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News Media and Digital Platforms – Note by Spain

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>.

Please contact Mr Antonio Capobianco if you have questions about this document [Email: Antonio.CAPOBIANCO@oecd.org].

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Spain

1. This contribution by the Spain's National Commission for Markets and Competition¹ (CNMC) addresses the subject of “news media and digital platforms”, to be held in the OECD competition policy roundtable in December 2021.
2. The appearance of digital platforms has had a significant impact on the news media industry. On the one hand, they act as important gateways to a global audience, and, on the other hand, they have changed the way in which news content is consumed.
3. It seems that digital platforms have become unavoidable trading partners for news media and publishers creating several challenges: digital platforms benefit from the content of news media publishers without necessarily remunerating them for it, and, at the same time, they capture a great share of the online advertising revenues, leaving news media in a very difficult position (given that the decline of sales of print media has implied a bigger relevance for other sources of income such as online advertising and subscriptions).
4. As news media play a central role for society (as disseminators of public interest and trustworthy news), governments have been urged to intervene in order to address some of these challenges, including the viability of the news media industry. Governments have adopted different approaches to tackle some of these problems, and with different results.
5. This contribution will cover:
 - (i) the definition of the market players and the new business model originated by the appearance of digital platforms;
 - (ii) the main advantages and disadvantages of such business model for news media and platforms;
 - (iii) main competition issues;
 - (iv) examples of the approaches (alternative to competition law) adopted to tackle some of the issues identified; and
 - (v) the main conclusions.

1. Market players and business models

1.1. Market players

6. There are several markets that could be related to news media and digital platforms such as online internet search, social media, news journalism, online advertising, etc., which have been analysed in recent reports by different competition authorities².

¹ This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents.

² See, for example: (i) the [Digital Platforms Inquiry \(2019\) – Final Report](#) (from the Australian Competition and Consumer Commission, “ACCC”); (ii) the [Cairncross Review](#) (2019, an independent report on journalism and competition conducted by order of the UK's Government); (iii) the [Online platforms and digital advertising market study](#) (2020) (from the UK's Competition and Markets Authority, “CMA”); (iv) the [Ad Tech Inquiry \(2021\) – Final Report](#) (also from the ACCC); and (v) the [Study on the competition conditions in the online advertising sector in Spain](#) (2021) (from the Spanish Competition Authority, “CNMC”).

7. According to these reports, the main players on the “news media and digital platforms” markets could be classified in five groups:

- (i) digital platforms
- (ii) news media (also known as press publishers or news publishers)
- (iii) advertisers
- (iv) publishers
- (v) consumers

8. **Digital platforms** are multi-sided applications that serve multiple groups of users at once, providing value to each group based on the presence of other users³. In this regard, multiple sides of these platforms consist of groups of individuals who use the platforms for different reasons. For example, one side of a platform may consist of individuals who use its search services to find content or products, while another side may consist of businesses wanting to advertise to targeted groups of those individuals⁴.

9. Using different types of digital platforms, a user can communicate with other users, find and access content or services, transact with merchant businesses, or produce and publish their own user-generated content⁵. At the same time, content publishers and advertisers can use digital platforms to easily reach online audiences⁶.

10. According to the ACCC, there are three main digital platforms related to the dissemination of news:

- Search engines: software systems designed to search for information on the World Wide Web, generally returning a curated, ranked set of links to content websites. Search engines operate in an automated fashion using sophisticated algorithms to collect information. Examples include Google Search, Bing, Yahoo! and DuckDuckGo⁷.
- Social media platforms: online services that allow users to participate in social networking, communicate with other users, and share and consume content generated by other users (including professional publishers). Social media platforms generally display content for consumption as linear ‘feeds’, curated by algorithms or displayed chronologically. Examples include Facebook, Instagram and Snapchat⁸.
- Digital content aggregation platforms: online intermediaries that collect information from disparate sources and present them to consumers as a collated, curated product. Those specialising in journalism – ‘news aggregators’ – are the most relevant example for the purposes of the present article. Examples include Google News, Apple News, and Flipboard⁹.

³ The ACCC’s [Digital Platforms Inquiry \(2019\) – Final Report](#), page 43.

⁴ The ACCC’s [Digital Platforms Inquiry \(2019\) – Final Report](#), page 43.

⁵ The ACCC’s [Digital Platforms Inquiry \(2019\) – Final Report](#), page 43.

⁶ The ACCC’s [Digital Platforms Inquiry \(2019\) – Final Report](#), page 43.

⁷ The ACCC’s [Digital Platforms Inquiry \(2019\) – Final Report](#), page 43.

⁸ The ACCC’s [Digital Platforms Inquiry \(2019\) – Final Report](#), page 43.

⁹ The ACCC’s [Digital Platforms Inquiry \(2019\) – Final Report](#), page 43.

11. **News media** are those elements of the mass media that focus on delivering news to the general public or a target public¹⁰. They include "traditional" broadcast media such as television, radio, movies, CDs or DVDs, as well as the print media, and also the Internet along with services such as the World Wide Web, communicated via the Internet¹¹.

12. **Advertisers** are mostly companies (although there are also government and non-profit organisations) that wish to buy advertising space to reach consumers to increase sales or brand awareness of their products¹². They can do so directly or through media agencies.

13. **Publishers** are companies such as news media publishers, websites, app developers, social media platforms and/or podcast creators that want to sell space to show digital advertising (the so-called "inventory"). Publishers can even include digital platforms that have their own inventory, such as Google, which commercialises its own inventory directly (e.g., in YouTube)¹³.

14. **Consumers** are the customers of all the players involved (digital platforms, news media, and advertisers), and could be any natural (i.e. end users) or legal person (i.e. business users).

1.2. Business models

15. In a nutshell, as outlined by the [Cairncross Review](#) (2019), the market for news has drastically changed in the last decades (especially since the arrival, consolidation and expansion of the use of internet and, more recently, since the launch of smartphones): readers have moved online, print news have decreased, and online news distribution has changed how people consume news; which has led to failing revenues for these news operators. This has left news media no other option than to respond to the changes posted by the online world, for example, by pursuing digital advertising revenue or by direct payment by customers through subscriptions to their websites.

16. In this context, digital platforms have two major roles: (i) the operation of the online advertising market; and (ii) the distribution of news publishers' content online¹⁴ (and both the [Cairncross Review](#) and the ACCC's [Digital Platforms Inquiry \(2019\) – Final Report](#) consider that Google and Facebook are central to both).

1.2.1. The operation of the online advertising market

17. The [Cairncross Review](#) describes that prior to the digital revolution, the market for news included three main actors: newspapers (publishing content and being at the centre of a two-sided market), readers (that would contribute to the cost of publication by paying for the paper), and advertisers (that would contribute by paying to place their adverts in the news)¹⁵. In this regard, the more readers publishers were able to attract, the more valuable their supply of advertising space¹⁶.

¹⁰ See https://www.sciencedaily.com/terms/news_media.htm.

¹¹ See Council of Europe's website: <https://www.coe.int/en/web/compass/media>.

¹² CNMC's [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 35.

¹³ [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 8.

¹⁴ The [Cairncross Review](#) (2019), page 57.

¹⁵ The [Cairncross Review](#) (2019), page 58.

¹⁶ The [Cairncross Review](#) (2019), page 58.

18. However, in the market for online news, the picture is much more complicated. This is so because technology now allows an automated system – known as “programmatically advertising” – which¹⁷:

- From the supply side, allows publishers to sell inventory (the space to show digital advertising) automatically, targeting users and creating an online auction for ad space¹⁸
- From the demand side, allows advertisers and media agencies to compete for the ad space auctioned by publishers¹⁹.

19. This technical mechanism for online advertising gives digital platforms a great advantage, leaving publishers with diminished influence and choice²⁰. In its turn, this great advantage of monitoring the “programmatically advertising” is built on two foundations²¹:

- The digital platforms’ control of the advertising supply chain: for example, Google not only owns its own inventory (e.g. through Google search and YouTube videos) – and, thus, play a publisher role in the market -, but it also owns (i) demand-side technologies, used by advertisers to bid and buy inventory online, such as Display & Video 360 and Google Ads; and (ii) supply-side technologies, which publishers will use to sell their ad space to advertisers, such as Ad Manager and AdSense²². In addition, it also owns supplementary technologies such as Chrome browsers, Google Analytics (a “freemium” web analytics service), and the Android mobile operating system²³.

For smaller publishers, this integration can help lower barriers to entry, allowing them to make use of self-service platforms and inexpensively gain access to a global audience²⁴. However, it also adds to the opaque nature of the display advertising market as it essentially means that a company operating on all sides of the supply chain has the ability to adjust the fees charged on one side, in order to benefit the other²⁵.

- The digital platforms’ control of data: publishers gather user data from their own sites, including login data for their subscribers, but this pales in comparison to the power of digital platforms, which have a rich set of user data giving them significant advantage over others in the market²⁶. Whether it is search data (Google), the social networks of users (Facebook) or generally the devices, locations, interests and behaviours of users online (both), these players have an unimaginable wealth of information (valuable to advertisers and publishers)²⁷. In this regard, the lack of

¹⁷ The [Cairncross Review](#) (2019), page 58.

¹⁸ The [Cairncross Review](#) (2019), page 58.

¹⁹ The [Cairncross Review](#) (2019), page 58.

²⁰ The [Cairncross Review](#) (2019), page 58.

²¹ The [Cairncross Review](#) (2019), page 62.

²² The [Cairncross Review](#) (2019), page 62.

²³ The [Cairncross Review](#) (2019), page 62.

²⁴ The [Cairncross Review](#) (2019), page 62.

²⁵ The [Cairncross Review](#) (2019), page 62.

²⁶ The [Cairncross Review](#) (2019), page 62.

²⁷ The [Cairncross Review](#) (2019), page 62.

clarity on data measurement online generally makes it hard to see how effective advertising is²⁸.

1.2.2. The distribution of news publishers' content online

20. Digital platforms and publishers relationships can vary substantially. Certain digital platforms, such as Yahoo and Microsoft News (MSN) will duplicate news publishers' articles in their entirety, while others, such as Google or Facebook, will use a combination of preview images, headlines and snippets (short extracts)²⁹.

21. Readers increasingly reach news publishers' content indirectly, finding their websites through online digital platforms, especially Google and Facebook³⁰. In this regard, the more prominent their content is in these digital platforms (either in the form of entire articles or snippets), the more readers are likely to click through to the originating website, and the more advertising revenue (and potential subscribers) news publishers will acquire³¹.

22. However, some issues need to be taken into account:

- (i) the algorithm which determines how news is ranked is a closely guarded secret³²
- (ii) publishers are not consulted on how their content is treated³³
- (iii) in cases where platforms aggregate content from a news publisher but show only snippets (as it is the case with Google and Facebook as explained above), with links to the publisher's website, none of the bigger platforms pay the publisher³⁴.

23. Digital platforms usually argue that, in any case, this is a mutually beneficial relationship, for the following reasons³⁵:

- (i) for platforms, the content provided by newspapers is a reason for people to visit their sites and then, potentially, to look at or use other content or services they offer (in addition to the data they gather)
- (ii) for publishers, the platforms are an additional distribution channel – a way to attract more clicks and readers to their own sites.

24. On the other hand, publishers frequently complain that the relationship is excessively weighted in favour of the digital platforms³⁶:

- (i) in most cases, the latter do not directly remunerate news publishers for placing their content on their platforms
- (ii) digital platforms share with them much less data than they could
- (iii) digital platforms are not subject to the same press rules of accuracy and fairness as news publishers are.

²⁸ The [Cairncross Review](#) (2019), page 63.

²⁹ The [Cairncross Review](#) (2019), page 65.

³⁰ The [Cairncross Review](#) (2019), page 65.

³¹ The [Cairncross Review](#) (2019), page 65.

³² The [Cairncross Review](#) (2019), page 65.

³³ The [Cairncross Review](#) (2019), page 65.

³⁴ The [Cairncross Review](#) (2019), page 68.

³⁵ The [Cairncross Review](#) (2019), page 68.

³⁶ The [Cairncross Review](#) (2019), page 65.

2. Main advantages and disadvantages of the business model for media and digital platforms

25. From the perspective of digital platforms, the main advantage is the increase of their attractiveness in relation to consumers (without apparent disadvantages). The content provided by newspapers is a reason for people to visit their sites and then, potentially, to look at or use other content or services they offer (in addition to the data they gather)³⁷; while there are no clear disadvantages for platforms derived from this business model.

26. From the perspective of news media, digital platforms offer publishers an important gateway to a great number of customers, as they reach global audiences through the provision of (usually) free services highly demanded by consumers³⁸. In this regard, digital platforms offer publishers two main advantages:

- (i) the more readers, the more advertising revenue (and potential subscribers) news publishers will acquire³⁹; and
- (ii) the larger the audience, the more advertisers will be attracted⁴⁰ (i.e. more readers, more advertisers, more revenues – in the form of advertising revenue or new subscriptions).

27. In addition, the automated process of buying and selling advertising space has provided other advantages: it has created scale, has saved time, and has also meant that users can be better targeted through the use of more sophisticated data providers and analytics⁴¹.

28. However, these important gateways don't always imply higher revenues for publishers. As pointed out by the [ACCC's report](#), for many news media businesses, the expanded reach and the reduced production costs offered by digital platforms have come at a significant price⁴². In particular, the rise of the digital platforms has marked a continuation of the fall in advertising revenue that began with the loss of classified advertising revenue in the early days of the internet⁴³. Without this advertising revenue, many print/online news media businesses have struggled to survive and have reduced their provision of news and journalism⁴⁴. In fact, many news media businesses are still searching for a viable business model for the provision of journalism online⁴⁵.

29. This discussion on whether digital platforms lead to an increase or decrease of revenues for publishers is sometimes explained by reference to two different effects⁴⁶: the

³⁷ The [Cairncross Review](#) (2019), page 68.

³⁸ [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 37.

³⁹ The [Cairncross Review](#) (2019), page 65.

⁴⁰ [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 38.

⁴¹ The [Cairncross Review](#) (2019), page 58.

⁴² The ACCC's [Digital Platforms Inquiry \(2019\) – Final Report](#), Executive summary, page 5

⁴³ The ACCC's [Digital Platforms Inquiry \(2019\) – Final Report](#), Executive summary, page 5

⁴⁴ The ACCC's [Digital Platforms Inquiry \(2019\) – Final Report](#), Executive summary, page 5

⁴⁵ The impact of this reduction in advertising revenue is most evident in relation to local and regional news providers, which do not have the large potential audience of metropolitan and national titles (The ACCC's [Digital Platforms Inquiry \(2019\) – Final Report](#), Executive summary, page 5).

⁴⁶ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, pages 2 and 3.

market expansion effect (i.e. the number of visits to the publishers' website through the digital platform that would not have visit such website otherwise) and the substitution effect (i.e. the number of visits that stay in the digital platform, which displaces traffic from the publishers' website). Whether the market expansion effect (that would lead to a revenue increase for publishers) or the substitution effect (that would lead to a revenue decrease for publishers) will prevail depends on the circumstances of each specific case.

30. In addition to the aforementioned (i.e. not always using a digital platform to reach a global audience leads to higher revenues), it is said that publishers face a number of challenges (or, to put the point another way, a number of disadvantages) derived from this business model:

- (i) non-remuneration for the content that is used by digital platforms⁴⁷;
- (ii) non-sharing of data gathered by digital platforms from publishers' users⁴⁸;
- (iii) digital platforms are not subject to the same press rules of accuracy and fairness⁴⁹;
- (iv) opacity and lack of transparency of the algorithm which determines how news is ranked⁵⁰;
- (v) opacity and lack of transparency of programmatic advertising (absence of information on how much advertisers are willing to pay for their inventory, which makes it more difficult for publishers to take decisions to optimise such inventory)⁵¹;
- (vi) by acting as gatekeepers to news traffic, large online platforms appear to be unavoidable trading partners for news businesses and may exert substantial bargaining power in their dealings with publishers and advertisers⁵²;
- (vii) the control of the distribution of the publishers' content online and the imposition of the digital platforms own policy for displaying news content⁵³
- (viii) digital platforms are accused of capturing a huge share of the advertising revenue by free-riding on the investments made by publishers to produce news content, taking advantage of the value created by the content that they do not produce and for which they do not bear the costs⁵⁴

31. Lastly, there are those who argue that this new business model is compromising the viability of public-interest news, that is, news that helps to underpin democracy at national

⁴⁷ The [Cairncross Review](#) (2019), page 65.

⁴⁸ The [Cairncross Review](#) (2019), page 65.

⁴⁹ The [Cairncross Review](#) (2019), page 65.

⁵⁰ The [Cairncross Review](#) (2019), page 65.

⁵¹ [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 9.

⁵² See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 1.

⁵³ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 4.

⁵⁴ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, pages 2 and 3.

and local levels⁵⁵ (in fact, news media are often called “the fourth power” by analogy with the three traditional powers in a democracy: legislative, executive and judicial⁵⁶).

32. In this regard, by altering the incentives for the production of high-quality journalism, the structure and the economics of new intermediaries are deemed to negatively affect the public debate and the proper functioning of a democratic society, promoting the spread of fake news and the decline of the local press⁵⁷.

3. Main competition issues

33. Some of the competition issues that may arise have been analysed by competition authorities. We will mostly refer to the assessment of the French Competition Authority in a recent case⁵⁸ (Autorité de la Concurrence, “AdC”), considering also the work of other competition authorities⁵⁹.

3.1. Unfair trading conditions

34. The AdC observed that Google, one month before the entry into force of the Law on Related Rights, issued news publishers with notice of termination of their pre-existing relationships, accompanied by an offer to continue these relationships, but at zero cost and without any possible negotiation⁶⁰. This conduct had the effect of forcing press publishers, which have no satisfactory alternative to ensure reuse of their content by Google, to forsake in advance the expected benefit from the Law on Related Rights (i.e. to allow for a rebalancing of their relations via an effective negotiation process)⁶¹.

35. Each publisher faced a prisoner’s dilemma, knowing that if it did not grant Google a royalty-free license while other publishers did, then it would lose traffic (and revenue) to its rivals⁶². Thus, the situation in which Google’s behaviour places news publishers can therefore only lead to zero remuneration⁶³.

⁵⁵ The [Cairncross Review](#) (2019), page 76. See also the following sentence in page 77: “[...] as the digital transition has led most publishers to cut costs, the provision of public-interest news has been weakened. But while investigative and national level reporting have suffered, it is local provision that is most under threat”.

⁵⁶ See Council of Europe’s website : <https://www.coe.int/en/web/compass/media>.

⁵⁷ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 4.

⁵⁸ The French competition authority stands out with Decision 20-MC-01 of 9 April 2020 ([see press release of 9 April 2020](#)) and Decision 201-D-17 of 12 July 2021 ([see press release of 13 July 2021](#)).

⁵⁹ The German Competition Authority (the “Bundeskartellamt”) closed a similar investigation to the one conducted by the AdC. In this case, following a complaint filed by a collecting society (VG Media) and various press publishers, the Bundeskartellamt decided not to open formal proceedings against Google concluding that it was unlikely that neither to show shorten versions of news media snippets nor the opt-in declaration fulfilled the requirements of discrimination and unfair trading conditions.

See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 15.

⁶⁰ See official decision ([here](#)), para. 199.

⁶¹ See official decision ([here](#)), para. 199.

⁶² See official decision ([here](#)), para. 201 and [here](#).

⁶³ See official decision ([here](#)), para. 201.

36. The AdC considered that this could constitute, *prima facie*, an infringement of article 102.2.a) of the Treaty on the Functioning of the European Union (“TFEU”), as it would involve the application of unfair trading conditions beyond a “reasonable extent”⁶⁴.

37. Concretely, the AdC considered that Google's application of a “zero price” to all news publishers for the reuse of their protected content did not appear to constitute a reasonable measure within the meaning of the case law⁶⁵. Moreover, when the legislator considered that the current distribution of added value should be altered in favour of publishers and news agencies via a remuneration specifically linked to the related right⁶⁶.

38. Google argued that, in any event, it did not obtain any meaningful economic benefit from the reproduction of publisher content⁶⁷. However, the AdC considered this argument as inadmissible as such an argument amounts to questioning the validity of the choice made by the legislator to redefine value sharing in favour of publishers and news agencies⁶⁸.

39. In addition, it considered that there were economic advantages for Google from the reuse of protected content: (i) Google admitted that there were ads that appear as a result of news-related queries⁶⁹; (ii) there is a clear economic interest for Google and indirect revenues that are derived from the reuse and display of protected content (as this type of display is indeed attractive for users insofar as it improves the quality and viewing experience of the search page)⁷⁰; and (iii) the profits made by news website publishers from the display of content benefit Google directly⁷¹ or indirectly because of its own role as an intermediary in online advertising⁷².

3.2. Discrimination

40. The AdC considered that Google's conduct amounted to impose zero remuneration for all publishers, irrespective of any examination of their respective situations and the corresponding protected content against the yardstick of the criteria laid down by the Law on Related Rights⁷³.

41. The AdC considered that this could constitute, *prima facie*, an infringement of article 102.2.c) of the TFEU, as it would consist in “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”⁷⁴.

⁶⁴ See official decision ([here](#)), para. 192 and 193.

⁶⁵ See official decision ([here](#)), para. 192 and 203.

⁶⁶ See official decision ([here](#)), para. 192 and 205.

⁶⁷ See official decision ([here](#)), para. 205.

⁶⁸ See official decision ([here](#)), para. 207.

⁶⁹ See official decision ([here](#)), para. 209.

⁷⁰ See official decision ([here](#)), para. 210.

⁷¹ See official decision ([here](#)), para. 212 «*users are satisfied with the enriched information on Google's search page without feeling the need to click on the link, and therefore to visit the site, which subsequently will not be able to monetise its content in the form of a subscription or advertising*”.

⁷² See official decision ([here](#)), para. 213 «*Google [...] has contractual and financial relationships with news publishers for the sale and purchase of advertising and acts as an intermediary in the advertising ecosystem* »

⁷³ See official decision ([here](#)), para. 240.

⁷⁴ See official decision ([here](#)), para. 238.

3.3. Circumvention of the law

42. The AdC, relying on Astra Zeneca judgement⁷⁵, considered that an undertaking in a dominant position may be guilty of an abuse when, without formally infringing a law, it circumvents its purposes without any objective justification⁷⁶.

43. In the present case, Google's implementation of the Law on Related Rights appears likely to contravene the spirit of the law⁷⁷. In addition, the AdC considered that Google's behaviour also enabled it to obtain new, even more advantageous trading conditions than before the new rules on the reuse and display of protected content came into force⁷⁸.

3.4. Other issues

44. Several reports have analysed other competition issues in this area⁷⁹. Some of these emphasize the role of large online platforms as gatekeepers to news traffic (exerting substantial bargaining power in their dealings vis a vis publishers and advertisers⁸⁰). But there are also other issues.

3.4.1. The CNMC's *Study on the competition conditions in the online advertising sector in Spain* (2021)

45. The CNMC's Study identified two main problems:

- (i) opacity and lack of transparency; and
- (ii) leveraging of market power and self-preferencing; which could result in a reduction of consumer welfare.

46. On the opacity and lack of transparency, the CNMC considered that:

- (i) advertisers do not have information regarding the allocation of their investment, especially regarding intermediaries and final inventory where the add is displayed; and
- (ii) publishers do not have information on how much advertisers are willing to pay for their inventory, what makes more difficult for publishers to take decisions to optimise such inventory⁸¹.

47. In this regard, there is a gap between what the advertisers pay and what the publishers receive. The remuneration for the different intermediaries can entail between 30-40% of the advertising investment (so the publishers only receive between 60-70% of

⁷⁵ See Judgment of the Court of 6 December 2012, AstraZeneca, C-457/10, paragraphs 129 to 141.

⁷⁶ See official decision ([here](#)), para. 242.

⁷⁷ See official decision ([here](#)), para. 243.

⁷⁸ See official decision ([here](#)), para. 244.

⁷⁹ See, for example: (i) the [Digital Platforms Inquiry \(2019\) – Final Report](#) (from the Australian Competition and Consumer Commission, “ACCC”); (ii) the [Cairncross Review](#) (2019, an independent report on journalism and competition conducted by order of the UK's Government); (iii) the [Online platforms and digital advertising market study](#) (2020) (from the UK's Competition and Markets Authority, “CMA”); (iv) the [Ad Tech Inquiry \(2021\) – Final Report](#) (also from the ACCC); and (v) the [Study on the competition conditions in the online advertising sector in Spain](#) (2021) (from the Spanish Competition Authority, “CNMC”).

⁸⁰ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 1.

⁸¹ CNMC's [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 156.

the investments compromised by the advertisers). The problem is not that much the amount of the remuneration, but the lack of transparency regarding the remuneration of the different intermediaries, as it makes more difficult to take optimum decisions and might consolidate the market power of certain operators⁸².

48. In addition, the lack of transparency does not only affect the remuneration of the different operators but it can also imply the imposition of discriminatory conditions or technical standards that unduly restrict interoperability⁸³.

49. On the leveraging of market power and self-preferencing, most digital platforms commercialise their own inventory exclusively (i.e. it is not open to other intermediaries). In addition, they are intermediaries in the commercialisation of third parties' inventory. This leads to several issues:

- (i) lots of advertisers might use these digital platforms as priority purchasing tools or even as exclusive tools (this could produce foreclosure effects of other independent tools);
- (ii) digital platforms may use their market power in the supply side to extend it to the purchasing advertising tools market (leveraging); and
- (iii) digital platforms might also favour their own inventory against other publishers' inventory (self-preferencing)⁸⁴.

50. These concerns could lead to a reduced consumer welfare. In this regard, this scenario could lead to higher costs for advertisers in comparison to a more competitive scenario, and it is very likely that advertisers pass them on (totally or partially) in the form of higher prices for their products⁸⁵.

51. Lastly, specifically in relation to the news media, the CNMC considered that the fact that they face less competition in the intermediation and commercialisation of their inventory could result in the reduction of content, with a negative impact for consumers, or in the reduction of their inventory, with a negative impact for advertisers⁸⁶.

3.4.2. The ACCC's [Digital platforms inquiry \(2019\) – final report](#)

52. The ACCC identifies three main sources of concern⁸⁷:

- (i) self-preferencing (i.e. many businesses are reliant on the services provided by these digital platforms in order to reach customers and are potentially exposed, given the ability and incentive of digital platforms to favour either their own or a related business)
- (ii) the lack of transparency in their operations (i.e. the black box nature of online advertising products and services as the automated or 'programmatic' advertising supply chain is particularly opaque, so it can be difficult for advertisers to know where their advertising investment goes and for websites and apps offering advertising)

⁸² CNMC's [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 157.

⁸³ CNMC's [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 157.

⁸⁴ CNMC's [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 158.

⁸⁵ CNMC's [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 159.

⁸⁶ CNMC's [Study on the competition conditions in the online advertising sector in Spain](#) (2021), page 159.

⁸⁷ See The [ACCC's report](#) Executive summary, page 1 and 2. Specific issues in digital advertising services have been dealt by the the [Ad Tech Inquiry \(2021\) – Final Report](#).

- (iii) the collection of user data (that could constitute both a barrier to entry in the market for other operators and a competitive advantage for digital platforms in their relationships with other operators).

4. Examples of the approaches (alternative to competition law) adopted to address some of the issues identified

53. Authorities around the world have adopted different approaches to address the aforementioned issues (especially regarding digital platforms bargaining power vis a vis publishers and advertisers⁸⁸).

4.1. The EU approach (special consideration to the German and Spanish cases)

54. The European Union (“EU”) decided to address the concerns of publishers and the sustainability of the publishing industry by conducting a reform of the copyright regulation in Europe as a means to encourage cooperation between press publishers and digital platforms⁸⁹ (concretely by passing a new Directive that introduced a new ancillary right for publishers/news media over their content).

55. As argued in the Commission’s impact assessment on the modernization of EU copyright rules, the gap in the current copyright EU rules “*further weakens the bargaining power of publishers in relation to large online service providers and contributes to aggravate the problems faced by press publishers as regards the online exploitation of, and enforcement of rights in, their content*”⁹⁰.

56. However, at the same time, the European Commission (“EC”) acknowledged that none of the reforms of copyright laws adopted at national level (in Germany and Spain, which implemented similar solutions before the Directive) have proven effective, as they have not resulted in increased revenues for publishers from digital platforms⁹¹.

4.1.1. The German approach

57. Germany introduced in 2013 an ancillary right for news media (i.e. before the EU Directive) that covered snippets⁹² and permitted voluntary negotiation between news media and digital platforms remuneration⁹³. In reaction, Google offered publishers two solutions:

- (i) to show shortened versions of news media snippets (arguably because it would infringe the new copyright rules otherwise); or

⁸⁸ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 1.

⁸⁹ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 1.

⁹⁰ See «*Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules - Part I*», page 160 (see [here](#)).

⁹¹ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 6.

⁹² As explained above, a small piece or brief extract with text, images, headlines, etc.

⁹³ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 15.

- (ii) that publishers grant a license so it could have free access to publishers' information (opt-in declaration)⁹⁴.

58. Thus, if the publishers did not grant such licence, Google would display in its results list mostly only headlines (but no small snippets and preview images)⁹⁵. This, obviously, did not result in increased revenues for publishers from the digital platforms.

4.1.2. *The Spanish approach*

59. Contrary to the German version, the Spanish reform of copyright introduced in 2014 an ancillary right for publishers that cannot be waived and that included a compulsory fee. Thus, while the German model permits voluntary negotiation, the Spanish reform does not allow publishers to opt out and negotiate over their right to be remunerated⁹⁶.

60. There are those who argue that the results of the Spanish reform were very harmful as they led to different companies shutting down their aggregation services (such as Google News, among others) and with some publishers witnessing 14 percent drops in traffic⁹⁷.

61. However, the News Media Alliance published a note of the Spanish reform that counterargued the aforementioned⁹⁸:

- (i) industry observers report that these drops in traffic amounted to only 1 to 1.5 percent of the total traffic
- (ii) while referral traffic may have decreased, it has been replaced by direct traffic, particularly to publisher landing pages, which is more valuable to news publishers (both monetarily and qualitatively, as news aggregators can minimize differences in publisher brands)
- (iii) at the same time, the Spanish publishers have reached licensing agreements with other aggregators, and publishers in countries without Google News are doing arguably as well as those in similar countries with Google News
- (iv) some news media have seen an enormous increase in the number of subscribers that pay for the content. However, they also acknowledge that the reform might have a greater negative impact for smaller business.

62. Before the new copyright law was passed, the CNMC issued a report on the draft amendment of the Intellectual Property Law⁹⁹.

63. In its report, the CNMC identified two aspects of the draft amendment that lacked proper justification:

- (i) the amendment was grounded on the consideration of publishers of newspapers or websites as direct competitors of news aggregation service providers and on the assumption that a compensation would not arise from private negotiation between

⁹⁴ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 15.

⁹⁵ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 15.

⁹⁶ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 7.

⁹⁷ See NERA Economic Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual*, <https://www.aepp.com/pdf/InformeNera.pdf>.

⁹⁸ See «The Effects of the Ancillary Right for News Publishers in Spain and the Resulting Google News Closure» ([here](#)).

⁹⁹ See the Report PRO/CNMC/0002/14 ([here](#)).

the latter – neither of which were, in the CNMC’s view, substantiated in the norm; and

- (ii) new entrants to the content aggregation market would be discouraged because of the compensation.

64. Despite these recommendations, the law was eventually approved with the same text as it was in the draft amendment of the law subject to the review by the CNMC. However, it should be pointed out that the mandatory transposition of the Copyright Directive¹⁰⁰, the deadline for transposition of which expired on 7 June 2021, is likely to lead to a change in the regulation of the current ancillary right for publishers in Spain.

4.2. The Australian approach

65. Australia has tried to solve the problem of the bargaining between news media and digital platforms through the application of regulation.

66. After some problems were outlined in the [ACCC’s report](#), the Australian government requested the ACCC to develop a mandatory code of conduct that obligated publishers and digital platforms to address bargaining power imbalances between digital platforms and new media businesses¹⁰¹.

67. The Bill was passed very recently and establishes a mandatory code of conduct to address bargaining power imbalances between digital platform services and Australian news businesses, and it does this by setting out six main elements¹⁰²:

- Bargaining – which requires responsible digital platform corporations and registered news business corporations that have indicated an intention to bargain, to do so in good faith;
- Compulsory arbitration – where parties cannot come to a negotiated agreement about remuneration relating to the making available of covered news content on designated digital platform services, an arbitration panel will select between two final offers made by the bargaining parties;
- General requirements – which require responsible digital platform corporations to provide registered news business corporations with advance notification of planned changes that are likely to have a significant effect on covered news content;
- Non-differentiation requirements – responsible digital platform corporations must not differentiate between the news businesses participating in the Code, or between participants and non-participants, or between non-participants because of matters that arise in relation to their participation or non-participation in the Code;
- Contracting out – the Bill recognises that a digital platform corporation may reach a commercial bargain with a news business outside the Code about remuneration or other matters. It provides that parties who notify the ACCC of such agreements

¹⁰⁰ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹⁰¹ See the « [Revised explanatory memorandum - 25 February 2021](#) » of the [News Media and Digital Platforms Mandatory Bargaining Code Bill 2021](#).

¹⁰² See the « [Revised explanatory memorandum - 25 February 2021](#) », page 10.

would not need to comply with the general requirements, bargaining and compulsory arbitration rules (as set out in the agreement);

- Standard offers – digital platform corporations may make standard offers to news businesses, which are intended to reduce the time and cost associated with negotiations, particularly for smaller news businesses. If the parties notify the ACCC of an agreed standard offer, those parties do not need to comply with bargaining and compulsory arbitration (as set out in the agreement).

68. There are those who argue that the Australian regulatory approach provides a swift solution to the ongoing disputes between news media/publishers and digital platforms by guaranteeing a remuneration to the former without modifying copyright laws or involving antitrust enforcement (ensuring a sharing of revenues between digital platforms and news media organizations and being more effective in quickly securing the result)¹⁰³.

4.3. A new approach (the second one) in Europe?

69. Based on limitations of the copyright approach to solve some of the problems detected, the EC might be trying to solve again some of those problems by introducing a new piece of legislation: the Digital Markets Act (“DMA”, which is now being discussed between the Council and the European Parliament)¹⁰⁴.

70. According to the draft of this legislation, gatekeepers (it is very likely that large digital platforms such as Google or Facebook would meet the foreseen thresholds to be defined as such) will have to comply with a series of obligations in order to ensure the existence of fair and contestable markets.

71. Among others, the most relevant obligations to the content of this article are:

- Article 5.g: “provide advertisers and publishers to which it supplies advertising services, upon their request, with information concerning the price paid by the advertiser and publisher, as well as the amount or remuneration paid to the publisher, for the publishing of a given ad and for each of the relevant advertising services provided by the gatekeeper”;
- Article 6.1.g: “provide advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of the ad inventory”;

72. Pending a final text of the legislation, it is still to be seen whether these obligations would help to tackle the bargaining power of digital platforms or, at least, solve some of the other problems detected¹⁰⁵, such as the opacity and lack of transparency in the digital advertising market.

¹⁰³ See “*Enforcing copyright through antitrust? The strange case of news publishers against digital platforms*” by Giuseppe Colangelo, *Journal of Antitrust Enforcement*, 2021, 00, 1–29, page 24.

¹⁰⁴ See the text of the DMA proposal [here](#).

¹⁰⁵ See the [CNMC’s position paper](#) for the public consultation on the Digital Services Act (DSA) and a New Competition Tool (NCT), which includes the CNMC’s assessment of digital regulation.

5. Conclusions

73. As explained above, the relationship between news media and digital platforms offers different outcomes for the parties involved.

74. On the one hand, digital platforms seem to reap substantial benefits (while not facing great disadvantages). Thanks to the news media content, they can attract consumers (e.g. through aggregation or search services) that might try as well other of their services (e.g. mail, maps, and/or video services).

75. On the other hand, the main advantage for publishers would be an increase in their advertising revenues thanks to the role played by digital platforms as important gateways to global audiences. However, this is not the case on all occasions, and it will really depend on whether the market expansion effect or the substitution effect prevails. In addition, publishers face a number of issues such as non-remuneration for their content, no control over how their content is presented, or non-sharing of data gathered by digital platforms from publishers' users, among others.

76. There have been competition cases (like the one in France) and reports by competition agencies (like the ones in Spain or Australia). And governments have adopted other approaches: like copyright (in the EU) or regulation (in Australia and, potentially, again in Europe). It is clear that governments around the world consider that there are concerns in the relationship between digital platforms and news media, especially considering also the central role news media play in the society (through the dissemination of public interest news).