Regulation

Traditionally, antitrust regulation is reactive. It is done through litigation and involves interpreting broadly worded laws after the fact. But governments can also pursue competition policy through prospective economic regulation. Although the FTC can make prospective rules, many regulations that affect competition come from industry-specific bodies, like the Federal Communications Commission and Securities and Exchange Commission. These regulations may still be enforced through litigation, or the threat of litigation, but they offer more specific ex ante guidance to the industry that can be taken into account before companies act. Given current competitive conditions and the slow pace of antitrust enforcement, policy makers are showing increased interest in pro-competitive regulation in the technology sector.

In this module, you will learn how the antitrust laws interact with economic regulation. Consider the strengths and weaknesses of each method, when each is appropriate, and whether they are substitutes or complements. Consider how regulation can be designed to lower entry barriers and intensity competition; consider also how regulation might be used to *thwart* competition.

Reading

Required Reading

Review *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)

Credit Suisse Securities LLC v. Billing, 551 U.S. 264 (2007)

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975)

U.S. Futures Exchange v. Board of Trade of the City of Chicago, 953 F.3d 955 (7th Cir. 2020)

Howard A. Shelanski, *The Case for Rebalancing Antitrust Regulation*, 109 Michigan L. Rev. 683, 687 (2011).

Recommended Reading

Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 Colo. Tech. L.J. 33 (2017)

Andrea Coscelli, CEO of the CMA, "Regulation and competition enforcement – a combined approach" (Fordham Annual Conference, 2018)

European Commission Digital Markets Act ("Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector") (15 December 2020)

Background Reading

Silver v. New York Stock Exchange, 373 U.S. 341 (1963)

Electric Trading Group, LLC v. Banc of America Secs., 588 F.3d 128 (2d Cir. 2009)

Howard Shelanski, Antitrust and Deregulation, The Yale Law Journal, Vol. 127, Issue 7 (May 2018), pp. 1922–1961.

Robert J. Jackson, Jr., Speech: "Competition: The Forgotten Fourth Pillar of the SEC's Mission", Washington D.C., Oct. 11, 2018.

Jacob A. Kling, Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine (2011) 120:4 Yale L J 910.

Samuel N. Weinstein, Financial Regulation in the (Receding) Shadow of Antitrust, Temple Law Review, Vol, 91 No.3, pp. 447–512.