Insight

Yelp v. Google: An AICOA Case Study

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Executive Summary

- After the Department of Justice successfully proved in court that Google had monopoly power in online search, review website Yelp sued Google, arguing that it had illegally preferenced its own local search products at the expense of rivals.
- Self-preferencing has largely not been considered by courts to violate the antitrust laws, and thus companies such as Yelp have supported the American Innovation and Choice Online Act (AICOA), a bill that would outlaw self-preferencing by large technology platforms.
- Yelp's case against Google demonstrates the extent to which AICOA would change antitrust law, although it is not likely that such a change in the law is necessary to protect competition and consumers.

Introduction

In late August, Yelp filed an antitrust lawsuit alleging Google illegally preferenced its own local search products at the expense of Yelp and other local search engines. Notably, the case came in the wake of the Department of Justice's successful lawsuit in which the U.S. District Court for the District of Columbia found Google had illegally maintained its monopoly in general search, raising concerns about Google's search practices.

Yelp and other applications that operate on platforms like Google – in which the company both controls the underlying marketplace and participates in that marketplace – have long complained about self-preferencing practices, but current law largely allows firms to preference their own products, subject to some exceptions. Congress has, over the past few years, considered legislation such as the American Innovation and Choice Online Act (AICOA) to amend current antitrust standards, eliminating requirements about market power and declaring self-preferencing an anticompetitive practice.

Yelp's case against Google demonstrates the extent to which AICOA would change antitrust law, although it is not likely that such a change in the law is necessary to protect competition and consumers. In fact, current law allows for a deep examination of the specific markets and the conduct at issue, and if the conduct harms competition, courts can find that such conduct is violative of the Sherman Act.

Yelp's Self-preferencing Claims

Yelp brought its lawsuit against Google largely alleging a violation of Section 2 of the Sherman Act, which prohibits the illegal monopolization of a market. To succeed on a Section 2 illegal monopolization claim, a plaintiff must show two elements: 1) that the defendant had monopoly power in a relevant market, and 2) that the firm illegally acquired or maintained that monopoly power using anticompetitive means. While Yelp alleges a few different theories in the case, this paper focuses on the claim that Google is using monopoly power in the general search market to self-preference local search offerings at the expense of rivals such as Yelp.

Element 1: Monopoly Power

First, Yelp must show that Google has monopoly power in a relevant market. For the type of conduct at issue in this case, Yelp would likely need to show that Google both has monopoly power in the general search market and uses that monopoly power to attempt to monopolize the more specific local search market.

The timing of this lawsuit is not a coincidence. In July, the DOJ won its case arguing that Google had illegally monopolized the general search market through the use of default search engine agreements with browsers and smartphone manufacturers. While that specific conduct isn't at issue here, Yelp will almost certainly point to the finding that Google does, in fact, have monopoly power in general search. This provides Yelp with a strong foundation for its case, and if a court accepts Yelp's argument, Yelp would simply need to show either that Google has monopoly power in the local search market or that Google has sufficient market power to pose a dangerous probability of monopolizing that market.

Yelp's case isn't clear cut, however. First, the decision in the DOJ case is not binding here because Yelp is suing in a different jurisdiction, though a district court opinion from another jurisdiction may be a persuasive authority. Even if the judge in the Yelp case defers to the D.C. decision, the D.C. decision largely dismissed arguments about generative AI being a viable alternative to the traditional search engine because, at the time of discovery, the technology didn't exist commercially. Within the past two years, tools that offer similar search functionality such as ChatGPT have grown significantly, providing an alternative to Google's general search product and restricting Google's ability to act as a monopolist. Second, Google will undoubtedly argue that local search is not distinct from general search.

Element 2: Anticompetitive Conduct

In addition to monopoly power, Yelp will need to show that Google could acquire that monopoly power in the local search market through "willful acquisition…as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

At the core of the complaint, Yelp alleges that

> "Google has degraded quality, demoted rivals, and grown its monopoly power by (1) inserting Google's own vertical search results at the top of its horizontal search results page to divert user attention away from organic search results and (2) excluding rivals and their vertical content from that prime placement in the vertical search sections that populate the top of the [search engine results page]."

This argument relies on what is known as "self-preferencing," a legal theory that has become popular in European competition law in recent years, but is largely dismissed by U.S. courts. Courts in the United States have found that even firms with monopoly power generally have no duty to deal with their rivals, as firms

should be able to choose how they offer their products and services to better compete on the merits. Some tying arrangements can violate the law, but tying arguments generally require a firm to tie the purchase of a product in a market in which the firm has monopoly power to the purchase of a product in another market in which the firm does not have monopoly power. Yet as antitrust scholar Herbert Hovenkamp has explained, these types of tying agreements do not usually reach mere preferential ordering of goods that falls short of prohibitions on dealing.

The reason courts generally don't recognize self-preferencing as a viable theory of harm under the law is because firms use these displays to compete on the merits. If a customer searches for "best local lunch spots near me," for example, Yelp would still be the top general search result on the website, though Google Places appears at the top of the result with a direct list of restaurants, their reviews, and their locations. Google, by incorporating its own vertical products, provides the user with immediate suggestions to the question, a tool to see how individuals rate the restaurants, and a map to see how far away they are. And if users want a more detailed local search option, they can simply click on the Yelp link right below the vertical offerings.

Courts tend to prefer to give firms freedom to design their products as they see fit, largely due to concerns that mandating specific designs could negatively affect competition and consumers.

AICOA in an Alternate Universe

The American Innovation and Choice Online Act specifically targets the kind of conduct at issue here. First, the bill would designate large technology platforms like Google as covered platforms. Second, the bill would make it illegal to "preference the products, services, or lines of business of the covered platform operator over those of another business user on the covered platform in a manner that would materially harm competition," along with a variety of other restrictions on harming smaller competitors.

Under AICOA, a case against Google would more likely succeed, though it would still present challenges.

First, and most important, Yelp couldn't bring the case directly under the law, as AICOA would require the Department of Justice, the Federal Trade Commission, or a state attorney general to bring a claim. Yelp could still bring private litigation, and perhaps having this law on the books may persuade courts to recognize a self-preferencing claim, but it would not be able to bring an AICOA claim.

Second, under AICOA, a plaintiff could largely ignore any discussion of monopoly power. Monopoly power is difficult to demonstrate, and it is extremely costly to adjudicate at trial for all parties involved. It is, however, a critical part to the competition analysis: If a firm lacks the power to profitably raise prices or exclude rivals, it is unlikely that the firm's behavior would harm competition regardless of how it acts, as alternatives exist and business would go elsewhere. Instead, under AICOA, Google would essentially already be found to have that power, forgoing any analysis of market structure and restrictions on behavior, and would hold instead that the firm is large enough for the courts to be concerned.

Third, AICOA specifically prohibits self-preferencing, a theory largely not recognized by courts in the United States as described above. Though the legislation includes language about materially harming competition, courts would have flexibility in interpreting that provision. It could simply be a rule of reason analysis in which the court weighs the procompetitive justifications against the anticompetitive harms, but it could also mean that there is some harm to the competitive process, regardless of whether there are procompetitive justifications or even on the net a benefit to competition.

Similarly, the legislation would allow defendants to argue an affirmative defense that the conduct was "reasonably tailored and reasonably necessary…to maintain or substantially enhance the core functionality of the covered platform," but affirmative defenses mean that the defendant has already been found in violation of the law and have the burden of proving by a preponderance of the evidence that the defense applies. In other words, it would be up to the defendant to prove that that the conduct was reasonably tailored and reasonably necessary. This is similar to the burden-shifting analysis under the current anticompetitive conduct element of Section 2 claims – but by requiring the defendant prove that the conduct would "substantially" enhance the core functionality of a product, a firm like Google would have a more difficult time arguing the procompetitive case for conduct that led to vertical integration.

Conclusion

Self-preferencing claims under the Sherman Act are currently difficult to prove in court, largely because of the complex market analysis and the procompetitive justifications for allowing firms to design their products as they see fit. Under AICOA, much of this analysis would be foregone, increasing the likelihood that conduct such as vertically integrating a local search product into a general search engine could lead to liability. As a result, a firm may choose not to implement features that would make them more competitive and benefit consumers out of a fear of liability. Congress should not design competition law to ignore an analysis of competition.