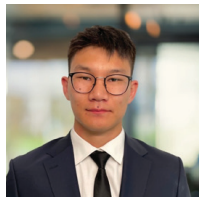

Webinar Recap: US v. Google: What Lies Ahead

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ABA Antitrust Law Section (June 10, 2025)



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Introduction

On August 5, 2024, in *United States v. Google*, U.S. District Judge Amit Mehta ruled that Google was a monopolist and has unlawfully maintained its dominance in online search, violating Section 2 of the Sherman Act.¹ The court found that Google secured default placements through exclusive contracts with partners, including browser developers and mobile device manufacturers. The ruling stated that, as of 2020, Google held an 89.2% share of the general search services market, and of 94.9% on mobile devices.²

On October 29, 2024, the ABA Antitrust Law Section hosted a webinar titled “US v. Google: What Lies Ahead.” The webinar was moderated by Daniel Francis (professor of law at New York University) with the following panelists: Renata Hesse (attorney at Sullivan & Cromwell LLP), Bill Kovacic (professor of law at George Washington University), Nancy Rose (professor of economics at MIT) and Carl Shapiro (professor of economics at UC Berkeley). The panelists discussed Judge Mehta’s opinion on the ruling, explored potential future developments in the case, and the range of possible remedies and their challenges. The summary below summarizes the opinions presented by panelists during the webinar.

Initial Reactions to Judge Mehta’s Opinion

Professor Francis opened the discussion by inviting each panelist to share their initial high-level reaction to the opinion. Professor Rose began by highlighting Judge Mehta’s ease in grounding his decision in familiar antitrust principles and analysis, despite some others’ hand-wringing before the trial about the difficulty of applying antitrust law to zero-price markets. She also noted Judge Mehta’s embrace of behavioral economics and the important role that scale economies and network effects played in the analysis .

Professor Rose and Ms. Hesse both praised the simplicity and clarity of Judge Mehta’s ruling. Professor Rose particularly emphasized the simplicity of the market definition, which in her view avoided unnecessary complexities and centered directly on impacts on users and advertisers.³ Ms. Hesse commented on the accessibility of the ruling was to a wider audience. According to Ms. Hesse, Judge Mehta’s analysis was painstaking in its evaluation of the potential product markets and each of the potential violations.

Professor Kovacic found Judge Mehta’s tone measured in balancing Google’s contributions to the information services sector with findings of misconduct under Section 2 of the Sherman Act. Likening this approach to the case,⁴ he welcomed the departure from the harsher tone of older antitrust rulings. He also noted the selective dismissal and upholding of claims, reflecting a deliberate approach conducive to crafting proportional remedies.

Professor Shapiro underscored the lasting influence of the *US v. Microsoft* decision as a key precedent, particularly in addressing defaults, network effects, and barriers to entry.⁵ He explained the significance of Judge Mehta’s causation standard for future remedies. He also highlighted Google’s payments for default status on Apple’s Safari browser as a central issue in the case, noting that behavioral economics played a pivotal role in undermining Google’s defense.

Professor Francis then flagged what he perceived to be a possible disconnect between the at-issue illegal conduct—the exclusive nature of the default status—and the anticompetitive effects described by Judge Mehta, which seemed to him to be in part driven by the default status itself, rather than the exclusive nature of the default status.

Exploring Potential Remedies

Professor Francis then shifted the discussion to remedies, focusing on the legal standards guiding monopolization remedies, particularly divestiture or breakup.

Ms. Hesse began by discussing the challenges and objectives of antitrust remedies, drawing on her experience with *Microsoft*. She explained that the goal of a remedy is not to recreate the market as it would have been absent the conduct—an often impossible task—but to restore competitive conditions and ensure the market functions competitively moving forward. Ms. Hesse outlined remedies such as “fencing-in” relief—which are provisions that are broader in scope than the conduct found to be

unlawful—or prohibitions of certain agreements. She noted that, in her view, not all antitrust issues are suited to structural solutions, emphasizing the complexity of designing effective remedies.

Professor Shapiro then drew lessons from *Microsoft* in designing potential remedies. He highlighted the D.C. Circuit's focus on three key goals: (1) restoring competitive conditions, (2) denying the monopolist the benefits of its illegal conduct, and (3) preventing future monopolistic practices. Professor Shapiro highlighted the importance of establishing a causal connection between the conduct and its market effects, central to determining the scope of remedies in both cases. He explained that while Google's revenue-sharing payments would have been acceptable if not conditioned on securing default status, the real issue, in his view, lay in assessing how this insistence on default status harmed competition and shaped the market.

Professor Kovacic next highlighted the foundational principles of antitrust remedies from landmark cases in the 1940s and 1950s, emphasizing the authority of district judges to implement measures beyond simply halting illegal conduct. According to him, remedies should restore competition, potentially through divestiture if needed, and recover gains from monopolistic practices, while maintaining proportionality to the misconduct. Professor Kovacic noted that courts typically grant government plaintiffs latitude when proposing broader remedies, a long-standing precedent in antitrust cases. He praised Judge Mehta's serious and responsible approach to crafting a remedial framework in the Google case, contrasting it, in his view, with Judge Jackson's handling of remedies in *Microsoft*.

Professor Francis then shifted the remedies discussion to whether structural remedies are appropriate in cases of behavioral misconduct, such as in *Microsoft*, or if they are less relevant in modern antitrust enforcement. He highlighted the rarity of structural remedies in such cases, where oversight is typically the standard approach, and questioned whether it made sense to consider structural remedies in the first place in the *Google search* case.

Professor Kovacic noted that in cases of severe behavioral misconduct, more drastic interventions, such as divestiture, may be considered. However, he argued that such measures are not always justified, underscoring the significant responsibility judges face when crafting antitrust remedies, particularly when restructuring major enterprises with substantial economic impact. Professor Kovacic highlighted that this responsibility often necessitates long, deliberate proceedings to ensure all options are carefully evaluated and the chosen remedy is both well-founded and effective.

Ms. Hesse then emphasized the importance of considering the severity and duration of anticompetitive behavior when determining remedies, particularly whether the market can recover without structural intervention. She highlighted the challenges of designing effective behavioral remedies compared to structural remedies, which, in her view, are more decisive but risk being overly punitive or disruptive. Ms. Hesse noted that Judge Mehta appeared cautious about drastic structural actions, acknowledging Google's contributions while carefully weighing the appropriate remedy. She also

pointed out the challenge for the DOJ and Plaintiff states in proposing a remedy with a clear causal link to the violation, as in her view, Judge Mehta is likely to prioritize remedies that are methodical, justified, and capable of withstanding appeal.

Exploring Structural Remedies and Divestiture

Professor Francis then moved the discussion to the possibility of structural remedies, particularly divestiture, in the Google search case.

Professor Rose highlighted an economic rationale for considering divestiture, given the limitations of behavioral remedies. Drawing on historical examples, she highlighted the challenges of enforcing behavioral remedies when a company's incentives and ability to exercise anticompetitive market power are unchanged. She referenced the *US v. Live Nation* case, in which, in her view, repeated consent decree violations demonstrated their ineffectiveness.⁶ Similarly, she pointed to challenges in Europe, where she explained that Google was viewed to have found ways to circumvent such behavioral remedies. According to Professor Rose, structural separation might be necessary—not as punishment, but as a practical solution to address the lasting effects of Google's anticompetitive behavior.

Professor Kovacic described the historical challenges and uncertainties surrounding antitrust remedies, particularly divestiture. He observed the challenges of antitrust enforcement in designing effective remedies and the frequent failure of structural remedies to address underlying issues.⁷ He further pointed out that the true effectiveness of remedies—whether structural or behavioral—often becomes evident only after years, complicating short-term evaluations. For example, Professor Kovacic highlighted the *US v. Western Electric* case, in which a 1956 compulsory licensing scheme, initially criticized, ultimately fostered technological innovation and helped shape the digital age.⁸

Professor Francis then turned the discussion to structural measures to remedy Google's anticompetitive behavior. He referenced Judge Mehta's finding that Google's trading partners rarely considered alternatives and suggested that this insight could be pivotal in evaluating the impact of Google's conduct and determining whether divestiture would be an appropriate remedy.

Professor Shapiro emphasized that, while divestiture is firmly on the table for plaintiffs and will be a significant part of the discussion, it faces substantial challenges. He noted the difficulty Google may have in convincing the court and the public that divestiture would cause undue harm. He also discussed the role of vertical integration and whether diversified companies allocate resources efficiently or inefficiently. He then further stressed the importance of causation evidence, referencing *Microsoft*, where strong evidence was essential to support divestiture. In contrast, he pointed out that the evidence here—particularly regarding how Apple's behavior might have differed without Google's default arrangements—is limited in his view. Professor Shapiro

concluded that this lack of robust causation evidence could be a significant obstacle to divestiture, even as the remedy remains central to the debate.

Ms. Hesse next explored the topic of divestiture, which could be central due to public demand and its inclusion by the plaintiffs. Reflecting on her experience with *Microsoft*, she highlighted the complexities of assessing remedies, noting the possibility that market changes may result from the remedy itself, the case's scrutiny, or the findings of liability. She suggested that the broader impact of a case—such as heightened oversight and judicial findings—can sometimes be as significant as the specific remedy imposed.

Building on Ms. Hesse's discussion on the challenges of evaluating antitrust remedies, Professor Kovacic next explored the effectiveness of remedies like divestiture and the role of enforcement in shaping corporate behavior. He highlighted that ongoing scrutiny and enforcement can act as a visible deterrent, discouraging dominant firms from overreaching while fostering competition.⁹ However, he acknowledged the difficulty of empirically validating this theory, as it requires a deep understanding of corporate decision-making, including how companies like Microsoft and Google responded to enforcement and whether competitors were emboldened—further underscoring, in his view, the complexity of disentangling these effects.

Exploring Behavioral Remedies

Professor Francis moved the discussion to the complexities of implementing behavioral remedies for Google. He posed the critical question of what a “sin no more” remedy might entail, emphasizing the challenge of designing effective behavioral relief.

Professor Shapiro started off by clarifying that in his view the issue is not Apple or other distributors choosing Google as their default search engine—this decision is fully within their rights. He argued that the problem lies with Google's conduct, specifically providing payments conditioned on being made the default search engine. A “sin no more” remedy would prohibit Google from offering such conditional payments to ensure default status, while still allowing Google to make unconditional revenue-sharing payments. In Professor Shapiro's view, this distinction is critical, as Google can still incentivize partners like Apple through revenue-sharing agreements, but cannot tie those payments to securing default positions.

Professor Kovacic built on Professor Shapiro's remarks, arguing that effective behavioral remedies must anticipate how Google might adapt to or circumvent restrictions. He then called for a proactive approach, suggesting simulation exercises or internal assessments to identify potential workarounds. Additionally, he underscored the importance of considering how technology and market dynamics could evolve independently of the remedy.

Professor Rose affirmed the need for robust remedies to address Google's long-standing anticompetitive practices, arguing that simply prohibiting default agreements would be insufficient. As Judge Mehta's opinion concludes, there were significant

consequences of Google's exclusionary contracts, including denying competitors access to scale and stifling investment and innovation, thereby entrenching Google's monopoly in search. Professor Rose suggested eliminating Google's default status on browsers like Chrome and Safari and implementing measures to encourage consumer choice were obvious but insufficient remedies, noting the limited effectiveness of choice screens in similar cases in Europe and with Microsoft. She also proposed more innovative remedies, such as requiring Google to share its data and APIs with competitors to help them compete more effectively, as well as exploring options like financial incentives for consumers to try alternative search engines. Professor Rose concluded that limited remedies might not effectively address Google's dominance.

Following Professor Rose, Ms. Hesse highlighted three key harms identified by Judge Mehta: the foreclosure of rivals, the inability of competitors to achieve scale, and the reduction in incentives for investment and innovation in general search. In her view, addressing these issues through behavioral remedies is difficult without requiring Google to share some of the advantages it has gained from its scale. Ms. Hesse also pointed out the limitations of remedies like prohibiting Google from being the default search engine, as such measures may not sufficiently address the scale problem or encourage rivals to innovate. Additionally, she noted that emerging technologies like AI, as highlighted by Google, could reshape the search landscape, but incorporating these factors into an effective remedy remains uncertain. Given these challenges, Ms. Hesse suggested that structural remedies, such as divesting Chrome or Android, be considered as a potential way to foster competition.

The conversation next turned to Professor Shapiro, who clarified his earlier description of the "sin no more" remedy, emphasizing that while it was a response to the question posed, it should not necessarily be viewed as adequate. He discussed Judge Mehta's emphasis on how Google limited competitors' market access, denying them usage and the ability to grow. Professor Shapiro noted that drastic changes, such as Apple replacing Google with Bing as the default search engine, may not work due to perceived differences in quality. Instead, in his opinion, the focus should be on providing rivals with opportunities to compete without creating distorted or inefficient outcomes, such as prohibiting Google from paying for distribution, which could have unintended consequences. Professor Shapiro expressed support for remedies like data sharing, which directly address Google's scale advantages stemming from network effects. He further added that similar measures are already being implemented for Google under European Union's Digital Markets Act (DMA).

Lessons from History and Antitrust Precedents

The discussion then shifted to lessons from antitrust history that should inform future remedies.

Professor Kovacic opened the discussion by calling for a comprehensive, collaborative approach to remedies in the Google litigation, suggesting that the court

draw on lessons from various jurisdictions and regulatory experiences. He proposed inviting the FTC to provide guidance on key issues such as interoperability, data sharing, and privacy, leveraging the FTC's lesser-known authority under Section 7 of the FTC Act. He also recommended consulting the European Union's Competition Directorate for insights from implementing the DMA and the UK's Competition and Markets Authority, which has conducted extensive studies on the tech sector and Google-related issues. Recognizing the uncertainty surrounding the effectiveness of remedies in such complex cases, Professor Kovacic advocated for a structured review process, such as a three-year mandatory assessment—similar to those in the AT&T decree and the DMA—to evaluate effectiveness and make necessary adjustments.¹⁰

Professor Shapiro emphasized the need for a careful, evidence-driven approach to remedies, aligning with Professor Kovacic's view that the court should take time to evaluate its options and allow the remedy to evolve as circumstances change. He stressed a forward-looking strategy that considers current market conditions rather than focusing solely on past conduct. Remedies, in his opinion, should function within the existing competitive landscape without artificially reshaping it. He also cautioned that remedies aimed at promoting competition should carefully avoid unintended negative impacts on consumers.

Ms. Hesse emphasized the role of independent technical expertise in the remedies process. She suggested that a structure similar to the Technical Committee used in *Microsoft* could help Judge Mehta navigate the technical complexities of crafting effective remedies. She also pointed to the DMA as a valuable reference for evaluating potential unintended consequences. Noting past concerns in *Microsoft* about disproportionate impacts, Ms. Hesse stressed the importance of carefully calibrating remedies to avoid disproportionate effects on market stability or competition.

Professor Rose then discussed the challenges of designing effective remedies, given what she described as the need to anticipate how companies like Google might adapt to maintain dominance. While acknowledging the value of frameworks like those in the DMA, she expressed caution regarding implementation, noting ongoing challenges in compliance. She stressed the importance of forward-looking remedies, particularly given emerging AI technologies. Supporting the idea of requiring Google to share its search APIs with rivals for a set period, she argued this could help competitors close the quality gap by leveraging Google's search results while they improved the quality of their search engines.

Concluding Remarks and Future Predictions

In their concluding remarks, the panelists reflected on potential outcomes and broader implications of the Google search case. Ms. Hesse predicted a remedy combining structural and behavioral elements, such as limited structural measures, such as data sharing to support behavioral remedies. She suggested the decision would likely

withstand appeal. Professor Rose, while hesitant to make specific predictions, supported the idea of a balanced approach as suggested by Ms. Hesse.

Professor Kovacic anticipated that the case could reach the Supreme Court, marking the first major Section 2 antitrust case to do so since 1973. He expected the Court would clarify Section 2 standards and provide guidance on remedies, potentially increasing clarity and sophistication in antitrust jurisprudence. Professor Shapiro noted the challenges related to causation evidence and anticipated a cautious approach by Judge Mehta. He predicted a measured remedy intended to balance disruption and effectiveness.

The panel concluded with Professor Francis thanking the participants and audience, emphasizing the value of the discussion in exploring the complexities of antitrust enforcement in the digital age.

Endnotes

1. United States, et al. v. Google, LLC, No. 20-cv-3010 (APM) (D.D.C. Aug. 5, 2024), Dkt. No. 1033.
2. United States, et al. v. Google, LLC, No. 20-cv-3010 (APM) (D.D.C. Aug. 5, 2024), Dkt. No. 1033, ¶¶ 23-24.
3. Ohio v. American Express Co., 585 U.S. ____ (2018).
4. United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).
5. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
6. United States, et al. v. Live Nation Entertainment, Inc. and Ticketmaster LLC, No. 1:24-cv-3973 (May 23, 2024).
7. Adams, Walter. "ANTITRUST AND A FREE ECONOMY." *Antitrust Law Journal*, vol. 46, no. 3, 1977, pp. 794–805.
8. United States of America v. Western Electric Co., Inc. and American Telephone and Telegraph Co., Civil Action 17-49 (Dist. N. J.).
9. Wu, Tim. "Tech Dominance and the Policeman at the Elbow." Columbia Public Law Research Paper 14-623 (2019).
10. United States of America v. American Telephone & Telegraph Co., et al., 552 F. Supp. 131 (D.D.C. 1982).

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