

# Antitrust Enforcement in 2023: Year in Review for the Federal Trade Commission and the Department of Justice

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January 2024

## INTRODUCTION

In 2023, the Federal Trade Commission (FTC) and Department of Justice (DOJ) continued their push for more aggressive competition policy enforcement, including litigation and policy initiatives based on novel theories of harm that encompass a wider range of business conduct.

In court, the agencies continued to lose merger challenges. The FTC lost all its merger challenges that were completed in 2023 in federal and administrative court,<sup>1</sup> with the partial exception of the United States Court of Appeals for the Fifth Circuit's December 15 decision in the Illumina/GRAIL merger.<sup>2</sup> The court's decision held that the FTC had carried its initial burden of showing that the Illumina/GRAIL merger was likely to substantially lessen competition. Nevertheless, the court vacated the FTC's order that the merger be unwound, holding that the FTC had applied an erroneous legal standard at the rebuttal stage of its analysis.<sup>3</sup> The court then remanded the case to the FTC for further reconsideration under the proper standard.<sup>4</sup> However, the remand was mooted by Illumina's decision to divest its shares in GRAIL rather than prolong litigation to defend the merger.<sup>5</sup>

The DOJ amassed a similar loss record in merger court,<sup>6</sup> with a single notable judicial victory in 2022, blocking the merger of publishing houses Penguin Random House and Simon & Schuster based on a novel labor monopsony theory of harm.<sup>7</sup> Despite the losses, FTC Chair Lina Khan touts as victories the number of merger deals that have been abandoned to avoid time and resource-consuming litigation.<sup>8</sup> However, the chilling effect on mergers and acquisitions across multiple industries in the wake of the agencies' aggressive antitrust crusade is likely to have dampened many procompetitive deals that could have benefited consumers.<sup>9</sup>

In the regulatory space, the FTC’s leadership continues to try to stretch the limits of the commission’s regulatory powers. The FTC continues to advocate substantive rulemaking on unfair methods of competition despite legal uncertainty regarding its authority to pass such rules in the first place.<sup>10</sup> In 2023, the FTC proposed a substantive competition rule banning noncompete clauses in labor agreements.<sup>11</sup> It also proposed a variety of other rules under its statutory consumer protection authority. None of these rules has been finalized or enacted.

The FTC and DOJ also jointly issued new merger guidelines. Their initial draft guidelines were criticized for violating the rule of law and for incorrectly citing legal precedents,<sup>12</sup> with the final guidelines retaining many of the draft’s flaws and failing to acknowledge the benefits of mergers.<sup>13</sup> It appears unlikely that many of the legal arguments and claims outlined in these nonbinding guidelines will prove persuasive in court. Nevertheless, the guidelines may prove harmful to consumer welfare, to the extent that they discourage parties from merging and drive up the costs of securing even procompetitive mergers in the near term.

### **FTC-DOJ 2023 JOINT MERGER GUIDELINES**

In December 2023, the FTC and DOJ jointly issued new merger guidelines, which have been criticized for undermining the rule of law and creating undue uncertainty for commercial parties, as well as misapplying or failing to cite relevant legal precedents.<sup>14</sup>

The new guidelines place a greater emphasis on market concentration as the key criterion for challenging horizontal mergers, a “structural approach” that antitrust enforcers and courts have moved away from since the 1960s, with the benefit of economic learning. These new guidelines lower the concentration numbers that the most recent iteration of the merger guidelines had identified as potentially raising anticompetitive concerns (alongside other relevant indicators), thereby capturing a range of mergers that would previously have been presumed to raise no competitive concerns.

The guidelines also present a laundry list of possible theories of competitive harm, without acknowledging (unlike previous guidelines) that most mergers are unlikely to raise competitive concerns. The laundry list provides no “safe harbor” guidance on unproblematic mergers that will be allowed to pass. Furthermore, the guidelines fail to seriously address the substantial innovation-related economic benefits generated by many mergers. These benefits include cost reductions, product quality improvements, and new product generation, as well as the reallocation of resources to higher valued uses.<sup>15</sup> By failing to adequately recognize merger-induced efficiencies, the guidelines ignore decades of empirical and theoretical economic analysis.

Due to these deficiencies, the new guidelines fail to achieve key objectives advanced by previous guidelines—identifying mergers that the FTC and DOJ are likely to challenge, and setting forth

practical guidance on how the agencies will analyze particular proposed mergers. This serious “guidance deficit” is exacerbated by the inclusion of a disclaimer emphasizing that the new guidelines do not provide an exhaustive list of the theories of harm under which the DOJ and FTC will pursue merging firms.

In short, the new guidelines implicitly adopt a “merger skeptical” approach that may be expected to substantially raise the costs and uncertainty of *virtually any* merger. There is already evidence that the DOJ and FTC’s aggressive approach to pursuing mergers, which is reflected in these guidelines, is chilling investment in economically important sectors like biotechnology.<sup>16</sup>

## **KEY ANTITRUST ENFORCEMENT ACTIONS AND OTHER INITIATIVES: FEDERAL TRADE COMMISSION**

The FTC filed or settled/closed 8 antitrust complaints involving federal court and administrative proceedings in 2023,<sup>17</sup> down from 13 complaints in 2022 and 25 in 2021.<sup>18</sup> These cases encompass various types of conduct and cover many economic sectors, including pharmaceuticals, video games, and airlines. They include horizontal and vertical merger cases, as well as attempted monopolization.

### High-Profile FTC Cases

Below we summarize five high-profile FTC cases. We also note a reported FTC investigation of a restaurant merger, and briefly describe an FTC premerger notification rulemaking and other FTC rulemaking initiatives.

**Microsoft/Activision Blizzard:** The FTC originally sued to prevent technology giant and Xbox (game console) manufacturer Microsoft from acquiring leading video game developer Activision Blizzard in December 2022.<sup>19</sup> The agency alleged that this vertical merger would allow Microsoft to withhold key game titles and intellectual property from the manufacturers of rival consoles, and that Microsoft would have both the ability and incentive to harm competition by increasing prices for, or reducing the quality of, video games and the user experience on rival consoles. This claim appeared to be dubious, given that the post-merger entity would cover only 10 percent of the whole video game market<sup>20</sup> and would face stiff competition from Sony, which is both the world’s biggest video-game-console manufacturer and a major game publisher.

On July 19, 2023, the United States District Court for the Northern District of California rejected the FTC’s theories of harm and denied its bid to enjoin the vertical acquisition.<sup>21</sup> It recognized evidence that Microsoft had already signed agreements to make Activision Blizzard’s games available on other consoles, thereby mitigating potential anticompetitive harms. The importance of cross-console play to the video game experience also indicated that the merged firm would have a sig-

nificant disincentive to withhold its games from rival console makers. The court also accepted that vertical mergers typically benefit consumers by creating pro-competitive efficiencies by bringing together two entities that do not compete head-to-head and consolidating their synergies. These synergies would allow Activision Blizzard's games to reach more gamers. Microsoft's status as one of the few players in the emerging cloud gaming space would also make the merged entity a stronger competitor to the incumbent market leader, Sony, thereby increasing, rather than harming, competition, to the potential benefit of consumers.

The merger was consummated in October 2023, representing the largest merger in the video game industry to date.<sup>22</sup> The FTC has appealed the decision to the Ninth Circuit Court of Appeals.<sup>23</sup>

**Amgen/Horizon Therapeutics Inc.:** In mid-2023, the FTC sued to block biopharmaceuticals firm Amgen's \$27.8 billion acquisition of Horizon Therapeutics Inc., a smaller biopharma firm.<sup>24</sup> The agency alleged that the horizontal merger would let Amgen exclude competitors and diminish competition by bundling rebates on its big-selling drugs to pressure insurance companies and pharmacy benefit managers (PBMs) into providing favorable terms for Horizon's two key products on insurance formularies.<sup>25</sup> The two drugs in question, both of which treat rare diseases,<sup>26</sup> are the fast-growing thyroid eye disease treatment Tepezza, and Krystexxa, which treats gout.<sup>27</sup> Notably, this was the first time that any pharmaceutical company had been sued by the FTC over a merger or proposed merger where the merging parties had no overlapping (competing) products.<sup>28</sup>

The FTC eventually allowed the merger to proceed after reaching a consent order with Amgen in September 2023.<sup>29</sup> Amgen agreed not to bundle any of its drugs with Tepezza or Krystexxa, use product rebates or contractual terms to exclude or disadvantage competitor drugs to Tepezza or Krystexxa, or purchase the patent rights to drugs that compete against Tepezza or Krystexxa without FTC permission.<sup>30</sup> The consent order negates the merger's purported (if entirely speculative) potential harms, while preserving its potential pro-competitive efficiencies. These include speedier and more widespread access to Horizon's rare-disease drugs. Although the FTC eventually failed to block the merger, there is still evidence that its litigation challenge destroyed immense socioeconomic value. Commentators report that venture capital investment in biotechnology firms dropped by 25 percent in the final quarter of 2023, due in significant part to worries over FTC interference.<sup>31</sup> This has reportedly led to fewer new and potentially lifesaving drugs to come to market.

Recently, the pharmaceutical industry has seen a trend of larger firms, with the resources necessary to efficiently weather the bureaucratic regulatory approvals process for drug approval, acquiring smaller, research-intensive firms.<sup>32</sup> There is evidence that new drugs that were developed externally and then acquired by another firm are more likely to receive regulatory approvals than those developed in-house by the firm seeking approval for them.<sup>33</sup> These pro-competition and pro-consumer synergies can be brought together through mergers.

**Meta/Within Unlimited:** The FTC filed an administrative complaint against Meta in 2022 to block its acquisition of virtual reality software company Within Unlimited,<sup>34</sup> despite recommendations from FTC staff that the complaint not be filed.<sup>35</sup> Within Unlimited is the maker of Supernatural—a virtual reality fitness app that the FTC alleges to be a competitor to the virtual reality fitness app that Meta developed in-house. The FTC alleged that Meta was seeking to subvert the competitive process by acquiring Within Unlimited to deprive consumers of a potential competitor in the virtual reality fitness app space.<sup>36</sup>

In January 2023, the United States District Court for the Northern District of California ruled against the FTC’s attempt to seek a preliminary injunction against the merger, thus allowing the acquisition to proceed.<sup>37</sup> The court deemed the FTC’s theory of harm to be “impermissibly speculative,” meaning that an FTC effort to permanently enjoin the merger was unlikely to succeed on the merits.<sup>38</sup> Meta had argued that the merger would generate pro-competitive synergies by allowing for the application of Meta’s scale and resources to the deployment of Within Unlimited’s apps to a wider audience.<sup>39</sup> The FTC subsequently declined to continue challenging the merger in its internal administrative court and dismissed the complaint.<sup>40</sup>

**Axon Enterprise and Safariland (VIEVU):** In 2020, the FTC filed an administrative complaint contesting body-worn camera system maker Axon Enterprise’s acquisition of direct competitor VIEVU LLC, which was consummated in 2018.<sup>41</sup> The agency claimed that the merger reduced competition in the already concentrated market for body-worn camera systems sold to large metropolitan police departments and, thus, violated section 5 of the FTC Act.<sup>42</sup> Before the completion of internal administrative proceedings at the FTC, Axon sued the agency in federal court to obtain a declaratory judgment that the FTC’s adjudication process was constitutionally flawed.<sup>43</sup> Specifically, Axon alleged that the removal protections available to FTC commissioners and their administrative law judge (ALJ) contravene Article II of the US Constitution, and that the process of deliberation between the FTC and DOJ to decide which agency is to bring an enforcement action against a plaintiff violates their due process rights.<sup>44</sup> The federal court ruled against Axon, claiming that it lacked subject matter jurisdiction because the FTC’s administrative process had not been completed.<sup>45</sup>

Axon appealed to the US Supreme Court,<sup>46</sup> which ruled in April 2023 that private parties that are subject to the FTC’s administrative adjudication process, such as Axon, can bring constitutional challenges against the FTC in federal court even before the FTC’s internal administrative proceedings have been resolved.<sup>47</sup>

On October 6, 2023, the FTC dismissed its administrative complaint against the Axon merger.<sup>48</sup> The FTC noted in the reasons for its decision that it desired to avoid years of additional litigation that would result from Axon’s constitutional challenge to the agency’s structure,<sup>49</sup> which would delay the administrative action it sought against the plaintiff and strain the agency’s limited resources.<sup>50</sup> Axon subsequently announced that it would withdraw its constitutional challenge.<sup>51</sup>

**FTC v. Amazon:** On September 28, 2023, the FTC joined 17 states in suing tech giant, digital marketplace, and online retailer Amazon. The federal court suit accused Amazon of illegally using its monopoly power to hurt competitors, sellers on its platform, and consumers through various anticompetitive practices.<sup>52</sup> The practices in question include Amazon’s alleged inducement of sellers to adopt price parity clauses (PPCs); conditioning Amazon Prime eligibility for sellers on using Amazon’s in-house logistics service; and engaging in various forms of self-preferencing, improper advertising practices, and charging unreasonable fees.<sup>53</sup> Many of these practices, however, are likely to be pro-competitive and to increase consumer welfare.<sup>54</sup> In December 2023, the FTC and Amazon both announced that they expect the trial to begin in 2026, due to the lengthy and resource-intensive discovery process that is to come.<sup>55</sup>

#### Ongoing Investigation: Subway and Roark Capital

In November 2023, it was reported that the FTC is probing the proposed acquisition of restaurant chain Subway by Roark Capital.<sup>56</sup> Roark Capital already holds Inspire Brands, which owns restaurant chains including Arby’s, Buffalo Wild Wings, Jimmy John’s, and Baskin-Robbins.<sup>57</sup> Reuters has valued the deal at \$9.5 billion, inclusive of debt.<sup>58</sup> Although Subway holds a 20 percent share in the US sandwich and deli market, which is the focus of the FTC probe, its international market share is reportedly in the single digits or less.<sup>59</sup> Though focused on sandwiches, Subway also faces competition from the vast number of other fast-food and casual service restaurant chains across the country and worldwide. The ongoing probe could delay the merger by a year or longer.<sup>60</sup>

#### Hart-Scott Rodino Act (Premerger Notification) Rule Reform, Second Requests

In June 2023, the DOJ and FTC jointly issued a notice of proposed rulemaking that proposed extensive changes to the Hart-Scott Rodino (HSR) premerger notification rules.<sup>61</sup> The changes greatly increase reporting burdens on private parties, while requesting new categories of information that may not be directly relevant to the impact on competition of a proposed merger. In doing so, they would expand the scope of data and documents collected, thereby increasing the time and resources required to consummate even transactions that are likely to be pro-competitive. Thus, they are likely to deter pro-competitive mergers, if adopted. Notably, the changes include requests for information that typically accompany only Second Requests, which sometimes follow the existing premerger notification process.<sup>62</sup> Commentators in the legal industry have noted increases in the costs and volumes of Second Requests under the competition agencies in 2023 and preceding recent years.<sup>63</sup>

#### Other FTC Rulemaking Initiatives

In 2023, the FTC under Chair Khan continued its push to propose and promulgate substantive rulemaking in the competition space through section 6(g) of the FTC Act. Properly understood, that subsection only gives the FTC the authority to issue internal housekeeping rules, thus making

it likely that any finalized substantive competition rules will be challenged in court.<sup>64</sup> In January 2023, the FTC proposed a blanket rule banning all noncompete clauses in labor agreements.<sup>65</sup> This would prevent beneficial experimentation and competition between states in determining the best balance between labor rights, on the one hand, and enabling investments in professional training and skills development and allowing businesses to protect proprietary interests on the other hand.

Additionally, the FTC has proposed a number of substantive rules in the consumer protection space. Recent examples include a November 2023 proposed rule targeting “junk fees” (comment period ends in January 2024),<sup>66</sup> and an April 2023 proposed rule that expands the scope of the FTC’s existing Negative Option rule to cover all forms of negative option marketing.<sup>67</sup> The latter rule also consolidates various existing statutory and regulatory requirements, including a requirement that a simple “click to cancel” option be provided to consumers attempting to cancel subscriptions online. The FTC is currently considering public comments on the latter rule. So far, no final versions of any of the aforementioned rules have been enacted.

## **KEY ANTITRUST ENFORCEMENT ACTIONS: DEPARTMENT OF JUSTICE**

The DOJ opened 25 antitrust cases in 2023.<sup>68</sup> The DOJ focused on forms of conduct that are potentially anticompetitive, including the sharing of information between companies through electronic information exchanges and providers, which could facilitate tacit collusion. Notably, the agency withdrew three of its long-standing policy statements that were meant to provide guidance to companies on exchanging information depending on their industry, deeming them to have been overly permissive.<sup>69</sup> The DOJ also sued pricing-statistics data-consultancy firm Agri Stats Inc., as well as the meat-processing firms alleged to have used Agri Stats’s services to collude. Though finding some success in prosecuting the meat-processing firms, the DOJ has had less success in prosecuting Agri Stats itself.

In the merger area, the DOJ continued to launch cases based on its skeptical approach toward mergers. However, following a string of losses in this area, it seems to have changed tack by accepting a consent order in the Spectrum Holdings case (see the discussion that follows) to settle a merger challenge. The DOJ also continued to pursue tech giant Google for a range of allegedly anticompetitive, monopolizing behavior. The outcome of these cases is pending.

### High-Profile DOJ Cases

Eight high-profile DOJ litigation initiatives are summarized below.

**U.S. v. Agri Stats Inc.:** In September 2023, the DOJ sued Indiana-based meatpacking data firm Agri Stats Inc. in federal court in Minnesota, claiming that the firm provided several national meatpacking giants (including Cargill Inc.) with their competitors’ pricing and inventory infor-

mation.<sup>70</sup> Six states eventually joined the DOJ as plaintiffs.<sup>71</sup> Even though Agri Stats hides the names of the client companies when it provides data, the data are allegedly detailed enough that the companies can be ascertained, with Agri Stats allegedly taking insufficient steps to remedy this.<sup>72</sup> This allegedly facilitated a collusion scheme in violation of section 1 of the Sherman Act, by allowing the competing firms to align and increase prices while restricting supply. The DOJ claims that companies paying for Agri Stats reports encompass 90 percent or more of broiler chicken, 80 percent or more of pork, and 90 percent or more of all turkey sales nationwide, and that Agri Stats encouraged its clients to raise prices while restricting output.<sup>73</sup> Agri Stats has applied for the case to be transferred to the United States District Court for the Northern District of Illinois,<sup>74</sup> which granted a favorable ruling to it in a similar matter earlier in 2023 (see discussion below). The DOJ has contested this move.<sup>75</sup>

**In re: Broiler Chicken Antitrust Litigation:** Earlier in 2023, the United States District Court for the Northern District of Illinois found that multiple leading national poultry producers had acted in tandem to raise prices and reduce supply in 2008–09 and 2011–12.<sup>76</sup> There was thus “sufficient evidence for a reasonable jury to find the existence of the alleged conspiracy by a preponderance of the evidence with respect to certain defendants.”<sup>77</sup> However, the court also issued a summary judgment in favor of Agri Stats, which had provided pricing information to the colluding firms, thereby dropping Agri Stats as a defendant.<sup>78</sup> The judge concluded that, even though the convicted defendants possessed Agri Stats reports and were found to have traded them with each other to communicate proprietary production and pricing information between competitors, there was no evidence that Agri Stats had “encouraged” the defendants to do so. The mere fact that Agri Stats’s clients acted to deanonymize report information was also deemed insufficient as evidence that the company itself was part of the collusion scheme.<sup>79</sup>

**U.S. v. Cargill Inc. et al.:** Earlier in 2023, the DOJ also obtained a \$84.8 million settlement with Cargill Inc. and two other major poultry processors and their data consultancy firm after the firm was accused of setting up an information exchange that allowed the competing poultry processors to share competitively sensitive information on employee wages, thereby suppressing wage competition.<sup>80</sup> The consultancy firm in question agreed to cease providing information exchange services to any industry for 10 years as part of the settlement.<sup>81</sup>

**U.S. v. Koch Foods Inc.:** In November 2023, the DOJ sued chicken-processing firm Koch Foods Inc. of violating Sherman Act section 1 by imposing anticompetitive and unreasonable “exit fees” on chicken farmers who switched processors and of using unethical practices, such as the threat of lawsuits and harassment, against farmers who considered switching.<sup>82</sup> The fees allegedly amounted to more than half of most growers’ total yearly take-home income, and sometimes more than a full year’s take-home pay.<sup>83</sup> The lawsuit was settled that same month, with the defendant firm signing a consent order promising to cease charging the fees and penalties in question, to return the fees it had already charged (along with any out-of-pocket legal expenses

incurred by its client farmers in contesting the fees), and not to take any steps to collect such fees for the next seven years.<sup>84</sup>

**U.S. and Plaintiff States v. JetBlue Airways Corporation and Spirit Airlines, Inc.:** In March 2023, the DOJ joined the District of Columbia and six states in suing to block JetBlue Airways's \$3.8 billion acquisition of low-cost airline Spirit.<sup>85</sup> The complaint alleges that the merger would unlawfully harm competition in the airline industry in violation of section 7 of the Clayton Act, as it would deprive consumers of a low-cost competitor, and result in higher prices and fewer flights.<sup>86</sup> Conversely, the merging parties claim that both JetBlue and Spirit are lower cost competitors to the main airlines, and that the merger would allow them to weather unfavorable post-COVID business conditions to become an effective, competitive challenger to the major airlines.<sup>87</sup> Though JetBlue and Spirit are the sixth and seventh largest airlines in the country, respectively, they claim to collectively account for only 8 percent of the domestic airline market, with the four biggest airlines in the country (United, American, Delta, and Southwest) collectively accounting for 80 percent.<sup>88</sup>

JetBlue has agreed to divest slots and gates at airports in Massachusetts, New Jersey, New York, and Florida to settle the case and consummate the merger.<sup>89</sup> However, the agency asserts that a permanent injunction is the only remedy that it is willing to accept and that divestitures will not resolve anticompetitive concerns.<sup>90</sup> Closing arguments in the case were made in October 2023, with a ruling expected in early 2024.<sup>91</sup> Notably, the judge in the case has expressed reluctance about the prospect of granting the DOJ's permanent injunction request, opining that air travel is a "dynamic industry facing unique opportunities and challenges in the post-COVID environment."<sup>92</sup> Judge Young has signaled the possibility of approving the merger if JetBlue agrees to further divestitures, something that the airline says it is willing to do.<sup>93</sup>

Although there appear to be prospects that the merger will eventually be approved, the costs and 18-month delay caused by the DOJ-states joint litigation have caused immense economic damage to both companies involved, as well as to their employees and shareholders.<sup>94</sup> Spirit is reportedly hemorrhaging hundreds of millions of dollars each quarter and has laid off thousands of its staff, with more layoffs expected.<sup>95</sup> Both airlines have seen losses in stock value of 50 percent relative to premerger value.<sup>96</sup>

**U.S. v. ASSA ABLOY AB, and Spectrum Brand Holdings, Inc.:** In late 2022, the DOJ sued to block door hardware manufacturer ASSA ABLOY from acquiring the hardware and home improvement division of Spectrum Brand Holdings.<sup>97</sup> The agency claimed that the merger would end direct competition in the premium residential door hardware and smart locks market, thereby granting a "near monopoly" in the relevant markets to the post-merger entity.<sup>98</sup> It was alleged that this would lead to increased prices, less innovation, and poorer product quality.<sup>99</sup> The DOJ also rejected the plaintiffs' proposal to divest some of their assets as insufficient to assuage competitive concerns.<sup>100</sup> The trial began in April 2023. A final judgment was delivered on September

13, 2023,<sup>101</sup> with the merger receiving approval after a settlement whereby the parties agreed to divest some assets. The DOJ agreed to settle the case with a divestiture order after the judge expressed skepticism about its position, and noted the difficulty it would face in enjoining the merger.<sup>102</sup> This settlement represents the first time that the Biden administration DOJ, under Assistant Attorney General for the Antitrust Division Jonathan Kanter, has agreed to a settlement order to approve a merger, and it could represent a change in strategy intended to avert the agency's string of court losses in seeking permanent injunctions against mergers.

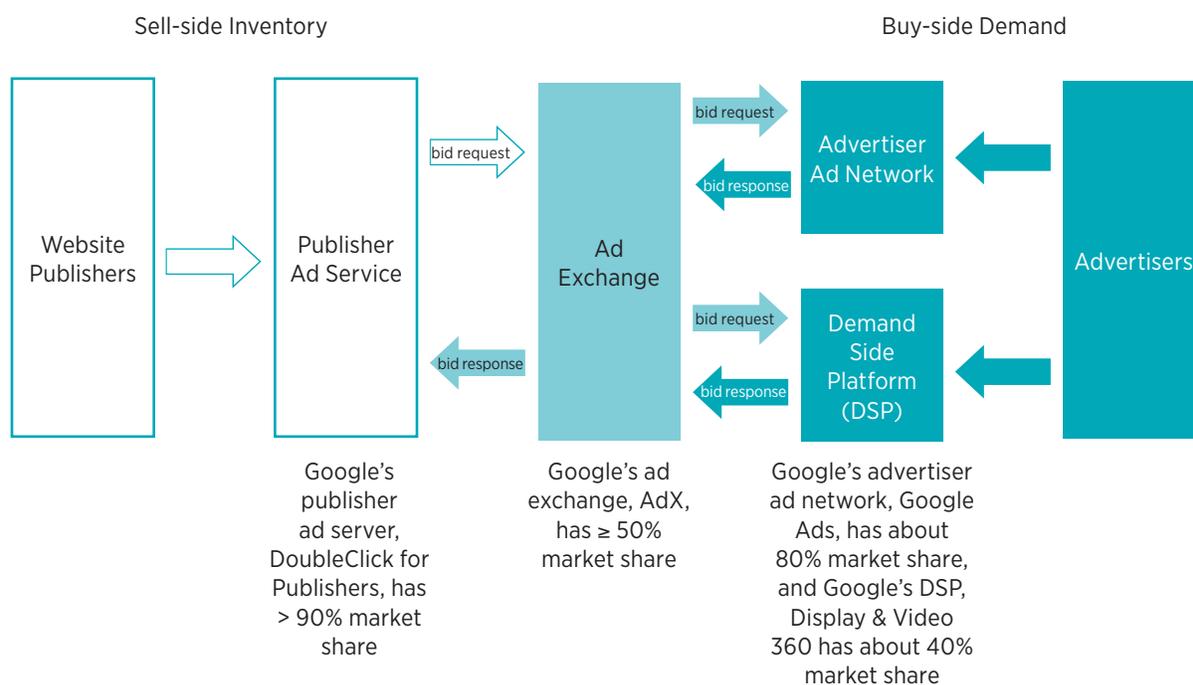
**U.S. and Plaintiff States v. Google LLC (2023):** In January 2023, the DOJ and six states sued Google for allegedly maintaining monopoly power through its management of its digital advertising services in violation of the Sherman Act.<sup>103</sup> The company is accused of operating in all three stages of digital advertising: (a) It acts as a buyer of advertising space on websites for advertiser clients through the Google Ads ad network and demand-side platform Display & Video 360.<sup>104</sup> (b) It acts as a seller of advertising space on websites through its Google Ad Manager (also known as DFP or Doubleclick for Publishers) publisher server, which has a 90 percent share of the web publisher-side ad server market.<sup>105</sup> (c) It also operates an advertising exchange platform that connects buyers and sellers, known as AdX, which is integrated into Google Ad Manager and corners more than one-half the ad exchange market.<sup>106</sup>

Google is accused of leveraging its position at all three levels of the ad chain and the knowledge and control over the process that this grants it, to raise prices and reduce innovation, without the threat of competitors eroding its market share.<sup>107</sup> As a result, “website creators [allegedly] earn less, and advertisers [allegedly] pay more, than they would in a market where unfettered competitive pressure could discipline prices and lead to more innovative ad tech tools that would ultimately result in higher quality and lower cost transactions for market participants.”<sup>108</sup>

Google is also accused of violating section 1 of the Sherman Act by tying its publisher ad server, DFP, to its advertising exchange, AdX.<sup>109</sup> This practice allegedly forces web publisher clients to use Google's stack of ad services, as choosing a rival ad exchange would mean forgoing access to the “economically essential, real-time, competitive advertiser demand” of Google Ad Services, which corners 80 percent of the advertiser ad network for open display advertising.<sup>110</sup>

A notable feature of the DOJ's complaint against Google is that its claims about Google's market dominance (see figure 1) rest on the relevant market for the complaint being narrowly defined as the market for “open web display advertising,” rather than global or US-based digital advertising as a whole. Google's US digital advertising revenue as a share of advertising spending in the United States was just 11 percent in 2019, and 12 percent in 2020.<sup>111</sup> And Google's share of US digital advertising is under 30 percent, with a steady and significant decline observed since 2019.<sup>112</sup> “Open web display advertising” accounts for only “websites [web publishers] whose inventory is sold through ad tech intermediaries that offer inventory from multiple websites.”<sup>113</sup> It thus excludes digital advertising on websites and social media platforms like Facebook (which are available

**Figure 1.** Google’s Market Shares in Open Web Display Advertising Services on Ad Exchanges, Publisher Ad Servers, Advertiser Ad Networks, and Demand-Side Platforms



Source: Adapted from DOJ complaint filing (see United States v. Google, LLC (January 2023), figure 5, p. 31) by John T. Scott, “Consequences of Dissolution of Google’s Digital Advertising Business” (Working Paper, Dartmouth College, Hanover, NH, July 2023), 4.

through proprietary tools on those platforms and websites), within videos streamed on platforms like YouTube and Netflix, within mobile apps and games, among others.<sup>114</sup>

Notably, Google’s “stack” of advertising technology services that are the subject of the complaint include access to both “open web display advertising” and other digital advertising segments that are owned and operated by Google, such as Google search advertising and ads on YouTube videos.<sup>115</sup> The rapidly evolving dynamics of the digital advertising market also pose a challenge for the DOJ, with Google facing competitive threats from artificial intelligence–integrated search services in the search advertising segment.<sup>116</sup> Evidence of competitive threats weighs against the argument that Google has the ability to charge monopoly rents, which is necessary for the DOJ to win its case. Google may also be expected to argue that its acquisitions were pro-competitive, allowing it to apply its resources and scale economies, as well as the benefits of vertical integration, to continue developing and deploying innovations and products created by smaller firms that did not provide as much value to consumers before acquisition and integration.<sup>117</sup>

As a remedy, the DOJ seeks (at a minimum) an order forcing Google to divest of the Google Ad Manager suite, including both the company’s publisher ad server (DoubleClick for Publishers, or

DFP) and ad exchange (AdX).<sup>118</sup> It is unlikely that the court will approve divestiture as a remedy against the alleged monopolization and exclusionary conduct if Google’s purported control over digital advertising cannot be wholly or partly attributed to acquisitions.<sup>119</sup> Specifically, the DOJ considers Google’s acquisitions of publisher ad server DoubleClick and the nascent ad exchange AdX, both of which were integrated into the company’s “stack” of advertising services, as anti-competitive.<sup>120</sup> Conversely, however, if Google’s purported dominance is the result of providing a “better product” through its integrated stack of advertising services, then the DOJ case will fail.<sup>121</sup> The trial will begin in March 2024.<sup>122</sup>

**U.S. et al. v. Google LLC (2020):** In 2020, the Trump administration DOJ filed an antitrust case against Google in the United States District Court for the District of Columbia.<sup>123</sup> Google is accused of using anticompetitive tying agreements that paid smartphone and computer-operating system firms like Apple to make its search engine the default.<sup>124</sup> It is alleged that these multibillion-dollar contracts prevent rival search engines, like Microsoft’s Bing and DuckDuckGo, from acquiring the scale necessary to compete with Google,<sup>125</sup> which enjoys a stable 85 percent or more share of the search-engine market.<sup>126</sup> The DOJ claims that, as a result, consumers suffer harm through degraded search-result quality and being forced to share their personal data.<sup>127</sup> The agency also claims that, even though alternative search engines are freely accessible and can be made the default, consumers often do not choose to do so because it is cognitively difficult and time-consuming.<sup>128</sup> Conversely, Google claims that its dominance in the search-engine and advertising space, as well as the willingness of the companies that it works with to implement its search engine as the default on their operating systems and devices, is due to the superior product quality of Google search.<sup>129</sup> Google also characterizes the payments it makes to smartphone manufacturers and wireless carriers as legal revenue-sharing arrangements deriving from the competitive process, undertaken to incentivize the receiving parties to keep user data secure and update their products regularly.<sup>130</sup> The trial began in September 2023,<sup>131</sup> with evidentiary arguments wrapping up in November 2023.<sup>132</sup> Closing arguments will take place in May 2024, with Judge Mehta expressing no views about how he will rule.<sup>133</sup>

## CONCLUSION

The FTC and DOJ continued to advance an extremely aggressive approach to antitrust enforcement and (in the case of the FTC) regulation during 2023. Nevertheless, their unimpressive enforcement record failed to match their rhetoric. The outlook for clear-cut agency litigation victories in 2024 appears to be poor. The longer-term impact of Biden administration antitrust policy may turn on the results of the 2024 election.

## ABOUT THE AUTHORS

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Alden Abbott is a senior research fellow focusing on antitrust issues. Before joining Mercatus, he served as the Federal Trade Commission's general counsel from 2018 to early 2021, where he represented the FTC in court and provided legal advice to its representatives. Prior to working at the FTC, he worked at the Heritage Foundation and BlackBerry Ltd. He also served as an adjunct professor at George Mason's Antonin Scalia Law School from 1991 to 2018. He has a JD from Harvard Law School and an MA in economics from Georgetown University.

## NOTES

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