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PERSPECTIVE

Google likely to lose if sued by US for antitrust violation

By Patrick E. O'Shaughnessy

Press reports suggest that the United States and nearly every state are in the midst of putting the finishing touches on their collective plan to sue Google for allegedly violating Sherman Act Section 2. Section 2 cases are very rare. The U.S. Department of Justice (DOJ), which splits federal enforcement of Section 2 with the U.S. Federal Trade Commission (FTC), would lead the potential lawsuit against Google.



New York Times News Service

The Google campus in Mountain View, California.

Which Enforcement Agency Got the Case Matters

DOJ reports in its current 10-year workload statistics that it filed exactly one Section 2 case from 2009 to 2018. The agency's 10-year workload statistics report from 2000 to 2009 shows it filed no Section 2 cases in the 2000s. The FTC filed more Section 2 lawsuits than DOJ over the last 20 years. It also has evaluated recently whether to file a Section 2 lawsuit against Google. One might think it makes more sense for the FTC to handle the pending evaluation of a lawsuit against, and possible prosecution of, Google for Section 2 violations.

But that is not what happened. This case went to DOJ instead, and there are important differences between the two agencies that

will help explain the federal government's analysis and actions this time around. How the agencies are run is one key difference. The FTC is run by its five Commissioners, who are nominated by the President and confirmed by the Senate. Rules prohibit more than three Commissioners from the same political party.

DOJ is run by just the Attorney General, who is nominated by the President and confirmed by the Senate. Attorneys General delegate most of the Department's decisions about initiating litigation to other political and career attorneys within DOJ. But the Attorney General retains the authority to make key decisions for the United States, such as in this instance whether to sue Google, even if other political and career attorneys within

DOJ disagree with the decision.

Another key difference is precedent. When the FTC considered whether to file a similar lawsuit against Google recently, it chose not to. The FTC's analysis of how to handle Google this time around may have been influenced heavily by how it handled Google issues the last time around. DOJ is not inhibited by internal FTC precedent on this go around.

That said, DOJ's career prosecutors, in particular, do pay close attention to the learning from prior cases brought and not brought. That learning often develops through non-public analyses and results that are not published. And it is really important in understanding how DOJ might proceed with an antitrust case against Google.

Certain Public Information About Internal DOJ

Precedent Suggests

What It Might Do

Many who have written about the prospective Google lawsuit have focused on the published case law involving DOJ. Consequently, many believe DOJ will approach its evaluation of the Google case in a way that closely tracks what it did in its last major Section 2 case, against Microsoft. But, that was in the 1990s. DOJ had different leaders and mostly different staff then.

Indeed, DOJ's workload statistics report from the 1990s reveals it filed nine Section 2 cases from 1990 to 1999 versus its average of about 0.5 per decade since. Further, in the 1990s, DOJ initiated 106 formal evaluations of Section 2 cases. DOJ appeared to change course in the 2000s, initiating

just 34 formal Section 2 case evaluations. And, from 2010 to 2018 (excluding 2009 to avoid double-counting), DOJ initiated just 12 formal Section 2 case evaluations.

While the downward trend in Section 2 formal case evaluations and cases filed is significant, the ratio of case evaluations to cases filed is “V shaped” and arguably significant too. Grouping the apparently soon-to-be-filed Google case with the current 10-year workload statistics, that ratio would have gone from about 12:1 in the 1990s, down to 34:0 in the 2000s, and up to about 6:1 more recently. Arguably, DOJ is twice as likely to sue following a formal Section 2 case evaluation in recent years than it was in the 1990s.

Lessons Likely Learned

These Section 2 workload statistics probably reflect important lessons learned from DOJ’s experience with Microsoft. That case evaluation concluded with a lawsuit in 1998. The case led to a DOJ Trial Court win in 2000. However, the win was followed by appeals and a 2001 settlement, then several years

of monitoring. The experience likely reinforced within DOJ that Section 2 cases are expensive and time consuming on a day-to-day resource allocation basis; and, in the end, they may not accomplish as much as DOJ’s leaders and staff had hoped when they started. The opportunity costs of a major Section 2 lawsuit against Google are high, and may outweigh its result even if DOJ “wins.”

Although DOJ’s Attorney General ultimately gets the final say and can influence the direction of the agency’s antitrust enforcement, the institution and its career attorneys have significant influence over its course too. The radical drop in Section 2 case evaluations from 106 to 34 to 12 over three decades, and an entire decade following the Microsoft case with no Section 2 lawsuits filed at all, suggest DOJ may have developed some strong opinions institutionally about the costs and benefits of Section 2 lawsuits and when to bring them.

If DOJ Is Going to Go There, It Very Likely Will Not Come Up Short

Other important public

information that helps explain what is going on with the apparently soon-to-be-filed Google lawsuit includes the Antitrust Division’s winning percentage in Court on civil antitrust cases. The most recent 10-year statistics report tallies 143 DOJ wins to just one loss on this metric. DOJ’s civil antitrust enforcement record in the 2000s was “worse,” with 129 wins and four losses. In the 1990s, DOJ won 161 civil antitrust cases and lost eight. Arguably DOJ, as an institution, was so disappointed with its mere 95% success rate in Court in the 1990s that it pushed that rate to 97% in the 2000s, and then past 99% in the most recent ten years recorded.

Conclusions

So what does all of this mean for Google? First, DOJ got the case not the FTC. The Attorney General can sue Google if he wants to. By all accounts, it looks like he wants to and soon. Second, DOJ as an institution likely has learned to be extraordinarily picky on Section 2 cases. It looks for the most promising cases to evaluate, and picks only the very best of that small group

to bring to Court. Third, and finally, DOJ’s generally careful case selection and track record in Court suggests that, if it sues, Google likely will lose.

The potential fly in the ointment for DOJ is whether it has had adequate time to prepare its case. If it has, then positive results are much more likely; but, public reports indicate that a number of career DOJ lawyers feel DOJ needs more time. If accurate, this could have an effect on the outcome. ■

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