If Google Is A 'Bad' Monopoly, What Should Be Done?


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Google Inc. is currently subject to antitrust investigations by state attorneys general in the United States, as well as antitrust authorities in the European Union. Google and its allies have mounted a vigorous public defense, arguing that Google's activity should be immune from antitrust scrutiny or that imposing a remedy on Google would transform antitrust enforcers into some kind of undesirable "software regulatory agency," which would threaten innovation in the Internet.

These arguments are reminiscent of the claims made 20 years ago that antitrust analysis was too outdated to apply to high-tech industries. That argument was rejected then, and it should be rejected now. Exclusionary conduct by a dominant firm can distort fair competition in high-tech markets, just as in more traditional markets. Antitrust remedies can, and should, be imposed to make sure that a dominant company does not improperly keep rivals out of its markets or improperly strengthen its dominant position, to the detriment of consumers and innovation.

EU Competition Commissioner Joaquin Almunia rejected Google's original proposals to resolve claims of anti-competitive conduct in July 2013, and is currently considering a revised proposal submitted by Google. So what remedy proposals would make sense? This article will outline potential antitrust remedies that may appropriately be imposed upon Google, assuming antitrust authorities or courts determine that Google has violated the antitrust laws.

What Is an Illegal Monopoly?

A company violates Section 2 of the Sherman Act when it acquires or maintains or "monopoly power" in a relevant market by "exclusionary" conduct. "Monopoly power" is the power of a company with a large market share to exclude competition or keep prices above competitive levels in a relevant market. "Exclusionary conduct" is conduct that would not make business sense but for its elimination or weakening of competition.

The U.S. Supreme Court has made clear that a company does not violate the U.S. antitrust laws merely by gaining a large market share if this position is achieved by being first in the market; by having better products; by having great marketing or even because of luck. What is illegal is acquiring or maintaining a dominant position by engaging in conduct that keeps rivals out of the market to the detriment of consumers, and where the dominant company could not get away with such business behavior but for its dominant position.

Google is a "Monopolist" With Respect to Its Real Customers

Google's argument that competition is "just one click away" diverts attention in the wrong direction. Google's real customers are the advertisers who will pay it over $40 billion a year for access to the "eyeballs" of the hundreds of millions of consumers who utilize Google's search products on PCs, tablets and smartphones.

As a rule of thumb, a company may be considered to have a "monopoly" position if it has a market share of 65-70 percent in the U.S. and a share of around 50 percent or more in the EU. Recent studies estimate Google's share of Web searches in the EU at over 85 percent and around 67 percent

in the U.S. Google's share of Web advertising dollars is even higher. Google's dominance means that it presumptively can be labeled as a "monopoly."

Given that there are an estimated 1 billion websites, the Google search engine has become the essential guidebook to Internet content. As a practical matter, if a website link does not appear on the first page of Google's search results, it may never be found by many potential consumers. This gives Google enormous power to punish perceived competitors, to unfairly promote its own interests and properties and to deter Internet advertisers and website publishers from dealing with Google's rivals.

What Are Google's "Exclusionary Acts"?

Whether Google should be considered a "bad" monopolist depends on whether Google is engaging in "exclusionary acts." Antitrust enforcers and commentators have described Google's potential "exclusionary acts" in several categories:

- Actual or de facto exclusive dealing arrangements between Google and website publishers and/or Web content providers requiring them to obtain all or most of their requirements for search advertisements from Google, thus shutting out competing providers of search advertising.

- Imposing restrictions that interfere with the portability of online search advertising campaigns from Google's AdWords platform to the platforms of competitors.

- Exclusionary conduct in the mobile phone space, including imposing exclusivity restrictions in its Android licensing agreements to maintain and expand its dominance.

- Unauthorized utilization of content from competing vertical search services, while restricting access to its own content, such as YouTube.

- Biased display of search results to favor Google's own vertical search sites.

- Discriminatory treatment of websites through conduct such as manipulating websites' quality scores where the websites are perceived by Google to be actual or potential competitors.

What Antitrust Remedies Can Address These Issues?

Assuming antitrust authorities or courts find that Google engaged in the types of exclusionary acts described above, the following types of remedies would be appropriate:

- Prohibiting exclusive dealing or discriminatory treatment of customers for dealing with competitors or competing with Google;

- Prohibiting restrictions on portability of customer data or ad campaigns, or any restriction which would make it more difficult for advertisers to "port" their ad campaigns to the search advertising platforms of Google's competitors;

- Removing restrictions on access to Google-owned properties by Google competitors;

- Prohibiting the tying of the Android operating system to other Google products or services and otherwise "prying open" competition in the mobile space;

- Provisions addressing the issue of "search bias" and the retaliatory treatment by Google of perceived competitors.

General Principles in Fashioning an Antitrust Remedy

The purpose of a court order in an antitrust case is to impose a remedy that will be effective in remedying antitrust violations and in restoring competition. United States v. Du Pont & Co., 366 U.S. 316, 326 (1961). Significantly, the relief that can be imposed in a injunctive decree is not limited to the restoration of the status quo. Rather, the relief must be directed to that which is "necessary and appropriate in the public interest to eliminate the effects" of anti-competitive conduct. Ford Motor Co. v. United States, 405 U.S. v. 562, 573 n. 8 (1972). Thus, antitrust relief should unfetter a market from anti-competitive conduct and "pry open to competition a market that has been closed" by defendant's illegal restraints. Ford Motor Co., 405 U.S. at 577-578.

Further, the decree should be drafted broadly enough to prevent evasions by the defendant. In other words, the remedies should be designed to undo the effects of the defendant's anti-competitive conduct and prevent its recurrence, by restoring as much as possible the competitive conditions that would have prevailed absent the anti-competitive behavior and by ensuring that the doors to competition remain open. The remedy should also be forward-looking and should not undermine the incentives of the defendant to innovate. Finally, the relief "should be tailored to be fit the wrong creating the occasion for the remedy." United States v. Microsoft Corp., 253 F. 3d 34, 107 (D.C. Cir. 2001).

That Google may claim intellectual property rights in its search algorithms or other programs is no defense to an antitrust claim, and is certainly no bar to an antitrust remedy. In the Microsoft case, the court of appeals specifically rejected Microsoft's argument that if intellectual property rights have been lawfully acquired, then their subsequent exercise cannot give rise to antitrust liability. In colorful language, the court of appeals stated, "That is no more correct than the proposition that the use of one's personal property, such as a baseball bat, can not give rise to tort liability." U.S. v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001). Antitrust remedies may appropriately require access to Google's intellectual property.

Indeed, a long-overlooked Senate report summarizes over 100 antitrust judgments entered between 1940 and 1960 requiring compulsory licensing of patent rights, sometimes on a "reasonable royalty" basis, and sometimes on a royalty-free basis. See Staff Report of the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee pursuant to S. Res. 240, entitled "Compulsory Patent Licensing Under Antitrust Judgments" (86th Cong., 2d Sess. 1960).

In sum, remedies in high-tech markets should aim to provide opportunities for competition on the merits, while still enabling even a dominant firm to improve its products or services.

Finally, while antitrust remedies should be aimed at restoring the competitive process, nothing in the law prevents remedies that impact or provide benefits to specific Google competitors. Indeed, sometimes the only way to restore competition is to require a dominant company to make available certain property or services to specified rivals.

Prohibitions on Exclusive Dealing or Discriminatory Treatment of Customers for Dealing With Competitors or Competing With Google

Any remedy decree against Google should include provisions prohibiting Google from engaging in any commercial practice which has the effect of discouraging (or making it more expensive) for Google's customers (including advertisers and website publishers) to take all or part of their business to a

Google competitor. These types of provisions are common in antitrust decrees, and prohibit the defendant from offering benefits to customers in exchange for assurances that the customers will refrain from dealing with the defendant's competitors. "Benefit" in this context can be broadly defined to include not only monetary consideration, but also encompasses access to technical information, supply assurances and technical or engineering support.

Such provisions would also prohibit Google from conditioning any benefit to a customer on that person's agreement to only license or buy products or services from a competitor in a fixed percentage (i.e., no more than 20 percent from a competitor). Finally, such provisions would prohibit any retaliation against any customer for purchasing, licensing or promoting the products or services of Google's competitors. Such decree provisions have been imposed by antitrust enforcers in the past.

Prohibiting Restrictions on Portability of Customer Data or Ad Campaigns

One way to restore "competition on the merits" between Google and rival search engine providers is to remove any impediment to advertisers "porting" their ad campaigns from Google platforms to the search platforms of Google rivals. Thus, the decree should remove any "carrot or stick" presently imposed by Google which inhibits advertisers from making the choice to utilize the search platforms of a Google rival for at least part of their ad campaigns. The remedy decree could prohibit Google from enforcing or interpreting any licensing terms to prohibit a customer from transferring information or data, so that the customer may seamlessly utilize the same ad campaign utilized in AdWords on the paid search platform of a Google rival.

To the extent that Google asserts any intellectual property right with respect to report data or input data, the decree should grant a compulsory, irrevocable, royalty-free license to any customer so that the customer may seamlessly port any AdWords campaign to the paid search platform of a Google rival. As noted, such compulsory IP licensing provisions have been imposed in many antitrust decrees.

Removing Restrictions on Access to Google-Owned Properties by Google Competitors

Google has acquired over 100 companies. Most prominent among them are the acquisitions of Android in 2005; YouTube in 2006; Double Click in 2007; AdMob in 2009; Motorola Mobility in 2011; and Waze in 2013. Where required, these acquisitions have been reviewed and approved by antitrust authorities. Nevertheless, the acquisitions of these companies has given Google a tremendous advantage over rivals, because it enables Google engineers to utilize customer data derived from these additional websites or services in improving Google's search algorithms. Further, such acquisitions, especially of YouTube, have enabled Google to integrate its search results in a way that cannot be matched by Google's rivals.

Another way to allow "competition on the merits" between Google and its rivals is to permit such rivals access for web-crawling and indexing to Google-owned sites, especially YouTube. Thus, a remedy decree could prohibit Google from enforcing any claimed intellectual property right to restrict a Google competitor from "crawling" any Google property, and including search results or "snippets" from such properties in their search results. Further the decree should require Google to provide the necessary technical information to fully access these properties on the same basis that Google Search has. Similar information-sharing requirements were imposed on Microsoft by both the U.S. Department of Justice and the EU.

Prohibiting the Tying of the Android Operating System to Other Mobile Google Products or Services and Otherwise "Prying Open" Competition in the Mobile Space

Google has utilized its monopoly profits from search advertising (over $40 billion in annual revenues) to cross-subsidize the development and distribution of the "free" Android smartphone operating system. Android-based smartphones have captured significant market share, both in the U.S. and worldwide. Through "carrots or sticks", handset manufacturers are allegedly induced to utilize Google search boxes and other Google products if they utilize the Android operating system in a handset. This has quickly led to Google's monopoly position with respect to mobile search and mobile search

advertising. Even if Internet search on computers and on mobile devices are considered to be different relevant markets, antitrust regulators have recognized that where a dominant company controls products or services in another market, this creates possibilities for exclusionary bundling or tying practices that could disadvantage or foreclose competitors or otherwise significantly impede competition in the second market.

Thus, unless clear and strong nondiscrimination provisions are imposed on Google in a remedy decree, Google will have the ability and incentive to create a "closed system" for Android handsets and Google's search/software products. In the EU, Microsoft was required to offer consumers a choice of browsers. Why shouldn't the same conditions be imposed on Google so that consumers have a choice of the search engine or other software they want as the default on their Android handset?

Thus, the remedy decree should provide that any cell phone, smartphone, or tablet manufacturer which licenses the Android operating system should not be required to use (exclusively or in any fixed percentage) any other Google product, including Google Search, Google Maps, or Google Toolbar.

Provisions Addressing the Issue of "Search Bias" and the Retaliatory Treatment by Google of Perceived Competitors

A major concern of antitrust regulators and legislators is whether Google has transformed itself from a neutral search engine delivering the "best" search results into a multifaceted content company which favors its own content over the websites of perceived competitors. One partial remedy that could address this issue is a requirement that Google clearly disclose its ownership interest in any link appearing in a search result and also make more conspicuous the designation of which search results are the product of Google's algorithm and which search results appear because Google favors its own properties.

However, such a "transparency" remedy is not enough. Even if such "disclosure and transparency" requirements are imposed on Google, this will clearly not restore the competitive situation that would have developed had Google not engaged in anti-competitive "search bias." To the contrary, it would leave Google to enjoy the fruits of all its exclusionary conduct to date. This conduct has enabled Google to build up a huge scale advantage.

Google's conduct has given it an advantage in scale which may be insurmountable. Thus, an antitrust remedy should seek to address the scale advantage in algorithmic search that Google's behavior has enabled it to gain. Google now has a scale advantage in two dimensions: (1) indexing of the Web and (2) returning relevant user results based on that index. Because of this scale advantage, without an appropriate antitrust remedy, a rival search engine may find it impossible to catch up with Google with respect to the ability to provide appropriate search results.

One remedy that could address this problem is to require Google to enable rivals to access the data that Google has collected about users' digital interactions for a specified time period (i.e., five years). As part of this remedy, Google could be required to provide access to rivals (under appropriate confidentiality provisions) to index data it has collected. Google could also be required to make available the data it collects concerning users of Google's services. Google could further be required to make available documentation and other materials, such as APIs, to enable rivals to make use of the data.

This proposed remedy would not take away Google's advantages or undermine its incentives to innovate. Nor would it require a fundamental modification of Google's business model. Rather, it would provide rival search engines access to the building blocks necessary to at least try to build better algorithms and/or provide better and cheaper alternatives for advertisers. In this way, this proposed remedy would promote competition on the merits, provide consumers with more choice, and lower prices for advertisers.

This proposed remedy would fully maintain Google's and rivals' incentives to innovate. Since search is "free" to consumers, rivals cannot compete by offering a lower price to consumers than Google. To succeed, they must offer a higher quality user experience by developing better algorithms and higher quality services. This proposed remedy would stimulate innovation because all search providers (including Google) would know that they are all on a level playing field, with comparable access to

data about computer users, and so the best search engine would win on the merits.

A complimentary approach to deal with Google's scale advantage would be to require Google to serve up ads from the ad platforms of rivals on the results page seen by a consumer when he or she types in a search request on Google.com. It is common practice for website owners to enable third parties to display ads on the website. This proposed remedy would require Google to make some of its own webpage "real estate" available to third parties. Google would be hard-pressed to claim that such a remedy is technically or commercially difficult because it is what Google itself proposed to do in its attempted deal with Yahoo in 2008. This remedy could be available to Google's rivals for a limited period of time in order to help gain a foothold in the search advertising market.

Another alternative to address "search bias" is to require that Google be even-handed in displaying natural search results. Under this proposal, Google must apply the same criteria to all websites, using exactly the same crawling, indexing, ranking, display and penalty algorithms with respect to all websites, including all websites or web services which Google owns or in which it has any financial interest. Under this proposal, Google would be prohibited from favoring its own websites or services and penalizing or demoting the websites or services of Google competitors.

In summary, assuming a regulator finds anti-competitive conduct, fashioning an appropriate remedy is doable.

--By Samuel R. Miller