

Nov. 12, 2023 — Prof. Tom Jorde

Antitrust and Big Tech



ANTITRUST AND BIG TECH

- **INTRODUCTION**

1. How we got here today

- Last year Symposium
- In the news - several big government cases

2. **Big Tech 5 firm capitalization**

- (2 of top 3, 5 out of 7 top global firms)
- #1 Apple: \$2.7T
- #2 Microsoft: \$2.4T
- #4 Google: \$1.7T
- # 5 Amazon: \$1.35T
- # 7 Facebook: \$790B
 - Total: \$7.24 Trillion
 - [#3 Saudi Arabian Oil: \$2.2T]
 - [#6 Nvidia: \$1.1T]

3. **Concerns about Big Tech**

- Different groups emphasize different harms.
 - **Progressives** complain that the firms exercise excessive political power, hurt small businesses and workers, threaten privacy, spread misinformation, and exacerbate wealth inequality.
 - **Conservatives** contend that the firms are biased against their values and wrongly censor their speech.

- **Antitrust is not the right vehicle** for addressing concerns about privacy, excessive political influence, wealth inequality, regulation of speech and disinformation.
- **AT laws were designed to protect consumers** by focussing on competition in the market place, which in turn would generate low prices, product choices, and innovation
- **Today we will focus on antitrust and big tech**
- **First, a primer on antitrust law**

- **ANTITRUST LAW OVERVIEW**

1. **Monopoly** (Sherman Act 1890)

- Is a firm a monopolist, and if so, is it using its monopoly position to harm consumers or dampen innovation?
- **Market power** in a relevant markets (60%+)
- Monopoly share is not illegal in US if legally acquired
- **Behavior**
 - Even is monopoly share is legally acquired, the firm cannot use it's power to harm competitors or maintain its power
 - But there are efficiency reasons that benefit consumers with better products or lower prices
 - Beware speculative projections of consumer harm
 - Current enforcement assumption is that it is “pro-competitive” to insist that all large platforms are as open and neutral between users and businesses as possible, and that so- called vertical restraints—instances where platforms bundle, tie, or self- preference their own products within their platform or marketplace—are inherently damaging to consumers.
- **Experts are critical for testimony and analysis**

- **Relief**

- **Break up** the firm and/or **alter the behavior**
 - Note: Risk that overzealous antitrust enforcement can chill the development of products or services that would have raised consumer welfare
- Cases can take between **5-10 years** (ATT, Microsoft)
 - Note: Markets are likely to look very different by the time relief confirmed. This is especially true in tech markets where innovation continues at rapid pace. Example: ChatGPT AI

2. **Restraint of trade** (Sherman Act 1890)

- Price fixing or market division agreements between firms: not an issue here
 - **Relief:** injunctive relief and fines for government suits; treble damages for private actions

3. **Mergers (Clayton Act 1917)**

- **Mergers (Clayton Act 1914 - FTC):** If a firm is proposing a merger with another firm in the tech industry, will the merger cause potential harms to consumers or innovation, and therefore should be blocked?
- **Merger GLs:** Greater than 30% share and/or causes highly concentrated market post merger
 - Experts critical
- **Relief:** block the merger
 - Note: mergers should be scrutinized because relief is easy. After a merger, it is harder to unscramble the eggs later if the larger, post-merger firm behaves anticompetitively.
 - On the other hand, we don't want to over inhibit mergers, because they can be the source of great efficiencies that will benefit consumers or future innovation. Difficult, but important balance.

4. **Enforcement** possibilities: DOJ, FTC, State Atty Gen's, private suits for treble damage

- **ANTITRUST CASES AGAINST BIG TECH**

1. There are cases against all the Big Tech 5, but we will **focus** for the remainder of the session on **Amazon** and **Google**, which involve claims of monopolization
2. Time permitting I can fill in details about the others cases in the Q&A

- **FTC v. AMAZON (Sept. 2023)**

1. History: Success of business model

- Jeff Bezos started out as a book seller 1994. Built incredible infrastructure over time, that now includes the most sophisticated online market place and warehousing and delivery system on the planet.
- Provides consumers free product cataloging and product search
 - 66% for all product search begins at Amazon , even if consumer intends too to buy at store
- Price ranking
- 12 million products on the platform from 9.5 million sellers; 200 million buyer per month with 90% satisfaction rating
- 78% favorable rating from the public; #1 and ahead of US Military #2 (Google is #3)

2. **FTC alleges Amazon is a monopolist and uses its market power exclude current and potential competitors, which in turn harms consumers**

- **Market power?**

- 80-90% of online “SuperStore” market
- Amazon will try to broaden market to include all e-commerce = 40% market share
- FTC prevails with SuperStore definition, but loses with e-commerce definition - court must decide. Experts will be key
- Nothing wrong with monopoly power in US if legitimately acquired because products are desirable

- **Anticompetitive behavior?**

- Challenge Buy Now Button and Prime Ck~
- **[Slide]**

3. Buy Now Button

- Q: How many shop Amazon and use the Buy Now Button?
 - The BNB = Default payment method and default shipping address
 - Very important because of convenience
- A seller can get the Buy Now Button only so long as it does not offer the same product at a lower price on some other website or store (discounts).
- Important because
 - Amazon scours the internet to check.
 - First a warning to lower Amazon price too, or drop the lower price elsewhere
 - Loss of the button means great loss of sales = 90%, even though still listed in “additional seller” category, because most people do not check this list
- **Amazon’s defense:** Important because Amazon promises lowest price for these items, so consumers do not need to search elsewhere

- **Prediction: Amazon will lose IF** courts finds it has monopoly power, because this practice **involves price**, and does harm potential entry and growth from a competitor
 - In addition, Amazon can cause prices to be raised across the board if Amazon raises its costs to sellers, because that now higher price must become the base price!

4. Prime Ck Mark

- **Q: How many are Prime Members** (160M in US and 200M world wide!) -
 - Cost \$139 annual
 - Amazing how fast delivery can be today
 - Also other Prime benefits such as video, music
- **Prime check mark means** that the product will arrive in 1-2 days! Incredible, but because of Amazon buildout of infrastructure. Critical to Prime members
- **How to get the Ck?** Either use **FBA** Fulfillment by Amazon or prove that your alternative shipping method will meet the same standard
- **FTC claims this coerces sellers** to use more expensive shipping than they would like and means that alternative shippers cannot grow because Amazon locks up such a vast number of sellers.

- **Amazon's defense:** Heart of Prime business: efficiency basis and pro-consumer. Can't afford reputation loss. Seller has alternatives.
- **Prediction: FTC will lose**
 - The Prime check is a guarantee that seller will meet Prime requirements.
 - Sellers still have alternative of Prime Ck by self shipping within 1-2 days
 - Alternatively, seller can be on alternative seller list; not off the platform
 - This **lawsuit will take years** to go through trial and appeals.
- [There are also allegations of self-preferencing Amazon brand; and bias, and excessive fees to sellers]

- **DOJ v. GOOGLE**

- Synonymous with search: “Google that!”
 - How many use? How often?
 - There are 8.5 billion searches per day!
 - #3 in admired list

1. **DOJ alleges G is a monopolist**

The lawsuit, first filed Oct. 20, 2020, alleges the tech giant unlawfully maintained a monopoly for its search business by forming partnerships with device manufacturers and internet browsers to use its search engine as the product's default option.

- **Market Power?**

- DOJ: 90%+ share of search mobile devices
 - Bing (3%) + Yahoo (1.7%, uses Bing) = 5%; Duck Duck Go (0.3%)
- Google will argue that it competes with other types of search, e.g. Walmart, but that won't fly
- AI new search - true, but probably not enough, especially since Google already into AI search
- Clearly market power in on-line search

- **Anticompetitive harm?**

- DOJ: Google makes \$\$ payments to phone makers and operating system developers and wireless carriers to make Google Search the exclusive Default Search Engine
 - Total of \$30B, estimate \$20MB going to Apple (= 30% OS market)
 - Android OS = 70% OS was developed by Google and Google Search is default
 - Opera OS (3%) and Firefox (3%) OS also use Google
 - Edge is MS's OS and default is Bing - 5%, but customers switch to Google!
- Google bundles search with its Android OS (=70% market share)
- **DOJ argues** this practice harms actual and potential competitors by depriving them of the opportunity to grow their search engines to scale to compete effectively with Google; which in turn deprives consumers choice
 - Bing (3%) + Yahoo (1.7%, uses Bing) = 5%; Duck Duck Go (0.3%)
 - Apple is being paid off to not create its own search engine

2. Google's defense:

- **Google is sharing advertising revenue** with its partners, which they demand
 - \$160B annual ad revenue from search (66% total)
 - Sharing only \$30B!
 - It helps partners **lower their prices**
 - Apple payment = 5% total revenue
 - Note: Google is in the business of selling eyeballs!
- **Microsoft/Bing has the resources to complete**
 - Cash = \$144B!
 - Note: Microsoft Windows is the dominant Operating System for PCs = 70% global share. And Windows has Bing as its default search engine. 3% search market share, because people switch to Google!
 - [G is big because it is better, or G is better because it is big, and anticompetitive practices led to size]
- **Google search is the best:** it has gained market share because it is superior and consumers recognize that.
- **Easy to switch** from default — a couple of clicks

3. Predictions

- Difficult case
- DOJ may win initially, but ultimately will lose on appeal
- **Relief will not be structural** - hard to imagine what would that look like?
- **Alter behavior:** Require opening screen for phone or device to have choices among several Search Engines
 - Google, Bing, Duck Duck Go
 - People will choose Google because best
 - This relief would copy EU suit and relief
 - EU required choice on opening screens and 93% choose Google! (Up from 90%, probably because better data now)
- **Pyrrhic victory**
 - Consumers will choose Google search
 - Apple and others will lose \$\$, which Google will keep

- **REGULATORY ALTERNATIVES**

- **EU enforcement**, with lower thresholds for action

- **DIGITAL CONSUMER PROTECTION COMMISSION ACT (2023)**

- Bi-partisan legislation introduced by Elizabeth Warren and Lindsey Graham - strange bedfellows, but both liberals and conservatives have objections to Big Tech
- Digital Consumer Protection Agency
 - Concurrent jurisdiction with DOJ and FTC
 - Addresses: Transparency, privacy, national security,
 - Requires platforms to register and be licensed
 - Enforcement alternatives are rich
 - Antitrust competition policy additions
 - Overlap with existing laws
 - Adds new standard called “the public interest” —whatever that means — for evaluating conduct and mergers
 - Relief can include break up of firms

- **Comment/Prediction:**

QUESTIONS

- **Audience Questions**
- **Other big tech law suits**
 - Facebook (Nov. 2021)
 - FTC - monopolization from prior mergers that were already approved: WhatsApp and Instagram. These acquisitions were 10 years ago. The F.T.C. argues in its suit that Facebook obtained a monopoly in social networking and maintained it illegally by acquiring rivals. The lawsuit focuses on the company's acquisitions of Instagram for \$1 billion in 2012 and WhatsApp for \$19 billion in 2014.
 - Oct. 24 lawsuit by 33 States Atty Gen. Against META for Facebook/Instagram harmful effects on children.

- Apple (April 2023)
 - FTC - closed App Store - upheld. The Ninth Circuit Court of Appeals found that Apple's closed App Store and security restrictions didn't violate antitrust law
 - Epic Games/Fortnite had tried to get around Apple 15-30% fees for app purchase
 - BUT that Apple couldn't maintain anti-steering rules that prevent users from learning about alternate payment options. Apple's own payment system charges 30%.
- Microsoft
 - Prior suit was 25 years ago - 10 years to resolve. Monopolization: MS has monopoly power in operating system Windows and bundles Office software w/Windows
 - 2022 FTC challenged \$69B acquisition of Activision game software.
 - 2023 FTC lost and EU approved. MS argued it was going to be #3 and trying to increase competition. Agreed that other platforms could continue to have Call of Duty.

- DOJ v. Google re advertising - separate suit