LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, DECEMBER 23, 2020

PERSPECTIVE

Divided. Will conquer? Google faces 3 distinct challenges to its conduct

By Patrick E. O'Shaughnessy

Governments in the United States allocate resources to address competing priorities through both independent and collective action. Antitrust enforcement is one of those priorities, and an expensive one. So, while governments may pursue antitrust enforcement either independently or collectively, they customarily pursue it collectively to save resources for other priorities and improve their overall effectiveness. Many governments have broken from that custom recently, and spent more of their limited resources on expensive antitrust enforcement in the technology sector by pursuing three separate, distinct, and challenging antitrust lawsuits against Google.

First, the federal government and 14 states sued Google in District of Columbia federal court starting in late October (the "DOJ lawsuit"). Second, a Texas-led group of 10 governments sued Google in Texas federal court on December 16. Then, a Colorado-led group of governments sued Google in District of Columbia federal court on December 17. These three different Google lawsuits do not stem from a division of labor nearly as much as they do from different resources, priorities and opinions.

These differences — given the limited resources available to governments, their custom of collective action in this context, and the expense of less collective action — likely are fairly important to the governments involved.

The DOJ Lawsuit

The DOJ lawsuit claims Google violated federal anti-monopoly laws. It is often cited for its similarities to the last major DOJ anti-monopoly lawsuit against Microsoft. But, this Google lawsuit differs from the Microsoft case because it does not allege a "tying" violation. The Microsoft case was fundamentally about tying and competition between Netscape's Navigator and Microsoft's Internet Explorer browsers. The core claim was that Microsoft unlawfully leveraged its strength in producing the Windows operating system to drive use of its less strong browser by requiring those who purchased the operating system to also use the browser.

The DOJ lawsuit against Google alleges unlawful "monopoly maintenance," and not unlawful tying. It challenges Google's practices focused on preserving its existing strengths in its Internet search, search advertising, and search text advertising products. A key method by which Google allegedly maintains its existing strengths unlawfully is by paying Apple $8 billion to $12 billion per year to make Google's search product the default on Apple's Safari browser. The DOJ lawsuit is led by government lawyers and seeks no monetary damages.

The Colorado Lawsuit

The Colorado lawsuit focuses on the same federal anti-monopoly laws, and Google strengths, addressed in the DOJ lawsuit. It even references the DOJ lawsuit and incorporates its allegations by reference. But, the Colorado lawsuit is different from the DOJ lawsuit because it includes a significant number of Microsoft/tying-like factual allegations.

Like Netscape with its competing browser, numerous businesses that compete with Google to provide shopping, airline, hotel, auto rental, and restaurant reservation, and business review products, among others, have provided antitrust enforcers and legislators with voluminous materials to suggest Google leveraged its strengths to drive sales of its new and less strong products. These businesses claim Google unlawfully requires its search customers to view Google's less successful products when using Google's search product to identify competitors to those less successful products, and to view Google's product first before scrolling down or clicking to find the alternatives.

Despite detailing these factual allegations, the Colorado lawsuit does not actually allege a tying violation. It alleges only monopoly maintenance violations, like the DOJ lawsuit. The Colorado lawsuit also appears to be led by government lawyers, and it does not seek monetary damages.

The Texas Lawsuit

The Texas lawsuit alleges federal and state anti-monopoly and other violations not found in either the DOJ or Colorado lawsuits. It includes a monopoly maintenance claim, like the DOJ and Colorado lawsuits, but for maintenance of different strengths: Google's publisher inventory management, display ad exchanges, display ad networks, and display ad buying tool products. The Texas lawsuit also includes a claim for unlawful tying, like the Microsoft case.

In addition, it makes broader claims that address far more than just anti-monopoly laws. One of those claims involves very strongly-worded allegations that: Google and Facebook competed at one point

in the provision of header bidding, subsequently agreed clandestinely with each other to a "truce" that amounted to "collusion," "market allocation," and "price fixing," and then concealed the conduct from their header bidding customers and others. The Texas lawsuit describes Google's conduct as "evil," seeks monetary damages, and involves outside lawyers who likely will be paid a portion of any damages the lawsuit establishes.

Different Resources, Priorities and Opinions

The differences between these three lawsuits likely reflect different resources, priorities, and opinions. DOJ's in-house antitrust enforcement group is better funded and equipped than the antitrust enforcement arms of all 50 states combined, with more than twice as many antitrust lawyers and an even more disproportionate number of Ph.D. economists focused on antitrust. These different resources influence its actions, likely including the choices to not seek monetary damages or use contingency-fee outside counsel in the DOJ lawsuit.

The Colorado-led group appears to have prioritized making factual allegations not found in the DOJ lawsuit. The differences in their lawsuit may have created leverage for them to more effectively influence the DOJ lawsuit, which the Colorado group has explicitly stated they hope to join, along with their different factual allegations. They may persuade DOJ to apply its muscle more directly to these different allegations.

Fewer governments signed on to the Texas-led opinion that Google's conduct is "evil." And, fewer governments chose to allege tying violations. The Colorado lawsuit set forth Microsoft antitrust like tying facts, and the Texas lawsuit alleged the violation; the governments involved in those lawsuits likely asked DOJ to bring tying claims against Google too. The absence of a tying claim in the DOJ lawsuit is significant.

Conclusion

The considerations that go into government antitrust enforcement decisions like these are complex. Google's considerations likely are more coordinated and better funded. Time will tell whether the divided approach works here, and how important of a priority it is for each government with different opinions to maintain them against the expense of complex antitrust litigation. At the moment, it seems some have chosen to spend more of their limited resources than usual to emphasize their different perspectives. ■

Patrick E. O'Shaughnessy *is a business litigator and principal at Bartko Zankel Bunzel & Miller in San Francisco. He previously served as an honors trial attorney in U.S. DOJ's Antitrust Division, and a senior assistant attorney general in state antitrust enforcement.*