NSR Tech Policy: Google Antitrust Ad Tech Case: The Long, Steep Road Ahead

By Blair Levin, Matt Perault and Dan Salmon | January 25, 2023

What's new? The Justice Department filed an antitrust case against Google yesterday, alleging that the company has illegally monopolized ad tech. The complaint claims that Google used acquisitions to reduce competition, used its dominance to force the use of its products, and made it more difficult for users to choose alternatives. Google responded in a blog post arguing that the complaint ignores active competition in the ad industry.

The complaint is lengthy, and analysts will debate the nuances in the weeks and months ahead. As such, we don't see the news as immediately material to other ad tech stocks like Neutral rated TTD (or not rated CRTO, MGNI, PUBM, etc.), however the complaint adds to a growing list of jurisdictions pursuing Google in this area, so momentum for changes to its #1 position across this ecosystem is building. Here, we provide a few initial observations.

- **A big swing and a…** The Biden administration has brought several cases that are aimed at reining in Big Tech. Several of those cases have sought some form of "break up" as a remedy (the FTC's suits to prevent Meta's acquisition of Within and Microsoft's acquisition of Activision, for instance). In this case, the Justice Department seeks to order Google to divest several components of its ad tech ecosystem. It is difficult for the government to win any antitrust case. Securing "break up" as a remedy–which we think is the government's principal goal– is particularly hard. Winning will take an enormous amount of time and resources, as it is not certain that this DOJ will have either. The Biden administration is swinging for the fences, but it's hard to hit the pitch.
- **No new evidence immediately apparent.** In our quick review of the 151 page complaint, nothing jumped out at us as a "smoking gun" or even something new or surprising to those familiar with the business. Of course, during discovery, additional facts will come to light and they may prove decisive, but we simply note for purposes of an initial take, that the DOJ has been investigating Alphabet for several years, and at

least in our view, we haven't seen the kind of evidence the DOJ compiled against, for example, the airlines. While there will undoubtedly be factual disputes, this suggests to us that the principal focus of the litigation will be more about the legal implications of the facts, including the appropriate market definitions and the implications of various technological developments (such as Chatgpt.)

- **More traditional antitrust case.** While we think the DOJ has an uphill battle, we think this is a more traditional case than some being brought by Biden antitrust authorities. That is, in contrast with cases testing novel legal theories, this is about whether a single entity has consolidated market power in a mature sector and used that power to suppress competition and raise prices. The facts and economic analysis may or may not bear out that narrative, but it is not a breaking new ground for what antitrust has traditionally addressed.
- **But a very non-traditional and complex industry.** By adding a pursuit of Google for dominance in ad technology, to go alongside the current case pursuing anticompetitive behavior in search, the DOJ has chosen a far more complex industry to make its case. The complaint builds upon efforts made already by the states, but if/when this reaches a courtroom, framing industry competitive dynamics to a jury will face a far higher bar than in search, where jury members are at least familiar with the user experience.
- **Courts, not Congress, in the lead:** Various antitrust legislative proposals have been introduced, including some gaining bipartisan support and targeted at the harms the DOJ complaint identifies, in our quarterly updates on regulatory risk in the tech sector (1Q, 2Q, 3Q, and 4Q), we have repeatedly emphasized that litigation will be more important than legislation, that states will be more important than the federal government, and that international regulators will be more important than domestic regulators. This Justice Department case is consistent with that framing, coming just as a divided Congress gets underway with slim prospects for meaningful tech legislative reform.
- **A long process:** Litigation is lengthy. The Justice Department's previous antitrust case against Google was filed in October 2020 and is now set for trial this fall. If this case proceeds on a similar timeline, it would be scheduled for trial in late 2025 or early 2026. It will take longer to resolve any appeals. That lengthy timeline may also affect the equities in the case, as the Justice Department in a new administration, in either 2025 or even 2029, could have a very different view of the issues than the current one. As noted below, the states brought a similar case and while some claims have already been dismissed, others have

survived initial court scrutiny, suggesting neither side will be positioned for a quick win.

- **International pressure.** While we are skeptical of the likelihood of success in terms of the new litigation, investors will have to pay attention to how it interplays with antitrust activity abroad. Even as the process in the United States winds its way through the legal system, enforcers in Brussels and London – among other jurisdictions – will likely pursue antitrust cases against Big Tech companies, including Alphabet, as well as regulatory regimes that will have similar ramifications.
- **States vs. federal.** The Texas attorney general filed a similar suit in 2020. Although eight states joined this federal complaint, Texas did not. It is not yet clear how the two cases will relate to each other, including whether resolution of one case will affect resolution of the other.
- All of this likely unsuccessful litigation creates another stage (a platform if you will) - and that is the stage upon which the negotiations with DOJ around remedy and or Alphabet management's posture to settlement. Here we are reminded at how distracted MSFT's management was during a similar situation where a Presidential election saw a final end to that proceeding. We are not predicting the same outcome here; only trying to understand what history can teach us.