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The DOJ's Antitrust Case Against Google

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tl;dr

Background: The Department of Justice and a few Republican state attorneys general have filed an antitrust suit against Google. The complaint alleges that Google's deals with Android smartphone manufacturers, Apple, and third-party browsers to make Google Search their default general search engine are anticompetitive, harming consumers by denying Google's competitors the scale and data they need to compete.

But... The DOJ case will struggle. Nothing in these deals limits the ability of users to switch from Google to another search engine if they want to, and switching is trivially easy. Nor do the deals constrain Android smartphone makers from pre-installing competing search engines alongside Google. In fact, consumers benefit from these deals because they mean lower handset prices and greater incentive for Google to invest in Android. Moreover, the competition among general search engines to secure these default positions isn't constrained by Google, and that competition should encourage all search providers to invest in their products.

KEY TAKEAWAYS

DEFAULT POSITIONS ARE NOT EXCLUSIONARY.

In each of the cases the complaint mentions, it is trivially easy for users to move away from the default: typically it takes a matter of seconds to do so, and alternative search engines are plentiful and readily found in app stores or online. This alone will make it difficult to establish anticompetitive harm. Arguably, this ability for users to switch, even in the presence of a contractual default deal, is exactly what antitrust law is designed to encourage. While a default position is clearly valuable, it is more like a central piece of real estate for a retail store that makes shopping more convenient for potential customers, not something that prevents them from accessing competitors at all. As with commercial real estate, there is competition for the best spots. Having won, it's not anticompetitive for the winner to occupy the prime real estate.

USERS APPEAR TO PREFER GOOGLE SEARCH.

The complaint assumes that search engine default placements are the source of Google's success. But such an assertion is undermined by the fact that users frequently do install alternatives to default apps. Though not preinstalled on Windows or macOS devices, for example, Google's browser is used by 60-70% of American desktop users. And other browsers

have reported receiving user complaints when they have switched their default search from Google: in 2017, Mozilla said that switching to Yahoo (which had outbid Google to be the default search engine on Firefox) "was part of a number of moves that turned users against Firefox because it didn't always feel as if Mozilla had the user's best interests in mind."

THE ANDROID BUSINESS MODEL IS ON TRIAL.

The allegations about Android, which closely resemble the European Commission's 2015-18 case, are particularly dubious. In parts, the complaint reads as if the DOJ expects Google to develop and maintain Android and distribute it without charge with no prospect of earning revenue from it. If Google's default deals are what give it the incentive and ability to develop Android and provide it to OEMs for free in the first place, it will be difficult to argue that these deals are anticompetitive — especially because these Android distribution agreements still impose no constraints on users' ability to choose other browsers and search engines if they wish.

THE DOJ'S MARKET DEFINITIONS ARE OFF-BASE.

The DOJ identifies general search and search advertising as the relevant markets, no doubt because Google has substantial market share in these markets. But the concerns the DOJ raises relate to conduct involving the distribution of search engines. The relevant question is not whether Google has market power in search, but whether it has market power over browsers and mobile operating systems, and whether it exercises this market power to secure anticompetitive distribution deals. And in all of these, the answer is likely to be no. If securing the default position on iOS, for example, allows Google to collect anticompetitive rents (despite its massive payments to Apple to do so), there is nothing precluding Microsoft from bidding even more for the same position and the same rents.[1]

THE CASE IS NOT *U.S. VS MICROSOFT* 2.0.

That case was about Microsoft allegedly using its control over its dominant platform, Windows, to protect its dominance by breaking its competitors' products (Netscape). This complaint does not allege that Google breaks its competitors' products. Nor does this complaint allege that Google controls the distribution of its competitors' products, as was the case in Microsoft, and abuses that position to impede competition. A case analogous to Microsoft would allege that Google impairs its competitors' products by diminishing their ability to function on Google Search. We may yet see that case, but this is not it.

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[1] It is significant that this case is being brought under Section 2 of the Sherman Act, which relates to unilateral conduct by a business, rather than Section 1, which relates to coordinated conduct. A Section 1 case would allege that the parties that Google has default agreements with are complicit in the anticompetitive enterprise. Such a claim might make somewhat more logical sense, but it is not the DOJ's claim.