June 2021

The French Competition Authority fines a Big Tech company €220 million for abuse of a dominant position through self-preferencing in the ad tech industry *(Google AdX / Google DoubleClick for Publishers)*

UNILATERAL PRACTICES, FRANCE, DOMINANCE (ABUSE), DISCRIMINATORY PRACTICES, DOMINANCE (NOTION), INVESTIGATIONS / INQUIRIES, REMEDIES (ANTITRUST), SANCTIONS / FINES / PENALTIES, UNFAIR COMPETITION, MARKET DEFINITION, ADVERTISING , HIGH MARKET SHARES, MARKET POWER, ANTICOMPETITIVE OBJECT / EFFECT, INTERNET, ONLINE PLATFORMS, BIG TECH

The French Competition Authority, *Google AdX / Google DoubleClick for Publishers*, Case 21-D-11, 7 June 2021
Fayrouze Masmi-Dazi, *The Google decision*, Antitrust Code by Concurrences [podcast], 22 June 2021

Thomas Höppner | Hausfeld (Berlin)
Max Volmar | Hausfeld (Berlin)
Phillipp Westerhoff | Hausfeld (Berlin)

e-Competitions News Issue June 2021

On 7 June 2021, the French Competition Authority ("**FCA**") concluded an investigation into Google's ad tech business. The FCA (i) found that Google abused a pan-European dominant position and thereby infringed EU competition law by favoring its proprietary display advertising intermediation services, (ii) fined Google €220 million and (iii) rendered commitments mandatory that Google had offered and intends to implement globally (the "**Decision**"). [*1*] Since Google waived its right to appeal, the Decision is legally binding and final.

The Decision is only one effort among many to restore competition in ad tech. [*2*] Embedding the Decision in the global debate on competition in online advertising, this article summarizes the technical and economic background, outlines the abuses of dominance identified by the FCA, and assesses the legal implications of the Decision for affected parties as well as for (remaining) specific regulation of the conflicts of interest within the ad tech markets. This article also presents an initial evaluation of potential follow-on damages claims.

Relevant facts (technical and economic background)

The reasoning of the Decision (at **B.** below) cannot be assessed without digging into technical details of online display advertising.

I. Intermediaries for online display advertising in the open display market

The Decision concerns the intermediation of online display advertising. Every time users visit a website, a complex multi-step procedure takes place to choose which ads to display to the user. This procedure takes only fractions of a second and involves a chain of advertising technology companies (the so-called "ad tech stack"). [3] On the supply side, "**Publishers**" sell available space for display ads on their websites or within their mobile apps (so-called "inventory"). On the demand side, "**Advertisers**" buy such inventory to display their ads to visitors/users of the Publishers' services (so-called "impressions"). Both Publishers and Advertisers use a chain of third-party intermediaries to match supply and demand in the open display market. [4]

From the perspective of Publishers wishing to sell inventory, the – simplified – intermediation value chain for the automated real-time sale of such inventory – that is, the so-called programmatic sale – as well as the serving of ads, consists of the following core technology providers: [5]

- "**Publisher Ad Servers**" manage Publishers' inventory and the decision logic underlying the final choice of which ad to be served;

- "**Supply Side Platforms**" ("**SSPs**") provide technology for automated sales through real-time auctions by connecting to multiple Demand Side Platforms;

- "**Demand Side Platforms**" ("**DSPs**") provide a platform for Advertisers and their agents to buy inventory from SSPs and other sources;

- "**Advertiser Ad Servers**" store and deliver ("serve") the ads and track the performance of ad campaigns. The ad tech stack value chain can be illustrated as follows (Figure 1):
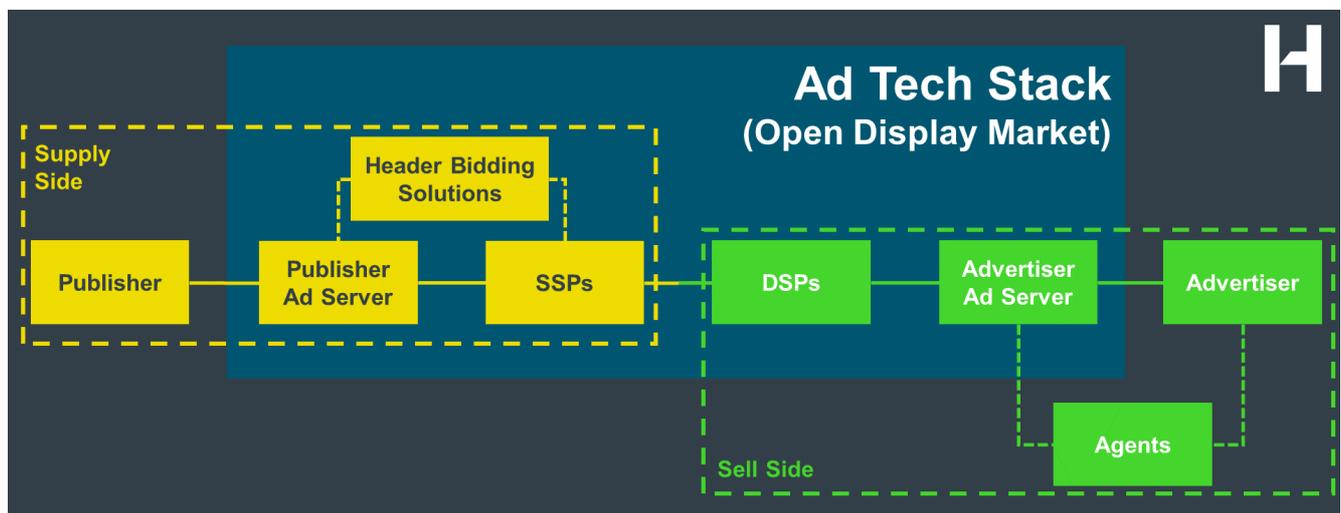

Figure 1: Simplified scheme of the ad tech intermediation value chain

"**Header Bidding Solutions**" allow Publishers to communicate with multiple SSPs simultaneously – Publishers can send ad requests to, and receive bids from, different SSPs (that is, they can multi-home). Publishers benefit from such competition among SSPs in an effort to sell their inventories at a higher price. [6] In addition to SSPs, "**Ad Networks**" facilitate sales for inventories of smaller Publishers. [7]

II. Google's services across the ad tech stack

Across this series of vertically related markets, [8] Google has the strongest position at each part of the chain, particularly in publisher ad serving (see Figure 2 below). [9]

- "**DoubleClick for Publishers**" ("**DFP**") is Google's dominant Publisher Ad Server. Competition authorities estimate Google's market share at 80-90%. [10]

- "**Google Ad Exchange**" ("**AdX**") is Google's core SSP for large Publishers. In addition, Google operates "**AdMob**" (for app inventory) and "**AdSense**" (an Ad Network for smaller Publishers), along with a broader category of supply-side services under the "**Google Display Network**" brand (for owned-and-operated web inventory such as YouTube and a network of millions of partner sites). Cumulated, Google handles up to 80% of the sales, depending on the region. [11]

- DFP and AdX are now both part of Google's rebranded "**Google Ad Manager**" service, but both still fulfil separate functions. [12]

- "**Google Ads**" and "**Google Display & Video 360**" ("**DV360**") are Google's DSPs. Together, they handle 50-60% of Advertisers' programmatic demand. [13]

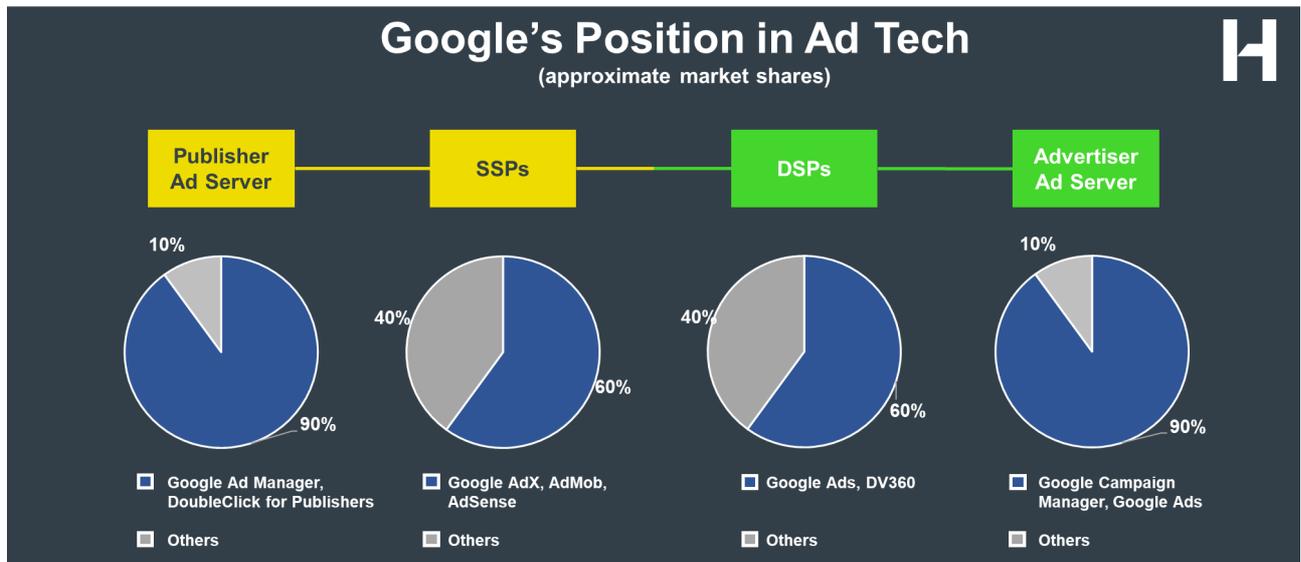- "**Google Campaign Manager**" is Google's Advertiser Ad Server, which serves 80-90% of all impressions. [14]

Figure 2: Google's position across the ad tech stack.

III. The process of selling inventory via ad tech intermediaries

1. Selling and serving display ads programmatically

The above-described advertising intermediaries facilitate the automated multi-step processes of (i) programmatically selling inventory via a number of auctions for each impression, and (ii) serving the winning ads to the user's browser/app in just a few milliseconds: [15]

- When a user visits a website or an app, the Publisher notifies the Publisher Ad Server about available impressions (i.e., ad slots for this particular user). The Publisher Ad Server requests bids for these specific impressions from SSPs. The SSPs forward such requests to all connected DSPs.

- Based on the Advertisers' pre-sets and the available user information, the DSPs assign individual impression values for the available advertising opportunities and then apply algorithmic selection processes (such as auctions) to select among the available ads ("**auction between Advertisers**"). The winning bids are submitted back to the SSPs.

- The SSPs then run an auction between the bids received from multiple DSPs based on the Publisher's preferences and the value of the bids ("**auction between DSPs**"). The winning bids are sent back to the Publisher Ad Server.

- The Publisher Ad Server then runs the final auction among the bids received from the various SSPs ("**auction between SSPs**"). In addition, the Publisher Ad Server evaluates them alongside direct deals that the Publisher may have negotiated with Advertisers.

- Finally, the Publisher Ad Server notifies the Advertiser Ad Server, which serves the ad to the browser/app of the user.
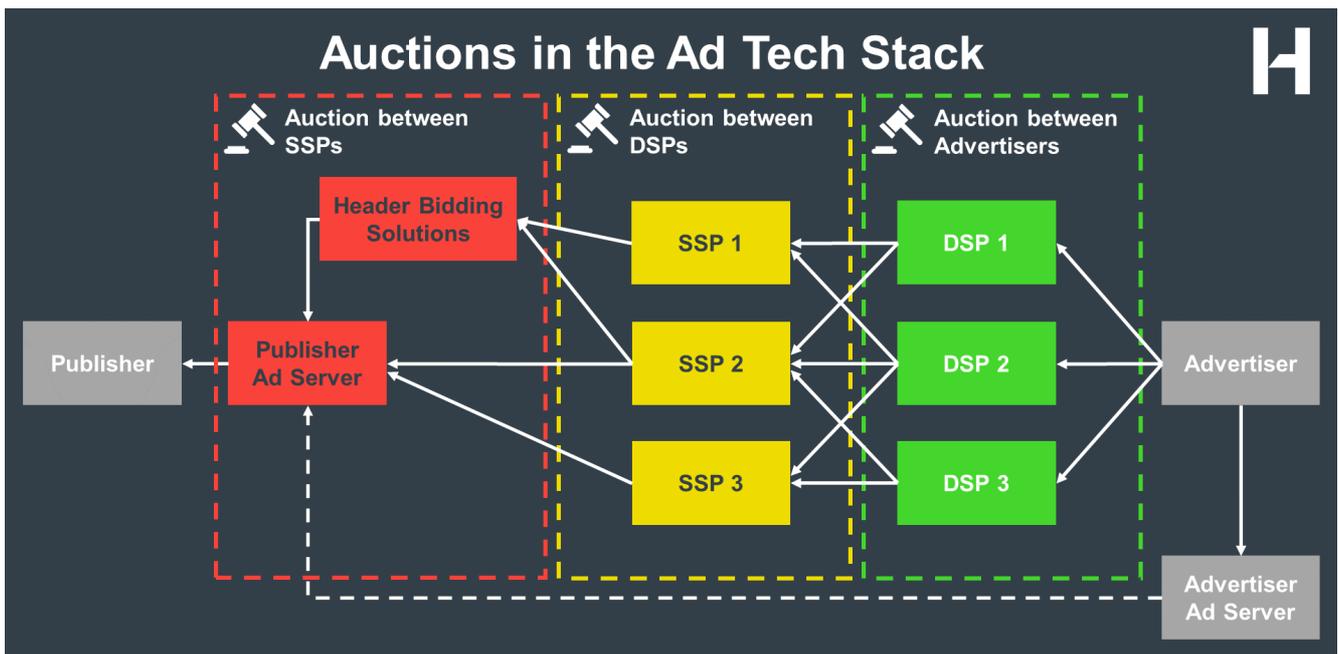
Figure 3: Different types of auctions in the ad tech supply chain.

2. Overview of relevant interoperability modalities between Publisher Ad Servers and SSPs

The understanding of the different available interoperability modalities between Publisher Ad Servers and SSPs is crucial for the assessment of the FCA's competition concerns. Publisher Ad Servers have multiple options of sending out bidding requests to SSPs and compare offers from different SSPs: [16]

- "**Waterfall**": Traditionally, the Publisher Ad Server valued an impression to set a price floor. It then ranked

SSPs based on their estimated revenue potential. Afterwards, the Publisher Ad Server requested bids intermediary-by-intermediary, i.e., only one at a time. The first SSP matching the price floor (at a minimum) won the impression. However, this allocation mechanism is highly inefficient [*17*] because SSPs cannot compete in real time. That is why the Waterfall is rarely used today. [*18*]

- "**Dynamic Allocation**": To address some of the inefficiencies of the Waterfall, Google introduced "Dynamic Allocation" for Publishers using Google's Publishers Ad Server (DFP) ad server. [*19*] Under this allocation mode, Publishers still estimate a price floor based on expected bids of third-party SSPs. However, DFP then requests real-time offers on their behalf from Google's SSP (AdX) (exclusively), prior to calling any other SSP. Only if there is no buyer on AdX, the impression is passed on to other SSPs. Given that *estimated* bids of third-party SSPs "compete" with *real-time* bids on AdX, the latter has an advantage and could single out the most lucrative bids.

- "**Header Bidding**" is a mechanism developed by publishers to address the Waterfall and Dynamic Allocation inefficiencies. It allows Publishers to hold a real-time auction between all participating intermediaries, not only Google's AdX. To this end, Publishers include source code into the "header" of a website which allows the user's browser [*20*] to send out a request for bids to all SSPs prior to calling the Publisher Ad Server (i.e., Google's DFP). The browser then determines the winning bid and only then contacts the Publisher Ad Server. This way, multiple SSPs would be able to compete on equal terms to win an impression.

- "**Open Bidding**" was one of [*21*] Google's reactions to the increasing use of Header Bidding and the competitive pressure deriving from this solution. Google's AdX does not participate in Header Bidding. However, in April 2018, with Open Bidding, Google developed an alternative version of Header Bidding specifically for Google's DFP. [*22*] Within Open Bidding, rival SSPs can bid alongside Google's AdX SSP, but are subjected to several disadvantages (outlined below) that form the basis for the finding of an infringement.

- "**Unified Auctions**" were introduced by Google in September 2019 as a single first-price auction between "Header Bidders" [*23*], "Authorised Buyers" [*24*], and "Open Bidders" [*25*] (see Figure 5 below). As a result of this mechanism, Google's DFP combines bids from Authorized Buyers within Google's AdX SSP, from Open Bidders within Google's DFP as well as from Header Bidders within Header Bidding to one single auction to determine the winning buyer.

B. The French Competition Authority's Decision of 7 June 2021

With the Decision, the FCA finds that Google has infringed EU competition law (Art. 102 TFEU) and the corresponding French provisions on abuse of dominance [*26*] since at least 1 January 2014. The authority imposed a fine of €220 million on Google and made commitments binding that Google offered to cease the abuse. The Decision is final, as Google waived its right to appeal it. [*27*]

I. Market definition and dominance

As outlined above, the ad tech value chain consists of several interrelated markets. The Decision focuses on two product markets: (i) the market for Publisher Ad Servers (websites and app developers), [*28*] and (ii) the separate market for SSPs and – certain – Ad Networks. [*29*] Both relevant markets were defined on at least an EEA-wide basis. [*30*]

Regarding the market for Publisher Ad Servers, the Decision establishes that Google's DFP held a dominant position at least 1 January 2014. [*31*] The FCA based this finding on the EEA-wide market share of at least 60-70% in terms of ads sales value [*32*] and 70-80% based on the number of ads served. [*33*] The finding of dominance is further supported by (i) the relatively low market shares of the next competitor and an increasing divergence of the relative market shares in Google's favor, [*34*] along with (ii) high barriers to entry, (iii) actual market exits of competing Publisher Ad Servers, (iv) high switching costs for Publishers. and (v) significant synergies to the benefit of Google due to its presence on all levels of the ad tech supply chain. [*35*]

The Decision leaves open whether Google also holds a dominant position in the market for sales platforms for (non-search based) advertising inventory. It limits the analysis to the finding that Google held – at the very least (" *à tout le moins*") – a "preeminent position". [*36*] Such finding was, again, based upon Google's high market shares and growth rates.

II. The identified abuses

While the FCA's rulings on market definition and dominance contain little surprises as they are largely in line with previous investigations into ad tech markets, [*37*] the FCA enters new territory when it comes to the finding of an abusive practice.

1. Overview

The Decision identifies two distinct, but closely related, abusive practices. Namely, Google departed from competition on the merits by reciprocally favoring its own programmatic advertising intermediation services offered under the Google Ad Manager brand, that is, Google's DFP and Google's AdX:

- First, Google's DFP, active in the market for Publisher Ad Servers, granted Google's AdX, active in the separate market for SSPs more favorable terms and conditions as compared to SSPs competing with AdX.

- Second, reciprocally, Google's AdX favored Google's DFP by means of a preferential interoperability that attracted more publishers as customers to DFP. Presumably in order to render unnecessary any finding of dominance (also) in the market for SSPs (see above), the Decision finds that both practices, despite being implemented in separate markets, constitute an abuse of dominance on the clearly dominated market for Publisher Ad Servers (rather than also on the market for SSPs). To this end, the FCA considers that Google's DFP favoring of AdX *extended* market power from a dominated market to a separate, not yet dominated market, while Google's AdX reciprocal favoring of Google's DFP *strengthened* the existing dominance of DFP in the market for Publisher Ad Servers. In this respect, the Decision considered that "*where certain specific circumstances are met, behavior which is implemented in a market other than the dominated market and which has effects either on the dominated market or on the non-dominated market itself may be considered abusive.*" [*38*] This may result, in particular, from the fact that both markets are related and from the pre-eminence of the undertaking on the non-dominated market (which was found to be the case regarding Google's AdX).

2. Favoring of Google's AdX by Google's DFP

DFP has consistently applied more favorable conditions to AdX than to competing SSPs. How exactly DFP achieved this changed over time during the period that the Decision covers. The various methods of how DFP favored AdX are outlined below. Overall, these measures gave AdX an unjustified competitive advantage vis-à-vis

competing SSPs active on the market for sales platforms for advertising inventory. The main advantages are summarized below:

a) The Dynamic Allocation feature allowed AdX to submit real-time bids, whereas rival SSPs participated in DFP's auctions only with estimated bids

Pursuant to the Dynamic Allocation scheme that Google DFP had set up, while all other SSPs participated in an auction only on the basis of an estimated bid (determined prior to the auction on the basis of historic data), only AdX was able to submit a bid in such auctions in real-time. This was a major advantage as it allowed AdX to use real-time user data to decide whether the ad matched the users' interest. In addition, the estimated bids of rival SSPs served as price floors which AdX could outbid. Since DFP informed AdX about such price floors, AdX could win any impression by outbidding this price by as little as €0.01. Conversely, since the bids of rival SSPs were only estimated based upon historic data, Publishers never knew how much a rival SSP would really have been willing bid to win the particular impression. In 2014, Google expanded Dynamic Allocation to also include direct deals between the Publishers and Advertisers. This scheme provided a right of first refusal [*39*] to Google's AdX – which was seen as a further advantage.

b) Google prevented Publishers' ability to benefit from increased competition between SSPs through Header Bidding

To avoid the disadvantages of the Dynamic Allocation scheme, the Header Bidding technology was developed to (finally) allow all participating SSPs to compete against each other on the basis of their real-time demand. It was intended to give all participating SSPs the same information at the same time. However, Google outright rejected participation in Header Bidding because it saw it as a competitive threat. [*40*] To prevent Header Bidding from reducing the described advantages that AdX enjoyed under the Dynamic Allocation scheme, Google's DFP did not allow Publishers to receive bids from AdX, unless the Publisher had first completed the Header Bidding process. This meant that AdX could outbid SSPs using Header Bidding by marginal sums. In other words, only once a Publisher has gathered the highest bid from all rival SSPs via Header Bidding, such bid was forwarded to AdX to see if AdX would beat the highest Header Bidding offer. During this process, Google once again ensured that AdX had advantages over rival SSPs, most notably through the so-called "**Last Look**" and the "**Dynamic Revenue Sharing**" features:

- "**Last Look**" advantage: When a Header Bidding auction was finished, DFP once again sent AdX the winning bid as the price floor. Thus, even after the introduction of Header Bidding, AdX retained the same information advantage and right of first refusal as it had when using Dynamic Allocation. Publishers observed that Google's AdX beat 30-40% of Header Bidding winners by just one cent. [*41*]
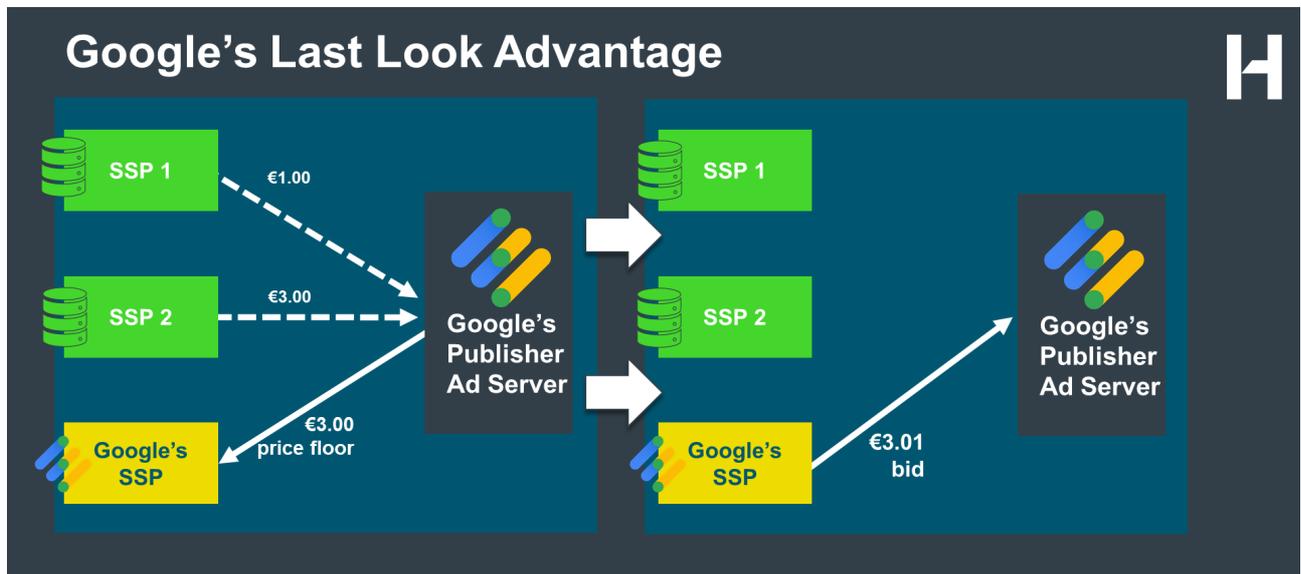
Figure 4: Google's last look advantage.

- **Dynamic Revenue Sharing:** With the available information, AdX could also vary the commission that it took from Advertisers. It could do so on an individual basis for each impression for as long as the average revenue share over the course of all completed transaction remained at the contractually set rate. [*42*] Therefore, Google could dynamically adjust to the competitive pressure emanating from rival SSPs. To this end, whenever there was significant competition for a specific impression, AdX reduced its commission in order to increase the margin it could bid to win such impression. Where, in contrast, there was less competition for another impression, AdX could charge a higher commission and still win the impression. Due to a lack of necessary data, rival SSPs did not have the ability to vary their commissions.

c) Google's AdX enjoyed competitive advantages even after the introduction of Unified Auctions in September 2019

Google claimed that it lost its "Last Look" advantage with the introduction of Unified Auctions, and the advantages of Dynamic Revenue Sharing with the suspension of such feature in September 2019. [*43*] The FCA rejected this claim. In the authority's view, instead of addressing the competition concerns, Google had simply introduced new practices favoring AdX and disadvantaging rival SSPs participating via Open Bidding or Header Bidding:

- **Selective access to "Minimum Bid to Win" information:** Since 2019, after completing a Unified Auction, DFP sends the value of the minimum amount a buyer would have had to bid to secure the impression to some participants of the auction (that is, to "Authorized Buyers" and to Open Bidders). [*44*] Such information allows SSPs to adjust their bidding strategy to secure impressions for the least possible amount. [*45*] However, SSPs who participate in the auction via Header Bidding are not provided with Minimum Bid to Win information and are, therefore, unable to optimize their campaigns in the same manner. [*46*] Thus, the advantage derived from this information surplus is, in terms of function, nearly identical to the Last Look advantage described above. [*47*]
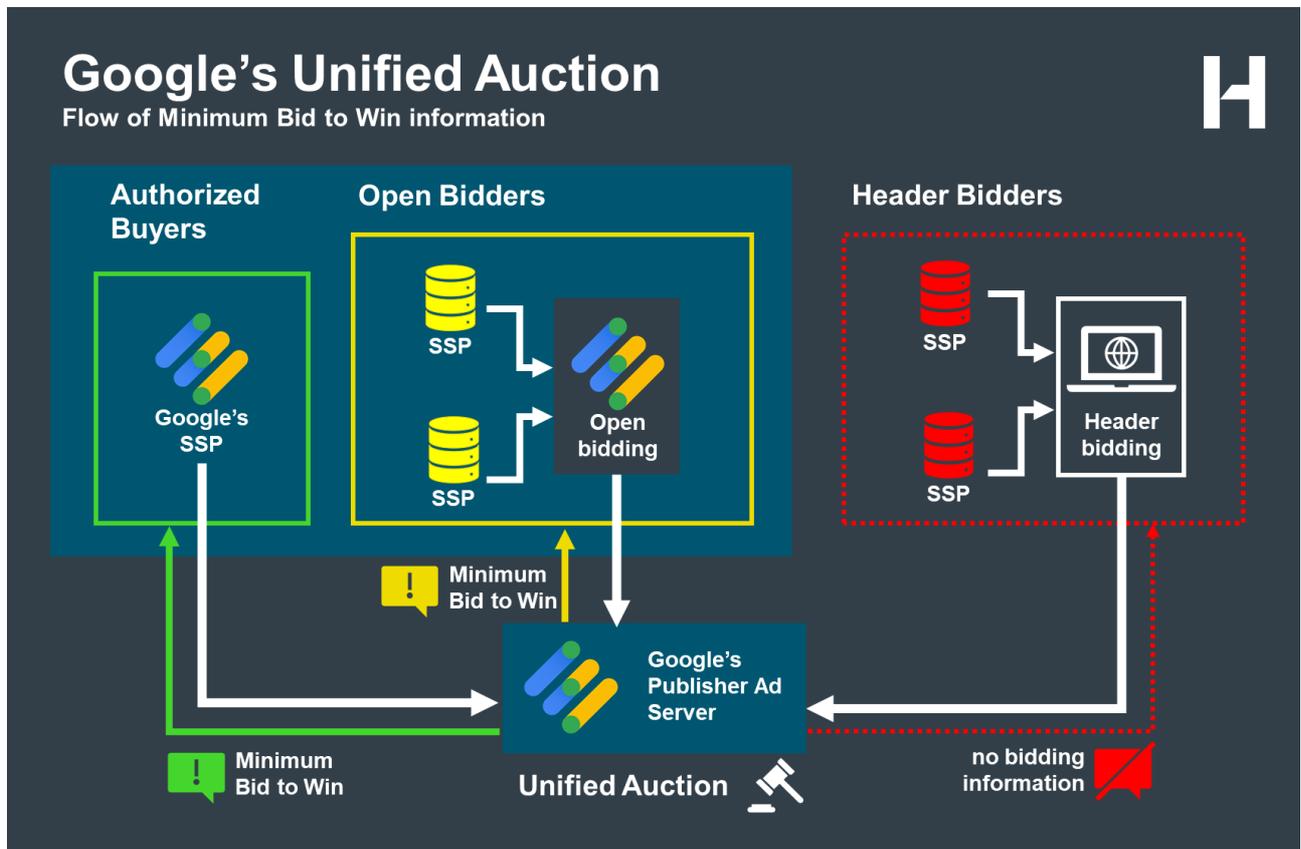
Figure 5: Scheme of Google's Unified Auctions since 2019.

- **"Unified Pricing"**: With the introduction of Unified Pricing, Google removed the possibility that Publishers could set different price floors for different buyers (that is, notably higher price floors for AdX). Prior to Unified Pricing, a Publisher could, for example, set the price floor for SSP1 at €1.0, for SSP2 at €1.05, and AdX at €1.20, to control for the different take rates of the SSPs and ensure a maximum net revenue from a given impression. [*48*]

d) Additional disadvantages for Open Bidders

The FCA also identified a number of aspects that favored AdX following Google's DFP's introduction of Open Bidding (as Google's "answer" to Header Bidding, see above). For example, rival SSPs participating in Open Bidding (i) are charged a commission, further reducing their margin, [*49*] and (ii) are contractually prohibited from submitting bids for auctions generated by their own DSPs. [*50*] This contradicts Google's own policy as Google allows its SSP AdX to process bids from its own DSPs. Documents reviewed by the FCA substantiate the fact that Google developed Open Bidding not as a level playing field for rival SSPs and AdX, but rather to further slow the development of Header Bidding. [*51*]

In sum, regardless of the chosen auction and allocation mechanism (i.e., Waterfall, Header Bidding, Open Bidding), AdX consistently enjoyed significant competition advantages over rival SSPs. Most importantly, Google grants its own services information advantages with measures such as its Last Look or the selective access to Minimum bid to win information.

3. Favoring of Google's DFP by Google's AdX

In addition to the favoring of AdX by DFP, with a view to expand its position into the market for SSPs, Google employed practices to reciprocally favor DFP over rival Publisher Ad Servers through AdX.

Google reserved real-time access to AdX to its own Publisher Ad Server DFP. [*52*] Since only DFP is fully interoperable with AdX, publishers that wish or have to use AdX to access bids of its advertising customers had to use DFP. Additionally, since many advertisers use AdX exclusively (i.e. single-home), AdX bundles a significant demand from advertisers and is therefore an unavoidable intermediary for publishers. [*53*] Thus, according to the FCA,Google's refusal to make AdX fully interoperable with competing Publisher Ad Servers forced Publishers to use Google's DFP as their primary ad server, and severely reduced the ability for rival ad servers to offer a competitive product. [*54*]

4. Anti-competitive effects to the detriment of Publishers

According to the FCA, Google's conduct had significant anti-competitive horizontal effects on rival Publisher Ad Servers and SSPs on their respective markets. After all, Google's core strategy in ad tech has relied upon foreclosing competitors ever since it acquired DoubleClick in 2008. [*55*] The FCA considered these abusive practices all the more serious because they occurred in a still emerging market with strong growth. Google could significantly increase its market share and related revenues while competitors were forced to leave the market or to reduce their margins. [*56*]

In addition, according to the Decision, Google's conduct also harmed Publishers. As a result of reduced competition between ad tech intermediaries, the Abuses deprived Publishers of competitive prices and marketing opportunities for their inventories. [*57*] In fact, the FCA identifies press publishers as having been "*particularly affected by Google's practice.*" [*58*]

The FCA highlighted that the Decision would pave the way to damages claims of Publishers that used ad tech services. [*59*] Pursuant to the EU Antitrust Damages Directive, the Decision will be binding on civil courts in any follow-on damages claims. [*60*] Accordingly, affected Publishers will not have to demonstrate an infringement but only the fact that they suffered causal damages, and their amount.

While the Decision does not elaborate on the economic theory for the recovery of any damage caused, it could be based on the following aspects:

- First, there are strong indicators that Publishers were overcharged when using Google's ad intermediation services. In other words, Google's take rate was potentially higher than it would have been absent the abuses. As a result, Publishers could be entitled to recover the over-charge. Similarly, Texas and other U.S. states allege that such fees are supra-competitive and that Google conceded this in internal communication. [*61*]

- Second, there are indicators that Publishers using Google services did not receive the highest bids available on competing SSPs, or that Google could keep its bids artificially low because of information advantages. As a result, Publishers would be entitled to claim lost ad revenues. This argument is supported by the sharp increase in Publishers' revenues after the introduction of Header Bidding – up until the point at which Google started its countermeasures. In their complaint, Texas *et al.* argue that, for some Publishers, Header Bidding led to a revenue increase of 40-100%. [*62*] During the FCA's investigation, NewsCorp submitted that Header Bidding allowed it to increase its revenues by up to more than 50%. [*63*] This shows how during the period of effective

competition, Publishers' income was higher than in the period of Google's anti-competitive practices.

- Third, there are further indicators that a lack of competition reduced Publishers' revenues: Only real-time bids accurately respond to the value of a particular impression. Therefore, Google's AdX could secure high-value impressions for significantly less than their actual value. Internal Google documents reveal that Google misrepresented the benefits to Publishers and that Publishers lost revenue due to this practice. [*64*] For example, a Google study estimated that actual competition between exchanges would have increased Publishers' clearing prices by an average of 40%. [*65*] The U.S. States claim: "*Dynamic Allocation had permitted Google's exchange to clear publishers' inventory for depressed prices*". [*66*] In the EEA, from 2016 to 2019, well over 70-80% of DFP users had the Dynamic Allocation feature enabled and could be impacted by Google's practices. [*67*]

- Fourth, although Google claims Dynamic Revenue Sharing has an "*overall positive*" impact on the revenue share paid out to Publishers, [*68*] the company was unable to provide the FCA with any evidence in such regard. [*69*] Conversely, the FCA explicitly stated that the Dynamic Revenue Sharing allowed Google to adjust its revenue share to the detriment of Publishers. [*70*] According to an economic study, "*Google's asymmetric ability to price discriminate can result in a misallocation of impressions and a resulting increase in the 'effective' price paid by publishers (to be understood as the difference between payments that publishers did receive and payments that publishers* could *have received)*". [*71*] The FCA demonstrated the negative effect on revenue paid out to Publishers using a scenario of two consecutive auctions as examples. [*72*]

- Fifth, Publishers were also harmed when using rival Publisher Ad Servers that could have generated higher revenues for advertising inventory if Google had not restricted these rivals. [*73*]

III. Google's Commitments

Within the framework of the settlement procedure, Google proposed Commitments to improve the interoperability of Google Ad Manager services with rival Publisher Ad Servers and SSPs, and to end the reciprocal favoring of its own services (the "**Commitments**"). With its Decision, the FCA rendered such Commitments binding. Due to the pan-European market definition, Google will have to implement the Commitments across the EEA. In fact, Google announced afterwards that it will implement some of those changes on a global scale. Google committed, in particular, to the following:

1. *Fair(er) competition between Google's AdX and rival SSPs*

With regard to competition between AdX and rival SSPs, Google committed to offer rival SSPs an interoperability modality for the purchase of inventories from Publishers that use Google's DFP. This commitment intends to ensure that:

- rival SSPs' have fair access to information on the auction, including giving competitors using Header Bidding access to the Minimum Bid to Win information (1st Commitment);

- the full contractual freedom of rival SSPs is preserved, notably to allow them to negotiate and agree on specific terms in direct deals with individual Publishers (2nd Commitment);

- AdX refrains from using bidding information of rival SSPs to optimize its own bidding strategy in a way that is not reproducible by competing SSPs (3rd Commitment);

- technical and operational stability is guaranteed, both for rival SSPs and for Publishers, notably through a three-

month notice period before introducing major changes to the ad intermediation process (4th Commitment).

2. Fair(er) competition between Google's DFP and rival Publisher Ad Servers

With regard to competition between DFP and rival Publisher Ad Servers, Google committed to allow rival Publisher Ad Servers to access Google's AdX demand in real-time (5th Commitment).

C . Remaining competitive concerns in ad tech to be addressed through regulation or further enforcement

Google's Commitments will improve the competitive structure of the highly concentrated ad tech markets. They are a first step to creating a level playing field. However, not least due to the FCA's focus on the Publisher-side of ad tech, a number of competition concerns remain unresolved, as summarized below.

I. Effective monitoring in face of a history of non-compliance

Google has a history of both non-compliance and delayed compliance with regulators' decisions. [74] Considering the technical complexity of the services at stake, monitoring compliance with Google's Commitments does not appear an easy task. The Commitments are subject to a number of exceptions and are formulated broadly. For example, Google will not have to provide information to bidders that it "does not recognize." [75] Google may also change the functionality of its ad tech products without notice for "safety" and "privacy" reasons. [76] The FCA will have to pay close attention to ensuring that Google does not abuse its creativity in interpretating such terms to its own advantage in order to render the Commitments meritless. It is questionable, in this respect, whether full independence of the external monitoring process can be ensured by a trustee who is paid by Google, as envisaged by the Decision. [77]

II. Limited geographical and temporal scope

The Commitments offered by Google are binding in France only. [78] While Google has announced that it will apply some changes globally, the extent to which this will be permanently implemented remains to be seen. Google also envisages a lengthy implementation period. The sharing of information with all SSPs will only begin by 1 February 2022 for selected Publishers, and by 30 June 2022 for all EEA Publishers. [79]

III. Remaining competition advantages

Other provisions of the Commitments continue to provide Google with significant competition advantages or other benefits. For example, Google may still charge a 5% fee on SSPs participating in Open Bidding, while AdX does not have to bear such costs. [80] Google may also delay the sharing of minimum bid to win information for up to 24 hours, [81] making any near real-time adjustments basically impossible.

Moreover, the Decision only focuses on the interoperability between SSP, Google's AdX, and its publisher ad server, DFP. The Commitments may not prevent Google' from distorting competition by means of a preferential interoperability between other Google ad tech services, such as between its DSPs (Google Ads and DV360) and its SSPs (AdX, AdMob and AdSense). In June 2021, the European Commission launched a new competition investigation that also looks at some interoperability issues in the advertiser-facing side of the ad tech stack. [82] However, a regulatory obligation to ensure a comprehensive interoperability with competing ad tech services

across the entire ad tech stack would appear most effective. This has already been proposed by some members of the European Parliament. [*83*]They suggest including a new obligation in Article 6 of the Digital Markets Act that a digital gatekeeper has to enable interoperability between its own advertising services and competing advertising services. [*84*] Amongst others, the gatekeeper would have to ensure a seamless interconnection of all participants along the entire in the ad tech stack. [*85*]

IV. Vertical integration and ties remain unaddressed

Most significantly, the Decision leaves Google's deep vertical integration across the entire ad tech stack untouched. Such integration is the root of Google's many profound conflicts of interest, [*86*] its ability to charge supra-competitive prices and incentives to artificially impair the quality of standalone rivals, thus reducing the overall efficiency of the ad tech stack. [*87*]

The Decision focuses on the Publisher side of ad tech while the Advertiser side remains unaddressed (and is now addressed by a new EU investigation, noted below). Yet, as a multi-sided platform, ad tech intermediaries can generate their market power through positioning themselves as competitive bottlenecks between the two. In this regard, both sides of the overall platform and the ability to generate indirect network effects must be carefully taken into account. In particular, Google grants Advertisers access to its proprietary ad inventory (YouTube, Search) only if they use Google's DSPs (DV360 and Google Ads). [*88*] This constitutes an anti-competitive tie with effects on the other side of the platform – since most buyers of ad space use Google's services, Google controls a majority of the demand, which, in turn, makes Publishers dependent on Google in selling their ad space.

V. Google's "insider bidding" ability is not addressed sufficiently

In numerous instances, Google can use data from one side of the ad tech supply chain (e.g., the buy-side) to adjust bidding behavior on the other side (e.g., the sell-side). Google's "Last Look" advantage as described above is one of such examples. This specific aspect is now prohibited, but Google can use its inside data to benefit its own services in a myriad of ways.

Instead of targeting only specific cases of insider bidding, a full-scale prohibition of insider bidding – a form of insider trading and conflict of interest that would be illegal in financial markets [*89*] – should be implemented. Financial regulation could serve as a prototype for ad tech in this respect. [*90*] It is remarkable that the current EU Proposal for a Digital Markets Act [*91*] ("**DMA**") mentions conflicts of interest only once, in Recital (48), and foresees no rule to specifically combat this issue. Thus, the DMA should include rules that: (i) prohibit insider bidding in advertising auctions, i.e., the auctioneer and the bidder being an identical company; (ii) require ad tech intermediaries to actively monitor, avoid and disclose conflicts of interest; and (iii) prohibit ad tech intermediaries from operating exchanges, buy-side facilities and sell-side facilities simultaneously or, at least, from sharing amongst them data relating to ad auctions.

VI. The general lack of transparency is largely unaddressed

The entire auction process is characterized by a lack of transparency. The FCA Decision explicitly carved this issue out. [*92*] Google withholds information about prices, fees, and its actual take rate – Advertisers that use Google Ads know only the price they paid for an ad, but neither the share that Google took in fees, nor the amount actually paid out to the Publisher. [*93*] Conversely, Publishers only know the commissions agreed to with the SSP, and the amount their inventory was sold for, but not the amount the Advertiser actually paid. Publishers might not even know which Advertisers are bidding for their inventory. [*94*]

- This lack of transparency may be exploited in the form of "hidden fees" charged by some intermediaries. [*95*] They are subjecting Publishers and Advertisers to complicated arbitrages by buying impressions at one price and selling them at a higher price, without disclosing − and potentially keeping − the spread. [*96*] Google is particularly well-suited to take such hidden fees, as it controls multiple stages of the ad tech chain. It can disclose one price to the Advertiser and another to the Publisher, keeping the difference to itself.

- In addition, Google is keeping crucial information about its auction mechanism secret. Which bid wins an auction is determined by a Google formula where price is only one factor. Even a bid that is the highest by far is not certain to win. By keeping this formula secret, Google can rig auctions to disadvantage certain bidders without them ever noticing. [*97*]

- The FCA obliges Google only to share information about auctions with rival SSPs (1st Commitment). This still leaves the core problem of transparency in ad tech largely untouched. Some of these aspects are addressed by the DMA proposal. [*98*]

D. Outlook

In addition to targeted regulation of Google's involvement across the ad tech stack, we should see further competition cases in this area. In its newest investigation against Google, the EU Commission will "*assess whether Google has violated EU competition rules by favouring its own online display advertising technology services in the so called 'ad tech' supply chain, to the detriment of competing providers of advertising technology services, advertisers and online publishers*". [*99*] Following the investigations of the CMA, the ACCC, the FCA and *Texas et al. v Google [100]*, this will be the fourth in-depth analysis of the ad tech sector.

Lastly, the remaining concerns are also relevant in the context of recently released draft legislation of the U.S. House of Representatives known as the "Ending Platform Monopolies Act" [*101*] and the "American Choice and Innovation Online Act" [*102*]. Any such legislation, as well as the outcome of ongoing cases such as *Texas et al. v Google,* will impact the EU's playing field of competition in ad tech as well .

[*1*] *Thomas Hoppner is a professor for business and IP law at Technical University Hausfeld and partner with Hausfeld RA LLP. Philipp Westerhoff is Senior Associate and Maximilian Volmar Associate at Hausfeld. The law firm is advising publishers, advertisers and ad intermediaries that are adversary to Google. The article represents their personal views.

FCA, Decision 21-D-11 of 7June 2021, English translation available at *https://bit.ly/3x4ZXq5* .

[*2*] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (**Digital Markets Act**), COM(2020) 842 final; 19 lawsuits by private parties and State Attorneys General consolidated as **Google Digital Antitrust Litigation,** Dist. Ct., S.D.N.Y., Case MDL No. 3010 of 10 August 2021; Introduction of the **American Choice and Innovation Online Act**, H.R. 3816, 117th Cong. (2021), *https://www.congress.gov/bill/117th-congress/house-bill/3816/text* and **Ending Platform Monopolies Act**, H.R. 3825, 117th Cong (2021), *https://www.congress.gov/bill/117th-congress/house-bill/3825/text* ; Investigation of the European Commission, AT.40670 − *Google − Adtech and Data-related practices*.

[**3**] For an overview of the ad tech stack, *see* CMA, *Online platforms and digital advertising, Market study final report*, 1 July 2020, the "**Final Report**", paras. 5.204 *et seq.*, *https://bit.ly/3tebZMf* and ACCC*, Digital advertising services inquiry*, Interim Report, 28 January 2021, the "**Interim Report**", p. 37 *et seq.*, *https://bit.ly/3eM3CDR*. On industry background, see also *State of Texas et al. vs. Google LLC*, Complaint, 16 Dec. 2020, as amended, 15 March 2021, Dist. Ct., E.D. Tx., case 4:20-cv-00957 (the "**Texas Amended Complaint**") as of 10 August 2021 consolidated in the Google Digital Antitrust Litigation (fn. 1), para. 28 *et seq.*, *https://bit.ly/3aYmAo6* .

[**4**] Unlike "owned-and-operated" platforms (for example, Facebook or YouTube), publishers in the open display market are unable to sell all available inventory directly to Advertisers or their intermediaries. Therefore, publishers such as online media companies (for example, newspapers and other content providers) procure intermediation services from ad tech suppliers to sell the vast majority of inventory that is not marketed through direct deals with specific Advertisers. For an overview of intermediation in open display advertising *see* CMA, Final Report, Appendix M, *https://bit.ly/3l86SKR*. Throughout this article, the notion of "**Publisher**" refers to these publishers in the open display market, and excludes owned-and-operated platforms.

[**5**] See FCA, Decision (fn. 1), paras. 37 *et seq.*

[**6**] *See* FCA, Decision (fn. 1), para. 51; Texas Amended Complaint (fn. 3), paras. 185 *et seq.*

[**7**] *See* FCA, Decision (fn. 1), para. 57. However, this is generally not done programmatically (*ibid.*).

[**8**] There is no single market for advertising intermediation, but a series of vertically related markets providing different complementary functions. *see* CMA, Final Report (fn. 3), para. 5.212. According to the CMA, "*there has been an increasing trend towards vertical integration, with providers fulfilling more than one function*" (see *ibid.*, para. 5.213).

[**9**] See CMA, Final Report (fn. 3), para. 5.213. According to the CMA, "*the industry has been consolidating in recent years, with supply increasingly concentrated in a small number of large providers at each level of the value chain*".

[**10**] FCA, Decision (fn. 1), paras. 321, 326 (60-70% based on ad revenue and 70-80% in terms of ads served); similar findings by the CMA and ACCC put Google's market share as high as 90%. CMA, Final Report, para. 5.213, 5.222; ACCC, Interim Report (fn. 3), p. 89.

[**11**] 50-60% in the UK, *see* CMA, Final Report (fn. 3), paras. 5.213, 5.221-5.223; 40-50% in France, 50-60% in the Netherlands, 70-80% in Spain, see FCA, Decision, para. 352.

[**12**] FCA, Decision (fn. 1), para. 89. *See also* Google Blog, *Introducing Google Ad Manager*, 27 June 2018, *https://bit.ly/3gING5P*.

[**13**] CMA, Final Report (fn. 3), paras. 5.218-5.220; ACCC, Interim Report (fn. 3), p. 89.

[**14**] CMA, Final Report (fn. 3), para. 5.215; ACCC, Interim Report (fn. 3), p. 89.

[**15**] For a more detailed overview of the process of selling inventory via ad tech intermediaries, *see* CMA, Final Report (fn. 3), para. 5.210 and ACCC, Interim Report (fn. 3), p. 37 *et seq.*

[**16**] See FCA, Decision (fn. 1), paras. 97 *et seq*. for details.

[**17**] The inefficiency is due to the fact that lower-ranked SSPs might have offered a better price than the price floor the Publisher Ad Server estimated, but were not called because the impression was already sold at a lower price to an intermediary at a higher level of the "waterfall".

[**18**] See FCA, Decision (fn. 1), para. 104.

[**19**] The use of Dynamic Allocation is mandatory, *see* FCA, Decision, para. 105. Publishers using DFP can interact with AdX only when enabling Dynamic Allocation.

[**20**] Note that there exist two different technical implementations for Header Bidding solutions – Browser-Side and Server-Side Header Bidding solutions, *see* FCA, Decision, para. 119.

[**21**] Another reaction was an anti-competitive agreement with Facebook ("Project Jedi Blue"), which saw Facebook dropping its support for Header Bidding and instead using Open Bidding. In exchange for using Google's ad tech tools, Facebook received bidding advantages such as a guarantee, it would win a certain amount of auctions regardless of the bids of other parties, *see* Texas Amended Complaint (fn. 3), para. 203 *et seq*. In addition, there are indications that (Google's) "Accelerated Mobile Pages" ("**AMP**") HTML framework was created to make Header Bidding technically impossible on mobile websites as well. *see* Texas Amended Complaint, para 245 *et seq*.

[**22**] FCA, Decision (fn. 1), para. 134.

[**23**] These are rival SSPs participating in Header Bidding.

[**24**] These are DSPs making bids in Google's SSP, including Google's DSPs.

[**25**] These are rival SSPs participating in Open Bidding, Google's proprietary version of Header Bidding.

[**26**] Article L.420-2 of the French Commercial Code.

[**27**] FCA, Decision (fn. 1), paras. 241 *et seq*., para. 247.

[**28**] FCA, Decision (fn. 1), paras. 263 *et seq*.

[**29**] FCA, Decision (fn. 1), paras. 294 *et seq*.

[**30**] FCA, Decision (fn. 1), paras. 286 *et seq*., 305 *et seq*.

[**31**] FCA, Decision (fn. 1), paras. 318, 321. Prior to that date there was insufficient data to establish this, *see id.*

[**32**] FCA, Decision (fn. 1), paras. 318, 321. The FCA stated that this estimated market share most likely still underestimates the actual market share of DFP, see *id.* para. 322.

[**33**] FCA (fn. 1), Decision, para. 326.

[**34**] FCA, Decision (fn. 1), para. 323.

[**35**] FCA, Decision (fn. 1), paras. 329 *et seq.*

[**36**] FCA, Decision (fn. 1), paras. 346 *et seq.*

[**37**] *See, e.g.,* European Commission, Decision of 17 December 2020, M.9660 – *Google/Fitbit*, paras. 164 *et seq.*, 347 *et seq.*, European Commission, Decision of 20 March 2019, AT.40411 – *Google Search (AdSense)*, paras. 120 *et seq.*, 231 *et seq.*, paras. 274 *et seq.*, European Commission, Decision of 11 March 2008, M.4731 – Google/DoubleClick, paras. 108, 109, CMA, Final Report (fn. 3), paras. 2.40 *et seq.*, 5.212 *et seq.*, ACCC, Interim Report (fn. 3), p. 37 et seq., p. 89.

[**38**] FCA, Decision (fn. 1), para. 367.

[**39**] With Dynamic Allocation, Google enabled AdX to generate a bid for every impression, as it was not dependent on a given position in the Waterfall. AdX was also able to secure any impression, as it always had the option of overbidding the price floor.

[**40**] *See, e.g.,* FCA, Decision (fn. 1), e.g. paras. 196 *et seq.*, 207; Texas Amended Complaint (fn. 3), para. 185 *et seq.*

[**41**] FCA, Decision (fn. 1), para. 156.

[**42**] FCA, Decision (fn. 1), para. 182. As of May 2016, this feature was enabled for all DFP users by default (*ibid.*).

[**43**] FCA, Decision (fn. 1), paras 180, 194.

[**44**] *See* fn. 24; fn. 25.

[**45**] FCA, Decision (fn. 1), paras. 214-215.

[**46**] FCA, Decision, (fn. 1) paras. 214-216.

[**47**] While the amount of the winning is now only known after the auction is closed (unlike before, when Google had such information prior to bidding for a specific impression), the difference is minimal for AdX – AdX buys thousands of impressions per second and can easily use the minimum price of one auction to adjust its bidding strategy for the next auction, possibly even to bid on the next impression for the same user on the same website. In this regard, *see* Complaint filed by Associated Newspapers Ltd. And Mail Media Inc. in the Dist. Ct., S.D.N.Y., 20 April 2021, case 1:21-cv-03446 (the "**Daily Mail Complaint**"), para. 51. According to the ACCC, "'*Minimum bid to win' information is a valuable input for informing future bidding strategies*" (Interim Report (fn. 3), p. 140).

[**48**] FCA Decision (fn. 1), para. 209. Publishers used this option to optimise their net revenue taking into account the comparative advantages of different SSPs (*id.*, para. 211). AdX frequently received a higher price floor to compensate for higher take rates or to maximise revenue (*id.*, paras. 211-212). Internal Google documents substantiate the fact that removing this disadvantage for AdX was Google's main motivation for introducing this policy, *see* CMA, Final Report (fn. 3), Appendix M, para. 463.

[**49**] Google charges SSPs participating in Open Bidding a 5-12% fee on the revenue generated by transactions made via Open Bidding, *see* FCA, Decision, para. 202. This causes rival SSPs to be less competitive than AdX, as they have to provide compensation for such fee by submitting higher bids. AdX is not subject to such a fee.

[**50**] Therefore, rival SSPs are unable to leverage efficiencies brought by vertical integration such as direct access to their own demand, saving on transaction costs, easing data sharing and reducing legal challenges and technical problems, *see* FCA, Decision (fn. 1), paras. 203 *et seq.* Once again, AdX is not subject to the same restrictions and can freely submit demand sourced from Google's own DSPs.

[**51**] Open Bidding was designed to provide slightly better outcomes than Header Bidding, but ensured that participating SSPs were still at a competitive disadvantage, *see* FCA, Decision (fn. 1), para. 207.

[**52**] FCA, Decision (fn. 1), paras. 218 *et seq.*

[**53**] Google funnels most of the demand from its own DSPs (i.e., Google Ads and Google DV360) exclusively into AdX. In 2019 Google's own DSPs accounted for 60-80% of impressions bought on AdX. *See* FCA, Decision (fn. 1), para. 227.

[**54**] FCA, Decision (fn. 1), para. 230 *et seq.*

[**55**] *See, e.g.*, Texas Amended Complaint (fn. 3), para. 7 *et seq.*

[**56**] FCA, Decision (fn. 1), para. 328, 391.

[**57**] FCA, Decision (fn. 1), paras. 95, 448.

[**58**] FCA, Press Release of 7 June 2021, "The Autorité de la concurrence hands out a €220 million fine to Google for favouring its own services in the online advertising sector", *https://bit.ly/3xFtaJc*.

[**59**] *Mathieu Rosemain, Google to change global advertising practices in landmark antitrust deal,* Reuters, 7.6.2021, *https://reut.rs/3CSJppl* ↗; *Gaspard Sebag, Aoife White, Google Overhauls Global Ad Model After French Antitrust Fine,* Bloomberg, 7.6.2021, *https://bloom.bg/3iQzTLv* ↗.

[**60**] Article 9(2) of the Directive 2014/104/EU of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p. 1-19).

[**61**] Texas Amended Complaint (fn. 321), para. 189. Note that the British CMA also examined the effective margin Publishers earn from the bid price paid by the Advertisers and concluded that there was no clear evidence that Publishers paid higher rates when Google was involved in the ad intermediation process. *See* CMA, Final Report (fn. 3), para. 5.242.

[**62**] Texas Amended Complaint (fn. 3), para. 188.

[**63**] FCA, Decision (fn. 1), para. 129.

[*64*] Texas Amended Complaint (fn. 3), para. 141.

[*65*] Texas Amended Complaint (fn. 3), para. 141.

[*66*] Texas Amended Complaint (fn. 3), para. 141.

[*67*] FCA, Decision (fn. 1), para. 116.

[*68*] FCA, Decision (fn. 1), para. 185.

[*69*] FCA, Decision (fn. 1), para. 188, 189.

[*70*] FCA, Decision (fn. 1), paras. 191, 195, 461. In this regard, *see* Latham *et al.* (fn. 73), p. 8 *et seq.* Given Google's ability to price discriminate, it is also meaningless to simply compare Google's take rate to that of its competitors (*id.*).

[*71*] See Latham *et al.* (fn. 73), p. 26.

[*72*] FCA, Decision (fn. 1), para. 192, 193.

[*73*] *See* FCA, Decision (fn. 1), para. 230 *et seq.*, where the FCA explains why Publishers benefitted from the comparative advantage of DFP over rival Publisher Ad Servers. Conversely, this means that Publishers using such rivals were passed on such competitive disadvantages, which are valued by one market participant at 20-30% of additional programmatic sales value. See also *id.*, paras. 403-409, where the FCA explains that rival Publisher Ad Servers' limited access to AdX had a significant impact on Publishers' revenue. In addition, see Latham/Hervé/Bizet, "Antitrust concerns in Ad-Tech: formalizing the combined effect of multiple conducts and behaviours." (2021) European Competition Journal, 1-38, p. 18 *et seq.*

[*74*] *See, e.g.,* Hoppner, *Google's (Non-) Compliance with the EU Shopping Decision,* 28 September 2020, *https://ssrn.com/abstract=3700748* ; Hoppner, *Antitrust Remedies In Digital Markets: Lessons For Enforcement Authorities From Non-Compliance With EU Google Decisions,* Hausfeld Competition Bulletin Fall 2020, 17 November 2020, *https://ssrn.com/abstract=3739813* ; Marsden, *Google Shopping for the Empress's New Clothes – When a Remedy Isn't a Remedy (and How to Fix it),* Journal of European Competition Law & Practice, Volume 11, Issue 10, December 2020, Pages 553–560, *https://doi.org/10.1093/jeclap/lpaa050* ; Hoppner/Westerhoff, *Google finally amends Choice Screen remedy to prevent non-compliance proceedings in EU Android case,* Hausfeld Perspectives, 9 June 2021, *https://bit.ly/3f634I9* .

[*75*] FCA, Decision (fn. 1), Annex 1, para. 2.8.

[*76*] FCA, Decision (fn. 1), Annex 1, para. 2.19.

[*77*] FCA, Decision (fn. 1), Annex 1, paras. 5.1 *et seq.*

[*78*] FCA, Decision (fn. 1), Annex 1.

[*79*] FCA, Decision (fn. 1), Annex 1, para. 2.7.

[*80*] FCA, Decision (fn. 1), Annex 1, para. 2.5.1.

[*81*] FCA, Decision (fn. 1), Annex 1, para. 2.8.

[*82*] European Commission, Press Release of 22 June 2021, "Antitrust: Commission opens investigation into possible anti-competitive conduct by Google in the online advertising technology sector" (IP/21/3143).

[*83*] European Parliament, Committee on the Internal Market and Consumer Protection, 9 July 2021, 2020/0734(COD), Draft report Andreas Schwab (PE692.792v01-00), Amendment 790 (available at *https://bit.ly/3Advit4*).

[*84*] Ibid., "*[In respect to each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall] establish and enable on a lasting basis, interoperability of each of the technical components used by the Gatekeeper for the provision of advertising services with each of the technical components used by third party advertising service providers; the gatekeeper must ensure that the use of its technical components by a business user in combination with technical components of a third party advertising service provider is possible under the same conditions as applied by the gate-keeper in the provision of advertising services.*"

[*85*] Ibid., "*This obligation includes: (i) but is not limited to, the seamless interconnection of ad servers, sell-side platforms, demand-side platforms, data management platforms and other technical components used in digital advertising by the gatekeeper and/or third advertising service providers through open, fully-functional and latency-free interfaces; (ii) the duty to make available targeting information including data processed under Regulation EU 2016/679; to this end, the gatekeeper procures that the end user has been presented with the specific information and/or choice and provided consent, if necessary, to the processing of data under the same terms applied and with the same effort made by the gatekeeper for its own purposes in digital advertising; (iii) the duty to make available to a business user which is not a gatekeeper pursuant to Article 3 for resale inventory for targeted advertising generated through the operation of a core platform service or a related service of the Gatekeeper at fair and competitive wholesale prices, terms and conditions*".

[*86*] *See* Opinion, Dina Srinivasan in the New York Times of 21 June 2021, *Google Is Dominating This Hidden Market With No Rules, https://nyti.ms/3f3gi8w* .

[*87*] *See, e.g.,* Latham *et al.* (fn. 73), p. 3, 20.

[*88*] Texas Amended Complaint (fn. 3), paras. 129-130, 147, 261 *et seq.*, 284 *et seq.*; CMA, Final Report (fn. 3), paras. 5.258, 5.264; *Srinivasan*, 24 Stan. Tech. L. Rev. 55, 117-119, 122-123 (2020); *Google, About Shopping campaigns and Shopping ads, https://bit.ly/3vahSvu.*

[*89*] Insider trading in financial instruments is prohibited, *see* Art. 14 of the EU's Market Abuse Regulation ("**MAR**"). Investment firms are not allowed to trade against their clients, *see* Art. 20(1) of the Second Markets in Financial Instruments Directive ("**MiFID II**"). Investment firms must not operate a trading venue such as an exchange and at the same time deal on their own accounts, *see* Art. 20(4) MiFID II. Financial intermediaries are obliged to actively ensure that conflicts of interest are detected and remedied, for example through information barriers, *see* Art. 16(3), 18(4), 23(1) MiFID II and ESMA, Final report, Draft technical standards on the Market abuse regulation, 28 September 2015, paras. 248-249.

[*90*] *See* Srinivasan (fn. 83); Srinivasan (fn. 85).

[**91**] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, 15 December 2020, *https://bit.ly/2VfqMLg* .

[**92**] *See* FCA, Decision (fn. 1), paras. 420, 425 *et seq.*

[**93**] CMA, Final Report (fn. 3), para. 5.331. They are also typically unable to observe all the intermediaries that are involved in buying inventory, CMA, Final Report (fn. 3), Appendix M, para. 547.

[**94**] CMA, Final Report (fn. 3), para. 5.335.

[**95**] *See* Latham *et al.* (fn. 73), p. 8 with further references.

[**96**] *See* Latham *et al.* (fn. 73), p. 8; CMA, Final Report (fn. 3), paras. 5.337 *et seq.*; Texas Amended Complaint (fn. 21), para. 64. For example, a SSP may receive a €1.00 bid from an DSP but only submit €0.80 bid into the Publisher Ad Server, pocketing the difference without disclosing such increase of the overall take rate.

[**97**] CMA, Final Report (fn. 3), para. 5.344.

[**98**] First, auction mechanisms should be fully transparent. Participants must be able to understand why they win or lose auctions. Yet, the DMA does not contain such rules. Art. 6(i) DMA-P requires gatekeepers to provide business users with the data that is generated as a consequence of them using the gatekeeper's services. However, this obligation falls short of giving Publishers and Advertisers the required full picture of auction mechanisms. Second, bidders and sellers should be able to know what fees are paid in auctions. Art. 5(g) DMA-P obliges gatekeepers to disclose such information. Accordingly, Publishers would benefit from such provision, if it were drafted with sufficient clarity.

[**99**] European Commission, Press Release of 22 June 2021, "Antitrust: Commission opens investigation into possible anti-competitive conduct by Google in the online advertising technology sector" (IP /21/3143).

[**100**] See references in (fn. 3).

[**101**] Ending Platform Monopolies Act, H.R. 3825, 117th Cong (2021), *https://www.congress.gov/bill/117th-congress/house-bill/3825/text*

[**102**] American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021), *https://www.congress.gov/bill/117th-congress/house-bill/3816/text*