

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

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UNCTAD Ad Hoc Group of Experts Meeting
7 July 2014, Geneva

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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) (incentive coherent)
- Long run incremental costs on access (incentive incoherent)
- Efficient component pricing rule on access (Final price-avoided costs) (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), Astra Zeneca (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)