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Memorandum

D.C. District Court Rules Against Google in Search Antitrust Case

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On August 5, 2024, Judge Amit Mehta of the United States District Court for the District of Columbia issued a decision in the landmark Google search case, brought by the U.S. Department of Justice ("DOJ") and several dozen state attorneys general. The court found that Google had violated U.S. antitrust law by maintaining a monopoly over general search services and general text advertising, through exclusive distribution agreements which locked in Google's position as the default search engine. The DOJ argued that Google paid tens of billions of dollars each year for these distribution agreements. As Judge Mehta explained: "After having carefully considered and weighed the witness testimony and evidence, the court reaches the following conclusion: Google is a monopolist, and it has acted as one to maintain its monopoly."

The ruling follows a nine-week bench trial in which Google argued that it faces fierce competition and that its success was driven by the quality of its products. Kent Walker, president of global affairs at Google parent Alphabet, said on X that the company would appeal the ruling, saying that the decision "recognizes that Google offers the best search engine, but concludes that we shouldn't be allowed to make it easily available."[1] U.S. Attorney General Merrick Garland called the ruling "an historic win for the American people," adding "[n]o company—no matter how large or influential—is above the law." Jonathan Kanter, head of the DOJ's antitrust division, said the "landmark decision holds Google accountable" and "paves the path for innovation for generations to come and protects access to information for all Americans."[2]

Procedural History

On October 20, 2020, the DOJ, joined by 11 states, commenced *United States v. Google*, 20-cv-3010 (APM) in the District Court for the District of Columbia. The case was assigned to Judge Mehta. On December 17, 2020, 38 states joined together to bring *State of Colorado v. Google*, 20-cv-3715 (APM). On January 7, 2021, upon plaintiff States' motion, the court consolidated the two cases for pretrial purposes, including discovery. Discovery began in December 2020 and concluded in March 2023. In August 2023, Judge Mehta narrowed the case against Google by granting, in part, Google's motion for summary judgment, but allowed the claims relating to Google's exclusive dealing arrangements to move forward. The court held a nine-week bench trial starting in September 2023. It

[1] *See* here.

[2] *See* here.

heard from dozens of live witnesses, including multiple experts, and admitted over 3,500 exhibits. The court held closing arguments over two days in early May 2024.

A "Landmark" Decision

Judge Mehta concluded that Google violated Section 2 of the Sherman Act by maintaining its monopoly in two product markets in the U.S.—general search services and general text advertising—through exclusive distribution agreements. Section 2 of the Sherman Act prohibits individuals and businesses from monopolizing, attempting to monopolize, or conspiring to monopolize any part of trade or commerce in the United States.

Specifically, the court held that: (1) there are relevant product markets for general search services and general search text ads; (2) Google had monopoly power in those markets (with a more than 89.2% share of the market for general search services, which increases to 94.9% on mobile devices); (3) Google's distribution agreements were exclusive and had anticompetitive effects; and (4) Google had not offered valid procompetitive justifications for those agreements. The court also found that Google exercised its monopoly power by charging supracompetitive prices for general search text ads, which allowed Google to earn monopoly profits.

The court focused on certain distribution agreements entered into by Google with browser developers, mobile device manufacturers, and others to secure Google search as the preloaded default search engine, ultimately finding that these agreements were exclusive and anticompetitive. The court noted that, in 2021, payments to secure these preloaded default positions (usually calculated as a percentage of the advertising revenue that Google generates from search queries run) totaled more than $26 billion. In return for these payments, partners agreed to install Google as the search engine that is delivered to the user right out of the box at key search access points. Partners also agreed not to preload any other general search engine. Google argued that these agreements are not exclusionary because its positions as the default general search engine are the product of "competition for the contract." The court rejected this argument and found these agreements to be exclusive as a matter of law, as they effectively block Google's rivals from the most effective channels of search distribution, namely the out-of-the-box default search settings. The court found these exclusive agreements to be anticompetitive, as they "ensure that half of all [general search engine] users in the United States will receive Google as the preloaded default on all Apple and Android devices, as well as cause additional anticompetitive harm." Judge Mehta explained the agreements have three anticompetitive effects: (1) market foreclosure; (2) preventing rivals from achieving scale; and (3) diminishing the incentives of rivals to invest and innovate in general search. The court did not find any valid procompetitive justifications.

While of small comfort to Google, Google did prevail on a number of other claims. With respect to a broader market for search advertising, the court held that there is a product market for search advertising (which includes all advertisements served in response to a query, regardless of the digital platform and excludes display ads, retargeted display ads, and non-search social media ads) but that Google lacked monopoly power in that market. With respect to general search advertising (an alleged submarket of search advertising that includes all ads that appear on a general search engine results page in response to a user query), the court held that there is no product

market for general search advertising. Furthermore, in regards to the plaintiff States' claims that Google's SA360 "search engine management tool" (which allows advertisers to purchase digital advertisements across multiple platforms) was also the subject of additional illegal exclusionary conduct, the court held that Google's SA360-related conduct did not give rise to antitrust liability for two reasons: (1) as a matter of law, Google had no duty to deal with Microsoft and (2) plaintiff States did not produce evidence of anticompetitive effects.

Finally, while Judge Mehta was critical of Google's document retention practices, he did not find any liability for document destruction relating to Google's highly-publicized failure to retain internal chat messages—though he noted that the decision "should not be understood as condoning Google's failure to preserve chat evidence . . . Google avoided sanctions in this case. It may not be so lucky in the next one."

Next Steps and Implications

The court will now determine potential remedies. Judge Mehta has scheduled a September 6 hearing to begin this next phase of the proceedings. The DOJ has asked for "structural relief." This could, in theory, mean breaking up the company. Other, more likely, remedies could include preventing or restricting Google from paying to ensure its search engine is the default on the iPhone and other devices, requiring Google to license data to competing search engines or applying a consumer "choice screen" to choose between alternate default search engines. Google plans to appeal the ruling, a process which may take many years thereby delaying any immediate effects for both consumers and advertisers. Although the D.C. Circuit would review an appeal in the first instance, a further appeal by the losing party to the Supreme Court is possible. A settlement is also possible, as occurred in the government's *Microsoft*[3] case.

The decision is the second antitrust defeat for Google in recent years, after a federal jury in California decided in December 2023 that Google has unlawfully monopolized its proprietary app store. The court in that case is deliberating possible remedies. Google is also challenging that verdict.

The decision is indeed a landmark in the ongoing fight against Big Tech. Google has been labelled a monopolist in violation of U.S. antitrust laws. Judge Mehta applied the legal framework from the government's high-profile *Microsoft* antitrust case[4] throughout his ruling, and this decision against Google could have just as seismic implications. The ruling takes aim at Google's oldest and most prominent business. Alphabet, Google's parent company, generated $175bn in revenue from its search-based advertising last year (more than half of its total revenue). The decision may also embolden federal antitrust enforcers, who continue to prosecute a raft of other monopolization cases against Big Tech, including against Amazon, Apple and Meta. DOJ is also pursuing a separate and distinct antitrust suit against Google related to the company's advertising technology business. That case is expected to proceed to trial in early September 2024.

[3] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001)

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