Institutional Design and Antitrust Doctrine: Will the US and EU Evidentiary Standards Converge?

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Abstract

The purpose of this paper is to study the relative impact of public and private competition law enforcement on the substantive doctrine of antitrust liability. In a model with asymmetric information during trial, and where the number of cases filed depends on the amount of the damages awarded and the standard of proof applied upon trial either by the public authority or by the judge, we highlight a crucial trade-off between the number of cases filed and the social cost of judgement errors. Our analysis is useful to discuss the evolution of the future European substantive doctrine of antitrust liability in view of the recent move by the European Commission to facilitate private claims for antitrust damages in Europe.

Keywords: antitrust, public and private enforcement, standard of proof

JEL classification: K21, L41, D82

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1 Introduction

Over the past two decades, the EU and US competition policies appear to have evolved towards greater convergence in certain enforcement areas. Both EU and DOJ officials today consider cartels as the most serious form of anticompetitive behavior, and the recent EU practice has substantially and voluntarily converged on US norms, by adopting and reforming the leniency program that had been largely tested in the US. Horizontal merger policy similarly reflects a substantial degree of convergence, with decisions by courts of both jurisdictions pushing EU and US enforcement authorities to satisfy more demanding evidentiary standards and withstand closer judicial scrutiny of proof offered to demonstrate likely anticompetitive effects.

In turn, the comparative treatment of abuse of dominant position/market monopolization illustrates the substantive dissimilarity between the two antitrust systems. Consider predatory pricing and its three acknowledged elements: sacrifice, elimination, recoupment. Whereas the approach in the EU focuses on the first two (the form of pricing), the US policy on predation emphasizes all three of them, which makes predation harder to prove. More generally, the decisions of the US courts under Section 2 of the Sherman Act such as Brooke Group\textsuperscript{1}, Trinko\textsuperscript{2} or Weyerhaeuser\textsuperscript{3} have shown greater skepticism about abuse of dominance claims and weaker liability for dominant firms than the European judicial decisions in mirror cases such as France Telecom/Wanadoo\textsuperscript{4}, Michelin II\textsuperscript{5} or British Airways\textsuperscript{6}.

One possible explanation for this visible progression towards a more lenient treatment of dominant firm conduct in the US over the past 30 years may be the role played by private rights and the delegation of the decision to prosecute (Kovacic, 2003). Accordingly, if courts fear that the private party incentives to sue are misaligned with the larger interests of the

\textsuperscript{5}Case T-203/01, Manufacture Francaise des Pneumatiques Michelin v. Commission, 2003.
public, or that the US style of private rights of action (with mandatory treble damages, asymmetric shifting of costs, class actions) excessively deter legitimate business conduct, the courts will use measures within their control to correct the perceived imbalance. Following Kovacic (2008), the courts may “equilibrate” the antitrust system by adjusting evidentiary requirements that must be satisfied to prove violations, or alter substantive liability rules in ways that make it more difficult for the plaintiff to establish the defendant’s liability.

It is our purpose in this paper to devise a model to deal with the relative impact of public and private competition law enforcement on the substantive doctrine of antitrust liability.

Our model involves two private parties, the plaintiff and the defendant. The latter chooses a certain type of market behavior, pro- or anticompetitive. The plaintiff observes this and then incurs some cost of gathering evidence, which will enable him to bring suit against the defendant. The model also involves a decision-maker, the public antitrust authority or the judge (depending on the type of enforcement, public or private), that rules on the defendant’s liability and consequently inflicts a fine or awards damages and pronounces an injunction to cease the alleged behavior. The objective of the decision-maker is to maximize welfare, i.e. minimize the cost of decision/enforcement errors. The liability decision is reached based on the standard of proof chosen in the beginning, and to which the decision-maker credibly commits, and also on an imperfect signal, generated by the plaintiff’s initial evidence and imperfectly correlated with the true type of behavior adopted by the defendant.

The two types of antitrust enforcement may actually differ in many respects, but we only focus on one: whereas the plaintiff receives the amount of the damages awarded by the judge, he does not receive the amount of the fine inflicted by the antitrust authority (which instead is destined to the state budget). Consequently, the incentives to bring suit will likely differ between the two procedures, and therefore we expect the optimal choice of a standard of proof to differ as well. This will enable us to eventually compare the two types of antitrust enforcement, in terms of optimal standard of proof but also in terms of expected welfare deriving from this.

The optimal standard of proof strikes the balance between the associated cost and ben-
efit, namely the welfare loss from not deterring and punishing the anticompetitive practices, and the welfare gain from encouraging the pro-competitive conduct. We show that suits are brought more often when the standard of proof is lower and the monetary sanction inflicted to the defendant is higher, because then the plaintiff stands more to gain. Increased litigation deters the anticompetitive practices, but also chills the pro-competitive ones, because for a given standard of proof liability is ruled more often, both rightfully and wrongfully. This risk of type I errors (i.e. chilling of pre-competitive practices) will make the decision-maker increase the standard of proof, so as to preserve the incentives encouraging the pro-competitive behavior. Following this argument, the optimal standard with private enforcement is always higher than with public enforcement, because the latter triggers fewer complaints (since the administrative fine is not pocketed by the plaintiff).

Before turning to the model itself, let us briefly discuss the relevant literature for this topic. For instance, Besanko et Spulber (1990), Briggs et al (1996) and more recently Bourjade et al (2009) have tackled private claims for antitrust damages from the point of view of the impact of treble damages and asymmetric information between litigants, whereas Rubinfeld (2006), Segal et Whinston (2007), Wils (2009) and Peyer and Hüschelrath (2013) investigated the relationship or optimal mix between public and private enforcement of competition law. McAfee et al (2008) explicitly dealt with this, by comparing the two types of enforcement. They reach the conclusion that adding private claims to the already existing public enforcement is welfare improving if the ensuing litigation does not give rise to too many judgment errors. At this point it is worth recalling that the amount of errors may depend on the type of procedure and above all on the standard of proof, the latter being possibly endogenous (Kaplow, 2011). We depart from the previous literature in as much as we undertake a relative performance comparison between the two types of enforcement. More precisely, we determine the impact of a given type of enforcement on the number of cases filed and on the standard or proof (applied either by the public authority or the judge), and thereby ultimately on the deterrent effect aimed at the anticompetitive behavior of firms. In so doing we hope to contribute to the debate on the opportunity of introducing private claims
and litigation for antitrust damages in the EU\textsuperscript{7}.

The rest of the paper is organized as follows: first we present the model, then discuss the choice of optimal standard of proof with private antitrust enforcement. We go on to highlight how the results may change with public enforcement, and compare the two procedures before concluding.

2 The model

The players and their information

Consider first the two firms, the defendant ($D$) and the plaintiff ($P$). The defendant can be of two types. The first, denoted $D^A$, may adopt an anticompetitive conduct, at a cost $K^A$, generating an extra profit equal to $\Delta$. The second type of defendant, denoted $D^P$, has the opportunity to undertake a pro-competitive practice, also leading to an extra profit of $\Delta$, but at a cost $K^P$. Both types are equiprobable but lead to different welfare outcomes: the welfare loss induced by the practice chosen by $D^A$ is equal to $L > 0$, whereas the welfare gain generated by firm’s $D^P$ conduct is equal to $B > 0$, where $B \geq |L|$. Beyond this welfare effect, the defendant’s conduct also leads to a profit loss for the plaintiff, which amounts to $\Delta$. The plaintiff $P$ observes $D$’s true type, and may file against her a complaint for abusive conduct when $D$ undertakes the practice\textsuperscript{8}. To file the complaint, the plaintiff needs to gather evidence, at a cost $f$. The plaintiff’s evidence-processing cost is his private information, and is uniformly distributed over the interval $[0, f]$.

The game we consider is a three-player game, to the extent that the plaintiff may bring suit either in front of the antitrust authority (AA) or in front of a civil judge (J). We assume that a formal procedure takes place against firm $D$ only if firm $P$ chooses to file a complaint.\textsuperscript{7}

\textsuperscript{7}On 11 June 2013 the European Commission adopted a package of instruments to facilitate damages claims by victims of antitrust damages. The main element of the package is a proposal for a directive on antitrust damages.

\textsuperscript{8}Note that we deliberately assume the same profit change for both defendant and plaintiff in order to avoid any exogenous impact on the plaintiff’s incentives to file a complaint.
Neither AA nor J observe D’s conduct. Firm $P$ provides some evidence on the alleged conduct, but not enough to perfectly discriminate between both practices. Both the AA and the judge receive a signal based on $P$’s evidence and imperfectly correlated with the true type or behavior of firm $D$, and this signal is used to establish $D$’s liability. However, the risk of judgement errors also depends on the standard of proof retained: the higher the standard, the higher the risk not to condemn a firm that undertakes an anticompetitive practice, but also the lower the probability to wrongfully condemn a firm that adopts a pro-competitive behavior$^9$. We thus assume that the probability to receive the signal enabling to establish liability given that the true type is $D^A$ is equal to $1 - s$, whereas the probability of the same signal given that the true type is $D^P$ is only $p - s$, where $p < 1$ and $s$ is the standard of proof.

**The antitrust enforcement procedure**

We consider two polar procedures: a pure private enforcement and a pure public, administrative, enforcement of antitrust. We assume that the plaintiff may initiate either one or another, meaning it may either claim damages in front of a civil judge for the alleged anticompetitive behavior of the defendant, or file a complaint with the antitrust authority. Both types of antitrust enforcement lead to the obligation for the defendant, if found liable, to stop the alleged anticompetitive practice. We assume that such an injunction to cease involves a profit loss of $\Delta$ for the defendant and a profit recovery of $\Delta$ for the plaintiff, regardless of the type of procedure.

In practice, the two type of antitrust enforcement differ in several respects. We focus here on one particular aspect, related to linked to the fine or damage paid by the defendant if found liable. Accordingly, the defendant has to pay a damage to the plaintiff in the civil claims/private procedure, whereas he has to pay an administrative fine in case of public enforcement, which will not go to the plaintiff but to the state budget. In what follows we denote $x$ the damage awarded by the judge or the fine inflicted by the public authority, and

$^9$A typical example is the standard of proof required for predatory pricing. Under a low standard of proof only the dominance/market power and the cost test are used to establish the liability for predatory pricing. A higher standard of proof would also include the lost profits recoupment test.
will discuss the role played by the size of this penalty payment made by the defendant.

The timing of the game

Stage 1 - The decision-maker (judge or AA) credibly commits to a standard of proof $s$.

Stage 2 - Each type of defendant $D$ chooses whether to undertake or not the conduct.

Stage 3 - The plaintiff $P$ decides to file or not a complaint based on its evidence-processing cost and the observation of the defendant’s true type/conduct.

Stage 4 - If the plaintiff did file a complaint, the AA or the judge, depending on the type of enforcement, receive the signal enabling to establish liability. We assume that the decision-maker is credibly bound by the decision rule (set for instance by the law) according to which if the signal of evidence satisfying the standard of proof is received, then liability is established and the defendant has to stop her conduct and pay either damages or an administrative fine.

The objective of either the AA or the judge is to maximize welfare, i.e. minimize the cost of decision/enforcement errors. By assumption, there is no welfare change if at the first stage the defendant does not engage in anti/pro-competitive conduct but maintains the status-quo.

In what follows, we determine the Perfect Bayesian Equilibrium for each type game (public or private antitrust enforcement) so as to identify the optimal standard of proof under each type of procedure and eventually compare them.

3 Private enforcement of antitrust claims

Solving the game requires us to detail the plaintiff’s choice at the third stage, since the final stage merely witnesses the application of the decision rule to which the decision-maker (here, the judge) is legally bound.

If the plaintiff $P$ observes type $D^A$ adopting the anticompetitive conduct, it files a suit with probability $(1 - s)(x + \Delta)$, whereas if he observes type $D^P$ choosing the pro-competitive behavior, the probability of bringing a suit is $(p - s)(x + \Delta)$. Several remarks are worthwhile. First, although the signal is imperfect, it is informative, therefore the probability for type $D^A$ to face a complaint is always higher than for type $D^P$. Secondly, this probability is
increasing in the amount damage to be paid, $x$, as well as in the amount of profit recovery $\Delta$ induced by the injunction to stop the practice, because these enter the plaintiff’s expected gain from filing suit. Finally, and by the same token, a lower standard of proof leads to a higher probability of filing a complaint, since the expected gain from this is more likely.

Going back to the previous stage, we can now discuss the defendant’s choice to undertake or not the allegedly abusive practice. This choice is made based on a cost-benefit analysis, putting into balance the private gain from the practice and the probability to be held liable for it and incur the associated cost. The probability to be found liable of an abusive conduct equals $(1 - s)^2(x + \Delta)$ for $D^A$ and $(p - s)(x + \Delta)^2$ for $D^P$, leading to an expected private gain of $\Delta - (1 - s)^2(x + \Delta)$ and $\Delta - (p - s)^2(x + \Delta)$ respectively.

Given the trade-off that the defendant faces between the private benefit from undertaking the allegedly abusive practice and the expected cost in case she is held liable for it, we deduce the following:

**Lemma 1** A firm $D^i$ undertakes the practice $i$ iff $s > s^i_{priv}(x)$. The standard $s^i_{priv}(x)$ increases with $x$, and $s^P_{priv}(x) < s^A_{priv}(x)$ iff $x$ is high enough.

**Proof.** Denote $\tilde{K}^i$ the cost threshold such that for $K^i < \tilde{K}^i$, $D^i$ undertakes the alleged abusive practice. Then $\tilde{K}^P = (p - s)^2(x + \Delta)(-x) + (1 - (p - s)^2(x + \Delta)) \Delta$ and $\tilde{K}^A = (1 - s)^2(x + \Delta)(-x) + (1 - (1 - s)^2(x + \Delta)) \Delta$. Equivalently, one can rewrite to obtain the standard-of-proof thresholds, $s^P_{priv}(x) = p - \sqrt{\Delta + \tilde{K}^P \Delta + x}$ and $s^A_{priv}(x) = 1 - \sqrt{\Delta + \tilde{K}^A \Delta + x}$.

The cost for the defendant to adopt the possibly abusive conduct depends on the standard of proof that applies in case of litigation. Lemma 1 states that a higher standard of proof provides higher incentives to undertake the practice, since the chances of being held liable for it are lower. Moreover, the threshold in terms of standard of proof tipping the balance in favor of the adoption of the practice depends on $x$, the damages payment that the defendant will incur if found liable. Since a higher damages payment lowers the defendant’s incentive to adopt the practice, whatever its nature, Lemma 1 also stresses the substitutability between
the level of damages $x$ and the standard of proof $s$. As a result, if $x$ increases, then a higher $s$ is required to induce the adoption of the pro-competitive practice by $D^P$, which will prove crucial for optimal standard choice by the court.

Note that $s_{priv}^P(x) > s_{priv}^A(x)$ for a low damages payment: in that case, the choice of optimal standard of proof will involve a trade-off, since it is impossible to encourage the adoption of the pro-competitive practice and deter the anticompetitive behavior at the same time. In turn, for a high damages payment, there is a continuum of standards of proof (in the range of $[s_{priv}^P(x), s_{priv}^A(x)]$) allowing optimal incentives: the anticompetitive practice is deterred whereas the pro-competitive practice is encouraged. Thus a high level of damages to be paid relaxes the incentive constraints. This is the case because higher damages will increase much more the number of suits filed against an anticompetitive defendant than a pro-competitive defendant. This explains why a higher damage payment makes the deterrence of anticompetitive practice more likely than the chilling of pro-competitive behavior.

The next step of our analysis will be identifying the optimal standard of proof set by the judge at the first stage. Before that we can derive the expected welfare for both types of defendant, and emphasize the ambiguous role of the standard of proof.

The expected welfare when $D^P$ actually adopts the pro-competitive practice is equal to $B \left[ 1 - (p - s)^2 (x + \Delta) \right]$ if $s > s_{priv}^P(x)$ and 0 otherwise. A higher standard of proof provides higher incentives to adopt the pro-competitive conduct as well as reduces the probability to be wrongly held liable, due to both a lower probability of liability ruling and fewer suits being filed. As a result, the expected welfare from the pro-competitive behavior increases with the level of standard of proof. In turn, the expected welfare when $D^A$ undertakes the anticompetitive practice equals $-L \left[ 1 - (1 - s)^2 (x + \Delta) \right]$ if $s > s_{priv}^A(x)$ and 0 otherwise, and it is straightforward to see that a lower standard of proof leads to a higher the expected welfare, thanks to higher chances to rightfully hold $D^A$ liable.

In other words, the optimal standard of proof strikes the balance between the associated cost and benefit, namely the welfare loss from not deterring and punishing often enough
the anticompetitive practices, and the welfare gain from encouraging the pro-competitive conduct. Below we provide the result of this trade-off, and discuss the impact of the damages payment on the optimal standard.

**Proposition 1** Denote $s^*_\text{priv}(x)$ the optimal standard of proof with private enforcement. Then $s^*_\text{priv}(x) \geq s^P_{\text{priv}}(x)$ and $s^*_\text{priv}(x)$ is always increasing in the amount of damages $x$. The expected welfare may decrease in $x$.

**Proof.** For a low level of $x$, the expected welfare (change) can be written as follows:

$$W(s) = \begin{cases} 
0 & \text{if } s < s^A_{\text{priv}}(x) \\
W^A(s) & \text{for } s^A_{\text{priv}}(x) < s < s^P_{\text{priv}}(x) \\
W^{A+P}(s) & \text{for } s \geq s^P_{\text{priv}}(x)
\end{cases}$$

where:

$$W^P(s) = B\left[1 - (p - s)^2(D + \Delta)\right],$$

$$W^A(s) = (-L)\left[1 - (1 - s)^2(D + \Delta)\right],$$

$$W^{A+P}(s) = B\left[1 - (p - s)^2(D + \Delta)\right] + (-L)\left[1 - (1 - s)^2(D + \Delta)\right].$$

The highest expected welfare is obtained for the optimal standard of proof, given by $s = \max(s^P_{\text{priv}}(x), \frac{1}{B-L}(Bp - L))$. For a low level of $x$ we have $s^P_{\text{priv}}(x) < \frac{1}{B-L}(Bp - L)$, whereas for higher $x$ we have the opposite.

For a high level of $x$ the expected welfare equals:

$$W(s) = \begin{cases} 
0 & \text{if } s < s^P_{\text{priv}}(x) \\
W^P(s) & \text{for } s^P_{\text{priv}}(x) < s < s^A_{\text{priv}}(x) \\
W^{A+P}(s) & \text{for } s \geq s^A_{\text{priv}}(x)
\end{cases}$$

Then, the highest level of welfare is achieved for $s = s^A_{\text{priv}}(x) > s^P_{\text{priv}}(x)$.

To show that the expected welfare may decrease with $x$, we consider the case where $x$ is low. Evaluating the welfare at the optimal standard, it is easy to show that an increase in $x$ decreases the expected welfare equal to $B(1 - p)(-x + \Delta)p + 2\sqrt{\Delta - k} + 1$ for $B = -L$.

Proposition 1 first states that the optimal standard of proof necessarily provides incentives for the adoption of the pro-competitive conduct. This is hardly surprising if the damages
payment is high, since there is actually no trade-off: the anticompetitive behavior is de-
terred while the pro-competitive conduct is encouraged. The result is more surprising for a
lower level of damages awarded. Then, following from Lemma 1, it is more efficient to en-
courage pro-competitive practices at the cost of also encouraging anticompetitive practices,
rather than deter both practices. This is the case because establishing liability for the anti-
competitive conduct is more likely than wrongly convicting the adoption of pro-competitive
behavior. Thus it is always welfare improving to have both anticompetitive practices and
pro-competitive practices rather than no such practices at all.

Proposition 1 also provides the immediate corollary, dealing with the impact of higher
penalty: in order to preserve the incentives in favor of pro-competitive practices, the optimal
standard must increase whenever the damages payment increases. This is a perfect illustration
of how the monetary sanction in the form of damages to be paid is actually expected to work in
the private enforcement of antitrust. First, a higher sanction leads to more suits being filed,
because the plaintiff stands more to gain. Increased litigation deters the anticompetitive
practices, but also chills the pro-competitive ones, because for a given standard of proof
liability is ruled more often, both rightfully and wrongfully. This risk of type I errors and
resulting chilling of pre-competitive practices will make the judge increase the standard of
proof, so as to preserve the incentives encouraging the pro-competitive behavior.\footnote{As
mentioned in the Introduction, this argument serves as a possible explanation for the gradual leniency
towards dominant firm conduct in the US over the past 30 years. Accordingly, if the courts fear that the
mandatory treble damages excessively deter pro-competitive practices, the judges may "equilibrate" the an-
titrust enforcement by adjusting the evidentiary requirements that must be satisfied in order for violations to
be proved. In other words, they apply a higher standard of proof to avoid type I errors.}

Finally, Proposition 1 establishes the impact of damages on the expected welfare. A higher
damages payment as a monetary sanction may have a negative impact on the efficiency of
the antitrust enforcement because the damages lead to two opposite welfare effects.

On the one hand, higher damages trigger more suits being filed, and this is potentially
welfare-improving thanks to the informativeness of the signal received by the judge upon
trial. However, and as before argued, in order to preserve the incentives to undertake pro-
competitive practices, the judge is also constrained to increase the standard of proof. The net outcome of an increase in both the standard of proof and the damages to be paid is a net decrease in the number of suits filed against the truly anticompetitive practices. It is easy to show that as long as the welfare cost of the anticompetitive practices is sufficiently high, increasing the amount of damages has a negative impact on the expected welfare because of its indirect effect on the choice of optimal standard.

On the other hand, Lemma 1 stressed that a high level of damages will relax the incentive constraint on the choice of the optimal standard, because there exists a range of standard of proof for which the $D^A$ is deterred whereas $D^P$ is not. In short, the optimal standard is the highest standard of this range, i.e. that manages to encourage only the pro-competitive conduct. It is easy to check that if the optimal standard thus defined is high, then the expected welfare increases with the amount of damages awarded.

4 Public vs. private enforcement

We begin this section by the outline of the solution of the game with public enforcement. As before mentioned, the difference between the two procedures that we focus on in this paper is the fact that the public, administrative, procedure involves a monetary sanction for the defendant in the form of a fine, which is therefore not a transfer to the plaintiff. It is nonetheless straightforward to derive the expressions of the relevant variables, such as the standard of proof or the expected welfare. Thus, the standard-of-proof thresholds above which each type of defendant will choose to undertake the practice will be now given by $s^P_{pub} = p - \sqrt{\frac{\Delta + K^P}{(\Delta + x)\Delta}}$ and $s^A_{pub} = 1 - \sqrt{\frac{\Delta + K^P}{(\Delta + x)\Delta}}$ respectively, whereas the expected welfare from providing incentives to undertake both types of conduct will now equal $B \left[ 1 - (p - s)^2 \Delta \right] - L \left[ 1 - (1 - s)^2 \Delta \right]$. Moreover, it is clear that all the qualitative results obtained in the case of private enforcement still hold.

We proceed below to compare the two types of antitrust enforcement in terms of optimal standard of proof, so as to shed light on the implications of the difference that we focus on
between the two procedures. The following result holds:

**Proposition 2** Denote $s_{\text{pub}}^*(x)$ the optimal standard of proof with public enforcement. Then the optimal standard under private enforcement is always higher than under public enforcement: $s_{\text{priv}}^*(x) > s_{\text{pub}}^*(x)$. For a given level of monetary sanction (fine or damages awarded), the public enforcement may lead to a higher expected welfare than the private one.

**Proof.** The comparison of optimal standards follows the discussion in the text.

Let $B = -L$, and evaluate the expected welfare at the optimum for low value of $x$: the difference public/private procedures equals $B(xp - 2\sqrt{\Delta - k} + 2\sqrt{\frac{\Delta}{\Delta + 2}}) > 0$. Thus as far as $B$ remains close to $L$, the public expected welfare is higher.

For a higher $x$ for which $s_{\text{priv}}^*(x) = s_{\text{priv}}^A$, the welfare under the private procedure is higher.

**Proposition 2** compares the optimal standards set under each type of enforcement. For a given amount of monetary sanction inflicted to the defendant, either administrative fine or awarded damage, the plaintiff will have higher incentives to bring suit with private enforcement, simply because he will pocket the payment made by the defendant. Increased litigation over private claims for antitrust damages will likely increase the expected welfare derived from the anticompetitive practice on two accounts: the anticompetitive defendant will be held liable more often, and therefore the injunction to cease the practice will occur more often, but also and as a result, the anticompetitive conduct itself will be more often deterred. However, the same increased litigation over private claims for antitrust damages will also lead to more type I errors, with the pro-competitive defendant being found liable more often than under the public enforcement procedure. In order to counterbalance this risk, and to preserve the incentives of the pro-competitive defendant to adopt the pro-competitive conduct, the optimal standard of proof with private enforcement will be higher than with public enforcement.

Note that this may provide a possible explanation for the difference in the substantive
antitrust doctrine for market power abuses between the EU and the US. So far, the European antitrust enforcement has been a pure administrative procedure, and as such conducive to fewer complaints being filed. As a result, the risk of chilling the pro-competitive practices is considerably lower compared with American antitrust enforcement, which relies heavily on private claims. Following the above argument, the European substantive doctrine can therefore afford to apply a low standard of proof to establish liability, whereas the American doctrine optimally requires a higher standard of proof, so as to avoid the increase in type I errors and the ensuing chilling of pro-competitive practices on account of the intensive litigation activity.

Proposition 2 also compares the two types of enforcement in terms of expected welfare. Public enforcement triggers fewer complaints. Therefore liability is less often established, for both types of practices, and thus the optimal standard of proof, preserving the incentives to undertake the pro-competitive behavior, does not need to be very high. The welfare loss from not punishing and not deterring the anti-competitive practice is important, but so is the welfare gain from encouraging the pro-competitive conduct. The contrary holds with private enforcement, for which, as before mentioned, the judge will necessary set a high standard of proof to avoid chilling the pro-competitive behavior through the intense litigation. In this case, the welfare loss from type II errors on the anti-competitive practice is lower, but so is the welfare gain from avoiding the type I errors. Since the expected welfare comparison between the two procedures depends on the relative size of the two types of errors (−B and L) and on that of the respective occurrence probabilities, \((1 − (p − s)^2\Delta)\) and \((1 − (1 − s)^2\Delta)\) respectively, one can easily show that the comparison can go both ways: the public enforcement may yield a higher expected welfare, or not.

5 Concluding remarks

This paper proposes a model to deal with the relative impact of public and private competition law enforcement on the substantive doctrine of antitrust liability. We compare the two types
of antitrust enforcement, public/administrative and private, in terms of number of complaints filed, optimal standard of proof, and also expected welfare. Our results provide a possible explanation for the likely evolution of the European substantive doctrine of antitrust liability, given the near-future introduction of private claims for antitrust damages. Our analysis may further be improved by additional assumptions that have been left aside for the time being, such as the respective enforcement costs of the public and private procedures, or the unique possibility of the public authority to open a case independently from a private claim, which a judge cannot do.

References


