Monopoly Leveraging & Equal Treatment: the EU Commission's Google Shopping Decision

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On 27 June 2017, the European Commission (the "Commission") penalized Google for having abused its market dominance as a search engine by promoting its comparison shopping service, Google Shopping, over rival services.

The Commission explained that it:

"does not object to the design of Google's generic search algorithms or to demotions [of rivals] as such [but] it objects to the fact that Google has leveraged its market dominance in general internet search into a separate market, comparison shopping."

In addition to a € 4.2 billion fine, the Commission required Google:

"to respect the simple principle of equal treatment in its search results for its own comparison shopping product and rival comparison shopping products. Google has to apply the same processes and methods to position and display rival comparison shopping services in Google's search results pages as it gives to its own comparison shopping services."[1]

Google's supporters have criticized the Commission's legal theory of harm as nebulous and unprecedented because Google's conduct supposedly did not fit into any established precedent for abuse of dominance. Instead, according to the critics, the Commission supposedly resorted to a new theory based on diversion of internet traffic. Google itself has argued that there is no judicial support for the position that a dominant undertaking should be obliged, when advertising or promoting its own products or services, to promote the products or services of competitors to the same extent or, indeed, to any extent at all. Such an obligation may only be envisaged when dealing with access to 'indispensable facilities' as defined by the Court of Justice of the European Union (CJEU) in its refusal to deal cases.[2]

This article outlines why this criticism is not convincing. Specifically, the fact that a dominant company's conduct does not 'fit' any existing category of abuse does not preclude a finding of abuse. The non-discrimination *remedy* imposed on Google does not create a new general *duty* under Article 102 of the Treaty on the Functioning of the European Union (TFEU) to treat third party competitors and a subsidiary equally. Indeed, it is not the self-promotion as such, but the way Google changed its business conduct in the primary market for search services in order to enter the secondary market for comparison shopping services that fell outside the scope of competition on the merits, and into monopoly leveraging. In particular, the 'indispensability' requirement for a refusal to deal violation is not on point. And of most significance, the imposed remedy of equal treatment effectively brought the monopoly leveraging to an end.

I. The Commission's Equal-Treatment Remedy Did Not Create a New Type of Abuse of Dominance.

The claim that the Commission established a new duty for dominant companies to grant third parties the same advantages as their own subsidiaries misrepresents the theory of harm relied upon by the Commission. In general, even dominant companies are entitled to grant favorable privileges to their subsidiaries. Article 102(2)(c) TFEU only prohibits discrimination against 'other trading parties.'

The identified abuse did not constitute discrimination, but the abusive leveraging of monopoly power. The equal-treatment remedy was the only effective instrument to bring the monopoly leveraging[3] to an end. In order to neutralize the consequences of an abuse, the Commission may impose behavioral obligations, which would otherwise (in the absence of a prior abuse) not be required of a dominant company under Article 102 TFEU.[4]

Google's conduct at issue did involve some elements of established types of monopolistic abuse, in particular tying discrimination, and a refusal to supply. However, squeezing Google's novel conduct into one of these categories is equivalent 'to trying to fit a square peg in a round hole.'

There is no exhaustive list of abuses under Article 102 TFEU. The key consideration was whether Google's conduct met the general criteria of an abuse of dominance by impairing effective competition to the detriment of consumers. Google's promotion of its comparison shopping service constituted an anti-competitive expansion of dominance from one market to another as generally prohibited under Article 102 TFEU. In fact, both U.S. and EU competition law are generally skeptical towards the attempt by a dominant undertaking to extend its power to a separate market through means that are not available to its rivals. As early as 1948, the U.S. Supreme Court held that it was anti-competitive for a company that is dominant in a primary market to use its market power as a lever to gain competitive advantages in a secondary market.[5] The U.S. Court of Appeals for the 7th Circuit once referred to the use of a monopoly in one market to foreclose competition in another market as 'a classic violation of the U.S. antitrust laws.'[6]

Classic strategies of monopoly expansion are all characterized by the same economic facts: a company dominant in the provision of a particular product or service subsequently tries to maximize its profits by integrating its business into a distinct second market. In the case of bundling/tying, for instance, the dominant company makes the purchase of a primary product dependent on the use of a separate product that it wishes to promote. In a margin squeeze, the dominant company decreases the profit margin for downstream rivals that depend on its upstream input. In the case of a refusal to deal after a vertical integration into a downstream market, the dominant company terminates the provision of its upstream input because its previous customers became downstream rivals as a result.

The condemnation of these classic leveraging strategies is based on the general principle that market power may not be extended to a separate, but related, market by means that deviate from competition on the merits. This certainly is the case when the conduct has no economic rationale except the foreclosure of competition in the second market.

The Commission was right to base its finding of Google's abuse on a monopoly leveraging basis. As in classic leveraging, Google had a dominant position in a 'primary' market, namely the provision of general search services, and then sought to maximize its profits by vertically integrating into the neighboring market for comparison shopping services, which was separate and 'secondary' to the general search market.[7] While previously having ranked and displayed all websites on the basis of the same criteria, starting in 2008 Google began to implement in European markets a fundamental change in strategy to push its comparison shopping service by systematically favoring it in search results and demoting competing services.

In the absence of dominance, any shift of a general search engine from a purely relevance-based system of equal treatment regarding the ranking and display of results to a system of self-promotion of an inferior related downstream service would risk users conducting fewer searches on the applicable site and/or switching to another general search engine. Thus, Google's decision to shift from an equal treatment of downstream services to a promotion of its own downstream service made no economic sense. The shift from equal-treatment to self-promotion can be explained only by Google's objective to gain market share in the separate market for comparison shopping in order to increase its total profits. An overall increase in profits was likely because of a higher profit margin in the market for comparison shopping services resulting from a higher click-through[8] and conversion[9] rate as compared with standard text ads on general search engines.

The condemnation of Google's leveraging practice should bring down advertising prices, and in turn product prices for consumers. It also should promote other advantages in the comparison shopping market such as more choice, innovation, and service. In addition, it encourages active market players in the field of specialized search to find and deploy new solutions to expand into the market for general search services. They therefore potentially pose a competitive threat to Google in terms of a disruptive search innovation that could overcome its current general search monopoly. Google could only accept the risk of disappointing its users in the general search market with less relevant results due to its near monopoly in that market throughout Europe. The lack of competition rendered unlikely large-scale shifts of users to other search engines.

As in the classic leveraging cases identified earlier, existing competitors in the secondary market could not, on a timely basis, effectively counter the sudden changes on the primary market. Comparison shopping services rely to a large extent on traffic to be competitive. If competitors wished to secure the same traffic advantages that Google secured for its general search service, they would have had to integrate into that market and, more importantly, build up similarly large user bases. Due to strong network effects in the market for general search services, this appeared economically unviable for any company. Hence, the economic rational underlying a prohibition of leveraging*, i.e.,* to deprive competitors of the need to enter two markets simultaneously, also supports the ban of Google's leveraging strategy.

- Based on the European case law,[10] an abuse can be found, at least, when the following circumstances are present. A company with a dominant position in an existing market for the provision of a particular good or service;
- alters its business conduct in that market to gain advantages in a distinct, but related, second market;
- resulting in an exclusionary effect in that secondary market by foreclosing competitors which are at least as efficient as the dominant company;
- and there is no counterbalancing economic or other objective justification for the conduct.

All of those factors were present in the case against Google.

II. The Commission's Equal-Treatment Remedy Terminates the Anti-Competitive Leveraging.

The purpose of a remedy is to effectively bring identified infringements to an end.[11] This means that the anti-competitive effects of the infringements on the market have to be eliminated or neutralized. For this purpose, in addition to ordering that the infringing conduct be ceased, the Commission may also require a company to take additional measures to neutralize the consequences of its practices, and restore competition to how it would have developed but for the anti-competitive conduct.

In monopoly leveraging cases, the typical approach to effectively remedy an identified abuse is a cease and desist order that obliges the dominant company to undo the change in business conduct on the primary market that was used to leverage its market power.

Imposing the equal treatment remedy on Google was the natural fix to the identified leveraging abuse. The remedy merely obliges Google to cease the conduct that was used for the leveraging. Prior to the condemned fundamental changes in the ranking and display of results, Google's search engine treated all web services equally; it applied the same processes and methods in deciding the positioning and display of the results for all websites. Accordingly, the 'principle of equal treatment' imposed by the Commission merely reflects Google's practice prior to the condemned conduct. The remedy finds its roots in the functioning of general search engines, in particular their (at least implied) promise to return the most relevant results without bias. Due to these specific features of search engines, the remedy should not be interpreted as introducing a new general rule that dominant companies may not favor their own services anymore.

The imposed equal treatment remedy is no more than adequate. The Commission is interfering neither with Google's algorithms nor with the manner by which Google displays or organizes its search results pages. The flexibility of the remedy allows Google to have freedom to innovate. In the design of its product, it can choose whatever mechanism or process it wishes, so long as it is applied to rival services in the same manner as it is to its own downstream service. There is no need for Google to display any rival at all if it does not display its own service. Thus, the remedy does not result in a free promotion of rival services. Given the frequent imposition of equal treatment obligations in other cases,[12] there is also nothing unprecedented or unworkable about the remedy in the *Google* case.

III. Conclusion.

Far from suggesting an unprecedented general duty to treat subsidiaries like external trading parties, the Commission's *Google Search* decision merely applies established principles to a novel type of conduct. Considering the common characteristics of established leveraging strategies and the legal criteria applied to them, Google's conduct fulfilled all conditions for anti-competitive abuse of a dominant market position. The condemned fundamental change in Google's business conduct on the primary market for general search services (from unbiased to self-promoting results) can only be explained as an intention to strengthen its position in the secondary market for comparison shopping services. Given that the conduct deteriorated search results, it made no sense in the primary market and therefore did not constitute competition on the merits. Due to the close links between the two markets, Google's downstream rivals could not counter this change in a timely manner. The resulting anti-competitive effects in the market for comparison shopping services sufficed for a finding of abuse.

The imposed equal treatment is a logical remedy to the challenged abuse. The remedy merely obliges Google to cease the relevant self-promotion that was used for the monopoly leveraging. Considering the freedoms left to Google, it constitutes a sensible approach.

Footnotes

[1] 'Antitrust: Commission fines Google € 4.2 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service.' (Commission Press Release, 27 June 2017).

[2] *See* Joined Cases C-241/91 P and C-242/91 P *Magill* [1995] ECR 1995 I-00743; Case C-7/97 *Bronner* [1998] ECR 1998 I-07791; Case C-418/01 *IMS Health* [2004] ECR 2004 I-5039.

[3] In this article, the term 'monopoly leveraging' refers to the economic concept of leveraging. It is not identical with the 'monopoly leveraging doctrine' as developed by U.S. Courts of Appeals (but denied by the U.S. Supreme Court in *Verizon* and *Trinko*).

[4] Cf Joined Cases 6 and 7-73 *Commercial Solvents* ECR 1974 -223, para 45; Case C-119/97P *Ufex* [1999] ECR 1999 I-1341, paras 93-94; Microsoft (Case COMP/C-3/37.792) *Commission Decision* [2004] (OJ 2007 L 32/23), para 1006.

[5] *United States v Griffith*, 334 US 100, 107-109 (1948).

[6] *Fishman v Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir 1986).

[7] *See* Thomas Höppner, 'Defining Markets for Multi-Sided Platforms: The Case of Search Engines' (2015), 38 World Competition, 349, 363.

[8] In internet marketing, 'click-through-rate' means the percentage of visitors that click on a displayed ad.

[9] 'Conversion rate' means the percentage of visits to a website that convert into a transaction such as a purchase or download.

[10] Case *Commercial Solvents* (n 3); Case C-311/84 *Télémarketing*, ECR 1985, 3261; Case T-336/07 *Telefónica* [2012] ECLI:EU:T:2012:172; Case C-52/09, *TeliaSonera* [2011] ECR 2011 I-527; *Port of Helsingborg* (Case COMP/A.36.570/D3) Commission Decision [2004] para 229.

[11] Article 7(1) Regulation 1/2003.

[12] *See* Commission 'Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004' (2008/C 267/01) para 62.

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