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DMA TRANSPARENCY REQUIREMENTS IN RELATION TO ADVERTISING

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TABLE OF CONTENTS

ABOUT CERRE.....	3
ABOUT THE AUTHORS.....	4
1. INTRODUCTION	5
2. THE DMA OBJECTIVES	6
2.1 The Advertising Ecosystem.....	6
2.2 What the DMA is Trying to Achieve	6
3. TRANSPARENCY IN TRANSACTION INFORMATION	8
3.1 The DMA Obligations	8
3.2 Interpretation and Implementation Issues to be Clarified	12
3.2.1 What is an advertisement and what is a publisher?	12
3.2.2 How will consent be managed?	12
3.2.3 What will getting ‘metrics’ mean?	13
4. TRANSPARENCY IN PERFORMANCE MEASUREMENTS	15
4.1 Obligations and Their Possible Impacts.....	15
4.2 Interpretation and Implementation Issues to be Clarified	17
4.2.1 Whose performance is this about?	17
4.2.2 What will constitute a request and how will they be handled?	18
5. OVERARCHING ISSUES	19
6. CONCLUSIONS	20
REFERENCES	21



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1. INTRODUCTION

In the years preceding the adoption of the Digital Markets Act (DMA), market investigations in the UK and Australia by competition authorities found problematic concentration of platform power and anti-competitive situations in online advertising (Australian Competition and Consumer Commission, 2019; Competition & Markets Authority (CMA), 2020). The French competition authority took up a case against Meta over the withdrawal of APIs to third party ad tech providers, eventually receiving concessions.¹ The US Department of Justice launched a suit against Google in relation to search advertising.² The European Commission launched a formal anti-trust investigation into anti-competitive behaviour by both Google and Meta in the market for online display advertising in early 2022³. There had been mounting evidence from academics as well of various problems of concentration in the market for online advertising (Andreou et al., 2019; Broughton Micova & Jacques, 2020b; Geradin & Katsifis, 2019). Issues were identified with lack of transparency, unfair data-driven advantages, conflicts of interests and dependencies at crucial points in the ecosystem.

The DMA aims to address some of these problems in relation to gatekeeper undertakings. It contains measures directly related to the problems of opacity in the trade of online advertising and in the measurement of its effectiveness. This issue paper covers these measures, which are contained in Articles 5 and 6 of the DMA. It begins with a brief overview of the online advertising ecosystem. The paper then elaborates the aims of the DMA as indicated in the recitals and provisions. It later takes in turn each of the provisions of the DMA related to transparency in online advertising, first addressing those related to transaction in Articles 5(9) and 5(10) and then those related to performance measurement in Article 6(8). Finally, it provides an interpretation of each of the provisions and identifies some outstanding questions to be dealt with in implementation.

This paper argues that there are crucial definitions to be established, namely of advertisement, publisher, and metrics, and that how these are defined will have significant implications for the effects of the DMA. It also points out that questions need to be answered about how the consent of advertisers and publishers will be managed, how they will be enabled to make requests for access to measurement tools and data, and how they will receive data. The potential to improve contestability and fairness in the advertising ecosystem could be stymied by overly cumbersome processes for consent or requests, or by ineffective delivery of the information that is supposed to be made transparent. This paper also highlights two overarching issues, one related to the designation of gatekeeping services and the other arising from the role that personal data processing plays in some of the information due to be made more transparent. In conclusion it argues that, with user fairness considerations at the forefront, the implementation of the advertising transparency requirements in the DMA could encourage industry-wide re-evaluation of measures of value and effectiveness and a move away from personal data-intensive types of advertising.

¹ See: <https://www.autoritedelaconurrence.fr/en/press-release/meta-makes-commitments-autorite-de-la-conurrence>

² See: <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>

³ See: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1703



2. THE DMA OBJECTIVES

2.1 The Advertising Ecosystem

As has been argued in an earlier CERRE report (Broughton Micova & Jacques, 2019) and other scholarly work (Broughton Micova & Jacques, 2020a; Eisenhardt et al., 2018; Stallone & Klaas, 2019), the trade in advertising takes place within a **highly complex ecosystem of demand actors, suppliers, intermediaries and other services**. Efforts to visualise this either as interconnected value chains (Adshead et al., 2019) or as evolving ecosystems (Gusic & Stallone, 2020) have shown that some undertakings are present in multiple parts of these ecosystems, and may tend towards aggregation or consolidation.

The DMA specifically classifies online advertising services as a type of core platform service, including any advertising networks, advertising exchanges and any other advertising intermediation services, if they are provided by an undertaking that also provides any other core platform service. Nevertheless, nearly all the other types of core platform services identified in Article 2 of the DMA also have some role to play either as the supplier of the inventory (search engine, social network, or video-sharing platform) or as a service through which data is gathered that feeds into advertising (web browser, virtual assistant). Several functions must be fulfilled for advertising to be purchased and delivered to an end-user:

- inventory provision;
- inventory sale (reserve & auction);
- auction management & execution;
- ad verification;
- optimization & planning (including re-targeting, which requires 1st party data);
- ad serving;
- performance tracking.

The importance of consumer data in this ecosystem has been well evidenced (Boerman et al., 2017; Bourreau et al., 2017; Competition & Markets Authority (CMA), 2020), but transactional data and increasingly contextual data related to the content around advertising inventory are also crucial to some functions and types of advertising and thus are also of considerable value (Broughton Micova & Jacques, 2020b; Krämer et al., 2020). Access to these types of data is highly uneven, however. There is a clear **lack of transparency in transaction data and performance data** that makes it difficult for advertisers to “exercise choice effectively” (Competition & Markets Authority (CMA), 2020, p. 16), and for publishers to understand and represent the value of their inventory (Broughton Micova & Jacques, 2020b; Jeon, 2021). The DMA contains provisions intended to increase transparency in the transactions that take place in the advertising ecosystems and in the measurement of performance.

2.2 What the DMA is Trying to Achieve

The DMA has two overarching aims: contestability and fairness.

Contestability – The DMA aims to rectify weak contestability where, according to Recital 13 “extreme scale economies, very strong network effects, an ability to connect many business users with many



end users through the multi-sidedness of these services, lock-in effects, a lack of multi-homing or vertical integration are the most prevalent.” Theoretically there should be adequate contestability across all the advertising functions listed above. The DMA should therefore facilitate rivalry among firms and market entry in the provision of each function. This requires firms wishing to provide a service to be able to access the information that serves as the raw material for the function that service would provide. For example, both ad verification and campaign optimization require data that is generated at the point where an ad is served to an end user. Firms wishing to compete as ad verification services or agencies providing campaign planning and optimisation need continual access to that data (Jeon, 2021). Contestability in the functions performed in the advertising ecosystem also requires firms to be able to make informed choices. For example, inventory holders need to have a choice of auction services and ad servers with which to partner, and must be able to access information upon the basis of which to make that choice among providers.

Fairness – As stated in Recital 7, the DMA is concerned with fairness for both end users and business users. The concern comes from the fact that certain core platform services have “gained the ability to easily set commercial conditions and terms in a unilateral and detrimental manner for their business users and end users.” The aim here is to enable fair conditions for marginal decision-making by business users and end users. Business users need to be able to access the information necessary to assess the fairness and value of their commercial relationships with core platform services. For example, an advertiser should be able to decide how to allocate its budgets across ad networks. End users should also be treated fairly in relation to conditions of use. For example, they should not receive poorer quality service if they refuse to consent to data collection for the purposes of advertising, as set out clearly in the Act. Fairness towards the end user would also be informed by the principles set out in the GDPR. End users should be able to understand what personal data is being collected and for what value-creating purpose, and only the minimal data required should be gathered.

Articles 5 and 6 of the DMA set out transparency requirements for information about the transactions involved in the trade in advertising and information necessary for the measurement of performance within the ecosystem. The next sections discuss each of these in turn and raise some issues with each that should be considered in the implementation and enforcement of the Act.



3. TRANSPARENCY IN TRANSACTION INFORMATION

3.1 The DMA Obligations

Article 5 of the DMA sets out the general obligations on gatekeepers. Both 5(9) and 5(10) below deal with the transparency of financial information generated in the trade of advertising.

Article 5(9)

The gatekeeper shall provide each advertiser to which it supplies online advertising services, or third parties authorised by advertisers, upon the advertiser's request, with information on a daily basis free of charge, concerning each advertisement placed by the advertiser, regarding:

- (a) the price and fees paid by that advertiser, including any deductions and surcharges, for each of the relevant online advertising services provided by the gatekeeper,*
- (b) the remuneration received by the publisher, including any deductions and surcharges, subject to the publisher's consent; and*
- (c) the metrics on which each of the prices, fees and remunerations are calculated.*

In the event that a publisher does not consent to the sharing of information regarding the remuneration received, as referred to in point (b) of the first subparagraph, the gatekeeper shall provide each advertiser free of charge with information concerning the daily average remuneration received by that publisher, including any deductions and surcharges, for the relevant advertisements.

Article 5(10)

The gatekeeper shall provide each publisher to which it supplies online advertising services, or third parties authorised by publishers, upon the publisher's request, with free of charge information on a daily basis, concerning each advertisement displayed on the publisher's inventory, regarding:

- (a) the remuneration received and the fees paid by that publisher, including any deductions and surcharges, for each of the relevant online advertising services provided by the gatekeeper,*
- (b) the price paid by the advertiser, including any deductions and surcharges, subject to the advertiser's consent; and*
- (c) the metrics on which each of the prices and remunerations are calculated.*

In the event an advertiser does not consent to the sharing of information, the gatekeeper shall provide each publisher free of charge with information concerning the daily average price paid by that advertiser, including any deductions and surcharges, for the relevant advertisements.



The table below breaks down the provisions, showing what information it ensures for the demand side and the supply side of advertising respectively and where the consent of either is required.

Table 1: Breakdown of the provisions in Article 5(9) & 5(10) of the DMA

INFORMATION GIVEN TO ADVERTISER OR AUTHORISED 3RD PARTY	INFORMATION GIVEN TO PUBLISHER OR AUTHORISED 3RD PARTY	CONSENT?
The price and fees paid for each advertisement including deductions and surcharges	The remuneration received and the fees paid by that publisher for each advertisement displayed, including any deductions and surcharges	No consent required
The remuneration for each advertisement received by the publisher, including any deductions and surcharges	The price paid by the advertiser for each advertisement displayed on the publisher's inventory, including any deductions and surcharges	Consent required from publisher for remuneration data and advertiser for price paid data
The metrics on which each of the prices, fees and remunerations are calculated	The metrics on which each of the prices and remunerations are calculated	No consent required
The daily average remuneration received by that publisher for an advertiser's advertisements	The daily average price paid by that advertiser, including any deductions and surcharges, for advertising on that publisher's inventory	No consent needed – This is the alternative offered if consent is not given where needed.

As can be seen in the table, these two provisions will give advertisers and publishers equivalent access to transaction information, if consent is given on both sides. However, **each of these groups of business users of core platform services would use or derive value from this information slightly differently.**

For advertisers, or the media agencies working on their behalf, having the detailed information on the prices they paid per ad is **important for campaign planning and optimisation** as it is an important measure of efficiency. Media agencies, the likely authorised third parties, would normally already have access to this information across all their clients, though not necessarily in real time. In some jurisdictions there are transparency requirements governing the relationships between advertisers and their media agencies. The Sapin Law, for example, ensures this in France and could contribute to the effectiveness of this provision, but the relationships between advertisers and their authorised third parties are outside the scope of the DMA. Combining price paid with information on the remuneration received by the publishers will allow advertisers to see the cost of the intermediation involved in the placing of advertisements. For some advertisers this might be used as a measure of efficiency, for instance in order to calculate how much of their ad spend is going to various



intermediaries. The concentration among intermediaries on the buying side has been documented as well as the consequences for advertisers (Decarolis & Rovigatti, 2021). However, the advertisers would not necessarily be interested in how much any given publisher receives.

Whether seeing how much of their advertising spend is extracted between the price paid and the remuneration received would lead advertisers to change routes to those publishers will firstly depend on whether alternative routes are available and secondly on whether there is sufficient competition and fairness towards publishers. If the power dynamics between a core platform service and publishers allows the platform service to extract the lowest price for the inventory, which could even be under cost, then going through a gatekeeper's core platform service will still result in a lower price paid by the advertiser. The advertiser will then have no incentive to choose an alternative route that allows a higher percentage to reach the publisher.

Information on the metrics used to calculate prices could be invaluable to advertisers for the marginal decision making involved in assessing and planning campaigns, which would encourage fairer competition in the supply of inventory and possibly among the exchanges and brokers involved in executing auctions. The latter will depend on how widely the term 'metrics' is interpreted, and whether it captures the situations in which price is not so much calculated as it is the result of a bidding process, in which the intermediary may be using different metrics for demand and supply sides. For example, Google Ads sometimes uses cost per click (CPC) to charge advertisers, but cost per impression (CPM) to pay publishers. Also, the price paid at auction is often not the highest bid, which means that information on the final price paid may blur the actual value of the inventory. In order for an advertiser to assess efficiency and fairness in a second price auction, for example, it would need to know all the other bids, their sources, and granular details on the ad. A wide and detailed approach like this has been proposed in the US to encourage competition in digital advertising.⁴ **Giving advertisers and their representatives sufficient level of detail has the potential to enable them to identify unfair practices and generate evidence for competition-related complaints.** Experiments with the bidding behaviour of learning algorithms, which are frequently used by large buying agents, have shown that the effects of the nature of ad trading auctions and amount of feedback information received by the bidding side can vary in terms of the prices achieved and the potential for tacit collusion (Banchio & Skrzypacz, 2022; Decarolis et al., 2022). **A delicate balance will have to be achieved** and monitoring put in place to ensure that the level of detail does not enable collusion or other unfair practices too.

The term 'publisher' is not defined in the DMA, which is a significant gap. If it refers to all those selling advertising inventory through core platform services it could include a variety of different business users, from a local non-news website to a major newspaper group or broadcaster. It could

⁴ The Bill to prevent conflicts of interest and promote competition in the sale and purchase of digital advertising proposed in the US Senate would require data "(II) for each identifier [unique to advertising space] described in subclause (I), all bids received, and, for each bid received, the bid submitted to the digital advertising exchange on behalf of the buy-side brokerage customer, the winning price, the uniform resource locator or other property identifier at the lowest level of granularity, the identity of the digital advertising exchange or other digital advertising venue returning the bid, date, time that the bid response was received in microseconds or a lower level of granularity, web domain associated with the advertising creative, the advertising creative size and format, and whether the bid won the seller's impression". See: <https://www.congress.gov/bill/117th-congress/senate-bill/4258/text>



also include social media, comparison or niche search services, or even marketplaces, owned by the same provider as the core platform service. Such a wide definition of publisher would include a vast number of small inventory holders that would have little, if any, capacity to make use of the data these provisions would allow them to request and so would not be likely to request this data. It therefore makes sense for the purpose of this discussion, and arguably the DMA's implementation, to **assume a narrower definition** of publisher akin to the way the term is used in the Copyright Digital Single Market Directive⁵, describing firms that invest in the production or acquisition of content and associated rights and have editorial responsibility.

For such publishers, mainly audiovisual media and press publishers, having data on the prices paid by advertisers, including any surcharges and discounts, for their inventory would be invaluable. If they **are able to effectively combine it with the information on their own remuneration using unique identifiers, it would allow them to assess the efficiency and fairness of core platform services**. If there are alternatives, they could potentially compare and chose the best option based on the % of the paid price that they receive, enabling fair competition in the sale and auction functions among supply side platforms, ad exchanges, and other intermediaries. Those core platform services not provided by designated gatekeepers would arguably have an incentive to provide equivalent information to the publishers even though they would not be obliged to do so in order to be competitive. Large publishers with the capacity to process and utilise large amounts of such data for pricing and inventory planning would likely derive the most benefit.

Information on the metrics on which prices and remuneration are calculated will be useful for publishers in a similar way as it would be for advertisers. Metrics can be more than whether a price is calculated on click or impression, it would also be how a click or an impression is determined. Value determining information could also include the format, the number of total impressions available, and the type of data used for targeting, if any. This is particularly important for publishers who have been using core platform services operated by companies that also operate social media or video-sharing platforms that compete with them in the provision of inventory. **Metrics of sufficient breadth, granularity, and timeliness could enable publishers to compare intermediary services and to identify any unfair practices**, especially in programmatic trading and auctions. However, it may also allow publishers that also sell directly to advertisers to compare the data they have from direct sales with the prices advertisers are willing to pay for certain conditions through the gatekeeper.

Where large publishers use automated systems with learning capacity there are **risks that these will tend toward tacit collusion** (Calvano et al., 2020), or that the advantages they gain from the additional information will further widen the gap between them and smaller publishers. Competition authorities will need to monitor closely the way this information is used by publishers in advertising markets more widely, and regulators responsible for media plurality will need to assess the consequences for smaller publishers.

⁵ This Directive also fails to exactly define 'publisher' among its definitions, however Recitals 54-60 give an indication of what they are understood to be: Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29, OJ [2019] L 130/92.



This account of how transaction information might be used by advertisers and publishers contains a number of “ifs”. The DMA leaves several important questions unresolved, that will need to be attended to in the implementation in order for these provisions to be effective in achieving contestability and fairness.

3.2 Interpretation and Implementation Issues to be Clarified

3.2.1 *What is an advertisement and what is a publisher?*

These two questions are linked because a clear definition for one could indicate the definition of the other. An advertisement could be a paid for ranking or prominence such as on Booking.com results or in Amazon’s ‘buy box’. It could also include promotion by a game streamer arranged through Twitch’s ‘Bounty Board’, a branded filter in Instagram, or another form of what the Audiovisual Media Services Directive⁶ defines as ‘commercial communication’ but that is not inventory provided by a press publisher or audiovisual media. If the term advertisement is to be understood in a very comprehensive way, it could imply that the term publisher would be similarly understood, and not necessarily in the way discussed above.

One thing that does seem clear in the DMA, however, is that the **term advertisement does not only refer to openly traded display advertising**. The annex to the DMA for designation of gatekeeper status for online advertising services explicitly gives a measure for ‘active end-users’ and ‘active business users’ for both proprietary sales of advertising and services that operate open trading. The transparency requirements in Article 5(9) and (10) are not so important for those large services whose advertising is sold only through their own proprietary trading systems as they already have access to all of the transaction data covered by these provisions. However, if implemented forcefully the requirements **could be very meaningful for advertisers and for those ad inventory sellers who compete with large platforms in the provision of inventory**.

3.2.2 *How will consent be managed?*

Advertisers will only have an interest in the information on publisher remuneration if it helps them reduce the costs and improve the efficiency of their advertising overall, and have little or no incentive to consent to allowing publishers to see their price paid information. The business of media agencies has historically been in arbitrage, and they continue to make income off the difference between what they pay for advertising and what they charge their advertiser clients. They will have little interest in encouraging or facilitating advertiser consent to the release of transaction data to publishers or vice versa. Publishers would have an incentive, or at least no disincentive, for giving consent to the sharing of data on the remuneration they receive, and would likely derive the most benefit from getting access to advertisers’ price paid data. Whether it is in the interest of the core platform services managing the request and consent processes to make those processes easy or cumbersome may depend on whether

⁶ Directive 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ [2010] L 95/1, as amended by Directive 2018/1808



it is also trading ad inventory from other services it provides or it is engaged in other parts of the ecosystem.

For the provisions in Article 5 on transaction transparency to be effective, these incentives will need to be balanced out in the implementation of consent for the release of the data on both sides. As has been seen with the implementation of the e-privacy Directive⁷, and even to some extent GDPR,⁸ consent processes can be designed so as to render the policy essentially meaningless and even frustrate users (Fassl et al., 2021; Sanchez-Rola et al., 2019). **Article 5 of the DMA does not require end user consent, but the consent of the business involved in the trade.** The data released should not be personal data, but transaction related non-personal data. In the implementation of the DMA **steps should be taken to ensure that the processes for making requests and giving consent are designed to encourage both.**

For example, could they be automated and or integrated into the buying and selling process? Could they be made on a regular basis, perhaps annually, as a blanket consent, rather than ad hoc for individual campaigns or trades? A daily average is considerably less useful for both sides, especially for the marginal decision-making that could encourage competition among inventory holders and online advertising services. The aims of improving contestability and fairness withing the advertising ecosystem will only be served if most transaction data is shared, if essentially the default is that advertisers and publishers both consent and receive the data.

3.2.3 What will getting 'metrics' mean?

This question addresses two issues, the first of which is determining the kind of data that will qualify as 'metrics', and the second of which is the way the metrics will be made available. Without clarity on the first, there is a danger of the implementation of this provision being at odds with the principle of minimization of personal data use. Prices for online advertising can be determined through a variety of ways depending on the type of advertising and the purchasing pathways used (Broughton Micova & Kostovska, 2021), some of which rely on personal data. Display advertising alone can be traded through open auction, in which case the price is determined by the bidding process such as in the example above, or through premium channels where prices may be determined by the characteristics of the inventory and/or the targeting criteria. As with the old arbitrage systems for offline advertising, prices, discounts, or rebates can also depend on volume and duration. It may be that not all the possibilities are relevant to the kinds of undertakings likely to be designated gatekeepers, however there should be a wide enough understanding to cover the variety of information used to determine pricing, from the granular bid data from auctions to the viewability and geolocation characteristics feeding into premium buys. Where price determination may involve the processing of personal data generated by users, it will be vital that this data is not shared.

⁷ Directive 2002/58 of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ [2002] L 201/37 as amended by Directive 2009/136.

⁸ Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation), OJ [2016] L 199/1.



Metrics that are consistent and comparable are most useful for encouraging contestability and fairness, as trends can be identified and services compared. However, industry standards remain somewhat patchy. Viewability criteria have been defined in various ways to suit the players who have the power to define them, and there has been little interest in standardisation (Expósito-Ventura et al., 2021). Though efforts have been made to produce guidelines on impressions and accredited measurement services, these seem to skip over bigger questions about what effectiveness actually is, and whether ever more granular, and arguably invasive “measurement” is merited.

The DMA states that metrics should be provided for free, on a daily basis and for each advertisement. This could come in a form that renders it pretty much useless or it could be provided in forms that are appropriate to the type of data and that make it useable to the receiver. **For most of the data, the most appropriate mechanism would be for it to be provided through an API. The metrics data would also need to be linked to unique identifiers** for the ads (not the users), or at least for the transaction in order to be very useful to publishers for assessing and demonstrating the efficiency of their ad inventory. They would need to be able to connect price, price-determining metrics, and other performance data by advertiser and across core platform services when multiple are provided by a single gatekeeper.



4. TRANSPARENCY IN PERFORMANCE MEASUREMENTS

4.1 Obligations and Their Possible Impacts

Article 6 of the DMA contains a provision that obliges gatekeepers to give advertisers and publishers, or third parties authorised by them, access to performance measuring tools and ad verification related data.

Article 6(8)

The gatekeeper shall provide advertisers and publishers, as well as third parties authorised by advertisers and publishers, upon their request and free of charge, with access to the performance measuring tools of the gatekeeper and the data necessary for advertisers and publishers to carry out their own independent verification of the advertisements inventory, including aggregated and non-aggregated data. Such data shall be provided in a manner that enables advertisers and publishers to run their own verification and measurement tools to assess the performance of the core platform services provided for by the gatekeepers

Unlike in relation to transactional data, there is no consent required in this provision. The performance measuring tools will rely on data collected by the gatekeeper through its core platform service(s) as first party data or data from third parties. Where the advertising business model is heavily reliant on targeting and user behaviour tracking, measurement tools will involve processing personal data. In such cases, the consent relevant to this data is that of the end user, whose interaction with the ad and other behaviour online generates it. The gatekeeper manages this end user consent, which cannot be assumed on the basis of engagement with an ad.⁹

According to this provision, if they request it, advertisers, publishers, or their authorised third parties will be given access to:

- performance measuring tools of the gatekeeper; and
- the data necessary to carry out independent ad verification.

As stated in the provision, the purposes of the access are to enable them to:

- run their own ad verification; and
- assess the performance of the core platform services.

The Interactive Advertising Bureau (IAB), Europe's leading industry association promoting digital advertising, defines **ad verification** as: "a process which attempts to verify that one or more attributes of a served online ad have been executed in a manner consistent with the terms specified by the advertiser or agency and agreed to as part of the ad campaign terms" (IAB, 2012, p. 5). Terms can include placement conditions such as targeting related user characteristics or contextual conditions such as avoiding children's content. They can also include a variety of delivery characteristics such as

⁹ This is made clear in the EDPB's guidelines on the targeting of social media users https://edpb.europa.eu/sites/default/files/consultation/edpb_guidelines_202008_onthetargetingofsocialmediausers_en.pdf and in the Article 29 Working Party Opinion on profiling and automated decision making, which confirms that consent must be explicit and that 'legitimate interest' cannot be used to justify the use of this data <https://ec.europa.eu/newsroom/article29/redirection/document/49826>.



those aimed at combatting bot-related fraud or those that determine the quality of the ad impression, such as viewability or sound quality. Ad verification does not have to require user tracking and extensive personal data, but often does.

This information is important to advertisers and their agencies for ensuring that the terms for the purchase of advertising inventory are being met. It allows them to assess the quality of the online advertising services through which their campaigns are being executed, particularly the ad servers that deliver the advertisement in front of the end user. Advertisers and their agencies tend to get this information already directly from core platform services or from third party ad verification providers. Several verification providers already have special relationships with core platform services that give them access to the necessary data through the consent obtained by the core platform service. The provisions of Article 6(8) have the potential to open this up and perhaps inspire more advertiser focus on alternatives to user data intensive practices.

Publishers also value the data used for ad verification, as such data would allow them to see how their inventory is being perceived by those on the demand side. They would be less interested in the individual verification of ad placements as they would be in the trends and tendencies associated with their inventory. It is not in their interest to allow fraudulent impressions or poor viewability as it devalues their inventory. Publishers would derive great value from access to performance measurement tools if they enable them to assess the performance of ads served on their inventory. This kind of information can also help them make decisions about their pricing and inventory offerings, among others. Some of the same independent verification services that cater to advertisers also provide services to publishers for these purposes. As it does for advertisers, the DMA provision would also enable publishers to request the data used for verification themselves and may enable new publisher facing services to emerge. The volume and complexity of the data used for verification means that most individual publishers are not likely to have the capacity to derive much value from it on their own, however access to performance measurement tools could be done so as to be useful to smaller publishers as well.

The provisions in Article 6(8) have the potential to increase competition among firms providing ad verification services and to allow all players to access the information they would need in order to check whether they are being treated fairly. Theoretically, an advertiser could access ad verification data directly to check whether they are getting good service from their independent verification service. A publisher could do the same to check whether their inventory is being fairly represented by such services or other online advertising services. It is also possible that widespread use of the performance measurement tools of the core platform services by publishers enables fairer competition in the provision of advertising inventory. However, here also there remain some questions to be answered in order for the DMA to be effective in achieving contestability and fairness throughout the ecosystem.



4.2 Interpretation and Implementation Issues to be Clarified

4.2.1 Whose performance is this about?

In addition to the data necessary for ad verification, Article 6(8) ensures access to the “performance measurement tools” of the gatekeeper and the data necessary for advertisers and publishers to “run their own[...]measurement tools to assess the performance of the core platform services”. These can be about different types of performance, and the DMA is not clear as to whether this is about achieving transparency in the performance of advertising or in the performance of online advertising intermediaries, or perhaps both.

Recital 58 identifies one of the problems this provision aims to address, namely “a lack of information for advertisers and publishers about the effect of a given advertisement”. Advertisers or their agencies can access large amounts of information from some core platform services on this and use it to make real time decisions on ad placement and for campaign planning. However, as mentioned above, there remains **a lack of consensus around measures in the industry**, and also there remain questions about the independence and veracity of the auditing of the information. This has been a significant contributor to creating an unlevel playing field in the provision of inventory because some of those selling inventory also have access to vast amounts of data to evidence the effectiveness of their inventory, whereas others do not (Broughton Micova & Jacques, 2019, 2020b). Those that also have access to vast amounts of user behaviour data can evidence a purchasing pathway using click throughs, engagement with other content, and maybe even purchases. They make performance measuring tools available to advertisers and their agencies to be able to use this data to track the performance of campaigns that use their inventory and that of others sold through their intermediary services.

Though some data may overlap, this is not the same function as ad verification. It is used to demonstrate the value of the inventory and can lock-in advertisers or their agencies that need to demonstrate return on investment. Press publishers, audiovisual media services, and other media have been struggling to match this ability to measure and demonstrate the effect or performance of their online inventory. If they sell their inventory through online advertising intermediary services provided by those large players with access to vast amounts of ad performance measurement data, the advertisers who buy their inventory may have access to it, but not the publishers.

The provision in Article 6(8), it seems, would only give publishers the ability to access the same tools that advertisers can use to track the performance of ad sold through those online advertising intermediary services. This should help publishers assess the value of some of their inventory. However, if this provision does not enable access to the tools for measuring the performance or effect of a given ad on services where that is being tracked, then it will not do much to even the playing field between publishers and ad-dependent platforms whose providers are also operating online advertising services, or ad tech. Determining exactly which “performance measuring tools” of the gatekeeper are within the scope of this provision will thus be important.

Measuring “the performance of a core platform service” would require different types of data depending on the type of core platform service. As discussed above, the ad verification process



essentially does that for those services involved in the placement and serving of the ads. Measuring the performance of ad exchanges or other trading platforms would require the transactional data covered by Article 5.

4.2.2 What will constitute a request and how will they be handled?

The DMA conflates advertisers, publishers, and their authorised third parties in Article 6(8) even though they have rather different interests and incentives in the acquisition of performance data. The provision is not specific about how requests should be made or fulfilled, but does state that performance data should be given in a manner that enables the receiver to use it for ad verification and be able to use measurement tools.

A media agency or third-party verification service being used by an advertiser will likely already have access to the kind of performance information dealt with in Article 6(8). The processing and interpreting of that data would be a significant part of the service they are providing to the advertiser. These third parties will have an interest in discouraging requests directly from advertisers to core platform services. At the same time, a publisher's sales house might operate a proprietary supply side platform that collects some of the information, while it may pay a third party that has access to data to process and interpret it. Some large advertisers and publishers may have in-house capacity and the ability to draw on the data from multiple brands (Procter & Gamble or Axel Springer, for example).

This provision has the potential to encourage competition in the provision of verification and performance measurement by eliminating the exclusivity of access to data from core platform services that some firms have currently (through trusted partner programmes, for instance) and by making it easier for publishers and advertisers to combine data from core platform services with performance data from other sources. However, this unlikely to happen if requests have to be given for each campaign or for each ad, or otherwise on a frequent and unmanageable basis.

For this data to be useful for advertisers and publishers to understand the value of ad inventory or to identify weaknesses or unfairness in core platform services they need to be able to do performance measurement continually. At the same time, for any new firm to enter the market for verification and measurement services they will need assured access to the data ahead of, or at least congruent to, taking on any given client. Requests would likely need to be executed as one-time permissions, rather than ad hoc or piecemeal, and handled through APIs in order to be useful for achieving greater contestability and fairness.



5. OVERARCHING ISSUES

How designation is handled will have consequences for the effectiveness of these transparency provisions for transaction and performance data. Undertakings may provide multiple ad tech services within the ecosystem. Some of these individually might meet the thresholds while other may not. Undertakings providing ostensibly one service may be able to easily institute artificial separation of the service based on inventory type, business user type, or different end-user platforms. If an undertaking that is designated as a gatekeeper based on one core platform service is not obligated to provide the transparency called for in Articles 5 and 6 for all their services, there may be an incentive for separation. Therefore, an overarching issue is **whether undertakings providing ad tech services will be designated as a gatekeeper for ad tech services in general, with obligations automatically applicable to all the undertaking's individual services or whether each ad tech service will need to be designated.** This issue is discussed in more detail in another CERRE Issue paper by Richard Feasey on designation.¹⁰ As Feasey argues, the Commission may struggle to evidence that any disaggregation was strategic avoidance of regulation under the anti-circumvention provisions in Article 13. It may be necessary to set out a broad understanding of “purposes” for the specific case of ad tech services so that minor differences, such as in types of inventory or users, do not exclude major providers involved in the ecosystem.

A second overarching issue is how these provisions will be implemented effectively without being at odds with the principles of GDPR. As evident in the discussion above, personal data processing can be involved in determining price paid, in ad verification, and in ad performance measuring. This would likely be most prevalent where the core platform service enables highly targeted and/or behavioural advertising. It may be relatively easy for core platform services to achieve pro forma compliance with GDPR by including the right wording in their consent terms, as they might for partner services. However, this would be arguably counter to the principles of the GDPR, especially given the evidence that consent terms are often inaccessible to the average reader (Becher & Benoliel, 2021) and that consent can be given amidst unfair power imbalances between platform services as data processors and their users (Clifford et al., 2019). **These provisions in the DMA should not be used to undermine the protections in GDPR and expand the use of personal data intensive and invasive forms of advertising.** Striking the right balance between providing actors in the ecosystem with the information necessary to ensure contestability and fairness and safeguarding the users of advertising supported services will likely require extensive discussions about what measures of effectiveness are appropriate and what metrics should be used at all.

¹⁰ Available at: <https://cerre.eu/publications/effective-and-proportionate-implementation-of-the-dma/>



6. CONCLUSIONS

The transparency provisions in the DMA have the potential to make a significant difference in the advertising ecosystem. They also have the potential to be rendered ineffectual if the processes for granting consent for transactional data and requesting both kinds of data are not designed in a manner that encourages transparency. They could also be undermined if the transactional and performance data provided is overly narrow or delivered in an unusable fashion. There are significant undertakings that provide core platform services for supply, demand, and intermediation functions within the advertising ecosystem. The provisions in Articles 5 and 6 of the DMA will oblige those undertakings to make available data from their core platform services in intermediation that helps their competitors in the provision of ad inventory compete with them better.

One of the main sources of dominance that has been identified in the advertising ecosystem is the ability to combine and leverage vast amounts of consumer data, especially from online behaviour, for the purposes of providing highly sophisticated profiling and targeting of end users (Bourreau et al., 2017; Broughton Micova & Jacques, 2019; Competition & Markets Authority (CMA), 2020; Jeon, 2021). **The transparency provisions in the DMA are not designed to directly address that imbalance. An approach to DMA implementation that would encourage publishers to compete in ever increasingly sophisticated personal data intensive, surveillance-based advertising is not desirable.** It would be counter to the GDPR and would be at odds with the steps taken in the Digital Services Act to put at least some constraints on targeting.¹¹ If effectively implemented and with fairness toward users as a priority, the transparency provisions may help to encourage a move away from the more invasive targeting techniques by giving more visibility to the effectiveness and relative value of contextual, broadly segmented, and other types of advertising.

¹¹ The Digital Services Act Article 24 bans targeting based on sensitive personal information.



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