Competition Law in a Complex Economy

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Futurity

Schumpeter, Economist, Feb

‘Smart’ and ‘walled’ digital ecosystems

- Centralisation and decentralisation of the Internet
  - Cloud computing
  - Blockchain
  - Fogg computing
- Walled Gardens
- Open Gardens

Power and industry architecture

- ‘(t)he concept of industry architecture (IA) describes how labour is typically organized and structured within an industry (‘who does what’) and which firms capture value and profit as a result (‘who takes what’)’. Being in a position to influence the way the industry is organised/structured and the value allocation between the industry (or ecosystem) actors, provides ‘architectural advantage’
  - MG Jacobides, Industry Architecture, in M. Augier & D. J. Teece, n2us-3.8 (i)-3.8 (7em.

Leveraging and ecosystems

- A monopolist may be able to gain additional profits through leveraging in certain circumstances (no single monopoly profit theorem)
- Raising Rivals' Costs
  - Aim is not always exclusion, but also
  - Relaxing competition in the marketplace
- The motivation behind monopoly leveraging activities may be a reduction in (vertical and horizontal) competition over time, rather than immediate profit: dynamic theory of market foreclosure
  - To protect a monopolistic position
  - To transfer monopoly power from a bottleneck to another market – this defeats the purpose of having markets, which is to ensure a proper reward on productivity
  - To reinforce vertical market power so as to gain a larger share of the surplus and capture the innovation rents – again affects productivity and ecosystems
- Many large firms are more intent on maximizing their total output, sales, or growth rates/develop network effects or acquire architectural advantage rather

IoT – Some questions

- Who controls the sensors embedded in infrastructure?
- Who controls the sensors in devices?
- Who controls the flow of information between the moving

The rise of platforms: a complex economy perspective

The return of the social question? Polycentric competition law

- ¾Consumer welfare' under attack
- ¾ Overlapping games
- ¾ Competition law and inequality
  - ‰ Winner takes most
  - ‰ Superstar firms
  - ‰ The new Proletariat
- ¾ Consumers versus citizens?
- ¾ Complex equality
- ¾ Competition law and the computational economy
  - ‰ New metrics?
  - ‰ Augmented competition law

Some recent papers

- Lianos, Ioannis, Polycentric Competition Law (September 1, 2018).( )]TJ 2# : ¥Á S¾\ 11*Z «SÂA € Ñì¾ ØÀ 1,io(y)-1ng3(L10 (Bon)l)tcenton oa.( ) (ol)0.9 tion entC5osom,

A behavioural turn in enforcement?

Anne-Lise Sibony

Behavioura
l turn

Behavioural economics has a "bright future" in competition litigation

"Lawyers and judges like to think that understanding human nature is key to making and enforcing good law"

Dame Vivien Rose

What the behavioural approach is not

- An alternative to economic models
- An general theory of human behaviour

But that needs not be a problem

“Theory deals in aggregate; litigation deals with individual episodes of anticompetitive behaviour”

C.R. Leslie, Can Antitrust Law Incorporate Insights from Behavioural Economics? Texas Law Review 2014

What behavioural insights are

- A set of empirical results
  - From psychology and behavioural economics
  -

Boundedly rational consumers

- Availability heuristics (fresh in your mind)
- Myopia (focus on short term)
- Framing effects (gain and loss)
- Inertia bias (default option)

Did we remember to get what we came here for?

Boundedly rational firms

Boundedly rational firms

- Peer pressure / social comparison
- Overconfidence
- Optimism bias
- Framing effects
  - Gain frame: risk averse
  - Loss frame: risk seeking
- Truncated reasoning (WYSIATI)

  ...

What lawyers can do with behavioural insights

- Use them as part of their analytical grid when thinking in scenarios
  - Anti-competitive scenarios (Commission, NCAs)
    - Eg power of default options (MS)
    - After markets: tendency to underestimate need for secondary good (eg toner, nails)
      - ¾ Competition of primary market might not be enough
  - Pro-competitive scenarios (Defendants)
    - Overconfidence can drive unprofitable entry and increase competition
  - ¾ Formulate hypotheses
- Behavioural phenomena cannot be assumed to occur in any particular market setting
  - ¾ Test the hypothesis on the facts

EU law is open to behavioural insights

- Not across the board
  - RPM: behavioural insights matter in the UK (R), less in the EU
- But importantly
  - EU law has not solidified the rationality hypothesis so strongly
  - Irrational predation escapes enforcement under Brooke Group, not under Wanadoo
  - Arguments about loss aversion and risk-seeking behaviour could be relevant
    - Defendant: no possibility of recoupment ex ante, leave me alone
    - Commission / NCA: no possibility of recoupment, but you ignored that

Where do behavioural insights matter?

- Entry
  - Overconfident managers
    - More entry than one might expect
- Efficiencies
  - Tendency to overestimate efficiencies
    - Agencies know it but do not currently try and assess what factors facilitate or inhibit biases in managerial decisions
  - Effect on pricing
    - If firms take into account fixed and sunk costs => Could favour passing on of cost reduction post-merger
      - Study track record of merging parties factoring in fixed and sunk costs in their decisions

How do behavioural insights fit in?

- Counterfactuals (Rose)
- Structure assessment (Tor)
  - Account for rational pro- / anti-

Wrap up

If you read only one article

- Avishalom Tor, Understanding Behavioural Antitrust, Texas Law Review 2014, 573.