



Public Comments of the European Publishers Council submitted in the context of the FTC “Hearings on Competition and Consumer Protection in the 21st Century” 20th August, 2018

I. Introduction

On June 18, 2018, the Federal Trade Commission (“FTC”) announced that it “*will hold a series of public hearings on whether broad-based changes in the economy, evolving business practices, new technologies, or international developments might require adjustments to competition and consumer protection enforcement law, enforcement priorities, and policy.*” The FTC solicited public comments on 11 topics, including “*competition and consumer protection issues in communication, information, and media technology networks*” and “*the intersection between privacy, big data, and competition.*”

The European Publishers Council (the “EPC”) commends the FTC for organising these hearings, which will cover several important topics for the news industry. The EPC is a high-level group of Chairmen and CEOs of leading European media corporations.¹ Their companies are publishing a diverse range of quality, independent content across all platforms and devices, bringing print or digital newspapers, magazines, journals, eLearning solutions, books and broadcasting to citizens across the EU and globally. Although the EPC tends to concentrate its activities in the European Union (“EU”), the challenges faced by the news industry due to the online platforms’ conduct are similar in the EU and the U.S. Hence, the planned FTC hearings are of direct relevance to the concerns of the EPC and its members vis-à-vis the conduct of online platforms.

Our comments are divided in five parts. Part II contains an executive summary. Part III explains how digitalisation and the increasing shift to online news consumption have transformed the media landscape. Part IV explains the online platform’s anticompetitive practices towards publishers, with a focus on Google’s behaviour.² Finally, Part V shows how these anticompetitive practices create serious consumer harm.

¹ Further information on the EPC can be found on its website: www.epceurope.eu

² This does not mean that the practices of other online 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.



II. Executive summary

Over the past decade online platforms have engaged in a variety of strategies to entrench their role as intermediaries between publishers and consumers, and to ensure that they remain *the* gateway to the Internet. They have used their market power to attract consumers to their ecosystem in the first instance – through the use of opaque algorithms, scraping and extracting snippets of content – and then to retain consumers within their ecosystems. Enhanced consumer engagement enables digital platforms to harvest more user data, which enriches the data available to sell to advertisers, and thus increase their advertising revenues. Meanwhile, content creators, such as publishers of news, are deprived of the opportunity to monetise their content by selling subscriptions or advertising. Furthermore, the systematic scraping of publishers' content has created detrimental effects on publishers' ability to licence content in the B2B market, and stifled innovation in creating new licences, e.g. in the area of content mining where there is an untapped demand in the B2B market.

Excessive intermediation between content creators and consumers has also led to brand dilution and lower levels of engagement. The fragmentation of news publications into diffuse and individualised articles 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 fake news.

The online platforms' conducts identified in these comments harm consumers:

- Online platforms reduce the publishers' ability and incentives to invest in journalistic innovation, meaning to produce quality content to the benefit of online news' readers as the production of such content requires significant financial resources.
- Moreover, algorithms used by digital platforms, which are designed to optimise engagement and advertising revenues by showing content to consumers they are more likely to interact with, lead to "echo-chambers" where consumers are increasingly exposed to opinions that confirm their existing views and values rather than challenging them.
- 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 institutions, hence allowing increased government efficiencies.
- Finally, the online platforms' practices hurt innovation as it harms news organisations' incentives to invest in new modes of delivery, such as, for instance, mobile applications and dynamic pay-walls, which are costly to develop and maintain, as well as new services to the benefit of their readers.

For these reasons, the EPC urges the FTC to investigate the online 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.

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

Digitalisation and the increasing shift to online news consumption have transformed the media landscape. In the online environment, the two primary business models for publishers are either or a combination of:

- **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 online platforms as they need to generate large volumes of traffic to generate advertising revenues. They might thus have to invest heavily in search engine optimisation (“SEO”) or produce click-baits instead of quality content in order to draw large amount of traffic to their websites.
- **Subscription-funded** – where publishers generally “lock” content behind a paywall. Some subscription site may operate a hard paywall only accessible to subscribers; others may allow metered access (e.g. allowing X free views per month); and others may use a dynamic paywall where the numbers of free articles is customised to visitors to increase the likelihood that they will subscribe. Subscription-based digital newspapers are less dependent on online 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.

Another important shift 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), the fastest growing category of advertising in the digital age is so-called programmatic advertising where ad targeting is primarily based on analysis of *user* data (identifying viewers specifically interested in running), rather than contextual information about the content being consumed. This acts to shift advertising spend away from publishers, such as news brands producing original content and towards players, such as Google and Facebook, with greater access to user data and analytics capability.

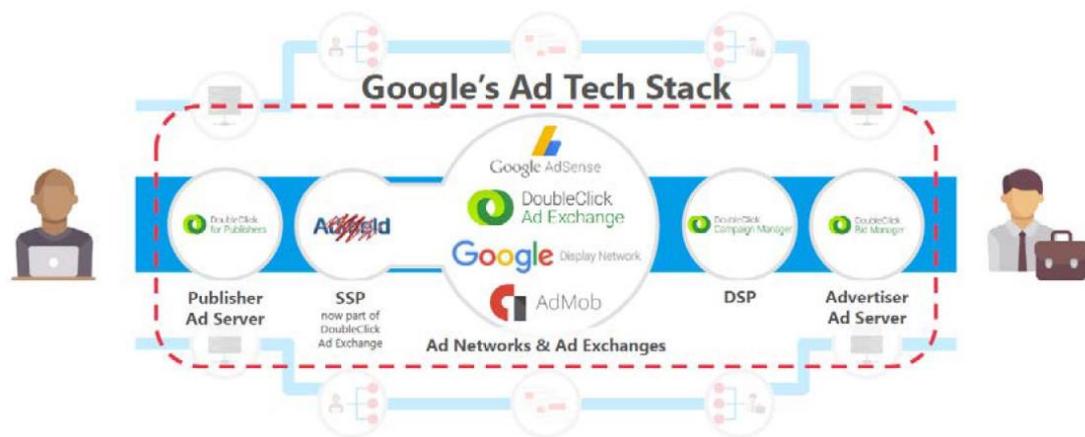
While it is often said that data is the new oil of the digital age, this is particularly true in the programmatic advertising space (as increased data availability allows advertisers who want access to a specific audience (e.g., soccer fans) to achieve this without targeting a category of content in particular (soccer news). User data is thus extremely valuable value and the data that digital



platforms collect is superior to that of publishers, since they can merge data across the Internet, whereas publishers 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 now controls the dominant technologies at every point in the supply chain, allowing it to control the entire trading process. Facebook is also developing its Ad-Tech capabilities and dominates advertising technology in the social media advertising space. As a result, publishers are now greatly dependent on Google and Facebook with respect to the technologies needed to sell their ad inventory.

Figure 1 : Google’s Ad Tech tools



These developments have thus strengthened the position of Google and Facebook as traffic allocators on which publishers are largely dependent for their survival, but also central players in the advertising space given their large access to data, their analytics capability and their control of Ad Tech.

The EPC finally 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

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>. Facebook's Data Policy similarly provides that Facebook collects and stores data including: things uploaded or created by users (including additional data such as the location of where a photo was taken or the date the file was created); the way users engage with Facebook's services; information other users post, for example photos, direct messages or contact information; users' networks; device information; and information from third party partners and Facebook owned companies. See Facebook, *Data Policy*, at <https://www.facebook.com/policy.php>

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 its ad tools. In doing so, it has proclaimed itself co-controller of that data and wants to decide whatever it does with that data – something that would previously have been purely in the realm of the publisher. As data privacy is getting increasing attention in the U.S.,⁵ the Commission may wish to pay attention to Google’s behaviour in this area.

IV. The online platform’s anticompetitive practices towards publishers

In this part, we explain some of the anticompetitive practices online platforms, in particular Google, have engaged in to their advantage and to the detriment of publishers.

A. Google uses its dominance in search to coerce publishers to adopt conducts that are hostile to their interests, while being profitable to Google

The shift from print to screen has turned online platforms, such as Google and Facebook, 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, online platforms seek to attract and retain consumers on their platform, so they can collect highly personalised data they can use for advertising purposes. In this context, the algorithms used by digital platforms are designed to optimise engagement by showing content consumers are more likely to interact with.

Against this background, the EPC has been particularly active in the context of the European Commission’s investigation of Google’s anticompetitive practices.⁶ Google has indeed engaged in a variety of practices that have created considerable harm to publishers and consumers, including:

- **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.

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/>

⁵ See, e.g., Dipayan Ghosh, What You Need to Know About California’s New Data Privacy Law, July 11, 2018, available at <https://hbr.org/2018/07/what-you-need-to-know-about-californias-new-data-privacy-law>; Robin Kurzer, The United States finally starts to talk about data privacy legislation, Martech Today, August 10, 2018, available at <https://martechtoday.com/the-united-states-finally-starts-to-talk-about-data-privacy-legislation-219299>

⁶ The Commission has adopted two infringement decisions against Google. See

Because of the dominance of Google search, the importance of Google's traffic leaves publishers with no choice but to allow Google to freely scrape their content.

- In December 2017, Google unilaterally announced that it would show longer snippets of content in search results. Snippets allow users to consider the identified search keywords in context and determine whether the search result is relevant. However, longer snippets effectively allow users to scan news articles and understand their substance, removing the need to click on the link and navigate to the full content article.⁷
- **First-Click-Free.** Second, 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 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 Search Engine Results Page ("SERP"). Google's FCF Policy has created significant harm to publishers of paywall-protected content. It also led readers to believe that, although expensive to produce, news content should be free. Google's indication that this policy is over will do nothing to repair that harm, especially if Google is permitted to pursue other anticompetitive behaviors vis-à-vis publishers.

While Google is not a producer of news, it certainly distributes them and benefits most from the supply of news being "free" so that it can access and reproduce content in full and gather data on users which benefit its advertising business. Subscription sites are, however, adverse to Google's interests as a consumer who builds a relationship with a subscription site is less likely to use search as a source of information. Google is therefore incentivised to discriminate against subscription sites in order to keep users dependent on search to access news, reinforcing its dominance and generating greater opportunities for data collection and monetisation via search advertising. The end of the FCF policy started the new era of Flexible Sampling; while publishers in theory have the option of choosing between a metered or hard pay-wall, it appears that certain signals, such as time spent, bounce rate and number of clicks, impede the ability of quality publishers with a hard-pay wall to benefit from higher rankings.

- **AMP.** Google is now 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.⁸ This creates a host of serious problems for publishers.

⁸ 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.

- 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 also 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 news content to the detriment of news brands. While the publishers' brands appear homogenised, Google's brand appears prominently, thereby allowing Google to build its brand awareness as a source for news content among users, and preventing publishers from doing the same.
- Third, AMP allows users to easily swipe through articles by different publishers and encourages readers to return to the Google search page.⁹ 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.
- 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.

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 as they protect its position in search 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 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 (by impeding their ability to monetise their content whether through subscriptions and/or advertising, as well as by commoditising news content), as well as their readers.

⁹ 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.



B. Google undermines the ability of publishers to gather the data they would need to market their ad inventory competitively

Google does not only use AMP to collect massive amounts of additional data, but also to restrict the ability of publishers to gather the data they would need to market their ad inventory competitively. For instance, Google imposes significant restrictions on publishers' ability to get unique audience figures, which they need to ensure traffic figures are accurate and not overinflated when users view content multiple times, in the AMP environment. Following mounting pressure from publishers, Google recently announced that the AMP format would support "first party tracking" of users. This means, for example, that if a consumer reads an article on *The Post* in AMP format and then reads an article on *The Post* in non-AMP format, that behaviour can be tracked. However, publishers wishing to take advantage of this feature therefore have no choice but to use Google Analytics, and cannot use third-party analytics software. Where a publisher does use Google Analytics to track unique audiences, Google collects data on the user and shares it with publishers under its terms. In other words, publishers remain dependent on Google for access to data.

Google also limits publishers' ability to reconcile the data collected from AMP articles with non-AMP articles, in particular if publishers intend to use the data for commercial purposes. Although there is now some limited ability to track users on AMP, no such solution has been provided for the tracking of ads. While Google has not explained why this is the case, the technology required for the tracking of users and ads is very similar, making it doubtful that the reason is technical feasibility. A more likely explanation is that restricting publishers' access to ad tracking advances Google's advertising business. Only Google has the ability to track ads across AMP and publishers' inability to track ads across different channels reduces the relative attractiveness of their direct advertising business.

C. Google's anticompetitive behavior should be analysed as a pattern of conduct

While Google's conducts described in Sections A and B may appear distinct, it would be a mistake to analyse them as isolated events as they all rely on the same mechanism of coercion (based on the threat of no longer crawling and indexing publisher's content or on demoting such content, or on depriving it from appearing on Google's news carousel in the AMP case), are part of the same strategy of maintaining readers within Google's environment (where Google is able to collect ever growing volume of valuable user data), and have the same disastrous effects on publishers of quality content and ultimately on their readers.

As is recognised in both U.S. antitrust law and EU competition law, firms which hold a dominant position in a market may seek to leverage that dominant position to either extend it to other markets ("offensive leveraging") or to protect their dominant position in the market in which they hold it ("defensive leveraging"). As the European Commission observed in its *Shopping* and *Android* decisions, as well as in its *AdSense* investigation, Google is no stranger to such strategies:



- In its *Google Shopping* decision, the European Commission found that Google leveraged its market power in general search to a neighbouring market, i.e. the market for shopping comparison services, “*by giving prominent placement in its search results only to its own comparison shopping service, whilst demoting rival services.*”¹⁰
- In the European Commission’s press release announcing the *Android* decision, Commission Vestager explained that the case was about “*three types of restrictions that Google has imposed on Android device manufacturers and network operators to ensure that traffic on Android devices goes to the Google search engine*” and that Google thus “*used Android as a vehicle to cement the dominance of its search engine*” denying “*rivals the chance to innovate and compete on the merits*”.¹¹
- Finally, in a press release regarding the status of its *AdSense* investigation the European Commission observed that the restrictions Google placed on the ability of certain third-party websites to display search advertisements from Google’s competitors “*enabled Google to protect its dominant position in online search advertising. It has prevented existing and potential competitors, including other search providers and online advertising platforms, from entering and growing in this commercially important area.*”¹²

While the EPC does not suggest that the FTC should follow the path of the European Commission, it nevertheless believes that Google’s pattern of conduct is part of a leveraging strategy designed to consolidate its market power in some markets and to extend it in other markets.

V. The online platforms’ anticompetitive practices create serious consumer harm

As seen in prior parts, Google harms publishers and, 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 similar issues as those by Google.

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

¹⁰ Press release of the Commission, “Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service” IP/17/1784, 27 June 2017.

¹¹ Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google’s search engine, 18 July 2018, available at europa.eu/rapid/press-release_IP-18-4581_en.htm

¹² Press release of the Commission, “Commission takes further steps in investigations alleging Google’s comparison shopping and advertising-related practices breach EU rules”, IP/16/2532, 14 July 2016.



- First, by harming publishers' ability to generate revenues (through subscriptions and/or advertising), online platforms reduce their ability and incentives to produce quality content as the production of such content requires significant financial resources. 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, online platforms do not reward original content with a higher ranking and other publishers that simply reproduce the same content can appear higher in search results. Indeed, ad-funded publishers 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 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. This is leading to "echo-chambers" where consumers are increasingly exposed to opinions that confirm and do not challenge their existing views and values. Further, digital platforms have made it harder 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.
- Fourth, the disappearance and the weakening of newspapers may have severe societal consequences. For instance, in a recent paper,¹³ 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.
- Finally, Google's practices also hurt innovation. For instance, by imposing an obligation on publishers to adopt the AMP format if they want their content to appear in the Google news carousel and being fairly ranked on Google's SERP, Google harms competition between different formats and hurts publishers' incentives to experiment with different techniques to accelerate the loading of their mobile pages. Because of Google's prominence and the presence of network effects, there is a danger that AMP may become so dominant that alternative, and possibly better, formatting standards and technologies will be less likely emerge.

¹³ 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>



EPC | European
Publishers
Council

*For further information please contact:
Angela Mills Wade, Executive Director, European Publishers Council
angela.mills-wade@epceurope.eu*



EPC | European
Publishers
Council

80 08

www.epceurope.eu