

COMMENTS OF THE AMERICAN BAR ASSOCIATION'S ANTITRUST LAW SECTION REGARDING THE CNMC'S CONSULTATION ON ITS ONLINE ADVERTISING SECTOR INQUIRY

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Introduction

The American Bar Association's Antitrust Law Section (the Section) is pleased to offer comments to the CNMC in response to its consultation on Online Advertising Sector Inquiry.


General Assessment/Impact on Consumers

As part of the Consultation, CNMC has inquired about the potential benefits to consumers that can come with online advertising, particularly when used to support online platforms that provide other services to consumers such as internet search or social media functionality.

As a general matter, the activities of online platforms, including those that are advertising supported, are often not fundamentally different from other sectors of the economy merely because they involve software and internet content. As such, online platforms remain equally subject to the well-established competition laws analysis. Indeed, if anything, the online nature of the service increases transparency into some aspects of platform operators' practices, which, in turn, increases the ability of market participants and competition authorities to detect anticompetitive behavior in a timely manner.

The Section agrees that competition in the online advertising sector can yield numerous procompetitive benefits to consumers. Such benefits can come in the form of lower prices, as well as innovation. For example, the flexibility of an online advertising platform has led to advances in the types of offerings available to consumers of advertising services. Platform advertisers can target specific population demographics in ways that may be more efficient than other forms of advertising that serve a broader audience, such as traditional print media. This innovation can allow businesses of all sizes to be more efficient with their advertising budgets and, in turn, drive competition in their own segments of the economy. In addition, such tailored offerings can create an improved end-user experience on a platform.

Given the highly fact specific nature of each business model, the Section recommends that the CNMC maintain a case-by-case approach to allegations of anticompetitive conduct in online advertising. It is important to have flexible policy frameworks that promote competition



while facilitating innovation, by not discouraging or otherwise impeding further development of new technologies. Innovations related to online business have been transformative in a wide variety of major industries over the last several decades. Despite potential antitrust concerns, the obvious and profound consumer benefits of such innovations should caution against application of legal tools whose costs and ultimate benefits may be difficult to predict. The Section respectfully submits that the CNMC's design for the study take into account that enforcement should be based on careful factual analysis and not simply on theory.

The Section believes that it is important to consider and analyze the effects on all market participants, including both consumers and businesses. Online platforms connect businesses and consumers and must balance the needs of these disparate groups. To the extent that policy is considered that would impose requirements on the terms of online advertising providers or other online platforms, the CNMC's study should consider the effect on all groups that participate in online services. For example, mandating greater transparency and terms of access to businesses may decrease the quality of the offering to consumers who participate in these platforms. In addition, compliance with any policy could result in increased costs for online platforms, some of which will be passed on to businesses and consumers using these services. This may in turn result in fewer consumers and businesses using these platforms.

Privacy

The Consultation raises, in particular, whether the advantages of online advertising outweigh the costs in terms of potential loss of privacy. The Section respectfully suggests that this is a matter to be resolved through the competitive process and a platform company's own balancing of the need to fulfill a mix of demands on both sides of a platform. To be successful, online services must appeal to each group of participants with an optimal mix of prices and terms. Online platforms seek to attract customers and users by offering lower fees, improved services, an attractive user base, ease of use, and favorable terms of access. Rather, this variation reflects a competitive dynamic in which online platforms compete by offering differentiated services to their participants.

Pursuant to the CNMC public consultation's explanatory notes, we understand that the purpose of the study is to analyze the *conditions of competition and of market conduct by undertakings*. As a first comment, the Section is of the view that any possible loss of, or harm to, privacy of consumers should not be addressed under competition law. The Section therefore respectfully submits that point 3 of the consultation (*Impact on consumers*) should exclude data protection concerns, which should instead be dealt with by data protection authorities. Under European Union law, and in Spain in particular, the EU General Data Protection Regulation (GDPR) and the Spanish Organic Law of Protection of Personal Data provide a high level of protection of consumers' privacy rights. Under competition law, privacy terms and conditions should be treated as a non-price, quality factor and treated similarly to other such factors, without any need for novel theories of competitive harm.¹

¹ The Section is concerned by competition enforcement actions that are based solely on privacy concerns and believes these are better handled by a data protection agency than a competition authority.

In Spain, it is pertinent to point out the General Protocol between the CNMC and the Spanish Data Protection Agency entered on 26 July 2018, which sets a collaboration framework between both agencies while delineating the respective agencies' powers.² The Section respectfully submits that this approach, of collaboration between competition and data protection agencies, but leaving it clear that privacy matters are to be dealt with by data protection authorities (as stated under Sec. IV of the General Protocol), strikes the right balance between competition and data privacy enforcement.

Specific Issues of Competition

The CNMC asks whether there are specific issues of competition raised by the online advertising sector.

In general, we believe that standard antitrust analysis should apply to digital platforms in the online advertising sector. The flexibility of competition and consumer protection laws, especially to the extent that much of the interpretation has been left up to the courts and enforcement agencies, allows for adaptation to rapidly changing markets, products, and business environments. However, it is critical to have a deep understanding of different aspects of competition in high-tech industries to inform future enforcement decisions. For example, is the collection of user data an efficiency, or is it a barrier to entry? How should the agency assess competitive effects in markets in which products are free? Will the acquisition of a start-up improve the platform's offering, benefiting consumers, or will it unnecessarily eliminate important "nascent" competition?

It is also important to consider the implications of multi-sided markets with platform businesses. For example, if traditional tools for market definition, like the SSNIP, are applied to only one side of the market, it can cause the market to be defined either too narrowly or broadly if there are significant positive demand feedbacks.³ It will also be necessary to test the strength of indirect network effects for various types of advertising-supported platforms. For example, are online platform users indifferent to the quantity of advertising to which they are exposed? The economics of multi-sided platform markets is critically important where interdependency can trigger a "feedback loop" when membership of one side of the platform grows or shrinks.

Below we consider some of the specific issues raised by the CNMC with respect to competition enforcement.

Access to Data

The CNMC asks whether "Access to data represents a barrier to entry of undertakings or to the growth of smaller ones" in the online advertising sector. For the reasons explained below, the Section believes that, while data access can be a concern in certain specific cases, a large data set does not inherently create a competitively significant barrier to entry or expansion in an entire

² CNMC, *Protocolo General De Actuación Entre La Comisión Nacional De Los Mercados Y La Competencia Y La Agencia Española De Protección De Datos* (July 26, 2018), https://www.cnmc.es/sites/default/files/2296420_1.pdf.

³ David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, 21-22 (NBER Working Paper No. 18783, Feb. 2013).

industry sector. Therefore, an individualized assessment of the specific case at issue is necessary to determine whether a given data set creates a competitively significant barrier to entry.

Data has always been an important input, both in technology-based industries and in more traditional sectors. In most cases, data are not a significant barrier to entry. It is important to analyze data-related questions on a case-by-case basis and to focus enforcement on credible evidence that a particular transaction or competitive practice has harmed or likely would harm competition on the merits. Whether access to a large volume of data creates a competitive advantage will depend on the specific market at issue, the nature of the data, and the competitive significance of the data set.

Therefore, the Section respectfully recommends that the CNMC carefully assess what, if any, competitive advantages a firm may enjoy by the mere possession of a specific data set, and whether the mere possession of that data has harmed or is likely to harm consumer welfare and the competitive process. As always, the focus should be on competitive effects, such as the creation and strengthening of barriers to competition and market foreclosure due to predatory and exclusionary conduct. In many cases, data are not a barrier to entry because it can be easily replicated or purchased. The collection of data by one company usually does not prevent another company from collecting similar data – particularly as many customers “multi-home” or use multiple online products – and the sale of “big data” has become a big business. The Section believes that enforcers should be cautious in responding to claims that any particular data held by a firm is an “essential” input or facility, and demands for mandatory sharing or access. As the U.S. Supreme Court has observed, care must be taken to ensure that any such remedy does not lead to worse competitive outcomes, whether due to a chilling effect on incentives to innovate or the increased risk of collusion that information sharing presents.⁴ Treating the mere possession of data as a barrier to competition could have a significant chilling effect on innovation.

Moreover, data markets are usually very dynamic. Individual data points in many cases quickly become stale, as a result of which a firm that holds a significant data set at a given time may not enjoy any long-term advantage over competitors on the basis of that data. This is both because big data often needs to be constantly updated (this is known as the “velocity” of data) and because new technologies employ constantly evolving types of data. In such cases, a specific big data set cannot be monopolized in the sense that it is not an asset over which the exercise of durable market power is possible. In other words, the data set itself often is not nearly as important to competition as the algorithms or uses of the data invented by the company that holds it.

In sum, the Section encourages the CNMC to ensure that the design for the study does not presume that access to data are a unique antitrust phenomenon that would justify new analytical approaches. Existing competition tools are generally sufficient to address the likely limited scenarios in which big data presents a legitimate threat to competition and consumer welfare. The various avenues available to attain and utilize data sets, as well as the difficulties surrounding the assessment of the competitive value of a given data set, make it inadvisable to adopt presumptions that treat data in any sector differently from other important inputs.

⁴ See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

Vertical Integration

The CNMC has asked for opinions regarding the statement that “The vertical integration of platforms, which act as intermediaries while at the same time rent advertising space as content creators and service providers, implies disadvantageous conditions for advertisers, such as tying and bundling of services or discriminatory treatment.” The Section appreciates the concerns that motivate this question but encourages the CNMC to avoid implicit assumptions that could skew the design, and therefore the results, of the study. In particular, the Section emphasizes the following three points.


First, vertical integration is generally pro-competitive. Accordingly, enforcement involving vertical issues should recognize the need for a careful, fact-specific analysis. This is even more important when considering vertical issues in the context of platforms, where additional complexities emerge as a result of features such as indirect network effects, feedback loops, and the fact that harms on one side of a platform may be offset by benefits on the other side.

Second, although a vertically-integrated platform operator might find it profitable to engage in tying and bundling or other forms of vertical restraints, vertical integration is neither a precondition for such conduct nor a guarantee that such conduct will occur. A non-vertically-integrated platform could enter into such arrangements with a preferred arms’-length customer, or a vertically-integrated platform could refrain from doing so. Accordingly, the Section suggests that the CNMC’s study should focus on the effects of particular types of conduct as they arise rather than on vertical integration *per se*. Alternatively, if the CNMC wishes to understand the effects of vertical platform integration on online advertising markets, it should focus on the market structure issue without presuming that particular forms of vertical restraint will follow.

Third, even if a vertically-integrated platform were to engage in tying or bundling conduct, such conduct would not necessarily be disadvantageous to advertisers. In certain cases, a vertically integrated platform and content provider may face commercial incentives that encourage it to abuse its position by engaging in conduct such as keeping content exclusive to its own platform or hindering rivals’ ability to access the platform. Such foreclosure may result in higher prices or reduced quality.

However, it is widely recognized that vertical restraints such as tying and bundling can be pro-competitive in certain circumstances, which is why such conduct is not *per se* illegal in the United States and many other countries. For example, tied or bundled products may have significantly lower production costs, which can be passed on to customers. Similarly, vertical restraints can lead to improvements in product quality. This is a particularly relevant consideration in digital platform markets.

For this reason, restraints imposed by a vertically-integrated platform may not harm non-integrated advertisers, and may be pro-competitive – benefiting consumers - even if they harm certain competitors such as non-integrated advertisers.



In light of these considerations, the Section encourages the CNMC to ensure that the design of the study does not presume that vertical integration at the platform level will necessarily lead to the proliferation of vertical restraints such as tying and bundling, nor that such restraints will inevitably harm either non-integrated advertisers or competition generally. Instead, the study should proceed according to an impartial approach that will enable the CNMC to benefit from the views of market participants.

CONCLUSION

The Section appreciates the opportunity to comment and welcomes the opportunity to discuss with the CNMC any comments or questions it may have as it prepares its sector inquiry.