FTC should drop case against Google

By Thomas Lenard

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A decision on whether to bring a potentially historic antitrust case against Google is imminent, and the Federal Trade Commission will be judged, for better or worse, on what it decides.

At a recent Technology Policy Institute conference, former FTC Chairman William Kovacic lamented that antitrust agencies are too often evaluated on the number of cases they bring — especially big cases — which he analogized to evaluating airlines on the basis of departures rather than arrivals. "You are whom you sue," Kovacic suggested, is not a meaningful measure of agency performance. A better measure is whether the suits yield benefits for consumers.

After investigating for more than a year, and with the European Union already in settlement talks, the FTC may find it difficult to drop the Google case. But that's what responsible agencies do when the evidence is lacking and no possible remedy is likely to benefit consumers. Just because the FTC may be able to claim a scalp doesn't mean it should.

The principal complaint against Google is inextricably intertwined with Google's attempts to innovate and better serve its users by directly answering their queries rather than simply referring users to other sites. For example, when users search for travel information, Google now provides a list of the best flights in addition to links to other travel sites. Bing, Microsoft's search engine, provides similar information in its search results.

Despite the fact that consumers have welcomed this practice, it is the basis for the allegation that Google favors its own content and that its searches are "biased." This complaint comes principally from Google's competitors in specialized search. In a recent op-ed, for example, Jeffrey Katz, CEO of price-comparison site Nextag, complained that Google promotes its "less relevant and inferior" service instead of Nextag's, which Katz asserts is "better." Katz wants Google to work "the way it used to work," which presumably means going back to showing 10 blue links. That is clearly not a recipe for innovation.

Although antitrust should focus on consumers and not competitors, it should be noted that specialty search sites like Kayak and Yelp have been doing very well and have had successful IPOs, even as they complain to the FTC about Google's supposedly anticompetitive practices. (Nextag is not a public company, so details about its finances are not available.)

Normally, an agency will pursue a monopolization case only with unambiguous evidence that the company is in fact a monopoly. The evidence was quite strong with Microsoft. But 2012 is not the world of Microsoft, circa 1998. Technological leadership in the Internet ecosystem is now shared among a number of firms — Google, Facebook, Apple, Amazon, Microsoft and others — who compete in multiple areas, including search, social networking and advertising. Other players, including Internet service providers, also compete for their slice of the consumer dollar.

Antitrust, especially as it applies to the rapidly changing technology sector, is far from an exact science. The technology sector is characterized not only by product innovation but also by innovation in business models. Because the economics of this sector are complex, these new business models are often difficult to understand and vulnerable to charges that they are anticompetitive when in fact they are not.

The biggest challenge in the Microsoft case was not proving that Microsoft was a monopoly, but in devising remedies that would yield more good than harm. Setting aside the specious claims of an

anticompetitive Google monopoly, it is even more difficult to imagine a remedy that would benefit consumers. Virtually any conceivable remedy would constrain Google's ability to improve its search results and vigorously compete in emerging interplatform markets. Such constraints would not serve consumers. Moreover, any remedy would need to stand the test of time as conditions change since most remedies are in effect for a minimum of five years and often longer. That's a long time in the Internet world.

Antitrust agencies should, therefore, show humility. Before proceeding, they should have a high degree of confidence not only that the target of their investigation is engaged in significant anticompetitive behavior but also that they can devise a remedy that will make consumers better off and not inhibit innovation. The FTC can't make either claim and therefore should pass on this one.

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