AMERICAN ECONOMIC LIBERTIES PROJECT

Prying Open Competitive Search Markets from Google's Monopolistic Grip: A High-Level Framework for Remedies After the Google Search Trial

On August 5, 2024, Google was ruled an illegal monopolist– for the second time in less than a year. Next, Judge Mehta will decide how to remedy the illegal conduct in search markets. With the Antitrust Division of the Department of Justice about to release its "high level" remedy framework, Economic Liberties presents a collection of proposals to guide public discussion.

Legal principles: Antitrust relief is not constrained by stopping the exact conduct that maintained an illegal monopoly. Instead, Supreme Court precedent requires remedies to meet several goals:

1) Prying open markets to competition after they were artificially closed off;
2) Ensuring the monopolist cannot benefit from the fruits of illegal conduct; and
3) Preventing future violations, including in other markets where unlawful acts "may fairly be anticipated" based on the monopolist's prior conduct.

Courts can require illegal monopolists to do things–including deal with rivals–that they could not require innocent companies to do, and enjoy "large discretion" in crafting equitable remedies as needed to achieve these goals.

Potential Remedies: To work, remedies should be complementary and reinforce each other. History has also shown that "behavioral remedies" that attempt to restrain conduct are often expensive and, on their own, ineffective. Conversely, the Supreme Court has referred to "structural remedies," including divestiture, as the "surer, cleaner remedy." Structural remedies, such as selling off business lines or granting fair technology licenses, eliminate incentives to engage in illegal conduct and must be a part of an effective remedy. Moreover, Google will continue to reap ill-gotten gains and harm competition every day until Judge Mehta rules next summer. Because AI is at a technological inflection point, when the "most meaningful intervention" is in "real time," immediate interim relief may include a tailored set of the below remedies.

Structural remedies

- *Selling off Business Units.*
    - *Android.* Due to exclusionary default placement of Google's search engine on Android, 80% of all queries are routed to Google. Although the Android OS is open source, Google's control of Android creates an inherent incentive to deny rivals access to distribution restrict innovation among upstream and downstream market participants. Notably, Android was acquired by Google in 2005 and maintains separate branding– factors that have legally favored divestiture (break ups).

    - *Chrome*. The Court heard testimony that the Chrome web browser's primary purpose is as a distribution mechanism for Google's search engine. Discovery will be needed to assess Chrome's standalone viability, but divesting Chrome would enable other search engines to compete for placement on Chrome.
    - *Google's search text ad monopoly*. Google's dominance in the market for search text advertising derives in part from its search monopoly. The Court should also consider ordering Google to divest its control over advertiser demand. Parallel litigation against Google's alleged ad tech monopoly may result in complementary remedies, pending a finding of liability.

- *Compulsory licenses to Search and AI technology*. To give existing rivals and new entrants the scale they were denied by Google's anticompetitive practices, Google should make its web index, ranking algorithms, and large language models (the product of Google's ill-gotten gains) accessible to existing and potential rivals. Access must include rivals' ability to adapt code to enhance security, alter signal weights, and otherwise improve search engine quality.

- *Fair, Reasonable, and Non-Discriminatory (FRAND) access to Google's search results*. This would allow competitors to re-rank and mix research results, and allow other search engines to differentiate their products based on privacy and customization of the user interface and results page.

- *Cancellation or compulsory licensure of Google's trademark*. Google's ubiquitous and generalized search brand is among its ill-gotten gains, and the Court may cancel or mandate compulsory licensure of Google's trademark (e.g., "Powered by Google.")

Behavioral remedies

- *Ending Google's exclusive default search agreements*. Google maintains its dominance through various default search agreements with wireless carriers, device manufacturers, and web browsers. Google's revenue share agreement with Apple disincentivizes Apple from entering the search market itself. Defaults and rent-splitting should be banned, both for Search and Gemini, and the Court must prohibit Google from "re-creating" Google's dominance with any divested business lines.

- *Moratorium on relevant acquisitions.* Google's market power is also the result of serial acquisitions, and the Court should enjoin Google from making new acquisitions to enhance its power in search, advertising, and AI-related markets.

Non-conflicted monitors should be appointed to oversee compliance and field confidential complaints. They will need to coordinate with counterparts in other cases against Google, so they should have the power to share information and coordinate across jurisdictions.

Finally, given Google's "shocking" destruction of evidence, the Court should also ensure the retention of relevant business records, protection for workers from surveillance and retaliation for cooperation with law enforcement, and termination or firewalling of officials whose unethical conduct contributed to Google's illegal monopoly maintenance.