# 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 restrains 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 conducts 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

| Control Strategy | Minimum Penalty | Example |
|---|---|---|
| Ex-ante authorization regime | $p\,M > SC$<br>$M > SC\,/\,p$ | 5 times the cost of taking precautions |
| Ex-post negligence regime (rule of reason) | $P_{B1}M > SC$<br>$M > SC\,/\,P_{B1}$ | 11 times the cost of taking precautions |
| Ex-post strict liability regime (per se illegality) | $P_{B1}\mathrm{M} > SC + P_{B2}M$<br>$M > SC\,/\,(P_{B1}-P_{B2})$ | 20 times the cost of taking precautions |

Ejemplo: $p$=20%, $P_{B1}$=9%, $P_{B2}$=4%, $P_{B1}$-$P_{B2}$ =5%

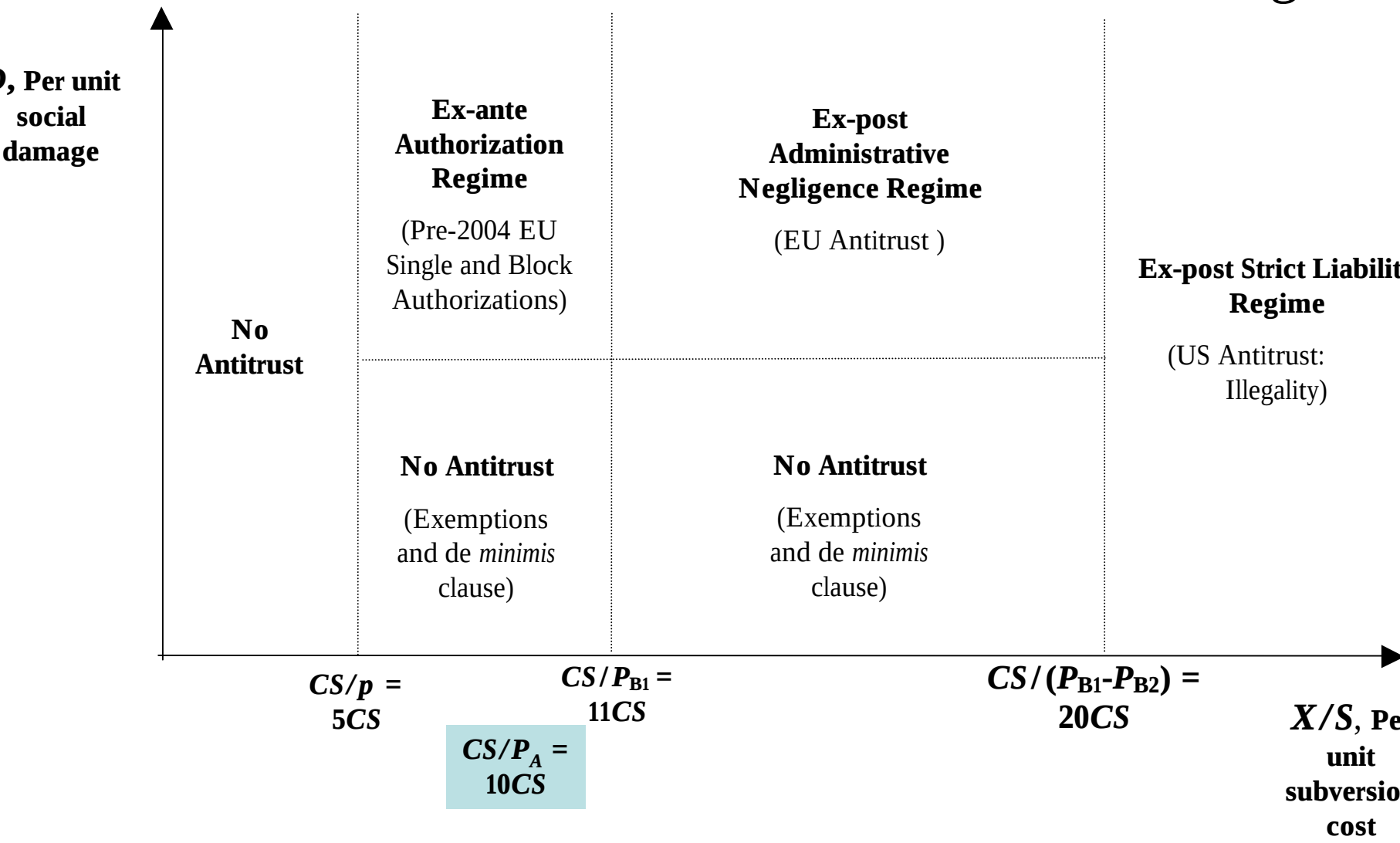
# Binding maximum penalties in regulation and in negligence

$SC < (1-o_A)(P_{B1}-P_{B2})\,DS$ $\qquad$ $P_A M < SC$

$D > C / (1-o_A)(P_{B1}-P_{B2})$ $\qquad$ $M < SC / P_A$

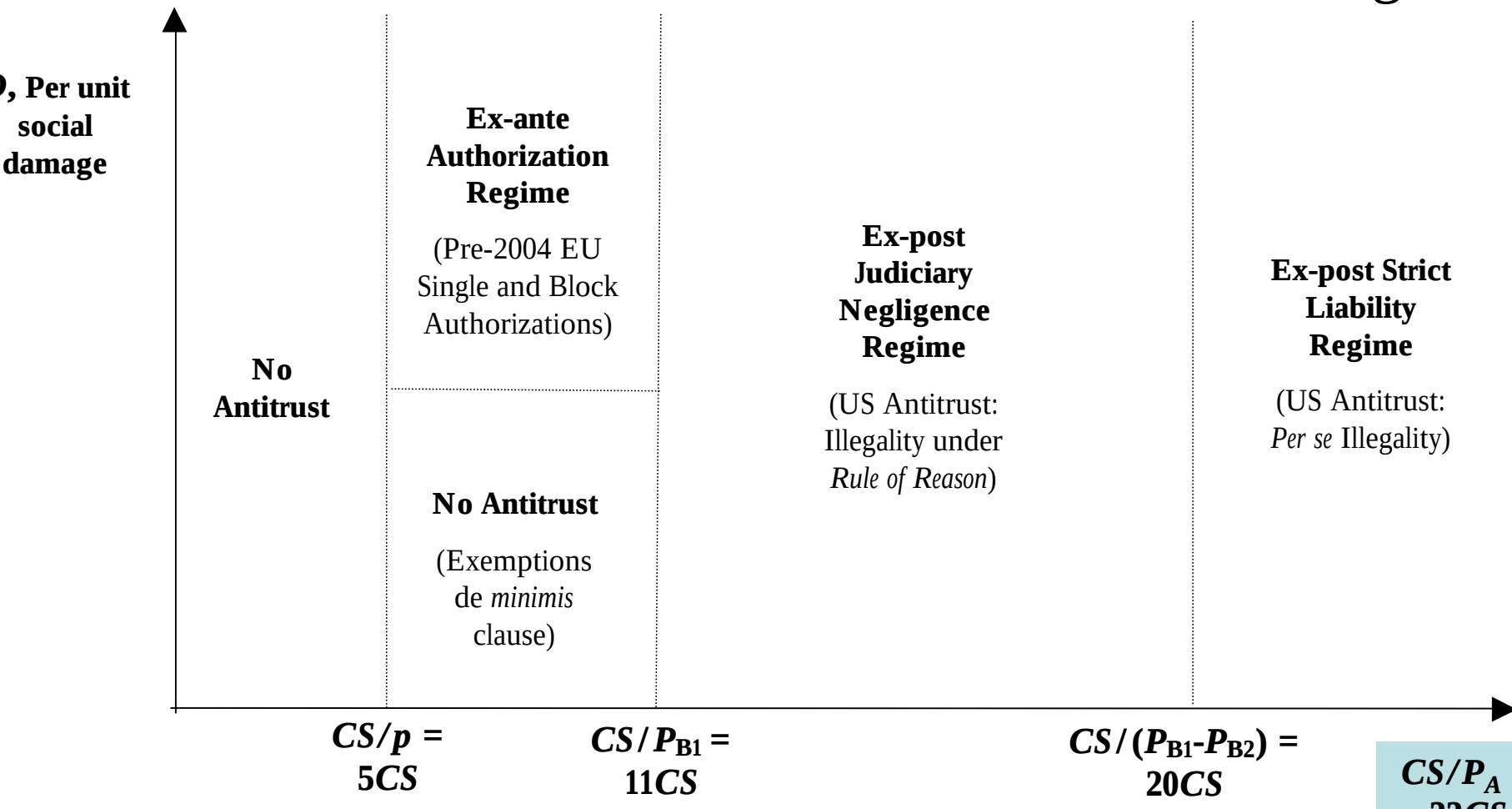
| $P_A$ | Maximum Penalty | M |
|---|---|---|
| **3%** | No binding | 33 times the cost of taking precautions |
| ***7%*** | Negligence is not optimal when penalties have to be large | 14 times the cost of taking precautions |
| ***10%*** | Negligence is partially not optimal when penalties have to be large | 10 times the cost of taking precautions |

Figure




$P_A > P_{B1}$ : 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

Figure




$P_A < P_{B1} - P_{B2} < P_{B1}$ : 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)

Figure 3

*Institutional strength of developed countries (X'), and $P_A$ fixed in the range where exemptions are not needed ($P_A > P_{B1}$)*

**, Per unit social damage**

**Ex-post Negligence Regime: Rule of Reason**

A do not take precautions and do pay fines if causing harm

B take precautions and do not pay fines if causing harm

**Ex-post Strict Liability Regime: Per se**

A do not take precautions but B firms do take precautions

Both pay damages / penalties if end causing damage

$P_{B1}$-$P_{B2}$

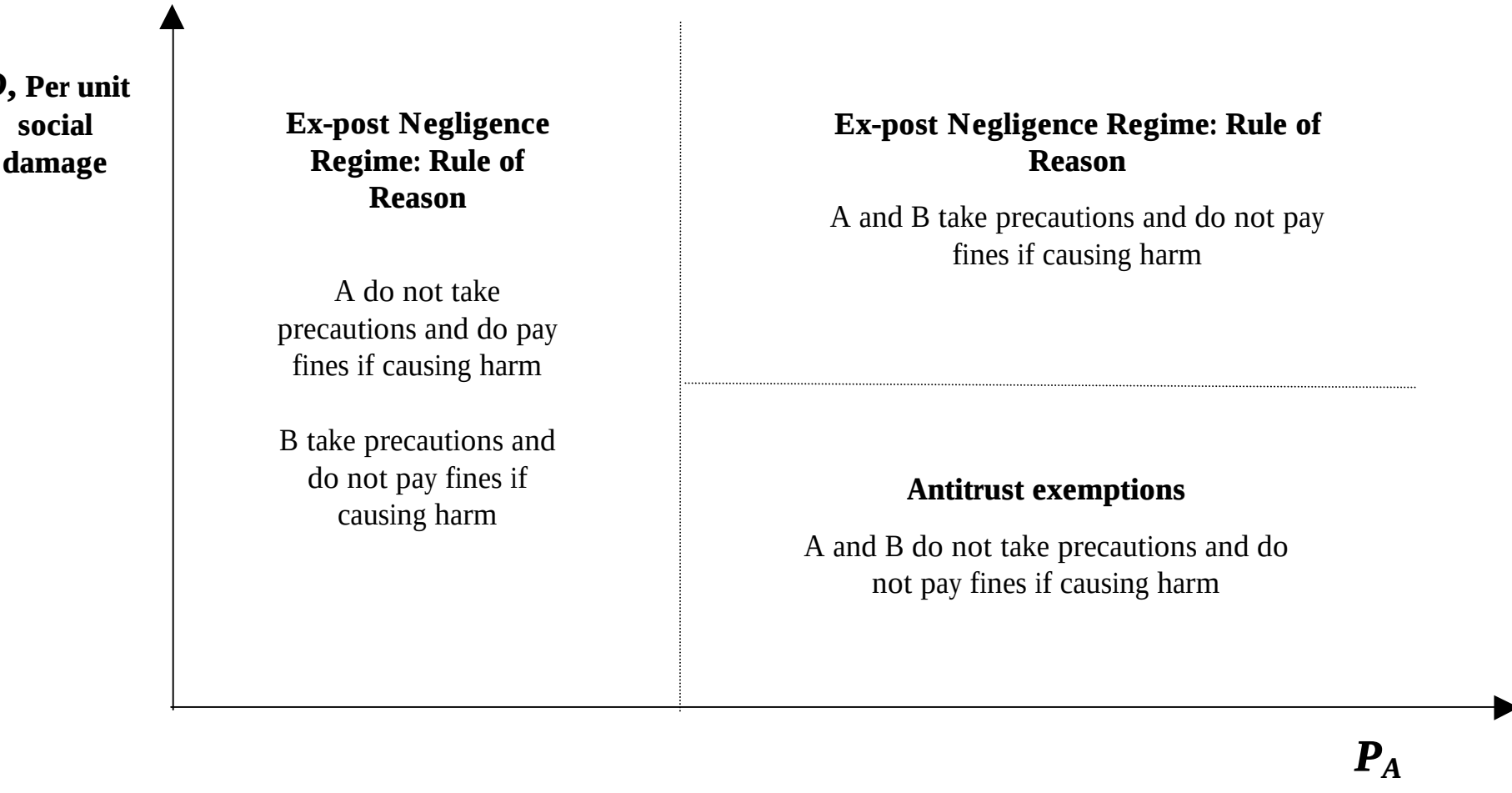
***s $P_{B1} - P_{B2}$ increases*** precautions turn to be **more socially valuable**. The reduction in the robability of causing damage by firms for which precautions are useful gets larger.

In large markets, agreements are more likely to be anticompetitive because they are more prone be aimed for enforcing coordination, and not for gaining scale

n small markets, firms with dominant positions are more likely to abuse because small markets e less contestable

*Institutional strength of developed countries (X'), and $P_{B1}$ $P_{B2}$ fixed in the range where negligence is preferred to strict liability ($X'<CS/(P_{B1}-P_{B2})$)*

Figure 4




***s $P_A$ increases*** the probability of causing damage by firms for which precautions are useless gets rger, 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 greements 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 ominant firms although they are useless because innovation make any such remedies ineffective

**Table 1**

| | **Per se rule** | **Rule of reason** |
|---|---|---|
| | Large $P_{B1}$, large $(P_{B1}-P_{B2})$<br>$CS/(P_{B1}-P_{B2})<X'$, B firms take precautions, reduce substantially the risk of causing harm, but pay fines if finally end up causing harm | Small $(P_{B1}-P_{B2})$<br>$CS/(P_{B1}-P_{B2})>X'$, A firms (sometimes) and B firms (always) take precautions, reduce slightly the risk of causing harm, and avoid paying fines |
| **Large, integrated markets, and mature markets** | **Agreements**<br>Parties do not work jointly to gain scale and reduce costs, parties only try to coordinate. **Shaping agreements** to exclude practices facilitating collusion **is likely to avoid harmful coordination**. | **Abusive practices**<br>Dominant positions are contestable. **Precautions** to avoid conducts qualified as abusive **does not reduce substantially** the already narrow scope for abusing consumers in markets where small competitors can grow quickly and replace abusive firms. |
| **Small, non-integrated and new markets** | **Abusive practices**<br>Dominant 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. | **Agreements**<br>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**. |

# 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