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Legal Sidebar

District Court Holds That Google Unlawfully Monopolizes Online Search: Overview and Potential Remedies

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On August 5, 2024, the U.S. District Court for the District of Columbia held that Google unlawfully monopolizes the markets for general search services and general search text ads through a series of exclusive contracts with browser developers, mobile device manufacturers, and wireless carriers. The opinion emerges from a lawsuit filed by the Department of Justice (DOJ) and a group of state attorneys general (AGs) in 2020. The DOJ lawsuit was later consolidated with a separate case filed by another group of state AGs that largely adopted the allegations in the DOJ's complaint. This Legal Sidebar provides an overview of the court's decision and issues that may arise during the remedies phase of the case.

The Challenged Agreements

The DOJ's lawsuit targets distribution contracts that allegedly allow Google to foreclose (i.e., deny access to) significant shares of the markets for general search and general search text ads. Some of the contracts involve browser developers like Apple (the developer of the Safari browser) and Mozilla (the developer of the Firefox browser). Under these agreements, Google pays developers a share of its search ads revenue in exchange for the developers preloading Google as the default search engine for their browsers.

Other contracts involve manufacturers of Android mobile devices, such as Motorola and Samsung. These agreements allow manufacturers to preinstall certain proprietary Google apps, like the Google Play Store, on their devices. In exchange for that access, manufacturers must also preload other Google apps, including Google Search and the Chrome browser, which defaults to Google Search.

Other agreements involve revenue-sharing arrangements with device manufacturers and wireless carriers. Under these contracts, Google pays manufacturers and carriers a share of its revenue from search ads in exchange for the preinstallation of Google Search at certain access points. Some of these agreements also prohibit Google's counterparties from preinstalling or promoting alternative general search engines.

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The Court's Decision

The DOJ's lawsuit contends that Google's distribution agreements constitute unlawful monopolization under Section 2 of the Sherman Act because they foreclose substantial shares of the relevant markets and deprive rivals of the scale needed to improve their search engines. The monopolization offense has two elements: (1) the possession of monopoly power, and (2) exclusionary conduct. The following subsections discuss the district court's analysis of both elements.

Monopoly Power

The Supreme Court has characterized "monopoly power" as "the power to control prices or exclude competition." More specifically, monopoly power involves a substantial degree of market power—the ability to raise prices above costs without sacrificing profits. Plaintiffs can establish monopoly power via direct proof that a firm has in fact profitably raised prices substantially above competitive levels or indirect structural evidence that supports an inference of monopoly power. Under the more common indirect approach, plaintiffs can prove monopoly power by showing that the defendant possesses a dominant market share that is protected by entry barriers.

To calculate market shares, plaintiffs must define a relevant market in which competition occurs. The scope of the relevant market is determined by the range of reasonable substitutes for the good or service in question. In evaluating substitutability, courts rely on both quantitative evidence and a series of qualitative factors from *Brown Shoe Co. v. United States*, a 1962 Supreme Court decision. Because of its centrality in establishing market power and monopoly power, market definition is often a dispositive issue in antitrust cases.

Applying this legal framework, the district court concluded that Google has monopoly power in two markets: general search services and general search text ads. The court relied on several of the *Brown Shoe* factors in defining these markets, rejecting Google's arguments that the relevant markets are broader. Instead of a market for general search, Google had posited a larger market for "query responses" that included vertical search engines (e.g., Expedia, Yelp), social media platforms, and other websites. The court declined to adopt Google's proposed market, reasoning that vertical search engines do not respond to the range of queries answered by general search engines, even if they can serve as substitutes for discrete purposes. The court concluded that Google has monopoly power in the narrower market for general search based on the firm's market share of over 89% and significant entry barriers like high capital costs, Google's control of key distribution channels, brand recognition, and scale.

In analyzing the scope of the relevant advertiser-side market, the court recognized markets for both search advertising and general search text ads, rejecting Google's argument for a broader digital advertising market. Among other things, the court reasoned that search ads (which are displayed in response to specific queries) are not reasonably interchangeable with other types of digital ads because search ads allow advertisers to target customers with greater precision. The court ultimately determined that Google lacks monopoly power in the market for search advertising—which includes search ads on vertical search engines and social media platforms—because of an absence of entry barriers. However, the court found that Google is a monopolist in the narrower market for general search text ads based on the firm's dominant market share and the entry barriers discussed above.

Exclusionary Conduct

In assessing whether conduct is "exclusionary," as opposed to permissible "competition on the merits," courts apply different principles and tests to different categories of challenged conduct. In cases involving exclusive contracts, courts typically evaluate the share of the market that the contracts foreclose and qualitative factors that may be relevant to their effect on competition (e.g., the contracts' length and ease of terminability). Some monopolization decisions have also employed a burden-shifting framework that allows defendants to rebut a *prima facie* case of anticompetitive harm with evidence of procompetitive benefits. In this framework, if a defendant makes such a showing, the burden shifts back to the plaintiff to rebut the defendant's evidence or show that the anticompetitive harms of the challenged conduct outweigh the procompetitive benefits.

"Competition for the Contract"

At the outset of its analysis of Google's conduct, the court rejected Google's argument that its distribution agreements emerged from the type of "competition for the contract" that antitrust protects. (Courts have held that, in some circumstances, competition to become an exclusive supplier cuts against the argument that exclusive contracts are anticompetitive.) In analyzing this defense, the court acknowledged that Google's search engine is superior to rivals and that Google's counterparties select it as their default in part for that reason. Nevertheless, the court concluded that there is no genuine "competition for the contract" based on the durability of Google's market position. Citing an Apple executive's testimony that there was "no price" that Microsoft could offer Apple to preload Microsoft's Bing search engine, the court reasoned that Google does not face meaningful rivalry in securing the relevant agreements.

Exclusivity

The court then assessed whether Google's distribution agreements are in fact exclusive. Here, Google disputed the DOJ's contention that its contracts require exclusivity. Specifically, Google argued (among other things) that

- its browser agreements permit the promotion of other search engines;
- consumers can and do access other search engines despite Google's default status;
- the Android licensing agreements do not require device manufacturers to preload Google's proprietary apps; and
- the Android licensing agreements allow device manufacturers to preload other search engines and search access points, in addition to Google's apps.

The court rejected these arguments, concluding that *de facto* and partial exclusivity can be enough to establish exclusivity under Section 2 and that Google's distribution agreements met these standards.

With respect to the browser agreements, the court determined that rivals' ability to contract for less efficient distribution channels and consumers' ability to access other search engines did not preclude a finding of exclusivity. Instead, the court reasoned, the browser agreements functioned as exclusive contracts because they closed a "substantial percentage of the available opportunities" for distribution.

The court also concluded that market realities rendered the Android agreements *de facto* exclusive. In particular, the court found that device manufacturers view the Google Play Store as "essential," meaning they feel compelled to preinstall it and accept the associated requirement to preload Google's search access points. Additionally, the court determined that manufacturers want to avoid preloading an excessive number of apps on their devices, allowing Google to secure functional exclusivity with its preinstallation requirement.

Anticompetitive Effects

The court then identified three "primary" anticompetitive effects of Google's distribution agreements in the market for general search services: (1) foreclosure, (2) denial of scale to rivals, and (3) reduction of rivals' incentives to invest and innovate in general search.

The foreclosure inquiry implicated a key argument in the litigation. The DOJ alleged that 50% of all search queries in the United States run through default search access points covered by Google's distribution agreements—a figure that exceeds traditional thresholds for "significant" foreclosure in the case law. Google did not contest this factual allegation, but offered an alternative conception of foreclosure grounded in a counterfactual analysis of consumer behavior. Because few consumers would switch to another search engine without the contracts, Google argued, the contracts do not result in significant foreclosure.

The court rejected this argument, citing the D.C. Circuit's 2001 *Microsoft* decision and other cases for the proposition that plaintiffs can establish significant foreclosure based on the percentage of the market covered by exclusive contracts. The court went on to conclude that Google's distribution agreements resulted in significant foreclosure based on the 50% coverage figure and the absence of qualitative factors that might militate against a finding of anticompetitive harm.

Next, the court turned to the issue of scale. The court explained that scale is key to a search engine's success because of the role of user data in improving search quality. By gaining scale, the court reasoned, search engines can create a feedback loop in which (1) more data enhances search quality, which (2) attracts more users, which (3) attracts more advertisers and ad revenue, which (4) enables greater expenditures to obtain further scale. The court concluded that Google's distribution agreements prevent rivals from achieving the minimum scale needed to activate this type of virtuous cycle.

The court also found that Google's distribution contracts reduce rivals' incentives to invest and innovate in general search. Here, the court reasoned that Google's foreclosure of efficient distribution channels had contributed to a lack of investment by smaller competitors and venture capital investors; that this foreclosure was "reasonably capable" of having disincentivized Microsoft from increasing its investment in search; and that Google's revenue-sharing arrangements with Apple may have helped dissuade the iPhone maker from developing its own search engine.

After concluding that the DOJ had established a *prima facie* case of anticompetitive effects, the court evaluated three categories of procompetitive benefits advanced by Google: (1) enhancements of user experience, quality, and output; (2) promotion of competition in the markets for browsers and mobile devices, which increases output in the search market; and (3) consumer benefits in the markets for browsers and mobile devices. Ultimately, the court rejected these justifications on a variety of grounds. A common thread in the court's reasoning was that the exclusive nature of Google's defaults was not necessary to achieve the relevant benefits.

Because Google failed to rebut the government's *prima facie* case of anticompetitive effects in the market for general search, the court held that Google unlawfully monopolizes that market.

The court then proceeded to the market for general search text ads, identifying four anticompetitive effects in that market: (1) foreclosure, (2) supra-competitive pricing, (3) quality degradation, and (4) harm to rivals' ability to generate ad revenue, which limits investments in quality improvement. Because Google had not identified any procompetitive benefits in the market for general search text ads beyond those discussed above, the court held that Google had also monopolized that market.

Possible Remedies

The district court's decision finds that Google is liable for violating the Sherman Act, but does not impose remedies for those violations. Earlier in the litigation, the court granted the parties' joint request to bifurcate the liability and remedies phases of the case. The court has ordered the parties to propose a schedule for remedies proceedings by September 4, 2024. Google has said that it plans to appeal the court's liability decision, but it is unclear whether the appeal will proceed before or after the district court imposes remedies.

During the remedies phase, the district court will have several options. The narrowest would involve an injunction prohibiting Google's exclusive contracts. An injunction barring exclusivity was the remedy in *United States v. Dentsply*, a monopolization case involving exclusive dealing that was resolved in 2006. The most cited antitrust treatise also suggests that, in cases involving a single category of anticompetitive conduct like exclusive dealing, a targeted injunction may be the most appropriate remedy. This type of relief could allow distributors to negotiate default arrangements with other search engines, retain Google as their defaults without receiving payments conditioned on exclusivity, or offer consumers a "choice screen" directing them to select their own default search engine. The court may also consider ordering Google to adopt a choice screen on Android devices, but it likely lacks the authority to require the relevant browser developers to do so because they are not parties to the litigation.

Another possibility is a broader injunction requiring Google to share search data with rivals. This type of mandatory pooling could facilitate the emergence of rival search engines, but might also create free-rider problems that disincentivize investments in improving search quality. Such an arrangement might also prove difficult for the court to administer.

A more sweeping remedy would involve mandatory divestiture of the Chrome browser and/or Android operating system. Divestiture may eliminate the need for ongoing monitoring of Google's conduct, but could pose technical challenges and interfere with operational efficiencies. The D.C. Circuit's 2001 *Microsoft* decision may also counsel against a breakup. In that case, the D.C. Circuit vacated a divestiture remedy because of procedural deficiencies and modifications of the district court's liability conclusions. In doing so, the appellate court offered general guidance regarding appropriate monopolization remedies. In addition to emphasizing the logistical difficulty of dissolving an integrated firm without sacrificing efficiencies, the D.C. Circuit instructed the district court to consider whether the government had established a "sufficient causal connection between Microsoft's anti-competitive conduct and its dominant position." Absent a "significant causal connection" between challenged conduct and the creation or maintenance of monopoly power, the D.C. Circuit explained, the appropriate remedy is "an injunction against continuation of that conduct." This standard is more demanding than the causation inquiry that the court adopted for monopolization liability, which requires only that challenged conduct be "reasonably capable of contributing significantly" to a defendant's monopoly power.

In Google's case, the district court may be skeptical that the causation standard for divestiture is met. In its liability decision, the court remarked that Google "has long been the best search engine" and documented the company's "numerous innovations" dating back to 1998. While they are far from conclusive, these comments could suggest that the court is unlikely to find that Google's distribution contracts have a sufficiently significant causal connection to the company's market position to justify structural relief.

Considerations for Congress

The competitive practices of large tech platforms have been on the congressional radar for several years. Concerns regarding those practices have led to the introduction of legislation that would extend beyond general antitrust law and create special competition rules for dominant platforms. Examples include bills that would prohibit designated platforms from preferencing their own products and services or from operating in adjacent markets altogether. The Google search distribution case, in contrast, involves fairly traditional antitrust theories. While the litigation featured a variety of nuanced issues, exclusive dealing has been a concern of competition authorities since the inception of the antitrust laws.

The lawsuit's implications for legislative reform efforts remain to be seen. If the district court's liability finding stands on appeal, the case's impact on search markets will likely turn on the ultimate remedy. Other antitrust actions against major platform operators—including a separate lawsuit targeting Google's ad tech businesses—also remain pending. If the government prevails in a meaningful percentage of these cases and obtains structural relief, those outcomes may be perceived as obviating the need for broader prohibitions of platform self-preferencing or vertical integration. If, however, the lawsuits fail or the remedies are viewed as inadequate, that may catalyze legislative action directed toward general antitrust reform or tech-specific regulation.

Beyond these reform efforts, Congress may consider the causation standard for monopolization liability, which remains an area of doctrinal uncertainty. As discussed, in *Microsoft*, the D.C. Circuit employed what it characterized as a "rather edentulous" (i.e., toothless) causation test under which liability turns on whether challenged conduct is "reasonably capable of contributing significantly" to a defendant's monopoly power. The district court adopted this standard in the Google search litigation. In 2008, however, the D.C. Circuit imposed a stricter causation requirement in a monopolization case alleging deception of a standard-setting organization (SSO). In *Rambus Inc. v. FTC*, the D.C. Circuit assumed that the defendant's deception made the SSO's adoption of its technology "somewhat more likely." Nevertheless, the court concluded that the government failed to establish liability because it did not show that the SSO would have adopted another firm's technology but for the deception.

In the Google case, the district court appeared to read *Rambus* as establishing a special rule limited to cases involving deception of SSOs. Some commentators, however, have argued that *Rambus*'s "but for" test is the default causation standard for monopolization liability and that *Microsoft*'s more lenient "reasonably capable" test applies only in cases involving the suppression of nascent competitive threats. According to that view, the district court in the Google case committed a legal error, though it is unclear whether such an error would have been outcome-determinative. Other observers have proposed alternative ways of reconciling *Microsoft* and *Rambus*. The D.C. Circuit may clarify the causation issue on appeal, but Congress could also consider addressing this uncertainty.

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