THBT Google should be broken up.

What the U.S. Has Argued in the Google Ad Tech Antitrust Trial

New York Times, by David McCabe September 20, 2024

As the government wraps up its case, it has built a picture of how Google has become dominant among companies that buy and sell ads online.

Over the past two weeks, lawyers for the Department of Justice have questioned more than a dozen witnesses as they try to prove that Google has broken antitrust laws, part of a second major federal antitrust trial against the tech giant.

The government on Friday concluded its main arguments in the case — U.S. et al. v. Google — and the internet giant started mounting its defense. The case, filed last year, accuses Google of building a monopoly over the technology that places ads on websites around the internet.

Now, Google will deny the claims. The company argues that the ad tech industry is intensely competitive, and accuses the Justice Department of ignoring rivals like Facebook and Amazon to make its case sound more compelling.

The trial, which is taking place in the U.S. District Court for the Eastern District of Virginia, is expected to last a total of about four weeks. After that, Judge Leonie Brinkema could take several months to make a decision. The stakes are high: The government has asked for a breakup of the company, requiring Google to sell off some assets.

Two prime threads have emerged during the trial: what the government says Google has done to illegally build and maintain its monopoly and how those practices have harmed website operators, advertisers and ultimately consumers. Here are the Justice Department's main arguments.

How Google built a monopoly in ad tech software

The Justice Department and a group of states accused the tech company of abusing control of its ad technology and violating antitrust law, in part through its 2008 acquisition of the advertising software company DoubleClick. Google has pushed up ad prices and also harmed publishers by taking a big cut of each sale, the government argues.

The acquisition of DoubleClick "set the competitive conditions for all the anticompetitive conduct that followed," Julia Tarver Wood, the government's lead courtroom lawyer, said in her opening statement. The government has said that Google controls 87 percent of the market for a crucial technology that publishers use to sell ads.

The DoubleClick acquisition gave Google two linchpins in its ad tech operation, the government says. The first is a system that people who run websites use to offer ad space, like the rectangle at the top of the homepage on a news site. The second is a so-called exchange — software that conducts real-time auctions between publishers and advertisers to sell ads as users load a web page. Google also monopolizes some technology that allows advertisers to buy ad space on different websites, the government said.

That means that Google can be involved in every stage of a deal to sell ad space online. The Justice Department pointed to an email from a former Google employee that compared that arrangement to allowing a bank to own the New York Stock Exchange.

Google's ad tech business generated $31 billion in revenue last year, or about a tenth of the company's total revenues.

How Google cemented its power

As Google built its system of ad technology, it also set the rules to protect its monopoly and benefit itself, the government argued.

Millions of advertisers use Google's tools to place ads around the web. For years, those tools could place bids only on ad auctions that took place on Google's system, giving the company a major advantage, the government argued.

"They have been draconian and absolutist," said Jed Dederick, the chief revenue officer of the Trade Desk, which makes rival tools for advertisers, during his testimony.

The Justice Department said Google had run the same playbook against publishers. It made it harder for publishers to use ad systems that competed with Google's, and a former ad tech executive testified that he had shut down his company's competing business as a result.

Google also rigged the rules of the auctions to benefit itself, the government said. That included, at various times, prioritizing itself when publishers compared bids from ad space from different auction systems. The company also said that publishers needed to set the same minimum price for ad space with both Google and its competitors, making it harder for publishers to negotiate with the tech giant.

How Google harmed publishers, advertisers and consumers

Google charges a 20 percent fee to publishers who run ad auctions using its system, known as an ad exchange, witnesses testified. But the government said that it had been possible only because of Google's dominance.

In one 2018 email shown to Judge Brinkema, Chris LaSala, a Google executive who has since left the company, said that the fee had been justified only because publishers had needed access to the enormous demand for ad space provided by the company's tools.

To accommodate that fee, advertisers paid more than they would have otherwise in a free market, the government said. And

publishers made less, with Google skimming the high fee off the top of each transaction.
The government says that means the public has ultimately suffered, as the websites where they get news and information have been bled dry of revenue and higher ad prices made products cost more.
"It is likely that consumers were harmed," Dr. Rosa M. Abrantes-Metz, an expert witness for the government, said during testimony on Wednesday.

Google Is No Monopoly. It's Widely Used Because It's the Best | Opinion

Newsweek, By Hannah Cox 08/07/2024

On Monday, a federal judge ruled that Google violated antitrust law and acted illegally in order to maintain its monopoly in online searches. There's just one glaring problem: Google isn't a monopoly—not even close.
In fact, there are over 30 other search engines in the world that are dedicated solely to search functionality, including Yahoo!, Bing, and Duck, Duck, Go. Additionally, websites like Amazon, TikTok, and Pinterest have placed increasing competition on Google in recent years as consumers have begun using these websites for all manner of searches, from products to DIY tutorials to medical advice.
The ruling marks the first antitrust decision in the modern tech era, and its implications could be far-reaching for our legal framework, our economy, and consumers.
In the case, the U.S. Justice Department argued that Google acted in an anti-competitive nature by securing agreements with companies like Apple and Samsung that ensured their browsers were auto-downloaded to their devices. They also argued that over 90 percent of web searches are conducted on Google's search engines.
In reality, consumers have always had the ability to download their preferred search engines to their phones or delete the apps that come pre-programed to their devices. In securing these deals, Google did not block other search engines from being accessible, nor did they force anyone to use their products. They just made them more convenient to access, which is a perfectly reasonable step for a business to take.
Google disputes the claim that 90 percent of web searches are done on their engines. But even if they were, the company's popularity indicates one thing and one thing alone: Consumers like Google products and want to use them. The company has in no way harmed consumers, defrauded anyone, or even acted in an unfair way toward their competition. Being smart enough to negotiate such deals simply makes Google better at its job.
For decades, antitrust law has hinged on conservative legal jurisprudence known as the consumer welfare standard. It's a very good legal precedent that defenders of capitalism and limited government worked hard to enshrine into law following a disastrous period of aggressive antitrust pursuits by the U.S. government in the 20th century that crippled our economy.
The consumer welfare standard says that in order to have breached antitrust law, three conditions must be met. The company in question must be a monopoly (an extreme rarity), it must have used its monopoly power, and it must have done so in a way that harms consumers. No serious person could argue Google crossed any one of these lines, much less all three.
Yet the case against Google is one of many the government has brought in recent years, many of which have come from the FTC under the aggressive and anti-capitalist reign of chair Lina Khan. Khan's agenda, which has been supported by the Biden administration and populists in both parties such as Senators Elizabeth Warren and Josh Hawley, seeks to overturn the consumer welfare standard and return our antitrust landscape to that of the mid-1900s. According to these types, a business being big means it is bad, rather than the obvious truth that a business becoming big merely means it is popular and offers a product or service consumers quite like. And their solution to "bad" big business is always the same: The government needs more control of the economy and private companies in order to "protect" consumers from these evil corporations.
But antitrust enthusiasts always tip their hand, revealing antitrust as a Trojan horse: The same people who openly hate capitalism are always claiming we need more of it in order to "save" capitalism. But capitalism doesn't need saving by the government, certainly not from monopolies. In a true free market, system failures come naturally and swiftly as better competitors emerge, products become outdated, or bloat takes over. Monopolies rarely exist at all and never for long under capitalism.
Despite the fact that our economy is more mixed than free market these days, supporters of antitrust are still hard-pressed to identify actual monopolies in existence. In fact, the only long-standing monopolies that come to mind are government created or backed (think the public school system or certificate of need laws that block the infusion of new healthcare suppliers).
Google lost its lawsuit, but the real losers are the American people. Not only could this decision prohibit Google from offering quality products millions of us enjoy, it also means it will be even harder for the next competitor to get their foot in the door.
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What Should We Do About Google?

The New York Times, By Tim Wu, Aug. 13, 2024

Mr. Wu is a law professor at Columbia, a contributing Opinion writer and the author of "The Curse of Bigness: Antitrust in the New Gilded Age."
A federal judge held last week that Google has a monopoly on online search and has been illegally defending that monopoly for years. The verdict is important and correct, yet it leaves open an important question: What should the remedy be?
Judge Amit Mehta, in his 277-page decision, found that Google used a variety of means to hold on to its monopoly power

and inflate prices paid by advertisers (and ultimately, consumers) to use Google's search platforms. The remedy, which will be decided by the same judge after hearings begin in early September, needs to tear down the barriers that protect Google's monopoly; if the judge delivers little more than a slap on the wrist to the tech giant, this verdict — a historic victory for the Biden administration's antitrust division — will mean very little.

The government's case centered on payments, which in 2021 totaled more than $26 billion, that Google pays Apple and others to be the default search engine on their products. In doing so, Google kept Apple out of the search market and, the judge ruled, weakened its other competitors. But if the court merely decrees that Google now abandon those agreements, it won't be enough to unlock a long-monopolized market. It might even help Google in the short term by saving it some money. Likewise, a remedy that attempts to restore competition in search by forcing users to click through multiple search-engine alternatives would most likely be ineffective and annoying — worse than the status quo.

A truly effective remedy need seek not only to punish Google for its past offenses but also open markets by meaningfully restraining the company from similar conduct in the future. The best way to do that is to ensure that a new generation of companies can compete fairly not just in the search market but also in new markets — especially the emerging markets for artificial-intelligence-driven tech services. That sort of remedy would return antitrust law to its historical role as a form of industrial policy that restrains monopoly to promote economic growth and innovation.

As a model to emulate, consider the remedies imposed on AT&T, the greatest tech monopoly of the 20th century. In 1956, the Justice Department settled a major antitrust suit against AT&T by requiring the company to stay out of computing — and to license, free, all of its 7,820 patents. That remedy was a blockbuster that gave rise to a new generation of companies that developed two essential American industries: general-purpose computing and semiconductors.

In 1984, following another antitrust success story by the Justice Department, the Bell System, which was governed by AT&T, was broken up into eight pieces, transforming the telecommunications industry (over time) from an economic backwater into what we now call the internet industries. Once again, the strong remedy catalyzed a generational change: It created space for the rise of new companies that not just offered better products but also pioneered new industries.

If the treatment of AT&T was a success story, the tale of high-tech industries that were spared antitrust scrutiny is a cautionary one. The American passenger aerospace industry, originally comprising Boeing, McDonnell Douglas and Lockheed Martin, was in the late 20th century coddled with government defense contracts rather than being challenged by federal antitrust enforcers. When Boeing and McDonnell Douglas sought to merge in 1996, the Clinton White House pushed for the approval of what was a clearly anti-competitive merger apparently based on the belief that the United States needed a company large enough to compete effectively with Europe's Airbus.

At the risk of stating the obvious, Boeing has not benefited from those indulgences. It has become an oversize and ossified company that exhibits every symptom of what Louis Brandeis called "the curse of bigness."

The goal with Google should be to shake up the tech industry and launch many new companies, just as resulted from the AT&T decrees. So what sort of antitrust remedy might now inspire people to quit their jobs and pursue new opportunities in online search or A.I.? Two possibilities come to mind.

The first would be to force Google to divest from its web browser, Chrome, and the Android operating system for mobile devices. As Judge Mehta found, Google has illegally maintained its monopoly in part by preventing the distribution of rivals' products. It did so with large payments, but also by controlling the "choke points" — the places where we download software, like the browser or a phone. If Google no longer controlled those choke points, it would instantly improve the prospects for the emergent rivals to the Google empire.

Another remedy would be to force Google, which has provided access to some of its A.I. language models, to grant anyone free and open access to all of its A.I. technologies, as well as the vast troves of data on which those technologies are trained. This would be the most like the 1956 AT&T decree, leveling the playing field and giving newcomers a chance to build competing products while also improving A.I. safety by allowing more people to keep an eye on the technology.

If these proposals sound unduly punitive — Google is, after all, a company that has produced great products, many of which are offered at no direct cost to consumers — keep in mind that companies always produce their best products and services when their feet are held to the fire. At this point there is no need to worry about undercutting economic incentives: Google has long since made its initial investors and executives very wealthy.

As Francis Urquhart, the ruthless politician in the British version of "House of Cards," once put it: "Nothing lasts forever. Even the longest, the most glittering reign must come to an end someday." The time has come to give others their chance.

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Breaking up Google would be misguided

Financial Times, The Editorial Board OCTOBER 9 2024

Break-ups are never easy. But one could be on the cards for Google's $2tn empire. On Tuesday, the US Department of Justice recommended splitting up the company — spanning its Chrome browser, Play app store and Android operating system — as one of several options to remediate the Big Tech group's "anti-competitive conduct". The suggestion follows a landmark court decision in August when a federal judge, Amit Mehta, branded Google a "monopolist". He said deals it had made with wireless carriers, browser developers and device manufacturers, including Apple, had helped to tighten its hold over the online search market.

Google is under fire on other fronts, too. On Monday another federal judge said the business must open up its Play shopfront for apps to competition. A separate lawsuit argues that the company uses unfair practices to dominate the market for online advertising technology. The cases all feed into the belief that Google's size is a problem for the tech sector. But it makes more sense to target the company's ability to entrench its power than to break it up.

Google's strength in online search — where it handles over 90 per cent of queries — has been underpinned by a network effect. As it has grown, it has collected more user data, allowing it to sharpen its search tools and, in effect, drive more traffic to its site. That has been a boon for its ad-driven revenue model, which has helped it to deliver innovative products from which Google's users and marketers all benefit. The problem, then, is less about how big it has become, and more about its ability to raise barriers to entry.

Forcing Google to strip away Chrome or Android — which help to promote its search tool — risks being ineffective and too retrospective. A break-up will have little impact if it can still make deals to be the default search engine. Even when users have the choice they still tend to opt for Google's search tool over the likes of Microsoft's Bing. A misguided focus on size is also not the best message to send to other rapidly scaling tech businesses.

Time is another factor. A final decision on how to sanction Google may not come until August 2025. An appeal could add years. By the time any remedy even hits the business, technology and market dynamics could have shifted. As it is, users have been complaining over recent years about apparently declining quality in Google's search results. New generative AI search tools are also gaining market share. Microsoft, which was ordered to be split up in 2000 for squeezing competition, is a good example. That case was overturned, but the software firm's dominance fell anyway as it failed to innovate and mobile technology grew.

So what should be done? The DoJ is better off focusing on other, forward-looking remedies it proposed on Tuesday. That includes curtailing Google's ability to strike contracts with other tech companies to set its search tool as default. These deals prevent other search businesses from scaling up.

Encouraging tech firms to provide a choice of possible search engines, including AI-driven ones might help too. Asking Google to share a portion of its data trove could also support new entrants and help level the playing field for companies trying to build up generative AI search tools. But data privacy concerns abound.

Investors do not appear to be too concerned about the threat of a split for now. The looming presidential election also adds to the uncertainties surrounding the eventual outcome of the case. Either way, talk of breaking up Google is an oversimplified answer to a complex problem.

Breaking Up Google Isn't Nearly Enough

The New York Times, By Julia Angwin, Aug. 27, 2024

Ms. Angwin is a contributing Opinion writer and an investigative journalist.

Have you looked for a recipe online? If so, you probably found yourself on a blinking hellscape of a web page that was as long as an epic poem, but without any of the insight. First, you get the hokey story about the recipe's origin. Then there are the videos. The irrelevant ads. The photos of each ingredient. The thousands of words are divided up into sections with headlines like, "Chia Seed Pudding Troubleshooting."

If you graduated from college anytime before 2010, you may remember a time when websites provided relevant information, and did so swiftly. The reason so many businesses have tortured their web pages into a pulsing, ad-cluttered, endless scroll is because that is what it takes to check all the boxes needed to rank highly in Google search results. The result succeeds in its goal — getting the website to land at the top of Google results — but does little to get you to your goal. And you have little alternative but to wade through the morass.

A federal judge recently told us what we already knew: that Google is a monopolist in the web search market. In his scathing 277-page ruling, U.S. District Court Judge Amit Mehta noted that Google has an 89.2 percent share of the overall search market and a 94.9 percent share of searches conducted on mobile devices.

Fixing the problem is trickier. Next month, the judge will start deliberations on how to fix an industry that is so thoroughly dominated by one player. It is not going to be easy to jump-start competition in a market where Google has spent decades and billions of dollars quashing rivals.

The judge seems likely to ban the kind of exclusive distribution deals Google long used to make its product the default search engine on Apple phones and in web browsers such as Firefox. In 2021, Google spent more than $26 billion on these deals. And the Department of Justice is reportedly considering pushing for a breakup of Google — which would stop the company from installing Google search as the default option on its popular Chrome web browser and Android phones.

Both of those remedies are a good first step, but they aren't enough. They only address the barriers that competitors would face in marketing a rival search engine. But there are also huge obstacles to anyone who just wants to build one.

Competitors need access to something else that Google monopolizes: data about our searches. Why? Think of Google as the library of our era; it's the first stop we go to when seeking information. Anyone who wants to build a rival library needs to know what readers are looking for in order to stock the right books. They also need to know which books are most popular, and which ones people return quickly because they're no good.

All this information is currently available only to Google. You don't have to look far for an example of what a search engine without it looks like. If you've ever used Microsoft's Bing, you know how even a well-resourced company can struggle to provide meaningful results without access to the kind of information Google has about search queries.

Opening up Google search data to competitors is not a new idea. There was a similar concept in broadband, called "open access," which required some cable and telephone companies to allow competitors to use their lines to provide internet service. Although it wasn't uniformly successful, open access allowed for internet providers such as EarthLink to offer alternatives.

Of course, privacy considerations are involved in releasing data about search queries. Back in 2006, AOL released some search queries to the public for research purposes, and some of the information allowed users to be identified. We have better and more sophisticated privacy protections these days.

If Google was forced to share its data, we could live in a world where numerous competitors offer us different ways to access the world's knowledge. We could have a privacy-focused search engine, a shopping-focused search engine or even a search engine devoted to circulating high-quality news content.

Not only would our search results be better, but all the web pages that are currently optimized for Google — with their long listicle formats — would have to compete on other metrics such as speed and quality.

Building a better web populated by higher quality pages is a goal we should all shoot for. Forcing Google to open up its data is key to getting us there.

The Google decision is the right ruling — at the wrong time

The Washington Post, By Adam Lashinsky, August 6, 2024

The glacially slow process of reining in bad behavior by a powerful corporation lands just as AI takes off.

In its resounding victory over Google, the Justice Department might well be slamming the proverbial antitrust barn door after the monopolistic horses already have fled.

As we've seen before, the glacially slow process of reining in bad behavior by a powerful corporation — in this case Google, the undisputed thoroughbred champion of search-engine advertising — is happening at the precise moment when technological trends are moving away from the product that made the monopolist dominant.

Generative artificial intelligence, not browser-based search, is the technology enchanting consumers and businesses at the moment — and for the foreseeable future. Google, an important player in AI but hardly the leader in a field that includes OpenAI, Microsoft, Meta and multiple well-funded start-ups, now seems likely to be punished for its past transgressions just as a new market is taking shape.

None of this is to say that the reasoning by U.S. District Judge Amit Mehta in his ruling against Google is anything but sound. In clear language that serves as a useful history of the past 15 years of the technology industry, Mehta explains how Google has abused the position that gave it upward of 90 percent of the search market. By comparison, the second-place contestant, mighty Microsoft's Bing, has been able to scrape together a mere 6 percent share.

Google has achieved this position, Mehta ruled, by spending so much money to secure distribution of its search engine, notably by paying to make it the default for Apple's Safari browser, that competitors don't stand a chance against it. Mehta didn't use this comparison, but it would be as if a breakfast cereal company spent so much money ensuring its products' place on supermarket shelves that competing cereal makers couldn't afford to promote their brands.

Mehta was particularly persuasive in his explanation of the chilling effect this expensive distribution strategy has had on would-be Google foes. "As a result of the extraordinary resources required to build, operate, and monetize" a general search engine, he wrote, "venture capitalists and other investors have stayed away from funding new search ventures." The judge noted that this is even more remarkable given the ostentatious profitability Google enjoys. One would expect fat profit margins to attract competition like bees to honey. Not so when an illegal-monopolist bee guards the hive.

Not even Apple could afford to build a search engine, something it had plenty of incentive to do. The judge cited Google estimates that it would take Apple $20 billion in capital expenditures to replicate Google's technical infrastructure dedicated to search.

Mehta's trenchant observation about VCs and megacap aspirants, however, belies the important trend at play. Investors in fact have moved on from search. They are investing billions in AI instead. Whether they are doing this because Google blocked them from investing in novel search ideas or because they are anticipating the next big thing is irrelevant.

There's a laughable side note to all this, by the way: that Google's defeat is a victory for what some in Silicon Valley call "little tech," namely start-ups that have been stymied by Big Tech. The dynamic is hardly new — though it's a clever PR strategy to suggest otherwise — and the entire history of Silicon Valley is predicated on scrappy upstarts successfully challenging slothful incumbents. (Another aside: Until earlier this year, my wife worked at Google.)

Still, that the antitrust regime would focus on yesterday's war is wholly consistent with the disruption-to-dominance-and-back-again cycles of the industry's past. Regulators went after IBM in the 1970s over its stranglehold on mainframe computers, a market that barely exists today. In the 1990s, Microsoft ran afoul of the Justice Department over its control of a software operating system and its browser. More than a decade later, Google neutered that market with free software that performed nearly as well as what Microsoft had sold so dearly.

It makes one wonder which declining technology antitrust cops will target 20 years from now.

Of course, it typically doesn't even take lawsuits to bring down a dominant technology. Intel was so powerful in semiconductors that for years it was considered a legal monopoly, with a consistent 80 percent share of the market for the processors that went into personal computers. Ironically, given Intel's decade-long slide — including last week's decision to lay off 15,000 employees — it still dominates the market for microprocessors that go into PCs and servers. Unfortunately for

Intel, that market isn't what it used to be, and Intel missed important shifts, first into mobile phones and then into AI.
There is one thing about Mehta's ruling that is shockingly new. It is the first major case affecting the technology industry that validates the attempt by what just a few years ago was called the "hipster antitrust" crowd to argue that antitrust protections should extend beyond consumers. The so-called consumer welfare standard, popularized by Robert Bork in the 1980s, held that if consumers weren't injured, there was no antitrust violation. Alleging monopolistic behavior against a company such as Google, which makes many of its products available free to consumers, was a stretch under this thinking.
Though Mehta has yet to rule on how Google should be punished, his finding of illegal monopolist behavior for harming competitors constitutes a horse of a different color from the past four decades in antitrust law. Google's Big Tech brethren, including Apple, Amazon, Meta and, possibly, even Microsoft (again), should all take heed.
Adam Lashinsky is former executive editor of Fortune magazine and the author of "Inside Apple: How America's Most Admired — and Secretive — Company Really Works." follow on X @adamlashinsky

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Why Breakups Aren't the Best Way to Curb Tech Monopolies

Knowledge at Wharton, by Herbert Hovenkamp, February 27, 2024

Antitrust regulators should prioritize injunctions over breaking up Big Tech companies to boost market competition, according to Wharton's Herbert Hovenkamp.
Breaking up monopolies draws populist cheer from some antitrust advocates, but that approach could cause more harm than good in the case of digital enterprises, according to Herbert Hovenkamp, Wharton professor of legal studies and business ethics, and professor of law at the University of Pennsylvania's Carey Law School. A more flexible option to curb anticompetitive practices is to use injunctions, which "opens the path for more competitive choices," he said.
Regulating Big Tech from an antitrust standpoint can be complicated and the nature of the business does not easily allow clarity on the underlying issues, Hovenkamp said recently on the Wharton Business Daily radio show that airs on SiriusXM. (Listen to the podcast.) It is best for regulators to take a cautious approach and avoid taking strong actions on markets they don't understand well, he advised in a recent paper titled "Structural Antitrust Relief Against Digital Platforms."
"[Big tech companies] have certainly done things that could be challenged as antitrust violations," Hovenkamp said. "However, I don't think there's much warrant for this prolonged, repeated attack on Big Tech, which is using up a very large percentage of agency enforcement revenue." Furthermore, there is "no real evidence of naked antitrust violations" among those companies such as fixing prices, he continued. They tend to focus more on "vertical agreements" such as mergers, he added.
Hovenkamp's comments are set against the backdrop of recent government actions targeted at Amazon, Google, Facebook, and Microsoft that accuse them of violating antitrust laws. Hovenkamp is the pre-eminent authority on the subject. *The New York Times* in 2011 noted that many consider him to be "the dean of American antitrust law." He also co-authored the landmark 21-volume Antitrust Law, which has been cited more than 50 times by the Supreme Court and more than 1,000 times by federal courts, according to his Wharton online profile.
Dismantling Modern-day Monopolies
The paper noted that structural remedies — or breakups — for monopolization cases are uncommon under the Sherman Act. (The 1890 Sherman Antitrust Act is the first of the three acts in the U.S. that target unlawful mergers and business practices; the other two are the Federal Trade Commission Act and the Clayton Antitrust Act, both of 1914.) When they do occur, the courts almost always break firms along the boundary lines that had been formed by an earlier combination or merger, the paper added. "Undoing anticompetitive mergers is and should be lawful," Hovenkamp said.
In finding a remedy for a proven antitrust violation, structural remedies, or breakups, should be considered only as a last resort, according to the paper. "Courts should always look first to injunctions, which can be more effectively targeted at the harm and are likely to do less collateral damage," Hovenkamp wrote.
For example, a court order "divesting" Amazon of e-books would likely take the form of an injunction prohibiting it from licensing and relicensing e-books, or perhaps placing other contractual limits on its license agreements, the paper noted. If an injunction proves inadequate, the next option is to consider relief such as interoperability decrees, it added. Interoperability can take the form of firms in a market sharing data and operations, intellectual property, or other productive assets.
Hovenkamp agrees with the Federal Trade Commission's (FTC) request that Facebook parent Meta divest Instagram, which it acquired in 2012. Spinning off assets acquired by unlawful mergers is categorically different from breaking up firms that were developed through internal expansion, he noted. In the Facebook case, the FTC alleged that the company used illegal means "to crush competition." It accused Facebook of buying up-and-coming rivals Instagram and WhatsApp to protect its dominance and of luring other would-be competitors with access to its platform and data and then cutting them off when they became threats. Facebook faces similar charges in another suit filed by 48 state attorneys general.
In the case involving Google Search, the FTC took issue with Google paying $26.3 billion in 2021 to companies including Apple and Samsung to make its search engine the default on their devices, *The Wall Street Journal* reported. In its case against Amazon, the FTC has characterized the company's online superstores as monopolistic. The Google case will come up for a verdict in May 2024, and for Amazon, a federal judge has set a trial date of October 2026.
Hovenkamp pointed out that Big Tech companies are "highly productive," have growth rates that are three to four times as large as the growth rates of the overall economy, do "enormous amounts of research," and are among the largest patent-receiving entities. The paper also cited the innovation spends of firms like Apple, Microsoft, and Amazon.

"We should avoid the effort to try to break up Big Tech, because we have a very poor track record with respect to breakups," Hovenkamp said. For instance, a breakup is an unwise antitrust remedy if it ends up transferring a monopoly to another company. "Should the remedy in the Google search case be to force Google to transfer [its] search [capabilities] to another buyer?" he asked. "Unless we can predict some other kind of pro-competitive consequence down the road, it really doesn't make any sense to simply transfer a dominant product like a search engine and break it up."

That aside, "there's no good way to come up with an engineering mechanism for breaking up Google search or Facebook," Hovenkamp continued. "The only thing any one of those remedies does is make Facebook less valuable. It will hurt users. It will hurt investors, stockholders, and employees. But it won't do any good in terms of making that particular set of markets more competitive."

How Antitrust Action Impacts Innovation

The social value of antitrust enforcement shows up on a chart as an inverted "U," the paper stated. At one extreme, monopolized markets produce less innovation because monopolists lack competitive pressure to do more and tend to become path-dependent on their own existing technology, it explained. At the other extreme, very tiny firms in atomistic markets do not do much innovation either, because they lack the surplus resources. "Most innovation is done in the middle — that is, in moderately concentrated markets with a fairly small number of firms," the paper noted.

Antitrust enforcement has a roughly similar profile, the paper continued. "If antitrust's goal is competitive rates of output and prices, then the optimum level of enforcement is somewhere in the middle," it stated. "Too little antitrust leaves too much monopoly unchallenged, and gives us unreasonably high prices, low quality or low innovation, and harm to consumers and labor. Too much antitrust yields surprisingly similar results, although perhaps with smaller firms."

Call for a Balanced Approach

Hovenkamp is not in denial, however, that Big Tech firms may be guilty of anticompetitive activities, in addition to abuses that impinge on privacy, decency, or national security. "But their antitrust violations are nothing in proportion to the vilification that has been aimed at them," he wrote in the paper.

For sure, antitrust regulators "should keep some pressure on" technology firms, including digital platforms, to ensure that their markets are competitive, Hovenkamp said. "But they need to be more selective about targeting practices that are harder to defend and that have more obviously anti-competitive consequences."

The paper discussed the complexities in imposing structural antitrust remedies on digital platforms, including challenges in defining terms such as "structure" and "divestiture"; the likely effects on output, prices, innovation, or growth; and the relationship between mergers and innovation. Specifically, it pointed out that digital platforms like Amazon outsource much of their "production" from third parties or operate with licensing agreements.

Also, digital assets are likely to be "nonrivalrous," and therefore more readily subject to sharing; they also are "characterized by high fixed costs and low variable costs, making both scale economies and network effects significant," the paper stated. In thinking about remedies, networks should be treated as assets, not as firms, Hovenkamp advised.

The paper also weighed the difficulties in understanding the concept of market power in dealing with a firm like Amazon that has both physical stores (Whole Foods) and e-commerce sales, but does not enjoy monopolies in a large number of the products it vends. "You need to go product by product and consider the range of competitive alternatives and pressures that exist for each product," Hovenkamp said. "You get very different answers depending on which product you're looking at."

The paper cited Google to illustrate why breaking up its alleged monopoly could be counterproductive. "Any attempt to 'break up' Google Search would be a scale or operational disaster, even if it were technically feasible. Further, selling a monopoly asset to someone else simply transfers the monopoly, but does nothing to break it up," the paper stated. "On the other hand, an injunction may not fix the problem if Google has already attained scale that places it out of competitive reach," it added. The option here for regulators is to find "more creative remedies," such as compelled sharing of the search database.

How Regulators Must Proceed

"The best course of action is to go slowly, and certainly not to try to break up firms when you don't really understand what's going on," Hovenkamp advised. "Injunctions that stop certain anti-competitive practices have a much better track record in antitrust enforcement than mandatory breakups do, with one exception in the divestiture of recent mergers."

In a nascent field such as digital platforms, regulators have limited experience in crafting remedies to ensure competitiveness, and "the risks of collateral damage are large," the paper pointed out. "No one should mount an antitrust challenge without knowing what the harms are and at least some idea about the remedies that will fix them."

As it happens, the FTC is investing in learning about how new technologies impact competition. On January 25, it launched an inquiry into investments by Microsoft, Amazon, and Google in AI firms OpenAI and Anthropic, *The New York Times* reported. "Our study will shed light on whether investments and partnerships pursued by dominant companies risk distorting innovation and undermining fair competition," Lina Khan, the F.T.C. chair, said in a statement.

What you need to know about the proposed measures designed to curb Google's search monopoly

Associated Press, November 21, 2024

U.S. regulators are proposing aggressive measures to restore competition to the online search market after a federal judge ruled Google maintained an illegal monopoly for the last decade.

The sweeping set of recommendations filed late Wednesday by the U.S. Department of Justice could radically alter Google's

business, including possibly spinning off the Chrome web browser and syndicating its search data to competitors. Even if the courts adopt the blueprint, Google isn't likely to make any significant changes until 2026 at the earliest, because of the legal system's slow-moving wheels.
Here's what it all means:
What is the Justice Department's goal? Federal prosecutors are cracking down on Google in a case originally filed during near the end of then-President Donald Trump's first term. Officials say the main goal of these proposals is to get Google to stop leveraging its dominant search engine to illegally squelch competition and stifle innovation.
"The playing field is not level because of Google's conduct, and Google's quality reflects the ill-gotten gains of an advantage illegally acquired," the Justice Department asserted in its recommendations. "The remedy must close this gap and deprive Google of these advantages."
Not surprisingly, Google sees things much differently. The Justice Department's "wildly overbroad proposal goes miles beyond the Court's decision," Kent Walker, Google's chief legal officer, asserted in a blog post. "It would break a range of Google products — even beyond search — that people love and find helpful in their everyday lives."
It's still possible that the Justice Department could ease off on its attempts to break up Google, especially if President-elect Donald Trump takes the widely expected step of replacing Jonathan Kanter, who was appointed by President Joe Biden to oversee the agency's antitrust division.
Why focus on Chrome? Regulators want Google to sell off its industry-leading Chrome web browser, though the filing did not specify who would ultimately buy the business or how that process would work.
Justice lawyers called Chrome a "gateway to the internet" that provides the search giant with data it then uses for targeted advertising. Regulators believe that asking Google to divest Chrome would create a more equal playing field for search competitors.
Chrome also is included in the set of apps bundled with Android on phones as part of a mobile device ecosystem that regulators say gives Google a big edge.
Chrome is the world's most popular mobile web browser, with about 67% adoption globally, according to StatCounter. Apple's Safari browser has the next highest adoption at 18%.
Although it could be years before we see any practical effects of this case on the market, it could mean users would see more search engine options when selecting a default one to use on their favored devices.
While federal regulators aren't going as far as to demand Google spin off Android, they are leaving the door open.
The government asked the judge to impose behavioral limitations that would essentially blunt Android from favoring Google's own general search services.
Regulators asserted U.S. District Judge Amit Mehta should make it clear that Google could still be required to divest its smartphone operating system if the other proposed measures prove ineffective at restoring competition to the search market.
Android is the world's most popular smartphone operating system, found on 71% of mobile phones, Statcounter says. It's free to use, so many devices by Samsung and many other tech companies — aside from Apple — have it pre-installed.
What else? The Justice Department outlined a range of behavioral measures to give rival search engines a better chance at competing with Google.
The core remedy is a ban on Google from cutting deals worth billions of dollars to lock in its search engine as the default option on Apple's iPhone and other popular devices. This could potentially impact the bottom line at companies receiving such packages.
Other key recommendations:
1. Prohibiting Google from using search results to favor its own services, such as YouTube or its recently-launched artificial intelligence platform, Gemini.
2. Forcing Google to license the search index data to its rivals.
3. Requiring Google to be more transparent about how it sets the prices advertisers pay to be listed near the top of some targeted search results.
4. Giving publishers, websites and content creators the right to opt out of having their data indexed for Google's search results or to train its artificial intelligence models.
Google has the chance to submit its own list of proposed fixes in December, and federal regulators will file a revised version of their proposals in early March. Court hearings on these proposed measures are scheduled to begin in April and Mehta is expected to issue a final decision before Labor Day.
The remedies trial will take place after the Trump administration takes over from Biden in January and assumes oversight of the Department of Justice, which could impact the punishments it ultimately pursues.
Although Trump has made comments suggesting a breakup of Google isn't in the U.S. national interest, recent nominations put forward by his transition team have favored those who have been critical of Big Tech companies. And the case was originally filed during Trump's first term, which suggests Google won't be entirely off the hook.
Google is expected to appeal the case after the remedy hearings, which means the case could drag on for years in the courts.