

CPI's North America Column Presents:

The *Google* Complaint: A Step Backward for Antitrust Policy

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The U.S. Department of Justice (“DOJ”) and eleven states filed their [Complaint](#) against Google, accusing the company of anticompetitive conduct to maintain and extend monopolies in search and search advertising. Although the Complaint alleges anticompetitive exclusion, its theory is ultimately grounded in mere harm to competitors. The Complaint seeks relief that is likely to harm consumers, hinder innovation, and distort the competitive process. The Complaint’s focus on harm to competitors rather than competition is a step backward for antitrust policy. Perhaps even more importantly, the Complaint will generate further uncertainty about antitrust standards for unilateral conduct in markets across the economy, leaving many companies to question whether antitrust enforcers would condemn vigorous competitive conduct as anticompetitive.

The Complaint

The Complaint accuses Google of maintaining and extending monopolies in search and search advertising by paying original equipment manufacturers (“OEMs”), web browsers, and wireless service providers to install Google search as the default search engine on “search access points” controlled by these entities. The Complaint alleges that installing Google as the default search engine gives Google “*de facto* exclusivity.” The Complaint also alleges that scale is “of critical importance to competition among general search engines” and that Google’s conduct to obtain default status at search access points has “foreclosed competition for internet search” and denied “vital distribution, scale, and product recognition” to Google’s general search engine competitors.

Notably, the Complaint does not allege that Google’s payments for default status at search access points sacrificed short-term profits to hobble competitors. Instead, the Complaint argues that paying for default status increases Google’s “valuable scale” and “simultaneously denies that scale to rivals.” The Complaint contends that no other search engine competitor can match Google’s bids to obtain default status because “of the longtime deprivation of scale” for these competitors, which leads them to be unable to match Google’s “mix of quality, brand recognition, and economics.”

Are Search Engine Defaults Anticompetitive?

The Complaint’s allegation of Google’s *de facto* exclusivity at search access points is central to the Complaint’s case. Google may dispute this allegation. After all, if a user prefers another search engine to Google, changing a search engine default is not very difficult. Search engines also assist users in changing defaults. Moreover, users can access alternative search engines directly by going to “bing.com” or to “duckduckgo.com” in their browsers. But even if one were to accept the Complaint’s characterization of search engine defaults as leading to *de facto* exclusivity, the Complaint offers no compelling basis for concluding that installing Google search as the default search engine at search access points had a significant anticompetitive effect.

A default is a user convenience. It saves users the time and effort of selecting options, but also leaves them the flexibility to customize their systems through selecting alternative options. Defaults are especially convenient for users if they reflect the users' preferences. Installing Google as the default search engine is convenient for users who prefer Google to other search engines or are indifferent between search engines. The Complaint argues that users rarely change search engine defaults and that search defaults on mobile devices are "especially sticky." However, the lack of switching from Google to other defaults may simply be a reflection of users' preference for Google search rather than any resistance to switching defaults.

The Complaint does not argue that installing Google as the default search engine is inconsistent with user preferences. On the contrary, the Complaint suggests that Google may offer better searches than its competitors because of Google's greater scale. Presetting another search engine as a default at search access points may benefit that search engine, but may harm the consumers of search. If a user prefers Google to other search engines, then presetting another search engine as the default would either force the user to spend the time and effort to change the default or relegate the user to a less preferred search engine because of user inertia. The Complaint offers no evidence to suggest that forcing users to choose a search engine for their searches would result in significantly more search scale for Google's competitors.

The Complaint Seeks Relief That Would Harm Distributors and Consumers

The Complaint seeks relief that would enjoin Google from paying for default status at search access points. The Complaint refers to such payments as "exclusionary payoffs." Enjoining Google from paying for default status would deny compensation to OEMs, wireless service providers, and browsers for use of their proprietary assets in distributing search services. This relief would effectively infringe the distributors' property rights.

Although enjoining Google from paying for default status may benefit Google's search engine competitors by making it easier for them to obtain default status at search access points, doing so would likely harm the consumers of products and services from OEMs, wireless service providers, and browsers. Rather than harming competition, Google's payments for default status intensify competition among the distributors of search services. The Complaint alleges that Google pays Apple in excess of \$8 billion each year for search default status on Apple devices, accounting for between 15 and 20 percent of Apple's worldwide net income. The Complaint also alleges that Google pays billions of dollars to other owners of search access points, including other OEMs, wireless service providers, and browsers. These payments are structured as revenue sharing agreements, under which Google pays the distributors a percentage of search advertising revenue for searches conducted through the distributors' search access points. The revenue sharing agreements effectively reduce the distributors' marginal costs of serving users and provide direct incentives for OEMs, wireless service providers, and browsers, to compete for new users by reducing prices and investing in innovation. Google's payments under the revenue

sharing agreements thus pass through to consumers in significant part through lower prices and greater innovation. Enjoining Google from paying for default status would deny users these significant procompetitive benefits of lower prices and greater innovation by OEMs, wireless service providers, and browsers.

The Complaint Seeks Relief That Would Interfere With the Normal Competitive Process

Enjoining Google from bidding to obtain default status at search access points would interfere with the normal competitive process, potentially leading to inefficient allocation of default status and harm to consumers. Securing distribution channels to reach end-users is a common element of competition, and it is normal for distributors to receive compensation for providing distribution services.

Default status is a scarce resource because there is at most one default search engine for any given search. Multiple search engines may wish to be installed as the default search engine at a search access point, but only one can be selected for any given search. Bidding to secure default status is an effective market mechanism for balancing the supply and demand of default status at search access points.

Paying to obtain default status at search access points is similar to other market mechanisms for the allocation of scarce resources. For example, firms pay to show their commercials on cable networks' 30 second slots, where the slots can only show one commercial at a time to any given viewer. The practice of paying to use scarce resources is ubiquitous in business. Firms hire talented engineers and scientists, lease retail and office space, lease production facilities, and lease supercomputing resources. A firm's use of these resources precludes other firms from using the resources. Search engines' payments for default status are substantially similar to these other procompetitive business practices.

Bidding to obtain default status (by offering compensation to distributors of search services) is also likely to lead to an efficient allocation of default status among search engines. The efficient allocation of a resource is one that generates the greatest value from its use. For the choice of a default search engine, this value reflects the value to consumers of having their preferred search engine set as default, as well as the value to search engines from gaining additional scale, which the search engines can use to improve their products and services. What the search engines are willing to bid for default status incorporates their value of gaining additional scale from the default status. Under a competitive bidding process, the distributor chooses the search engine default based on search engines' bids and the preferences of the distributor's customers. When the competitive process functions properly, the distributors' choice of default search engine likely yields an efficient allocation of default status.

The Complaint offers no credible basis for claiming that paying for default status at search access points harms the competitive process. It does not allege any anomalies in Google's bids to obtain

default status. The Complaint does not allege that Google sacrificed short-term profit to hobble competitors or that it somehow inhibited the ability of its search engine competitors to bid for default status.

Some may argue that there is a potential benefit to interfering with the competitive process for the acquisition of default status if doing so results in greater scale for Google's search engine competitors. The Complaint suggests that greater search scale for these search engines would cause them to be more effective competitors to Google. However, such a shift in search scale from Google to other search engines (as a result of enjoining Google from paying for default status) may actually harm consumers. Shifting scale from Google to other search engines would reduce Google's scale, which may prevent Google from achieving some further improvements in search quality. Because Google conducts far more searches than its competitors, the loss of quality improvements for Google searches may be more impactful than any benefit in search quality improvements for other search engines. Shifting searches from Google to competing search engines by imposing alternative defaults may also harm consumers if the consumers prefer Google to other search engines.

Uncertainty About Antitrust Policy

The Complaint does not articulate clear principles for determining when unilateral conduct crosses the line from being vigorous competition to being anticompetitive. The Complaint raises many important questions about antitrust policy in markets with significant scale effects. In the view of the DOJ and the eleven states, how could Google lawfully compete for default status? What are the rules of conduct when it comes to going after users in a market with scale effects? Should Google have avoided paying for default status? Should Google have avoided bidding to be the default search engine? Should Google have bid on only some default opportunities at search access points? Should Google have bid less aggressively? Should Google have been more accommodating to other search engines so as to allow them to gain greater scale? The Complaint does not answer these questions, leaving market participants not knowing exactly what conduct would raise concerns for antitrust enforcers.

Uncertainty about the rules of conduct is never a good thing. Companies may see the Complaint as sending a message that competing hard would increase antitrust risks and being accommodating to competitors would mitigate the risks. Such a message discourages robust competition to the detriment of consumers.

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