Searching Google For Anti-Competitive Conduct

David Balto

Reportedly, the Federal Trade Commission seems poised to finish its two-year-long inquiry of Google Inc.'s search practices. Industry rivals perhaps hope for some type of enforcement action. But those who suggest that alleged high market shares and popularity create a monopoly have not recognized the appropriately limited circumstances in which antitrust law condemns conduct by a successful firm.

Some of Google's critics who compare Google's conduct of today to Microsoft Corp.'s conduct during the 1990s simply do not make a compelling case for the federal antitrust authorities to bring an action against Google.[1] Highlighted by the factual differences between the case against Microsoft and a potential case against Google, it is unlikely that an antitrust claim would pass muster under the Sherman Act jurisprudence. Courts are increasingly skeptical of claims of monopoly power in high-innovation industries because of how fast markets can change when a newer and better product is created. Just think of how relevant former market behemoths like MySpace, AOL Inc. and Yahoo! Inc. are today.

However, the FTC has another tool beyond the traditional antitrust laws. Unlike the U.S. Department of Justice, which brought the Microsoft case and is confined to the Sherman and Clayton Acts, the FTC has a third weapon in its arsenal to combat anti-competitive practices: Section 5 of the FTC Act. Antitrust laws are general in nature, and Section 5 tests the limits, by declaring illegal "unfair trade practices" and "unfair methods of competition." Although I have often been a proponent of Section 5 enforcement, both as a former FTC official and as a public-interest attorney, as I explain below, the FTC should be extremely cautious about using its unique powers under Section 5 against Google because an action would not reflect sound legal or economic policy.

A Unique Tool to Fight Anti-Competitive Conduct

Section 5 of the FTC Act forbids, among other things, "unfair methods of competition." The FTC rarely brings actions solely on Section 5 and rather almost always relies on cases based on traditional Sherman Act principles. Such restraint is prudent since the courts have held the FTC to a high threshold in its efforts to bring standalone Section 5 cases.

The history is well known. In spite of its broad language, courts have been very skeptical of FTC efforts to expand the bounds of the Sherman Act through Section 5 enforcement. There has not been a successful Section 5 litigated case since the early 1970s. During the 1980s, the FTC suffered three consecutive defeats before courts of appeal. These decisions sent a clear message to the FTC — Section 5 enforcement had to be grounded on sensible economic principles with a clear story of how consumers would be harmed. Not surprisingly the FTC did not bring a Section 5 case for over two decades.

The FTC has shown some interest in resurrecting standalone Section 5 claims, and appears to have targeted the high-tech industry as battleground for these cases. The FTC targeted N-Data and, most recently, Intel Corp. in bringing Section 5 claims, and entered into settlement

agreements with both technology companies. Since both cases settled, it is impossible to know how a court would react to the reinstatement of Section 5 as a standalone violation. I am a strong proponent of the institutional advantages of having the FTC pursue claims in the fast-changing high-tech sector where the need for expertise in antitrust matters and expedited procedures is imperative. I also fully supported both the N-Data and the Intel decisions (in fact, I actually thought the facts of N-data supported a Sherman Act claim too).

Section 5 and Its Limits

That being said, I do not think that Section 5 of the FTC Act gives the FTC carte blanche. Herbert Hovenkamp, a well renowned antitrust scholar and proponent of the FTC's Section 5 power, cautions that the FTC needs to be mindful of only condemning truly anti-competitive practices. These are practices that reduce output, raise prices, lower quality and harm consumers — not competitors.

FTC Commissioner Maureen Ohlhausen has also expressed concern that the FTC was too aggressive in Intel, writing "[u]nder this new approach to Section 5, the Commission would have the power to sock business with expansive remedies for conduct that the courts have been reluctant to declare violations of the law and for which even the FTC itself has not clearly delineated the boundaries of legality."

I find FTC Commissioner J. Thomas Rosch's guidance in his recent lecture at the University of Virginia particularly useful in staking out the appropriate territory for standalone Section 5 claims. Commissioner Rosch set out two major considerations before the FTC should pursue a standalone Section 5 claim. First, the FTC should not pursue a standalone Section 5 claim when doing so would unsettle settled Sherman Act or Clayton Act case law. Second, "consistent with the business community's insistence that there be certainty, particularly in enforcement of antitrust laws governing single-firm conduct, Section 5 should be applied only to firms in highly concentrated industries, i.e., those with monopoly or near-monopoly power."

The Obstacles to Sound Enforcement

Under this guidance, the FTC has a challenging task in bringing and successfully litigating a standalone Section 5 case against Google.

As I've previously written, there is good reason a Sherman Act claim would face very substantial obstacles. It is well-settled Sherman Act case law that it is not illegal to gain market power or even monopoly power through superior skill, innovation or business acumen. Google Chairman Eric Schmidt's testimony before the Senate Judiciary Subcommittee and his later follow-up responses suggest that market forces compel Google to give users and advertisers what they want by competing through innovation, which is what antitrust law is supposed to be encouraging. It is also established that a company can improve its products by combining previously separate products, and that a company does not have a duty to inform its competitors of changes or facilitate their adaption to these changes, even if those changes pose a threat to these competitors.

As detailed in my previous research, the search market remains a highly competitive industry with low barriers to entry. Consumers and advertisers can — and in fact do — use multiple general search engines as well as niche search engines for their respective search and advertising needs. And, even if we assume away that fact, the switching costs are low. Google has taken steps to improve data portability, not only for consumers, but also advertisers. There is little reason to believe Google has monopoly or near-monopoly power.

Even if the FTC mistakenly identified sustainable market power, Google's pro-competitive rationale for its business decision far outweigh any harm that the FTC might be able to identify. Finally, the dynamic nature of the industry should quell any concerns. Facebook is the most visited site on the Internet, and is reportedly in the process of developing a search engine to compete with Google. For all we know, Google could fall from grace in the time it took to get through discovery. In short, a Section 2 case against Google would be a loser.

There is a time and a place for a standalone Section 5 case. For example, sometimes Section 5 is used as a "gap filler" to attack clearly anti-competitive conduct where the statute seems to miss an element — such as cases that attack attempts by firms to collude or as in the N-Data case. Where Section 5 is not appropriate is attempts to regulate business practices of companies merely because certain competitors allege they have suffered economic harm. Section 5, like all antitrust regulation, must be consumer-focused.

In the case of Google, presumably the Section 5 allegation would be centered on (1) Google's change in algorithmic functions that result in websites falling lower in Google search results or (2) Google's inclusion of its own content in its search results. In both cases, these are unilateral decisions by a competitor to improve its product for consumers. This is an instance of competing. Neither the Sherman Act nor the FTC Act contemplates the regulation of pro-competitive behavior such as this. he fact that Google's competitors fear they will not be as successful without Google's help is immaterial. Harm to specific competitors and changes in business methods are not justifiable reasons to invoke a standalone Section 5 complaint.

Expending enormous resources to litigate a Section 5 claim against Google search will only harm consumers. Currently, if they are unhappy with Google's current search services then they can simply switch to a competitor. FTC action would only deprive happy consumers with the product they have come to expect. If the problem is a lack of transparency, then it should be solved industry-wide. Especially since Google's competitors engage in the same of similar practices.

As everyone knows, consumer welfare is the lodestar that guides antitrust enforcement. Although there are some rivals who complain about Google's practices there have been few if any complaints by consumer or public-interest groups. That provides one important form of guidance of why enforcement is unnecessary.

There is a time for creativity and innovation. This is not the time for a novel approach to Section 5. Rather, the FTC should focus its concerns on search by conducting hearings and searching for an industry-wide guidance about how search can function most effectively.

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. Balto has also published research and authored scholarship for Google on technology policy topics.

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[1] http://www.huffingtonpost.com/david-balto/google-is-no-microsoft_b_885616.html