Is There Any Market Power in Online Display Advertising?
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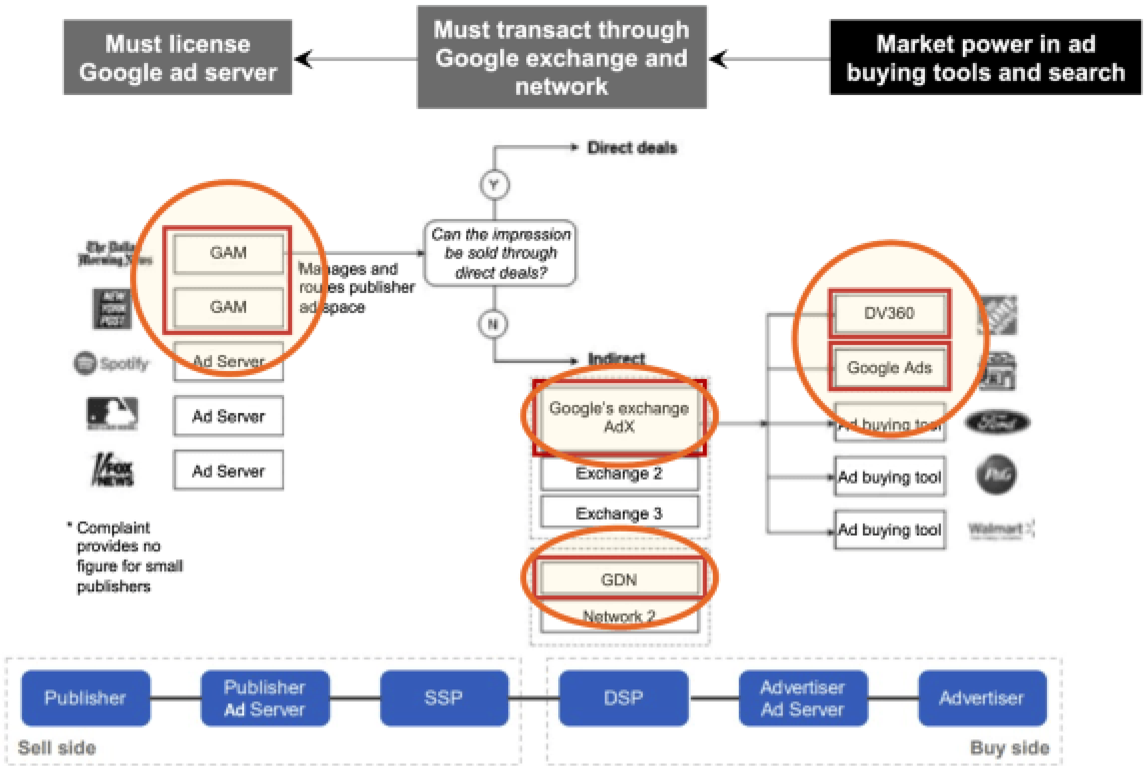
Eric Fruits, Samuel Bowman and Geoffrey A. Manne

A lawsuit filed by the State of Texas and nine other states in December 2020 alleges, among other things, that Google has engaged in anticompetitive conduct related to its online display-advertising business.

Broadly, the Texas complaint (previously discussed in this TOTM symposium) alleges that Google possesses market power in ad-buying tools and in search, illustrated in the figure below.



Source: Texas v. Google complaint; CMA
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The complaint also alleges anticompetitive conduct by Google with respect to YouTube in a separate "inline video-advertising market." According to the complaint, this market power is leveraged to force transactions through Google's exchange, AdX, and its network, Google Display Network. The leverage is further exercised by forcing publishers to license Google's ad server, Google Ad Manager.

Although the Texas complaint raises many specific allegations, the key ones constitute four broad claims:

1. Google forces publishers to license Google's ad server and trade in Google's ad exchange;
2. Google uses its control over publishers' inventory to block exchange competition;
3. Google has disadvantaged technology known as "header bidding" in order to prevent publishers from accessing its competitors; and
4. Google prevents rival ad-placement services from competing by not allowing them to buy YouTube ad space.

Alleged harms

The Texas complaint alleges Google's conduct has caused harm to competing networks, exchanges, and ad servers. The complaint also claims that the plaintiff states' economies have been harmed "by depriving the Plaintiff States and the persons within each Plaintiff State of the benefits of competition."

In a nod to the widely accepted Consumer Welfare Standard, the Texas complaint alleges harm to three categories of consumers:

1. **Advertisers** who pay for their ads to be displayed, but should be paying less;
2. **Publishers** who are paid to provide space on their sites to display ads, but should be paid more; and
3. **Users** who visit the sites, view the ads, and purchase or use the advertisers' and publishers' products and services.

The complaint claims users are harmed by above-competitive prices paid by advertisers, in that these higher costs are passed on in the form of higher prices and lower quality for the products and services they purchase from those advertisers. The complaint simultaneously claims that users are harmed by the below-market prices received by publishers in the form of "less content (lower output of content), lower-quality content, less innovation in content delivery, more paywalls, and higher subscription fees."

Without saying so explicitly, the complaint insinuates that if intermediaries (e.g., Google and competing services) charged lower fees for their services, advertisers would pay less, publishers would be paid more, and consumers would be better off in the form of lower prices and better products from advertisers, as well as improved content and lower fees on publishers' sites.

Effective competition is not an antitrust offense

A flawed premise underlies much of the Texas complaint. It asserts that conduct by a dominant incumbent firm that makes competition more difficult for competitors is inherently anticompetitive, even if that conduct confers benefits on users.

This amounts to a claim that Google is acting anti-competitively by innovating and developing products and services to benefit one or more display-advertising constituents (e.g., advertisers, publishers, or consumers) or by doing things that benefit the advertising ecosystem more generally. These include creating new and innovative products, lowering prices, reducing costs through vertical integration, or enhancing interoperability.

The argument, which is made explicitly elsewhere, is that Google must show that it has engineered and implemented its products to minimize obstacles its *rivals* face, and that any efficiencies created by its products must be shown to outweigh the costs imposed by those improvements on the company's competitors.

Similarly, claims that Google has acted in an anticompetitive fashion rest on the unsupportable notion that the company acts unfairly when it designs products to benefit itself without considering how those designs would affect competitors. Google could, it is argued, choose alternate arrangements and practices that would possibly confer greater revenue on publishers or lower prices on advertisers without imposing burdens on competitors.

For example, a report published by the Omidyar Network sketching a "roadmap" for a case against Google claims that, if Google's practices could possibly be reimagined to achieve the same benefits in ways that foster competition from rivals, then the practices should be condemned as anticompetitive:

> It is clear even to us as lay people that there are less anticompetitive ways of delivering effective digital advertising—and thereby preserving the substantial benefits from this technology—than those employed by Google.
>
> *– Fiona M. Scott Morton & David C. Dinielli, "Roadmap for a Digital Advertising Monopolization Case Against Google"*

But that's not how the law—or the economics—works. This approach converts beneficial aspects of Google's ad-tech business into anticompetitive defects, essentially arguing that successful competition and innovation *create* barriers to entry that merit correction through antitrust enforcement.

This approach turns U.S. antitrust law (and basic economics) on its head. As some of the most well-known words of U.S. antitrust jurisprudence have it:

> A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. ***The successful competitor, having been urged to compete, must not be turned***

> ***upon when he wins***.
>
> *– United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)*

U.S. antitrust law is intended to foster innovation that creates benefits for consumers, including innovation by incumbents. The law does not proscribe efficiency-enhancing unilateral conduct on the grounds that it might also inconvenience competitors, or that there is some other arrangement that could be "even more" competitive. Under U.S. antitrust law, firms are "under no duty to help [competitors] survive or expand."

To be sure, the allegations against Google are couched in terms of anticompetitive *effect,* rather than being described merely as commercial disagreements over the distribution of profits. But these effects are simply inferred, based on assumptions that Google's vertically integrated business model entails an inherent ability and incentive to harm rivals.

The Texas complaint claims Google can surreptitiously derive benefits from display advertisers by leveraging its search-advertising capabilities, or by "withholding YouTube inventory," rather than altruistically opening Google Search and YouTube up to rival ad networks. The complaint alleges Google uses its access to advertiser, publisher, and user data to improve its products without sharing this data with competitors.

All these charges may be true, but they do not describe inherently anticompetitive conduct. Under U.S. law, companies are not obliged to deal with rivals and certainly are not obliged to do so on those rivals' preferred terms.

As long ago as 1919, the U.S. Supreme Court held that:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.
>
> *– United States v. Colgate & Co.*

U.S. antitrust law does not condemn conduct on the basis that an enforcer (or a court) is able to identify or hypothesize alternative conduct that might plausibly provide similar benefits at lower cost. In alleging that there are ostensibly "better" ways that Google could have pursued its product design, pricing, and terms of dealing, both the Texas complaint and Omidyar "roadmap" assert that, had the firm only selected a different path, an alternative could have produced even more benefits or an even more competitive structure.

The purported cure of tinkering with benefit-producing unilateral conduct by applying an “even more competition” benchmark is worse than the supposed disease. The adjudicator is likely to misapply such a benchmark, deterring the very conduct the law seeks to promote.

For example, Texas complaint alleges: “Google’s ad server passed inside information to Google’s exchange and permitted Google’s exchange to purchase valuable impressions at artificially depressed prices.” The Omidyar Network’s “roadmap” claims that “after purchasing DoubleClick, which became its publisher ad server, Google apparently lowered its prices to publishers by a factor of ten, at least according to one publisher’s account related to the CMA. Low prices for this service can force rivals to depart, thereby directly reducing competition.”

In contrast, as current U.S. Supreme Court Associate Justice Stephen Breyer once explained, in the context of above-cost low pricing, “the consequence of a mistake here is not simply to force a firm to forego legitimate business activity it wishes to pursue; rather, it is to penalize a procompetitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry where prices typically exceed costs.” That commentators or enforcers may be able to imagine alternative or theoretically more desirable conduct is beside the point.

It has been reported that the U.S. Justice Department (DOJ) may join the Texas suit or bring its own similar action against Google in the coming months. If it does, it should learn from the many misconceptions and errors in the Texas complaint that leave it on dubious legal and economic grounds.

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