ANTITRUST ENFORCEMENT AND REGULATION
DIFFERENT STANDARDS, BUT IS THERE INCENTIVE COHERENCE?

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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD
Antitrust enforcement v regulation

• **Antitrust enforcement:**
  • Instructs firms on what **not** to do
  • Rules are written in a very general way
  • Risk of uncertainty for firms over what the law prohibits

• **Economic regulation**
  • Instructs firms on what to do
  • Rules are precise
  • Risk of ignoring firms incentives
Price regulation

- Price cap regulation on final prices (RPI-X) \( \text{(incentive coherent)} \)
- Long run incremental costs on access \( \text{(incentive incoherent)} \)
- Efficient component pricing rule on access (Final price-avoided costs) \( \text{(incentive coherent)} \)
- Price regulation does not protect from antitrust enforcement
Intellectual property rules

Main justification:
❖ **Promote innovation** ➔ ensures appropriability of the results of research *(incentive coherent)*

BUT
❖ **Risk of excessive protection** ➔ the length of patent protection may be too long; the non obviousness standard may often be overlooked

As a result
❖ **Rent seeking** ➔ too many patents and too much litigation

Solution
❖ **Improve the process of granting patents** ➔ Strengthen patent offices; By self selection create two categories of patents (Lamley)
Intellectual property rules and property rights

• Obligation on information as a quid pro quo for receiving a patent
• No license requirements and no caps on royalties
• However if a number of patents pool together to create a standard, they may be obliged to use FRAND royalties (incentive coherent because it avoids strategic behavior)

• IP protection does not exclude antitrust enforcement: For example, Rambus (US-EU), Microsoft (US-EU-Korea), AstraZeneca (EU), etc. (incentive coherent)
Trade policy

In principle trade policy promotes competition (market access), but the remedies are often incentive incoherent:

✓ **Antidumping** (The majority of dumping cases aim at blocking “market expansion” strategies)

✓ **Anti subsidy code** (No identification of the relevant market is required nor is harm clearly defined)

✓ **Terms of patent protection** in TRIPS (extended to existing patents)

Possible solutions:

✓ **Antidumping** ➔ import antitrust approach on abuse of dominance (the harm is to the competitive process)

✓ **Subsidies** ➔ adopt the competition oriented EU approach (the harm is to the competitive process)
Antitrust enforcement and incentive coherence

• The objective of antitrust is to protect the competitive process (avoid false positives). This is why prohibited practices are (mostly? Uniquely?):
  ✓ Cartels
  ✓ Vertical agreements, but only when exclusionary
  ✓ Exclusionary abuses
  ✓ Anticompetitive mergers (mostly horizontal)
• But firms need to know what is prohibited: guidelines, communications, case law, etc.
Antitrust enforcement and the regulatory approach

• *Trinko v, Verizon* (2004). The US Supreme Court said no to antitrust liability when access prices are regulated at non-market levels (*incentive coherent*)

• Microsoft (2004 and 2007): The EU General Court said that there is an obligation to sell information at FRAND prices (*incentive incoherent*)

• Comcast and NBC Joint Venture (2011): The US FCC and DoJ imposed that content be licensed at reasonable terms (*incentive incoherent*)

• What is the “correct” standard for identifying abusive pricing: reasonable or not exclusionary?
Conclusions

• The understanding of how incentives operate is essential for public policy
• Antitrust enforcement has a lot to teach to regulation. This is why involving antitrust authorities in the design of policies is important: for example through Competition Impact assessment, as recommended by the OECD
• The regulatory approach looks good at first sight, but may become detrimental

• Regulation, IP protection and trade policy should become (more) incentive coherent. On this Unctad, the WTO and Wipo could greatly contribute
• Antitrust should not become incentive incoherent (by adopting the regulatory approach)