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Diminishing Enforcement: Negative Effects for Deterrence of Mistaken Settlements and Misguided Competition Promotion and Advocacy

Competition policy is conceived to preserve and promote free market competition. Relatively recent developments have increased the number of tools in the shed of competition law enforcement. It has gone past 'regular' enforcement and currently also foresees settlements as a tool to introduce flexibility in the prosecution of competition violations. If properly used, recourse to settlements may allow competition authorities to save costs and resources in pursuing risky proceedings with an uncertain outcome. However, an often overlooked effect is that settlements may also dilute the deterrent effect of 'regular' enforcement. A similar reasoning or discussion underlies the objectives and operation of leniency programs, although several striking differences exist between leniency and competition settlements. Softer new tools have also been developed. Under the headings of competition promotion and competition advocacy a variable set of instruments are created for competition authorities to create and spread the culture of free market competition in areas that have traditionally been exempted from market forces or competition. This article criticizes certain uses, mistaken or misguided, of settlements, advocacy and promotion. These are two very different settings in which the deterrent feature of competition authorities' enforcement actions may suffer a deathly blow. The basic point of departure is that the new tools might be diminishing the effectiveness of 'regular' competition law enforcement—which shall not be left in the shed to rust.