

International Competition Network

Antitrust Enforcement in Regulated Sectors Working Group

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ANTITRUST ENFORCEMENT IN REGULATED SECTORS

GENERAL INTRODUCTION

Economic regulation and antitrust enforcement

In all jurisdictions, including the most market-oriented ones, firms operate within a set of legal rules which affect business conduct. Some of these rules are general in scope (e.g. rules on property rights, including intellectual property rights, on tort and liability and on contracts), while others are sector-specific. In the following analysis, all rules directly affecting business conduct will be referred to as economic regulation.

Regulation may result from laws, formal and informal orders and subordinate rules issued by all levels of government, and from rules issued by non-governmental or self-regulatory bodies. Some rules regulate markets ex-ante, while others are enforced ex-post with reference to specific cases.

Rules may be targeted to achieve a variety of objectives of general interest. First, they may reduce transaction costs; examples are provided by the rules on property rights or on the enforceability of contracts. Second, they may address information asymmetries among economic agents which are not easily corrected by experience, such as for example rules ensuring minimum quality or making sure that there is no harm associated with consumption. They may also address externalities, i.e. situations where economic agents neglect the adverse or positive spill-over effects of their decisions on third parties. Commonly cited examples of negative externalities include pollution, traffic congestion and the instability of financial markets. Fourth, regulation may address distributional issues, for instance by ensuring the provision of minimum or universal services to consumers. Moreover, when the characteristics of a market prevent effective competition (e.g. natural monopolies), the regulation of business conduct or the requirement of structural (horizontal or vertical) separation may aim at ensuring allocative efficiency and consumer protection.

Among all legal rules affecting business conduct, antitrust laws play a distinctive role. They prohibit restrictive agreements and the abuse of a dominant position (or monopolization) so as to impede the harm for consumers which would result from artificial increases in market power. Furthermore, merger control ensures that competition is not substantially reduced through concentrations. Antitrust rules are usually formulated in general terms; their enforcement strictly depends on the jurisprudence of the courts. Although differences among jurisdictions still exist, there is an increasing international convergence on the substantive interpretation of the economics of antitrust prohibitions on business conduct.

When business conduct is directly or indirectly affected by regulation, the enforcement of antitrust rules faces special problems. The following contributions aim

at pointing out these problems and at illustrating how they have been addressed in a number of countries.

The solution to “exempt” regulated sectors from the application of antitrust rules has been progressively abandoned in most countries also as a result of technical progress allowing competition in natural monopoly environments. Competition law is increasingly recognised as beneficial, also as a residual safeguard. Once set aside the “exemption” alternative, the issue to be addressed is whether and at what conditions the regulation of business conduct may prevent the specific enforcement of competition rules on agreements, on abuses and on mergers.

Complementarity of regulation and antitrust

In most cases, regulation and antitrust enforcement pursue distinct aims and affect different aspects of business conduct. Therefore, the two instruments complement each other.

The rules aimed to limit pollution, for instance, do not reduce the need for the prohibition of cartels, abuses of a dominant position and anti-competitive mergers.

Another example is provided by mandatory labelling or the prohibition of misleading advertising. These rules, aimed to promote transparency, eliminate some of the uncertainties associated with the purchase of goods. By increasing the ability of consumers to choose among different alternatives, they complement antitrust rules in ensuring an effective competitive discipline.

The complementary role of antitrust and regulation is also evident in recently liberalised sectors, where regulation tries to avoid that the development of competition is impeded by incumbents holding a significant market power. Regulation typically focuses only on the main aspects of business conduct (for instance, access or final pricing), providing the ex-ante framework that regulated firms need to follow. Antitrust prohibitions on agreements and abuses are expressed in more general terms and are enforced ex-post. Therefore, they play a residual role: the prohibition of abuse of a dominant position, for example, may impede any behaviour which may distort competition and is not specifically covered by regulation. In most jurisdictions, when an industry or a firm are regulated, antitrust enforcement represents an additional tool, the baseline being determined by regulation. In other words the regulated environment represents the standard to which to compare any restriction originating from autonomous firms behaviour.

Substitutability of regulation and antitrust

Regulation of a specific conduct so as to ensure the protection of competition and consumers may be viewed as a functional substitute for antitrust intervention, the main difference being that regulation operates ex-ante, while antitrust is usually an ex-post solution. In particular, the direct regulation of the price of a natural monopolist

makes unnecessary the enforcement of the prohibition of abuse to prevent “excessive prices”. In these cases the application of antitrust rules to the regulated conduct is normally avoided, since it would give rise to a serious legal uncertainty. In most countries, the law does not allow to intervene with two different instruments on a same conduct in order to attain a same objective (according to the so- called *ne bis in idem* principle). When regulation is not fully effective the best alternative is to promote its amendment so as to improve it.

Contrast between regulation and antitrust

Sometimes regulation restricts competition (for instance, by establishing entry barriers or by fixing minimum prices).

When the restriction of competition is not justified by the need to attain objectives of general interest, there is scope for competition advocacy. A distinct problem is whether, and under what conditions, antitrust rules may be applied to firms subject to an anticompetitive regulation.

Antitrust enforcement, unless there is a specific exemption, is always possible when there is a restriction of competition which falls under the prohibition of the antitrust law and this restriction may be attributed to an autonomous firm decision, i.e. it is not mandated by regulation. In some jurisdictions antitrust rules may also be applied when the anticompetitive regulation is clearly not in the general interest and it delegates the power to implement its provisions to the regulated firms themselves.

Relations between competition and regulatory authorities: the institutional choice

Institutions, once they are set up, tend to have a life of their own, so that a reorganization of their tasks becomes quite difficult. When establishing or reevaluating a regulatory framework, it is therefore crucial that the decision on the division of labor between regulators and antitrust authorities be based on efficiency considerations. There are a number of alternatives.

The most common institutional set-up is based on the functional separation of the regulatory and competition protection activities: the task to regulate final prices and access is assigned to the regulator, while the task to enforce competition rules is given to the competition authority. The main advantages of the functional separation approach are transparency and specialization in the fulfilment of the different tasks. Specialization however comes at a cost. In particular, functional separation may lead to the duplication of hard-to-acquire sectoral knowledge. This is why it is important that regulators and competition authorities share information and cooperate with each other.

A possible alternative is to give the regulator full competence over an industry, summing up regulatory and antitrust enforcement tasks. The main problem with this institutional set-up is the conflict which may arise between the objective to protect competition and other objectives pursued by the regulator (for example financial

markets stability). Regulatory objectives might therefore overwhelm those pursued by competition rules.

A third possibility is that the competition authority is responsible for both regulation and antitrust. This option has a number of advantages: in particular, it eliminates costly duplication of sectoral expertise and it makes sure that regulation is applied in a way which minimises restrictions of competition. However it might lead to very complex institutions, increasing bureaucracy and reducing their ability to take prompt action. Furthermore it might well be that the regulatory approach takes over: when there is the choice there is a good presumption that a bureaucracy would prefer much more visible direct regulatory measure over indirect antitrust rulings.

The Antitrust enforcement in regulated sectors (AERS) working group established at the Merida Annual Conference is chaired by Benoit Parlos and Giuseppe Tesauo. This report summarizes the work of three subgroups. The first subgroup, chaired by Alberto Heimler, addressed the limits and constraints facing antitrust authorities intervening in regulated sectors; the second, chaired by Frédéric Jenny, analysed the enforcement experience in regulated sectors; the third subgroup, chaired by Caroline Montalcino, studied the division of labor between regulators and antitrust authorities in different jurisdictions. Special thanks are due to Ginevra Bruzzone, a non governmental advisor from Assonime, that drafted this introduction, to Gianluca Sepe, from the Italian Competition Authority, that drafted Chapter one, to Claude Duchemin, that drafted Chapter 3, and to Laurence Idot, a non governmental advisor from l'Université de Panthéon-Sorbonne in Paris who provided invaluable input. Member agencies were of extremely valuable assistance, providing information and comments on earlier drafts. Particularly helpful have been the comments by Paul O'Brien and Thomas Krattenmaker on Chapter one.