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News Media and Digital Platforms – Note by BIAC

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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>.

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BIAC

1. Introduction

1. *Business at OECD* (BIAC) recognizes the importance of news media to democracies and widespread changes the advent of digital platforms has brought to this sector and is pleased to provide this contribution to the Competition Committee.¹

2. The emergence of digital platforms has had many positive benefits for the dissemination and democratization of information, including news media. BIAC acknowledges that maintaining high-quality investigative journalism necessary for a healthy democracy, economy and society-at-large depends on the existence of business models that ensure adequate returns for news media. There is a wide range of business models for the provision of online news media, including both subscription and advertising-based models and combinations thereof. Regardless, many traditional news media have faced financial pressure in the face of the growth of digital platforms.

3. Not all commercial challenges faced by news media as a result of the rise of digital platforms are competition issues, however. BIAC recommends that challenges facing news media be carefully identified and analysed so that appropriate remedies and solutions can be applied to ensure that public policy objectives—e.g., diversity, fairness, objectivity, editorial accountability and adequate remuneration of content owners—can be met while preserving the positive benefits of digital platforms.²

4. Towards this end, BIAC encourages competition authorities to undertake any analysis of the relationship between news media and digital platforms with precision to ensure that conclusions are robust and directed at identifiable competition problems.

5. To the extent that important public policy issues affecting news media are not related to competition issues, BIAC encourages such issues to be dealt with by regulatory bodies that coordinate their activities with competition authorities, rather than by these competition authorities themselves.

1 This paper builds on previous contributions of BIAC on related subjects, including digital advertising markets and quality considerations in the zero-price economy. See OECD, Competition in Digital Advertising Markets—Note by BIAC, DAF/COMP/WP2/WD(2020)8 (Nov. 24, 2020), [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2020\)8/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2020)8/en/pdf) [hereinafter BIAC Competition in Digital Advertising Markets]; OECD, Quality Considerations in the Zero-Price Economy—Note by BIAC, DAF/COMP/WD(2018)151 (Nov. 23, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)151/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)151/en/pdf). Although “news media” can cover a wide range of possible activities, for purposes of this paper, we focus on traditional publishers of written news media in a manner consistent with the Background Note by the Secretariat. See OECD, Competition Issues Concerning News Media And Digital Platforms—Background Note by the Secretariat, DAF/COMP(2021)16 (Oct. 25, 2021), [https://one.oecd.org/document/DAF/COMP\(2021\)16/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)16/en/pdf) [hereinafter Background Note].

2 Although not completely discrete from quality of journalism, this brief paper does not significantly address the controversy over online disinformation.

2. News Media: Disruption and Innovation from Digital Platforms

6. Digital platforms are not monolithic and pursue different business models with different implications for news media. Digital platforms can take the form of search engines (like Google, Bing, or Yahoo), social media (like Facebook, YouTube, Twitter, Instagram or Tik Tok), e-commerce websites (like Amazon), and aggregator/subscription services (like Apple). No matter the form, digital platforms rely on, and also build upon, news media as an input to their product.

7. Digital platforms have enabled news media publishers to expand their reach to new audiences around the globe. Traffic referral from digital platforms is crucially important for news publishers as it can be monetized in two ways: “(a) it creates advertising opportunities and (b) may also generate subscriptions as Internet users repeatedly hitting a paywall may decide to take a subscription to have access to a news publishers’ content.”³ In turn, accessibility of news media content over digital platforms makes the latter attractive from a user’s perspective, and, consequently, for advertisers.

8. Alongside enhancements of broadband Internet connections, digital platforms have decreased the costs of distributing information, which has in turn increased the entry of new information producers. Lower barriers to enter the news media market allows for greater diversity of voices behind the content. Digital platforms can then use algorithms to take this diversified news media content, together with other forms of information, and expose it to individuals whom it is most likely to engage. In addition to putting the most relevant news in front of users, these algorithms are able to maximize advertising revenues generated by this content.

9. The disruption created by digital platforms has also had negative impacts on news media, e.g., disruption to traditional business models and changes to the new “supply chain;” decline in investments in journalism as traditional news outlets struggle to establish or maintain viable online business models; and increase in online advertising spend (recouped largely by digital platforms) relative to spend on print media. Digital platforms emphasised free access to content from the start, and despite the elimination of Google’s former “First Click Free Policy,” many consumers of news content now have the impression that news content is something that can and should be accessible for free.⁴ Concerns have been raised that digital platforms have become gatekeepers for news media.⁵

3 Damien Geradin, *Complements and/or Substitutes? The Competitive Dynamics Between News Publishers and Digital Platforms and What It Means for Competition Policy*, 8 (TILEC, Discussion Paper No. 2019-003, Feb. 2019), <https://ssrn.com/abstract=3338941>.

4 The Cairncross Review: *A Sustainable Future For Journalism* 52 (Feb. 12, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf [hereinafter Cairncross Report].

5 The Stigler Center’s Committee for the Study of Digital Platforms identifies three main forms of disruption resulting from the rise of digital media platforms: First, the reduction in advertising revenues, resulting in news media firms being unable to afford the production of original journalism-type content; second, the loss of the power to pick and bundle news by professional news editors in favor of digital platforms that act as the new gatekeepers of news and information; and third, the disruption of the accountability of editors, in favor of algorithms to filter and curate content that have little incentive to be public-spirited, but rather focus on the goal of maximizing engagement. George J. Stigler Center for the Study of the Economy and the State, *Committee for the Study of Digital Platforms, Media Subcommittee, Protecting Journalism in the Age of Digital Platforms* 25 (2019), <http://www.columbia.edu/~ap3116/papers/MediaReportFinal.pdf> [hereinafter Stigler Report].

3. Relevant Competition Considerations

10. Digital platforms are rivals to, but also important business partners of, news media. In view of the public interest in support of journalism, it is necessary to identify competition-related market failures or theories of harm that are appropriate for competition authorities to address.

11. For example, although the Cairncross Report on “A Sustainable Future for Journalism” has characterized the relationship between digital platforms and news publishers as “unbalanced,”⁶ an unbalanced relationship does not necessarily imply an anti-competitive relationship. Authorities’ application of any competition theories of harm should be predictable, transparent, and based on both a solid factual record and sound economic analysis.

12. A case in point regarding different competition authorities arriving at contrary solutions based on incorporation of different theories of harm is presented by the expansion of copyright treatment in Europe of “snippets,” i.e., article extracts, photographs, infographics and videos from a publisher’s hyperlinked webpage.⁷ Snippets act as a preview to the main article and entice readers to click. In reaction to the introduction of ancillary copyright at the national level, Google started to show very short extracts to which the new protections did not apply, unless the publishers had provided free access to longer extracts.

13. In the snippet case, the German and French competition authorities, the Bundeskartellamt and the Autorité de la Concurrence, respectively, took contrary stances, demonstrating the uncertainty created by importing into competition law public interest objectives associated with protecting news media.⁸ The Bundeskartellamt took the position that the “dispute is not so much about competition law but about the scope of the ancillary copyright.”⁹ It distinguished Google’s objective justification for the changes made to its display of results—i.e., the requirements of copyright law—from a case where Google would have completely delisted individual publishers’ websites from Google’s results, which could have constituted an infringement of competition law.¹⁰ In contrast, the Autorité assessed the alleged abuse as being devoid of objective justification, “[h]aving regard in particular to the legislator’s intention to give news publishers and news agencies the possibility of receiving remuneration for the reproduction and display of their protected content on the basis of precise criteria.”¹¹ It therefore incorporated the public interest

6 Cairncross Report, *supra*, note 4, at 72.

7 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, 2019 O.J. (L 130) 92.

8 Vikas Kathuria & Jessica C. Lai, The Case of Google ‘Snippets’: An IP Wrong that Competition Law Cannot Fix 6 (Max Planck Institute for Innovation & Competition Research Paper No. 20-13, 2020), <https://ssrn.com/abstract=3693781>.

9 Press Release, Bundeskartellamt, Bundeskartellamt Takes Decision in Ancillary Copyright Dispute (Sept. 9, 2015), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html access 09/26/2021.

10 *Id.*

11 Autorité de la concurrence, Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d’information générale

objective directly into its application of competition law.¹² The contrary conclusions reached by the competition agencies in the two countries demonstrates how relying on competition enforcement to advance separate public policy goals can lead to uncertainty. As noted by commentators, in extending copyright and related-rights protections to snippets, which the EU did by its “Copyright in the Digital Single Market” Directive in 2019 in order to overcome differing national approaches among Member States and for the sake of a high level of protection afforded to authors and other rightsholders, this has created an issue that “has subsequently been left to competition law to resolve.”¹³

4. Horizontal Competition

14. News media and digital platforms are direct competitors for users’ time spent online, user data and advertising dollars.¹⁴ However, “it is not clear the extent to which these firms compete in one or several antitrust ‘attention markets’ and, even if that were the case, whether one or several digital platforms would have market power on such a markets.”¹⁵

15. In terms of advertising specifically, it has been recognized that because news publishers and digital platforms compete for advertising revenues, digital platform practices could have exclusionary effects.¹⁶ These practices might include, for example, changes to digital platforms where users remain on the platform to engage with the news content.¹⁷

16. There still exists, however, debate as to whether news media and digital platforms are complements or substitutes. According to the Stigler Report, empirical evidence suggests that on the consumption side, news aggregators act as a complement: “[A]nalysis using a shutdown of Google News in Spain in December 2014–January 2015 as a natural experiment found that the removal of Google News reduced overall news consumption by about 20 percent for users affected by the shutdown, and visits to news publishers declined by about 10 percent, a negative shock that particularly affected small publishers.”¹⁸ At least for small publishers, this data indicates that Google News seems to act as a complement rather than as a substitute.

and others and Agence France-Presse, ¶ 240
https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf.

12 Kathuria & Lai, *supra* note 8, at 30.

13 *Id.* at 6.

14 Sally Hubbard, Fake News is a Real Antitrust Problem, *Competition Pol’y Int’l* (Dec. 19, 2017), <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/CPI-Hubbard.pdf>.

15 Geradin, *supra* note 3, at 26.

16 *Id.* at 28.

17 See e.g., Hubbard, *supra* note 14 (where Facebook defaults users to an in-app browser for clicking on external links rather than sending users to an external browser).

18 Stigler Report, *supra* note 5, at 16.

5. Vertical Competition

17. News media and digital platforms enjoy complex vertical relationships. These vertical relationships are shaped by the publishers' dependence on platforms for digital distribution as well as access to financing (advertising services and/or share of revenues), and the impacts that digital platforms have over referral traffic to news sites. It is clear that there is a relationship between news media and digital platforms, in which they depend on each other. News media need digital platforms to drive traffic to their online presence, while digital platforms require news media content, even if just snippets, which serves as an important free input for their platforms.

18. In this context, it can be questioned whether digital platforms play the same "gatekeeper" role that has emerged as a primary concern with regard to these platforms in other contexts. Rather, the issues in the vertical relationships between news media and digital platforms appear to revolve primarily around such questions as transparency and economic dependency/asymmetry in bargaining positions, in addition to non-discrimination. There are a number of complex factors that would have to be taken into account when assessing the bargaining position of digital platforms vis-à-vis news media, each of which operate in complex double-sided markets.

19. Certain commentators have identified an imbalance in bargaining positions as exploitive, "[F]rom a vertical standpoint, some of Google and Facebook's practices vis-à-vis news publishers could be exploitive in nature because the imbalance in the relationship seems to allow the platforms to extract far more from the exchange than is fair."¹⁹

20. Others argue that digital platforms in their current form could not survive without the very news content supplied by traditional publishers, causing them to value the viability of its suppliers:

*Aggregator platforms, including search engines, are, however, also complements to the underlying content, just as a distributor is a complement to a manufacturer of automobiles. Without content, irrespective of who generated that content—platform users, third parties, or the platforms themselves—the aggregator platforms would have no reason to exist. Were the supply of content to dry up, there would be no Google News; were there no content worth embedding, there would be far less value to the owners of Facebook, Twitter and LinkedIn. That is, the viability of the platforms depends on the viability of the suppliers of content, including both news content and user-generated content.*²⁰

21. As mentioned above, an imbalance in bargaining power does not necessarily imply a competition law problem. Competition law is most effective when dealing specifically with abuses of market power, and competition authorities must therefore scrutinize alleged theories of harm brought forward to determine whether these do, in fact, raise issues of market power (and therefore lend themselves to competition enforcement) or issues better addressed through regulation.

22. The Australian Competition and Consumer Commission (ACCC) notes that news publishers have expressed a long list of concerns, including a lack of transparency in the operation of digital platforms' algorithms when ranking and distributing news content;

19 Geradin, supra note 3, at 3.

20 Id. at 8 (citing H. Ergas et al., Impact of news aggregators on public interest journalism in Australia 37 (May 2018)).

digital platforms profiting from news content; the imposition of publishing formats, such as Google’s Accelerated Mobile Pages (AMP) and Facebook’s Instant Articles, which limit the amount of advertising that can be displayed by news publishers; and the lack of sharing of consumers’ data.²¹ Even if certain of these practices could be construed as instances of abuse of market power, however, it is not clear that competition agencies have the remedial tools at their disposal to address the longer term issues faced by the news media industry.²²

6. Policy Considerations

23. BIAC recognises that competition agencies have significant expertise in understanding markets and competitive and bargaining dynamics. Many competition agencies also hold the powers and resources to conduct thorough and complex market-wide investigations. However, as acknowledged by the OECD Secretariat paper,²³ and by almost every competition inquiry into news media and digital platforms, the issues raised by the interaction between the news industry and digital platforms may in some cases go beyond the application of “traditional” antitrust theory, to encompass arguably “new” structural market issues, but also non-competition issues.

24. BIAC also recognises that competition law is not—and should not be—static. It adapts as markets evolve and new technologies and business models emerge. Innovative theories of harm and remedies, supported by evidence, ensure that competition law remains relevant and capable of dealing with the challenges of the digital economy. However, BIAC cautions against the use of competition law to address situations which by no means represent competition issues; against any lowering of the established evidential and legal standards in the application of competition law; and against undue remedial intervention by competition authorities aimed primarily at a redistribution of profits along a supply chain, or at the protection of incumbent business models, especially without a gaining a sufficient degree of certainty that this would ultimately benefit consumers. These risks are especially live in examinations of the interactions between the news industry and digital platforms.

25. In the context of the intersection between competition law and consumer data rights, BIAC recommended that, while cooperation should improve between privacy and competition regulators, the legal regimes should remain distinct, and that competition law theories of harm regarding different situations of deploying consumer data should be carefully considered.²⁴

26. The same is true for the intersection between competition law and non-competition considerations relevant to the news industry, such as maintaining the quality of journalism, ensuring a plurality of viewpoints, investment in content, and the regulation of content. This sector has also raised important questions about the scope of copyright, which are

21 Austrl. Competition & Cons. Comm’n, Digital Platforms Inquiry—Final Report 108-109 (2019), <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf> [hereinafter ACCC Report].

22 See Neil Weinstock Netanel, Mandating Digital Platform Support for Quality Journalism, 34 *Harvard J. of L. & Tech.* 473, 507 (“[A]ntitrust enforcement is highly unlikely to obviate the need for forward-looking regulatory measures to foster competition and protect consumers of goods and services that dominant digital platforms currently provide.”).

23 Background Note, *supra* note 1.

24 BIAC Competition in Digital Advertising Markets, *supra* note 1, at 9-11.

being addressed, to the extent inherent in the legal instruments used, in certain jurisdictions, such as with the European Union’s Directive on Copyright in the Digital Single Market.²⁵ Similarly, the ACCC has recommended a number of areas of legal and regulatory reform to better protect consumers and level the regulatory playing field.²⁶ It is right that any such issues are addressed through distinct legislative proposals and that competition law is not seen as an all-purpose tool to solve those problems in the short term.

27. As the OECD Secretariat’s Call for Contributions notes, a key issue in the recent inquiries into the dynamics between news providers and digital platforms has been “the impact of digital platforms on consumption of content with potential effects on the reputation of news outlets, as well as on incentives to amplify viral content, and potentially mis- and dis-information” and “whether these issues can be addressed through competition law.”²⁷ Aside from where it raises issues of consumer law such as that relating to misleading advertising (and where that is in the remit of a competition agency), competition law is not equipped to solve harms arising from mis- and dis-information. This is not to say that these issues are not worthy of consideration, but competition agencies must indeed ask the threshold question of whether they can be addressed through competition law. To not ask this question risks distorting competition law and creating legal uncertainty for all.

28. In addition, the challenges of tackling issues in the digital economy and its hugely disruptive effect should not lead to a lowering of the relevant evidential and legal standards in the application of competition law. As noted above, competition law and existing enforcement tools are sufficiently adaptable to meet the challenges of the digital economy. In fact, the more “novel” the theory the more important that the analysis is robust and evidence based.

29. The presence of seemingly unassailable market power can make it tempting to apply less rigorous standards to theories of harm. Competition inquiries in this industry have invariably examined as a threshold factor the market power of digital platforms, in particular of Google and Facebook. The ACCC noted, “The ubiquity of the Google and Facebook platforms has placed them in a privileged position. They act as gateways to reaching Australian consumers and they are, in many cases, critical and unavoidable partners for many Australian businesses, including news media businesses.”²⁸

30. Market power in conjunction with barriers to entry (which may arise from market power) can distort competitive dynamics to the detriment of other market operators and ultimately consumers. However, it is important that legal and evidential standards remain high in the analysis of theories of harm and in the evaluation of potential remedies. This is especially the case where theories are arguably novel and non-competition issues have been raised. Also, to view market power (even substantial market power) purely as a threshold matter, justifying a lowering of legal and evidential standards applicable to theories of harm and remedies, might risk creating company-specific regulation, particularly in the absence of appropriate safeguards, and this could create legal uncertainty for firms across affected industries.

25 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, 2019 O.J. (L 130) 92.

26 ACCC Report, *supra*, note 21, at 199-203.

27 Letter from Frédéric Jenny, Chair, OECD Competition Comm., to Delegates 1 (Aug. 5, 2021) (on file with author).

28 ACCC Report, *supra*, note 21, at 1.

31. Further, as the ACCC Report identified, it can be the case that substantial bargaining power in one part of a supply chain can reduce investment in other parts of the chain. However, imbalances of bargaining power are prevalent in many industries and are not, standing alone, an abuse. It is important that competition authorities seeking to rebalance industries, especially through codes of conduct and sanctioned collective bargaining,²⁹ or even by themselves determining “fair” compensation, do so only on the basis of competition abuses. Such acts can have a considerable impact on market competition, including between those on the same side of the bargain. For example, Australia’s News Media Bargaining Code was initially subject to comments from the news industry that it would actually work against smaller news outlets.³⁰ Intervening to redistribute profit across an industry can also distort incentives to innovate or invest by preserving existing products and business models. Similarly, seeking to preserve incumbent business models or to generally shield firms from technological advances, risks harming consumers. This is not to say that where there are competitive distortions caused by structural issues—such as substantial market power, unjustified regulatory imbalances, or a lack of transparency—that intervention is not warranted, it is essential that any attempts to effectively shield firms from market or technological forces (however disruptive) or to “rebalance” profit distribution, has a demonstrable benefit to consumers, otherwise such measures serve only to protect existing market operators, arguably to the detriment of consumers. The news industry has an importance beyond purely economic considerations, but competition authorities should be guided by what benefits both consumers of news and suppliers of news and recognise where issues are better addressed by means other than competition law.

7. Conclusion

32. BIAC recognises the important considerations of the quality of journalism, access to news content, diversity, and plurality, raised by the disruptive effect of the internet. Also given the vertical and horizontal relationships between the various parties, it is natural for competition authorities to be called upon to intervene. Competition authorities and competition tools are well able to deal with the competition issues that may arise. In case of non-competition issues, however, other regulators and legislators are better able to address these issues. With respect to regulatory bodies, competition authorities can usefully take a coordinating function, but we caution against the use of competition law to solve such non-competition issues.

33. Any action considered or undertaken by competition authorities regarding news media and digital platforms should 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.

²⁹ Geradin, *supra*, note 3, at 24.

³⁰ See News Media Bargaining Code, ACCC, <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>.