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!