

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

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*competition*commission
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MEDIA AND DIGITAL PLATFORMS MARKET INQUIRY FINAL TERMS OF REFERENCE

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1. INITIATION OF A MARKET INQUIRY

- 1.1 The Competition Commission (“Commission”) will conduct a market inquiry into the distribution of media content on digital platforms, including search, social media and news aggregation platforms, the “Media and Digital Platforms Market Inquiry” (or “MDPMI”). Search and social media platforms primarily fund themselves through advertising and drive consumer traffic, engagement and data collection to support that revenue stream. New media content is made available to drive traffic and engagement and where the digital platform market features will influence the bargaining over the use of that content and referral traffic to news media websites. News aggregation services curate content from various news sources to offer consumer convenience in digital news consumption, and market features will influence the bargaining over the use of news content.
- 1.2 The MDPMI is initiated in terms of section 43B(1)(a) of the Competition Act 89 of 1998 (as amended) given that the Commission has reason to believe that there exist market features in digital platforms that distribute news media content which impede, distort or restrict competition, or undermine the purposes of the Act, and which have material implications for the news media sector of South Africa. These reasons are set out below along with the final scope of the Inquiry. The draft Terms of reference were published

on 17 March 2023, The Inquiry allowed for public comments and has considered all written submissions made by industry stakeholders in its final scope.

2. BACKGROUND TO THE CONCERNS ON DIGITAL PLATFORMS AND THE IMPACT ON NEWS MEDIA ORGANISATIONS

Digital platform concerns and the use of a market inquiry

2.1 The growth of digital platforms in recent years has had a significant impact on traditional news media organisations and its traditional revenue streams. The transition to digital news consumption and advertising has resulted in publishers seeing a massive decline in advertising revenue, and an increase in costs, as newsrooms need to devote resources to their digital presence. This transition has left publishers and news media organisations in a precarious financial position. For small news organisations, the costs may even prohibit a meaningful online presence at all. In addition, independent journalism in the country is under threat as a result, a concern given independent public interest journalism is one of the cornerstones of a healthy democracy.

2.2 The Commission is also aware that globally, there have been several inquiries and investigations led by competition authorities on the impact of digital platforms (e.g., Google and Meta) concerning, amongst others, news media businesses that use these platforms to distribute their content digitally as well as the impact on their generation of revenue.¹ Due to the prominence of some of these digital platforms, players such as Google and Meta, act as gateways to reaching consumers, especially for businesses in the news media sector.

2.3 Domestically, news organisations have raised a similar range of allegations which may impact negatively on competition, public interest, and the ability for news publishers and

¹ Many competition authorities have undertaken market inquiries into various aspects of digital markets including a focus on digital advertising and digital platforms. In these types of inquiries, many aspects of the impact of digital platforms have been assessed which include the impact of digital platforms on: consumers, businesses using platforms to advertise to and reach customers, and more specifically news media businesses such as publishers and news aggregators using these platforms to disseminate their content. See Australian Competition & Consumer Commission (“ACCC”), June 2019, “Digital Platforms Inquiry – Final Report”. Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>; Competition & Markets Authority (“CMA”), 1 July 2020, “Online platforms and digital advertising – Market Study Final Report”. Available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

news media organisations to fully enjoy the revenue benefits of their content in the news media sector which warrant further inquiry, namely:

- 2.3.1 Google and Meta (formerly known as Facebook), through their digital platforms, are dominant gateways to consumers and news publishers are, in part, dependent on referral traffic from these platforms. However, these platforms use their dominance to effectively extract copyright news snippet content for free by demoting news articles that lack a snippet on the search engine results page (“SERP”) or exclude them from the social media feed. This effectively, denies the publishers referral traffic that would allow them to earn display advertising revenue. The practice of offering news snippets also denies the publishers referral traffic as news consumption has shifted to many consumers simply browsing news snippets. This change in news consumption adds value to the search and social media platforms, allowing them to monetise data or advertising, and in so doing extract the benefits of copyright content from the publishers.
- 2.3.2 The dominance also enables the search and social media platforms to act as a gatekeeper on consumer data, denying publishers full access to that data which prevents them from better understanding and serving the South African consumer. In addition, the dominance has imposed costs on the publishers as changes in algorithms impact on publisher visibility and referral traffic and require ongoing investments in news site optimisation for search and social media. This situation is worsened by the lack of engagement by these companies.
- 2.3.3 Google and Meta are also dominant in digital advertising and the so-called ‘ad tech stack’ or supply chain used in the buying and selling of display advertising on websites and/or mobile applications (apps), including news sites. These platforms are used for the sale of display advertising inventory and simultaneously offer display advertising purchases by advertisers given their dominance over consumer data allowing improved targeting. Their dominance means that their members may receive a lower proportion of the fee paid by advertisers than they would in a competitive market.
- 2.3.4 The algorithms used to rank news items in search results or be inserted in social media feeds also determines competitive outcomes between news

media organisations, and may favour larger more established media companies or reinforce particular media sources, to the detriment of competition from smaller or more diverse media organisations.

News media organisations' relationship with digital platforms and the implications on competition

2.4 News media organisations² rely on Google and Meta's user-facing services to host content or to drive traffic to their websites or apps. The Competition and Markets Authority ("CMA") identifies three broad types of digital business model strategies adopted by publishers of online content:³

- 2.4.1 Subscription based, where the publishers focus on turning the user into a paying subscriber;
- 2.4.2 Traffic and digital advertising based, where the primary focus is to drive traffic to the publisher's webpages and monetise their content in the form of targeted digital advertising that is displayed to the visitor; and
- 2.4.3 Monetisation of content on third-party platforms, where publishers post content on third-party digital platforms (e.g., social media sites or news aggregator services) and use monetisation tools made available by those platforms (e.g., sharing of advertising revenues) to generate revenue.

2.5 The Australian Competition and Consumer Commission ("ACCC") identified that there is increasingly an overlap between the functions of news media businesses and digital platforms with respect to the selecting and curating of content, evaluation of content, and the ranking and arranging of content online.⁴ For instance, the ACCC found that many digital platforms utilise complex algorithms that select relevant content, extract titles and links, and group or rank the content in order of relevance to its users sourced from available

² News media organisation refers to a business or company or non-profit that produces and publishes news content which include news publishers, news agencies, and any other business that provides news media sources.

³ See CMA (2020), "Annexure S: the relationship between large digital platforms and publishers". Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>

⁴ See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

online news content.⁵ Digital platform users may access online news content through search queries on search engines (e.g., Google Search or Microsoft's Bing),⁶ through social media sites (e.g., Facebook under its News Feed),⁷ or through news aggregator sites/apps (e.g., Google News and Apple News).⁸

2.6 Digital platforms are critical channels through which news businesses reach consumers and provide them with vital referral traffic. A substantial amount of online news publishers' referral traffic emanates from digital platforms in South Africa.⁹ Several market studies have found that this direct access that digital platforms have to consumers makes the use of these platforms by businesses, such as those in news media, critical and unavoidable.¹⁰ As such, there are several potential competition and public interest implications that may stifle the business activities of news media organisations due to their dependency on digital platforms:

2.6.1 The dependency of news media organisations on the digital platforms for referral traffic means that the platforms may enjoy significant bargaining power both in terms of the intermediary relationship they have as gatekeepers but also the asymmetric nature of the relationship between these parties. This dependency can further entrench these platforms as intermediaries between

⁵ Ibid.

⁶ Search engines such as Google Search produces a set of hyperlinks that its algorithm considers to be relevant to the search term inputted by a user where the search query is displayed as organic search results. The algorithm also considers what type of results to display, for instance, if it determines that the search term is relevant to a current news item (i.e. has 'news intent'), the search results display a 'Top Stories' carousel on the results page. The Google algorithm uses algorithms to rank and determine the news articles that are displayed within 'Top Stories' as well as the placement of the article on the search page. Bing also provides the same service that provides news content relevant to the search query. See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

⁷ Meta displays and ranks the most relevant content on its Facebook News Feed using algorithms that are based on predictions on how likely a user is to comment on a story or share it with friends. The ACCC has found that social media platforms are a vital gateway for news dissemination to consumers, where the highest consumption of news via these platforms emanates from Facebook. See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>

⁸ News aggregator sites or apps such as the services offered by Google in its Google News services and Apple in its Apple News app collect and curate headlines and news articles from a wide range of sources including news outlets, blogs and other websites. Users of these digital platforms are often able to personalise the type of content that the digital platform algorithm will select for them based on the type of preferences on topics and sources that they are interested in. Content curated from the algorithm is also personalised to the user according to the user's reading history.

⁹ See submissions from the PSS to the OIPMI dated 18 February 2022

¹⁰ See ACCC (2019). "Digital Platforms Inquiry – Final Report". Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>; CMA (2020), "Annexure S: the relationship between large digital platforms and publishers". Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>

news media businesses and consumers and exacerbate the imbalance in bargaining power held by those digital platforms.¹¹ For instance, in the United Kingdom, the CMA found that Google Search is the most important interaction between users and publishers as it is significant referrer of traffic to the websites of news publishers.¹² Meta is also an important source to drive customer traffic to publishers' websites. However, publishers generally have little to no ability to directly monetise their content through digital advertising on Meta's platforms such as Facebook.¹³

- 2.6.2 Digital platforms may also have an incentive to use news content to draw users and keep them engaged on these platforms without establishing fair payment terms with the original news content providers. This is achieved by controlling the news content made available by news businesses on the platform by using complex algorithms, providing snippets of news content and selecting what content consumers interact with. In this instance, consumers may simply benefit from reading headline snippets on these digital platforms without being directed to the publishers' web pages or apps. Thus, publishers do not derive the benefit of monetising this content through the display of their own adverts on their websites or apps.
- 2.6.3 The lack of transparency on how algorithms employed by these digital platforms operate may also make it difficult for news media businesses to monitor the quality and effectiveness of their news content and their advertising endeavours to fully extract monetisation opportunities in displaying and providing online news content. In addition, the lack of transparency on algorithms and any changes to the algorithms relating to display and referral links of news content may significantly impact on news business' ability to operate.
- 2.6.4 Increasingly, digital platforms are performing the same (or substantively the same) services as traditional publishers (as mentioned above). However, there are laws and regulations that are applicable to news media businesses which are not or disproportionately applied to digital platforms when performing the

¹¹ Ibid.

¹² See CMA (2020), "Annexure S: the relationship between large digital platforms and publishers". Available at: <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report>

¹³ Ibid.

same functions.¹⁴ On the other hand, protection over copyrighted content may be harder to enforce once this content is distributed and displayed online. Even where the digital platforms pay for such news services, the unequal bargaining power typically results in the platforms extracting most of the value from the trading relationship.

2.7 Loss of advertising revenue for publishers means that they cannot make the necessary investments which in turn may potentially reduce the quality and diversity of news content that is available to consumers. A smooth transition into digital distribution requires considerable investment in technology and highly skilled developers which comes at a high cost. This effectively means that competition on quality in the news publishing sector is diminished. News media organisations have been hesitant to invest in sourcing additional referrals from digital platforms, due to the lack of digital revenue sharing and the unsustainability of this approach. Whilst they have invested heavily to adapt to operating in the digital space, digital platforms are hampering the financial sustainability of such adaptation¹⁵ and excluding smaller players in the process which are unable to make such investments in a digital presence.

Recent trends in new technologies

2.8 Recently, there has been development of opensource artificial intelligence (AI) applications developed as a language model to interact conversationally to user questions. This type of AI machine learning falls under generative AI,¹⁶ which describes algorithms that can be used to create new content, including audio, code, images, text, simulations and videos.¹⁷

2.9 In late November 2022, OpenAI launched a chatbot model, ChatGPT which uses generative AI machine learning to provide answers to any questions posed by users.¹⁸ OpenAI was initially created as an open source, non-profit company, but has now become a closed source, profit-driven company.¹⁹ In February 2023, Microsoft announced that it

¹⁴ See Australian Competition and Consumer Commission (2019). "Digital Platforms Inquiry". Available at [Digital platforms inquiry - final report.pdf \(accc.gov.au\)](https://www.accc.gov.au/publications/2019/digital-platforms-inquiry-final-report)

¹⁵ See submissions from the PSS to the OIPMI dated 18 February 2022

¹⁶ Generative AI systems have a constantly adapting machine learning algorithm which creates its output from content (or information) that is already widely available over the internet. This machine learning aspect of the algorithm allows these AI systems to learn from data patterns without human direction using data already publicly available for it to assess.

¹⁷ See McKinsey & Company, 19 January 2023, "What is generative AI?". Available at: <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-generative-ai>

¹⁸ See Open AI website. Available at: <https://openai.com/blog/chatgpt/> [Accessed on: 24 February 2023]

¹⁹ <https://www.diamandis.com/blog/ai-open-closed> [Accessed on: 06 September 2023]

had partnered with OpenAI to utilise the ChatGPT chatbot model in its Bing search engine. Around the same time, Google announced it had launched its own chatbot model, Bard (Duet), that would be integrated with its search engine. This too is being monetised through commercial applications. The integration of these generative AI based chatbots into search engines would allow users to obtain direct answers to questions or queries posed in the search results page without the need to necessarily obtain it through accessing publisher webpages. Search has been generating responses and predicting answers without generative AI for quite some time and online news publishers have claimed they are receiving less traffic already due to these features.

2.10 This poses a potential threat to user traffic being driven to online content publishers' webpages such as news publishers, resulting in a further threat to monetisation of their content through adverts. Furthermore, South African news publishers' content may also be used to train these AI systems without authorisation or compensation. This was confirmed by ChatGPT itself in response to that query. The accuracy of generative AI results has been questioned subsequent to ChatGPT creating false stories and citing fake news articles by credible online news publishers.²⁰ This poses another threat online news publishers due to the reputational harm it may inflict.

2.11 The integration of these generative AI systems into search engines and greater online usage are still in the early stages of adoption, however, generative AI systems are rapidly evolving. Previously, ChatGPT could only pull data it learned prior to September 2021, which is when GPT-3's training data was assembled. However, OpenAI's release of the new GPT-4 engine and Whisper API in March 2023 allows plugins that enable ChatGPT to pull real-time data. These plugins can even enable ChatGPT to take action on behalf of the users like booking a flight or ordering take-out.²¹ While availability of this plugin is still limited, it is unclear the extent to which these systems may pose a threat to online content publishers, especially news publishers, in the form of significant competition and public interest concerns in South Africa. However, this should be investigated in these early stages such that appropriate remedies can be implemented to reduce or eradicate future competition and public interest harm to news media businesses.

²⁰ <https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies/> [Accessed on 06 September 2023]

²¹ <https://www.engadget.com/chatgpts-new-plugins-will-deliver-real-time-stats-182900388.html> [Accessed on 06 September 2023]

Ad Tech stack²² and Digital Advertising through online search and social media platforms

- 2.12 There has been considerable international attention by competition authorities around online advertising markets, or Adtech Stack, used by the news publishers and others. Globally, competition authorities that have conducted market studies on digital advertising have found that Google and Meta are also dominant in “ad tech” or the supply chain in the buying and selling of display advertising on websites and/or mobile applications (apps), including news sites, with significant market power, and large network effects, economies of scale and significant consumer data access.
- 2.13 The MDPMI will consider the Adtech Supply Side Platforms (SSPs)²³, Demand Side Platforms (DSPs)²⁴ and intermediary Ad Exchanges (AdEx)²⁵ used to surface digital advertising as it relates to the South African news media websites or apps context. The focus will be on whether there are structure or conduct features which adversely affect competition in the Adtech stack which may result in publishers either facing fewer or lower bids for their inventory, or a lower share of the advertising Rand as a result of intermediary fees that are not fully constrained through competition.
- 2.14 In the ACCC investigation²⁶, there have been concerns that platforms that sell ad inventory and provide intermediary services for publishers and advertisers may have a conflict of interest, where a platform may be incentivised to favour its own business units compared to competitors. The conflict of interest arising from the platform may reduce competition and transparency in the market. It has been suggested that digital platforms on the supply side have favoured their businesses against its competitors with respect to

²² Ad tech (or “adtech”) is shorthand for “advertising technology”. It refers broadly to the software, systems, platforms, and tools used by publishers, advertisers, and other parties to buy, sell, and manage digital advertising. These are tools that assist in the automatic purchasing, selling and serving of some types of display ads. These ad tech tools can be configured to interact with each other in different ways and are generally interoperable (that is, the services connect and are able to be used with each other). *The combination of ad tech services involved in completing an end-to-end display ad transaction between advertisers and websites is often referred to as the ad tech supply chain or the ad tech stack.* (See ACCC (2019). “Digital Platforms Inquiry – Final Report”. Available at: <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>)

²³ Supply side platforms (SSPs) – platforms used by websites to help maximise the price at which ad inventory is sold, and which utilise various data to provide ad targeting services.

²⁴ Demand side platforms (DSPs) – platforms used by advertisers to help them purchase ad inventory from suppliers of ad inventory as effectively and cheaply as possible, and which utilise various data to provide ad targeting services.

²⁵ Ad exchanges – platforms on which supply and demand side sources meet to take part in an auction for ad inventory. The function of ad exchanges however is increasingly being combined with SSPs.

access to consumer data, access to auctions and speed. Access to consumer data is important to target digital display advertising and be able to produce competitive bid for programmatic advertising. Hence, consumer data is important for advertisers to reach a certain consumer and for publishers to receive higher bids for ad inventory in programmatic advertising.²⁷

3. SCOPE OF INQUIRY

3.1 Consistent with section 43B of the Act, the MDPMI will focus on whether there are any market features in digital platforms that distribute news media content which impede, distort or restrict competition, or undermine the purposes of the Act, and which have material implications for the news media sector of South Africa. The news media sector includes news publishers and broadcasters, including the public broadcaster, the South African Broadcasting Corporation (“SABC”) and small, local, and community media organisations, given the integration of video into search and social media, and the news publisher moves into video content. These include the following relevant digital platforms:

3.1.2 Search engines (e.g. Google Search and Microsoft Bing);

3.1.3 Social media sites (e.g. Meta);

3.1.4 News aggregator sites and/or apps (e.g. Google News and Apple News);

3.1.5 Video sharing platforms (e.g. YouTube and Tiktok);

3.1.6 Generative AI services whether integrated into the above platforms or not (e.g. ChatGPT alone or integrated with Bing);

3.1.7 Ad Tech stack companies on the Supply Side, Demand Side and Ad Exchanges;
and

3.1.8 Other platforms identified in the course of the inquiry.

3.2 The scope of the inquiry will exclude non-news publishers such as magazines, books and journals. The scope of the inquiry will specifically exclude app store commission fees and

²⁷ Competition Commission “ad tech stack and online advertising markets scoping study” dated 28 October 2022

terms & conditions for South African news media own apps which were the subject of the Online Intermediation Platforms Market Inquiry.

3.3 The MDPMI is broadly focused on (i) the interaction and dependency of South African news media on relevant digital platforms as an intermediary, distributor and link to online users for the dissemination of news content online and facilitate the sale of advertising inventory on the news publishers sites; (ii) the impact, thereof, on news media to aggregate, display, create and monetise their news content online; and (iii) the implications of the dependency on digital platforms by news media organisations on consumers, on the sustainability of news media sector and the provision of credible news content as a public good to consumers.

3.4 The main objectives of the inquiry into Media and Digital Platforms are to:

3.4.1 Evaluate trends, adoption and use of the relevant digital platforms identified in 3.1 above to aggregate and display news content online and the importance of digital revenue sources for news media organisations;

3.4.2 Evaluate whether market features distort competition for advertising revenue, consumer data and subscription fees between news media organisations and the relevant digital platforms that display and distribute news media content as intermediaries to consumers, including news aggregators;

3.4.3 Evaluate whether the commercial relationship between news media and relevant digital platforms is characterised by imbalances in bargaining power and the impact of such imbalances on competitive outcomes affecting the news media industry, including pricing and non-price outcomes;

3.4.4 Evaluate whether competition for the distribution, display and monetisation of news content online between news media organisations through relevant digital platforms is distorted by market features including, but not limited to, ranking algorithms, paid results, search engine optimisation, consumer and social network preferences and commercial relationships with news media organisations; and the effects of this on public access to credible news content as a public good.

3.4.5 Evaluate whether market features in the markets for Adtech Supply Side Platforms (SSPs), Demand Side Platforms (DSPs) and intermediary Ad Exchanges (AdEx) may

reduce advertising sales to, lower the price of advertising sales and/or reduce the share of advertising spend of the South African news media sector.

- 3.4.6 Evaluate whether the current and future integration of generative AI systems in relevant digital platforms, including the AI review and assimilation of news media content, will impact on the adoption and competition considerations in 3.4.1 to 3.4.5;
- 3.4.7 Evaluate the impact of 3.4.1 to 3.4.6 on the quality and consumer choice of South African news media, as well as the impact on news media organisations that are small and medium-size enterprises (“SMEs”) and/or businesses owned by historically disadvantaged persons (“HDPs”);
- 3.4.8 Determine appropriate remedies where an adverse effect on competition or the purposes of the Act are found as set out in section 43C(3) of the Act.

4. Market inquiry timelines and process

- 4.1 The MDPMI will commence within 20 business days after the publication of the final Terms of Reference and the final report will be completed within 18 months, as per the statutory requirements of sections 43B(2) and 43B(4)(a) of the Act respectively. Details on the administrative phases of the inquiry along with Guidelines for Participation will be made available on the Commission’s website once the final Terms of Reference are published. At that point, members of the public and businesses will be invited to provide written representations and information to the inquiry.