



Online Platforms and Digital Advertising Market Study Observations of the European Publishers Council (EPC) on the Statement of Scope

Sent to the Competition and Markets Authority on 30th July 2019

I. Introduction

On 3 July 2019, the Competition and Markets Authority (“CMA”) announced that it is carrying out a market study into online platforms and the digital advertising market in the UK. On the same day, the CMA issued a Market Study Notice, as well as a Statement of Scope on which interested parties are invited to comment.

The European Publishers Council (the “EPC”) commends the CMA for launching this market study as the revenues generated by digital advertising are of critical importance for news publishers. The EPC is a high-level group of Chairmen and CEOs of leading European media corporations.¹ Their companies are involved in multimedia markets spanning newspaper, magazine, book, journal, internet, online database publishers, radio and TV broadcasting.

The aim of this short document is to present the observations of the EPC on the Statement of Scope published by the CMA, with a **particular focus on “Theme 3: Competition in the supply of digital advertising in the UK.”**² It is divided into four Parts. Part II concerns the significance of digital advertising for news publishers. Part III lays down EPC’s observations as regards the scope of the market study on digital advertising and identifies the main areas of concern where the CMA should focus. Finally, Part IV sets out EPC’s comments on the remedies proposed by the CMA.

II. The importance of digital advertising for news publishers and issues encountered by news publishers regarding digital advertising

As a preliminary point, the EPC acknowledges that the CMA does not propose to focus specifically on the sustainability of press,³ as that has been the subject of a detailed inquiry,

¹ Further information on the EPC can be found on its website: <http://epceurope.eu/>

² Competition & Markets Authority, “Online platforms and digital advertising market study – Statement of Scope”, 3 July 2019, available at https://assets.publishing.service.gov.uk/media/5d1b297e40f0b609dba90d7a/Statement_of_Scope.pdf (“Statement of Scope”), par. 71-74.

³ Statement of Scope, par. 104.

the results of which are found in the Cairncross Review.⁴ Nevertheless, the importance of the announced market study for the sustainability of journalism cannot be overstated, as it is a unique and timely opportunity to shed light on an opaque industry, characterised by monopolistic behaviour and hidden fees that starve news publishers of vital revenue streams. This lack of transparency combined with the importance of digital ad revenues prompted the authors of the Cairncross Review to recommend that the CMA use its information gathering powers to conduct a market study of the online advertising industry.⁵

Given the pivotal role of quality news publishers in modern democratic societies, the CMA should bear in mind that lack of competition in digital advertising translates into consumer harm that goes beyond higher prices of final products or lower quality content: starvation of quality news publishers ultimately undermines our very democratic society and civic engagement, as acknowledged by the Cairncross Review.

For as long as they have existed, news publishers have monetised their content through two main sources of revenues, namely subscription fees and advertising. In the digital era, while some news publishers solely rely on advertising fees, the majority of high-quality publishers rely on a combination of subscription and advertising revenues. The ability of news publishers to generate such revenues largely depends on the volumes of traffic they are able to attract to their website. While some Internet users directly go to news sites, many still use search and digital platforms to access news content.

As far as digital advertising is concerned, an important evolution started a decade ago. While historically advertisers sought to associate their ads with certain categories of content (e.g., makers of running shoes would want their ads to be shown in the sports section of newspapers) and thus directly bought advertising space from publishers, the fastest growing category of advertising in the digital age is so-called “programmatic advertising” where ad targeting is automated and primarily based on analysis of *user* data (e.g., identifying news readers specifically interested in running), rather than contextual information about the content being consumed. This evolution has led to the development of a variety of online ad intermediaries, including operators of ad exchanges (operating real-time-bidding (“RTB” auctions) and various suppliers of ad analytics’ services.

⁴ Cairncross Review, A Sustainable Future For Journalism, 12th February 2019, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/21919_DCMS_Cairncross_Review_.pdf

⁵ Id. p. 93.

While digital advertising should have created new opportunities for news publishers, the reality is that a very large part of digital advertising revenues has been captured by online platforms and, in particular, Google and Facebook (which commentators have referred to as an online advertising duopoly). This means that despite the resources they devote to producing original content, news publishers only receive a small fraction of the online ad investment made by advertisers.

III. Distinction between different levels of competition in digital advertising

Ad-funded online platforms are present in two-sided markets, offering a product or service to consumers often at no cost and then monetising user attention and data through the display of targeted advertising. The CMA proposes to examine both sides of the market through three, broad, inter-related Themes.

There is a partial overlap between Theme 1 and Theme 3, to the extent they both refer to the market power of online platforms in the supply of digital advertising. Under “Theme 1: The market power of online platforms in consumer-facing markets”, the CMA proposes to examine (a) to which extent online platforms enjoy market power in consumer-facing markets (e.g. because of economies of scale and scope and network effects) and (b) to which extent online platforms have market power in the supply of advertising inventory. But the latter issue is also considered under “Theme 3: Competition in the supply of digital advertising in the UK”, which seems to focus on ad intermediation. This partial overlap might stem from a possible confusion over the various levels of competition in digital advertising.⁶ For the sake of clarity, the EPC would suggest distinguishing between different levels of competition. Other than bringing analytical clarity, such distinction is necessary in order to identify the different concerns posed by the power of online platforms.

- First, there is competition at the level of supply of digital advertising inventory. At this level major online platforms supply inventory and thus compete for user attention and advertising fees with the thousands of publishers of online content, among which news publishers have traditionally held prominent position. The main

⁶ Under Theme 1 the Statement of Scope refers to the most prominent platforms (Google and Facebook) as (potentially must have) “partners for both advertisers and publishers” by reason of the scale of their advertising inventories and their advanced targeting abilities. It then observes that platforms could be able to “exploit the weakness of advertisers and publishers, for example by charging more than would be possible in a more competitive environment. That would give the impression that publishers cooperate with the major online platforms. But as regards the supply of digital inventory online platforms and publishers are *competitors*, not partners. Any cooperation between platforms and publishers takes place only at the level of intermediation and other supporting services. It is for this reason that the EPC suggests distinguishing between the different levels of competition.

concern here is whether major online platforms have market power by reason of their unique data economies of scale and scope, to the effect that (news) publishers are deprived of vital sources of revenue as they turn into fringe competitors. That corresponds to Theme 1 of the Statement of Scope.

- Second, there is competition at the level of online ad intermediation and other supporting services for the provision of online advertising (the ad tech stack).⁷ At this level major online platforms *do not* compete with publishers. Some platforms, primarily Google, provide intermediation and other supporting services to publishers. The main concern here relates to the transparency of the ad tech ecosystem and lack of competition which may result in higher prices for advertisers and less revenue for publishers. That corresponds to Theme 3 of the Statement of Scope.

The EPC will now present briefly its views on the main issues on which the CMA should focus as regards competition at the level of supply of online inventory (Section A) and competition at the level of intermediation and other supporting services (Section B).

A. Competition at the level of supply of online inventory

As said above, major online platforms compete with the thousands of publishers for user attention and advertising fees. Yet evidence shows that the digital advertising market is highly concentrated, with the vast majority of revenue being absorbed by a handful of platforms, primarily Google and Facebook. In 2018, out of a total of \$237 (£190) billion of global digital ad spend, \$113 (£90) billion was accounted for by search advertising (a market segment on which Google is ultra-dominant).⁸ Out of the remaining \$ 124 (£100) billion advertisers spent on display advertising, \$78 (£62) billion were spent on so-called “walled gardens” while only \$46 (£37) billion were spent on the open web (i.e., the thousands of publishers, from leading news brands to small blogs). There is no sign that this could change, as Google and Facebook alone capture 99% of growth of online advertising, leaving just 1% for the thousands of online publishers. (News) publishers are thus starved of vital sources of revenue. Given that digital ad revenue cannot offset the dramatic plunge of print revenue, the very sustainability of press – and by extension, of democracy – is put at stake.

⁷ Within the ad tech ecosystem, it is possible to further distinguish between various layers according to the various operators that facilitate interactions between publishers and advertisers.

⁸ Source: Jounce Media, “A Bottoms-Up Sizing of Digital Ad Spend”, 18 July 2018, available at <https://jouncemedia.com/blog/2018/7/18/a-bottoms-up-sizing-of-digital-ad-spend>. It is noted that according to other sources, digital ad spend in 2018 was estimated to exceed 270 billion dollars. See <https://www.emarketer.com/content/emarketer-total-media-ad-spending-worldwide-will-rise-7-4-in-2018>



The main reason for this highly concentrated market has been identified in the Statement of Scope: it is the major platforms' unique data economies of scale and scope. As the CMA observes, access to user data is increasingly important for targeting purposes.⁹ That in turn has placed a few data-rich platforms in a unique position over myriads of other publishers.¹⁰ These platforms possess high-accuracy data linked to a specific, personally identifiable user, typically collected in 'logged-in' environments. Such high-quality data is usually hard to scale, as only few operators boast vast audiences. Only a handful of companies in the world possess such data at scale, and they refuse to share any data with advertisers (hence the name "walled garden"): Google, Facebook, Amazon, and to a lesser extent Twitter, Pinterest and Snapchat.¹¹

The CMA should examine whether such massive data extraction reflects the walled garden's market power over consumers, and whether it raises barriers to entry. For example, it has been shown that despite Facebook's repeated assertions to the contrary, the platform used social plugins (e.g. Like button) embedded on thousands of publisher websites, to track users – even if they had no Facebook account – for advertising purposes. Facebook's pervasive surveillance, exacerbated by its deceptive conduct, has significantly raised barriers to entry and reduced competition in digital advertising.¹²

Moreover, the CMA should examine whether the walled gardens have engaged in practices aimed at amassing data while making it harder for publishers to build their own datasets and present a credible competitive threat. For example, both Google and Facebook have used their power in adjacent markets to promote their own proprietary formats for the display of mobile webpages, namely Accelerated Mobile Pages ("AMP") and Instant Articles respectively. Both formats were touted as a solution to the problem of slow loading speed of mobile webpages. To address this issue, Google and Facebook deliver a pre-cached version of the webpage which is stored on their server. That means that instead of

⁹ Statement of Scope, par. 8. For the role of data in programmatic see also the white paper of IAB Europe "Using Data Effectively in Programmatic" (2016) <https://www.iab.it/wp-content/uploads/2016/11/IAB-Europe-Using-Data-Effectively-in-Programmatic-White-Paper-November-2016.pdf>

¹⁰ See M. Ingram, "How Google and Facebook Have Taken Over the Digital Ad Industry", *Fortune*, 4 January 2017, available at <http://fortune.com/2017/01/04/google-facebook-ad-industry/> (noting that "[d]ata on users and their preferences and behaviour is the Holy Grail for most advertisers, and the reality is that Google and Facebook have orders of magnitude more data than their nearest competitors.")

¹¹ For example, Google collects troves of data across *all* its online products – Google Search, Maps, YouTube, Chrome, the Android O/S, Play Store and so on. Google is able to combine the data collected across its properties, achieving economies of scale and scope. Since 2016, Google changed its Privacy Policy and it may combine such data with the massive amounts of behavioral data collected by DoubleClick to create user super-profiles. See J. Angwin "Google has Quietly Dropped Ban on personally Identifiable Web Tracking, ProPublica, 21 October 2016 available at <https://www.propublica.org/article/google-has-quietly-dropped-ban-on-personally-identifiable-web-tracking>

¹² For a more detailed account of how Facebook used deceptive practices to surveil on consumers and its impact on publishers, see Dine Srinivasan, "The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy", 16 *Berkeley Bus. L.J.* 39 (2019), p. 64 and 75. See also L Gormsen & J. Llanos, "Facebook's Anticompetitive Lean In Strategies", p. 52-65.

navigating to the publishers' website, users remain in the environment of the platform, which harvests their data for advertising purposes.

In particular, Google has used its dominance in online search to prioritise webpages that are AMP-compliant.¹³ Facebook has similarly taken advantage of its importance as a source of traffic for (news) publishers to force them adopt its Instant Articles format. Despite Facebook allegations to the contrary, there is evidence that Instant Articles are prioritised in the user's Newsfeed over news stories that are not Instant Articles.¹⁴ In both cases, the result is that the platform manages to keep users on its ecosystem, collecting all the valuable user data. The publisher is deprived of important user data, as it cannot use first-party cookies and relies on the data provided by the platform at the latter's discretion.

Another closely related issue – which does not however appear at the Statement of Scope – concerns the fact that **walled gardens free-ride on (news) publishers' valuable content**. As already said, walled gardens capture the lion's share of advertising revenue by reason of their vast troves of data and high levels of engagement. However, it is often ignored that in the absence of third-party content, including professionally produced journalistically driven content – whether breaking news, analysis, features, entertainment or sport, produced by publishers under their editorial responsibility and legal liability, and made available on the open web, the platform would never be able to attract traffic in the first place, let alone monetise it through harvesting data and selling targeted ads. In many cases, but for the existence of such third-party content, platforms would be nothing but empty shells with no inherent value. Platforms such as Facebook, Twitter and Google would lose much of their value if they could not include hyperlinks to a much-discussed news story. Yet those that produce the original content – often at considerable cost and legal liability – that feeds the platform and attracts users to it, receive no remuneration for their contribution. One of the reasons for this is that individual publishers have no bargaining power to negotiate with dominant players. They are forced into a position of dependency through coercive behaviour of the dominant players, whereby there is no level playing field when it comes to negotiating terms and conditions for use of the publishers' content. Additionally, a disparity has arisen between licensed and unlicensed users of publishers' content which itself gives rise to a distortion of competition, giving unfair advantage to dominant platforms. In an

¹³ M. Scott, "Google's mobile web dominance raises competition eyebrows", *POLITICO*, 1 June 2018, available at <https://www.politico.eu/article/google-amp-accelerated-mobile-pages-competition-antitrust-margrethe-vestager-mobile-android/>

¹⁴ The reason is that Facebook's algorithm promotes native content (such as Instant Articles) over non-native content (such as an article on the publisher's website). Moreover, Instant Articles usually display more user interaction, which is prioritised by Facebook's algorithm. Note that Facebook itself contributed to the problem that Instant Articles was purported to solve, i.e. page latency: the Facebook app prevented the use of any browser but for the in-app browser customised by Facebook, which is nevertheless much slower compared to the Safari browser. Facebook may have used its slow in-app browser to push adoption of Instant Articles. See L. Gormsen & J. Llanos, "Facebook's Anticompetitive Lean in Strategies", p. 65-66.

effort specifically to address the imbalance of negotiating power between platforms and publishers, the European Commission proposed the introduction of a press publisher's neighbouring right at part of the recently adopted Directive on Copyright in the Digital Single Market¹⁵.

Member States are in the process of transposing this neighbouring right which protects the press publication in whole or in part into national law, and we would ask the Government to ensure similar protections are enshrined without delay into UK law. This is particularly important given the widespread unauthorised, and unremunerated re-use of British press publications which because of their quality but also because of their accessibility to the many millions who speak and read the English language in addition to their own, gives rise to an unusually high level of infringement of English language press content. As the recitals¹⁶ in the Directive variously point out, the organisational and financial contribution of publishers in producing press publications needs to be recognised to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information. In the absence of the recognition of publishers of press publications as rightholders in their own right with their own legal status, the licensing and enforcement of rights in press publications regarding online uses by online platforms in the digital environment will remain complex and inefficient. Therefore, we ask that the UK government provides press publishers with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC¹⁷ (i.e. for the reproduction and making available to the public of their press publications in whole or in part) for the online use of their press publications by information society service providers by way of amendment of the Copyright, Designs and Patents Act 1988.

B. Competition at the level of intermediation and other supporting services

When advertisers purchase inventory from one of the major online platforms (e.g. search inventory from Google or social display from Facebook) they use the platform's own proprietary ad tech tools (e.g. self-service software AdWords for Google Search inventory).

By contrast, when advertisers purchase display inventory "on the open web", i.e. from among the thousands of publishers of online content, they have to rely on third party ad tech service providers. Online display advertising "on the open web" comprises a complex ecosystem, where a variety of operators intermediate between advertisers and publishers. These third parties provide the necessary technology tools for the provision of the ad (ad

¹⁵ <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules>

¹⁶ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.130.01.0092.01.ENG recitals 54-60

¹⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029&from=EN>



servers for publishers and ad servers for advertisers), and/or intermediate between publishers and advertisers to facilitate the sale of inventory (ad networks in the past and now primarily ad exchanges/Supply-Side Platforms (SSPs) and Demand-Side Platforms (DSPs)). There are also operators providing data and data analytics services (Data Management Platforms (DMPs), data providers, ad verification providers).

As the CMA observes, the online display advertising value chain presents unique complexity, further exacerbated by the lack of transparency over how the market operates.¹⁸ Yet that should not dissuade the CMA from using its investigative powers to understand the mechanics of the market. The reason is that competition at the various layers of the ad tech stack is of critical importance for having an efficient and innovative market where publishers and advertisers transact under optimal conditions. As regards news publishers in particular, higher ad revenue means more jobs for journalists and more investment in high-quality investigative journalism to the benefit of readers and society at large. On the other hand, the absence of effective competition results in higher prices for advertisers, which may be passed on to consumers in the form of higher prices for final products, and less revenue for news publishers, which in turn leads to lower quality content for consumers and all the negative consequences on democracy and civic engagement that entails. Concerns are often expressed over the so-called “ad tech tax”, i.e. the various commissions charged by intermediaries, to the effect that the publisher may end up receiving as little as £ 0.30 out of £ 1 of ad spend.¹⁹

Moreover, there are valid concerns that one of the platforms – Google – has effectively monopolised the market for ad technology services, building an end-to-end value chain between publishers and advertisers, as explained in more detail in recent papers.²⁰ Google has managed to gain a stranglehold over the ad tech ecosystem through a series of acquisitions and by engaging in anti-competitive conduct over the years. When Google decided to acquire DoubleClick in 2007, concerns were expressed that the merged entity could take advantage of DoubleClick’s leading ad server for publishers (DoubleClick For Publishers or “DFP”) and its pivotal role in the ad selection process to favour its own intermediation service over its competitors. These concerns were eventually dismissed by the European Commission, which held that the merged entity would have neither the ability nor the incentive to foreclose rivals.²¹

¹⁸ Statement of Scope, par. 72-73

¹⁹ D. Pidgeon, “Where did the money go? Guardian buys its own ad inventory”, *Mediatel Newslines*, 4 October 2016, available at <https://mediatel.co.uk/newsline/2016/10/04/where-did-the-money-go-guardian-buys-its-own-ad-inventory/>. According to a 2014 study of the World Federation of Advertisers, publishers receive only 40% of ad spend with intermediaries capturing 60% thereof. See <https://www.wfanet.org/app/uploads/2017/04/programmatic.pdf>

²⁰ D. Geradin & D. Katsifis, “An EU competition law analysis of online display advertising in the programmatic age”, *European Competition Journal*, 4 February 2019, available at <https://www.tandfonline.com/doi/full/10.1080/17441056.2019.1574440>; D. Geradin & D. Katsifis, “Google’s (Forgotten) Monopoly: Ad Technology Services on the Open Web”, 10 June 2019 (forthcoming in *Concurrences*), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391913

²¹ European Commission, Decision of 11 March 2008, COMP/M.4731 *Google/DoubleClick*, par. 295 et seq.

But reality proved that the Commission was rather over-optimistic. Most of the operators that were identified by the Commission in 2008 as constraining Google's conduct in the ad serving or ad intermediation market, such as Microsoft, AOL, Yahoo! and WPP have either left the market or retained only a marginal presence. In the following years Google used DFP to favour its own intermediary Google Ad Exchange ("AdX") to deprive rival intermediaries from revenue, while continuing to acquire new companies and integrating them into its ad tech stack. Dissatisfied publishers resorted to an innovative technique called "header bidding" which promised fairer auctions but Google refused to participate, instead launching its own product (called "Exchange Bidding") to ensure that it remains in control of the ecosystem. Google's ad tech stack is rife with conflicts of interests, as the same entity (Google) both organises auctions and participates in such auctions, without even the slightest pretence of separation.

Eventually, instead of bringing efficiencies to customers (publishers and advertisers), Google's unique vertical integration has allowed it to extract supra-competitive rents by charging undisclosed margins on top of its disclosed commission. In particular, Google charges publishers a commission for the use of its intermediation services (AdX) calculated on the basis of the clearing price of the AdX auction. However, the same ad may go through multiple consecutive auctions – all run by Google – until it is finally sold. Google may take advantage of the different prices of the various auctions it organises in order to receive an extra margin. The total lack of transparency over Google's conduct and its refusal to share auction data with publishers make it impossible to calculate the true magnitude of Google's commission. Google thus determines its remuneration at its own discretion, with publishers and advertisers having limited, if at all, visibility into its conduct. The CMA should use this opportunity to shed light into Google's opaque practices.

IV. Remedies

The importance of adopting adequate remedies cannot be overstated.

To introduce competition at the level of supply of digital ad inventory between the walled gardens and publishers, the CMA would need to adopt strong data-related measures. There needs to be much greater transparency on data, but also on the supply chain, including who is receiving monies from whom. Such transparency is standard practice in other fields. For example, in February 2019, National Trading Standards published new guidance on referral fees received by estate agents across the UK, which will make previously hidden fees open and transparent to consumers.

One remedy has been already identified in the Statement of Scope, i.e. obliging walled gardens to provide publishers with access to their data, provided of course that user privacy

is observed.²² Yet the EPC is concerned over the practical implementation of such a remedy and of its efficiency, as it is not clear at all what categories of data the online platform should be mandated to share. Perhaps most interesting is the reverse remedy, i.e. limiting the sharing of user data across applications of the same platform.²³ Such a structural separation between datasets has the potential to lower barriers to entry. Of course, such a remedy would again entail considerable monitoring costs. It is for these reasons that perhaps the CMA should consider measures designed to reduce the platform's incentives for massive surveillance and data hoarding. This would not only enhance user privacy and user trust, but also signal a shift back to the value of the original content, and context of the advertising, which would help restore the balance between platforms and (news) publishers, rewarding quality content instead of surveillance.

But introducing and nurturing competition among walled gardens and publishers is not sufficient. Even if (news) publishers are able to attract advertisers they still face challenges in monetising their inventory. The CMA should thus ensure that the wider ad tech ecosystem remains competitive and works optimally to the benefit of advertisers, publishers, and ultimately consumers. Given the unique complexity of the ad tech landscape, the CMA should adopt appropriate remedies to establish transparency among the value chain, in particular as regards financial flows, the commissions charged by intermediaries and ad fraud.²⁴ In addition, the CMA should implement structural remedies e.g. breaking up Google's ad tech stack, or at the very least mandate that vertically integrated companies such as Google are prohibited from leveraging their market power at one level of the chain to favour their own business. A separation of datasets would also help stimulate competition, as e.g. Google would no longer be able to leverage its vast troves of data collected across its properties to gain a lead in ad intermediation.



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²² Statement of Scope, par. 85

²³ Id. par. 89.

²⁴ Id. par. 98-101.