NATIONAL TAXPAYERS UNION

Issue Brief

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Breaking Down the Fallacies in DOJ's Antitrust Case Against Google

The Department of Justice (DOJ) has filed a lawsuit against Google in the U.S. District Court for the District of Columbia, along with 11 state attorneys general (AGs). The complaint alleges that Google has violated Section 2 of the Sherman Act by "unlawfully maintaining monopolies in the markets for general search services, search advertising, and general search text advertising in the United States through anticompetitive and exclusionary practices." The case, long rumored and now launched mere weeks before a national election, ultimately threatens products, services, and future innovations that benefit hundreds of millions of American consumers and taxpayers every day.

NTU issued a statement shortly after DOJ filed its suit expressing our significant concerns with the case, but as we analyze the case further it is worth expanding on the grave flaws in the 64-page complaint filed by DOJ:

- The case completely departs from the long-standing consumer welfare standard that NTU believes should govern a light-touch approach from the antitrust enforcement agencies; it appears DOJ's suit would try to protect *competitors* rather than *competition*.

Key Facts:

The Department of Justice's antitrust case against Google is making waves in media, but suffers from several flaws that make the case a bad bet for taxpayers.

Most concerning of all is the DOJ's significant departure from the decades-old consumer welfare standard, which should be the north star of light-touch antitrust enforcement.

DOJ has not ruled out asking the courts for a breakup of Google, an aggressive government intervention that would threaten services for tens of millions of global users.

- DOJ barely makes a passing mention of alleged harms sustained by consumers due to Google's business conduct; these alleged harms should *not* be remedied through antitrust enforcement in Congress or the courts.

- DOJ relies on some outlandish and dubious arguments to support their claim that Google operates as a monopoly, including that the use of the word "Google" as a verb is an indication of the company's illegal dominance.

- According to news media, DOJ has refused to rule out recommending severe enforcement actions against Google, up to and including breaking the company up; until now such recommendations have *typically* only been made by very progressive politicians, so it is disturbing to see DOJ officials refuse to rule out such options.

- DOJ's suit seeks to expand antitrust enforcement for political ends, which is a dangerous approach that opens the door to future ideologically motivated antitrust actions.

A breakup of Google would be disastrous for consumers and taxpayers, threatening some of the services that have allowed American workers, employers, and families to thrive during a pandemic that is keeping people inside and away from offices or schools. Even a years-long investigation where Google prevails, though, would steer both private and public sector resources away from more productive ends, such as investments in the products and services that will drive the *next* several decades in the global economy. (For example, evidence suggests that DOJ's lengthy antitrust case against Microsoft negatively impacted "returns on most computer industry stocks.")

More on each of these specific concerns below.

The Consumer Welfare Standard

For years, NTU has stressed that the consumer welfare standard must be the north star for antitrust regulators at DOJ and FTC. As NTU's Pete Sepp wrote in a letter to the Senate on FTC nominees in 2018:

> To the degree that FTC should be involved in federal antitrust policy, it is vital that all nominees respect the simple principle that any merger or other corporate action under review must be analyzed solely by the prospect of consumer benefit or harm.
>
> ...Substituting exotic legal theories, such as requiring merger proponents to prove a positive impact on competition, would be a license for ideologically motivated mischief, rather than economically anchored analysis.

Or, as we put it earlier this month, "the consumer welfare standard does not allow room for the federal government to pursue antitrust enforcement with political or ideological aims."

There is some evidence suggesting that there are political motivations for the timing of this case, "with some [DOJ] staffers questioning Attorney General William Barr's push to bring a case as quickly as possible" and White House economic adviser Larry Kudlow telling reporters that the White House has "been consulting" with DOJ on the case.

Even absent these concerns, though, none of DOJ's six alleged anticompetitive effects of Google's business conduct have a clear negative impact on consumers. Those six alleged effects are:

- "Foreclosing competition in general search services;"
- "Excluding general search services rivals from effective distribution channels;"

- "Impeding other potential distribution paths for general search services rivals;"
- "Increasing barriers to entry and excluding competition at emerging search access points from nascent competitors;"
- "Stunting innovation in new products that could serve as alternative search access points or disruptors;" and
- "Insulating Google from significant competitive pressure to improve its general search, search advertising, and general search text advertising products and services."

All of these alleged effects primarily impact Google's *competitors* in general search services and search access points, such as Yahoo, Microsoft, and DuckDuckGo. Google also competes for online advertising dollars with large companies such as Facebook and Amazon. DOJ fails to establish in their lawsuit how "structural changes" to Google's business would usher in more competition for general search services or would benefit consumers, even as DOJ acknowledges that consumers can change their preferred or default general search service on pretty much any platform at any time and at no cost to the consumer.

What few alleged consumer harms DOJ does bring up cannot be remedied through antitrust enforcement or by 'breaking up' the company.

Alleged Consumer Harms Cannot Be Remedied Through Antitrust Enforcement

DOJ spends a good portion of its complaint attempting to explain Google's relationship with American consumers, but it fails to even make an attempt at estimating consumer harm until page 53 of a 64-page complaint. Even then, it spends only a paragraph doing so:

> 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.

Here DOJ seems to echo Democrats on the House Judiciary Subcommittee on Antitrust, who in their recent report on major American tech companies (including Google) argued that tech business practices have "diminished consumer choice, eroded innovation and entrepreneurship in the U.S. economy, weakened the vibrancy of the free and diverse press, and undermined Americans' privacy."

In response to the Subcommittee report, NTU pointed out that there is little to no evidence for two of these four alleged harms (diminished consumer choice and eroded innovation). The other two alleged harms (a weakened free press and privacy concerns), we argued, cannot be addressed through antitrust enforcement. Instead, "Congress could legislate to address consumer privacy concerns without touching the antitrust laws," and members from both major parties have attempted to do so for years. We make the same argument now, as DOJ attempts to remedy data privacy and protection issues with the wrecking ball of federal antitrust enforcement.

As for "lessening choice" and "impeding innovation," two additional harms alleged in DOJ's complaint, we point to some of the same arguments we made in our recent analysis on the Antitrust Subcommittee report. Google does not ban Android users from using Bing as their default search engine, or from downloading the Firefox browser app instead of Google Chrome. Google also does not ban Chrome users from setting Yahoo as their default search engine. Consumers still have numerous choices for search engine or browser, and downloading and accessing these choices costs them no money and perhaps 30-60 seconds of their time.

The American tech sector is also not lacking for innovation:

> A number of stakeholders have used cold, hard data to challenge the opinion that tech companies have choked off innovation. As a venture capital leader wrote of the report, "According to the House, big tech has reduced entrepreneurship and VC activity. The data show otherwise: from '06-'19, total # of VC deals/$ up 4x to 12,211 deals/$135.8b, early-stage deals/$ up 3x to 4,157 deals/$46.3b, angel/seed deals/$ up 10x to 5,107 deals/$10b." And as the Progressive Policy Institute wrote in July, the four companies targeted in the report are among the dozen or so U.S. leaders in research and development (R&D) spending and capital expenditures, where "a monopolist secure in its market position would rather distribute profits to shareholders than make risky investments."

Data privacy, protection, and even portability may be legitimate issues that Congress can address through legislation, but neither DOJ nor Congress should seek to address these concerns through the antitrust laws. Meanwhile, DOJ fails to back up their concerns about choice, innovation, and entrepreneurship with hard evidence. Clearly consumer welfare is an afterthought in the DOJ's case against Google, and it shows.

Dubious Allegations Supporting DOJ's Monopoly Claims

A key aspect of any antitrust case is defining the relevant market, and NTU has noted before that antitrust regulators can sometimes improperly define a relevant market by making it either too broad, too narrow, or too unfocused.

In its complaint against Google, DOJ calls the company "a monopolist in the general search services, search advertising, and general search text advertising markets." Time and evidence may reveal that these "markets" are too narrowly defined -- or, even if they are properly defined, that a monopoly in these markets helps rather than harms consumers.

Notwithstanding that aspect of the case, DOJ overreaches significantly in an apparent effort to scrape up any flimsy evidence that may demonstrate Google is a harmful monopolist.

One of DOJ's first shreds of evidence? That the use of the word "Google" as a verb indicates monopolist behavior:

> Google is so dominant that "Google" is not only a noun to identify the company and the Google search engine but also a verb that means to search the internet.

Numerous social media users pointed out that if this an argument for antitrust enforcement then DOJ and FTC should pursue antitrust cases against Xerox, Kleenex, and Band-Aid too.

DOJ also argues that because Google owns a web browser they "[control] search distribution channels" for even *non-Google* searches that take place on Google's browser. This is no more true than Apple or Firefox or Microsoft controlling *Google* searches that take place on their browsers. What the claim does allow DOJ to do is inflate Google's control of "general search queries," from "just under 60 percent" to "roughly 80 percent."

DOJ further claims that Google's creation of a phone (the Pixel) is evidence of "owned-and-operated properties" that allowed Google to become a monopolist in general search. What DOJ fails to mention is that Google's market share for smartphones is under one half of one percent:

> In the smartphone market, 7.2 million sales is not a lot, and Jeronimo says Google is "still far from reaching the top 10" smartphone manufacturers. For a look at what a "top 10" list looks like, we have this 2019 market share report from Counterpoint. From top to bottom, Google is behind Samsung, Huawei, Apple, Xiaomi, Oppo, Vivo, Lenovo Group, LG, RealMe, and Tecno.

> That market share report also give us raw numbers. Samsung, the no. 1 manufacturer in 2019 with 20 percent of the market, sold 296.5 million devices, according to Counterpoint Research. With 1.486 billion phones sold overall in 2019, Google's 7.2 million in sales gave it a 0.4 percent market share.

Google's Android operating system for mobile phones is far more ubiquitous than the Pixel hardware, but as DOJ acknowledges Google "released the Android code for free under an open-source license" in 2007. "Being 'open source,'" DOJ writes, "means that anyone can access the source code and use it to make their own, modified operating system—a 'fork.'"

A Breakup Should Be Off the Table

The DOJ complaint is mostly silent on the remedies the agency is seeking for Google's alleged monopoly behavior, but a DOJ official told *The Wall Street Journal* that "nothing is off the table":

> A loss for Google could mean court-ordered changes to how it operates parts of its business, potentially creating new openings for rivals. The Justice Department's lawsuit didn't propose particular remedies, though one Justice Department official said nothing is off the table.

Several reporters pointed out that the DOJ's "Request for Relief" includes "structural relief as needed to cure any anticompetitive harm," which could include breaking up Google and/or requiring it to separate various lines of its business.

Until recently, these breakup calls were almost exclusively made by progressive lawmakers. NTU has criticized House Judiciary Antitrust Subcommittee Chairman David Cicilline (D-RI) for entertaining "Glass-Steagall" legislation for tech companies that would ban, for example, Amazon from selling Amazon-branded products in its online store. Applied to Google, such a ban might prevent Google from offering its apps (Google search, Google Maps) on the Google Play store. We have also criticized Cicilline, Sen. Elizabeth Warren (D-MA), and Rep. Alexandria Ocasio-Cortez (D-NY) for attempting to ban all mergers and acquisitions during the current public health emergency.

The breakup calls, though, could harm workers, consumers, and taxpayers more than any other proposed "relief":

> While it may be easy for witnesses to issue statements of support for these drastic measures, none of witnesses appeared to offer remedies for the impact such breakups would have on employment at these companies, on the millions or billions of users for these various platforms and services, or on the efficiencies and innovations that acquired companies have developed in tandem with each other over years of partnership.

It is disturbing to see Attorney General Bill Barr and career officials at DOJ reportedly willing to entertain these breakup calls. As NTU noted in its statement on the case, "[s]uch proposals have typically existed on the fringes of the ideological debate over American tech companies, and on the fringes they should remain."

DOJ Must Resist Attempts to Politicize Antitrust

Perhaps the most concerning part of these early days in DOJ's case against Google is how certain politicians have reacted to the lawsuit. Lawmakers such as Cicilline, Warren, and Sen. Josh Hawley (R-MO) have for years sought to use antitrust enforcement for political aims, even as the two parties are more polarized than ever on a whole host of other issues.

Here's how those politicians reacted to DOJ's announcement:

- Cicilline: "Today, DOJ finally brought an antitrust lawsuit against Google. This step is long overdue. It is time to restore competition online."
- Warren: "...@TheJusticeDept has the power to pursue a legit antitrust suit against Google. The case is clear – in fact, it could have gone further. It must move forward without political interference."
- Hawley: "'United States v. Google' are the most patriotic words I've heard in a long time. God bless America."

These lawmakers have been on the wrong side of antitrust enforcement issues for years, and all three have sought significant and harmful departures from the decades-old consumer welfare standard. That, if anything, should be a sign that DOJ has significantly overreached in this case.

Even if DOJ's case ultimately falls short, the lawsuit itself may embolden politicians to fundamentally change the nature of the antitrust laws in America, "leaving antitrust law captive to temporal, parochial interests, choking off innovation and discouraging entrepreneurs." Now, more than ever, lawmakers who support free markets need to make clear that using the awesome powers of antitrust for partisan political purposes is unacceptable.

Conclusion

When the Federal Trade Commission (FTC) declined to pursue antitrust allegations against Google in 2013, NTU's Pete Sepp praised the FTC for their restraint. He said, in part:

> Today's long-overdue FTC decision should bring closure to an investigation that never should have been opened in the first place. Like many previous government forays into high-tech policy, the allegations made against Google had nothing to do with protecting consumers and much to do with mangling the marketplace on behalf of disgruntled competitors. In fact the FTC's acknowledgement that Google aggressively competes in the marketplace should be cause for praise; that's exactly how a vibrant economy which effectively serves consumers should work.

Unfortunately, it appears that this week DOJ has done just what Sepp warned about seven years ago: it has pursued allegations that have "nothing to do with protecting consumers and much to do with mangling the marketplace on behalf of disgruntled competitors." NTU will continue to make the case that this lawsuit would do far more harm to taxpayers and consumers than good.

About the Author

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