Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

The Google Antitrust Lawsuit: Initial Observations

October 23, 2020

On October 20, 2020, the Department of Justice and eleven Republican state attorneys general (hereinafter "DOJ") filed a long-anticipated antitrust lawsuit against Google, alleging that the tech giant has unlawfully monopolized the markets for general internet search services and search advertising. The complaint follows an investigation of "Big Tech" platforms that the DOJ launched last summer and represents the Department's most significant antitrust case since the Microsoft litigation that began over twenty years ago. The lawsuit also implicates an area of intense congressional interest: earlier this month, the House Antitrust Subcommittee released a report concluding that major tech companies—including Google—have engaged in exclusionary conduct that violates the antitrust laws. This Legal Sidebar provides an overview of the Justice Department's allegations and offers initial observations on their relationship to existing antitrust doctrine.

Monopolization Doctrine: The Basics

Section 2 of the Sherman Antitrust Act makes it unlawful to "monopolize" commerce. But the statute does not define that key term, leaving the courts to flesh out its content. In unpacking this language, the Supreme Court has explained that the mere *possession* of monopoly power is not illegal. Instead, a firm violates Section 2 only if it has monopoly power *and* engages in exclusionary conduct to achieve, maintain, or enhance that power.

An antitrust plaintiff typically establishes that a defendant has monopoly power by showing that it has a dominant market share that is likely to be durable. This process requires parties to define the scope of the market in which the defendant operates—that is, the denominator in the market-share fraction. Plaintiffs predictably argue that defendants compete in narrow markets with few rivals, while defendants ordinarily maintain that they struggle in large markets awash with adversaries. The legal test goes as follows: a relevant antitrust market consists of the good or service at issue in a given case and all others that are "reasonably interchangeable" with it.

In addition to establishing that a defendant has a dominant market share, monopolization plaintiffs typically must prove that the defendant's dominant position is likely to be *durable*. Plaintiffs usually try

Congressional Research Service
https://crsreports.congress.gov
LSB10544

to satisfy this burden by showing that the defendant is insulated from potential competitors by significant entry barriers.

When it comes to Section 2's "conduct" element, courts have held that a wide range of behavior—including predatory pricing, tying, and exclusive dealing—*can* qualify as impermissibly exclusionary *depending on the circumstances*. Evaluations of a monopolist's conduct generally proceed under a three-part burden-shifting framework. First, a Section 2 plaintiff must make a *prima facie* case that a defendant's conduct had anticompetitive effects. Second, if the plaintiff makes this showing, the defendant must proffer a "procompetitive justification" for its conduct—that is, a non-pretextual claim that its conduct is a form of competition on the merits. If the defendant cannot adduce such an argument, the plaintiff prevails. But if the defendant presents a procompetitive justification for its behavior, the burden shifts back to the plaintiff to show that the anticompetitive harms of the challenged conduct outweigh its procompetitive benefits.

As this framework suggests, distinguishing exclusionary behavior from vigorous-but-legal competition can be highly fact-intensive. Monopolization suits therefore often turn on detailed inquiries into the effects of the precise conduct that is being challenged.

The Lawsuit's Central Claims

Monopoly Power

The DOJ's lawsuit alleges that Google has monopoly power in the markets for "general search services," "search advertising," and "general search text advertising." According to the complaint, Google occupies dominant shares of each market: 88 percent of "general search services" and over 70 percent of "search advertising" and "general search text advertising."

The DOJ further contends that Google's dominance is likely to be durable in light of the significant entry barriers surrounding these markets. Because a search engine's accuracy improves as it obtains more data from more searches, the DOJ argues that Google derives crucial benefits from its enormous scale. Meanwhile, smaller rivals with access to less data face an uphill battle in developing algorithms that can compete with Google's technology. The Justice Department alleges that Google's scale advantage in *search* creates a similar competitive moat in *advertising markets*, where advertisers seek the search engines with the most users and most accurate algorithms.

Exclusionary Conduct

In addition to benefiting from these structural entry barriers, the DOJ asserts that Google has engaged in exclusionary conduct to maintain and extend its monopoly power. The core argument here is that Google has entered into a series of anticompetitive agreements with companies that control various "search access points"—specifically, mobile device manufacturers, wireless carriers, and browser developers. Under the contracts, these companies agree to adopt Google as the default search engine for their products. And because users "rarely" change these defaults, the DOJ contends that the challenged agreements seriously impede the ability of rival search engines to meaningfully compete with Google.

The complaint alleges that Google has used the relevant agreements to "lock up" several "search distribution channels."

First, the Justice Department claims that Google has excluded rivals from key access points on *mobile devices*. Google has allegedly accomplished this goal on *Apple iOS* devices by entering into revenue-sharing agreements (RSAs) in which Apple has agreed to make Google the default search engine for its Safari web browser, which is itself the default browser on iOS devices. (In exchange, Apple takes a cut of the revenue Google derives from searches on its devices). The DOJ contends that Google has secured similar default status on *Android* devices through a series of interlocking agreements involving its Android operating system. These contracts include:

- "Pre-installation" agreements with device manufacturers, which condition the availability of highly demanded Google apps (*e.g.*, the Google Play store) and application programming interfaces (APIs) on the pre-installation of Google Search;
- RSAs with device manufacturers and wireless carriers that pre-install Google Search on their devices. The DOJ alleges that "in many cases," these RSAs also expressly prohibit manufacturers from pre-installing rival search engines; and
- "Anti-forking" agreements that prohibit device manufacturers who pre-install Google's highly demanded apps from selling Android devices that do not comply with Google's technical standards. The complaint alleges that these agreements have inhibited the development of new mobile operating systems that could challenge Google's version of Android and thereby create alternative search distribution channels.

Second, the Justice Department argues that Google has "locked up" search distribution via *web browsers*. The complaint asserts that Google has secured these access points by entering into RSAs with browsers that make Google their default search engine. In addition to its deal with Apple, Google has allegedly entered into such RSAs with every "significant" non-Google browser other than those distributed by Microsoft. The DOJ contends that because of these agreements, 85 percent of all browser usage in the United States occurs on Google's Chrome browser or a browser covered by an RSA with Google.

Third, the complaint claims that Google is positioning itself to dominate *the next generation of search distribution channels*—smart watches, smart speakers, smart TVs, and other "Internet of Things" (IoT) devices. Google is allegedly pursuing this goal by interpreting its anti-forking agreements with Android device manufacturers to cover these new products. And the DOJ further contends that Google has entered into restrictive contracts with IoT manufacturers that use other types of Google technology.

While Google's allegedly anticompetitive agreements are diverse and occasionally complicated, the DOJ argues that the contracts share a key similarity: they impede rival search engines' ability to compete by giving Google prime position at major search access points. By excluding rivals in this manner, the DOJ alleges that the agreements violate Section 2 of the Sherman Act.

Initial Observations

Monopoly Power

The DOJ's lawsuit raises several interesting antitrust issues, starting with monopoly power. Google will likely contest the complaint's assertion that "general search services" is a properly defined antitrust market. The company's CEO has argued that Google competes with other online sources of information, including news websites, social media platforms, and specialized search engines like Amazon and Expedia. In response, the DOJ contends that these other services are not "reasonably interchangeable" with general search engines because few consumers would regard them as suitable substitutes for most types of search queries.

While the Justice Department intuitively seems to have a strong argument here, it will be interesting to see how it makes its case. The DOJ's favored methodology for defining markets is a *quantitative* test that asks whether a hypothetical monopolist in a proposed market could profitably impose a five-percent price hike. But that test is not readily applicable to a putative market for online search, where most search providers offer their services for free. The DOJ may therefore have to rely on consumer surveys, internal company documents, testimony from industry experts, and other forms of qualitative evidence to defend its proposed "general search" market.

Google will also probably challenge the DOJ's claim that "search advertising" and "general search text advertising" are relevant markets. Google and organizations that it backs have recently released papers arguing that the tech giant competes with a range of other companies that sell online ads, including Facebook, Amazon, and Twitter. For its part, the DOJ contends that these other venues for online ads are not reasonable substitutes for general search engines, because only the latter allow advertisers to target customers *based on specific search queries*. Because Google and these other companies charge advertisers for their services, this dispute will likely be amenable to the kind of econometric arguments on substitutability deployed in more typical antitrust litigation.

Finally, Google may dispute the DOJ's argument that its access to large amounts of data represents a significant entry barrier. The company's defenders and its Chief Economist have claimed that the marginal returns on data diminish fairly rapidly. These commentators argue that the quality of a search algorithm—not the amount of data available to "train" it—is the key variable determining its success or failure. Google's backers contend that this view derives support from the many startups that have supplanted once-dominant tech incumbents—evidence that they argue belies the suggestion that online markets have major entry barriers. (Unsurprisingly, other economists dispute these claims). We can probably expect dueling expert testimony on this issue and on the durability of Google's allegedly dominant market share more generally as the litigation proceeds.

Exclusionary Conduct

Because monopolization cases are incredibly fact-intensive, it is difficult to confidently predict how the court will evaluate the "conduct" element of the DOJ's case without a factual record. But several features of the lawsuit stand out even at this early stage.

First, the complaint relies heavily on the effects of Google's default status at major search access points. Indeed, the DOJ argues that default search engines are so "sticky" that default status gives Google "*de facto* exclusivity" at the key distribution channels. This is a factual claim that Google will probably deny. In a blog post released hours after the DOJ filed its lawsuit, a company official emphasized how "easy" it is for consumers to use other search engines.

Observers will have to await further evidence on this issue as the case progresses, but we already have at least one useful data point. In a 2018 antitrust action targeting similar conduct, the European Commission (EC) found that 95 percent of all search queries on Android devices—where Google Search was pre-installed—were made via Google Search. In contrast, less than 25 percent of all queries on Windows Mobile devices—where Bing but not Google Search was pre-installed—were made via Google. Similar evidence from the U.S. would likely buttress the DOJ's arguments on the competitive effects of default status. But even without such evidence, Google's implicit contention that default placement is not competitively significant may be difficult to square with the complaint's allegation that the company pays billions of dollars annually to secure it.

Second, while the DOJ's complaint is sparse on citations to the antitrust case law, Google's alleged conduct does resemble certain categories of behavior that are familiar in monopolization doctrine. Google's "pre-installation" agreements are a form of "tying" arrangement in which Google has conditioned the availability of certain products (the Google Play store, other Google apps, and certain APIs) on the pre-installation of Google Search. The DOJ argues that this "tie" reinforces the dominance of Google Search, because many device manufacturers want access to the Play store, the other Google apps, and the relevant APIs.

If the DOJ can make a *prima facie* case that these "ties" harm competition—as it did with similar "ties" involving Microsoft's Windows OS and Internet Explorer two decades ago—the burden will shift to Google to offer a procompetitive justification for the agreements. In the EC's 2018 antitrust action, Google unsuccessfully argued that its Android "ties" were procompetitive because the revenue Google derived from them allowed it to license Android to device makers for free. The company's October 20 blog post gestures toward a similar argument. But the permissibility of this type of cross-market balancing—that is, weighing harms in the market for *online search* against benefits in the separate market for *mobile devices*—is contested in both the case law and academic literature. This wrinkle in the doctrine adds another issue to the "wait and see" pile.

Third, the DOJ may have difficulty proving that major targets of its case—Google's RSAs with Apple and other device makers, browser developers, and carriers—are exclusionary and not a form of legitimate competition on the merits. The theory here appears to be that the RSAs have harmed consumers by reducing the quality of general search engines (on dimensions like privacy and data protection), lessening consumer choice, and impeding innovation. But it is unclear whether a judgment in the DOJ's favor would ameliorate these alleged harms. Without the challenged RSAs, it seems that Apple and Google's other counterparties would have three options: (1) decline to offer consumers *any* default search engine, (2) maintain Google as their default search engines but forgo revenue sharing, or (3) enter into RSAs giving other search engines default status.

Google will likely argue that (1) would *harm* consumers, who benefit from ready-to-use default features on their devices and browsers. If (2) is the likelier outcome and Google's counterparties would instead *maintain* Google as their default search engine—perhaps because, as the company suggests, its counterparties enter into RSAs because of the superiority of Google's product—then *Google* would benefit from the litigation, while consumers would seemingly be unaffected. Finally, if the case results in Google's counterparties entering into new RSAs with other search engines, it is not clear how that outcome benefits consumers. If the theory is that the challenged RSAs have denied rivals the *scale* necessary to "train" their algorithms, its viability will depend on empirical claims about the value of additional data. (Some of Google's general-search rivals like Bing and Yahoo! have been on the market for over a decade and have deep-pocketed corporate parents, which may suggest that they would derive limited quality benefits from more data). Alternatively, the DOJ may focus on the positive effects of fragmentation in search markets for *advertisers*. Or the government could offer a totally separate narrative about the relevant markets. But at this stage, its core theory of competitive harm awaits further explanation.

Conclusion

The Google litigation is enormously significant and likely to affect the continuing antitrust investigations of the other three "Big Tech" firms—Apple, Amazon, and Facebook. We are also unlikely to see a resolution anytime soon: the case will probably stretch on over several years. Indeed, the DOJ filed its seminal Microsoft lawsuit in May 1998, only to have its final settlement with the company approved in June 2004. The DOJ's lawsuit may also not be the only antitrust action against Google. A separate group of state attorneys general is reportedly preparing a broader suit targeting Google's ad-technology platform. While the DOJ's action is groundbreaking, then, it will hardly be the final word.

Author Information

Jay B. Sykes
Legislative Attorney

Disclaimer