Insight

DOJ's Google Search Case: Implications Moving Forward

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Executive Summary

- On August 5, the Department of Justice won its highly anticipated case in federal court alleging that Google has illegally maintained a monopoly in online search and search text ads by entering into agreements with web browsers and smartphones to be the default search engine.
- Google will have some very strong arguments on appeal, namely that the opinion does not fully consider the company's competitors – in particular generative artificial intelligence models that have been developed since the case's beginning – and that Google's agreements benefit consumers and competition as a whole.
- The case also highlights that current antitrust law can sufficiently apply to online markets; Congress need not change well-established principles to target firms if those firms can be shown to harm consumers.

Introduction

On August 5, the United States District Court for the District of Columbia released an opinion finding Google violated Section 2 of the Sherman Act, holding that it illegally maintained a monopoly in online search and search text ads. In a major win for the Department of Justice (DOJ), the opinion held that both general search services (search engines such as Google and Bing) and search text advertisements (advertisements that appear as a normal search result) are relevant product markets in which Google has monopoly power. Importantly, the opinion found that Google entered into anticompetitive agreements to become the default search engine on web browsers and mobile devices, harming competition as a whole.

Google plans to appeal the decision, and it will have strong arguments to bolster its case. Most notable is that the opinion ignores much of the competition that general search engines face, especially from generative artificial intelligence (AI) models that have been developed since the case's inception. Google's case also relies heavily on behavioral economics to argue that consumers would not choose to change their default search engine to another service, even if prompted, but direct evidence from Europe suggests Google would not lose significant market share even if it were not the default. Finally, the court's opinion also largely dismisses the procompetitive justifications offered by Google. Google argues that the agreements into which it enters with browsers and device manufacturers allow these companies to better compete in their respective markets, though the court countered by stating that Google failed to show that these default payments directly resulted in increased investments in other product markets.

It is important to note that the court's opinion follows well-established principles of law. Whether the DOJ wins or loses on appeal, the case highlights that current antitrust law can apply to conduct in online marketplaces, and Congress need not change well-established principles to target big tech or any other company if firms can be shown to harm consumers and competition as a whole.

This insight first breaks down the court's ruling on the two major elements of the case, monopoly power and anticompetitive conduct, as well as Google's likely arguments on appeal. It next discusses what the ruling means for antitrust law more broadly and the implications for Congress moving forward.

Element I: Monopoly Power

To show that a firm violated Section 2 of the Sherman Act, the plaintiff must first demonstrate that the firm has monopoly power, the power to control prices or exclude competition. The opinion concludes that Google has such power in two relevant markets, general search services and search text ads.

General Search Services

The opinion first finds that general search services is a relevant product market in which Google has monopoly power. General search services allow a user to enter a query, and the search engine provides results to different webpages and products. As the opinion explains, general search services are not reasonably interchangeable with more narrow search products, such as Amazon for specialized product searching or social media platforms including Reddit and TikTok on which users can search for information. The opinion also notes that general search is publicly recognized as a distinct market from other search queries. To establish monopoly power in this market, the opinion largely relies on indirect evidence, such as Google's large market share and the general search market's high barriers to entry, which make it difficult for new startups to form.

Google will likely argue a few points on appeal. It will of course repeat similar arguments made in this case, most notably that general search engines are reasonably interchangeable with a wide range of services for queries. But it may also argue that the court's opinion largely dismissed the development of generative AI models as an alternative to the traditional search engine, which increasingly have become a rival for general search but which did not exist when the case was originally filed.

Search Text Ads

The opinion also found that Google has monopoly power in the search text ads market. Search text ads are displayed on a results page in response to a user's query and appear to be organic search results. While other ads featured elsewhere could theoretically serve as a substitute, evidence in the record suggests that text ads play a unique role in capturing customers who are ready to buy a product, and over the years Google has raised prices by a small but meaningful amount. It has also implemented technologies that result in a higher price for placement of the advertisements, without forcing advertisers to switch to different advertising options. According to some evidence in the record, Google doesn't consider the prices of competitors when setting text ad prices, indicating the power to control prices.

Google made a series of counterarguments likely to come up on appeal, most notably that advertisers do in fact shift spending between text ads and product listing ads, and this option for retailers limits Google's ability to control prices. It will also likely argue that, even though some advertisers purchase only text ads, not all potential substitutes must be equally compelling to consumers to be considered a substitute that restricts Google's ability to extract monopoly rents. Nevertheless, if the appellate court finds that search text ads are a relevant market, it will be difficult to dispute that Google has monopoly power in that market.

Element II: Anticompetitive Conduct

A successful Section 2 claim also requires that the plaintiffs prove the willful acquisition or maintenance of monopoly power as distinguished from regular growth stemming from a superior product, business acumen, or historic accident. Therefore, the plaintiff must show that the firm's conduct harms competition, and if successful, the defendant can attempt to show that there are procompetitive justifications for the conduct.

The main conduct at issue here is agreements between Google and a variety of firms allowing Google to be the default search engine on web browsers and mobile devices. The opinion calls these agreements exclusive deals for the "out-of-the-box" default search settings and finds that they effectively foreclose competition by capturing a significant portion of users. As the opinion explains, while these agreements are not necessarily illegal in isolation, they are unique in that they do not spur competition among search engines, as no other search engine could offer the product Google does. It also highlights evidence based in behavioral economics showing that some consumers, due to inertia, will not switch off a default setting due, even if changing settings is relatively easy. By capturing these consumers, the court argues that Google forecloses competition by depriving rivals of scale and reducing the incentive for competitors to invest in and develop rival search engines. Even though Google's initial rise stems from its delivery of a superior product, these agreements illegally allow Google to maintain the monopoly power it gained through legal means, the court ruled.

The opinion has some flaws that Google will likely attempt to exploit on appeal. Most notable is the court's conclusion that consumers are often locked into a default browser, which is far from clear. For example, the ruling highlights that for consumers using Microsoft Edge, in which Bing is the default search, 90 percent of search queries go through Bing. Yet the opinion doesn't fully acknowledge that many consumers simply switch browsers entirely when they want to switch search engines, so a large portion of the remaining userbase of Edge may be those who want to use Bing instead of Google. Further the European Union required Google to offer a choice screen for users to handpick their default search engine – but the choice screen did not significantly affect Google's market share.

Perhaps most problematic is that the opinion dismisses the procompetitive justifications for Google's conduct, especially in other product markets. For example, Google argues that firms such as Apple want to provide a seamless out-of-the-box experience for its iPhone and only one search engine can be the default; therefore, Google claims, these agreements spur competition among search engines to become that default option. What's more, for many firms, Google's payments for default status often drive innovation and investment and thus competition in different markets. For example, 80 percent of web browser Mozilla's operating budget comes from its default search engine deal with Google, and with this agreement it can compete with Chrome and Microsoft Edge. The court argues, however, that Mozilla is too small to matter.

Implications Moving Forward

While Google plans to appeal the court's decision, the ruling highlights that current antitrust standards are sufficient to address anticompetitive behavior in online markets. While the opinion may have inadequately considered some arguments, it relies on well-established theories of antitrust law and applies them to Google search in a detailed manner. In particular, it carefully considers the competitive effects and the procompetitive justifications, finding that on the whole the conduct harms competition. This is how the practice of antitrust law should work.

Some in Congress have called for laws that would ignore the analysis entirely, simply declaring specific practices to be illegal on the basis of industry concentration alone. These firms are too big, they claim. But as the opinion makes clear, bigness alone isn't illegal, and there are benefits to consumers that come with size and scale.

The DOJ and the Federal Trade Commission both have more outstanding cases against big tech firms. Rather than preemptively regulating, Congress should allow the law to work, ensuring that truly anticompetitive behavior is prohibited, while conduct that on the net benefits competition and consumers is allowed to flourish.

Conclusion

The court's decision is a major win for the DOJ in its antitrust case against Google. What's more, the opinion highlights how current law is more than capable of addressing harm in online markets. While Google will appeal the ruling – it has some strong arguments with which to do so – Congress should allow the courts to continue examining specific conduct and evaluating whether it harms competition rather than crafting unnecessary legislation to prohibit a wide range of conduct solely due to fears that firms are too large.