Settlements in EU competition enforcement

An economic analysis

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1 Introduction

1.1 The scope and aim of this thesis

In Rue de la Loi in Brussels, Belgium, lies the Berlaymont, the famous headquarter of the European Commission, the executive arm of the European Union. From this office building originates many decisions that affect citizens and organizations of the European countries. Among those with greatest impact are the decisions concerning the enforcement of EU competition law. *These decisions and the proceedings leading to them form the scope of this thesis.*

Competition enforcement decisions have vast economic consequences directly and indirectly, they involve substantial elements of discretionary decisions, while at the same time, the reasoning behind these decisions is difficult to access for the public opinion. The choice of type of decision, and the type of procedure leading to that decision, is therefore well worth a close examination.

The sheer size of fines alone indicate the massive impact of EU competition proceedings: From the introduction of the new procedural regulation in 2004\(^1\), the total amount of fines amounts to € 10.1 Billion\(^2\). This is equivalent to the GDP in a small country, such as Jamaica, Uganda or Albania\(^3\). Considering that fines are only imposed in some of the competition cases, the sum of fines only gives a taste of the total impact of competition proceedings. For example the recent decision concerning free browser choice on all

\(^3\) Error! Hyperlink reference not valid.
Windows PCs\(^4\), functioning retroactively in form of updates, will concern the 100 million PCs already using this operating system, and 30 million new European users each year\(^5\).

Also the challenging legal aspects of such decisions make such an analysis important. Perhaps no other field than Competition law is characterized to such a degree by the interaction and tension between law and economics. The decisions imposed are legal in nature, but economic considerations are given substantial weight. The interaction between law and economy occurs at several levels. First, the rules are built upon economic considerations, and the law merely operationalizes\(^6\) the desired economic policy. Second, the nature of the activity governed by the rules is measured in economic terms in relation to the rules, i.e. the question of whether the legal boundaries of competition laws are overstepped is answered by use of economic considerations. Third, economic considerations are important for the *enforcer*, when it chooses its decision to address an infringement. It is these economic considerations of the enforcer form that relates to the scope of this thesis, namely the Commissions choice of type of decision it intends to impose, and thereby the type of proceeding leading to it.

The modernization of competition enforcement in 2003\(^7\) left the Commission with different types of decisions with different types of proceedings leading to that specific type of decision. I will analyze the opportunity of the Commission to apply various forms of settlements, as opposed to a traditional fully adversarial process\(^8\). Settlements in EU competition law may be in form of commitment decisions\(^9\), in form of settlements rewarding cooperation with cost saving procedures\(^10\), and to some extent informal

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\(^4\) Microsoft browser case commitments, press release, IP/09/1941, Date: 16/12/2009.
\(^5\) Microsoft browser case commitments, frequently asked questions, MEMO/09/558 Date: 16/12/2009.
\(^6\) Kolstad (2009).
\(^7\) Reg. 1/2003.
\(^8\) Cfr. Art 7, reg. 1/2003, henceforth, when referred to art. 7 in this thesis, this implies art. 7 of reg. 1/2003.
\(^9\) Art. 9 Reg. 1/2003, henceforth, when referred to art. 9 in this thesis, this implies art. 9 of reg. 1/2003.
\(^10\) Art. 10a, Reg. 773/2004 henceforth, when referred to art. 10a in this thesis, this implies art. 10a of reg. 773/2004.
settlements. The Commission may also choose not to follow up a case, if it does not find an infringement likely, or that the case would require extraordinary resources to follow up.

The aim of this thesis to use economic theory to answer how the enforcement agency’s policy for ending cases over time may yield the highest social welfare. The primary object of this analysis is therefore the procedural EU law, especially concerning the ending of the enforcer’s competition proceedings.

The scope of this thesis relates to a situation in which the Commission faces a complex decision. An economic analysis can structure the deliberations and analyses of the competition enforcer. They can provide the main factors of the analysis, and how they should be weighed against each other. However, economic reasoning cannot take into account all aspects of complex decisions, and it is therefore important to place the decision in context. It is therefore a secondary aim of this thesis to provide an outline also of the legal basis of such decisions, and address other issues arising in connection with the introduction of settlements in EU competition enforcement.

The perspective of this analysis is that of the competition enforcer. In the European Union, the Commission is the central enforcement agency for the EU competition rules, and has a special role in enforcing competition law in the entire union market.\textsuperscript{11}

The decision is therefore analyzed from the Commission’s angle of view, even though the choice of type of decision and proceeding also involve other important stakeholders:

- The national competition agencies (henceforth NCAs)\textsuperscript{12} are dependent on cooperating with the Commission. While the NCAs primary role is to enforce the member country’s own competition law, the Commission is responsible for

\textsuperscript{11} TFEU Art. 105.
\textsuperscript{12} In fact they may be involved in the procedure., cfr. Art. 11, Reg. 1/2003.
enforcing trans-national competition matters, where the treaty directly applies, cfr. TFEU art. 101 and 102\textsuperscript{13}.

- The decision is also of great importance for the undertakings\textsuperscript{14}, because they are directly affected by the decision. To some extent they also influence the proceedings, especially with regard to settlements, were negotiations are crucial.

- Finally, third parties are affected by the proceedings, and may to some extent also influence the proceedings and the final decision.

1.2 The purpose of the procedural competition law enforcement rules

The procedural rules are only a part of the complex set of rules in the competition law and enforcement system comprising laws, institutions and enforcement procedures. The main function of the procedural rules is to ensure the competition rules are enforced as efficiently as possible.

In the very core of competition law lies as a premise that if the government abstains completely from intervention in the markets, some undertakings will profit from the market in a way harming social welfare. This is what justifies the cost of enforcing the competition rules.

The general purpose of competition law can be expressed negatively as to obstruct undertakings from enriching themselves at the cost of the society as a whole by

\textsuperscript{13} In accordance with the wording “may affect trade between the Member states”. In case of conflict between national law and Community law where both may be applicable, the starting point is that Community law takes precedence over national law, see for example Case 6/64. Flaminio Costa v E.N.E.L., Competition Law (2008) p 75 etc.

\textsuperscript{14} The term is not defined in the EU treaty, ECJ has, in e.g. Case C-41/90. Judgment of the Court (Sixth Chamber) of 23 April 1991. Klaus Höfner and Fritz Elser v Macrotom GmbH. GmbH, held that the term encompasses “every entity engaged in an economic activity”. Questions may arise as to whether organizations are “undertakings” or not, but for the purpose of this paper, no further considerations regarding the extent and scope of this term will be discussed.
collaborating or misusing market power. But it can also be expressed positively as to organize the market to induce innovation and competition, which in turn will benefit the economy as a whole as opposed to a completely unregulated market.

With regard to the sanction rules, of which decisions are an important element, the purposes of these are to restore a competitive market in following the infringements, and to ensure proper incentives for the undertakings to behave in accordance with the competition rules. To effectively contribute to this, the sanctions for breaking the rules of competition serve several purposes. These can be grouped into the following categories: Ending the infringement, prevention and reparation$^{15}$.

*Ending the infringement* implies that the activity infringing the competition rules must be brought to an end. Ending the infringement *early* is usually of great importance, both as a means of reducing the loss caused by the infringement, but also to ensure none of the competitors are pressed out of the market by the infringing undertaking, which in turn could be detrimental for the competition on the market.

*Prevention* relates to the deterrence of new infringements. It is quite safe to assume that without a functioning sanctions system, the effect of the competition rules will be greatly reduced$^{16}$. Measures from the enforcer implying a preventive effect therefore correspond to future savings in infringement costs.

*Reparation* relates to re-distributing the profit illegally gained by the infringer to those who have incurred losses because of the infringement, primarily consumers or competitors. Reparation is not the primary scope of this paper, first and foremost because it is not enforced by the competition authority itself, but rather through civil lawsuits.

$^{15}$ The following systematic organization of the different purposes of competition law sanctions is based on the grouping in Norsk Konkurranserett, Volume II (2006) p.17.

$^{16}$ That the absence of a law enforcement authority leads to an increased level of infringement, has been demonstrated throughout history. In Copenhagen in 1944, the occupying Germans arrested the police force, though an improvised guard assumed some responsibility for enforcement, criminality increased rapidly, because of the lack of police. A similar situation arose during a police strike in Canada.
The vast impact of competition law proceedings makes it necessary for the enforcer to take into account other factors than just the effectiveness of the remedy. For example, the costs of imposing the sanctions must be taken into consideration. As mentioned above, the competition rules are justified as a means of making the society as a whole benefit due to more competition. But if the sanction costs become too high, they may actually cause a loss to the society\textsuperscript{17}. Even though infringements of the competition can be harmful to the society, the sanctions must not in turn exacerbate the loss for the society by leading to job-loss, and uncertainty regarding investments and contracts that are to be completed.

1.3 The methodology of this thesis

Throughout the thesis I will use various theoretical frameworks in order to determine the optimal way of ending the proceedings. These frameworks include cost-benefit analyses, analyses of the firms’ individual behavior and principal-agent theory.

The majority of the analyses in this thesis are economic in nature. But initially I will present the rules serving as a legal basis for the Commission’s decision. When deriving the content from the sources of law, I will rely upon the legal method of EU law.

The legal review of the relevant rules aims at presenting the system of the procedural rules, and the decisions finding their legal basis in them. I have devoted more of the review to an overview of the system of sanctions rather than to deal with more marginal, but legally challenging questions that may arise in connection with the interpretation and application of the enforcement rules. To fully understand the rules, and place them in their right context, a brief description of the rest of the procedural system is also included.

The main part of this thesis is a qualitative rather than a quantitative analysis, and the reasoning and findings of the thesis are presented in form of text. However, I sometimes

\textsuperscript{17} Becker (1968).
use basic mathematical models, because they provide more accurate descriptions of effects than words alone. These are presented in the footnotes of the text, designated by letters instead of numbers. When these footnotes occur, the reader may choose to take a closer look on the expression, or to continue reading. I believe these expressions most accurately give a description of the analysis on which this thesis is based, but it is not necessary to read them to understand the thesis.

I have, based upon material from the Commission, investigated the current use of settlements in EU, by use of simple statistics. The statistics demonstrate the impact, and thereby the relevance of settlements in EU enforcement proceedings, but are not directly related to the economic reasoning of the thesis. I have therefore chosen to present these findings in an appendix to the rest of the thesis.

1.4 Terminology

This thesis investigates the use of settlements in EU law. However, the European Commission has no procedure for ending competition cases which is generally applicable, that is specifically designated as a “settlement”\(^{18}\).

Through this thesis, I will use the word settlement for the forms of procedures in EU competition law implying a negotiated remedy, i.e. Art. 9 decisions, art. 10a decisions and informal settlements\(^{19}\). When I use the word “settlement”, I therefore refer to any of the forms of settlements that can be used in EU law, i.e. commitment decisions, procedural settlements or more informal settlements.

This will be more in line with general legal and economic terminology, and make it easier to draw upon existing analyses and literature, especially with regard to law and economics.

\(^{18}\) Art. 10 a of 773/2004, use the word settlements, but this is limited to cartel cases.

\(^{19}\) This will be described further below.
The reader might like to bear in mind that when I refer to settlements this predominantly implies commitment decisions, as this is the by far most used type of settlement under the new procedural regime.

The enforcer in this analysis is the Commission. Occasionally, I choose to use the more general word “enforcement agency” or “agency”, to indicate the generality of the analysis. Whenever the more general term “enforcement agency” is used this nonetheless refers to the Commission.

In economic theory, the concept of utility, defined loosely as the satisfaction or happiness gained by an action, is used to weigh the consequences of actions against each other. In this thesis, I do not use the term utility, because most of the effects can be described using monetary values. I therefore use the term “value” on some occasions where one could use the term utility, such as in the “aggregate value” of a market for the consumers, resembling the utility of the consumers.

Sometimes the Commission’s choice is referred to as a choice of type of decision and thereby the type of proceedings. Strictly speaking, the proceedings precede the final decision, but because of the differences in procedural requirements\textsuperscript{20}, the Commission must follow the proceedings of the type of decision it \textit{intends to impose}. It is therefore natural to describe the choice as a choice of type decision thereby requiring the appropriate type of proceeding rather than a choice of proceeding leading to a decision.

1.5 The problems of this thesis

The scope of this thesis is to shed light on the introduction of settlements in EU competition proceedings. The proceedings I investigate are the proceedings leading to a decision with a legal basis in Regulation 1/2003\textsuperscript{21}, which is the antitrust and cartel

\textsuperscript{20} For example, these are more extensive if the Commission wants to impose fines.
\textsuperscript{21} Proceedings related to f.ex. Mergers and State aid therefore falls outside the scope of this thesis.
proceedings. I seek to broadly assess the introduction of more formalized settlement procedures in light of EU law in order to answer in which situations the different sanctions should be used.

The perspective is the enforcer’s, and the object of analysis is the effects of the different, specific alternatives\textsuperscript{22}, where the enforcement agency should seek to chose the best applicable type of decision in each case. Because of the agency’s own budget, this corresponds to a constrained maximization problem.

To fully answer the question of the enforcer, and place it in context, the main problems of this thesis are to

1. Outline the legal and economic basis of the competition proceeding, in order to conduct an analysis of EU competition law enforcement

2. Analyze if, and how the enforcer may use the widened choice of type of decision and the required type of proceeding leading to it, to increase the overall effectiveness of competition enforcement.

3. Comment on the issues that arises because of the introduction and use of settlements in EU competition enforcement, in light of other academic work

1.6 The outline of the thesis

In order to elucidate the problems of this thesis, I will investigate several aspects of competition enforcement and law and economics.

The purpose of chapter 2 to 5 is to address the first problem in this thesis, namely to outline the legal and economic basis of the competition proceeding. I will establish the scope of the

\textsuperscript{22} In fact given by law, cfr. Reg. 1/2003.
analysis, outline the proceedings, and present the choices the commission with regard to different types of decision. I will further briefly comment upon the economic cost of infringements, which it is the primary aim of the enforcer to reduce.

- In chapter 2, the general use of economic analyses on law is presented, as well as and how economic analyses might guide the enforcement agency in its discretionary decisions.

- In chapter 3 and 4, the legal basis of the Commission’s decision is reviewed, an overview of the proceedings, and the nature and extent of the Commission’s competence is provided.

- In chapter 5, the economic cost of competition infringements is assessed.

In chapter 6 to 10, I will address the second problem in my thesis, namely to analyze if, and how the agency may use its range of choice regarding type of decision and required type of proceeding to reduce the economic cost of infringement.

- In chapter 6 and 7, it is discussed how effective allocation of resources can contribute to reducing the cost of competition infringements.

- In chapter 8, the various effects of choosing a type of decision are more closely assessed. It is illustrated, using i.a. case law, how the agency could and should use economic considerations in its decisions. It is demonstrated how law interacts with economic considerations, and how these considerations, with the general model in mind, can contribute to more efficient enforcement.

- In chapter 9, it is assessed in more detail how the choice of type of decision affects the resource use of the enforcement agency.
In chapter 10, it is described a number of “typical cases”, i.e. situations where one type of decision usually is more appropriate.

In chapter 11 to 13, I will address the third problem in my thesis, to investigate and discuss the use of the settlements, by describing important issues in relation to the introduction of settlements in EU competition enforcement, and finally conclude. The purpose of this section is to place the analysis into its context.

In chapter 11, important issues in relation to the introduction of settlements are outlined and commented on in light of academic works on competition proceedings. Also, a comparative outlook on the US use of settlements, which were influential in the introduction of settlements in EU law, is provided.

In chapter 12, I provide ending comments.

In chapter 13, the thesis is concluded

2 The use of economic analyses on law

2.1 Introduction

In this chapter, I briefly introduce the field of law and economics, describe the types of law and economics analyses, as well as the scope and limitations of law and economics analyses. The purpose of this is to clarify important aspects of law and economics that are important to bear in mind during the further analysis. In addition to this, I will describe how law and economics can act as a guideline regarding discretionary decisions, which is the form of decisions this analysis concerns.
2.2 An outline of the field of law and economics

The field of law and economics is an approach to legal theory applying methods of economics to law. In other words, it is the use of laws as the object of analysis using economic theory. Apart from its object of analysis, law and economics does not differ from other application of economic theory.

Law has several features making the analysis of legal theory and practice different than most other objects for economic studies. First, the object of analysis is itself abstract. Laws do not exist physically, only the sources of law, and the effects that manifest when it is applied. This is why economic studies of law are generally concerned about the effect of law, i.e. how law manifests itself in measurable effects.

Second, laws are a dynamic matter both in application in a specific case as well as the way it evolves as a system. The application of laws open up for a wide range of action, and the same sources of law can provide different effects because the circumstances have changed; the effects are therefore not static, though they are not entirely unstable and unpredictable.

2.3 Types of law and economics

Law and economics can apply to several aspects of law. In law and economics, it is common to differ between positive and normative law and economics. By positive law and economics is meant analysis of the effect of laws, i.e. seeking to explain how law works. By normative law and economics is meant using the findings about how law works to make policy recommendations to better ensure the efficiency of legal rules.

Positive law and economics can be further divided: First, into theoretical law and economics, in which one uses economic theory to predict the effects of law. Second, into

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empirical law and economics, which investigates empirical effects of law, using economic methods such as econometrics.

Normative law and economics can be divided\textsuperscript{25} into normative jurisprudence, which primarily aims at explaining how the rules should be, regardless of their current shape and sources, and second into applied normative law and economics, which aims at providing the best solution possible, in an economic sense, which can be drawn from the available sources in a specific case.

The analysis in this thesis does not fit accurately into any of these categories. The object of analysis is a choice between several remedies which are legally available. The aim of the thesis is to provide a guideline to which situations the different remedies will be appropriate. The analysis therefore consists of two elements, first to describe the effects, mainly drawing upon theoretical models, then to make recommendations based upon these conclusions. As such, the analysis therefore consists of a combination of positive analysis, and normative recommendations based on positive analysis.

2.4 Scope and limitations of law and economics analyses

Using economic theory is only one of several theoretical frameworks that can be used to describe the effect of rules of law. Other types of theory can also be used to describe how legal rules work, such as psychology, social science methods etc. Most of the theoretical frameworks these provide are, however, like academic study of law, qualitative in their nature. The use of economic theory opens up for combining qualitative and quantitative reasoning to a larger degree. Thus, they open up for seeing the rules in an entirely new light, and to make calculations that describe the effects of laws on basis of empirically reliant data.

Law and economics is only one area in which there is a close interaction between two scholarly disciplines. In almost all other fields of science, attention has been drawn to inter-

\textsuperscript{25} Kolstad (2008).
disciplinary study. This development corresponds well to our understanding of how the different parts of the world interact and are inextricably bound together.

Economics cannot provide exhaustive answers about all effects of law. Economic theory draws upon simple models to enable analyses of the effect of a limited set of variables. To isolate the different variables relevant to the analysis of the effect of legal rules can be extremely rewarding when it comes to revealing correlations, causes and effects. At the same time, it does not take into account in all the aspects and nuances of complex legal questions. Fundamental assumptions are necessary to reduce the number of variables. Moreover, the answers derived from economic theory cannot be more accurate than the data it relies on. And in the field of law, the effect of law can often be described in measures that are hard or impossible to quantify, such as prevention, justice, fairness etc.

Neoclassical economics\(^{26}\), which is the basis for most studies in law and economics, has been subject to systematic critique on basis of its assumptions. Criticism of the neoclassical economic theory points to many issues that are important to bear in mind when using the theoretical economic models. The criticism has come from various camps, but mainly relates to two categories.

First, rational choice theory is criticized because of its cognitive foundations\(^{27}\), which relates to the fundamental premise of rational choice. Among this criticism is that the theory of rational choice makes unrealistic assumptions about how the participants in the market form their decisions, for example regarding perfect information. According to this criticism, the “economic man” of neoclassical economics is in reality unrealistic\(^{28}\).

\(^{26}\) Referred to as “A collection of assumptions customarily made by mainstream economists starting in the late 19th century, including profit maximization by firms, utility maximization by consumers, and market equilibrium, with corresponding implications for determination of factor prices and the distribution of income.” Deardorff (2009).

\(^{27}\) Brian (1997).

\(^{28}\) Thorstein Veblen (1898).
Especially lately, the hypothesis of rational economic players has been criticized. But this criticism relates more to market behavior in itself\textsuperscript{29} than to white-collar crimes. One may relatively safely assume that most willful competition infringements are more or less rational acts motivated by profit. The enforcement agency should also seek to enforce competition law in a way that at least not gives incentives to breaking the law. This confers to a need for logical consistency in the enforcement. Assuming most players over time to be rational may be a good guideline to enforce the rules effectively, and minimize adverse effects.

Second, the theory has been criticized because of its structural foundations\textsuperscript{30}. It is held that the general equilibrium analysis and game theory payoff matrices provide a too simple explanation of how the participants really interact. This may especially relate to how neoclassical economics incorporate into it an economy that develops and the role capital goods\textsuperscript{31}

Despite the objections to use of neoclassical economics, I find it justifiable to use microeconomic models in this thesis. First, the aim of this thesis is to analyze only a very small part of the economy, in a situation less complex than the overall real economy, and where the specter of choices are genuinely limited because of the procedural rules. Such a situation is better suited for an analysis using simple frameworks, because many of the presumptions necessary follows directly from legal regulation.

Second, the rational choice theory might very well be too inaccurate to describe how a specific market participant will act with reliable certainty in a specific situation. However, when analyzing the rules \textit{generally}, to describe how the market participants \textit{generally} will act, the theory can provide clear indications because the variances will not be as extreme as in a specific case.

\textsuperscript{29} Such as buyers and sellers of advanced financial products.
\textsuperscript{30} Brian (1997).
\textsuperscript{31} Such objections have been raised and discussed often in economic literature, an example being the "Cambridge Capital controversy".
Third, the market participant in question in the following thesis is an organization rather than an individual. Organizations are assumed to act different from physical persons, because their choices as well as their expected outcomes are different. The organization itself cannot, for example be imprisoned, and its limited liability induces greater risk-taking behavior. Application of the theory of rational choice to organizations can therefore provide greater accuracy than for physical persons.

With regard to the analysis of the rules of law, the question is therefore not whether a model describes the real-life situation as accurately as possible, but whether one is able to infer relevant, verifiable and interesting conclusions from the analysis.

Like any other use of theory, use of economic theory can be likened to putting on a new pair of glasses. They open up for seeing the world in a new light, and can provide more detailed and accurate information, and thus reveal unseen truths. One must, however, not forget that one wears those glasses. If so, the models become a bias rather than an angle of approach.

Theoretically rewarding use of economic theory therefore encompasses at least two important aspects. First, knowledge of the models themselves, how they work, and how to interpret the results they yield. And second, sound knowledge of the scope and limitations of the models, what information they will provide accurately, and what they will not answer.

2.5 Economic analyses as a guideline in discretionary decisions

Law is but a tool for policymakers to give life to their decisions, and ensure application consistent with the desired policy. In other words, laws operationalize\textsuperscript{32} the intent of the

\textsuperscript{32}Kolstad (2008).
policymakers. But acting as a tool for the policy makers, laws can never absolutely realize the exact intent of the policymaker.

While many policies can be implemented by enforcing norms prescribing cause and effect, given in written text, as is most usual in our legal order, in a fully functioning legal system, some room must be left to discretionary decisions. A detailed normative system opens up for analogies and extended interpretation as unexpected situations requires application of the law. A less detailed legal system opens up for limiting interpretations of wide-reaching norms. In most well working legal systems, a fair balance has been struck between these two extremes.

To a certain extent, a lack of materially oriented law, i.e. in its simplest form, norms prescribing cause and effect, can be mended by more extensive procedural regulations, for example constituting who is to decide, in what forms the decision must be made etc. Most changes in constitutions are for example dependent on qualified vote by a competent assembly, typically a parliament, and such examples apply to many forms of norms.

But even the most intricate and sophisticated procedures opens up for a certain amount of discretionary decisions. Especially when the norms open up for a wide range of actions, or leave open several alternatives, the law enforcer must often choose between different alternatives, with or without being able to seek any significant guidance in the law – often because it is the intention of the law-maker to leave this decision to the organ deemed most competent.

Especially in complex fields of law, the problem of imposing the right decision becomes crucial. Here, the authority enforcing the law often seeks to combine aims which are difficult to unite. The problem in question in this thesis is such a problem, as it is left to the enforcement agency to make the decision on which type of decision it wants to implement on the actual case. By acting as an enforcement agency the competition authority have a broad responsibility for minimizing the loss caused by anti-competitive behavior.
In Norwegian law\textsuperscript{33} this is usually done by \textit{weighing} the \textit{relevant} sources of law, their meaning correctly interpreted, against each other. In case of collision between norms\textsuperscript{34}, there exist norms regarding which rules to apply, and to arrive at the correct solution.

Apart from the rules governing the competence to impose a decision, the Commission does not have a set of norms that absolutely guides it to the right decision, and it must therefore also use its discretionary competence when applying the rules.

An economic analysis can serve several purposes in relation to such a decision. First, it can indicate the how the agency can apply the rules to form an optimal policy for ending cases. Second it can serve as a starting point in relation to an analysis of the sanction rules, to analyze whether or not the sanctions system is an effective tool in the application of the norms enforced.

It was such application of economics to the field of criminology that Gary Becker introduced in his seminal article “Crime and punishment”\textsuperscript{35}. In the words of Becker, one needs to establish a “criterion that goes beyond catchy phrases and gives due weight to the damages from offences, the cost of apprehending and convicting offenders, and the social cost of punishments”. In the article, he demonstrated how the welfare function of modern welfare economics can act as such a criterion.

The strong bonds between economics and law in the field of competition law make use of economic frameworks particularly relevant: The competition rules are the ground rules for the market itself, which is usually the objective of study in economy. Further, the motivation of the participants in the market, which are the subjects of the legal rules, is economic. The very infringement of the competition rules is, in essence, that one gains an

\textsuperscript{33}Eckhoff (2001) p. 20 – following.
\textsuperscript{34}Eckhoff (2001) Chapter 13.
\textsuperscript{35}Becker (1968) p. 181.
illegal profit by acting contrary to the competition rules. Finally, economic theory has a vital impact on the making of competition law, and the infringements usually consist of distorting the markets in an undesired manner.

In a broader competition context, in relation to the choice of type of decision, such a criterion can be an effective indicator on the effectiveness of the enforcement system. Also here is needed criterions that give due weight to the various effects the decision will imply. It is on this basis I have chosen to use economic analytical tools to address the problems in this thesis.

3 A legal review of the enforcement proceedings

3.1 Introduction
In this chapter I will outline the enforcement proceedings from a legal viewpoint, by pointing out the relevant rules, the rules governing the proceedings, and the stages of the enforcement proceedings. Moreover, I will describe the different “tracks” of enforcement at the Commission’s disposal, encompassing formal and more informal tracks of proceedings that may lead to a decision. The aim of this chapter is to give an outline of the legal framework in the proceedings, and show how the proceedings, whose final decision is the object of my analysis, progress.

3.2 The relevant rules
The relevant rules with respect to the sanctions system of EU competition law have their legal basis in TFEU art. 103 which imply that further and more specific rules are to be introduced.

With regard to the proceedings, the most important of these is Council Regulation 1/2003, henceforth Regulation 1/2003, Commission Regulation 773/2004, as well as relevant case
These regulations were a part of the modernization process of European competition law, and entered in force from 1 May 2004.

Regulation 1/2003 contains the most important procedural rules relating to EU competition law enforcement. With regard to the sanctions system and possibilities for ending the proceedings, the most important rules are found in the regulations chapter III: Commission decisions:

- Article 7 decisions form the legal basis for the Commission to find and order the termination of an infringement, impose remedies, and if needed, a fine with basis in art. 23, with basis in regulation 773/2004, art. 10a, the commission may also reward cooperation in the proceedings by reducing the fine by 10 %, in a procedural settlement.

- Article 9 provides the legal basis for commitments, which basically is a form for settlement. Following negotiations, the undertaking(s) in question make an offer for a commitment that aims at solving what might be an infringement. Subsequently, the Commission decides whether to make the commitment binding, in which case it is given legal force. Given that the undertaking complies with the commitment, the Commission concludes that there are no longer any grounds for action, and the process comes to an end. In other words, there is a remedy, but no decision finding an infringement.

- The Commission also has the possibility of concluding that the competition rules are not applicable to the case, i.e. negatively finding an infringement, Art. 10. In addition to this, more informal settlements may also still be used.

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37 The Commission may, at its own discretion also reward cooperation in cases other than with basis in 10a decisions, cfr. The Commissions guidelines on setting fines, para. 29. However, art. 10a decisions are the only type of decision in which the undertaking has a legal claim to this reduction.
3.3 Background and characteristics of EU competition rules

Regulation 1/2003 is a part of a modernization of the enforcement of EU competition rules. It aims at better addressing infringements, and allocating resources to best improve competition in EU markets.

Traditionally, when the EU originated, there was little tradition for competition law in Europe. Thus, it was concluded that enforcement of competition should be centralized to one institution, to better ensure harmonious and effective enforcement.

This situation is now radically different. There are now fully functional NCAs that are both competent and capable of enforcing competition rules even in complex international markets. Further both undertakings and stakeholders are very aware of the competition rules, and these rules which play an important part in their choice of actions.

This development has increased the need for, and made it less alarming that national NCAs and even the undertakings themselves take a more active role in competition proceedings. If successful, such involvement can lead to better integration between the stakeholders in a competition case proceeding, better resource allocation, and finally; better results.

Due to more active stakeholders and the resource constraints of the Commission, a policy of settling cases informally began. While providing flexibility for the parties involved, this method of ending the proceedings lacked the transparency and formalized framework that characterized other competition decisions. Thus, a need for legal regulations arose, and it was natural to address this in the modernization process.

The widened cooperation with NCAs and the parties involved is not entirely unproblematic, and gives rise to new problems. One example of this is pluralism in enforcement of the rules, which themselves open up for a wider variety of sanctions, when
the same rules are applied by different institutions.\textsuperscript{39} This heterogeneity in both enforcement and types of decisions has made the need for transparency and predictability through the rule of law even more crucial than it was before.

3.4 Overview of the Commission’s procedure leading to a decision

3.4.1 Timeline

After the start of the investigation, the further procedure of the Commission investigating and finding infringements consists of two successive stages\textsuperscript{40}: First, the Commission investigates facts, second, it makes its objections known to the concerned undertakings and takes any decision it deems necessary. The third stage is the optional judicial review of the decisions by courts, if the Commission’s decision is contested.

Despite there being three major stages in a competition proceeding, the Commission has the option of choosing different “tracks” of enforcement procedure, dependent on the type of decision it intends to make.

\textsuperscript{39} Norsk konkurranserett, Volume II (2006) p. 11.
\textsuperscript{40} PVC cartel cases: Limburge Vinyl Maatschappij NV (LVM) (C-238/99 P), DSM NV and DSM Kunststoffen BV (C-244/99 P), Montedison SpA (C-245/99 P), Elf Atochem SA (C-247/99 P), Degussa AG (C-250/99 P), Enichem SpA (C-251/99 P), Wacker-Chemie GmbH and Hoechst AG (C-252/99 P) and Imperial Chemical Industries plc (ICI) (C-254/99 P) v Commission of the European Communities, cfr. EC antitrust procedure (2005) 1-039.
The basis has traditionally been the elaborate art. 7 procedures, which ensures that the undertaking has an option of defending itself before the Commission imposes a decision. Also in case there has been a complaint, certain procedures must be followed. However, in cases where the parties negotiate the outcome of the case; there is less need for a procedure resembling a trial.

The Commission may in such cases proceed more informally, such as with art. 9 decisions, which, for example, do not require the lengthy statement of objections. In these more informal proceedings, the procedure is just as much aimed at informing other parties of the intended decision, and ensure that these may voice their objections to the proposed solution.

It lies within the Commission’s discretion to decide what procedure to follow, but the undertakings can of course not be forced to negotiate. In case one “track” of proceedings does not lead to a decision, the Commission may seek to use another track to ensure a final result.

### 3.4.2 The start of the investigation

The investigation starts when the Commission decides to investigate a case to assess whether or not a competition infringement procedure should be initiated. To decide this, the Commission must obtain information about the possible infringement. This may come from various sources, both from the Commissions own investigation, the undertakings themselves, or from third parties:

- Formal complaint
- Transfer from NCA

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41 Typically because the case affects “trade between the Member states”, cfr Art. 101 and 102. If the Commission initiates proceedings to adopt a decision, the NCA is relieved of its competence, cfr. Art. 11 (6), Reg. 1/2003.
Complaints have traditionally been very important in obtaining information about possible infringements\textsuperscript{44}. The last decade, the Commission has, on its own initiative, more often sought to inquire into whole business sectors where the market does not seem to work as well as it should\textsuperscript{45} Moreover, the undertakings themselves have increasingly been supplying information about own infringements in cartel cases under the leniency regime, which may result in a substantial reduction of fines if leniency is granted\textsuperscript{46}.

3.4.3 Stage 1 Fact finding

The first stage of the investigation may proceed formally or informally\textsuperscript{47}. If informal investigation is sufficient to detect adequate information and evidence regarding the case, the Commission may not need to use its formal investigative powers. If the undertakings do not cooperate, the Commission is nonetheless entitled to acquire necessary information from the undertakings. The investigative powers include:

- The right of request for information Art. 18, reg. 1/2003,
- The power to take statements Art. 19, reg. 1/2003\textsuperscript{48}
- The right for inspection of business books, records etc Art. 20, reg. 1/2003.
- Inspection of private homes, Art. 21, reg. 1/2003.

\textsuperscript{42} For example through sector inquiries, cfr. art. 17 of Reg. 1/2003.
\textsuperscript{43} CFR. Commission Notice on Immunity from fines and reduction of fines in cartel cases, Official Journal of the European Union 2006, C 298/17.
\textsuperscript{46} “In the period from 14 February 2002 until the end of 2005, the Commission received 167 applications under the 2002 Leniency Notice (see IP/02/247 and MEMO/02/23). Of these applications, 87 were requests for immunity and 80 were requests for reduction in fines”, cfr. MEMO/06/470
\textsuperscript{47} EC Antitrust procedure (2004) 1-039.
\textsuperscript{48} Though the interview requires consent.
Investigations by NCAs, Art. 22, reg. 1/2003

Compliance with these rights can be enforced by use of fines Art. 23, reg. 1/2003. The power to impose fines relates to several stages of the process. Fines can be imposed because of failure to cooperate during the proceedings, because of the infringements themselves (which makes them a part of the decision, cfr. below), or because of failure to comply with the Commission’s decision.

During the investigation, the Commission must observe procedural rules. Though the European Convention of Human Rights EU is not directly a part of EU law, court practice has determined that fundamental rights are a part of the general principles of community law. Some of these are now codified in the EU Charter on Fundamental Rights. For instance Art. 41 provides a) the right to be heard, b) access to file and c) the obligation of the administration to give reasons for its decision. These rights resemble the right to a “fair trial” after ECHR art. 6.

The procedural safeguards also include a privilege against self-incrimination, which may give the undertakings some right to refuse to supply information. Further, there is a client-lawyer privilege, which allows the undertakings to withhold certain documents. This is limited to correspondence with independent lawyers relevant for the case.

In case there has been lodged a complaint, there are some procedural rules that must be observed by the Commission. If a formal complaint is lodged, the Commission has a duty to assess it, in the words of ECJ “nothing justifies the Commission in avoiding its obligation to undertake … a thorough and impartial examination of the complaints made to

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49 There are no penalties for not complying with the power to take statements after art. 19.
50 The Convention for the Protection of Human Rights and Fundamental Freedoms, henceforth ECHR.
51 cfr. C29/26 Stauder.
53 Case 374/87 Orkem, and Case 27/88, Solvay.
54 Case 155/79m [1982] AM and S Europe Ltd.
The Commission is required to notify the complainant by letter if it does not want to pursue the case, and give the complainant time to give additional information. Final decisions regarding the proceedings are then made. If the case is rejected, the complainant may challenge the decision before court.

3.4.4 Stage 2 Hearing and decision

In stage two, the Commission either initiates the procedure, or ends the case. The proceedings may be informal or formal. The initiation is a formal step required to reach a final decision, but the decision to initiate the proceedings cannot itself be contested, only the results of a proceeding. At latest, the initiation of the case must be at the day where a preliminary assessment as referred to in art. 9, a statement of objections or a notice pursuant to art. 27 (4) is issued.

Notice to parties concerned

Giving notice to parties concerned is vital in the initiated proceedings. Art. 10 (1) of Reg. 773/2004 obliges the Commission to “inform the parties concerned in writing of the objections raised against them”. The statement of objections must set out the facts and legal arguments that form the basis for the Commission’s case. The final decision cannot address other objections than those made known to the undertaking in a statement of objections, and the undertaking must have been able to comment on it.

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55 Case C-170/02 Schlüsselverlag J.S. Moser and Others v Commission, para 29.
57 See for example Case T-24/90, Automec Srl v Commission of the European Communities.
60 Art. 2(1) Reg. 773/2004.
61 EC antitrust procedure 4-018.
Though necessary to reach a conclusion, the statement of objections is a procedural step, not a final decision, and the statement itself may not be contested before the court\textsuperscript{63}. The statement of objections is usually an extensive document, which may run over several hundred pages in complex cases\textsuperscript{64}.

In some cases, the Commission therefore resort to the less comprehensive “preliminary assessment”, or publish a notice\textsuperscript{65}. While this is not sufficient to adopt a decision after art. 7, such notices are adequate for the purpose of commitment decisions\textsuperscript{66}.

This notice must consist in a “concise summary of the case and of the commitment or of the proposed course of action”, cfr. Art. 27 (4). It is a minimum requirement to adopt an Art. 9 or 10 decision after Reg. 1/2003. The summary is just as much aimed at third parties as the undertaking, for example those indirectly affected by a commitment\textsuperscript{67}. Also the suspected infringer must be given notice of the initiation of the proceedings\textsuperscript{68}. In cases were settlements are appropriate, however, the more informal procedure the undertakings are usually well aware of the initiated procedure, and the initiation of the case, and the notice of proposed actions is therefore published as a press release\textsuperscript{69}, mostly aimed at third parties.

Following the Statement of Objections, the Commission sets a time limit for the undertaking to respond\textsuperscript{70}, or in case of a notice compliant with Art. 27 (4), a time limit for interested parties to respond.

**Notice of fines**

\textsuperscript{63}IBM personal computer, supra note.
\textsuperscript{64}EC antitrust procedure 4-020.
\textsuperscript{65}Example: RWE Gas Foreclosure OJ C 310, 05.12.2008.
\textsuperscript{66}Art. 27 (4), Reg. 1/2003.
\textsuperscript{67}See for example Case T-170/06 Alrosa Company Ltd v Commission of the European Communities.
\textsuperscript{68}Cfr. Above.
\textsuperscript{69}See for example RWE Gas Foreclosure OJ C 310, 05.12.2008.
\textsuperscript{70}Art. 10, reg. 773/2004.
The Commission may not impose fines without first informing the party concerned. The Statement of objections must make it clear that the Commission intends to impose a fine. This is to ensure that the undertakings are given a chance to defend themselves also against the possibility of a fine. The Commission must set out details of why the fine is to be imposed. But the requirement to do so is only demanded as far as it is necessary for the defense of the undertaking.

Given this requirement, there is already at an early stage of a proceeding two categories of cases, those were fines are appropriate, and those were fines are not. This decision is also influential on the range of remedies available to the Commission in the case.

In case a fine is intended, Art. 7 is the only decision opening up for a legal basis to impose a fine, and the more extensive procedure leading to an art. 7 decision must be followed. There are still room negotiated remedies, but only in form of Art. 10 a procedural settlements, which is only applicable in cartel cases.

If a fine is not intended, the Commission may choose both art. 7 decisions, as well as accept commitments from the undertakings. It is also in these situations the use of informal settlements could be possible.

The extensive nature of Statements of objections combined with the procedural regulations regarding art. 7 decisions, the Commission may sometimes sacrifice the possibility to impose fines in exchange for a more informal procedure. Indeed, the Commission has been criticized for using commitment decisions in cases were fines would otherwise have been likely.

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71 Cases T-25/95 Cimenteries.  
73 Case T-48/00 Corus UK v. Commission.  
74 The fines have basis in art. 23 of reg. 1/2003.  
75 Waelbroeck (2008).
**The parties’ right to be heard**

The right to be heard for the undertaking is one of the fundamental rights of the undertaking. The Commission may in its final decision deal only with those objections on which the undertaking has been able to comment. The right to be heard also encompasses the right to an oral hearing, if the undertaking requests it. While the right in particular concerns undertakings subject to proceedings and complainants, the Commission, if it considers it necessary, may also hear other parties.

To ensure a fair procedure which observes full contradiction, the parties are also granted access to the Commission’s file on the case, Art. 27 (2). The right to access of the Commission’s file, resembles the “equality of arms” principle in ECHR, and is also set out in the EU Charter of Fundamental Rights, Art. 41 (2) b.

**Interim measures**

The Commission may take interim measures in “cases of urgency due to the risk of serious and irreparable damage to competition, cfr. Art. 8, reg. 1/2003. Interim measures are subject to a preliminary decision, and may only apply for limited time. In practice, the uses of interim measures are rare.

**Advisory Committee**

Consulting the Advisory Committee on Restrictive Practices and Dominant Positions is a requirement for the Commission to reach a decision under Art. 7, 8, 9, 10, 23, 24 (1) and 29 (1), cfr. Art. 14, Reg 1/2003. The committee consists of representatives from the competition authorities in the different member states. The role of the committee is primarily to ensure harmonious application of competition law across the entire union.

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76 Art. 27, Reg 1/2003.
80 “Prima facie”, in the words of reg. 1/2003.
81 Art. 8 (2), Reg. 1/2003, though, the decision may be renewed.
Commission is obliged to take “utmost account of the opinion delivered by the Advisory Committee”\textsuperscript{82}.

**The Commission’s decision**

Following the proceedings, the Commission decides whether to impose a decision or not. This may result in a decision pursuant to Art. 7 (possibly including fines, Art. 23), 9, 10 of regulation 1/2003 or 10 a of regulation 773/2004. The different outcomes of a competition proceeding will be described in more detail below, under part 4

3.4.5 **Stage 3 Judicial review**

If the parties concerned contest the decision, judicial review is ensured by the General Court and ultimately the European Court of Justice. In accordance with TFEU Art. 263, the “Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and Opinions”. This implies a wide scope of the judicial review, encompassing jurisdiction with regard to penalty, legal competence, observance of procedural requirements, infringements of treaties, or misuse of powers\textsuperscript{83}. Failure of the Commission to act may also give reason for judicial review, cfr. TFEU Art. 265.

4 **The different outcomes of a competition proceeding.**

4.1 **Introduction**

In this chapter the different outcomes of a competition proceedings, from the Commission’s side, is outlined. Since the perspective of this thesis is the Commission’s,

\textsuperscript{82} Art. 14 (5), reg. 1/2003.

\textsuperscript{83} TFEU Art. 263 (2).
the aim of this chapter is to present in more detail what types of decisions the Commission can impose, and the nature and extent of these decisions from a legal angle of approach. The rules giving the legal basis to the Commission’s decision constrain the types of decision the Commission may impose, and the nature and extent of these is therefore important to clarify with regard to the further analysis.

4.2 The basis: Article 7: Finding and termination of infringement

Article 7 forms the legal basis for Commission decisions to find and order the termination of infringements of the competition rules. The wording of article 7 requires the Commission finding that there is, or has been an infringement of TFEU article 101 or 102\textsuperscript{84}. This implies that the Commission must hold the burden of proof to be satisfied, cfr. Art. 2, Reg. 1/2003.

In the words of ECJ in the Cement case\textsuperscript{85}

“As the Council very recently stated in the fifth recital of Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 102 of the Treaty[now 101 and 102] (OJ 2003 L 1, p. 1), it should be for the party or the authority alleging an infringement of the competition rules to prove the existence thereof and it should be for the undertaking or association of undertakings invoking the benefit of a defense against a finding of an infringement to demonstrate that the conditions for applying such defense are satisfied, so that the authority will then have to resort to other evidence. [Author's highlight]”

The Commission shall in principle act only against actual infringements\textsuperscript{86}, and not make decisions regarding potential breaches. This follows from case-law by the General Court,
but also the wording of article 7 require that an infringement of either TEC art. 101 or 102 exist. However, the Commission often uses “like effects” orders, concerning acts of the undertakings with similar effects, which in reality concerns potential breaches\textsuperscript{87}. In such cases the commission acts against future infringements, but only in cases where an infringement has been established.

Notwithstanding the Commissions lack of power to act against potential infringements, the legality of the legal actions of the undertakings is subject to the general rule of art. 101 (1). At the point the legal actions represents an infringement, it is automatically void, cfr. Art. 101 (2).

Regarding past breaches the Commissions powers reach farther; it follows from art. 7 (1) that if the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past, which is referred to as a “declaration in respect of past breaches”. Such legitimate interest can arise from i.e. the power to impose fines by reference to the duration\textsuperscript{88}, to easier facilitate private suits for damages caused by the infringement, or simply stating the infringement in the form of a decision and publicizing it, which may in itself prevent future infringements.

### 4.2.1 Requirements regarding the reasoning of the decision

There are few formal requirements regarding the Commission finding and ordering the termination of an infringement, and none following directly from regulation 1/2003. But according to TFEU article 296, the Commission must establish the reasons on which it takes the decision. In “PVC\textsuperscript{89}”, ECJ highlighted that “the operative part of such a decision can be understood, and its full effect ascertained, only in the light of the statement of objections”. In other words, the decision must be adequately reasoned, and this seems to be

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\textsuperscript{87} EC antitrust procedure (2005) Sec. 6 – 021.
\textsuperscript{88} EC antitrust procedure (2005) Sec. 6 - 019.
\textsuperscript{89} PVC cases, supra note.
a condition for the validity of the decision as well as determining for the scope and reach of the decision.

Further requirements regarding the reasoning of the decision can be found in reg 1/2003 art. 27 (1) after which the Commission “shall base its decisions only on the objections on which the parties concerned have been able to comment”. There must, in other words, have been sufficient contradiction about the issues on which the commission bases its decision.

4.2.2 The nature of the remedies imposed with legal basis in art. 7

Article 7 empowers the Commission to a variety of ways of ordering the infringement to an end. First, the Commission may simply require the undertakings to bring the infringement “to an end”. This is usually referred to as a cease and desist order, and gives the undertaking a wide margin for deciding how to end the infringement, although the decision usually specifies a time by which the infringement must have ended.

Second, the Commission can prescribe measures that positively require the undertaking to undertake actions to end the infringement. The wording of article 7 has a wide reach, and empowers the Commission to use “any behavioral or structural remedies”.

By behavioral remedies is meant a wide range of remedies that aims at altering the behavior of the undertaking concerned to end the infringement. Such remedies can for example consist in making agreements void, bar certain forms of agreements or to enter into contractual relations with certain parties, or prohibit sharing information.

Structural remedies include different types of remedies. The most far-reaching of these may imply splitting a company up, for example vertically by separating production and distribution, or horizontally by creating smaller, less dominant firms. Less draconian

90 EC antitrust procedure (2005) Sec. 6-020.
structural remedies typically include altering the organization of the undertaking, for example by ensuring two divisions of the company do not cooperate.\textsuperscript{91}

The distinction between behavioral and structural remedies is not stringent, and there is no commonly agreed definition of the two categories.\textsuperscript{92} The ECJ has emphasized that the distinction is “immaterial” and that it is the effect of the remedy, and not the category that is of importance.\textsuperscript{93}

However, the wording of art. 7 relates, in contrast to art. 3 of 17/62, specifically to the distinction between behavioral and structural remedies. According to art. 7, structural remedies can only be imposed when there is “no equally effective” behavioral remedy, or when any equally effective remedy would be “more burdensome” for the undertaking concerned. Structural remedies thus become a secondary remedy to behavioral ones. Court practice indicates that the decision of which remedy is the more burdensome should, within the limits of reason, be that of the undertaking concerned.\textsuperscript{94}

Within the categories of structural and behavioral remedies, the variety of instruments the Commission may use to end infringements have been interpreted quite wide by the ECJ, for instance in Magill, where the court held that art. 3 of reg 17/62 [predecessor of art. 7]...

“... is to be applied according to the nature of the infringement found and may include an order to do certain acts or things which, unlawfully, have not been done as well as an order to bring an end to certain acts, practices or situations which are contrary to the Treaty”

\textsuperscript{91} I.e. “Chinese walls”.
\textsuperscript{92} Tajana (2005) p. 5.
\textsuperscript{93} Case T-102/96 Gencor Ltd v Commission of the European Communities p 319.
\textsuperscript{94} Case T-24/90. Automec Srl v Commission of the European Communities para 52.
In other words, the Commission may prescribe *positive* as well as negative measures to be imposed on the undertaking, which opens up for remedies of virtually any nature that the Commission sees fit to use, and is within its power to order, which will be discussed below.

4.2.3 The extent of the remedies imposed with legal basis in art. 7

Article 7 present the Commission with a wide range of remedies, but the extent of these are not limitless. Limitations in the extent of power under article 7 are found both in the wording of the article, court practice as well general principles of EU law.

Already art. 5 (2) of TEU holds that the EU shall act “only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. Further art. 5 (1) prescribes the use of government competence to be “governed by the principles of subsidiary and proportionality”.

Further, it follows from art. 7 itself that the remedy must be “proportionate”. This proportionality relates to “the infringement committed” and not to the company itself. In principle, the Commission cannot impose greater penalties on bigger companies. The remedy must also be an effective means of bringing the infringement to an end; this finds its basis in the requirement for the remedy to be “appropriate” to bring the infringement to an end.

From the wording of article 7, seen in connection with case law, there seems to be two important principles relating to the Commissions powers under art. 7. First, it can be noted that, according to the wording of article 7, the scope and extent of the Commissions power is closely related to *the infringement*. The Commission cannot impose a decision that goes any further that to bring the undertakings actions in compliance with EU law. In line with this, the Commission can for example not require the undertakings to compete.95

95 Norsk konkurranserett, volume II (2006) p. 34.
In other words, the decision terminating the infringement carries no penalty – the element of penalty in the decisions should come from the fines, not the decision itself. As held by the Court in “Magill”, the “burdens imposed on the undertakings in order to bring an infringement of competition law to an end must not exceed what is appropriate and necessary to attain the objective sought, namely compliance with the rules infringed. The Court therefore seems to have a goal-oriented approach in deciding competition cases, where fulfilling the aim of the rules is the most important.

Such an approach is natural, because the goal of competition rules is to accommodate fair competition for the benefit of the society as a whole, especially consumers, not for the benefit of specific undertakings. The competition rules are not goals in themselves, merely means to realize goals. The Commission should not restore justice or provide reparation for specific undertakings through the competition rules, but always aim to provide fair competition at all times, and act to restore this in case of infringements.

But the limits does not prohibit measures that completely restores the competition, even if this goes further than to just stopping the act that constituted the infringement. If the effects of that act remains, the Commission may remedy those effects, cfr. Case C-119/97 P, Union Française de l'Express (Ufex) p94. Here, the court held that

“If anti-competitive effects continue after the practices which caused them have ceased, the Commission thus remains competent under Articles 2, 3(g) and 86 [ now TFEU 2, 3 and 102] of the Treaty to act with a view to eliminating or neutralizing them.”

There is, however, a limit to this competence. In Case T-395/94 R, Atlantic Container Line AB and others v Commission of the European Communities, the question arose of whether the Commission could impose on the undertaking to inform third parties it had entered into contracts with, of their right to terminate or re-negotiate their agreements on the grounds

96 It should be noted that in this case, the Commission had not used this power, which was one of the grounds for appeal.
that they were based upon preconditions caused by the infringement. In this case, the court annulled this part of the decision, on the grounds that its reasons were not sufficiently well stated. The court did not explicitly imply whether the decision was within the Commissions competence or not. But, possibly, there is a correlation between the principle of proportionality, and the need for sufficient reasons. If there can be stated sufficient reasons to impose such a decision, it will most likely lie within the competence of the Commission.

In the Ford97 case, the Court held that the Commission could not go any further in an interim decision than it could have done in addressing the infringement through a final decision. In the words of ECJ, the Commission could not make an interim decision, implying a separately enforceable order “which leaves no choice to the undertaking concerned”98, because “the interim measures must come within the framework of the final decision which may be adopted”99.

A second principle is that there seems that the undertakings seem to have a large degree of freedom relating to how to end the infringement. From Court practice, this was remarked by the General Court in “Automec II”:

“the Commission undoubtedly has the power to find that an infringement exists and to order the parties concerned to bring it to an end, but it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty.”100

Several arguments are in favor of this. The principle of legality, that the undertakings have the competence - not to mention the physical means, and the motivation to do this as cost-effectively as possible. Should the Commission itself issue very detailed regulations

97 Joined cases 228 and 229/82.Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft v Commission of the European Communities.
98 Ford, supra note, para 22.
99 Ford, supra note, para 19.
100 Case T-24/90. Automec Srl v Commission of the European Communities.
regarding how to end the infringements, it would also intervene in the market, and de facto influence the business conduct of the undertaking contrary to the free market competition it tries to accommodate. The Automec II case was closed before the introduction of art. 7, but its principle is in accordance with general principles in EU law, and compatible, even supported by the wording of article 7, that indicate that the least burdensome alternative should be chosen, cfr. Above.

The nature of the infringement is of importance when determining the extent of the Commissions power to impose remedies. The ECJ seems to have put emphasis on this, for example in Automec II, in which the court seems to have drawn a distinction between art. 101 and art. 102 infringements.

A question that arises is whether the Commission can impose structural remedies to terminate art. 101 infringements. The wording of former Regulation 17 /62 seen in connection with former court practice strongly suggests no. But in light of the new wording of art. 7, and the ECJ view that it is the effect, and not type of remedy that are material, there seem now to be a legal basis for adopting structural remedies for art. 101 infringements. However, this is not likely, as it can hardly be imagined to be both necessary and proportional in relation to art. 7. But one situation it may be of use for is cutting through business transactions concealed as corporate structures, for example of the sort involving tax paradises.

4.2.4 Fines

Art. 7 decisions is the type of decision where the Commission may impose a fine. When imposing fines pursuant to article 23 (2) (a) of reg. 1/2003, the Commission “enjoys a wide margin of discretion”\(^\text{101}\). The process for setting the fine consists of several stages.

\(^{101}\) OJ 2006/C 210/02 para 2.
First, the commission sets a basic amount of the fine, using a method that involves a calculation of the value of the sales, and then finding the proportion that relates to the infringement.

Second, the Commission takes into account circumstances that “result in an increase or decrease on the basic amount”\(^\text{102}\), such as the conduct of the undertaking during the procedure, deterrent effect etc. Then a statutory cap is imposed, which means that the fine cannot exceed 10% of the sum of the total turnover of each member active on the market, cfr. Art. 23 (2).

After this, the Commission may apply leniency rules, as well as, in exceptional circumstances, take into consideration the undertakings ability to pay\(^\text{103}\).

4.2.5 Summary of the Commission’s competence under art. 7

In sum, the Commissions powers under art. 7 are characterized by:

- That the Commission has a wide range of remedies
- The extent of the effect of these remedies is closely related to the infringement in question, and goes only as far as to end the infringement. There is no basis for penalizing the undertakings by use of art. 7 remedies, only through fines.
- When imposing the remedy, the starting point is freedom of contract. The undertakings should themselves decide, if possible, how to end the infringement.

\(^{102}\) OJ 2006/C 210/02. Para 27.
\(^{103}\) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Para (35).
4.3 Alternatives to art. 7 findings of infringement

4.3.1 Article 9: Commitments

Competition cases often proceed over several years and require vast resources both for the agency and the undertaking. Much is at stake for the undertakings involved, and they may therefore want to settle the case as quickly as possible. This is also so for the Commission, as the decision is not effective before the end of the proceedings, in which case it can already be too late to fully restore the infringement. Thus, both sides in a competition case have a motivation to settle the case instead of maintaining a full adversarial process.

Also under the enforcement regime existing under regulation 17/62, cases were settled informally. There were, however, no coherent practice regarding how to do this, resulting in heterogeneous forms of settlements, and processes with little transparency and predictability for the parties involved. It is on this background art. 9 of regulation 1/2003 was introduced.

4.3.1.1 The requirements for making commitment decisions binding.

The procedure leading to a commitment decision is set out in art. 9. From the wording, commitment decisions under art. 9 are only applicable where the Commission intends to adopt a decision requiring that an infringement be ended. This limits the Commission from accepting entirely pre-emptive commitments. In the case a commitment may be suitable; the undertaking concerned may offer commitments to “meet the concerns expressed to them by the Commission”. If the Commission finds it appropriate, the Commission may make the commitment binding upon the undertaking.

From the wording, there is a condition for the use of commitment decisions that the proceedings has been initiated, and further, that the Commission has expressed concerns to the undertaking in its “preliminary assessment”. This ensures that the Commission does not misuse its powers by threatening undertakings into making commitments, but that genuine assessment lies behind the concerns expressed.
The Commissions use of commitment decisions may not be used for all cases. They are not intended for the gravest cases, where the Commission intends to impose a fine\textsuperscript{104}. As the Commission must also find that there is an infringement, the use of commitments is limited from cases where there is no infringement, and the competition rules therefore are inapplicable. The use of commitment decisions is limited to the middle of these two extremes.

The first question that arises is therefore to which extent the Commission must have established that there is an infringement in order to make commitments binding. The wording of article 9 prescribes settlements only in cases where the Commission “intends” to adopt a decision requiring that an “infringement” be brought to an end.

The answer is most likely that the Commissions power is limited to cases where it reasonably finds it probable that there exists an infringement. The wording indicates is, as does the principle of legality. The use of the sanctions must also be seen in connection with the purpose of the rules, namely to \textit{end} the infringements. Therefore, the Commission may not make commitments binding in situations where it deems the commitment in question would imply a more desirable solution, if it not at the same time finds it more probable than not probable that there has been an infringement. Otherwise, the Commission would intervene in the market in a way not compatible with its powers. This question may also be posed as a question of the proportionality of the commitment, which will be treated in further detail below.

Regarding the limitation of the severity of the infringement, Commitment decisions may not be imposed where the Commission “intends to impose a fine”. This wording may seem to limit the scope of settlements considerably, as there is imposed a fine in many competition cases. However, the Commission seems to have read this restriction quite flexibly, though, and there are several cases in which settlements were used, that could

\textsuperscript{104} Recital 13, regulation 1/2003.
have justified a fine\textsuperscript{105}. As long as the practice concerning commitments is within reasonable limits, this may be a sound approach. If a fine were completely excluded, it would provide little incentive for the undertaking concerned to offer a commitment\textsuperscript{106}. In practice, the restriction seem only to apply where the infringement in question is serious, and qualifies for a severe fine\textsuperscript{107}

4.3.1.2 The nature and extent of the commitment decision

A further question that arises is how far the Commissions power goes in make commitment offers binding upon the undertakings. Regarding decisions under art. 7, it is clear that they cannot go any further than to end the infringement. But can the Commission make binding an offer that goes further than the conditions of necessity and proportionality requires under art. 7?

Several arguments are in favor of extending the Commissions powers under art. 9 as opposed to art. 7. The offer is voluntary, and, given that the undertakings in question are always relatively big, they have access to adequate counsel\textsuperscript{108}. Commitment decisions are also, as it is now, relatively transparent process, with several procedural safeguards.

On the other hand, it is clear that abusive use of the power to make commitments binding upon the undertakings would not be in accordance with the purpose of the competition rules, and imply unjust intervention in community markets. The undertaking may feel pressured to settle, especially as the expected fines can be enormous, and as well as other aspects such as the increasing cost of bad publicity\textsuperscript{109}.

\textsuperscript{105} Waelbroeck (2008) p. 28.
\textsuperscript{106} Gippini Fournier (2008) p. 29.
\textsuperscript{108} Organisation for economic co-operation and development (2008).
\textsuperscript{109} This will be treated further below.
Indeed, court practice has indicated that also art. 9 decisions, though voluntary, has to be proportionate in order to be legal, cfr. Case T-170/06 Alrosa Company Ltd, para. 92. Here, the court states that

“although Article 9 of Regulation No 1/2003 does not, unlike Article 7(1), refer to the principle of proportionality, the Commission is obliged to comply with that principle when it adopts decisions on the basis of Article 9.”

And further that “even though the Commission has a margin of discretion this does not relieve it of its obligation to comply with the principle of proportionality”\(^{110}\). The review of proportionality is an objective review\(^{111}\). However, the Commission retains certain discretion as to the application of the remedies, because the court limits the review of the Commissions more complex economic assessment to more manifest errors\(^{112}\). The elements of the assessment of proportionality is necessity and appropriateness

This judgment by the General Court implies a quite strict principle of proportionality in relation to art. 9 decisions. This implies that the range of remedies available under art. 9 can go no further than the Commission could anyway impose, under art. 7. This will de facto narrow the scope of art. 9 further, because the remedy in addition to lying within the borders of what the Commission could have decided under art. 7 also will have to be suggested by the undertaking.

The ECJ has not yet decided in the appeal case, but AG Kokott has delivered her opinion in the case Commission v. Alrosa (C-441/07). In this opinion she deviates from the argumentation of the General Court, holding that art. 9 serve a distinctly different purpose than art. 7, by being more of a tool addressing concerns over competition for the future, and by far more characterized by the needs of procedural economy than art. 7.

\(^{110}\) Case T-170/06 Alrosa Company Ltd v Commission of the European Communities, para. 97.

\(^{111}\) Case T-170/06 Alrosa Company Ltd v Commission of the European Communities, para. 99.

\(^{112}\) Case T-170/06 Alrosa Company Ltd v Commission of the European Communities, paras. 108-110.
Regarding the assessment of appropriateness, she holds that the Commission has a wider margin of discretion in such cases, and that “the assessment of alternatives is not intended to require any extensive or lengthy investigations or evaluation”\(^\text{113}\).

In the assessment of proportionality regarding the necessity, Kokott holds that this must be presumed in relation to the undertaking offering the commitment, and only needs to be assessed in relation to third parties. This implies a wider scope for Commission, as the undertaking may offer a better remedy in the eyes of the Commission than it otherwise could have been achieved by art. 7. This widens the scope of the use of settlement, since the Commission does not necessarily have to have competence to decide the remedy, once it is offered by the undertaking.

Another question that arises is whether the commission can impose structural remedies under art. 9. The wording itself does not distinguish between structural and behavioral remedies. If the undertaking concerned deems a commitment with structural effects most desirable, there seem to be nothing hindering the Commission from making such commitments binding, which has been done several times\(^\text{114}\), and never contested by others.

4.3.1.3 Legal effect:

The commitment made binding upon the undertaking by the Commission corresponds to an obligation for the undertaking involved to act in accordance with the obligation, which may be binding for a specific period only. This obligation can be enforced by fines cfr. Art. 23 2. (C) of reg. 1/2003.

\(^{113}\) Advocate General’s Opinion - 17 September 2009, Commission v Alrosa, Case C-441/07 P, Advocate General: Kokott, para. 58.

\(^{114}\) For example in E.ON German electricity market OJ C 36, 12.2.2009 and RWE Gas Foreclosure OJ C 310, 05.12.2008.
The proceeding is terminated, and the Commission concludes that there are no longer any grounds for action”, cfr. Art 9, but the Commission does not find an infringement. This limits the effect a commitment decision has on clarifying the law, and acting as a precedent. The Commission can only re-open the case on very limited grounds, such as material change of facts, misleading information or the undertaking act contrary to its commitment.

4.3.2 Settlements under art. 10a of reg. 773/2004

Settlements under art 10a of reg 773/2004 find their legal basis in Commission decisions under art. 7 of reg 1/2003. The settlement entails a reduction in the fine following from the decision cfr. Art. 23. The settlement procedure is only relevant for cartel cases. The procedure differs from the leniency regime in that it is only used when the proceedings have been initiated, and first when the parties are “prepared to acknowledge their participation in a cartel”\(^1\).\(^1\)

The settlement procedure is initiated by the Commission, when it, after sufficient investigation finds that the case will require a decision in accordance with art. 7 and 23, and finds that the case could be appropriate for settlement discussions , and if this is the case, explores the parties interest in a settlement, by “set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions”, cfr. Art 10a. In deciding whether or not the case is suitable for settlements, the Commission has a wide discretion.

If the parties express their interest in a settlement, and when the settlement discussions lead to a “common understanding regarding the scope of the potential objections and the estimation if the likely fines to be imposed”, the Commission may set a final time-limit for a settlement submission\(^2\).

\(^1\) Commission notice 2008/C 167/01.
\(^2\) Commission Notice 2008/167/03.
The settlement submission must, inter alia, clearly indicate the party’s acknowledgement of liability for the infringement, an indication of the maximum amount the undertaking could accept under the procedure, and the party’s agreement to receive a decision pursuant to art. 7 and 23 of reg. 1/2003. Following this, and as in a normal fully adversarial process, the Commission will issue a statement of objections also in the settlement procedure.

If the statement reflects the party’s settlement submission, it should confirm this to the Commission. But also where the party does not deem the statement of objections to reflect the settlement submission, the Commission maintains the right to adopt the statement.

Upon the Commission’s reception a confirmation, it may adopt a final decision pursuant to article 7 and 23 of reg 1/2003. If the undertaking does not confirm the statement, the Commission may in any case return to the normal procedural rules, but the acknowledgements made by the parties cannot be used as evidence against them.

4.3.2.1 The legal effect

The legal effect of a procedural settlement under art 10a of reg 773/2004 is quite similar to those under art 7. The result process is still the finding of an infringement, and a fine is imposed. The difference lies in the reduction of the fine. This reduction is, in accordance with Commission Notice 2008/167/05, 2. 32. 10%, which is subtracted from the total amount of the fine after the 10% statutory cap has been applied.

4.3.3 Informal settlements

Reg. 1/2003 do not directly regulate alternatives to the aforementioned sanctions, and the enforcement agency’s discretion as to whether or not to use the rules imply that there is some room for alternatives. Before the introduction of regulation 1/2003, this was how settlements were concluded. And though one of the objectives of the regulation was to

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117 Commission Notice 2008/167/05.
make such informal settlements part of a more transparent and organized procedure, the Commission may likely still choose use its competence to conclude informal settlements.\textsuperscript{118}

4.3.4 Finding of inapplicability, art. 10

According to art. 10 of regulation 1/2003, the Commission may, where “Community public interest” relating to the enforcement of the competition rules so requires “by decision” find that art 101 or art 102 is not applicable to the agreement, either because the conditions for finding an infringement is not fulfilled, or because the criteria for the exemption in 101 (3) is satisfied. Firms do not have the right to ask for such a decision, and the provision is rather intended to ensure harmonious enforcement of competition law across the union, than to provide legal certainty in for the undertaking in question\textsuperscript{119}

In the “Report on Competition Policy”, 2005, the Commission set out the criteria for deciding whether or not to proceed with the case. These criteria encompassed, in short, the significance on the market, the complexity of the investigation, the possibility of bringing the case before a national court, importance of other areas of Community or national law affected by the conduct, whether the case is a single incident, or whether there are many like it, and the cessation or modification of the conduct since the time of a complaint. Recital 14 of regulation 1/2003 indicates that the provision is to be used only in “exceptional cases”.

Generally, the Commission will indicate which of these criteria it relied on in the finding of inapplicability, but as in most matters regarding competition law, the Commission has a wide discretion on finding a case inapplicable.

4.4 The choices of the participants in the proceeding

\textsuperscript{118} Wils (2006) b, p. 23.
\textsuperscript{119} Competition law (2008) p. 257.
On basis of the outline of the procedure, we can outline the stages of choice in the legal dispute between the enforcement agency and the undertaking as consisting of the following stages:\textsuperscript{120}:

Table 1: Stages in the sanction system

| Stage 1: | The undertaking decides whether to infringe or not based upon expected gain |
| Stage 2: | The enforcement agency starts investigation of the undertaking |
| Stage 3: | The undertaking decides whether or not to offer a commitment |
| Stage 4: | The enforcement agency decides whether or not to make the commitment offer binding, find the case inapplicable, or to start the adversarial procedure (by claiming and infringement and/or a fine). |
| Stage 5: | The undertaking/third parties decides whether to contest the agency’s decision in the court system |
| Stage 6: | Trial |
| Stage 7: | The parties decide whether or not to appeal the case |
| Stage 8: | Appeal trial |
| Stage 9: | Implementation of remedy |

In a game three, this gives us the following depiction of the road from infringement to implementation, where the players’ different choices result in either implementation or the case is ended without result (End)\textsuperscript{121}.

\textsuperscript{120} This is an extended version of the model in Law and economics (2000) p. 374.
\textsuperscript{121} There is still some possibility of reopening the case, which is not represented in the game three.
The analyses in this thesis concerns primarily stages 3 and 4, i.e. when the Commission has gathered sufficient evidence, and is able to assess the case, and even may have received specific offers of commitments from the undertakings.

The model may to some extent be applicable also on later stages of the road to implementation of the remedy. Further, given that the agency takes ex ante effects into account when deciding on its remedy, also potential “stage 1” situations become elements of the agency’s consideration, for example regarding the effect of prevention.

5 The economic cost of infringement:

5.1 Introduction

In this chapter I will look closer upon the economic cost of infringement. I will comment upon how one generally may quantify the harm done to society by competition
infringements, the aim of competition law, and the economic assessment of the damage caused by competition infringements with regard to static and dynamic efficiency.

The purpose of this chapter is to establish more accurately what the competition enforcer primarily seeks to reduce by enforcing the competition rules, namely the economic cost of infringements. This chapter does not, however, describe how competition policy has been operationalized through positive law, as in TFEU art. 101 and 102.

5.2 Quantifying harm caused by competition infringements

The damage, D, to society caused by competition infringements can be said to be the difference between the value for the society of a market without the infringement and the gain caused by the infringement. The damage caused by a single infringement, j, which is the situation for the enforcement agency, will thus be given as:

(2) \[ D_j = H_j - G_j \]

Since competition offences require precautions, concealments etc. by the undertaking committing them, it can be assumed that the marginal gain for the undertakings is diminishing with additional offences (Becker (1968)p173). (Common sense would indicate this to be true, as the cost of the “marginal cost” of further infringement increases. It is also assumed by Becker (1968) p. 173.)
value in the market when the infringement is committed\textsuperscript{122}. As such, a very wide number of anti-competitive behaviors may possibly be causing lessened total value.

When measuring the effects individuals actions have on the aggregated social welfare in the field of competition law, the measurement scale will usually be monetary, or can be described using monetary terms. This is different from for example use of law and economics to describe violent crime. In these cases harm is often far greater than the benefit.

Also in relation to an economic analysis, a common scale is needed. As established in the introduction of the thesis, I assume, for analytical convenience, that the various effects of infringements are of monetary value.

The damage caused by competition can take many forms: It can manifest itself present or in the future, in terms of more expensive goods for the consumers, in form of less production of goods or services than desirable or in form of slower technological development than would otherwise have been the case.

5.3 The scope of the enforcers assessment of the economic cost

It is the main aim of competition law to facilitate a business life that maximizes effective and contributive competition, and counteract actions that cause damage to the society as a whole. And it is the main aim of the competition enforcement agency to enforce this policy.

But since competition infringements can manifest themselves in many different ways, the competition authority cannot take every thinkable effect into account when enforcing the competition environment.

\textsuperscript{122} Becker (1968), p 173, defines damage as the difference between the harm and gain, in this thesis I use aggregate value of a market, this amounts to much of the same, but in a competition setting, the total welfare standard is limited by concerns over consumers, see below.
There is a border between the development of society, dynamic competition and competition infringement that is difficult to estimate and enforce, and that becomes vaguer the farther away we look. Effects concerning the far future are almost impossible to estimate.

There must therefore be a limit to which cases the competition authority takes into account in its practical enforcement. In relation to this thesis, the natural frame for the enforcement agency is to only take into account the effects that are related within an *adequate proximity* to an *actual competition law infringement*. In other words, the competition rules, that constitute a room of possible infringements, must be the starting point when the competition authority seeks to estimate and reduce the damage.

This is also in line with the general mandate of the competition enforcer, namely mainly to deal with *actual* infringements. The Commission also has regulatory powers, and it can initiate investigations on its own initiative, but the basis to act in relation to a specific undertaking and impose an enforcement decision comes from the enforcement procedure.

### 5.4 The aim of competition law

Much of the literature in law and economics, an example being Becker in “Crime and punishment”\(^\text{123}\), is centered on finding the optimal level of deterrence, in order to reduce the loss sustained by society. In those analyses, the ultimate objective is minimizing cost by for example deterring crime. Crime, per definition, is unwanted by society, and any reduction will therefore contribute to social welfare\(^\text{124}\).

With regard to competition law, there are stakeholders that represent a wide specter of interests, where some of the interests are conflicting. Producers are interested in becoming

\(^{123}\) Becker (1968).

\(^{124}\) Which in this thesis, for analytical convenience, is assumed to be of monetary value.
as profitable as possible, while consumers want low prices. The model of a free market in equilibrium, for example, will not take into account the distribution of the value. Damage to consumer surplus could, for example, represent only a loss for the consumers of that specific market, not the society as a whole, because the producers become better off.

The question therefore arises as to which standard should be used to describe the damage caused by competition infringements? In other words: Should distribution effects also being taken into account when determining what the damage is caused?

In EU competition law, \textit{consumer welfare is an important aim for the competition enforcement}\(^{125}\). The predominant view, stated by the Commission both regarding art. 101\(^{126}\) and art. 102\(^{127}\), is that consumer welfare is the principal aim of the enforcement agency. This is also the predominant view in the United States\(^{128}\).

However, this is not undisputed, and some scholars disagree, and argue that a wider consideration for public policy is also important to the consideration\(^{129}\). For example Østbye\(^{130}\) refers to the aim of the EU as a whole, of which a central element is creating a well-functioning internal market, and thus is an important consideration\(^{131}\). And while consumer protection is the overall aim of art. 102, its operative scope is often the conflicts between undertakings. As far as can be reconciled with the concern for consumer welfare, also overall social welfare therefore seems to be the aim of the agency.

It is also worth to note that the term consumer welfare can also be interpreted in several ways, referring either to fair and just distribution of assets or to efficiency: Especially in

\(^{126}\) Article 81 (3) guideline para 13, regarding art. 81.
\(^{127}\) Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings para 19.
\(^{128}\) Antitrust law and economics (2004).
\(^{129}\) See for example Article 81 EC and Public Policy (2009).
\(^{130}\) Konkurranserett (2008).
\(^{131}\) Konkurranserett (2008), though he refers to EC, presently EU.
US, the term consumer welfare tend to refer more to efficient use of resources than the distribution of resources\textsuperscript{132}

Regarding this thesis, in relation to further considerations regarding gain, payoffs, and other effects related to reducing the cost of competition infringements, the aim of primarily enforcing consumer welfare, and overall welfare as long as it is not damaging for consumer welfare, should be applied when measuring the different consequences against each other.

5.5 Discrepancies in harm caused and the legal basis to act

The agency seeks to remedy the harm caused. Nonetheless, there may be discrepancies between the harm caused and the basis to act, which effectively impairs the agency from seeking to remedy the complete harm caused. Even if damage can be measured accurately, damage alone is not sufficient to state a competition infringement. EU law is bound by the principle of legality, which is an underlying principle of EU law\textsuperscript{133}, in addition to the regulations that require proportionality with regard to sanctions\textsuperscript{134}.

These rules only operationalize the underlying policy behind the rules, and in some cases discrepancies may arise regarding the damage actually caused, and the damage that there is legal basis to sanction. The enforcement agency is, in such a situation, obliged impose sanctions that only cover the infringements of the rules, not the damage as a whole in accordance with the principle of legality. The legal basis thus constrains the economic assessment, and the agency must seek to maximize the effect of the remedy within the constraints of the legal basis.

It is not sufficient to establish that the action of the undertaking is harmful to the society. It is also necessary to have a legal basis to act against the undertaking. Even though an undertaking has caused damage to society through its actions, the enforcement agency can

\textsuperscript{133} Cfr. TFEU art 5.
\textsuperscript{134} E.g. art. 7 of reg. 1/2003.
only impose sanctions with legal basis in norms introduced before the action took place. EU law does, in art. 101 and 102, set up a wide legal basis for sanctions against infringers of those rules.

In practice, the requirements regarding evidence, which requires the EA to effectively demonstrate that there has been an infringement, will rule out the lesser infringement, and only the more clear-cut damages to consumer surplus will be subject to a process.

The opposite situation may also arise; there is legal basis for sanctions, even though no damage to the surplus of the society can be effectively demonstrated. In these cases it is sufficient that an infringement has been found, and it is not necessary to establish that harm to the society has been already made. In many instances it is not only the damage that is prohibited, but also to willfully create an opportunity to do harm to the society, for example by crushing competitors, such as art. 102.

The reasons for these rules are to make competition enforcement more effective, as clear damage to consumer welfare cannot always be easily demonstrated. Also, in case of abusing market power, it may be late to implement remedies if a competitor is already crushed out of the market. In these situations the enforcement agency may take what actions it deems necessary to restore the competitiveness. This is a form of enforcement that may be pre-emptive to the harm actually inflicted. In these cases, the agency’s reduction of loss is pre-emptive.

5.6 Economic assessment of damage caused by competition infringements

Damage caused by competition infringements can be assessed in a number of ways. But usually, the two main categories of assessing damage can be grouped into. First, static

135 This follows from the European Convention on Human Rights, Article 7, and the EU charter art. 49. Though these primarily refer to criminal activity, and it may be unclear whether a competition infringement constitutes a criminal act, the principle of non-retroactivity will most likely be given substantial weight.
damage, i.e. the damage that is caused by the total surplus for the society being lower than it would otherwise be, calculated with a basis in a free market model, given essentially the same conditions. Second, dynamic efficiency, which takes into account that the conditions of the market place may develop. This makes the effects hard to estimate, especially with regard to infringements. A dominating monopoly could lead to better technology, and thus cheaper goods produced for the consumers. On the other hand, fierce competition may lead to even better improvements. Dynamic efficiency is therefore harder to calculate than static efficiency.

One could say that while static models may best assess the loss caused by competition infringements in retrospect, the dynamic models assess the effects of the competition infringement will have in the future.

With regard to the use of economic theory in assessing the damage inflicted by competition infringements, the following description of static and dynamic efficiency is not necessarily exactly the same economic considerations that will be used by the competition enforcer.

It is a general principle in competition law enforcement, already established in 1899 in the important US judgment "Addyston Pipe"\(^\text{136}\), that the best available economic theory should be used when determining competition infringements\(^\text{137}\). The following description will therefore serve as a general example rather of the economic measurement of competition infringements than accurately depicting the economic reasoning of the Commission.

5.6.1 Static damage caused by competition infringements.

Modern competition law is heavily influenced by the microeconomic thinking inherent in the free market model, and current application of competition assumes markets to function

\(^{136}\) Addyston Pipe and Steel Co. v. United States, 85 F. 271 (6th Cir. 1898).

in accordance with neoclassical economic theory\textsuperscript{138}. The model was i.a. the theoretical reference for the Committee on the Norwegian Competition act in 1993\textsuperscript{139}, and is still an important reference.

In an enforcement setting, modeling the effect of infringements is important to assess the damage the agency seeks to repair. But also with regard to the other effects of enforcement, such as transactions costs, externalities etc., an understanding of the model make these effects easier to understand clearly.

Analyses of static damage using the free market models are intended to describe a market, usually in relation to a perfect functioning market, in which the allocation of resources to produce the goods is coherent with consumer demand, and thus, that the appropriate amount of resources is allocated to the production.

As mentioned above, damage is the \textit{difference} between the aggregate values of the market for the society with the infringement, compared to the aggregate value of the market without the infringement. Since value is not easily measured, for most practical purposes the free market model serves as the basis for the calculation of the damage the infringement is causing.

If the condition of the model is fulfilled, in a utopian society, in which all goods are sold on a free market, under the conditions of a perfect market, the allocation of resources in the society will be consistent with the maximization of value.

Competition infringements in relation to the free market model corresponds to deadweight loss and possibly the loss of consumer surplus\textsuperscript{140} The free market model gives a snapshot at the market, and provides information of the supply and demand of the market in question.

\begin{itemize}
  \item \textsuperscript{138} Konkurranserett (2008).
  \item \textsuperscript{140} Cfr. The discussion above the aim of competition law.
\end{itemize}
for example on a given day. When the conditions for perfect competition are present, the price will, according to the free market model, end up at the optimal level that maximizes welfare for the society. A completely free market is dependent on a number of different factors\textsuperscript{141}. It is an important aim for the agency to ensure the presence of these factors in the market, and these factors are often reflected in competition decisions.

- First, the specific market is supposed to sell homogenous goods. In a free market all the goods sold are homogenous, and there are no perceivable differences in quality. In other words, the buyers are indifferent between the goods of two sellers as long as it is the same amount.

- Second, the participants must be price givers or price takers. If the individual party may influence the price (as in a monopoly), the price setting may not be entirely corresponding to consumer demand, and a less optimal amount of resources may be allocated to the market. Practically, this can only be achieved if the parties in the market are so small that their behavior has no effect on the total price of the market. Such a market is referred to as an “atomistic market”.

- Third, there has to be freedom of contract, and the parties must be able to enter into contracts with whoever they want.

- Fourth, all parties must be in good faith, and there must be no risk of deals that are not honored.

- Fifth, all parties must have full information. If this is not the case, some parties may use price information to their own advantage, and to achieve a higher than market price. The producers must be able to instantaneously adapt production to the new information.

\textsuperscript{141} Rettsøkonomi (2008) p. 76.
Sixth, there must be no transaction costs. If the consumers have transaction costs, the demand curve will shift correspondingly to the left, meaning that consumer demand at every price level is lower than the demand curve would otherwise indicate, because the consumers are willing to buy less when transaction costs are high. Also the producers have may have transaction costs, which shifts the supply curve to the left, meaning that the producers will produce less goods at a given market price.

The market demand is given by the curve labeled demand below, this is the horizontal aggregation of how much of the good each customer is willing to purchase at the market within a given timeframe. The market supply is given by the curve labeled supply. This is the horizontal aggregation of the amount all the suppliers are willing to produce and send to the market at each given price.

Figure 2. Free market equilibrium
The equilibrium is in the intersection between the demand and the supply curve. Without government interference, and in a market where some of the buyers would be willing to purchase (usually a smaller amount of) goods on the market. They can now buy the good for less money. The difference between the sums they were willing to pay, and the sum they paid is called the consumer surplus.

Assuming rational and well informed consumers, the price they are willing to pay are equal to the value they will gain from the purchase. This is an important assumption regarding the ability of the market to increase value. With some consumers willing to pay more than the market price, yet still assuming the price to be equal on the market, consumer surplus arises. In the case of consumer surplus, the customers willing to pay the most get more value than they actually paid for. A consumer with a fairly inelastic demand may for example be willing to give €20 for a good with a price of €10. Thus the consumer gets €10 in consumer surplus. Since the consumer is rational, it has gained €10’s equivalent of value for society.

Correspondingly, the producers experience suppliers’ surplus because they were willing to sell some of the goods on the market more cheaply than the price they obtained, and they gained a higher price for some of their goods.

There are several categories of competition infringements. As we remember, the free-market model consists of a supply and a demand curve. These curves are effects of the choices of the participants in the market, and mostly, the participants can only affect these curves indirectly. Roughly speaking, competition infringements consist in manipulating either supply or demand, in order to create an unfair advantage for the market participant(s) in question.

In the following are the main categories of competition infringements:
5.6.1.1 Manipulating supply

A producer is, basically free to choose whether to produce, and how much to produce. But in certain cases, the decisions of a producer regarding how much goods to produce to a given market severs surplus for the society in a such a way (especially for consumers) that the society wants to forbid them.

A monopolist is the classical example of a producer that is able to regulate the supply in such a way that he can optimize revenues by acting as a price giver. In short, a monopolist seeks to maximize revenues, given the demand curve on the market. If the monopolist cannot price-discriminate, all units must have the same price. The monopolist must therefore strike the balance between selling few units at a higher price and selling many units at a low price. A rational monopoly maximizes revenue by choosing the output where the total marginal revenue is 0, at top of the total revenue curve\(^{142}\).

Acting or pricing as a monopoly is not forbidden in principle. It is only when the monopolist prices in a way that implies misuse of market power.

The typical infringement that consists in manipulating supply is restricting supply to achieve higher prices. This type of infringements may in some cases apply to monopolies, but almost always to cartels. In fact, a perfect cartel prices like a monopolist\(^{143}\). The restriction of the rules regard the agreement forming the cartel (such agreements are forbidden in EU law, art. 101). Similar behavior, which does not outright constitute a cartel, can be conscious parallelism, where the producers follow each other’s price setting closely, as a form of implicit agreement (which is also forbidden).

Also “over-supplying”, by providing more goods at a given price than the marginal cost should imply can constitute an infringement. This is typically done by bigger and financially strong companies to crush competitors off the market, by smoking them out.

\(^{143}\) Microeconomics (2006) p. 430
until they withdraw from the market. Thus, the bigger company can gain a more lucrative monopoly situation. While the rules regarding predatory pricing mostly is intended to put an end to bigger companies gaining price-setting power, it is important to remember that over-supply in itself leads to more ineffective resource allocation, and consequently a deadweight loss, that should be considered in addition to the loss of the competitor and the potential loss due to higher future prices.

Also other types of contractual mechanisms can contribute to manipulating the supply from what would have been the case with a free market equilibrium. For example dividing territories, which gives the different parties price-setting power over a smaller market, bid rigging in tender offers, refusals to deal (which can indirectly have consequences for example for competitors ability to supply) etc.
**Illustrations**

Figure 3: The reference: A free market in equilibrium

![Diagram showing supply and demand with shaded areas for consumer and producer surplus in a free market (FM).]
Figure 4: Perfect price setting power (illustrated by a monopoly, or a perfect cartel)

The infringer manipulates the quantity, resulting in a new equilibrium, in which he is able to set a higher price, and increase revenue. There is still demand, but the consumer has a lower surplus than before. In addition, there becomes a deadweight loss, which implies a loss of economic efficiency.

This could be the effect of:

- Monopolization
- Collusion dividing territories (restricting supply)
• Conscious parallelism
• Cartels
• Price fixing
• Bid rigging
• Refusal to deal (ex. Group boycott)
• Predatory pricing (creating price-setting power for the supplier)
• Exclusive dealing

5.6.1.2 Manipulating demand

Competition infringements can also consist in manipulating demand. Typically this is done by using a high market share on one market to increase the demand on another market, via bundling or tying. In such a case the consumer cannot buy the item he or she wants without also buying the bundled item. The demand for the bundled item, of that producer specifically, increases more than the real marginal value for the consumer, represented by the original demand curve, would indicate.

This damages both the other producers on that market, that are not able to sell their product at the realistic demand price, and the consumers, who have to buy an overly expensive item. Thus they receive less value per monetary unit from the transaction than they would if they could buy the product alone.

There becomes a deadweight loss because more resources than necessary are used to produce goods on the market, resources that would result in greater value for society if used to produce other types of goods.

Also misleading marketing would contribute to the demand curve being shifted right, i.e. more customers would be willing to pay a higher price than their value gained from the transaction should indicate which would lead to lower aggregate value.
Figure 5. Illustration of demand manipulation

Demand is artificially inflated. The consumer value curve is no longer the same as the demand curve (it is still equal to the old demand curve, in grey). While producer surplus increases, the average consumer value in the market (considered how much money the consumers use) decreases.
5.6.2 The time factor

The free market model gives only a snap-shot at the market at a given time, the more time a market participant is able to deviate from the free market equilibrium, the more damage society will incur. The harm, measured statically, is therefore given by multiplying the deadweight loss (if measuring total welfare), and/or damage to consumer surplus (if consumer welfare is given weight), i.e. infringement multiplied by the appropriate time factor representing the time frame of the market equilibrium. In other words, the time in which the infringement consists have a great impact on the overall economic cost of the infringement.

5.6.3 Dynamic damage caused by competition infringements

Our world changes in a fast pace, and because of i.a. technological development, markets conditions change. The static models most widely used in economic theory do not take these developments fully into account. Nonetheless, the impact of these effects requires them to be adequately addressed. Both the Microsoft and Intel cases, the commission has referred to dynamic competition as an important reason for initiating the cases.\(^{144}\)

The question of dynamic efficiency can be posed as 1) if there are any dynamic effects on the market at all, and, if so, 2) what weight should be given to the dynamic changes.

Regarding the first problem, several objective parameters could be used in assessing whether the industry is subject to dynamic change or not. The very essence of dynamic efficiency is technological development, which would have to be reflected in these parameters:

\(^{144}\) Microsoft, IP/09/1941, and Intel MEMO/09/400.
Product lifecycle\textsuperscript{145}, i.e. analyzing how mature a market for a certain product is could be one parameter. The more mature the market, the less likely great dynamic improvements will be, the newer the product, the more likely it is that new technological improvements will find place. Also the time-span of the total life cycle can indicate the probability of dynamic effects. The market for grain is, for example, subject to developments, and has certainly undergone a major transformation the last thousand years. But relatively speaking it is a mature market consisting of homogenous products that changes little every year. On the other hand, manufacturing computer processors, the developments over a single year alone may be immense.

It is few cases where dynamic efficiency is been explicitly discussed by the competition authority. But in most of these, Research & Development seems to be used as a parameter to indicate whether the industry is subject to dynamic change. In for example the Jotun/Nodest\textsuperscript{146} case, the effects on R&D was considered, likewise in Aker/Euroc\textsuperscript{147}. A more objective parameter that can be used could for example be R&D as a percentage of product cost. In e.g. the medicine industry, the drug itself may be quite cheap to produce, but the R&D cost high, resulting in much of the R&D cost being reflected in the price of the product. This industry is an example of an industry where dynamic improvements play an important role.

Regarding the second, the weight which should be placed on consideration for dynamic efficiency is strongly related to proximity in time. The farther away one looks, the more uncertain the effect will be. There should therefore be placed less weight on effects of dynamic efficiency that lies far into the future.

Another perspective regarding how to achieve dynamic efficiencies, is that a competition policy ensuring properly working competition routines, well-functioning markets, and

\textsuperscript{145} As used by Levitt (1965).
\textsuperscript{146} Case published in Norsk Pristidende 8/92.
\textsuperscript{147} Case published by the Norwegian competition authority, 95/1175.
predictability for market stakeholders is one of the most important ways to facilitate development. In such a perspective, the enforcement agency should rather focus on *facilitating* the future, than predicting it.

### 6 Reducing the cost of infringements

#### 6.1 Introduction

In the previous chapters, the legal proceedings have been outlined, the Commission’s choice of decisions have been clarified, the economic frameworks have been introduced, and the damage to the society caused by competition infringements, which it is the aim of the enforcement agency to reduce, has been described.

In this chapter, I will analyze how the enforcement agency may *reduce* the cost of competition infringements. I will establish the objective function of the agency and describe how the agency may maximize its output by assessing the marginal gain of imposing a decision in relation to the use of resources. This analysis will serve as a starting point to analyze the impact of the introduction of settlements, and describing in which cases the Commission should use different types of decisions, i.e. art. 7, 9 and 10a decisions.

This analysis is basically a cost benefit analysis. Cost-benefit analyses imply weighing the expected benefits of a contemplated action against the expected costs. If the *expected benefit outweighs the cost*, the action should be done. Making decisions on this basis, when the player contemplates the consequences for the entire society, corresponds to the Kaldor-Hicks criterion\(^{148}\). The agency’s decision must therefore be Kaldor-Hicks efficient.

6.2 The objective function

The enforcement agency has several ways of achieving its goal of minimizing the loss caused by competition infringements. One of its techniques may be to influence the making of laws\textsuperscript{149}, or by other means affect the expected payoff for the undertakings that potentially can infringe\textsuperscript{150}. Such general policies are important for overall deterrence. Moreover, the agency also uses its resources for administration, and other activities such as education and participating in political processes.

In addition to this, the enforcement agency also does “core enforcement tasks”, such as detection, gathering of evidence and prosecution\textsuperscript{151}. While there also exists a correlation between the deterrence effect from non-core enforcement activities (influencing the rules, for example, can have a vast effect compared to the amount of resources used to draft it), these effects are more difficult to measure than those core enforcement activities.

In the following, I therefore concentrate my thesis around the core enforcement tasks. This type of enforcement also relates more directly to the scope of this thesis. I choose to treat legal rules as exogenous in relation to the choice of type of decision. In fact they act as constraints limiting the choice of potential actions against infringers, due to the principle of legality.

The deterrent effect from enforcement activities is the net reduction of the loss for society caused by the competition infringement. The core activities are only a part of the specter of enforcement activities, but their aim is the same as the total aim of the agency, namely to reduce total loss. Effective deterrence, however, also implies a social cost of punishment. This is the cost of the infringer (and third parties connected to the infringer) bears because

\textsuperscript{149} In fact, the Commission has the responsibility for proposing new legislation, cfr. TEU art. 17 (2).
\textsuperscript{150} By for example influencing expected sanction or probability of being caught.
\textsuperscript{151} In relation to the economic analysis, the word “prosecution” is, for simplicity, sometimes used to indicate those cases where the Commission initiates the proceedings, with or without this resulting in a final decision.
of the penalty of the enforcement decision. This cost should not be so high that the reduction of loss is outweighed by the cost of punishments, which also may be borne by third parties innocent of the infringement.\footnote{152}

The objective function\footnote{153} of the enforcement agency is therefore to reduce damage as effectively as possible, without causing a too high loss due to the social cost of punishment, externalities etc.\footnote{B}

This objective function must be fulfilled, under the constraint of the total level of cost, C. Within this given cost-frame, the agency may choose how to distribute its resources. The cost-frame is given by governmental grant, and is not decided by the enforcement agency.

In a long term perspective, the total level of cost spent on the enforcement agency has an impact of the total level of deterrence.\footnote{154} But in the short term constrained choice addressed

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\footnote{152}{This is one of the reasons it is not viable to raise penalties enormously to achieve better effect of prevention, the cost of punishment would be higher than the damage it avoided.}

\footnote{153}{This definition is approximately used by Becker (1968), though on an overall setting, where also the spending on enforcement is taken into account. It is also almost the same as OECDs definition, see OECD (2008) p. 3}

\footnote{B}{OECDs definition, see OECD (2008) p. 3}

\footnote{154}{See for example Gary Beckers seminal article on this: Crime and punishment (1968).}
in this thesis, the cost frame is given \( C \). It is therefore the distribution of resources within the frame of cost that is crucial to this analysis.

6.3 Distributing resources optimally: The “production output” of the agency

An economic choice is basically about comparing the return on resources that a choice will yield, and this is exactly what the enforcement agency seeks by choosing the optimal type of decision. The agency should spend its resources in a way that implies the highest reduction of loss, i.e. the highest “enforcement effect”.

The enforcement agency seeks to handle as many cases as possible, in order to reduce damage by remedying as many cases as possible. However, the resources of the agency are limited, and it can only use it on a limited number of cases to ensure proper dealing with them. The budget constraint therefore implies that the agency must select which cases to prosecute.

It is because the agency has limited resources, the distribution of these resources affect the effect of enforcement. And it is this selection that actualizes the choice of the type of decision, and the proceeding leading to it, in order to enforce optimally.

For simplicity, we assume, in relation to this analysis, that the activity of the agency is three-fold: First it must detect infringements and evidence, second, it must prosecute cases,

\[ C \]

This implies that the objective function:

\[ \min(L(O)) = D(O) + S(O) \]

is subject to

\[ C = \text{gov. grant} \]
and third it must do other tasks. To be able to exercise any enforcement at all, the agency must complete at least two activities: Both detecting a case, and follow it up until at least some damage is remedied. It is therefore necessary for the enforcement agency to at least balance its distribution of resources between these two activities.

Since the enforcement agency cannot choose which cases to detect\(^{155}\), the choice of whether to apply a sanction and which sanction to apply is the most important way for the enforcement agency to distribute its resources between detecting and following up cases. In the situation in which the case is detected, the enforcement agency must decide whether to decide on a fully adversarial disposal of the case, procedural settlement, to make a commitment binding, or simply drop the case. The situation in which the agency must decide what type of decision to impose is therefore particularly important in relation to maximizing the reduction in the objective function.

To look closer upon which cases the agency should choose to prosecute, we can see how the distribution of resources to different tasks relates to the overall deterrence, i.e. the total reduction of loss, which is the reduction in the value of the objective function.\(^D\)

\(^{155}\) This would require it to know all cases beforehand, and make detection obsolete.

Formally, the marginal effect of deterrence can be found by maximizing the effect of deterrence within the budget constraint. In this case, the reduction in the objective function

\[
\min(L(O)) = D(O) + S(O)
\]

Is denoted \(E\) for enforcement. This reduction, \(E\), can be described, as a function of distributing resources to detection, \(D\), prosecution, \(P\), and other acts, \(O\). This gives us the effect of enforcement as:
The “cost” of distributing resources to each of these activities is the same, because we assume the use of the agency’s resources to cost the same. Thus, we can say that:

(7) \[ C = \text{price} \times (D + P + O). \]

C is given. And given that the “average price” per “unit” of resources used is the same, and the derivative of a constant is 0, we can, for theoretical purposes, simplify the constraint equation:

(8) \[ C = D + P + O \]

Combined, this gives us the following langrangian function:

(9) \[ L(D, P, O, \lambda) = F(D, P, O) + \lambda (C - D - P - O) \]

Since we maximize L (the lagrangian function) as we would maximize any other function, the partial derivative of L, with regard to each of the variables equals the marginal benefit from using additional resources on the activity. In other words, we maximize the lagrangian function so no additional benefit can be gained by using more resources on one variable. This gives us the following set of equations:

(10) \[ \frac{\partial L}{\partial D} = 0, \quad \frac{\partial L}{\partial P} = 0, \quad \frac{\partial L}{\partial O} = 0, \quad \frac{\partial L}{\partial \lambda} = 0 \]

The partial derivatives here give the marginal gain of increasing \( D, P, O, \lambda \) respectively, \textit{within} the budget constraint. When all of these are zero, no additional gain can be brought forth by substituting an increase in one variable for another.
6.3.1 Opportunity cost

A central part in procedural economy is getting the highest return, in form of deterrence, from the resources spent. In economic terminology opportunity cost implies a choice between different, but mutually exclusive results\textsuperscript{156}. When choosing one alternative, the player forgoes the other. The gain the player could have achieved in choosing the other alternative is the opportunity cost. A rational player seeks to maximize own gain, and will therefore choose to spend its resources in the way that yields the highest gain\textsuperscript{157}. In relation to this thesis, and remembering the constraint that the cost level gives on the level of activity, the choice of decision and proceeding system is implies an opportunity cost in forgoing the other alternatives.

\begin{equation}
\frac{\partial L}{\partial \lambda} \neq 0
\end{equation}

The distribution could be in right proportion, but the agency would either not use all of its resources, or use too much resources. In fact, $\lambda$ is the “opportunity cost” of the \textit{budget constraint itself}. $\partial \lambda$ is the change in total effect following an increase in the budget.

In the situation where $\frac{\partial L}{\partial D} > 0$, $\frac{\partial L}{\partial P}$ or $\frac{\partial L}{\partial D} > 0$, one could gain a bigger total output by substituting the variables with highest gain per additional unit of resources used for other variables with lower gain.

\textsuperscript{156} Buchanan (1987).
\textsuperscript{157} Polinsky and Shavell (1999).
If the agency for some reason should choose an alternative that yields a different alternative cost to the resources used, the difference between this hypothetical best choice and the actual choice will represent a gain or loss respectively to the enforcement agency.

6.3.2 The marginal effects of choosing the type of decision

To be able to compare these effects, we must assess the marginal effect of the agency’s choice.

The choice of type of decision corresponds to a “total gain” from prosecuting the case and a change in resources used on prosecution.

- The gross effect is the remedial effect on the infringement in reducing the overall damage caused by competition infringements. Minus the cost of punishment for the undertaking, it represents the net effect of the infringement.

- The net effect divided by the amount of resources used will be the “marginal effect of deterrence” from the actual case \(^E\).

\[
\frac{\text{Remedial effect} - \text{punishment cost}}{\text{Resources used on prosecution}} = \text{"marginal gain" from prosecuting the case.}
\]

E)

Basically, this is the same as

\[
\frac{\partial L}{\partial P} = 0
\]

Because it is the change in total output, in relation to the change in resources used for prosecution.
The different types of decisions, such as a full adversarial process, commitment decisions etc. all results in different “marginal gains”. If there are no special circumstances in the case, a rational agency will thereby choose the alternative yielding the highest marginal gain.

6.3.3 Implications of the model

Every time the agency chooses an alternative that affects the distribution of resources, it must assess the “opportunity cost” of using the resources elsewhere. The different alternatives with regard to the case yield different “marginal returns”.

The three alternative forms of decisions give different marginal gains:

\[ MR_{FAP} = \text{Fully adversarial procedure} \]
\[ MR_{PS} = \text{Procedural settlement} \]
\[ MR_{CD} = \text{Commitment decision} \]

Note that all of these alternatives imply spending more resources in prosecution, i.e. increase P.

The output for all of these alternatives will be given by the marginal gain, which is relative. However, in absolute terms, more resources are being spent on prosecution in the case of a fully adversarial process, than in the case of commitment decisions or settlements \( F \).

In the case of

\[ F \]

\[
\frac{\partial L}{\partial P}, \text{ but typically } \Delta P_{FAP} > \Delta P_{PS} \text{ or } \Delta P_{CD}.
\]
\[ MR_{\text{Drop}} = \text{Drop the case and use resources elsewhere} \]

The resources would be spent “other activities” or “detection”, i.e. increases in D, O, or both. \(^G\) It could also be used on future prosecution\(^{158}\).

Given a situation where the enforcement agency is able to assess the marginal return on the different alternatives, it will choose the highest marginal return.

Given an allocation that is not ideal, this simply means that the opportunity cost of continuing a similar distribution will involve a loss for the agency.

6.3.3.1 Typical situations

In order to analyze more in detail the decisions taken by the enforcement agency, it is useful to distinguish between different types of situations.

6.3.3.1.1 Majority of resources used on prosecution

In a situation where much of the agency’s resources are tied up in prosecution, marginal gains of distributing further resources to prosecution will be low. This is because the “opportunity cost” of not using resources on detection of cases and evidence will be quite high, as we suppose high marginal returns when little resources are being used on one variable, because marginal returns are diminishing.

\[ G \]

I.e. \( \Delta D \) and/or \( \Delta O > 0 \).

\(^{158}\) Though an analysis of whether the agency should save its resources for future use falls outside the scope of this thesis.
This does not, however, imply that the agency should not use its resources on prosecution. It merely states that for the agency to rationally choose to use even more resources on prosecution, the marginal gains must exceed those expected from using the resources on detection. This can be likened to a demand for “return on investment” that must be satisfied. If the agency did choose an option yielding a lower return, this will not maximize production of enforcement.

Because of the high opportunity cost by not using resources on detection (i.e. “Other”), typically, though not always, the preference in such cases will be for dropping the case, or using less resource intensive decisions and proceedings:

Because using resources on other activities than prosecution typically would yield the highest effect. Choosing alternatives that do not draw as much resources towards further prosecution (i.e. settlements) will typically result in a higher gain than a full procedure.

6.3.3.1.2 Majority of resources used on detection

Conversely, in a situation where a majority of the agency’s resources are already being used on detection, marginal gains of distributing further resources to detection will be low, because they add relatively little extra effect. Higher marginal gains are more likely by distributing resources towards more extensive investigation of the cases. This may be because of the detrimental effect on prevention by choosing an alternative implying less severe punishment (settlements), or because there are being imposed actually working decisions in too few cases overall.

\[ H) \text{Because} \]

\[
(13) \quad MR_{Other} > MR_{CD} \text{ or } MR_{PS} > MR_{FAP}
\]
Typically, the order of preference in such cases would be for fully adversarial processes, ensuring better effect of prevention and possibly better remedies:}

6.3.4 The timeframe of the analysis

Microeconomic analyses are subject to more or less explicit timeframes. When we compare marginal effects, for instance, we extend our analysis to at least two situations (though they may be hypothetical). Above, I have used microeconomic “production” models to look closer upon the effect of resource distribution.

In relation to the timeframe of the analysis, one could look upon the enforcement agency as a producer or a “factory”. When the factory realizes that the current distribution is not ideal for maximizing production, it uses every possibility to improve the distribution (as above, by assessing the opportunity cost). But in enforcement, different from a factory, cases are individual, and cannot reliably be predicted in advance (like for example the production of a car).

This is equivalent to a producer, where the order of the marginal returns are random, such that prosecuting the first case may yield low marginal returns, the next a very big, then small, then big, then big, then small etc:

Figure 6.

\[ (14) \quad MR_{FAP} > MR_{CD} \text{ or } MR_{PS} > MR_{Other} \]

1) Because
One may assume that over time, the agency is able to foresee which cases are easiest, and then select those first, i.e. order the random “marginal returns” in preference. It is therefore usual, even in analyses of enforcement, to assume diminishing marginal value of distributing more resources to enforcement, implicitly implying that the agency can choose to prosecute the easiest cases first.

In most microeconomic analyses, philosophical questions relating to our knowledge of the future are usually answered implicitly. We do, for example, assume that the factory will be able to produce a certain output, given certain inputs. In the case of enforcement, there is no guarantee for the situation to stay alike. But absent of specific facts of imminent changes, historical data are the best guideline we have.

A rational enforcement agency investigates the cases easiest to prosecute first in the long term, leading to a more efficient use of resources at first, and diminishing returns. This gives the following depiction of marginal effect (y-axis) and resources used (x-axis): Figure 7.
And total effect as:

Figure 8.

7 The elements of the decision’s total effect on deterrence
7.1 Introduction

In the last chapter, it was described how the effects of enforcement could and should be maximized in relation to resource use. The marginal gain of making a decision in a case was demonstrated to be the same as the *reduction* of the objective function, cfr. 6.2 and 6.3.2.

The aim of this chapter is to identify the *different elements in the reduction* of the objective function.

7.2 The effects of imposing a decision

The effect of imposing a decision, and thus implicitly distributing resources to prosecution, has several elements:

First, the effect comes from enforcing the rules in the specific cases and impose remedies to end the infringements and restore competition\(^\text{159}\). The more optimally the agency distributes its resources, the more infringements is the agency able to remedy, thereby

\[^J\]

\[ E = F(D, P, O) \]

is the same as a reduction in the overall objective function

\[ \min(L(O)) = D(O) + S(O) \]

which the agency seeks to minimize.

\(^{159}\) See for example Reg. 1/2003 recital 11.
decreasing damage to society, either by 1) increasing the number of decisions leading to an effective decision\textsuperscript{160}, or 2) increasing the effectiveness of the decision in each proceeding, and thus the overall enforcement effect. This confers to a reduction in damage (D(O)), the first element of the objective function.

Second, it comes from the punishment cost\textsuperscript{161} of the remedy. In this analysis, this do is not the cost for the agency in prosecuting the case\textsuperscript{162}, but for the undertakings in question and third parties, because of the decision. The social loss due to the punishment may decrease overall social welfare, and is a negative effect in relation to the reduction of the objective function, which nonetheless must be taken into account. This confers to an increase in punishment cost(S(O)), the second element of the objective function.

Third, the agency’s policy for handling cases will affect the total effect of prevention\textsuperscript{163}. This implies that the ex ante payoff of an infringement for the undertaking will change. This will in turn influence the overall level of infringements and thereby overall damage inflicted\textsuperscript{164}. This thereby confers to a reduction in damage and possibly also punishment cost, if less infringers need to be punished.

Fourth, the effect comes from clarifying the law\textsuperscript{165}. If the law is clarified, this will likely reduce the overall damage inflicted as well as the punishment cost, because the limits of what constitutes an infringements becomes clearer for the parties concerned, and it will be easier to know when the limits of infringements are overstepped. In addition it will reduce the resources used to prosecute cases, both for the agency, the undertakings in question and potential infringers. Also with regard to transaction costs, clarification of the law has a

\textsuperscript{160} If, for example, the agency’s resources are so constrained that they cannot prosecute all the cases they want.
\textsuperscript{161} Becker (1968).
\textsuperscript{162} Since its grant is decided by the government, the “cost” of prosecuting a case for the agency is only the use of its limited resources.
\textsuperscript{163} Wils (2006) b, p 7.
\textsuperscript{164} And punishment cost, because there is no need to punish those who voluntarily refrains from infringing.
\textsuperscript{165} Wils (2006) b, p 7.
positive impact, because the property rights regarding the undertaking becomes more well-defined. This reduces the damage and the punishment cost, because it provides the stakeholders with greater legal certainty, and f.ex. less negligent breaches of competition law occur.

The introduction of the new procedures may correspond to a higher enforcement gain. In such a case, the agency is able to achieve a higher enforcement effect using equal or less resources, for example by imposing more efficient remedies.

But gain is not the only effect a choice between different kinds of decision can have. Also, the “cost” of each case may be less, this means that the agency uses less resources on achieving at least the same result as before.

Unlike many maximization problems, both gain and “cost” may therefore be affected by the choice of decision. This makes the analysis more complex than many other microeconomic analyses.

In total we therefore have the marginal gain of prosecuting the case as:

\[
MG = \frac{\text{Damage remedied} + \text{Punishment cost} + \text{Prevention effect change} + \text{Clarification of the law}}{\text{Resources used}}
\]

\( K \)

This is \( \Delta L > 0 \), while \( \Delta P \leq 0 \)

\( L \)

This is \( \Delta P < 0 \) while \( \Delta L \geq 0 \)
7.3 The further analysis

Since the marginal effect of deterrence is the guideline of the agency in relation to what type of decision it chooses, the enforcement agency needs a way to assess this effect. The enforcement agency usually relies little on purely mathematical considerations in deterring crime in the actual case. I will therefore elaborate more on how the various forms of decisions relate to the “marginal gain” of the different elements of the total effect.

This implies a more practical approach, and I will illustrate how the law and sources of law relate to the economic considerations regarding choice of type of decision. To do this, I will look more closely upon the different elements of the marginal gain.

Economic considerations are paramount in all competition cases, and economic argumentation is used, more or less implicitly in many cases. Choosing the appropriate remedy, for instance, is mainly an economic consideration, but at the same time a legal requirement.

Also reducing the punishment cost is an economic consideration, as well as a legal requirement in accordance with the principle of proportionality, ensuring that the remedy (including fines) must be necessary to attain the agency’s goals.

In assessing the elements of the marginal effect of prosecuting a case, one can therefore use previous case law to demonstrate how the agency could and should use economic considerations in their decisions. I will demonstrate how the law interacts with economic considerations, and how these considerations, with the general model in mind, can contribute to more efficient enforcement.

This is not an economic analysis in a strict sense, rather a demonstration of the resonance economic reasoning have in current case law, and an attempt to clarify and systematize
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how these legal considerations may interact with overall economic considerations and theory.

Some effects are, however, not explicitly present in the legal argumentation, this relates specifically to the prevention effect and the clarification of the law. While important, these are often considered matters of general policy. To address these as elements of the marginal gain in each proceeding, I therefore use economic theory, to demonstrate how also these effects relate to the marginal gain, and therefore should be assessed in relation to choosing a type of decision in the specific case.

8  A closer assessment of the effects on enforcement in each case

8.1  Introduction

In this chapter, I will look closer upon the different effects on enforcement in each case. As outlined in the previous chapter, these effects are:

- The damage remedied
- Punishment cost
- Prevention effect change
- Clarification of the law

8.2  Damage remedied

For each new case, the enforcement agency has to evaluate the estimated effects of the remedy on direct enforcement, leading to an “expected loss reduction” from the competition infringement.

The expected reduction of loss has three main elements:
• First, the *appropriateness* of the remedy in itself, i.e. to which extent the remedy has the ability to address the infringement in question. If the proposed remedy is not suited to repair the damage, it will not contribute to the overall reduction of damage.

• Second, it must address the damage in as short *time* as possible. Since damage incurred by the competition infringement is not a one-time cost, but rather a condition in the market. Each unit of time that the infringement is present in the market confers to a loss incurred.

• Third, since the remedy is not yet implemented when the Commission makes its decision, the agency must take the *implementation risk* into account. If the remedy cannot be imposed, for example, the value of the remedy is greatly diminished.

These three elements will be assessed below:

**8.2.1 The appropriateness of the remedy**

**8.2.1.1 The legal requirement of finding an appropriate remedy**

Finding the appropriate remedy to end, and, more important to avoid infringements is an essential part of the enforcement agency ending an infringement. For the Competition enforcer, the remedy must be appropriate in regard to restoring the harmful effects of the infringement. In some cases this implies a punishment for the infringer (in form of fines).

The *legal condition* of proportionality, especially related to the appropriateness of the remedy, is closely related to the *economic assessment* of finding an effective remedy.

From a legal viewpoint, the undertakings should have a large degree of freedom relating to how to how to end the infringement, and more specific orders should only be given from
the enforcement agency if this is needed\textsuperscript{166}. As indicated in the section about the relevant rules, the principles of legality and proportionality limits the enforcement agency from using whatever remedy it wants in order to maximize the effect of deterrence.

Once the damage is determined, the enforcement agency needs to remedy the damage by seeking the remedy that over time, if implemented correctly, reduces the loss the most. Indeed, using an “appropriate” remedy is legally required in the assessment of proportionality after all the procedural alternatives, in accordance with the general principle of proportionality (TEU art. 5), and art. 7 explicitly refer to it. The relevant sources of law also use the term “appropriate” in the assessment on whether a remedy is proportionate or not.

The remedies may vary with regard to the different type of decisions after art. 7, 9, 10 and 10 a respectively. All of these form a wide legal basis for imposing a wide range of remedies. The main difference with regard to the appropriateness of the remedy is perhaps that fines can only be imposed in art. 7 decisions, which makes art. 7 remedies the only appropriate if the enforcement agency considers it important to impose a fine.

The Commissions legal competence with basis in art. 9 is not fully determined. As mentioned above, the pending Alrosa judgment will be particularly influential in determining whether art. 9 decisions may go further than what the Commission could impose with legal basis in art. 7, as long as the undertaking willingly has committed to it.

In line with the opinion of AG Kokott in the ECJ appeal case, proportionality must be assumed in relation to the undertaking offering the commitment\textsuperscript{167}. In economic terms, this is a very interesting development, because the choice of different types of remedies becomes more important to the choice of decision. The type of decision thus influences the

\textsuperscript{166}Cfr. Chapter 4.
\textsuperscript{167}Advocate General’s Opinion - 17 September 2009, Commission v Alrosa, Case C-441/07 P, Advocate General: Kokott, para 58.
marginal return more greatly than it would do if the nature and extent of the remedies that could be imposed after art. 7 and 9 were the same. The scope and extent of art. 9 remedies are widened. The choice between procedural economy, implementation and appropriate remedies are thus more acutely brought to attention. If the Commission’s competence under art. 9 is widened, the Commission can to a larger degree choose to trade off other effects in return for an effective remedy.

However, if the limit of proportionality is the same under both art. 7 and art.9, as the General Court held, the choice is in reality limited to choosing one of the alternatives the Commissions could *in any case unilaterally* given the force of decision. The only reason for choosing commitments would thus be speeding up the procedure (i.e. the undertaking practically renounces the right to appeal), and ensuring more efficient implementation, not the nature or extent of the remedy itself.

### 8.2.1.2 The economic gain of an appropriate remedy

From an economic viewpoint, the *effectiveness* of the remedy is the most important factor determining the appropriate remedy. The Commission has a wide economic margin of discretion regarding this matter\(^{168}\), which, in relation to the assessment of remedy, relates to finding the remedy that best addresses the infringement. The enforcement agency should also consider future effects.

In a classic competition setting, with regard primarily to static efficiencies, this would be equal to seeking to re-introduce free market conditions on the given relevant market, in order to maximize total welfare. With regard to dynamic efficiencies, this is equal to facilitate the dynamic efficiencies that yield the most value for society.

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\(^{168}\) Case T-170/06 Alrosa Company Ltd v Commission of the European Communities para 96.
8.2.1.3 Increasing the gain of the remedy

The alternatives are measured against each other, and the Commission should seek the best alternative, should there be several appropriate remedies available.

8.2.1.4 Typical cases for regarding legal and economic appropriateness

There are two categories of “typical cases”: Those where art. 7 and art. 9 respectively are best suited in relation to finding the most appropriate remedy (art. 10a is similar to art. 7 with regard to the appropriateness of the remedy). On one hand one has clear-cut infringements, typically cartel cases, with more or less explicit agreements leading to prizing towards the level of a monopolist. And on the other hand, one has “forward-looking” cases, where the future effects of the infringement are more concerning than past actions.

8.2.1.4.1 Typical cases where art. 7 is more appropriate

The process in art. 7 cases is backwards-looking, almost resembling a trial. From the Commission’s side it is focused on finding evidence and stopping and fining the offenders.

In these situations, article 7 gives the commission the competence to impose a decision including both an order to stop the infringement, as well as punishment for the act. Indeed it may be the only legal basis applicable for imposing the remedy/punishment the commission wants, as art. 9 do not form the basis for imposing a penalty.

A typical example of such a case is the “Car glass cartel case”\(^{169}\), where the Commission imposed a fine of almost 1.4 Billion Euro\(^{170}\), the biggest at that time. In this case, the remedy was just as much aimed at past actions than at achieving a better market in the future. The investigation was initiated by the Commission, after an anonymous tip, and

\(^{169}\) Car glass cartel case IP/08/1685.
\(^{170}\) The total fine of the entire cartel.
after conducting surprise inspections to gather evidence the Commission imposed the fine. In this case, a settlement was not an option because a fine as a central part of the decision.

Other typical cases were art. 7 decisions are more appropriate is the cases where the undertakings prove uncooperative, do not acknowledge an infringement, or when Commission wants to impose a different remedy than the undertaking offers to commit to.

8.2.1.4.2 Typical cases where art. 9 is more appropriate

Different situations arise where the infringement already committed is minor or hard to accurately verify, but the conduct of the firm and the market situation raises concerns for the competition in the future. In this situation, the Commission focuses on preventing future loss, rather than restoring the infringement.

A typical example of such a case was the RWE gas market case\textsuperscript{171}. In this case, the Commission opened investigations on RWE, on basis of its conduct as a market leader on the German gas market. It found preliminary that RWE infringed the EU treaty rules on the abuse of dominant market position after art. 102. The abuse in particular consisted of systematically seeking to squeeze out competitors, and squeezing their margins. However, these types of infringements tends to be harder to prove for the enforcement agency, because the line between being a dominant firm, which is legal, and abusing its powers, which constitutes an infringement, is harder to establish.

While these actions were committed in the past, and infringements of art.102 could theoretically imply a fine, the Commission accepted the commitments from RWE to divest its control of the German gas transmission network. This remedy did specifically address the \textit{past} action infringement as no infringement was officially found, but ensured a better market in the \textit{future}. Specifically, the remedy addressed one of the aims behind art. 102, namely to prohibit firms to abuse their dominant positions. It was therefore chosen as appropriate in relation to the possible infringement. With regard to the criteria of

\footnotesize{\textsuperscript{171} RWE Gas Foreclosure OJ C 310, 05.12.2008.}
appropriateness, it is also interesting to note that the case was settled using structural remedies (in this case divestiture).

It also shows the wide discretion of the agency with regard to selecting a remedy on basis of general considerations for future competition rather than specifically addressing an infringement.

8.2.1.4.3 Cases where the appropriateness is more uncertain

In-between the typical cases, there may arise cases where both the past and the future market situation has to be assessed. In such a situation, the Commission may have to bear in mind a possible trade-off between different effects of the decision.

An example of the difficulties the enforcer has in deciding upon the optimal remedy is the Microsoft case\textsuperscript{172}. In this case, the Commission i.a. decided, in an art. 7 decision, that Microsoft, to address the tying of its media player with its computer operating system, Windows, should offer a version of Windows without Windows Media Player. A fine of €497 million was also an important part of the decision, which made the use of commitment decisions inapplicable. The impact of this remedy was minimal, however, because suppliers of personal computers still chose to provide the version with the media player, not the one without.

In contrast, with regard to the Commission’s allegations of Microsoft tying its browser software to its operating system, Microsoft has recently offered commitments\textsuperscript{173} to make a “choice screen”, offering a choice of 12 of the most widely used browsers, on all of its versions of Windows, including existing versions, through updates, and it will thus reach out to 100 million computers in Europe and 30 million new users per year\textsuperscript{174}. This remedy,

\textsuperscript{172} Case T-201/04. Microsoft Corp. v Commission of the European Communities.
\textsuperscript{173} In accordance with art. 9, reg. 1/2003.
\textsuperscript{174} Commission MEMO/09/558.16/12/2009.
though not implemented yet, will probably have a substantially higher impact than the remedy concerning the media player, which in practice had little impact.

The case effectively demonstrates that the more expensive types of decision in terms of resource use (i.e. art. 7 decisions) do not necessarily yield better results than decisions with negotiated remedies.

An even better example may be the Norwegian GFU\textsuperscript{175} (Gas Negotiation Committee) agreement. In this case, the Commission expressed concern over gas produced on the Norwegian continental shelf being sold exclusively through a committee, and that given this exclusivity this constituted a cartel.

The producers offered commitments to stop the joint marketing and selling of gas to address the question of a cartel. Even more interesting, the two biggest producers, then Statoil and Hydro, offered to offer certain volumes to new customers, an obligation the Commission could likely not impose. The producers also confirmed that they would not impose territorial restrictions or use restrictions on their gas sales agreements.

In this case, the competition agency found the remedy appropriate because it would mend their concerns about competition, even though it did not imply a punishment of the previous infringement directly. In this case, the very clear and exclusive nature of the committee would, if the case had not been settled, likely made the case appropriate for a fine. Thus, at least theoretically, it is a kind of settlement the Commission could now no longer agree to after art. 9, which specifically indicates commitment decisions are not appropriate for cases where the Commission intends to impose a fine.

The case is an interesting example, not only because it shows that settlements can yield remedies that address other situations than only those about which the agency has

\begin{footnotesize}
\begin{itemize}
\item[175] Gas Negotiation Committee (GFU), IP/01/830, Brussels, 13 June 2001.
\end{itemize}
\end{footnotesize}
expressed concern (in this case opening up for new customers, not only disbanding the cartel). It also demonstrates how the Commission weighs the overall outcome of the different types of decisions against each other, and has a pragmatic approach to trading off higher fines for more extensive remedies.

Generally, this broadens the scope of situations where art. 9 is applicable, as commitments are more appropriate for facilitating better market conditions in the future, than addressing clear-cut competition infringements.

The case was concluded before the new regulations (1/2003) had entered into force, but can nonetheless be illustrative with regard to the agency’s discretionary competence to consider remedies appropriate.

8.2.2 The time used to implement the remedy

8.2.2.1 Legal practice: Examples on differences in implementation time

Three cases can serve as an illustration of the vast time used to implement decisions in EU competition cases, when a full procedure is used\(^\text{176}\), and the considerably shorter time-span of settled cases\(^\text{177}\).

The Irish Ice Cream case\(^\text{178}\) arose from an attempt from the producer of chocolate ice cream Mars to gain access to its products in Unilever freezer cabinets in 1989. Unilever won the domestic case in Ireland, but Mars appealed to the Commission,. In 1998, the Commission imposed a decision finding that Unilever’s practice of denying Mars access to its freezers constituted an infringement of art. 101 and 102. Unilever contested this, and gained an

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\(^{176}\) See Wils (2006) b, p12.

\(^{177}\) These are rather extreme examples, and are not intended to provide any statistical evidence as to the “mean time” etc. But though they are extreme, I find they are characteristic for the different kinds of decisions.

\(^{178}\) Case C-552/03 (Irish Ice Cream). Unilever Bestfoods (Ireland) Ltd v Commission of the European Communities.
order for staying the execution while the case was pending. The order to terminate the infringement thus became effective in 2003, after the General Court rejected the application for annulment.

Similarly, in the PVC cartel case, the investigation started in 1983, the Commission found that there was an infringement. Many of the PVC producers contested the decision, and brought it in first for the General Court, then ECJ, which rejected the Commission’s decision, because it did not follow the Commission’s Rule of Procedure. The Commission made a second decision, which eventually was confirmed by ECJ in October 2002.

Commitment decisions, on the other hand, have proved to be very effective with regard to time. A prime example of the application of the new rules is the Cannes Agreement decision\(^{179}\), which was the first case to be conducted under the new rules alone\(^{180}\). The initiation of the proceedings was in January 2006, and the case was able to adopt a final decision in October 2006, which is significantly shorter than the usual procedure.

8.2.2.2 The economic cost of late implementation

Time is an important factor in remedying the loss. The practical effect of a perfectly appropriate remedy is smaller the later it is implemented. Prolonged procedures have been a major problem in European competition enforcement, and are reasons alternatives to the full adversarial process was introduced\(^{181}\).

Late implementation of sufficient remedies is not only a problem related to fairness and justice, but also directly related to avoiding losses of social welfare caused by competition infringements.

\(^{179}\) Cannes Extension Agreement, IP/06/1311, Brussels, 4\(^{th}\) October 2006.
\(^{180}\) Earlier 1/2003 proceedings leading to binding Commitment decisions were initiated under the old rules.
As discussed under 5.6.2, competition infringements are deviations from the natural conditions of the market. The continuously incurred damage to consumer and the society in general is therefore approximately proportional with the time in which the infringement is present.

In case of the PVC cartel case\textsuperscript{182}, the companies could therefore, theoretically, continued their infringements (while at a considerably higher risk, because the infringement was detected) for many years, several of them only because the Commission did not follow the procedural rules.

Aside from increased damage, the future effects of not remedying an infringement in time may result in even more detrimental effects on a market. If a dominant undertaking misuses its market power after art. 102, it may force a smaller competitor off the market altogether, and in turn use its market power raise prices towards the level of a monopolist. This could very well have been the case in the Unilever case, as Unilever\textsuperscript{183} de facto was able to hold its competitor off the market for the over a decade. In the meantime, the competitor may find the barriers of entry so high it abandons the entry on the market altogether.

With regard to dynamic efficiency, distortions of natural market conditions may alter the development leading to long term losses. Also here, one can assume a correlation between the time of the infringement and the impact of the infringement. This factor will therefore, in a procedural setting, often be one of the most decisive factors in determining the effectiveness of one remedy compared to another.

\textsuperscript{182} PVC case, supra note.
\textsuperscript{183} Case C-552/03 (Irish Ice Cream). Unilever Bestfoods (Ireland) Ltd v Commission of the European Communities.
8.2.3 Implementation risk of the decision

8.2.3.1 Legal practice: An example on implementation risk

Remedying a welfare loss caused by a competition infringement is not only dependent on the enforcement agency’s success in measuring the damage, procuring the appropriate remedy, and using minimal time on the proceedings, but also on its effective actual implementation.

The Microsoft case is one example of this. In this case the decision of March 24, 2004, ordered Microsoft i.a. to disclose interface information to its competitors, in order to allow competitors to interoperate with Windows. However, following late implementation, the Commission initiated compliance proceedings in 2005, and found in February 2008 that Microsoft had not complied with its obligations until October 2007, more than three years after the decision, and almost three years after the General Court upheld the decision. Especially in areas of business that are dynamic in nature, such as software development, a period of three years may include considerable development in the relevant market.

8.2.3.2 The economic importance of considering the implementation risk

From an economic viewpoint the enforcement agency should try to maximize the enforcement effect by choosing the alternative for implementation that yields the highest expected gain. The enforcement agency therefore has to assess the probability for success in implementing the remedy.

If the undertaking do not contest the decision made by the enforcement agency, implementation agreed upon, and there is no need for the enforcement agency to dwell further on alternative ways of ending the case. If the undertaking, as it often does, contests the decision, the question of the optimal way of implementing decision arises.

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184 Case T-201/04. Microsoft Corp. v Commission of the European Communities.
A settlement that is not optimal may for example yield better results in the long run than the alternative, if the implementation risk and procedural economy outweighs the gain one would expect from pursuing a case the agency would likely lose.

It is not an aim for the agency in itself to “win” cases, and the agency should take all reasonable measures to prevent false findings of infringements. But there might be situations where the infringement very likely has been committed, but the evidence is concealed, illegally gained etc. so the agency is unable to use it in court. The PVC cartel case dragged out several years because the commission had violated a procedural rule. In such situations, where the agency might have a good case, but is unable to implement its preferred decision for some reason, the implementation risk should be properly taken into account.

8.2.3.3 Implementation risks with regard to a full adversarial process

In a fully adversarial procedure, only winning the case will ensure proper implementation of the remedy (given that the infringer complies in the implementation, which it usually does due to threat of further sanctions etc.). If the enforcement agency looses the case, the remedy will not be implemented. In this situation the lost case may be an indicator that there has been no infringement at all, in which case the enforcement agency should drop the case. Or it may be that the enforcement agency was not able to effectively demonstrate the infringement for the court. In such a case the enforcement agency should consider settlements.

Court decisions rely on a number of different factors, such as the composition of the court, the legal knowledge of the parties, personal preferences etc. However, the agency should be able to estimate the chances of winning the case. For example, the amount of evidence possessed by the enforcement agency would be an indicator as to the success of the enforcement agency in winning the case, and thus implementing the remedy.

\[185\] In fact, the Commission had to readopt the decision, see IP/94/538.
8.2.3.4 Implementation risks with regard to settlements

Settlements, if accepted by the undertaking, provides a much more certain way of achieving the enforcement effect. But given rational players, it is little likely that the undertaking will accept a sanction through settlement that do not imply a reduction in the expected penalty. It is therefore a danger that the effect of the settlement could therefore be lower either because of less impact on repairing the damage, or because of the lesser prevention effect\textsuperscript{186} the sanction would give.

In total, the enforcement agency must choose between implementing the remedy in the form it desires (art. 7 provides the widest basis for this), but with less probability of gaining sufficient legal basis for the implementation, or with more probability achieve a remedy which content is determined by the offering undertaking.

8.3 The cost of punishments and other enforcement acts

8.3.1 Legal requirements to reduce the punishment cost

Reducing the cost of punishment and other enforcement acts is both a legal requirement (which confers to a constraint in economic terms) as well as an aim for the enforcement agency.

Already the legal basis of the Commission’s decision points towards achieving effective enforcement without harming the undertakings needlessly\textsuperscript{187}. Also the general limits of equal treatment of undertakings\textsuperscript{188} limits the Commission from imposing as high sanctions it wants in a case.

\textsuperscript{186} See below about the effect of prevention.
\textsuperscript{187} E.g. TFEU 5 on proportionality.
\textsuperscript{188} Cfr. EU charter art. 20.
That being said, the Commission has a large certain discretion with regard to the level of fine, as demonstrated in Case T-150/89 Martinelli v Commission\(^{189}\), where the court stated that:

"Fines constitute an instrument of the Commission’s competition policy. That is why it must be allowed a margin of discretion when fixing their amount, in order that it may channel the conduct of undertakings towards observance of the competition rules."

In the assessment of proportionality, both in relation to art. 7 and art. 9\(^{190}\), “necessity” is an important element. This implies that the decision must go no further than needed, and if the commission can choose between different equally appropriate remedies, it should choose the one less onerous to the undertaking.

Since the two major elements in the consideration of proportionality is that the decision is “appropriate” and “necessary”, one may say that appropriate refers primarily to the effectiveness, while necessary refers to the “punishment cost”. This is illustrative of how fulfilling the legal requirements, namely reducing the damage and the cost of punishment, fit well with the aim of overall effective enforcement.

With regard to fines, the punishment cost is implicitly referred to in the “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. In (35) it is held that the Commission may take the undertaking’s inability to pay into account in a “specific social and economic contest”. This is limited to “exceptional cases”, and it is not enough only to state an adverse or loss-making situation. It is a condition that imposing fines in accordance with the guidelines would “irretrievable jeopardize the economic viability of the undertaking concerned and cause its assets to lose all their value”. The strict wording seems to indicate that the Commission does not wish to be approached with such

\(^{189}\) Case T-150/89 G. B. Martinelli v Commission of the European Communities., paragraph 59.
\(^{190}\) Though this assessment may relate to different standards of proportionality, where the standard of proportionality after art. 7 is stricter, cfr. AG Kokott’s opinion, Advocate General’s Opinion - 17 September 2009, Commission v Alrosa, Case C-441/07 P.
requests on a general basis. The Commission has likely, though, a wide discretion also in finding which are the “exceptional cases”.

8.3.2 The economic cost of punishment in competition law

The cost of punishment is the cost to the offender that is punished, minus the gain of others\(^\text{191}\). The agency should take into account the total effect of the punishment. Whether it will damage total welfare depends on its alternative use. Remedies, for example in settlements, may have positive effects on total welfare, and over time imply a gain for the society. There is therefore not entirely sure that a sanction ultimately results in a social cost. However, in most cases where a punishment is imposed, at least one party will be harmed.

With regard to competition law, most punishments are given in form of fines, which is a monetary transaction. The total effect on welfare will therefore depend on whether or not the recipient of the money can use them to gain more value than the punished party.

It is not the purpose of the competition enforcer to reduce all social loss incurred by infringers of the law. Punishment is society’s reaction towards those that breaks the rules of the society and by definition implies a loss of welfare to the infringer. In fact, punishment can be defined as “an evil which the state impose on an offender because of the offense, with the intention that he should feel it as an evil”\(^\text{192}\) The “punishment cost” is also the price the society must pay in order to create effective prevention.

However, in cases where the effects on social welfare by punishment is extraordinarily severe, the enforcement agency may opt for a decision that better reconciles the interests in punishing, remedying and at the same time reducing loss of welfare.

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\(^{191}\) Becker (1968), p 180.

\(^{192}\) Alminnelig strafferett (2005).
Almost any kind of sanction, whether intended as punishment or not, can result in a loss of social welfare. If the remedies needed to comply with the law imply high implementation costs for the undertaking they may de facto imply a punishment cost. Also stakeholders in the undertaking, such as shareholders, customers etc. can be affected by the finding of infringement. Typically, loss of social welfare can stem from loss of liquidity, lessened value creation, increased prices for customers, etc.

The impact of competition decisions on the valuation of firms has been investigated by Langus and Motta (2006). Using event study techniques, they show that antitrust actions have an impact. Dawn raids lowers the share price by 2%, decisions by 3% and when the court upholds, the price is lowered by 1%.\(^\text{193}\)

For major corporations, this reduction in market value may often be bigger than the fine, and may be representative of how the market price the vast costs of the competition procedure, as an equal element as the fine itself in the total cost of a competition proceeding.

The type of decision may imply different effects on social welfare. Typically fines and a long procedure will imply the highest cost to social welfare, sometimes impairing the undertaking, while settlements imply lessened loss of welfare for the undertaking.

8.3.3 Reducing the economic cost of punishments

The EU competition rules do not explicitly refer to “punishment cost”, but to the overall standard of proportionality, and the ability to pay. The question may arise as to how far the Commission must go in order to reduce the punishment cost. It seems clear from the sources of law that the Commission is obliged to choose the less insidious of two alternatives, but it is not required to conduct extensive investigations to assess this. AG Kokott, in the her Opinion in the Alrosa case, indeed says that the Commission “need not

take into consideration alternatives whose appropriateness could not be established without such efforts”

Drawing on previous experience, the Commission could get an overview of what different sanctions tends to imply of costs for the undertakings, and society in general. Various forms of “market tests” and close interaction between the infringer and the enforcement agency can also help avoid the most severe effects of punishment.

To a certain extent, also the interest of third parties must be taken into account. This is the case in the important pending Alrosa case. Alrosa contests the commitment made by De Beers, amongst others on the grounds that it goes further than what was necessary to remedy the damage (i.e. the decision was disproportionate), and thus *harmed* Alrosa more than was necessary to restore competition.

8.4 The choice of sanction’s effect on prevention

8.4.1 The importance of effective prevention

Prevention is an important aim is almost any law enforcement. It denotes the optimal way of avoiding crime – by deterring it before it is committed. Prevention is the most effective means of stopping infringements. Prevention saves resources needed to detect and prosecute the infringements, not to mention the social cost of punishment.

Achieving prevention can be looked upon as a relation between a principal and an agent, where the agency is the principal, and the undertakings are the agents. The principal-

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195 Zhou (2004) uses this in a leniency setting, which is similar to the enforcement setting of this thesis.
agent relation occurs when a principal seeks to make the agent act in the interest of the principal, while both the principal and the agent seeks to maximize their own gain\textsuperscript{196}.

One of the central issues in principal-agency theory is how to align the interest of the agent to that of the principal. The study of principal-agent relations often relates to the choice of the optimal incentive structure to realize this aim.

Prevention a way the enforcement agency can influence the actions of the potential infringer, and create an incentive to reduce infringements. The actions of the undertaking are influenced by the type of decision, because the type of decision will affect both the expected probability for being caught as well as the expected penalty.

\subsection*{8.4.2 The basic model for the undertakings behavior}

According to established theory, the undertaking will commit an act only if the expected gain from doing so exceeds the expected loss\textsuperscript{197}. A participant in the market has a limitless set of potential actions, some of which also represent infringement of various rules, amongst them competition rules.

For a rational, risk neutral undertaking effective prevention through expected loss by committing the crime is the only factor restraining the undertaking from infringing the competition rules\textsuperscript{198}. The firm will therefore commit an infringement of law if its expected gain is bigger than the expected punishment if caught.

\footnotetext{196}{The principal-agent problems often arise under conditions of incomplete and asymmetric information (Ross (1973). If the interests of the agent and the principal are not entirely aligned, the agent might be pursuing his own interest instead of the interest of the principal, which causes a loss for the principal.}

\footnotetext{197}{Polinsky (1999) p. 6}

\footnotetext{198}{Many undertakings still abide the law, which may mean that they economically are losing money compared to breaking the law. Such behavior may nonetheless be incorporated into an analysis of rational participants. For example, the management, which may be liable for criminal offences, may act in their own interest, and therefore not break the law (the situation thus becomes a principal-agent relation, as described above). One might also extend the scope of the purpose of the company, from only focusing on maximizing profits for the benefit of the shareholders to maximizing the value (i.e. utility) for the shareholders. In such a case, the shareholders might receive the greatest value (in a broad sense) when maximizing profits within the...}
The expected punishment has two elements, both the probability of being punished, and the severity of the punishment imposed if caught.

8.4.2.1 The probability of being punished

To achieve effective prevention, there must be a realistic probability for the undertaking to actually incur a loss if it chooses to infringe. Pure prevention can probably not deter all infringements, if the undertakings are rational. In a situation all undertakings refrains from infringing because of a high perceived probability of being caught, it is likely that an undertaking will start to infringe because it perceives the probability of being caught so low that expected gain from the infringement exceeds the expected loss. The effect of prevention is therefore dependent on the enforcement agency effectively demonstrating its ability to apprehend infringers.

The probability of being punished depends on two factors. First the ability of the EA to detect the infringement, and second that the EA is actually able to impose a sanction limits of law. This method corresponds to what can be referred to as norm-dependent rational behavior (Rettsøkonomi (2008) p. 499).

\[ g_x > p_x \cdot l_x \]

For any undertaking, \( x \), an offense, \( O \), will be committed given that gain, \( g \) outweighs the expected loss given by the probability, \( p \) and the expected loss for the undertaking, \( l \).

The effect of prevention is given by the right hand side of the equation, as only the expected loss prevents a rational offender from committing the crime. \( l_x \) Denotes the expected fine of the undertaking if it is caught, and \( p_x \) denotes the probability of being caught and fined.

\(^{200}\) Cfr. The above mentioned incidents of lack of police in Denmark and Canada respectively.
implying a punishment. The probability for detection and finding sufficient evidence is closely related to how the enforcement agency distributes its resources, typically because this procures more evidence and increases the probability of the EA to have a legal basis for imposing sanctions.

Each finding of infringement has a preventive effect and an overall effect on future cases. The probability of detecting an infringement can be expressed as infringements found divided by total infringements. If the enforcement agency stops finding new infringements, total infringements will typically still rise, meaning that the proportion of detected infringements becomes watered out. We can therefore assume diminishing effect with time for each case of detected infringements.

This effect will be reinforced by the typical human bias in giving weight to recent events. Less active enforcement may also indicate that the enforcement agency currently is less able to detect infringements. To uphold the prevention effect there must be some kind of continuance in the apprehension of the infringers. These factors make it difficult to estimate the impact one single case has on the total perceived probability of being punished.

The probability of successful prosecution is also dependent on the prosecutor’s abilities, the composition of the court etc. For both the undertaking and the enforcement agency the

\[ p_X = p_D \times p_P \]

(16)

Where \( p_D \) and \( p_P \) stands for the probability of detection and successful prosecution respectively, where both \( p_D, p_P \in [0, 1] \).
system of independent courts implies that the outcome of the specific case is an exogenous factor. Implementation risk, as discussed above, therefore relates both to the implementation in the specific case, as well as the overall effect of prevention.

8.4.2.2 The severity of the penalty

Different types of decisions correspond to different levels of penalty, or severity, of the sanction. The introduction of settlements in EU law has led to increased polarization between the severity of the penalty and the decision types.

With regard to art. 7 decisions, which may involve fines, the level of fines has increased the last year, especially in connection with cartel cases. One of the main aims of this increase has been to increase overall deterrence.

The newly introduced types of decisions involving settlements, on the other hand, imply a less severe sanction; otherwise the undertakings would have no incentive to settle. The enforcement agency should therefore be careful in selecting the cases chosen for settlements. Only in cases where other factors, such as repairing the damage, or reducing social cost outweighs the loss in prevention effect, should settlements be used.

This does not mean that settlements do not have a penalizing effect in the eyes of the undertaking. There is no legal basis in EU law for making the undertaking incur a loss through settlement; the infringement can only be remedied. However, in line with Kokkott's opinion in the Alrosa case, the Commission has a relatively wide discretion with regard to which sanction it will impose. Since proportionality is assumed in relation to the undertaking that proposes the commitment, the companies have higher incentives to make “high bids” of settlement because the expected loss is quite high. While not labeled “punishments” explicitly, few undertakings would likely voluntarily part with valuable

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*If the ECJ follows the proposed opinion of AG Kokott.*
assets (though for market price), such as in the RWE case. Settlements may therefore also be regarded as an “expected penalty” in relation to prevention, though not as high as in a decision implying a fine.

8.4.3 The economic effect of prevention in a market

The effect of prevention is the difference between the size of total damage caused by competition infringements\(^{203}\) with and without the enforcement agency, ranging from no functioning EA and a perfectly functioning EA that prevents all crime\(^{204}\)

\[^{203}\text{Cfr. The objective function.}\]

\[^{204}\text{O)\}\]

If a perfectly functioning EA prevents all crime, this implies that

\[(17)\]

\[g_x - (p_x \ast l_x) < 0\]

i.e. the undertakings will not infringe because the loss is expected to be bigger than the gain. Typically this will be that the EA detects almost all of the infringements, as a high sanction alone is not enough to deter all criminal acts

In case of a non-functioning agency,

\[(18)\]

\[p_x \ast l_x = 0\]
In the market regulated by the EA, total loss is given by the aggregate sum of the harm caused by the infringements committed by the different undertakings that have chosen to infringe.

Since each undertaking’s decision to infringe or not is dependent on the estimated expected penalty, the *total effect* in the market is directly dependent on the probability of being caught and the probable punishment if caught for each of the undertakings on the market.  

\[
P \}
\]

If the companies, for simplicity, are assumed to have equal values, i.e. all are \( x \), the number of cases where gain theoretically outweigh losses, for \( n \) companies, is given by

\[
(19) \quad O_t = \sum_{i=1}^{n} (X_i = 1 \mid g_x > l_x \cdot p_x)
\]

Resulting in \( O_t \) offenses. Since the undertakings are assumed risk neutral, the theoretically possible crimes is equal to the actually committed crimes:

\[
(20) \quad O_t = O_c
\]

Total damage of \( O_c \) offences committed, is therefore the aggregate sum the damage of each of the infringements, \( l \), \( (I_1, I_2, I_3 \ldots I_{O_c}) \):

\[
(21) \quad D_{total} = \sum_{i=1}^{O_c} l_i
\]
Generally, the prevention effect is therefore highest when the product of the probability of punishment and the punishment imposed is highest, this gives the least chance that gain outweighs loss for the undertaking concerned, consequently fewer offenses committed, and minimized total damage. The aim for the EA, with regard to prevention, is therefore to maximize this product.

For the enforcement agency, the effect of prevention corresponds to a reduction in overall damage. Because of this effect, there is also less punishment cost (there is no need for action), as well as less resources used on prosecution. This results in a higher aggregate value of the market for the society.

8.4.4 The relation between optimal distribution of resources and the effect of prevention

In relation to the analysis of optimal resource distribution above, we can analyze how resource distribution will affect how the agency handles cases. The total effect of prevention in relation to each firm will depend on two variables

\[(23)\]

\[
\text{Preventive effect} = l \times p_x
\]

- We postulate that adding further resources to detection will relatively increase probability for detection, \( p_x \).
- Further, we can postulate that adding further resources to prosecution will relatively increase the severity of the sanction, \( l_x \).

Given the cost constraint, as \( p_x \) increases, \( l_x \) will decrease because the agency uses more resources on detection and less on prosecution, which necessitates the use of less severe sanctions such as settlements (resources for other uses held constant).
Conversely, as adding further resources to prosecution will increase $l_x$, $p_x$ will decrease because the agency now will prefer the alternative that yields the highest sanction (and expected penalty), although they consume more resources.

As mentioned above, there will be little prevention effect both without any probability of being caught, as well as with little sanction. $l_x$ and $p_x$ are inversely related because their value depends on increases in inversely correlated variables. This gives us the following relation between distributing resources to $l_x$ and $p_x$ respectively:

\[ \text{Figure 9.} \]

![Figure 9](image)

100% of resources used on prosecution

100% of resources used on detection

Generally, this demonstrates that the general effect of prevention need not necessarily be a trade-off between efficient distribution and deterrent effect, in fact, to a certain degree; they are both dependent on each other. However, the distribution that yields the highest overall

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\[ ^{205} \text{Given diminishing marginal return for each variable, we can assume } L''(P) \text{ and } P_x''(D) > 0, \text{ in which case we will have an interior solution, and a maximum that implies use of both variables.} \]
prevention may not necessarily yield the highest overall welfare with regard to the enforcement agency’s aim. This is dependent also on the other effects of the agency’s decision, and is not given generally.

Intuitively one might assume diminished deterrence being a trade-off to be paid when choosing to use settlements. My analysis shows that this cannot be answered generally. It further shows that, broadly speaking, overall total effect of prevention is dependent on optimal distribution. As the distribution approaches the equilibrium, however, there might be relatively speaking bigger differences between the distribution giving optimal prevention and the distribution optimal enforcement. But the total effect of the trade-off between prosecution and detection might not be as big as feared.

8.5 Clarification of the law

8.5.1 The legal basis

Clarification of law is seldom used as an argument in specific cases, but is often pointed out as an important aspect in the choice of decisions. Clarification of law relates both clarifications of the content of specific decisions, for those directly concerned, as well as to clarification of the general application of the competition rules.

8.5.2 The economic cost of legal uncertainty

In economic terms this uncertainty can be classified as an increased transaction cost with regard to the companies, or as a process risk for the undertakings.

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206 Richard Wish does for example emphasize the size of the penalty rather than the expected penalty in producing deterrent effect; see Competition Law (2008) p 259. (Though this relates to leniency, and the payoff is somewhat different from the payoff in relation to prevention).


208 Settlements (commitment decisions) may to some create more uncertainty in the given case with regard to appeals, private suits etc, cfr. Georgiev (2007) p 1021.
EU competition law is largely modeled on the free-market model, under the presumption that this model will ensure efficient use of resources. As demonstrated by economist Ronald Coase, *transaction costs* are hindering effectively trading resources to the entity that appreciates them the most\(^\text{209}\). Thus, increased transaction costs decrease social welfare.

General clarification of law eases the understanding of the rules, and makes it easier for both the Agency as well as the undertakings to predict whether their actions will be within legal limits. With regard to overall social welfare, these uncertainties impose elements of risk with regard to transactions and legal actions. The magnitude of sanctions in EU competition law makes this an important consideration for anyone considering transactions with parties under Commission investigation\(^\text{210}\). Especially buyers of companies have to compute this risk into their bids.

In the specific case, legal uncertainties regarding right to appeal etc. may not facilitate the optimal level of damage suits following appeals\(^\text{211}\). Further, the more uncertain the law is, the more legal disputes will arise because the solution to the disputed problem is not clear. Unnecessary suits brought for the courts may for example be damaging to overall social welfare.

### 8.5.3 Reducing the economic cost of legal uncertainty

With overall enforcement in mind, the enforcement agency should have this consideration for legal clarification in mind when adopting decisions in the specific case. Cases vary with regard to their applicability as precedents, and the agency should to a large degree be able to estimate the value as a precedent loosely by estimating impact, whether disagreements encompasses much used rules and other important factors.

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\(^\text{210}\) Usually such elements are present in all forms for valuations in relation to buying parts of the company (Due diligence, reflected to some degree in financial statements etc.).

\(^\text{211}\) EU now works to increase the level of such suits, see European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)), especially F.
The pending Alrosa case is a good example on a case which fundamentally makes the regulations regarding commitment decisions much clearer. Regardless of it outcome, it will at least ensure more certainty regarding the use of commitment decisions, which will make settlement negotiations easier both for the Commission and the undertakings.

The newly introduced art. 10 should also be remarked in relation to the aim of clarification of law. This decision has the form of a negative finding of infringement. The provision has still not be used, but allows the Commission to “find that [Article 101 and 102, own insertion] of the Treaty is not applicable to an agreement, decision by an association of undertakings or a concerted practice”, because the acts do not constitute competition infringements. The condition is that “public interest” “so requires”, which may well be the case in relation to clarification of law. However, the scope of art. 10 is not as wide as its wording may indicate, it is confined to “exceptional” cases.

9 The resources used to achieve the effects in each case

9.1 Introduction

In this chapter, I will look more closely upon how the achieving effects of enforcement require the use of the agency’s resources. The purpose of this chapter is to demonstrate the “price” or “cost” of the agency in imposing a decision, and the elements of this cost.

9.2 The relationship between the basis for decision and resource use

The choice of type of decision directly affects the resource situation of the enforcement agency. Different types of decisions usually correspond to different cost elements. The economic concept of settlement between rational participants implies that both parties benefit from the agreement. Usually the parties are interested in keeping the case costs low.

\[212\] Recital 14, regulation 1/2003.
For the enforcement agency, the costs arising from winning a fully adversarial process, losing a fully adversarial process as well as a settlement must be estimated. As presupposed above, one would intuitively assume the cost of a full procedure to be higher than the cost of a settlement. This is, however, not vital for the analysis as it is the final expected marginal gain in each case that should be the agency’s criterion for decision.

9.3 The different elements of resource use

9.3.1 The “cost” of detecting infringements

The probability of detection increases with the amount of resources used to conduct investigations, or other conduct to detect cases.

If we assume that the most clear-cut infringements are the easiest to find, and that finding additional offences harder and harder because some of the infringers use sophisticated means of avoiding detection, the probability of detection will decrease with each case detected, implying that the marginal return on resources spent on detecting cases is diminishing.

The methods of detection may, however, vary, and “technological improvements” such as amnesties, leniency etc. may affect the payoff.

9.3.2 “Cost” effects of gathering evidence

Using its investigative powers, the commission can gain the evidence it needs in many cases. But this uses the resources of the agency. First, it is the use of time of the personnel...

\[ \Delta P_{FA} > \Delta P_{PS} \text{ or } \Delta P_{CD} \]
of the agency, time which could otherwise have been spent on detecting, procuring evidence, prosecuting or following up other cases. Like any other decision, the decision of how much resources should be used to procure evidence is based on different criteria, and is typically among the day-to-day decisions the employees will have to make. On a higher level, the enforcement agency should seek to gather the optimal amount of evidence.

9.3.3 The “cost” of prosecuting and following up the cases

Also the cost of prosecuting and following up cases can be expressed as a relation between enforcement effect and resource use. If we assume that the enforcement agency prioritizes the prosecution of the cases after expected outcome, the marginal returns from prosecuting further cases will be diminishing. The enforcement agency should therefore first prosecute the cases which it is most secure on winning first, as they pose the least process risk.

9.3.4 The type of remedy’s impact on “cost”

Regard should be had to the overall procedure, not only to the case costs. Even in relation to this thesis, in which only an overview of the conceptually different types of remedies is given, the choice between different remedies has is important in assessing the question of cost.

The difference between structural and behavioral remedies should for example be observed. Structural remedies represent a onetime cost, while behavioral remedies in many cases has both a more vague effect, and require following up, both of which draws resources from the enforcement agency. The agency’s a wide economic margin of discretion when imposing the remedy has been highlighted in court practice\textsuperscript{213}.

The table below gives a short comparison of the differences in major cost elements and thereby the differences in cost situations between structural and behavioral remedies.

\textsuperscript{213} Cfr. Case T-170/06 Alrosa Company Ltd v Commission of the European Communities para. 86.
Table 2: The relation between remedy and elements of cost.

<table>
<thead>
<tr>
<th>Remedy</th>
<th>Structural</th>
<th>Behavioral</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cost elements</td>
<td>● Implementation</td>
<td>● Introduction, ● Following up</td>
</tr>
<tr>
<td>Cost situation</td>
<td>Higher initial costs. Lower “enforcement/administrative cost”, because decision is already implemented</td>
<td>Lower initial cost, higher “enforcement/administrative cost”</td>
</tr>
</tbody>
</table>

Traditionally, structural remedies have been considered more burdensome on the undertakings than behavioral. But this need not always be the case. In fact, while behavioral remedies almost always imply some constraint on the undertaking, structural remedies (e.g. selling one business division), may, at a sufficient price, be a fair trade for the undertaking. Further, the effects of a structural remedy are easier seen than those of a behavioral remedy. That being said, few firms would willingly commit to selling one of its business units without having a pressing reason to do so. But given a choice between remedies, both the agency and undertakings may be better off with a structural remedy. In line with the increased concern for the cost-effectiveness of the agency, one might argue that a shift from behavioral to structural remedies could address this more effectively.

10 Examples on cases where one type of decision is better suited

10.1 Introduction

In this chapter, situations where one type of decision is better suited than the other alternatives are demonstrated. This will typically be because one of the effects above, assessed more or less explicitly, predominantly affects the perceived marginal gain, on

\[214\] As in RWE Gas Foreclosure OJ C 310, 05.12.2008, p. 23
which the agency bases its decision. The purpose of this chapter is to look closer upon how the agency may use the assessment of marginal gain above to choose the optimal decision in each case.

10.2 Practical application of optimal case selection

Above, the different components in the marginal effect of prosecution (in various forms) in relation to resources used were assessed. We have seen the “typical” unideal situations where the “opportunity cost” rises because resources are distributed unevenly.

Optimal distribution does not imply even distribution. It might be that the agency is better off using a considerably higher percentage of its resources to one variable, there is not a precondition in the analysis that the distribution should be even. Intuitively, one would for example deem prosecution of the case to crave relatively more resources than detection. It is the marginal gain from adding resources to the variable that should be the same.

However, in a single, individual conditions may be influential in determining the marginal gain. Each of the factors discussed, may individually have such an impact that it is given most weight in the final decision of the agency.

These cases are “typical” or “idealized” cases. In cases where one or more of these factors are dominant, one type of decision will typically stand out as more appropriate. In practice, the agency will rely on these expectation rather than detailed assessments of a computed marginal gain. The concept is, however, exactly the same as in the analysis above, namely gaining an optimal return on investment, though not as explicitly referred to.

The table below gives a summary of situations where the importance of one factor in the case makes one type of decision more appropriate. On the left side, is the different factors the agency must consider in each case, and examples on situations where this factor may carry extra importance. On the right side is the type of decision that is usually better suited to address such a situation.
Table 3.

<table>
<thead>
<tr>
<th>Summary of typical cases, where the importance of one factor makes one type of decision more appropriate.</th>
</tr>
</thead>
</table>
| **1. Remedial effect**  
The enforcement agency’s aim is to reduce the effect of infringements. If the agency perceives differences in either appropriateness or time, this may be decisive. The agency must also assess its ability to obtain legal basis for implementation. | Article 7 or 9 may both be appropriate, depending on the specific circumstances. Given that the undertakings offer commitments, higher probability for implementation. |
| **2. Punishment cost.**  
The consequences of imposing one of the types of decisions could be prohibitively high, and actually worsen social welfare. E.g. fully fining infringing firm in a small oligopoly could in an extreme case lead to bankruptcy and worse effects on competition. | Art. 9 usually more appropriate. |
| **3. Prevention effect**  
Publicly well-known cases may produce more prevention effect than less well-known cases (perceived high impact on prevention). While fair and equal treatment constrains the agency from discriminating specific undertakings, the concern for “stating an example” could lead to the agency using its legal basis to impose a severe remedy. | Art. 7 usually more appropriate. |
| **4. Clarification of the law**  
Rigid and thorough procedures tend to be more clarifying with regard to the application of law generally, than individually tailored remedies. | Art. 7 decisions far better suited for general clarification of competition rules, as art. 9 decisions do not imply finding infringements. |
| **5. Cost (agency resource use)**  
If the cost of prosecuting a case is considered high, because of complexity, particularly burdensome procedural requirements, little expected payoff etc. | Art. 9 usually more appropriate.  
Art. 10 a. may be appropriate. |
As can be inferred from the Table 3, the different remedies are more suited to address particular concerns than others.

- Article 7 decisions are focused on remedy and prevention. The elaborate formal procedures connected with the decisions makes clarifying the law inherent in the decision. The procedure does not offer shortcuts with regard to costs, and though the agency has a large degree of discretion with regard to remedy, the proceedings tend to be more inflexible.

- Art. 9, decisions, on the other hand, are more suited in situations where resource use, implementation risk and punishment cost are given more relative weight. They do not encompass as elaborate proceedings as those resulting in art. 7 decisions. And with regard to legal clarification, they do not imply the finding of infringements, and has thus little weight in clarifying the general limits of the law. At the same time, there is a less strict limit with regard to the proportionality of the decision\(^\text{215}\), and the agency can, at least theoretically, implement wide-reaching remedies.

10.3 The implication of the agency's widened choice of decisions

The wider specter of sanctions opens up for bigger discretion for the agency, not only with regard to decision and remedy, but also with regard to the overall prioritization of the weight the different factors should have, because the agency has more options to choose from. The modernization reform therefore implies an implicit shift in the power to decide competition policy from the legislator to the enforcer.

In light of this increased competence, the agency must understand its role, and mission in a broader context than that of a pure enforcer. Because f.ex. art. 9 decisions do not inherently

\(^{215}\) Provided Alrosa ends up as proposed by AG Kokott, Advocate General’s Opinion - 17 September 2009, Commission v Alrosa, Case C-441/07 P.
give so much regard to prevention and clarification of the law, the agency must ensure that the these factors are given due weight

It is danger that the agency will fail to give due weight to these aims for enforcement. The agency could for example be biased in favor of cost and remedy, as they are easiest to measure in the specific case. Especially as the agency was allowed to give more weight to cost and remedy in its earlier decisions (the procedural framework ensured that other considerations were given weight), it is a risk that a continued policy giving most weight to these effects will not ensure due regard to externalities because they are not inherently ensured in the proceedings.

If the agency does give due weight to the factors contributing to effective enforcement, the more flexible rules could, however, give room for more flexible solutions and general disposal of cases that yields a higher marginal gain in relation to resources used per case.

11 Important issues in relation to the introduction of settlements

11.1 Introduction

An economic analysis is important for the agency in ensuring proper enforcement. As demonstrated above, most effects related to competition enforcement, even prevention and clarification of law, has economic costs that relate to overall enforcement.

However, an economic analysis cannot exhaustively serve as a guideline for the agency in its decision. Complex decisions will always encompass factors that cannot easily be quantified. But even though these effects are harder to estimate from an economic perspective, they must be taken into account as “constraints” with regard to the agency’s maximization in resource use. This is similar to a producer having product quality as a
constraint to maximum production (in fact, it is usually implied in most microeconomic production maximization problems).

Many important issues arising following the introduction of settlements have been addressed in form of academic criticism. In relation to the economic analysis of this thesis, they serve as a natural point of departure for discussing other important issues than the economic choice of the agency. Further, by introducing and commenting upon this criticism, the economic decision of the Commission is placed in a wider context than the limited economic analysis can provide.

In this chapter, I introduce important academic criticism following the introduction of the modernization reform of competition enforcement, and outline the most important issues. The purpose of this chapter is to give room to comment on important issues that have been raised by academics in relation to the introduction of settlements in the EU. Further, I present a comparison between EU and US competition settlements, and comment on the differences. The formalized settlement procedures in the EU were inspired by the US use of settlements, and an outlook upon the US rules can therefore provide interesting insights.

11.2 Criticism of the introduction of settlements

The introduction of regulation 1/2003 has given the Commission a far wider specter of tools to end competition cases. Quite certainly, it has improved the cost-efficiency of competition management, both by abolishing the notification system, and allowed for quicker endings in competition cases by using settlements.

In light of the emerging practice of settling cases informally, and the time consuming procedures connected with art. 7 decisions, increased use of settlements appear to be a natural next step for EU competition law. However, the modernization reform has not been entirely unproblematic.
The increased use of settlements in EU competition law has raised concern with regard to several important issues. These issues relate to the fairness and justice of the procedures. Generally, the regard for clarification, prevention and third party interest are externalities, and their lack of weight in the agency’s consideration can be regarded as a loophole problem\(^\text{216}\), because the agency do not take the entire picture into account.

11.3 Transparency

First, the concern for transparency has been raised. Though a part of a formalized settlement procedure, other parties than those directly involved may receive far less information under art. 9 proceedings than under art. 7 proceedings. In settlement cases, the Commission does for example not always send a detailed “statement of objections” to the defendant\(^\text{217}\), but, as in the RWE\(^\text{218}\) case, resort to a preliminary assessment finding an infringement instead. Transparency was much of the reason why the modernization reform was introduced. If the concern for transparency cannot be met, it would undermine much of the reasons for formalizing the procedure. Given the extensive powers of the Commission, making public more of its case papers could be a way to meet both the concern for transparency, and make the decisions subject to more feedback from a wider audience of stakeholders.

11.4 Clarification of law

Many academics have raised concerns in connection with the clarification of law, expressing fears that the Commission would use settlements were law is unclear, to avoid the strain of a possibly massive trial. If this is the case, the Commission could create an own competition policy exempt from court legal control\(^\text{219}\). This is a weighty claim, especially as the modernization reform was relatively recently introduced. The need for

\(^{216}\) Georgiev (2007).
\(^{219}\) Schweizer (2008).
legal clarification, not only with regard to what constitutes infringements, but also with regard how cases are actually ended is vital for the undertakings.

But the EU procedural framework concerning settlements is not necessarily incompatible with further clarification of law. In fact, the more formalized framework for negotiated remedies makes more information openly available to stakeholders and undertakings which the rules concern, if the concern for transparency is met. The Commission must, however, take on the extra cost of preparing documents so they may also serve to clarify the law beyond what is necessary for the negotiating parties. With regard to transaction costs, this could prove not only a procedural safeguard, but also a way of reducing the social cost of future competition infringements, by clarifying law for the stakeholders.

An inherent problem with regard to the clarification of law in art. 9 decisions is the lack of finding of infringement. This is a problem both generally, as well as for directly affected stakeholders. But while future modifications of the procedural system could encompass the right to declare infringements also in settlements, it is not evident that this would ensure better justice in competition cases. It might merely shift the concern over to the Commission using its more extensive powers to threaten undertakings into declaring themselves guilty.

The Commission itself says it “will not negotiate the question of existence of an infringement”\textsuperscript{220}. With regard to the Commissions competence, this seems to be a sound approach given the current procedural rules, \textit{provided} that the Commission gives clarification of law sufficient weight in its choice of type of decision. The extensive use of settlements under the new regime may give reason to doubt this.

11.5 Procedural safeguards

Ensuring procedural safeguards has also been voiced as an important concern. The use of settlements, especially in the form of commitment decisions imply a form of plea bargaining, that may lead to the undertakings being pressed into settlements. As Cooke points out, the Commission can give their negotiation terms legal force by decision.\textsuperscript{221}

Wils, points out that “the general answer of law appears to be that self-discrimination and waivers of procedural rights are unproblematic provided they are voluntary, which requires both \textit{adequate knowledge} and \textit{absence of improper compulsion}” [Wils’ highlights]\textsuperscript{222}. OECD, in their policy brief\textsuperscript{223}, holds that these concerns are less weighty in the field of competition law, as most undertakings have “sophisticated counsel” with “substantial experience”. This reasoning would be in line with the proposed new Alrosa judgment.

It might be held that given the professional scope of competition law, there is much injustice that deserves more attention than the possibility for undertakings being pressed into unwanted settlements. Given that we want competition law at all, the balance between effective and just enforcement will necessarily have to be struck. The burden on the decisions place on the firms, should lead to the threshold being set a little higher, but within limits, we must accept that the regard for effectiveness and justice in time sometimes weights heavier than being absolutely right.

11.6 Third party interests

Third party interest has also been raised as a concern. In economic terms this is one of several “externalities” that may adversely affect social welfare. In addition to other externalities like clarification of law and prevention, the agency may risk overlooking this

\textsuperscript{221} Cooke (2008) P. 2.
\textsuperscript{222} Wils (2008) p. 18. Wils bases these two criterions on ECHR and ECJ practice, e.g. Saunders v. The United Kingdom, 43/1994/490/672, Council of Europe: European Court of Human Rights and Joined cases C-65/02 P and C-73/02 P ThyssenKrupp Stainless GmbH (C-65/02 P) and ThyssenKrupp Acciai speciali Terni SpA (C-73/02 P) v Commission of the European Communities.
\textsuperscript{223} OECD (2008) p. 5.
concern when using settlements. In fact this is not only a procedural problem, but also a clarification problem for the third party undertaking. The new Alrosa judgment will be highly influential also regarding this dimension.

11.7 Backlog problems

Richard Wish has also raised the question of whether the Commission is misusing the new settlement procedures to clear its backlog of difficult cases. This is not necessarily a problem. If the Commission, with due regard to clarification of law, and prevention effect nonetheless decides to use a more cost-effective procedure, or even drop the case entirely, this is only an effect of effectively dealing with cases, which is something that should be encouraged rather than frowned upon. But given the vast use us settlements in antitrust cases the latter years, Whish’ concern may be indicative of disregard for externalities.

11.8 A comparative outlook: United States antitrust settlements

The introduction of settlements in EU competition law is to a large extent a development deemed necessary in order to adopt a more formal framework for the increasing amount of cases where the parties sought to end competition cases outside the scope of art. 17/62. But the introduction and the design of the new rules are also heavily inspired by the antitrust rules in the United States.

In light of this, in a broad assessment of the use of settlement in EU law, it is useful to look closer upon some similarities and differences from the US rules with regard to use of settlements.

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The US procedural endings consist, alike that of EU competition law, of a combination of cases adjudicated in the courtroom as well as cases ended by consent decree (settlement). However, the administrative system, especially regarding competence and binding decisions is somewhat different.

In EU law, the Commission has the authority both to impose legally binding decisions, as well as negotiating settlements. In the US system, the competition authorities can only bring cases in for court, not impose decisions like the Commission can. The US decision therefore rest, in principle entirely on the court system, while unilateral ending decisions can be imposed by the enforcer in EU law. The court’s role in EU law is therefore to review the decision, especially with regard to legality, rather than to impose it. This affects not only the decisions, but also the negotiation situation; because the Commission can threaten to impose its desired “negotiation result” by art. 7 decisions if the undertakings do not comply.

This has resulted in US writers tending to criticize EU law for being regulatory, while Europeans tend to be willing to give enforcement authorities the upper hand so effective settlements can be made. It is not strange that the different legal and governmental attitudes should be reflected also in the competence in competition cases. This criticism nonetheless points to an important issue, especially because the future effects of competition policy are difficult to estimate.

But while the criticism from US writers point to an important issue in EU law, it is not given that court decisions would result in better deterrence, particularly as the EU court

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227 Antitrust Division of Department of Justice, Federal Trade Commission, and state attorneys general, U.S. Department of Justice (1975) p. 3.
228 Though they review mergers. US department of justice (1975) p. 2.
229 The opinion of AG Kokott in the Alrosa case, Case C-441/07 P is an example of the court being criticized for going too far in their review (para 84). Here Kokott holds that “it is not sufficient, in order to assume a manifest error of assessment, for the Court of First Instance [now General Court] merely to take a different opinion to the Commission”.
231 See for example Georgiev (2007).
system is already strained with regard to resources. A difference often overlooked is also that the scope of settlements in EU law is somewhat different, and the Commission cannot impose fines in settlement cases, opposite of US\textsuperscript{232}. The Commissions “double role” should be less concerning with this in mind.

A further difference between US and EU rules is the difference in use of private enforcement, which is far more extensive in the US. Private parties may, alike the US competition authorities, bring cases in for court, as well as strike settlements. Currently, the Commission is engaged in advocating a wider use of this\textsuperscript{233}. However, the use of private enforcement is not entirely unproblematic in an EU setting. First, wider use of private enforcement will to a larger degree involve courts in imposing competition decisions. This would split the competence which may prove confusing, and result in inconsistent enforcement, both in the specific case as well as with regard to the general clarification of law.

Private enforcement may also produce different incentives for the undertakings themselves with regard to competition enforcement. This may contribute to effective enforcement by ensuring that the companies act as “watchdogs” for each other. Given their specific industry knowledge, they could provide valuable insights and increase effective detection of infringements. On the other hand, it may create incentives for companies to produce nuisance suits against competitors. If the Commission should further pursue to create a stronger system of private enforcement in the European Union, it must give due regard to a fair balance of risk in the proceedings, so the financial incentives to start unreasonable suits becomes less tempting.

\textsuperscript{232} Georgiev (2007), find better.
\textsuperscript{233} See for example the study conducted in Waelbroeck (2004).
12 An outlook into the future

12.1 The effect of the recent developments

The introduction of the modernization reform, and the increased use of settlements in EU competition law mark a shift of scope in competition enforcement.

In the proceedings related to the most clear-cut infringements, especially cartels, enforcement have been “harder” at least in terms of increasing fines\(^{234}\). The Commission also relies much on the firms providing information themselves, in return for reductions in fines, under the leniency programme.

In other cases, however, those where settlements are applicable, proceeding based on negotiations, results in a shift from the traditional “hard” enforcement, focused on detecting and prosecuting competition infringements, to a softer, more dynamic competition enforcement. This enforcement is focused on managing the competition rules, and to both promote and enforce competition at the same time.

That this results in increased interactions with both undertakings and NCAs from the Commission side is hardly surprising. In the last decades, Europe has gone from having minimal competition enforcement and no tradition for this, to having a comprehensive system for enforcing competition laws. It is first in the last decades that the undertakings and NCAs have been mature enough to deal with competition law on an equal standing as the Commission.

This increased interaction may provide increased transfer of insights between undertakings and enforcer, and probably minimize some problems that have been present during the emergence of a comprehensive competition law in Europe.

However, there are also inherent dangers to the new regime. It is now more than ever up to the players to take different effects into account and more directly influence decisions. The biggest potential danger seems to be that the most important players are biased in direction of measurable results, and therefore do not give clarification issues due weight. If the players fail to give due weight to this, the effect of competition laws will be unclear, and the endings of proceedings dependent on negotiation skills rather than the degree of infringement.

Besides “hard” prevention, making businesspeople internalize the competition rules in their decisions could also efficiently contribute to making competition law more effective. For example, softer law, and general competition advocacy could provide a valuable addition to more traditional enforcement\textsuperscript{235}. Given the shift of scope in some proceedings, to a softer enforcement, such a development seems natural.

12.2 The future of competition law
The role of competition law will continue to be challenged and developed. As of now, competition law seems to be a vital component of how governments facilitate markets. It is not given however, that governments should interfere too much in markets, and competition law is also subject to criticism on more general grounds.

A prominent example is Milton Friedmann\textsuperscript{236} who argues that competition law does more harm than good, and he holds that competition law might be theoretically feasible, but holds the adverse effects of competition law itself, particularly the cost of enforcing the competition rules, to be bigger than the actual gain.

Such an analysis may hold true in the short term. In the long term, however, the results may be different. History is full of humans trying to exploit each other, and over time the need

\textsuperscript{235} For example Marcos (2009) promotes such advocacy.
\textsuperscript{236} Friedmann (1999).
for corrections, and deterrence and enforcement of basic rules therefore becomes a necessary evil. The current financial crisis clearly demonstrates that businesses may not always innately act for society’s good.

In this respect, it can be useful to remember that competition law has been an aspect of almost any bigger civilization, earliest recorded in the Roman republic to protect its trade of grain against manipulating supply. Seemingly, there is a need for government intervention towards some actions carried out by businesses, although the limits and type of intervention are debatable.

Rather than hoping to abolish competition law entirely, we should therefore hope that competition law will develop, and produce better results at a lessened cost for society. In this respect, the development of more flexible enforcement is hopefully a natural step towards an evolution of a more mature competition law, even better serving European markets.

13 Conclusion

The purpose of this analysis has been to outline, and discuss the introduction of more formalized settlements in EU competition law. My analysis shows that the new rules may lead to more efficient use of resources, but also that the agency is given a broader enforcement responsibility:

1. The introduction of settlements represents a shift in the enforcement competence of the Commission
   a. The Commission has traditionally had a great deal of discretion with regard to the outcome of competition proceedings, but the proceedings themselves

237 The law of restrictive trade practices and monopolies (1966) p. 20.
have been subject to relatively rigid procedural regulations. With the introduction of the modernization reform, the Commission has gained a wider specter of types of decisions, and different tracks of proceedings leading to them.

b. Combined with the extensive discretionary competence regarding the outcome of the proceedings, the widened specter of proceedings implies an increased power of the Commission to decide policy.

c. This development represents an inclination for the enforcement agency to turn its role into being a manager of the competition rules rather than merely guarding the rules as an enforcer.

2. An economic analysis can serve as an important guideline to the Commission’s decision.
   a. An economic analysis structure the deliberations and analyzes the enforcer must carry out before making the decision.

   b. This thesis points out the main factors that must be included in the analysis and how the different considerations can and should be balanced against each other.

   c. Since the agency has limited resources, the distribution of the agency’s resources will affect the effect of enforcement. Maximizing the effect of enforcement could and should be done through distributing resources where they can provide the greatest gain in enforcement.

   d. The thesis may not necessarily give guidance on how much weight should be given to the different considerations, and some of the considerations (costs, benefits) are more easily quantified than others.
3. *Overall* consideration for all elements of deterrence is paramount, including consideration for prevention and legal clarification when selecting which cases to prosecute and, if so, what type of decision to use.

   a. Using a variety of tools for different infringements may increase gain, because it allows the agency a wider choice to choose the most effective type of decision.

   b. However, the widened choice of type of decision corresponds to a greater risk for adverse effects if the Commission fails to give due weight to all factors contributing to the marginal gain of prosecuting a case, e.g. clarification and prevention, or gives too large weight to other, typically cost and remedy.

   c. The extent of the use of settlements in EU law may give reason for concerns that less easily measurable externalities (i.e. clarification and prevention) are being given less weight in competition proceedings.

14 **APPENDIX: Present use of settlements in EU competition enforcement**

14.1 Introduction

In this appendix, I will investigate the present use of settlement in EU competition enforcement. Statistics will be used to quantify the impact of the use of settlements. The purpose of this appendix is to give an illustration of the importance of settlements in current EU competition enforcement, and describe the scope of use of settlements.
14.2 The introduction of the modernization regulation

Regulation 1/2003 was mainly aimed at creating a more efficient framework to facilitate better use of the Commissions resources. Primarily, the abolition of the notification scheme was intended to free up resources, allowing the Commission to focus more extensively on antitrust and cartel cases\(^{238}\).

Indeed, the Commission initially thought Commitment decisions to be rather rare and unusual instruments for ending antitrust cases\(^{239}\). However, the new institute of commitment decisions has proved to be a very much used legal basis for Commission decision in the years following the introduction of the new regulation.

The new flexibility with regard to sanctions appears to have been appreciated by both the undertakings and the Commission, both of whom have taken initiatives to settle cases\(^{240}\).

14.3 Statistics\(^ {241}\)

Statistics may even better than qualitative assessments give an illustration to the extent and scope of the use of settlements in EU competition law. The tables below are updated as of April 2009. Since there is always cases pending, and given the timeframe of some competition cases, the numbers should be taken as indicative rather than representative the use of settlement. Still, they show a shift in use of legal decisions for ending cases from the Commission.

**Table 4: Overall use of settlements**

<table>
<thead>
<tr>
<th>Art. 7</th>
<th>Art. 9</th>
<th>Use of settlements</th>
</tr>
</thead>
</table>

\(^{238}\) Regulation 1/2003 recital 2.
\(^{239}\) Temple Lang, annual proceedings of the Fordham Corporate law institute, p 270.
\(^{241}\) The statistics in this chapter is complied by the author on basis of the case list in the annex of “Final commission staff working paper accompanying the communication from the commission to the European parliament and council report on the functioning of regulation 1/2003”.
Table 4 shows the total number and percentage distribution of art. 7 and art. 9 decisions respectively following the introduction of reg. 1/2003. In 2004 there were no commitment decisions, most likely because the new regime required some time to be established after the introduction of the rules. The last years are likewise not as representative because of pending cases. Highlighting the most “normal” years, 2005-2007, settlements does in these years amount to almost a third of the total number of competition decisions adopted by the Commission in this period.

The results becomes even more interesting if one looks upon use of settlements only in antitrust (AT) cases. As indicated already in the recital of regulation 1/2003\textsuperscript{242}, settlements are not deemed appropriate in cases where the Commission intends to impose a fine. As fines are generally more used in cartel cases, it is therefore first and foremost in antitrust cases the choice between different types of decisions is essential:

Table 5: Use of settlement in antitrust cases

<table>
<thead>
<tr>
<th>AT</th>
<th>Art. 7</th>
<th>Art. 9</th>
<th>Use of settlements</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>3</td>
<td>0</td>
<td>0,00 %</td>
</tr>
<tr>
<td>2005</td>
<td>2</td>
<td>2</td>
<td>50,00 %</td>
</tr>
<tr>
<td>2006</td>
<td>1</td>
<td>4</td>
<td>80,00 %</td>
</tr>
<tr>
<td>2007</td>
<td>4</td>
<td>5</td>
<td>55,56 %</td>
</tr>
</tbody>
</table>

\textsuperscript{242} Recital 13, Reg. 1/2003.
As demonstrated by table 5, settlements have been widely used to end antitrust cases, in over 50% of the cases. This is by far a larger percentage of the antitrust cases than one would have foreseen at the introduction of regulation 1/2003. It seems too early to indicate whether the level of use of commitment decision the first years will be representative for the commission’s means of ending cases also in the future, but the vast initial use suggests that a substantial part of antitrust cases will be ended using commitment decision also in the future.

The use of commitment decision has been to a wide range of cases, regarding different infringements of EU law.

**Table 6: Scope of action: Use of art. 9 remedies in relation to different forms of competition infringements.**

<table>
<thead>
<tr>
<th>ART. 9 Remedies</th>
<th>A101</th>
<th>A102</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>2005</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bundesliga</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Coca-Cola</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>2006</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>De Beers</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>FAPL</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Repsol</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Cannes Agreement</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td><strong>2007</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DaimlerChrysler</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Fiat</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Opel</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Toyota Motor Europe</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Distrigaz</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>2008</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.ON German electricity</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>
Table 6 exhibits the wide range of different cases in which the Commission has used commitment decisions to end various kinds of infringements, both relating to art. 101 and art. 102 infringements.

With regard to type of remedy, commitment decisions have also been used to impose structural remedies on the undertakings, as in both RWE and E.ON, otherwise most remedies have been behavioral.

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Made by author

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Made by author

Figure 8.  
Made by author

Figure 9.  
Made by author

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