

**Antitrust and regulation: an uncertain
boundary?**

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Propositions to consider

“Regulation and antitrust represent alternative responses to perceived market failure. ... Regulation often has the effect of restricting competition. By contrast, antitrust is generally viewed as action by the antitrust agencies and the courts to promote competition through enforcement of antitrust law. A disturbing trend may be observed in which these traditional roles are being reversed.”

Daniel Spulber, *Regulation and Markets*, MIT Press, 1989.

Correcting market failure?

- A view regaining some support: e.g. aim to improve productivity and growth performance of the UK.”
- Links to Spulber’s concern that competition might be seen as ‘instrumental’ in relation to other policy objectives.
- But market failure (and social welfare maximisation) is a rationalising overlay, not a helpful guide:
 - Nirvana economics
 - Politically inept
 - Distracts attention from the principal source of restrictions of competition: regulatory policy
- Think market governance – an aspect of market structure: general/specific, ex post/ex ante, standards/rules.

Cost-based tests for predation: AVC

- AKZO: AVC and the ‘no rational firm’ reasoning.
- Quibbles: introductory offers, related products, sales, real options. Generally to do with duration and complements.
- But also note that AVC may be below average avoidable (economic) cost, so, strictly applied, AKZO reasoning could lead to a price floor above AVC in some cases.
- Position basically solid, but some tensions: static theory vs real time; neglect of complements; AKZO vs TetraPak; economic (avoidable) costs vs accounting costs.

Cost-based tests for predation: $AVC < P < ATC$

- If ATC includes capital costs, then lots of outcomes in this range (ATC will be an indicator of the *central* tendency of prices in a competitive market, with spread on both sides).
- TetraPak: necessity of showing intent, but not consumer harm (not necessary to establish the existence of realistic chance of recoupment).
- Weaker inference from price-cost relationships in making a judgement.
- Basic antitrust position maintained – no ‘regulation’ of prices – but diminished emphasis on recoupment (effects on consumers) clears the ground for formalism.

Pressures on antitrust to become more regulatory

- Power to intervene stimulates demand: courts crucial.
- Cost measurement: availability of accounting data.
- Poor quality of economic/accounting assessments hinders case for effects-based approaches:
 - Misguided training and support; limited resources, thinly spread.
 - Lack of clarity in “effects” tests (see JV’s Berlin speech).
 - Selection bias in assessment of evidence: finding facts to fit the theory/presumption.
 - Selection bias in choice of cases: incidence of apparently problematic conduct likely to be highest when it is actually OK. Margin squeeze example.
- Formulaic price-cost assessments seem ‘easier’ (TetraPak: $P < AVC$ determinative; no need to address recoupment).

AVC < P < ATC: Efficient competitor and new entrant tests

- Aberdeen Journals: Likely to be abusive when in anticipation of competitive entry or in order to undercut a new entrant, and $P < ATC$ will eventually force an equally efficient competitor out of the market.
- Highly uncertain presumptions here:
 - Low prices resulting from entry pressures looks very much like competition.
 - Absent the usual features of a predation case (intent, exclusion, longer-term consumer harm), undercutting a new entrant looks like normal post-entry competition.
 - Approach to duration of conduct highly problematic (“eventually”). How long will low prices persist: what is being *assumed* about future conduct?

Regulatory imports into antitrust?

- Regulation: emphasis on entry promotion/assistance in very specific historical conditions – inherited monopoly – though a similar approach also appears in margin or price squeeze cases (CEC/ECJ leading, not regulators).
- Intended versus unintended effects on market structure and dynamic competition. Differences in ‘error’ analysis.
- *Tendency to forget that the ability to undercut a more efficient competitor is essential to the competitive process: e.g. to undermine high prices. Constraints here can drastically shift the equilibrium. Electricity Pool example.*
- Linked with the downplaying of effects on consumers, and over-focus on supply-side factors.

Two-way traffic

- The entry assistance/efficient competitor stance, particularly w.r.t. margin squeezes, is more prominent in telecoms than in energy.
- UK energy regulation has tended to *import* antitrust principles, with varying degrees of success.
- Example 1: deregulation of storage, 1998 (BGS ‘super-dominant’):
 - Initially $P = ATC$ (regulated) , with excess capacity.
 - Deregulation package would take $P < ATC$ (and AVC very low).
 - Entrants complained, Ofgas/Ofgem rejected the complaints.
 - Strongly effects based, and forward looking. $P > AVC$ and customer benefits, not harm. $P < ATC$ unlikely to persist, but no concerns if it did.

Two-way traffic (cont.)

- Example 2: New Electricity Trading Arrangements (2001)
 - Pooling arrangements: multilateral agreement to address balancing issues in electric system. Contained numerous restrictions on price determination and competition, as well as poor rule-change procedures.
 - Ch I approach: were these indispensable for achievement of system balancing? Ofgem (July 1999): No.
 - Approach radically different from regulatory norms: cut through numerous technical arguments relevant to a CBA/RIA. Eg. Productive efficiency (merit order) defences of the Pool.
- Example 3: Market Abuse Licence Condition (2000)
 - Ch II approach (market abuse), but lacked support (preference for more regulatory methods), and impaired by appeals issues and uncertainties about the application of Ch II itself.

Disturbing?

- Antitrust importing regulatory emphases (efficient competitor and new entrant tests, accounting cost exercises, etc.): Yes.
 - Rules out some competitive price outcomes, with likely anti-competitive effects in consequence, possibly large and no less real for being unintended. Draws attention from questions of effects on consumers – which tend to be assumed rather than examined.
- Regulators importing antitrust principles: No.
 - Current procedures for assessing regulation are very poor (at best based on crude cost-benefit analysis, which has never worked well). An alternative approach deriving from Ch I should be strongly preferred: “if it leads to material restrictions of competition that are not indispensable, bin it”.
- But beware regulatory re-exports (general principles of antitrust modified to encompass specific problems).