

The Ubiquity and Limits of Competition Policy in a World of Flux

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Features of dynamic markets

- Rapid cycles of innovation
 - Innovation-intensive industries
 - Competition through innovation
- Importance of intellectual property protection
- Other features
 - Two-sidedness of markets
 - Importance of data

→ *These features would suggest that enforcement would become increasingly prudent. In fact, the opposite seems to be taking place.*

Features of dynamic enforcement

- Rapid cycles of innovation do not appear to deter intervention
 - Fast-moving industries have become an enforcement priority
 - Rapid cycles of innovation are deemed to require prompt action (*commitments, interim measures*)
- The balance between competition law and intellectual property seems to be shifting
 - The range of 'exceptional circumstances' seems to have expanded (e.g. *Microsoft, Huawei*)
 - No safe harbour for practices that remain within the substantive scope of an intellectual property right (e.g. *Lundbeck, Pay-TV*)

→ *What explains this (somewhat counterintuitive) outcome?*

Explaining the current trends

Substantive factors

- Nature of the industry
- Gap-filling role of antitrust
- Fight for rents
- Disruptive effects

Institutional factors

- Frequency of litigation
- Business v business
- Authorities' incentives
- Global market for ideas

Explaining the current trends



Frequency of litigation

The frequent litigation of an issue may lead to the progressive erosion of substantive standards.

Explaining the current trends

Probabilistic Patents

Mark A. Lemley and Carl Shapiro

Patent Holdup and Royalty Stacking*

Mark A. Lemley** & Carl Shapiro***

Global market for ideas

There is a great deal of cross-fertilisation across jurisdictions, and ideas circulate beyond the area where they originate

Limits to competition law enforcement

- Is it possible to set meaningful limits to intervention under (EU) competition law? Is it justified to do so?
 - Competition law provisions worded in broad and vague terms; difficult to define ex ante limits to intervention
 - The substantive standard to intervention in relation to some practices (e.g. exclusivity agreements, tying) seems to be very low
 - The complexity and uncertainty entailed by the application of remedies does not seem to deter intervention
 - EU competition law naturally absorbs emerging ideas

→ *However, some tentative limiting principles could be explored*

Limits to competition law enforcement

Tentative limiting principles

1. Assessment of the counterfactual
2. Is the theory based on consensus positions?
3. Intervention should not aim, as a rule, to change firms' business models
4. Anticompetitive foreclosure needs to be established in vertical and conglomerate relationships

Limits to competition law enforcement

- First limit: the need to assess the counterfactual
 - The impact of a practice on competition cannot be assessed in the abstract
 - It is necessary to consider the conditions that would have prevailed in the absence of the practice
 - In other words, authorities and courts should resist the temptation to assess practices from a purely ex post perspective
 - It is necessary to acknowledge that some practices create markets, and in this sense, create any ex post competition that might arise at a subsequent stage

Limits to competition law enforcement



Limits to competition law enforcement

- Second limit: is intervention justified when there is no consensus around the underlying theory?
 - There is no consensus around some of the most topical issues: patent hold-up or which market structures are most conducive to innovation
 - A case could be made that intervention would not be justified until the underlying ideas become part of the mainstream
 - This is an idea that was explored in relation to collective dominance (*Airtours*) and conglomerate mergers (*Tetra Laval*)

Limits to competition law enforcement

- Third limit: business models should not be altered absent exceptional circumstances
 - In some cases, remedial intervention might force firms to adopt a new business model
 - It is submitted that this should be done only sparingly by authorities
 - It looks like a logical corollary of *Magill* and *IMS Health*
 - It is typically not obvious that the outcome that results from intervention is preferable to an outcome without intervention

Limits to competition enforcement



Limits to competition law enforcement

- Fourth limit: anticompetitive foreclosure should be established in vertical and conglomerate relationships
 - Intervention does not seem justified if an actual or potential competitive constraint is not likely to be eliminated in the relevant time horizon
 - Absent anticompetitive foreclosure, any pro-competitive effects can be presumed to outweigh any potential harm
 - The point of competition law is not to fine-tune market structures, but to prevent their deterioration

Limits to competition law enforcement

