

DOJ Seeks Breakup of Google's Ad Tech Business

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In another example of heightened antitrust enforcement by the Department of Justice (DOJ) under the Biden administration, on January 24, 2023, DOJ and eight states filed a civil antitrust lawsuit accusing Google of monopolizing multiple digital advertising technology (“ad tech”) products.^[1] The lawsuit reflects the continued antitrust focus at both the state and federal levels on Google. The lawsuit follows a similar suit led by the Texas Attorney General, and joined by sixteen other states, alleging that Google monopolized the digital advertising market.^[2] It is also DOJ’s second antitrust lawsuit against Google in less than three years, with the earlier suit accusing Google of using its alleged monopoly power to thwart competition in internet search.^[3] In this newest lawsuit, DOJ claims that Google seized and maintained control of the “ad tech stack”—a group of high-tech tools used by publishers and advertisers to facilitate digital advertising. In relief, DOJ seeks relief rarely sought in monopolization cases in recent years—the breakup of Google’s ad tech business.

Ad Tech Background

Ad tech tools connect website publishers (who sell on-site advertising opportunities) to advertisers (who wish to buy those opportunities). On the “sell side” of the transaction, website publishers use what is called an “ad server” to evaluate and select advertisements to fill available advertising slots on a website. The advertising slots are sold either through direct sales, which result from one-on-one negotiations between publishers and advertisers or through indirect sales, which are made through a series of transactions often taking place on a software platform known as an “ad exchange.” An ad exchange receives requests—often from a publisher ad server—to auction advertising slots on a particular webpage; it then solicits bids from advertiser buying tools, chooses the winning bid, and transmits information on the winning bid back to the publisher ad server.

On the “buy side” of the transaction, advertisers use buying tools to receive and respond to bid requests. Depending on the size of the advertiser, different buying tools may be used. The “demand side platform” is a tool typically used by larger advertisers because it allows them to manage and customize their advertising purchases. Smaller advertisers often use “advertising ad networks,” which bid for and buy advertising space by submitting bids alongside other ad networks and demand platforms.

The flow of display advertising transactions through these various platforms is called the “ad tech stack.” According to DOJ’s complaint, Google has the leading ad tech stack platforms on both the buy and sell sides.

DOJ’s Monopolization Claims

DOJ claims that over the past fifteen years, Google obtained a monopoly in the ad tech stack through a series of acquisitions of competitors in the ad tech market, most prominently of DoubleClick, and by using its position at different levels of the ad tech stack to limit competition. DOJ challenges a variety of Google’s ad tech business practices related to its tools and bidding auctions. For example, Google supposedly strengthened its market position by tying its various ad tech products together, effectively requiring publishers to make their inventory available only through Google’s publisher ad server and ad exchange. Google also allegedly distorted ad-auction competition by limiting real-time bidding on publisher inventory to its ad exchange and manipulated auction mechanics across several of its products. Through this conduct, DOJ claims that Google not only kept out competitors, but also, as the go-to platform for all sides of the ad tech stack, amassed large amounts of data to help improve the quality of its services, protecting its market leadership.

Claims and Relief Sought

DOJ asserts five claims against Google, including that it monopolized, or attempted to monopolize, the ad exchange market and that it monopolized both the publisher ad server and advertiser ad network markets in violation of Section 2 of the Sherman Act. DOJ further accuses Google of unlawful tying in violation of Sections 1 and 2 of the Sherman Act. Notably, DOJ does not bring any post-consummation challenges to Google’s acquisitions under Section 7 of the Clayton Act, the provision DOJ and FTC have frequently used in recent years to bring post-closing challenges to acquisitions.

DOJ seeks declaratory relief, damages, and to break up Google’s advertising business. It is the first monopolization case in approximately half a century in which DOJ has sought damages for a civil antitrust violation.

Finally, DOJ filed its complaint in the U.S. District Court for the Eastern District of Virginia—a court which is well-known for its “rocket docket,” or speedy resolution of cases, likely indicating that DOJ is aiming to bring the case to trial quickly.

Takeaways

As if more evidence was needed, DOJ’s latest lawsuit against Google further evidences the Biden administration’s aggressive antitrust enforcement and dusting off of rarely used antitrust powers.

This lawsuit also reflects DOJ’s intent to continue to aggressively challenge potentially anticompetitive unconsummated transactions. In a [recent speech](#), Principal Deputy Assistant Attorney General of the Antitrust Division Doha Mekki observed that, even at the time of Google’s DoubleClick acquisition, “it was clear to everyone what Google *might* do but, still, a majority of [FTC] Commissioners wanted more certainty.” She held up the Google/DoubleClick transaction as an example of a potentially problematic transaction that DOJ and FTC have not challenged in the past, but should. And in fact, today’s DOJ is following through by bringing riskier antitrust cases challenging transactions and seeking to prohibit potentially problematic combinations. Companies contemplating strategic acquisitions should involve antitrust counsel early to assess, address, and minimize antitrust risks. Winston lawyers regularly help guide clients through the DOJ and FTC antitrust regulatory process.

¹¹ *United States et al. v. Google LLC*, No. 23-cv-00108 (E.D. Va. Jan. 24, 2023).

¹² *The State of Texas, et al v. Google, LLC*, No. 21-cv-06851 (S.D.N.Y. Dec. 16, 2020).

¹³ *United States et al. v. Google LLC*, No. 20-cv-03010 (D.D.C. Oct. 20, 2020).

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[Conor Reidy](#)

[Sarah L. Viebrock](#)

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