

Contribution of the European Publishers Council on “Shaping competition policy in the era of digitisation” Register ID: 4456380381-30

I. Introduction

The European Publishers Council (“EPC”) is very pleased to respond to the call for contribution issued by the European Commission in the context of the conference it plans to organise in Brussels on 17 January 2019 on the theme of “Shaping competition policy in the era of digitisation”. The EPC commends the Commission for this excellent initiative, which deals with a subject at the core of the EPC’s preoccupations. 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.

In the present contribution, the EPC will focus on the second theme identified by the Commission: DIGITAL PLATFORMS’ MARKET POWER. Our comments are divided in five parts. Part II contains an executive summary. Part III explains how the increasing shift to online news consumption and to “programmable advertising” have transformed the media landscape. Part IV explains the digital platforms’ anticompetitive practices towards publishers, with a focus on Google’s behaviour.² Part V argues that in engaging in these anticompetitive practices, Google abuses its dominant position in general search. Finally, Part VI shows how these anticompetitive practices create serious consumer harm.

Because of the complexity and opacity of the conducts of digital platforms, and their significant impact on the news publishing industry as well as on many other industries that depend on their traffic and on online advertising revenues to survive, the EPC urges the Commission to open a sectoral inquiry as part of Article 17 of Regulation 1/2003 on the potential anticompetitive practices of digital platforms.

II. Executive summary

There are fundamental problems associated with digital markets distinguishing them from traditional markets. This requires a review of competition law which is neither equipped to assess multi-sided markets, nor in particular the market power arising from data.

Over the past decade digital platforms have engaged in a variety of strategies to entrench their role as intermediaries between publishers and news readers. For instance, Google has used its market power in general search to coerce news publishers to give free access to their content on pain of losing their visibility on its search engine results page (“SERP”). By, for instance, scraping systematically news media sites in order to publish snippets extracted from news content produced by others, digital

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

² This does not mean that the practices of other digital platforms, such as Facebook, are not problematic. For instance, Facebook’s Instant Articles raises issues similar to Google’s Accelerated Mobile Pages (“AMP”). Moreover, Google and Facebook together form an advertising duopoly to the detriment of publishers and advertisers.

platforms attract and then retain consumers within their ecosystems. Enhanced consumer engagement within such ecosystems enables digital platforms to harvest more user data (without the full knowledge of users) which in turn enhances their ability to sell targeted ads to advertisers, and thus increase their advertising revenues.

The digital platforms' practices seriously harm the ability of content creators, such as news publishers, to monetise their content by selling subscriptions (as much of their content is offered for "free" by the platforms) or online advertising (an area that has now been 'duopolised' by Google and Facebook with only crumbs being left to news publishers). The digital platforms' efforts to maintain news readers on their ecosystem has also led to brand dilution and lower levels of engagement. The fragmentation of news publications into diffuse and individualised articles, which can be clicked on in Google News, its mobile carousel, Facebook or other digital platforms, means content creators often struggle to obtain attribution for their content and consumers struggle to identify the source of the article, with this "brand flattening" facilitating the spreading of others' fake news.

The digital platforms' conduct identified in these comments also harms consumers:

- Digital platforms reduce the publishers' ability and incentives to invest in journalism, i.e. to produce quality content to the benefit of digital news' readers, as the production of such content requires significant financial resources. The disappearance or weakening of cash-strapped newspapers may also have severe social consequences, such as for instance reducing the level of monitoring on public or private institutions.
- The digital platforms' practices also hurt innovation as such practices harm the news publishers' ability to invest in new features allowing them to stimulate sales (e.g., dynamic paywalls), new modes of delivery (e.g., mobile applications), which are costly to develop and maintain, and new services (e.g., interactive audio and video content) to the benefit of their readers. While some of the largest news publishers may still be able to innovate, although at a slower pace than they would in the absence of the digital platforms' abusive conducts, many small publishers are in a death spiral.
- Finally, algorithms used by digital platforms, which are designed to optimise engagement by showing content consumers are more likely to interact with, mean that a breaking story, which resulted from months of investigation by a quality newspaper, will often rank lower in Google's SEPR than stories that merely copied that breaking story because these latter stories are "free". Algorithms designed to stimulate user engagement may also lead to "echo-chambers" where consumers are increasingly exposed to opinions that confirm their existing views and values rather than challenging them.

For these reasons, the EPC urges the EU to look very closely at the digital platforms' strategies denounced in these comments to prevent them from harming news organisations, which play an essential role to democracy, as well as consumers whose interests are directly harmed when news organisations no longer have the resources to invest in high quality content and play their important

social role. A sectoral investigation under Article 17 of Regulation 1/2003 is fully warranted in the present context.

The Commission should also consider whether its current analytical tools (from market definition to the assessment of dominance) are fully adapted to the assessment of digital platform's conduct, considering for instance that the market power of a company may increasingly be linked to its ability to collect and exploit user data. In this context, alternative indicators of market power may be needed.

Moreover, when the conditions of Article 8 of Regulation 1/2003, the EPC would also like to encourage consideration of using "interim measures" in order to provide immediate relief to the party/ies affected by the conduct. And when an infringement has been proven, the Commission should consider the use of functional or structural remedies in order to maintain or restore effective competition in the market.

III. The shift to digital news and the rise of digital platforms

Digitalisation and the increasing shift to online news consumption have profoundly transformed the media landscape. In the online environment, the two primary business models are:

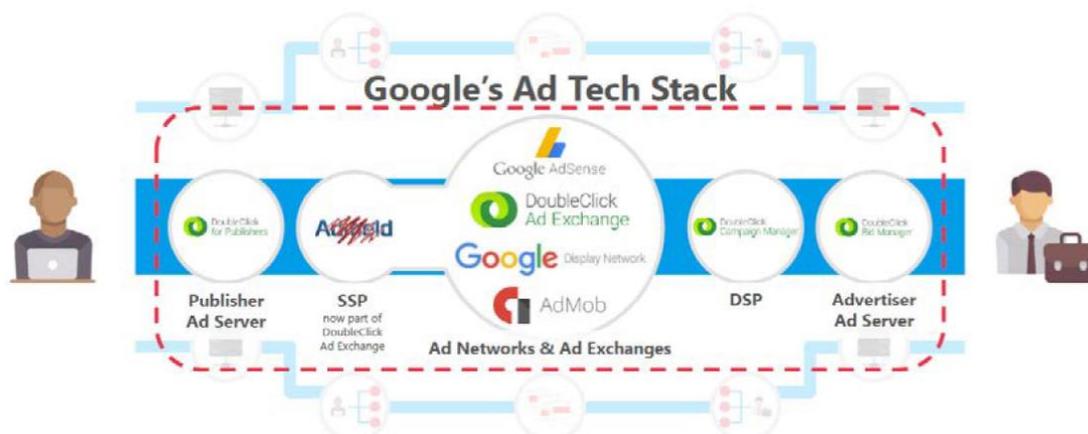
- **Ad-funded** – where advertising constitutes the sole or predominant source of revenue and users can access content for "free". Publishers pursuing that business model are highly dependent on Google and other digital platforms as they need to attract large volumes of traffic to generate advertising revenues. They might thus have to invest heavily in search engine optimisation ("SEO") or produce click-baits in order to draw large amounts of traffic to their websites. With the enormous share of display advertising revenues now going to Google and Facebook, it is questionable whether ad-funded news publishing models are sustainable in the future.
- **Subscription-funded** – where publishers keep content behind various types of paywall. Subscription-based digital newspapers are less dependent on digital platforms, but they still rely on their traffic to acquire new visitors who, after hitting the paywall a few times, might become subscribers. Moreover, publishers using a subscription model still generate a part of their revenues through advertising for which traffic from the platforms remains important.

An important shift to highlight is that, 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 alongside other data points to create monetisable profiles), rather than contextual information about the content being consumed. This evolution shifts advertising spend away further from news brands producing original content towards platforms, such as Google and Facebook, with unparalleled access to user data from multiple points across the web and apps together unrivaled analytics capability.

Programmatic advertising relies entirely on data; increased data availability allows advertisers who want access to a specific audience (e.g., soccer fans) to achieve this without targeting a category of content (soccer news) thereby giving a superior advantage to digital platforms which not only acquire the data generated by news readers when they interact with news content, on publishers' sites and beyond, but also merge this data with the data they collect across the Internet, whereas publishers only receive fragmented information.³

In addition to their data advantage, digital platforms increasingly control the entire supply chain between advertisers and publishers via their range of advertising technology (Ad Tech) services. As shown in Figure 1, through both acquisition and organic growth, Google controls the dominant technologies at every point in the supply chain. Facebook is also developing its Ad-Tech capabilities and dominates advertising technology in the social media advertising space. Publishers are dependent on Google and Facebook with respect to the technologies needed to sell their ad inventory.

Figure 1 : Google's Ad Tech tools



The EPC notes that Google has taken advantage of the EU General Data Protection Regulation ("GDPR") by interpreting it in a manner that, while protecting its business interest by deepening its monopoly in data ownership and exploitation, would undermine the fundamental purposes of the GDPR and the efforts of publishers to comply with the letter and spirit of the law.⁴ Google expects publishers to gain user consent on its behalf, in order to continue using Google ad tools. In doing so, it has proclaimed itself co-controller of that data and wants freedom to decide whatever it does with that data – something that would previously have been purely in the realm of the publisher.

³ For example, users of any Google service must agree to Google's Data Policy which provides that Google collects and stores data including: things users search for; websites users visit; videos users watch; ads users click on or interact with; users' location; device information; IP address and cookie data; emails sent and received on Gmail; calendar events; and users' personal information. See Google, *Your Data*, <https://privacy.google.com/your-data.html>.

⁴ For further details, please "EPC co-signs letter to Google's CEO expressing its concerns over their new GDPR policies and the requirements for publishers", May 1, 2018, available at <http://epceurope.eu/epc-co-signs-letter-to-googles-ceo-expressing-its-concerns-over-their-new-gdpr-policies-and-the-requirements-for-publishers/>

It is important to understand the consequences of how dominant platforms are leveraging data they have collected for one purpose for one product/field, into another and how this harms competitors but also consumers who have lost control over what happens to their data.

IV. The digital platform's anticompetitive practices towards publishers

In this part, we describe some of the anticompetitive practices the digital platforms have carried out to their advantage and to the detriment of publishers. While the practices described below belong to Google, the EPC is also concerned about comparable conducts by other digital platforms, which we are not able to elaborate in this short document e.g. how Apple requires app owners to install Apple's In-App purchase solution including for news subscriptions at a cost of 30% revenue share.

The shift to digital news consumption has turned digital platforms into traffic allocators on which publishers are largely dependent for their survival. However, instead of acting as neutral intermediaries helping Internet users to find the most relevant and reliable news content and send users to the websites of news organisations, digital platforms seek to attract and retain consumers on their platform (or "ecosystem") as this maximises their advertising and data collection opportunities.

For this reason, in the past few years the EPC has encouraged the European Commission to investigate Google, which has engaged in a variety of practices that have created considerable harm to publishers and consumers, including:

- a) **Scraping/Snippets.** Google coerces publishers to allow it to "scrape" their content on pain of losing Google search traffic. Google crawls and copies a site's full content onto its servers. It then extracts "snippets" of content and uses them in its search results, and to power Google News. While in theory publishers can opt out of scraping by implementing a meta-tag in Google's robots.txt, if they do so, traffic from Google search and Google News will collapse. Because of the importance of Google's traffic, this leaves publishers with no choice but to allow Google to freely scrape their content.
- b) **First-Click-Free.** While Google has recently abandoned this policy, publishers have had for a long time to give search users access to up to three free articles per day per browser and per device ("FCF policy") on pain of having their content neither crawled nor indexed by Google's search engine and thus not visible on Google's SERP. Google's FCF Policy – which originated from Google's preference for free content (which fits better with its advertising business model) – created significant harm to publishers of paywall-protected content, which was never compensated for. It also led readers to believe that, although expensive to produce, news content should be free, hence undermining the ability of publishers to generate subscriptions.
- c) **AMP.** Google is requiring publishers to produce articles that are consistent with its AMP standard, a new "stripped-down" format aimed at mobile pages, on pain of having their content excluded from Google's "news carousel" that appears on top of the screen of mobile

devices in response to news-related search queries and demoted on Google's SERP.⁵ This creates a host of serious problems for publishers:

- First, because – unlike traditional mobile pages – AMP pages are loaded on and served from Google servers, Google can maintain readers in its environment, as well as collect all the data generated on such pages. That is the reason why Google is willing to spend large resources to host hundreds of millions of AMP pages on its servers.
 - Second, because all AMP pages roughly look the same due to their simplified format, it commoditises content to the detriment of news brands. While the publishers' news brands appear homogenised, Google's brand appears prominently, thereby allowing Google to build its brand awareness as a source for news content among users, while it does not produce any original content.
 - Third, AMP allows users to easily swipe through articles from different publishers and encourages readers to return to the Google search page.⁶ The fact that users remain on the Google server and are not referred to the publisher's website prevents publishers from enticing users to read articles on other topics that may be of interest to them, which could potentially increase brand loyalty. Moreover, Google places the AMP news carousel above the publisher's website in the search results on smartphones, hindering further the ability of loyal readers who search publishers' brands to reach their homepages.
 - Finally, by imposing its AMP format on publishers, Google risks eliminating competition between mobile formats and distribution platforms, and the innovation that would result from it.
- d) **Subscribe with Google ("SWG").** Google is now coercing publishers to adopt a single subscription pay-wall powered by Google on pain of losing Google mobile search traffic and traffic in the Google News app. Google is indeed developing a SWG carousel on Android mobile devices limited to publishers that participate to SWG. Moreover, in its Google News app, Google only accepts AMP pages from SWG publishers. Publishers can refuse SWG, but they then lose mobile and Google News app search equity. In addition, Google includes many unnecessary conditions in its SWG offer. With SWG, publishers become entirely dependent on Google for their subscriber revenues.

⁵ Like AMP, Facebook hosts Instant Articles, Facebook-native news format for mobile devices, directly and users do not need to navigate to an external site to view the full content article. Instant Articles is Facebook's preferred platform to drive audience traffic and subscriptions, and publishers are actively encouraged by the platform to place their content in Instant Articles format. These articles are more likely to be seen in a user's newsfeed than non-Instant Article content.

⁶ A similar issue can be observed with Facebook's Instant Articles. Since Instant Articles open within Facebook's native interface, users only view the publisher's website indirectly. While Facebook does not share the data it collects from hosting articles on its server, publishers can use existing analytics and attribution systems to track article traffic in Instant Articles. While this allows publishers to track users reading Instant Articles, the format of Instant Articles actively discourages users from engaging with their content beyond the single article. Instant Articles display an arrow to return to the Facebook newsfeed in the top left corner of the Instant Article at all times, even as the user scrolls down. Publishers cannot link back to their homepage in Instant Articles, preventing users from viewing any article other than the one they open from Facebook within the native browser.

The common thread of these practices is that Google uses its dominance in search to coerce publishers to adopt conducts that are hostile to their interests, while being profitable to Google by maintaining news readers in its environment where it is able to collect even more data (to feed its *search advertising* business, where search is monetised); while also promoting its related business in intermediation services (such as Google Ads and Google Ad Manager) in relation to display advertising on third party websites. Although these conducts may appear distinct, they all are parts of Google's monopoly leveraging exercise, and they are harmful to publishers, as well as their readers.

V. Bringing an end to Google's abuses of market power to the detriment of publishers

The EPC rejects the view that Google's conducts are solely a matter of copyright violation as these conducts are only made possible by Google's reliance on its dominance in search to coerce publishers to adopt conducts they would otherwise reject. As illustrated in the previous sections of this contribution, there is no question that Google is using its market power in search to take advantage of news publishers by appropriating their content, as well as the data produced by the readers' interactions with that content. This undermines the publishers' ability to monetise their content through subscriptions or via advertising. The common thread of Google's practices is that they leave publishers with a Hobson's choice, either caving in to Google's demands or being deprived of Google's search traffic if they resist.

The Commission should bring Google's anticompetitive conducts to an end. In this respect, while the EPC commends the Commission for its *Google Shopping* decision, it is concerned that behavioural remedies will not be sufficient to eliminate Google's ability to leverage its market power in search to the detriment of downstream rivals or firms that rely on its traffic to compete. In the digital space, behavioural remedies are complex to define, implement and monitor, and thus they can be easily evaded. They also do little to eliminate the inherent conflict of interest and risk of discrimination that arises when a platform competes on neighbouring markets with firms that depend on it for commercial relevance and success. The EPC thus considers that a structural (or at least functional) separation should be seriously considered by the Commission to maintain or restore effective competition.

VI. The digital platforms' anticompetitive practices create serious consumer harm

As seen in prior parts, Google harms publishers by appropriating their content through scraping, damaging their ability to monetise their content through its FCF policy allowing news readers to get free access to some paywall-protected news content, and commoditising news through its stripped-down AMP format, which weakens news brands. Although we did not discuss the competition issues raised by Facebook to the same extent, there is no question that Facebook's conduct raises largely similar issues as those by Google.

Digital platforms are also harming consumers of news in the following ways:

- First, by harming the publishers’ ability to generate revenues (through subscriptions and/or advertising), digital platforms reduce their ability and incentives to produce quality content as the production of such content requires significant financial resources. They also impede their ability to innovate by developing a variety of tools ranging from dynamic paywalls that allow Internet users to get a taste of a publisher’s content to mobile apps and other methods to disseminate that content. While the leading national newspapers may be able to survive, many other journals, particularly local ones, will either disappear or lower the quality of their offering, hence directly affecting their readership.
- Second, when displaying articles to users, digital platforms do not reward the original story with a higher ranking. To the contrary, others including blogs that simply reproduce the same content can appear higher in search results. Indeed, ad-funded posts of reproduced content that invest heavily SEO optimisation and accommodate the algorithms used by digital platforms (for instance by opting in to AMP) can feature higher in search results and newsfeeds than publishers of original content hosted behind a paywall. This distorts competition in the news publishing market and once again reduces publishers’ incentives to invest quality content, hence harming consumers.
- Third, algorithms used by digital platforms are designed to optimise engagement by showing content consumers are more likely to interact with. Further, digital platforms have made it harder for consumers to identify the news brand which is publishing the article, and whether it is the original source of the content. This has hampered consumers’ ability to assess provenance and led to a proliferation of fake news. This is leading to “echo-chambers” where consumers are increasingly exposed to opinions that confirm and do not challenge their existing views and values.
- Fourth, the disappearance and the weakening of newspapers may have severe societal consequences. For instance, in a recent paper,⁷ three U.S.-based academic economists show that following a local newspaper closure, municipal borrowing costs increase by 5 to 11 basis points in the long run. The loss of monitoring that results from newspaper closures is associated with increased government inefficiencies, including higher likelihoods of costly advance refunding and negotiated issues, and higher government wages, employees, and tax revenues.

In summary, the EPC is extremely concerned by practices of digital platforms that undermine the ability of news publishers – and many other industries depending on digital platforms – to thrive in the digital space. To throw some light on these practices and work towards remedies, the EPC urges the Commission to initiate a sectoral investigation on the activities of digital platforms.

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⁷ See Pengjie Gao et al., “Dies in Darkness? The Impact of Newspaper Closures on Public Finance”, 15 May 2018, available at <https://ssrn.com/abstract=3175555>