Insight

# The Department of Justice's Antitrust Case Against Google Search

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## Executive Summary


- On September 12, the Department of Justice and a bipartisan group of attorneys general from 38 states and territories will argue that Google violated federal antitrust law by illegally monopolizing search and search advertising markets.
- To win at trial, the plaintiffs will need to show both that Google has monopoly power in a relevant market and engaged in anticompetitive, exclusionary conduct to either gain or maintain that monopoly power.
- While Google certainly enjoys a successful search business and has entered into agreements with browsers and mobile-device manufacturers to promote its own search engine, fierce competition from rival search engines and the significant procompetitive justifications for those agreements may counter the plaintiffs' case.


## Introduction

On September 12, the first and highly anticipated antitrust case against Google's search-market dominance will begin. The Department of Justice (DOJ) and 38 attorneys general (AG), the plaintiffs, will argue that Google entered into illegal exclusive dealing arrangements to prevent rivals from competing in the general search and search advertising markets. By preventing rivals from acquiring the necessary scale to compete in the market, the plaintiffs claim, Google ensures that these rivals pose little threat to the company's dominance in search. While the initial complaint contained a variety of charges, many were dismissed before trial. This insight focuses on the primary charge of whether Google's agreements violated Section 2 of the Sherman Act.

To win at trial, the DOJ and the AGs will need to prove two elements for their primary claims. First, they must show that Google has monopoly power in a relevant market. Second, they must show that Google willfully achieved or maintained this monopoly power using anticompetitive conduct designed to exclude rivals and not through vigorous and effective competition.

In this case, the plaintiffs will argue that the relevant market – that is, for the purpose of competition law, the set of products or services consumers consider substitutes – is general search and search advertising, and that Google's dominant market share and the difficulty of entry in those markets gives the firm monopoly power. The plaintiffs will also argue that Google unlawfully maintained its monopoly by implementing and enforcing a series of exclusionary agreements with distributors, denying rivals access to these channels and entrenching Google's market position.

Despite these claims, Google will likely have a strong defense. First, while Google may have a substantial market share for general text search, it is unclear that that general text search should be considered the relevant market for the purpose of this case, especially when advertising is taken into account. Consumers use a wide range of services, from product-focused Amazon to social media apps such as TikTok and Instagram, to find

information. Second, even assuming that general search is the relevant market, obtaining default status in this market represents competition on the merits, something the courts not only allow but actively encourage.

This insight outlines the legal standards at play in this case, as well as the arguments both the plaintiffs and Google will make. Specifically, this insight focuses on the plaintiffs' claim that Google's exclusivity and default search engine deals for browsers and devices are anticompetitive.

**Element 1: Monopoly Power**

For their illegal monopolization claim to succeed, the plaintiffs will first need to prove that Google has monopoly power in a relevant market. Monopoly power generally exists if a firm can raise prices for, or lower outputs of, those products or services without consumers being able to choose alternatives. While courts often use size and concentration as a proxy for monopoly power, other factors such as the barriers to entry, network effects, and substitutability of different products can ultimately restrict a firm's ability to raise prices or lower outputs.

The plaintiffs assert that Google has monopoly power in two main markets: general search and search advertising.

*General Search*: The plaintiffs assert that general search services in the United States is a relevant market , and for the purpose of their argument, propose to limit the market to services that allow consumers to "find responsive information on the internet by entering keyword queries in a general search engine such as Google, Bing, and DuckDuckGo." To support this assertion, the plaintiffs argue that these services are unique because they offer a "one-stop shop" to access an extremely large and diverse volume of information. Under this market definition, Google enjoys an 88 percent market share, with no other general search engine possessing more than 7 percent of the market. Further, other factors such as barriers to entry (the creation, maintenance, and growth of general search engine require significant capital investment) may support the finding that Google has monopoly power in this market because consumers have no meaningful alternatives.

Google will likely argue that this definition ignores substitutable services and consumers use different search tools other than general search engines to find information. First, many specialized search tools provide better results for consumers and users often choose these tools for information. For example, if a consumer wants information about different types of stools for a bar countertop, they may choose to search on Amazon, Wayfair, or a variety of brand specific websites to see what options are available, the relevant specifications, and reviews on the quality. Consumers and advertisers can choose these alternatives, meaning that if Google attempts to act like a monopolist, it will lose business.

Further, text-based general search goes beyond the search engines envisioned by the plaintiffs. Currently, individuals use social media platforms such as TikTok and Reddit to quickly find information that could also be found through a general search engine that scrapes the web like Google. For example, a user looking for information on how to install a new graphics card can search on Reddit's "buildAPC" subreddit. Even if such methods don't provide the same results, for many consumers it is an alternative that they can use if Google attempts to extract monopoly rents.

*Search Advertising*: The plaintiffs also assert that search advertising is the relevant product market in which Google has monopoly power. This market definition includes ads generated in response to online search queries including both general search queries and specialized search ads. The plaintiffs also argue that other forms of advertising such as internet video, television, or newspaper ads are not substitutable because they "cannot be targeted at a specific consumer based on the consumer's real-time, self-disclosed interests." Plaintiffs finally

claim that general text search advertising is the relevant market through which the case should be considered, but there is reason to doubt this assertion, as specialized search engines may be even better at targeting users' specific interests.

Again, the plaintiffs will need to show that Google has monopoly power in these markets. The plaintiffs rely largely on the share of search advertising market going to Google (70 percent, according to the complaint) as evidence. If advertisers can go elsewhere, however, such as to specialized search engines or other forms of digital advertising specifically targeting users based on interests, Google can be said to lack monopoly power to control prices and outputs. For example, if a golf advertiser such as Callaway wants to reach users specifically interested in golf, but Google raises the costs of general search advertising, Callaway may instead choose to advertise on Amazon for users who search for golf equipment or YouTube for users watching the latest Rick Shiels Break 75 golf video. These alternatives limit the ability of a firm to act like a monopolist. Absent evidence that Google has monopoly power in one of these markets, the claim will fail.

**Element 2: Anticompetitive Conduct**

Even if a firm has or may obtain monopoly power, plaintiffs must also prove a second element: The firm achieved that power through exclusionary conduct designed to harm competition. This is because a healthy market should encourage firms to improve their products and outcompete rivals. Nevertheless, defining what kinds of exclusionary conduct violate the law is difficult. Generally, however, courts will look at the procompetitive justifications for that conduct and weigh those benefits against the anticompetitive harm. The primary conduct the court will examine is "exclusionary agreements" with distributors designed, as the plaintiffs allege, to exclude rivals and protect its monopolies.

*Exclusionary Conduct*: First, the plaintiffs allege that Google entered into exclusionary agreements with Apple and other mobile distributors to control mobile search. With Apple, Google entered into an agreement making Google the default search engine for Apple's browser, Safari. For other manufacturers, Google makes Android available, but imposes preinstallation agreements and revenue sharing that prohibit preinstallation of other general search providers. As the plaintiffs argue, these advantages make it impossible for rival search engines to achieve the necessary scale to produce a viable alternative because consumers, in the aggregate, would not install rival search engines.

Second, the plaintiffs allege Google entered into exclusionary agreements with browsers such as Mozilla's Firefox to make Google the default search engine for the browser. In exchange for being the preset default search engine, Google shares with the browser up to 40 percent of advertising revenue. The plaintiffs allege that this forecloses competition in the general search market because consumers regularly use the default search engine rather than setting another option as their default.

*Procompetitive Justifications*: Even if the court finds these agreements exclusionary and anticompetitive, Google can show that the agreements serve procompetitive purposes, often to the benefit of consumers.

First, these agreements improve the quality of Google's search results. By directing more traffic to Google, the company can learn from use queries to improve its algorithms and deliver the information consumers want. While rival search engines may struggle to keep up, this is a significant benefit to consumers and ultimately is a result of Google competing on the merits.

As other courts have held, when a firm's conduct serves to improve the quality of its product, no weighing of procompetitive benefits with anticompetitive is even necessary. The D.C. Circuit Court will still likely weigh the exclusionary effects with the procompetitive justifications as other circuit decisions are not binding in this

case.

Second, providing a default or preinstalled search engine improves competition in adjacent markets. For example, Apple's decision to use Google as its default search engine for Safari allows the company to better compete with rival mobile operating systems using Android and another mobile web browsers. Traditional web browsers such as Firefox likewise benefit from a default search engine because this arrangement makes search easier for its users. As Mozilla's CEO said at the summary judgment hearing, "[w]e're making search easy for them, and we added a choice in a product in a way that no one else had or even thought of."

Finally, these agreements focus on Google being the default or a preinstalled option for browser services, but Google is not the only option available. If a mobile user doesn't like Google, they can install another search engine or change the default search engine on Safari. This consumer choice limits the potential exclusionary effects.

Taken together, Google has a strong argument that these agreements are procompetitive rather than anticompetitive, and even if it has monopoly power in general search or search advertising, the court will not condemn the agreements because they serve competitive purposes.

**Conclusion**

This case will present an excellent insight into how modern antitrust jurisprudence addresses competition in digital markets. Seemingly large players often compete in different markets, and this fierce competition may prevent a firm from extracting monopoly rents in any one segment. Nevertheless, smaller rivals may struggle to compete with large, established firms such as Google, particularly as they continue to gain scale and uniquity. Congress should keep a close eye on this case, as its outcome, and the analysis underlying it, will inform lawmakers of how to approach the regulation of large technology companies, particularly for antitrust concerns, in the future.