
Challenges in Competition Policy and Regulation in a Globalizing World

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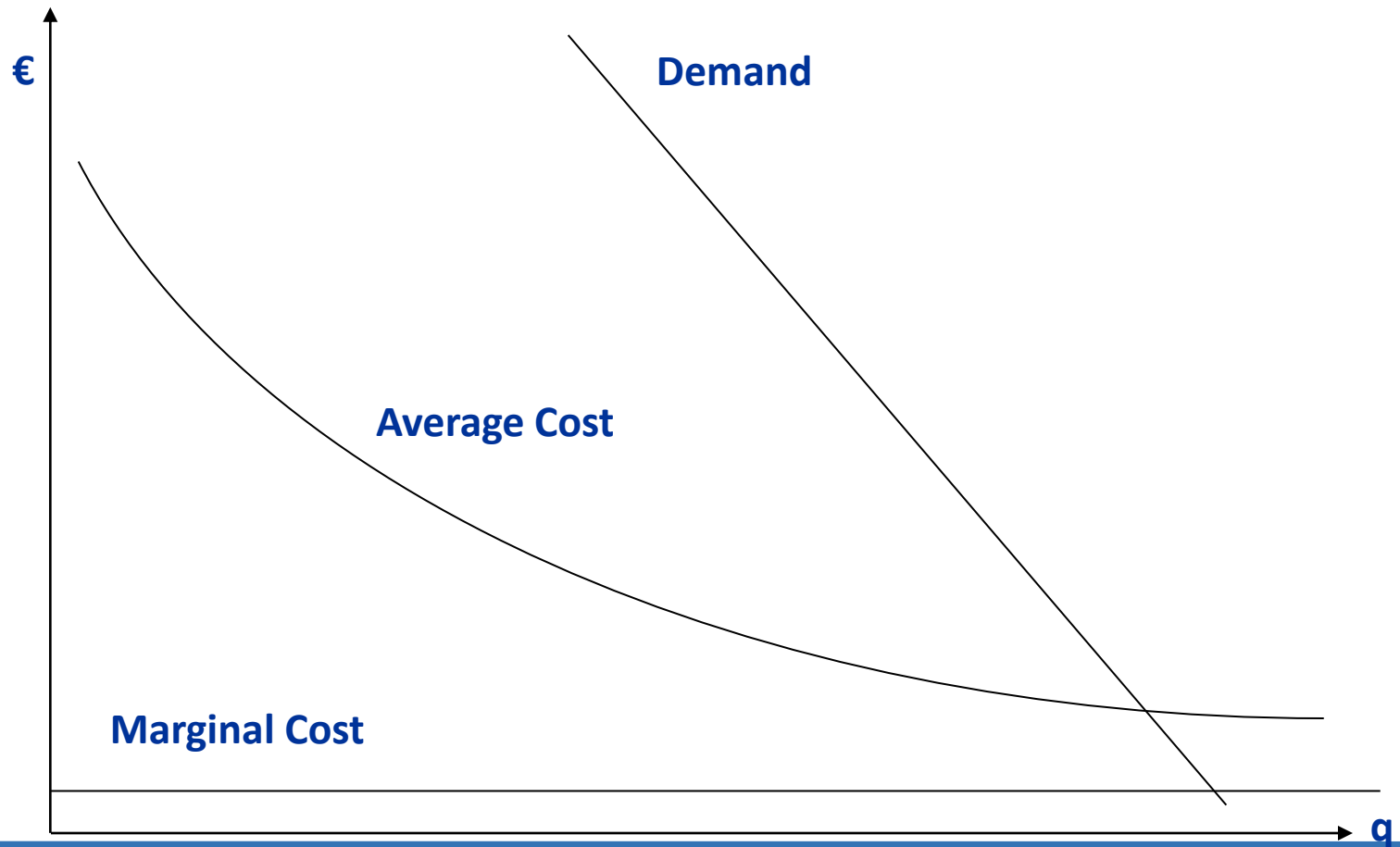
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What is good regulation?



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- Consumer protection against producers' market power.
- Investor protection against expropriation (hold-up) through the Government.

Regulation may be interpreted as an implicit contract between producers and consumers, which is administered by an (impartial) regulatory authority (see Goldberg, 1976).

- Every regulatory system contains two types of errors:
Type 1: Regulation even though not necessary.
Type 2: No regulation even though necessary.

Good Regulation

- An optimal regulatory system should aim at achieving a balance between the following five objectives:
 - Preventing abuse of market power (allocative efficiency)
 - Cost minimising production (productive efficiency)
 - Optimal investment (dynamic efficiency)
 - Minimal transactions costs (transactions costs efficiency)
 - “Efficient” incentives for lobbying and rent-seeking (political efficiency)
- Trade-offs are unavoidable – in addition there are different political objectives for different industries.

How to achieve good regulation?

- Debate about the two polar institutional mechanisms “regulation versus competition law” is often not precise.
- In fact, we observe some convergence in some areas (e.g., energy law in Germany, competition law with divestiture powers).
- Question 1: What material law (rules) should be applied?
- Question 2: Who should apply these rules?
- Question 3: When should they be applied (ex ante or ex post)?
- Question 4: Which courts should be responsible?
- Question 5: How should enforcement agencies be organised?

A Comparative Institutional Approach (I)

| | Competition Law | Telecommunications Law |
|-------------|--|---|
| Objectives | <ul style="list-style-type: none"> • Consumer Surplus • Efficiency • Freedom to Compete • Protecting the competitive process | <ul style="list-style-type: none"> • Consumer Interest • Undistorted Competition • Universal Service • Efficient Investment • Fostering Innovation |
| Threshold | Abuse of dominant position, essential facility doctrine | SMP // 3-criteria-test |
| Frequency | „Pointwise“ Intervention | Systematic industry coverage |
| Information | No continuous monitoring, Burden of proof with BKartA | Continuous monitoring, Burden of proof with firms |
| Instruments | (Ex post) prohibitions, no positive price setting, other remedies | Ex ante control, positive price determination, other remedies |

A Comparative Institutional Approach (II)

| | Competition Authorities | Regulatory Authorities |
|---------------------------|---|--|
| Degree of Independence | often high (e.g., Germany) | not quite as high |
| Lobbying Exposure | not as high | high |
| Expert Industry Knowledge | not as high | high |
| „Culture“ | Distortion of competition is the exception, as is market intervention | Distortion of competition is the rule, as is market intervention |
| | | |

A Comparative Institutional Approach (III)

- Weaknesses of Competition Law and Competition Authorities if:
 - Abuse of market power leads to irreversible damages (obstructive abuse versus “merely” exploitative abuse),
 - Abuse is likely to occur on a recurrent basis,
 - Abuse is difficult to detect or to “verify” (information requirements),
 - Prices or other terms and conditions have to be positively set in the absence of comparable markets,
 - Long-term nature of intervention in dynamic environment.
- Strengths of Competition Law and Authorities:
 - Freedom to compete and to adjust to changing market conditions is less restrained,
 - Lower exposure to lobbying groups,
 - Higher degree of political independence.

A Comparative Institutional Approach (IV)

- Note however: Competition law and its enforcement have been further developed over the last few years:
 - Higher penalties for abuse of market power,
 - Private enforcement,
 - National developments (e.g., injunction following abuse decisions).
- Also note: Competition law (and enforcement agencies) differ between jurisdictions.
- Regulation is needed if distortions of competition are not singular, non-temporary and if there is a high probability that abuse of market power leads to irreversible damages on a regular basis.

Example: Telecommunications

- Current Standard for (De)-Regulation: 3-criteria-test
 1. Non-temporary legal or structural barriers to entry,
 2. No long-term tendency towards effective competition,
 3. Insufficiency of competition law to address competition concerns.
- The test of the third criterion often appears to be rather cursory and not based on a comparative perspective.
- “The use of competition law alone would only allow for “pointwise” interventions. More detailed competencies are required to positively regulate matters. Furthermore, the telecommunications law allows faster interventions, as the regulator’s decisions have to be executed immediately.” (BNetzA)
- Currently, the 3-criteria-test can either be fulfilled or not (binary choice), there are no “grey” areas (Idea: “Ladder of Remedies”)

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