

Changing digital advertising landscape—Overview of EU and UK competition cases and regulatory initiatives

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The digital advertising industry permeates an increasing part of everyday life as consumer habits shift towards online, with revenues projected to reach €78 billion in Europe in 2022.¹ It is therefore not surprising that the sector has become a focus of regulators across Europe (and globally). Indeed, the digital advertising industry has experienced a flurry of regulatory activity, both in the European Union (EU) and the United Kingdom (UK). Over the last few years, there have been increasing numbers of merger reviews, behavioural investigations, and market inquiries examining advertising technology and the role of data in online advertising. In addition, regulatory reforms affecting advertisers, advertising technology providers, and publishers are imminent.

The online advertising industry holds particular interest for competition authorities who view it as going to the core of the business models and monetisation strategies of some of the largest global companies. Google and Facebook (recently renamed Meta Platforms, Inc), who have invariably been the targets of regulators' attention in the EU and UK, offer services free of charge to the end user and monetise those services through online advertising. Remedies therefore have the potential not only deeply to impact large companies' business models, but also to have serious ramifications for the very many consumers who make use of their free services. This

makes antitrust probes in online advertising a key area to watch in the world of tech, online services, and consumer protection in general.

This article provides an overview of the digital advertising sector, followed by a review of the EU and UK cases and regulatory initiatives relating to digital advertising.² It explores the themes and trends arising from the burst of recent activity, and considers the legislative proposals which will shape the industry in the future.

1. The many forms of digital advertising

Despite our frequent interactions with it, digital advertising can be difficult to understand and comes in many forms. The main categories of online advertising are search advertising and display advertising.

Search advertising is shown in response to the customer entering a search query in an internet search engine. The ads appear above or next to the organic search results on the page, and are primarily served based on matching the keywords searched by the consumer. Advertisers can bid on the keywords through an automated auction. Search advertising is typically charged on a “cost-per-click” basis, which means that advertisers are only charged a fee for placing their ads when a consumer clicks on the ad. If the ad is shown, but does not lead to a click, the advertiser does not pay.

Display advertising consists of ad placements on webpages and apps, in a variety of formats including images, in-page video, and in-stream video. Display advertising enables advertisers to reach specific audiences based on the characteristics of the webpage and the consumer's interests. Contextual advertising uses information gathered from the context of the webpage and device level information to show ads that are relevant to the consumer. Personalised advertising (also known as interest-based behavioural targeting) uses data relevant to the customer to serve an ad targeted to the customer's interests. Advertising service providers create customer profiles by combining data collected from first and third party sources. Targeted advertising is generally seen as a more effective form of advertising because the consumer has already expressed an interest for the product or service being advertised. Display advertising is usually charged on a “cost-per-impression” basis (where advertisers are charged for every 1,000 views of their ad) or “cost-per-view” basis (where the advertisers are charged when a viewer watches a number of seconds of a video ad or otherwise interacts with the ad).

Other forms of online advertising include affiliate advertising (where a website owner or blogger promotes ads for an advertiser on their site), content recommendations (where readers visiting a publisher's site are presented with links to other content which might be of interest), and native advertising (ads which look

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¹ Statista: <https://www.statista.com/outlook/dmo/digital-advertising/europe?currency=EUR>.

² This article covers key developments up to and including 20 February 2022.

like editorial content, also known as advertorials). As is typical of this industry, distinctions can be blurry and companies active in the space may operate across different types of digital advertising.

2. The digital advertising supply chain

Digital advertising is largely bought and sold programmatically through online auctions. At a very high-level, the demand side comprises advertisers and advertising agencies buying ad inventory, and the supply side comprises website and app publishers who provide the ad inventory.

Advertisers can participate in the auctions through publishers' self-service interfaces (predominantly for search advertising, but also for some display advertising) or through open display advertising. In open display, various intermediary technologies sit between advertisers and publishers to facilitate the sale and purchase of ad inventory through real-time bidding auctions as well as the execution of the advertising. Providers are active in respect of a number of different services which may overlap and interconnect and, while competition authorities try neatly to categorise them, they are rarely clear-cut.

The main functionalities are: advertiser ad server, demand-side platforms (DSP), supply-side platforms (SSP), and publisher ad server, each of which is described in turn below.

- Advertiser ad servers are used by advertisers to store and deliver ad creatives, and to manage and run online ad campaigns. The advertiser ad server makes instantaneous decisions about which ad creative to show on a website, and then serves it.
- DSPs provide the technology for advertisers and media agencies to buy ad spaces programmatically from many sources. Advertisers bid for the ad inventory through DSPs by inputting various parameters, including their campaign objectives and their target audience.
- SSPs provide the technology that allows publishers to sell ad inventory through real-time auctions. SSPs connect to several DSPs, collect bids from them, operate real time auctions and perform the function of exchanges.

- Publisher ad servers enable publishers to manage the space on their websites and apps made available for ads, including creating the ad inventory and automating a process for the selection of which ad to serve based on the bids received from different SSPs, and the direct deals agreed between the publisher and advertisers or ad agencies.

3. Sector inquiries to understand the digital advertising industry

National competition authorities across Europe have launched sector inquiries in an effort to map out and understand the complex digital advertising sector. The UK, Spain and France have concluded their studies,³ whereas (at the time of writing) the inquiries in Germany⁴ and Italy⁵ are ongoing.

(a) Market study into online platforms and digital advertising in the UK

The Competition and Markets Authority (CMA) in the UK conducted a year-long market study into online platforms and digital advertising, focusing on ad-funded platforms. In its final report dated 1 July 2020, the CMA set out its concerns relating to digital advertising, primarily relating to Google's and Facebook's positions. In particular, the CMA noted that Google and Facebook have both the ability and incentive to exploit their market power in search and display advertising respectively to increase revenues.⁶ In the "open display market", Google has a strong position stemming from its access to advertising inventory and user data, combined with its very high share of supply in publisher ad serving and other parts of the ad tech chain (including its DSP and SSP). In the CMA's view, this leads to concerns around conflicts of interest and the potential for Google to leverage its power in its owned and operated advertising inventory.⁷ In particular, Google may treat its own advertising services and inventories more favourably than similar services or inventory offered by third parties (known as "self-preferencing").

In addition, the CMA identified broader concerns applicable to "large platforms", including (i) a lack of transparency around processing for auctioning inventory (linked to a lack of access to data) and over fees in open display; (ii) the ability to monetise their content more effectively due to their data advantages; and (iii) the interpretation of data protection regulation in a way that

³ For completeness, the Dutch competition authority (ACM) carried out a study into paid or sponsored rankings, which touched on advertising displayed amongst search rankings and listings. In its findings published on 2 February 2021, the ACM called for greater transparency to enable consumers to recognise paid results: <https://www.acm.nl/sites/default/files/documents/sponsored-ranking-study-acm.pdf>.

⁴ Federal Cartel Office press release: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemittelungen/2018/01_02_2018_SU_Online_Werbung.html.

⁵ Autorità per le Garanzie nelle Comunicazioni (AGCOM) resolution: <https://www.agcom.it/documents/10179/25573212/Delibera+24-22-CONS/a60244d5-e5da-4d71-8b15-9dc2e6189eb9?version=1.0>. By resolution dated 27 January 2022, AGCOM closed its on-going market study as the legislative basis for the study was repealed, but a new market study will be opened and the documents currently in the file will be kept and analysed in the context of the new market study.

⁶ CMA's final report: "Online platforms and digital advertising: Market study, 1 July 2020", para.8.153: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

⁷ CMA, "Final report: Online platforms and digital advertising market study", 1 July 2020, para.8.154.

entrenches their competitive advantage.⁸ In respect of the latter, the CMA has subsequently investigated Google's withdrawal of third party cookies in its Privacy Sandbox (see section 5 below for further detail).

Ultimately, the CMA concluded that it would not initiate a market investigation reference on the basis that recommendations to government for regulatory reforms represent the best means of addressing its concerns more swiftly—but reserved the right to take direct action should its concerns not be addressed by a new regime.⁹ In particular, the CMA recommended that the UK government should introduce a new regulatory regime governing the behaviour of certain “online platforms”, which should consist of an enforceable code of conduct for firms with “strategic market status” funded by digital advertising alongside a set of “pro-competitive interventions”.¹⁰ The framework for this new regulatory regime is currently being considered by the UK government which launched the Digital Markets Unit (DMU) in shadow form in April 2021, pending legislation in respect of its powers (see section 6 below for further detail).

The CMA considered that the code of conduct would be an effective tool to address concerns identified in digital advertising, which are suited to ongoing control. In particular, in implementing its objectives of fair trading, open choices, and trust and transparency, the code of conduct could be used to address concerns around:

- auction manipulation (especially where “platforms” exercise discretion on bidders’ behalf and restrict how customers can use “platform” services);
- terms which limit the ability of publishers to monetise content when hosted within the “platforms’ ecosystem” (through guidance from the DMU on what would constitute reasonable behaviour);
- complaints about policies allowing “platforms” to arbitrarily suspend ads or accounts;
- self-preferencing within search advertising and ad tech intermediation (by ensuring new functionalities of rivals are introduced quickly or facilitating the integration of Google’s SSP, AdX, with rival publisher ad servers); and
- lack of transparency and information asymmetries (by providing guidance on how Google and Facebook present and distinguish between organic content, digital advertising, and their own services, scrutinising the working of algorithms and auctions, and requiring transparency over

fees or other data or compliance with industry standards on the provision of information to advertisers).¹¹

The CMA also recommended a number of pro-competitive interventions of relevance to digital advertising. Most notably, the CMA envisaged data-related interventions, including:

- increasing consumer control over data and facilitating consumer-led data mobility (including requiring consumers to be given a choice over whether to receive personalised advertising);
- mandating interoperability to overcome network effects and co-ordination failures (e.g., Facebook increasing interoperability with other social media platforms);
- mandating third party access to data where data is valuable in overcoming barriers to entry and expansion and privacy concerns can be effectively managed; and
- mandating data separation or silos to prevent firms from leveraging data from services where they have more market power in other markets where it has an adverse effect on competition.¹²

In addition, separation remedies could be used to address concerns about integrated firms exploiting market power through operating businesses across related markets in their common interest. Whilst the CMA acknowledges the interference of such remedies with property rights, it considers that one particular context in which the use of separation powers may be necessary is Google’s vertical integration and conflicts of interest in open display, where Google’s products include DV360 and Google Ads (which are DSPs), Google Ad Manager (which include both a publisher ad server and an SSP), and significant inventory (such as YouTube).¹³

(b) Market study into online advertising in Spain

The Spanish competition authority (CNMC) also published its final report on its market study into online advertising in Spain on 7 July 2021, concluding that digital advertising gives rise to substantial benefits but also potential conduct issues.¹⁴ The CNMC’s main concerns include: (i) a significant degree of concentration amongst Google and Facebook which enjoy high market shares; (ii) lack of transparency in relation to prices and conditions applied to demand-side customers; (iii) asymmetry of information; (iv) leveraging of supply- and demand-side technologies belonging to the same

⁸ CMA, “Final report: Online platforms and digital advertising market study”, 1 July 2020, para.8.155.

⁹ CMA, “Final report: Online platforms and digital advertising market study”, 1 July 2020, para.115.

¹⁰ CMA, “Final report: Online platforms and digital advertising market study”, 1 July 2020, paras 77 and 83.

¹¹ CMA, “Final report: Online platforms and digital advertising market study”, 1 July 2020, paras 8.157–8.166.

¹² CMA, “Final report: Online platforms and digital advertising market study”, 1 July 2020, para.85.

¹³ CMA, “Final report: Online platforms and digital advertising market study”, 1 July 2020, para.7.117.

¹⁴ E/CNMC/002/19: Study into online advertising: <https://www.cnmc.es/expedientes/ecnmc00219>.

intermediary; (v) self-preferencing by an intermediary platform of its own inventory over third party inventory; and (vi) potential anti-competitive agreements between agencies and advertisers. According to the CNMC, these competition concerns, coupled with the accumulation of data, can ultimately reduce consumer welfare. By contrast to the CMA, the CNMC recommends the enforcement of competition policy as the first line of defence in digital advertising, but also notes that competition policy tools should be complemented with *ex ante* regulation of digital platforms.

(c) Study into online advertising in France

The French competition authority was the first to publish its opinion in March 2018.¹⁵ The *Autorité* identified significant competitive advantages for Google and Facebook, including their popularity among internet users, vertical integration and presence in both demand- and supply-side intermediation, and large volumes and variety of data giving rise to powerful targeting capabilities.

Amongst the potential concerns, two issues are particularly prominent across regulators: (i) the accumulation of data used for personalised advertising amongst certain advertising services providers, giving them significant market power; and (ii) vertical integration and the ability to give advantage to an advertising technology provider's own inventory and/or technologies over third parties. Unsurprisingly, these themes are also prominent in competition authorities' merger and behavioural investigations where one or more parties are active in digital advertising.

4. Trends in merger reviews relating to digital advertising

Digital sectors have been characterised by an increase in merger activity in recent years. In particular, the competition authorities' focus has centred on so-called “killer acquisitions”—i.e., acquisitions “killing” a potential future threat to the buyer's business by smaller, innovative targets operating in the same or adjacent markets.¹⁶ At a high level, authorities' concerns with such acquisitions are that incumbent companies acquire start-ups to obtain their technology and either integrate it in their own offering to further strengthen their market position or to eliminate a nascent competitor.

Given the rapidly changing nature of the online advertising landscape and the acute regulatory interest in the sector (as shown by the various market inquiries outlined above), it is unsurprising that many recent mergers relate to the online advertising space. The

following section provides an overview of recent noteworthy mergers relating to online advertising and identifies key trends in merger reviews in the EU and UK.

(a) Narrow market definitions

Over a decade ago, in *Google/DoubleClick*, the European Commission (Commission) recognised the existence of a separate market for online advertising and ad serving technology, while leaving the definition of further sub-segmentations open.¹⁷ Since then, the online advertising industry has rapidly developed with the emergence of new and more specialised players. As a result, competition authorities are increasingly analysing relevant markets in a narrower and more granular fashion to account for the complex competitive dynamics of the online advertising space.

For instance, in the recent *Google/Fitbit* decision, the Commission adopted a narrow approach to market definition in relation to online advertising by distinguishing between search and display advertising, and identifying further sub-segmentations within display advertising (e.g., demand-side and supply-side platform services).¹⁸ Google was found to have high market shares in all these relevant online advertising markets. However, the Commission did not find any overlaps between the parties' activities.

Similarly, the CMA has considered sub-segmentations of the online advertising sector. For instance, in relation to the acquisition of Outbrain by Taboola,¹⁹ the CMA focused its analysis on the impact of the deal on the supply of advertising-based content recommendation services, rather than online advertising more broadly. By segmenting the market in this way, the CMA found that the parties were the largest providers of content recommendation services to publishers in the UK and that as a result, the deal would raise competition concerns by leaving publishers with fewer choices. As such, the CMA's theory of harm focused on potential consolidation within a sub-segment of digital advertising.

(b) Novel theories of harm

Given that merging parties may often operate at different levels of the vertical ads supply chain, the adoption of narrow market definitions means that overlaps between their activities are not readily established. As such, competition authorities are often hard put to build more “traditional” theories of harm based on horizontal overlaps and the elimination of direct competition. Competition authorities have therefore relied on alternative horizontal,

¹⁵ *Autorité de la concurrence* press release: <https://www.autoritedelaconcurrence.fr/en/press-release/6-march-2018-sector-specific-investigation-online-advertising>.

¹⁶ On the topic of “killer acquisitions” see: Nelson Jung and Elizabeth Sinclair, “Innovation theories of harm in merger control: plugging a perceived enforcement gap in anticipation of more far-reaching reforms?” [2019] E.C.L.R. 266; and Alex Noury, Chandralekha Ghosh and Jordan Bernstein, “Merger control in a post-Brexit world: is the CMA up to the task?” [2021] E.C.L.R. 371.

¹⁷ Commission Decision of 11.03.2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.4731—*Google/DoubleClick*) C(2008) 927 final at [44]–[81]: https://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf.

¹⁸ Commission Decision of 17.12.2020 declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.9660—*Google/Fitbit*) C(2020) 9105 final at [151]–[155] and [164]–[169]: https://ec.europa.eu/competition/mergers/cases/1/202120/m9660_3314_3.pdf.

¹⁹ Case ME/6877-20—Anticipated acquisition by Taboola.com Ltd. of Outbrain Inc, Phase 1 decision, paras 5 to 11: <https://www.gov.uk/cma-cases/taboola-outbrain-merger-inquiry>.

vertical and/or conglomerate theories of harm based on, inter alia, data consolidation and loss of nascent competition to build their cases.

The relevance and importance of data-driven theories of harm in authorities' assessment of mergers in the online advertising space are apparent in several recent and ongoing merger inquiries. In its *Google/Fitbit* decision, one of the Commission's theories of harm concerned Google's ability to access, consolidate, and use data from the target in the context of its advertising businesses. The Commission found that Fitbit's data would increase the amount of data Google can use for the purposes of targeted digital advertising, making it more difficult for rivals to compete with Google's services in online search and display advertising, and further strengthening Google's position in online advertising. As a result, the Commission concluded that the transaction would raise barriers to entry and expansion for Google's competitors, to the detriment of advertisers, who would face higher prices and less choice.²⁰

A similar line of reasoning guided the Commission's assessment in its probe of Facebook's acquisition of Kustomer (a customer relationship software (CRM) provider).²¹ Echoing its analysis in *Google/Fitbit*, the Commission expressed concerns at Phase 1 that the proposed transaction would enable Facebook more easily to obtain data from businesses making use of Kustomer's CRM software, thereby increasing the amount of data Facebook can use for the purposes of targeted digital advertising and further strengthening its position in the online display advertising market.²² The Commission's Phase 2 review ultimately led to the transaction being cleared on 27 January 2022, on the condition that Facebook complies with comprehensive access commitments for 10 years.²³ In particular, the commitments include giving competing providers of CRM software non-discriminatory access to Facebook's API for its messaging channels, and making any improvements or updates to messaging channels available to them.²⁴ With respect to the concerns raised in relation to the market for online display advertising services, the Commission found that any additional data Facebook might gain access to as a result of the transaction would not result in a significant negative impact on competition between providers of online display advertising.²⁵ When considering the same theory of harm during its own review of the *Facebook/Kustomer* acquisition, the CMA also found that the additional data Facebook would obtain

as a result of the transaction would not raise barriers to entry due to Kustomer's small size and the availability of similar data for Facebook's rivals, and ultimately cleared the deal at Phase 1.²⁶

In addition, while traditional merger control analysis focuses on actual and potential competition in the short-term, competition authorities are also increasingly expanding the notion of potential competition to capture nascent competitive forces. For example, in relation to its investigation into *Facebook/Giphy*, the CMA found that the acquisition could harm competition in display advertising by preventing Giphy from becoming a new player in the UK and therefore challenging Facebook's strength in display advertising.²⁷ In particular, the CMA considered the fact that Giphy offered innovative paid GIF-based advertising services in the US and that it was looking to expand these to the UK, thereby giving it the potential to compete closely with Facebook's display advertising services which face limited competition.²⁸ In addition, Facebook terminated Giphy's paid advertising partnerships following the transaction, which indicated that a source of potential competition had been removed, despite Giphy's small size and lack of current advertising-related operations in the UK.²⁹

(c) Tension with privacy

The central role of user data in online advertising, particularly targeted advertising, naturally raises questions and concerns around the protection of such data from a privacy law perspective. However, to date, privacy considerations have played a limited role in competition authorities' assessment of mergers in the online advertising space. It will be interesting to see whether privacy gains greater importance in merger cases, as concerns become more acute.

In its *Google/Fitbit* decision, the Commission took the view that the role of competition law is not to protect against and remedy privacy issues.³⁰ Rather, these are better addressed through data protection tools (e.g., GDPR). This conservative view of the purpose of merger review and the interests competition law should protect has led to criticism, with commentators arguing that the Commission failed to adequately take account of privacy concerns in *Google/Fitbit*, resulting in the remedies imposed being insufficient to protect consumers' data.

²⁰ Case M.9660—*Google/Fitbit* at [427]–[268]. Similar concerns were already raised by the Commission a decade prior in *Google/DoubleClick* where the Commission considered whether the combination of Google and DoubleClick's data on customer behaviour would give the merged entity a data advantage, leading to foreclosure of its competitors.

²¹ Case M.10262 *Facebook/Kustomer*, Commission Press Release, 2 August 2021: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4021.

²² Case M.10262 *Facebook/Kustomer*, Commission Press Release, 2 August 2021.

²³ Case M.10262 *Facebook/Kustomer*, Commission Press Release, 27 January 2022: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652.

²⁴ Case M.10262 *Facebook/Kustomer*, Commission Press Release, 27 January 2022.

²⁵ Case M.10262 *Facebook/Kustomer*, Commission Press Release, 27 January 2022.

²⁶ Case ME/6920/20—Anticipated acquisition by Facebook, Inc of Kustomer, Inc, Summary of Phase 1 decision, paras 10 to 14: <https://www.gov.uk/cma-cases/facebook-inc-dot-slash-kustomer-inc>.

²⁷ Case ME/6891-20—Completed acquisition by Facebook, Inc. of GIPHY, Inc., Final Report, 30 November 2021, paras 36 to 45 and Section 7: https://assets.publishing.service.gov.uk/media/61a64a618fa8f5037d67b7b5/Facebook_Meta_GIPHY_-_Final_Report_Public_Version_301121_.pdf.

²⁸ Case ME/6891-20—Completed acquisition by Facebook, Inc. of GIPHY, Inc, Final Report, 30 November 2021, paras 7.45 to 7.49.

²⁹ Case ME/6891-20—Completed acquisition by Facebook, Inc. of GIPHY, Inc, Final Report, 30 November 2021, paras 2.10 to 2.14 and 7.40.

³⁰ Case M.9660—*Google/Fitbit* at [410]–[413], and [452].

(d) Structural vs behavioural remedies

The recent *Google/Fitbit* and *Facebook/Kustomer* acquisitions indicate that the Commission may be increasingly willing to accept behavioural remedies over more traditional structural remedies, in particular to resolve concerns around the access to, consolidation, and use of data. Indeed, the *Google/Fitbit* acquisition was ultimately cleared by the Commission in December 2020, subject to a number of behavioural remedies, including a so-called “*data silo*” commitment whereby Google would segregate the data collected by Fitbit’s wearable devices from any other data used by Google for advertising and not use such data for the purposes of advertising. While the Commission’s approach was praised by some as being innovative, others criticised it for being too complex. Similarly, as explained above, the Commission recently approved the *Facebook/Kustomer* acquisition subject to access commitments.

By contrast, the CMA has expressed more scepticism in relation to the use of behavioural remedies, preferring to rely on structural remedies. In fact, Andrea Coscelli, Head of the CMA, criticised the Commission’s approach to remedies in *Google/Fitbit*, stating that “we’re quite sceptical about this type of complex, long-running behavioural undertakings that require quite a lot of monitoring, and we have rejected similar undertakings in cases over the years in the UK”.³¹ This stance is reflected in the CMA’s approach to its review of *Facebook/Giphy*—finding that the acquisition could harm competition in display advertising, the CMA required that the deal be unwound entirely (i.e., that Facebook sell Giphy) to address competition concerns.³² The CMA rejected Facebook’s proposal to abide by a “*data silo*” remedy (i.e., committing to not use certain data obtained through Giphy’s application programming interface for its advertising business), noting in particular the challenges in specifying Facebook’s obligations in the context of behavioural remedies, the risks of Facebook being able to circumvent such remedies, and the difficulties in monitoring and enforcing Facebook’s compliance with such remedies.³³

Similarly, the CMA has previously accepted divestment commitments in other complex digital deals, such as those offered by Adevinta and eBay in relation to the anticipated acquisition by Adevinta ASA of eBay Classifieds Group and eBay Inc’s acquisition of a minority stake in Adevinta ASA.³⁴ In particular, as the CMA found that the acquisition could lead to a loss of competition in classified advertising (resulting in higher prices and less choice for consumers), the parties agreed to divest their UK classified ads websites (Shpock and Gumtree UK).

5. Trends in behavioural investigations into digital advertising providers

Behavioural investigations by the Commission and CMA have tended to centre around certain key aspects of the online advertising industry including (i) findings of large market shares in narrowly drawn markets, and associated allegations of abuse of dominant positions; (ii) the tendency towards vertical integration of (often large) players active at more than one level of the ad tech supply chain and associated allegations of self-preferencing; and (iii) the role of data in the online advertising industry and the inequality of access to that data.

(a) Narrow market definitions and large market shares: abuse of dominance cases

Similar to the approach in merger reviews, competition authorities have tended to define online advertising markets relatively narrowly in behavioural investigations. European authorities have distinguished between search and display advertising as different markets, effectively splitting the industry into two markets in which Google and Facebook are each the largest player. This has paved the way for antitrust investigations based on allegations and findings of dominance and abuse under art.102 of the Treaty on the Functioning of the European Union (and the UK Chapter II equivalent of the Competition Act 1998).

In March 2019, the Commission imposed a fine of €1.49 billion on Google for abuse of its dominant position in the market for the intermediation of online search advertising, in respect of its AdSense service (Google was also ordered to cease the conduct, which it had already stopped in advance of the decision).³⁵ Google’s AdSense enabled third-party websites to embed ads within the search results that appear when users entered queries in a search box placed on their website. Google also typically provided the technology behind the search box itself, but the ad brokering service could be used independently. The service enabled operators of websites to become publishers within the advertising value chain; to make use of the space within search results on their website to sell advertising inventory to advertisers, thereby generating revenue (which they shared with Google).

The Commission concluded that the relevant product markets were for online search advertising and for online search advertising intermediation, and it made clear that it viewed online search advertising and online non-search advertising as belonging to different product markets.³⁶ It found limited substitutability between intermediation services for online search ads and intermediation services

³¹ MLex, “Google-Fitbit’s EU behavioral remedies would likely have failed in UK, CMA chief says”, 9 February 2021.

³² Case ME/6891-20—Completed acquisition by Facebook, Inc. of GIPHY, Inc., Final Report, 30 November 2021, Section 11.

³³ Case ME/6891-20—Completed acquisition by Facebook, Inc. of GIPHY, Inc., Final Report, 30 November 2021, paras 59 and 11.239 to 11.295.

³⁴ Case ME/6897/20—Anticipated acquisition by Adevinta ASA of eBay Classifieds Group from eBay Inc., and eBay Inc.’s acquisition of a minority stake in Adevinta ASA, Decision on acceptance of undertakings, paras 6 to 9: https://assets.publishing.service.gov.uk/media/60db232e8fa8f50ab3b8b5ce/Adevinta-eBay_-_Decision_for_final_acceptance_of_UILs.pdf.

³⁵ Case AT.40411 *Google Search (AdSense)*: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

³⁶ Case AT.40411 *Google Search (AdSense)*, paras 120 and 135.

for online non-search ads, and as between intermediated sales and direct sales of online ads.³⁷ The Commission subsequently drew on this decision as precedent for its narrow market definition in *Google/Fitbit* (see section 4 above).

Based on these market definitions, Google's share of the online search advertising intermediation market in the EEA exceeded 85% for most of the investigated period, and it was therefore considered dominant.³⁸

Google's strong market position was also important to the CMA's investigation into Google's Privacy Sandbox proposals.³⁹ In particular, the CMA was concerned that Google's proposals would allow Google to exploit its apparent dominant position in the supply of web browsers, also recognising its strong market positions in (i) search and search advertising (with a UK share of supply of 90%); (ii) display advertising (with YouTube holding a 15–20% share of supply of video display advertising in the UK); and (iii) advertising intermediation services (with Google holding a 90% share of supply in publisher ad serving in the UK).⁴⁰ The CMA published its decision to accept Google's modified commitments on 11 February 2022, in which it reiterated its initial concern that implementation of Google's proposals without regulatory scrutiny and oversight "would be likely to amount to an abuse of a dominant position".⁴¹

The investigations opened simultaneously by the Commission⁴² and CMA⁴³ into Facebook's use of advertising data also both refer to the relevant abuse of dominance legislation, building on the authorities' view of Facebook as having a large market share in the display advertising space.

(b) Vertical integration and self-preferencing

Vertical integration occurs in the online advertising industry between publishers and their intermediation services as well as between players offering intermediation services at various levels of the supply chain. Google and Facebook, with shares of supply of 90% and 50% of UK search and display advertising respectively according to the CMA's market study findings,⁴⁴ also offer vertically integrated intermediation services that can (and in some cases must) be used to serve ad inventory on their own properties. Both also operate intermediation services at various levels of the ad tech stack. This tendency of the industry towards vertical integration has been an area of interest, with competition authorities concerned about the potential for

harm to competition through players leveraging their power at one level of the supply chain to make uncompetitive gains in another.

The Commission opened an investigation into Google's conduct in respect of its services in the ad tech supply chain on 22 June 2021.⁴⁵ As part of the ongoing investigation, the Commission will look at the vertical integration of Google's intermediation services (focused on display advertising) with the supply of ad inventory on its own properties and will assess whether Google has favoured its own intermediation services over those of rivals. In particular, the Commission will look at Google's restriction on the sale of advertising inventory on YouTube, which it makes available for purchase by advertisers only through its own DSPs, DV360 and Google Ads. The Commission will also investigate the requirement that advertisers must use Google's advertiser ad server function, Google Ad Manager, to serve their ads on YouTube.

In addition, the investigation is set to look at integration between Google's various intermediation services. In particular, the Commission has said it will look at the possibility of DV360 and/or Google Ads favouring Google's SSP, AdX, over other supply-side options. Executive Vice-President Margrethe Vestager, in charge of competition policy, noted that "Google collects data to be used for targeted advertising purposes, it sells advertising space and also acts as an online advertising intermediary. So Google is present at almost all levels of the supply chain for online display advertising". This statement suggests that the Commission is viewing the collection of data for use in targeted advertising as a separate, additional level in the ad tech supply chain in which Google is active and vertically integrated.

(c) Access to data

As noted above, competition authorities have recently been focused on the role of data and its relative importance in online advertising, particularly with respect to the delivery of "targeted" ads. While search ads are usually served in response to a search query entered by an end user and are primarily selected based on the keyword content of that query, display ads can be served upon end users loading a webpage or video content, and their selection may be based on information including user characteristics and activity history so as to target the ad to an intended audience. Authorities have therefore become interested in whether companies holding certain

³⁷ Case AT.40411 *Google Search (AdSense)*, paras 186 and 194.

³⁸ Case AT.40411 *Google Search (AdSense)*, para.274.

³⁹ Case number 50972—Investigation into Google's "Privacy Sandbox" browser changes: <https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes>.

⁴⁰ Case number 50972—Investigation into Google's "Privacy Sandbox" browser changes: Decision to accept commitments, paras 2.57, 2.58: https://assets.publishing.service.gov.uk/media/62052c52e90e077f7881c975/Google_Sandbox_.pdf.

⁴¹ Case number 50972—Investigation into Google's "Privacy Sandbox" browser changes, para.3.2.

⁴² Case AT.40684—Facebook leveraging: https://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=1_AT_40684.

⁴³ CMA investigation into Facebook's use of data: <https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data>.

⁴⁴ CMA, "Final report: Online platforms and digital advertising market study", 1 July 2020, paras 5.371 and 7.62.

⁴⁵ Case AT.40670 *Google—Adtech and Data-related practices*: https://ec.europa.eu/competition/elojade/iseif/case_details.cfm?proc_code=1_AT_40670.

sets of data about end users have an advantage in delivering display ads that are more effectively targeted towards end users.

The Commission⁴⁶ and CMA⁴⁷ opened investigations into Facebook's use of advertising data simultaneously, on 4 June 2021. The investigations will look into the ways in which Facebook gathers data through the operation of its social network and advertising services, including data obtained directly from end users of its social network, through provision of the single sign-on service Facebook Login, and through the placement of ads on Facebook's properties by third-party advertisers. The authorities will investigate whether Facebook's collection and/or use of such data has enabled it to advantage its other services (which may well compete in other markets with the services of advertisers who are the source of the data). In particular, the investigations will consider the impact on competition in the neighbouring market of online classified ads, where Facebook is active through Facebook Marketplace. In addition, the CMA's case will also investigate whether Facebook has unfairly used the data to benefit its Facebook Dating service.

The Commission's investigation into Google ad tech will also look at Google's data-related practices, in particular the extent to which third parties have access to data collected by Google about user identity and user behaviour that is made available to Google's own advertising intermediation services.

(d) Unresolved tension with privacy

Google's plans to remove third-party cookies from its Chrome browser and replace them with its "Privacy Sandbox" tools were the subject of investigation by both the CMA⁴⁸ and the Commission.⁴⁹ Third-party cookies track user behaviour online, generating data that is used in online advertising to target ads more effectively, as well as to measure the effectiveness of ads, and their use has generated concerns around the impact on user privacy. Google's stated goals in launching Privacy Sandbox included making the web more private and secure for users.⁵⁰ However, the CMA and Commission have expressed concerns that Google's removal of third-party cookies and replacement with an alternative under the Privacy Sandbox initiative could distort competition in the online advertising industry through (i) restricting third parties' access to user tracking functionality and data while Google would retain access; and (ii) leading to self-preferencing of Google's own advertising

intermediation services and the supply of ad inventory on Google's own properties. The CMA's investigation did not conclude on the privacy impacts of the Privacy Sandbox proposals, as is noted in Google's final commitments,⁵¹ while the Commission's investigation is still ongoing.

On 11 February 2022, the CMA published a notice of its intention to accept the final commitments offered by Google in respect of its changes to Chrome.⁵² The decision came after the CMA's consideration of Google's initial commitments, which attracted representations from a large number of third parties (including 45 written responses) and resulted in Google submitting the now-accepted modified commitments.⁵³ In the CMA's view, the modifications are an improvement on the initial commitments through offering greater transparency in testing and development, improved monitoring and compliance arrangements, clarification on the limits to Google's own use of data for ad targeting and measurement, and an increased duration of the commitments. Principally, Google's commitments require it not to use users' personal data that it has access to as a result of activity through Chrome or Google Analytics for targeting or measurement of digital advertising once third-party cookies are removed. The purpose of this limit on Google's use of data is to remove the possibility of Google leveraging its position through other services to access data that others will no longer have access to following the removal of third-party cookies. Additionally, Google's commitments require it not to distort competition by favouring its own advertising products and services in the design and development of the Privacy Sandbox proposals. Google's commitments require it to engage with the CMA in relation to the design and development process; adhere to various monitoring and compliance requirements; provide transparency to third parties; and consult with third-party publishers, advertisers, and ad tech providers, taking into consideration their reasonable views.

In an effort to address the tension between competition and privacy law and policy, the CMA has worked closely with the Information Commissioner's Office (ICO) in the context of the Google Privacy Sandbox investigation, and will continue to do so as it takes on an "oversight role"⁵⁴ in the process of design and development of the cookie replacement proposals. In particular, the final commitments provide that, should the CMA need to notify Google of continuing competition law concerns during the oversight period, the CMA will consult the ICO before

⁴⁶ Case AT.40684—*Facebook leveraging*.

⁴⁷ Investigation into Facebook's use of data.

⁴⁸ Case number 50972—Investigation into Google's "Privacy Sandbox" browser changes.

⁴⁹ AT.40670 *Google—Adtech and Data-related practices*.

⁵⁰ Case number 50972—Investigation into Google's "Privacy Sandbox" browser changes, Appendix 1A to the CMA's final decision: Google's commitments offer, para.1: https://assets.publishing.service.gov.uk/media/62052c6a8fa8f510a204374a/100222_Appendix_1A_Google_s_final_commitments.pdf

⁵¹ Case number 50972—Investigation into Google's "Privacy Sandbox" browser changes, Appendix 1A to the CMA's final decision: Google's commitments offer, fn.1.

⁵² Case number 50972—Investigation into Google's "Privacy Sandbox" browser changes: Decision to accept commitments, paras 2.57, 2.58.

⁵³ Case number 50972—Notice of intention to accept modified commitments offered by Google in relation to its Privacy Sandbox Proposals, 26 November 2021 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1036204/211126_FINAL_modification_notice.pdf.

⁵⁴ <https://www.gov.uk/government/news/cma-to-keep-close-eye-on-google-as-it-secures-final-privacy-sandbox-commitments> and <https://www.gov.uk/government/news/cma-to-have-key-oversight-role-over-google-s-planned-removal-of-third-party-cookies>.

making any such notification.⁵⁵ The CMA and ICO also released a joint statement demonstrating their approach to collaboration in applying and developing competition and privacy law and policy with respect to digital markets.⁵⁶ Interestingly, the joint statement sets out the CMA's and ICO's view that competition and privacy are not fundamentally opposed, instead pointing to potential synergies between the regimes including (i) enabling user choice and control; (ii) promoting clear, well-designed regulation to achieve both competition and privacy aims; and (iii) focusing on data-related interventions.

6. Regulatory reforms to shape the future of digital advertising

Given the extensive interest of competition authorities in the digital advertising sector, it is perhaps unsurprising that various legislative initiatives affecting advertisers, ad tech providers, and publishers are currently under consideration in the EU and the UK.

(a) Regulation of digital markets in the UK

Following its market study into online platforms and digital advertising, the CMA set out a number of recommendations for legislative reform in the UK. As noted above, on 7 April 2021, the UK government launched the DMU within the CMA to oversee a new pro-competition regulatory regime in respect of digital activities. The DMU will be tasked with implementing and enforcing a code of conduct for businesses, or parts of businesses, that will be designated as having “strategic market status”. It is also expected to have the power to impose “pro-competitive interventions” to tackle the underlying sources of market power and promote competition. The UK government has committed to introducing legislation as soon as parliamentary time allows.

It remains to be seen whether the CMA's specific recommendations on the application of the new regime to digital advertising (see section 3(a) above) will be adopted.

(b) Regulation of digital platforms and online intermediaries in the EU

In December 2020, the Commission announced far-reaching proposals for regulation of digital platforms and online intermediaries to ensure effective competition, through the Digital Markets Act (DMA) and the Digital

Services Act (DSA). These two pieces of legislation are, at the time of writing, working their way through the EU legislative process.⁵⁷

The DMA will impose a list of obligations on advertising services providers that are designated as “gatekeepers”. These are providers of one or more other core platform services⁵⁸ which (i) have a significant impact on the internal market; (ii) control an important gateway to reach final consumers; and (iii) enjoy an “entrenched and durable position”. The DMA is particularly concerned with lack of transparency in respect of the conditions under which gatekeepers provide online advertising services to both advertisers and publishers, due to “the practices of a few platforms” as well as “the sheer complexity of modern day programmatic advertising”.⁵⁹ Indeed, the DMA notes that “the sector is considered to have become more non-transparent after the introduction of new privacy legislation, and is expected to become even more opaque with the announced removal of third-party cookies”.

Amongst other requirements, the proposed legislation will impose information obligations, including providing advertisers and publishers with certain information about pricing of advertising services, access to the performance measuring tools, and information that allows them to carry out their own independent verification of ad inventories.⁶⁰ In addition, the DMA will regulate gatekeepers' use of data by:

- prohibiting combining personal data sourced from a core platform service with data from other services of the gatekeeper or third-party services (art.5(a))—this is expected to primarily affect the use of a combination of data in targeted advertising, unless users consent;⁶¹
- facilitating data portability (art.6(1)(h)); and
- requiring gatekeepers to provide their business users to access the data that they generate in their use of the gatekeeper's platform (art.6(1)(i)).

⁵⁵ Case number 50972—Investigation into Google's “Privacy Sandbox” browser changes, Appendix 1A to the CMA's final decision: Google's commitments offer, para. 18.

⁵⁶ Competition and data protection in digital markets: a joint statement between the CMA and the ICO, 19 May 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987358/Joint_CMA_ICO_Public_statement_-_final_V2_180521.pdf.

⁵⁷ The European Parliament and the Council of the EU have both proposed amendments in November 2021. The references to the DMA and DSA in this article are in their original form as published in December 2020, unless specified otherwise.

⁵⁸ Aside from advertising services, other core platform services are: online intermediation services, including app stores and online marketplaces; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communication services; operating systems; and cloud computing services. The European Parliament has proposed adding web browsers, virtual assistants, and connected TV to the list of core platform service in its amendments adopted on 15 December 2021.

⁵⁹ DMA recital 42.

⁶⁰ DMA arts 5(g) and 6(1)(g).

⁶¹ The European Parliament has proposed a new obligation requiring gatekeepers to refrain from using personal data for targeted advertising when no clear, explicit, renewed and informed consent has been given by an adult; and banning targeted advertising to minors using personal data (art.6(1)(aa)).

Gatekeepers will also be prevented from tying access to a gatekeeping core service upon registering for or subscribing to, any other core platform.⁶² This would prohibit, for example, Google from tying access to YouTube to use of its DSP.

The DSA intends to regulate the interactions between providers of online intermediary services, including digital advertising services providers, and their customers and users. The proposal introduces a package of new obligations, including all online platforms displaying ads will be required to ensure that users of their services can identify “in a clear and unambiguous manner and in real time” that the information displayed is an ad; whose ad it is; and an explanation as to why the user is seeing a particular ad.⁶³

Similarly to the proposed reforms in the UK, the DSA also provides for the introduction of codes of conduct to support and complement the transparency obligations relating to online advertising by providers of online advertising intermediary services.⁶⁴

7. Conclusion: the importance of vertical integration and data

Two key themes emerge from the recent regulatory activity in the digital advertising industry and sit at the centre of the regulators’ main concerns: the importance of vertical integration and access to data.

The tendency towards vertical integration of (often large) players active at more than one level of the ad tech supply chain leads to concerns around conflicts of interest and the potential for those large players to leverage their power in particular in relation to their own ad inventory. This gives rise to allegations of self-preferencing, where vertically integrated players may treat their own advertising services and inventories more favourably than similar services or inventory offered by third parties. There is further concern about the impact of these practices on businesses who may rely on access to online advertising for growth.

Secondly, data plays an important role in various aspects of the digital advertising value chain, as an input to targeting services, ad effectiveness measurement, and verification services. Past and ongoing cases highlight the competition authorities’ concerns regarding lack of transparency and information asymmetries between different players and users. In addition, regulators worry that the interpretation of data protection regulation and privacy rules risks entrenching the competitive advantage of certain players.

It remains to be seen how far the proposed legislative initiatives in the UK and the EU will go towards addressing these perceived issues in digital advertising. Given the dynamic nature of the industry, digital advertising will undoubtedly continue to evolve and adapt to new rules and technological developments alike.

⁶² DMA art.5(f).

⁶³ DSA art.24; and the relevant information must be available for one year after the ad was displayed for the last time (see art.30).

⁶⁴ DSA art.36.