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The beginning of the end...? Google's epic antitrust battle begins

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Introduction

1. On Tuesday, 20 October 2020, Google parent company, Alphabet, ("**Google**") was officially served with an antitrust complaint by the Department of Justice ("**DOJ**") with a coalition of eleven (11) state attorneys generals claiming that Google operates as an illegal monopoly in respect of internet searches.

2. It has been widely publicized that this lawsuit is merely the beginning of what is expected to be a years-long legal saga, even after President elect Biden takes office, that could transform the world's pre-eminent internet search company.[1]

3. Google has been accused of harming competition in the internet search and search advertising markets through the conclusion of various distribution agreements with other companies to (i) prioritize Google search engine in their products and (ii) to place the Google search tool front and centre whenever consumers browse the web ("**the complaint**").

So what must the DOJ prove to succeed?

Market definition and dominance

4. The DOJ must, at the outset, prove that the markets which are the subject of the complaint are the correct markets. Thereafter, the DOJ must prove that google has monopoly power (in South Africa, this would be dominance) in these markets. As Sam Weinstein, a former justice department antitrust official, says "*if the government can't prove monopoly power in any of those markets then the case is over*".[2]

5. The above markets which the DOJ alleges Google has monopoly power is set out as follows:

- **general search services**: The market for search queries through search engines, which includes competitors like Microsoft's Bing;
- **search text advertising**: The market for ads sold by search engines that are designed to resemble organic search results, and typically appear above or below search results; and
- **search advertising**: The market for all types of ads generated in response to search queries, including search text advertising and specialised search ads that contain text and additional material such as product images.[3] (collectively, "**markets**")

Anti-competitive agreements

6. Subsequent to proving that Google operates a monopoly in the above markets, the DOJ must then demonstrate the crux of its complaint – that Google unlawfully controls these markets by using a wide array of exclusionary agreements to block rival search engines from competing. The basis of this allegation stems from the revenue-sharing agreements in terms of which device manufacturers such as Apple

and Android can get a share of Google's advertising revenues in exchange for making Google the default search engine on the respective devices.

7. In addition, Google also utilizes pre-installation agreements that require Android manufacturers to pre-download Google's bundle of apps, such as Chrome and YouTube, on consumer devices. Google also subjects Android manufacturers to anti-forking agreements which forbid manufacturers from developing and distributing versions of Android that do not comply with Google standards.[4]

Harm competition

8. Finally, as a final element to establish whether Google acted unlawfully, the DOJ must prove that this impugned conduct harmed competition.

9. In this regard, the DOJ has alleged that competing search engines such as Bing and Duck Duck Go do not have access to the same distribution channels on mobile devices because of Google's exclusive agreements with manufacturers – this has denied these firms the ability to compete.

10. Ultimately, the DOJ alleges, the harm experienced by these rival search engines hurts consumers as such consumers do not have access to other search engines that could offer different and possibly better services. This has reduced choice, quality and innovation.

Possible defences for Google

11. Subsequent to the filing of the complaint, Google has since vehemently denied the allegations, releasing an extensive rebuttal to its company blog saying that, *inter alia*, –

"*Today's lawsuit by the Department of Justice is **deeply flawed**. People use Google because they choose to, not because they're forced to, or because they can't find alternatives. **This lawsuit would do nothing to help consumers**. To the contrary, it would artificially prop up lower-quality search alternatives, raise phone prices, and make it harder for people to get the search services they want to use.*"[5] [Emphasis added]

12. Nevertheless, and as alluded on a holistic reading of the rebuttal, Google intends to proffer the following defences in rebuttal –

There are many competitors

13. Google is likely to argue and counter by pushing to expand the scope of what is included in the markets. In this regard, Google will argue that there other search engines such as Bing, Duck Duck Go and Amazon which compete with it in the provision for search engines.

14. Consequently, the degree of substitutability with Google is high and that its market share is negligible.

15. However, this argument may appear fallible as Google dominates the general search markets in terms of which it controls approximately 90% of the Web searches.[6] Furthermore, according to a 2019 EMarketer report, Google earned 73% of US search advertising revenue whereas Amazon's share, the closest competitor to Google, earned 13% of search advertising revenues.

Consumer benefit

16. It is anticipated that Google intends to prove that its various agreements with device manufacturers serve a wide array of business purposes as opposed to excluding competing search engines.

17. In practice, the commercial rationale for exclusive agreements is to create dedicated distributors that promote products. In this regard, Google has stated –

"*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. For digital services, when you first buy a device, it has a kind of home screen "eye level shelf."* ***[7]***

Conclusion

18. It remains to be seen what the outcome of the above antitrust complaint could result in for Google. In 1998, the last major monopoly case was brought against Microsoft when the DOJ successfully argued that Microsoft illegally operated a monopoly in computer operating systems by requiring computer makers to set its web browser as default on their machines.[8] Microsoft has since recovered from this and is now worth more than $1.5 trillion, and shows little sign of slowing.

19. The Federal District Court Jude Amit Mehta will have to weigh all arguments in what is called a "rule of reason" analysis in which he will balance the pro-competitive and anti-competitive effects that each party demonstrates.[9]

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[1] D Howley 'The Justice Department's figh against Google doesn't spell the end of Big Tech" available at https://uk.news.yahoo.com/google-antitrust-battle-wont-stop-big-tech-202705024.html, accessed on 15 November 2020.

[2] A Staff 'Google's epic antitrust battle begins: Here's how it could play out' available at https://techcentral.co.za/googles-epic-antitrust-battle-begins-heres-how-it-could-play-out/102536/, accessed on 15 November 2020.

[3] *ibid.*

[4] *ibid.*

[5] K Walker 'A deeply flawed lawsuit that would do nothing to help consumers' available at https://blog.google/outreach-initiatives/public-policy/response-doj/, accessed on 15 November 2020.

[6] *ibid.*

[7] *Supra* note 5.

[8] *Supra* note 2.

[9] *ibid.*



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