Why Google Can’t Criticize Ruling it is "Dominant and Anticompetitive"

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Why Google Can’t Criticize EU Much for Ruling it Dominant & Anticompetitive

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In the next several weeks, expect the EC’s Competition Directorate to decide that Google is in fact dominant with >90% share of Internet search in Europe and that Google has abused its search dominance by biasing its own Shopping service over competitors. It also could formally charge Google for abuse of its search dominance in contractually tying Google Search and other search-driven apps like Maps, YouTube, etc. to Android to extend its search dominance to mobile search and to the operating system market where Android now owns >80% share.

In taking a most extreme and ultimately indefensible legal and PR position, that the EU antitrust case is “*wrong as a matter of fact, law and economics*,” Google has painted itself into a corner, PR-wise and politically, much more than many appreciate. Why?

First, the U.S. DOJ has already officially found Google dominant in search/search-advertising — twice.

It will be very hard for Google to credibly argue that its >90% share of Internet search is not dominance when the EU legal threshold for dominance is just **~40%**.

It will also be hard for Google to get the USG to publicly pound the table on their behalf, because it is public knowledge that both the Bush DOJ and the Obama DOJ both officially found Google dominant after in-depth investigations.

The Bush DOJ determined in 2008: “*The Department’s investigation revealed that Internet search advertising and Internet search syndication are each relevant antitrust markets and that Google is by far the largest provider of such services, with shares of more than 70 percent in both markets*.” The Obama DOJ determined in 2010: “*…Google, the firm that now dominates these markets … [“Internet search and paid search advertising*”].”

Second, on a factual level, the FTC’s staff report on Google antitrust showed that both the FTC staff investigators, and even Google, viewed Google as dominant.

We learned from the inadvertent release of the FTC staff report that recommended an antitrust case against Google, that FTC investigators concluded that: "*Google is clearly the dominant provider of 'general' search services in the U.S.*" (p. 68).

The FTC also discovered an admission by Google's Chief Economist, Hal Varian, who stated: "*We're the dominant incumbent in the industry*" (footnote 547). In addition, the FTC uncovered email evidence Larry Page personally supported the search bias self-dealing that Google now denies: "*Larry [Page] thought product [Google's shopping service] should get more exposure*" (footnote 120).

Third, Google can't claim to be innocent victim of EU antitrust charges when it is obviously a rare serial antitrust recidivist.

In 2008, Google dropped its proposed Google-Yahoo Ad Agreement because the DOJthreatened a Section 1 & 2 monopolization case for trying to extend its >70% dominance of Internet search advertising and search syndication to a >90% share via the collusive proposal with Yahoo.

In 2009, the DOJ opposed the proposed Google Book Settlement as anticompetitive, and in 2011, a U.S. Court agreed and rejected the settlement as anti-competitive — a legal position by the way, that was officially supported by Germany and France in their opposition filings.

In 2010, the DOJ and Court prohibited Google and six other companies from continuing to engage is anticompetitive employee solicitation agreements.

In 2013, both the FTC and the EU settled with Google to prohibit it from continuing to anti-competitively abuse its Standard Essential Patent (SEP) portfolio, after the DOJ warnedGoogle to not do so when it approved Google's acquisition of Motorola.

Fourth, U.S. State AGs are asking the FTC for a new look at the Google antitrust case.

A recent bipartisan letter from the Attorney Generals of Utah and the District of Columbia said: "*We encourage the commission to consider new information and developments that have become available both domestically and internationally since closing its Google investigation*" per Bloomberg.

This is timely and significant because of the pending EU decisions on Google Search-bias and the Android-tying/app-bias investigation, and also because the Fifth Circuit Court of Appeals is expected to rule in the coming weeks against Google's Section 230 lawsuit claiming that state Attorney Generals have no law enforcement jurisdiction to investigate or prosecute Google for violation of state laws. 41 State AGs, including Utah and DC's, oppose Google's audacious claim of special legal immunity from state law enforcement.

Fifth, new Android mobile search financials spotlight Google's market power of tying search to Android.

We recently learned fromthe Oracle v. Google-Android copyright infringement case that Android enjoyed monopoly-size >70% gross profit margins in 2014. We just learned from Google's earnings, that Google's mobile search dominance also made Google most valuable company in the world.

Google's CEO Sundar Pichai said: "*Above all, our Q4 results show the great momentum and*

opportunity we have in mobile search…" Given what we now know from the Oracle 2014 Google-Android financials and Google's 2015 financials that exceeded revenue and profit expectations, Google Android probably now generates over a third of Google's revenues and over 40% of Google's profits. This is not normal competitive growth; this is anticompetitive Google-Android contractual tying in requiring Google Search to be the default and prominent search engine on Android devices – to drive dominance in mobile search.

Finally, neither Google nor the USG want to beg media or EU questions into why the USG is aggressively defending Google in public when the DOJ has previously found Google dominant and anticompetitive.

To the extent that Boss Google uses its influence machine to get the USG, FTC or the DOJ to publicly defend Google against the EU as not dominant, or as an innocent victim of the EU's antitrust charges, they will put the put the USG, FTC, and DOJ in the embarrassing position of answering logical public accountability questions it does not want asked.

Like why is Google allowed to create at least the perception of a conflict of interest by enthroning so many of its former employees or consultants in so many Federal Government positions of commercial importance to Google?

Why did the DOJ not require Google to fully comply with the requirements in its $500m criminal forfeiture, Non-Prosecution Agreement, when Google broke five laws during the probation period?

Why did the FTC shut down the Google antitrust investigation abruptly over the advice of the FTC's professional investigators, and why did the FTC put out a press release defending Google at Google's behest?

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This article was originally published in the Precursor Blog.

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