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Violating the Sherman Act: Google's Illegal Monopoly

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The occasion sparked much in the way of visionary language and speculative musings. This month, one of the world's most conspicuous and dominant behemoths of Silicon Valley was found to be operating an illegal monopoly in internet search and advertising markets, thereby breaching the Sherman Act which renders monopolisation, attempted monopolisation and conspiracy to monopolise unlawful.

In a Memorandum Opinion ruling running into 286 pages, Judge Amit P. Mehta of the United States District Court for the District of Columbia found that Google acted as a monopoly in its "general search" and "general search text advertising" markets and had breached Section 2 of the Sherman Act by making exclusive dealing agreements with various vendors (Apple, Samsung, Verizon and so forth).

In doing so, Google's search engine was given exclusive default status on various platforms and devices, notably web browsers, wireless carriers and smartphone manufacturers. "These partners agree to install Google as the search engine that is delivered to the user right out of the box at key search access points." Through its "revenue share" operation, involving the payment of billions of dollars to its partners, "Google not only receives default placement at the key search access points, but its partners also agree not to preload any other general search engine on the device." Such a distribution system had forced Google's competitors to seek other means of reaching users.

The decision offers a chronology of how such monopoly developed. Initially, Google most likely reached the high summit of market supremacy through legal means, making its search product enviably singular. The problem here was Google's conduct in seeking to maintain that supremacy in the market, thereby foreclosing it to competitors.

The memorandum ruling is also valuable for revealing the tactical and strategic approach of the company in preserving its dominance, not to mention showing full self-awareness of that fact. Were such partners as Apple to develop their own search engine as the default in Safari, for instance, a fortune would be at stake.

The company also showed a sketchy practice to preserving evidence, indulgently destructive in the practice of deleting chat messages after 24 hours, unless the default setting was turned to "history on". According to arguments of the DOJ and the regulators, doing so revealed knowledge that Google's practices "were likely in violation of the antitrust laws and wanted to make proving that impossible." In Judge Mehta's words, "Any company that puts the onus on its employees to identify and preserve relevant evidence does so at its own peril. Google avoided sanctions in this case. It may not be so lucky with the next one."

Other practices included an extensive, overly indulgent misuse of attorney-client privilege by filling email communications with gratuitous references to the company's in-house legal team. Directions were also issued to employees to avoid using "certain antitrust buzzwords in their communications." A March 2011 presentation, "Antitrust Basics for Search Team," was blatant in instructing employees to avoid any reference to "markets", "market share" or "dominance," not to mention "scale" and "network effects". Best also avoid, according to the presentation, any "metaphors to wars or sports, winning or losing."

The exclusionary conduct engineered through Google's agreements was found by the Court to have had "three primary anticompetitive effects": market foreclosure, preventing rivals from achieving scale and diminishing the incentives of any rivals, including nascent challengers, to invest and innovate in general search.

Causation of such harm could be "inferred" in this case if the anticompetitive conduct in question reasonably appeared "capable of making a significant contribution to … maintaining monopoly power". There was no need for "but-for proof," something that made the task of the US Department of Justice that much easier. It followed that the company's "distribution agreements are exclusionary contracts that violate Section 2 because they ensure that half of all GSE [general search engine] users in the United States will receive Google as the preload default on all Apple and Android devices, as well as cause anticompetitive harm."

The saga is set to become even lengthier, given that no remedies have yet been identified. These, as Robert Milne and Edward Thrasher of White & Case explain, can vary in terms of severity and effect, ranging from prohibiting Google from entering into the exclusive agreements to privilege the default status of its search engine, to requiring the company to share data and relevant code with other competitors in the search market, to the more drastic breaking up of the company.

Google has announced that it will appeal the decision, and the commentary about how it could do so is already mushrooming. Geoffrey A. Manne, president of the International Center for Law and Economics, is one, offering a detailed overview about where Judge Mehta is said to have misread or misunderstood such concepts as proof of anticompetitive conduct.

Invariably, scribblers in the tech industry have seized the opportunity to wonder what the alternatives to a post-Google world – or one where the company is stripped of its monopolistic ascendancy – might look like. Natasha Lomas in *Techcrunch* writes dreamily that a web lacking Google's acquisitive, data-pinching domination, let alone existence, "is absolutely bigger than mere utility." This presented a chance "for different models of service delivery – ones that prioritize the interests of web users and the public infosphere – to achieve scale and thrive."

Broadly speaking, the Google decision can be said to nest in a range of recent efforts and undertakings by government regulators to conserve competition in the field of artificial intelligence (AI) and digital markets, a point made by the July 23, 2024 "Joint Statement on Competition in Generative AI Foundation Models and AI Products" from the US Department of Justice, the US Federal Trade Commission, the European Commission, and the United Kingdom's Competition and Markets Authority.

The regulators are mindful of potential attempts by firms “to restrict key inputs for the development of AI technologies,” entrench or extend existing market power in digital markets “in adjacent AI markets or across ecosystems, taking advantage of feedback and network effects to increase barriers to entry and harm competition,” create instances of monopsony power and develop and wield AI “in ways that harm consumers, entrepreneurs, or other market participants.”

Such talk is hardly novel. It peppers and haunts the incipient stages of the web’s existence: misty visions of the informed cybersphere; communities of engaged digital citizens rowdily if respectfully engaged in civil discourse. All of this done in defiance of policing measures and the suspicious eye of the authoritarian State. Eventually, techno utopianism is as faulty as any other variant of the unrealised idyll. The honey, milk and fruit always seem better on that side of the river, till the journey is made.

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