“Problem Practices” in EU Competition Law

Nicolas Petit, @CompetitionProf
University of Liege, Liege Competition and Innovation Institute (LCII)
## Context

### Facts

- Planned obsolescence (cars, smartphones, etc.)
- Most (un)favored consumers (insurance, etc.)
- IP tracking history of web users: previous visits on website, search through price comparator, etc. (train or plane tickets)
- Versioning and artificial disabling of available functionality (low end and high end fragmentation)
- Shrouding and the “no read” problem
- “Confusopoly”
- Default setting strategies

### Law

- Debate on a more muscular application of Section V FTC Act that prohibits UMC
- Belgian Competition Act, 30 August 2013, Article 5(3) and (4)
- Loi Macron discussed in French Parliament (structural orders)
- Net neutrality and the recent reclassification of broadband as Title II “common carrier”
Issue

- Gap in “core” competition and consumer laws
  - Practices that generate “consumer detriment” (OFT, 2004)
  - But that do not infringe Articles 101 and/or 102 TFEU and consumer laws

- Two issues
  - Firms’ anticompetitive conduct that does not fall within the frontiers of positive competition law: Gap 1
  - Firms’ anti-consumer conduct that does not fall within the frontiers of positive consumer law: Gap 2

- Type II-error problem
  - Firms are not necessarily doing anything wrong => “Problem” (Lowe, 2009 talking of “competition problem”)
  - Though problem stems from firms’ conduct => “problem practices”, rather than “problem market”
Purpose of the presentation

Method

- Are the alleged gaps are material, or not?
  - Gap 1: Lawful anticompetitive conduct
  - Gap 2: Lawful anti-consumer conduct
- Check if and how Gaps 1 and 2 are dealt with under competition law only
- Assess whether there is a Gap 3, re. procedural issues

Findings

- There is a well-known Gap 1 in theory
  - Agencies often attempt to plug it
  - Gap 1 cases are remedied in the dark, and approach chosen to remedy Gap 1 cases is subject to discussion
- There is a similar Gap 2
  - But agencies are less active
  - They could be more active
  - Some instruments of competition law could help
- Unclear on Gap 3
Gap I: Lawful anticompetitive conduct
The legal framework (1), constraints

### Article 101
- Several independent firms
- That coordinate their conduct
- With a restrictive « object » or « effect »

### Article 102
- A firm occupying a dominant position
- That unilaterally exploits customers or excludes rivals
The legal framework (2), flexibility

**Article 101**
- Most inter-firm coordinations, horizontal, vertical (or both)
- Low threshold for anticompetitive effects => C-32/11, Allianz Hungary, §38 (“Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages”)
- Anticompetitive intent is not a requirement
- No appreciability requirement for “object” cases (Expedia)

**Article 102**
- List of abuses not exhaustive
- Both exploitative and exclusionary
- No need to prove actual or foreseeable effects
- No need for causal link between abuse and dominance
- No *de minimis* threshold of abuse
- Joint dominance
- Anticompetitive intent is not a requirement
- Use of “imprecise legal concepts” is a necessary evil
## What’s in Gap 1?

<table>
<thead>
<tr>
<th>Factual perspective</th>
<th>Legal perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existing structural issue</td>
<td><strong>101 immunity</strong></td>
</tr>
<tr>
<td>Not enough suppliers</td>
<td>- Unilateral invitations to collude</td>
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<tr>
<td>Tacit collusion</td>
<td>- Parallel anticompetitive conduct</td>
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<tr>
<td>Collective exclusion</td>
<td>- Anticompetitive arrangements within integrated firms (eg, market partitioning, RPM, etc.), incl. agency contracts</td>
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<tr>
<td>Market manipulation</td>
<td>- Anticompetitive contracts with consumers (exclusivity)</td>
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**102 immunity**
- Pricing and non pricing abuses of non dominant firms (number 2, 3, 4) // with Merger Regulation
- Incipient Article 102 TFEU conduct: “road to dominance” (Röller, 2009)

**Government conduct**
A reality check (factual perspective)

<table>
<thead>
<tr>
<th>Problem</th>
<th>Case</th>
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<tbody>
<tr>
<td>Existing structural issues</td>
<td>E.ON, 2008 (temporary dominance)</td>
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<td></td>
<td>Deutsche Bahn, 2013 (un-liberalized market for traction current)</td>
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<td>Rambus, 2010 (locked-in industry, post standardisation)</td>
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<td>Tacit collusion</td>
<td>E.ON, 2008, §20</td>
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<td>Laurent Piau, 2005, T-193/02</td>
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<td>Guidelines on HCA, 2011</td>
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<td>Collective exclusion</td>
<td>E-Books case, 2013 (threats of exclusion of Amazon if refusal to turn</td>
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<td>to agency model in E-Books market)</td>
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<tr>
<td>Market manipulation</td>
<td>EURIBOR and LIBOR cartel cases (2014, and ongoing); Oil and Biofuels</td>
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<td>(ongoing); CDS and Forex (ongoing); Gazprom, ongoing</td>
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<td></td>
<td>Google, ongoing</td>
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<td>Legal Instrument</td>
<td>Problem practice</td>
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<td>Anticompetitive agreements with consumers</td>
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<td>Article 102 TFEU</td>
<td>Unilateral abuse of non dominant firms</td>
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<td>Incipient Article 102 TFEU conduct: “road to dominance”</td>
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</tbody>
</table>
Findings (1)

- There is a clear Gap 1 in theory
- Due to the wording of Treaty, « legal » thresholds
  - Coordinated conduct
  - Dominance
- Agencies have often tried to plug it in practice
- Consistent with gut feeling of competition experts
  - Quiz on our blog: http://chillingcompetition.com/2013/09/20/the-ultimate-competition-law-quiz/
  - “What is a restriction of competition?”
  - “Whatever DG COMP decides it is”
Findings (2)

- Gap I closed to some extent within EU competition law but almost never through “formal” infringement cases
  - Settlement cases (article 9, R1/2003)
    - Theory of harm unclear or framed as existing category of infringement (e.g., market manipulation as excessive pricing)
  - Or “non binding” guidance
    - HCG covering practices facilitating tacit collusion and “hold up” problems
- Gap I closed outside EU competition law, by addressing competition issues in other EU law instruments
  - Roaming regulations (existing structural issues)
  - REMIT and MAD regulations (market manipulation)
  - CRAs regulation (tacit collusion)
- Gap I closed through national law (DG Comp internal study)?
  - Recital 8 and 9 of Regulation 1/2003. Member States can adopt “Stricter national competition laws … on unilateral conduct engaged in by undertakings” and “National legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual”
Findings (3)

- The choice of either approach is governed by *ad hoc* unclear motivations
  - *Ex ante* impact assessment?
    - Not applicable to EU competition cases
    - Applicable to EU legislation, but EU lawmakers rarely consider the adequacy of EU competition enforcement
    - Impact assessments routinely ignore solutions adopted in the legal orders of the MS (Larouche, 2012)
  - *Review or sunset clauses?*
    - Not applied in EU competition cases
    - No *ex post* assessment
Gap 2: Lawful anti-consumer conduct
Hypothesis

Does EU competition law leave anti-consumer conduct unchecked?

Anti-consumer conduct as consumer exploitation

Exploitation understood as “extraction” of consumer surplus (Carlton and Heyer, 2008)
Gap 2, legal framework

- **Exploitation**, in particular of end users, is the core of EU competition law (Joliet, 1970; Bellis, 2013)
  - Price and non-price exploitation (quality, etc.)
  - EU law covers abusive price discrimination
- But same legal thresholds as Gap 1
  - Coordinated or unilateral conduct > dominance
Gap 2, decisional practice

**Exploitation**

- Official disinterest for exploitation theories besides cartels (see Guidance Paper on Article 102 TFEU)
- Hidden application of exploitation theories (Hubert & Combet, 2011)
  - Shrouding: *Tetra Pak II* (1992)
  - Excessive prices: *Rambus* (2010); *Standard&Poors* (2011); *IBM* (2011)
  - Switching costs: *Thomson Reuters* (2012)
  - Hold-up: *Samsung* and *Motorola* (2014)

**Consumers**

- But exploitation of business customers primarily, not of end users
- Dearth of EU cases on distribution agreements
- Anecdotal application in 102 TFEU (*World Cup tickets* case, 1998; C-247/86, *Alstotel v SA Novasam*: 15Y lease contracts, with exclusivity for repairs; works and repairs on equipment unilaterally decided and tariffed by leaser; if modifications increase value by 25%, lease renewed for 15Y)
- Agency reluctance to look like a price regulator
Gap 2, wide open?

- Demand for application of EU competition law to new consumer exploitation practices
  - Planned obsolescence
  - Artificial versioning
  - Bandwidth throttling
  - Big data and differential pricing
Conclusion

- There is a Gap 2
- Can be partly resolved as a matter of policy through (some) re-prioritization of Commission resources on exploitative cases in consumer markets
- Reluctance of agencies can be surmounted conceptually through equilibrium story
  - Exploitation may also be a source of exclusion
  - DomCo charging excessive prices in consumer market A dries up consumer demand on neighboring (B, C, D, etc.) and unrelated markets (W, X, Y, Z)
  - It thus forecloses sales opportunities for other producers on a range of markets
- No need for specific legal basis, save for threshold issues; But specific legal basis could embolden agencies
Revised hypothesis

Theory

- Lawful exploitation of consumers’ deficiencies by undertakings?
  - “Failures internal to the consumer”, that make him unable to effectively choose

Illustrations

- Lande and Averitt
  - Overt coercion
  - Undue influence
  - Deception
  - Incomplete information
  - Confusing information
- Fletcher
  - Search costs
  - Poor information transparency
  - Divergence of incentives
  - Switching costs and hold-up
### Reality check (1)

**Consumer deficiencies as exclusionary device**

- Exploitation of consumer deficiencies pervades antitrust theories of exclusion
  - The predatory pricing firm exploits consumers’ short termism; the bundling firm exploits consumers’ materialism; the price discriminating firm exploits consumers’ search costs
  - *Intel*, 2009, and the “voice of doom”
- *Microsoft*, 2004: Pre-installation of WMP and IE on Windows was conducive to leveraging because of ‘end-users’ inertia’
- *Microsoft*, 2009: Commission relied on empirical analyses to confirm findings of exclusion. Consumer survey showed that a majority of users (51 per cent) had not downloaded alternative browsers

**Unfairness offenses in B2B relations**

- *Rambus*: deceitful conduct
- *Samsung* and *Motorola*: “false” FRAND commitment that fools market participants?
- *AstraZeneca*: provision of misleading information to a public authority
Reality check (2)

- Remedial nudges
- MSFT I and II
- Google?
Example (Google)

Before

After?
Example (Google)

Before

After?
Assessment
The issue

Gap I

- Legal threshold problem
- Some Gap I cases are plugged (i) informally within competition law, though with some limits; (ii) indirectly outside competition law; or (iii) in national law
- Diversity of approaches is arresting
- And indirect approaches which yield accountability issue

Gap II

- Legal threshold problem
- + policy problem, reluctance to look-like price regulator in exploitation cases
- Few cases relating to end-users
- Gap may increase with new economy, (eg opportunities afforded by big data)?
- For consumer deficiencies, same as Gap I, remedied in the dark
- Unclear approach, specific instrument as agency enabler?
The debate

- In the US, debate on Section V of the FTC act, on “Unfair Methods of Competition”
  - Kovacic & Winerman: “Frontier” cases or cases beyond the reach of conventional antitrust law can be dealt with under UMC, but must be “competition-based”, or Sherman-related
  - Commissioner Ohlhausen: need a “chart”; economic regulation of business conduct, not social or industrial regulation; conduct w/o efficiencies or w efficiencies but disproportionately anticompetitive
  - Commissioner Wright: conduct w/o efficiencies; enforcement to be driven by empiricism

- Existing approaches at national level
  - Article 5(3) and (4), Belgian Competition Act of 2013
  - UK market investigations
  - France: “compétence d’avis” and “injonction structurelle”
Article 5(3) and (4), Belgian Competition Act

- Price monitoring observatory => to draft report if “problem in relation to prices or margins; abnormal price change; or structural market problem”
- On its own motion or seized by Minister
- Report sent to the Belgian Competition Agency
- BCA can decide to adopt interim measures for 6 months, including price freezes
- After 6 months, the Minister – and the Government – can decide whether more permanent changes are needed
- Not yet applied
France

- Supermarkets
- Overseas territories
- Generalization?
  - Structural remedies
  - Dominant position + Abnormal margins or prices
  - Deterrence
Common features of existing approaches

- “No fault”
- Flexible
- Timely
- Administrative
- Expert
- Independent
Gap 3 at EU level?

- No specific instrument in positive EU law
- But possibility to use existing tools (Bellis, 2013)
  - Set out *ex ante* guidelines in “frontier” cases: guidelines through hard and soft law: Article 10 decisions, Recital 38 guidance letters, Communication and Notices, sector inquiries reports
  - Apply *ex post* cease an desist decisions without fines in “frontier” cases
    - Article 7 and 8 decisions
    - Article 9 decisions are not a surrogate (“summary investigation and product of bargaining process”, (Bellis, 2013)
    - *Motorola* (2014)?
Bellis’ proposed approach

Yes

- “Frontier” cases are already covered under Article 9 (Bellis, 2013), so they shall be open for resolution under Article 7 or 8 TFEU (unless one believes they are unlawful cases)
- “Effectiveness” theory is influential in EU competition policy
- In other areas of EU law, flexibility clause of Article 352§1 TFEU

No

- Bellis seems to have in mind novel cases, ie cases without clear precedent. Not necessarily frontier cases
- Under proposed framework, Commission must still prove an infringement of Article 101 and/or 102 TFEU
- Scope of 101 and 102 can only be expanded through EU legislation, see EUMR 1989
- And unlikely, because flexibility clauses cannot rewrite Treaty law!!!
Ad hoc instrument, design issues

- Debate in the US (and in Belgium)
  - “Incipiency” theory?
  - “Neighboring” issues?
    - Many practices that harm related objectives can be framed in competition terms
      - Market integrity: insider trading as abuse of informational dominance, that dissuades operators to participate to markets
      - Industrial policy: social dumping by non domestic firm, as abuse of dominance through the exploitation of unfair cost advantages
      - Tax efficiency: taxation corrects the effects of supra-competitive pricing. Tax fraud by dominant firms is a means to evade this corrective instrument
      - Consumer protection: contracts with consumers, as anticompetitive agreements
  - “Spirit” theory?
    - Conduct that undermines the goals of the competition rules, but that falls below the enforcement threshold
    - But goals of EU competition law remain uncertain
Conclusion
Conclusion

- Ad hoc instrument with streamlined procedure marks improvements in terms of legitimacy and accountability.
- But substantive scope remains key issue.

- Michael Pertschuk, Chairman, FTC, Remarks before the Annual Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools, Atlanta, Ga. (Dec. 27, 1977): “No responsive competition policy can neglect the social and environmental harms produced as by-products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of producer-stimulated demands.”


- Not too remote!!!

- Need to devote time to goals of EU competition law.