Google Ad Tech Ruling Creates Antitrust Uncertainty

By **Kristen Broz, Chesley Burruss and Elizabeth Lilly** (May 29, 2025)

Kristen Broz

Chesley Burruss

Elizabeth Lilly

It's been a tough nine months for Google in the antitrust space. The company was hit with two federal court decisions finding that it violated Section 2 of the Sherman Act — first, in August 2024, in the general search and search text advertising markets; and then in April, in the digital ad tech market.

U.S. District Judge Leonie Brinkema of the U.S. District Court for the Eastern District of Virginia held, on April 17, that Google violated Sections 1 and 2 of the Sherman Act by monopolizing the publisher ad server and ad exchange markets and engaging in anticompetitive conduct. The court also found Google liable for tying its products together in those markets.

The 115-page decision analyzed its findings from a three-week bench trial, wading through a complex market analysis of real-time auctions for website advertisements and the sale and display of those advertisements on a publisher's website.

The court will now consider the parties' proposed remedies, ranging from life-as-we-know-it-altering structural remedies to more modest monetary and injunctive relief.

Two aspects of Judge Brinkema's decision seemingly departed from precedent and open the door to more antitrust enforcement in the technology industry.

First, the court rejected Google's submission that the ad tech market should be viewed as a single two-sided market under the U.S. Supreme Court's 2018 decision in Ohio v. American Express Co.[1]

Second, the court found Google liable for unlawful tying, but it applied the per se rule, rather than the rule of reason, to Google's unilateral tying arrangement. We examine each in turn.

Two-Sided Platforms and American Express

In American Express, the Supreme Court determined that credit card networks are two-sided platforms, and courts must include both sides of the platform — merchants and cardholders — when defining the credit card market.

In reaching this conclusion, American Express reasoned that two-sided platforms cannot raise prices on one side without creating declining demand on both sides of the market due to indirect network effects — where the value of the platform to one group depends on how many members of another group participate.

Thus, for a two-sided platform to maximize the value of its services and compete, it must balance the prices charged on each side of the platform, necessitating consideration of both sides of the platform in a single market.[2]

Google argued that the digital ad tech ecosystem, like the credit card networks in American Express, is a single two-sided market.[3] Judge Brinkema rejected this argument, finding that, unlike in American Express, many of the ad tech products at issue did not fit within the American Expres definition of two-sided transaction platforms, and that American Express expressly did not apply to all two-sided platforms.

In particular, Judge Brinkema relied on the reasoning in American Express that a two-sided transaction platform must be considered in a single market because only other two-sided platforms can compete with a two-sided platform for transactions.[4]

In the ad tech ecosystem, on the other hand, the court found Google's competitors were not necessarily other two-sided transaction platforms. Further, one side of the platform included transactions that did not simultaneously affect the other side of the platform.

The court thus found that there were two relevant product markets:

- Publisher ad servers for open-web display advertising — which manage and deliver ads on a publisher's website; and

- Ad exchanges for open-web display advertising — which are digital marketplaces where publishers and advertisers connect to buy and sell inventory.

Based on this finding, the court concluded that Google monopolized those distinct markets.

The basis on which Judge Brinkema distinguished American Express could substantially affect other cases involving digital platforms. This is particularly so where, as here, a court is able to separate sides of the platform into distinct markets, and show competition, or lack thereof, in those distinct markets.

The court construed American Express narrowly, opening the door to arguments that complicated internet transactions and ad purchases do not fit neatly into the credit card network paradigm.

Unilateral Tying Arrangement

Another unusual aspect of U.S. v. Google is the court's holding that Google's tying of its publisher ad server to its ad exchange is per se unlawful under Section 1 of the Sherman Act — even though, as the court conceded, Google's tying arrangement was a unilateral act.

Although there is ample precedent for applying the per se rule to a Section 1 tying claim, courts typically do so where there is an agreement between competitors, not unilateral conduct by an alleged monopolist.

Unilateral conduct implicates Section 2 of the Sherman Act, under which courts traditionally apply the rule of reason to alleged unilateral tying.[5]

Specifically, in the 2001 decision in U.S. v. Microsoft, the U.S. Court of Appeals for the District of Columbia Circuit held that the rule of reason, rather than the per se rule, governed the legality of tying arrangements involving platform software products.[6]

Microsoft is analogous to Google because both involve a unilateral tie of two tech products with specific design features aimed at innovating and improving products for customers.

This type of tying arrangement could very well serve a procompetitive purpose. Yet, by applying the per se rule, which presumes the alleged conduct could serve hardly any purpose beyond suppressing competition, the court foreclosed this analysis.

The court's holding, if followed, sets a challenging precedent for tech companies attempting to innovate their products by designing distinct components that are tied together for improving customer experience. Here, analyzing this relationship under the rule of reason would have been the more obvious choice considering the organic way Google's ad technologies developed and the purpose behind those developments.

The decision to analyze the tying arrangement under the per se rule may also affect how the court considers structural remedies. By viewing the AdX ad exchange and the DoubleClick for Publishers, or DFP, ad server as distinct components whose tying could have scarcely any procompetitive purpose, the court has opened the door to aggressive — and potentially problematic — structural remedies.

Proposed Structural Remedies

As part of the structural remedies and monetary relief in the search engine antitrust litigation before the United States District Court for the District of Columbia, the government has requested that Google divest its web browser, Chrome, which proposal the court is currently considering.[7]

Similarly, the U.S. Department of Justice is pursuing divestiture in the ad tech case, requesting that Google divest its AdX ad exchange and DFP publisher ad server. The DOJ proposes a phased divestiture of DFP to allow for a smoother transition for other market participants and customers.

Google opposes divestiture — arguing that the DOJ's proposed structural remedies reach beyond the liability findings and would cause "economic chaos," "technological dysfunction," harm to "millions of advertisers and publishers," and "degrad[ation of] the experience of Internet users."[8]

If Google had to divest AdX or DFP, because of the way the two products are integrated, Google would need to develop entirely new products that could exist outside of Google's proprietary infrastructure and within the buyer's.

Google further argues that the time required for divestiture in a rapidly evolving industry would cause an unpredictable impact with unintended and/or damaging consequences.

The DOJ also requested behavioral remedies, for at least 10 years, including demands for nondiscriminatory dealings of buy-side tools with third parties. Further, the DOJ asked the court to order Google to place 50% of revenues from AdX and DFP in escrow to fund competitors and defray costs for publishers, and share data obtained as a result of its monopoly to restore competition.[9]

Google, on the other hand, has proposed predominantly behavioral remedies involving targeted changes to certain business practices. These include making ad bids open to all rival publisher ad servers; eliminating unified pricing rules; enjoining the rebuilding of First Look, Last Look and unified pricing rules; and monitoring compliance.

In general, divestiture is an uncommon remedy for anticompetitive conduct, because the consequences of divestiture are difficult to predict, and breaking up a company —

particularly one that developed unilaterally and not through acquisitions — is far from intuitive.[10] Further, antitrust remedies must be proportionate to the liability finding and designed to restore competition.

Impact on Tech Companies

Judge Brinkema's order creates significant uncertainty for Google and other tech companies in the antitrust space. By adopting a narrow application of American Express, the court opened the door to a more searching review of monopoly power among digital platforms.

Additionally, the court's application of the per se rule to Google's alleged tying of its publisher ad server and ad exchange may have consequences for tech companies trying to innovate, while staying within the bounds of the antitrust laws.

Further, if successful, the government's request for divestiture could upend a crucial part of Google's business. It also has implications beyond Google. The government's focus on divestiture — here and in the Google search case — serves as a warning to tech companies that the government can and will pursue structural remedies.

Kristen Broz is a partner, and Chesley Burruss and Elizabeth Lilly are associates, at Ballard Spahr LLP.

[1] Ohio v. Am. Express Co., 585 U.S. 529, 544, 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018).

[2] Id.

[3] United States v. Google LLC, No. 1:23-CV-108 (LMB/JFA), 2025 WL 1132012, at *25 (E.D. Va. Apr. 17, 2025).

[4] Id. at *26.

[5] United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001).

[6] Id.

[7] United States v. Google, LLC, Case No. 1:20-cv-3010 (D.D.C.).

[8] https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/1431_2025.05.05_Googles_Proposal_for_Appropriate_Remedies.pdf.

[9] https://storage.courtlistener.com/recap/gov.uscourts.vaed.533508/gov.uscourts.vaed.533508.1430.0.pdf.

[10] See https://www.law360.com/articles/2279254/searching-for-insight-on-requested-google-chrome-remedy.