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ANTITRUST
SPECIAL REPORT
OCT. 27, 2020

US Trustbusters Go After Google

The US Department of Justice has pressed the button on its landmark antitrust lawsuit against the search giant.

MLex brought unparalleled depth and breadth to laying out the risks for Google and the challenge for the DOJ.

INSIGHT | COMMENTARY | ANALYSIS

Editor's Letter

Lewis Crofts
MLex Editor-in-Chief

It would be hard to overstate the importance of the US government's lawsuit targeting Google over allegations that its longstanding agreements with Apple and Android phonemakers to make its search engine the default on their devices have made it too difficult for search rivals to compete.

The long-awaited Department of Justice action is the most significant antitrust case to affect Big Tech since the 1998 suit against Microsoft, and when it finally dropped last week, the news reverberated around the world.

MLex has watched closely since it emerged a year ago that the DOJ was putting a lawsuit together, and covered the filing with comprehensive depth and breadth — as demonstrated by this special report, which features the key insight and analysis that we published to our subscribers in the hours after the news.

Following the filing, we published a thorough overview of the case the DOJ was making and the evolution of antitrust thinking that led to it, following up with a deep dive into the text of the suit, detailing the arcane acronyms — the MIAs, MADAs and RSAs — that lie at its heart. We looked at Google's comprehensive response to the suit and offered insight into why the DOJ has a tough challenge ahead, given the search giant's history of fending off similar antitrust charges.

We also analyzed how Apple — a key competitor of Google's — is also the company's accomplice in the DOJ's narrative; compared the US enforcer's complaint to high-profile regulatory action in Europe in recent years; looked ahead with a focus on the potential damage that the case could signal for Google's ad business; examined the novelty of the DOJ's claim of degraded privacy protection as a key harm to consumers in the absence of an argument to make over pricing; and finally looked at the background and previous high-profile rulings of the judge assigned to hear the DOJ's case.

This report is intended to give a flavor of the predictive analysis of regulatory risk that we bring our subscribers daily in our core coverage area of global antitrust. The stories were published as events unfolded, offering unrivaled insight into the significance of a major story that MLex will follow for years to come.

We hope that you will enjoy reading this report and find it a useful guide. To find out more about our range of areas of interest and subscriber services — and to ask for a trial — see the contact details on the back page of this report or visit our website directly at mlexmarketinsight.com. ■

Contributors

Mike Swift

Chief Global Digital Risk Correspondent

Formerly chief Internet reporter for the San Jose Mercury News and SiliconValley.com, Mike has covered Google, Facebook, Apple and other major Silicon Valley companies closely as he followed trends in search, the mobile web and online social networks. He helps coordinate MLex coverage of privacy and data security worldwide. A former John S. Knight Fellow at Stanford University, he is a graduate of Colby College. He is an award-winning journalist with expertise ranging from the business of professional sports to computer-assisted reporting.

Max Fillion

Correspondent, Washington DC

Max is an antitrust correspondent for MLex's Washington, DC bureau. He started with MLex North America as a general assignment reporter. He is a recent graduate of the University of Missouri School of Journalism. Prior to reporting in DC, he covered the Missouri General Assembly for the Columbia Missourian and interned in MLex's Brussels, Belgium bureau.

Khushita Vasant

Senior Correspondent, Antitrust

Khushita covers US antitrust enforcement and litigation. A former Brussels hand writing about antitrust and mergers for the Policy and Regulatory Report (PaRR), she has covered the EU's actions against Google, Apple, Facebook and Amazon, to name a few. Khushita specializes in tech and patent policy coverage, which featured in the Concurrences Antitrust Writing Awards. Previously, as a financial journalist for The Wall Street Journal and Dow Jones Newswires, she wrote about monetary policy and the bond and currency markets. Khushita studied journalism at Mumbai University, and received an Erasmus Mundus scholarship for a joint masters from universities in Germany and Austria.

Michael Acton

Correspondent, Brussels

Michael is a correspondent for MLex in Brussels. He previously reported on EU politics as the Financial Times' Nico Colchester Fellow in Brussels. Michael has a degree in International Relations and Politics from the University of Cambridge, and a degree in History and French from University College London and Paris IV Sorbonne.

Dave Perera

Data Security & Privacy Reporter

Dave joined the Washington DC office as our new technology reporter as we built out that part of our coverage. He is a veteran cybersecurity reporter for Politico and a former editor for FierceMarkets publications. Dave studied Spanish and Italian literature at the University of Colorado, and has a Master's degree from the Columbia University School of International and Public Affairs.

Amy Miller

Senior Correspondent, San Francisco

Amy is responsible for the coverage of an array of regulatory and litigation issues pertaining to the Internet, including privacy, data security and antitrust. Formerly a legal reporter for the ALM media group, Miller has closely followed legal trends in Silicon Valley and covered corporate legal departments for online and print publications including The American Lawyer, Corporate Counsel, and The Recorder. Miller is a graduate of Columbia University Graduate School of Journalism and is an award-winning journalist with expertise ranging from education and legal reporting to computer-assisted reporting.

Listen to the Podcast Too

Every week our correspondents discuss the most pressing topics of interest. In our latest edition, Khushita Vasant and Mike Swift talk with senior editor James Panichi about the DOJ's Google suit, asking whether it ushers in a new era of muscular Big Tech enforcement and considering the argument that Google has already won in a sense by avoiding US antitrust action of this kind until now.

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Google hit by DOJ suit in most significant tech antitrust case since Microsoft

Google today was hit by an antitrust complaint filed by the US Department of Justice alleging its agreements with Android phonemakers to pre-load Google's search engine on their phones make it too difficult for rival search engines to compete. In the most important US antitrust action filed against a tech company since its suit against Microsoft in 1998, the DOJ was joined in the suit by 11 states, all led by Republican attorneys general.

COMMENTARY

By Mike Swift & Max Fillion

Published on Oct. 20, 2020

Google today was hit by an antitrust complaint filed by the US Department of Justice alleging its agreements with Android phonemakers to pre-load Google search engine on their phones make it too difficult for rival search engines to compete.

In the most important US antitrust action filed against a tech company since the DOJ suit against Microsoft in 1998, the DOJ was joined in the suit by 11 states, all of them led by Republican attorneys general.

"Two decades ago, Google became the darling of Silicon Valley as a scrappy startup with an innovative way to search the emerging internet," says the suit, which was filed in US District Court for the District of Columbia. "That Google is long gone. ... For many years, Google has used anticompetitive tactics to maintain and extend its monopolies in the markets for general search services, search advertising, and general search text advertising — the cornerstones of its empire."

The DOJ suit was joined by the Republican attorneys general of the states of Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina and Texas. The partisan cast of the states — in a complaint filed two weeks to the day before US elections — injects a note of politics into the case from the beginning.

The complaint doesn't directly ask Google to spin off any parts of its business, but would seek to make a court order Google to "enter any other preliminary or permanent relief necessary and appropriate to restore competitive conditions in the markets affected by Google's unlawful conduct."

In an immediate response to the suit, Google said its users are not denied the opportunity to use the services of competitors. "Today's lawsuit by the Department of Justice is deeply flawed," a spokesperson said. "People use Google because they choose to — not because they're forced to or because they can't find alternatives. We will have a fuller statement this morning."

Texas is understood to have taken a leadership role in a separate Google investigation carried out by a group of 51 attorneys general from US states and territories. Other state leaders include Iowa, Utah, Tennessee and New York, but none of those offices signed on to the complaint filed today.

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The filing of the long-anticipated DOJ suit against Google likely ushers in a new era of more muscular US antitrust enforcement by both the states and federal enforcers against large technology companies. Facebook, Amazon and Apple are under scrutiny by state or federal enforcers.

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The Google complaint caps a DOJ probe that has intensively investigated Google's search and advertising business for more than 18 months. The US Federal Trade Commission in the spring of 2019 relinquished its lead investigative role into Google's competition practices to the DOJ.

Google began receiving civil investigative demands from the DOJ in August 2019, and the pace of the investigation ramped up this spring. Over the past year, the DOJ served a long list of investigative subpoenas on third parties such as search-and-ad company DuckDuckGo, even as investigators fielded complaints from smaller tech companies such as Boomerang.

The DOJ isn't the first US antitrust enforcer to conclude that Google violated antitrust and consumer-protection laws to maintain its dominant position in »»

search, through the copying and re-use — or "scraping" — of others' data and down-ranking of specialized — or "vertical" — search services that compete with Google. The US Federal Trade Commission also reached that conclusion in 2012, according to an internal report made public in 2015, as did a House antitrust subcommittee report released earlier this month.

Google's share of US general search queries has grown from 71 percent in 2012 to 81 percent of all desktop searches this year, and 94 percent of mobile queries this year, according to private statistical services cited by the FTC and the House reports.

"Google has unlawfully maintained its monopoly over general search and search advertising … by scraping content from rival vertical websites in order to improve its own product offerings," FTC staff said, concluding the search giant violated Section 2 of the Sherman Act and Section 5 of the FTC Act. The FTC didn't sue Google in 2012 but allowed the company to voluntarily submit a letter promising to let companies — during a five-year period — opt out of having their content "scraped" without being demoted in Google's search results.

The House Judiciary antitrust subcommittee found the same violations this year. "Google's practice of misappropriating third-party content to bootstrap its own rival search services and to keep users on Google's own webpage is further evidence of its monopoly power and an example of how Google has abused that power," the House report said. "In this way, Google leveraged its search dominance to misappropriate third-party content, free-riding on others' investments and innovations."

And in both 2012 and 2020, those earlier probes — like the DOJ complaint today — found that Google privileged its own inferior vertical search offerings over those of rivals.

"Evidence shows that once Google built out its vertical offerings, it introduced various changes that had the effect of privileging Google's own inferior services while demoting competitors' offerings," the Oct. 6 House report said.

A group of 48 states led by Texas also has been probing Google's advertising business. State attorneys general met multiple times with US Attorney General William Barr, who made the Google antitrust probe a top priority of the DOJ as US national elections approached. As the probe intensified, tensions developed between the DOJ and some state attorneys general, with a faction of states arguing that the DOJ was moving too quickly, and that a more thorough probe of Google's ad business would be more likely to lead to lasting change.

Ahead for Google and the government are likely years of litigation in US district court in Washington, and perhaps in the US Court of Appeals for the DC Circuit, if the government's last major antitrust case against a powerful tech company — Microsoft — is a reasonable guide.

In that case, filed the same year Google was incorporated in 1998, it took a year and a half from the DOJ filing a complaint to a ruling by US District Judge Thomas Penfield Jackson that Microsoft had a monopoly on PC operating systems, and that it had acted illegally to break threats to that monopoly.

The FTC under former Chairman Jon Leibowitz spent 19 months in 2011 and 2012 — about the same length as the DOJ's current probe — investigating Google's search business for antitrust violations, but passed on filing allegations in court that Google had abused its dominance in search despite a recommendation from staff to pursue litigation.

The DOJ's case against Microsoft, filed on May 18, 1998 in US district court in Washington, focused on antitrust tying allegations, with the DOJ claiming Microsoft had tied its Internet Explorer browser to its dominant Windows 98 operating system, fearing competition from the then-popular Netscape browser. The DOJ in that case was initially joined by 20 state attorneys general and the District of Columbia.

Microsoft and the DOJ ultimately settled the case, with Microsoft avoiding a breakup of the company, but agreeing to share its application programming interfaces with other companies. ■

DOJ targeting Google's restrictive agreements with device makers, wireless carriers and software developers

Google has illegally used its market muscle to force device manufacturers, wireless carriers and software developers into restrictive agreements that allow the company to dominate the markets for search and search advertising, the US Department of Justice and 11 states said in a lawsuit filed today.

INSIGHT

By Max Fillion

Published on Oct. 20, 2020

Google has illegally used its market muscle to force device manufacturers, wireless carriers and software developers into restrictive agreements that allow the company to dominate the markets for search and search advertising, the US Department of Justice and 11 states said in a lawsuit filed today.

The antitrust enforcers are asking the US District Court for the District of Columbia to put an end to the agreements, either through an injunction or a restructuring of the company "as needed".

Through the agreements, Google committed device manufacturers and software makers to give Google's search engine exclusive or preferential display at "search access points" on mobile devices and computers, the complaint alleges. Search access points include anywhere a search query might be generated, such as a search bar in a browser or a smart voice assistant such as Siri.

In exchange for control of search access points, Google offered advertisement revenue sharing, including paying Apple billions of dollars a year to be the default search engine on iOS and Safari, the complaint alleges. The company also allegedly obtained control of search access points by threatening to withhold access to Google's Android operating system or other "must have" Google apps.

The agreements have suppressed potential rival search engines from competing and have reduced quality for consumers through inadequate data privacy and security, the complaint alleges.

The complaint harks back to the DOJ's landmark 1990s lawsuit against Microsoft, in which the US Court of Appeals for the DC Circuit "recognized that anticompetitive agreements by a high-tech monopolist shutting off effective distribution channels for rivals" constituted illegal monopolization under the Sherman Act, an accusation that the DOJ and states are now making against Google.

"For years, Google has entered into exclusionary agreements, including tying arrangements, and engaged in anticompetitive conduct to lock up distribution channels and block rivals," the complaint said.

The company is accused of monopolizing the market for search and search advertising. Search text advertising is depicted by the DOJ as a sub-market of search advertising, which includes specialized advertisements such as Google Shopping listings and text advertisements that appear above organic search results.

The search giant argues that the agreements it struck with device manufacturers and software developers did not prohibit them from doing business with other search engines.

"Yes, like countless other businesses, we pay to promote our services, just like a cereal brand might pay a supermarket to stock its products at the end of a row or on a shelf at eye level," Google's chief legal officer, Kent Walker, said in a blog post today. "So, we negotiate agreements with many of those companies for eye-level shelf space. But let's be clear — our competitors are readily available too, if you want to use them."

Google also argues that the US Federal Trade Commission and other regulators have already examined Google's exclusivity agreements and found them to be legal.

REVENUE SHARING

Google in part cemented default status on devices through revenue-sharing agreements, or RSAs, with mobile device manufacturers, computer makers and software developers, the complaint alleges.

In RSAs involving devices that incorporate Google's Android operating system, such as Samsung's, the company requires exclusive distribution as the default search service on the devices. Some of those agreements require blanket coverage for all devices sold, while others provide a "model-by-model" choice, the complaint reads. It notes that the leading US wireless carriers — AT&T, T-Mobile and Verizon — all have RSAs with Google.

Google has recently replaced RSAs in its latest round of negotiations with some Android manufacturers, striking "mobile incentive agreements," or MIAs, the complaint says. Under these, the complaint says, Google pays manufacturers to forgo preinstalling rival search services on their devices and to preload up to 14 additional Google apps.

To maximize payments under an MIA, the complaint says, manufacturers must set Google as the default for all search access points on nearly all of their devices. LG and Motorola have MIAs with Google, the complaint says.

The complaint also spends a great deal of time focusing on the revenue-sharing agreement with Apple, which started in 2005.

The original agreement between the tech behemoths solely covered Apple's Safari browser, but was later extended to additional "search access points" such as Siri, Apple's voice assistant, and Spotlight, Apple's system-wide search feature. The agreement now makes Google the default search service on all significant search access points for Apple computers and mobile devices, the complaint said.

TYING

Google also conditioned access for device makers — such as Samsung, LG and Motorola — to must-have licenses for Google apps and programming interfaces on giving the search company default status on their products, the complaint alleges

Google implements "anti-fragmentation agreements" as a prerequisite for "Mobile Application Distribution Agreements" that allow access to licenses for "must-have" Google apps, according to the complaint.

Under anti-fragmentation agreements, manufacturers are allowed access to Android operating systems in exchange for committing not to create and distribute "forked" versions of Android. Because Android is an open source application, developers can build on its code to develop "forked" operating systems that might allow for other search engines to have default status.

To avoid this, Google forces companies to commit to not sell devices with forked Android operating systems or to commit to vague Google-controlled technical standards that, in effect, ban forked Android systems, the complaint alleges.

Google argues that the agreements it struck with device manufacturers and software developers did not prohibit them from doing business with other search engines. It also argues that the US Federal Trade Commission and other regulators have already examined Google's exclusivity agreements and found them to be legal.

Mobile device manufacturers agree to such anti-fragmentation or "anti-forking" agreements because they are a precondition for receiving a license for popular Google apps such as Chrome, YouTube, Google Maps and Google's app store, Google Play, the complaint alleges.

"More than 90 percent of apps on Android devices are downloaded through Google Play," the complaint alleges. "For years, Google Play has been the only commercially significant app store option for Android manufacturers."

Google beat similar claims when US District Judge Beth Labson Freeman dismissed a complaint brought by Android device purchasers from Kentucky and Iowa for allegedly forcing device manufacturers to pre-load Android apps on their smartphones and tablets. Labson Freeman found that the purchasers had not sufficiently alleged any harm under federal or state antitrust laws.

IOT AND THE FUTURE

Now that Google has cemented itself as the default search engine across the current generation of computers and mobile devices, the company is looking to cement its status in Internet of Things devices that are rapidly gaining prominence as their technology develops, according to the complaint.

The complaint says that these devices create new search access points through the likes of voice assistants embedded in everything from cars to refrigerators. Google is trying to capture the emerging search access points by imposing similar exclusionary contracts on next-generation devices, the complaint states.

On top of that, Google is refusing to license its voice assistant, Google Assistant, to IoT device manufacturers that would host another voice assistant, such as Apple's Siri, simultaneously.

The complaint seeks to stop Google from further implementing these allegedly exclusionary agreements in the next generation of devices.

"For the sake of American consumers, advertisers, and all companies now reliant on the internet economy, the time has come to stop Google's anticompetitive conduct and restore competition," the complaint says. ■

Google says it defeats competitors because in online search, it's top shelf

Google today pushed back on the US Department of Justice's claim that it used a network of exclusivity agreements to illegally extend the company's monopoly on search and digital advertising, using a concept most everyone can understand: supermarket shelf space secured by payments from cereal brands. The competition analogy over digital "shelf space" is central to the four key arguments it plans to make in its defense to the DOJ antitrust suit.

COMMENTARY

By Mike Swift

Published on Oct. 20, 2020

Google today pushed back on the US Department of Justice's claim that it used a network of exclusivity agreements to illegally extend the company's monopoly on search and digital advertising, using a concept most everyone understands: supermarket shelf space.

Other tech companies control that digital "shelf space," including Microsoft through its Windows operating system on computers; Apple, Samsung and LG through their smartphone screens and AT&T and Verizon though wireless carrier agreements. Google will argue in US courts that the deals it has signed to secure that digital shelf space don't violate antitrust laws in large part because those deals don't foreclose access to rivals.

The estimated $8 billion to $12 billion it pays Apple each year to be the default search engine on the iPhone is no different from General Mills paying a supermarket chain to secure shelf space for Cheerios cereal, the search and ads giant says.

"Yes, like countless other businesses, we pay to promote our services, just like a cereal brand might pay a supermarket to stock its products at the end of a row or on a shelf at eye level," Google's chief legal officer, Kent Walker, said in a blog post today. "So, we negotiate agreements with many of those companies for eye-level shelf space. But let's be clear — our competitors are readily available too, if you want to use them."

Google plans to make four key arguments in its defense, senior executives told MLex and other reporters in a background briefing today.

One argument is that consumers are already getting a great deal because the digital services Google offers are free or have prices that are dropping.

Two, mobile apps have changed everything since the DOJ sued Microsoft for tying its browser to Windows in 1998. With one tap, an Android phone user can download an app that allows her to do a general search, or to access a specialized search for hotels, flights, or the best restaurant nearby.

In the third argument, Google says the ad revenues of big competitors such as Amazon and Apple are growing.

But particularly, Google says in its fourth argument, the DOJ has misread the antitrust laws in alleging Google violated the Sherman Act because the enforcer has failed to claim Google foreclosed access to rival search engines such as DuckDuckGo, Microsoft's Bing or any other digital competitor.

That's the nub of the dispute that a federal judge in Washington will have to decide, because the essence of the DOJ's argument is that the web of exclusive deals Google has built over the years do foreclose consumers from accessing the services of its rivals.

Because most consumers never change their defaults, the fact they can technically do so doesn't matter much. Default status essentially equals exclusivity and the ability to foreclose rivals from access, the DOJ argues in today's complaint.

"Google is a monopolist in the general search services, search advertising, and general search text advertising markets," the DOJ said in its 64-page complaint. "Google aggressively uses its monopoly positions, and the money that flows from them, to continuously foreclose rivals and protect its monopolies."

Google argues that consumers would be harmed by being forced to accept lower-quality search results, and would pay more for phones, if the DOJ suit succeeds and a court orders the company to make changes from the current state of the market.

The US Federal Trade Commission and other regulators already put Google's exclusivity agreements under a microscope and found them to be legal, the search giant said, quoting former FTC acting Chair Maureen Ohlhausen saying of Google's default deals that, "Simply put, I was not presented with any evidence to indicate that these arrangements were anything other than procompetitive."

Moreover, Apple made Google the default search engine on the iPhone because it compared search engines and preferred Google's, with the search giant today quoting no less an authority than Apple CEO Tim Cook that Google's "search engine is the best."

One index of the value of the default agreements is the amount Google pays Apple to be the default on the iPhone. That number has grown enormously from just over the $1 billion it paid Apple in 2014, a number MLex was the first to report.

Google will also point to its triumph over a private lawsuit making similar antitrust claims about the Mobile Application Distribution Agreements, or MADAs, that require smartphone makers using Android and the Google Play app store to preload Google search, Gmail and other apps on their devices.

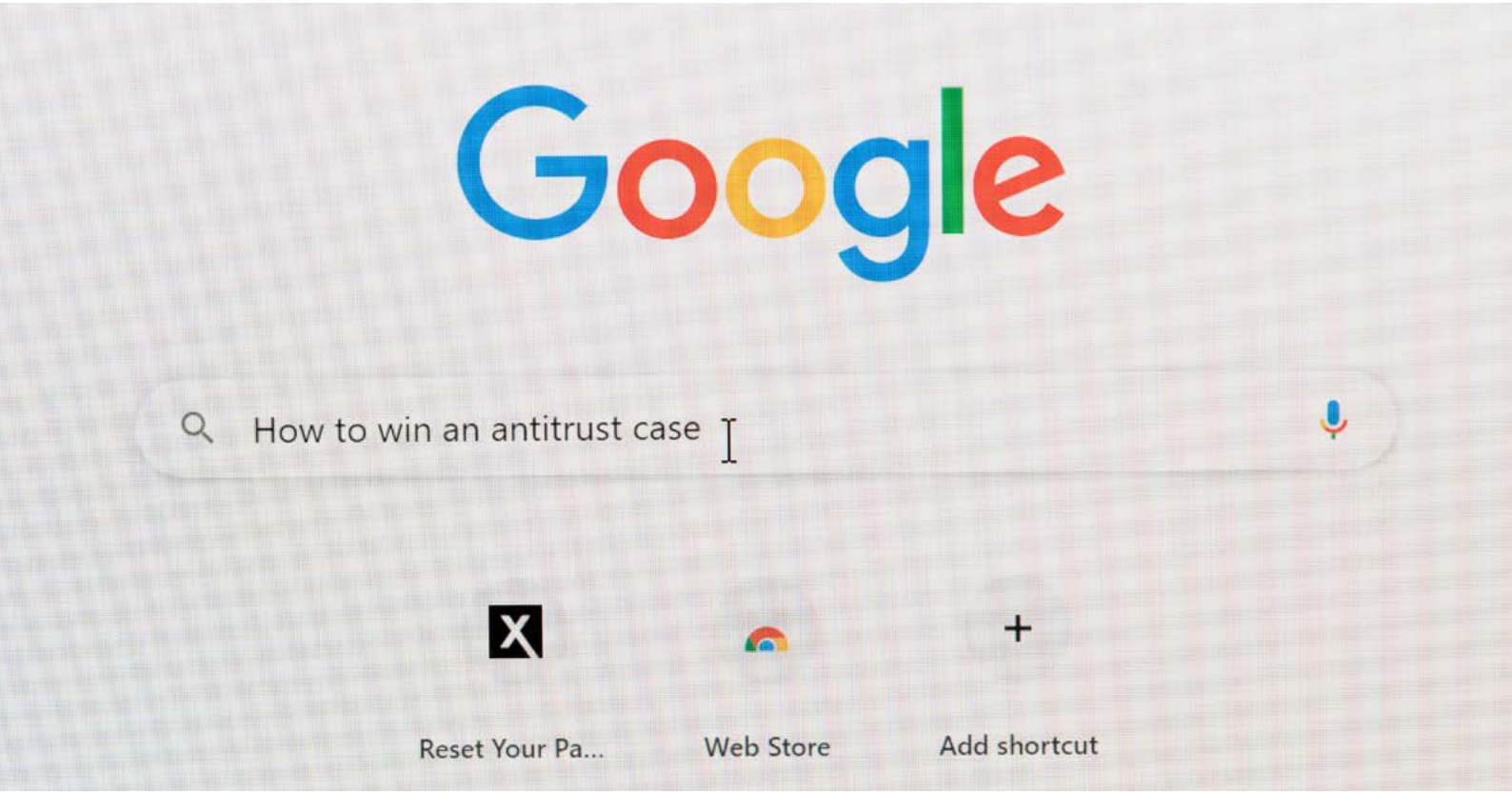
Whether a federal judge agrees with Google's cereal metaphor remains to be seen. For one thing, there are far more choices of cereal brands in most grocery stores than there are general search engines on the Internet.

And Google's argument that the DOJ favors forcing consumers to use lower-quality search engines might raise the question of why those rivals' results are less useful. One element boosting quality in general search is the volume of queries a search engine sees, and Google's deals with Apple and others have channeled it billions of queries.

"I don't think anyone would argue that Cheerios has a monopoly on cereal. Defaults really influence people; that's why Google is willing to pay for them," said Charlotte Slaiman, the competition policy director for Public Knowledge, a digital rights group that is a critic of Google's practices.

One thing a court may look at, Slaiman said, is the cumulative effect of Google's default deals. "Google has been benefiting from them for a long time, and Google has a really strong position now," she noted. "But the question is, in the absence of these default agreements, would Google still be on top?" ■

Particularly, Google says in its fourth argument, the DOJ has failed to claim that it foreclosed access to rival search engines such as DuckDuckGo, Microsoft's Bing or any other digital competitor. That's the nub of the dispute that a federal judge will have to decide, because the essence of the DOJ's argument is that the web of exclusive deals Google has built over the years do foreclose consumers from accessing the services of its rivals.



Google's past defeat of antitrust claims portends tough fight for DOJ

COMMENTARY

By Amy Miller

Published on Oct. 20, 2020

While the US Department of Justice may be seeking a court order "to restore competitive conditions in the markets affected by Google's unlawful conduct," getting one could prove difficult.

Google defeated similar antitrust claims in federal court six years ago, and will use many of the same legal arguments to fight the DOJ's antitrust allegations: that there is ample competition in the markets for search, digital ads and smartphone apps, Google said today.

Back in 2014, Android device purchasers from Kentucky and Iowa sued Google for allegedly forcing device manufacturers to pre-load Android apps on their smartphones and tablets.

Google violated the Sherman Act, the Clayton Act and California's Cartwright Act by requiring manufacturers such as Samsung, LG Electronics and HTC to sign "mobile application distribution agreements," or MADAs, making Google the default search engine on their products, consumers claimed. As a result, consumers overpaid for their smartphones, they alleged.

"Because consumers want access to Google's products, and due to Google's power in the US market for general handheld search, Google has »»

unrivaled market power over smartphone and tablet manufacturers," they said.

The allegations mirrored complaints made by FairSearch, an association that lobbied against Google's alleged behavior, in a complaint to the European Commission earlier that year. The DOJ's complaint filed today also echos complaints made to the commission.

Google urged US District Judge Beth Labson Freeman to dismiss the consumers' lawsuit, arguing that device makers have "full discretion" over whether to use the Android operating system, which is licensed for free, on their devices.

They can choose which Google apps to offer on those devices, Google said, and don't have to license and preload any Google apps to use the Android mobile operating system. Consumers are also free to download any app they would like, the company said.

"Google's conduct is not only fully consistent with but actually promotes lawful competition," Google said.

Labson Freeman sided with Google in February 2015 and dismissed the consumers' claims, finding they had not sufficiently alleged any harm under federal or state antitrust laws.

They didn't allege enough facts to show that Google's conduct prevented mobile device users from freely choosing among search products or prevented competitors from innovating, Labson Freeman said.

Consumers tried to tie the effect of the MADAs to the markets for general Internet search and handheld search, hoping to show harm to competition, Labson Freeman said. But they failed to show a relationship between the two markets and the MADAs, she said.

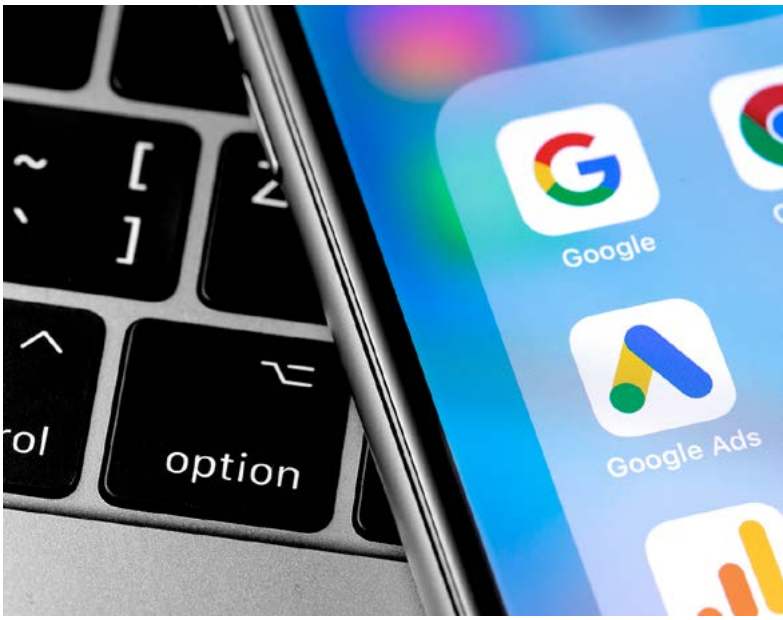
For example, they only claimed that the Android operating system had a 51.7 percent share of the US smartphone market, and failed to explain how the MADAs substantially hurt competition in the relevant market for handheld searches when the agreements only cover a subset of Android devices, she said.

"To be sure, this is a close call," Labson Freeman wrote. "However, the court must insist on greater specificity in pleading."

Labson Freeman gave the consumers permission to amend and refile their allegations, but they opted to settle the case two months later. ■

Consumers tried to tie the effect of the mobile application distribution agreements to the markets for general Internet search and handheld search, hoping to show harm to competition, Judge Beth Labson Freeman said. But they failed to show a relationship between the two markets and the agreements, she said.

Google's relationship with Apple features prominently in DOJ's landmark lawsuit



Google's revenue-sharing agreements with Apple have allowed the search giant to choke off potential competitors, according to a landmark lawsuit against Google filed in a federal court today by the US Department of Justice and 11 state attorneys general.

Google pays Apple an estimated $8 billion to $12 billion per year in advertising revenue in exchange for "privileged access to Apple's massive consumer base," the lawsuit says — with the two companies' financial interests clearly aligning. While only Google is accused of illegal behavior, the DOJ lawsuit paints a picture of the two tech giants working hand in glove to maintain Google's alleged monopoly.

There's good reason for this: By the company's own estimates, almost 50 percent of its search traffic originates on Apple devices. Meanwhile, the revenues Google shares with Apple make up around 15 to 20 percent of Apple's worldwide net income.

DOJ officials were clear today that the lawsuit is just the first step in their move to crack down on anticompetitive digital monopolies. The department is also probing Apple over allegations it has abused its dominance in the app distribution market.

Google and Apple have a long and close shared history, even though they compete in the sense of controlling the world's two dominant mobile operating systems, Android and iOS. Google's former chief executive officer, Eric Schmidt, was for example a long-time member of Apple's board of directors.

INSIGHT

By Michael Acton & Mike Swift

Published on Oct. 20, 2020

Much as the DOJ accused Google and Apple a decade ago of illegally divvying up a limited pie of engineering talent in Silicon Valley, today's complaint addresses how the CEOs of the two companies in 2018 — Apple's Tim Cook and Google's Sundar Pichai — met to apportion advertising revenue from search.

The DOJ accuses Google of handing Apple a cut of its monopoly search advertising profits. In return, Apple ensures Google is the default search engine on its devices, blocking out potential competitors and denying them the opportunity to scale up and challenge its dominance.

Following the 2018 meeting between the CEOs, "a senior Apple employee wrote to a Google counterpart: 'Our vision is that we work as if we are one company,'" the suit says. Google, it claims, views the loss of its default status on Apple devices as a "Code Red" scenario, as the advertising revenue generated through Apple's Safari browser is a key source of revenue.

The current revenue-sharing agreement between the two companies covers approximately 36 percent of all general search queries in the US, including both mobile and computers.

"By paying Apple a portion of the monopoly rents extracted from advertisers, Google has aligned Apple's financial incentives with its own," the lawsuit says.

Google has called the DOJ's suit "deeply flawed," and claims it competes fairly with the likes of Microsoft's Bing to cut deals with device makers.

Apple didn't respond to a request for comment. ■

DOJ's Google suit mirrors EU's Android case, with internal documents revealing smoking guns

A complaint against Google filed by the US Department of Justice is the spitting image of EU findings from 2018 into Android, with the technology giant's internal communications — a prominent feature of the suit — revealing several similar smoking-gun references aimed at nailing the tech company's alleged anticompetitive practices.

COMMENTARY

By Khushita Vasant

Published on Oct. 20, 2020

A complaint against Google filed today by the US Department of Justice is the spitting image of EU findings from 2018 into Android, with the technology giant's internal communications — a prominent feature of the suit — revealing several similar smoking-gun references aimed at nailing the tech company's alleged anticompetitive practices.

Among other things, the DOJ lawsuit attacks Google for allegedly anticompetitive agreements with Android phonemakers to pre-load Google's search engine on their phones, making it too difficult for rival search engines to compete.

The highly anticipated 64-page complaint features tidbits from internal documents in which Google employees discuss plans for Android to be "poised for world domination" and devise a belt-and-suspenders strategy to drive searches to Google and away from rivals on Android devices.

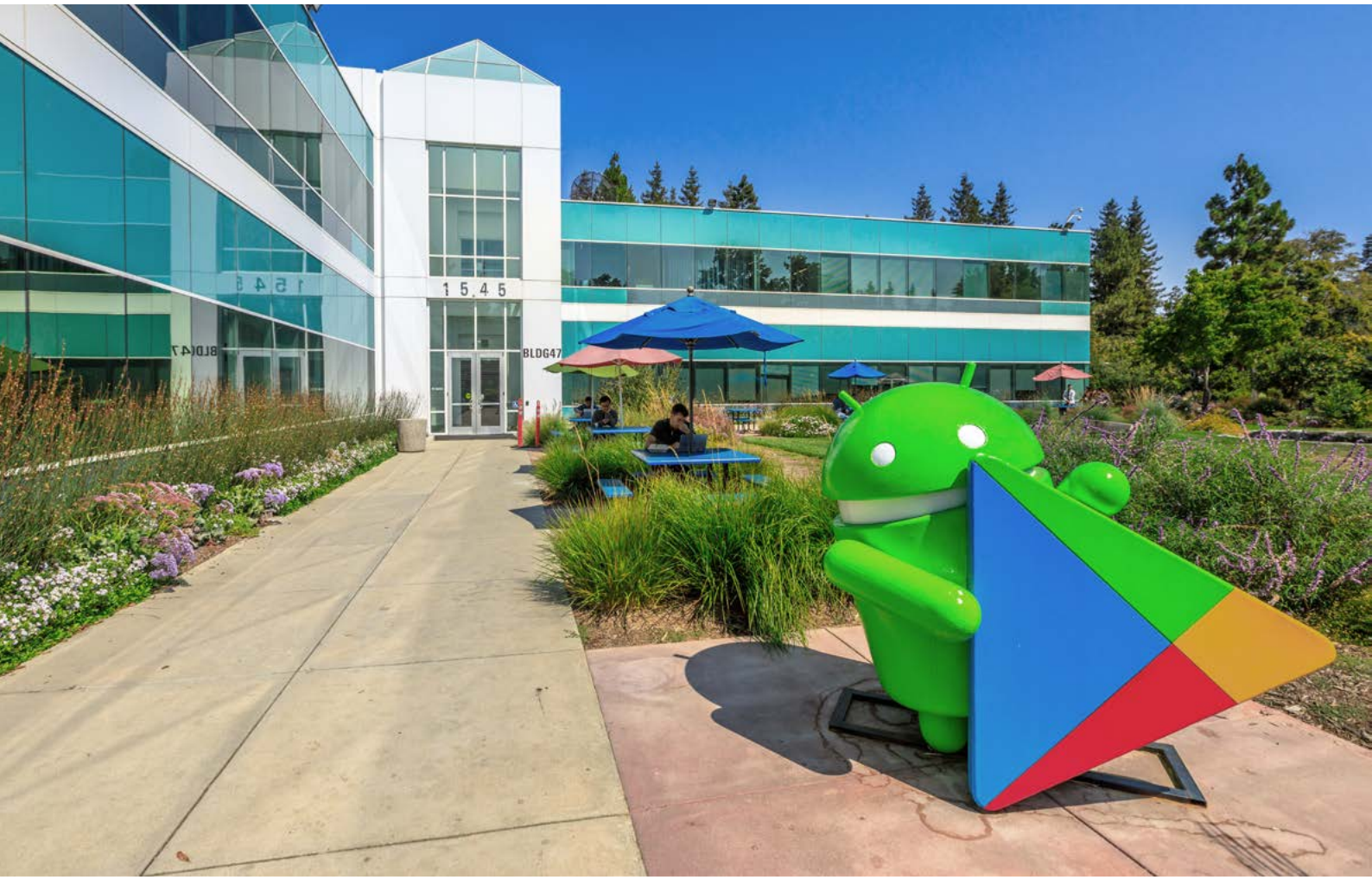
SEARCH, ANDROID

Both the DOJ and the EU agree that general search service is a relevant antitrust market and that Google is dominant in their geographies. The EU has previously said that general search services and specialized search services are two types of search services that are complements, rather than substitutes.

The agencies concur on the relevance of search advertising and how it serves to strengthen Google's dominant position in general search services.

Similar to its European counterpart's findings, the DOJ complaint delves into how Google allegedly maintains its monopoly status by leveraging products such as the Android operating system to enter into exclusionary agreements — including tying arrangements — to lock up distribution channels. In July 2018, the EU found Google's revenue-sharing agreements, or RSAs, with mobile device manufacturers such as LG, Motorola, and Samsung anticompetitive. In the US, agreements with carriers such as AT&T, T-Mobile/Sprint, and Verizon are aimed at controlling the distribution of search and search ads.

In internal documents provided to the DOJ, Google ponders: "How can we conquer the world's major wireless markets simultaneously?" The Android operating system was open-source, but control over it has always been a critical issue for Google, according to the complaint, which cited an Android team »»



leader asking in 2010: "How do we retain control of something we gave away?"

The DOJ and EU allude to the same smoking-gun references in Google e-mails that cite a set of contractual carrots and sticks that empower Google, as one e-mail put it, to "own the ecosystem" and thwart rival mobile ecosystems from developing and supporting a different search provider.

Along with references to restrictive agreements — called "anti-fragmentation" contractual terms — that Google imposed on mobile phonemakers, the DOJ also echoed EU findings on other restraints. For instance, if a manufacturer of an Android OS device wants to pre-install the popular YouTube or Google Maps apps on devices sold in the US, it has to "pre-install" the Google Play app store as well.

The DOJ alleged that to help the Android ecosystem achieve critical mass and to advance the network effects, Google "shared" its search advertising and app store revenues with distributors as further inducement to give up control.

The DOJ claims that Google's anti-fragmentation mandate and approval of devices before launch is a "poison pill" to prevent manufacturers from deviating from the Android ecosystem. In the EU, Google has defended anti-fragmentation contractual terms, citing security concerns and the incompatibility of some app stores with the Android OS, but in October 2018, the company announced it was removing restrictions on Android to comply with the EU antitrust decision.

Missing in the EU findings is the DOJ's allegation that Google uses its control over hardware products to protect its search monopoly. The DOJ suit cites internal documents that say hardware products also have "HUGE defensive value in virtual assistant space AND combatting query erosion in core Search business."

The US suit echoes EU antitrust chief Margrethe Vestager's comment from July 2018 that "Google has »»

used Android as a vehicle to cement the dominance of its search engine". Though the DOJ complaint is roughly one-fifth the length of the EU's non-confidential 328-page finding, it distills the essence of the EU's findings on Google's conduct.

VOICE SEARCH, BROWSER AGREEMENTS

While the EU findings briefly acknowledge Google's voice search as one of several entry points through which general search services can be accessed on smartphones, the DOJ goes a step further in outlining its significance.

"Internal Google documents have recognized that the 'voice platform will become the future of search' and financial projections for the assistant category recognize 'search defensive value,' " the DOJ complaint said.

The complaint also highlights Google's alleged refusal to license its Google Assistant to Internet of Things device manufacturers that would host another voice assistant simultaneously through a feature commonly known as "concurrency." Concurrency would mean rival voice assistants could challenge Google for control over the way users access the Internet generally, which the company sees as "too great a competitive risk," the DOJ said.

The DOJ complaint, however, does not mention the EU finding that Google's voice service provides it with behavioral data that can be leveraged to improve its search and advertising services, which in turn reinforces its position in those market segments.

While EU findings focus on Google's agreements to bundle its search engine and the Chrome browser on Android devices, the DOJ goes further and takes issue with the California-headquartered company's agreements to make Google the default search engine on browsers such as Apple's Safari and Mozilla's Firefox on desktops and laptops.

This action forecloses a critical avenue for search competitors to enter the market or increase distribution, when viewed alongside Google's monopoly and other anticompetitive practices, the suit says.

And while the EU's findings were focused on past harm, the DOJ suit also addresses forward-looking aspects of Google's conduct, highlighting internal documents that it says show "Google sees that 'Alexa and others may increasingly be a substitute for Search and browsers with additional sophistication and push into screen devices.' "

The lawsuit warns that as an increasing number of searches will be made on next generation devices such as smart watches, smart TVs, and connected automobiles, Google "is positioning itself to control these emerging channels" for search distribution and exclude rivals. ■

> *The DOJ and EU allude to the same smoking-gun references in Google e-mails that cite a set of contractual carrots and sticks that empower Google, as one e-mail put it, to "own the ecosystem" and thwart rival mobile ecosystems from developing and supporting a different search provider.*

DOJ lawsuit may also affect Google's display ad dominance

Today's antitrust lawsuit against Google filed by the US Department of Justice is as notable for what it doesn't allege — anticompetitive behavior by the search-engine giant in display advertising — as for what it does.

COMMENTARY

By Dave Perera

Published on Oct. 20, 2020

Today's antitrust lawsuit against Google filed by the US Department of Justice is as notable for what it doesn't allege — anticompetitive behavior in display advertising — as for what it does.

The suit takes aim at Google's "general search services, search advertising, and general search text advertising — the cornerstones of its empire," as Justice attorneys wrote in a complaint lodged with the US District Court for the District of Columbia.

Although likely a disappointment to Google's many critics in the display ad business, the suit has the potential to diminish Google's prominence in that market because of the way the tech company cross-pollinates search with its other advertising businesses.

Google grew over the past decade from non-entity to powerhouse in the market for placing ads wedged alongside, smack in the middle of, or hovering above the webpages of third-party publishers across the Internet — a business buoyed in great measure by Google's trove of data about the characteristics and interests of individual Internet users. Online banner, video and audio advertising together amounted to a $60 billion-plus market in 2019, according to the Interactive Advertising Bureau.

At each step of the process between buying and showing display ads, Google controls half to all intermediary software platforms' market share, the UK competition authority concluded earlier this year.

Google built its position by acquiring and building up a string of behind-the-scenes digital properties that connect buyers of advertising with sellers of virtual ad space, the so-called "ad tech stack."

Google's dominance of the ad tech stack has certainly drawn the attention of some regulators, including a coalition of attorney generals from nearly every US state expected make display advertising the centerpiece of a forthcoming lawsuit stemming from their own antitrust investigation into Google.

Internationally, the Australian competition authority is expected to publish, before the end of this year, a report on digital advertising services. European antitrust enforcers have initiated an investigation into Google's management of video ads, while EU regulators are ramping up to study the "privacy and economic impact" of the advertising technology industry.

Justice attorneys today didn't rule out augmenting their complaint with additional allegations as the case proceeds. "I don't think we're able to get into »»

any litigation strategy," said Ryan Shores, a senior DOJ advisor for technology industries, during a press call when asked about the potential for folding other concerns into the federal case.

Even without a concerted federal case against display advertising, a remedy that results in more competition for Internet search would likely affect Google's ability to entice buyers into its ad tech stack.

For one thing, search history, especially terms indicating an individual is actively looking for specific products or services, is extremely valuable to advertisers. The more information advertisers receive about the person about to load an ad-stuffed webpage, the more valuable the ad space. Google accounts for roughly 80 percent of general search queries in the US.

Verizon Media — parent company to AOL and Yahoo — told the UK Competition and Markets Authority in February that search data is "some of the most valuable data in the advertising market as a whole." The more advertising buyers perceive an advantage in using Google products for placing ads because of the richness of the company's targeting data, the more the tech giant dominates the display ad market.

Even without a concerted federal case against display advertising, a remedy that results in more competition for Internet search would likely affect Google's ability to entice buyers into its ad tech stack. For one thing, search history, especially terms indicating an individual is actively looking for specific products or services, is extremely valuable to advertisers.

In late 2018, Google made it even easier to collect user data by automatically logging users into the Chrome browser anytime they log on to another Google service such as Gmail.

Google may also be guilty of using its market power in search advertising to funnel business into its display ad business. Advertisers using the Google Ads product to purchase keyword advertising for search engine result pages find themselves automatically enrolled in a display ad campaign, the UK markets authority said in its report.

"Google has managed to leverage part of its search advertiser base to increase its importance as a source of demand in open display," the report stated.

Google's reading of the interplay between its search and display advertising business is much different, of course. The company says it has a special incentive to foster a vibrant ecosystem of ad-supported websites, as, without them, there's little demand for searching the Internet. It also points to its privacy policy and its optional settings for users to stop personalized advertising from being served using their Google account ID.

As for the charge that advertisers setting up search ad campaigns find themselves shoehorned into buying display ads, Google dismisses that, too. "Advertisers can easily un-check the box to set up a display campaign in Google Ads if they think this will not create value for them," the company told the UK authority. ■

DOJ focuses on privacy harms rather than price in Google antitrust suit

In filing its landmark antitrust suit against Google, the US Department of Justice faced a problem: the traditional measure of consumer harm in an antitrust case — higher prices — is difficult to apply to a company that offers consumers products that are free of charge. The DOJ has made a novel antitrust claim in identifying degraded privacy protection as the key harm consumers have suffered from Google's alleged illegal business practices in its search business.

COMMENTARY

By Mike Swift

Published on Oct. 21, 2020

In filing its landmark antitrust suit against Google, the US Department of Justice faced a problem: the traditional measure of consumer harm in an antitrust case — higher prices — is difficult to apply to a company that offers consumers products that are free of charge.

So the DOJ, in its complaint filed Tuesday in federal court in Washington, has made a novel antitrust claim in identifying degraded privacy protection as the key harm consumers have suffered from Google's alleged illegal business practices in its search business.

"By restricting competition in general search services, Google's conduct has harmed consumers by reducing the quality of general search services (including dimensions such as privacy, data protection, and use of consumer data), lessening choice in general search services, and impeding innovation," the DOJ antitrust division said in the 64-page complaint.

Later in the complaint, the DOJ alleges the web of default search agreements Google has struck with device makers such as Apple and wireless carriers such as AT&T means "American consumers are forced to accept Google's policies, privacy practices, and use of personal data; and new companies with innovative business models cannot emerge from Google's long shadow."

While the DOJ appears to be the first US antitrust enforcer to single out privacy as a primary consumer harm in a conduct-related monopoly action, it is unlikely to be the last. The US Federal Trade Commission is currently probing Facebook's impact on privacy protection as part of its antitrust investigation of the social-media giant, MLex first reported in September.

As part of its investigation of Facebook, the FTC is asking other Internet platforms to provide all relevant documents on their competition with Facebook "relating to data protection and privacy," according to a document seen by MLex.

The DOJ's complaint against Google notes there are only three general search engines available to US users: Google, Microsoft's Bing, and DuckDuckGo, which bases its business model on privacy. DuckDuckGo predicted the DOJ suit would be seen by history as "the beginning of the end of the surveillance economy".

The DOJ alleges in its complaint that but for Google's anticompetitive behavior, there would be more startups like DuckDuckGo, which "differentiates itself from Google through its privacy-protective policies. But Google's control of search access points means these »»

The word "price" only occurs six times in the 64 pages of the DOJ's Google complaint, a minuscule number considering antitrust complaints are traditionally brought over claims that anticompetitive behavior is driving higher prices for consumers. But that is a difficult argument to make with Google, which offers products like search, Gmail and Maps at no financial cost.

new search models are denied the tools to become true rivals: effective paths to market and access, at scale, to consumers, advertisers, or data."

This isn't the first time a US enforcer has identified the quality of privacy protection as a potential consumer harm in the context of antitrust. As far back as 2007, FTC Commissioner Pamela Jones Harbour warned that antitrust enforcers couldn't ignore privacy as a potential consumer harm when she dissented from the commission's approval of Google's purchase of DoubleClick, citing the "numerous privacy questions" the purchase raised.

"The parties claim to place a high value on protecting consumer privacy," Harbour said, in a decision that had to do with behavioral advertising rather than search. "The truth is, we really do not know what Google/DoubleClick can or will do with its trove of information about consumers' Internet habits. The merger creates a firm with vast knowledge of consumer preferences, subject to very little accountability."

The DOJ's invoking of privacy as a key consumer harm in the Google suit has caught the attention of privacy advocates, some of whom have long been frustrated federal antitrust enforcers like the FTC have not been mindful enough that market consolidation among online platforms is degrading consumer privacy. The Electronic Privacy Information Center made that argument to the US House antitrust subcommittee in July, saying that because data collection is central to many online platforms' business models, mergers and acquisitions in the Internet industry represent "acute risks" to privacy.

"Consumers are left with these Google defaults and no real choice because [Google has] so much market share that they have to accept whatever privacy policy Google throws at them," Caitriona Fitzgerald, the policy director for EPIC, told MLex today, saying there was "a complete failure" at the FTC to take privacy threats into consideration in antitrust cases.

Google's reply to the DOJ suit yesterday didn't mention privacy, but it did point out that the company's search access agreements, such as its payments to Apple to be the default search on the iPhone, don't block anyone from using a rival search engine. Asked about the DOJ's allegations of privacy harm to consumers due to Google's search dominance, a spokesperson today referred MLex back to the blog post.

The word "price" only occurs six times in the 64 pages of the DOJ's Google complaint, a minuscule number considering antitrust complaints are traditionally brought over claims that anticompetitive behavior is driving higher prices for consumers. But that is a difficult argument to make with Google, which offers products like search, Gmail and Maps at no financial cost.

It's incorrect to say that the consumer welfare standard for antitrust violations isn't up to the challenge of regulating modern technology because it only covers price, said Avery Gardiner, a former DOJ antitrust lawyer who now works on data-privacy and antitrust issues for the Center for Democracy and Technology.

Quality as a dimension of price has always been an index of consumer harm. "So it is not novel as a matter of antitrust law for quality competition to be in play; it is novel for DOJ to bring a case based on quality and innovation instead of price, strategically," Gardiner said of the new Google suit. "And within quality competition, I'm not aware of other antitrust cases that have focused on privacy specifically." ■

DOJ's Google suit draws Judge Amit Mehta, who oversaw FTC challenge to Sysco-US Foods

The Department of Justice's landmark antitrust lawsuit against Google was assigned today to US District Judge Amit P. Mehta, a 2014 Barack Obama appointee who presided over the Federal Trade Commission's successful challenge of the merger of Sysco and US Foods.

Mehta was appointed in 2014 to the US District Court for the District of Columbia, where the DOJ filed suit yesterday following an 18-month investigation.

In June 2015, Mehta granted the FTC's request for a preliminary injunction against the Sysco-US Foods transaction, which ultimately resulted in the companies abandoning the deal.

Sysco, the largest US food distributor, had sought to acquire rival US Foods for $3.5 billion (see here). Mehta said the FTC had shown a "reasonable probability" that the $3.5 billion deal would impair competition among "broadline" food distributors, which literally offer everything from soup to nuts.

The judge said he didn't believe customers could keep the merged company's ability to raise prices in check by threatening to switch to regional distribution rivals.

Mehta earned his law degree from the University of Virginia School of Law in 1997, and after graduation, worked in the San Francisco office of Latham & Watkins. He left that firm to clerk for US Circuit Judge Susan Graber of the US Court of Appeals for the Ninth Circuit.

Following the clerkship, Mehta worked for Zuckerman Spaeder LLP, a Washington, DC-based law firm, from 1999 to 2002.

He joined the District of Columbia Public Defender Service as a staff attorney in 2002, where he stayed until 2007. He then rejoined Zuckerman Spaeder to focus on white-collar criminal defense, complex business disputes, and appellate advocacy before taking the bench in 2014.

More recently, Mehta was thrust into the spotlight following his 41-page opinion in May 2019 that denied US President Donald Trump's bid to block a House Oversight Committee subpoena to his accounting firm, Mazars USA, for his financial records, finding that Congress had the authority to demand the president's records as part of its investigation.

"So long as Congress investigates on a subject matter on which 'legislation could be had,' Congress acts as contemplated by Article I of the Constitution," Mehta said in that ruling. "Applying those principles here compels the conclusion that President Trump cannot block the subpoena to Mazars."

INSIGHT

By Michael Acton & Khushita Vasant

Published on Oct. 21, 2020

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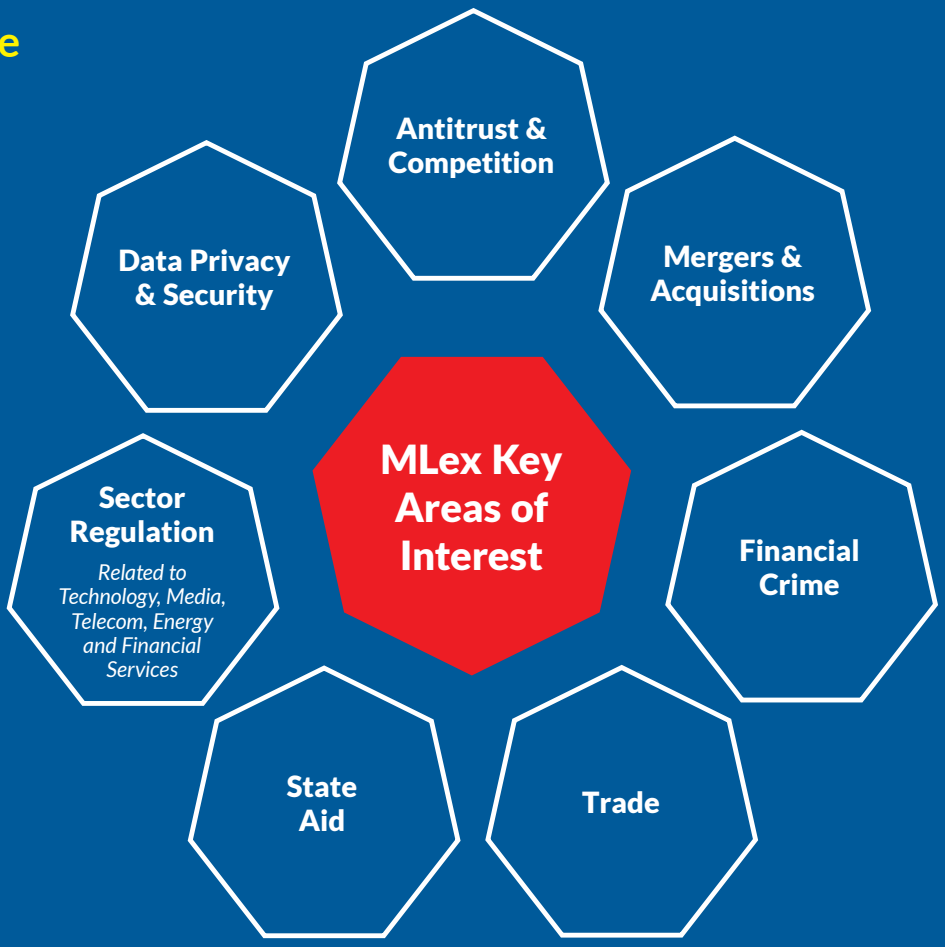

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