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What practitioners need to know about the Google trial

By Kate Patchen

The Google case is historically significant as the first major antitrust challenge against a tech company in over two decades, setting valuable legal precedent for assessing alleged anticompetitive conduct in technology markets.

The trial in the *United States et al. v. Google* search case commenced in the federal District Court for the District of Columbia. This case holds historical significance as it represents the first major antitrust challenge against a technology company since the Microsoft case over two decades ago and will provide valuable legal precedent for evaluating alleged anticompetitive exclusionary conduct in technology markets.

The case originated from two separate complaints. The United States Department of Justice (DOJ) and the Attorneys General of eleven states filed the first complaint in October 2020. A second complaint by 38 states and territories followed a few months later. These cases have been consolidated for the trial, as the key theories largely overlap.

The DOJ alleges that Google violated Section 2 of the Sherman Act by unlawfully maintaining a monopoly in the general search services, search advertising, and general search text advertising markets. According to the complaint, the general search services market consists of general search engines such as Google and Bing, which consumers use to search the internet for answers to various queries. Search advertising encompasses all types of ads generated in response to online search queries, including general search text ads and ads in specialized search services (e.g., Amazon, Yelp). The general search text advertising market consists of ads "sold by general search engines, typically placed just above or below the organic search results."

The DOJ alleges that Google unlawfully maintained monopoly power in these markets through a set of exclusive contracts with distributors. Specifically, the Complaints point to Google's preinstallation and revenue-sharing agreements with (1) web browser developers (e.g., Apple and Mozilla) and (2) Android device manufacturers and wireless carriers who sell Android devices (e.g., Verizon). The government plaintiffs allege that these agreements had the effect of "locking up" general search services on both Android and Apple iOS operating systems and on the web, unlawfully preventing Google's rivals from effectively competing for end users who provided data, which is essential for improving automated learning for algorithms and queries. The DOJ alleges that the search product and search advertising markets are mutually reinforcing because advertisers will pay more to buy ads from a search provider with a large user base. Thus, these agreements operated both to entrench Google's scale in the search market and maintain the barrier to entry in the search advertising market. The DOJ alleges that the Apple and Android distribution agreements taken together are "self-reinforcing, depriving rivals of the quality, audience, and financial benefits of scale that would allow them to mount an effective challenge to Google."

In its defense, Google asserts that consumers are free to choose other search engines despite these agreements, and that both consumers and device manufacturers opt for Google's search product because it is a superior product. In its summary judgment argument, Google chose not to challenge the DOJ's market definition or market share analysis. Instead, Google argued that the agreements at issue are not legally "exclusive" or "de facto exclusive" because developers (1) independently choose designs that necessitate default search engines, and (2) select Google due to its superior search service. Google also defends entering into revenue-sharing agreements as a way to lawfully promote its Google Search product on Android and iOS devices.

While Judge Mehta granted partial summary judgment to Google on a number of issues, the core of the DOJ's case survived for trial. In his summary judgment opinion, Judge Mehta found "sufficient conflict" regarding the extent of market foreclosure caused by Google's allegedly anticompetitive agreements to warrant trial. Judge Mehta referenced *United States et al. v. Microsoft*, 253 F.3d 34, 70 (D.C. Cir. 2001) (en banc), emphasizing that the Sherman Act does not automatically deem it per se unlawful for a monopolist to secure an exclusive contract but instead requires assessing whether the conduct resulted in a "significant degree of foreclosure." And because the trial is a bench trial before Judge Mehta, the Court's summary judgment order is particularly insightful as to what questions Judge Mehta will be evaluating, including: (1) which distribution channels to include in the DOJ's foreclosure analysis; (2) whether the Browser Agreements or the Android Agreements, or both, are part of the foreclosure calculus; and (3) whether a "but-for" approach is the appropriate way to measure foreclosure.

A separate issue that may need to be resolved is the appropriate remedy. Judge Mehta bifurcated the trial into liability and remedies phases, allowing for a focused consideration of remedies for conduct found illegal in the liability phase. The DOJ's complaint seeks broad relief, covering both structural and conduct remedies, providing Judge Mehta with substantial latitude to consider structural fixes to the market as well as injunctive relief to prevent Google from entering into certain types of agreements. But these remedies are often challenging to design and implement, especially in dynamic markets. As antitrust scholar Professor Herbert Hovenkamp explained in the context of the Microsoft litigation: "[T]he legal wheels turn far too slowly. By the time each round of Microsoft litigation had produced a 'cure,' the victim was already dead." Here, the contracts at issue were entered into several years ago, making any assessment of how to correct the market similarly challenging.

Given how rarely Section 2 large-technology cases make it to trial, the court's reasoning on both liability and remedies, as well as any appellate decisions that follow, will likely have significant implications for the tech industry and how antitrust regulators evaluate competition in technology markets.

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