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News Media Europe's contribution to the European Commission public consultation on the Notice on the definition of relevant market for the purposes of Community competition law

News Media Europe represents the progressive news media industry in Europe – over 2,500 media companies including newspapers, radio, television and internet. News Media Europe is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing the news brands, which are one of the most vital parts of Europe's creative industries.

Recommendations

- **NME welcomes the initiative to review the European Commission's Notice on Market Definition in light of rapid digitisation and evolving market structures;**
- **NME stresses that media markets are developing in different ways and at different speeds within national geographic markets, with the role and importance of user and advertising revenues differing across such markets;**
- **NME stresses that the distinction between analogue and digital media markets is no longer appropriate in several respects, and that the market definition process should seek to support the digital transformation of news media;**
- **NME notes that ongoing media convergence has important implications for the definition of relevant product markets as news media are increasingly competing for users with companies such as Netflix and Spotify;**
- **NME calls on the European Commission to assess whether market definitions applied to online advertising accurately reflect market reality in light of the diversity of actors and services active in advertising technology;**
- **NME questions the assumption that digital markets are by definition strongly contestable when assessing potential competition, calls on the European Commission to recognise entrenched dominant positions;**
- **NME calls on the European Commission to define an input market for data to reflect the increasingly important role of data as an important common denominator between different markets.**

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NEWS MEDIA EUROPE

1. Introduction

News Media Europe welcomes the opportunity to share its views on the evaluation of the Notice on the definition of relevant market (“the Notice”). The review of the Notice is both timely and necessary in light of rapid digitisation and evolving market structures. This contribution complements our feedback on the Digital Services Act and the New Competition Tool.

Media markets have undergone important transformations since the Notice was originally adopted, and our submission seeks to provide policy makers and competition authorities with relevant industry insights and reflections for the purpose of defining markets.

The need to reassess whether existing rules on market definition are fit-for-purpose has already been highlighted in the European context¹. The market definition process is central to the good functioning of competition law and it is essential that the European Commission’s guidance sets out a clear and consistent approach to both antitrust and merger cases.

The broader media market in which the news media industry operates has undergone major transformations since the Notice was first adopted, with the advent of digitisation and the rise of structurally distinct digital markets with special market features. These developments accordingly bear important implications for the purpose of defining relevant markets.

2. Understanding media markets

Media markets present the common feature of being two-sided markets, where undertakings compete on one side of the market to attract audiences, and on the other to attract advertisers. By and large, the media industry is reliant on advertising as an important source of revenue. That is particularly true for certain types of media such as news publishers and radios.

The advent of the internet and digitisation mean that it has in some ways become easier to reach audiences, because media content, including journalistic and news content, is broadly available online and can be accessed either via content aggregators or directly on proprietary websites. Changing consumer habits also mean that journalistic content is increasingly reliant on the algorithms of intermediaries to reach audiences².

News content is often accessed at zero monetary costs to readers (not literally for “free”, but in exchange for data and exposure to advertisement). Increasingly, news content can also be accessed in exchange for a direct payment as is the case for a growing number of news publishers (eg. via a subscription). Payments are already the norm in several European countries. In addition, we note that in some national markets press publishers now generate the majority of their revenues from subscriptions. The

¹ J. Crémer, Y-A. de Montjoye and H. Schweitzer (2019) Special Advisers’ Report “Competition policy for the digital era” ([link](#))

² University of Oxford Reuters Institute for the Study of Journalism (2020) Digital News Report 2020 ([link](#))

NEWS MEDIA EUROPE

main reason for this are the reduced advertisement revenues that result from Google's and Facebook's dominance in advertising markets.

While the growth in paid-for content models is a welcome development, we expect that many news publishers in Europe will continue to be very reliant on advertising revenues in the foreseeable future. Not only do the introduction of paid-for content business models (eg. subscriptions) require a cultural shift in consumer attitudes over a long period of time to become successful, subscription models also have limitations that are becoming increasingly clear³⁴, which is why advertising revenues remain important and the transition towards paid-for content models is a long-term process.

On the advertising side of the market, user data can be used to deliver relevant advertisement. In the case of online advertising, the relevant markets have become highly concentrated in the hands of a few companies and notably Facebook (in display advertising) and Google (in search advertising). Google in particular has a very strong presence both on the buy and sell sides of the market, and throughout the entire advertising technology supply chain.

3. The distinction between analogue and digital media markets

The present approach to defining relevant markets risks driving excessive and inappropriate distinctions between analogue and digital media which in our view are no longer justified in contemporary media and advertising markets because they no longer adequately reflect the key parameters and dynamics of competition.

It is clear from our perspective that while an important shift towards digital has occurred in the media landscape, the boundaries between analogue and digital media may become less clear. Importantly, insisting on a continued distinction between analogue and digital could ignore the competition that can take place between different types of media, as well as the competitive pressure from dominant digital platforms experienced by both analogue and digital media.

For example, the United Kingdom's competition authority recently found, as part of its recent report on online platforms and digital advertising⁵, that "there is limited substitutability between digital advertising and traditional advertising media" (see Appendix N of the report in particular). We would question whether this particular conclusion accurately reflects the underlying logic that informs the behaviour of firms, and whether the results yielded would be consistent with market reality.

Indeed, news publishers are well aware that the print market as well as readership and advertising revenues associated with it, are undergoing a rapid structural decline. Accordingly, news publishers are seeking to adapt by developing a stronger digital presence. There is therefore a need to reflect about how the definition of distinct print or analogue markets can be used to support the digital transition of news media.

³ R. Fletcher (2019) Paying for News and the Limits of Subscription ([link](#))

⁴ Tinius Trust (2020) Media Diversity Under Threat – digital subscriptions survey: Sweden and Norway ([link](#))

⁵ UK Competition and Markets Authority (2020) Online platforms and digital advertising market study ([link](#))

NEWS MEDIA EUROPE

Ensuring that a revised market definition notice addresses this concern is particularly important for merger cases. The media sector is presently characterised by ongoing consolidation. The two main reasons for this are the two-sided nature of media markets, which means that such markets have a higher natural tendency towards concentration due to strong network effects, and the intense competition with global platforms, which creates the need to achieve greater economies of scale and scope to compete.

Ultimately, mergers in the media sector are not only a question of consolidation to compete with global platforms, but also a matter of survival for often smaller, local and regional media who may no longer be economically viable⁶. We expect that consolidation will accelerate as a result of the serious impact of the COVID-19 pandemic on the broader media sector.

Therefore, if media consolidation continues to be assessed along the lines of the traditional distinction between print and digital media, there is a significant risk that transactions involving local and regional media and larger media groups would struggle to obtain clearance from competition authorities on the basis of, for example, market shares in the print market or in print advertising. That is, without taking into account actual and potential competition found in digital media markets.

Ideally, industry consolidation should be allowed to continue without requiring media groups to wait for potential acquisitions to be on the brink of financial collapse so that they may use the failing firm defense argument, which in any case typically involves a high burden of proof so that transactions may be cleared by competent authorities.

We also wish to use this opportunity to stress the need to ensure more proportionality and efficiency in the legal burden of proof required to support the review of merger cases, following reported cases of mergers being abandoned due to the associated legal advice costs exceeding the possible benefits gained from mergers.

4. Media convergence and product markets

Media markets are experiencing an ongoing convergence process as traditional formats such as print, television and radio are merging with digital, portable and remote technologies. There are multiple reasons for this including evolving consumer habits, the diversification strategies of media groups, and innovative products seeking to enrich the dynamic experience of audiences.

In the case of news publishers, for example, text-based offerings are increasingly accompanied by embedded audio or audiovisual content as well as interactive charts to support the visualisation of data. While the implications of such mixed media content offerings for current practice in defining distinct media markets along the lines of traditional media formats may not be of immediate relevance, there is a need to start monitoring the pace of these developments going forward because of the tendency of digital markets to evolve at a rapid pace.

⁶ Dame Frances Cairncross (2019) The Cairncross Review: a sustainable future for journalism ([link](#))

NEWS MEDIA EUROPE

That is particularly relevant when discussing the growth of subscription-based media content offerings which media groups are increasingly making use of in the marketplace. The obvious examples are Netflix and Spotify, even though both these service providers remain within clearer boundaries with respect to the type of media they serve. Yet, competition in this space is intensifying in some respects, notably with the market entry of large platform ecosystems.

The news media is in essence increasingly competing for people's time, attention and budgets. Consumers have limited time and are unlikely to take out more than a certain amount of online subscriptions, and publishers must now live up to the expectations of their users through the provision of quality content, or risk losing audiences to other media companies.

In this sense, news media are increasingly in direct competition with other kinds media providers such as Netflix and Spotify, who would typically be associated with distinct product markets. Indeed, we increasingly identify an important, horizontal competitive relationship that is stimulating rivalry between companies and influencing strategic market decisions by news publishers.

This development ultimately also reflects the growing importance of ensuring open access to online marketplaces for news publishers, both so that they may benefit from access to high-value data and so that they may continue building direct relationships with their customers, whether this refers to audiences or to advertisers.

Apple provides a good illustration for this point as it has recently announced that it intends to launch the "Apple One Bundle", which will combine several of its media offerings into a single subscription (eg. news, television and music)⁷. If the issue of consumers being locked into ecosystem persists, the market definition process may benefit from a reflection on whether there is a need to place greater emphasis on the perspective of consumers.

While assessments related to the plurality of the media landscape fall within the exclusive competence of Member States, a position which we fully support, it remains important for the European Commission to consider that the free choice of access to different types of media can be severely adversely impacted for citizens if closed walled-gardens and ecosystems persist, with important consequences for their ability to exercise their fundamental right to freedom of expression and access to information.

5. Market definitions in online advertising

The European Commission's decisional practice recognises online advertising as a distinct product market. It also further distinguishes between search advertising and display (non-search) advertising. Notwithstanding our stated reservations on the continued distinction between online and print advertising, this general approach is in our view appropriate and reflects the substitutability between different services.

A separate market for intermediation in online advertising has also been recognised by the European Commission to reflect the important roles of advertising networks and

⁷ Apple (2020) Press release "Apple One makes enjoying Apple subscription services easier than ever" ([link](#))

NEWS MEDIA EUROPE

advertising exchanges in the marketplace⁸. This approach continues to be relevant in current decisional practice⁹. More recently, the European Commission also explicitly identified a market for the supply of advertising technology services, which is also reflected in its announcement of the in-depth investigation of the proposed acquisition of Fitbit by Google¹⁰.

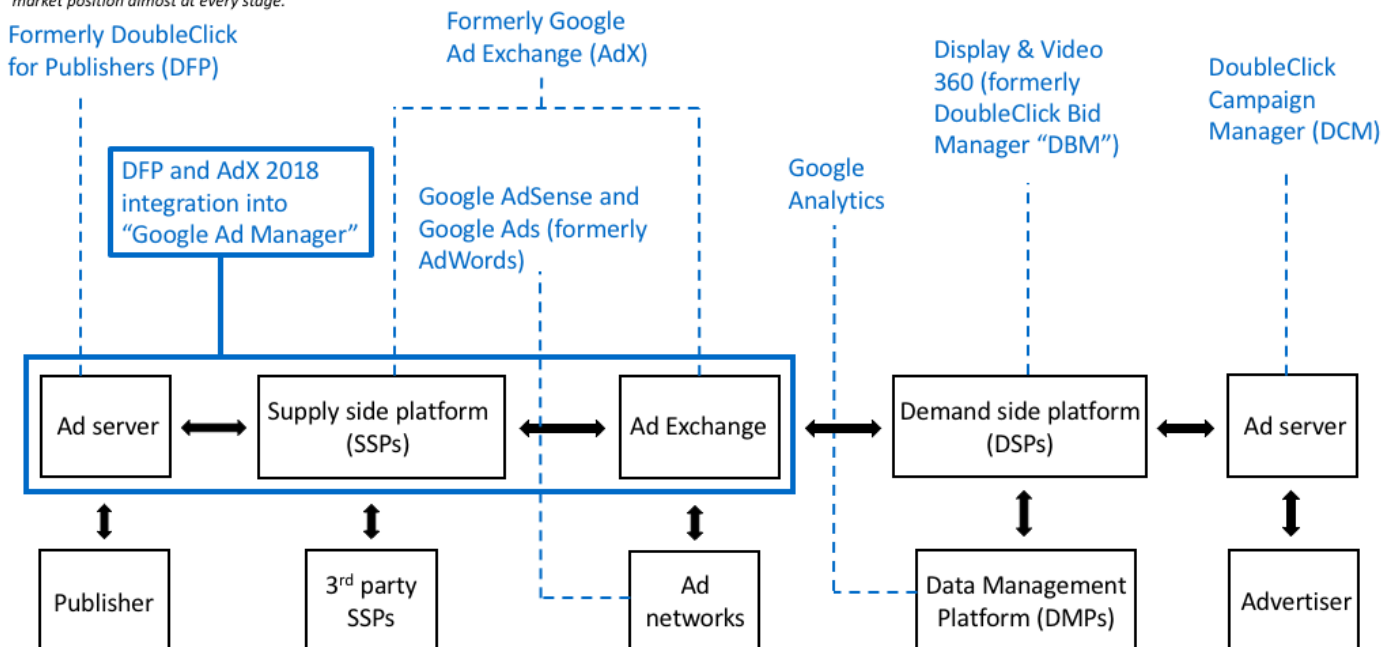
While we agree with the importance of recognising the distinct market for the supply of advertising technology services, there are concerns that the underlying market definition is excessively broad and unable to fully reflect the complex nature of online advertising¹¹. Each of the actors in the advertising technology supply-chain fulfil distinct roles that do not seem substitutable and which respond to different competitive constraints along the supply chain.

So while the market for the supply of advertising technology services seems to have been broadly defined, insofar as it seems to include inter alia advertising networks, supply-side platforms, advertising exchanges and demand-side platforms, the reality of the market may best be conveyed through a more segmented approach to the definition of the market(s), which could improve decisional practice and more accurately reflect the complex reality of online advertising markets.

By examining the role of Google along the online advertising technology supply-chain (see below), it may indeed be tempting to conclude that there is a broad market for the supply of technology services. However, a closer look at the variety of market

Online programmatic advertising: the role of Google

NB. The market shares at each point of the ad-tech supply chain for Google are difficult to determine, but anecdotal evidence suggests it has the strongest market position almost at every stage.



⁸ Commission decision of 11 March 2008 in Case M.4731 – Google/DoubleClick.

⁹ Commission decision of 20 March 2019 in Case AT.40411 – Google Search (AdSense).

¹⁰ European Commission (2020) Press release “Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by Google” ([link](#))

¹¹ D. Geradin and D. Katsifis (2019) An EU Competition law Analysis of Online Display Advertising in the Programmatic Age ([link](#))

participants and services they provide would also suggest that there may be various markets under discussion, making further market segmentation desirable.

6. The role of potential competition in defining markets

When assessing the scope of the relevant market, we believe that the traditional concepts of demand and supply-side substitution should play a less important analytical role in identifying competitive restraints in digital markets. This is particularly true for digital markets characterised by the presence of large platforms that leverage enormous quantities of data.

This is due to the understanding that a clear competitive relationship can often be established in such digital markets in the absence of demand or supply substitutability, due to a mere threat of entry by the said platforms. As such, the analytical emphasis should instead be placed on the notion of potential competition.

The structural characteristics of digital markets are such that, under certain conditions, the mere threat of entry by a given undertaking into a new market can in itself be sufficient motive to stimulate competitive rivalry and behaviour between undertakings. This is because digital markets can be characterised by strong levels of contestability of market positions, but only if certain conditions are met.

A strong user base can in that context be seen as a good proxy for the potential threat that an undertaking can pose to others, notably because of the potential entailed in collecting data and competing on that basis. Along the same lines, it may also be argued that the importance of potential competition is even more pronounced in zero-priced markets, or where price is not the main parameter of competition.

Conversely, the assumption that digital markets are strongly contestable should also not be taken for granted since the rise of large platform ecosystems is also the result of leveraging of data in unprecedented scales in combination with the creation of walled gardens. Together, these dynamics may produce insuperable competitive advantages or significant market position entrenchment, whereby some platforms become insulated from dynamic competition and seemingly credible competitive threats lose material significance. In this sense, contestability typically does not run both ways in digital markets characterised by the presence of global platforms.

Overall, it appears that entry into digital markets is less interlinked with neighbouring markets compared to what we may be used to in more traditional markets. Ultimately, the aim for competition policy should be to incorporate a better and more sophisticated understanding of firm behaviour and strategic management into antitrust analysis, which would yield a more consistent framework.

7. The role of data in defining markets

Data remains an emergent field in the application of competition law, posing both practical and conceptual challenges. One important question is whether, and if so how, the underlying role of data in shaping markets should be reflected in the market definition process. The fierce market rivalry around data and the shared reliance of

NEWS MEDIA EUROPE

platforms on data as a competitive asset to help them enter new markets means that data is becoming the common denominator between markets.

We believe that the importance of data is one of the key factors that can help explain the cross-market dominance of companies such as Google and Facebook in digital markets. This could in and of itself suggest that there is good reason to recognise a distinct market for data when defining relevant markets. In an abuse of dominance context, this would under certain circumstances have important implications for practices or conduct that restrict access to data, which could accordingly be found to constitute both exclusionary and exploitative abuse.

As a result, we believe that the European Commission should consider defining a separate and relevant market for data, even when data is not necessarily traded as a standalone product. Such a market could be conceived as an input market rather than an end product or service market. In any event, it is clear in our view that systemically understating the economic and competitive role of data by ignoring the industrial ecosystems built around it and the competitive constraints it can generate will result in analyses and decisions that are at odds with economic reality.