“Problem Practices” in EU Competition Law

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

Facts

- Planned obsolescence (smartphones batteries, etc.)
- Most (un)favored consumers (insurance, etc.)
- Pricing based on IP tracking history of web users: previous visits on website, search through price comparator, etc. (train or plane tickets)
- Default setting strategies, hassle costs, etc.
- Hold-up

Law

- Debate on a more muscular application of Section V FTC Act in stand-alone cases
- New Belgian Competition Act, 30 August 2013, Article 5(3) and (4)
Issue

- “Problem markets”
- 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

- Assess whether the alleged gaps are material, or not
  - Gap 1: Lawful anticompetitive conduct
  - Gap 2: Lawful anti-consumer conduct
- Assess if and how Gaps 1 and 2 are dealt with
- Assess whether there is a third gap, of a procedural nature: Gap 3

Findings

- There may well be a Gap 1, but its importance may not be as deep as suggested
- The perception that there is a large Gap 1 is, however, legitimate, because Gap 1 cases are remedied in the dark
- Approach chosen to remedy Gap 1 cases is subject to discussion
- Gap 2 cases can be plugged in so far as competition law is concerned
- Unclear on Gap 3
Gap 1: Lawful anticompetitive conduct
The legal framework (1), constraints

**Article 101**
- Several independent firms
- That coordinate their conduct
- With an « appreciable » restrictive « object » of « 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 object or 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

### 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?

Factual perspective
- Existing structural issue
- Tacit collusion
- Collective exclusion
- Market manipulation

Legal perspective
- 101 immunity
  - Unilateral invitations to collude
  - Parallel anticompetitive conduct
  - Anticompetitive arrangements within integrated firms (eg, market partitioning, RPM, etc.), incl. agency contracts
  - Anticompetitive contracts with consumers
- 102 immunity
  - Unilateral abuse of non dominant firms
  - Incipient Article 102 TFEU conduct: “road to dominance” (Röller, 2009)
A reality check (factual perspective)

<table>
<thead>
<tr>
<th>Problem</th>
<th>Case</th>
</tr>
</thead>
</table>
| Existing structural issues    | *E.ON*, 2008 (temporary dominance)  
                               | *Deutsche Bahn*, 2013 (un-liberalized market for traction current)  
                               | *Rambus*, 2010 (locked-in industry, post standardisation)           |
| Tacit collusion               | *German wholesale electricity markets*, 2008  
                               | *Laurent Piau*, 2005, T-193/02  
                               | *Guidelines on HCA*, 2011                                           |
| Collective exclusion          | *E-Books* case, 2013 (threats of exclusion of Amazon if refusal to turn to agency model in E-Books market) |
| Market manipulation           | *Gazprom*, ongoing  
                               | *Google*, ongoing  
                               | *LIBOR* and other X-OR cases                                        |
## A reality check (legal perspective)

<table>
<thead>
<tr>
<th>Legal Instrument</th>
<th>Problem practice</th>
<th>Case</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Article 101 TFEU</strong></td>
<td>Unilateral invitations to collude</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>Parallel anticompetitive conduct</td>
<td>In 101 TFEU =&gt; <em>E-Books</em>, 2013 + HCG&lt;br&gt; In 102 TFEU =&gt; <em>Laurent Piau</em>, 2005, T-193/02</td>
</tr>
<tr>
<td></td>
<td>Anticompetitive restraints within integrated firms (e.g., market partitioning, RPM, etc.), including agency contracts</td>
<td>In 102 TFEU =&gt; <em>AstraZeneca</em>, C457/10 P, 2012&lt;br&gt; <em>Sot Lelos</em>, C-468/06 to C-478/06, 2008</td>
</tr>
<tr>
<td></td>
<td>Anticompetitive agreements with consumers</td>
<td>None</td>
</tr>
<tr>
<td><strong>Article 102 TFEU</strong></td>
<td>Unilateral abuse of non dominant firms</td>
<td><em>E.ON</em>, 2009 (25% of installed capacity)</td>
</tr>
<tr>
<td></td>
<td>Incipient Article 102 TFEU conduct: “road to dominance”</td>
<td><em>Rambus</em>, 2010&lt;br&gt; Merger regulation 139/2004 (external growth)</td>
</tr>
</tbody>
</table>
Findings (1)

- There is a clear gap in theory, but its depth is less certain in practice

- Consistent with gut feeling of competition experts
  - “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 not through “**formal**” infringement cases
  - “**informal**” 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 texts
  - Roaming regulations (existing structural issues)
  - REMIT regulation (market manipulation)
  - MAD regulation (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 of sunset clauses?
    - Not applied in EU competition cases
    - No *ex post* assessment
Gap 2: Lawful anti-consumer conduct
Caveat and hypothesis

- Examination under competition law only
- Lawful exploitation of consumers’ deficiencies
  1. Exploitation = “extraction” of consumer surplus (Carlton and Heyer, 2008)
  2. Consumers (end-users)
Gap 2, legal framework

- The exploitation of consumers, and in particular of end users, is the core of EU competition law (Joliet, 1970; Bellis, 2013)
  - Price and non-price exploitation (quality, etc.)
  - Concerted or unilateral

- The exploitation of consumer deficiencies pervades standard antitrust theory
  - The predatory pricing firm exploits consumers’ short termism
  - The bundling firm exploits consumers’ materialism
  - The price discriminating firm exploits consumers’ search costs
Gap 2, decisional practice

Exploitation

- Official disinterest for exploitation theories besides cartels (see Guidance Paper on Article 102 TFEU)
- *De facto* application of exploitation theories (Hubert & Combet, 2011)
  - Shrouding: *Tetra Pak II* (1992)
  - Switching costs: *Thomson Reuters* (2012)

Consumers

- But exploitation of industrial customers primarily, not of end users
  - No EU cases on distribution agreements
  - Anecdotal application in 102 TFEU (*World Cup tickets* case, 1998)
- And when exploitation of end users, only to serve a larger exclusionary theory of harm
  - *Microsoft I* (2007, WMP)
  - *Microsoft II* (2009, Browser)
  - *Google* (ongoing)
Findings

- There is no gap in theory, but there is a significant one in practice
- Can be resolved as a matter of policy through (some) re-prioritization of Commission resources on exploitative cases in consumer markets
- Can be resolved conceptually through equilibrium story
  - Exploitation may also be a source of exclusion
  - A firm charging excessive prices in market A dries up 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
Assessment
Gap 1 cases

- Gap 1 cases can be plugged (i) informally within competition law, though with some limits; (ii) indirectly outside competition law; or (iii) in national law.
- Gap 1 may not be so deep.
- But diversity of approaches is arresting.
- + indirect approaches which yield accountability issue => what are competition authorities doing for consumers?
Need for rationalisation at EU level?

- “Frontier” cases or cases beyond the reach of conventional antitrust law (Kovacic & Winerman, 2010) should be dealt with under a “catch all”-fall back instrument

- In the US, debate on Section V of the FTC act, on “Unfair Methods of Competition”
  - 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
Common features of proposed approaches

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

- No specific procedural basis in EU text law
- But a possibility (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))
Discussion (1): what’s a “frontier” case?

- Defining scope is a prerequisite
- Debate in the US (and in Belgium)
  - “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
  - “Neighboring” issues?
    - A grab bag of 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 instruments
      - Consumer protection: contracts with consumers, as anticompetitive agreements
Discussion (2): Does substantive EU law cover frontier cases?

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)
- Substance of competition law close to UMC (Bellis, 2013)
- “Effectiveness” theory is influential in EU competition policy
- In other areas of EU law, flexibility clause of Article 352§1 TFEU

No

- Under the proposed framework, the Commission must still prove an infringement of Article 101 and/or 102 TFEU
- Flexibility clauses cannot rewrite Treaty law
Conclusions

- Gap 1, big in theory, smaller in practice?
- Gap 2, small in theory, bigger in practice?
- Gap 3 => unsure
- A lot is done informally or indirectly: need for more transparency and publicity
- No systematic approach to plug Gap 1