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Digital Markets Taskforce
NMA Response to the Call for Evidence

1.0 KEY POINTS

- The NMA welcomes the CMA's focus and its findings on the challenges publishers face stemming from platforms' dominance in digital advertising, search, and social media. The CMA's analysis of the consumer detriment flowing from these challenges is also well received.
- The news media industry is not in a condition to wait for wholesale competition reform regulating all digital markets from media to retail.
- Urgent pro-competitive reform to rebalance the platform-publisher relationship and restore competition to the digital advertising market is needed to secure a sustainable future for news. It is vital that these measures be implemented separately and in advance of wider reform of competition law in digital markets.
- The DMU should be located within the CMA or within Ofcom if that ensures more rapid implementation.
- The CMA should consider taking any interim action available to it to tackle both the sources of market power and their negative effects in the digital advertising and content markets. This includes making a market investigation reference alongside the DMT's work.
- We welcome many of the final report's recommendations relating to the codes of conduct, the powers available to the DMU, and the pro-competitive interventions available to it.
- In addition to the final report's recommendations relating to the codes of conduct, we propose that:
    - The codes of conduct should include a mechanism by which publishers may secure payment for their content by platforms.
    - The codes of conduct should include obligations to carry and surface the industry's trusted news subject to publishers' consent.
    - The DMU's powers and processes in relation to the codes should include a compensation mechanism for business users that have suffered harm as a result of platforms' exploitative conduct.
- In terms of the pro-competitive interventions available to the DMU, we agree it should have the power to implement separation interventions and to mandate transparency of bid data throughout the ad tech market through common transaction or impression ID.

- We are concerned about the uncertainty surrounding the future application of the choice requirement and fairness by design. We do not believe these can be fairly applied to publishers.
- We welcome the CMA's proposed plan of work in collaboration with the ICO to embed competition neutrality in data privacy enforcement.

2.0 INTRODUCTION

2.1 The News Media Association (NMA) is the voice of UK national, regional, and local newspapers in print and online. Our members publish around 1,000 news media titles – from The Sun, The Guardian, the Daily Mail, and the Daily Mirror to the Yorkshire Post, Kent Messenger, and the Manchester Evening News – and reach 49 million adults across the UK each month. Collectively, our members are by far the largest investors in news, accounting for 58 percent of the UK's total spend on news provision.

2.2 High-quality, independent journalism informs and engages the public, debunks misinformation, brings together communities, and holds the powerful to account. This work is essential to a healthy democratic society, but it is being threatened. News publishers have, for years, been operating in a deeply dysfunctional market which has precluded them from realising fair returns for their content. This is true for all our members, but it is the local and regional publishers that are hardest hit; to them, delays in implementation of the CMA's proposed remedies could be lethal. Urgent and incisive pro-competitive reform to rebalance the platform-publisher relationship and restore competition to the digital advertising market is needed to secure their future.

2.3 We therefore welcome the attention paid to the news media industry and the uptake of many of our recommendations in the CMA's final report. The CMA's proposals go a long way towards the development of a fit-for-purpose pro-competitive regulatory framework. However, we believe at least three key measures are missing from the DMU's proposed repertoire: formally requiring platforms to carry and surface trustworthy news content, mandating payment by platforms for publishers' content, and enabling financial redress for breaches of the code.

2.4 The NMA has been engaging with government on this matter since March 2017.[1] Throughout the Cairncross Review, the Furman Review and the CMA market study, our industry has conveyed to government the gravity of its situation. Two years on, a failure to take swift and decisive action would do irreparable harm to the UK news media landscape. To avoid such an outcome, we would urge that the DMT advise the government on a timeline within which its proposals should be implemented. This timeline should be separate and more condensed than that for wider reform of competition law in digital markets.

2.5 We were disappointed to see that the CMA has decided not to proceed with a market investigation at this time. We welcome its commitment to intervene if the government fails to roll out a timely response, but we do not believe a wait-and-see approach is sufficient. The design and implementation of a narrow, specialised regime will still take time, which publishers simply

[1] NMA Calls For Investigation Into Google, Facebook and the Digital Advertising Supply Chain to Combat Fake News, 09 March 2017, Available at: http://www.newsmediauk.org/News/nma-calls-for-investigation-into-google-facebook-and-the-digital-advertising-supply-chain-to-combat-fake-news/164705

do not have. We therefore ask that the CMA consider the interim enforcement actions available to it with respect to dominant platforms, including carrying out a market investigation on Google's presence throughout the digital advertising intermediation chain.

2.6 The following sections will flesh out our views on the structure, content, and enforcement of the codes, on the pro-competitive interventions available to the DMU and, more generally, on the implementation of the new regulatory regime.

3.0 SCOPE

Q1. What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why?

3.1 The NMA agrees with the final report's definition of SMS "*as a position of enduring market power or control over a strategic gateway market with the consequence that the platform enjoys a powerful negotiating position resulting in a position of business dependency*".[2] We likewise agree that type of evidence that would point to SMS, includes: *"measures of shares of supply in the consumer facing market; the extent of reach across consumers; share of digital advertising revenues; control over the rules or standards which apply in the market, and the ability to obtain and control unique data that is applicable outside the market*".[3]

3.2 Moreover, we fully support the finding that both Google and Facebook have enduring market power and act as gatekeepers of online traffic, creating a relationship of dependency with publishers.[4] Given the overwhelming evidence to this effect, and in the interest of rapid implementation, we fully endorse the CMA's recommendation that the government should designate both firms as having SMS at the outset of the regime[5].

Q2. What implications should follow when a firm is designated as having SMS? Should an SMS designation enable remedies beyond a code of conduct to be deployed?

3.3 We wholeheartedly support the final report's recommendation that firms with SMS should be bound by a code of conduct aimed at securing fair trading, open choices, and trust and transparency.

3.4 We further agree that the targeted interventions set out in the final report should be seen as complementary to the ex-ante rules found in a code, given that they are intended to address the causes of market power while the code deals with its negative effects.[6] It is then crucial that having SMS and being subject to such a code should not preclude a firm from being the object of a pro-competitive intervention.

3.5 Whether SMS should be a prerequisite for a firm to be the object of a pro-competitive intervention is more complicated. We agree with the CMA that certain pro-competitive interventions should only be applied to firms with SMS while others should be applied more

[2] CMA Market Study on Online Platforms and Digital Advertising, Final report para 7.55
[3] Final report, para 7.57
[4] Final report, para 7.59-7.64
[5] Appendix U, para 25
[6] Final report para, 7.106

widely.[7] Our view is that particularly onerous interventions like the choice requirement, fairness by design, the creation of data silos, or any form of separation could only be fairly applied to firms with SMS which present the greatest challenges and command the resources to adapt. Other less burdensome pro-competitive interventions addressing market-wide issues should be available to the DMU regardless of whether their object has been designated as having SMS. An important example of this is mandating transparency of bid data through the roll-out of a common impression or transaction ID, which should be implemented across the open display advertising market.

Should SMS status apply to the corporate group as a whole? Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?

3.6 The NMA agrees with the final report's recommendations that SMS should apply to the corporate group as a whole in relation to a subset of its activities.

Q3. What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular, what are the criteria that should define which activities fall within the remit of this regime? Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.

3.7 The activities covered in the CMA's final report -- online advertising, search, and social media -- should clearly be included.

3.8 The NMA agrees with the Furman Review that the pro-competitive regime should have a broad scope in primary legislation based on characteristics such as "*significant direct or indirect network effects, limited offsetting effects of multi-homing and differentiation, and significant sources of non-contestability*" which make it likely that SMS will materialise[8].

3.9 We also agree that there should be statutory reviews of the markets identified every three years. However, to embed greater flexibility in the regime, we would add that there should be a mechanism through which market players can trigger an early review if they identify relevant concerns with activities that are not considered to be in scope.

Q4. What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?

3.10 The Covid-19 crisis has thrown publishers' precarious financial situation and reliance on digital advertising revenue into sharp relief. According to a recent GroupM report, publishers will bear the brunt of the pandemic's impact on the advertising market. In 2020 pure-play digital advertising is due to decline by 2.4 percent before rising by 11.3 percent in 2021. In contrast, news brands' ad revenue, including that from their digital properties, is expected to decline by 26.1 percent in 2020 and by 1.5 percent in 2021.[9] This divide is compounded by the fact that, while

[7] Final report, para 7.121
[8] *Unlocking Digital Competition*, Report of the Digital Competition Expert Panel, para 2.115
[9] GroupM, This Year, Next Year: Global Mid-Year Forecast Report, June 2020. Available at: https://www.groupm.com/this-year-next-year-global-mid-year-forecast-report/

dominant platforms are easily able to absorb the shock of a slight, one year decline, the same cannot be said for publishers, which were already in dire straits prior to the pandemic.

3.11 According to NMA surveys, the smallest local and regional titles have seen their advertising revenue drop by as much as 80 percent. Most concerning, at the end of March, 50 percent of local independent titles surveyed estimated their survival time to be no more than two to four months and, indeed, at least 61 print titles throughout the UK suspended publication during the crisis, with many still unable to resume. Advertisers and ad agencies have also used keyword blocking to prevent their ads from appearing alongside Covid-19 related content, dramatically decreasing publishers' revenues at a time when their editorial content was needed more than ever. These developments have escalated the imbalance between platforms and publishers and made an already urgent need for reform even more acute.

4.0 REMEDIES

Q5. What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?

4.1 The NMA welcomes the final report's focus on the anti-competitive harms affecting news publishers. In particular we agree with the assessments in Appendix S:

- 4.1.1 that publishers rely on platforms for a significant part of their traffic;
- 4.1.2 that opaque algorithmic ranking harms publishers' business;
- 4.1.3 that publishers are strong-armed into using AMP and IA, that Google and Facebook use publisher content for free and keep users within their ecosystems;
- 4.1.4 that refusing to allow snippets harms publishers' rankings; and
- 4.1.5 that publishers are unable to access user data for their content hosted in Google and Facebook's ecosystems.[10]

4.2 The CMA's analysis of the conflicts of interest arising out of the structure of the open display advertising supply chain and the information asymmetry between intermediaries and customers[11] is also well received. We agree that:

- 4.2.1 Google has leveraged its access to data and inventory to cement its advantage against DSP competitors;[12]
- 4.2.2 The effect of linking demand from Google's DSPs to AdX and AdX to Google's publisher ad server is to increase the barriers publishers face in switching from Google to a different ad server;[13]
- 4.2.3 Linking Google Ads demand with the publisher ad server may provide Google with a greater incentive to foreclose rival providers along the intermediation chain;[14]

[10] Appendix S
[11] Appendix M
[12] Appendix M, para 405-425
[13] Appendix M para 445
[14] Appendix M para 446

4.2.4 Unified Pricing is a clear example of Google leveraging its market power in publisher ad serving to benefit its own buy-side intermediation services, to the detriment of publishers;[15]

4.3 More generally, we welcome the CMA's acknowledgement that "*improving the bargaining power of online news publishers will improve the health and sustainability of journalism in the UK, both nationally and regionally, and in turn contribute positively to the effectiveness and integrity of our democracy*".[16]

4.4 We would only add to this analysis by highlighting the gravity of publishers' situation and the urgency with which the issues laid out above must be resolved, to avoid irreversible harm to the UK's media landscape. The dysfunctionalities laid out above have stunted publishers' ability to compete in digital spaces by precluding them from optimally monetising their content, denying them access to their own readers' data and withholding fair compensation. Now, there is a real risk of media deserts emerging in the UK as many smaller publishers are in danger of closure, and national newspapers face similar challenges over time.

Q6. In relation to the code of conduct, to what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?

4.5 The NMA supports the CMA's recommendation that the code be backed by a statute setting out three broad objectives – fair dealing, open choices, and trust and transparency – under which the DMT, and subsequently the DMU, would develop principles and detailed guidance. We also agree that each SMS firm should have its own tailored code to address the unique relationship each has with publishers and other business users.

4.6 We support the proposed content for the code of conduct in the final report as an excellent starting point on which we trust the DMT and the DMU will build. We agree with each of the recommended principles in Chapter 7 and Appendix U geared towards rebalancing the commercial relationship between platforms and publishers, including:

4.6.1 Requiring platforms to ensure that publishers are able to exercise additional control over how their content is shown on platforms;[17]

4.6.2 Require that contractual terms concerning the ability of publishers to monetise their content be objectively justifiable;[18]

4.6.3 Obliging platforms to ensure that the appropriate user consent is sought to ensure disaggregated user data can be shared with the relevant publishers when hosting publisher content;[19]

4.6.4 Preventing platforms from imposing their own advertising software on publishers when they use platforms' publishing software like AMP or IA;[20]

[15] Appendix M para 479
[16] Final report, para 6.51
[17] Appendix U, para 92
[18] Appendix U, para 94
[19] Appendix U, para 86
[20] Appendix U, para 95

4.6.5 Requiring platforms not to prefer their own customers over third parties who use other intermediaries;[21]

4.6.6 Requiring platforms not to preference content using their publishing software like AMP and IA in features like Top Stories or the news carousel at the top of general search results;[22]

4.6.7 Preventing platforms from requiring that publishers use their advertising software when they publish on AMP or IA;[23]

4.6.8 Mandating interoperability of AdX and non-google ad servers by requiring AdX to participate in header bidding;[24]

4.6.9 Requiring platforms to explain the operation of search and news feed ranking algorithms and advertising auctions and to allow audit and scrutiny of their operation by the DMU;[25]

4.6.10 Requiring platforms to give fair warning about changes to the operation of algorithms where these are likely to have a material effect on users, and to explain the basis of these changes; and [26]

4.6.11 Requiring platforms to provide transparent information on remuneration mechanisms so that publishers can make more informed decisions about how they use the platform's services to monetise their content.[27]

4.7 However, we would contend that the recommended content falls short in at least two crucial respects: it fails to impose an obligation on platforms to carry and surface trusted quality news and it fails to provide for payment for publishers' content.

4.8 We believe there should be an obligation on platforms to carry and surface news and information by publishers that are subject to an industry regulator such as IPSO.

4.9 The way people access news and information is changing; in 2020 Reuters Digital News Report found that 36 percent of respondents across all countries surveyed used Facebook to access news in 2020 and 23 percent of respondents used Google News. At the same time, misinformation is rampant on these sites. According to the Digital News Report's survey, in April 2020 54 percent and percent of respondents saw some or a lot of misinformation on Covid-19 on Google and Facebook respectively[28].

4.10 The upcoming online harms legislation will attempt to tackle this issue by halting the spread of fake news on platforms that facilitate sharing of user-generated content. However, the government has not made a corresponding effort to require these platforms to nudge users towards accurate news and information.

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[21] Appendix U, para 123
[22] Appendix U, para 128
[23] Appendix U, para 95
[24] Appendix U, para 144
[25] Appendix U, para 149
[26] Appendix U, para 166
[27] Appendix U, para 175
[28] Reuters Institute, Digital News Report 2020, 6 June 2020, available at: http://www.digitalnewsreport.org/survey/2020/foreword-2020/

4.11 As more and more people in the UK use Facebook and Google to access news and information through platforms and aggregators, it is vital that these spaces are saturated with information that is accurate, trustworthy, and engaging. A formal requirement for platforms to carry trusted news stories and ensure they are given adequate prominence would help rebalance the platform-publisher relationship and dovetail with the government's online harms agenda.

4.12 It should be noted that the 'trusted news' designation cannot be left to the platforms. To ensure objectivity and fairness, we propose that the obligation to carry apply to content by publishers that are either subject to an industry regulator such as IPSO or follow a well-established editors' code like The Guardian and the Financial Times.

4.13 Moreover, a mechanism to enable compensation for content is required both as a matter of fairness and, perhaps more importantly, as a matter of necessity for the sustainable provision of news.

4.14 Journalistic content plays a key role in our democracy, but it is costly to produce. It requires the infrastructure, talent, and resources to conduct investigations, sift through information, package it in ways which engages readers and ensure that it is responsibly framed. Despite this investment, when content is hosted on digital platforms, its value is almost entirely captured by the platforms rather than flowing back to the publisher. In conjunction with dwindling digital advertising revenue, this dynamic poses an existential threat for local and regional publishers and may prove unsustainable for nationals in time.

4.15 Publishers' inability to realise a fair return for their content is an important matter for consumers because, as the CMA has often acknowledged, it is "*likely to reduce their incentives and ability to invest in news other online content, to the detriment of those who use and value such content and to broader society*".[29] If left unchecked, this problem could result in communities across the UK being left without dedicated quality news outlets.

4.16 The lessons learned from Google's negotiations with publishers in Spain and Germany certainly urge caution in respect of the mechanism through which compensation is sought. However, approaches like those proposed by the Australian Consumer and Competition Commission (ACCC) may provide a way forward. The ACCC was directed by the Australian Government to develop a mandatory code of conduct to address bargaining power imbalances between news media businesses and digital platforms. Draft legislation published on 31 July enables either bilateral or collective negotiations between news media businesses and each of the digital platforms, subject to compulsory arbitration if the negotiation does not result in a commercial agreement within three months[30]. The draft also includes helpful safeguards, like a competition law safe harbour to authorise collective bargaining among publishers, non-discrimination and transparency requirements relating to ranking, crawling, indexing, and displaying of news content and a requirement to negotiate in good faith backed by civil penalties.

[29] Final report para 2.85; see also final report, paras 14, 2.88, 6.3, 6.39 and the government press release, *New regime needed to take on tech giants,* available at: https://www.gov.uk/government/news/new-regime-needed-to-take-on-tech-giants

[30] ACCC, News media bargaining code, Draft legislation, published 31 July 2020, available at: https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/draft-legislation

4.17 We believe the DMT and DMU should include a principle under the fair dealing objective requiring platforms to engage in negotiations with publishers on payment for content. In order to enable these negotiations, as above, it could advise that legislation set out the appropriate time limits and the independent arbitrator and, if negotiations are to be on a collective basis, amend the Competition Act 1998 to create a temporary safe harbour for publishers. This approach is consistent with the CMA's commitment to avoid direct outcome regulation[31], as it would only set out the process through which parties should come to an agreement. Moreover, the mediator and arbitrator in the Australian model would work in collaboration with the parties to gather information and arrive at fair outcomes, obviating the need for the CMA to directly engage in price-setting.

4.18 International cooperation is essential to obtaining a fair allocation of the value extracted from publisher content. Google and Facebook could refuse to host content produced by any single country's publishers with relative ease. In contrast, the emergence of regulator-enabled compensation mechanisms throughout several countries would inhibit their ability to act independently of the publishers involved.

4.19 The NMA further supports each of the CMA's recommendations on the procedures and powers necessary for the DMU to conduct investigations and enforce the code[32]. In particular, we welcome the recommendations that the DMU be able to:

- 4.19.1 Carry out investigations under the code of its own initiative and in response to complaints;
- 4.19.2 Investigate other conduct that intentionally or negligently inflicts harm.
- 4.19.3 Compel information from the firms it is investigating;
- 4.19.4 Appoint a monitoring trustee to monitor and oversee compliance by an SMS firm;
- 4.19.5 Put in place interim measures pending the outcome of an investigation;
- 4.19.6 Make orders, and block, suspend or unwind decisions to enforce the code;
- 4.19.7 Impose penalties for non-compliance with such orders;
- 4.19.8 Impose substantial penalties for conduct that intentionally or negligently inflicts harm;
- 4.19.9 publish reports on its work and the industry more generally and co-ordinate and share information with UK regulators such as CMA, ICO and Ofcom, and with overseas authorities.

4.20 We also agree that investigations under the code should be conducted in a limited timeframe, such as six months from their launch. Longer investigations, such as those relating to pro-competitive interventions or intentional or negligent harms should still be conducted with relative speed and in any case within a statutory deadline of 12 months.

4.21 We were disappointed by the lack of a compensation mechanism for breaches of the code, especially where the harmful conduct in question is intentional or negligent. We appreciate that ex-ante regulation is intended to prevent exploitative conduct by setting the rules of the game rather than by deterring it through fines and penalties, and, consequently, that financial redress mechanisms are not the norm in this type of framework. However, our position remains that, in

[31] Final report para 7.79

[32] Final report, para 7.94-7.101

the new pro-competitive regime, there must be room for compensation for harm caused by exploitative behaviour.

4.22 First, we believe compensation is warranted as a matter of corrective justice. As acknowledged throughout the final report, Google's and Facebook's conduct in recent years has caused real and substantial harm to news publishers' businesses. Each breach of the code, each instance of non-compliance with the DMU's orders and each case intentional or negligent harmful conduct will constitute a novel injury which ought to be corrected.

4.23 Furthermore, at least some aspects of the proposed regulations do involve deterrence. For example, the report recommends that in order for the regime to be effective, fines should be available for non-compliance with the DMU's orders and for cases of intentional or negligent harm.[33] We consider that, at least in these cases in which financial penalties are available, compensation should be available to injured parties.

4.24 It should be noted that even small sums could have a real positive impact on dependent businesses that have suffered harm, particularly smaller ones like local and regional publishers. Making even modest compensatory awards is the most immediate way of averting consumer harm flowing from SMS firms' conduct, as these sums would go directly towards funding quality news content.

4.25 Finally, we agree with the CMA that the code *"(should) not preclude competition enforcement in appropriate circumstances*" and that "*such enforcement would still be appropriate in cases of egregious or repeated anti-competitive behaviour, and in cases not explicitly covered by the code, serving as a deterrent against such behaviour in the future*".[34]

Q7. Should there be heightened scrutiny of acquisitions by SMS firms through a separate merger control regime? What should be the jurisdictional and substantive components of such a regime?

4.26 The NMA's main concern relating to the establishment of a specialised merger regime is that it should not delay the implementation of other measures proposed in the market study. The statutory codes of conduct, pro-competitive interventions, and the creation of a well-equipped DMU have been in development for over a year. And, between the Cairncross Review, the Furman Review and the CMA market study, there is ample evidence that, together, they constitute an apt response to the dysfunctionalities in search, social media, and open display advertising. In contrast, an entirely new merger regime would require time to design and consult on.

4.27 It is imperative that the measures to address the source of platforms' market power and rebalance their relationship with publishers be promptly brought into force. If a separate merger regime is pursued, it should be done separately to the implementation of these measures.

Q8. What remedies are required to address the sources of market power held by digital platforms?

4.28 The NMA agrees with the final report's recommendations to implement **certain** data-related interventions and separation interventions. However, as set out below, we are concerned about

[33] Final report, para 7.95 and 7.100
[34] Final report para 7.53

the uncertainty surrounding the future application of the choice requirement and fairness by design.

4.29 We agree with the recommended powers available to the DMU in respect of these interventions, including the power to assess and implement them and to monitor, amend and revoke the interventions over time to ensure the regime is future-proof and flexible.[35] We support the CMA's recommendation that the statutory test the DMU would have to satisfy to carry out and intervention should be narrowly scoped in each case to ensure that the outcomes are deliverable within a reasonable timescale, subject to transparency and consultation rights.[36] The 12-month statutory deadline is also appropriate for this purpose.[37]

What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights?

4.30 The NMA's main concerns relating to data and interoperability is that publishers have access to their readers' data when their content is accessed through Google's or Facebook's ecosystems, and that they have access to impression-level bid data across the ad tech supply chain.

4.31 We welcome the CMA's acknowledgement that "*Google and Facebook are able to collect and use individual data from consumers who interact with content on the publisher websites through the use of Google and Facebook analytics service*" and that "*publishers do not have access to the same level of data on consumer interaction with their own content when hosted on Google and Facebook properties*".[38] As such, we entirely agree with the recommendation that the codes of conduct should "*oblige platforms to ensure that the appropriate user consent is sought to ensure disaggregated user data can be shared with the relevant publishers when hosting publisher content*".[39]

4.32 Transparency interventions in digital advertising are essential for publishers to obtain fair returns for their ad inventory. We particularly welcome the recommendation to introduce a common impression or transaction ID to enable sharing of non-aggregated impression-level bidding data with advertisers and publishers.[40] Access to this kind of information would allow publishers to detect hidden fees, monitor the fairness of auctions and hone their monetisation strategies.

4.33 Further, a transaction or impression ID solution is preferable to within-contract fee transparency and publication of average bid data. The within-contract transparency solution does not afford visibility of fees across the supply chain, doing little for publishers' ability to adapt their strategies. And, as acknowledged by the report itself, publishing averages will be of limited use, as "*data on*

[35] Final report, para 7.122-126
[36] Final report, para 7.124
[37] Final report, para 7.128
[38] Appendix U, para 97
[39] Appendix U, para 99
[40] Appendix Z, para 17-26

average fee or take rates is likely to be too aggregated, not specific to the individual participants and not easily comparable across intermediaries".[41]

Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?

4.34 The power to implement separations is crucial in the short term to tackle structural issues in the open display advertising market. As noted in our response to the interim report, we are not convinced that behavioural regulation and data and interoperability interventions alone will entirely subvert Google's incentives to exploit its position in open display. We consider that exploring the separation of Google's ad server and ad exchange should be a priority for the DMU once it is established.

4.35 In the longer term, it is important that the DMU be able to tackle competition issues in digital markets holistically, through a combination of ex-ante regulation and more traditional structural competition remedies.

Q9. What are the tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?

Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?

4.36 Much like the creation of a separate merger regime, a pre-emptive competition tool to address the risk of markets tipping would likely require further consideration compared to the measures developed in the market study. Again, the NMA's main concern is the swift implementation of the measures directed at curing the harms to publishers. If a pre-emptive competition tool is developed by the DMT, this process should occur separately to the implementation of the codes of conduct and the establishment of a DMU equipped to enforce the code and carry out pro-competitive interventions.

What measures, if any, are needed to address information asymmetries and imbalances of power between businesses (such as third-party sellers on marketplaces and providers of apps) and platforms?

4.37 The NMA supports the combination of the codes of conduct and the availability of targeted pro-competitive interventions to rebalance the relationship between platforms and their business users. We agree with the CMA that these should be used as complements to one another to address both the causes and the negative symptoms of market power.[42]

4.38 In relation to the codes of conduct, we support each of the CMA's recommendations collated in our response to Q6 as well as two additional measures: payment for use of publishers' content and a financial redress mechanism (see our response to Q6 on both of these).

4.39 In terms of pro-competitive interventions, the NMA especially supports:

[41] Appendix Z para 32
[42] Final report para 7.106

4.39.1 The separation of Google's ad server from its ad exchange; and

4.39.2 Introducing a common impression or transaction ID to enable sharing of non-aggregated impression-level bidding data with advertisers and publishers.

What measures, if any, are needed to enable consumers to exert more control over use of their data?

4.40 The NMA welcomes CMA's acknowledgement that the choice requirement and fairness by design would constitute a disproportionate harm to publishers compared to SMS platforms, and its recommendation to initially limit the application of these measures.[43] However, we are concerned about the uncertainty as to the future of their application. In particular, we are apprehensive about the categorisation of the choice requirement and fairness by design as interventions that could apply across a market, rather than just to firms with SMS.

4.41 As mentioned in our response to Q3, both the choice requirement and fairness by design are highly onerous interventions for businesses such as publishers that rely on digital advertising to survive. Unlike integrated platforms, whose profits from personalised advertising are significantly in excess of costs of capital, publishers' digital advertising revenue is at a subsistence level. While the loss of revenue resulting from reduced personalised advertising may be easily absorbed by Facebook or Google, the same cannot be said for smaller businesses. For many publishers, local regional and national, these measures would result in a debilitating loss of ad revenue, to the detriment of consumers that rely on their journalism for information, trusted news, and a link to their communities.

4.42 Moreover, news publishers do not pose the same consumer data privacy concerns as large integrated platforms. First, because they do not engage in the same kind of intrusive and systematic profile-building by pooling data from several services within their corporate umbrella. And, second, because, as noted in our last response, no single news website constitutes an unavoidable social and commercial space in the same way that Google or Facebook do.

What role (if any) is there for open or common standards or interoperability to promote competition and innovation across digital markets? In which markets or types of markets? What form should these take?

4.43 The NMA supports each of the principles under the "open choices" objectives set out in our response to question 6. Currently, publishers are forced to agree to platforms exploitative terms or risk stunting their digital reach. By introducing common standards and interoperability, particularly in the digital advertising supply chain and in relation to publishing software, the new regime would afford publishers meaningful exit rights and in turn encourage innovation and competition among firms bidding for their business.

5.0 DESIGNING PROCEDURES AND STRUCTURES

Q10. Are the proposed key characteristics of speed, flexibility, clarity, and legal certainty the right ones for a new approach to deliver effective outcomes? **AND Q11.** What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms

[43] Final report, para 8.78-8.82

and for imposing a code of conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?

5.1 The NMA agrees that each of the key characteristics set out in Q10 should inform the new framework.

5.2 Speed in particular is essential both in the roll-out of the new measures and, later, in the DMU's use of its powers. The NMA has been calling for an urgent investigation into Google, Facebook and the digital advertising supply chain for more than three years.[44] Over two years have passed since the Cairncross Review, and the Furman Review began to identify the challenges to sustainable news provision stemming from the duopoly's role as gatekeepers of digital audiences and Google's dominance in digital advertising. In that time, the platforms' exploitative conduct has continued and the financial situation of publishers across the UK has only worsened, exacerbated by the Covid-19 crisis. Now more than ever, securing a sustainable future for high quality journalism requires an urgent end to the duopoly's anticompetitive practices.

5.3 But with the DMT casting a far wider net than the market study, and the prospect of omnibus legislation in this area, we are concerned that implementation is still remote. In a House of Lords Communications and Digital Committee evidence session on the future of journalism, representatives from the CMA indicated that, realistically, the new regime would not come into force before 2022 at the earliest[45]. The news media industry cannot sustain the lengthy process of reviews and consultations required for a wholesale reform of competition law. A more targeted and pragmatic approach is needed.

5.4 We recognise that the legislative timeline to establish the codes of conduct and the DMU will ultimately be decided by the government. However, with a view to securing rapid change, we ask that the DMT advise BEIS and DCMS on an appropriate timeframe within which these measures should be implemented to minimise harm to consumers, publishers, and advertisers. We are confident that, given the wealth of evidence the CMA has gathered over the past year, it is well placed to advise on this.

5.5 We believe that, to avoid unnecessary delay, this advice should include that the regime governing open display advertising and the platform-publisher relationship be implemented separately and in advance of the wider competition law reforms. In our view, this new regime, including developed statutory codes of conduct and a fully functional DMU with the power to implement pro-competitive interventions, should be fully operational within six months of the DMT submitting its advice.

5.6 While we appreciate that the remit of the DMT's advice does not include the make-up of the DMU, we believe its design has important implications for the rapid implementation of the new regime, as it will take time to establish a DMU with meaningful statutory powers to monitor, investigate and enforce compliance with the new regime. To ensure that such a body can be set up as quickly as possible, we believe it should be installed in an existing regulator, like the CMA or Ofcom, which already have the credibility, expertise, institutional infrastructure to support it.

[44] See footnote 1

[45] Select Committee on Communications and Digital Uncorrected oral evidence: The future of journalism Wednesday 8 July 2020, available at https://committees.parliament.uk/oralevidence/666/pdf/

5.7 Finally, on this point, we ask that the CMA consider the interim enforcement actions available to it with respect to platforms' abuse of market power in digital advertising, search, and social media. This should include making a market investigation reference relating to Google's presence throughout digital advertising intermediation.

5.8 Speed and flexibility should also be embedded in the operation of the new regime. As mentioned in our response to Q6, we agree that the DMU should be able to respond to exploitative conduct as it arises with speed and flexibility. As such, we support the six-month statutory time limit for investigations under the codes and the 12-month statutory limit for investigations relating to pro-competitive interventions. We recommend that the same principle inform investigations of intentional or negligent infliction of harm, and that these also have a statutory time limit of 12 months.

Q12. What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?

5.9 As acknowledged in Chapter 10 of the CMA's final report, there is a balance to be struck between data protection regulation and competition. Large, integrated platforms like Google and Facebook are able to amass data from various sources, including volunteered data, contextual data, and observed user activity across all their different services. In addition, SMS platforms can leverage their role as gatekeepers to collect data from consumers who interact with their business users' products – for example, by tracking individuals who access online news publications. Because of their wealth of internally-held personal data, privacy measures implemented to prevent data exchanges only go towards cementing platforms' own advantage and buttressing barriers to entry, to the detriment of publishers and other data-driven businesses.

5.10 Moreover, it is precisely these platforms' brand of data collection which is seen as most intrusive – the detailed profile-building and large-scale, continuous tracking of consumers using unavoidable digital services. Conversely, no news publisher site is so wide spanning to enable this kind of invasive collection or so unavoidable a digital space to raise questions of meaningful choice.

5.11 We entirely welcome the CMA's aim to collaborate with the ICO to achieve competition neutrality in data protection regulation. In their work, we trust that both regulators will give due consideration to the points raised above, and to news publishers' reliance on advertising revenue.

6.0 CONCLUSION

6.1 It is difficult to overstate the challenges publishers face stemming from tech platforms' excessive market power in search, social media, and digital advertising. The news media industry is not in a position to wait for wholesale reform of competition law in digital markets; decisive action is needed to avert the deterioration of the quality and plurality of journalism in the UK.

6.2 This submission has proposed that the government implement pro-competitive measures aimed at rebalancing the platform-publisher relationship and restoring competition to the digital advertising market in advance of wider reform. As the design and implementation of a

specialised pro-competitive regime would still require some time, we have asked that the CMA consider the interim enforcement actions available to it with respect to platforms' abuse of market power in digital advertising, search, and social media.