

Client Alert: Key Takeaways from *United States v. Google*

Client Alerts

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On August 5, 2024, Judge Amit Mehta of the U.S. District Court for the District of Columbia issued a historic decision, finding that Google has unlawfully maintained its monopolies in the market for general search services and also in the market for general search text ads.^[1] On October 20, 2020, the Department of Justice and 11 state Attorneys General filed a complaint seeking to stop Google from unlawfully maintaining monopolies in the search and search advertising markets. The complaint alleged that Google did so by (i) entering into exclusivity agreements that forbid preinstallation of any competing search service, (ii) entering into tying and other arrangements that force preinstallation of its search applications in prime locations on mobile devices and make them undeletable, regardless of consumer preference, and (iii) using monopoly profits to buy preferential treatment on smartphones and browsers—particularly Apple’s Safari browser.

Part I of this analysis will look at the markets in which the court found Google possesses monopoly power. Part II will describe Google’s exclusionary conduct, while Part III will turn to why Google narrowly avoided sanctions for its document-retention practices. Finally, Part IV will preview what to expect on the horizon now that the court is turning to what remedies are appropriate. A key takeaway from the opinion is that firms that clearly dominate their industry should be on guard because, while proving monopoly power is a high bar in the absence of durably high market shares and strong barriers to entry, exclusionary conduct can take many forms. Even firms that provide superior products must be careful not to engage in conduct that inhibits competition.

I. Monopoly Power

The court found that Google has monopoly power in the market for general search services based on several types of evidence. It noted that an internal study found that Google could degrade the quality of its search product without losing revenue, and that Google admitted it makes product changes without concern that its users might go elsewhere — “something only a firm with monopoly power could do.” Op. 155. It also emphasized that “Google has enjoyed an over-80% share since at least 2009” and that this high share is protected by significant barriers to entry that include “(1) high capital costs, (2) Google’s control of key distribution channels, (3) brand recognition, and (4) scale.” Op. 157. The court similarly cited high, durable shares and barriers to entry along with an

indifference to potential competitive responses from rivals, in finding that Google possesses monopoly power in the market for text ads — which it found to be a relevant market due to a variety of factors “perhaps most importantly, text ads are available to a far broader range of advertisers.” Op. 186.

The court rejected contentions that Google is a monopolist in two broader advertising markets: advertising and general search advertising.

Search advertising, the broadest alleged market, “includes all advertisements served in response to a query,” whether that query is made on a search engine like Google, on a social media platform, or on a search feature of a specialized vertical provider like Amazon. Op. 165. The court found that search advertising is a relevant product market, but that Google does not have monopoly power in that market. First, the court was unpersuaded by direct evidence that Google profitably raised prices on its general search text ads because text ads constitute only 64% of the search advertising market. Op. 181. The court also did not credit the government’s proffered indirect structural evidence of monopoly power despite Google’s relatively high 74% market share.^[2] The court found that the government had not shown that “barriers to entry protect Google’s leading share in the search ads market” because “well-resourced entrants, and demonstrated growth by those entrants, belie a reality of unconstrained dominance” — particularly in light of “Amazon’s entry and explosive growth in the market.” Op. 183. The court also noted that Google’s share in this market had been declining modestly but steadily in recent years.

“General search advertising” refers to all ads appearing on a search engine’s results page, including image-based product listing ads. The court found that general search advertising is not a relevant market, relying on testimony from advertisers that text ads are distinct from product listing ads “because of [text ads’] breadth and effectiveness,” and emphasized that text ads, unlike product listing ads, “are purchased by keywords and appear similar to organic links” in search results. Op. 192-93.

II. Exclusionary Conduct

After finding that Google exercised monopoly power in the general search services and general search text ads markets, the court went on to hold that the government had shown that Google’s search distribution contracts — notably its agreements making Google the default search engine in Safari and Firefox and its similar agreements related to the Android ecosystem— constitute exclusionary conduct sufficient to show that Google had illegally maintained its monopolies. In reaching that determination, the court rejected Google’s argument that its monopolies were simply the result of a superior product. While the court acknowledged that Google “has long been the best search engine,” it concluded that this did not justify the “market stasis” inconsistent with a competitive marketplace that such agreements created. Op. 198-203.

The court found that Google’s search distribution contracts were exclusionary because they make Google the default search engine on most smartphones and browsers. Op. 204-24. It also pointed to restrictive contractual provisions preventing Apple from diverting queries away from Google, and preventing Android devices from preloading alternative search services. Op.198. The court went on to find that Google’s exclusive agreements have anticompetitive effects because they “reasonably appear capable of significantly contributing to maintaining Google’s monopoly power” by (1) foreclosing a substantial share of the market from Google’s competitors, (2) preventing those rivals from achieving scale,^[3] and (3) diminishing the incentives of rivals to invest in innovations in the general search market.^[3] Op. 216. The court concluded that this allowed Google to charge supracompetitive prices for text ads, to degrade the quality of text ads, and to cap rivals’ advertising revenue. Op. 259-65.

However, the court rejected the contention that Google’s refusal to acquiesce to Microsoft’s interoperability requests related to SA360 (Google’s proprietary search engine management tool) constituted exclusionary conduct because Google had no duty to deal with its rival. Op. 265. The court also found that there was insufficient evidence that this conduct actually harmed advertisers or rivals. Op. 271.

III. Sanctions

The government also sought sanctions against Google for its policy of deleting chat messages after 24 hours and training employees to include in-house lawyers on sensitive communications. Op. 273. While the court was “taken aback by the lengths to which Google goes to avoid creating a paper trail” it ultimately declined to impose sanctions “[n]ot because Google’s failure to preserve chat messages might not warrant them. But because the sanctions Plaintiffs request do not move the needle on the court’s assessment of Google’s liability.” In particular, the court noted that an “adverse evidentiary inference would not change the court’s finding that Google lacks monopoly power in the market for search ads or that there is no relevant market for general search ads. Nor would it change the court’s legal conclusion that Google had no duty to deal with Microsoft on its preferred terms as to SA360, nor its finding on the absence of anticompetitive effects, as Google is not likely to have possessed such evidence.” Op. 276. The court cautioned, however, that its “decision not to sanction Google should not be understood as condoning Google’s failure to preserve chat evidence. Any company that puts the onus on its employees to identify and preserve relevant evidence does so at its own peril. Google avoided sanctions in this case. It may not be so lucky in the next one.” *Id.*

IV. What’s Next?

The court’s recent decision dealt only with liability. The court has not yet reached a holding on remedies and has asked the parties to “meet and confer and submit a Joint Status Report no later than September 4, 2024, which proposes a schedule for proceedings regarding remedies.” While it is likely to be some time before the court rules on remedies, commentators and interested parties have already begun opining on what remedies the court might impose.

The most extensive list of suggested remedies thus far has come from Duck Duck Go — a rival search engine whose business model focuses on data privacy. Duck Duck Go has advocated:

1. Prohibiting Google from buying default positions, pre-installation deals, and prominent placement.
2. Fair access to Google's search and ad APIs. Google Search benefits from immense distribution and scale advantages, which no competitor could have access to in a reasonable time frame so market entrants should have access to it and the ability to make changes for privacy, ranking etc.
3. Public education initiatives inside and outside of product. Internet users often don't know that they can switch the default search engines and browsers they are presented with, what the difference is, and what benefits they can get from switching.^[5]

Duck Duck Go also argued that:

[S]olutions similar to those required in the EU would be helpful, but not enough on their own. And, as noted, those would also need to be implemented better, for example:

1. Choice screens that are shown periodically to all users (which is not the case in the EU where they are only shown once) that increase access to search engines.
2. A prohibition of dark patterns (which has not been enforced in the EU), for example, popups asking the user to switch back.
3. Easy ways to change the default when a user downloads a competing search app (also not enforced yet in the EU).
4. Click and query data to help optimize our search results (in the EU, Google is proposing to eliminate 99%+ of the data).^[6]

Finally, Duck Duck Go emphasized that Google's success in evading European regulations demonstrated the need for "a monitoring body with technical experts that are truly independent and possess the requisite user experience and technical expertise . . . to ensure Google doesn't find new ways to give itself preferential treatment."^[7]

Meanwhile, Yelp has argued that "there must be serious consideration of requiring Google to spin off services that have been artificially boosted by its illegal search monopoly, which harms consumers and businesses."^[8] While Yelp did not specify what divestitures would be appropriate, other commentators have speculated that Chrome, Android, and Google Search could become their own companies.^[9] It should also be noted that if the government prevails in the separate antitrust suit

focused on Google’s ad tech business (which was filed years after the search complaint) there could be additional divestitures related to Google’s ad stack.^[10] Finally, some commentators have speculated that remedies might include forcing Google “to let other companies access its search technology or its essential data to create search engines with the technical chops of Google” or preventing Google from allowing its various products to commingle information they collect from consumers.^[11]

Footnotes

[1] Text ads refer to the ads appearing on a search engine’s results page (“SERP”) below image-based ads, but above the actual search results. As the court explained “Multiple types of advertisements can appear on a SERP, but the two primary ones are general search text ads (which resemble organic results but are labeled “sponsored” on Google) and shopping ads (which typically consist of a product photograph, vendor identity, and price information).” Op. 20.

[2] The court itself noted that “[A] market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power.” Op. 183 (quoting *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981)).

[3] The court emphasized that the search engine market is characterized by the following network effect: “(1) More user data allows a [search engine] to improve search quality, (2) better search quality attracts more users and improves monetization, (3) more users and better monetization attract more advertisers, (4) more advertisers mean higher ad revenue, and (5) more ad revenue enables a [search engine] to expend more resources on traffic acquisition costs (i.e., revenue-share payments) and investments, which enable the continued acquisition of scale.” Op. 231.

[4] The court, by contrast, was not persuaded by the government’s evidence that the agreements reduced *Google’s* incentives to invest in innovation.

[5] *DuckDuckGo says Google must be banned from buying default positions, pre-installation deals after US court loss*, Mlex (Aug. 6, 2024), https://content.mlex.com/#/content/1582289/duckduckgo-says-google-must-be-banned-from-buying-default-positions-pre-installation-deals-after-us-court-loss?referrer=search_linkclick.

[6] *Id.*

[7] *Id.*

[8] *Yelp urges US court to consider requiring Google to spin off some search services*, Mlex (Aug. 6, 2024), https://content.mlex.com/#/content/1582087/yelp-urges-us-court-to-consider-requiring-google-to-spin-off-some-search-services?referrer=search_linkclick.

[9] See *THREE-MINUTE LEGAL TALKS: THE UNITED STATES V. GOOGLE CASE EXPLAINED*, University of Washington School of Law (Sept. 25, 2023), <https://www.law.uw.edu/news-events/news/2023/us-vs-google>; Shira Ovide, 6 ways the Google antitrust ruling could change the internet, *Washington Post* (Aug. 7, 2024), <https://www.washingtonpost.com/technology/2024/08/06/google-antitrust-lawsuit-illegal-monopoly/>.

[10] See Allison Schiff, *Imagining A World In Which Google Is Forced To Divest GAM*, *adexchanger* (Jan. 26, 2023), <https://www.adexchanger.com/platforms/imagining-a-world-in-which-google-is-forced-to-divest-gam/>. The EU has already ordered Google to divest portions of its ad tech business. See Brooke Osmundson, *Google Ordered To Sell Off Part Of Ad-Tech In EU Ruling*, *Search Engine Journal* (June 19, 2023), <https://www.searchenginejournal.com/google-ordered-to-sell-off-part-of-ad-tech-in-eu-ruling/489470/>.

[11] See Shira Ovide, 6 ways the Google antitrust ruling could change the internet, *Washington Post* (Aug. 7, 2024), <https://www.washingtonpost.com/technology/2024/08/06/google-antitrust-lawsuit-illegal-monopoly/>.

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