

ANTICIPATED ACQUISITION BY TABOOLA.COM LTD OF OUTBRAIN INC.

Issues Statement

4 August 2020

The reference

1. On 9 July 2020, the Competition and Markets Authority (CMA), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the Act), referred the anticipated acquisition by Taboola.com Ltd (Taboola) of Outbrain Inc. (Outbrain) (the Merger) for further investigation and report by a group of CMA panel members (the Group). Throughout this document we refer to Taboola and Outbrain collectively as the Parties.
2. In exercise of its duty under section 36(1) of the Act, we must decide:
 - (a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.
3. We are publishing this issues statement in order to assist any parties submitting evidence to the inquiry. The issues statement sets out the issues we currently envisage will be relevant to the inquiry. We invite parties to let us know if there are any additional relevant issues which they believe we should consider.
4. We are publishing this issues statement during the Coronavirus (COVID-19) pandemic, which is having significant impacts on consumers and business. A [statement](#) on the CMA website sets out how we have adjusted working arrangements in response and [guidance](#) on key aspects of practice during the pandemic. Our approach to evidence-gathering will take into account the difficulties that the pandemic may be causing for market participants in this sector. If appropriate, we will also take into account the impact of the pandemic in our assessment of the competitive effects of the Merger,

although we are required to consider what lasting structural impacts the Merger might have on the market(s) at issue.¹

5. In our inquiry, we intend to draw upon the evidence gathered in the CMA's initial Phase 1 investigation and to gather further evidence. The Phase 1 Decision² contains much of the detail underpinning this issues statement and parties are encouraged to read both documents together. Where we refer to evidence obtained to date, this includes evidence gathered during the Phase 1 investigation.
6. We intend to focus our investigation on the area in which the CMA found that the Merger gives rise to a realistic prospect of an SLC at Phase 1. That is, in the supply of content recommendation platform services to publishers in the UK (explained later in this document). Although this does not preclude the consideration of any other issues which may be identified during the course of our investigation, we are only likely to consider other issues in light of new evidence being brought to our attention by interested parties.

Background

7. Taboola is a privately-held Israeli limited liability company.³ In the UK, Taboola is mainly active in the provision of digital advertising services, including content recommendation through a platform placed on publishers' webpages under headings such as 'Content You May Like', 'Recommended for You' or 'Around the Web'. In 2019, Taboola had worldwide turnover of [REDACTED], of which [REDACTED]⁴ was generated in the UK.⁵
8. Outbrain is a privately held Delaware corporation headquartered in New York. Outbrain provides digital advertising services, including content recommendation through a platform placed on publishers' webpages.⁶ In 2019, Outbrain had worldwide turnover of [REDACTED], of which £[REDACTED]⁷ was generated in the UK.⁸

¹ The CMA has published a statement on its website on how it has adjusted its working arrangements in response and guidance on key aspects of its practice during the pandemic. [Merger assessments during the Coronavirus \(COVID-19\) pandemic](#) (CMA120), 22 April 2020.

² The Phase 1 Decision is available on the [CMA's case page](#).

³ See paragraph 34 of the CMA's Phase 1 Decision.

⁴ Based on Bank of England average US\$/GBP exchange rate of 1/0.78754 for the period of 1 January 2019 – 31 December 2019.

⁵ See paragraph 34 of the CMA's Phase 1 Decision.

⁶ See paragraph 36 of the CMA's Phase 1 Decision.

⁷ Based on Bank of England average US\$/GBP exchange rate of 1/0.78754 for the period of 1 January 2019 – 31 December 2019.

⁸ See paragraph 36 of the CMA's Phase 1 Decision.

9. The Parties' direct customers include advertisers (which include individual firms, media agencies and digital advertising service providers), publishers, and digital media platforms.

The transaction

10. The Merger concerns the acquisition by Taboola of all the equity securities of Outbrain on a fully diluted basis.⁹ The Merger was cleared by the German competition authority on 11 November 2019.¹⁰ The US Department of Justice closed its investigation in July 2020. The Israel competition authority's investigation into the Merger is ongoing.

Approach to assessing the Merger

11. Below we set out some specific areas of our proposed assessment in order to help parties who wish to make representations to us. As noted above, we invite parties to notify us if there are any additional relevant issues which they believe we should consider.

Market definition

12. Market definition provides a framework for the analysis of the competitive effects of a merger. The CMA will define the market within which the merger may give rise to an SLC (the relevant market). The relevant market contains the most significant alternatives available to the customers of the merging parties and includes the most relevant constraints on the behaviour of the merging parties.¹¹
13. Market definition is a useful analytical tool to focus much of the CMA's analysis, but the boundaries of the market do not determine the outcome of the CMA's analysis of the competitive effects of the merger. In practice, the analysis underpinning the market definition and the assessment of competitive effects overlap, with many of the factors being relevant to both. In its assessment of whether a merger may give rise to an SLC, the CMA may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others.¹²

⁹ See paragraph 38 of the CMA's Phase 1 Decision.

¹⁰ See paragraph 39 of the CMA's Phase 1 Decision.

¹¹ [CMA, *Merger Assessment Guidelines*, paragraph 5.2.1.](#)

¹² [CMA, *Merger Assessment Guidelines*, paragraph 5.2.2.](#)

Product market

14. The Parties both provide content recommendation platform services, which is a form of digital advertising, to publishers and advertisers. Content recommendation advertisements are displayed on publishers' websites or apps, often at the end of articles and under headings such as 'Content You May Like', 'Recommended for You'; 'Around the Web' or 'From Around the Web'. Content recommendation advertisements are often based on personalisation algorithms which use real-time data from users. When users click on these advertisements, they will be redirected to external webpages.¹³
15. The Parties largely act as intermediaries between advertisers and publishers for the selling and buying of digital advertising (including content recommendation services), though they also provide some services directly to publishers. The Parties' overlapping offerings (including those that we expect to be the primary focus of our investigation) can therefore be characterised as two-sided platforms. The Parties each compete to attract advertiser customers on one side and publisher customers on the other.
16. The evidence to date shows that the competitive dynamics on the advertising side are different from those on the publisher side. The Phase 1 Decision found (on the basis of a lower and more cautious legal standard than applied in a Phase 2 investigation)¹⁴ that competition concerns do not arise on the advertiser side. We are therefore currently minded to focus on publishers in our investigation. We will take into account the Parties' platform services on the advertiser side where relevant in our competitive assessment.
17. At this stage, based on the evidence at Phase 1, we intend to look at content recommendation platform services to publishers as the product market. We will consider what distinguishes content recommendation from other forms of digital advertising (including native advertising),¹⁵ and whether the Parties face competitive constraints from these, where relevant.
18. We will consider any new evidence we receive in relation to the market definition and any constraints that may also be taken into account in our assessment of the competitive effects of the Merger.

¹³ The Parties also provide organic recirculation which suggests further articles on the publishers' websites to the user.

¹⁴ [CMA, Merger Assessment Guidelines, paragraph 2.7.](#)

¹⁵ Native advertising follows the natural design, location and behaviour of the environment in which it is placed. It is a broad category which includes different advertising formats.

Geographic scope

19. We will also consider the relevant geographic market for the supply of content recommendation platform services to publishers. The evidence obtained to date indicates that:
 - (a) on the demand side, publishers with a UK readership find suppliers with advertisers interested in advertising to UK customers more attractive. Similarly, advertisers wishing to target a UK audience prefer suppliers partnering with publishers which have UK users; and
 - (b) on the supply side, the competitive conditions in the supply of content recommendation services in the UK are different to other countries – the strength and type of competitors vary by country.
20. We intend to assess the competitive effects of the Merger in the UK and on publisher customers with UK users.

Competitive effects of the Merger

Counterfactual

21. We will consider the potential effects of the Merger on competition compared with the counterfactual situation (that is, the situation that would have most likely arisen in the short to medium term absent the proposed Merger). For anticipated mergers the CMA generally adopts the prevailing conditions of competition as the counterfactual against which to assess the impact of the merger.
22. The CMA will typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of available facts and our ability to foresee future developments. We note that the Parties have not submitted during Phase 1 that the CMA should use any alternative counterfactual to the prevailing conditions of competition. Therefore, on the basis of the evidence obtained to date, we propose to assess the competitive effects of the Merger relative to the prevailing conditions of competition, this being the most likely situation absent the Merger. We will consider any new evidence we receive in relation to the counterfactual, taking account of foreseeable future developments.¹⁶

¹⁶ CMA, *Merger Assessment Guidelines*, paragraph 4.3.6.

Theories of harm

23. Theories of harm (ToH) describe the possible ways in which an SLC may be expected to result from a merger and provide the framework for analysis of the competitive effects of a merger.
24. We intend to assess a 'horizontal unilateral effects' theory of harm. Horizontal unilateral effects can arise when one firm merges with a competitor that previously provided a competitive constraint, allowing the merged entity profitably to worsen its offering (eg increasing prices, and/or reducing quality, range or service levels, including innovation or product development).¹⁷ Horizontal unilateral effects are more likely when the merging parties are close competitors. After the merger, it is less costly for the merging company to worsen its offering because it will recoup the profit on recaptured sales from those customers that switch to the products offered by the other merging company.
25. We plan to assess whether the Merger may be expected to result in an SLC as a result of horizontal unilateral effects in the supply of content recommendation platform services to publishers in the UK. This was the area in which the CMA's Phase 1 Decision found that the Merger gives rise to a realistic prospect of an SLC and will form our starting point in Phase 2 as a theory of harm. The CMA's Phase 1 Decision considered three other theories of harm but found that they did not give rise to a realistic prospect of an SLC.¹⁸

Horizontal unilateral effects in the supply of content recommendation platform services to publishers in the UK

26. We expect to consider a variety of different types of evidence, including: evidence on the Parties' offerings (eg similarities and differences in terms of price, quality, innovation/technology, use of user data and levels of R&D); the Parties' internal documents (including how closely they track and monitor each other, and other suppliers); views from interested parties, including publisher and advertiser customers and competitors; revenues and profitability; and evidence on switching by UK publishers (to, away from and between the Parties) including the reasons for switching and the impact on the Parties' revenues. We intend to consider this evidence in the round to assess in particular:

¹⁷ [CMA, Merger Assessment Guidelines, from paragraphs 5.4.1.](#)

¹⁸ See paragraph 16 of the CMA's Phase 1 Decision for detail on the theories of harm considered in the Phase 1 Decision.

- (a) the Parties' existing market position (based on their shares of supply of content recommendation platform services to UK publishers) and the structure of the relevant market;
 - (b) how closely the Parties compete with each other;
 - (c) whether there are alternative suppliers of content recommendation platform services to UK publishers which would provide a competitive constraint on the Parties post-Merger; and
 - (d) whether there are constraints outside the relevant market, such as other forms of digital advertising, and 'owned-and-operated' platforms (such as Facebook) which own and market their own advertising space.
27. We welcome views and evidence relating to the theory of harm described above and any other issues interested parties consider should be explored in the competitive assessment.

Countervailing factors

28. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find.

Entry and expansion

29. We will consider whether entry or expansion by effective competitors in content recommendation platform services to UK publishers would be timely, likely and sufficient to prevent any SLC. To do this, we will assess barriers to entry and expansion, and more specifically evidence relating to:
- (a) whether entry or expansion by rivals is likely to occur in a timely manner, which may include an assessment of the costs and time necessary to enter and/or expand, and any other factors affecting likelihood of successful entry or expansion, such as technological capabilities, network effects, regulatory barriers;
 - (b) whether entry or expansion by rivals is likely, including any plans and the certainty of those plans, and considerations around the reputation and credibility of entrants; and
 - (c) whether entry or expansion is likely to be sufficient to prevent an SLC from arising.
30. Based on the evidence gathered to date, we consider that potential expansion by Google via its Multiplex Ads tool (which is in the process of being tested for

launch in the UK) is likely to be relevant to our assessment of entry and expansion. We welcome further evidence and data on this matter, including the extent to which this would provide publishers with an alternative to the Parties' services. We would also welcome any other considerations interested parties think we should explore in our assessment of entry and expansion.

Efficiencies

31. We will examine evidence put to us in relation to efficiencies arising from the Merger. In particular, we will consider whether there are Merger-specific rivalry-enhancing efficiencies such that the Merger may not be expected to result in an SLC. As part of this, we will consider the extent to which efficiencies arising from the Merger may be necessary in order for the Parties to compete effectively against potential new market entrants or expansion by existing entrants, in particular Google, in the relevant market.

Possible remedies and relevant customer benefits

32. Should we decide that the Merger may be expected to result in an SLC in any market(s), we will consider whether, and if so what, remedies would be comprehensive, effective and proportionate,¹⁹ and will issue a further statement.
33. In any consideration of possible remedies, we may in particular have regard to their effect on any relevant customer benefits in relation to the Merger and, if so, what these benefits are likely to be, and which customers would benefit.

Responses to the issues statement

34. Any party wishing to respond to this issues statement should do so in writing, by **no later than 4pm on Tuesday 25 August 2020**. Please email taboola.outbrain@cma.gov.uk.
35. Due to the ongoing Coronavirus (COVID-19) pandemic, we are not able to accept delivery of any documents or correspondence by post or courier to our offices.

¹⁹ CMA, *Merger Remedies Guidance*, paragraph 3.3. and 3.4.