Revisiting FTC's 2013 Google Decision

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Much noise has been made over the US FTC's 2013 decision not to pursue charges against Google. A recent release of the full file has fueled this further, feeding into a general frustration over Big Tech and perceived enforcement deficits. However, most of the FTC file has been available since 2015, and but for a failure to look into Android, it has aged well. The FTC's decision rested on a careful evaluation of the prospect of prevailing in a court case, and devoid of this, how the best possible settlement could be secured.

Following recommendations from members of the U.S Senate, the U.S. Federal Trade Commission ("FTC") opened in the first half of 2012 formal investigations into Google's conduct focusing on four concerns: (i) whether Google gave preferential placement to its own content while demoting competitors' content, (ii) whether Google used data obtained without compensation from third party websites, a practice called "scraping,", (iii) whether Google imposed contractual restrictions on the AdWords for the purpose of foreclosing its advertisers' use of other search engines and (iv) whether Google tied owners of websites to them when it came to online advertisements. In sum, all practices directed at protecting the crown-jewel Google Search platform and the (substantial) online advertising revenue derived from it.

In January 2013, the FTC terminated its investigation without filing a complaint against Google for alleged search bias, but it did extract from Google voluntary commitments, over a period of five years, to allow rival websites to prevent Google from scraping and displaying their content, and to remove Google's restrictions on the use of its AdWords advertising platform. The latter hindered the ability of its advertisers to coordinate online campaigns across multiple platforms and search engines. In terms of website publishers, further investigations had indicated the question of exclusivity rested on a misunderstanding. Unfortunately, FTC's closing statement was a mere four pages, which, at the time, made it difficult to fully evaluate the Commission's reasoning for closing the file.

A FTC memo was accidentally released in 2015 and 2021

As it happens, however, an internal FTC memorandum was accidentally released to the public in 2015 in the form of every other page, providing insight into FTC's line of reasoning. From this leaked staff attorney memo, it followed that the staff attorneys regarded Google's conduct as detrimental to the interests of consumers ultimately impeding innovation in the online search and advertising markets. The memorandum even described real and substantial harm to Google's competitors. It is this memo, including some additional agency memos, that now in 2021 has been made available in full, not only fueling the critique of the FTC but also allowing for a revisit of the FTC's decision with the benefit of hindsight.

FTC market definition and evaluation of search bias

The FTC's investigation was narrowly focused on the ranking of the websites displayed in general search results, which the FTC recognized could be provided by two different types of search engines. "Horizontal," or general-purpose, search engines, such as Google, attempt to cover the Internet as completely as possible. Specialized, or "vertical," search engines focus on narrowly defined categories of content, such as shopping or travel. However, Google had introduced a *Universal Search* service, which displays vertical search results, along with horizontal search results, in response to a general search query, blurring the line between "vertical" and "horizontal" without eliminating the line completely.

In terms of the search bias, the investigation evaluated two categories of potential misconduct, (i) the prominent display of Google-affiliated services in a separate box in response to a general search query, and, (ii) the design or alteration of Google's search algorithm to demote the ranking of certain non-affiliated vertical websites so they appear further down the search results page. Thus, the FTC had to determine whether Google's policies had the purpose of excluding actual or potential competition or instead were intended to improve the quality of its search results and the overall quality of its users' experience. After a careful review of an apparently substantial evidentiary record, the FTC opted for the latter. In essence, the FTC concluded that the loss of traffic by some of Google's rivals was not the by-product of anticompetitive conduct, but the outcome of "competition on the merits," exonerating Google for infringing antitrust laws. Moreover, Google also voluntarily committed to allowing providers of websites to opt-out of certain Google search offerings without being removed completely and to remove restrictions on the use of its online advertising platform.

A potential monopolization case

The memorandum shows that the staff regarded scraping and the use of exclusionary arrangements as potential violations of the anti-monopolization provision in Section 2 of the Sherman Act, but they did not view the allegations of search bias in the same light. This was in spite of evidence that Google engaged in deliberately biased search results and that Google's *Universal Search* services benefitted from embedded policies. e.g., exclusive rights to certain images, better positioning its services in the generic search results and excusing itself from the usual "click-through rate" ranking criteria. Demoting rival sites, moreover, even may have involved the sacrifice of short-term profits, because it depressed revenue from paid advertising. None of this, however, was apparently enough to support the bringing of a case against Google for allegedly biased and self-serving search results. Further, the FTC viewed Google in 2012 as dominant in general search, with a 71% market share. But, it is deeply ingrained in U.S. monopolization law that the mere possession of monopoly power is not unlawful unless it is accompanied by an element of anticompetitive conduct. In contrast to the European Union ("EU"), and many other jurisdictions, that recognize an offence of abuse of monopoly, current U.S. law does not consider it unlawful to "exploit" a monopoly, so long as the monopoly in question has not been gained, or is not being maintained or expanded, in any unlawful way.

The staff clearly had mixed feelings about moving forward on Section 2 monopolization grounds and even compiled a compendium on perceived litigation risks, including questions about whether Google's monopoly power was durable, how *Universal Search* was "product improvement" that benefitted consumers and case law at best was inconclusive, and at worst, unsupportive for the prospect of winning a case. Further, in a separate economic memo, it was even concluded that a careful analysis of market data did not indicate the bias as having a foreclosure effect and was actually beneficial to users.

Could the FTC have prevailed in a case against Google search

Following the recent publication of the full FTC file, many have voiced the opinion that it was a mistake or a missed opportunity, and that the FTC failed to act against the search bias. However, this rests on the assumption that the FTC could have prevailed in court and ignores how pessimistic the staff was on the prospect of this in 2012. Further, the EU in its parallel investigation indicated its intention of closing the case against commitments in 2012, presumably motivating the FTC to follow suit. Granted, the EU eventually adopted a formal decision in 2017, but not before the appointment of a new chief enforcer, five years of investigations and adjustment of the theory of harm from search bias to self-favouring. A self-favouring where users are directing to products that Google markets, against a commission, on its Comparison Shopping marketplace questioning the user benefits.

Equally important is that the EU when acting against abusive behaviour, is not required to prove anticompetitive effects. It is sufficient if foreclosure might occur in the long-run. Nevertheless, the EU, in contrast to the FTC, managed to indicate how the bias moved market shares, however, not before an additional five years of investigations. Regardless of doling out fines in the billions and ordering Google to stop its abuse, it is not even obvious that the EU has managed to secure adequate remedies effectively stopping the embedded abuse. Strong voices claim Google is still acting abusively. While not decisive, the ability to close a case effectively will unavoidably shape the decision to open it in the first place.

Finally, while not expressed directly in the FTC file, the opening of investigations put Google under duress to offer commitments. Having concluded the core of the case to be weak, but not having conveyed this to Google in detail, the FTC had in 2012 some leverage to resolve the case in what looked like an acceptable manner.

Revisiting the full FTC file

As already indicated, the publication of the full FTC file has not added anything new but for two exceptions.

First, it appears that the FTC also has issues with Google's behaviour with respect to Android, which is the operating system for Android Mobile Phones. Google licenses this for free, subject to pre-installation requirements, such as, the Google Search engine, thus securing this as the dominant choice across different search platforms (desktop, mobile, and tablets). Google appears early to have understood how a market migration to mobile-based searches represented a long-term risk for its search monopoly, explaining why both the FTC and EU took interest. However, only the latter ended up acting against this in the form of EU's Google Android Decision from 2018, begging the question of why the FTC did not insist the matter to be included in the voluntary commitments.

A second novel element warranting comments is the separate economic analysis now available for review. Here it was concluded that market data did not indicate the search bias as having a foreclosure effect by virtue of significantly reduced visibility. However, six years later, the EU managed to establish this. It remains unclear if the EU benefitted from the use of longer time sequences, additional data or a different approach.