Choosing among American, European or no Antitrust at all

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Motivation

Some countries have antitrust and others don’t

Antitrust regimes differs by country and time:
   Ex-ante regulation vs. Ex-post litigation
   Per se illegal vs. Rule of reason
   Administrative law vs. Common (tort) law and criminal law
   Government vs. Agencies

Antitrust regimes differ by policy domains:
   (1) mergers, (2) multilateral agreements, (3) unilateral conducts

Is there an antitrust regime that fits all?
Menu of antitrust control strategies

Preventive Regulation

- Disclosure rules and authorization procedures of conducts ex-ante
- Administrative standards for what it is against the public interest and what is not (authorizations and exemptions)
- Authority oversight using sanctions
  (administrative discretion)

Litigation

- Rights and liability rules enforced ex-post
- Civil or common law standards of strict liability or negligence
- Monetary penalties and damages to private parties
- Agencies are mostly a watchdog promoting litigation
- Judicial or quasi-judicial authority show cause, fault or negligence, and liability
Antitrust regimes

Doing nothing

An ex-ante regime of authorizations
Firms should adjust their practices to a legal standard and get permission from government to proceed [Administrative penalties]

An ex-post administrative negligence regime: Rule of reason by agencies
Agencies should be compelled to analyze to what extend a firm conduct is a competition restrain and whether firms have taken precautions (first step allocating fault), and whether such restrain it is against the public interest [Administrative penalties]

An ex-post judiciary regime of negligence: Rule of reason by the judiciary
Firm conducts may be sued before the judiciary. Plaintiffs should show fault or negligence, that is, precautions have not been taken [Private damages and criminal penalties]

An ex-post judiciary regime of liability
Firm conducts may be sued before the judiciary. Plaintiffs should only show cause [Private damages and criminal penalties]
Subversion

Legal or illegal tactics to delay legal procedures, intimidation, bribes, ...

Preventive regulation

1. It imposes larger private costs: all firms have to disclose their conducts and should adjust them to the legal standards. It imposes larger social costs: some precautions are mandated although they are useless
2. It is less vulnerable to subversion: small penalties that have to be paid with high probability

Litigation

1. It imposes smaller private costs and smaller social costs: only those firms that can reduce their probability to cause damages adopt the legal standards
2. It is more vulnerable to subversion: large penalties and damages with small probability that have to be paid with small probability
The model

1. Firms engage in risky competition conducts by taking one of two possible level of precautions: $q_1 < q_2$

2. Taking precautions is costly. The high level of precautions, $q_2$, has unit cost of $C$, while $q_1$ is free

3. There are two types of firms that may cause damages:
   - **Type A firms**: taking the high level of precautions as mandated by the legal standard does not reduces the probability of causing damages, $P_A$
   - **Type B firms**: taking the high level of precautions as mandated by the legal standard does reduce the probability of causing damages $P_{B1} > P_{B2}$
Firm conduct imposes a social cost per unit of product of $D$ to third parties

Production units are $S$

Preventive regulation and oversight
   The probability that the competition authority detects that a firm is not taking the mandated standard of precautions is $p$, where $p > P_{B1}$, it is easy to detect competition restraints not disclosed

When it is socially valuable to take precautions to satisfy the legal mandate
   It is never socially desirable that type A firms adjust their conduct to the legal standard
   It is only socially desirable that type B firms buy the high level of precautions as if $(P_{B1} - P_{B2})D > C$

Firms found to have engaged in illegal conducts have to pay $M$

Subversion has a cost of $X$
   Firms will pay $X$ for not having to pay $M$ if and only if $X < M$
## Minimum Penalties

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<tr>
<th>Control Strategy</th>
<th>Minimum Penalty</th>
<th>Example</th>
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<tbody>
<tr>
<td>Ex-ante authorization regime</td>
<td>$p M &gt; SC$</td>
<td>5 times the cost of taking precautions</td>
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<tr>
<td></td>
<td>$M &gt; SC / p$</td>
<td></td>
</tr>
<tr>
<td>Ex-post negligence regime (rule of reason)</td>
<td>$P_{B1}M &gt; SC$</td>
<td>11 times the cost of taking precautions</td>
</tr>
<tr>
<td></td>
<td>$M &gt; SC / P_{B1}$</td>
<td></td>
</tr>
<tr>
<td>Ex-post strict liability regime (per se illegality)</td>
<td>$P_{B1}M &gt; SC + P_{B2}M$</td>
<td>20 times the cost of taking precautions</td>
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<tr>
<td></td>
<td>$M &gt; SC / (P_{B1}-P_{B2})$</td>
<td></td>
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</table>

**Ejemplo:** $p=20\%$, $P_{B1}=9\%$, $P_{B2}=4\%$, $P_{B1}-P_{B2}=5\%$
Binding maximum penalties in regulation and in negligence

\[ SC < (1-o_A) (P_{B1}-P_{B2}) \text{ D S} \]
\[ D > C / (1-o_A) (P_{B1}-P_{B2}) \]

<table>
<thead>
<tr>
<th>( P_A )</th>
<th>Maximum Penalty</th>
<th>( M )</th>
</tr>
</thead>
<tbody>
<tr>
<td>3%</td>
<td>No binding</td>
<td>33 times the cost of taking precautions</td>
</tr>
<tr>
<td>7%</td>
<td>Negligence is not optimal when penalties have to be large</td>
<td>14 times the cost of taking precautions</td>
</tr>
<tr>
<td>10%</td>
<td>Negligence is partially not optimal when penalties have to be large</td>
<td>10 times the cost of taking precautions</td>
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</table>
Ex-post Strict Liability Regime

(US Antitrust: Illegality)

No Antitrust

(Exemptions and de minimis clause)

\[ \frac{\text{CS}}{\text{P}} = 10 \text{CS} \]

\[ \frac{\text{CS}}{\text{P}_{\text{B1}}} = 11 \text{CS} \]

\[ \frac{\text{CS}}{(\text{P}_{\text{B1}} - \text{P}_{\text{B2}})} = 20 \text{CS} \]

\[ X / S, \text{ Per unit subversion cost} \]

\[ \text{P}_A > \text{P}_{B1} : \text{High probability of causing damage by firms for which precautions are useless} \]

Low probability of causing damage by firms for which precautions are useful

PRECAUTIONS HAVE LOW SOCIAL VALUE

Small markets (agreements might look for scale not for coordination)
Figure 2

Ex-ante Authorization Regime
(Pre-2004 EU Single and Block Authorizations)

Ex-post Judiciary Negligence Regime
(US Antitrust: Illegality under Rule of Reason)

Ex-post Strict Liability Regime
(US Antitrust: Per se Illegality)

$D$, Per unit social damage

No Antitrust

$X/S$, Per unit subversio n cost

$P_A < P_{B1} - P_{B2} < P_{B1}$: Low probability of causing damage by firms for which precautions are useless
Large reduction in the probability of causing damage by firms for which precautions are useful
PRECAUTIONS HAVE HIGH SOCIAL VALUE
Large markets (agreements are not for scale but for coordination)
As $P_{B1} - P_{B2}$ increases precautions turn to be more socially valuable. The reduction in the probability of causing damage by firms for which precautions are useful gets larger.

• In large markets, agreements are more likely to be anticompetitive because they are more prone to be aimed for enforcing coordination, and not for gaining scale
• In small markets, firms with dominant positions are more likely to abuse because small markets are less contestable
As $P_A$ increases, the probability of causing damage by firms for which precautions are useless gets larger, and precautions turn to be adopted by firms for which they are useless.

- In small high tech markets, remedies legally mandated are taken by the participants of agreements although they are useless because innovation make such remedies ineffective.
- In large high tech markets, non-abusive clauses are legally mandated in the contracts of dominant firms although they are useless because innovation make any such remedies ineffective.
<table>
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<th>Large, integrated markets, and mature markets</th>
<th>Per se rule</th>
<th>Rule of reason</th>
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</table>
| Agreements                                  | Large $P_{B1}$, large $(P_{B1}-P_{B2})$  
$CS/(P_{B1}-P_{B2})<X'$, B firms take precautions, reduce substantially the risk of causing harm, but pay fines if finally end up causing harm | Small $(P_{B1}-P_{B2})$  
$CS/(P_{B1}-P_{B2})>X'$, A firms (sometimes) and B firms (always) take precautions, reduce slightly the risk of causing harm, and avoid paying fines |

| Abusive practices | Precautions to avoid conducts qualified as abusive do not reduce substantially the already narrow scope for abusing consumers in markets where small competitors can grow quickly and replace abusive firms. |

<table>
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<th>Small, non-integrated and new markets</th>
<th>Abusive practices</th>
<th>Agreements</th>
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<tr>
<td>Abusive practices</td>
<td>D ominant positions are not contestable. Legal standards regarding conducts qualified as abusive do reduce substantially the scope of means by which dominant firms try to abuse consumers.</td>
<td>Parties jointly work to gain scale and reduce costs, and this cooperation in production facilitates market coordination. Shaping agreements to exclude practices facilitating collusion is not likely to avoid harmful coordination.</td>
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Findings

There is not an optimal antitrust regime. In countries that lack institutions, the best competition policy is the one that does not exist.

Corruption or institutional strength is a key determinant for deciding to have antitrust at all, and for shaping the antitrust regime.

Differences within countries and policy domains may be related to different perceptions of the usefulness of precautions.

Reforms in many countries towards per se illegality regimes in the cartel control domain may be signaling competition institutions strength.