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Possible Problems in the *Google* Case

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Google invented neither the search engine nor the Internet browser, but it made them better. Competing on the merits, Google overcame Microsoft's substantial incumbency advantages and displaced it as the dominant incumbent. At a cost of billions of dollars each year, Google provides and improves services that make it the third most trusted brand in American (behind the United States Postal Service and Amazon). To give up all on-line search and maps, the median American (in 2017) must be paid $21,178 per year.

The complaint filed by the Department of Justice and 11 states echoes the *Microsoft* case by alleging that Google has monopoly positions in search and search advertising which Google protects with anticompetitive tactics. The complaint has been criticized for not going further, but it states a case that seeks to take advantage of a causation standard for monopoly maintenance so low that the D.C. Circuit's liability opinion in *Microsoft* described it as "edentulous." Even so, Judge Mehta could get hung up on some points.

The complaint stresses the inability of small rivals to compete because they lack scale, and it alleges that Google's practices block small rivals from achieving scale. But the complaint does not allege that Google's small rivals had a plausible path to obtaining scale in the absence of all the challenged practices. If every computer and mobile device were preloaded with every search engine and browser, the vast majority of users likely would choose Google's search engine and browser.

Among other things, the complaint alleges that Google pays makers of mobile devices and mobile service providers to promote usage of Google search. A striking allegation in the complaint is that Apple charges Google $8-12 billion per year to use its search engine. One might wonder whether Apple is the real gatekeeper and Google is just paying the price of admission.

The foundational allegation of the complaint is that "For both mobile and computer search access points, being preset as the default is the most effective way for general search engines to reach users, develop scale or remain competitive." And the complaint acknowledges that Microsoft takes advantage of its monopoly in PC operating systems to promote its Edge browser and Bing search engine. Yet statcounter reports that Google has an 81.5 percent share in U.S. desktop search engines, while Bing has just a 12.1 percent share. Being preset as a default either does confer a big advantage on Bing, or Google overcomes that advantage through competition on the merits.

The obvious remedy would bar Google from buying distribution. The big loser could be Apple, and the loss of Google's payments would act like a cost increase throughout the mobile device supply chain, so consumer prices likely would rise. Microsoft stands to benefit significantly, as it has the second most popular search engine and browser. The impact on Google is least clear, but it could come out ahead: Google could save billions of dollars a year in payments yet experience only a modest decline in usage.

The complaint asserts that "Google's practices are anticompetitive under long-established antitrust law," but antitrust law has not come to grips with monopolies in free services. An earlier monopoly claim against Google brought by KinderStart.com was dismissed, in part, on the basis that free Internet search could not be a monopoly under antitrust law. But conventional antitrust principles can be applied to free search with careful modification to account for monetization through advertising.

The complaint misapprehends application of the hypothetical monopolist test ("HMT") to free search. The HMT made market delineation into a market power inquiry. Because market power normally is exercised by raising prices, the HMT asks whether a profit-maximizing monopolist would raise price, or perhaps whether an actual monopolist already did. Although a search monopolist would maximize profits by charging monopoly prices for advertising, the complaint omits the profit maximization and alleges that a hypothetical monopolist "would be able to maintain quality below the level that would prevail in a competitive market."

A curious aspect of the government's complaint is the public bemoaning of the fact that Google instructed employees not to use language that the government otherwise would have quoted. Antitrust plaintiffs love to invite the inference of anticompetitive motivation from small snippets taken from memos and emails. But the government cannot be inviting the inference of anticompetitive motivation from the absence of the usual snippets, so what is the point?

It also is unclear what the government hopes to achieve. History suggests that, no matter what is accomplished, the Biden Administration can be accused of selling out the American people in the 2024 election campaign. As President, William Howard Taft presided over the breakups of American Tobacco and Standard Oil in 1911. In the 1912 presidential election campaign, both Wilson and Roosevelt lambasted Taft for selling out the American people, and Taft got just 8 electoral votes (compared to 321 in 1908).

While any remedy is unlikely to satisfy the public, any rationale in the liability ruling is unlikely to satisfy the antitrust bar. In the platform context, legitimate competitive practices can look like illegitimate anticompetitive practices because network expansion lowers cost and improves quality. According to the complaint, Google increases the quality of it services by enlarging its user base and the best way to do that is through the sort of arrangement the government challenges. No one should expect the legal guidance from this case to be either clear or clearly in the consumer's interest.

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