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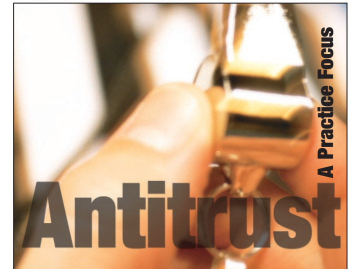

New Tech, Old Doctrines

When Google bought DoubleClick, the FTC reached back to ideas long out of favor.

By Paul T. Denis

Google's acquisition of DoubleClick is the prototypical new technology transaction. Neither company had even been formed at the time the Justice Department and the Federal Trade Commission promulgated the 1992 Horizontal Merger Guidelines. So it is not surprising that the FTC's official statement explaining why it chose not to challenge the Google/DoubleClick transaction discusses antitrust concepts not found in the guidelines.

What is surprising about the decision, however, is that the FTC does not blaze new trails of antitrust thinking to justify its decision. Rather, the FTC focuses on discarded or little used antitrust doctrine that had long since fallen out of favor and, in some cases, never was part of antitrust merger analysis. The prototypical new-technology transaction was reviewed largely under decidedly old-technology antitrust doctrine—a matter of potentially great relevance in the future for other high-tech companies such as Microsoft and Yahoo.

Most detailed merger reviews by the FTC involve horizontal mergers—mergers between competitors. The FTC found that Google and DoubleClick do not compete in any antitrust market, but, nevertheless, conducted an extensive review of various nonhorizontal theories of potential competitive harm.

In doing so, the FTC elevates to the level of serious inquiry a number of nonhorizontal theories of competitive harm that have never been and should not be the basis for finding a merger unlawful. By opening the door to these theories and failing to limit them appropriately, the FTC unnecessarily complicates the prospects for future procompetitive transactions.

In addition to reviewing nonhorizontal theories, the FTC offers a new take on the doctrine of potential competition and raises, but does not clearly address, interesting issues of nonprice competition in horizontal mergers. Each of these points may signal the direction of future FTC merger enforcement efforts.

Google is best known for its search engine to help users find material on the Internet, but in this merger, the FTC focuses on Google's role in online advertising. The FTC characterizes Google as "the dominant provider of sponsored search advertising" and a "leading but not dominant" provider of ad intermediation, a service for selling remnant advertising space on publishers' Web sites.

Google is not an ad server, which assists publishers and advertisers in the direct sale of display advertising on publishers' Web sites. The FTC notes, however, that "Google had been attempting to develop a third party ad serving solution at the time of the transaction."

DoubleClick is characterized by the FTC as a "leading firm in the third party ad serving markets" with a "significant share of today's third party ad serving markets," but not having market power in those markets. DoubleClick does not sell sponsored search advertising or, for that matter, any online advertising. DoubleClick is not an ad intermediary, though the FTC notes that DoubleClick was developing such a product.

Nonhorizontal Analysis

The FTC explores and appears to endorse what it refers to as three "potential leveraging theories" under which the merger might have an adverse effect on competition, even though the merging companies do not compete.

Consistent with its rather murky antitrust history, "leveraging" is used loosely to refer to using monopoly power in one market to gain a competitive advantage in another market. Here, the FTC uses the term to refer to three ways in which Google "could" use DoubleClick's position in ad serving markets for the advantage of Google's ad intermediation service.

Fortunately, the FTC's endorsement of leveraging is not quite as broad as it first appears. Although the statement does indicate that these leveraging theories "could, in principle, raise competitive concerns," the FTC's analysis is more limited. The Supreme Court has rejected the notion that leveraging states a claim under the antitrust laws unless it constitutes tying or attempted monopolization. Merely using a position in one market to gain a competitive advantage in another market is not anti-competitive.

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Indeed, far from being anti-competitive, this sort of conduct may be the sort of vertical integration that rivals fear because it enhances efficiency. The possibility of post-merger conduct that is not anti-competitive should never be the basis for challenging a merger.

The FTC appears to recognize this when it notes that "these [leveraging] arguments would raise antitrust concern if the evidence supported the conclusion that such conduct is likely to provide Google market power in the ad intermediation market." Given the state of the law, the FTC should have been more forceful and stated that leveraging arguments *could* raise antitrust concern *only* if the evidence supported that such conduct is likely to provide Google with market power in ad intermediation.

But even if leveraging is understood to refer only to post-merger conduct that constitutes unlawful tying or attempted monopolization, it has no place in merger analysis. The possibility that the merged company might do something unlawful in the future never has been, and should not be, the basis for blocking a merger. Rather, if the combined Google/DoubleClick engages in unlawful conduct post-merger, that conduct should be the subject of a separate challenge.

The introduction and apparent endorsement of these nonhorizontal theories into merger analysis could have a chilling effect on future efficiency-enhancing mergers between companies that do not compete but operate in adjacent markets. To avoid this, the FTC should clearly state, as it does for horizontal theories, the necessary conditions for these nonhorizontal theories and, therefore, the sufficient conditions for precluding their application.

Potential Competition

The FTC also offers a new articulation of the potential competition doctrine, a doctrine that has been near death from a hostile reception by courts. At times, the FTC appears to be attempting to breathe new life into the doctrine. At other times, the FTC's analysis appears to be the final nail in the doctrine's coffin.

The FTC considered that, absent the merger, Google might enter into ad serving markets and that DoubleClick might enter into the ad intermediation market. There was evidence that each company was considering such entry, but the FTC concluded that neither was "uniquely positioned to have a substantial competition-enhancing effect" in the market(s) into which it was considering entry.

The FTC's standard, at first blush, appears to be a shorthand version of the more systematic structural approach of the Justice Department's 1984 Merger Guidelines: The market is highly concentrated, entry generally is difficult, and the acquiring company is one of few companies with a comparable entry advantage. But the FTC appears to be suggesting that the uniqueness of the potential entrant should be evaluated relative to market incumbents, rather than other potential entrants. In this regard, the FTC appears to be trying to expand the doctrine.

But other aspects of the FTC's potential competition discussion appear to make future application of the doctrine more difficult. In considering Google's possible entry into ad serving markets, the FTC noted that the evidence was not clear that Google is "certain to be successful" in winning customers. If certain success is the standard, it is unlikely that any merger will ever be blocked under the potential competition doctrine.

Rather than further parse a doctrine that has fared so poorly in litigation, the FTC instead should recognize that potential competition analysis has been subsumed by horizontal merger analysis. The inclusion of uncommitted entrants as market participants in the Horizontal Merger Guidelines has done away with the need for a potential competition doctrine. The elimination by merger of a potential entrant that meets the guidelines' definition of uncommitted entrant can be analyzed like the elimination of any other market participant that is a current competitor. The elimination of a potential entrant that does not meet the guidelines' definition of uncommitted entrant should not be a matter of concern. If the potential entry is too remote or costly to be considered in assessing the likely effect of a merger between current market competitors, then its elimination by merger should not warrant independent scrutiny.

Nonprice?

A major issue raised by opponents of the Google/DoubleClick transaction was that it would allegedly lessen consumer privacy. The FTC's statement properly concludes that the FTC has no authority to inquire into whether a merger will lessen consumer privacy, just as it has no authority to examine the environmental or employment effects of a merger. Rather, the FTC's authority is limited to analyzing whether the merger likely will lessen competition, which may include competition to provide consumer privacy, among other nonprice dimensions of product or service offerings.

Despite this, the statement indicates that the FTC "investigated the possibility that this transaction could adversely affect nonprice attributes of competition, such as consumer privacy."

Does this mean that the analysis of nonprice effects of mergers follows some framework different from that applied to price effects? If not, why does not the FTC simply state that the analysis of nonprice effects necessarily follows from applications of the Horizontal Merger Guidelines' framework for price effects? If there is a different framework for nonprice effects, what is it? These questions go unanswered because the statement later concludes in a footnote that the Google/DoubleClick transaction cannot lessen competition in any nonprice dimension because there are no relevant product markets in which the parties compete.

Fortunately or unfortunately, the Federal Trade Commission does not have the last word on Google/DoubleClick. The European Commission recently completed its review of the transaction and, like its U.S. counterpart, decided not to challenge it. A written statement of the European Commission's decision is still forthcoming. Although neither the American nor the European statement is binding precedent, taken together, they should provide considerable fodder for the debate over the role of nonhorizontal theories in future merger analysis.

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