

# *“Problem Practices”* in EU Competition Law

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# Context

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## 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

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- ▶ 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

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## 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

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## 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

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## 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?

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## Factual perspective

- ▶ Existing structural issue
  - ▶ Not enough suppliers
- ▶ Tacit collusion
- ▶ Collective exclusion
- ▶ Market manipulation

## Legal perspective

- ▶ I01 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)
- ▶ I02 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)

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Problem	Case
Existing structural issues	<i>E.ON</i> , 2008 (temporary dominance) <i>Deutsche Bahn</i> , 2013 (un-liberalized market for traction current) <i>Rambus</i> , 2010 (locked-in industry, post standardisation)
Tacit collusion	<i>E.ON</i> , 2008, §20 <i>Laurent Piau</i> , 2005, T-193/02 <i>Guidelines on HCA</i> , 2011
Collective exclusion	<i>E-Books</i> case, 2013 (threats of exclusion of Amazon if refusal to turn to agency model in E-Books market)
Market manipulation	<i>EURIBOR and LIBOR</i> cartel cases (2014, and ongoing); <i>Oil and Biofuels</i> (ongoing); <i>CDS and Forex</i> (ongoing) <i>Gazprom</i> , ongoing <i>Google</i> , 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 => <i>E-Books</i> , 2013 + HCG In 102 TFEU => <i>Laurent Piau</i> , 2005, T-193/02
	Anticompetitive restraints within integrated firms (eg, market partitioning, RPM, etc.), including agency contracts	In 101 TFEU: <i>EBooks</i> case In 102 TFEU => <i>AstraZeneca</i> , C-457/10 P, 2012; <i>Sot Lelos</i> , C-468/06 to C-478/06, 2008
	Anticompetitive agreements with consumers	None
Article 102 TFEU	Unilateral abuse of non dominant firms	<i>E.ON</i> , 2008 (25% of installed capacity)
	Incipient Article 102 TFEU conduct: “road to dominance”	<i>Rambus</i> , 2010 Merger regulation 139/2004 (external growth)

# Findings (1)

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- ▶ There is a clear Gap I 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)

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- ▶ 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)

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- ▶ 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

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- ▶ 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

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- ▶ **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

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## 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, *Alstetel 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?

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

# Conclusion

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- ▶ 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

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## 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)

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## 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)

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

# Example (Google)

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Sears features gas grills with a wide variety of features, including multiple burners and searing options. Entertain outdoors year round with gas grills.

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After?

# Example (Google)

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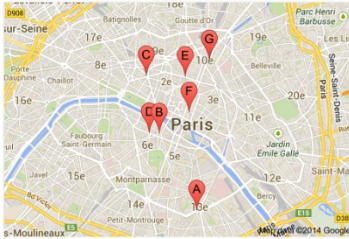
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# Assessment

# The issue

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## 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

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- ▶ 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

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- ▶ 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

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- ▶ Supermarkets
- ▶ Overseas territories
- ▶ Generalization?
  - ▶ Structural remedies
  - ▶ Dominant position + Abnormal margins or prices
  - ▶ Deterrence

## Common features of existing approaches

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- ▶ “*No fault*”
- ▶ Flexible
- ▶ Timely
- ▶ Administrative
- ▶ Expert
- ▶ Independent

## Gap 3 at EU level?

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- ▶ 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 and 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

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## 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

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- ▶ Debate in the US (and in Belgium)
  - ▶ “*Incipency*” 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

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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