“*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: 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

- 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?

Factual perspective

- Existing structural issue
  - Not enough suppliers
- 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 (exclusivity)
- 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)

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	*E.ON*, 2008, §20 *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	*EURIBOR and LIBOR* cartel cases (2014, and ongoing); *Oil and Biofuels* (ongoing); *CDS* and *Forex* (ongoing) *Gazprom*, ongoing *Google*, ongoing

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 101 TFEU: *EBooks* case In 102 TFEU => *AstraZeneca*, C-457/10 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*, 2008 (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 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 (eg, 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, *Alstatel 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
  - Lande and Averitt, "Consumer Sovereignty: a Unified Theory OF Antitrust and Consumer Protection Law", *Antitrust Law Journal*, Spring 1997: "*inside the head*"

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)

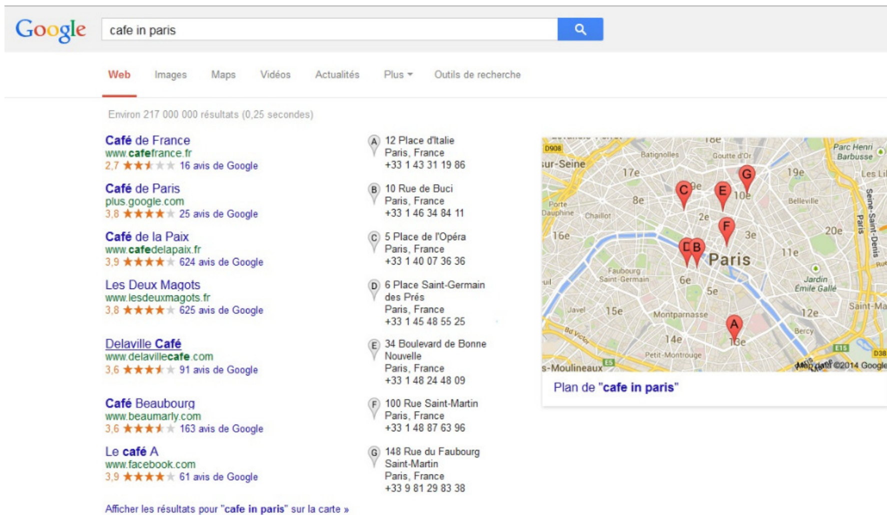
- Remedial nudges
- *MSFT I* and *II*
- Google?

Example (*Google*)

After?

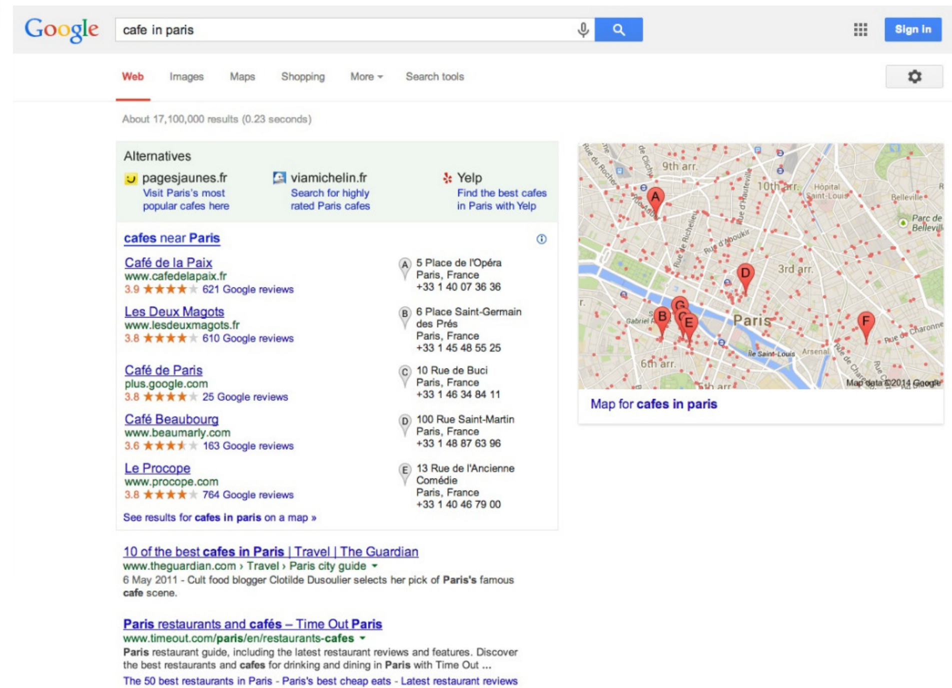
Before

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

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- *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*"
  - "*The FTC as National Nanny*", WASH. POST, Mar. 1, 1978, at A22.
  - Not too remote!!!
  - Need to devote time to goals of EU competition law