

Comments by the *Business at OECD* Competition Committee to the
OECD Competition Committee Working Party No. 2

Digital Advertising Markets

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I. Introduction

1. Online advertising has been the subject of intense scrutiny by competition authorities in the last few years. At a time when advertisers are moving away from traditional methods of advertising such as newspapers and commercial media, the increase of advertising on the internet and the role of certain key players in this sector, has led authorities to examine competition issues in more detail. Several authorities such as the Australian Competition and Consumer Commission (ACCC), the French Autorité de la Concurrence, the German Bundeskartellamt and the United Kingdom Competition and Markets Authority (CMA) have all carried out market studies and are considering various options on how to address perceived issues in this sector, either through competition law or regulation.

2. In recent years, significant competition concerns have been expressed about online advertising, in particular considering the role large players play in this area. For example, a recent report of the U.S. House Judiciary Committee (which did not receive bipartisan support), concluded that “[o]ver the past decade, the digital economy has become highly concentrated and prone to monopolization. Several markets investigated by the Subcommittee—such as social networking, general online search, and online advertising—are dominated by just one or two firms,”¹ and “[t]hey not only wield tremendous power, but they also abuse it by . . . extracting valuable data from the people and businesses that rely on them,”² and “[t]he accumulation of data can serve as another powerful barrier to entry for firms in the digital economy.”³

3. However, as one scholar has noted:

In general, the debate about market power in online advertising tends to have a remarkable lack of precision. Commentators talk[] about network effects without specifying for whom they are envisaging that the network effects apply or why. [They also] talk about how “sticky” online platforms are without being clear about whether they mean they are sticky for advertisers or users. And commentators generally take as given the principle that data is the lifeblood of online advertising, without distinguishing what kind of data they mean, how broadly available it is, or whether such data guarantees the ads success. However, such precision is necessary in order to have a meaningful

¹ MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONGR., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 11 (Comm. Print 2020), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

² *Id.* at 6.

³ *Id.* at 42.

discussion about sustainable sources of competitive advantage in online advertising markets.⁴

4. *Business at OECD* encourages agencies to undertake any analysis of online advertising markets with precision to ensure that conclusions are robust and directed at identifiable competition violations, and that remedies are appropriate to address the competition violation at hand. Moreover, to the extent that regulation (rather than enforcement) is considered on the basis of competition concerns, precision in identifying the underlying competition problems is both a necessary precursor and an essential element of an effective framework.

II. Online Advertising in General

5. The term online advertising includes many different types of advertisement that are delivered on the internet through personal computers, tablets and, increasingly, mobile devices. The last few years have seen a significant growth of the sector. According to the Interactive Advertising Bureau, display advertising totaled \$49.8 billion in the United States in 2018, up from \$39.4 billion reported in FY 2017.⁵ Since 2016, U.S. programmatic digital display ad spending has grown year-over-year by large double-digit figures (from \$25.48 billion in 2016 to \$49.23 billion in 2018, with a projected \$81 billion by 2021).⁶ At the same time, online advertising has become more sophisticated with a large number of outlets. The industry certainly is miles beyond the first clickable advertising banner in 1994 by AT&T on HotWired and which is usually considered the first ad on the web.

6. Online advertising has several advantages over traditional advertising. For example, it is possible to monitor the success of ads in real time and how many clicks an ad receives so that it is possible to change quickly the advert that is not fulfilling its expectations. Fees have evolved as well: while initially we had fixed charges now we have fees which are calculated on how many times an ad is viewed or a pay per click model (PPC). In addition, advertisers can bid on placements in search results: an advertiser pays the bid amount every time a search engine user clicks on the relevant ad. The more the advertiser is willing to pay per click, the higher up in the list of search results the ad appears.

III. Online Advertising: Disruption and Innovation

7. From its inception, internet-based advertising was a “gale of creative destruction” (in the words of Schumpeter, 1942) that swept across the advertising and media landscape.⁷ This results from significant reductions in transactions costs between merchants and consumers:

The[se] methods enable merchants to deliver information that is targeted to those consumers who value the information the most and are most likely to act on it. An oft-quoted line in the advertising business states ruefully: “Half the money I spend on

⁴ Catherine E. Tucker, *Online Advertising and Antitrust: Network Effects, Switching Costs, and Data as an Essential Facility*, CPI ANTITRUST CHRON., Apr. 2019, at 6, available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/04/CPI-Tucker.pdf>.

⁵ INTERACTIVE ADVERT. BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT 2018 FULL YEAR RESULTS (May 2019), available at <https://www.iab.com/wp-content/uploads/2019/05/Full-Year-2018-IAB-Internet-Advertising-Revenue-Report.pdf> [hereinafter IAB REPORT].

⁶ Lauren Fisher, *US Programmatic Ad Spending Forecast 2019*, EMARKETER (Apr. 25, 2019), available at <https://www.emarketer.com/content/us-programmatic-ad-spending-forecast-2019>.

⁷ David S. Evans, *The Online Advertising Industry: Economics, Evolution, and Privacy* 3 (Apr. 2009), available at <https://ssrn.com/abstract=1376607>.

advertising is wasted. The only trouble is I don't know which half." The new techniques replace a sledgehammer with a scalpel.⁸

8. As leading advertising executive Rob Norman said, digital advertising has "changed the dynamics of advertising forever by introducing a new market defined by auction-based pricing. It moved power from those brands with the most money—and might—to those with the most insight and the greatest relevance. It brought more accountability to marketing with payment reliant upon user action. And it leveled the competitive field by removing barriers to entry (like upfront payment), so even the smallest business could market its wares to anyone."⁹

9. A common feature of digital media markets, including online advertising, is that they bring fast and potentially disruptive innovation, are characterized by an impressive growth rate as well as by the presence of digital platform intermediaries that have a central role. Online advertising is able to compete with traditional advertising because it has generated unprecedented advantages for businesses and end consumer alike.

10. Businesses value digital advertising platforms because they can reach many consumers. It is also possible to adapt the advert to the individual, something that traditional media cannot do.

- For example, sponsored search ads tie advertising messages to specific keywords searches. Advertisers can therefore be matched to consumers who showed an interest in particular topics.
- Behavioral targeting and re-targeting techniques allow to use information collected on an individual's browsing behavior, such as the pages he has visited or the searches he has made to select which advertisement to display to that individual.

11. There are also other advantages. In general, online advertising is less costly than TV or newspaper advertising. This allows a larger number of advertisers, including smaller companies, to promote their products. Digital advertising generally has lower transaction costs so that it is accessible to smaller advertisers.

12. Online advertising has implications for the consumer as well. Often, the consumer views the online content or app while also viewing advertising. This model is common in traditional advertising and has existed for decades, e.g., in commercial television and "free" print media. The key distinction in online advertising is that it often is more targeted based on knowledge of user preferences. This targeting feature both makes the advertising more efficient, and therefore cost effective, but also can implicate privacy concerns where the targeting is based on personal user data.

13. For the consumer it also offers certain benefits:

- Consumers receive more tailored and pertinent information for their shopping habits and interests.
- Consumers can receive certain free services and at times elect whether to receive advertising. This is quite common for example in the app world where two versions often exist: one paid

⁸ *Id.*

⁹ Rob Norman, *AI and machine learning have many wondering about marketers' future role. GroupM's Rob Norman says 'fear not,'* THINK WITH GOOGLE (Mar. 2008), available at <https://www.thinkwithgoogle.com/future-of-marketing/emerging-technology/rob-norman-on-evolving-technology>.

with no adverts, and one free with adverts. This model allows users to determine the value of advertisements relative to the value of no advertisements.

- Where this “paid” choice is not given, the decision for users is whether the app or online resource is worthwhile in light of the type and volume of advertisements provided. If the value of the app is not worth the price, the user can choose not to use the app or resource. This is also similar to commercial television where a viewer can switch off a program with too many adverts.
- Disclosures with regard to personal data collection and use is often required by law or regulation. However, users may not always review such disclosures or appreciate the implications thereof.

IV. Relevant Market Considerations

14. Online advertising covers a broad swath of activity. The term “online advertising” refers to all types of advertisements delivered on the internet, but there are many aspects to this activity including graphic format advertising (e.g., text ads with basic interactivity; standard display ads with more graphical interest and interactivity, and “rich media” ads with a greater range of interactivity, such as mouseovers, keyboard inputs, video, or similar components) as well as targeted advertising, which may take form in search ads (ads that are displayed as results by a search engine after a user has specified a set of keywords that the advertiser has identified in advance) or non-search ads.¹⁰

15. The online advertising sector has experienced significant growth in recent years. The outlets for online advertising have become more sophisticated and varied. On the supply side, online advertising outlets may include search engines, (e.g., Google, Edge, Yahoo), social networks (e.g., Facebook, WhatsApp, Twitter), online news outlets (e.g., CNN, Daily Mail, Huffington Post), user-generated content platforms and apps (e.g., Instagram, YouTube, TikTok), and e-commerce outlets (e.g., eBay, Amazon, Rakuten). Digital platforms that offer free services to their users typically commodify themselves by hosting online advertisements and gathering information about their users through cookies and usage data.¹¹ Online advertising generally serves the same goals as offline advertising: namely, to educate, influence, and drive consumers through the delivery of information.¹²

16. Though consumers may be the end-recipients of online advertisements, the market is driven by the sellers and purchasers of the ads themselves. Today, the market for online advertising focuses on the viewable impressions of an ad (whether a consumer has seen the ad) rather than the delivered impressions of the ad (whether a consumer could have received it).¹³ By constraining the market to viewable impressions, the seemingly infinite supply of online ads is limited to those which the consumers have actually seen. From a demand perspective, advertisers are naturally inclined to pay for ads that will successfully reach their intended audience.

¹⁰ James D. Ratliff & Daniel L. Rubinfeld, *Online Advertising: Defining Relevant Markets* (2011), available at <https://www.law.berkeley.edu/files/Online-Advertising2011.pdf>.

¹¹ D. Daniel Sokol & Jingyuan Ma, *Understanding Online Markets and Antitrust Analysis*, 15 *Nw. J. Tech. & Intell. Prop.* 43, 47 (2017), available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1267&context=njtip>; OECD, *RETHINKING ANTITRUST TOOLS FOR MULTI-SIDED PLATFORMS* 38 (2018), available at <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf>.

¹² Ratliff & Rubinfeld, *supra* note 10, at 12.

¹³ Magid Abraham, *The Economics of Online Advertising* (Aug. 2012), available at <https://www.comscore.com/content/download/17977/850273/file/The>.

17. The majority of online advertisements are sold through ad networks or ad exchanges, which use an auction mechanism to commodify ad units by placing them before consumers in one or more online ad outlets.¹⁴ These auctions determine the price of the online ads based on the supply and demand for that ad; for lower-supply ads, the greater the market-clearing price will be at auction, and vice-versa.¹⁵ Some online advertising is sold contextually, by placing advertisements adjacent to certain content on specific platforms known to be attractive to a targeted audience.¹⁶

18. Some online markets may be multi-sided, thus requiring a more complex analysis.¹⁷ Online multi-sided markets may be defined as those “in which a firm acts as a platform and sells different products to different groups of consumers, while recognising that the demand from one group of customer depends on the demand from the other group(s).”¹⁸ Competition in multi-sided online markets typically exists across various types of platforms—for instance, a firm may compete directly with other digital platforms for online advertisements, while also competing against firms operating in offline markets, such as cable television advertisements or print advertisements.¹⁹ Because the various sides of the market interact, an assessment of competition requires an evaluation of the relationships between the various sides of the market, and the impact of any market impact on those various sides of the market.²⁰ Since multi-sided markets share interlinked demand, profits on one side may be diminished by profits on the other side of the market.²¹

19. From a demand perspective, many advertisers use both online and offline adverts, often interchangeably. Relative demand for advertising on a particular type of platform likely will vary from advertiser to advertiser, and the mix of online and offline media demand may vary not only by advertiser, but by campaign, product, time period, etc. For this reason, online and offline advertising will sometimes be complements and sometimes be substitutes. The individual product mix and demand curve(s) for an individual advertiser may not be known to the specific online platform or outlet. In some cases, online outlets may be indifferent to these differentiated demands where they manage on the basis of availability and offer advertising space on an “auction” basis. Demand-side characteristics, and the ability of online advertisers to price discriminate based on demand preferences, should be considered as part of the market definition analysis.

20. It is interesting to note that while in the past, advertisers viewed the different levels of the marketing chain as complements,²² this is evolving due to measurement capabilities, “meaning that advertisers can effectively use any format at any place in the funnel and evaluate whether it is effective for that particular target audience. Ultimately, an advertiser is indifferent between whether it is a video

¹⁴ *Id.* at 7.

¹⁵ Ratliff & Rubinfeld, *supra* note 10, at 20.

¹⁶ Abraham, *supra* note 13, at 7.

¹⁷ Sokol & Ma, *supra* note 11, at 46-48; OECD, *supra* note 11.

¹⁸ OECD, *supra* note 11, at 10.

¹⁹ Sokol & Ma, *supra* note 11, at 46.

²⁰ *Id.*

²¹ *Id.*

²² The marketing funnel describes the way that a firm can deploy marketing to address a variety of hurdles customers face if they are to purchase a new product or service.

ad, or a static text-laden ad that influences a customer to purchase as long as they can measure how effective that format was relative to its price.”²³

21. For these reasons, considering interchangeability when defining relevant markets within the online advertising segment is essential, lest artificially narrow markets be applied. For example, considering a large online platform player to operate in one relevant market, while considering another large player to reside in a separate relevant market for purposes of enforcement for abuse of dominance, would also imply that a merger between the two platforms would have no horizontal competitive significance. Considering reasonable interchangeability on both the advertising demand side and supply side is required to understand the degree to which competitive constraints exist, whether exclusion is possible, whether a dominant position exists, and whether potential consolidation may be harmful to competition and consumers.

22. Some of the recent antitrust discourse around digital advertising and competition concerns has not considered market definition. Rather, the focus has been on other possible indicators of market power, such as high price points, margins, and barriers to entry. For example, the UK CMA market study acknowledged, “We have not carried out a formal market definition assessment, but have instead looked at competitive constraints across the sector and have focused on observing direct indicators of market power and barriers to entry and expansion.”²⁴ These indicators, however, can have multiple causes. For example, high margins can stem from product differentiation attributes, efficiencies and economies of scope and scale; barriers to entry can stem from high investment requirements divorced from exclusionary conduct; and high price points can reflect effectiveness of delivery as has been the case in traditional advertising for many decades. These factors can also indicate market power. Conducting a market definition analysis based on empirical evidence can help discern the reasons for these effects and clarify the need for action by competition law enforcers.

23. Where abuse of dominance is the relevant concern, the presence of these indicators can justify further inquiry to ensure that abuses are not occurring to the net detriment of consumers on both sides of the multi-sided platform. In these cases, the evaluation should focus on defining markets to ensure that condemnation is based on economic analysis within a competition framework rather than assumptions or perception. Where public policy choices, such as potential market regulation, are being considered or justified on competition grounds, a market definition exercise will help to ensure that those choices are sound.

A. Zero-Price Services

24. Where zero-price services are offered, consumers do not pay directly for the service they receive while advertisers pay for adverts targeted at those consumers. Offering services to consumers at a zero price may be a rational commercial strategy and a firm may gain in other ways from offering some services free of charge and charge for other services such as from the sale of advertising. Advertising may fund free or cheaper products and services for consumers.

²³ Catherine Tucker, Competition in the Digital Advertising Market, *in* THE GAI REPORT ON THE DIGITAL ECONOMY 679, 688 (2020) available at <https://gaidigitalreport.com/wp-content/uploads/2020/11/Tucker-Competition-in-the-Digital-Advertising-Market.pdf>.

²⁴ COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 82-83 (July 1, 2020), available at https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf.

25. Competition analysis and measuring the effect of a price rise are far more difficult in zero price markets. One solution may be to apply the SSNIP test to the related market for the sale of the advertisements on the relevant platform thereby focusing the analysis on the side of the market where money does change hands. If a firm has no power over advertisers, it is unlikely to be able to increase the price of its consumer facing service without these leading to a decrease in advertising revenue. One other approach might be to consider whether there is market power on the side of the market where money changes hands, and whether competition is affected in the absence of such market power.²⁵

26. In these markets, we are seeing greater significance in competition analysis on non-price related parameters such as quality, consumer choice and innovation.

B. Data

27. The collection of data is central to developing efficiency in online advertising. Previously, to reach a large number of relevant consumers for its product, an advertiser often had to broadcast its message broadly, including to many consumers for whom the ad was not relevant. But through the use of cookies and other means of online data collection allow for targeted ads that reach only relevant consumers, without the waste of advertising to a broad audience.

28. Targeted ads can be placed within any website that provides for such advertising.

Because these so-called targeted ads no longer require potential consumers to visit a specific website, and instead can be shown on any website, advertisers have gained the ability to achieve reach across the web, without sacrificing relevance. As a result, the services of these data brokers and advertising platforms mean there is no longer a relationship between the viewership of any one website and its attractiveness to advertisers.²⁶

29. Collection of data allows for more efficient placement of advertisements. As the U.S. FTC noted in its report about data brokers, businesses can now “purchase information about their customers’ interests in order to market specific products to them, including using consumers’ offline activities to determine what advertisements to serve them on the Internet.”²⁷

30. Data has important characteristics that are very different from monetary value. Money can only be spent once while data is non-exclusive—the same data can be used by more than one supplier, without being “used up.” Unlike currency, the value of data largely derives from the ability to analyze that data and act on insight, not from the data alone.

31. Digital platforms can sometimes monetize data in several ways, including by using it internally to improve services or by selling it directly to advertisers or data brokers for repackaging. This monetized data in turn supports consumer access to a selection of free services and content, such as online search,

²⁵ Koren W. Wong-Ervin, *Assessing Monopoly Power or Dominance in Platform Markets*, ECON. COMM. NEWSLETTER (ABA Antitrust Law Section), Spring 2020, at 3, available at <https://www.axinn.com/assets/htmldocuments/ABA%20Economics%20Committee%20Newsletter-Spring%202020.pdf>.

²⁶ Tucker, *supra*, note 4, at 3.

²⁷ FED. TRADE COMM’N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY ii (May 2014), available at <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

email, maps, and streaming video, much of which was previously available only for a substantial fee. They can also use it to improve products in another market in which the platform is active.

32. Some enforcers have suggested that large platforms have huge advantages attributable to the data they collect. The way in which a consumer accesses information online can have important ramifications on whether the data is exclusively in the hands of one platform or spread more broadly, even if the consumer is not aware of such implications. Often, a user's behavior may place the same data in the hands of numerous online agents. As Professor Tucker explains:

It is also useful to think of instances where perhaps there are no alternative sources of data. For example, suppose that your house's water pipes sprung a leak and you used a search engine, or a single website such as "Angie's List," in order to quickly find a plumber. In that instance, perhaps only one web property would be aware of your need for a plumber and be able to take advantage of the related advertising opportunities. What is crucial here is that it is the limited interaction with the digital environment which leads to the lack of alternative sources of data. If you were looking for a plumber to do more general work (say for a bathroom remodel) without the same sense of urgency, then you would leave a broader digital footprint—for example browsing review sites to try and assess plumber quality, or browsing websites describing different types of showers and bathtubs. The key thing when approaching competition is to articulate the instances where the natural breadth of a digital consumer footprint is likely not to exist. In these cases, there are less likely to be alternative sources of data, and there are more likely to be areas of concern.²⁸

33. Authorities should consider these factors as well as how data affects new entry when assessing the extent to which data is a competitive constraint in a market.

V. Conclusion

34. The online advertising market continues to witness substantial growth, lower prices, and ongoing innovation.²⁹ *Business at OECD* recognizes that there are numerous investigations and proposals related to online advertising and takes no position with respect to those initiatives. Our membership consists of companies that both support and oppose these initiatives. We believe that it is important, however, that any action considered or undertaken be based on sound competition principles, rigorous economic analysis and thoughtful remedies that address the specific competition problems identified. The objective should be to identify and remedy competition problems with appropriate solutions. Any action taken for other reasons, including public policy considerations apart from competition concerns, should be clearly identified as such. Otherwise, there is a risk of diminishing the integrity of competition enforcement.

²⁸ Tucker, *supra*, note 4, at 5-6.

²⁹ See, e.g., Daniel S. Bitton & Stephen Lewis, Clearing Up Misconceptions About Google's Ad Tech Business (May 5, 2020), available at <https://www.accc.gov.au/system/files/Google%20-%20Report%20from%20Daniel%20Bitton%20and%20Stephen%20Lewis%20%285%20May%202020%29.pdf?becoming-subscriber-b130cd902fde> (data collected and charts starting at page 35).