

AntitrustConnect Blog

What Consumers Want in FTC v. Google

David Balto (Law Offices of David A. Balto) · Monday, November 5th, 2012

The press is on fire with dozens of stories that the FTC appears poised to sue Google for alleged anticompetitive conduct in search (and the possibility that any case may be settled). There certainly is no lack of well-paid advocates for aggrieved rivals ready to spin claims that Google is the next Microsoft and that FTC action is necessary to open the market to competition. But while these advocates are making a lot of noise, consumers are almost entirely silent. Indeed, unlike almost all of the recent antitrust wars such as the AT&T/T-Mobile and Ticketmaster/LiveNation mergers, or even the DOJ case against Microsoft, in which there was a groundswell of consumer opposition that spurred the antitrust cops, when it comes to search, consumers are entirely silent.

For good reason.

Unlike Microsoft, here there is no monopolist charging monopoly prices at the checkout lane. Search is free to consumers. Moreover, any effort to take advantage of consumers would invite a quick response from the public, because competition is just a click away. Moreover, search succeeds because each of the search firms must constantly attract consumers—so consumer sovereignty is the lodestar that guides their business.

If the FTC pursues an action and the parties decide to settle, there will be lots of high-priced lawyers and lobbyists at the table. There will be a cacophony of voices crying for action. But consumers should not be forgotten.

If consumers had a voice, what would they ask for?

Do no harm. If the FTC decides to regulate how Google operates search, their first principle should be to do no harm. Google organizes search in part to protect consumers from the countless malefactors who are ready to deceive or peddle 21st Century snake oil; the focus of search for all the competitors is to protect the consumer and provide accurate and useful results. These efforts to protect consumers must be fully protected.

Where is the beef? (Some of us remember the 1980's Wendy's commercials). Any limitations on Google's conduct must be based on clear evidence that there has been harm to consumers. Decades of antitrust law have made clear that it is appropriate to restrain companies' conduct only where consumers have suffered in higher prices or less innovation.

Don't build us a "bridge to nowhere." Sometimes it is tempting for Washington bureaucrats to engage in economic engineering, trying to second-guess how a market should work. For example,

the European Union has imposed various requirements on Microsoft to offer consumers options that sounded good on paper, but years later seem irrelevant. A bridge to nowhere in search is not worth the effort.

Don't make us pay the price of protecting competitors. Fifty years ago, Justice Brennan set the antitrust laws straight when he declared "the purpose of the antitrust laws is to protect competition, not competitors." Aggrieved rivals have come up with a panoply of suggestions to limit Google's business. Some aggrieved rivals have even suggested that Google should be prevented from expanding into aligned businesses or vertically integrating. But this rule of economic celibacy would ultimately penalize consumers. Would consumers have benefited if, for example, Google was prevented from creating Gmail, Google Maps or Google Finance?

Use your limited resources prudently. There will certainly be lots of high-priced advocates calling for the FTC to engage in the trial of the century. Such an effort against Google could clearly tax the FTC's resources for several years. (The last major FTC monopolization case lasted over six years, and it hasn't won an "unfair trade practice" case since 1972). The FTC has a simpler, more comprehensive, and more sensible way of approaching the competitive issues in search. As I have suggested elsewhere, the FTC should revise its search guidelines, which were last issued in 2002. In antitrust, an ounce of prevention is worth a pound of cure. Updating those guidelines would be a far more expeditious and efficient way to address these issues. An enforcement action against Google would only change the situation for consumers using Google, and consumers using other forms of search such as Bing, Yahoo, Facebook and countless others would not have the same protections.

Sometimes in Washington it's hard to hear the voice of consumers, especially when there is a well-funded advocacy machine. The FTC prides itself as being the nation's consumer protection agency. With this in mind, the FTC should put consumers' concerns (or the lack thereof) at the forefront of its evaluation of what to do with search.

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