Decision 23-MC-01 of May 04, 2023

on the request by the company Adloox for interim measures

Posted on: June 23, 2023 | Sector(s) :

DIGITAL

Presentation of the decision

Summary

In the context of the present decision, the *Autorite? de la concurrence* (hereinafter "the *Autorite?*") has issued interim measures against the companies Meta Platforms Inc., Meta Platforms Ireland Ltd. and Facebook France EURL (hereinafter "Meta").

On 9 October 2022, Adloox S.A.S. (hereinafter "Adloox"), which provides independent online ad verification services, referred to the *Autorite?* practices implemented by Meta in the online advertising sector.

Ad verification refers to the processes in the online advertising sector which are intended to verify the quality of an ad inventory or an ad impression. It allows advertisers and other online advertising stakeholders to verify that their advertising budget has been spent in a meaningful way. These services typically include (i) measuring viewability, which involves checking whether the ad has actually been seen by a user; (ii) fraud detection, which involves detecting invalid traffic from machines or bots; and (iii) brand safety, which consists of verifying that the ad is not displayed in an environment that could harm the interests of the brand, and brand suitability, which consists of verifying that the environment in which the ad is displayed meets the criteria set by the advertiser.

This type of service can be offered by integrated advertising platforms (such as Meta) on their own ad inventories, and by specialised independent operators,

such as Adloox, who offer more accurate and granular measurements.

Following criticism from advertisers about the actual audience and context of display ads on certain platforms, including Facebook, Meta set up a viewability partnership in 2015 and a brand safety partnership in 2019. In the context of these partnerships, Meta collects, processes and provides data to its partners *via* an Application Programming Interface (API), so that they can offer their verification services on its inventories (in particular on ads displayed on Facebook and Instagram). Since the end of 2020, Meta has undertaken to restructure these two partnerships and to incorporate them into the "Measurement" sub- specialty of the "*Meta Business Partners*" programme (hereinafter "MBP").

According to Adloox, Meta, which is in a dominant position on the French online advertising market, has discriminated against it by refusing it access to its viewability and brand safety partnerships, even though it is in a similar situation to other companies that have been able to access these partnerships. The complainant also believes that Meta is abusing its dominant position by refusing to allow independent verifiers to collect the information necessary for ad verification directly from the platform, and is limiting itself to supplying data which it collects and processes itself.

As of the date of this decision, only three operators have access to each of these partnerships. Despite numerous requests since 2016, Adloox has been systematically denied access, with its last unanswered request dating from August 2022. In this context, in parallel to its complaint on the merits of the case, Adloox has requested that interim measures be imposed, intended to order Meta to include it in its viewability and brand safety partnerships.

At this stage of the investigation, the *Autorite?* considers that Meta was likely to have a dominant position, both on the French market for online advertising on social media, and on the broader market for online non-search advertising. Both of these markets are characterised by high barriers to entry and expansion due to the presence of operators such as Meta which have integrated advertising platforms, on which a highly significant share of ad spend is concentrated.

Furthermore, the *Autorite?* considered that the reported practices relating to access to the Meta ecosystem, with a view to providing independent ad verification services, are likely to constitute an abuse of a dominant position within the meaning of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") and Article L. 420-2 of the French Commercial Code (Code de commerce).

Firstly, Meta has not defined transparent, objective and non-discriminatory criteria for accessing the viewability and brand safety partnerships, and admitted its current partners to the partnerships following an opaque procedure which it initiated itself. The restructuring of these partnerships into the MBP programme from 2020 onwards has not changed this fact. Although, in the course of the investigation in 2023, Meta finally communicated to the *Autorite?* "*eligibility criteria* for its viewability and brand safety partnerships", these "*criteria*" have not been made public and are still intended to be implemented only upon prior invitation from Meta. Moreover, these criteria seem both disproportionate and unjustified at this stage. However, in its capacity as a dominant operator, and since it has decided to open access to its infrastructure to third parties, it is up to Meta to subject such access to objective, transparent, non-discriminatory and proportionate conditions.

Secondly, the contentious refusal to grant Adloox access to the partnerships is likely to be qualified as discriminatory, as Adloox is in a comparable situation to that of certain operators who were able to access these partnerships, with regard to the conditions allegedly applied by Meta.

The *Autorite?* notes that these practices result in serious and immediate harm to the independent ad verification sector and to the interests of the complainant.

With regard to the harm to the sector, the practices identified result in access to the independent ad verification market being foreclosed, for the benefit of players who already have access to the Meta ecosystem, thereby reinforcing the oligopolistic structure of this market, at a crucial moment in its development. In this context, access to the ad inventories of Meta platforms is a decisive competitive factor for independent ad verifiers. Indeed, on the one hand, a significant portion of the ad spend of online advertisers on social media are

concentrated on Meta's inventories, meaning that having access to these platforms allows independent ad verifiers to meet a significant part of the demand on this market. On the other hand, access to Meta's ecosystem allows ad verifiers to meet the growing demand from their clients for a comprehensive independent ad verification service across all online advertising channels (websites, platforms, etc.).

With regard to the harm to Adloox's interests, the elements analysed show that Adloox's activity has substantially declined since 2017, when its main competitors were incorporated into the viewability partnership, in a context of strong growth in the independent ad verification sector. The elements submitted by Adloox following Meta's latest refusal for it to access the market in August 2022 confirm that the company (Adloox) is in serious financial difficulty, which could lead to its exit from the market in the near future.

The new 'criteria' adopted in 2023, which have the effect of making the conditions for admission to the viewability and brand safety partnerships more stringent and more complex, only exacerbate the effects of Meta's practices. On the one hand, Meta has kept its invitation system in place, meaning that it has sole discretion as to which partners it admits into its ecosystem. On the other hand, Meta has added a list of so-called 'criteria', which appear to be non-transparent, non-objective and disproportionate, to allow a new entrant to access these two partnerships. Independent verifiers wishing to be incorporated into Meta's advertising platforms are therefore faced with additional obstacles to those that existed previously.

The need to provide a rapid and effective response to the competition issues raised, in particular, by access to the services offered by the main digital platforms such as Meta, prompted the European legislator to adopt *ex ante* regulation for this sector, in Regulation 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act, hereinafter the "DMA"). The DMA also stipulates that there must be full access to the data necessary for independent ad verification within the inventories of the core platforms. Pending the full effectiveness of this new legislative framework, resorting to interim measures to safeguard the conditions of competition in this

sector seems particularly relevant.

The *Autorite?* has therefore ordered Meta to define and make public new criteria for accessing and maintaining the viewability and brand safety partnerships which are objective, transparent, non-discriminatory and proportionate. In this regard, it will have to implement the criteria according to a transparent access procedure which is not based on its own discretion.

The *Autorite?* has also issued interim measures intended to accelerate Adloox's admission into the viewability and brand safety partnerships, in the event that its application for access, proposed on the basis of the new criteria to be adopted by Meta, is accepted.

These interim measures will remain in effect until the *Autorite?* issues its decision on the merits of the case. During this period, and in order to ensure their effectiveness, Meta will have to send the *Autorite?* regular reports on the implementation of the present decision.

Information about the decision

Mesures conservatoires	oui
Origin of the case	Adloox S.A.S.
Company(ies) involved	Meta Platforms Inc., Meta Platforms Ireland Ltd., Facebook France EURL, Adloox S.A.S.

Read

Full text of the decision
1.09 MB

Press release