

MEMORANDUM

To: Movement for an Open Web

Date: 28 June 2024

From: Tim Cowen, Chair, Antitrust Practice, Preiskel & Co

Re: Google's Terms of Service applicable to its Privacy Sandbox Products

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I Summary

1. This Memorandum sets out the context and background for Google's recently announced Coordinator Service Additional Terms of Service (the "**Coordinator ToS**")¹. The Coordinator ToS provides the terms and conditions for use of Google's Privacy Sandbox Application Programming Interfaces ("**PS APIs**"). Google takes no responsibility for operational factors such as availability or those that affect the functioning of its APIs, such as latency, and does not offer any guarantees on availability, or any other parameter of quality of service. Critical matters are not addressed, nor is it clear that Google's own products will use the APIs. Google will be able to operate its business system unimpeded by the terms on which the APIs are offered while others will be limited and constrained by the terms. This is likely to adversely affect the competitive position of third parties.

II The facts: background and context

2. In January 2020, Google announced its intention to deprecate third-party cookies in its browser, Google Chrome.² Cookies are small storage files³ that are used by websites – such as publishers, advertisers, newspapers – to store match keys that match and then connect spare inventory with adverts. They currently operate to match inventory with advertising between websites, supply side advertising platforms, advertising exchanges and demand side platforms under a chain of contracts.
3. Cookies thus enable matching and synchronisation of demand and supply in online advertising.⁴ Advertising finances the "free at the point of use" nature of the worldwide web and is the main source of funds for many websites and publishers, such as online newspapers. Google is threatening to block all cookies used by third parties. However, it will continue to use cookies itself after blocking their use by others. Its Privacy Sandbox⁵ products will then be available for use by websites instead of cookies through the interconnection of their systems with Google Privacy Sandbox APIs.⁶

¹[https://developers.google.com/privacy-sandbox/relevance/aggregation-service/tos#:~:text=TO%20THE%20EXTENT%20ALLOWABLE%20BY,COORDINATOR\(S\)%2C%20AND%20ANY](https://developers.google.com/privacy-sandbox/relevance/aggregation-service/tos#:~:text=TO%20THE%20EXTENT%20ALLOWABLE%20BY,COORDINATOR(S)%2C%20AND%20ANY)

²<https://www.cnbc.com/2020/01/14/google-chrome-to-end-support-for-third-party-cookies-within-two-years.html>

³<https://ico.org.uk/for-the-public/online/cookies>

⁴<https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes>

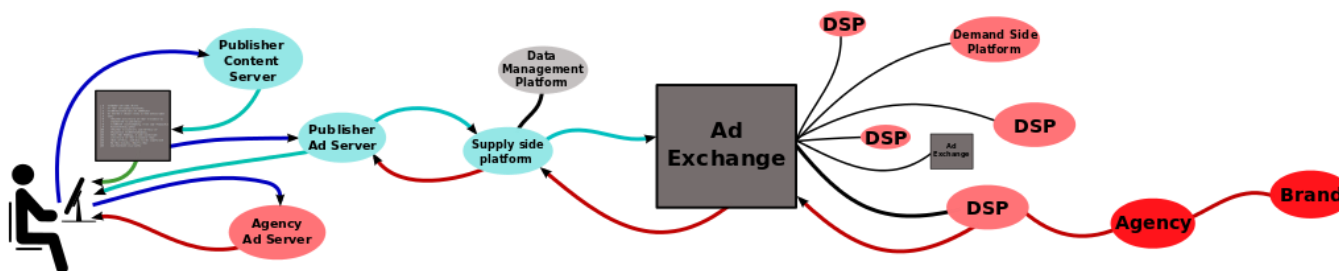
⁵<https://developers.google.com/privacy-sandbox/overview>

⁶https://assets.publishing.service.gov.uk/media/62052c52e90e077f7881c975/Google_Sandbox_.pdf

- Since cookies are a commonly used feature of the world wide web, they are deployed and used by millions of websites and operate across decentralized networks. The blocking of third-party cookies by Google means that publishers’ advertising will lose considerable value. This has been investigated and calculated to be a probable loss of 70% of revenue for news publishers by both Google and the Competition and Markets Authority (‘CMA’)⁷. The more recent research by Criteo found that even with proposed Privacy Sandbox alternatives to third party cookies publishers should expect a loss of 60% of revenue.⁸ The alignment of these two research findings highlight that hopes that machine learning will compensate for Google’s interference with rivals’ real-time interoperability, or that contextual signals alone suffice, are wholly unsubstantiated. One significant difference between Google’s PS APIs and cookies is that Google’s PS APIs centralize functions that are currently decentralized across the advertising technology supply chain.⁹

III Current standard terms of service imposed on third parties by Google’s Ad Exchange

- The below illustrates the different parties in advertising intermediation (the Ad Tech supply chain), some of which are bound by contractual arrangements.



- The different intermediaries enter contractual arrangements that include various contractual protections such as quality of service obligations, and the distribution of risk amongst arms-length contracting parties. The current terms do not reflect the risk allocations that would be expected in arms-length trading in a competitive market, where some risk is allocated by different players in the value chain and warranties provide some contractual protection for counterparties¹⁰.
- The CMA illustrates Google’s role in each stage of the ad intermediation¹¹:

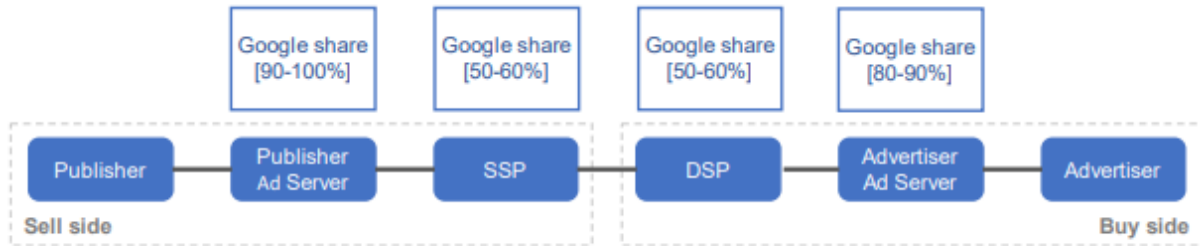
⁷ CMA, *Online platforms and digital advertising final report*, (1 July 2020) at [6.41]. Available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf; further supported in para 3.38 of the CMA’s Decision to accept commitments from Google at [Decision to accept commitments \(publishing.service.gov.uk\)](https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Decision_to_accept_commitments_publishing_service_gov_uk.pdf)

⁸ Criteo: The Privacy Sandbox Is NOT Ready Yet, But Could Be If Google Makes Certain Changes Soon, Adexchanger (27 June 2024). “In addition to uncovering that colossal 60% dip in revenue on Chrome for publishers without access to third-party cookies, Criteo also observed a more than 100% increase in load time for ads rendered on Sandbox traffic.” <https://www.adexchanger.com/privacy/criteo-the-privacy-sandbox-is-not-ready-yet-but-could-be-if-google-makes-certain-changes-soon>

⁹ <https://developers.google.com/privacy-sandbox/#:~:text=An%20initiative%20to%20develop%20technologies,to%20keep%20online%20content%20free.>

¹⁰ See the CMA *Online platforms and digital advertising final report*, (1 July 2020). Available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf The European Commission, in the context of its Google Search (AdSense) case, has defined a market for online search advertising intermediation, where intermediaries provide search adverts to publishers whose websites have a search function embedded. The European Commission found Google to have a dominant position in that market and to have abused it by imposing a number of restrictive clauses in contracts with third-party websites which prevented Google’s rivals from placing their search adverts on these websites (see the Press release here: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770)

¹¹ CMA, *Online platforms and digital advertising market study final report*, (1 July 2020) at [p.20]. https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf



Source: CMA: We include Google AdX, Google Ad Sense and Google AdMob in our definition of SSPs and Google DV360 and Google Ads in our definition of DSPs.

8. Google Ad customers in the UK currently enter the Google Ireland Limited Advertising Programme Terms.¹² Clause 9 (Disclaimers) states as follows:

“Disclaimers. No conditions, warranties or other terms apply to any Programme or to any other goods or services supplied by Google or its Affiliates under the Terms unless expressly set out in the Terms. To the fullest extent permitted by law, no implied conditions, warranties or other terms apply (including any implied terms as to satisfactory quality, fitness for purpose or conformance with description). None of Google, its Affiliates or Google’s Partners makes any guarantee in connection with the Programmes or Programme results. To the fullest extent permitted by law, Google makes no promise to inform Customer of defects or errors.” [emphasis added].

9. This highlights the one-sided nature of the terms imposed unilaterally by Google. Google takes on minimal obligations and all risk is passed on to the third-party.

IV Google’s terms of service

10. Google’s General Terms of Service identify the legal obligations Google accepts in the provision of its PS APIs for use by third parties. They state, simply:

“What you can expect from us

Provide a broad range of useful services

We provide a broad range of services that are subject to these terms, including:

- *apps and sites (like Search and Maps)*
- *platforms (like Google Shopping)*
- *integrated services (like Maps embedded in other companies’ apps or sites)*
- *devices (like Google Nest and Pixel)*

Many of these services also include content that you can stream or interact with.

¹²<https://payments.google.com/payments/paymentsinfofinder?hostOrigin=aHR0cHM6Ly9wYXltZW50cy5nb29nbGUuY29tOjQ0Mw..&sri=-21>

Our services are designed to work together, making it easier for you to move from one activity to the next. For example, if your Calendar event includes an address, you can click on that address and Maps can show you how to get there.

Develop, improve, and update Google services”¹³

11. These statements provide no obligation on Google to deliver any availability or quality of service. By contrast, the terms on which third parties are required to contract are imposed in a series of policy documents. Those documents are onerous, and require, for instance, the licensing of intellectual property rights on a worldwide royalty free basis¹⁴. No such license is provided by Google to third parties when using its APIs or systems.
12. The table below compares the obligations imposed under Google’s General Terms of Service on Google versus third parties.

Obligations imposed on third parties	Obligations imposed on Google
Compliance with Google’s Terms of Service	Provide a broad range of services. ¹⁵
Compliance with service-specified additional terms ¹⁶	Develop new technologies and features to improve Google’s services. ¹⁷
Compliance with other policies such as their Privacy Policy, Copyright Help Center, Safety Center, Transparency Center, and other pages.	Provide reasonable advance notice if Google materially changes the services ¹⁸ or these terms. ¹⁹
Compliance with the basic rules of conduct	
Requirement to have a Google Account for some services. ²⁰	
Must indemnify Google (to the extent allowed by applicable law) in the event of unlawful use of the services. ²¹	

13. Google also recently announced its Coordinator Service Additional Terms of Service (the ‘Coordinator ToS’). Those using the PS API services provided as part of the Privacy

¹³ <https://policies.google.com/terms?hl=en-US#toc-relationship>

¹⁴ <https://policies.google.com/terms?hl=en-US#toc-relationship>: “We need your permission if your intellectual property rights restrict our use of your content. You provide Google with that permission through this license.”

¹⁵ <https://policies.google.com/terms?hl=en-US#toc-what-you-expect~:text=We%20provide%20a.Nest%20and%20Pixel>

¹⁶ <https://policies.google.com/terms?hl=en-US#toc-what-you-expect~:text=The%20permission%20we.additional%20age%20requirements>

¹⁷ <https://policies.google.com/terms?hl=en-US#toc-what-you-expect~:text=We%E2%80%99re%20constantly%20developing%20new%20technologies%20and%20features%20to%20improve%20our%20services>.

¹⁸ <https://policies.google.com/terms?hl=en-US#toc-what-you-expect~:text=If%20we%20make.law%20and%20policies>.

¹⁹ <https://policies.google.com/terms?hl=en-US#toc-what-you-expect~:text=If%20we%20materially%20change%20these%20terms%20or%20service%20specific%20additional%20terms%2C%20we%E2%80%99re%20provide%20you%20with%20reasonable%20advance%20notice%20and%20the%20opportunity%20to%20review%20the%20changes%2C>

²⁰ <https://policies.google.com/terms?hl=en-US#toc-what-you-expect~:text=Some%20services%20require%20that%20you%20have%20a%20Google%20Account%20in%20order%20to%20work%20%E2%80%94%20for%20example%2C%20to%20use%20Gmail%2C%20you%20need%20a%20Google%20Account%20so%20that%20you%20have%20a%20place%20to%20send%20and%20receive%20your%20email>.

²¹ <https://policies.google.com/terms?hl=en-US#toc-what-you-expect~:text=To%20the%20extent.or%20willful%20misconduct>.

Sandbox are required to agree to these Coordinator ToS, as well as the basic Google Terms of Service as a condition of use.²²

14. The Coordinator ToS set out several further provisions which ‘provide an important in function in [the] use of Privacy Sandbox Services, such as providing key management, aggregatable report accounting, and attestation of the Privacy Sandbox Service’ being operated.²³
15. Notably, the Coordinator ToS provides a set of blanket disclaimers for those that are “based”²⁴ outside the EU or UK, that seek to further substantially limit Google’s liabilities, obligations and responsibilities in several ways:
 - i. The Coordination ToS provides that Google makes no promises about the service, its **reliability, availability or ability to meet businesses’ needs**²⁵.
 - ii. The Coordinator ToS provides, in a disclaimer, that they make no promises that Google will provide the Coordinator Service (i.e.: the relevant APIs) **in a reliable, timely, secure or error-free manner.**²⁶
 - iii. The Coordinator ToS provides, in a disclaimer, that they make no promises that the Coordinator Service **will continue to exist or be otherwise valid.**²⁷
 - iv. The Coordinator ToS provides, in a disclaimer, that they make no promises that **any errors or defects in the Coordinator Service will be corrected.**²⁸
16. The above points (i) - (iv) serve to highlight that no such obligations are provided in Google’s General Terms and Conditions and hence exemplify the lack of commitment Google is making to all other third parties. If the Privacy Sandbox is implemented, its functionalities and tools will have widespread use and will be the main mechanism through which advertising takes place on the Chrome browser.

²² <https://developers.google.com/privacy-sandbox/relevance/aggregation-service/tos>. “To use the Coordinator Service, including related reports, features and functionality (collectively the “Coordinator Service”), you and the legal entity on whose behalf you are using the Coordinator Service (if any) (together, “You”) must accept (1) the Google Terms of Service, and (2) these Coordinator Service Additional Terms of Service (the “Additional Terms”).”

²³ Ibid. ‘The Coordinator Service provides an important function in Your use of Privacy Sandbox Services, such as providing key management, aggregatable report accounting, and attestation of the Privacy Sandbox Service You are operating. For example, for the Aggregation Service, the Coordinator Service is designed to ensure that reports from the client software, such as a Chrome browser or an Android device, which are sent to the Aggregation Service, will be processed in a Trusted Execution Environment using Approved Privacy Sandbox Service Code and Binaries and to configure access to decryption keys and manage aggregatable report accounting.’

²⁴ It is unclear what “based” means, and it can be used by Google as a discretionary matter to rely on these further exclusions as needed.

²⁵ Ibid; ‘TO THE EXTENT ALLOWABLE BY APPLICABLE LAW, GOOGLE, THE COORDINATOR(S), AND ANY SUBCONTRACTORS (COLLECTIVELY “RELATED PARTIES”) DO NOT MAKE ANY SPECIFIC PROMISES ABOUT THE COORDINATOR SERVICE, ANY RELATED SERVICE, REPORT, FEATURE OR FUNCTIONALITY, THEIR RELIABILITY, AVAILABILITY, OR ABILITY TO MEET YOUR NEEDS.’





²⁶ Ibid; TO THE EXTENT ALLOWABLE BY APPLICABLE LAW, GOOGLE AND THE RELATED PARTIES DO NOT REPRESENT OR WARRANT TO YOU THAT [...] (2) THE COORDINATOR SERVICE WILL BE UNINTERRUPTED, TIMELY, SECURE, OR ERROR-FREE;

²⁷ Ibid; TO THE EXTENT ALLOWABLE BY APPLICABLE LAW, GOOGLE AND THE RELATED PARTIES DO NOT REPRESENT OR WARRANT TO YOU THAT [...]. (3) THE COORDINATOR SERVICE WILL BE ACCURATE, RELIABLE, COMPLETE, CONTINUE TO EXIST, OR OTHERWISE VALID

²⁸ Ibid; TO THE EXTENT ALLOWABLE BY APPLICABLE LAW, GOOGLE AND THE RELATED PARTIES DO NOT REPRESENT OR WARRANT TO YOU THAT [...]. (4) DEFECTS IN THE OPERATION OR FUNCTIONALITY OF ANY ASPECT OF THE COORDINATOR SERVICE, CONTENT, DATA, SUPPORT OR ANYTHING ELSE PROVIDED TO YOU AS PART OF, OR IN CONNECTION WITH, THE COORDINATOR SERVICES, WILL BE CORRECTED.

17. Further to this, it is important to note the privacy implications of Google’s PS. The latest quarterly report from the CMA and ICO²⁹ provides a long list of privacy concerns that are identified with relation to data that is being provided to third parties through the APIs. That data raises concerns under the GDPR.
18. In these circumstances, the handling of personal data depends on the use to which it is being put and the ability of the recipient to reidentify the individual. Following the SRB case, contractual protections could be put in place to prevent re-identification or misuse³⁰. However, Google’s blanket disclaimers effectively means that Google is failing to put in place contracts that may help it to comply with GDPR.
19. Furthermore, previous Google APIs merely related to transport, and therefore would not be subject to data protection considerations. However, PS APIs are likely to return Personal Data to third parties Under General Data Protection Regulation principles, this makes Google either a joint data controller or it will require a data processor agreement between the caller of the API and Google. This will also depend on the legal jurisdiction and the data returned from the API³¹.
20. In all events, there is no mechanism in the Coordinator ToS or the General ToS for such an agreement.
21. Below is a table illustrating two of the key differences in distribution of contractual obligations between Google’s terms of service for the PS APIs, and existing contractual obligations in current supply chain contracts between demand-side platforms, supply-side platforms, and ad exchanges.

Figure 1: A comparison between Google’s Terms of Service and existing supply chain Terms of Service³²

Terms of Service	Data protection and privacy obligations	Quality of service obligations; obligations placed on both contracting parties
Google		
Demand-side platforms, Ad exchanges, Supply-side platforms		

²⁹ CMA Q1 2024 Report, Available at: https://assets.publishing.service.gov.uk/media/662baa3efee48e2ee6b81eb1/1_CMA_Q1_2024_update_report_on_Google_Privacy_Sandbox_commitments.pdf

³⁰ Case T-557/20 *SRB v EDPS* [2023] Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=272910&doclang=EN>

³¹ See for instance, ICO guidance on when a data processing agreement is needed: <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/accountability-and-governance/guide-to-accountability-and-governance/accountability-and-governance/contracts/>

³² Movement of an Open Web (MOW) sources

22. The table, which draws from MOW member sources' existing supply chain contracts, further highlights the unequal distribution of risk and obligations and the absence of any mechanism to establish data protection processing agreements to ensure compliance with data protection laws.

V Applicable law

15. In the European Union ('EU') and the United Kingdom ('UK'), competition law ensures that dominant undertakings do not undermine, restrict or otherwise limit competition on the merits by abusing their dominant position.³³ Unfair terms are specifically identified as a form of abuse. Exploitative, discriminatory or unfair terms are therefore a feature of many competition cases. Under Article 102(a) of the TFEU, undertakings abuse their dominant position where they 'directly or indirectly impose [...] unfair trading conditions.'³⁴ In this regard, Google's terms, which accept no responsibility and place no obligation on Google, can be seen as an abuse of its position. Further examples of relevant case law and legislation are provided in the Legal Annex. Our reasoning is set out in brief below.

Google's dominance in the relevant market

16. Google has been found to be dominant in the search market, the browser market and in the digital advertising market in several different investigations and cases.
- i. **The browser** - The Competition and Markets Authority ('CMA') investigation into Google's Privacy Sandbox Proposals led to a set of commitments offered by Google. In the CMA's decision to accept the commitments, the CMA provides that Google is 'likely dominant [...] in the browser market' and has 'significant presence in open display advertising.'³⁵
 - ii. **Publisher ad servers and programmatic ad buying tools for the open web** – The European Commission preliminary found Google dominant in the market for the ad-serving platform for publishers, and the market for the tools used to buy advertising space by advertisers.³⁶
 - iii. **Online search advertising intermediation** – The Commission has also found Google to be dominant in the market for online search advertising intermediation since at least 2006.³⁷
17. Google has been found to be dominant in online digital advertising markets several times under UK and EU competition regimes. In the context of its terms and conditions, Google's dominance in the provision of its browser is acknowledged in the CMA's Privacy Sandbox Decision.³⁸

³³ For the UK, see The Competition Act 1998 (<https://www.legislation.gov.uk/ukpga/1998/41/contents>). For the EU, see the **Treaty on the Functioning of the European Union (TFEU)**, Article 101 and 102 (https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0006.01/DOC_3&format=PDF).

³⁴ Article 102(a), *Treaty for the Functioning of the European Union*. (C 306/1) of 17 December 2007). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102>

³⁵ *Decision to accept commitments offered by Google in relation to its Privacy Sandbox Proposals*, Competition and Markets Authority, 11 February 2022, at [3.93]. https://assets.publishing.service.gov.uk/media/6544cbaed36c91000d935d20/Non-confidential_decision_pdfa_4.pdf

³⁶ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3207

³⁷ https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770

³⁸ See fn 35

18. Given that PS APIs will replace third-party cookies, Google's General Terms of Service and the Coordinator ToS will replace the current contractual commitments between suppliers operating through the decentralised supply chain. Given that the market will consist of only Google's products, services and tools, it is likely that Google would be abusing its dominance in the market for the provision of APIs that enable advertising in the digital ecosystem.

Google's unfair, discriminatory, and one-sided terms

19. Firstly, Google's terms are unilaterally imposed on the entire digital ecosystem. The terms are onerous, discriminatory, and one-sided. Google takes on no responsibility for availability or delivery and takes no responsibility for any risk. Rivals and third-party businesses are left to grapple with an uncertain service. To date, the Privacy Sandbox has suffered from software bugs and glitches³⁹. It may crash or be otherwise unavailable. No outage reporting system or trouble ticketing is provided so no warning is available to those depending on its services. No mechanism for providing visibility of issues or bug fixes or ways to escalate issues for early resolution is provided. Damage for service outages or service credits or recourse for those forced to use its products is unaddressed. Damage to entire businesses is foreseeable and may well occur, caused by Google's failings, for which no process or mechanism exists through which escalation or mitigation of harm may reasonably be made.
20. Second, it is not just the substance of the Google terms that creates an uncertain environment for third parties and rivals. The process by which the terms are set is also unfair, discriminatory, and one-sided. There has been no negotiation or discussion with supply chain providers about what type of terms would be relevant and needed, and no negotiation on the relevant terms between the relevant parties, nor does it seem likely that there will be. Instead, Google has announced the changes unilaterally. Google can also unilaterally change or amend the terms as it sees fit.
21. In effect, they are the terms offered at the whim of a dominant monopolist. This lack of certainty negatively impacts all rivals' risks and when understood by markets, may affect others' ability to finance their businesses. In essence, Google can modify its product – the Privacy Sandbox APIs - at any time, without even providing advance notice. This sets up a discriminatory situation for rivals to compete: any change that Google may subsequently make to terms and conditions could be applicable only to third parties, not to Google itself.
22. This has recently been illustrated on 30 May 2024, where Privacy Sandbox experienced an outage for 16 hours, which cut the flow of advertising through the platform.⁴⁰ The current impacts from Google failures were mitigated by the continued availability and use of cookies. However, it shows how risky it is to centralise the entire digital advertising ecosystem into the Privacy Sandbox, and further highlights the importance of having fair, reasonable and non-discriminatory terms to access the PS APIs.

V Conclusions

³⁹<https://adage.com/article/digital-marketing-ad-tech-news/google-post-cookie-ad-tech-glitch-raises-questions-about-privacy-sandbox/2562521>

⁴⁰ Ibid

23. The Memorandum sets out the background and context to Google's recently announced Coordinator ToS and its General Terms. It further sets out the applicable law and explains why Google's Terms would likely be found to be unfair and illegal.

LEGAL ANNEX

I. Applicable law

1. In the EU, unilateral or dominant firm conduct is governed by Article 102 TFEU. The provision and its UK implementing provision in Chapter II of the 1998 Competition Act, prohibit undertakings that hold a dominant position in a relevant market in the UK from abusing that dominant position without objective justification. Article 102 places a special responsibility on dominant undertakings not to distort markets or act unfairly towards customers or suppliers.
2. Conduct may, in particular, constitute such an abuse if it consists in—

(a) *directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*

(b) *limiting production, markets or technical development to the prejudice of consumers;*

(c) *applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*

(d) *making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.*⁴¹

3. The unfair trading conditions law has been considered many times in the courts since the seminal case of *United Brands*⁴² at EU level. Recently the Court of Appeal judgement in *CMA/ Pfizer (Flynn Pharma)* provides a helpful review of the cases in the context of a proceeding brought by the CMA⁴³. The cases reviewed in the Court of Appeal's judgment include:

- Case 395/87 *Ministere Public v Tournier* (13th July 1989)⁴⁴
- Case C-159/08P *Scippacercola v Commission* (25th March 2009)⁴⁵
- Case COMP/A.36.568/D3 *Scandlines Sverige AB v Port of Helsingborg* (23rd July 2004)⁴⁶
- Case C-177/16 *Autoritiesbu un Komunesanas Konsultaciju Agentura / Latvijas Autoru Apvieniba v Konkurences Padome* (6th April 2017)⁴⁷
- C-52/07 *Kanal 5 Ltd, TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå*^{48,49}

⁴¹ Article 102 TFEU, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12008E102>

⁴² *United Brands Company and United Brands Contineental BV v Commission of the European Communities*.

Chiquita Bananas. Case 27/76. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0027>

⁴³ CMA Decision: Case CE/9742-13, Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK (7 December 2016) (hereinafter: *Pfizer/Flynn*). See here for the Court of Appeal decision: *Flynn Pharma v CMA* [2020] EWCA Civ 339, available at: <https://files.monckton.com/wp-content/uploads/2020/03/MPB-JB-CMA-v-Flynn-Pharma-Ltd-and-Ors.pdf>

⁴⁴ *Ibid* at [72]

⁴⁵ *Ibid* at [74]

⁴⁶ *Ibid* at [76]

⁴⁷ *Ibid* at [78]

⁴⁸ *Ibid* at [85]: “Paragraph [28] of *Kanal* described the overall test: “... an abuse might lie in the imposition of a price which is excessive in relation to the economic value of the service provided”. The authorities relied on in *Kanal* include Case 26/75 *General Motors Continental v Commission* [1975] ECR 1367 paragraph 12 (“General Motors”)

⁴⁹ See also: *Napp Pharmaceutical Holdings v DGTF* [2002] CAT 1; *Attheraces v BHB* [2007] EWCA Civ 38

4. The European Commission's most recent Amendments to the Guidance on Enforcement Priorities for Article 102 TFEU⁵⁰ provides that the European Commission can investigate cases where a dominant firm imposes unfair access conditions to a particular input (such as the Privacy Sandbox APIs), even if there is no evidence that the input is *indispensable*. This signals a shift in enforcement priorities and a recognition that dominant undertakings in the digital ecosystem will often have immense bargaining power when it comes to determining conditions for access. Google's General Terms of Service and Coordinator ToS exemplify an abuse of this bargaining power and would likely come under scrutiny given the European Commission's new amended enforcement priorities under Article 102.
5. In *Microsoft*, Microsoft's was held to have abused its dominant position by refusing to grant access to inputs, protected by intellectual property rights, which were necessary to enable interoperability and allow rivals to compete.⁵¹ The case illustrates first, how discriminatory or abusive terms of service can amount to an abuse of dominance, and secondly, why interoperability takes primacy over refusals to access. There is also a long string of EU case law on abuses of dominance through the imposition of unfair trading conditions.⁵²
6. In recent case law, The Court of Justice of the European Union ('the CJEU') confirmed that Meta had abused its dominance by collecting Personal Data of its users in violation of the General Data Protection Regulation ('GDPR') violation.⁵³ Notably, the Bundeskartellamt (the German competition authority, 'the BKA') found that Meta's privacy policy was an extension of its terms of service, which constitutes a contract between Facebook and its consumers. The privacy policy, which was argued to violate GDPR, was therefore an *unfair contractual obligation* which, could constitute an abuse of dominance.⁵⁴
7. In the UK, the Competition and Appeals Tribunal recently certified *Gormsen v Meta Platforms*, an opt-out collective proceedings case where it is being claimed that Meta has imposed unfair prices/unfair trading conditions on its users by collecting users' Personal Data from beyond the Facebook platform, thereby generating significant advertising revenues through targeted advertising⁵⁵. The case is yet to be heard, but it nevertheless highlights the growing trend of unfair non-price terms and trading conditions – especially violations of the GDPR – as constituting an abuse of dominance.

II. Applicable legislation – *The Digital Markets Act and The Digital Markets, Competition and Consumer Act.*

⁵⁰ European Commission, "Amendments to the Communication From the Commission — Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty [now TFEU Article 102] to Abusive Exclusionary Conduct by Dominant Undertakings" (the Amending Communication), March 27, 2023; "Annex to the Amending Communication"; and "A Dynamic and Workable Effects-Based Approach To Abuse of Dominance," Issue 1, March 2023 (the policy brief providing the background to the Amending Communication)

⁵¹ *Microsoft Corp. V Commission of the European Communities* (Case T-201/04)

⁵² See, for instance, *Ministère public v Jean-Louis Tournier* [Case 395/87], and Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others* [1989] ECR 2811. See also fn 42-49

⁵³ *Meta Platforms Inc and Others v Bundeskartellamt Case C-252/21 (2023)*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0252>

⁵⁴ Bundeskartellamt Decision B6-22/16

⁵⁵ Case No 1433/7/7/22, *Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and Others*, Available at: <https://www.catribunal.org.uk/cases/14337722-dr-liza-lovdahl-gormsen>

8. Similarly, EU and UK legislation address discrimination by dominant platforms and protect competition by assuring interoperability and preventing the unilateral imposition of unfair and exploitative terms. For instance, Articles 5 and 6 of the Digital Markets Act ('the DMA') address specific issues and require them to trade on fair, reasonable, and non-discriminatory general conditions of access ('FRAND terms')⁵⁶.
9. Google's Chrome Browser has been designated a Core Platform Service by the EU Commission⁵⁷ and Google's terms and conditions are conditions through which the Chrome Browser APIs are accessed.
10. More specifically, there are a series of provisions in the DMA which outlaw limitations on interoperability. As with all EU legislation, those terms are governed by their aims as set out in the preambles. Preamble 54 notes that *'gatekeepers can hamper the ability of end users to access online content and services, including software applications. Therefore, rules should be established to ensure that the rights of end users to access an open internet are not compromised by the conduct of gatekeepers.'*⁵⁸
11. Google's discriminatory terms of service do indeed hamper users' unfettered access to the open internet. The DMA also highlights that *'the gatekeeper should not be allowed to engage in any behaviour undermining interoperability [...] such as for example by using unjustified technical protection measures, **discriminatory terms of service**, [...] or providing misleading information.'*⁵⁹
12. Articles 5 and 6 of the DMA give effect to the aims and objectives of the law as outlined in the preambles. The actions taken by Google may infringe the specific provisions in Article 5, perhaps the most pertinent of which include forcing businesses to use Google's advertising system (contrary to Art. 5.5) forcing the use of browser APIs by blocking their ability to use cookies (contrary to Art. 5.7), misusing dual role data (contrary to Art. 6.2) or breaching Art. 6.7 which mandates free interoperability with the core platform service, (in this case Google's Chrome browser).
13. Google is offering application program interfaces to enable interoperability between its Chrome browser software and other businesses' software. Google disclaims all liability for the functionality offered. As outlined above, Google's offering is made at the same time as its withdrawal of cookies, on terms that provide no assurance of essential matters such as latency and will limit users' access to the open internet and their use of advertising software and systems deployed in competition with Google. This combination looks to compromise the rights of users and infringe the DMA by both implementing unjustified technical protection measures and implementing discriminatory terms of service to access its less useful products.

⁵⁶ The Digital Markets Act 2022. Regulation 2022/1925. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>

⁵⁷ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328

⁵⁸ Ibid at Preamble 54

⁵⁹ Ibid at Preamble 70

14. Similarly, the recently passed Digital Markets, Competition and Consumer Act 2024 will soon set out tailored codes of conduct which will regulate designated dominant firms' behaviour⁶⁰. The Codes of Conduct will be based on principles of fair trading, open choices and trust and transparency⁶¹. In practice, this will mean that the newly formed Digital Markets Unit (the 'DMU') will intervene, where, for instance, *'a firm uses contractual terms or its wider ecosystem of products to unreasonably restrict the ability of others to compete'*⁶².
15. By removing any obligation on Google to provide API tools that work, are reliable, or meet technical specifications needed for rivals to compete, Google has simply imposed its will on others, this derived from its extraordinary dominance and bargaining power.

IV Objective justification?

16. In competition law, an abuse of dominance may be subject to the defence that it is objectively justified. However, such objective justification cannot be based on the dominant player claiming that it is ensuring the discharge of legal obligations on others.⁶³
17. Google might seek to rely on the assertion that its Privacy Sandbox tools offer privacy benefits to users. However, as noted above, it is for each business to discharge the obligations imposed on it by the law and thus, it is not Google's responsibility, nor will it be a defence to claim that Google is better at protecting users from non-compliance with data protection law by third-party businesses.
18. Further to this, the recent CMA and Information Commissioner's Office ('ICO') Q1 2024 Report brings to light many unresolved privacy concerns that suggest that the Privacy Sandbox does not do anything to remedy privacy⁶⁴. Indeed, Personal Data is still being used for advertising, it is merely that Google now has a stranglehold over Personal Data due to the deprecation of interoperable third-party cookies. Any objective justification that relies on privacy to explain the deprecation of third-party cookies, and the imposition of abusive terms for competitors using Google's alternative Privacy Sandbox, would therefore likely fail.
19. In addition to the justification needing to be objective it must also be proportionate. In *Automec*, the Commission was challenged because the remedy adopted was not proportionate to the harm identified.⁶⁵ As a matter of general competition law, proportionality requires actions to be taken in line with the least restrictive alternative.

⁶⁰Digital markets, Competition and Consumers Act 2024. Available at:

https://www.legislation.gov.uk/ukpga/2024/13/pdfs/ukpga_20240013_en.pdf

⁶¹<https://www.gov.uk/government/publications/digital-markets-competition-and-consumers-bill-supporting-documentation/a-new-pro-competition-regime-for-digital-markets-policy-summary-briefing>

⁶² <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/consultation-document-html-version>

⁶³ See *Hilti AG v Commission of the European Communities* (12 December 1991), Case T-30/89 at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61989TJ0030&from=EN> where *Hilti* sought to claim that bundling of its own nails with its nail guns was therefore to ensure end user safety. The ECJ dismissed the claim stating, *"it is clearly not the task of an undertaking in a dominant position to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products."*

⁶⁴ See the CMA Q1 2024 Report, Available at:

https://assets.publishing.service.gov.uk/media/662baa3efee48e2ee6b81eb/1. CMA_Q1_2024_update_report_on_Google_Privacy_Sandbox_commitments.pdf

⁶⁵ Case T-24/90. *Automec Srl v Commission of the European Communities*

20. Cookies are a form of storage file - they create no inherent privacy risk (see for example the *Lloyd vs Google*⁶⁶ Supreme Court case where the Supreme Court was persuaded by Google that cookie files themselves pose no inherent privacy risk. Like a physical file in an office, the digital cookie file can be used to store many different types of documents, and while some may contain data that may tend to reveal a specific individual, many do not. Recent evidence suggests that 80% of third-party cookie use is based on express end user consent⁶⁷. The banning of all third-party cookies for all uses is therefore inherently a disproportionate way of addressing a potential privacy issue relating to some data stored in some cookie files for some of the time. This is further compounded by the imposition of centralised set of tools (the PS APIs) owned by a dominant undertaking which seeks to provide access to them on unfair, onerous and discriminatory terms. Any objective justification based on privacy would therefore likely fail.

⁶⁶ *Lloyd (Respondent) v Google LLC (Appellant)* [2019] EWCA Civ 1599

⁶⁷ <https://t.co/dGFu3z6MLX>