Under debate

David Wood takes issue with John Temple Lang's "Getting the wrong idea" article published in last November's CLI

John Temple Lang's appraisal (see *CLI* 11 November 2014) of a number of arguments made by his firm in its defence of Google demands a response. His basic premise is that the law on article 102 is so unclear and the guidance from the Commission so inadequate that many lawyers and economists have fallen into the trap of thinking that any undesirable behaviour might be prohibited by article 102.

He begins by setting up a strawman: the example given is of the provision of transport services, by air or rail, and the offer of third-party travel services by the provider of the transport services. By this, he seems to be thinking of, say, Ryanair giving its passengers the opportunity of hiring a car with, say, Hertz – but it might as well be the offer of beverages or snacks.

However, the most significant case that the Commission is currently looking at – the Google case – is quite different. It is about a dominant platform operator that privileges its own downstream services. There is a considerable body of law and economics establishing that such behaviour may be prohibited under article 102 – and, indeed, the Google case revolves around whether that body is applicable to Google's behaviour.

Three reasons examined

John Temple Lang puts forward three reasons why such an approach is "ill-considered" and "would not make sense", and lawyers or economists who would seek to apply it to Google are not serious. (For a somewhat more nuanced view of price discrimination, see Temple Lang at *https://cpi.adobeconnect.com/_a812723998/p46709454*.)

First, he implies that competition concerns about vertical leveraging are restricted to "essential facilities" cases. As an enforcer, John Temple Lang had an impressive record and reputation for applying article 102 to platforms such as ports and airports. Indeed, the Commission has applied article 102 to other platforms and networks such as computerised reservations systems and set-top boxes, as well as utilities. Such cases do not depend on the essential facilities doctrine but on the broader principle that a dominant provider of such services has both the opportunity and incentive to discriminate in favour of its own vertically integrated subsidiaries at the expense of third party competitors, and that such behaviour harms consumers and can amount to an abuse.

This principle has been well understood and described in a variety of sectors including software platforms: "A software platform provider that is subject to competition would find it rational to encourage and facilitate other software programmes to run on or interoperate with its platform. Only because [name of a company dominant at the time] enjoys a near monopoly in [relevant platform at the time] can it afford to use its platform as a tool to expand its position in neighbouring software markets" (see Winckler, A, Dolmans, M, and Graf, T, "EC Takes Firm Stance against Microsoft", Legal Week, 29 April 2004).

Second, John Temple Lang argues that the prohibition of vertical leveraging could harm the ability of the vertically integrated operator to deliver synergies to consumers. Lost synergies are clearly important in the assessment of vertical leveraging, particularly where structural remedies may be contemplated. Article 102 allows for them to be taken into account by way of defence (subject to the proportionality test) and should require them to be balanced against relevant harm to competitors, including any deterrent effect on market entry.

Third, he argues that German competition law says clearly that favouring one's own business is not an abuse. German colleagues tell me that may be true of one provision of German law, namely section 20, paragraph 1 of the preamended version of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB) but that section 19, paragraph 2 No 4 GWB sets out stricter rules for companies that:

- own infrastructure facilities;
- are dominant on the infrastructure market; and
- are also active on the markets upstream or downstream to the facility.

Consumer harm

With respect to consumer harm, consumer associations have complained not only that Google's practices lead to consumers being given less relevant and more expensive results, but also that Google's market position and scale advantages were not earned on their merits but through unlawful acts. It is obviously inadequate to argue that article 102 should not be applied where a dominant undertaking might arguably be passing on some of the advantages of scale to consumers in circumstances where that scale has been acquired unlawfully. At the very least, there would need to be some analysis and balancing of the harm to consumers caused by the reduced competitive ability of the dominant undertaking's competitors. As John Temple Lang knows from his days enforcing the competition rules in the telecoms sector, intervention at the wholesale level may be necessary precisely because of its effects at the retail level.

Clearer arguments

Google's public statements in defence of its conduct have largely been restricted to soundbites, such as the patently absurd lines that "Competition is only one click away" (try telling that to advertisers) or "We built Google for users, not websites". It is to be welcomed that the kind of arguments it is making are becoming clearer, not least because the broader debate should lead to better decision-making.

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