

WHITE PAPER

COMPETITION LANDSCAPE IN ADTECH INDUSTRY IN INDIA

CENTRE FOR COMPETITION LAW AND ECONOMICS
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OVERVIEW

Advertisement Technology (AdTech) is an indispensable component of the digital markets globally. The size of the AdTech industry is around \$886 bn. While the conventional digital advertising industry looks for a direct supplier and buyer of advertisements for the operation of the economy, AdTech has led to a complete overhaul of the system. Now, the publishers and advertisers are governed by the terms issued by the intermediaries where both of them benefit in terms of maximisation of revenue and targeted reach to the consumers. The role played by such intermediaries, though, has raised competition concerns. Not only is the AdTech market severely dominated by one specific intermediary, but also there is documentary evidence to suggest that this intermediary has abused its dominant position on multiple occasions across the world. Some of the key allegations levelled on the intermediary include creating structural barriers for entry of new firms in the AdTech market, adopting black box decision-making so as to limit the ability of stakeholders to challenge its conduct, self-preferencing at multiple levels of the supply chain due to vertical integration of services provided of the intermediary and charging of high commission rates among others.

The Indian competition regulator is currently looking into competition concerns in the AdTech industry on, at least, two occasions. The allegations raised by the Informant before the Indian competition body include the imposition of one-sided terms and conditions by the intermediary on the publishers, denial of key information pointers and non-disclosure of the overall sum of the transaction. The Informant has also raised questions related to the non-distribution of revenue obtained through the monetisation of zero-click searches by the intermediary. The timing is apposite for the CCI to conduct a market study based on stakeholder consultation to assess competition concerns in the Indian AdTech industry and suggest intervention.

The Commission may look into various submissions made by the stakeholders to determine the market dynamics of the industry. There may be a possibility of a lack of information with the publishers and advertisers on certain pointers, and the Commission may refer to the submissions made by the intermediary in such cases. These submissions may, however, be subject to cross-verification in reference to the pleadings made by the intermediary in foreign jurisdictions on a similar point of a query so that the correct position of the law may be determined. Based on experience the world over, it is also possible that the extant regulatory framework through the Competition Act, 2002 may not be sufficient to undertake the reforms required to correct the course when it comes to AdTech. The Commission may note such limitations in the study and recommend the enactment of further regulations through the parliamentary legislative process.

1. INTRODUCTION

The size of the global advertising industry is over \$600 bn¹. The revenue comprises different streams of advertisement like television, print media, radio, digital advertising, and cinema among others. Among the various modes, the usage of digital advertising has been on an exponential rise over the last few years where the size of digital advertising has grown from \$235 bn to \$615bn between 2017 and 2022 globally². The growth is partially due to the rise of the recent global pandemic which led to economic entities opting for online mode of business against brick-and-mortar model, and also because of the availability of high-tech tools available with digital marketing companies offering unique characteristics to the buyers.

The gain in size for digital advertising has come with its own merits and demerits. While some gains are natural for entities on the supply and demand side of the market in terms of targeted reach and maximising revenues, the enterprises have lately flagged concerns around opaqueness and non-availability of data due to the presence of advertisement technology (AdTech) intermediaries in the supply chain. These intermediaries have also become indispensable partners for the suppliers of advertisement space due to the inherent efficiency effect they bring in. The issues raised by the entities include the imposition of one-sided terms and conditions by the AdTech intermediaries, denial of market access, leveraging of dominant position by the intermediary in one market to strengthen its position in another and absence of bargaining power on the part of suppliers. These concerns around opaqueness and non-availability of data are shared by the entities on the demand side of the market who ultimately pay for the ad space through the intermediaries.

¹ IMARC, Global Advertising Market: Industry Trends, Share, Size, Growth, Opportunity and Forecast 2023-2028, <https://www.imarcgroup.com/global-advertising-market>

² Statista, Digital Advertising – Worldwide, March 2023, <https://www.statista.com/outlook/dmo/digital-advertising/worldwide>

2. BACKGROUND

The Indian competition regime is governed by the provisions of the Competition Act, 2002. The nodal competition regulator has been looking into antitrust concerns in digital marketing through the provisions of the Act and recently passed three contravention orders where it imposed a combined penalty of over INR 2,500 crore³. The Competition Commission of India (CCI) passed another order in the digital space a few years back where it imposed a penalty of over INR 130 crore on the contravening entity⁴. Apart from the said contravention orders, the Indian competition commission is currently looking into, at least, five other matters where fundamentals of digital marketing governing space may be defined⁵.

The provisions of the Competition Act, 2002 are currently at an amendment stage. The Government of India is in the process of enacting the Competition (Amendment) Bill, 2023 which will introduce some of the few pending substantive changes under the law including the incorporation of commitment and settlement scheme, deal value threshold and change in the definition of ‘relevant market’ among others. Apart from the Act, the government has also formed a panel to look into the possibility of enacting another legislation specifically for digital markets which may be known as the Digital Competition Act. The contours of this legislation would be based on the 53rd report submitted by the Standing Committee on Finance.

The AdTech industry falls under the larger domain of digital markets. The much-needed revenues for the operations of digital marketing companies are obtained through digital advertisements which are further facilitated through AdTech. The basic

³ Case no. 07 of 2020, 39 of 2018 and 14 of 2019 at the CCI

⁴ Case no. 07 of 2012 at the CCI

⁵ Case no. 19 of 2020, 39 of 2020, 16 of 2021, 04 of 2021, 01 of 2021 at the CCI

digital economic principles of network effects, economies of scale and targeted reach to consumers remain the same with additional features like processing of consumer data within a fraction of a second, allotment of inventory based on a determined algorithm and charging of fees based on applicable caps.

The Indian antitrust watchdog is looking into competition concerns in the digital advertising industry through case no. 36 of 2022. Based on the material available on record, the CCI has been informed that a concerned AdTech intermediary in digital advertising space has been imposing one-sided terms and conditions on the Indian publishing houses thereby resulting in the denial of much-needed revenues. The Commission has also been informed that the concerned intermediary has been monetising zero-click searches on its search engine based on the content generated by publishing houses, however, the latter have been denied their due share out of it. The Commission has observed that such allegations *prima facie* violates the provisions of the Act, and has ordered a DG investigation to look into the matter in detail.

3. ISSUES FOR CONSIDERATION

Based on the information received by the Indian competition commission, the following questions emerge when it comes to determining competition aspects in the digital advertising industry:

1. What is the structure of the AdTech industry in India?

2. What are the competition concerns in the AdTech industry in India?
3. Is the current Indian legislative framework sufficient to address the regulatory concerns arising out of the AdTech industry worldwide?
4. What are the possible remedies before the Indian competition commission to sanction in the AdTech industry?

4. CURRENT POSITION

The Indian media publishing industry is a diversified space. There are, at least, ten online media publishing houses which regularly sell their ad inventory to potential buyers. Based on the number of followership on one of the most popular social media websites, a few of the top publishing houses include Dainik Jagran (15.3M), Dainik Bhaskar (14.5M), India Today (12M), Times of India (11M), NDTV (9.4M), Amar Ujala (8.4M), Indian Express (7.5M), Hindustan Times (5.9M) and The Hindu (5.3M).

As far as the advertisers are concerned, the overall size of the Indian economy is over \$3.5 trillion⁶. Based on the data available, companies spend, at least, two per cent of their overall revenue on buying advertisements. There is no dearth in the number of advertisement buyers where there are, at least, 75,000 companies registered with the Indian government. With the current focus on Digital India, such purchasing power is only likely to rise in the coming years.

⁶ The Economic Times, India's nominal GDP to be USD 3.5 trillion by end-March: Economic Survey, 31 January 2023, <https://economictimes.indiatimes.com/news/economy/finance/indias-nominal-gdp-to-be-usd-3-5-trillion-by-end-march-economic-survey/articleshow/97498963.cms>

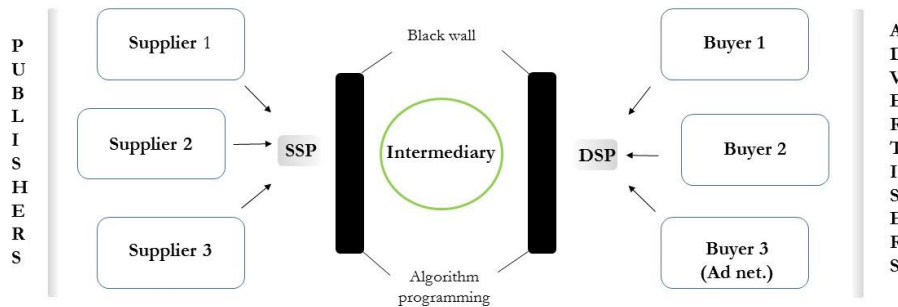


Diagram 1: Structure of the AdTech market

4.1 Australia

The Australian Competition and Consumer Commission (ACCC) in a recent inquiry held that there are weak competitive constraints for the operation of services in the AdTech industry⁷. The industry is not only dominated by a single player where it is unaffected by competitive constraints in the market, but engages in a host of practices which have led to harm at the publisher, advertiser and consumer levels. Some of these practices include self-preferencing, selective disclosure of information to the advertisers, controlling the supply of available inventory, usage of first-party data through a dubious policy and charging a high commission fee by the company. Based on the evidence, the Commission concludes that this firm has systemically prevented competition with actual and future rival firms. The Commission held that it is in receipt

⁷ Australian Competition and Consumer Commission, Digital Advertising Services Inquiry, August 2021. <https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf>

of multiple complaints under the relevant legislation against the said entity, however, the current legal framework would be insufficient to address systematic competition concerns which have occurred in the industry.

4.2 United Kingdom (UK)

The Competition and Markets Authority (CMA) recently conducted a market study on online platforms and digital advertising. The CMA held that the AdTech industry is not only severely concentrated in favour of a couple of firms, but the identified firms have also been indulging in practices which have lessened competition in the market⁸. The Authority held that the biggest concern in the AdTech industry is around the adoption of black-box decision-making which limits the ability of market participants to know about the process adopted by the intermediaries thereby limiting their ability to meaningfully challenge such processes. The opacity is pervasive where these intermediaries reserve the discretion in terms of which auctions advertisers are able to participate in, the level of a bid by them, criteria for determining the relevance of the results and how traffic is diverted to the publishers. The said opacity ultimately reflects in the prices paid by the advertisers. There are also concerns around conflict of interest and self-referencing when it comes to vertical integration of services provided by these firms across the supply chain.

The CMA has launched a formal investigation against one of these firms for potential abuse of its dominant position in the AdTech industry in 2022⁹. This is the second investigation opened by the CMA where it was already looking into how auctions are made using header bidding. The Authority is now looking into the possibility of

⁸ Competition and Markets Authority, Online platforms and digital advertising market study: final report, 1 July 2020, https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

⁹ Competition and Markets Authority, Google probed over potential abuse of dominance in ad tech, 26 May 2022, <https://www.gov.uk/government/news/google-probed-over-potential-abuse-of-dominance-in-ad-tech>

Google limiting the interoperability of its Ad Exchange services with third-party Ad servers. Another cause of concern for the CMA is the possibility of the said entity indulging in self-preferencing where its publisher Ad servers and DSPs select its own Ad Exchange.

4.3 France

The French Competition Authority (‘Autorité de la concurrence’) has held that Google is abusing its dominant position in the AdTech market as per the provisions of the local legislation and the Treaty on Functioning of the European Union (TFEU)¹⁰. The Authority held that the entity engages in self-preferencing where its publisher Ad server (‘Double Click’) favours its own AdExchange (‘AdX’) through awarding of bids to the detriment of competing players. The entity further imposed limitations on the use of AdX through contractual obligations through the usage of third-party servers. As part of the proceedings, Google agreed to offer multiple commitments where it not only allowed third-party SSPs to access the inventory available with Double Click on merits, but further amended its internal process so that third-party publisher Ad servers are able to access the AdX inventory. The Authority further imposed a monetary penalty of €220 million on the company.

4.4 United States (US)

The Department of Justice (DOJ), United States has initiated a case under the relevant law against Google for monopolising the AdTech industry¹¹. The DOJ has alleged that Google engages in anti-competitive conduct which puts a barrier to entry for new

¹⁰ Autorité de la concurrence, Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector, 7 June 2021, https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2021-07/21-d-11_ven.pdf

¹¹ Department of Justice, Justice Department Sues Google for Monopolizing Digital Advertising Technologies , 24 January 2023, <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>

players in the market and deprives its existing rivals of opportunities to scale up their services. The Department has further alleged that the company restricts the publishers from multi-homing publisher Ad servers and limits the development of technology from rival entities which can bring efficient results when it comes to demand-supply match in real-time for ad space allocation. It is the allegation of the Department that instead of choosing efficient options which have resulted in overall welfare, Google adopted a ‘be-all and end-all’ approach where it limited the ability of publishing entities to engage with its rivals thereby increasing the publishing entities’ dependence on Google for sale of inventory. In a detailed plaint, the DOJ has sought multi-pronged relief against the company where it is not only decreed to provide damages and divestiture may be sanctioned at various levels of the supply chain to undo the harm. In a separate proceeding, a US district court has further sanctioned action against Google for deleting evidence¹².

5. CONCLUSION

Based on the evidence available worldwide, it is found that Google is a dominant entity in the AdTech industry where it even accounts for more than 90 per cent of the overall impressions in some countries. The industry reflects weak competition constraints where there are structural barriers to entry of new players, high incumbency effect, network effects, economy of scale and power of defaults in determining consumer behaviour among other factors. The said structural barriers have been a culmination of business conduct which, even though may have resulted in pro-efficiency effects in certain cases, has led to marginalization of rival service-providers resulting in severe

¹² Business Today, US court sanctions Google in privacy case, company's second legal setback in days, 31 March, 2023, <https://www.businesstoday.in/technology/news/story/us-court-sanctions-google-in-privacy-case-companys-second-legal-setback-in-days-375473-2023-03-31>

concentration. Google has been accused, and in some cases - established, to indulge in self-preferencing across various levels of the supply chain, adopting black-box decision-making in order to limit the ability of market participants to challenge its conduct and has charge high commission rates from both ends of the market to make supernormal profits. The company has also been making contradictory submissions on the basis of the country it is engaging with thereby deepening the suspicions when it comes to the increase of consumer harm related to its business practices.

The Indian competition commission may engage in detailed stakeholder consultation when it comes to the determination of key factual pointers in relation to the AdTech industry in India. This stakeholder consultation may focus on the business model adopted by Indian publishing houses and advertisers which may be similar or different based on the national context. The Commission may further focus on what are the barriers when it comes to the adoption of possible alternate options available to these stakeholders when it comes to the sale and purchase of advertising space inventory. There is a possibility of a lack of information with these entities and in such a case, the Commission may refer to the submissions made by Google. These submissions may, however, be subject to cross-verification as Google has been pleading differently at different fora on a single point of the question.

The Indian Parliament is in the process of passing the Competition Amendment Bill, 2023 to enhance the jurisdiction of the Indian competition commission. The extant provisions may, however, still be insufficient. In such a case, the Commission may further recommend enactment of a separate legal framework to the legislator where it may set up a sector-specific ex-ante regime for compliance. Such rules would pay due

focus to the efficiency effects of various business practices of the entity and ensure that unnecessary regulatory burden is not passed to them. Such an approach would ensure enhanced welfare for various stakeholders in the AdTech system including the publishers, advertisers and consumers.

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