Remedy May Be Google's Biggest Hurdle Yet In Antitrust Case

By **Jonathan Rubin** (August 21, 2024)

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I was not alone in noting the significance of the U.S. District Court for the District of Columbia's Aug. 5 decision to hold Google liable for monopolization of the general search market and the search text advertising market in U.S. v. Google LLC.

I previously covered how the antitrust enforcement agencies successfully argued that Google's exclusive deals with smartphone manufacturers, browser developers and wireless carriers amounted to anticompetitive conduct with the effect of foreclosing competition and maintaining its search monopolies.[1]

In the following, I give my perspective on potential remedies in the case.

It was decided prior to the trial against Google Search to split the proceedings into two phases, a liability phase and a remedies phase. The liability phase was completed upon the District of Columbia federal court filing of Judge Amit Mehta's memorandum opinion that contains the court's findings of fact and conclusions of law.

This decision eventually will be appealed by Google and could be overturned by the U.S. Court of Appeals for the District of Columbia Circuit, although the appeal is likely to have to wait for the conclusion of the remedy phase.

A hearing before the trial judge is scheduled for Sept. 6 to discuss how the remedies phase will move forward. The hearing is likely to focus on proposals by the parties regarding the scheduling and any further discovery or expert analysis the parties may request.

Because remedies in antitrust matters are supposed to restore the competition found to have been harmed by the antitrust violation, any remedy likely to be accepted by the court will have to be effective in restoring competition in the markets in which Google has been found to be a monopolist: the market for general search services and the market for general search text advertising.

There are two broad categories of remedies: so-called behavioral remedies and structural remedies.

Potential Behavioral and Structural Remedies

Behavioral remedies are rules that the company must follow for a period of time. For example, the court could prohibit Google from entering into contracts with third parties to be the exclusive default search engine on a device or in a browser.

Another behavioral remedy would be to require a so-called choice screen, where users are asked to choose the search engine they want as their default in a given environment. It is not clear that either of these, or any, behavioral remedy will accomplish the purpose of restoring competition to the two affected markets.

Google Search may have such a large lead that prohibiting default agreements may have little effect on competition in the market if device manufacturers and software developers

continue voluntarily to install Google Search as the default search engine in response to consumer preferences.

As for choice screens, the EU has been largely unsuccessful in promoting competition by mandating choice screens in a variety of circumstances. Moreover, the D.C. federal court only has jurisdiction to enter orders that impose certain rules on Google; it has no authority to require Apple Inc. or any other third-party to do anything.

Because such rules usually can be defeated by a work-around strategy, it is highly likely that Google will prefer a behavioral remedy. We can therefore expect Google to argue that a behavioral remedy will be a sufficient and effective approach to restoring lost competition.

A structural remedy involves separating the company into smaller parts. The antitrust enforcers have voiced skepticism in recent years over whether as a general proposition behavioral remedies can be effective.

Not surprisingly, public discussion has turned to the prospect of some form of forced divestiture. For example, some commentators have suggested separating Search from the Android and Chrome operating systems.

While this would put at arm's length the relationship between Google Search and two operating systems where Google's default search position has been particularly valuable, it would do nothing to address the effect of its default status on third-party devices and operating systems.

Thus, there is no clear mechanism to show how this type of divestiture will restore competition in the relevant markets.

Perhaps more promising for the prospect of restored competition, although more extreme, would be a structural remedy that separates the indexing function of Google's search engine from Google Search itself.

The indexing operation would retain the click and query data collected by Google and serve as a type of utility to other, competing search engines. This type of remedy, however, is much more typical of Europe than in the U.S., where forcing private companies to share their assets or otherwise serve as a kind of public utility is highly disfavored.

It is also conceivable that the court could impose both kinds of remedies at the same time.

For example, Google could be required to divest its search engine business to a stand-alone entity and then be required to observe certain restrictions on their conduct, such as a prohibition against pursuing the kind of exclusive default agreements with third parties found by the court to have violated the antitrust laws.

The Difficulties Ahead

Because of the complexity of the problem, there are likely to be several more rounds of litigation leading up to a final remedies hearing.

It is likely that on Sept. 6, the parties will outline the additional information that is needed before their remedy proposals can be submitted, which could include additional expert economic analysis of various remedy proposals and whether they will or will not be effective in restoring competition.

A significant hurdle to be confronted by any remedy purporting to restore competition is the nearly insurmountable first-mover advantage acquired by Google from scaling up the dominant search engine for the past decade and a half.

In the process, the company has acquired so much expertise, user data, and capital infrastructure that no company can acquire the scale and technology that Google brings to bear in search in a short amount of time.

A striking example of Google's scale advantage was noted by the court, when it observed that the same quantum of data that Google utilizes in a 13-month period of training a search optimization routine would require Bing to train its algorithm for 17 years. Clearly, if there is to be any prospect of restoring competition in general search, it will require several years and significant investments by Google's competitors.

It is always a fraught situation when decisions in the fast-moving tech industry take a long time. In this case, the advent of artificial intelligence and the enhancement such technology could bring to general search services could alter the competitive landscape far more significantly than any court-ordered remedy.

For all these reasons and others, the remedy phase — act two of the Google Search monopolization case — is likely to be even more challenging, difficult and interesting than all of the proceedings conducted so far.

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[1] https://blog.moginrubin.com/antitrust-google-default-deals-drive-search-monopololy-decision