Recent Developments in the Enforcement of Article 102

INTERTIC CONFERENCE

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On Competition Law and Geeks

- Abuse of dominance 2.0?
- ERA Conference on 14 June 2013 => "*New Kinds of Abuse under Article 102 TFEU*": www.era.int/?123507&en

The Market

The "*Real*" Economy	The "*New*" Economy
• Firms adjust to their legal environment • Avoidance tactics => firms find creative ways to achieve anticompetitive outcomes short of a conventional competition law infringement • *See* Schinkel, "Market Oversight Games", 2010	• Replication of conventional business practices on novel products and services (*e.g.* tying in software markets) • Emergence of novel business practices on new products and services (*e.g.* versioning and pricing practices in two-sided markets) • *See* Rato and Petit, "Abuse in Technology-Enabled Markets", ECJ, 2013

The "*New*" Cases

"*Real*" cases	**"*High-tech*" cases**
• "*Pay for delay*" arrangements in the pharmaceutical industry • *Gazprom* abusive pegging of oil and gas prices • Abusive switching tactics (*Thomson Reuters*)	• Allegations of abusive injunction-seeking (*Motorola*, *Samsung*, *Interdigital*) • Allegation of abusive patent trolling from Google against MSFT • Mega-case against *Google* (>15 complaints) • Gaggle of interoperability cases (*MathWorks*, *SAP*)

Goals of Presentation and Outline

- Introduction
- Challenge 1 – Substantive Law
- Challenge 2 – Enforcement Policy
- Conclusion

1. Substantive Law

The Issue

Under what substantive benchmarks shall the average competition agency assess new forms of alleged abuses?

Wealth of Theoretical Options

1. Ascribe to a known category of abuse, and apply known specific test (*e.g.* a presumptive rule)
2. Generic abuse under the "*anticompetitive foreclosure*" standard
3. Deal under new, *ad hoc* test
   - View it as a new, distinct category of abuse
   - Ascribe to a known category of abuse, and change the law
4. Avoid the issue, with recourse to "*serious doubt*" benchmark

The Debate (1)

The "*geeks*" theory	Source

• Revamp "*old*" standards in cases that involve new or evolving markets or business practices, in particular on technology-enabled markets
  ○ New standards to avoid type II issues (SEP injunctions)
  ○ New standards to avoid type I issues (FRAND licensing terms)
	• CJEU, *TeliaSonera*, §58
	• "*Competition authorities need the space to develop and apply novel theories of harm to pursue continuously changing evasion strategies as potential violations of the competition rules*" (Schinkel)

The Debate (2)

My take	Source (Rato & Petit, 2013)

• After all, what's a "*technology-enabled*" market?	• As a principle, don't touch
	  ○ Legal uncertainty
	  ○ Enforcement costs
	  ○ Akin to forms-based approach in disguise

Outstanding Practical Issue

- How to chose between option 1, 2, 3 and 4?
- SEP injunction seeking
  - *Magill-IMS Health-Microsoft III*
  - *ITT Promedia/Protégé International*
  - Anticompetitive deception/fraud à la *Rambus*
  - Anticompetitive Foreclosure
  - Orange book standard ("*willing licensee*" test)
  - *Sui generis*

Stepwise Approach

1. Agency shall try to categorize conduct under a known type of abuse, and apply existing standard
2. If this does not work, but serious doubts remain, review the conduct under the fallback "*anticompetitive foreclosure*" standard
3. If the agency applies the "*anticompetitive foreclosure*" standard, it should look for "*actual*" effects, and NOT follow the "*likely*" effects road (// with J. Wright, 2013)
4. Cases which yield actual "*anticompetitive foreclosure*" effects and that are not covered by known abuse are the sole for which the agency shall devote time to set a new standard
5. In setting a new substantive standard, the agency shall seek to ensure "*consistency*"

Best Practices for Setting New Substantive Standards

- Internal consistency (*TeliaSonera v Bronner*)
- Transversal consistency (*Tomra v Van den Bergh Foods; Post Danmark*)
- Scientific consistency (*AKZO, Tetra Pak II, Laurent Piau*)
- Constitutional consistency (*ITT Promedia* and *Protégé International*)

2. The Enforcement Challenge

The Issue

Under what procedural setting shall the average competition agency handle abuses on fast moving markets?

Towards a Fast-Track, *ex ante* approach on "*high tech*" Markets?

- Conventional antitrust enforcement is slow
- New idea pushed by Commissioner Almunia in recent speeches (links here and here):
  - *"I believe that these fast-moving markets would particularly benefit from a quick resolution of the competition issues identified. Restoring competition swiftly to the benefit of users at an early stage is always preferable to lengthy proceedings, although these sometimes become indispensable to competition enforcement".*
  - *"I strongly believe that users and competitors would greatly benefit from a quick resolution of the case; it is always better to restore competition swiftly in fast-moving markets, provided of course that the companies concerned are ready to seriously address and solve the problems at stake"*

Features of the Proposed Approach

- *Ex ante*
- Use of alternative procedural routes => Interim measures and Article 9 settlements

Sector Specific Regulation	Proposed Approach	Classic Antitrust Approach
Ex ante	*Ex ante*	*Ex post*
No proof of antitrust offense	No proof of antitrust offense (serious concerns, and even before SO)	Proof of antitrust offense
Remedies	Remedies	Fines
Minimal due process requirements	Minimal due process requirements	Heavy due process requirements
No fault	No fault	Fault
Ongoing monitoring	Ongoing monitoring	One shot
Injunctive	Hybrid (settlement, but commitments are mandatory)	Injunctive or collaborative

Theoretical Invalidation

- Quasi regulatory approach, reminiscent of utility regulation
- But underlying rationales for SSR are absent in high tech markets
  - Low barriers to entry in the market (no "*barriers to periphery*")
  - Inability to predict risks of anticompetitive foreclosure
- And cost of errors even more severe than in the real economy
  - Combinatorial innovation
  - Dearth of precedents

Empirical Invalidation

Standard Art 7 Procedure

- *Intel*, 9 years following complaint
- *Microsoft*, 6 years following complaint
- *Astra Zeneca*, 7 years following complaints
- *Tomra*, 6 years since complaints
- GVG/FS, 4 years following complaint
- *Wanadoo*, 4 years following investigation
- *Telefonica*, 4 years following complaint
- *Telekomunikacja Polska*, 3 years following investigation
- *Clearstream*, 3 years following investigation

Current Art 9 cases (latest 5)

- *ENI* (3y and 4m)
  - Formal inv: 10.05.2007
  - Commitments: 29.09.2010
- *S&P* (2y and 11m)
  - Formal inv: 12.01.2009
  - Commitments: 15.11.2011
- *IBM* (1y and 5m)
  - Formal inv: 26.07.2010
  - Commitments: 14.12.2011
- *Thomson/Reuters* (3y and 2m)
  - Formal inv: 30.10.2009
  - Commitments:20.12.2012
- *Rio Tinto* (4y and 11m)
  - Formal inv: 20.02.2008
  - Commitments: 20.01.2013

Empirical Invalidation

- Two things stand out:
  - Article 7 decisions can be adopted in 3-4 years, so can Article 9 decisions ☺
  - Cases with formal complainants are much longer than cases without.
- Google is already an "*old*" case
  - Complaint (Feb. 2011)
  - Market test notice (26.04.2013)

Words of Wisdom

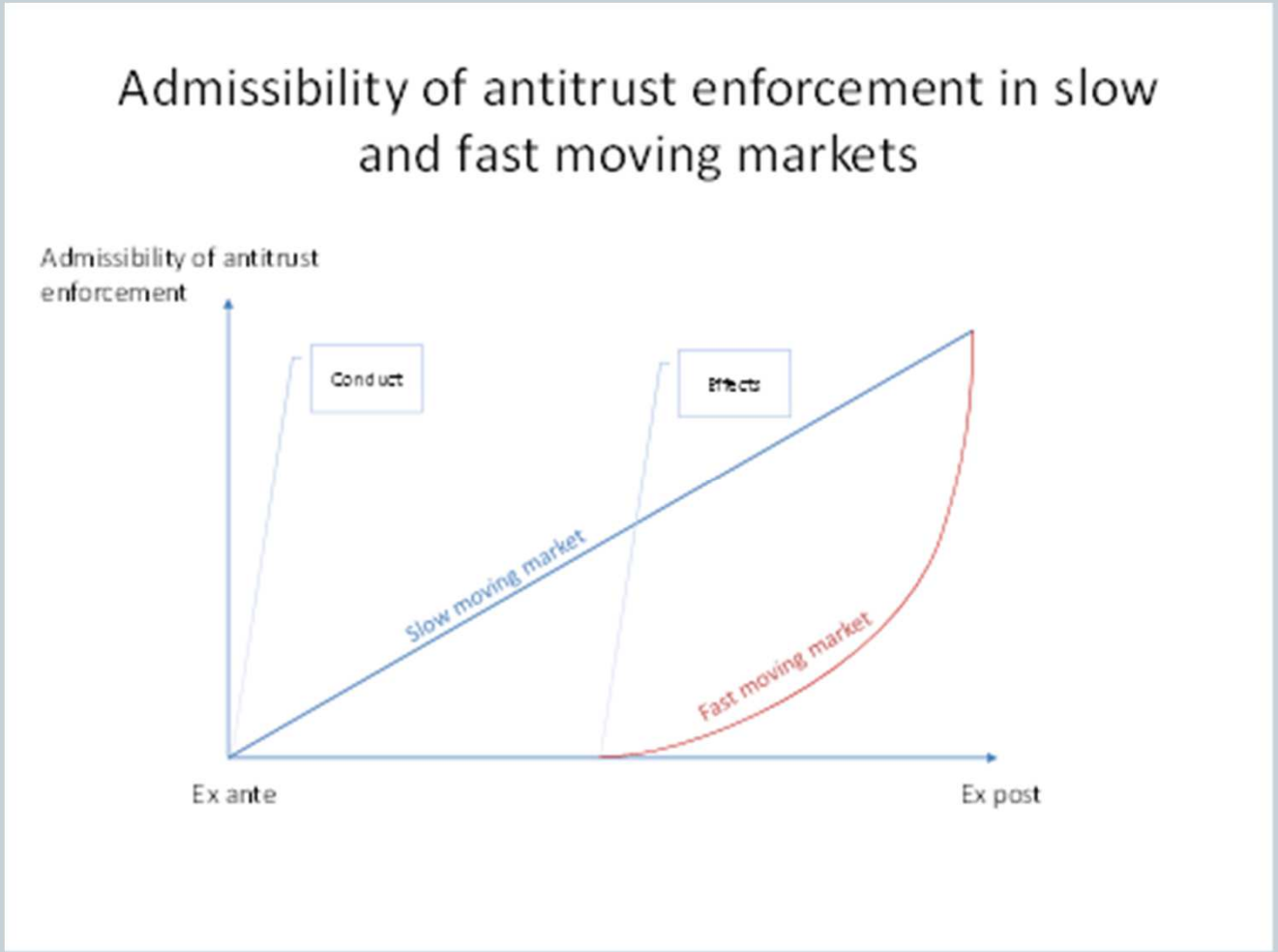
- Wright (2013):

  "regulatory humility is always important but particularly in fast-moving industries characterized by dynamic competition"

- Communication on relevant markets in electronic communications:

  "Newly emerging markets should not be subject to inappropriate obligations, even if there is a first mover advantage [...]. Newly emerging markets are considered to comprise products or services, where, due to their novelty, it is very difficult to predict demand conditions or market entry and supply conditions, and consequently difficult to apply the three criteria. The purpose of not subjecting newly emerging markets to inappropriate obligations is to promote innovation [...]".

Proposed Enforcement Framework (Rato & Petit (2013)



Conclusions

Bottom-Lines

- No need for new substantive rules and enforcement approaches for new sectors, *but*
- Need for a new substantive doctrine and enforcement policy in the entire area of Article 102
  - Make a choice on forms or effects based approach (1)
  - Abandon the Settle 'em all enforcement policy (2)

1. The Messy State of the Substantive Law on Abuse

- Resilience of forms-based approach, besides effects-based approach
- Legal uncertainty and lack of uniformity of competition enforcement
- At Commission level => DG COMP v Legal Service
- At the EU Courts level => even more schizophrenic
  - GC v GC/GC v CJ
  - CJ v CJ
- A clear choice ought to be made

2. The Perils of the "*Settle 'Em All*" Approach

- Rise of settlements (commitments in EU and consent decrees in US)

The Past 5 Years

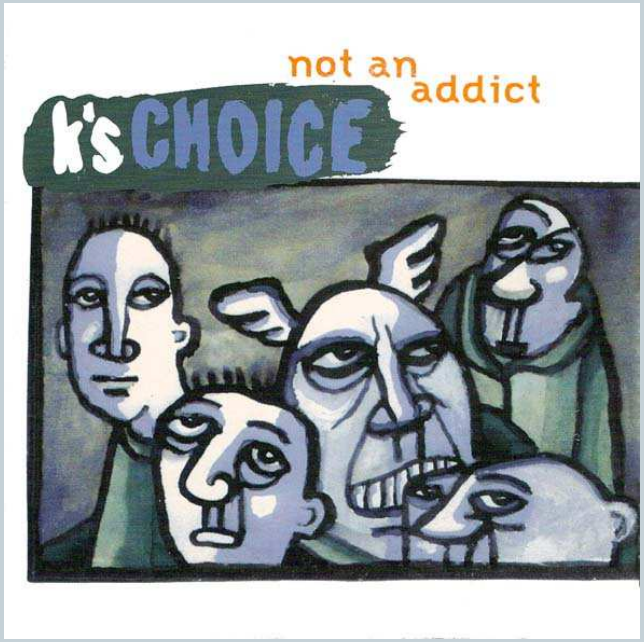
Commitments decisions

- *Rio Tinto Alcan*
- *Thomson Reuters – Instrument Codes*
- *IBM - Maintenance services*
- *Standard and Poor's*
- *ENI*
- *E.On gas foreclosure*
- *Swedish Interconnectors*
- *Long term electricity contracts in France*
- *Microsoft (Tying)*
- *Rambus*
- *GDF foreclosure*
- *Ship Classification*
- *RWE gas foreclosure*
- *German electricity balancing market*
- *German electricity wholesale market*

Infringement decisions

- *Telekomunikacja Polska*
- *Intel*

A Commitments' Addict?



- In *Microsoft II*, the Commission settled a case which 3 years before had been solved with a fine (thereby violating recital 13 of Regulation 1/2003).
- In *S&P*, *IBM* and in a gaggle of energy cases, the Commission settled cases where anticompetitive effects had lasted over a significant period of time, thereby failing to punish past anticompetitive conduct
- E-*Books* case, => settle a "*hardcore restriction*", namely an industry-wide resale price maintenance scheme
- Upcoming *Google* settlement=> settle a case which raises novel legal and economic issues. Yet, how can the Commission possibly suspect an infringement short of any significant precedent?

Shortcomings

- Adverse enforcement selection => Settlements exist because of alternative threat of prohibition
- Policy paradox => Incongruent with rising compensatory philosophy in competition law (*i.e.* private enforcement)
- Risk of "*guidance desert*"

A Need for Restraining Principles

- Rule #1 => Exclude from Article 9 decisions, cases where anticompetitive conduct has lasted over time (settlements only change the future, and do not correct, punish and compensate past harm)
- Rule #2 => Exclude from Article 9 decisions, cases raising novel legal and economic issues from settlements (such cases should simply not be settled, because the agency cannot reasonably suspect an infringement short of any precedent. Moreover, agencies should give guidance to the market when new legal and economic problems arise)

In Need of a more Balanced Enforcement Policy?

- Cultivate a track record of positive and negative enforcement decisions besides settlements
- Use of guidance letters, Article 10 inapplicability decisions
- *See* Kovacic's and Bellis proposals, along the lines of Section 5 of the FTC Act