



September 30, 2018

Comments of News Corp to the European Commission

Re: Shaping Competition Policy in the Era of Digitisation

I. Introduction

News Corp would like to commend the European Commission for hosting a conference in Brussels in January 2019 on “*Shaping competition policy in the era of digitisation*”. It appreciates the opportunity to submit comments on this critically important subject, which it intends to focus on Panel 2: “*Digital Platforms’ Market Power*”.

As a global diversified media and information services company – comprised of businesses that include, among others, news and information services, book publishing, and digital real estate services – News Corp has a strong interest in the protection of fair competition in the online distribution of content. The rise of digital platforms has brought with it enormous benefits to consumers – including unprecedented access to news and information from many sources. Unfortunately, the same market dynamics that have allowed such benefits to flourish have also created opportunities for abuse of market power by digital platforms, which in turn harms publishers and consumers.

The purpose of News Corp’s comments is to assist the Commission in understanding the threats to the news industry resulting from the growing importance of digital platforms, including (i) the difficulty for news publishers to successfully operate a subscription-based business model when digital platforms use their market power to arrogate content while distorting traffic away from pay-wall-protected content; and (ii) the shrinking advertising revenues of news publishers linked with the growth of programmatic advertising and the market power exercised by digital platforms in the ad intermediation services markets. News Corp also intends to share some thoughts on how EU competition policy could be used to address these challenges and mitigate their anticompetitive effects.

While the business models of digital platforms may considerably vary, News Corp’s comments focus on platforms operating a business model predicated on offering a free service to users (*e.g.*, a search engine or social network) to aggregate attention monetized through advertising revenues. These platforms – including Google, Facebook Twitter, and others – are indeed those whose activities generate the most significant concerns for news publishers in that they unduly interfere with their ability to distribute and monetize news content.

The news industry is not the only industry under threat as a result of anticompetitive conduct in the digital economy. It is, however, one of the most consequential as it is responsible for connecting people to the recent and valuable information about their world. We also give citizens a way to oversee the choices and actions of those in power, both in government and in the private sphere. The news media is thus worth protecting, not merely because it is an industry that produces content consumers value, but because it is a vital component of our democratic system. News Corp calls on the Commission to ensure that digital platforms practices do not engage in anticompetitive conduct harming the news publishing industry.

The present comments are divided into six sections. First, News Corp discusses the challenges faced by news publishers in the digital era (Section II). It then discusses the digital platforms' anticompetitive conducts in the digital news space (Section III) and the consumer harm these conducts create (Section IV). News Corp outlines the challenges that may be faced by competition authorities when dealing with digital platforms' anticompetitive practices, as well as possible ways to address them (Section V). Section VI concludes.

II. Challenges faced by news publishers in the digital era

News publishers have always monetized their content through two main sources of revenues, namely subscription fees and advertising. In the digital era, while some news publishers solely rely on advertising fees, the majority of high-quality publishers rely on a combination of subscription and advertising revenues. The ability of news publishers to generate revenues online largely depends on the traffic they are able to attract to their websites. While some Internet users directly go to news sites, many go to digital platforms (*e.g.*, search engines) to access news content.

Internet traffic obviously matters to news publishers relying on advertising revenues. This makes these publishers largely dependent on digital platforms given their traffic allocation function and dominance. They might thus invest heavily in search engine optimisation or produce “click-bait” instead of producing original content in order to draw traffic to their websites. While subscription-based newspapers are less dependent on digital platforms, they still need online traffic to acquire new users who might become subscribers. Moreover, publishers using a subscription model still generate a substantial part of their revenues through advertising, for which traffic from the platforms is key. In short, digital newspapers are largely dependent on digital platforms for their commercial viability.

A further challenge for the news industry is linked to the important shift that has taken place in the online advertising space. While historically advertisers sought to associate their ads with certain categories of content (*e.g.*, luxury brands would, for instance, want their ads to be shown in the “life and arts” section of leading newspapers) and thus directly bought advertising space from publishers, the fastest growing category of advertising in the digital era is so-called “programmatic advertising” where ad targeting is fully-automated and based

on the analysis of *user* data (identifying the news readers who are the most likely to buy luxury brands), rather than contextual information about the content being consumed. The shift to programmatic advertising gives an insurmountable advantage to digital platforms given their greater access to user data, which they can collect across the Internet.

In addition to their data advantage, certain digital platforms dominate the advertising technology services and tools, including ad servers, ad exchanges, and data analytics, which advertisers and publishers use to match their respective demand and supply for advertising inventory. Given their dominance across multiple layers of the “ad tech” infrastructure, the digital platforms are able to set pricing in a way that allows them to capture the lion’s share of online advertising revenues.

News Corp recognizes that the advent of the digital era has been a major source of disruption in many industries and that disruption can unleash significant market benefits. However, news publishers are harmed by certain practices of an anticompetitive nature.

III. Digital platforms’ anticompetitive conducts in the digital news space

In order for news publishers to compete, succeed and innovate in the digital space, several conditions need to be met:

- Internet traffic should be allocated neutrally and transparently by digital platforms so that Internet users seeking news content are, consistent with their reasonable expectations, directed to the most relevant and reliable news content.
- Digital platforms should not be allowed to use their market power as traffic allocators to free-ride on news publishers’ content as it harms news publishers’ ability to monetize their content through subscription fees.
- News publishers should not be impeded by digital platforms in their ability to monetize their content through advertising.
- The “ad tech” industry needs to be competitive.

A. Digital platforms’ allocation of traffic should be neutral and transparent

One of the defining features of quality news publishers is that they invest significant resources in producing original news content (*e.g.*, heavily researched news stories or critical analysis of news developments) as original stories usually drive readers to buy subscriptions.

While online users can access news sites directly, they often use digital platforms, such as Google Search, to find stories on a given subject. However, instead of acting as a neutral intermediary to source the most relevant and reliable news content, digital platforms can and do allocate traffic in a way that suits their commercial interests to the detriment of (some categories of) news publishers. In this respect, the commercial interests of news publishers and digital platforms are not necessarily aligned:

- While news publishers are keen to build brand loyalty, digital platforms seek to commoditize news and maintain readers in their ecosystem, allowing them, and only them, to harvest valuable user data. For instance, Google effectively forces publishers to produce articles that are consistent with its AMP standard,¹ a new “stripped-down” format aimed at mobile pages. This format presents many disadvantages for publishers. First, as AMP pages are loaded on and served from Google servers, Google can maintain readers in its environment, as well as collect all the user interaction data generated on such pages. Moreover, because AMP pages have a unified format, AMP commoditizes content to the detriment of news brands.²
- Digital platforms may also design algorithms that discriminate against publishers operating a subscription-based business model in favour of those operating an ad-based model as the latter offer greater data gathering and advertising opportunities to digital platforms. For instance, paywall-protected breaking stories almost always appear in Google’s search results behind free news stories recycling the content of the breaking story. This distorts competition in news markets as it steers readers away from quality output in the form of original content, hence making its monetization more challenging.

It is therefore critically important to news publishers, and in particularly those relying on a subscription-based business model, than Internet traffic be allocated in a manner that rewards relevance and quality of content over the commercial interests of digital platforms.

B. Digital platforms should not be allowed to free-ride on news publishers’ content

News content is critical for digital platforms as Internet users are always looking for fresh, accurate and informative content and news is a key attention and engagement driver. In order to attract users to their ecosystem, search engines take news content (not only links to an article, but also extracts of such content or “snippets”) in response to user queries. Digital platforms may also aggregate news content by creating web pages (for instance, Google News), which collect and curate content produced by others to users –presenting it in ways that compete for attention with the original sources. In so doing, search engines

¹ Publishers that do not wish to produce articles consistent with this standard indeed see 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 mobile SERP.

² The critical importance of these dynamics cannot be overstated. Search and social platforms entice users with an offer of “free” services and tools, including free information. As the amount and quality of free information available online declines, the ability of search and social platforms to attract users into their environments necessarily declines. In direct contrast, because news publishers incur significant costs in creating reliable, quality news, they need to charge for their products in order to have a sustainable business model. Everything the dominant internet platforms do to coerce news publishers into providing free content and/or ceding access to consumer use data simultaneously benefits the platforms while hurting publishers, who are competing with the platforms for the same user attention to monetize (either in the form of subscription or advertising revenues).

arrogate, for free, attention and user data generated by the news content created by publishers at great cost. Because the dominant platforms are critical and unavoidable sources of user traffic, news publishers are coerced into accepting this arrogation; this process is also described as “forced free riding.”

Free-riding on news publishers’ content is not only a copyright problem but also – and perhaps more fundamentally – a competition law issue:

- The ability of digital platforms to free-ride on news publishers’ content reflects their market power over news publishers. Free-riding is possible because digital platforms are unavoidable sources of traffic; publishers therefore have to accept any and all terms attached by the digital platforms.
- Free-riding is exploitative. While exploitation may take the form of excessive pricing, the use of market power by digital platforms to appropriate original content produced by news publishers without compensation is similarly abusive. In the case of news aggregators, free-riding creates an additional penalty for news publishers as aggregators who scrape content are able to attract greater audiences than publishers because they can offer users a greater breadth of coverage (as a result of also scraping other publishers).
- Free-riding also has the effect of “*limiting production, markets or technical development to the prejudice of consumers*”. By harming the news publishers’ ability to monetize their content, free-riding in turn harms their ability to produce original content (and thus decrease the output and quality of a product sought after by consumers), and invest in dissemination means, such as high-quality websites (which are expensive to maintain), mobile applications (which are expensive to develop), etc. When this happens, a digital platform acts as an innovation bottleneck, which can deter the development of new and innovative products and services on the edges of the platform.

When free-riding is made possible by the exercise of market power, it *is* an antitrust problem.

C. News publishers should not be impeded in their ability to monetize their content through online advertising

Display advertising is critically important for digital newspapers, either as a sole source of revenues (for news publishers with an ad-based business model) or as a complementary source of revenues (for news publishers with a subscription-based model).

As noted above, the shift to programmatic advertising has created significant challenges for news publishers given the massive data advantage enjoyed by digital

platforms. Some counterstrategies are however available to news publishers. For instance, news publishers may try to bypass Google's ad intermediation services by targeting ads to specific readers based on longitudinal data accumulated across their own websites. When that is possible, advertisers can buy targeted ads associated with high-quality news content direct from the content owner.

This approach can only succeed provided that digital platforms (i) do not interfere with the news publishers' ability to collect data associated with their readers' interactions with their content and (ii) do not themselves collect this data and combine it with the large troves of data they already collect through their own activities (hence, eliminating any situational data advantage that news publishers may be able to gain). Digital platforms may, however, fail to act along these lines. Google's AMP is a case in point.³ By loading and serving all news publisher's content produced in the AMP format, Google does not only collect large troves of data associated with the readers' interactions with news content, but also makes it harder for news publishers to use their data.

In short, if digital platforms are at the same time allowed to acquire and use data associated with the readers' interactions with news content, while making it harder for news publishers to get access and use that same data, news publishers cannot compete for advertising revenues with these platforms.

D. The ad tech industry needs to be competitive

In a programmatic advertising-dominated world, both advertisers and publishers are heavily reliant on the intermediation services necessary to match the supply of and demand for advertising inventory. These services include (i) publisher ad technologies;⁴ (ii) exchanges, networks, and other means of transacting for advertising inventory without a human salesforce; (iii) advertiser ad buying technologies;⁵ and (iv) audience data services.⁶

Each of these services are dominated by digital platforms. This creates several risks for their rivals, including anticompetitive tying⁷ and lack of interoperability.⁸ Given the lack of competition and transparency with which certain platforms operate their intermediation

³ Scott Gilbertson, "Kill Google AMP before it kills the web", *The Register*, 19 May 2017, available at https://www.theregister.co.uk/2017/05/19/open_source_insider_google_amp_bad_bad_bad/

⁴ These are technologies that facilitate ad inventory management, the serving of advertisements, and the tracking/reporting on ads inventory). See, e.g., Google Ad Manager (earlier known as DFP and AdX).

⁵ These are technologies to manage advertiser ad campaigns, creative inventory, and digital advertising budgets. These technologies are also part of Google Ad Manager.

⁶ These are data and associated tools to manage and analyse data in support of ad targeting and performance optimization.

⁷ For instance, while DFP and AdX used to be separate products, they have been recently merged into Google Ad Manager.

⁸ Concerns have been expressed that Google intermediation tools may not be compatible with rival solutions. See, e.g., Kean Graham, "Header Bidding: The War of the Auction", *Medium*, 24 May 2016, available at <https://medium.com/ad-optimization-tips-and-adsense-alternatives/header-bidding-the-war-of-the-auction-fde1ee27c26f>

services, there is also a risk that news publishers (as well as advertisers) are charged a supra-competitive price for the distribution services they receive in the ad tech marketplace.

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

While news publishers are suffering first-level harms because of the digital platforms' anticompetitive practices, these practices also create significant second-level consumer harm:

- By harming the publishers' ability to generate revenues (through subscriptions and/or advertising), online platforms reduce their ability and incentives to produce quality output as the production of quality content requires significant financial resources. Without investment, journalists will be laid off, offices will be closed, and longer-term investigations will be cut. This directly harms consumers who are looking for original, accurate and timely news content. In this respect, the recurring argument by digital platforms that (news) content should be free and thus prioritized because this is what consumers want is not only self-serving, but also fundamentally wrong because quality content is costly to produce and, in a context where digital platforms absorb a growing share of advertising revenues, subscription fees are vital to the future of news organisations.
- The digital platforms' anticompetitive practices also hurt innovation not only in that they reduce the incentives of news publishers to produce original content, but also deprives them of the means to improve their readers' experience through new modes of dissemination, improved websites and apps, etc. Digital platforms prefer news readers to spend time in their ecosystems rather than having them interact directly with publishers websites and apps, which makes it more challenging for publishers to monetize their content and create brand loyalty.
- The digital platforms' efforts to maintain news readers in their ecosystem and to commoditize news while promoting their own brand as a source of news content produce a "brand flattening" effect, which is the weakening of the association between content and its source. Thus, "*if readers do not pay attention to the identity of the publisher when they read articles on Google News*", publishers "*may lose their incentives to maintain a reputation for quality and consumers may be less willing to subscribe to the publisher or use the publisher's mobile application.*"⁹ Brand flattening may also make it harder for Internet users to distinguish between reliable and non-reliable sources of information (as all sources of information look alike), leading to both higher consumer discovery costs and an environment in which it is easier for dubious news outlets to spread misinformation.

⁹ Susan Athey, et al., The Impact of Aggregators on Internet News Consumption 2 (Working Paper, 2017), <https://pdfs.semanticscholar.org/27e4/6dfcfbce75660b39462cccff62328d0ede5.pdf>, at p. 27.

V. Challenges faced by competition authorities when dealing with digital platforms' anticompetitive practices

While there is no reason to believe that the current EU competition law framework is insufficient or unsuited to address the issues created by digital platforms, one potential challenge relates to the nature of the relations between digital platforms and publishers: they are complex and do not necessarily fall into the traditional consumer/competitor categories, as well as in the traditional theories of harm based on vertical leveraging as in the *Microsoft* or *Google Shopping* cases.

In News Corp's view, EU competition law is, however, sufficiently flexible to challenge anticompetitive practices by digital platforms that may negatively affect quality news output, as well as the publishers' ability to innovate. Two competition law provisions are of particular importance in this respect.

First, Article 102(a) TFEU on exploitative abuses has a role to play in digital platform markets because the ability of digital platforms to take advantage of its users (either other businesses or end consumers) is significant. For instance, the ability of digital platforms to use their market power (as traffic allocators) to arrogate content produced by third parties or to capture data generated by the interactions of users with such content is exploitative. There is thus an important role for Article 102(a) TFEU to ensure fairness in the manner in which digital platforms deal with other businesses and end users.

Second, while the Commission has been traditionally concerned about cases of vertical foreclosure where a dominant firm is leveraging its market power on an upstream market to extend it on a downstream market, it should consider other forms of abuses that do not necessarily fit into that model:

- For instance, digital platforms may use their market power as traffic allocators to undermine firms operating business models that are aligned with their own interests, which rely on free access to content. Thus, Google's First-Click-Free Policy, whereby publishers have had for a long time giving search users access to up to three free articles per day per browser per device on pain of having their content thus not visible on Google's Search Engine Results Page ("SERP"), effectively undermined news publishers operating a subscription-based model.¹⁰ This distorted competition on news markets to the detriment of consumers.

¹⁰ While Google has now abandoned this policy, it created significant financial damages to news publishers, which will never be recovered. See Thuy Ong, "Google scraps controversial policy that gave free access to paywalled articles through search", *The Verge*, 2 October 2017, available at <https://www.theverge.com/2017/10/2/16395604/first-click-free-policy-flexible-sampling-publishers>

- Digital platforms may also undermine the ability of other companies to innovate by undermining their incentives to do so. In the news industry, innovation can take at least two forms. First, the production of original content, which is the way in which high-quality newspapers differentiate. Second, news publishers innovate by experimenting new forms of delivering content and ways to enhance their readers' experience. Traffic distortions, discrimination and free-riding undermine the ability of news publishers to innovate by interfering with their ability to monetize their content and thus generate the resources needed for innovation.

Article 102(b) TFEU, which prohibits dominant firms from “*limiting production, markets or technical development to the prejudice of consumers*” is an ideal vehicle to catch these other forms of abuses as it does not require vertical foreclosure for its application.

VI. Conclusion

While the rise of digital platforms has brought with it enormous benefits to Internet users in terms of providing access to news and information from a vast array of sources, some of their conducts have also been a major source of concerns for news publishers as they distort competition in news markets and interfere with the publishers' ability to monetize their content with significant potential harm to consumers.

Given the complexity and in some instances the opacity of these conducts, as well as their potential impact not only on publishers and consumers, but also on the ability of the press to pursue its role as a fourth estate, News Corp would like to invite the Commission to initiate a sectoral inquiry on the basis of its powers under Article 17 of Regulation 1/2003.

In any event, DG COMP should be extremely vigilant towards the practices of digital platforms that distort competition in news markets, decrease quality news output and harm the ability of news publishers to innovate.