

Discretion In Public Enforcement

Evidence From UK Competition Enforcement, 1970-2003

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ABSTRACT

Applied to public enforcement, the concern for value for money in the public sector makes discretionary decision-making a target for reform. UK competition policy has already been reformed in favour of a more prohibitive legal regime. I isolate some discretionary features in the previous competition regime, and examine their consequences on decisions. Extant empirical competition studies rely on case-level analysis. To deepen the analysis, I disaggregate enforcement data at company level, on abuse of dominance cases published by the UK national competition authority, between 1970 and 2003.

Econometric analysis confirms that decisions still depend on the economic facts of the case. Additionally, decisions are shown not to be neutral to the investigation process itself, but actually to the specific assortments and hierarchy amongst investigators. Extensive experience of chairing investigations makes case chairmen tougher: the more experienced the case chairman, the more likely an adverse finding against a company. The strength of the discretionary power of the case chairman does not, however, destroy all the potential benefits of the more onerous method of making decisions in a panel. Panel members unaccustomed to a given case chairman exert a calming effect on an experienced case chairman's tendency towards more adverse findings, which can be interpreted as a sign of effective information aggregation. The controversial use of profitability analysis in competition decisions affects only decisions where the abuses investigated directly involve excessive pricing. Furthermore, companies alleged to have engaged in infringements where economic theory recommends more active intervention, respond to de facto incentives to change their behaviour as the investigation starts: reported profitability levels exhibit a marked reduction in the financial years during the investigation, compared to the pre-investigation years. Within-tenure experience, the use of profitability, and collegiality effectively injected more discretion into public enforcement decisions.