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The Role of Fines in the Toolkit of Competition Agencies

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2.1 INTRODUCTION

Competition in markets has significant macroeconomic effects.[1] In this sense, competition authorities' work contributes to general economic development. In the EU, tasks related to the protection of competition are mainly carried out by public bodies. The task of public bodies is to create public value.[2] In the case of competition authorities, this is achieved by ensuring a competitive market environment through the curtailment of market power and the removal of barriers to entry. Competition authorities have both regulatory and nonregulatory tools at their disposal for carrying out their tasks aimed at improving the performance of the economy. As far as nonregulatory tools are concerned, these include participation in the regulatory process in order to promote a competitive environment (competition advocacy).

The work of public bodies broadly falls into two main categories: (1) the provision of services (e.g. issuance of documents, processing of registrations/authorizations, granting of public aid); and (2) the provision of protection (e.g. environmental protection, consumer protection, etc.). Public bodies falling into both of these categories share a common aim, namely the creation of public value. For service-providing agencies the creation of public value is measured in terms of customer satisfaction, while in the case of protection-type agencies (like competition authorities) this is measured in terms of their ability to solve social problems by preventing or controlling harms. While the prevention of harm is undoubtedly more socially beneficial and valuable than its resolution once it has occurred, it is unrealistic to assume that all future potential harms can be avoided by pre-emptive measures. Consequently, while prevention should be the number one operational aim of public bodies, the control and resolution of harms must also remain a priority.

In this chapter, I argue that the prevention of harms should be placed at the core of the functioning of competition authorities, including competition advocacy work. The legislative proposals of competition authorities can also be seen as a preventive tool. I place the role of the fines imposed by competition authorities in this complex context of prevention.

[1] J. B. Baker, , *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press, 2019).
[2] Mark H. Moore, *Creating Public Value, Strategic Management in Government* (Harvard University Press, 1995).

2.2 PREVENTION IN MARKET REGULATION

2.2.1 *Types of Prevention*

Market regulation aimed at preventing harms can be either ex-ante or ex-post. Ex-ante prevention seeks to prevent future harms through regulatory action and, unlike ex-post prevention, is not based on a specific, past harmful market behavior. There are two types of ex-ante prevention: prior authorization (as in the case of merger control) and the pre-emptive setting of rules for the future. The latter is not based on any specific past market conduct and typically seeks to counterbalance market power, e.g. significant market power–based telecommunications regulation or the proposed Digital Markets Act (DMA).[3] Ex-post prevention is motivated by specific market behavior that occurred in the past. It is also possible to impose behavioral and structural remedies for the future under the framework of ex-post prevention; however, in this case – as opposed to in the case of ex-ante prevention – there exists past market behavior on which the remedies can be based. Prohibition decisions and the imposition of fines also belong to ex-post prevention.

2.2.2 *How Prevention Works*

Prevention is both specific and general, as through a specific enforcement measure it aims to prevent future harms from occurring as a result of a particular market player's behavior (direct prevention) and to also send a message to market players that deters them from engaging in harmful market conduct (indirect). The success of specific (direct) prevention is therefore the key to general (indirect) prevention. General prevention can prevent more harm.[4] However, without the special prevention, this general preventive effect could not be materialized. The complementary nature of specific and general prevention is much more important for ex-post prevention than it is for ex-ante prevention. This is because ex-ante regulation provides greater preventive guarantees, given that market players are informed in advance about the behavioral requirements they are expected to abide by. Ex-post prevention, on the other hand, only provides a preventive mechanism based on the complementary work of general and specific prevention, which is also known as deterrence-based prevention. However, it should be noted that ex-ante prevention can also have a deterrent effect (see merger control prohibitions or interventions that may also affect future potential mergers[5]).

2.2.3 *Prevention and Social Fear*

Regulatory prevention is motivated by the social fear of the occurrence of risk. The prevention of harm is aimed at keeping the risk of harm at a socially acceptable level through the use of reasonable measures, bearing in mind that it is impossible to offer a full guarantee against the prevention of all potential future harms. The degree of socially acceptable risk is not necessarily

[3] Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) Brussels, 15.12.2020 COM(2020) 842 final 2020/0374.

[4] Stephen Davies et al., Quantifying the Deterrent Effect of Anti-Cartel Enforcement 2, Apr. 15, 2017, https://ssrn.com/abstract‡2520014 (accessed November 20, 2020).

[5] Jo Seldeslachts, Joseph A. Clougherty, and Pedro Luis Pita Barros, Remedy for Now but Prohibit for Tomorrow: The Deterrence Effects of Merger Policy Tools, February 2007, WZB, Markets and Political Economy Working Paper No. SPII 2007-02, https://ssrn.com/abstract=1009135 or http://dx.doi.org/10.2139/ssrn.1009135 (accessed November 20, 2020).

based on objective facts, with research showing that it is more closely related to the perception of risk (availability heuristic). For example, even though a nuclear disaster or plane crash is much less likely to occur in practice, people fear it much more than a car crash. If people can easily think of relevant examples they are far more likely to be frightened and concerned than if they cannot.[6] This also has implications for public policy, as decision science has shown that governments are likely to allocate their resources in a way that corresponds to people's fears rather than in a way that reflects the most likely danger.[7]

In the case of more perceptible harms, there is a greater social need for prevention. As discussed above, ex-ante prevention provides greater security for harm prevention than ex-post, but not all damage can be prevented using ex-ante tools (vide the Seveso regime for the prevention of industrial disasters[8]). Ex-ante preventive regulatory tools are therefore used in cases of significant societal fear (e.g. aviation safety, drugs R&D, industrial or nuclear facilities). However, ex-ante preventive regulatory tools also can be used for the prevention of abstract harm when social fear is not significant, e.g. in competition law in the case of a concentration creating a monopoly position.

Nevertheless, it is not possible to protect against all social fears using ex-ante preventive tools. The conditions for the application of ex-ante prevention are not present if the risk essentially results from human factors or human behaviors. In this case, the fear caused by regulation itself is the only possible means of prevention. In the same way that social fear may result in preventive regulation, regulation itself uses fear as a tool to prevent risk. Accordingly, the only tool available for eliminating the risks inherent in human behavior is ex-post prevention, which relies on the effectiveness of the complementary relationship that exists between specific and general prevention (known as deterrence).

2.2.4 *Ex-ante Prevention*

There are two types of ex-ante regulatory prevention: prior authorization and the pre-emptive setting of rules for the future, the latter of which is not based on any specific past market conduct.

Prior authorization is applied where the potential risk stems from the implementation of some tangible physical tool (e.g. vaccine, building construction) or institutional steps (e.g. merger).

In these cases, the nature of the potential harm is unique in the sense that

- the damage cannot be remedied later, or can only be remedied at significant cost and with great difficulty (e.g. construction or merger authorization)
- the possible occurrence of the damage causes great publicity and fear amongst society (e.g. safety of nuclear installations or aviation).

Ex-ante regulation, the pre-emptive setting of rules for the future, can be described in comparison to ex-post-based prevention (see next subsection).

[6] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (Yale University Press, 2009), 25.

[7] Ibid., 26.

[8] Esther Versluis, Marjolein van Asselt, Tessa Fox, and Anique Hommels,, Calculable Risks? An Analysis of the European Seveso Regime, in Morag Goodwin, Bert-Jaap Koops, and Ronald Leenes (eds,), *Dimension of Technology Regulations* (Wolf Legal Publishers, 2010), 264.

2.2.5 *Ex-post Prevention or Deterrence*

As mentioned, ex-post prevention depends on the complementary relationship that exists between specific and general prevention. Its success is contingent on the perception of risk; in the case of ex-post prevention, the threat arises from the regulatory intervention itself (fine, behavioral or structural remedy) or from the credibility of the threat. The more credible the threat of intervention is, the more the recipients of the norms believe that the sanction cannot be avoided in the event of an infringement. This relies on the perceptibility of the risk, which in this case is the high probability of regulatory intervention. According to Gal, the preventive deterrence effect is determined by the severity of the sanction and the probability of detection.[9] The more vividly a specific example can be associated with an intervention, the more threatening it appears. It is therefore closely linked to specific and general deterrence. The more visible that specific prevention is to those market players, for example in the form of the elimination of specific behaviors with fines and behavioral and structural remedies, the greater the deterrent effect. Recent behavioral science research also confirms that widespread communication of the imposition of fines increases the sense of danger of being caught despite the fact that in reality the chance of detection is not very high.[10] Consequently, it is important that there is effective communication about the imposition of fines.[11]

2.2.6 *Switching from Ex-post to Ex-ante Regulation As an Additional Type of Prevention*

Ex-post deterrence cannot, in some cases, effectively deter, and thus encourage law-abiding behavior. Examples of such cases are:

- when it is necessary to promptly correct or solve specific behavior in order to avoid further harm (e.g. liberalization regulation)
- when the use of ex-post enforcement would not pose a real threat (e.g. in the case of monopolies).

For example, the application of Article 102 of the ~~Full~~ Treaty of the European Union (TFEU) can only take place through slow and cumbersome procedures. For instance, in the Microsoft case,[12] after a six-year-long investigation the Commission obliged the company to provide access to its competitors, by which time it enjoyed a market share of 60 percent on the downstream market. Two years later when the Commission had to compel Microsoft to fulfill its obligations by imposing a penalty payment, the company already had a market share of 74 percent.[13] Another recent example is the Google case, where – after a seven-year investigation – a fine was imposed on the company for its anticompetitive business practice of favoring its own price comparison shopping service. In this case it turned out that Google's proposal for remedying the established anticompetitive business practice was not helping shopping rivals.[14]

[9] M. Gal, Harmful Remedies: Optimal Reformation of Anticompetitive Contracts, *Cardozo Law Review*, 22 (2000), 91–132.
[10] Godefroy de Moncuit, Relevance and Shortcomings of Behavioural Economics in Antitrust Deterrence, *Journal of European Competition Law & Practice*, Vol. 11, No. 5–6 (2020), 230.
[11] Ibid., 232.
[12] Microsoft (Case COMP/C-3/37.792) Commission Decision C(2005) 4420 OJ L 166/20 [2008] para. 499.
[13] Ibid., fn. 355.
[14] Yun Chee, Waldersee: EU's Vestager says Google's antitrust proposal not helping shopping rivals, 2019, www.reuters.com/article/us-eu-alphabet-antitrust-idUSKBN1XH2I8 (accessed 20 July 2020).

Consequently, markets characterized by market power need to be subject to ex-ante regulation in the long run, as the proposed DMA demonstrates in the context of the digital economy. Belgium[15] (August 2020) and Germany[16] (September 2020) have also adopted a similar legislative initiative in this field. The British Furman report[17] in 2019 also proposed that ex-ante regulation should be adopted in order to eliminate the competition problems arising in the digital economy, similarly to how it is used to regulate the telecommunications market, in light of the ineffectiveness of ex-post competition law enforcement.

The OECD worries about the switch from ex-post to ex-ante regarding digital economy since it may lead to questions about the broader relevance of abuse of dominance cases as a competition enforcement tool.[18] However, in sectors such as the digital economy where there is no sectoral regulation, antitrust rules could temporarily serve as the only regulatory intervention tool. Competition in the digital economy is much more dynamic and fragile; consequently, the European Commission and national competition authorities are encouraging the application of interim measures due to the speed with which they can be imposed.[19]

Where ex-ante prevention (regulation) proves ineffective, ex-post enforcement can also be used as a preventive tool. It can have a deterrent effect, e.g. in the case of Microsoft, which exercised self-restraint when faced with the risk of potential divestiture.[20] If market participants can reasonably expect to be subject to ex-ante regulation or divestiture if ex-post deterrence is ineffective, then this could serve as an important prevention tool, and even as a higher level of prevention.

2.2.7 *Proper Functioning of Prevention*

In order to achieve the maximum preventive effect, all prevention tools must be operated effectively. This includes switching to ex-ante prevention (regulation) when ex-post enforcement proves ineffective. This is because prevention creates real public value when it eliminates the causes that lead to the recurrence of harms. Sparrow pointed this out in the field of social regulation (health, safety, welfare, working conditions, and environment) when he placed

[15] Marc Wiggers, Thomas Verstraeten, and Robin Struijlaart, New rules prohibiting the abuse of economic dependence entered into force in Belgium on 22 August 2020 – What does this mean for the digital sector?, September 10, 2020, http://competitionlawblog.kluwercompetitionlaw.com/2020/09/10/new-rules-prohibiting-the-abuse-of-economic-dependence-entered-into-force-in-belgium-on-22-august-2020-what-does-this-mean-for-the-digital-sector (accessed November 20, 2020).

[16] Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz), www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile& (accessed November 20, 2020).

[17] Jason Furman et al., Unlocking digital competition, 2019, 84, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (accessed November 20, 2020).

[18] OECD, Abuse of dominance in digital markets, 2020, www.oecd.org/competition/globalforum/abuse-of-dominance-in-digital-markets.htm (accessed November 20, 2020).

[19] European Commission, Antitrust: Commission imposes interim measures on Broadcom in TV and modem chipset markets, (October 16, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6109 (accessed October 1, 2020); Autorité de la concurrence, The Autorité de la concurrence has ordered interim measures against Google, January 31, 2019, www.autoritedelaconcurrence.fr/en/communiques-de-presse/31-january-2019-online-advertising-directory-enquiry-services-0 (accessed July 20, 2020).

[20] Jonathan Tepper and Denise Hearn, *The Myth of Capitalism:Monopolies and the Death of Competition* (Wiley, 2019), 94.

radical solutions to real problems at the heart of public agency action.[21] At the core of this problem-solving mechanism is the identification and resolution of important social problems by public agencies, e.g. reducing the number of car accidents. In this sense, proper prevention means preventing the recurrence of a given problem by getting to the roots of the problem and addressing it at this level. This type of problem- solving mechanism developed in the field of social regulation could also be implemented in the field of economic regulation in order to prevent the recurrence of competition problems in a given industry. This would require the consistent and comprehensive use of all available preventive tools and, more specifically, the following:

- visible specific preventive measures to ensure the proper functioning of general deterrence;
- the widespread use of specific preventive measures that not only include fines but also behavioral and structural remedies, as is the case in the EU energy markets (This may include, where appropriate, a drastic transformation of the market structure leading to unfavorable market conditions through the breaking up of monopolies);
- a shift from an ex-post deterrence-based approach to ex-ante regulation if damage recurs despite ex-post deterrence (Competition authorities could be empowered by these ex-ante regulatory tools, e.g. in the case of the aforementioned draft German legislation).

2.3 PREVENTION IN COMPETITION LAW

2.3.1 *Monopolies As the Greatest Harm to Competition*

Competition leads to an improvement in allocative efficiency as it incentivizes market players to operate at their most effective level. This efficiency (X-efficiency) ensures that the market economy does not have more losers than result from the by-default inherent loss of the market economy. People with income levels below P = Mc cannot access goods even though markets are perfectly competitive. This innate injustice, which occurs by default, is aggravated by the distortion of competition. On the one hand, this is detrimental to the allocation of resources, which is a fundamental function of the economy, as more people are excluded from accessing goods and services than in the case of a perfectly competitive output. The basic function of the economy is to enable consumers to satisfy their needs. If competition is lacking or imperfect, output falls and the allocation (the central function of the economy) of resources is damaged, as fewer people receive the goods or services compared to the outcome of perfect competition. On the other hand, in the case of basic consumer goods, this loss of allocation efficiency imposes an additional burden on taxpayers, since the state has to care for not only citizens who have suffered from the by-default imperfect functioning of a market economy, but also those who would have had income between the competitive and noncompetitive levels.

Consequently, the role of competition law in the creation of public value must be the prevention of market power that is detrimental to consumer welfare. With this in mind, the various ways in which market power can arise need to be taken into consideration. First, there are market formations that create market power between competitors by artificially eliminating competition (e.g. cartels). Second, there are 'natural' market powers that need to be controlled through long-lasting regulation that substitute the competitive market outcomes in terms of price and quality (see e.g. network industries). Third, there are monopolies that emerge under competitive market conditions. That is a natural consequence of the competition which can be

[21] Malcolm K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000).

won. One of the main motivations that the market economy offers market participants is the prospect of becoming a monopoly. As can be seen in the example of digital giants, this is one of the most important drivers of innovation.

In the early stages of American competition law, in the twentieth century (until the middle of the century), market concentration was seen as a source of inefficiencies. According to Louis Brandeis, the natural result of the market process can be opposed if it leads to a concentration. In the 1970s the views of the Chicago School were still marginal and a movement towards the deconcentration of the American economy was developing.[22] In 1968, the Neal Report[23] proposed, among other things, measures to deconcentrate American industry. For a decade following this report (Woodstock Antitrust),[24] the existence of a long-term dominant position was considered as a structural market failure that needed to be corrected through competition rules, even if the market position solely stemmed from the past merits of the concerned firm[25] (as confirmed by the Supreme Court's Grinnell judgment).[26]

It was Robert Bork who put consumer welfare at the heart of antitrust policy in the 1960s and made low prices its only measure.[27] Since then the interest in eliminating or counterbalancing economic power, preventing the exploitation of consumers and the exclusion of competitors from the market has disappeared. According to Bork, a high market share is probably due to economies of scale and greater efficiency. According to him, antitrust law only serves to protect small companies from competition, fragments markets, and reduces cost-effectiveness. When the Chicago School became dominant, the widely held view was that in the absence of (regulatory) barriers to entry a dominant position was not sustainable.

Scientific progress is not made by correcting previous ideas, but by drastically shifting from one paradigm to another. Changes in competition law paradigms are also taking place along the lines of which group's interests are considered paramount. For example, the victims of market power are mobilized. As early as 1937 Judge Jackson stated that any move that weakens antitrust law (thereby increasing concentration) was a guaranteed step towards increased government control.[28] According to Kovacic, it is only a matter of time before business scandals or economic crises give rise to populist sentiments against large corporations, and politics will have to turn its attention towards imposing stricter standards for evaluating anticompetitive behavior (see EU Commission's DSA[29] and DMA[30] proposals), which will ultimately lead to deconcentration.[31] According to Tepper and Hearn, now would be the time to return to the post-World War II paradigm, i.e. to the elimination of concentration.[32]

[22] H. Hovenkamp, The 1968 Neal Report: An Introduction and Reprint, *CPI Journal*, *Competition Policy International*, Vol. 5 (2009).
[23] W. Kovacic, Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act As a Tool for Deconcentration, *Iowa Law Review*, 74 (1989), 1105–50.
[24] Harry First, Woodstock Antitrust, *CPI Antitrust Chronicle*, April 2018.
[25] Fred Marty: Protecting the competitive process, not a competitive structure, https://chillingcompetition.com/protecting-the-competitive-process-not-a-competitive-structure-by-fred-marty (accessed December 10, 2020).
[26] United States v. Grinnell Corp., 384 U.S. 563 (1966).
[27] Tepper and Hearn, *The Myth of Capitalism*, 157.
[28] Robert H. Jackson: Should the Antitrust Laws Be Revised?, *United States Law Review*, Vol. 71, No. 10, 577.
[29] Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC Brussels, 15.12.2020 COM(2020) 825 final 2020/0361.
[30] Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) Brussels, 15.12.2020 COM(2020) 842 final 2020/0374.
[31] William E. Kovacic, Failed Expectations: Troubled Past and Uncertain Future of the Sherman Act As a Tool for Deconcentration, *Iowa Law Review*, Vol. 74, No. 5, 1105–50.
[32] Tepper and *Hearn*, *The Myth of Capitalism*, 165.

2.3.2 Prevention Tools in Competition Law

Competition law creates public value by protecting society from the adverse effects of companies' anticompetitive strategies. For this purpose, the legislator has provided competition agencies with ex-post and ex-ante (merger control) tools. As mergers involve a number of administrative steps for their completion, they can be subject to a prior authorization procedure. In contrast, harms resulting from naturally existing and artificially created market powers stem from human action and can therefore only be prevented using ex-post tools.

Competition law fines should be interpreted in this context. The genuine threat of the imposition of a fine may discourage businesses from behaving anticompetitively in the future (known as general, repressive deterrence or indirect mechanism).[33] In terms of the competition law toolbox, it is not only fines but also leniency that has a deterrent function by increasing uncertainty among cartel members. The leniency intends to reinforce the prisoner's dilemma situation by undermining internal trust with the increased risk that one of the parties involved unilaterally reports in order to enjoy the benefits of the leniency program.[34]

Ex-post prevention tools also comprise behavioral and structural remedies. As mentioned above, in contrast to ex-ante prevention, the behavioral or structural remedies imposed in the framework of ex-post prevention are based on past market behavior. These remedies can be considered as an ex-post prevention tool, as the ex-post imposition of a remedy also serves to deter companies from engaging in unlawful conduct. Article 9 of Regulation 1/2003 enables the Commission to conclude an antitrust proceeding by making the commitments offered by a company legally binding in a commitment decision. Such a decision does not establish an infringement of EU competition law but legally binds the concerned company to respect the commitments offered. The EU Commission has strategically used remedies in the energy sector (sometimes in the form of structural remedies) to prevent the recurrence of market problems. Almost one-third of all EC commitment decisions under Article 9 of Regulation 1/2003 since 2004 have dealt with market conduct in the energy sector.[35] Since the liberalization of the EU energy markets, competition law enforcement has been active in the sector to promote more competitive gas and electricity markets in Europe by accepting divestiture remedies[36] and to facilitate market integration as well as the exchange of energy between member states.[37]

The Commission's proposal for a DMA continues and reinforces the competition law regulatory approach which was already implemented in the form of a commitment decision

[33] Jan Broulík, Preventing Anticompetitive Conduct Directly and Indirectly: Accuracy versus Predictability, *The Antitrust Bulletin*, Vol. 64. No. 1 (2019), 118.

[34] G. Spagnolo, *Optimal Leniency Programs*, 2000, *Working Paper, Fondazione Eni Enrico Mattei*, Milan.

[35] Luuk de Klein, PaRR statistics: one-third of EC commitment decisions in the energy sector, https://app.parr-global.com/intelligence/view/prime-2601673?src_alert_id=117053 (accessed December 10, 2020).

[36] In 2013 the Commission accepted the commitment offered by CEZ to divest part of its generation assets (power plants) (800–1000 MW) to a suitable purchaser (competitor) in the Czech Republic. (CEZ, a.s. (Case AT.39727) Commission Decision C(2013) 1997 [2013].) In 2009 RWE (RWE AG (RWE Gas Foreclosure) (Case COMP/39402) Commission Decision 2009/C 133/08 [2009] OJ L 133/10), a dominant firm in the gas transmission market by virtue of its network in Germany, undertook to divest its German gas transmission system business. In 2008 E.ON (E.ON AG (German Electricity Wholesale Market) (Case COMP/39388) Commission Decision 2009/C 36/08 [2008] OJ L 36/8) undertook to divest one-fifth of its generation capacity, and unbundle the entire high-voltage transmission system business from the distribution network controlled by the company in Germany. In 2010 ENI (ENI Spa (Case COMP/39315)) committed to divest its international gas transmission pipelines that bring gas from Russia and northern Europe to a suitable buyer in Italy.

[37] European Commission, Report of the European Commission on Competition Policy 2016, May 31, 2017, http://ec.europa.eu/competition/publications/annual_report/2016/part1_en.pdf (accessed July 20, 2020).

under Article 9 of Regulation 1/2003 in the energy sector. The market investigation under the proposed DMA would allow the Commission to impose behavioral and, where appropriate, structural remedies so that competition problems can be tackled much more effectively.[38]

Below I demonstrate how the limited deterrent effect of fines can be offset by the deterrent effect arising from the introduction of ex-ante regulation or the imposition of ex-post behavioral or structural remedies.

2.3.3 *Preventive Limits of Ex-post Fines in Competition Law*

There are situations where the ex-post imposition of fines proves ineffective and the harm continues to occur (e.g. abusive behaviors). If there are recurrent competition problems on a market, then this is a strong indicator that competition fines alone are not a sufficient deterrent. In such cases other types of preventive tools should be considered, such as ex-ante regulation or even divestiture.

The insufficient deterrent effect of fines in the field of competition results from the following factors:

- giant firms are not fazed when large fines are imposed on them for abusing their dominant position and do not fear a loss of reputation;[39]
- high recidivism[40] stemming from infringing companies' optimism that they are unlikely to be caught again;[41]
- large companies do not simply disappear, instead they use their power to buy fast-growing rivals;[42]
- cartel and abuse-adequate market structures remain unchanged, which means that fines do not effectively deter on a sustained basis;[43]
- companies may overestimate the low probability that cartels will be detected[44] and therefore choose to ignore competition law prohibitions;[45]
- anticompetitive practices are not associated with the same level of stigma as white-collar crime or tax evasion;[46]

[38] The European Commission's Digital Markets Act Proposal: Regulating systemically important digital platforms, www.linklaters.com/en/insights/publications/2020/december/european-commissions-digital-markets-act-proposal-regulating-systemically-important-digital (accessed December 20, 2020).

[39] Jean Tirole, *Telecommunication and Competition*, in Pierre A. Buigues and Patrick Rey (eds.), *The Economics of Antitrust and Regulation in Telecommunication* (Edward Elgar Publishing, 2004), ch. 14.

[40] Marc Barennes and G. Wolf, Cartel Recidivism in the Mirror of EU Case Law (2011) 2:5 *Journal of European Competition Law & Practice* 423; Wouter P. J. Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35:1 *World Competition* 5–26.

[41] de Moncuit, Relevance and Shortcomings, 233.

[42] Tepper and *Hearn*, *The Myth of Capitalism*, 51.

[43] J. Thompson and D. Kaserman, After the Fall: Stock Price Movements and the Deterrence Effect of Antitrust Enforcement, *Review of Industrial Organization*, 19 (2001), 329–34.

[44] E. Combe, C. Monnier and R. Legal, Cartels: The Probability of Getting Caught in the European Union, 2008, Working Paper PRISM-Sorbonne, Paris. According to the authors, the annual probability of being caught is between 12.9 percent and 13.3 percent. Deloitte, The Deterrent Effect of Competition Enforcement by the OFT, OFT 962, London, 2007. The survey showed a ratio of 1 to 5 (i.e. five times the deterrent effect) in terms of merger control and cartel enforcement in the UK for the period 2000–6.

[45] de Moncuit, Relevance and Shortcomings, 230.

[46] Daniel Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think about Enforcement' (2012) 78 *Antitrust Law Journal* 217–18.

- if a company fails to create a corporate culture that requires compliance with the law, the manager of the company is likely to ignore the seriousness of a violation;[47]
- if the managers of companies have a high tolerance of risk they will likely opt for an infringement strategy,[48] as they will be tempted by the possibility of destroying competitors, restoring market dominance, and making additional profits by overcharging consumers.[49]

2.3.4 Achieving the Maximum Level of Prevention in Competition Law

As mentioned above, the problem-solving approach adopted in the field of social regulation could also be implemented in the field of competition through the comprehensive and consistent use of all available preventive tools. While the ex-post imposition of fines and remedies is widespread, further research is needed to determine whether switching to ex-ante regulation and the application of divestitures can offset the limitations associated with ex-post prevention and bring about effective prevention. While there are some who associate prevention with the imposition of fines, I do not share this view.[50] Fines are not a standalone tool but part of a comprehensive set of preventive measures that must be used comprehensively and consistently in order to maximize the public value of preventive action.

The public value of prevention is especially important when markets tend to become concentrated.[51]

Baker has argued that competition policy has become unusually weak in recent decades, allowing for a long-term decrease in competition in markets, which has had large macroeconomic effects.[52] Market power is usually defined by economists as the ability of a firm to charge a price for a product that is above the additional cost of producing one more unit of that product (the 'incremental cost' or 'marginal cost').[53] The bigger the gap between the price of a product and its marginal cost, the greater the firm's market power.[54] According to Jan de Loecker and Jan Eeckhout, global corporate markups have risen from 18 percent in 1980 to 67 percent today.[55] Increased industry concentration has coincided with a significant rise in prices and thus profit margins.[56] The Competition and Markets Authority (CMA) has also emphasized that increasing markups or profits could indicate decreasing competition; consequently, the evolution of markups is closely related to the market power of firms.[57] Germany also reported relatively constant development of concentration, since the average markup in Germany has risen since 2013.[58]

[47] de Moncuit, Relevance and Shortcomings, 231.
[48] Gennaro Bernile and Vineet Bhagwat, 'What Doesn't Kill You Will Only Make You More Risk-Loving: Early-Life Disasters and CEO Behavior' (2017) 72 *The Journal of The American Finance Association* 167–206.
[49] de Moncuit, Relevance and Shortcomings, 236.
[50] Kai Hüschelrath and Jürgen Weigand, Fighting Hard Core Cartels, 2010, ZEW Discussion Paper No. 10-084, 24; M. Block, F. Nold, and J. Sidak, The Deterrent Effect of Antitrust Enforcement, *Journal of Political Economy*, Vol. 89 (1981), 429–45; C. Veljanovski, Cartel Fines in Europe, (2017) 30(1) World Competition 65–86.
[51] J. E. Stiglitz, The new era of monopoly is here, The Guardian, May 13, 2016.
[52] J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press, 2019).
[53] J. Tirole, *The Theory of Industrial Organization* (The MIT Press, 1988), 284.
[54] CMA, The State of UK Competition, 37.
[55] Jan de Loecker and Jan Eeckhout, The Rise of Market Power and Macroeconomic Implications, August 2017, NBER Working Paper No. 23687.
[56] Tepper and *Hearn*, *The Myth of Capitalism*, 36, 226.
[57] CMA, The State of UK Competition, para. 11.
[58] Monopolkommission, 2018, Trends in indicators of market power, www.monopolkommission.de/images/HG22/Main_Report_XXII_Market_Power.pdf.

To provide a few examples: the four biggest beer makers own more than 50 percent of the world's beer market;[59] the four biggest seed companies have a 58 percent share of the global market;[60] the central processing unit (CPU) market is dominated by duopolies,[61] Google dominates the search engine market[62] and mobile phone operating system market,[63] and Facebook dominates the social media landscape.[64]

The digital economy provides a good example of competition authorities taking the initiative to adopt ex-ante regulation when ex-post deterrence proves ineffective.[65] However, competition authorities need to pursue this practice more consciously and consistently and not only in relation to digital markets.

Any proposal that removes the requirement to define markets[66] or that applies abuse of dominance prohibitions to firms that are not yet dominant actually points to new ex-ante regulation.[67] Moreover, the ex-ante regulation motivated by the ineffectiveness of ex-post deterrence can be operated by the competition authority as in the case of the proposed draft German[68] or Belgian[69] digital market regulation suggested.

Furthermore, within the framework of the ex-post toolbox, competition authorities should be encouraged to apply divestitures at their own discretion. The threat resulting from the potential of divestiture enhances prevention, as demonstrated by the Microsoft case.[70] An interesting development in this regard is that the Trump administration filed a lawsuit against Google shortly before the 2020 presidential election.[71] This was followed on December 9, 2020 by the Federal Trade Commission (FTC), which sued Facebook in cooperation with a coalition of attorneys general of forty-six states. The FTC is seeking a permanent injunction in federal court

[59] www.statista.com/statistics/257677/global-market-share-of-the-leading-beer-companies-based-on-sales (accessed November 20, 2020).
[60] www.rightseeds.de/en/international-seed-markets-some-facts-we-collected (accessed November 20, 2020).
[61] www.cpubenchmark.net/market_share.html (accessed November 20, 2020).
[62] www.statista.com/statistics/216573/worldwide-market-share-of-search-engines (accessed November 20, 2020).
[63] www.statista.com/statistics/272698/global-market-share-held-by-mobile-operating-systems-since-2009 (accessed November 20, 2020).
[64] https://financesonline.com/facebook-statistics (accessed November 20, 2020).
[65] L'Autorité publie sa contribution au débat sur la politique de concurrence face aux enjeux posés par l'économie numérique, www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-publie-sa-contribution-au-debat-sur-la-politique-de-concurrence (accessed November 20, 2020).
[66] H. Schweitzer et al., Modernising the law on abuse of market power, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742 (accessed November 20, 2020).
[67] Marc Wiggers, New rules prohibiting the abuse of economic dependence entered into force in Belgium on 22 August 2020 – What does this mean for the digital sector?, http://competitionlawblog.kluwercompetitionlaw.com/2020/09/10/new-rules-prohibiting-the-abuse-of-economic-dependence-entered-into-force-in-belgium-on-22-august-2020-what-does-this-mean-for-the-digital-sector (accessed November 20, 2020); Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz), www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile& (accessed November 20, 2020); Jason Furman et al., Unlocking Digital Competition, 2019, 84, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (accessed November 20, 2020).
[68] www.bmwi.de/Redaktion/DE/Downloads/Gesetz/gesetzentwurf-gwb-digitalisierungsgesetz.pdf?__blob=publicationFile& (accessed November 20, 2020).
[69] http://competitionlawblog.kluwercompetitionlaw.com/2020/09/10/new-rules-prohibiting-the-abuse-of-economic-dependence-entered-into-force-in-belgium-on-22-august-2020-what-does-this-mean-for-the-digital-sector (accessed November 20, 2020).
[70] Tepper and *Hearn*, *The Myth of Capitalism*, 94.
[71] Department files complaint against Google to restore competition in search and search advertising markets, www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws (accessed November 20, 2020).

that could, among other things, require divestitures of assets, including Instagram and WhatsApp.[72]

Accordingly, a limited number of natural monopolies should be regulated ex-ante, while the rest should be broken up as France and Netherlands also propose.[73] Additionally, mergers that have reduced competition should be reserved.[74] The Commission essentially states in the EU Data Strategy[75] that in the future it will carefully examine the potential effects of large-scale data accumulation and the necessity of data-access or data-sharing remedies to address potential concerns.

The Commission cleared the Google/DoubleClick merger[76] on the basis that the linking of searching and browsing information would result in contractual difficulties and also reduce DoubleClick's attraction. Of course we know by now that Google has succeeded in combining searching and browsing history for advertising purposes. As a result of this merger, Google has become a vertically integrated online advertising business (since the acquisition of DoubleClick enabled it to access browser data), which according to a French sector inquiry[77] is now one of the main problems in the online advertising market. Correspondingly, in the Facebook/WhatsApp merger case,[78] the Commission took the position that although WhatsApp did not collect user information, it was unlikely that Facebook would start collecting user data after the merger. It is also clear by now in this case that the technical barriers quoted by Facebook did not exist, as after the merger Facebook did in fact connect WhatsApp profiles with Facebook profiles.

There remains significant scope for further enhancing ex-post deterrence and it would be narrow-minded to solely focus on fines. A study carried out for the EU identified two main ways in which the deterrent effect of competition enforcement could be increased, namely through more private damages actions and the introduction of individual sanctions for competition law violations.[79] One key result of a survey conducted in the US was that private enforcement seems to play a larger role in creating a deterrent effect than public enforcement.[80] The CMA argues that ensuring personal responsibility for competition law compliance (disqualification of directors) could further enhance the deterrent effect of enforcement.[81] It is worth considering the CMA's suggestion that auditors should be required to make a report to a company if, during the

[72] FTC sues Facebook for illegal monopolization, www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization (accessed December 10, 2020).

[73] France and Netherlands join forces to back EU move against tech giants, www.ft.com/content/4a9ed79e-c8c8-4b47-8055-1cd029541c32.

[74] Tepper and Hearn, *The Myth of Capitalism*, 243. In its complaint against Facebook, the FTC claimed that the company had engaged in a systematic strategy to eliminate threats to its monopoly when it acquired WhatsApp and then its upcoming rival Instagram. www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization (accessed December 10, 2020).

[75] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, Brussels, 19.2.2020 COM(2020) 66 final, 14.

[76] COMP/M.4731 – Google/DoubleClick, 340.

[77] L'Autorité rend son avis sur la publicité en ligne, www.autoritedelaconcurrence.fr/fr/communiques-de-presse/lautorite-rend-son-avis-sur-la-publicite-en-ligne (accessed December 10, 2020).

[78] COMP/M.7217 – Facebook/WhatsApp.

[79] R. Feinberg, The Enforcement and Effects of European Competition Policy: Results of a Survey of Legal Opinion, *Journal of Common Market Studies*, 23 (1985), 373–84.

[80] A. Beckenstein and H. Gabel, Antitrust Compliance: Results of a Survey of Legal Opinion, *Antitrust Law Journal*, 51 (1982), 459–516.

[81] Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy, February 21, 2019, 23

course of their normal work, they identify practices that may raise competition risks.[82] Ex-post deterrence is also improved if soft law and the reasoning of the decisions are clear. The complex nature of competition law and cases means that individuals will disregard unclear rules.[83] However, the more robust the inquiry in a competition case, the greater the uncertainty.[84] In order for deterrence to be effective, competition law enforcement must be predictable. If companies are unable to determine whether or not their conduct will be sanctioned, this may not only prevent them from being able to refrain from anticompetitive acts, it may also hinder their adoption of procompetitive practices.[85] According to Broulík, there is tension between case-by-case enforcement (where accuracy matters) and general deterrence (where predictability is the most relevant).[86] Since antitrust is primarily focused on the general prevention of anticompetitive conduct, predictability is indispensable for its overall effectiveness.[87] Consequently, when reviewing competition authority decisions, courts should consider whether greater general deterrence can be achieved through correction. The general deterrence should not be undermined by unpredictability-related deterioration.[88]

2.4 SUMMARY

In this chapter, I have shown that fines are not a standalone tool in the toolbox of competition authorities when it comes to the prevention of harms. Instead, they are one of several tools that can be used by authorities to prevent harm and create public value. In order for competition authorities to effectively carry out their protective role and shield the public from harm, they must make full and consistent use of the preventive tools at their disposal. This necessarily requires the use of not only fines, but also regulatory initiatives and, where appropriate, the consistent application of divestitures.

[82] Ibid.
[83] de Moncuit: Relevance and Shortcomings, 233.
[84] Barry E. Hawk and Nathalie Denaeijer, The Development of Articles 81 and 82: Legal Certainty, in Claus-Dieter Ehlermann and Isabela Atanasiu (eds.),*European Competition Law Annual* 2000.129–40.
[85] Broulík: Preventing Anticompetitive Conduct, 124.
[86] Ibid., 125.
[87] Ibid.
[88] Ibid. 126.