NON CONFIDENTIAL

Associazione Antitrust Italiana

The Google Shopping Decision

4 May 2018

Cecilia Nardini

The views expressed in this presentation are those of the author and do not necessarily reflect the views of Compass Lexecon

OUTLINE

- Framing the abuse: tying vs refusal to deal
- Economic logic of refusal to deal
- Legal framework for finding abusive refusal to deal
- The Google Shopping case as a refusal to deal: what would it take to find abuse?

FRAMING THE ABUSE

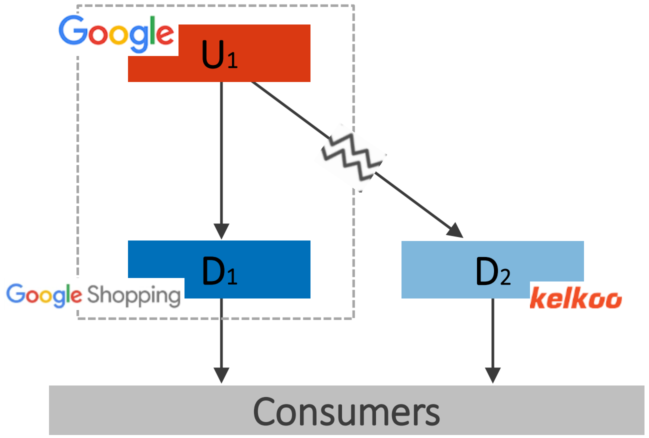
- The Commission's theory of harm is one of **leveraging**: Google has leveraged its dominance in the market for general search into the (separate) market for comparison shopping services
- From an economic perspective, the case could be assessed as tying or as vertical foreclosure (constructive refusal to deal)

	Tying	**Refusal to deal**
Leveraging mechanism	Tying Google shopping service to Google search (when consumer queries concern shopping)	Denying/degrading access to input to rival comparison shopping services by demoting their placement
Legal test	Article 102 Guidance: (i) dominance in tying market, (ii) separate tied market, (iii) foreclosure likely	– Bronner conditions – Article 102 Guidance – Case law: 'exceptional circumstances' test
Rationale for enforcement	Balancing efficiency considerations (e.g. increased incentive to innovate) with potential exclusionary effects	

- **Framing matters**: economic and legal principles to find an abusive refusal to deal are arguably much stricter compared to tying

REFUSAL TO DEAL: ECONOMIC LOGIC

- How refusal to deal works:



– Upstream firm (dominant) refuses to sell input to rival downstream firms

– Alternatively, upstream firm treats rival downstream firms less favourably than its own downstream division, e.g. by delaying or otherwise degrading the supply of the product (constructive refusal to deal)

- From an economic perspective, the assessment of a refusal to deal requires balancing potential efficiencies and anticompetitive effects:
  - **Efficiencies**:
    - Primarily in a dynamic sense: preserving ex ante incentives to invest
    - But also static efficiencies, e.g. quality certification
  - **Anticompetitive effects**:
    - Reduce or eliminate effective competition downstream (e.g. raising rivals' costs)
    - Preventing emergence of new products/services by competitors
    - Protect dominance in upstream market by preventing rivals to climb up the ladder

LEGAL FRAMEWORK TO ESTABLISH ABUSIVE REFUSAL TO DEAL

Oscar Bronner

- European Court of Justice (ECJ), 1998, establishes that refusal to deal is anticompetitive if:
  - Upstream input is **indispensable** to compete
  - Refusal is such as to reserve to the asset owner a secondary market, by eliminating all effective competition in that market
  - No objective justification
- Case sets a **high standard of indispensability** for compelling access to a dominant company's facility under Article 102

Article 102 Guidance

- Requirement of **objective necessity** reflected in the Commission's guidance on enforcement priorities:
  - Upstream input has to be objectively necessary to compete effectively downstream
  - Refusal is likely to lead to the elimination of effective competition downstream
  - The refusal is likely to lead to consumer harm

Case law on refusal to license

- Principle of '**exceptional circumstances**'
- Exceptional circumstances defined on a case-by-case basis:
  - *Magill* (ECJ, 1995): (i) indispensability; (ii) dominant firm reserves secondary market for itself; (iii) no objective justification
  - *IMS Health* (ECJ, 2004): (i) refusal prevents emergence of a new product for which demand exists; (ii) no justification; (iii) refusal eliminates competition in secondary market. These criteria are sufficient, not necessary
  - *Microsoft* (General Court, 2012): IMS Health principles are confirmed, but it is specified that list of circumstances identified in *Magill* and *IMS Health* **is not limitative**

- Translating these legal principles into the economic framework:
  - The anticompetitive consequences of a refusal to deal are greatest when:
    - The asset is indispensable, or at least important to compete effectively downstream (i.e. there is no viable alternative)
    - The conduct is likely to cause foreclosure
    - The refusal leads to consumer harm – but other 'exceptional circumstances' may be relevant
  - The efficiency justification for a refusal to deal is strongest when there are large ex ante investments that would not have happened otherwise
- **If anticompetitive consequences > efficiencies, absence of intervention is more costly than intervention**

WOULD ABUSE HAVE BEEN ESTABLISHED WITH THIS FRAMEWORK?
(1 OF 2)

Indispensability

- The Commission finds that prominence in Google's general search result page is important for comparison shopping services to compete effectively, because traffic generated from Google Search accounts for a large proportion of traffic to comparison shopping services (§539)
- A function of market definition!
- The case seems to hinge on the different views of how customers conduct their shopping online:
  - According to the Commission, consumers first search for products through a general search engine, compare products using a shopping comparison site, and then click on merchant websites
  - In Google's view, the shopping search is less 'structured': merchants' websites can be reached not only via the steps outlined above, but also via specialist search services, merchant platforms, online ads, social networks etc.
- Who is right?
  - The Decision spans a number of years, in which online shopping and general digital platforms have grown exponentially
    - Consumers' habits have evolved over time, towards a less 'rigid' consumption of online shopping services (e.g. can compare products on shopping comparison sites, platforms such as Amazon, or directly from merchants' websites)
  - Preferences and habits with respect to shopping search may vary across consumers, and possibly across countries
    - More sophisticated customers likely to 'consume' comparison shopping services through multiple sources (e.g. shopping comparison sites, platforms such as Amazon, or by shopping directly from merchants' websites). Other customers may have a stronger preference for one way or the other. It is not clear that the Commission's survey was able to capture all these aspects

WOULD ABUSE HAVE BEEN ESTABLISHED WITH THIS FRAMEWORK?
(2 OF 2)

Foreclosure

- The Commission finds that a reduction in traffic to rival comparison shopping services is capable of driving competing comparison shopping services out of the market
- The data shows a generalised decline in traffic for comparison shopping sites (with a few exceptions)
- Again a function of market definition
- Protecting competition or competitors?

Harm to consumers

- The Commission finds, *inter alia*, that Google's conduct: (i) has the potential to foreclose competing comparison shopping services, which may lead to higher fees for merchants, higher prices for consumers, and less innovation; (ii) is likely to reduce the ability of consumers to access the most relevant comparison shopping services (§593-599)
- Do consumers have more choice than before?
  - Probably yes, given that they have likely become more sophisticated and now shop through multiple platforms
  - The Commission argues that this is unlikely to be as a result of the abuse; but arguably this is still relevant evidence to assess effects

Efficiency justification and impact on incentives to invest / innovate

- Is there any reason why Google Shopping performs better as the top result than rival sites?
  - Google argues that they have provided online shoppers with an improved service over time. Probably more likely to be the case since the introduction of the Shopping Unit (in 2013), rather than with the change of the search algorithm in 2011
- Google's investments in comparison shopping services are small compared to its investments in Google Search, and these are not conditional on the success of Google Shopping
- Google can still monetise access to extract some of the value of competing vertical search engines