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Notes on the enforcement of Article 102

Comments on Vertical Foreclosure

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Plan of the discussion

1. **Indispensability**
2. **Outright and constructive refusal to supply**
3. **Self-preferencing**

General takeaways

- For a **vertical foreclosure** action to be **anticompetitive** it has to produce **appreciable** effects on **consumer welfare**.
- **Indispensability** should **not** be a **necessary condition** for a dominant firm to engage in vertical foreclosure.
- **Self-preferencing** akin to **vertical foreclosure**.

Indispensability

- Indispensability as a sufficient condition and false positives.
  - Tying of a service to a platform assumed to produce foreclosure effects on the argument that the platform is an essential facility. Ex.: Microsoft/Media Player.
  - Difficult to generalize without incurring in false positives.
  - What matters is degree of complementarity between platform (OS) and service (Media Player), and the substitutability between the service and its competitors.

- Once we «dispose of indispensability», which criteria can we use in **vertical foreclosure** actions to preserve efficiency?

Indispensability

It is **justifiable** to limit vertical foreclosure actions to dominant firms that:

- Have **not committed** considerable **resources, effort, creativity, or acumen to develop** the input, or
- Have **already abundantly gained from their input**, or
- Are already **subject to regulatory obligations** to share the input.

Indispensability

- These conditions have the merit of aiming at preserving dominant firms' innovation incentives (ex-ante efficiency).
- It is very challenging to find safe arbors in this context.

Indispensability

- Condition related to the **«abundant gain from the input»**.
- **Large companies are** constantly active in **acquisition markets**.
- Should a dominant firm's refusal to supply an input **recently acquired** through a takeover be allowed?
  - **Ex-ante**: if refusal to supply prosecuted, the acquirer may be willing to pay a lower acquisition price, thus reducing the target's ex-ante innovation incentives.
  - **Ex-post**: refusal to supply by a dominant firm may be anticompetitive.

Outright and constructive refusal to supply

- **Outright refusal to supply should never be treated more leniently than constructive refusal to supply**.
- Reasons to treat an **outright and constructive** refusal to supply **on equal terms**:
  1. Both can produce appreciable anticompetitive effects by foreclosing competitors.
  2. Changes in conditions of supply can allow authorities to infer incentives to foreclose.
     - Suppose a dominant firm degrades supply conditions offered to customers.
     - Absent an increase in the dominant firm's cost of input provision or production, a worsening in supply conditions reflects a change in the dominant firm's interest in giving access to input.
     - MS/Azure: in 2019 MS renegotiated Office license for users storing data outside Azure.

Self-preferencing

- Situations in which an **integrated firm discriminates** in **favor** of the products or services offered by **affiliated companies** and to the **detriment** of those offered by **rivals**.
- «Form of vertical foreclosure.»
- Should self-preferencing be treated differently from vertical foreclosure actions? Are there any **legal** or **economic** reasons to do so?

Thank you!