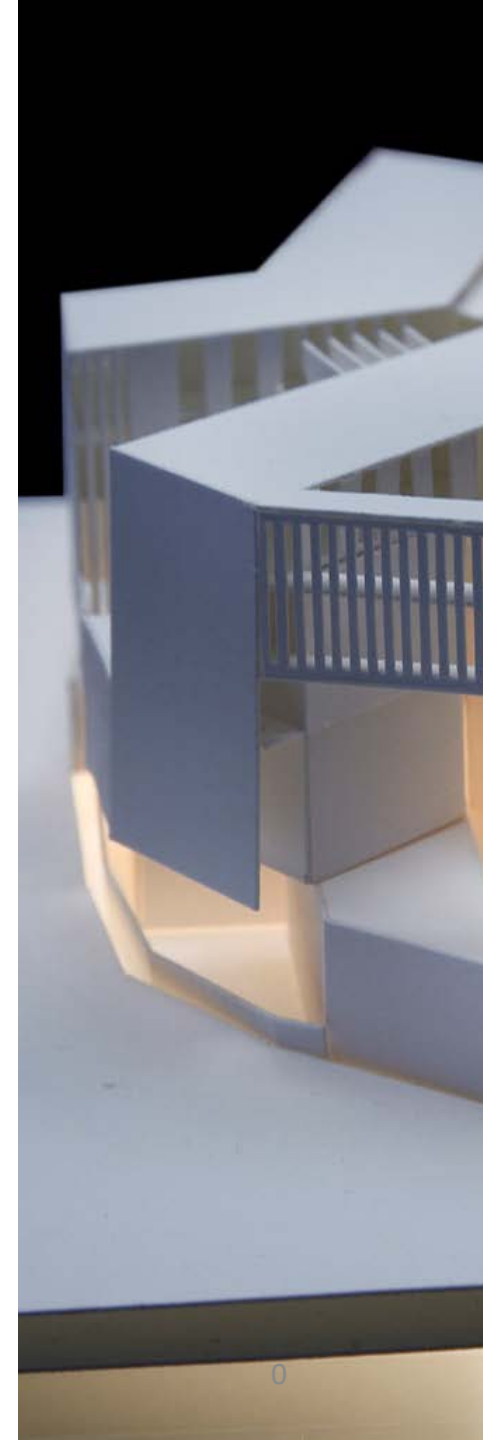


Session 1

Exclusionary abuse

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Comments

- Excellent insights (not surprising 😊)
 - Objective of enforcement: reference to consumer/total welfare
 - Definition of abuse: anti-competitive effects harming consumers
 - Form versus effect: same practice can be pro- or anti-competitive [full / partial exclusion]
- To open the discussion
 - Objective of competition policy
 - Exclusionary versus exploitative abuse
 - Definition of an abuse
 - Rebuttable presumption
 - Market definition

Objective of competition policy

➤ On the “competitive process”

- “the institution of a system ensuring that competition in the common market is not **distorted**” (Article 3(f)); several other references to “distortion of competition”
- No reference whatsoever to a competitive process; the word “process” only appears initially in expressions such as “processed goods”; later on, it also applies to various “processes” to be used to introduce changes in the rules used in various matters – other than competition

➤ Multiple objectives

- Competition versus plurality, environment, employment, revenue (spectrum auctions)
- Better to have “mono-objective” agencies + balancing
 - Clearer incentives
 - Better informed decisions
 - Dewatripont – Tirole: “Advocates”, *JPE* 1999

Exclusionary versus exploitative abuse

- All abuses are ultimately motivated by “exploitation”
 - Predation: preserving / improving exploitation in the future
 - Entry barriers (Whinston), horizontal foreclosure (Carlton-Waldman, Choi-Stefanides): same
 - Vertical foreclosure / raising rivals’ costs: enhancing exploitation
 - Other examples of foreclosure as by product: Aghion-Bolton, Chen and Rey, Jullien et al.
- Distinguish
 - Exploitation (“only”): direct impact on customers/suppliers, no impact on rivals
 - Exclusionary: adverse impact on actual / potential rivals (needed or by-product)

Definition of an abuse: a “story”

➤ Merit

- Internal consistency check
- Spelling out relevant facts; cf. judgment of the Court in *Servizio Elettrico Nazionale* (§70):
competition authorities cannot rely on the effects that that practice might produce or might have produced if certain specific circumstances – which were not prevailing on the market at the time when that practice was implemented and which did not, at the time, appear likely to arise – had arisen or did arise.

➤ Capability + **incentives**

- Not required by Courts, but can still be done
- Article 19: proposal to replace reference to “profitably ...” with “to its advantage” (difference?)
- Difficult to quantify ... but should at least make sense – what if the parties convincingly argue that the story does not make sense (because of inconsistency or lack of facts)?
- Cf. EAGCP report on Article 82

Rebuttable presumption

- As in “efficiency defence”?
 - OK for mergers / entrenched quasi-monopolies
 - More caution for 102 (pro / anticompetitive effects)
- Still requires a story + evidence of “materiality” (de minimis)
 - Alternative to presumption: lower standard of proof
 - All the more so that dominance is strong
- In case of counter story (“competition on the merits”)
 - Counter story should be internally consistent / spell out relevant facts
 - Balancing requires more detailed assessment of harm to competition (consumers)

No emphasis on market definition

- [Requires dominance in some relevant market]
- Conglomerates (multiproduct firms) and ecosystems
 - Customers interested in a variety of products and services
 - One-stop shopping / consumption synergies
 - Distinction between complements and substitutes is blurred
 - Complements now / for some users or usages but substitutes later / for other users or usages
 - Partly endogenous (level / structure of prices)
 - Armstrong and Vickers *RES* 2010, Chen and Rey *AER* 2012, *Rand* 2019
 - All the more so in the digital era