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Hey Google, What's Next?

By **Bryan Koenig and Matthew Perlman**

Law360 (November 30, 2023, 5:43 PM EST) -- The fate of Google's largest source of revenue remains months, and probably years, away from resolution after 10 weeks of trial on the government's antitrust allegations targeting the contracts that make Google the default search engine on the devices and browsers used by most Americans.

U.S. District Judge Amit P. Mehta won't hear closing arguments in the dual cases from the U.S. Department of Justice, backed by a small coalition of state attorneys general, and a larger group of state enforcers, until early May 2024 — six months after the D.C. federal court bench trial wrapped Nov. 16.

Whatever the judge decides has implications not just for Google but also for the companies it contracts with for the default status, which include Apple, Samsung, Mozilla and more. The case also has major implications for antitrust enforcers' efforts to rein in Big Tech through merger and conduct cases that have already targeted not just the search giant but also Meta, Amazon and Microsoft as the DOJ and the Federal Trade Commission test the bounds of competition law in the age of smartphones, apps and the modern internet.

"We are at a crossroads," said John Briody of McKool Smith. "These are absolutely critical cases, for the companies that do business and the customers that use them."

To help guide those first next steps, Judge Mehta will be sorting through 1,900 pages of post-trial filings spread across proposed conclusions of fact, proposed conclusions of law, post-trial briefs, and response submissions. Collectively, all that work means the judge may not turn out an opinion on Google's liability under Section 2 of the Sherman Act, which bars monopolistic conduct, until late next year.

"With that much briefing, though, it's a Herculean task," said Briody. "It's anyone's guess" when a ruling will come.

Appeals Almost Certain

After Judge Mehta's decision comes inevitable attempts to appeal, no matter who loses, and potentially a remedies phase if the DOJ wins, meaning another lengthy trial with further prospects for appeal.

"100% Google is going to appeal if they lose," said Sam Weinstein, a professor at the Benjamin N. Cardozo School of Law at Yeshiva University and former DOJ Antitrust Division lawyer.

Weinstein said that a DOJ appeal, in turn, is "pretty likely," but would depend on exactly what Judge Mehta's ruling looks like.

Whatever happens, "we're not gonna get real resolution in that sense, for a while," Weinstein said.

All the unknowns and what-ifs further obfuscate the fate of the search business that, alongside "other" parts of Google's business, brought in over $162 billion in revenue in 2022, according to the company's most recent annual securities filing. That's out of a total $283 billion in revenue for the year.

The public was also given a glimpse of several other eye-popping financial figures during the trial, including that Google paid over $26.3 billion for search distribution agreements in 2021 and that Apple, the company's most important distribution partner thanks to its control of the Safari browser on Macs and iPhones, receives 36 cents out of every dollar in search advertising revenue Google brings in through those devices.

Trial Tests Apple's Choices, Microsoft's Also-Ran Status

Apple's role in the industry was a focus throughout the trial, with testimony and questioning about the tech giant's reasons for choosing Google. Apple's executives insisted that the choice was made because Google offers the best search product and that the service provides the best experience for users.

Enforcers, on the other hand, insisted that Apple had other options, including potentially developing its own general search engine, but chose to strike the deals that best benefited its bottom line.

Erik Hovenkamp, an associate professor at the University of Southern California's Gould School of Law, told Law360 that the judge heard conflicting testimony on many issues in the case, including the reasons manufacturers give for making Google the default and what would have happened without the agreements. He also noted that Apple is "not exactly a neutral party. They're making lots of money from these deals."

"Looking at all of the testimony combined, it's a little hard to know what to make of it," Hovenkamp said. "There really were a lot of inconsistencies, and it'll be tough for the court to sift through it all and try to establish a concrete record."

Microsoft, the last tech company to be targeted by a major government monopolization case more than 20 years ago, also loomed large throughout the Google search trial, despite its relatively small share of the general search engine market through Bing. Advertisers testified about the importance of Google search to their business and contended Microsoft's only meaningful role in search is on desktops, thanks to Bing being set as the default search engine on Windows machines.

Enforcers also argued throughout the trial that search engines get better as more people use them and that Google's default agreements are preventing potential competitors like Bing and DuckDuckGo, a privacy focused search engine, from gaining any meaningful traction. Google's executives countered that user data is no longer that important to improving the quality of search results now that machine learning and artificial intelligence are being employed.

Hovenkamp, who recently authored a paper looking at ways to measure the competitive effects of search engine defaults, said the importance of user data was another area where Judge Mehta heard conflicting testimony. The issue is relevant from an economic perspective, he said, because of the

supposed network effects associated with search engines, meaning they improve with more users, and scholarship suggesting that data has "diminishing returns."

"It's helpful at first, and it gets less and less helpful the more you get," Hovekamp said. "If that's true, then Google doesn't necessarily gain a lot of extra quality by capturing an extra 5% of the market because it's already so big. Depriving Bing of some user data could be consequential [to Microsoft] because it doesn't have that much data yet."

Market Definition as Potentially Decisive

A major point of contention throughout the trial was the exact bounds of the market in which Google operates. The DOJ pushed a definition limited to general search services and the ads that accompany their results, where Google has a roughly 90% share. But Google argued it competes broadly with specialized vertical search providers such as Expedia, Yelp and Booking.com, with one expert contending there's competition every time a user decides how they want to run a search.

Executives from Booking.com and Expedia, on the other hand, testified that there's no substitute for Google search ads. Google tried to deflect the contentions through testimony from economists and marketing experts about the different roles that advertisements play, arguing there is no unique market for general search advertising.

"The key framing is going to be in the definition of the market," said Anthony Dukes, a marketing professor and co-director of the initiative on digital competition at the University of Southern California Marshall School of Business.

If Google can water down how the market is measured, it would mean the company doesn't have a monopoly under Section 2 of the Sherman Act. The company might succeed in that effort, because, according to Dukes, digital economies blur market lines that may have been clearer in the past.

Search Isn't the Only Google Fight

The search case continues to move forward as Google battles litigation targeting **other parts** of its business, brought by the DOJ, state attorneys general and private plaintiffs, including at least one case likely to see initial resolution before Judge Mehta rules.

In some ways, Weinstein said the search trial was much more straightforward than what's next: **the DOJ case** in the Eastern District of Virginia and the state attorneys general case in the Eastern District of Texas, both accusing Google of monopolizing the display advertising ecosystem through its control over technology used to display advertisements on third-party websites. The allegations target technology used to connect website publishers, advertisers and consumers through split-second auctions that place ads on webpages each time they are loaded.

Both of the ad tech cases are likely to go to trial next year. And the DOJ case in particular could see a very quick initial resolution thanks to the department's bid, contested by Google, for proceedings in front of a jury rather than a judge who has the luxury of mulling a decision for months.

Outsized Search Importance

The search trial was the first of both the crush of litigation against Google and for the broader modern

wave of antitrust enforcement against Big Tech, giving it "some outsized political value," Weinstein said.

"If the government wins, it's very good for them," Weinstein said. "It might be seen as ratifying the way the Biden administration has approached [antitrust]," even though the case was filed by the Trump DOJ.

A win for the DOJ, according to Weinstein, could show that the more aggressive antitrust tack taken by the Biden administration can be successful, after a string of high-profile setbacks, and that modern antitrust law, which critics in and out of FTC and DOJ leadership argue has been too laxly enforced in recent decades, "can be used against tech companies successfully."

Remedies Unclear

If the case does get as far as a remedies phase, even after or in spite of any appeals, it remains unclear what kind of fix Judge Mehta could or would impose on Google. The search trial that kicked off Sept. 12 focused heavily on whether to impose choice screens as European and Russian regulators do, which ostensibly gave rivals like Bing and DuckDuckGo a fighting chance, although Google fought tooth and nail to argue the European choice screen, in particular, did little to erode its market share.

Also overhanging any remedy would be the obligations Google and other tech giants face under the European Union's new Digital Markets Act.

Imposing a choice screen in the United States, at least through the instant litigation, would likely be more difficult. That's because a choice screen would be the purview of distributors like Apple and Samsung. The DOJ, however, did not sue those companies, meaning Judge Mehta couldn't order them to do anything.

"Those companies aren't before the court. So the court can't order them to do that," said Weinstein.

The DOJ has kept tight-lipped about any prospective remedy it might seek.

Perhaps the most likely option would be an injunction banning Google from inking default contracts. Yet that would not block Apple and other distribution partners from picking Google as their default search engine anyway, albeit likely based on dramatically reduced revenue sharing. And Apple Senior Vice President Eddy Cue testified that the company never really needed to consider "inferior" alternatives to Google Search. A reduced revenue share could prove calamitous for Mozilla, which draws nearly 90% of its income from search revenue.

"Many people are going to choose Google as the default anyway. Or choose it as their browser anyway," Weinstein said. The point of such a remedy for the DOJ, he said, may be "opening up the possibility."

If that possibility does open up, the question becomes whether Bing, DuckDuckGo and others could entice distributors to switch where they haven't previously been able to wrest away Google's defaults when contracts went up for renewal. Rival executives had argued during the trial that what they really need to compete against Google and its massive data advantage is not just a choice screen but default status.

Briody noted arguments that Google's defaults have already entrenched the company to the point where people and distributors are unlikely to turn to alternatives.

"There are good arguments why that remedy is maybe not going to be sufficient to ameliorate the effects of the past conduct," Briody said of an injunction against default contracts. "It really is a tricky situation when you get into the tech space."

The cases are U.S. et al. v. Google LLC, case number 1:20-cv-03010, and State of Colorado et al. v. Google LLC, case number 1:20-cv-03715, in the U.S. District Court for the District of Columbia.

--Editing by Jay Jackson Jr.
