Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Biggest Antitrust Developments So Far In 2023

By **Matthew Perlman**

Law360 (July 25, 2023, 4:43 PM EDT) -- The U.S. Department of Justice and the European Commission each lodged cases that could disrupt Google's digital advertising empire, while Apple looks to the U.S. Supreme Court to protect its anti-steering rules and enforcers continue to struggle with labor-side antitrust cases.

In a dizzying array of cases alleging anti-competitive conduct — particularly among major players in the technology arena — Law360 looks at the biggest developments this year so far.

Pressure Against Google Mounts

The DOJ lodged its second antitrust enforcement action against Google in January, accusing the company of monopolizing key technology used to display advertisements on third-party websites, known as display ads. Several state enforcers also joined the suit.

In response, Google has contended that the case mischaracterizes the company's business decisions and fails to account for the competitive dynamics of the digital advertising industry.

The allegations are similar to claims from a separate contingent of states led by the Texas Attorney General's Office that were already pending in multidistrict litigation centered in New York and also include claims from advertisers and publishers. But unlike those previous cases, the DOJ's case specifically seeks an order that would force Google to sell a piece of its advertising business.

Kellie Lerner, co-chair of the antitrust and trade regulation practice at Robins Kaplan LLP, told Law360 that the DOJ's case is part of a broader spate of government and private cases right now taking on the market dominance of the largest players in the tech space.

"There's a multipronged attack in terms of attacking the business models holistically and chipping away at some of the more discreet aspects of the business models," Lerner said. "It has been an interesting time for antitrust, and it will continue to be interesting as we finally get some rulings on these issues."

Google first tried unsuccessfully to get the DOJ's ad tech case transferred from the Eastern District of Virginia, known for its speedy "rocket docket," to New York to be coordinated with the other cases. But U.S. District Judge Leonie M. Brinkema found that moving the case would cause significant delays and subvert Congress' intent to have government antitrust enforcement actions resolved quickly.

Judge Brinkema then denied Google's motion to dismiss in April, following the lead of the court in New

York, which largely denied Google's bid to toss the state-led case in September. Trial is now expected to start in the DOJ's Virginia case early next year.

The state enforcers, meanwhile, moved in February to get their case transferred out of the New York litigation and remanded to federal court in Texas, where they initially filed, based on legislation passed in last year's budget appropriations bill.

The State Antitrust Enforcement Venue Act extends to state enforcers an exemption that prevents federal antitrust actions from being included in multidistrict litigation. Google argued that the new law does not apply retroactively, but the Judicial Panel on Multidistrict Litigation disagreed in a June ruling.

Google then lodged a mandamus petition with the Second Circuit challenging the transfer that remains pending.

The European Commission also hit Google with a complaint in June targeting some of the same digital advertising technology as enforcers in the U.S., saying the company may have to sell some of its services to fix the problem.

The case follows three other European abuse-of-dominance cases targeting different aspects of Google's business that resulted in a total of €8 billion ($8.7 billion) in fines, all of which Google is appealing. New legislation will also soon take effect in Europe that imposes even greater obligations and regulations on large technology platforms like Google.

Lerner said the standards that apply under Europe's abuse-of-dominance laws make it much easier to bring cases targeting the type of conduct Google's accused of using than Section 2 of the Sherman Act, the U.S. law barring monopolization. That means the ad tech case in Europe could pose the biggest risk to Google.

"It's just a far easier task in Europe with their broader abuse-of-dominance standard," she said. "Companies that face Section 2-like claims are far more vulnerable in Europe than they are in the U.S."

In addition to the ad tech cases in the U.S., Google also has a bench trial set for September in federal court in Washington, D.C., for the DOJ's first antitrust case against the company. That suit targets Google's control over general internet searches and the advertising that shows up alongside search results.

There's also a December jury trial scheduled in California federal court over claims from state enforcers and others attacking the Google Play Store and the distribution of apps of Android devices.

Apple Fights Epic App Store Claims

The most significant ruling in an antitrust conduct case so far this year came in April, when a Ninth Circuit panel largely upheld a lower court's ruling in a suit being brought by video game developer Epic Games against Apple, finding that the tech giant's App Store policies don't violate federal antitrust law but do violate California's unfair competition law.

The Fortnite maker alleges that Apple's policies giving it strict control over the distribution of apps on its devices allow it to monopolize the market and collect undue commissions of up to 30% on most purchases, similar to the claims over Google's Play Store.

U.S. District Judge Yvonne Gonzalez Rogers rejected the bulk of Epic's claims following a bench trial in 2021,

siding with Epic only on a claim alleging that rules preventing developers from steering users to alternative payment methods violated state law. The lower court issued an injunction that would bar Apple from enforcing the anti-steering rules, but that remains on hold.

Both sides appealed and the Ninth Circuit largely affirmed the trial court's ruling, only reversing a finding that Epic is not obligated to pay Apple's attorney fees for related breach of contract claims. After the panel denied rehearing bids from both Apple and Epic, Apple asked the court in early July to stay its mandate for a petition to the U.S. Supreme Court on the anti-steering rules.

The Ninth Circuit obliged, but one of the judges slammed Apple's arguments in a 10-page concurrence, saying they "cannot withstand even the slightest scrutiny."

Constantine Cannon LLP partner Ankur Kapoor told Law360 that the trial and appellate rulings in the Epic-Apple case are significant because they're some of the first decisions on the merits in an antitrust conduct case targeting large technology platforms and could indicate how courts will view similar claims down the road.

Kapoor said the findings on market definition were of particular importance, with the circuit court saying that the trial court made errors when defining the relevant market at issue as the market for mobile-game transactions but that the errors were harmless. Epic had proposed a market for the distribution of apps and in-app payments only on Apple devices, while Apple proposed a market that included all video game transactions, whether mobile or otherwise.

The Ninth Circuit's holding that the trial court's errors were harmless was part of the reason for a partial dissent that argued anti-competitive effects cannot be assessed at all until the market is identified. Kapoor said it was surprising to hear from the court of appeals "that you do not always have to define the market with such precision."

The court also credited evidence beyond just market shares to find that Apple has power in the market, including that it charges a commission that's well above the cost of providing the services, Kapoor said. But while the Ninth Circuit found that Apple has market power, it affirmed the lower court's findings that the position was not unlawfully acquired.

Meta Still Facing FTC Case

A D.C. Circuit panel in April affirmed a lower court's dismissal of a case from state-level enforcers accusing Facebook parent company Meta Platforms of monopolizing social networking, mainly through its acquisitions of Instagram and WhatsApp.

The panel said the states waited too long by filing a case in 2020 targeting acquisitions that occurred several years before, and noted that Meta has been integrating the services and relying on them to make changes to its own products since completing the deals.

A Federal Trade Commission action with similar claims remains pending in D.C. district court, with federal enforcers not bound by the same time limits as their state counterparts.

Kapoor said the D.C. Circuit ruling was certainly a partial victory for Meta, since it will no longer have to confront claims under a number of state laws or the 48 attorneys general that were bringing that case.

"Individually they're small, but you add up that many AGs, and it's quite a force," he said.

Labor Case Struggles

The DOJ's enforcement push against activity that hurts competition for workers saw a pair of significant setbacks in early 2023, leaving the agency without a jury win on labor-side antitrust claims three years after filing its first cases.

Federal enforcers warned for several years about the potential for criminal antitrust charges over no-poach, wage-fixing or other agreements that affect labor markets before they filed their first cases in 2020. But their record in the space continues to have no convictions, except on a claim for lying to investigators, and a pair of plea deals with fines and restitution totaling just $134,000.

The trend continued in March when a jury acquitted four operators of home health agencies accused of conspiring to fix caretakers' wages in Maine. A Connecticut federal judge in April then tossed charges midtrial against six aerospace and staffing company bosses accused of participating in a no-poach conspiracy.

U.S. District Judge Victor A. Bolden stopped the aerospace case from going to the jury ahead of closing arguments after finding that no reasonable juror could convict based on the evidence presented by prosecutors under Federal Rule of Criminal Procedure 29. Judge Bolden said that workers were still able to switch between different engineering staffing companies servicing Raytheon Technologies Corp.'s Pratt & Whitney division, meaning there was no evidence that the labor market was divided or allocated.

Lisa M. Phelan, a partner at Morrison Foerster LLP and a former chief of the DOJ Antitrust Division's National Criminal Enforcement Section, told Law360 that it's incredibly rare for a case to be tossed under Rule 29 and that the allegations in the aerospace case were complicated by the relationships between the companies involved.

And while other types of white collar cases involve more tangible offenses, like stealing money or making false statements, criminal antitrust cases are hard even with the best of facts, Phelan said.

"An antitrust crime is a meeting of the minds, which is a hard thing to prove," she said. "There's no physical, tangible proof other than maybe some cryptic statements in an email or a text message."

Criminal labor-side antitrust cases are also new, she said, so neither the agency nor the courts that evaluate the claims have much experience or precedent to go on. While the DOJ has defended bringing the cases and continues to push other cases focused on the labor markets, Phelan said some of the holdings in the losses so far could impact the DOJ's enforcement of other types of antitrust violations.

That's especially true for issues surrounding intent and the evidence needed to show actual harm in the market, which Judge Bolden seized on.

"If that were to spread over to other, more classic price-fixing or bid-rigging cases, that would be a disaster for the DOJ," Phelan said.

Golf Gets the Antitrust Treatment

An antitrust and contract dispute that roiled the golf world for the better part of a year ended abruptly in

June with a bombshell agreement between the PGA Tour Inc. and its Saudi-backed rival LIV Golf Inc. to merge their operations.

The dispute erupted after the PGA Tour banned LIV players from its events, citing violations of its exclusivity contracts, LIV's funding by Saudi Arabia's Public Investment Fund and the Saudi government's human rights record.

LIV and its players responded with a lawsuit alleging that the PGA Tour was violating antitrust laws with its grip on the sport. PGA Tour countersued, accusing LIV of interfering with player contracts.

Sean P. McConnell, vice chair of the antitrust and competition group at Duane Morris LLP, told Law360 that as an avid golfer and an antitrust attorney, his two worlds are colliding.

"Folks that I play golf with actually now know what I do for a living," he said.

Antitrust experts generally agreed that the PGA Tour was on firm ground in the case, considering the upstart promotion's quick rise, which seems to undercut its central allegation that it was being nudged out of the market for professional golf events. But the dispute also reportedly sparked an investigation from the DOJ into potential anti-competitive activity by the PGA Tour.

The PGA Tour has denied that the agreement ending the litigation is actually a merger, instead describing the deal as the combination of commercial assets by partnering entities, which also includes the PGA European Tour, known as the DP World Tour.

McConnell said it will be interesting to see how exactly the transaction is structured, but the DOJ's interest in potential antitrust issues in the sport will mean it likely gets scrutiny from enforcers. Lawmakers have also called PGA Tour officials in front of Congress over antitrust concerns and concerns about LIV's Saudi funding.

"The DOJ is going to look at this extensively, and it's clear that Congress is also going to look at this transaction," McConnell said.

--Editing by Alanna Weissman.
