



Google, Yahoo, Microsoft: antitrust confusion

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By Thomas Hazlett

Financial markets are abuzz with the possibility of a Microsoft-Yahoo merger or a Google-Yahoo to block it. A heavy dose of the chatter is consumed by the regulatory implications of either: will the antitrust agencies in the US and European Union approve the transaction? The deals pivot on such anticipations.

Of course, antitrust laws are meant to encourage efficient mergers and disrupt the rest. But that careful delineation proves a challenge.

The standard approach begins - and, some would say, ends - by defining the relevant antitrust market. If a Yahoo merger is seen as involving two advertising businesses, then market shares are modest and competitive concerns evaporate.

Framing the market as online search advertising, however, upsets this conclusion. In that case, Google accounts for about 62 per cent of US sales, Yahoo 20 per cent and Microsoft 9 per cent. This level of concentration generally leads authorities to oppose intra-industry mergers - "three to two" combinations.

Yet, online search adverts compete with television commercials, newspaper classified ads and other marketing media. The question is, to what degree? This is an arduous, fact-intensive inquiry. There are multiple ways to botch the mission. The first is that the inquiry can drag.

The second is that the government's analysis may get the economics wrong. The proper policy aims to deter only anti-competitive deals. But the balancing act is a tough exercise.

Hence, a third problem surfaces when a delicate consumer welfare analysis is roughed up by hard-ball politics. Interests opposed to mergers routinely lobby regulators and legislators to thwart their foes. Google has blasted Microsoft as a monopoly that should be prevented from buying Yahoo - but it is only returning Microsoft's fire in the Google-DoubleClick merger, when the software giant failed to convince US or EU authorities that the deal was anti-competitive. In breaking off its effort to buy Yahoo, Steve Ballmer, Microsoft's chief executive, admitted that a "host of regulatory and legal problems" pushed it to walk.

The evidence proffered by rivals is often excellent - but it proves the reverse of what is intended by the lobbyists. As Judge Richard Posner noted in a merger case involving medical facilities that came before the Federal Trade Commission: "Hospital Corporation's most telling point is that the impetus for the Commission's [antitrust] complaint came from a competitor ... The hospital that complained to the Commission must have thought that the acquisition would lead to lower rather than higher prices - which would benefit consumers."

There is great confusion about the state of competition policy. In January 2007, for example, The Wall Street Journal reported: "The federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish." This would be news to the lawyers at Yahoo, Microsoft or Google.

Moreover, the US government has tried to prevent important mergers in recent years, only to be

over-ruled in court. The Department of Justice blocked Oracle-PeopleSoft (2004) and the FTC tried to stop Whole Foods-Wild Blue (2007) but both were over-ruled and the deals completed.

In March, Sirius Satellite Radio was cleared - after a 13-month DoJ investigation - to buy rival XM Satellite Radio. (Disclosure: I wrote two white papers at the request of the merging parties in 2007.) But the merger still languishes because the Federal Communications Commission, with duplicative review authority, dawdles.

The FCC wants the merged company to "agree" to lease (at nominal cost) channels to a minority-owned programming company. Using merger approval as an opportunity to coerce payments to politically favoured constituents is a perfect policy inversion: the "competitive analysis" shifts into monopoly-priced extractions by the state.

The Sirius-XM merger delays have been triggered by concerns from terrestrial radio broadcasters. When anti-competitive strategies sabotage consumer interests, this perverts the enterprise of antitrust. As important as preventing undue concentration is the need to prevent regulators from serving as nuisances that sandbag the very social progress they were assigned to protect.

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