"*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: Gap1
  - 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 treshold 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)

Problem	Case
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)

Legal Instrument	Problem practice	Case
Article 101 TFEU	Unilateral invitations to collude	None
	Parallel anticompetitive conduct	In 101 TFEU => *E-Books*, 2013 + HCG In 102 TFEU => *Laurent Piau*, 2005, T-193/02
	Anticompetitive restraints within integrated firms (eg, market partitioning, RPM, etc.), including agency contracts	In 102 TFEU => *AstraZeneca*, C457/10 P, 2012 *Sot Lelos*, C-468/06 to C-478/06, 2008
	Anticompetitive agreements with consumers	None
Article 102 TFEU	Unilateral abuse of non dominant firms	*E.ON*, 2009 (25% of installed capacity)
	Incipient Article 102 TFEU conduct: "*road to dominance*"	*Rambus*, 2010 Merger regulation 139/2004 (external growth)

Findings (1)

- There is a clear gap in theory, but its depth is less certain 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 1 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 (eg, market manipulation as excessive pricing)
  - or "*non binding*" guidance
    - HCG covering practices facilitating tacit collusion and "*hold up*" problems
- Gap 1 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 1 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)
  - Excessive prices: *Rambus* (2010); *Standard&Poors* (2011); IBM (2011); *Visa* (2011, 2014); *Samsung* (2014); *Motorola* (2014)
  - 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 I 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