



EX-POST ASSESSMENT OF COMPETITION LAW DECISIONS

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Competition law objectives

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- A competition law decision has two general purposes
 - Stop a conduct or prevent a merger that is likely to alter competition in a way that is detrimental for consumer and/or social welfare
 - Deter similar conducts in the future, not only in the market interested by the decision
- A retrospective analysis aims at assessing whether the decision was appropriate for its purposes

Research questions and

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- “Appropriate” may have 3 different meanings

1) Did the decision have an impact on the interested market? Did it improve consumer or social welfare? (**assessment of the outcome**)

2) Was the decision based on a valid theory of harm? Were all the relevant theories of harm (and efficiency justifications) properly investigated by the CA? (**assessment of the analysis**)

3) Was the decision able to deter similar anticompetitive behavior? Did the decision provide clear guidance on which conducts should be deemed illegal? (**assessment of deterrence**)

Assessment of the outcome

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- Definition of the **outcome variable**
 - Some factors that affect consumer/social welfare
 - Price
 - Output
 - Quality
 - Innovation

- The definition of the outcome variable can be guided by the **theory of harm** underpinning the decision

- The assessment of the outcome requires a **counterfactual analysis**, i.e., the question is to understand if one of the outcome variables would have been worse/better if the Commission had adopted an alternative decision

Counterfactual analysis

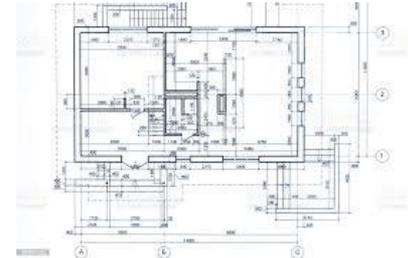
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- A counterfactual is a purely **hypothetical** situation: it **cannot be observed**; we have to **build** it
- As for any construction, we need:



Material → **Information** (data on observable variables)

Technical drawings → A **Model**



Tools → **Statistical techniques** (to elaborate data)

The observable information

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- The information we use to build the counterfactual may concern
 - The outcome variable in the affected market before and after the decision (**before and after**)
 - The outcome variable in the other comparable markets not affected by the decision (**yardstick**)
 - A combination of the previous sets of information (**difference in differences**)
 - Variables on factors - other than the outcome variable - that can affect demand and supply conditions (**structural analysis**)
 - The opinion of market participants, industry experts and researchers (**survey**)

The model

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- Models vary substantially, depending on the information we use
- A model comprises a **set of assumptions**
- Sometimes these assumptions are embedded in the statistical technique

Assessment of the analysis (1 / 2)

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- The purpose is to decide whether the theory of harm underpinning the decision was relevant and valid using the information available in the aftermath, i.e. with the benefit of hindsight
- A theory of harm is a story that explains why and how a certain practice is likely to impair competition. The story comprises some statements that can be divided in 2 groups:
 - **Factual assertions**
 - **Logical propositions**
- Some of these statements are key in the theory harm

Assessment of the analysis (2/2)

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- Identify the key statements
 - Key factual assertions
 - Key logical propositions
- Check whether the key factual assertions can be considered “**true**” (“false”) given what really happened
- Check whether the key logical assertions can be considered “**valid**” (“invalid”) given what really happened (and possibly new insights from economic theory)
- Evaluate whether other theories of harm could have been relevant (or even more relevant)
- If there are “mistakes” were they inevitable? Was there evidence available at the time of the decision to correct these mistakes? If so, which pieces of evidence did the Commission overlook or misinterpret?

Assessment of deterrence (1 / 2)

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- Deterrence stems from a combination of factors: (1) a clear (i.e. **predictable**) partition between legal and illegal conducts; (2) the probability that illegal conducts are uncovered and successfully prosecuted; (3) the overall “sanction” imposed on infringers (which include damages, reputation, etc.)
- Individual decisions affect mostly (1), as the other factors depend on some general features of a competition policy regime
- Hence, I believe that the assessment of the deterrence properties of the decisions should address mostly the question whether they were able to set the **boundaries of the prohibition** and the applicability of the theory of harm on which they were based

Assessment of deterrence (2/2)

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- Looking for a **pattern**: an increase in the number of antitrust decisions concerning the same practice (or the same theory of harm) and a steadily decline afterward
- Soliciting the **expert opinion** of legal (and to a limited extent, economic) counsels; they can reveal the frequency with which they advised their client against a certain practice

Conclusions

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- The ex-post evaluation of competition law decision can be very informative and help improving the enforcement

- However...
 - It is a complex exercise
 - It needs data (and a lot of work) to provide reliable results
 - In my opinion, frequently too focused on the assessment of the outcome