophylactic ones seeking to 'level the playing field', reduce the ability of the market players to commit anticompetitive acts, and eliminate practices or markets conditions likely to result in distortions of competition in the future.[109] Regulation 1/2003 allows for a wide range of remedies and provides for different types of enforcement tools that would permit the Commission to use a broad array of strategies.[110] Specifically, the Commission can adopt commitments (Article 9), interim measures (Article 8) and findings of inapplicability of Competition Law (Article 10).[111] Furthermore, the Commission can and regularly does issue guidelines and other soft law tools[112] to articulate its competition policy, explain its understanding of the law, and clarify its enforcement priorities.[113]

---

104 For the use of the terms, I draw on Lianos, *supra* n. 10, at 380–381.

105 *Ibid.*, at 372.

106 Eleanor Fox, *Remedies and the Courage of Convictions in a Globalized World: How Globalization Corrupts Relief*, 80 Tul. L. Rev. 571, 573 (2005).

107 Lianos, *supra* n. 10, at 362–455. Specific deterrence can be defined as the impact of the remedy on the incentives of those apprehended (the infringers) to adopt similar illegal behaviour in the future. General deterrence focuses on the public at large.

108 Lianos, *supra* n. 10, at 362–455. Lianos highlights that prophylactic remedies differ from special deterrence for they aim to affect the ability and not merely the incentive of the infringers to commit antitrust violations in the future.

109 Sadowska, *supra* n. 3, at 7–10; Ibáñez Colámo, *supra* n. 1, at 261.

110 Eddy de Smijter & Lars Kjoelbye, *The Enforcement System Under Regulation 1/2003*, in *The EU Law of Competition* 125 (Jonathan Faull & Ali Nikpay eds, Oxford 2007).

111 Monti, *supra* n. 15, at 392–418.

112 Oana Stefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union* (Kluwer 2012); Oana Stefan, *Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law*, 37 Eur. L. Rev. 49 & 62 & 64 (2012).

113 *See* for instance: Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Guidance Paper) OJ C 45, 24 Feb. 2009.

This type of enforcement suggests that the Commission does not care only to identify wrongdoers and enforce the rules, but also to realize the law's core mission and ensure that markets remain competitive for the benefit of consumers. The fact that the Commission has invested in improving its epistemic capacity, by creating the position of Chief Competition Economist in 2003 and by setting up internal checks and balances demonstrate its emphasis on problem-solving and delivering results.[114] The emphasis on economic expertise could be also traced in the appointment of economists to leadership positions and in the increasing ratio of economists to lawyers within Directorate-Generale Competition.[115] These developments go beyond the crime-tort enforcement model and the conceptualization of competition law as a set of prohibitions to be implemented *ex post* and in a proscriptive manner, and suggest that the Commission has the ability and has often demonstrated its willingness to act as a responsive enforcer.

Notably, this style of competition law enforcement is not entirely new.[116] It predates Regulation 1/2003. Under the old regime of Regulation 17 the Commission frequently used comfort letters and informal settlements to close cases. By issuing a comfort letter the Commission officially declared that no action would be taken and terminated its proceedings without adopting a formal decision regarding the behaviour at stake.[117] In addition, via informal decisions the Commission modified the behaviour of undertakings without finding any infringement.[118] Moreover, the Commission frequently used informal opinions, non-infringement decisions and decisions to end the proceedings. As Bael notes,

---

[114] Lars-Hendrik Röller & Pierre A. Buigues, *The Office of the Chief Competition Economist*, 8 Global Competition Rev. (2005), available at https://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf; Michelle Cini & Lee McGowan, *Competition Policy in the European Union* 15–37 (2nd ed., Palgrave 2008); Anne Witt, *The More Economic Approach* 47–49 (Hart Publishing 2016).

[115] Röller & Buigues, *supra* n. 114, at 3. Until the mid-1990s, the ratio of economists to lawyers was about 1 to 7, in 2007 it increased to 1 to 1 and in 2015 reached the 1 to 1.7. Damien Neven, *Competition Economics in Europe*, in *The 2007 Handbook of Competition Economics* 4 (2007).

[116] European Commission, *Competition Policy Report* 11 (1976), available at https://ec.europa.eu/competition/publications/annual_report/ar_1976_en.pdf; European Commission, *Competition Policy Report* 26 (1999), https://ec.europa.eu/competition/publications/annual_report/1999/en.pdf; Ian Forrester, *Competition Structures for the 21st Century*, in *Annual Proceedings of the Fordham Corporate Law Institute* 445, 469 (Barry Hawk ed. 1994); European Community, *Competition Policy Report* 39 (1996), available at https://ec.europa.eu/competition/publications/annual_report/1999/competition_policy_en.pdf.

[117] Comfort letters were administrative letters created by the Commission in the early 1970s so as to alleviate the administrative burden of the ex ante notification regime and enhance legal certainty in an area where the courts had not yet managed to develop the law sufficiently. These letters were signed by the Commission stating that no action will be taken with respect to a particular agreement. Ivo van Bael, *The Antitrust Settlement Practice of the EEC Commission*, 23 CMLR 61, 64 (1986), doi: 10.54648/COLA1986004; John Temple Lang, *European Community Constitutional Law and the Enforcement of Community Antitrust Law*, in *Annual Proceedings of the Fordham Corporate Law Institute* 525, 566–567 (NY 1994).

[118] European Commission, *Competition Policy Report* (1982), available at https://ec.europa.eu/competition/publications/annual_report/ar_1982_en.pdf; Valentine Korah, *Comfort Letters-Reflections on the Perfume Cases*, 6 Eur. L. Rev. 14, 15 (1981).

over 95% of Articles 101 and 102 TFEU proceedings under Regulation 17/62 were resolved by means of soft enforcement.[119] In addition, Regulation 17 of 1962 allowed for informal settlements and comfort letters and provided for a system of *ex ante* scrutiny of all agreements falling within the scope of Article 101 TFEU.[120] Such agreements had to be notified to the Commission and would be implemented only if they were granted an exemption.[121] Hence, competition law enforcement was never really constrained within the narrow contours of the crime-tort model. Regulation 1/2003 did not undo this trend. Instead, it enhanced it. With this Regulation, the Commission's capacity for responsive enforcement was significantly enhanced and became streamlined and structured in a more refined manner.[122]

Consequently, as competition law institutions build expertise and their knowledge of markets and economics advances, it becomes increasingly evident that competition law intervention must be multi-levelled and multi-fashioned and that remedies are key in solving competition problems. Remedies are key also because what matters at the end of the day is whether competition law intervention improved the state of competition in the market. For this reason competition authorities are increasingly using a wide array of tools and engage in *ex ante* and *ex post*, prescriptive and proscriptive enforcement.

To these, it should be added that the third pillar of competition law, merger control, is by default *ex ante* and entails proscriptive and prescriptive, restorative and prophylactic remedies. According to Regulation 139/2004, concentrations with a 'European dimension' cannot be put into effect, unless notified to and cleared by the Commission.[123] Such transactions will be allowed only if they are not likely to lead to a substantial lessening of competition.[124] Therefore, merger control entails an *ex ante* assessment and requires a prospective analysis: the

---

[119] Ivo van Bael, *supra* n. 117, at 61; European Commission, *Competition Policy Report* 24 (1971), available at https://ec.europa.eu/competition/publications/annual_report/ar_1971_en.pdf; European Commission, *Competition Policy Report*, *supra* n. 109, at 11; European Commission, *Competition Policy Report*, *supra* n. 109, at 26; Forrester, *supra* n. 109, at 445, 469; European Community, *Competition Policy Report, supra* n. 109, at 39.

[120] Ivo van Bael, *supra* n. 117, at 61, 64; Temple Lang, *supra* n. 117, at 525, 566–567. A comfort letter was not binding on NCAs and NCs or third parties (*see* Case C-253/78 and 1 to 3/79 *Procureur de la République*, ECLI: EU:C:1980:188 para. 13; Case C-31/80 *L'Oreal v. De Nieuwe* AMCK, ECLI:EU:C:1980:289, paras 11–12) and informal decisions to close an investigation (informal commitments to modify behaviour. *See* van Bael, *supra* n. 117, at 61, 63.

[121] Monti, *supra* n. 15, at 392–418.

[122] Ulrika Morth, *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* 37–38 (Edward Elgar 2004); Dirk Lehmkuhl, *On Government, Governance and Judicial Review: The Case of European Competition Policy*, 28(1) J. Pub. Pol'y 139–159 (2008), doi: 10.1017/S0143814X08000810; Makris, *supra* n. 6, at 30–33.

[123] Council Regulation (EC) 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings (EC Merger Regulation) OJ L 24, 29 Jan. 2004, at 1–22, Arts 1, 3, 4(1), 7(1).

[124] *Ibid.*, Art. 2.

Commission has to run a counterfactual analysis and compare the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger.[125] If the merger has as its direct and immediate effect a significant impediment to effective competition, it will be blocked.[126] Such a finding necessarily requires a 'prospective analysis' consisting of an 'examination of how a concentration might alter the factors determining the state and structure of competition on the markets affected. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely'.[127]

However, even if the Commission finds that a merger might lead to a significant impediment to effective competition, still the parties can clear their transaction if they propose certain behavioural or structural remedies that address the Commission's concerns. In fact, most notified mergers are cleared, even when they raise significant concerns of potential distortion of competition, after the merging parties concede to adhere to certain behavioural or structural measures aimed at preserving the competitive structure of the market.[128]

3.3 An illustrative example

One example can illustrate the importance of remedial design and the inevitably hybrid nature of competition law intervention. In *Google Shopping*, the main concern of the Commission was that Google, by being dominant in the general search market, and by promoting its services and demoting competing comparison shopping services (CSSs), was able to leverage its position in the market for online CSSs, and to harm competition.[129] This practice was considered to have a negative impact on the competitive process and for consumers.[130] In particular, the Commission found that for a period of six years (2010–2016) the visibility of

---

125 European Commission, *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, (HMG) OJ C 31, 5 Feb. 2004, at 5–18, para. 9.

126 Case T-399/16 *CK Telecoms UK Investments Ltd v. European Commission (CK Telecoms)*ECLI:EU:T:2020:217, para. 114 (noting that 'such an impediment, which would stem from future decisions by the merged entity, may be regarded as a direct and immediate effect of the concentration, if that future conduct is made possible and economically rational by the alteration of the characteristics and the structure of the market caused by the concentration').

127 *Ibid.*, para 108.

128 Case COMP/M.7932 *Dow/DuPont* C(2017) 1946 final; Case COMP/M.8084 *Bayer/Monsanto* C (2018) 1709 final. Recital of Council Regulation (EC) No 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings.

129 Case T-612/17 *Google Shopping*, *supra* n. 88, para. 167.

130 *Ibid.*, paras 65, 290 (noting that customers are more likely to use Google's other products, irrespective of whether these are the best available or best suited to the customer's own needs; that they lose out as a result of GGoogle'sbehaviour; and that rival companies operating CSSs are seriously disadvantaged in competing against Google, and in some instances, struggle to stay in the market').

competing CSSs on Google's general results pages had suffered a sudden drop and never recovered.[131] Finding that 38% of the 361 CSSs competing against Google were no longer active, the Commission considered that Google's practice would diminish incentives to innovate on the part of rivals and on the part of Google; reduce consumers' ability to access the best-performing CSSs; and lead to over-charges, lesser choice and lower quality.[132]

The Commission grounded these inferences in the fact that Google had an ultra-dominant position,[133] enjoyed strong network effects,[134] and was protected by very high barriers to entry.[135] In addition, the specific characteristics of the market context played a key role in the Commission's assessment. In particular, (1) the importance of traffic;[136](2) the behaviour of users;[137] (3) and the fact that large portion of traffic diverted from competing CSSs could not be effectively replaced;[138] led the Commission to conclude that Google had a general obligation of equal treatment (i.e., to provide non-discriminatory access).[139] Hence, in the Commission's view, by adopting the converse economic model from the one that brought it success, Google engaged in abusive leveraging.[140]

As a result, a hefty fine (€ 2.4 bn) was imposed on Google and the company was ordered to refrain from unlawful activities and explain how it will reform its practices.[141] Yet, this fine represents only a small friction of Google's annual turnover, and it took seven years for the Commission to complete its investigation and issue its decision.[142] In the meantime the relevant markets significantly changed. Furthermore, even after the Commission decision and the General Court judgment, it remained unclear what the company should do to comply with the law, and several commentators were dissatisfied with the remedy. For instance, Marsden found that 'in a case that is all about the visibility of comparison-shopping services (CSS) on Google, all that the remedy guaranteed was their invisibility'[143] and Höppner found that:

---

131 *Ibid.*, paras 59, 403.
132 *Ibid.*, paras 158, 187, 452, 566, 588.
133 *Ibid.*, para. 183.
134 *Ibid.*, para. 178.
135 *Ibid.*, para. 182.
136 *Ibid.*, paras 170, 171, 178.
137 *Ibid.*, para. 172.
138 *Ibid.*, paras 169, 170, 173.
139 *Ibid.*, para. 180.
140 *Ibid.*, paras 176, 179.
141 *Ibid.*, paras 71, 68.
142 European Commission, AT.39740 *Google Search (Shopping)*, available at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740.
143 Philip Marsden, *Google Shopping for the Empress's New Clothes – When a Remedy Isn't a Remedy (and How to Fix It)*, 11(10) J. Eur. Competition L. & Prac. 553 (2020), doi: 10.1093/jeclap/lpaa050.

> following three years in operation, all empirical economic data shows that the so-called Compliance Mechanism that Google chose to implement (…) has failed to improve the market conditions for competing CSSs. On the contrary, it has further strengthened Google's position on the national markets for CSSs and has entrenched its dominance in general search.[144]

Google Shopping illustrates well not only the importance of remedial design in competition cases, but also the hybrid nature of competition rules. Specifically, in this case the General Court addressed the question whether the Commission was obliged to show actual anticompetitive effects. In this regard, the Court held that 'the Commission had to demonstrate the – at least potential – effects attributable to the impugned conduct of restricting or eliminating competition on the relevant markets, taking into account all the relevant circumstances'.[145] In addition, the Court noted that 'the Commission was not required to identify actual exclusionary effects' and that the categorization of a practice as an abuse 'cannot be altered because the practice at issue has ultimately not achieved the desired result'.[146] *A fortiori*, the Court found, the Commission was not required to demonstrate that 'the possible consequences of the restriction of competition *actually manifested* themselves, for example in the form of less innovation or price increases'.[147] The Court considered that the weakening of competition is highly likely to have such consequences.[148] It was sufficient to establish an abuse that the Commission showed that Google's behaviour had material consequences, i.e., that its conduct had led to a reduction of that traffic for almost all competing CSSs and, to an increase in traffic to Google's CSSs.[149]

Given this analysis, it could be argued that modern competition law intervention is 'by nature' *ex ante* and *ex post*, prescriptive and proscriptive. Tools such as commitments, sector investigations and market interventions, as well as tools that speed up the process of pending cases (such as the settlement tool or the leniency programme) open up a more multi-level, 'regulatory' role for competition authorities. Simultaneously, remedial design and implementation have become a central issue, suggesting that what really matters is that competition law enforcement responds to the problem at hand. Thus, the multiplicity of tools, the hybrid nature of competition rules, and the issue of remedial response have led not only the HCC (as discussed in section 2 above) but also the Commission (as indicated in subsection 3.2 above) and more generally most competition enforcers

---

144 Thomas Höppner, *Google's (Non-) Compliance With the EU Shopping Decision*, Study, SSRN, available at https://ssrn.com/abstract=3700748.
145 Case T-612/17 *Google Shopping*, *supra* n. 88, para. 441.
146 *Ibid.*, para. 442.
147 *Ibid.*, para. 443.
148 *Ibid.*, para. *443*.
149 *Ibid.*, para. 445.

to adopt a 'responsive attitude': to be mission-oriented, focus on problem-solving and employ a multiplicity of tools and strategies to ensure that competition in the market is not restricted and works for consumers and the society at large.

4 THREE KEY CHALLENGES

The analysis so far suggests that the crime-tort model cannot really capture what competition enforcers do since enforcers behave to an increasing degree responsively. Several commentators have observed this phenomenon and used a variety of terms to describe it. For instance, the relevant literature refers to 'participatory competition law',[150] 'consensual or negotiation-based competition law',[151] 'responsive competition law'[152] or 'polycentric competition law'.[153] The common thread between these approaches is the realization that competition authorities need to and actually do intervene in a multi-faceted, versatile manner to protect and promote competition in the market.

Moreover, the conventional distinction between competition law and regulation – which constitutes the silent foundation of the crime tort mode – fails to provide solid grounds for assessing or formulating competition policy. This distinction is not limited to a descriptive argument about the 'nature' of competition law; it also entails a normative argument according to which competition law *should* not be applied *ex ante* and via prescriptions because, in this way, it becomes 'regulatory'. However, if we consider, as the present analysis argues, that competition law, especially in our days, cannot but be applied in a 'regulatory manner', we are obliged to abandon both the crime-tort model and its conceptual foundation. In that case, the crucial question becomes not whether a competition authority applied the law in a regulatory fashion, but whether they applied the rules in an *effective manner* (namely, whether they succeeded in protecting and promoting competition).

From this angle competition law enforcement faces three main challenges: (1) the risk of type I (false positives) and type II (false negatives) errors,[154] (2) the risk of regulatory failures,[155] (3) the risk of using discretion in ways that undermine fundamental rule of law principles. These risks could make competition law intervention ineffective. Let us explain these risks in turn.

---

[150] The relevant term should be attributed to the Nobel Prize-winning economist Tirole, *supra* n. 11. *See also* Kathuria, *supra* n. 11.

[151] J. Mark Ramseyer, *supra* n. 12, at 604; Ginsburg & Wright, *supra* n. 12. Wagner-von Papp, *supra* n. 12, at 59.

[152] Makris, *supra* n. 6, at 228; Maria Ioannidou, *Responsive Remodelling of Competition Law Enforcement*, 40 (40)Oxford Journal of Legal Studies 846 (2020).

[153] Lianos, *supra* n. 10, at 161.

[154] Christiansen & Kerber, *supra* n. 16, at 215, 222–230.

[155] Wilson, *supra* n. 17, at 203; Ayres & Braithwaite, *supra* n. 7, at 4–7.

'False positives', on the one hand, are defined as cases in which competition law is applied in a way that prohibits economically beneficial agreements or practices, while 'false negatives' refer to the cases in which competition law is applied in a way that allows economically unfavourable agreements or practices.[156] Since the interpretation and application of the law can give rise to such errors, a key objective of competition law, in general, is to formulate legal tests and implementation tools that minimize such errors.[157]

Responsive enforcement entailing 'discretionary remedialism'[158] can create such errors. For example, commitments, which by definition are based neither on a thorough investigation by the authority nor on a complete and well-defined theory of harm, can produce (1) false positive results when the undertakings under scrutiny are risk averse and make excessive concessions, thus creating problems of over-enforcement,[159] and (2) false negative effects, when the authority has reservations about a case's merits or is prone to regulatory capture and accepts overly lenient commitments, thus creating problems of under-enforcement.[160] Similarly, interim measures, settlement procedures, sector investigations and market intervention can lead to false positives or false negatives. Judicial review on the above-mentioned decisions could reduce the risk of over-enforcement.[161]

A second risk is the so-called 'regulatory failure'.[162] The wider the discretion enjoyed by an authority the greater the risk of corrosive incentives in the selection and handling of cases. In other words, if given a wide option to choose among different tools and strategies, an authority may opt to investigate weak cases since, at worst, it may be able to secure commitments or, on the contrary, treat certain seriously anticompetitive practices more leniently than necessary through the use of the settlement tool.[163] It is also possible that an authority may be subject to 'confirmation bias'[164] or 'cognitive dissonance'[165] when using softer enforcement

---

156 Christiansen & Kerber, *supra* n. 16, at 225–228.

157 Pablo Ibáñez Colámo, *The Shaping of Competition Law* 41–44 (CUP 2018); Frank Easterbrook, *The Limits of Antitrust*, 63(1) Tex. L. Rev. 1, 14–39 (1984).

158 Peter Birks, *Three Kinds of Objection to Discretionary Remedialism*, 29 U.W. Austl. L. Rev. 1 (2000).

159 Florian Wagner-von Papp, *Critical Considerations on the Commission's Commitment to the Commitment Procedure*, 3 CPI Antitrust Chron. 2; Dunne, *supra* n. 3, at 399.

160 Jean-Francois Bellis, *EU Commitment Decisions: What Makes Them So Attractive* 53 (OECD, 7 Jun. 2016), https://one.oecd.org/document/DAF/COMP/WD(2016)53/en/pdf.

161 Wagner-von Papp, *supra* n. 159, at 4-5.

162 Ayres & Braithwaite, *supra* n. 7, at 4–7.

163 Christopher Cook, *Commitment Decisions: the Law and Practice under Article 9*, 29(2) World Competition 209, 213 (2006).

164 Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford University Pressm1957); K. C. Klauwer, J. Musch & B. Naumer, *On Belief Bias in Syllogistic Reasoning*, 107 Psychol. Rev. 852 (2000), doi: 10.1037/0033-295X.107.4.852.

165 Malcolm B. Coate & Andrew N. Kleit, *The Economics of the Antitrust Process* 9 (Springer 1996).

tools such as commitment or settlement decisions, which are subject to weaker judicial review.[166] Furthermore, powerful firms are likely to use their resources to secure commitments or settlements, while less financially powerful firms or consumer associations may be unable to do so.[167] Moreover, the frequent contact between certain undertakings and an authority in the context of negotiations may provide opportunities for such undertakings to identify weaknesses in the authority's claims or to manipulate or delay the process to their advantage. Such interactions could enable also lobbying and regulatory capture. It has also been observed that, when market players become the primary source of information, they can control the flow of information and increase the chances of 'regulatory capture'.[168]

A third challenge concerns potential tensions with fundamental rule of law principles.[169] For example, an authority may choose different tools to address similar practices, thus raising suspicions of unequal treatment. In addition, wide use of commitments, settlements and other softer tools may deprive courts of the opportunity to clarify the law, particularly in cases of novel behaviour or new and dynamic markets.[170] This could be problematic especially in cases where an authority forms and applies a new theory of harm, because the absence of a court's judgment on such issues in particular may cause legal uncertainty.[171]

Moreover, the use of prophylactic remedies can raise rule-of-law concerns. With such remedies authorities may attempt to engineer the market or interfere with the undertaking's product design; impose broad compliance programs, and oblige the concerned undertakings to promote competition.[172] For instance,

---

166 A. Tversky & D. Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 Cognitive Psychol. 207–212 (1973), doi: 10.1016/0010-0285(73)90033-9. N. J. Roese & J. M. Olson, *Counterfactuals, Causal Attributions, and the Hindsight Bias: A Conceptual Integration*, 32 J. Experimental Soc. Psychol. 197 (1996), doi: 10.1006/jesp.1996.0010.

167 Neil K. Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* (CUP 2001). Marc Galanter, *Why the 'Haves' Come Out Ahead*, 9 (1) L. & Soc'y Rev. 95 (1974), doi: 10.2307/3053023.

168 Robert Baldwin, Martin Cave & Martin Lodge, *Understanding Regulation* 108 (OUP 2012).

169 The GC and the CJ have dealt with relevant issues, inter alia, in the following cases: Case T-76/14 *Morningstar* v. *Commission*, ECLI:EU:T:2016:481; Case C-441/07 P, *European Commission* v. *Alrosa Company Ltd*, ECLI:EU:C:2009:555.

170 Ian Forrester, *Creating New Rules or Closing Easy Cases?* 637–638, 647–648 in Claus-Dieter Ehlermann & Mel Marquis eds, *European Competition Law Annual 2008: Antitrust Settlements Under EC Competition Law*, Bloomsbury 2010). George Stephanov Georgiev, *Contagious Efficiency: The Growing Reliance on U. S.-Style Antitrust Settlements in EU Law*, 4 Utah L. Rev. 971, 1026–1029 (2007).

171 Wagner-Von Papp, *supra* n. 12, at 931, 962–966.

172 OECD, *Policy Roundtables: Remedies and Sanctions in Abuse of Dominance Cases* (2006), available at http://www.oecd.org/dataoecd/20/17/38623413.pdf; Nicholas Economides & Ioannis Lianos, *A Critical Appraisal of Remedies in the E.U. Microsoft Cases*, 2010 Colum. Bus. L. Rev. 346 (2010), doi: 10.2139/ssrn.1523908.

authorities could impose a duty to release capacity on the market[173] or to provide access to rivals on Fair, Reasonable, and Non-discriminatory(FRAND) or other terms,[174] an obligation to treat rivals equally[175] or fairly or a duty to interoperate.[176] Such remedies may seek to generate or bring back the self-correcting forces of the market as the default mechanism that would adjust the incentives of market actors and discipline their conduct, but of course, they can create risks of false positives or negatives and of regulatory failure.[177]

5 TOWARDS A RESPONSIVE MODEL OF COMPETITION LAW ENFORCEMENT

In light of these challenges, in this section I draw on Responsive Law theory to make some recommendations on how enforcement that aspires to be responsive can attain its goal.[178] According to this theory, authorities should combine 'command-and-control' strategies with other softer means of consensual and negotiated enforcement to ensure that the core mission of the law is effectively realized.[179] Hence, authorities should not only impose sanctions (following the crime-tort model), but also invest in building trust, in cultivating compliance and self-regulation mechanisms.[180]

Under this approach market players, industry associations, common interest groups and public actors can be utilized by the authority to address

---

[173] Sadowska, *supra* n. 3, at 11–14.

[174] Case C-170/13 *Huawei Technology Co. Ltd v ZTE Corp. (Huawei)* EU:C:2015:477, para. 71.

[175] Case T-612/17 *Google Shopping, supra* n. 88, para 155.

[176] Following complaints in Dec. 2007 by Opera, the Norwegian Internet browser maker, the Commission alleged a violation by Microsoft of Art. 102 TFEU for tying its web browser Internet Explorer to its dominant client PC operating system, Windows. On 16 Dec. 2009, the Commission accepted Microsoft's commitments. Microsoft committed to (1) distribute a 'choices screen' through a software update to European users of Windows XP, Windows Vista, Windows 7, and Windows client PC operating systems, and (2) allow both OEMs and users to turn Internet Explorer on or off. The choices screen gave users who had set Internet Explorer as their default web browser an opportunity to choose whether to install any or several competing web browser(s), in addition to the one(s) they already had. Microsoft committed to distribute and install the choices screen software update 'in a manner that is designed to bring about installation of this update at a rate that is at least as high as that for the most recent version of Internet Explorer offered via Windows Update'. *See* Commission Decision, Case COMP/C-3/39.530, *Microsoft* (16 Dec. 2009), available at http://ec.europa.eu/competition/antitrust/cases/decisions/39530/final_decision_en.pdf (hereinafter EU '*Microsoft II* decision').

[177] Keith N. Hylton, *Remedies, Antitrust Law and Microsoft: Comment of Shapiro*, 75 Antitrust L.J. 773 (2009), doi: 10.4337/9781849805285.

[178] Ayres & Braithwaite, *supra* n. 7, at 19–100.

[179] *Ibid.*, at 19–20.

[180] Darren Sinclair, *Self-Regulation Versus Command and Control – Beyond False Dichotomies*, 19(4) L. & Pol'y 529 (1997), doi: 10.1111/1467-9930.00037; Neil Gunningham, Peter N. Grabosky & Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press 1998).

information asymmetries, design better remedies and organize compliance.[181] To do so authorities should have at their disposal and utilize a wide array of versatile enforcement tools that span from 'sunshine'[182] and soft[183] to hard enforcement. From this perspective, the main question is what kind of enforcement tool or strategy can ensure the effective implementation of competition law and not whether the law is applied *ex post* and via prescriptions. Hence, this approach shifts the debate on enforcement away from the categorical distinction between competition law and regulation towards an inquiry of the responsiveness of competition law intervention. This basic idea is captured in Ayres and Braithwaite's pyramid of enforcement tools, which illustrates the multi-level tactics and versatile tools that authorities can use to achieve their objectives.[184]

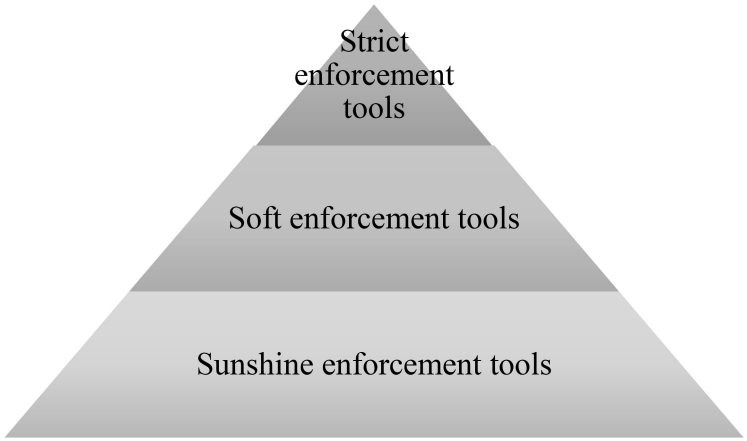
---

[181] Ayres & Braithwaite, *supra* n. 7, at 17.

[182] This term refers to instruments of uncertain legal validity which may or may not produce legal effects, but are likely to influence the behaviour of societies as well (e.g. guidance papers). Nicolas Petit & Miguel Rato, *From Hard to Soft Enforcement of EC Competition Law - A Bestiary Sunshine Enforcement Instruments*, in *Alternative Enforcement Techniques in EC Competition Law* 183–220 (Charles Gheur, Nicolas Petit & Jean-Francois Bellis eds, Bruylant, Bruxelles 2009). According to the responsive law theory the effectiveness of such instruments relies on that of more stringent intervention measures.

[183] By soft law measures, I refer to administrative acts that are legally binding only on the involved parties which are less stringent than unilateral, punitive administrative acts that apply the law to wrongdoers, and to administrative acts that have ambiguous legal effects (e.g., guidelines). For example, commitments or out-of-court settlements constitute forms of soft law enforcement. Such tools - by definition - impose less burdensome sanctions in comparison to infringement decisions that establish a breach. In addition, such tools could function as 'administrative shortcuts' and allow the involved undertakings to avoid litigation. Filippo M. Zerilli, *The Rule of Soft Law: An Introduction*, 56 J. Global & Hist. Anthropology 3, 9 (2010), doi: 10.3167/fcl.2010.560101; Frank Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56(1) Mod. L. Rev. 19 (1993), doi: 10.1111/j.1468-2230.1993.tb02852.x (defining as soft law 'those rules of conduct which, in principle, are not legally binding, but which may nevertheless have a practical effect'); K. C. Wellens & G. M. Borchardt, *Soft Law in the European Community*, 14 Eur. L. Rev. 285 (1989) (defining soft law as 'rules of conduct which are in principle at a legally non-binding level (in the sense of enforceability and sanctionability), but which, according to the authors, must be given legal scope or binding force, which must be determined at each step, and therefore do not have a uniform intensity in terms of their legal bindingness, but ... have the effect of influencing the behaviour of the Member States, the institutions, businesses and individuals, but do not contain Community rights and obligations').

[184] Ayres and Braitwaite, *supra* n.7, at 17–53.



This pyramid of responsive enforcement reflects the idea that authorities should have at their disposal and make use of a wide range of punitive and persuasive tools. This pyramid also captures the idea that the authority should escalate gradually its intervention and use a system of punishments and rewards. For example, when a company complies promptly, it should be rewarded. If it refuses to comply, then the authority should resort to stronger deterrence measures.[185] If the company continues to resist compliance, the authority should further use stricter enforcement measures. As one moves up the pyramid, increasingly severe penalties are considered appropriate.

According to Ayres and Braithwaite 'the more sanctions can be kept in the background, the more regulation can be transacted through moral persuasion, the more effective regulation will be'.[186] On this basis, these authors suggest that authorities should at first use milder means and more lenient enforcement mechanisms, given that consensual or negotiated enforcement constitutes a low-cost, respectful, and time-saving strategy. They warn, however, that these techniques can only produce positive results if more severe measures lurk in the background and can be used successfully. It is the existence and effective use of such 'big guns' that renders voluntary compliance effective.[187] Therefore, the key element of the responsive law theory is that a competition authority escalates or de-escalates its intervention depending on the reaction of the parties.[188]

---

185 *Ibid.*, at 53.
186 *Ibid.*, at 19–30.
187 *Ibid.,* at 19-30.
188 John Braithwaite, *Types of Responsiveness*, in *Regulatory Theory: Foundations and Applications* 117 (Peter Drahos ed., ANU Press 2017).

It should, however, be borne in mind that, in some circumstances, a gradual response would in fact be unresponsive or inappropriate. Such circumstances may arise when there is a serious risk of imminent irreversible damage, when there are indications of recurrence, or when there are no frequent interactions between the authority and the concerned company.[189] In the first two occasions, the company would have weaker incentives to comply with a softer measure, as its pay-offs from non-compliance would be much higher than the non-compliance costs, whereas in the latter the company would have no incentives to cooperate as it will not be obligated to interact with the authority again.[190]

One objection against responsive enforcement could be that it may jeopardize the deterrent effect of competition law, as it urges authorities to use soft and sunshine enforcement tools. For instance, Brook observes that the European Commission's tendency to rely on milder instruments may have reduced the deterrent effect of Articles 101 and 102 TFEU.[191] Nonetheless, as far as an authority is willing and able to escalate its intervention on non-cooperative undertakings, this risk would be low.[192] An additional benefit of responsive enforcement is that it can lead to resource savings because time-consuming procedures associated with hard enforcement (e.g., fines, unilaterally imposed remedies) will be activated against a smaller number of undertakings.[193] Another advantage of this enforcement model is that it allows authorities to avoid regulatory capture, as it requires them to be prepared to use hard enforcement tools when required.[194] Furthermore, this model invites authorities to apply the law strategically so as to avoid 'regulatory gaming' and maximize compliance. In that way, responsive enforcement can strengthen not only the deterrent effect but also enhance the social consensus towards competition law and strengthen the law's legitimacy.[195]

The wide range of enforcement tools and strategies presented in section 2 suggests that the HCC utilizes the pyramid of responsive Competition Law

---

189 Gunningham, Grabosky & Sinclair, *supra* n. 180, at 5–19.

190 This observation is based on game theory and, in particular, on the 'prisoner's dilemma'. Compare the one-off prisoner's dilemma with the repeated one. Steven Kuhn, *Prisoner's Dilemma,* the Stanford Encyclopedia of Philosophy (2 Apr. 2019), available at https://plato.stanford.edu/archives/win2019/entries/prisoner-dilemma/.

191 Or Brook, *Has EU Competition Law Lost Its Bite? A Hard Look on How 'Soft' Enforcement Undermined the Basic Conventions and Goals of EU Competition Law*, ASCOLA presentation, 14th ASCOLA Conference, Aix-en-Provence, France (2019).

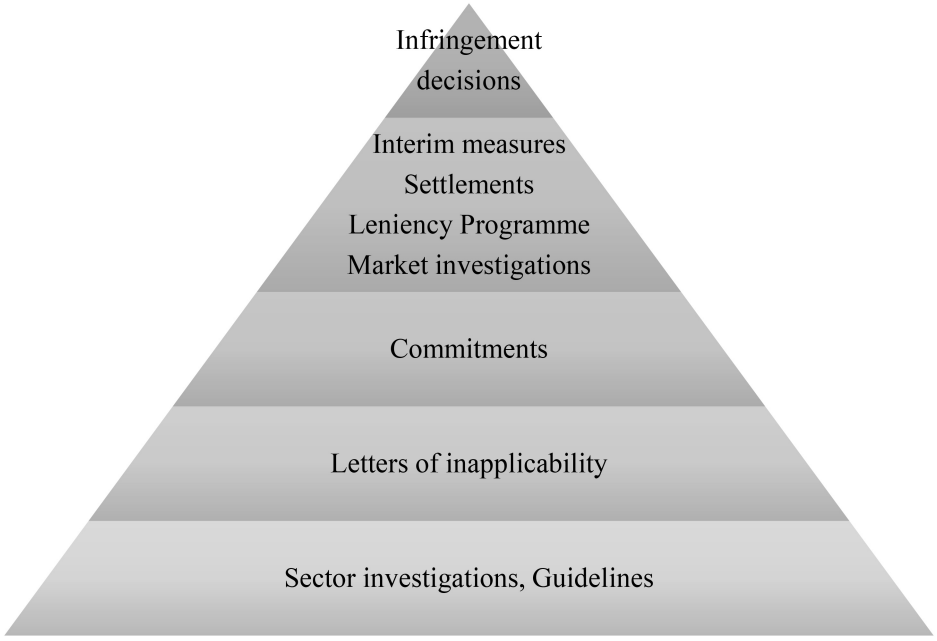
192 John Braithwaite, *The Essence of Responsive Regulation*, 44 UBC L. Rev. 475–520 (2011).

193 On the contrary, extremely strict regulatory rules may lead to weaker enforcement. *See* Cass Sunstein, *Paradoxes of the Regulatory State* 57(2) Univ. Chicago L. Rev. 407, 413-419 (1990).

194 Ian Ayres, *Responsive Regulation: A Co-author's Appreciation*, 7(1) Reg. & Governance 145–151 (2013).

195 Christine Parker & Viebeke Lehmann Nielsen, *Explaining Compliance* (Edward Elgar 2011).

enforcement. In particular, if we superimpose the Ayre' and Braithwaite's pyramid to competition law enforcement the following pyramid will be discernible.



At the top of this pyramid lies the strictest, most burdensome, formal, and time-consuming tool, infringement decisions. Infringement decisions can impose a sanction, and/or proscriptive or prescriptive, restorative or prophylactic remedies, after a formal investigation and a finding of violation. Below we can place tools such as interim measures, cartel settlements, the leniency programme, and market investigations. These tools allow the authority to intervene more quickly and save resources, yet the measures imposed will be severe and non-cooperative. Interim measures and market investigations do not require full investigation of a potential infringement, yet they allow the authority to intervene in a prophylactic manner and impose prescriptive and proscriptive remedies, while cartel settlements and the leniency programme enable the authority to handle a case more efficiently by rewarding undertakings that comply promptly and/or assist in its investigation.

The instrument of commitments follows, since, as noted above, it consists of consensual, negotiated enforcement even when the adopted remedies are intrusive. A commitment decision is based on bilateral and plurilateral negotiations, requires the consent of the concerned companies and does not require a fully-fledged investigation and theory of harm. Importantly commitment decisions do not

include a finding of a violation. Decisions of inapplicability constitute an even softer tool which the authority can use in cases where there are no serious competition law concerns and the companies need some reassurance before engaging in the activity in question. This tool offers flexibility and can be particularly effective in promoting sustainability objectives or allow the authority to deal with crisis.

Finally, sector investigations and guidelines are the least intrusive tools.[196] Sector investigations allow the authority to investigate and assess the competitive conditions in the market under consideration; obtain valuable information from the companies, and communicate possible concerns to them. Through guidelines, the authority can justify its competition policy and clarify its priorities, promote voluntary compliance, and strengthen the social consensus towards competition law.[197]

In any case, it should of course be noted that for the effective implementation of competition law it does not suffice that an authority simply has a wide range of tools at its disposal. The authority must also use these tools in a coherent and rational manner. To this end, the theory of responsive law, in principle, points to intervention through gradual threats and to the successive use of milder and more stringent tools.

Against, this backdrop, it becomes clear that the HCC – as the Commission and the other NCAs – has at its disposal a responsive enforcement pyramid. In addition, as showed in section 2 above, the HCC actually intervenes in the market in a multi-faceted, *ex ante* and *ex post* way, employing proscriptive and prescriptive remedies. Consequently, the HCC has not only the ability to enforce the law responsively it has also demonstrated an increasing willingness to be a really responsive enforcer. Of course whether it succeeds to be fully responsive in a *particular* market requires a focused study of how this market was performing before and after its intervention, as well as an assessment of the workings of the authority on the basis of certain key performance indicators. Such an inquiry goes beyond the scope and the aims of the present study.

The present study seeks to demonstrate that the responsive enforcement model can capture the reality of competition law enforcement (*see* above section 2), and identify its key challenges (*see* above section 4) to propose certain ways to address them. Now that it has been made clear that responsive regulation theory can be applied to competition law enforcement, and after having outlined the main elements of this approach we could present the normative component of this theory. Consequently, given the existing institutional capabilities and the concerns identified

[196] Petit & Rato, *supra* n. 182, at 183–220.
[197] *Ibid.*, 183–220.

in section 4 (i.e., the risk of type I and type II errors, the risk of regulatory failures, the risk of enforcement and remedial discretion undermining fundamental rule of law principles), we can now present fourteen high-level recommendations that could be deduced from the responsive enforcement theory.

First, given that competition law intervention on many occasions deals with practices with ambiguous welfare effects, enforcers should be using prescriptive and proscriptive tools, restorative and prophylactic remedies to address competition problems. They should be paying particular attention to the remedial response and devise a broader and coherent enforcement strategy.

Second, when setting their priorities or intervening in the market, authorities should devise an overall enforcement strategy and avoid merely pursuing 'easy' or 'strong' cases. Internal meetings with all Case Handlers and the Board of Directors of the authority could be instrumental in devising coherent enforcement strategies per sector and avoiding frictions.

Third, authorities should be concerned not only about punishing past violations but also and mainly about promoting competition in the market by solving competition problems and facilitating compliance. To do so authorities need to focus on remedial design and compliance through persuasion tools. For this purpose, best practice guidelines for the design of remedies and enforcement priorities guidelines could be instrumental.

Fourth, enforcers could stimulate compliance via systems of rewards (e.g., reduction of fines), clear and succinct guidelines, and advocacy campaigns. Involving not-for-profit organizations and consumer associations could be an important part of this strategy. Compliance can be enhanced if the market participants perceive enforcers' concerns and/or interventions as legitimate. Hence, enforcers should also care about the public's perception of the authority's independence and performance. The authority can conduct annual or biannual surveys to monitor this performance indicator.

Fifth, enforcers should in principle intervene by escalating threats and using a continuum of sunshine, soft and hard enforcement, except if such an escalating strategy is likely to prove inappropriate (e.g., when there is serious risk of imminent irreversible damage, indications of recurrence, or no frequent interactions between the authority and the concerned company).

Sixth, enforcers should be able to gradually and rapidly escalate and/or de-escalate their intervention to remain really responsive. Static enforcement could be avoided if authorities include time limits or review clauses (e.g., sunset/sunrise clauses) in their decisions. Sunset clauses can phase out a remedy when the competition problem has been addressed, while sunrise clauses may compel authorities to revisit the effectiveness of the remedy in light of new market circumstances. By operating in this way authorities could reduce type I and type II errors.

Seventh, to avoid static enforcement, authorities should revisit their performance, and reassess the solutions given based on pre-identified benchmarks. This is particularly important in fast-paced, dynamic markets where a remedial solution given at a given time may be inadequate or excessive a few years later.

Eighth, enforcers should invest in learning from the market. They could utilize bilateral and plurilateral negotiations and other softer enforcement tools to learn about the functioning of the market and guide the companies. These tools should be focused on dealing with information asymmetries and utilize third-party observations to avoid underenforcement (e.g., market testing commitments).

Ninth, enforcers should learn from each other. This could be achieved by organizing regulatory conversations and utilizing the cooperation and collaboration capabilities of the existing networked institutional structure introduced by Regulation 1/2003.

Tenth, focusing on problem-solving and remedial design can lead to the realization that companies have more than one way to comply. In this case, a proportionality assessment is necessary to ensure that the remedy is adequate and the least onerous for the concerned parties. Remedial design could improve by engaging in co-creation with the concerned parties, by harnessing third-party input, and by testing the remedy before implementation (e.g., by using a sandbox). The key concern of authorities should be to help companies design a compliance pathway for the long term.

Eleventh, to avoid the pitfalls of discretionary remedialism, authorities need to have in place procedural safeguards. Such safeguards could ensure the legitimacy and effectiveness of remedies and fortify agency independence.

Twelfth, to ensure their independence authorities should not only put in place procedural safeguards, but also shield themselves against regulatory and intellectual capture. Avoiding intellectual capture can be achieved by investing in the epistemic capacities of the authority (e.g., collaboration with academics and other expert advisers, conducting research projects, participation of enforcers in academic conferences, staff training).

Thirteenth, responsive enforcement may entail higher implementation and monitoring costs. These costs could be dealt with by delegating to experts the monitoring of commitments or imposing reporting on the concerned parties.

Fourteenth, given that enforcement that aspires to be responsive (e.g., by using softer tools such as commitment decisions and settlements before employing the big guns) can generate false positives and false negatives, lead to regulatory failures or undermine Rule-of-Law principles (e.g., by allowing enforcers to instrumentalize competition law, and use it for purposes remotely connected

with the protection of competition), judicial review is crucial.[198] In other words, adjudicators' role is to make sure that enforcers remain responsive. As a result, their review should be on the merits and not restrained by doctrines of judicial deference (e.g., the complex economic assessment doctrine), since it is important that judges assess whether the theory of harm and the remedies match.

6 CONCLUSIONS

The present study argued that the various enforcement tools and strategies that are available to competition authorities suggest that the conventional view on the distinction between competition law and regulation is inaccurate. 'Regulatory antitrust' is a natural evolution of competition law enforcement and not an aberration. This trend has always been present since competition rules have a hybrid nature and competition authorities have always used various tools and remedies to apply the law. Yet nowadays this trend has become dominant. The HCC authority was used as an example to illustrate this point. Yet, most competition authorities operate along these lines. Thus, the HCC is not an outlier but an illustrative example of how modern competition law enforcers operate.

Unlike the crime-tort model that considers appropriate only the *ex post* and proscriptive enforcement, the responsive enforcement model accepts that a combination of *ex post* and *ex ante* interventions, and prescriptive and proscriptive tools, and restorative and prophylactic remedies could be crucial for the realization of the law's goal. Hence, this model can better describe how modern enforcers operate. This enforcement style towards what we call here 'responsive enforcement' should be welcome as it could arguably ensure a more effective application of competition

[198] For the specific issue of whether a Competition Authority is bound by a commitment decision *see* Alexander Ruiz Feases & Stavros Makris, *Commitments and Network Governance in EU Antitrust: Gasorba*, 55(6) Common Mkt. L. Rev. 1959 (2018), doi: 10.54648/COLA2018152. On the basis of what has been set out in this study, it can be argued that the ne bis in idem principle does not apply where a competition authority imposes commitments and then a regulator intervenes under regulatory law. This conclusion seems to be reached, *a maiore ad minus*, by applying the recent case law of the CJ by analogy. Compare Case C-117/20 *bpost SA* v. *Autorité belge de la concurrence*, 22 Mar. 2022, ECLI: EU:C:2022:202 (where the Court held that 'Article 50 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 52(1) thereof, must be interpreted as not precluding a legal person from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalization of the relevant market, provided that there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; that the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and that the overall penalties imposed correspond to the seriousness of the offences committed').

law. The challenges of the modern economy, in particular the emergence of digital markets as well as the need to accelerate sustainable growth, render multi-level problem-solving enforcement not only inevitable but also desirable.[199]

However, enforcement that aspires to be responsive may create problems of over-enforcement or under-enforcement, allow regulatory failures, or undermine Rule-of-Law principles. For this reason, we used here the responsive regulation theory not only to grasp enforcement trends and identify the challenges they raise but also to articulate specific recommendations that could improve enforcers' performance. In competition law 'substance and procedure are not distinct bodies but part of a continuum of legal and institutional rules, practices and mechanisms'.[200] In the end competition law is as good as its enforcement.[201]

---

[199] Klaudia Majcher & Viktoria Robertson, *The Twin Transition to a Green and Digital Economy: The Role for EU Competition Law*, Graz Law Working Paper No. 05-2022 (11 May 2022), https://ssrn.com/abstract=4106485.

[200] Daniel Crane, *The Economics of Antitrust Enforcement* in Keith Hylton, *Antritrust Law and Economics* (Edward Elgar Publishing 2010).

[201] William Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix,* 1(1) Columbia Bus. L. Rev 1, 36 (2007) (noting that 'antitrust rules should not outrun the capabilities of implementing institutions. Antitrust rules and decision-making tasks must be administrable for the central participants in the antitrust system').