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Legal Sidebar

The DOJ's Ad Tech Antitrust Case Against Google: A Brief Overview

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On January 24, 2023, the Department of Justice (DOJ) and several state attorneys general filed a civil antitrust suit against Google in the U.S. District Court for the Eastern District of Virginia. The complaint alleges that Google has monopolized several markets related to digital display advertising through a series of mutually reinforcing exclusionary practices. On April 28, 2023, the district court denied Google's motion to dismiss the DOJ's lawsuit, concluding in part that Google's market-definition arguments raise fact-specific issues that cannot be resolved on a motion to dismiss.

This Legal Sidebar provides a general overview of the ad tech tools at the center of the DOJ's case, the allegations in the complaint, and some of the relevant legal doctrines. It concludes with options for Congress.

Background: The Ad Tech Stack

The DOJ's complaint alleges that Google has monopolized several open web display advertising markets involving the ad tech stack, a set of technological tools that connect website publishers offering advertising inventory to prospective advertisers. The allegations focus on graphical web ads (as opposed to search ads, video ads, and mobile app ads) and the open web (rather than websites such as Facebook that use their own tools to sell directly to advertisers).

The technologies in the ad tech stack allocate ad space via a complex series of transactions that are resolved nearly instantaneously while a website loads for a user. The complaint identifies three primary components and relevant markets:

- **Publisher Ad Servers** – Website publishers use these tools to manage their advertising inventory. Publisher ad servers submit information regarding available ad space to an ad exchange. Publishers generally use a single ad server for administrative reasons.
- **Ad Exchanges** – Ad exchanges oversee and resolve auctions for available advertising inventory. The exchanges receive requests from publishers via publisher ad servers and solicit bids from advertisers via advertiser buying tools. Both publishers and advertisers

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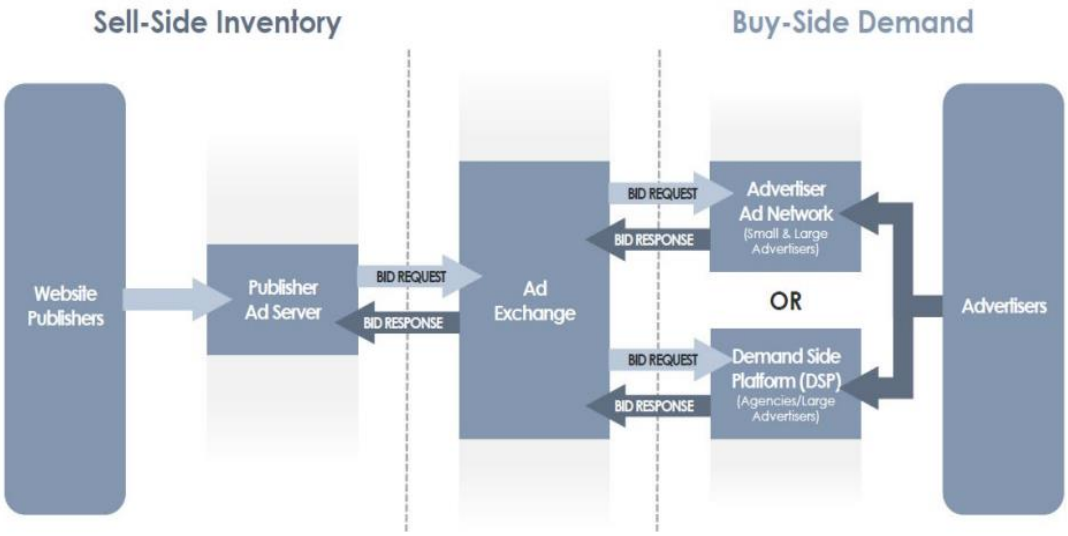
prefer to use multiple ad exchanges simultaneously to obtain the most favorable prices available.

- **Ad-Buying Tools** – These tools transform advertisers' demand into bids for specific advertising inventory. They include both demand-side platforms and advertiser ad networks. Demand-side platforms offer sophisticated and customizable tools to ad agencies and large businesses, while advertiser ad networks provide simple but opaque access for smaller advertisers.

Figure 1. Figure 1. The Ad Tech Stack



Source: Complaint at 16, United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023).

Through these technologies, a publisher's website displays the advertisement of the winning bidder to the user. The advertiser pays the publisher for this advertising impression, with portions of the price collected by the ad buying tool and ad exchange. The publisher ad server generally charges the publisher a separate fee that does not depend on the impression purchase price.

The complaint alleges that Google has established monopoly positions in several markets across the ad tech stack via Google Ad Manager (a publisher ad server), AdX (an ad exchange), and Google Ads (an advertiser ad network).

DOJ Complaint: Google's Alleged Conduct

Google entered display advertising in 2000 with the launch of Google Ads (then called AdWords), which began by offering advertising on Google search results pages and later expanded to third-party websites. In 2008, Google acquired DoubleClick, which operated the industry-leading publisher ad server, DoubleClick for Publishers (which later became Google Ad Manager), and an ad exchange, AdX. The FTC declined to challenge this transaction at the time, in part because it concluded that DoubleClick customers would switch to competing products if Google's offerings proved unattractive.

The DOJ complaint includes lengthy factual allegations regarding Google's conduct in digital display advertising. Google disputes many of these allegations. As discussed below, Google unsuccessfully moved to dismiss the complaint. For the purposes of resolving a motion to dismiss, a district court generally accepts as true the factual allegations of a complaint and determines whether the complaint

adequately states claims to relief under that assumption. In denying Google's motion, the district court held that Google's arguments involved fact-specific issues that could not be resolved on a motion to dismiss.

In the complaint, the DOJ alleges that Google used monopoly power over the different levels of the ad tech stack to restrict competition. For example, Google allegedly made Google Ads' demand exclusive to its own ad exchange, AdX. Likewise, Google allegedly gave its publisher ad server exclusive access to real-time bidding information from AdX, driving rivals out of the ad server market. The DOJ claims that this link between Google's ad server and access to real-time bids from AdX amounted to an unlawful tying arrangement.

The complaint further claims that Google used its market power to force publishers to give AdX preferential access to valuable inventory. Even when publishers were offering inventory to other exchanges, Google allegedly gave its ad exchange greater information and greater opportunity to bid at lower prices.

By 2010, other firms began to develop "yield management" technology that allowed publishers to receive real-time bids from multiple ad exchanges and demand sources. The DOJ claims that Google took action to suppress this potential threat, acquiring a leading yield manager called AdMeld and shutting down its operations with non-Google exchanges and advertiser tools.

Later, Google allegedly began manipulating both its demand-side margins and the bids of advertisers to subsidize transactions when it faced competition, while offsetting the resulting losses by charging higher fees for transactions where it faced no competition. The company also allegedly implemented a similar system to subsidize publishers who might be able to switch to competing products at the expense of those less likely to do so.

Around 2015, according to the DOJ, ad tech customers and competitors mounted a serious challenge to Google's dominance by embracing a technique called "header bidding." Header bidding involved publishers inserting code into the "header" section of a web page to trigger a real-time auction among ad exchanges prior to the involvement of a publisher ad server. While this process had technical disadvantages, the complaint alleges that it provided competition to Google, producing higher publisher revenues and greater market transparency.

Google allegedly viewed header bidding as an "existential threat" to its ad exchange and took action to forestall its adoption. To offer an alternative to header bidding, Google's ad server allegedly provided publishers slightly liberalized access to rival ad exchanges. The complaint claims that Google undermined the competitiveness of that access, however, through fees and restrictions and by capturing the data represented by external bids for its own advantage.

When Facebook and Amazon both began offering advertising services related to header bidding, Google allegedly attempted to head off their competition by offering them special access to Google's ad tech platforms. Ultimately, Google negotiated an agreement with Facebook that, according to the complaint, provided Facebook with preferential access to Google's ad tech products in exchange for Facebook's curtailing of potentially competitive offerings. Amazon allegedly rebuffed Google's attempt at a similar deal.

To further reduce the threat of header bidding, Google allegedly leveraged its demand-side platform, Display & Video 360, by systematically lowering bids from the platform to rival ad exchanges that employed header bidding. This purportedly shifted transactions to AdX, encouraging Google to increase the extent of manipulation and maintain high exchange fees. Google also allegedly manipulated the development of Accelerated Mobile Pages, a technology purporting to offer better mobile web browsing, to discourage header bidding.

With header bidding in check, Google allegedly took advantage of its ad exchange dominance to manipulate the ad exchange fees charged to publishers, in much the same way that it had previously manipulated advertiser fees and bids (i.e., by subsidizing potentially competitive transactions while recovering those costs in less competitive auctions). In 2019, Google allegedly further consolidated its control by removing publishers' ability to use pricing tools from its ad server to steer transactions away from AdX, overriding publisher criticism, and by further reducing the information available to publishers and rival exchanges from AdX.

Analysis

Many of the allegations in the DOJ's complaint are similar to those made by a group of state attorneys general in a separate lawsuit in the Southern District of New York (the state AG lawsuit). In September 2022, a federal district court granted in part and denied in part Google's motion to dismiss that suit.

Google also moved to dismiss the DOJ's complaint. While the company's motion to dismiss the state AG lawsuit focused on allegations of exclusionary conduct, its motion in the DOJ ad tech case targeted the assertions of monopoly power. In particular, Google contended that the DOJ's proposed markets erroneously omit other types of ad tech tools that substitute for the relevant services. Google also argued that its ad exchange's alleged market share of "more than 50%" is not sufficient to plead monopoly power, even if ad exchanges constitute a relevant antitrust market.

On April 28, 2023, the district court denied Google's motion, explaining that the company's market-definition arguments raised fact-specific issues that could not be resolved on a motion to dismiss. Google may renew these arguments after fact discovery via a motion for summary judgment or at trial.

The DOJ's allegations of exclusionary conduct implicate several areas of antitrust doctrine, including tying and product design.

As discussed, the DOJ's tying claims allege that Google unlawfully required publishers to use its ad server to obtain real-time bids from its ad exchange. In the state AG lawsuit, Google denied engaging in illegal tying, contending that publishers could use AdX without using Google's ad server. While the ability to receive real-time bids from AdX may have made Google's ad server more attractive than rivals, Google argued, that advantage did not amount to the type of coercion necessary to establish unlawful tying. The firm is likely to offer a similar argument in this litigation. The DOJ has alleged that Google planned to eliminate the "antiquated" program that allows rival ad servers to access AdX, but decided to retain the program because of its potential usefulness as a defense to antitrust claims.

The case may also implicate questions regarding the appropriate antitrust treatment of product-design decisions.

Different courts have taken different approaches to this issue. The Ninth Circuit, for example, has held that design changes do not trigger antitrust liability if a redesigned product improves upon a previous design by providing a new benefit to consumers, even if the anticompetitive effects of a change outweigh the benefits. Similarly, the Second Circuit has rejected a claim of anticompetitive product design based on evidence that a design change represented an improvement in one respect, despite evidence that the redesigned product was inferior to previous versions in "several" other respects.

The D.C. Circuit's 2001 decision in *United States v. Microsoft* suggested a different standard, however. There, the court identified a four-part rule-of-reason inquiry under which a plaintiff can prevail on a claim of anticompetitive product design by showing that a design decision's anticompetitive harms outweigh its procompetitive benefits. (The court did not ultimately reach this balancing step in that case.)

In the state AG litigation, Google has attempted to frame several of the plaintiffs' allegations as challenges to its product-design decisions. The company may attempt to do the same with the DOJ's

claims. The DOJ's complaint appears to acknowledge that certain design changes improved upon previous programs in at least *some* respects. As a result, the viability of some allegations may depend on whether the court follows *Microsoft* in subjecting design decisions to a balancing test, as opposed to concluding that product improvements render such decisions immune from antitrust liability.

Considerations for Congress

The DOJ's lawsuit seeks structural relief compelling Google to divest its publisher ad server and its ad exchange. Some Members of Congress have proposed legislation that could produce similar results. S. 1073, the Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act would prohibit firms that process more than $20 billion in digital-ad transactions annually from owning platforms in more than one of the key nodes in the ad tech stack (exchanges, supply-side platforms, and demand-side platforms). The bill also would require companies that process more than $5 billion in digital-ad transactions annually to abide by certain requirements involving order execution, transparency, conflicts of interest, and fair access.

More generally, in recent years Congress has considered a variety of proposals to reform the competition laws governing Big Tech firms, including non-discrimination rules and merger restrictions. This report provides an overview of some of the relevant bills from the 117th Congress.

Congress also retains the option to leave the existing legal regime unchanged.

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