CPI's Europe Column Presents:

From Microsoft to Google: eyes wide shut on predatory innovation?

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On June 27, 2017, the European Commission ("Commission") has fined Google 2.7 billion dollars[1] for having abused its dominant position by giving illegal advantage to its own comparison *shopping service*. According to the Commission, Google had notably "*demoted rival comparison shopping services in its search results*." We do not know – yet – if that demotion was purely contractual, but if it also involved technical changes, it would mean that Google has implemented practices of predatory innovation. We shall soon know, once a non-confidential version of the decision will be made public.

And we are already expecting another decision to be released against Google, in the *Android* case. In its statement of objections,[2] the European Commission held that Google imposed restrictions on Android device manufacturers and mobile network operators. Some of them are technical – those related to anti-fragmentation, for instance.

These strategies – without making any assumption about their legality in these particular cases – are falling within the definition of predatory innovation which covers the *"alteration of one or more technical elements of a product to limit or eliminate competition."*[3] And they are implemented on a daily basis.

For this very reason, some authors have underlined the urgent need to consider the issue.[4] Tech websites such as TechCrunch contain hundreds of articles dealing with compatibility issues, and predatory innovation is not limited to that. The general press is full of examples of potential predatory innovation.[5] In fact, no expert is actually denying the existence of such practices, and yet, most of predatory innovation escapes the current rules of competition law. This needs to change, and if it hasn't been done so far, there are several reasons explaining it.

I. Why predatory innovation is not a thing (yet)

Predatory innovation is yet to be known for several reasons. First, because legal concepts evolve very slowly (if at all) over time and creating new ones is rarely done. Second, because much of our attention is drawn to algorithms & big data, at the expense of the other issues. Third, because we generally associate innovation with a positive process, not to anti-competitive strategies, which does not help to win acceptance of the concept. Fourth, because predatory innovation is hard to catch. Fifth, because some ideologies continue to guide certain competition authorities and sixth, because the fear of judicial errors seem to limit research on the subject.

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1 *See* European Commission Press Release IP/17/1784 (June 27, 2017): http://europa.eu/rapid/press-release_IP-17-1784_en.htm

2 *See* European Commission Press Release IP/16/1492 (April 20, 2016): http://europa.eu/rapid/press-release_IP-16-1492_en.htm

3 Thibault Schrepel, *Predatory Innovation: The Definite Need for Legal Recognition*, SMU Sci. & Tech. L. Rev (forthcoming 2017) *https://ssrn.com/abstract=2997586*

4 They called for studies a long time ago, *see* James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982), J. Gregory Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121 (1983), Ross D. Petty, *Antitrust and Innovation: Are Product Modifications Ever Predatory*, 22 SUFFOLK U. L. REV. 997 (1988). More recently, *see* John M. Newman, *Anticompetitive Product Design in The New Economy*, 39 FLA. ST. U. L. REV. 681 (2012).

5 For instance, *see* Alexei Oreskovic, *Google Bars Data From Facebook As Rivalry Heats Up*, REUTERS (November 6, 2010): http://www.reuters.com/article/us-google-facebook-idUSTRE6A455420101105, David Gelles, *Facebook accused of restricting its users*, FT (July 11, 2009): https://perma.cc/ES6E-EKT5.

Because of how legal concepts (do not) evolve

Legal concepts evolve very little over time, if at all. It is therefore difficult to convince antitrust authorities and courts of the need to shift existing boundaries. As a preeminent French author rhetorically asked, "*is there ever any real change in legal concepts? Will they be tomorrow fundamentally different from what they were yesterday? One would have reason to believe that they are neither really new nor really renewed to the point of changing face.*"[6]

And if legal concepts evolve slowly because of a certain legal conservatism, it is even more challenging to have new concepts recognized. Plus, even though predatory innovation was first theorized in the late 70s[7], and despite the fact that several court rulings have used the terms, neither the Court of Justice of the European Union nor the American Supreme Court has decided a case of predatory innovation. The European Parliament and US Congress have not taken any initiative in this regard either. This probably explains certain reluctance from the lower courts or the national competition authorities to recognize this notion as an independent legal concept.

In fact, this creates a vicious circle: the absence of doctrine leads to the absence of court rulings (in this order or in the reverse order), and so on. Other institutions have not been of much help either. The OECD, for instance, dealt with predatory innovation in 2004 for the first time,[8] which is quite late knowing that one of its first roundtable, "*Application of Competition Policy to High Tech Markets*," was held in 1996. It is time to break this dynamic and make predatory innovation ~~a~~ priority policy area.

Because of publication bias

As I wrote elsewhere,[9] *big data* was the most fashionable topic these last few years, but things have changed and *algorithms* are now the kings. Here actually lies a publication bias which leads academics to focus much of their attention on a subject that probably does not deserve so much.

The alleged emergence of algorithms as part of anti-competitive strategies is not quantified. In fact, the amount of U.S. antitrust law cases dealing with algorithms is stable since 2007. Second, even though we could quantify the importance of algorithms into illegal practices – as well as to the harm done to the consumers, it remains that algorithms are just a new means of implementing the same old anti-competitive practices (cartel on prices, information sharing etc).

And yet, algorithms are the subject of numerous papers.[10] I'll stop here, but the fact is that this inflation of literature about algorithms is problematic because it monopolizes much of the doctrinal attention, and consequently, it prevents studies on other subjects. In fact, the

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6 David Bosco, *Regards sur la modernisation de l'abus de position dominante*, LPA, 2008, n°133.

7 Robert E. Bartkus, Note, *Innovation Competition Beyond Telex v. IBM*, 28 STAN. L. REV. 285 (1976).

8 OECD, Predatory Foreclosure, DAF/COMP(2005)14, 2004.

9 Thibault Schrepel, *Here's why algorithms are NOT (really) a thing*, Revue Concurrentialiste (May 2017): https://leconcurrentialiste.com/2017/05/15/algorithms-based-practices-antitrust/.

10 See Cyril Ritter, *Bibliography on Antitrust and Algorithms*: https://ssrn.com/abstract=2982397. For a thoughtful view of the subject, see Nicolas Petit, *Antitrust and Artificial Intelligence - A Research Agenda:* https://ssrn.com/abstract=2993855.

development of new technologies raises legal problems that need to be addressed much more urgently. Predatory innovation is obviously one of them.

Because of "a sort of" mental block

The term "*innovation*" is generally associated with a positive process while the concept of "predatory innovation" covers an anti-competitive practice which must be prohibited. Accordingly, the latter may seem counterintuitive. But it is not.

Talking about predatory innovation is in fact an abuse of language insofar as it is not an innovation in the ordinary sense of the term, but precisely, the modification of a product that takes on the appearance of an innovation without being one. We should speak, in fact, about *predatory non-innovation*, or *frivolous innovation*, but I think that it is wiser to keep the wording of *predatory innovation* that has already been adopted by some. Let's make it clear, however, that condemning predatory innovation does not mean condemning certain innovations for whatever reason, but rather, condemning all anti-competitive strategies that inhibit genuine innovation.

Because predatory innovation is hard to catch

Predatory innovation is not trendy in courts and it implies that some research has to be done on the type *and* the frequency of such practices. I've conducted research on the first – to categorize all of its forms,[11] but let's face it, the second one is not easy.

In fact, predatory innovation is an internal strategy by which a company modifies its product so to hurt its competitors. Unlike predatory pricing which implies some publicly available information (the price), predatory innovation may be hard to identify. Competitors' complaints are the best way to raise doubts about the legality of product modifications. Otherwise, predatory innovation will continue to fly below the radar.

And we should also note, with regard to the opacity of predatory innovation, that the development of settlement/negotiated procedures does not seem to lean toward better days. For instance, in the ***Intel*** case which involved predatory practices,[12] the FTC reached an agreement in which the company committed to modify its practices for the future, without giving more information on the legal analysis. This type of agreement does not help to improve the understanding of predatory innovation, to make other companies aware of its legal existence and, above all, to create a clearly defined legal regime.

Yet, as mentioned in the introduction, there is no doubt about the very common

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[11] Thibault Schrepel, *Predatory Innovation: The Definite Need for Legal Recognition*, SMU Sci. & Tech. L. Rev (forthcoming 2017): https://ssrn.com/abstract=2997586.

[12] Federal Trade Commission, Complaint in the Matter of INTEL CORPORATION, Docket No. 9341 : "*For example, in response to AMD introduction of its Opteron CPU for servers in 2003, Intel became concerned about the competitive threat posed by Opteron processors. Intel then designed its compiler and libraries in or about 2003 to generate software that runs slower on non-Intel x86 CPUs, such as Opteron. This decrease in the efficiency of Opteron and other non-Intel x86 CPUs harmed competition in the relevant CPU markets*".

[13] Ron Miller, *Partnerships and Interoperability Matter Most In Cloud-Mobile World*, TECHCRUNCH (Jan. 4, 2016): https://techcrunch.com/2016/01/04/partnerships-and-interoperability-matter-most-in-cloud-mobile-world/.

implementation of these practices. Just look how many standard setting organizations are implementing standards so to remove interoperability issues. Just have a look at the European Commission press releases in its Google investigation. Just reread (again!) the Microsoft cases. In fact, as it was recently said on TechCrunch, "*partnerships and interoperability matter most in the cloud-mobile world."* That is unless you already have market power.[13]

Because of the Chicago School, the Harvard School and the Freibourg School of thought

Schools of thought may seem outdated, but their influence remains. In (very) short, the Chicago School saw competition policy through prices. The Harvard School was more interventionist and gave a great deal of importance to market structures. The Freibourg School has some similar pattern and also concentrated on competition authorities' design.

None of these schools focused on innovation.[14] For sure, prices are one important element through which firms compete, but high-tech markets tend to move toward innovation. The Chicago School's teachings are then to be updated, because as the OECD underlined, "*apart from acts of predatory foreclosure that involve short run losses, there may exist strategies that are exclusionary, that reduce competition, but do not involve short run losses. Recently, competition authorities have been focusing their attention on types of foreclosure that are likely to be less costly methods of foreclosure than predatory pricing, which may be termed 'cheap exclusion'.*"[15]

On the other side, focusing on market structure, rather than practices, leads to publishing a large number of merger decisions dealing with innovation,[16] and accordingly, to leave aside the issue of non-price strategies. This also explains why predatory innovation wasn't at the center of attention these past few years.

Because of the fear of judicial errors

Several of the articles dealing with predatory innovation over the last few years have argued or applying a *per se* legality rule to it. In short, it has been contented that dealing with innovation is tricky

– which is true – and, therefore, that courts could only avoid creating type-I error – which they should do – by applying such *per se* legality rule. These articles have probably disregarded any doctrinal renewal regarding predatory innovation.

And fighting against type-I error is indeed a priority, especially in high-tech markets where dominant positions are created very rapidly and where judicial errors may put deadly sticks into

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[14] For one focusing on innovation, *see* Thibault Schrepel, *The «Berkeley School of Antitrust»*, Revue Concurrentialiste (Octobre 2016): https://leconcurrentialiste.com/2016/10/31/the-berkeley-school-of-antitrust/. *See* also Thibault Schrepel, *Applying the Neo-Chicago School's framework to high-tech markets*, Revue Concurrentialiste (May 2016): https://leconcurrentialiste.com/2016/05/06/neo-chicago-school-high-tech-markets/.

[15] OECD, Predatory Foreclosure, DAF/COMP(2005)14, 2004.

[16] Nicolas Petit, *Significant Impediment to Industry Innovation: A Novel Theory of Harm in EU Merger Control?*: https://ssrn.com/abstract=2911597.

the wheels of companies. But this shall not have the consequence of preventing any work on some new legality test specifically designed for predatory innovation. Sure thing, a *per se* legality rule prevents type-I errors, but this short-term vision should not hide the long-term objective: eliminating predatory innovation so that the markets become even more free.
It is indeed too often forgotten – even within libertarian circles – that the principle of non-aggression implies (of course) for governments and judges not to condemn companies that play by the book, but that it also implies to liberate companies from unlawful aggression. In short, the fear of creating judicial error is a necessary one, but it doesn't mean that *per se* legality is the only path and that another legality rule may not be designed to do so while getting rid of predatory innovation.

II. Much is to be done

It is often said that the rapid development of high-tech markets is coming along with new challenges in terms of legal analysis. It is currently said too little that one of these major challenges is predatory innovation.

Software, platforms, and other applications are modified at each update – i.e. even though they already are on the market. All of these updates are opportunities to implement predatory innovation. Get your iPhone or Android phone out of your pocket and have a look at how many updates are waiting to be downloaded. How many of them could be predatory innovation? Well, all of them… So, if it's eyes wide shut on predatory innovation, how long can it be this way?

In a time when innovation is the trendiest word in the legal spheres, it is time to concede predatory innovation the importance it deserves. It is time, also, to create a proper legal regime for it. Hopefully, it is expected more from top antitrust law officials. The European Commission, Federal Trade Commission and Department of Justice antitrust division's members are invited to speak publicly about the issue. Guidelines need to be addressed and rulings need to be published. The forthcoming *Android* case could be the first major opportunity to do so. Parliaments must not stand still either. Everything could actually start from one of them. Unless it starts from a national competition authority or a private plaintiff whose lawyers would be particularly inspired to push to that direction.