

GLOBAL GOVERNANCE: THE ROLE AND DESIGN OF ANTITRUST ENFORCEMENT

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- From “roots to codes to network” (Fox, 2016)
- Identification of the underlying problem :
 - Differences in legal and institutional regimes across jurisdictions and differences in enforcement practice
 - Truncated objectives : each jurisdiction has an Incentives to take into account the effects in its own jurisdiction
 - With possible conflicts in the case of overlaps when the remedies are discrete, or involve different net effects in different jurisdictions (overlaps)
 - Interaction between different legal regimes (antitrust as an island) – an export cartel has the same effect as an export tax.
- Soft convergence in the ICN/OECD has done a great deal to address differences in enforcement practice
- According to Eleanor, many problems of overlap can also be addressed by further soft convergence (possibly by nominating lead jurisdictions).

- Overlaps (with truncated objective functions) give an incentive to cooperate because of repeated interactions, except in extreme cases (à la Cabral)
- Further codes are required when objective functions are truncated but no overlap – like export and import cartels
- In those circumstances, same logic as the exchange of market access in the WTO (exchange the prohibition of export cartels in one sector/country for the prohibition in another one in which the country is an importer, à la Bagwell/Staiger).
- Three footnotes : the scope of capture in enforcement remains a threat to the edifice, the « great unblinding » makes the problem of coordination across instruments harder (and hence enhance the need for hard codes) and some « new » enforcement initiative involve quasi-regulatory issues (wich require a different type of hard code)

The scope for capture

- Fuzzy standards enhance the scope for capture (including in the EU, see debate triggered by neo-ordoliberals.)
- The resilience of institutional constructions should not be taken for granted (see the experience of the Visograd countries)
- Consolidation wave in the telecom sector in the EU (with the debate over Telefonica/eplus).
- Concerns about national champions remain alive (Eon/Rurhgaz allowed by the Minister)
- Capture is getting smarter (the complainants in the Google case)
- Some MOFCOM decision appears to be openly protectionist (Marubeni/Gavillon, Novartis/Alcon).
- Soft convergence in this area may be a priority (strategic competition enforcement alert)

Enforcement and value chains

- Great unbundling of tasks internationally (partly as a consequence of information technology)
- Transactions involves specific investments and hence a risk of hold up.
- Prices are determined by bilateral bargaining instead of market clearing conditions.
- This affects the interaction between border policies (duties) and behind the border policies (subsidies, but also competition enforcement)
- When prices are determined by market clearing conditions (even with market power), the risk of undoing international commitments by internal policies can be addressed by a simple rule (no change)
- This is no longer the case with bargaining. Border and behind the border policies need to be determined jointly.
- This arises because behind the border policies play a specific role in addressing the underinvestment problem (Antras and Staiger, 2012)

Quasi-regulation

- Consider the recent enforcement towards Standard essential patents (and more generally over royalty contracts)
- These interventions have the same effect as key characteristics of IP policies (determine rent for innovators in the same way as patent length for instance).
- There is a free rider problem with respect to the incentive to innovate
- Countries in the South (lower R&D capability, smaller markets for innovative products) will have lower IP protection (Grossman and Lai, 2004)
- Can competition enforcement undo the benefit of TRIPS ?
- Many alternative combinations of policies can achieve the first best.

Conclusion

- “Hard” conflicts in the presence of overlaps (Boeing/Mc Donnell Douglas, Oracle/Sun, GE/Honeywell)
- Protectionist enforcement
- Coordination going beyond market access commitments.
- Still, a need for complicated codes ...
- And for some enforcement mechanism.
- Rely on dispute settlement mechanisms in FTA ?