Regulatory vs antitrust remedies
A policy perspective

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Regulatory vs antitrust remedies

- Under Articles 101 and 102 TFEU, one can distinguish between two main ways in which an infringement may be brought to an end
  - **Antitrust remedies**: traditional intervention *reactive* in nature (they entail (i) a *negative obligation*, administered (ii) on a *one-off basis*)
    - The point of antitrust remedies is to preserve the competitive process
    - They make sense and are effective in the market structures of the ‘industrial era’
  - **Regulatory remedies** are *proactive* instead (they entail (i) a *positive obligation* that (ii) may require *monitoring*)
    - Regulatory remedies re-shape the competitive process
    - They apply where reactive intervention would prove ineffective
Regulatory vs antitrust remedies

• A decision adopting a **reactive approach** typically
  • ...declares the behaviour to be an infringement;
  • orders the firms to refrain from engaging in similar conduct in the future;
  • [and may impose a fine]

• Practices in which reactive enforcement is manifested include:
  • Cartels
  • Exclusive dealing
  • Predatory pricing
Regulatory vs antitrust remedies

• A decision adopting a proactive approach may take many different forms, depending on the circumstances of the case. It may...
  • ...order a firm to give access to a facility, or to license an intellectual property right;
  • set the prices at which a firm is entitled to sell a product;
  • require a firm to sell some of its assets;
  • require a firm to alter the design of its products
# Regulatory vs antitrust remedies

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<th>Remedy</th>
<th>Examples</th>
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<td>Obligation to supply/resume supplies on regulated terms and conditions</td>
<td>CDS, Commercial Solvents, Microsoft I (interoperability obligations)</td>
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<td>Regulation of the conditions under which an input must be sold</td>
<td>Container Shipping, Rambus, Standard &amp; Poor’s</td>
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<td>Obligations to change the design of a product</td>
<td>Google Search, Microsoft I (media player), Microsoft II</td>
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<td>Divestiture obligations</td>
<td>BA/AA/IB, CEZ, German Electricity Balancing Market (E.On),</td>
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- Regulatory remedies give rise to issues and concerns that do not arise in the case of antitrust remedies. These may relate to:
  - **Design**: when enforcement is proactive, there is not a unique and/or obvious response to the concerns identified
    - The design of proactive remedies is sometimes left for the firm to figure out (‘principles-based remedies’)
    - In some cases, proactive enforcement will fail to yield
  - **Implementation**: proactive enforcement is inherently more complex than a negative obligation administered on a one-off basis
  - **Consequences**: striking the right balance between pro- and anticompetitive effects may be more delicate when intervention is proactive
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Tying
Regulatory vs antitrust remedies
Regulatory vs antitrust remedies
Regulatory vs antitrust remedies

• The nature of the remedy (regulatory vs antitrust) provides crucial insights about the nature of the case and the issues involved
  • Cases involving regulatory remedies are fundamentally different from those where reactive enforcement is effective ('tying' means nothing)
  • The remedy cannot be an afterthought: the difference should be reflected in the criteria for their prioritisation, if not the law
• These criteria should take into account:
  • The complexities involved in the design and implementation of the remedy
  • The risks inherent in the re-shaping markets

→ Competition law has been here before (excessive pricing, refusals)
Regulatory vs antitrust remedies

- Prima facie unlawful
- Effects analysis
- ‘Enhanced effects’ analysis
- Prima facie lawful

By object infringements

Reactive enforcement

Proactive enforcement
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Factors:
- Probability
  - likelihood
- Capability
- Freedom of action
  - Market structure
  - ‘As efficient’
  - Consumers

Certainty vs. Uncertainty

References:
- Bronner
- TeliaSonera