

# Antitrust Issues To Watch Amid Google Ad Tech Trial

By **Ryan Kocse, Rachel Marmor and Caitlin Saladrigas** (September 27, 2024)

Since early September, the U.S. Department of Justice has presented its case-in-chief against Google LLC in a lawsuit accusing the company of anticompetitive and monopolistic practices in the complex digital advertising industry.

At issue for U.S. District Judge Leonie Brinkema of the U.S. District Court for the Eastern District of Virginia to decide is whether Google is using its size and power to edge out competitors, making it harder for companies to compete in the digital advertising space.

This includes whether Google's past acquisitions of other ad tech businesses expanded its control across the ad tech ecosystem and whether Google established practices that favored its own services over those offered by others.

During the trial so far, important industry participants have testified about the competitive pressures to use Google's products, as well as the challenges of competing against its integrated ad tech platform.

Other witnesses testified that the challenges competitors face come not just from Google's dominance in the industry, but also from its unparalleled access to user data and the insights it derives from that data, which allow Google to dominate digital ad auctions.

The DOJ has also highlighted Google's efforts to combat the growth of so-called header bidding, a technology that allowed website owners to receive bids from advertisers without using Google's services.

The DOJ used internal Google documents to show Google's efforts to control this process and maintain its dominance. The impact of these actions was significant, with revenue for some competitors dropping dramatically.

Whether this evidence is enough to convince the court that Google maintained its monopoly in violation of Section 2 of the Sherman Act remains to be seen. Implications abound regardless of the outcome.

## Will the Court Turn Google into Alphabet Soup?

A ruling in the ongoing antitrust trial against Google could have profound implications for Google and the digital advertising industry, as well as potential ripple effects across other related industries.

### **DOJ Victory**

A ruling against Google and in favor of the DOJ might necessitate divestitures in Google's ad tech divisions, fostering competition and setting a precedent for future antitrust actions.



Ryan Kocse



Rachel Marmor



Caitlin Saladrigas

Publishers and advertisers could benefit through more competitive rates and innovative advertising solutions.

The antitrust agencies may be emboldened to explore further enforcement actions against other powerful tech companies.

### ***Google Victory***

A decision in Google's favor would likely solidify its market position, potentially influencing the regulatory landscape and affecting competitors' strategies within a Google-centric digital ecosystem.

Antitrust enforcers might adopt a more cautious approach, and competitors might adapt through strategies such as collaboration, consolidation or focusing on niche markets in response to Google's established market power.

### ***Broader Implications***

Regardless of the outcome, the trial's examination of Google's interactions with Big Tech companies and the consequences of the court's ruling simultaneously highlight and expose the complexity of the digital ad ecosystem.

These aspects underscore the importance of scrutiny by government regulators and antitrust enforcers in ensuring fair competition and innovation in the market. The trial's outcome serves as a critical inflection point in the debate over the balance between market dominance and competitive fairness in the rapidly evolving digital economy.

### **Things to Watch for When the Court Turns Off Incognito Mode**

Although Judge Brinkema appears to have taken seriously her duty to ensure that as much of the trial as possible occurs in the public eye, public access to certain portions of the trial will continue to be restricted due to the sensitive nature of some of the proceedings.

When not under seal, the Google ad tech trial presents several key developments and issues to monitor in the upcoming weeks.

### ***Adverse Inference Against Google***

The DOJ is seeking an adverse inference and sanctions against Google stemming from allegations that Google instructed its employees to adopt cautious communication practices, including the use of self-deleting chats, which allegedly led Google to hide or destroy relevant communications.

Judge Brinkema has expressed concern over these allegations, just as U.S. District Judge Amit Mehta from the U.S. District Court for the District of Columbia did in the related case challenging Google's search and search advertising monopolies, which ended in August.

If the court decides an adverse inference is warranted and presumes that the evidence Google hid would have been harmful to Google's case, this could greatly affect the trial's outcome against Google.



### ***Data Privacy and User Protection Implications***

The DOJ's trial has, when not under seal, made public not just Google's conduct, but how the entire ad tech industry works, including the heavy use of personal data in selecting and tracking targeted ads.

This could provide other government regulators, including those charged with upholding consumer protections and privacy laws, with an opportunity to obtain a collegiate-level understanding of how personal data is used to power online advertisements.

Such knowledge could, in turn, enable regulators to bring enforcement actions under one of the seven new state consumer privacy laws now in effect, all of which contain obligations to offer and honor consumer choices related to use of their data for targeted advertising.

Decentralization of the ad tech industry, if such occurs as an outcome of the trial, could result in publishers being able to demand that their ad tech providers be more responsive to the efforts of publishers to comply with privacy laws and meet consumer expectations.

### ***Market Definition and Monopolization Claims***

Part of the trial's focus is on defining the digital advertising market, with Google urging the court to find that it competes in a broad market encompassing both sides of the two-sided platform, including publishers, advertisers and the exchanges that bring them together.

The DOJ is arguing that the ad tech marketplace consists of multiple independent markets, with Google holding a monopoly share in each component of the market, extracting an unwarranted portion of advertising dollars that flow through its platforms.

The court's determination on market definition will significantly affect the trial's outcome and could set precedents for future antitrust actions against tech giants in markets with similar two-sided features.

### ***Unified Pricing Rules***

Unified pricing rule implementation by Google and its effects on competitors and the market at large are under intense scrutiny in the trial. Unified pricing rules arguably simplified ad pricing and management but also eliminated some pricing control by competitors, potentially to their disadvantage.

The court's findings on these practices could influence future regulations and business practices in the ad tech industry.

### ***Interactions With Other Tech Heavyweights***

Evidence related to Google's interactions with other major players in tech may reveal the extent of its market influence and effects on competition. The examination of these relationships might provide insights into the broader implications of Google's practices on the digital advertising ecosystem and could influence regulatory actions beyond this trial.

### **Conclusion**

Stakeholders should stay informed about these developments as they could have far-reaching implications for the digital advertising industry, competition and innovation.

In some ways, this case feels like a high-water mark for antitrust enforcement with the capacity to usher in a new wave of competition in the ad tech industry and perhaps the tech industry more broadly.

At the same time, hindsight may ultimately teach us that it was just the beginning — a starting point for a more informed and technically focused approach to both antitrust and privacy enforcement.

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*Ryan Kocse is senior counsel, and Rachel Marmor and Caitlin F. Saladrigas are partners, at Holland & Knight LLP.*

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