



Insight

Are Big Tech Companies Colluding?

JENNIFER HUDDLESTON, JUAN LONDOÑO | SEPTEMBER 29, 2021

Executive Summary

- Some Republican and Democratic critics of “big tech” have alleged Facebook and Google may be engaged in illegal collusion around certain advertising markets.
- Claims of collusion are different from the claims of monopolization; collusion suggests illegal agreements between otherwise rival companies to restrain trade.
- As with other competition laws, it is important that enforcement regarding collusion is undertaken in an objective and principled manner, and not used to penalize normal interactions between companies in the same industry.

Introduction

Recently a group of Democratic Members of Congress including Senator Elizabeth Warren [sent a letter to the Department of Justice \(DOJ\)](#) asking it to determine if actions undertaken by Google and Facebook constituted collusion. Similar claims were made by Republican Texas Attorney General (AG) Ken Paxton in [an antitrust case filed against Google](#) in late 2020.

Most of the allegations against tech companies have been regarding monopolization or attempted monopolization. While both collusion and monopolization are governed by existing antitrust laws, collusion is a distinct type of claim with its own legal elements and analysis for enforcement actions. As with other competition laws, it is important that enforcement regarding collusion be undertaken in an objective and principled manner and not used to penalize normal interactions between companies in the same industry.

Accusations of Collusion Between Google and Facebook

The first significant accusations of collusion against “big tech” came in the case against Google brought in December 2020 by Texas AG Paxton. The Texas AG led the case [against Google’s](#) parent company, Alphabet, for allegedly engaging in anticompetitive behavior in its advertising. The AG alleges that Google has engaged in various instances of anticompetitive behavior, which includes a case of collusion alongside Facebook.

The allegation focuses on Facebook’s and Google’s participation in the digital ad market. This market usually operates as an auction. As all auctions, these have both auctioneers and bidders. Websites and publishers place some ad space in their websites out for auction, which places this offering in a digital ad exchange. Advertisers then bid to place their ads on the website, where the highest bid wins the ad space. These advertisers often make use of ad-buying tools which allow them to place the ads in a desired demographic at the best price possible. This a [diverse and multi-sided market](#) with many players engage at different steps in the process that ultimately determine the ads a consumer may see.

The complaint's collusion charge focuses specifically on the agreement which led to the inclusion of Facebook Advertising Services (FAN) in Google's Open Bidding Program, which aims to compete with other ad-bidding technology known as header bidding. News reports [state](#) that the now-redacted portions of the draft complaint argued that an agreement between the companies limited competition by guaranteeing FAN would win a fixed percentage of its bids through the program, regardless of the amount bid, and the option to bypass certain fees.

This would constitute an illegal quid pro quo: Google benefits from reduced competition, and Facebook receives special treatment in the bidding in comparison to other members of Open Bidding. This supposedly rigged bidding system harms publishers, as they are facing lower ad revenue due to less competition. It also harms competing ad sellers in the program as they struggle to compete against FAN's particular advantages.

This agreement, which had the nickname "Jedi Blue," has gained additional scrutiny at the federal level. On September 1, 2021, Senators Warren and Blumenthal along with Representatives Jayapal and Jones, [wrote a letter](#) to DOJ asking it to determine if there is ground for federal charges. The letter suggests the Jedi Blue agreement would violate Section 1 of the Sherman Act as described in the section below.

Both companies have denied allegations that the agreement, which was publicly announced, establishes any restrictions on trade or competition.

Understanding Collusion

These allegations, if true, could constitute illegal collusion in violation of Section 1 of the Sherman Act that prohibits agreements that unreasonably restrain trade and impact interstate commerce.

Collusion occurs when rivals agree to cooperate rather than compete with one another. Illegal collusion can take many different forms including price fixing, bid rigging, and kickbacks. This type of behavior may be revealed by suspiciously uniform pricing or other actions observable to consumers, enforcers, and those within the industry. But even if such actions are observed, there may be legitimate business reasons for why they occur that are not illegal. . As the [DOJ's own explainer on collusion](#) cautions, "While these indicators may arouse suspicion of collusion, they are not proof of collusion. For example, bids that come in well above the estimate may indicate collusion or simply an incorrect estimate.... Thus, indicators of collusion merely call for further investigation to determine whether collusion exists or whether there is an innocent explanation for the events in question."

Cooperation between firms does not always constitute illegal collusion and there may also be tacit understandings around various issues including competition for talent that do not amount to illegal collusion. There can be debate about the impact or value some of these interactions , but they occur in a wide range of industries and often can help yield best practices around complicated issues. This may include novel issues that similarly situated companies may be facing in a rapidly evolving industry such as technology. Additionally, responding to similar market pressures may result in similar responses that, without appropriate understanding and analysis, may initially appear suspicious to those not in the industry or familiar with enforcement.

Considering Collusion Claims Against Big Tech

Both Facebook and Google have [publicly stated](#) that FAN does not have any particular advantage in the bidding process, and that they still have to offer the highest bid in order to win the bidding process. Lawful agreements that do not pertain to anticompetitive behavior are not collusion. Similarly, as discussed above, the nature of the

bids themselves are insufficient to prove that collusion occurred without evidence of an anticompetitive agreement.

If there was not an agreement to engage in anti-competitive behavior, such allegations may discourage industry interactions for fear of investigation. Targeting non-infringing cooperation between businesses as collusion can have significant negative consequences both for the companies involved and for the investigating authorities. In an era where tech companies are being asked by policymakers to [work together](#) to prevent the spread of terror content or child sexual abuse material online, these unfounded accusations may cause the companies to think twice before sharing information with each other to prevent being flagged for collusion.

While certain details of the complaint are yet to be unredacted, the complaint by AG Paxton is not likely to stand up in court and seems to be part of a [broader use of antitrust law](#) to target tech companies. While the consumer welfare standard is agnostic regarding the appropriate levels of antitrust enforcement, concerns about both under- and over-enforcement are valid. Over-enforcement could both chill legitimate business behavior as described above but could also dilute the seriousness with which legitimate claims are treated by both the public and the court. Policymakers should also refrain from encouraging behavior in favored industries while discouraging it in disfavored ones. For example, while calling for investigations of tech companies, policymakers have also considered a [proposal that would enable traditional print journalism to form a cartel](#) against digital and social media.

Conclusion

Collusion is a specific type of violation of antitrust law that is distinct from monopolization or attempted monopolization. Antitrust enforcement is appropriate if companies make illegal agreements to restrain trade as such agreements could harm consumers and the free market. Still, policymakers and enforcers should not misuse this important policy to over-zealously condemn legal intra-industry cooperation. Such over-enforcement could deter information sharing or the development of industry standards and practices. As with other issues in antitrust, it is important that enforcers and policymakers remain focused on a principled approach that uses the appropriate tools to protect consumers and ensure the benefits of a free market rather than politicize this powerful policy to go after disfavored industries.