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ANTITRUST REMEDIES AND *U.S. V. GOOGLE*: PUTTING THE CONSUMER BACK INTO THE "FIX"

EXECUTIVE SUMMARY

Democratic and Republican administrations have brought and litigated antitrust cases involving some of the largest U.S. digital and technology companies over the last five years. These cases allege that companies engaged in strategic business practices to maintain or extend their monopolies, squeezing out competition in markets such as online search, smartphones, eCommerce, and social media. Now, the oldest of these monopolization cases, *U.S. v. Google*, has almost run its course.

The *U.S. v. Google* case spans three political administrations. The "Trump 1.0" Department of Justice (DOJ) brought the case in 2020, the Biden DOJ successfully litigated it, and the "Trump 2.0" DOJ will bring it to a conclusion. After a major win for the government in 2024, the U.S. District Court for the District of Columbia (District Court) is now considering the Biden DOJ's proposed remedies for restoring competition in the markets for online search.

The long legal journey for *U.S. v. Google* and other pending monopolization cases will tell us a lot about how large antitrust cases survive changes in administrations and enforcement priorities. At the center of the remedies debate in *U.S. v. Google* is antitrust's bedrock consumer welfare standard, which has been buffeted by shifting ideological winds over the last several years.

Consumers benefit from antitrust remedies that succeed in restoring competition in a market, but they also bear the burden of those that fail or have unintended consequences. The consumer welfare standard captures a wide range of possible effects from these outcomes, including less choice, lower quality, slower innovation, or higher prices. The critical consumer perspective in *U.S. v. Google* is the focus of this Progressive Policy Institute (PPI) report.

At the center of the remedies debate is not any single "fix" but the DOJ's complex package of structural and conduct fixes that is designed to open up markets to competition by new search engines. The government's approach entails a sweeping restructuring and decade of "quasi-regulation" that will have a significant impact on search markets. It will also leave an indelible imprint on complementary markets, such as internet browsing, cloud computing, applications, and devices.

PPI argues that the DOJ's remedies proposal does not account for its impact on consumers under the full scope of the consumer welfare standard. The government's approach recognizes the importance of consumer choice in online search markets, but only in passing. The proposal also overlooks the effect of the remedies on firms' incentives to innovate and improve quality, both of which will directly affect consumers. Moreover, PPI's analysis reveals that the complexity of the government's proposed remedies in *U.S. v. Google* could have unintended, detrimental effects on consumers.

Antitrust history teaches us that the more complex a remedy, the higher is the risk of failure, and the greater is the potential harm to consumers. Past failed divestitures and ineffective conduct remedies support this important maxim. The DOJ's remedies proposal raises concerns in light of this legacy, recent efforts to downplay the consumer welfare standard, and antitrust's relative inexperience in the digital sector.

It remains that the impact of the proposed remedies on consumer welfare will be a major consideration in the District Court's determination of whether the final decree in *U.S. v. Google* is in the public interest. The District Court has the unique opportunity to ensure a strong remedy that restores competition while striking a better balance to protect consumers under the consumer welfare standard. The outcome will set important precedent in other pending monopolization cases and future antitrust cases.

I. INTRODUCTION

The *U.S. v. Google* monopolization case spans three political administrations. The "Trump 1.0" Department of Justice ("DOJ") brought the case in 2020; the Biden DOJ successfully litigated it; and the "Trump 2.0" DOJ will see it to an end.[1] After the government's major win on liability in 2024, the U.S. District Court for the District of Columbia (District Court) is now considering the Biden DOJ's proposed remedies for restoring competition in the markets for online search.

Remediating the harmful effects of anticompetitive consolidation and business practices is an important facet of U.S. antitrust jurisprudence and policy. Antitrust remedies have the potential for lasting impact, not only on antitrust defendants but also other participants in the market. These include consumers and other businesses in the market where an antitrust violation occurs, in complementary and related markets, and even a larger supply chain or business ecosystem.

Millions of consumers are asking how the ultimate resolution of the *U.S. v. Google* case will change the markets for online search in the U.S. This is a telling indicator of the importance of the consumer welfare standard, which embraces of a number of different effects. These include choice of search engines; the quality of the search experience, including user privacy and the security of personal data; and innovation in online search and interconnected digital and device markets.

The consumer welfare standard, often described as the "backbone" of antitrust, has recently been buffeted by shifting ideological winds.[2] Yet it remains a key factor in the District Court's determination of whether the remedies in *U.S. v. Google* is in the public interest.[3] The DOJ's remedies contained in the Revised Proposed Final Judgment (RPFJ) will leave an indelible imprint on the markets for online search and related markets for browsing, cloud computing, applications, and devices.

The Progressive Policy Institute's (PPI's) analysis concludes that the DOJ's proposed remedies in *U.S. v. Google* do not adequately consider the impact on consumers. The RPFJ relegates the consumer almost to an ancillary role in online search. It contains only a passing reference to promoting consumer choice and misses other elements of consumer welfare such as quality and innovation.[4]

Regardless of whether this reflects recent efforts to move away from the consumer welfare standard, or other considerations, the RPFJ's sweeping restructuring and quasi-regulation

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[1] *U.S., et al. v. Google*, *LLC*, Amended Complaint, Case No. 1:20-cv-03010 (D.D.C., Jan 15, 2021).
[2] *Kimble v. Marvel Entertainment, LLC* (135 S. Ct. 2401 (2015)).
[3] 15 U.S.C. § 16(e).
[4] Leah Samuel and Fiona Scott Morton, *What Economists Mean When They Say "Consumer Welfare Standard,"* ProMarket (Feb. 16, 2022), https://www.promarket.org/2022/02/16/consumer-welfare-standard-antitrust-economists/.

of online search could have unintended, adverse consequences for consumers. PPI's findings are important because consumers benefit from successful remedies that restore competition. But they also bear the burden of those that fail, through less choice, lower quality, less innovation, or higher prices.

Antitrust history teaches us that the more complex a remedy, the higher is the risk of unintended consequences or failure, and the greater is the potential harm to consumers. Past failed divestitures and ineffective conduct remedies support this important maxim. It is vital, therefore, to consider the impact of the proposed remedies in *U.S. v. Google* on all aspects of consumer welfare and how its complexity could introduce new risks and frictions for consumers. The District Court, therefore, has the unique opportunity to ensure a strong remedy that restores competition while striking a better balance to protect consumers under the consumer welfare standard.

II. THE REVISED PROPOSED FINAL JUDGMENT: THE 10,000 FEET VIEW

The remedies set forth in the DOJ's RPFJ constitute a sweeping set of proscriptions and prescriptions for how Google will conduct itself in the online search markets (i.e., general search services and general search text advertising) for the next 10 years. PPI's analysis does not address each of the many provisions in the RPFJ. Some of the proposed remedies are noncontroversial and essential for restoring competition for the benefit of consumers, such as prohibiting contracts for default or preferential treatment of Google's search products.

The focus of PPI's analysis is the collection of proposed remedies that, taken together, risk "overreaching" through the sweeping restructuring of the markets for online search and quasi-regulation of a large, standalone search platform. For example, the RPFJ proposes to restructure the search market through divestiture of Google's Chrome browser. Spinning off Chrome would sever the vertical integration between search and browsing that has strengthened Google's incentives to "self-preference" and limits competition from other search engines.

The RPFJ also deploys a set of complex conduct remedies that act, in effect, as a quasi-regulatory system for how Google operates its post-divestiture, standalone search platform. This part of the remedy has attracted significant scrutiny. For example, there is no lack of experience in the U.S. and abroad involving the regulation or quasi-regulation of standalone networks. These approaches pose a difficult balancing act between controlling market power and promoting incentives for firms to innovate.[5]

Key elements of the quasi-regulatory system for a standalone Google search platform in the RPFJ include: providing rivals with disclosure and access to Google's search index,

[5] *See, e.g.,* Nancy L. Rose, Learning from the Past: Insights for the Regulation of Economic Activity, in Economic Regulation and Its Reform: What Have We Learned? Univ. Chicago Press (June 2014).

user-side, and ads data; rules governing the design of choice screens for user selection of a search engine; restrictions on revenue-sharing with distributors; and prior notification to the government of anticipated acquisitions and investments involving competitors or companies that control critical search access or products.[6]

The DOJ's approach in *U.S. v. Google* has generated atypical pushback from some market participants and, as is clear from PPI's analysis, questions about how consumers will fare under a complex package of remedies. To better understand this controversy, it is important to note that DOJ's pathway to remedies in *U.S. v. Google* is largely a function of what the government *cannot* do. That is, namely, breaking up Google search into smaller search companies.

Breaking up the Google search platform, which is similar to the remedy obtained in *U.S. v. AT&T (1982),* would be ineffective for restoring competition in the markets for online search.[7] For example, economies of scale in cloud and data and network effects in search mean that larger firms tend to generate more benefits to consumers. Breaking up a search platform could eviscerate those benefits. The DOJ's "compromise" approach, which implicitly recognizes this limitation, however, introduces more uncertainty and risk for consumers. Minimizing potentially adverse effects on consumers requires a more fulsome demonstration in the RPFJ of the link between the remedies and consumer benefits

III. COMING TO TERMS WITH ANTITRUST REMEDIES IN DIGITAL MARKETS

An unavoidable truth in the debate over remedies in *U.S. v. Google* is antitrust's lack of experience in the digital sector. The government's proposed remedies draw on a slim body of monopolization case law under Section 2 of the Sherman Act.[8] *U.S. v. Microsoft* (2000)[9] is the nearest point of reference. But the case is 25 years old, of an entirely different digital "vintage," and generated a broad consensus that remedies were ineffective in restoring competition in the PC operating systems market.[10] A number of other features of the digital ecosystems pose further challenges for antitrust remedies.

A. Antitrust's Late Arrival on the Digital Scene

Antitrust is a relative newbie to the modern digital sector. In contrast to many non-digital markets, the digital markets are dynamic, innovative, and rapidly transforming. The digital ecosystems also feature a complex business model, with economic-engineering integration across a multi-sided platform, cloud infrastructure and computing, and a constellation of applications that are interconnected with and supported by the

[6] *U.S. v. Google, et al.*, Plaintiffs Proposed Revised Final Judgment, Case No.1:20-cv-03010-APM (D.D.C, Mar. 7, 2025) ["RPFJ"].
[7] *U.S. v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).
[8] 15 U.S.C. § 2
[9] *U.S. v. Microsoft Corporation*, 253 F.3d 34, (insert paragraph citation in case) (D.C. Cir. 2001).
[10] Carl Shapiro, *Microsoft: A Remedial Failure*, 75 Antitrust Law J. 739 (2009).

ecosystem.[11] This complexity challenges antitrust's narrow market approach, which may be less "fit for purpose" when competition cuts across multiple markets in nontraditional ways.[12]

The digital ecosystems also grow largely through acquisition, which presses on limited antitrust resources.[13] A recent study reveals, for example, that non-digital firms are, on average, up to 64% less acquisitive than digital firms.[14] Acquisitive growth spurs faster scale, market penetration, and accretion of market share than internal organic growth.[15] The digital sector completed two major cycles of acquisition-driven expansion in relatively short order. These include the build-out of the large first-generation digital ecosystems beginning in the mid-1990s and the expansion of cloud infrastructure and AI capability beginning in the mid-2000s.[16] More cycles of expansion will follow as GenAI models transform the digital landscape.[17]

The DOJ and Federal Trade Commission (FTC) looked carefully at the hundreds of acquisitions that built out the digital platforms, cloud infrastructure, and applications for the largest digital ecosystems since the early 2000s. However, enforcers challenged only a tiny fraction of them as illegal under Section 7 of the Clayton Act.[18] Almost 25 years later, only *one* case has been settled with a remedy.[19]

Antitrust enforcement has often proved a quick study on new markets and forms of strategic competition. However, the complex remedies proposed in *U.S. v. Google*, and its impact on consumers, should be considered in the context of antitrust's limited experience in the digital sector.

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[11] *See, e.g.,* Garces, Eliana, *The Dynamics of Platform Business Value Creation* (Aug. 2017), CPI Antitrust Chronicle (Aug. 2017), https://ssrn.com/abstract=3138924.
[12] Nicolas Petit and David J. Teece, *Innovating Big Tech firms and competition policy: favoring dynamic over static competition*, 30 Industrial and Corporate Change 1168 (2021), https://doi.org/10.1093/icc/dtab049.
[13] Diana L. Moss & David Hummel, *Anticipating the Next Generation of Powerful Digital Players: Implications for Competition Policy*, Am. Antitrust Inst. (Jan. 18, 2022), https://www.antitrustinstitute.org/wp-content/uploads/2022/01/NextGenDigitalAAIReport.1.18.22-1.pdf.
[14] *Id.,* footnote 13.
[15] Martin Weiss, Dominic Herrmann, Theodore A. Khoury, Markus Kreutzer, and Marc Hummel, *The boundary conditions for growth: Exploring the non-linear relationship between organic and acquisitive growth and profitability*, 56 Long Range Planning 102291 (2023), https://doi.org/10.1016/j.lrp.2022.102291.
[16] Diana L. Moss, *In Search of a Competition Policy for the Digital Sector*, Progressive Policy Institute (Oct. 2024), https://www.progressivepolicy.org/wp-content/uploads/2024/10/PPI-Digital-Competition-Nov24.pdf.
[17] *Id. See also,* Jeffrey Erickson, *The Role and Benefits of AI in Cloud Computing*, OCI (Jun. 21, 2024), https://www.oracle.com/artificial-intelligence/ai-cloud-computing/.
[18] Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Table X (detail on NAICS Code 518), 2001-2024, https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reportshttps://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.
[19] *U.S. v. Google and ITA Software,* Proposed Final Judgment, Case 1:11-cv-00688-RLW (D.D.C., Jul. 7, 2011).

B. Complex Economic Features of Digital Ecosystems

The digital ecosystems are economic "enigmas," on both the supply side and demand side of a market. Unique economics tilt many digital markets toward high concentration and dominant players. For example, economies of scale in cloud infrastructure and data, both of which hinge on firm size, can significantly lower costs.[20] Some platform services, including online search, exhibit powerful network effects that increase the value of a service as more users adopt it, potentially tipping the market to a single provider or technology.

There are also significant information asymmetries in digital ecosystems. For example, users often do not know how their data is used and are inconsistent in stating and following their data privacy preferences.[21] The value proposition in digital ecosystems, however, rests on collecting, enriching, and monetizing user data through algorithmically-driven suggestions and advertising. When user data is the "currency" of exchange in a market, there are strong incentives to capitalize on information asymmetries to realize this unique value proposition.[22]

These features highlight the importance of remedies that do not increase the risk of unintended consequences for consumers. The evolution of the DOJ's remedies in *U.S. v. Google,* in fact, reflects antitrust's relative lack of experience with digital markets. Indeed, the RPFJ's scaling back of more stringent conditions in the original November 2024 Proposed Final Judgment (PFJ) was intended to resolve ambiguities, prevent unintended consequences, and address a lack of sufficient detail.[23] As discussed next, these modifications still do not adequately consider the impact of the remedies on consumer welfare.

IV. RESTRUCTURING ONLINE SEARCH MARKETS

A. The Important Legacy of Past Failed Remedies

Experience with past divestitures provides important perspective on the RPFJ's requirement that Google divest the Chrome browser. As the preferred antitrust remedy, divestiture changes the structure of a market to reduce or eliminate incentives to exercise

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[20] *See, e.g.,* W. Brian Arthur, *The second economy*, McKinsey Quarterly (Oct. 1, 2011), https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/the-second-economy#/.
See also, What is cloud economics? Vmware.com, queried Feb. 17, 2025, https://www.vmware.com/docs/vmware-faq.

[21] *See, e.g.,* Shota Ichihashi, *Online Privacy and Information Disclosure by Consumers*, 110 Am. Econ. Rev. 569 (2020), at 2 and Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, 82 Antitrust Law J. 835 (2019).

[22] *See, e.g.,* Garces, *supra* note 11.

[23] *U.S. v. Google, et. al*, Executive Summary of Plaintiffs' Revised Proposed Final Judgment, Case No.1:20-cv-03010-APM (D.D.C, Mar. 7, 2025).

market power.[24] This "one and done" structural approach differs from conduct remedies, which require ongoing monitoring and compliance enforcement.

Conduct remedies also rely on smaller market participants to report violations, so invariably include provisions to prevent retaliation. Most important, conduct remedies do not alter incentives to exercise market power, therefore inviting "workarounds" by defendants.[25] There is no better example of the failure of conduct remedies than in the Live Nation-Ticketmaster merger, which prompted the DOJ to file a monopolization case almost 20 years later.[26]

Two decades ago, there was a dearth of evidence on the success of merger remedies. This is no longer the case. For example, academic and FTC studies reveal a high rate of failure for divestitures in past merger cases, especially in pharmaceuticals.[27] Failed remedies in high-profile merger cases such as Safeway-Albertsons, Hertz-Dollar Thrifty, and Sprint-T-Mobile left the DOJ and FTC with no recourse when divested assets were repurchased by the merged companies, or exited the market entirely, leaving consumers to bear the burden of anticompetitive harm.[28]

A lack of agency guidance on remedies exacerbates this problem. There are no guidelines on remedies in monopolization cases or for digital markets. The Biden DOJ withdrew, without replacement, guidance on merger remedies in 2022, and the FTC's guidance on merger remedies is well over a decade old. During this time business models, technology, and markets have fundamentally changed. The DOJ's proposed divestiture of Chrome should be viewed against this backdrop.

B. Implications for *U.S. v. Google*

The Chrome browser is tightly integrated with Google's search engine. The RPFJ describes Chrome as a "critical search access point through which more than 30% of search inquiries are routed."[29] The divestiture of Chrome would, therefore, eliminate Google's incentives to self-preference and "allow rival search engines the ability to access the browser."[30] The DOJ's approach in *U.S. v. Google* is similar, therefore, to what the

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[24] U.S. Dept. of Justice, Antitrust Division Policy Guide to Merger Remedies (Oct. 2004), at 9, https://www.justice.gov/d9/pages/attachments/2019/07/30/205108.pdf.
[25] *See* John Kwoka and Diana Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, 57(4) Antitrust Bull. 979 (2012).
[26] *See, e.g.*, Diana Moss, *The Case For Why the Department of Justice Should Break Up Live Nation-Ticketmaster*, ProMarket (Apr. 25, 2024), https://www.progressivepolicy.org/moss-for-promarket-the-case-for-why-the-department-of-justice-should-break-up-live-nation-ticketmaster/.
[27] Study of the Commission's Divestiture Process, FTC (1999) And FTC's Merger Remedies 2006-2012, FTC (2017).
[28] S*ee, e.g.*, Diana L. Moss, *Fixing The Fix: Updating Policy On Merger Remedies*, CPI Antitrust Chronicle, Volume 2 (Oct. 2024).
[29] Executive Summary, *supra* note 23, at 3.
[30] *Id.*, at 12.

government sought (but did not obtain) in breaking off Internet Explorer from the Windows operating system in *U.S. v. Microsoft*.[31]

Divestiture of Chrome, however, raises fundamental questions for consumers. For example, who will buy Chrome? A qualified buyer would need significant financial resources and a large user base, or the ability to create one in short order, to purchase and maintain the largest browser in the market. A buyer would also need a track record of experience competing in search, browsing, or related markets and strong, pro-competitive incentives to compete head-to-head with rivals.[32]

Divestiture to a competitor such as Microsoft or a major AI player would raise serious antitrust concerns. This leaves much smaller players in the browser market or those that do not currently compete, increasing the risk that a buyer will be less successful. Identifying buyers of divestiture assets under these circumstances has proved challenging in far less complex markets.

For example, Dish TV's acquisition of wireless telecommunications provider Sprint ran aground soon after it was spun off in the merger of Sprint-T-Mobile.[33] In Safeway-Albertsons, an experienced regional grocer that bought over 100 divested grocery stores was unable to maintain them, exited the market, and the stores reverted to Albertsons.[34] In both cases, the fallout from failed divestitures was borne by consumers, in the form of higher prices, lower quality, and less innovation.

Even this small sample of failed divestitures is a sobering reminder of the risks to consumers. It prompts the need for very close scrutiny of a divestiture in *U.S. v. Google*, which is markedly more complex and for which antitrust has no comparable experience. Moreover, the failure of a divestiture puts significantly more pressure on the quasi-regulation of a standalone Google search platform to restore competition.

V. "QUASI-REGULATION" OF A STANDALONE SEARCH PLATFORM

The unique features of digital ecosystems have important implications for antitrust remedies. Quasi-regulation of search under the RPFJ would affect virtually all aspects of the market. These include control over which rivals enter the market; how Google deals with rivals and distributors; and how the standalone platform expands into next generation AI-related search. These conditions will indelibly affect consumers in the online search

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[31] *U.S. v. Microsoft*, Modified Final Judgment, Case 1:98-cv-01232-CKK (D.D.C., Sep. 7, 2006) ["MFJ"].
[32] DOJ Policy Guide to Remedies, *supra* note 24.
[33] Dan Meyer, *Dish Network Backs Out of T-Mobile Spectrum Buy, Financial Woes Continue*, SDxCentral (Mar. 4, 2024).
[34] Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger. *See also*, Brent Kendall, *Albertsons to Buy Back 33 Stores It Sold as Part of Merger with Safeway*, Wall St. J (Nov. 24, 2015).

market and bring into sharp focus the balancing required to restore competition while protecting consumer welfare.

A. Control of Market Entry

The RPFJ borrows from *U.S. v. Microsoft* in requiring the formation of a Technical Committee (Committee) of industry experts.[35] The Committee in *U.S. v. Google,* however, would have far greater purview and powers. For example, the Committee has the power to co-determine (with the government) which companies are Qualified Competitors based on their investment plans and proposals to compete in the online search or advertising markets.[36]

The RPFJ appropriately recognizes that market entry is the first step for jump-starting competition in search. The process would largely supplant market forces in determining how the search market evolves. For example, the RPFJ says nothing about how long the Committee will control market entry under the term of the decree or how much competition, should it develop, is "enough" to warrant a phase-out of this regulatory-style condition. This approach risks shaping the future of competition and innovation in online search through government fiat — an outcome that could have a significant impact on consumers.

B. Disclosure and Data Sharing With Competitors

The RPFJ also gives "Qualified Competitors" access to critical inputs.[37] For example, Qualified Competitors would gain access, at marginal cost, to "scale dependent" Google search index, user-side, and ads data. Forced sharing and pricing of proprietary data at marginal cost would, under the best of circumstances, spur strong incentives to find workarounds to the RPFJ's requirements. Mandatory sharing of data used in the development of the next-generation GenAI models supercharges this incentive.[38]

Moreover, the RPFJ's data-sharing requirements are contingent on the ability of potential search entrants to "[safeguard] personal privacy and security."[39] In a market where the value proposition is wholly dependent on access to user data to build scale, potential entrants could be expected to act on strong incentives to find workarounds to protect user privacy and security. The RPFJ does not address how these outcomes could have direct effects on consumers.

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[35] Microsoft MFJ, *supra* note 31, at S.4.B.
[36] RPFJ, *supra* note 6, at S.III.U.
[37] *Id.*, at S.VI.
[38] *Id.*, at S.VI.C.
[39] *Id*.

C. Ban on Compensating Distributors

The RPFJ prohibits revenue-sharing between Google and market players such as browsers or device manufacturers. The effect of a ban on revenue-sharing is to ensure non-preferential treatment of Google's standalone search platform. The sweeping scope of the prohibition, however, could have disparate effects based on the type and size of the distributor that could create unintended consequences for competition and consumers.

For example, a ban on revenue-sharing may be appropriate in the case of large, powerful distributors but would likely have no effect on market players that operate integrated search engines and browsers (i.e., Microsoft). The prohibition could, however, have material effects on smaller, unintegrated distributors because it eliminates incentives for, and value, around efficient coordination of browsing services and search.

This approach is likely to influence how distributors compete, incentives to innovate and improve product quality, and decisions around market entry. It will assuredly affect the evolution of competition in online search and the extent to which consumers benefit from the ban on revenue-sharing. The RPFJ does not explain or account for these possibilities.

D. Prior Notification of Acquisitions and Investments

The November 2024 PFJ sought complete divestiture of Google's interests in AI-related search investments and acquisitions, presumably to prevent further entrenchment using next-generation technology.[40] The RPFJ, however, was scaled back to require the prior notification to the government of future acquisitions and investments, including GenAI transactions. This includes ventures that "compete[s] with Google in the GSE or Search Text Ads markets or any company that controls a Search Access Point or GenAI Product."[41]

The antitrust agencies have long relied on prior notification and approval requirements in consent decrees in merger cases. In *U.S. v. Google*, however, the unique growth-by-acquisition strategy that is endemic to the digital ecosystems raises new questions. The prior approval requirement targets transactions that are not reportable under the Hart Scott Rodino filing requirements.[42] These are typically small transactions, often involving startups, that fall below the reporting thresholds.

With rapidly developing GenAI technology and the high frequency of acquisitions in digital markets, prior approval will place significant demands on enforcement resources. It may potentially slow decision-making and put the government in the position of deciding if and how Google should expand. The RPFJ does not account for this possibility, or how the prior

[40] *U.S. v. Google, et al.*, Plaintiffs Initial Proposed Final Judgment, Case No.1:20-cv-03010-APM (D.D.C, Nov. 20, 2024) ["PFJ"].
[41] Executive Summary, *supra* note 23, at 4.
[42] RPFJ, *supra* note 6, at S.IV.H.1.

notification process involving what is likely to be a significant number of future transactions will impact incentives to innovate and quality. This uncertainty could have a significant impact on consumers.

E. Design of User Choice Screens

The RPFJ outlines conditions for offering Choice Screens for user selection of search or search access points on Google and non-Google devices.[43] This condition is designed to harness the power of the user to choose competing search engines as they enter the market. Indeed, there is evidence that choice screens — implemented as part of Europe's Digital Markets Act ("DMA")[44] — have resulted in an uptick in users adopting smaller browsers.[45] However, choice screens are not without potential problems, as is also evident from the DMA experience.[46]

The mixed results of this and other regulatory experiments, such as the rejection of retail choice in state-level electricity deregulation in the U.S., are important to consider in *U.S. v. Google*.[47] Regardless of how rival search options are ordered or ranked on a choice screen, they can be frustrating for users and defeat the purpose of spurring consumer choice. For example, they can appear at inconvenient times or become unmanageable if competition takes hold through the entry of new search engines. The RPFJ does not anticipate or explain these potential problems.

VI. CONCLUSION

PPI's analysis looks carefully at the DOJ's proposed remedies package in *U.S. v. Google* from the vital perspective of how it will affect consumer welfare. The complexity of the DOJ's proposal to restore competition through sweeping restructuring and quasi-regulation of online search will affect elements of consumer welfare, such as innovation and quality, that are not adequately addressed in the RPFJ. This approach to restoring competition could well have unintended and detrimental consequences for consumers. More work is needed, therefore, to find an approach that restores competition while striking a better balance to protect consumer welfare.

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[43] *Id.*, at S.IX.D.
[44] *The Digital Markets Act: Ensuring Fair and Open Digital Markets*, European Commission, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.
[45] Natasha Lomas & Ivan Mehta, *Alternative Browsers Report Uplift After EU's DMA Choice Screen Mandate*, TechCrunch (Apr. 10, 2024), https://techcrunch.com/2024/04/10/eu-dma-browser-choice-screen-early-impact/.
[46] George Nguyen, *Google's Search Choice Screen Had Virtually No Effect on Search Market Share, Perhaps by Design*, Search Engine Land (Feb. 17, 2021), https://searchengineland.com/googles-search-choice-screen-had-virtually-no-effect-on-search-market-share-perhaps-by-design-346167.
[47] Jeff Lein, *Electricity Restructuring: What Has Worked, What Has Not, and What is Next*, U.S. Department of Justice, Antitrust Division, Economic Analysis Group Discussion Paper (EAG 08-4, Apr. 2008). https://www.justice.gov/atr/electricity-restructuring-what-has-worked-what-has-not-and-what-next.