

DOJ SUGGESTS A FRAMEWORK FOR REMEDIES TO PRY POWER AWAY FROM GOOGLE



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This article discusses recent developments in the U.S. government's antitrust case against Google relating to its dominance in general search and search text advertising markets. The author provides a point-counterpoint account of the government's arguments presented to the federal court and Google's rebuttal as expressed in a public statement. The Department of Justice ("DOJ") outlined a "remedies framework" aimed at dismantling Google's monopoly, seeking to address various aspects of Google's business, including search distribution, revenue sharing, web indexing, search result generation, advertising monetization, and data accumulation. The proposed remedies are far-reaching and could have significant implications for the tech industry and consumers alike. Google, however, has expressed concerns about the scope of the DOJ's proposed remedies, arguing that they exceed the bounds of the case and could have unintended consequences. The outcome of this case will likely shape the future of online search and advertising for years to come.

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The government's antitrust case against Google's Search business passed another milestone with the government's description of a "remedies framework" to loosen Google's monopoly grip on the general search services and search text advertising markets. The U.S. Department of Justice ("DOJ's") filing maintained that Google's conduct resulted in "interlocking and pernicious harms" for which fashioning a remedy "present[ed] unprecedented complexities in a highly evolving set of markets." "[T]he importance of effectively unfettering these markets and restoring competition," the filing said, "cannot be overstated" since they are "indispensable to the lives of all Americans. . . ."

The government's remedial framework is inspired by the court's August 5th decision finding that Google unlawfully maintained its monopoly in the U.S. general search services and U.S. search text advertising markets in violation of Section 2 of the Sherman Act. The court found that Google's revenue sharing agreements for the exclusive preinstallation of Google as the default search access point for Safari and Firefox and in devices running Chrome and Android foreclose rivals from a substantial share of the general search services market, deprive rivals of necessary scale to compete, and reduce the incentive to invest and innovate. The court also found that the exclusive agreements foreclose a substantial share of the search text advertising market and insulate Google from competition, enabling Google to charge supracompetitive prices for search text advertising, and restrain the ability of rivals to earn revenue from search text advertising.

The DOJ clearly intends to paint on a broad canvas in November, when it will propose actual remedies. Arguing that "the scope of the remedy need not be limited to the specific means or methods of how Google achieved [its] illegal monopoly maintenance," the DOJ's framework considers remedies that "account for alternative and future forms of monopoly maintenance in the affected markets and reasonably related markets in addition to the specific conduct to date." Accordingly, the DOJ's framework addresses not only search distribution and revenue sharing but also web indexing and the generation and display of search results, search engine monetization through advertising, and the accumulation and analysis of end user data. Also included in the DOJ's framework are its aspirations to prevent Google from dominating AI-augmented search in the future and the appointment of an executive and a technical committee to monitor compliance and deter circumvention of the court's final order. "For each area," the DOJ said, "the remedies necessary to prevent and restrain monopoly maintenance could include contract requirements and prohibitions; non-discrimination product requirements; data and interoperability requirements; and structural requirements."

Google responded immediately after the government's filing in a corporate blog post claiming that DOJ's "sweeping agenda" exceeds the bounds of the case, which Google perceives as limited to search engine distribution contracts and nothing more. "Rather than focus on that, the government seems to be pursuing a sweeping agenda that will impact numerous industries and products, with significant unintended consequences for consumers, businesses, and American competitiveness. The DOJ's outline also comes at a time when competition in how people find information is blooming, with all sorts of new entrants emerging and new technologies like AI transforming the industry," Google said.

Below is a summary of the elements of the DOJ's remedies framework and Google's public response to each.

The DOJ wants to limit or end Google's use of contracts and other measures to control or influence search distribution channels, i.e. browsers, search apps, artificial intelligence summaries and agents, by limiting default agreements, preinstallation agreements, and revenue-sharing arrangements with third parties related to search and search-related products. In addition, DOJ is considering behavioral and structural remedies to prevent Google from favoring its own search products over rivals in its own products, such as Chrome, Play, and Android.

Google says unreasonable restrictions on how it promotes its search engine would create friction for consumers and harm businesses. "Overbroad restrictions on distribution contracts designed to make Google Search easily available would create friction for people who just want to easily search for information. And those restrictions would reduce revenue for companies like Mozilla (reducing its ability to invest in its own browser) and Android smartphone makers (potentially raising phone prices)." With respect to structural remedies, Google claims that splitting off Chrome or Android "would break them — and many other things." The company claims that its "free" operating systems help people access the web and use its products. ". . . Breaking them off would change their business models, raise the cost of devices, and undermine Android and Google Play in their robust competition with Apple's iPhone and App Store." According to Google, businesses that rely on Android and Chrome, including a range of consumer product manufacturers, would suffer, as would security, because Chrome's Safe Browsing, Android's security features, and Play Protect would be compromised.

In an attempt to rollback Google's enormous scale advantage, the DOJ is considering requiring Google to make available "(1) the indexes, data, feeds, and models used for Google search, including those used in AI-assisted search features, and (2) Google search results, features, and ads, including the underlying ranking signals, especially on mobile." In addition, the government is considering remedies that would "prohibit

Google from using or retaining data that cannot be effectively shared with others on the basis of privacy concerns.” They are also considering ways to “reduce the cost and complexity of indexing or retaining data for rival search engines.”

Google (addressing consumers) said “forcing [Google] to share your search queries, clicks, and results with competitors risks your privacy and security. . . The search queries you share with Google are often sensitive and personal and are protected by Google’s strict security standards; in the hands of a different company without strong security practices, bad actors could access them to identify you and your search history — as we’ve seen before. Additionally, while sharing Google’s search results with others might create a few copycats, it could also decrease incentives for other companies to actually innovate in search.”

The DOJ is considering remedies to address Google’s leverage of its monopoly power to enhance search results with, for example, artificial-intelligence functionality, by utilizing websites and other content created by third parties with little or no bargaining power against Google. The DOJ considers this capacity to be “an emerging barrier to competition” that risks further entrenching Google’s dominance and intends to propose remedies to prohibit Google from undermining rivals’ access to web content and to allow websites crawled for Google search to opt out of training or appearing in any Google- owned artificial intelligence product. Google says hampering its AI tools “risks holding back American innovation at a critical moment.” Predicting the importance of AI to America’s technological and economic leadership, the company says “competition globally is fierce.” Now is not the time to hinder progress. “There are enormous risks to the government putting its thumb on the scale of this vital industry — skewing investment, distorting incentives, hobbling emerging business models — all at precisely the moment that we need to encourage investment, new business models, and American technological leadership.”

- The DOJ also wants to create more competition and lower barriers to entry into search text advertising and restrain the ability of Google to charge supra-competitive prices and to degrade advertising quality. Accordingly, the framework includes Google’s use of AI to enhance its text ad monopoly as well as mandatory licensing or syndication of Google’s ad feed independent of search results. Google could be required to provide detailed information to its search advertisers, such as “transparent and detailed information (e.g. Search Query Reports and other information related to its search text ads auction and ad monetization) consistent with user privacy and to opt out of Google search features (e.g. keyword-expansion, broad match).”
- Google says changes to the online advertising market “would make online ads less valuable for publishers and merchants, and less useful for consumers.” The company says its “innovative ads system” has “leveled the playing field for small businesses and publishers” by requiring no minimum spend and no upfront commitments. Small websites can earn revenue in the same way larger publishers do. “Government-mandated changes could disrupt this, and tilt the field at the precise moment that competition is thriving.”
- The DOJ also intends to request monitoring by a court-appointed technical committee, the designation of a senior Google executive to regularly report on the company’s compliance, continuing record-retention obligations, routine employee compliance training, and prohibitions on any future acquisition of search competitors or retaliation against anyone involved in implementing the remedies.

The parties are now conducting discovery into matters relevant to remedies in advance of late-November deadlines for witness lists and initial proposed final judgments, revisions to which are expected by March 2025. Given the breadth of the government’s framework, observers are likely to be keenly focused on any indication of the court’s view of the appropriate scope of any court-ordered remedy.



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