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Comment by Alberto Heimler on:

Co-ordinating regulation and competition law – ex ante and ex post

by

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Introduction

Martin Cave and Peter Crowther address a very important issue, the day to day relationship between antitrust and regulation, a topic which is very rarely studied in academic (and non academic) papers. The debate in this area is still concentrated on the degree of independence antitrust authorities and regulators should be entitled to and on to the most efficient way they should share responsibility (sectoral vs functional division of labor). These are of course very important questions that are far from being settled. The recent Report on the “Interrelations between antitrust and regulatory authorities” prepared by the Antitrust Enforcement in Regulated Sectors (AERS) Working Group of ICN, after a brief survey of the institutional structure of major countries, concludes that “whatever the current division of labour between competition agencies and regulators, there are certainly no countries where that division can be regarded as finally settled, especially since the transition to greater competition is often far from complete”. The AERS Report however does not analyse the intricacies of the antitrust authority/regulators interface in actual practice. The ICN Annual Conference held in April last year in Seoul approved an extension of the project right in the direction of the C&C paper, that is the Annual Conference requested the Working Group to analyse the practical division of labor between antitrust and regulatory authorities. As a matter of fact I had been the proponent of that extension, so I read with great interest the C&C paper and I am quite happy to have been asked to be their discussant.

In my comments I will briefly analyse the respective roles of antitrust enforcement and regulation. I will further address whether and how the new powers the Commission was given by regulation 1/2003 may affect the importance of antitrust enforcement in network industries.

Regulation vs competition

First of all why regulate? The most obvious answer is that a stable natural monopoly or a market failure be identified and that the expected benefits of regulation outweigh its costs, inclusive of administrative burdens.

Regulation is necessary when: 1) market power cannot be disciplined by competition; 2) positive or negative externalities exist; 3) information asymmetries exist among economic agents, which are not easily corrected by experience; 4) there is a social consensus that minimum or universal services need to be guaranteed.

With respect to situations where market power cannot be disciplined by competition, both antitrust and regulation could be used. They are not completely substitutable because regulation is necessary not only for preventing abuses of market power (a typical antitrust violation), but also for inducing monopolies to charge fair prices, to guarantee stability of supply or some other public interest objective. Regulation, being much more concerned with monopoly profits than antitrust, operates under a much stricter standard.

Are regulatory interventions in telecommunications coherent with antitrust?

C&C look for antitrust decisions that have a regulatory nature, only briefly on whether regulation is in contrast with antitrust. For example, it would be a proper question to ask whether it is legitimate to regulate call termination charges, a typical example of excessive prices, or whether Telric is an appropriate antitrust standard. The problem is that exploitative abuses, although theoretically possible, are not common in the antitrust practice. Contrary to antitrust, regulation is much more concerned with exploitation because one of its objectives is to eliminate the extra-profits associated with natural monopolies.

Exclusionary conduct is somehow but not completely different. ECPR (that is no margin squeeze) is an antitrust standard, but regulators are also concerned that extra profits are not gained and insist on a cost based standard (cost orientation in the EC terminology). Regulators impose Telric also to encourage innovation on the part of the incumbent.

The interplay between antitrust and regulation is clearly brought out in the recent US Supreme Court Judgement in the *Trinko* case.

The Trinko case

In *Verizon v Trinko* the US Supreme Court first of all ruled that not complying with the FCC unbundling and pricing regulation does not constitute an antitrust offence unless it could be proved that it would be an antitrust violation also in a hypothetical world where the FCC regulation would not exist. In particular the Court questions whether a Telric standard could be considered as an antitrust standard and concludes that it should be not, since it would not be a standard that would emerge without regulation. In any event, and this is the second part of the judgement, the assessment whether an antitrust violation exists should be made with reference to the specific circumstances of the case. The Supreme Court states in fact that “when there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small ... Here Verizon was subject to oversight by the FCC and the New York Public Service Commission both of which agencies responded (to the *Trinko*’s complaint)... by imposing fines and other burdens on Verizon”. The substantive issue in *Trinko* is not whether a violation existed, but whether an antitrust violation could be superimposed over a regulatory violation. The reasoning of the Court however tells us also that antitrust and regulation are not really substitutes.

Is regulation ex-ante and antitrust ex-post?

I am completely in agreement with C&C when in the introduction they state that competition law and regulation both operate ex-ante. However in the middle of the paper they say “competition law is applied *ex-post* through article 81 and 82”. I am not fully in agreement with this last statement and I would like to explain why, using a traffic type prescription as an example. A regulatory intervention would be setting the speed limit at 50 kilometers per hour, while an antitrust rule would be to prohibit dangerous driving. Of course the 50 kilometers per hour rule is known ex-ante, but also the prohibition of dangerous driving is known ex-ante. Furthermore the prohibition of dangerous driving is fine tuned (only behavior which is dangerous is prohibited. An error here could be introduced by the interpreter) while the 50 kilometers limit may introduce a lot of errors. The major difference between the two is the degree of ex-ante information of what is a violation. While the regulatory provision identifies a violation with certainty, antitrust laws may introduce some uncertainty. In this respect the development of a specific case law is very helpful and so are guidelines, including prescriptions in some cases.

In the real world what really distinguishes regulation from antitrust is whether competition would be sufficient to lead to efficient outcomes. In particular regulation pursues wider objectives than antitrust, for example fair prices or universal services. The problem then is to make sure regulation is not excessive with respect to its stated objectives.

Are antitrust decisions too regulatory?

C&C examine antitrust decisions in regulated public utilities and ask whether these decisions follow a regulatory approach. They cite two J-V 81.3 decisions (Global One and British Interactive Broadcasting) and two exclusionary abuses (Marathon and Gazprom-Eni). Although I have some difficulties in exactly understanding what exactly C&C mean when they refer to a regulatory approach (I guess they mean prescriptive), I certainly share their view that a commitment by national governments to open their domestic telecommunications markets (as in Global One) is certainly of a regulatory nature. As a justification for the Commission, however, in all the cases that C&C cite remedies are not imposed by the Commission but they are commitments offered by the parties and accepted by the Commission. The distinction may seem legalistic but it has also some substance, in the sense that the system in place until May 1 this year (when Regulation 1/2003 became effective) gave the incentive to the Commission to accept as many commitments the parties were willing to offer.

The major problem with commitments, and they are quite common in merger decisions, is that, being offered “voluntarily”, they may be considered not subject to appeal. To be precise we do not know what the Courts would say should an authorization with commitments be appealed since so far no company ever appealed it (to my knowledge), the reason being that any company that offered commitments would generally not find it worthwhile to appeal a decision that merely accepted them.

Contrary to a regulatory intervention, that in principle is always subject to review by an independent judge, an antitrust decision with commitments would become definitive without the possibility of testing its proportionality in the Courts.

What changes (if any) has Regulation 1/2003 brought about?

As C&C remind us, article 7 of Regulation 1/2003 provides that the Commission may by decision impose on undertakings that were found to have infringed articles 81 or 82 of the Treaty behavioural or structural remedies. These remedies need to be proportionate and necessary to bring the infringement to the end. The major improvements with Regulation 1 is that these would no longer be commitments by the parties, but remedies imposed by the Commission. The possibility of appeal would be greatly enhanced with respect to the practice examined by C&C.

As a counterpart to article 7 of Regulation 1 where as I just mentioned undertakings do not have a formal role, article 9 allows the Commission to make a decision on commitments offered voluntarily by the parties. In fact after a preliminary assessment of their behavior undertakings may give the Commission some commitments that would be made binding by a Commission decision. Of course these commitments (submitted voluntarily) would not be subject to appeal, maintaining with the Commission quite a significant discretionary power. However these decisions, contrary to article 7 decisions, would have validity only for the parties themselves and would not be of a general nature (they would not enter the case law because no infringement had been clearly identified). Of course the discretion of the Commission of accepting commitments should not be exaggerated since undertakings would always have the option to have the Commission conclude the case and then appeal.