Google Foes Must Admit Defeat on Antitrust Case

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The press is reporting that FairSearch and the other Google opponents have trotted down Pennsylvania Avenue to the Department of Justice Antitrust Division asking them to take over the antitrust investigation of search now that the Federal Trade Commission is poised to close its investigation.
Although it's Christmas time and we all like Christmas shopping, this is the wrong type of shopping: forum shopping. This last-ditch effort by Google's competitors doesn't make sense and is bad for innovation and consumers. Fortunately there is no way it will work.

In the United States we have the mixed blessing of having two antitrust agencies: the Federal Trade Commission and the Antitrust Division of the Department of Justice. Despite the overlapping jurisdiction they are different in many respects. The Trade Commission enforces consumer protection laws and can conduct studies and hearings and issue Guidelines. The Commission can bring cases in administrative litigation in an expedited fashion. The Division can bring criminal cases and must litigate their cases in federal court. Perhaps most important the Federal Trade Commission can bring cases under a broader antitrust statute—Section 5 of the Federal Trade Commission Act which permits them to challenge unfair methods of competition that might not violate the traditional antitrust laws.

The agencies have a 60-year-old clearance agreement in which they allocate jurisdiction so they don't conduct redundant investigations. When issues involving

search came up the Trade Commission appropriately took jurisdiction. Many of the important issues in the investigation focus on disclosure and potential deception and the Commission has broad expertise on those subjects because of its decades of consumer protection enforcement. Now after 19 months of intense scrutiny by the Federal Trade Commission, including reviewing countless terabytes of data, an ocean of documents, and reaching out to anyone with complaints, the Google foes seem to be unhappy with the Commission's prudent scrutiny of the situation and seem to want to have the Antitrust Division repeat the same investigation.

But this is a "do over" that just does not make sense.

First, the Commission seems poised to complete its 19 month investigation. How does it make any sense for another set of antitrust cops to repeat the same investigation? The scores of man-years spent would have to be respent at the Division. That's a cost no taxpayer would see as making one bit of sense.

Some may point to the fact that the Department of Justice took over the Commission's Microsoft investigation in the mid 1990s (a matter I worked on as an Federal Trade Commission staff attorney). But in that case it was not that the Commission made the wrong decision, it was that it could not make any decision because of a deadlock.

Second, the misguided push for so-called "search neutrality" has already been rejected by the Department of Justice when they approved Google's acquisition of ITA Software. At that time, Google's competitors argued that Google should not be allowed to provide specialized travel search results and the Department of Justice rejected those arguments because of the obvious benefits to consumers of more innovation in this space.

Third, giving the Google kvetchers a second bite at the apple won't lead to a different result. The Federal Trade Commission has conducted a mammoth investigation. It has not limited its efforts; indeed it went to the expense of hiring a stellar litigator from a first class law firm. But at the end of the day the evidence appears not to support a case. And that won't change no matter who is behind the desk.

The result would not be the least bit different at the Department of Justice. Indeed, the Department of Justice would have a much stiffer legal burden. It must demonstrate Google is a monopolist that has harmed competition through clearly

exclusionary conduct. This is a much tougher standard than the Federal Trade Commission Act, which requires the Commission to demonstrate an "unfair method of competition."

No court has ever decided that conduct which was not an "unfair method of competition" was illegal exclusionary conduct to support a Sherman Act violation. Never.

Then there is yet another crucial problem. The Commission can litigate a case before a Federal Trade Commission administrative law judge and it sets the time deadlines. It must issue a decision in about one year. The Department of Justice must litigate in federal court where there are no time limits. A typical Department of Justice enforcement action can take three to five years to litigate. By that time the world of search will have evolved substantially.

Finally, giving the Google kvetchers a do-over is dreadful public policy. It would undermine the ability of the Trade Commission or Division to make a decision in future cases always knowing if a supplicant is unhappy it can go to the other agency.

If the Federal Trade Commission does not bring an enforcement action it is not due to any lack of resources, competence, or enforcement gumption. It is because consumers are not harmed from Google's practices and if there are problems they are best addressed, as I have suggested before, through search guidelines.

It's time for the Google kvetchers to stop shopping for a different investigator and spend those resources on innovating and creating better products. Then competition and consumers will really be better off.

This post originally appeared on the U.S. News & World Report website.

David Balto is a former policy director of the Federal Trade Commission, attorney-adviser to Chairman Robert Pitofsky, and antitrust lawyer at the U.S. Department of Justice. He has been a senior fellow at the Center for American Progress and has worked with the International Center on Law and Economics, both of which receive funding from many organizations including Google. Mr. Balto has also published research and authored scholarship for Google on technology policy topics.