



# Platforms and content providers, including news publishers

Advice to DCMS on the application of a code of  
conduct, November 2021

© Crown copyright 2021

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence.

To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

## Contents

	<i>Page</i>
Summary.....	4
1. Introduction and context.....	11
Digital competition.....	11
The commission: how would a code work.....	12
Relationship between this advice and the CMA’s broader work on online platforms and digital advertising .....	13
Context: the challenges facing news publishers .....	14
Scope of our work.....	16
How we have developed the advice.....	16
Other international approaches.....	17
Structure of this document .....	17
2. The case for intervention to address platforms’ market power.....	18
How content is used by platforms .....	19
Sources of bargaining power of the platforms over publishers .....	22
Broader market failures in news and interaction with market power .....	25
3. Concerns raised by news publishers .....	27
Algorithmic transparency .....	27
Data access asymmetry.....	29
Content presentation and loss of control over branding.....	31
Payment for content.....	31
Advertising concerns.....	33
4. How a code could apply to non-payment terms .....	36
5. How a code could apply to payment for content .....	41
Payment for content under the SMS code .....	41
What might fair and reasonable obligations look like in practice?.....	43
Guidance on the assessment of fair and reasonable compensation for content.....	44
6. Application of a code: enforcement and remedies for rectifying breaches .....	56
Enforcing a code .....	56
7. Impacts and limitations of code interventions .....	59
Code impacts.....	59
Limitations of code interventions.....	59
Possible unintended consequences.....	64
Other initiatives in this space .....	64
Appendix A: Additional evidence on the case for a code.....	66
Case study evidence on the impact of the shutdown of Google News in Spain..	66
Wider market failures in news and impact of digitalisation.....	67
Appendix B: International examples of interventions on payment for content .....	70
Australian Media Bargaining Code (AMBC).....	70
French Competition Authority abuse of dominance case against Google.....	75
Appendix C: Examples of the use of FRAND obligations in other contexts.....	80
Appendix D: Methodology for establishing fair and reasonable prices used in other contexts. ....	84

## Summary

1. The government is proposing a new pro-competition regime for digital markets, including enforceable codes of conduct applying to digital firms designated as having Strategic Market Status (SMS).<sup>1</sup> In April 2021, the Digital Secretary asked the non-statutory Digital Markets Unit (DMU) in the CMA to work with Ofcom to ‘look at how a code would govern the relationships between platforms and content providers such as news publishers, including to ensure they are as fair and reasonable as possible’.<sup>2</sup> This advice is the CMA’s and Ofcom’s response to that request.
2. The aim of a code of conduct would be to manage the effects of an SMS firm’s market position, ensuring the SMS firm cannot unfairly use its market power and strategic position to distort or undermine competition between users of the SMS firm’s services. A code is only one way of addressing market power issues between SMS platforms and content providers.<sup>3</sup> In particular, we would expect the code to sit alongside pro-competitive interventions (PCIs), which would tackle more directly the sources of the platforms’ market power.
3. While we have focused in detail on how an SMS code might address the issues that have been raised by news publishers, by its nature that code would apply to all content providers. Specific platform/publisher settlements could vary significantly depending on the nature of the content and the business models of the firms.
4. It is important to note that this advice has been prepared in advance of the government’s policy proposals being finalised with respect to the nature of the new regime. No decisions have been made on which firms may be designated with SMS.<sup>4</sup>
5. We have consulted widely with digital platforms, news publishers and other stakeholders. Our view is that an enforceable code of conduct where the DMU can set requirements would be effective in securing fair compensation for use of content by:
  - addressing concerns about the transparency of algorithms;

---

<sup>1</sup> [A new pro-competition regime for digital markets - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/a-new-pro-competition-regime-for-digital-markets).

<sup>2</sup> [New watchdog to boost online competition launches - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches).

<sup>3</sup> For example, the CMA’s market study into online platforms and digital advertising proposed a range of potential measures, including data and interoperability remedies and forms of operational separation.

<https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

<sup>4</sup> [A new pro-competition regime for digital markets - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/a-new-pro-competition-regime-for-digital-markets).

- giving publishers appropriate control over presentation and branding of their content;
- driving improved practices in the sharing of user data between publishers and those platforms that host their content; and
- redressing the imbalance in bargaining power in negotiations between publishers and platforms by providing a framework for the determination of fair financial terms for publishers' content where this is hosted by large platforms with SMS.

## Background

6. The traditional business model of news media, particularly print media, has been substantially disrupted by the growth of digital. Longstanding revenue sources such as advertising and direct sales have significantly declined as consumers and news consumption have moved online. As a consequence, the advertising industry has also been transformed.
7. Publishers have responded by changing their approaches, engaging directly with consumers, and consequently their approaches to distribution, subscriptions and advertising have changed too.
8. There is no single solution to the challenges facing news publishers, but a key element is ensuring that the relationship between the major digital platforms and publishers is fair for both sides in terms of access to consumers and the opportunity to gain a return from content provided to them. The government's request to the CMA and Ofcom is focused on this need for fairness and how it might be delivered under a new digital markets regime, while recognising it will not solve all the industry's challenges. As the government noted in response to the Cairncross Review on a sustainable future for journalism, it 'is committed to supporting the sustainability of high-quality journalism in the UK and will continue to identify ways in which it can develop and complement the [Cairncross Review's] recommendations... to help the industry further'.<sup>5</sup>
9. The major digital platforms such as Facebook and Google<sup>6</sup> are an ever more important link between consumers and content providers, whether it is through search facilities, the posting of content or links, or the hosting of third-party content. Both publishers and platforms can benefit from these services.

---

<sup>5</sup> [The Cairncross Review: a sustainable future for journalism - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/442222/cairncross-review-a-sustainable-future-for-journalism.pdf).

<sup>6</sup> Google and Facebook were identified in the Cairncross Review and the CMA's Market Study as being by far the most important digital platforms for publishers and thus we have focused on them in the compilation of this advice. However this should not be interpreted as a 'designation' of their services for possible future regulation, and these proposed codes could apply to any designated firm.

Publishers' content is found by those interested in it and publishers are able to create relationships with new consumers. Platforms benefit from direct and indirect advertising revenues, an improvement in the services they offer, increasing consumer loyalty, and a greater understanding of their consumers.

10. The concerns with respect to the relationship between platforms and publishers apply to all content providers, but there are strong arguments that news publishers are particularly affected given the direct challenge to the traditional business models and functions of such publishers – i.e. to engage with consumers through content curation (mixing multiple types of content) as well as content creation and their reliance on advertising.<sup>7</sup> Digital platforms increasingly act as curators of cross-publisher content and have changed the nature of the advertising market and the direct relationship between news publishers and consumers of content.
11. The challenge facing the government and regulators is to ensure that the benefits from the relationship are shared fairly and this division is not distorted by the bargaining power of the platforms. Large platforms are 'must have' partners for individual publishers in a way that individual publishers cannot be to the platforms. Such concerns underlie the proposed establishment of the new digital markets regime and hence the consideration of how its proposed codes for firms with SMS would address its impact for publishers.

### **Concerns raised by publishers**

12. News publishers and other content providers are affected by the market power of the big platforms in three main ways:
  - Competition for user attention and advertising – the big platforms have advantages in, for example, user data;
  - Reliance on platforms' advertising intermediation services, particularly given Google's very strong position in the digital advertising supply chain; and
  - Reliance on the platforms to host content and drive traffic back to their own websites.
13. The first two of these concerns were key areas of focus in the CMA's online advertising and digital advertising market study.<sup>8</sup> The CMA proposed a series of remedies to address the market power of the platforms and make ad tech

---

<sup>7</sup> See OECD Competition Committee, background note on competition issues concerning news media and digital platforms, section 3.4. Available at: [Competition issues in News Media and Digital Platforms - OECD](#).

<sup>8</sup> <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

services work more effectively, to be delivered through the proposed DMU regime. It also launched a Competition Act investigation of Google's Privacy Sandbox changes, to ensure that publishers and other ad tech providers were not being unfairly disadvantaged by the removal of third-party cookies in Chrome.<sup>9</sup> Further antitrust investigations into ad tech are being carried out in several other jurisdictions including the US and Europe. All of these interventions will play an important role in addressing publishers' concerns about the role of the big platforms in digital advertising.

14. In this advice we have focused on the third set of issues – where publishers are hosting content on the platforms' sites or using the platforms for content discovery, which was addressed in less detail in the digital advertising market study.
15. The CMA and Ofcom have engaged with UK media publishers and the major platforms and drawn on the recent work undertaken in other jurisdictions, in particular Australia and France. We have also drawn on the Cairncross Review, the CMA's market study on digital advertising and Ofcom's Media Ownership Review.<sup>10</sup> We have found that there are several ways in which large platforms' behaviour might adversely affect publishers. These include:
  - **Lack of transparency over algorithms:** Platforms use algorithms to analyse consumer behaviour and assess what content to present to them. Minor changes to algorithms, which are outside the publishers' control, can have a significant impact on the traffic they receive, and therefore their revenues.
  - **Limited access to data on user engagement:** Many publishers feel they have no option but to put content in mobile web formats hosted on the platforms' servers. This gives the platforms control over how much data publishers receive on users' interaction with their content, and their ability to monetise the content through advertising.
  - **Limited control over content presentation and branding:** Platforms' control over the presentation and attribution of content can lead to a loss of consumer understanding of its original source, to the detriment of the publisher's brand.

---

<sup>9</sup> <https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes>.

<sup>10</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-2/morr>.

- **Fair payment for content:** Publishers are concerned that platforms ‘free ride’ on online content, providing little or no compensation while using it to attract users and generate advertising revenue.
16. Before any code is put into place, further analysis of the concerns and consultation with the parties would need to be undertaken through a participative approach. However, our analysis so far shows that there is an imbalance of bargaining power between platforms and publishers which affects the publishers’ ability to negotiate terms, and that this imbalance could be addressed through a code.

## Response to the concerns

17. The government’s July 2021 consultation on a new pro-competition framework for digital markets envisaged two ways of tackling competition problems. One is to keep in check the worst effects of market power through an enforceable code of conduct. The other is to address the root cause of market power through ‘pro-competitive interventions’. The digital advertising study considered a range of such interventions, which between them could result in more competitive digital advertising markets: for instance, opening up Google’s ‘click and query’ data to support more vigorous competition in search; or using interoperability remedies to open up social media.
18. This advice focuses on a code of conduct, as a change that could be implemented relatively rapidly after the expected new regime comes into force, subject to the SMS designation process. Pro-competitive interventions could offer a more complete overall solution to the underlying problems, and in the best outcome could remove the need for a code of conduct; but would take more time to take effect. Once measures were put in place, it would take time for stronger competition in advertising markets to build, and for the current bargaining power imbalances to be eroded as a result.
19. Our advice sets out how each of the concerns could be addressed under the three proposed objectives of a code set out in the government’s consultation: ‘fair trading’, ‘open choices’ and ‘trust and transparency’.<sup>11</sup>
20. A code could be particularly effective in addressing behaviour relating to broader non-payment-related issues critical for effective competition between publishers and with the platform, for example the use of algorithms and access to data. Code principles could be targeted at ensuring that competition

---

<sup>11</sup> [A new pro-competition regime for digital markets - GOV.UK \(www.gov.uk\)](https://www.gov.uk). Given that the government is still considering the precise form of the SMS code, we have not attempted to specify what would be captured within code principles and what in guidance since that will depend on the final shape of the SMS framework.

works effectively and that the SMS platforms are not able to exploit a position of market power over content providers. For example,

- a. We would expect that SMS platforms should not apply discriminatory terms or policies in relation to setting algorithms. A code could specify that SMS platforms should treat content providers equally unless there is an objectively justifiable reason to differentiate between them.<sup>12</sup>
  - b. A code should also ensure that publishers are able to negotiate reasonable terms and make open choices with respect to data collection and content presentation and attribution in different formats.
21. In addition, under the ‘fair trading’ objective of a code, publishers would be entitled to fair and reasonable compensation for the use of their content by SMS firms. A code could also state that SMS platforms should not discriminate unduly between different publishers, for example between large and small publishers. It is important to emphasise that we have not assessed whether the terms currently offered by the large platforms are fair and reasonable; rather, we are suggesting ways in which the assessment might be made under a future code.
  22. We have suggested that a code should be able to set expectations for negotiations of fair compensation without the need for direct price setting by the regulator – though noting the need for the regulator to have scope to intervene should negotiations lead to terms which are not fair or reasonable. We set out our initial view on the factors that might be taken into account when considering how ‘fair and reasonable’ terms might be assessed which we consider could usefully act to inform commercial discussions in advance of any legislation and code.
  23. As set out above, legislation has not yet been finalised; nor have any firms been designated as having SMS or codes of conduct agreed. Once this has happened the DMU would have to assess SMS firm behaviour against the codes, and work to resolve any breaches identified. The nature of the final Digital Markets regime will determine the efficacy and timeliness of any code enforcement; but the proposed code interventions as set out in this advice should be enforceable by a regulator.
  24. The advice also discusses options for the government which might act to streamline enforcement and increase the incentives on platforms to comply without the need for enforcement. For example, we discuss the option of a

---

<sup>12</sup> We would not expect a code to stop platforms from responding to consumer needs or complying with legal obligations (for example excluding illegal or harmful content).

binding arbitration process as a possible backstop power where there has been a breach of the code and the SMS firm does not offer acceptable payment terms.

# 1. Introduction and context

## Digital competition

- 1.1 Digital markets bring huge benefits for consumers, businesses and the wider economy. However, competition in these markets is not working as it should. There is a consensus that the concentration of power among a small number of firms is curtailing growth, inhibiting innovation, and having negative impacts on consumers and businesses which rely on them.
- 1.2 A small number of online platforms have become key gateways for the online world, and therefore also for news consumption in the UK. The findings of the Cairncross Review and CMA's market study into online platforms and digital advertising suggest that this position gives them significant power over news publishers.<sup>13</sup> In particular, Google and Facebook were identified in the Cairncross Review<sup>14</sup> and the CMA's market study<sup>15</sup> as being by far the most important digital platforms for publishers.
- 1.3 The Furman Report<sup>16</sup> identified the need for a code of conduct to manage the effects of a firm with SMS relative to its users (i.e. the businesses and consumers that rely on the SMS firm's products and services). The government accepted the need for enforceable codes of conduct for firms with SMS in its response to the CMA's market study into online platforms and digital advertising.<sup>17</sup> The codes of conduct are intended to manage the effects of market power by setting out how firms with SMS are expected to behave. They will offer clarity to both users and firms with SMS, aiming to influence the SMS firm's behaviour in advance to prevent negative outcomes before they occur.
- 1.4 In July 2021, the government consulted<sup>18</sup> on broader proposals for a new pro-competition regime for digital markets, including codes of conduct for SMS firms. Given our focus on the SMS code, we have not considered the potential role of wider elements of the proposed regime, including Pro-Competitive Interventions to address the root causes of SMS firms' market power, as part of this advice (see also discussion below about the links between this advice and the CMA's broader work on digital advertising).

---

<sup>13</sup> Cairncross Review, Key Findings, page 57; CMA's Market Study into Online Platforms and Digital Advertising, paragraph 5.366.

<sup>14</sup> Cairncross Review, Key Findings, page 23.

<sup>15</sup> CMA's Market Study into Online Platforms and Digital Advertising paragraph 5.359.

<sup>16</sup> [Unlocking digital competition, Report of the Digital Competition Expert Panel - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/94422/unlocking-digital-competition-report.pdf).

<sup>17</sup> DCMS & BEIS, 2020. Response to the CMA's market study into online platforms and digital advertising.

<sup>18</sup> A new pro-competition regime for digital markets - GOV.UK (www.gov.uk).

## The commission: how would a code work

- 1.5 In April 2021, the Digital Secretary asked the CMA to work with Ofcom to ‘look specifically at how a code would govern the relationships between platforms and content providers such as news publishers, including to ensure they are as fair and reasonable as possible’.<sup>19</sup> This report represents our advice in response to the Government’s request.
- 1.6 We have taken as our starting point the government’s proposals<sup>20</sup> for establishing a Digital Markets Unit, with a code of conduct applying to digital firms designated as having SMS. We have focused on how an SMS code might apply to the issues that have been raised by content providers in relation to the large digital platforms. The government’s policy proposals including the exact legislative structure of a code have not yet been finalised and no decisions have been made on which firms will be designated, so our advice should be viewed as an illustration of the possible approaches that could be taken.<sup>21</sup>
- 1.7 Accordingly, while we discuss how the objectives of a code (Fair Trading, Open Choices, Trust and Transparency) might be expected to govern behaviour, we cannot propose specific code principles at this stage. We would expect any code principles and guidance to be consulted on as part of the participatory approach envisaged in the government’s consultation.
- 1.8 It is important to recognise that a code is only one way of addressing market power issues in the relationship between SMS platforms and content providers. For example, the CMA’s market study into online platforms and digital advertising proposed a range of potential measures, including data and interoperability remedies and forms of operational separation. Given that the focus of the Government’s request for advice was on how a code might operate, we have not considered these wider remedies as part of this work. However, this does not mean that we think that the code should necessarily be used in preference to alternative remedies. Where possible, we would want to consider the use of wider remedies (for example, Pro-Competitive Interventions) if this was a proportionate way of addressing an underlying lack of competition and stimulating more competitive markets.

---

<sup>19</sup> [New watchdog to boost online competition launches - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/new-watchdog-to-boost-online-competition-launches).

<sup>20</sup> [A new pro-competition regime for digital markets - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/a-new-pro-competition-regime-for-digital-markets).

<sup>21</sup> We have assumed that the DMU would be able to specify some code principles. However we have not specified in detail what should be in code principles and what would be in guidance, which would be determined in part by the final form of the government’s proposed framework.

## Relationship between this advice and the CMA's broader work on online platforms and digital advertising

1.9 This advice fits alongside a broader programme of work that the CMA is carrying out following on from the market study into online platforms and digital advertising.<sup>22</sup>

1.10 News publishers and other content providers are affected by the market power of the big platforms in three main ways:

- First, news publishers compete with the large platforms for user attention and as suppliers of digital advertising inventory on their websites – they are thus affected by the market power and data advantages of the large platforms, which allow them to provide more effective targeted advertising and attribution services, and in turn earn much higher advertising revenues.
- Second, news publishers are frequently reliant on the platforms' advertising intermediation services when selling digital advertising inventory – Google, in particular, has a very strong position in ad tech services, and is able to use this to extract data from publishers and self-preference its own services and sources of inventory.
- Third, news publishers use the user-facing elements of the platforms' services (such as search, news services and social media) for content discovery and to drive consumers back to their own websites. Where the platforms act as essential gateways for news publishers, this gives them a strong position of bargaining power, allowing them to dictate the terms of the relationship.

1.11 The first two of these concerns were key areas of focus in the CMA's online advertising and digital advertising market study.<sup>23</sup> The CMA proposed a series of remedies to address the market power of the platforms and make ad tech services work more effectively, to be delivered through the proposed DMU regime. These included:

- Using a code to address the behaviour of SMS platforms where this is restricting competition or exploiting users in relation to digital advertising;
- Measures to increase competition in the SMS firms' core markets, for example through tackling search defaults or opening up access to 'click

---

<sup>22</sup> [Online platforms and digital advertising market study - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/614441/online-platforms-and-digital-advertising-market-study.pdf)

<sup>23</sup> <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>.

and query data’; and through increasing interoperability of social media platforms;

- Measures to rebalance the data advantages of the SMS firms, including through increasing consumers’ control over their data and exploring options to promote data mobility solutions;
- Proposals to address competition problems in ad tech services through a mixture of code and PCI interventions.

1.12 The CMA also launched a Competition Act investigation of Google’s Privacy Sandbox changes in January 2021, to ensure that publishers and other ad tech providers were not being unfairly disadvantaged by the removal of third-party cookies in Chrome.<sup>24</sup> Further antitrust investigations into ad tech are being carried out in several other jurisdictions internationally, including the US and Europe. All of these interventions will play an important role in addressing publishers’ concerns about the role of the big platforms in digital advertising.<sup>25</sup>

1.13 In this advice we have focused on the third set of issues – where publishers are hosting content on the platforms’ sites or using the platforms for content discovery, which was addressed in less detail in the digital advertising market study. Action to address the market power of the platforms directly, as set out in the previous paragraph, should reduce the bargaining power of the platforms in relation to the use of content. However, given the current bargaining power imbalance, it is also right to consider how a code might address publishers’ concerns, alongside broader interventions to tackle market power directly.

## **Context: the challenges facing news publishers**

1.14 News content occupies a particularly important place in our society. In contrast to other forms of content, the provision of news content from a variety of voices and sources, accessible to the public, is vital to the functioning of our democracy. The relationship between news publishers and digital platforms therefore has a significance beyond the mechanics of their transactions.

---

<sup>24</sup> <https://www.gov.uk/cma-cases/investigation-into-googles-privacy-sandbox-browser-changes>.

<sup>25</sup> [May 2022 update] Since our advice was submitted to government in November 2021 we have agreed commitments with Google to address competition concerns relating to its proposals to remove third party cookies from Chrome and replace them with alternative Privacy Sandbox tools. We have also launched a competition enforcement case focused on Google and Meta’s ‘Jedi Blue’ agreement and Google’s conduct in relation to intermediation services for online advertising. We are investigating concerns that this agreement, and Google’s broader conduct, made it harder for other firms to compete.

- 1.15 Print media has been in structural decline since the early 2000s, fuelled by new advertising models, changes to consumer behaviour and the move to online news consumption. This has significantly reduced print circulation and print advertising revenues for UK news publishers. While digital advertising and subscription revenues have increased for some UK news publishers, they have not offset falls in print revenues. As a result, revenues and profitability have declined over time.<sup>26</sup> Other traditional broadcast news and content sources are increasingly facing similar challenges from digital consumption.
- 1.16 In 2018 the government commissioned the Cairncross Review,<sup>27</sup> which identified the challenges to traditional business models for journalism from the internet, including new advertising models, changes to consumer behaviour and news consumption and the rise of new intermediaries between consumers and publishers. The Cairncross Review also recommended a code of conduct to address the ability of certain firms to impose terms on news publishers that limit the ability of those news publishers to monetise content.
- 1.17 The government response to the Cairncross Review accepted that there was a need to respond to the challenges to the news industry in the interest of ensuring the continued sustainability and plurality of news sources, which are seen as critical to a healthy civil society. The government noted that its response to the Cairncross Review would be part of a wider programme of work focused on the challenges raised by digital products and services in the UK.
- 1.18 Ultimately there is no single intervention that will resolve the problems faced as a result of digitalisation with respect to the news industry. The problems are multi-faceted, and so similarly must be the responses. The industry needs to make a transition to new commercial models, but it is also important to ensure that the digital environment provides a fair opportunity to gain a reasonable commercial return on news services, as well as maintaining the incentives to innovate, invest and evolve business practices.
- 1.19 Our focus has been on addressing competition issues and bargaining power imbalances as opposed to wider societal concerns that could be considered when thinking about news. These are outside the scope of our advice.

---

<sup>26</sup>26 The Cairncross Review: a sustainable future for journalism - GOV.UK ([www.gov.uk](http://www.gov.uk)), Chapters 2 and 3 in particular.

<sup>27</sup>27 The Cairncross Review: a sustainable future for journalism - GOV.UK ([www.gov.uk](http://www.gov.uk)).

## **Scope of our work**

- 1.20 Given the commission we received and the importance of news, we have focused on competition issues and bargaining power imbalances between platforms and news publishers in this advice. However, addressing how a code could work in this specific instance will have read-across to broader content providers and other areas, and we have been conscious of this in compiling our advice.
- 1.21 We have focused on Google and Facebook when gathering our evidence, as examples of large platforms that act as intermediaries for users to access news publishers' content. This has allowed us to build on the previous findings of the CMA's market study into online platforms and digital advertising and to illustrate how a code might operate in the context of any SMS firm's relationship with news publishers, as a way of considering how the SMS regime could work more generally. However, it is important to emphasise that no decisions on SMS designation have yet been made.
- 1.22 We have also not looked in detail at specific allegations that might fall under a code. It would not be appropriate to do so before the final legislative structure has been determined, activities are designated as having SMS and codes and guidance have been published.
- 1.23 Finally, we have also not investigated alternative approaches to a code of conduct in detail, although we have considered in our advice the interaction between a code and copyright rules and collective bargaining, for example (see section 7).

## **How we have developed the advice**

- 1.24 To produce this advice, we have referred to information from a number of sources:
- The CMA's previous digital advertising market study and information gathered during that market study.
  - Meetings with stakeholders: a number of digital platforms, including Google and Facebook but also Microsoft, Twitter, Apple, Snap; news publishers (representatives of large national publishers and a selection of independent and local publishers) as well as industry experts, academics and tech commentators.
  - Requests for information sent to, and completed by, some of these parties.

- 1.25 We have also spoken to other competition authorities which have investigated similar issues in their jurisdictions.

## **Other international approaches**

- 1.26 The challenges facing news publishers are not confined to the UK. Most prominently both Australia and France, through quite different legal approaches, have engaged with online platforms and encouraged them to agree commercial terms for the use of content. Other countries are similarly considering the commercial relationship between news providers and platforms. We summarise a number of different international approaches in more detail in Appendix B.

## **Structure of this document**

- 1.27 Our advice is set out in the remainder of this document. Section 2 covers the case for a code and sources of market power of the platforms over publishers. Section 3 outlines the concerns raised by publishers, and the following two sections discuss how an SMS code might apply to the non-payment terms (section 4) and payment for content considerations (section 5) that collectively form the terms under which platforms use publisher content. Section 6 covers code enforcement, and section 7 considers the possible impacts, and potential limitations of a code intervention.

## 2. The case for intervention to address platforms' market power

- 2.1 This section summarises the reasons why some large digital platforms are able to exercise substantial market power over online content providers, and hence why an SMS code could be an appropriate way of addressing concerns relating to the exercise of market power. It also puts these market power concerns in the context of the wider challenges facing news publishers. It is important to recognise that an SMS code to address bargaining power would not be able to address these wider challenges directly, although we note areas where there may be a link between market power and broader market failures.
- 2.2 We focus on Google and Facebook in this document because first, they are the firms that we found in the online platforms and digital advertising market study (the market study) were likely to have SMS, and so a code would be likely to apply to them.<sup>28</sup> Second, Google and Facebook account for a much larger share of time spent online than other platforms. Google's and Facebook's share of user attention held up during the COVID-19 pandemic, increasing to 39% in April 2020.<sup>29</sup> Third, Google and Facebook account for nearly 40% of the traffic to large publishers.<sup>30</sup> Fourth, Facebook is the highest reaching intermediary service used for accessing a variety of news sources, and Google is second-highest.<sup>31</sup>
- 2.3 During the spring 2020 lockdown, 37% of online adults in Britain said they used Facebook to access news content, and 36% said they used Google. Fifty per cent of online 15- to 24-year-olds in Britain said they had ever used Facebook for news, with 25% of 55- to 64-year-olds saying the same. The most commonly-used source among online 55- to 64-year-olds (at 30%) was Google News, which was the fourth most-used source for 15- to 24-year-olds (40%), behind Snapchat (41%) and Twitter (40%).<sup>32</sup>
- 2.4 Other platforms such as Twitter and Instagram are also popular as a way to access news, as well as video sharing platforms like YouTube. Google and

---

<sup>28</sup> No decisions have been made on designation either for Google and Facebook or for other firms, or in fact on the criteria for designation; however, for illustrative purposes we have focused on how a code might apply to Google and Facebook.

<sup>29</sup> [https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final\\_report\\_Digital\\_ALT\\_TEXT.pdf](https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf) page 41.

<sup>30</sup> CMA analysis of publisher data, see Table 2.1 below.

<sup>31</sup> [Ofcom's Online Nation 2021 report](#), Section 5, Figure 5.4.

<sup>32</sup> See [Ofcom's Online Nation 2021 report](#) section 5.

Facebook each own more than one service that is popular in news: Google owns YouTube and Facebook owns Instagram.

## How content is used by platforms<sup>33</sup>

- 2.5 There are a range of different ways that platforms can use publisher content, and there are also variations between the platforms in how they access and use content. For example, we can distinguish between search results (where content is ‘scraped’), posted content (where content is generally placed by the publisher) and curated content where publisher content is collated and packaged by the platform on one of its services. These examples are described in more detail below.
- 2.6 Within these different types, a broad distinction can be drawn between referral and hosting services. For example, search results are generally a mechanism for driving traffic to a publisher site. By contrast, posted content and curated content is often viewed on the platform itself. However, this distinction is not absolute: for example, search results can contain some content information (or ‘snippets’), while some consumers may ‘click through’ from hosted content on a platform to view further content on the publisher’s own site.

### Box 2.1 Cached and optimised content (AMP and IA formats)

Publisher content may also be delivered in different formats, such as through Accelerated Mobile Pages (AMP) or Facebook Instant Articles (IA).

- AMP: A publishing format for mobile devices. By caching web pages and using optimised/restricted coding pages can be loaded faster.
- IA: Similar to AMP, IA allow faster loading of web content as users do not have to navigate to a new website.

While viewing content on AMP or IA consumers remain within the platform’s ecosystem rather than navigating to the publisher’s website.

## Search

- 2.7 Web-based search engines are a tool to help consumers to navigate the internet and find useful information in response to a broad range of search

---

<sup>33</sup> In the remainder of this chapter we refer to Google and Facebook as ‘the platforms’.

queries. They make money by serving these consumers with paid-for adverts. The largest search engine in the UK is Google Search.<sup>34</sup>

- 2.8 General search engines work by maintaining an index of the websites that are available on the internet and returning a set of ranked search results when consumers enter search queries.<sup>35</sup> General search results pages return different categories of search results, including generic search results and specialised search results. In addition, search engines may show online search advertisements in response to a user search.
- 2.9 When people search for news, Google and other search engines may scrape hyperlinks, snippets and headlines from news publishers to display amongst general search results.<sup>36</sup> Some search engines (such as Google and Bing) also have a news tab which presents search results from a more limited range of news only sources.
- 2.10 In principle publishers have control over if and how their content is used by search engines due to certain internet standards and protocols as well as the service optionality offered by the search engines themselves. For example, in the case of Google, publishers have control over whether and how their content is displayed by Google. Publishers are able to block indexing<sup>37</sup> and crawling<sup>38</sup> of their websites. In addition, publishers are able to choose if and how snippets are presented alongside search results.<sup>39</sup> However, during the market study publishers submitted that in practice they had little choice over whether to allow Google to use their content in search results as they viewed this as a must have service (we discuss this in more detail below).<sup>40</sup>
- 2.11 Publishers do not receive any financial remuneration for the use of their content in search results. However, during the market study Google argued that publishers receive a significant volume of web traffic in return for their content (which they can then monetise through advertising).<sup>41</sup>

---

<sup>34</sup> Paragraph 3.17 CMA Online platforms and Digital Advertising Market Study [Final report \(publishing.service.gov.uk\)](#)

<sup>35</sup> [Organising information – How Google Search works.](#)

<sup>36</sup> [Advanced Guide to How Google Search Works | Google Search Central.](#)

<sup>37</sup> [Block Search Indexing with 'noindex' | Google Search Central.](#)

<sup>38</sup> The Robots Exclusion Protocol allows website owners to exclude automated clients, for example [web crawlers](#), from accessing their sites - either partially or completely see: [Formalizing the Robots Exclusion Protocol Specification \(google.com\)](#).

<sup>39</sup> [How to Write Titles & Meta Descriptions | Google Search Central.](#)

<sup>40</sup> Paragraphs 21 to 24. CMA Online platforms and Digital Advertising Market [Appendix S: the relationship between large digital platforms and publishers \(publishing.service.gov.uk\)](#).

<sup>41</sup> Paragraph 45. CMA Digital Advertising and Online Platforms Market Study [Appendix S: the relationship between large digital platforms and publishers \(publishing.service.gov.uk\)](#).

## **Posted content**

- 2.12 Publishers post content to platform services such as social media. The content is sometimes used by the social media platform in the services that it offers to its users. An example is Facebook News Feed. Users build their own News Feed by deciding which people, communities, and organisations – including news publishers – to connect to, meaning that their News Feed will contain, for example, content from their friends, the pages they follow and the groups they join. News links on the News Feed are therefore either: (a) posted by publishers on their Pages (for free) in whichever format they choose (e.g. as links to articles on their websites, which drive users to their mobile or desktop experience, or by publishing them as IAs); or (b) shared by a person using Facebook.
- 2.13 For most posted content publishers receive no financial payment. However, for some types of posted content the publishers are able to earn revenues through mechanisms such as sharing of advertising revenue, sponsored posts or branded content.<sup>42</sup> During the market study Google and Facebook also argued that publishers receive a significant volume of web traffic in return for their content (which they can then monetise through advertising).<sup>43</sup>

## **Services presenting curated content**

- 2.14 Curated content is content created by other publishers that is displayed in a specialised service focusing on one type of content, in this case news. Examples include Google Showcase and Facebook News.
- 2.15 Google Showcase<sup>44</sup> consists of a number of news ‘panels’ located in a dedicated space on Google News<sup>45</sup> and Discover.<sup>46</sup> Publishers agree to select stories each day to fill an agreed-upon number of panels (typically five or seven) that will be syndicated across Google News and Discover. The panels can be customised by publishers to reflect their branding and identity. The Showcase panels do not contain whole articles, and therefore if users wish to access more content they must click on the article within the

---

<sup>42</sup> See: [How to earn money on YouTube - YouTube Help \(google.com\)](#); and [Earn money from your content with Facebook | Facebook for Business](#).

<sup>43</sup> Paragraph 45, CMA Digital Advertising and Online Platforms Market Study [Appendix S: the relationship between large digital platforms and publishers \(publishing.service.gov.uk\)](#).

<sup>44</sup> [What is Google News Showcase? - News Publisher Help](#).

<sup>45</sup> Google News is a news aggregator service developed by Google. It presents a continuous flow of links to articles organized from thousands of publishers and magazines, see: [About Google News](#).

<sup>46</sup> Google Discover is a service which surfaces content to users, See: [Introducing Google Discover: Discover new information and inspiration with Search, no query required \(blog.google\)](#).

Showcase panel and this will direct them to the article on the publisher's website.

- 2.16 Showcase panels curated by news publishers are remunerated by Google. Other content in Google News is not, whether or not the publisher has chosen to license it to Google.<sup>47</sup> Facebook News operates on similar principles to Google Showcase and also has licensing agreements in place with a number of UK news publishers.<sup>48</sup>

## **Sources of bargaining power of the platforms over publishers**

- 2.17 There is an imbalance in bargaining power between large platforms and content providers, including news publishers. Each publisher needs Google and Facebook more than the platforms need them.
- 2.18 This derives first from the fact that people increasingly consume content online. Therefore, the online market is increasingly important for publishers' viability. For example, a study by Ofcom has shown that the internet is the second most important source for news after television.<sup>49</sup>
- 2.19 Second, people increasingly use large platforms to access content. Publishers rely on the services provided by these firms for the discovery of their content and for traffic directed to their websites which they can then monetise through the sale of advertising.
- 2.20 The success of Google and Facebook in attracting consumers' attention is illustrated in Figure 2.1 below, which shows consumer time spent on the top 1000 online 'properties' in February 2020. As noted above, Google and Facebook's share of user attention has held up during the COVID-19 pandemic, increasing to 39% in April 2020. At the same time, other, more traditional sources of traffic and profit are in decline.

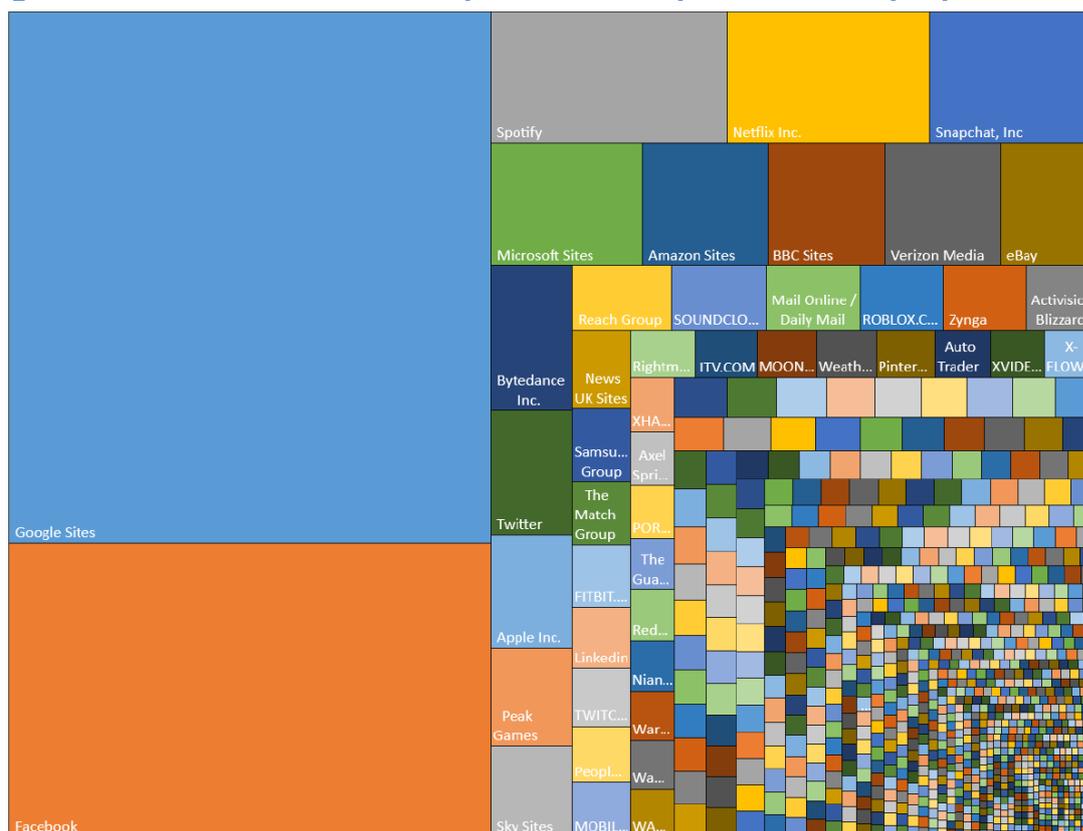
---

<sup>47</sup> [Google News Showcase is launching in the U.K. \(blog.google\)](https://blog.google).

<sup>48</sup> [A New Destination for News in the UK - About Facebook \(fb.com\)](https://about.fb.com).

<sup>49</sup> See: [News Consumption in the UK: 2020 \(ofcom.org.uk\)](https://www.ofcom.gov.uk). Facebook had the third highest reach of all news sources with 34% of UK adults using it for a source of news, after BBC One (56%) and ITV (41%). Twitter, Instagram and Whatsapp all appear in the top 20 sources but have lower reach than several TV channels. Commonly used newspapers included the Daily Mail/Mail on Sunday (17%), Metro (11%), The Sun/Sun on Sunday (10%) and the Guardian/Observer (10%). Roughly one in ten people say they use local newspapers. 15% of UK adults said they use Google Search for news.

**Figure 2.1: UK consumer time spent on the top 1000 online properties**



Source: Comscore MMX Multi-Platform, Total Digital Population, Desktop aged 6+, Mobile aged 13+, February 2020, UK.

Notes: Top 1000 properties account for 83% of total user time spent online.

\* Where 'Google Sites' includes all Google owned properties eg YouTube and Google Search.

†Where 'Facebook' includes Facebook, Instagram and WhatsApp.

Online advertising and digital advertising market study final report, page 48

- 2.21 Ofcom's Online Nation (2021) report shows that 45% of UK adults use social media for news, and 76% of this group said they got their news from Facebook. During the spring 2020 lockdown, 37% of online adults in Britain said they used Facebook to access news content. The most commonly used source for 50-64 years was Google News (30%).<sup>50</sup> In addition, almost all smartphones have a news aggregator pre-installed on them: Upday is loaded on all Samsung devices, Google News Feed is preinstalled on several other Android phones, and Apple News is on iPhones.<sup>51</sup>
- 2.22 As noted above, Facebook and Google are both also very popular as intermediaries for news and they act as gateways to some large and important audiences online for news publishers. The importance of the online platforms is reflected in the significant proportion of publishers' website traffic

<sup>50</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0013/220414/online-nation-2021-report.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0013/220414/online-nation-2021-report.pdf)

<sup>51</sup> Ofcom's Online Nation 2021 report Section 5.

that is referred via platforms, and there is evidence that this may be especially the case for smaller providers.<sup>52</sup>

2.23 The CMA’s market study into online platforms and digital advertising analysed website traffic data from a number of large content providers (mainly news publishers).<sup>53</sup> This data shows that in 2018 and 2019 these publishers relied on Google and Facebook’s properties for between 36% and 38% of total traffic to their websites, although traffic going direct to publisher websites was the most significant source of traffic for these publishers, as shown in Table 2.1 below.

**Table 2.1: Sources of website traffic for online publishers**

Year	Website traffic from Google, Facebook and Direct visits								
	All traffic <sup>54</sup>			Desktop/Laptop			Mobile		
	Google*	Facebook	Direct	Google	Facebook	Direct	Google*	Facebook	Direct
2019	25%	13%	43%	26%	4%	55%	25%	17%	38%
2018	26%	10%	44%	29%	4%	52%	25%	14%	40%

\* Some publishers included AMP in the ‘referred from Google properties’ data estimate but not all. If all AMP referrals were included, then this percentage would increase.

Source: CMA analysis of publisher data, CMA Online Platforms and Digital Advertising market study final report.

2.24 The implications of Table 2.1 include:

- a large proportion of news publishers’ website visits come from Google and Facebook - this suggests that they will be reliant on them for accessing certain groups of consumers and indicates that the platforms may have a high degree of bargaining power.
- an individual news publisher’s bargaining position in relation to the platforms will depend on how far it would still be able to attract these consumers to its platforms through other routes – e.g. through direct website/app visits. In practice, this is likely to vary by publisher, but overall, the large platforms retain a significant gateway role over publishers’ content.

2.25 A number of studies have exploited the natural experiment of Google shutting down its Google News service in Spain in response to the imposition of a

<sup>52</sup> Case study evidence from Spain shows that the shutdown of Google news in 2014, resulted in significant falls in traffic to news sites, particularly for small publishers. These case studies are summarised in Appendix A.

<sup>53</sup> This analysis includes traffic data for the following websites: The Independent, The Sun, The Times, The Daily Mail, The Telegraph, Reach PLC websites, Sky websites, and all Vice websites.

<sup>54</sup> These findings are similar to those from analysis by the ACCC in Australia, which found that in 2016-18 sources of visits to Australian news media websites were: Direct 44%; Google 32%; and 18% Facebook. See Figure 6.4: [Digital platforms inquiry - final report.pdf \(accc.gov.au\)](#).

‘Google tax’ to estimate impact.<sup>55</sup> These studies suggest that there was a short-term reduction in traffic to publishers as a result, especially for smaller publishers, demonstrating the importance of Google as a referral mechanism.<sup>56</sup>

2.26 Given that we estimate that there are hundreds of online UK brands with news content, it is likely that individual new publishers will be some extent substitutable from the platform perspective.<sup>57</sup> However, news as a whole is likely to be very important to platforms. This is because there is evidence that news is one of the key reasons why consumers go online. For instance, during the spring 2020 lockdown, half of online adults in Britain (52%) said that news and current affairs was one of the main reasons why they went online.<sup>58</sup>

2.27 Overall, it is clear that publishers receive a significant proportion of their traffic from Google and Facebook. Where publishers rely on a platform for access to a significant share of viewers/customers, this can give the platform significant bargaining power.

## **Broader market failures in news and interaction with market power**

2.28 News publishing is particularly important because this is where public policy issues and concerns around sustainability of content production appear to be most acute.<sup>59</sup>

2.29 There have always been a range of market failures associated with news. These were mitigated in part under traditional business models. However, as we detail further in Appendix A, with digitisation of news, traditional revenue sources are under threat, through a combination of:

- market power concerns highlighted above;
- disintermediation, which has made it more challenging for news providers to mitigate market failures in news (e.g. by building brand recognition, or bundling content); and

---

<sup>55</sup> In Spain in 2014 a ‘Google tax’ was introduced to make it mandatory for news aggregators to pay for use of snippets (it worked out at approximately € 0.05 per user, per day). As a result Google shut down its Google News service in Spain for a period of time.

<sup>56</sup> See Appendix A for detail on the studies.

<sup>57</sup> Publishers have a copyright over their material, and some news output is in the form of exclusives or opinion and analysis which are less likely to be substitutable with other news content. However, a large proportion of news content is made up of reporting on current events which is likely to be more substitutable from a platform’s perspective.

<sup>58</sup> Online Nation 2021, Section 5.

<sup>59</sup> See, for example, the Cairncross Review: A Sustainable Future for Journalism, February 2019.

- greater competition for consumer attention, some of which comes from platforms who sell ad-space in a more targeted way.
- 2.30 These factors could result in an undersupply of quality news. This may be of particular concern if it threatens the ability for UK citizens to access a plural media landscape, and where undersupply leads to a loss of positive externalities associated with public interest news.
- 2.31 By setting out the principles on which SMS firms should trade with content publishers on fair and reasonable terms, as well as with open choices and trust and transparency, a code could play a role in mitigating the harmful effects of the imbalance of bargaining power. To the extent that this results in greater payment for news content, this would in part mitigate the challenges faced by publishers' traditional business models. This could in turn contribute to supporting a plural media landscape.
- 2.32 However, a code would not address all the challenges faced by traditional news publishers, as it cannot correct the impact of disintermediation and changes in the advertising market more generally.

### 3. Concerns raised by news publishers

3.1 Based on intelligence gathered during the market study and more recent conversations, publishers have raised a series of issues regarding their relationships with Google and Facebook that they consider affect their ability to run their businesses sustainably. As explained in more detail in earlier sections we focus on Google and Facebook (and the focus of concerns about ‘platforms’ in this section relates to them) because of their importance to publishers. While the subjects and levels of concern varied, recurring themes emerged which are set out below:

- Algorithmic transparency;<sup>60</sup>
- Unequal access to data;<sup>61, 62</sup>
- Content presentation and loss of control over branding;
- Free riding on content<sup>63</sup>

3.2 We also briefly set out the interaction between these issues and concerns relating to the digital advertising market, which were explored in detail in the CMA’s market study into online platforms and digital advertising.

3.3 It is important to note that our aim has not been to substantiate or disprove individual concerns raised. The aim instead is to describe the types of issues that might be addressed under a code.

#### Algorithmic transparency

3.4 Platforms use algorithms to determine what users see when they search on Google or access Facebook. Algorithms are essential to organising the content that users see in response to, for example, entering a search term or opening their Facebook News Feed. The quality of the service that the platform provides is dependent on its algorithm selecting the content that users are most interested in. This also benefits publishers, because it enables

---

<sup>60</sup> See paragraphs 25 to 31 of [CMA \(2020\) Online platforms and digital advertising market study Appendix S: the relationship between large digital platforms and publishers](#).

<sup>61</sup> See paragraphs 32 to 39 of [CMA \(2020\) Online platforms and digital advertising market study Appendix S: the relationship between large digital platforms and publishers](#).

<sup>62</sup> See paragraphs 32 to 39 of [CMA \(2020\) Online platforms and digital advertising market study Appendix S: the relationship between large digital platforms and publishers](#).

<sup>63</sup> See paragraphs 41 to 51 of [CMA \(2020\) Online platforms and digital advertising market study Appendix S: the relationship between large digital platforms and publishers](#).

them to surface content to the consumers who are most likely to be interested in it.

- 3.5 However, the complexity and lack of transparency of algorithms can also create challenges for publishers. In particular, where platforms are responsible for a significant share of a publisher's user traffic, it can exacerbate the market power of the platforms over publishers.
- 3.6 Platforms argue that changes to their algorithms are necessary to both ensure a smooth operation of their service and a positive user experience, and prevent 'gaming' of the system, or the targeting of users with low-quality or 'clickbait' content.
- 3.7 For example, in its response to the market study interim report, Google set out a number of factors that place limits on the amount of information it can share on the operation of, and changes to, its search algorithms. Google argued that disclosing too much information might allow publishers to game the system, and that the information could be used by competitors to copy innovations and free-ride on its investments. Google also stated that the provision of information was complicated by the fact that ranking may be governed by several different algorithms and added that it already provides 'vast amounts' of data on the criteria used to search rankings.<sup>64</sup>
- 3.8 However, changes to these algorithms can dramatically affect the ordering of content, with knock-on impacts on traffic directed to publishers and therefore to revenue generation. News publishers told us that the impact of this is that they are forced to invest in resources that enable them to adapt to each new iteration of the platforms' algorithms, as each change can result in dramatic profit swings. Uncertainty over future traffic may chill their incentive to invest in creating content, while the resources needed to understand algorithmic changes may reduce news publishers' ability to focus on providing content that meets the needs and demands of their readership (as opposed to simply understanding what the latest algorithm thinks that is).
- 3.9 The News Media Association (NMA), in its response to the market study interim report argued that '[c]omplaints about ranking practices should be referred to the digital markets unit, which must have the power to investigate and impose remedies. This complaints process should be available to publishers which have concerns about the impact of existing ranking algorithms on their traffic'.<sup>65</sup>

---

<sup>64</sup> Google's response to our consultation on the Interim Report, paragraphs 52 and 53.

<sup>65</sup> NMA's response to CMA consultation on the Interim Report, paragraph 3.7.1.

- 3.10 Alongside the concerns about lack of transparency, some publishers also expressed concerns over platforms' possible motives for algorithm changes. There was concern that algorithms could be used to reward or punish news publishers based on other commercial relationships they may have with the platforms, as a bargaining tactic in other negotiations. The lack of transparency makes it very difficult for news publishers to discern if this is the case – but nevertheless the hypothetical presence of such incentives was a concern. The fear of such action can contribute to news publishers' perceptions of their weak position when bargaining with the platforms.
- 3.11 We have not been able to investigate specific complaints as part of this work and note that the platforms have denied that they manipulate algorithms based on wider commercial factors. However, the platforms' ability to change their algorithms, combined with the lack of transparency over how these algorithms work, mean that there is an important role for a code in providing reassurance to publishers and other third parties.

### **Data access asymmetry**

- 3.12 Two key concerns were raised by publishers in relation to data. The first was about the amount of data firms gather on users engaging with publisher sites. The second related to restrictions imposed on publishers accessing data when content is delivered in a particular format by the platform (such as when articles are displayed in AMP or IA formats).<sup>66</sup>
- 3.13 As noted in section 2, large platforms enjoy a significant data advantage over online publishers because they have access to large volumes of valuable first party data<sup>67</sup> and greater opportunity to track and collect data on users across the online ecosystem.<sup>68</sup> Gathering user data from publisher websites increases the data advantage of large platforms over other publishers and increases the value of their advertising inventory relative to that of other publishers.
- 3.14 The ability of large platforms to access user data from other publishers also has the potential to devalue the data publishers hold. Publishers are concerned that access to this data by Google and Facebook may lead to it being used by advertisers for targeting of ads on sites other than the original

---

<sup>66</sup> AMP and IA offer faster browsing speeds by preloading content and are primarily used for mobile access. We understand that these formats can have different rules around monetisation and advertising, and can limit the data which can be derived from users. See also Box 2.1.

<sup>67</sup> Paragraph 5.307: CMA Online platforms and Digital Advertising Market Study [Final report \(publishing.service.gov.uk\)](#).

<sup>68</sup> Paragraph 5.307: CMA Online platforms and Digital Advertising Market Study [Final report \(publishing.service.gov.uk\)](#).

publisher website. This ‘data leakage’ may mean that data on a publisher’s unique audience may be ‘commoditised’ and used to target ads on cheaper sites and apps, which in turn might undermine the value of advertising inventory on a publisher’s own website.<sup>69 70</sup> While the scope of this problem is difficult to determine, we have heard concerns that platform practices such as the use of cookies to derive data on users engaging with publisher websites may undermine the value proposition from publishers to advertisers.

- 3.15 Publishers also expressed concerns that they do not enjoy full access to the data associated with their content when it is hosted by third parties, limiting their ability to understand, monetise and tailor content for their audience. For example, some publishers told us that if a reader views content on AMP or IA then the content provider will receive no insight into what content has been consumed. Google told the CMA that it ‘strives to create parity between the user data that publishers can collect on AMP pages and the data that publishers can collect on non-AMP pages’, and that to the extent that this is not possible, it compensates via an ‘analytics partner/tool’ that allows the news publisher to gain data that is ‘substantially similar’ to what it can collect on traditional web pages. Facebook told the CMA that it provides ‘a variety of tools which can be used by news publishers to gather data and insights on the performance of their posts and advertising campaigns’ (although the data therein is aggregated to ensure compliance with privacy requirements) and that ‘Facebook has built its services to respect the monetisation and data flows applied by publishers to their content,’.
- 3.16 In spite of the concerns some news publishers express about the use of these page formats, their alternatives can be limited. Some news publishers told us it can be difficult to opt out of page formats which provide a better reader experience, retain a higher proportion of users, and may be ranked more highly by algorithms – but which go hand-in-hand with a loss of advertising revenue and data, which itself is valuable for revenue. As with the other concerns presented in this section, we have not investigated individual complaints as part of this work. However, in our view the imbalance in the amount of data between large platforms and publishers, coupled with platforms’ control over access to that data, mean that there are legitimate concerns which should be addressed by a code.

---

<sup>69</sup> Paragraph 57: CMA Online platforms and Digital Advertising Market Study [Appendix S: the relationship between large digital platforms and publishers \(publishing.service.gov.uk\)](#).

<sup>70</sup> Jeon, D. (2021), Market Power and Transparency in Open Display Advertising – A Case Study, <http://www.tse-fr.eu/fr/publications/market-power-and-transparency-open-display-advertisingcase-study>

## Content presentation and loss of control over branding

- 3.17 Developing a brand and trust with users is key to news publishers' business models. This can be challenging when users access content via Google and Facebook, because these firms control how content is presented and, moreover, tend to display it in a disaggregated format.
- 3.18 For example, on a Facebook News Feed, news content will typically appear as an isolated entry in the user's News Feed alongside completely different types of content (predominantly that generated by the user's 'friends, family and groups'<sup>71</sup>).
- 3.19 This may reduce publishers' ability to curate their own product, prioritise news stories on the basis of their own judgment, and build and maintain their brands. The BBC has shared research with us that (consistent with Ofcom research) shows users find it harder to attribute/credit original content producers via third-party platforms.
- 3.20 There is a risk that these issues could be exacerbated as firms develop bespoke products hosting publisher content. The design and presentation of products hosting publisher content have the potential to keep users within a platforms' ecosystem, where content remains disaggregated and the publisher/consumer relationship is harder to develop.

## Payment for content

- 3.21 As a result of the decline of print media (and print advertising), news publishers are heavily reliant on their online presence to disseminate and monetise their product. As set out in section 2, this gives the platforms significant bargaining power over news publishers.
- 3.22 Some news publishers claim that they are not receiving fair value for the use of their content. However, they also have limited information on how their content is used and so their ability to assess fair value is restricted. During the market study<sup>72</sup> some publishers referenced a study by the News Media Alliance (NMA) which estimated that Google receives \$4.7 billion in revenue from news publishers' content worldwide in 2018.<sup>73</sup> The methodology of this

---

<sup>71</sup> Facebook blog post: [News Feed FYI: Bringing People Closer Together](#), in particular the statement from CEO Mark Zuckerberg that '*The first changes you'll see will be in News Feed, where you can expect to see more from your friends, family and groups*'.

<sup>72</sup> Paragraph 43, : CMA Online platforms and Digital Advertising Market Study [Appendix S: the relationship between large digital platforms and publishers \(publishing.service.gov.uk\)](#)

<sup>73</sup> See News Media Alliance, June 2019, 'New Study Finds Google Receives an Estimated \$4.7 Billion in Revenue from News Publishers' Content'.

study is, however, limited<sup>74</sup> and, as Google pointed out in response, ‘the overwhelming number of news queries do not show ads’<sup>75</sup> (and no advertising is currently displayed on Google News).

3.23 Google and Facebook have typically argued that their relationship with the media is at least mutually beneficial, in that it provides them with content that attracts people to their services, while providing news publishers with traffic that they would otherwise struggle to attract. Facebook in particular has been unwilling to accept that it should remunerate publishers for content that it ‘neither take[s] nor ask[s] for’.<sup>76</sup> In a submission to the EU, as part of its development of the EU Copyright Directive, Google submitted research that it said showed that news publishers in the EU benefited significantly in financial terms from traffic referred to their websites by third parties (including Google Search).<sup>77</sup>

3.24 We have not attempted to quantify whether the current balance of payment terms between the large platforms and news publishers is fair; the purpose of this advice is instead to determine how a code might apply to this question in principle, as set out in section 5. Nevertheless, the principle of fair trading under a code could be used to ensure fair payment for content. We discuss the practicalities of doing this in section 5.

3.25 As we note above, since the CMA’s market study into online platforms and digital advertising, Google and Facebook have introduced new products which provide a mix of curated and personalised news content: Google Showcase and Facebook NewsTab. We understand that Google and Facebook pay certain news publishers to license the use of their content within these services. During our recent stakeholder engagement, a number of issues have been raised in relation to these products, including:

- These products cover only a small proportion of the news content that is used by Google and Facebook in their services – for example any content displayed via Google Search (outside of Showcase) is not remunerated and no negotiation is offered.
- Publishers told us that the level of remuneration for use of content by Google and Facebook within these services is very low, insufficient to

---

<sup>74</sup> It takes an estimate stated by a Google executive for news related revenue in 2008 (\$100m) and simply extrapolates this to 2018 by assuming that Google revenue from news represents that same proportion of total revenue from Google properties in 2018 as it did in 2008.

<sup>75</sup> As referenced in [New York Times article, 9 June 2019](#).

<sup>76</sup> See Facebook account of ‘[The Real Story of What Happened With News on Facebook in Australia](#)’ (Nick Clegg).

<sup>77</sup> Deloitte (2016): The impact of web traffic on revenues of traditional newspaper publishers A study for France, Germany, Spain, and the UK (commissioned by Google).

cover the value extracted by Google and Facebook from the use of news content. Publishers report that there is no transparency or explanation about how these figures have been derived.

- Licence payments are only made available to certain news publishers, with the payments tending to favour larger publishers.

## **Advertising concerns**

3.26 As noted above, the platforms' strong position in digital advertising is a key contributor to their bargaining power imbalance with respect to news publishers. Publishers have raised a number of concerns with how the ad tech market works, many of which were investigated as part of the digital advertising market study. Although these concerns are outside the direct scope of this advice, we summarise them briefly here because they provide important context for the concerns about how publishers' content is used. We would also expect an SMS code to be able to address at least some of these concerns, as set out in the digital advertising market study.

3.27 We identified two main groups of concerns:

- First, publishers are concerned that they are not able to compete on a level playing field with large platforms when selling advertising inventory, in particular given the platforms' greater ability to use data to provide effective targeting and attribution, allowing them to earn higher advertising revenues.
- Second, publishers expressed concerns about their reliance on ad tech intermediaries, in particular given Google's very strong position in the ad tech supply chain, and concerns that a significant proportion of publishers' ad revenues go to intermediaries.

3.28 In relation to the first set of concerns, the sustainability issues faced by news publishers are in part the result of an advertising market which has rapidly transformed and moved online, and in which the large platforms including Google and Facebook have taken a significant share. News publishers now compete with a variety of platforms and services for what was traditional advertising revenue<sup>78</sup> and they compete directly for advertising spend with the same platforms which they increasingly rely on to provide access to their customers, including Google and Facebook.

- 3.29 The growth of online advertising at the expense of traditional advertising is not itself a problem – indeed, online advertising can bring advantages for both publishers and the big platforms. However, as set out in the digital advertising market study, news publishers, in particular smaller publishers with smaller audiences and less first party data on users, are at a competitive disadvantage. The scale of Google and Facebook in particular, and the data that they hold, make their advertising inventory more valuable; this is added to by their scale and reach (because more people spend more time on, for example, Facebook than they do on news websites).
- 3.30 The importance of both scale and access to data in providing effective targeting and attribution of online advertising relates back directly to the concerns outlined above about publishers’ access to user data. In particular, it is important that publishers are able to access data about the activity of users when engaging with content on the SMS platforms, and also that the platforms are only able to gather information on user activity on the publishers’ sites which is necessary for the services that they are providing to the publishers.
- 3.31 In relation to the second set of concerns, the CMA’s digital advertising market study found that:
- Ad tech intermediaries capture at least 35% of the value of advertising bought from newspapers and other content providers in the UK.<sup>79</sup>
  - There is a lack of transparency over ad tech fees, since publishers only have limited information on individual transactions and it is not always clear which advertisers have advertised on a publisher’s site.
  - Google has a very strong position in providing services throughout the ad tech chain, and in particular as a publisher ad server, where we found that Google’s share of supply was greater than 90%.<sup>80</sup>
- 3.32 We have not investigated these concerns further as part of this project, since they do not relate directly to the issues relating to the hosting of publisher content on the platforms’ sites. However, we recognise that they are an important element of the news publishers’ overall interaction with the online platforms, and we would expect the SMS code to apply to these concerns.

---

<sup>79</sup> [Final report \(publishing.service.gov.uk\)](#) – paragraph 15.

<sup>80</sup> *Ibid.* – paragraph 63.

3.33 We also note that there are a number of ongoing antitrust investigations into ad tech in the UK and elsewhere which are seeking to address these concerns. These include:

- The CMA's Competition Act investigation of Google's planned Privacy Sandbox browsers changes, which will involve removing third party cookies and other functionalities from its Chrome browser.<sup>81</sup>
- The European Commission's investigation into possible anticompetitive conduct by Google in the online advertising technology sector.<sup>82</sup>
- Investigations in the US, including by a number of State Attorneys General into Google's conduct in ad tech.<sup>83</sup>
- An inquiry into digital advertising services by the Australian Competition and Consumer Commission.<sup>84</sup>

---

<sup>81</sup> [CMA to investigate Google's 'Privacy Sandbox' browser changes - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

<sup>82</sup> [Antitrust: Google in the online advertising technology \(europa.eu\)](https://european-council.europa.eu)

<sup>83</sup> [20201216 COMPLAINT\\_REDACTED.pdf \(texasattorneygeneral.gov\)](https://www.texasattorneygeneral.gov)

<sup>84</sup> [Digital advertising services inquiry | ACCC](https://www.accc.gov.au)

## 4. How a code could apply to non-payment terms

- 4.1 This section sets out how the concerns raised by the news publishers in relation to non-payment terms could be addressed under an SMS code regime.
- 4.2 A code could be particularly effective in addressing behaviour critical for effective competition between publishers and with the platform, for example the use of algorithms and access to data. Code principles could be targeted at ensuring that competition works effectively and that the SMS platforms are not able to exploit a position of market power over other content providers.
- 4.3 As with the other parts of this advice, the suggestions below start from the broad framework envisaged by the government's consultation, although the precise formulation of code principles and guidance will depend on the final approach set out in legislation. We first set out how the high-level principles would apply, and then discuss the specific concerns relating to algorithms, content hosting and data access.

### ***Framework for an enforceable code of conduct***

- 4.4 As set out in the government's recent consultation,<sup>85</sup> exactly how an SMS code would operate and the final legislative structure is yet to be determined. Nevertheless, a code could cover many of the concerns outlined in the previous section, and we discuss in more detail below how this could be done under the government's proposed code objectives.<sup>86</sup>
- 4.5 The application and form of legally binding principles or firm-specific requirements beneath these objectives are subject to the final legislative structure for such codes. We do not speculate on what the outcome might be here and our advice is aimed at informing the ongoing discussion about how the new SMS regime will work in practice. However, it is likely that any principles would be supplemented with guidance, which would outline how a code's legal requirements would apply to a specific firm. This guidance may include examples of behaviours that we expect to breach a code, and clarify what is expected of SMS firms.
- 4.6 The aim of principles-based regulation is that it would allow platforms to make informed judgments about their own behaviour and strategies. Again, the form of guidance will be dependent on the eventual legislative structure and the process of designating firms with SMS, so it is not appropriate for us to

---

<sup>85</sup> [A new pro-competition regime for digital markets \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

<sup>86</sup> See p31 figure 4.

attempt to produce draft guidance here. We also envisage that the approach of the regulator will be participative in nature, which would mean the regulator engaging in consultation – both with any potential SMS firms and more broadly with interested parties – during the process of drafting, and before adopting, any firm-specific requirements or guidance. Accordingly, the points we make in this advice about how a code might work are only illustrative.

## **Algorithms**

### *Issues*

- 4.7 As set out in section 3, the strong positions of the largest platforms gives them significant power over news publishers and this is particularly felt in the impact of ranking algorithms<sup>87</sup>:
- (a) News publishers report a lack of transparency and complexity in understanding how these algorithms operate.
  - (b) News publisher traffic is in many cases highly sensitive to changes the platforms make to these algorithms, and news publishers consider that they have limited information on the content, rationale or timing of these changes.
  - (c) There are also concerns that this power, and the sensitivity of news publishers to any changes, creates the opportunity for algorithms to be manipulated to encourage acquiescence on other terms. This might include, for example, encouraging take-up of an alternative commercial product, or discouraging other publisher behaviour such as public criticism of the platform.
- 4.8 Were a code to come into force with certain platforms designated as having SMS, our view is that it could address all of these issues. For illustrative purposes we consider how these issues are likely to be addressed under the objectives of Fair Trading, Open Choices and Trust and Transparency set out in the government’s consultation paper.

### *Algorithms as a manipulation tool*

- 4.9 Our view is that a code would expect that SMS firms treat news publishers equally unless there is an objectively justifiable reason to differentiate between them. This is perhaps most clear when considering concerns about

---

<sup>87</sup> See OECD Competition Committee, background note on competition issues concerning news media and digital platforms, section 3.2.4. Available at: Competition issues in News Media and Digital Platforms – OECD.

how news publisher content is displayed through algorithmic ranking and prominence. In these situations, our view is that news publishers should be treated equally; for example, it would not be objectively justifiable to:

- (a) Promote firms with which the SMS firm has an existing commercial relationship, including through self-preferencing.<sup>88</sup> This is to ensure that ranking (when combined with bargaining power) cannot be used to leverage deals elsewhere on new products, particular web formats or improved access to user data (see concern discussed in paragraph 3.13).
- (b) Demote firms who have complained about SMS firms' conduct either in public or to regulators.

- 4.10 There could be objectively justifiable reasons to discriminate: for example to meet other legal obligations around harmful content or GDPR, for content classified as advertising or where it is demonstrably in the consumer interest (whilst noting our concerns about promoting alternative commercial products in paragraph 4.5c).

#### *Transparency and complexity of algorithms*

- 4.11 We would expect that SMS firms provide clear, relevant, accurate and accessible information to users on how the algorithms and processes which determine how content is surfaced operate, the most material factors involved, and changes to these over time. While it would be for the SMS firm to determine how it does that under a code, we expect news publishers to have a good understanding of the factors that determine prominence and how they change over time. There is clearly a balance to be struck between accessible information to allow news publishers to make informed judgements, and full transparency allowing them to game the system. We envisage that it would be for the SMS firm to provide assurance on how they have met the principle, and have processes in place to explain how they have done so.
- 4.12 We would also expect SMS firms to allow sufficient audit and scrutiny of these processes (including explaining their algorithmic systems) by the regulator to give news publishers confidence that the principle is being adhered to.

#### *Fair warning of changes*

- 4.13 We would likely expect SMS firms to consider how they make changes to these processes, given concerns from news publishers that they can be made

---

<sup>88</sup> This would not apply to paid advertising, see paragraph 4.8 below.

with little notice and can have a significant impact on publishers' revenues. As set out above we would expect SMS firms to be required to give 'fair warning' of changes that 'are likely to have a material impact' and provide 'clear, relevant, accurate and accessible information provided' on their substance and rationale. It will be for the SMS firm to put in place such processes as are necessary to comply, and subsequent guidance (adopted following consultation once the form of legislation is settled) would clarify the regulator's interpretation of any principles and examples of behaviours we would consider in keeping with the principle. At this stage our view is that platforms should have clear processes for determining how they make such decisions, what the appropriate notice to give news publishers is, and have an effective process in place for handling complaints.

### ***Content hosting and data***

4.14 Section 3 sets out the claims from news publishers regarding the hosting of content by online firms and the use of unjustified data terms. Were a code to come into force, with certain platforms designated as having SMS, our view is that it could drive improved practices in relation to the following activities (under the high-level objectives proposed by the government) by:

- (a) Preventing unjustified data leakage from publishers through SMS firms.  
*For example*, when providing services to access news publisher content through search or social media functions, we would expect that SMS firms should only require the collection of data that is reasonably linked to the provision of that service. This includes restricting the extent to which SMS firms can require data collection through the use of cookies on a news publisher's site.
- (b) Supporting publishers to present content in their preferred web format.  
*For example*, we would expect that where possible SMS firms should enable news publishers to present content to mobile users in their preferred web format unless there is an objective justification to require the use of other formats. This should better enable news publishers to host users on their own websites/apps and thereby reduce the imposition of any data or other restrictions which may relate to web formats required by SMS firms.
- (c) Ensuring any requirements on publishers to use specific web formats are objectively justified.  
*For example*, we would expect that SMS firms should avoid imposing format requirements (either direct or indirect) on publishers on the basis of: restricting user movement away from the firm's services; or delivering financial/data-derived benefits for the firm. However, we believe some

restrictions could be objectively justified where using a particular web format delivers a user benefit and such benefit could not be delivered in another way.

- (d) Ensuring any requirements on publishers to use specific web formats do not unfairly restrict the relationship between publishers and users. *For example*, where an objective justification exists to require the use of a particular web format, we would expect that the SMS firm should enable, as far as reasonably possible, news publishers to understand their users and build a customer relationship. We believe this could entail activities such as: ensuring the news publisher's content is adequately attributed, enabling users to move into the news publishers website/apps without unjustified interference, and providing the publisher with fair access to data which would help them to understand their audience and thereby tailor and monetise their content more effectively. These activities would further support user choice by allowing them to view content in their preferred manner.

- 4.15 These activities would be strengthened by setting expectations on SMS firms regarding transparency and providing fair warning of material changes to terms relating to data and web format requirements, including how sources can be attributed.

## 5. How a code could apply to payment for content

- 5.1 In this section we set out how a code could apply to publisher concerns relating to payment for content. While we cover payment for content in isolation here, it is important to recognise that a wide range of factors, such as those discussed above including access to user data, might form part of a ‘fair and reasonable’ settlement – and thus any contractual package would have to be assessed in its entirety.
- 5.2 The detail of the advice, particularly as it relates to consideration of content value, has been developed with a particular focus on news content. We have not considered in the same detail how similar assessments might be undertaken with respect to other types of content. While the principles set out here would have an application across all content, the specific payment settlements could vary significantly.

### Payment for content under the SMS code

- 5.3 We consider that use of content by SMS firms would be covered by an SMS code. Under the ‘fair trading’ objective, content providers should be entitled to fair and reasonable compensation for the use of their content by SMS firms.
- 5.4 It is complex to determine what ‘fair and reasonable’ compensation is, and there is likely to be disagreement between SMS firms and publishers. For this reason, it would be important to set out guidance for how fair and reasonable terms might be assessed under a code. We describe what this guidance might consist of in more detail below.
- 5.5 It is important to note that any intervention under a code would only be intended to address the impact of bargaining power of the SMS platforms, and would not address the wider challenges facing news publishers.

### *The current situation*

- 5.6 It may be that content providers do not receive a fair share of the joint value that is created from use of their content by platforms. As set out in sections 2 and 3 above, the strong bargaining position of platforms is a common concern amongst content providers, who say that it enables platforms to use their content while providing little or no financial compensation.<sup>89</sup>

---

<sup>89</sup> As we note above in Section 2 platforms have argued that content providers receive increases in traffic to their websites (which they can then monetise through advertising) as a form of compensation.

- 5.7 When platforms and content providers collaborate, value is created for both the platform and the content provider through their relationship. The use of content by platforms increases consumer and advertiser demand for their services. It also drives demand for the content providers' own services where customers click through to the providers' websites. In both cases valuable data and advertising revenue are generated.<sup>90</sup> There will also be incremental costs associated with the use of content, such as the cost of adapting the service, and the content itself, so that it is in a form that is suitable for use within the platforms' services. The joint value that is created is the sum of the incremental benefits of both parties generated by the use of content, less the sum of any incremental costs incurred.
- 5.8 Where platforms have strong bargaining power it is likely that they will capture a large proportion of this joint value. Indeed, if many content providers view the services of platforms as being must have, it is possible that the platforms could capture almost all of this joint surplus. Accordingly, although the value creation is two-way, the publisher may have to accept current terms based on little or no financial remuneration for content even if the consequence is that the majority of joint value is retained by the platforms.
- 5.9 The bargaining power of platforms may also affect the total joint value created when compared to what would happen in a more competitive market without such buyer power. This is because low prices for content may lead to a reduction in investment in content. This may well be profitable for an SMS platform because, although low prices reduce the size of the joint surplus, as the buyer, the SMS firm captures a greater share with a low price.
- 5.10 As we concluded during the market study<sup>91</sup>, some of the larger platforms are likely to have significant market power and may be designated as SMS firms under the SMS code. Where this is the case, the fair trading objective of a code will apply to them and content providers should be entitled to fair and reasonable compensation for the use of their content by SMS firms. Fair and reasonable compensation for content should ensure that content providers receive a fair share of the joint value that is created by the use of their content by an SMS firm.

---

<sup>90</sup> See CMA Online Platforms and Digital Advertising Market Study [Appendix S: the relationship between large digital platforms and publishers \(publishing.service.gov.uk\)](#); Colangelo, G. (2021), "Enforcing copyright through antitrust? The strange case of news publishers against digital platforms", *Journal of Antitrust Enforcement*.

<sup>91</sup> CMA Online Platforms and Digital Advertising Market Study [Final report \(publishing.service.gov.uk\)](#).

## What might fair and reasonable obligations look like in practice?

5.11 In this section we discuss how fair and reasonable obligations have been used in other pricing contexts and some of the pros and cons of using more detailed descriptions versus using higher level principles to set out what is fair and reasonable. This provides the starting point for then considering what might be appropriate in code guidance on payment for content.

### *Use of fair and reasonable obligations in other markets*

5.12 The use of a fair and reasonable obligation for compensation or pricing occurs in a number of different contexts such as utility regulation, where obligations are often placed on firms with market power to provide access to services on a fair and reasonable basis; and standard essential patents. In practice these obligations usually also involve a non-discrimination requirement in addition to a fair and reasonable obligation to ensure that there is no undue discrimination in the terms and condition offered to different parties.

5.13 The level of detail on what is fair, reasonable and non-discriminatory (FRAND) varies significantly from context to context, from very high-level principles (for example, that a price should be fair, reasonable and non-discriminatory) through to detailed methodologies for how prices should be set. We set out some examples and discussion of how fair and reasonable obligations have been used in other contexts in Appendix C, and summarise in Box 5.1 below how FRAND obligations have been applied by Ofcom in the telecoms sector in relation to BT and KCOM.

#### **Box 5.1 Example of FRAND obligation from telecoms**

Ofcom's Review of the Wholesale Local Access Market Statement on market definition, market power determinations and remedies 2010 states that: 'We also consider that any pricing to be charged on a fair and reasonable basis under the network access obligations would be appropriate in order to promote efficiency and sustainable competition and provide the greatest possible benefits to end users by enabling competing providers to buy network access at levels that might be expected in a competitive market.'

Section 47(2) requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. The conditions are:

- both objectively justifiable and a proportionate response in relation to the extent of competition in the markets analysed, as it ensures that BT and KCOM are unable to exploit their market power and enables competitors to purchase services at charges that would enable them to develop competing services to those of BT and KCOM in downstream markets to the benefit of consumers, whilst at the same time allowing BT and KCOM a fair rate of return that they would expect in competitive markets;
- not unduly discriminatory, as it applies to both BT and KCOM and no other operator has SMP in these markets; and
- transparent, in that it is clear in its intention to ensure that BT and KCOM should set charges on a LRIC+ basis.

Ofcom replaced the fair and reasonable obligation requiring BT to set the Virtual Local Unbundled Access (VULA) charges with a condition to maintain a minimum differential between the wholesale VULA price and the price of the retail packages offered by BT that use VULA as an input supplemented by guidance on how compliance with the condition would be assessed.

Sources: [Paragraphs 5.81-5.82, Ofcom \(2010\): Review of the wholesale local access market Statement on market definition, market power determinations and remedies](#); and paragraphs 4.62 to 4.72: [VULA margin statement - non-confidential \(ofcom.org.uk\)](#).

## Guidance on the assessment of fair and reasonable compensation for content

- 5.14 In this section we discuss what the guidance<sup>92</sup> on fair and reasonable compensation for content might look like under the SMS code. Our current view is that the guidance on what is fair and reasonable would need to go beyond high level FRAND principles but that setting out a detailed methodology on how to calculate what is fair and reasonable compensation would not be appropriate in this context.
- 5.15 Assessing what is fair and reasonable compensation for use of content is complex and there are likely to be significant areas of disagreement between SMS firms and content providers about how to assess the joint value created from use of content by SMS firms. Failure to provide further guidance would likely result in significant uncertainties for the parties involved about what in fact is fair and reasonable and could lead to a large number of disputes needing to be determined by the regulator.
- 5.16 However, setting out a detailed methodology on how to calculate what is fair and reasonable compensation would not be appropriate in this context. Doing

---

<sup>92</sup> Specific guidance is likely to be needed in any circumstance, regardless of the exact legislative framework.

so may unnecessarily limit the flexibility of the parties involved and – given the nature of the online environment – such a methodology is unlikely to be future-proof.

- 5.17 Ultimately, the aim of the guidance would be to provide clarity for the parties involved to help them come to an agreement whilst allowing sufficient flexibility such that these solutions could be market-based and commercially beneficial. In addition, the guidance should support the parties coming to an agreement amongst themselves and seek to avoid costly disputes that would need to be settled by the regulator.
- 5.18 The terms of any agreements would include what copyrighted content is to be reproduced by the platforms, under what circumstances, and what consideration is provided, including data, as well as any financial consideration. Taken together, these terms would be assessed<sup>93</sup> against whether they are compliant with a code, and whilst the legislative framework is yet to be finalised, this is likely to involve an assessment of whether the terms are ‘fair and reasonable’. Guidance would set out the framework the DMU would follow to assess whether these terms are compliant with a code. However, it would not be a detailed methodology. Different methods and terms may prove ‘fair and reasonable’ when assessed against this framework.
- 5.19 In the remainder of this section we set out in more detail what guidance on fair and reasonable compensation is likely to include. Our view is that the guidance should set out a number of key principles<sup>94</sup> to provide clarity for SMS firms and content providers and facilitate them reaching an agreement on what is fair and reasonable compensation for use of content. These principles are:
- The joint value should include the incremental benefits and costs accruing to both to the SMS firm and the content provider from using the content;
  - The assessment of joint value should take a broad view of value created through use of content by SMS firms and not just include advertising revenue from paid advertising placed around the content;
  - The assessment of joint value should be carried out collectively for all UK publishers of a particular type of content, i.e. joint value should be the

---

<sup>93</sup> Once brought to the DMU's attention and subject to how the eventual system deals with complaints, informal engagement, prioritisation and other factors.

<sup>94</sup> The code is intended to be principles-based, but with sufficient flexibility to determine how those principles apply across the different digital markets, including through guidance. This section discusses the way that guidance could be presented, and in particular whether it could include prescriptive definitions of how ‘fair and reasonable’ pricing principle could be applied to the platforms and publishers. The use of the term ‘principle’ here is not intended to have the meaning of a code principle but is part of the guidance.

value created from use of content from all providers of a certain type of content (e.g. news) by an SMS firm;

- Joint value should include value generated by the use of copyrighted content, but this does not include any obligation to remunerate harmful content;
- Compensation for use of content should ensure content providers receive a fair split of joint value between SMS firms and content providers; and
- Compensation for use of content should not unduly discriminate between content providers.

***The joint value includes the incremental benefits and costs accruing to both the SMS firm and the content provider from using the content***

5.20 As we note above, the joint value that is created through the use of content by SMS firms is the sum of the incremental benefits of both parties generated by the use of content less the sum of any incremental costs. We have reviewed how content is used and how incremental benefits and costs arise from the use of content across a number of Google and Facebook services, including those most likely to be given SMS status on the basis of analysis carried out in the CMA’s Online Platforms and Digital Advertising market study – Google Search and Facebook social media.

5.21 This work showed that the main categories of benefits and costs which accrue to platforms and content providers are very similar across these services, although the exact details of how they accrue, how they would need to be calculated and their scale will differ. We summarise the main categories of costs and benefits that accrue to SMS firms and content providers due to use of content in Table 5.1 below. Whilst the input we have received has largely come from news publishers, much of what we set out below is applicable to other types of content provider.

**Table 5.1. Main categories of cost and benefits accruing to SMS firms and content providers due to use of content**

	<b>Benefits</b>	<b>Costs</b>
<b>SMS firms</b>	<p><b><u>Benefits from direct interaction with a content providers’ content</u></b></p> <p><b>Direct advertising</b> – SMS firms derive advertising revenues from ads placed around content. For example, when content from a news publisher appears in search results then it may be placed alongside paid search results.</p>	<p><b>Incremental costs of hosting content</b> – There are often high sunk costs incurred by the SMS firms in developing and maintaining their services. However, most of these costs will not be incremental to the hosting of certain types of content (e.g. news content) and therefore would not be relevant for the calculation of joint value.</p>

	<p><b>Data benefits</b> – When users interact with content used by the SMS firms’ services, the firms obtain data about those users.</p> <p>This data can then be combined with existing data held by the SMS firm on those users and can be used by the SMS firm in supplying targeted advertising across the SMS firm’s suite of advertising services.</p> <p>For some, but not all, services SMS firms pass on a share of the benefits they receive from use of content to content providers in the form of a share of the advertising revenues or licence fees</p> <p><b><u>Wider market expansion/indirect benefits</u></b></p> <p>Even when not interacted with directly, a particular content provider or type of content can generate benefits for the SMS platforms. Content used by SMS firms’ services as a whole plays a role in attracting users to those services in the first place and keeping them there. More users and more time spent on the SMS firm’s service leads to more opportunities for monetisation via advertising displayed to these users.</p>	<p>For some services provided by SMS firms there will be incremental costs attributable to the hosting of specific content. For example, in the case of breaking news, search services have to be developed to accommodate this. The nature of breaking news means that search providers cannot index the relevant webpage in the manner that they do with most webpages and consequently need to develop alternative methods of accessing these pages.</p>
<p><b>Content providers</b></p>	<p><b><u>Benefits from user clicking through to content provider web properties from SMS firms’ services</u></b></p> <p><b>Direct advertising</b> – Where content is used by SMS firms in their services it will often be accompanied by a hyperlink back to the original content hosted on the content providers’ web properties. Where a user clicks through to these properties the content provider can earn revenues derived from ads placed around content. Note it is only revenue derived from clicks that are truly incremental due the use of content by the SMS firm that would be relevant.</p> <p><b>Other monetisation opportunities</b> – when content is used in some SMS firms’ services then the content providers can monetise the content in ways other than advertising such as through subscriptions and sponsorship or branded content.</p> <p><b>Data benefits</b> – When users click through to the content providers’ properties and they interact with the content on these properties the content provider is able to obtain potentially valuable first party data about the preferences and interests of these users. This data can then be combined with existing data held by content providers and used to more effectively target ads to users of their web properties thereby increasing the value of its advertising inventory.</p>	<p><b>Curation cost</b> – In some cases there is an incremental cost to content providers for providing content and maintaining it in a format that can be used by an SMS firm’s services.</p> <p><b>Content production</b> – in some cases content providers may create online-only content which they might not otherwise have created without the ability to reach users through SMS firms’ services.</p> <p><b>Substitution effects</b> – Where users interact with a content provider’s content within the services of an SMS firm this may lead to a reduction in the number of users visiting the content provider’s web properties. For example, a user may see a news headline in search results but not click through to the news article, therefore the content provider is unable to monetize this user interaction with its content through advertising. If the content were not used in the SMS firm’s services the users may have visited the content provider’s web properties. Note this is the converse of the market expansion effect.</p> <p><b>Disintermediation</b> – Where users interact with a content provider’s content within the services of an SMS firm the provider’s control over that content and over the presentations and branding of that content is reduced. This may mean that users do not accurately attribute content production to the correct content provider. This can erode the value of content</p>

	<p><b><u>Wider market expansion/indirect benefits</u></b></p> <p>Hosting of content providers' content on an SMS firms' services can have benefits for content providers which are not necessarily a result of users clicking through to their properties. It can improve the brand awareness and content discovery of the content provider. This can lead to an increase in the number of users visiting their web properties which the content provider can monetise through data and advertising.</p>	<p>provider's brand, particularly where it invests significant amounts in producing original and substantial content.</p>
--	--	---

- 5.22 It is important to recognise that the creation of value is a joint enterprise and that the use of content by an SMS firm creates benefits and costs to both the SMS firm and the content provider. Any assessment of joint value should include the benefits and costs accruing to both platforms and publishers from the use of the content.
- 5.23 In addition, only benefits and cost that are genuinely incremental to the use of the content are relevant to the assessment of joint value. In some cases benefits and costs that might appear to fall into one of the categories outlined in Table 5.1 are not genuinely incremental and care must be taken to establish what benefits and costs are genuinely incremental. For example, in the case of direct advertising benefits accruing to content providers (where a user clicks through to the content properties online properties the content provider can earn revenues derived from ads placed around content) it is only revenue derived from clicks that are truly incremental due the use of content by the SMS firm that would be relevant. This is not the same as all clicks through to content providers properties from the content used by the SMS firm. The assessment of what are genuinely incremental clicks needs to consider that, if the content were not used by the SMS firm, then many of these clicks might occur anyway as users would find alternative ways to access the content (such as going direct to a website).

***The assessment of joint value should take a broad view of value created through use of content by SMS firms***

- 5.24 Based on our discussions with platforms and publishers in the process of preparing this advice, there is likely to be disagreement between platforms and content providers about which of the incremental benefits and cost identified in Table 5.1 should be incorporated in any assessment of joint value. This disagreement is most notably around whether a narrow or wider view of benefits accruing to the SMS firm should be adopted.

- 5.25 Google and Facebook have argued for a narrow view, where the monetary benefits to them are limited to the revenues that accrue from advertising that is placed around or on the same page as the content ('Direct advertising' in table 5.1). These are the revenues that are more easily identified and most directly attributable to use of content. Google contends that such revenue is primarily generated by elements other than content such as its proprietary ranking technology; and Facebook told us that advertising is not targeted to appear directly around any specific content, like news, but is instead tailored to target users.
- 5.26 Content providers typically argue for a wider view which incorporates all of the benefits that accrue from the use of their content by platforms. This wider view would include the value of data acquired by platforms ('Data benefits') when users interact with their content as well as the contribution of their content to attracting users to the platform's services and keeping them there ('Market expansion/indirect benefits').
- 5.27 The narrow view favoured by the platforms is easier to identify and estimate as it is based on measurable advertising revenues; however, in our view it misses out important aspects of the joint value. We also note that estimates of joint value which only incorporate direct advertising are likely to be relatively low.
- 5.28 Our starting point in drafting guidance would be that a wider view of these benefits should be adopted. Although there are practical challenges in estimating the wider value, it forms an important part of the benefit to the platforms in hosting publishers' content, and thus to ignore these wider benefits might significantly underestimate the value of content to the platforms. We note that the French Competition Authority recently endorsed the view that levels of compensation for use of content should reflect value derived by Google from its use of content beyond revenues solely related to advertising displayed alongside the content.<sup>95</sup>

---

<sup>95</sup> In a summary of recent decision to fine Google for failure to comply with interim measures imposed in an abuse of dominance case on the remuneration of related rights for press publishers and agencies the French Competition Authority stated that 'Google also unjustifiably reduced the scope of the negotiation with regard to the scope of income derived from the display of protected content: according to Google, only advertising revenue from Google Search pages displaying content should be taken into account to establish the remuneration due. The Autorité considered that this position, leading to the exclusion of income derived from other Google services and all indirect income related to such content, was contrary to the Law and to the Decision; This is all the more so since the Decision noted the importance of press content for Google, which plays a role in triggering Internet users' visits and in extending consultation times, thus strengthening Google's position and the data available to it.'. See: [Autorité de la concurrence \(July 2003\), Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions.](#)

### ***The assessment of joint value should be carried out collectively for all UK publishers of a particular type of content***

5.29 We consider that assessment of the joint value should be based not on the contribution of each individual content provider's content, but on the contribution of all content providers of a certain type (e.g. news publishers) to the joint value. There are several reasons why we favour this approach:

- We consider that it would be more efficient to assess joint value on a collective basis and then divide the publisher share amongst publishers (i.e. the platform and authority would only need to evaluate one calculation for all providers);<sup>96</sup>
- This common framework would also ensure that there is consistency between assessments for individual content providers and mitigate the risk that smaller publishers get a worse deal than larger publishers; and
- The calculation is practicable because it avoids the need to estimate the joint value that would be created through the use of individual content providers' content in the absence of buyer power. Where a platform has excessive buyer power this is likely to distort the value of content and so a simple assessment of the value of content, using current market data, is unlikely to yield useful results.<sup>97</sup>

5.30 Our view is that, in principle, an approach based on collective value would be consistent with applying the 'fair and reasonable' principles under a code and is likely to be the preferred approach to assessing joint value for the reasons described above. However, it would be open to an SMS firm to set out an approach based on bilateral negotiation if it could justify why that approach resulted in a fair, reasonable and non-discriminatory outcome.

### ***Joint value should include value generated from use of copyrighted content***

5.31 Our view is that the principle of fair and reasonable compensation for use for use of content should apply to content that is currently covered by UK copyright law. The reason for this is that it is only likely to be considered fair

---

<sup>96</sup> In addition, estimating some of the more indirect elements of value for each individual content provider is not practicable, for example, in the case of the market expansion effect it is difficult to attribute the impact on the ability of SMS firms to attract and keep users on their services to individual content provider but it is more practicable to do so for a category of content e.g. news.

<sup>97</sup> An assessment of joint value based on current market data on a collective basis will offset the distorting impact of buyer power on the value of content, at least to some extent, which would reduce the need to rely on hypothetical assumptions about market outcomes in the absence of buyer power.

and reasonable for content providers to be paid compensation for content over which they have a property right.

- 5.32 This is not to say that all copyrighted content would have equivalent or even necessarily similar value. Differences in how the content is used and the type of content that is used would influence the contribution of that content to the joint value and this should be reflected in levels of compensation for its use. As we describe in Section 2, different services use content in different ways (for example services primarily with the role to refer users to content provider websites use content in a different ways to services which are primarily intended for content to be hosted within the service) and this would influence the value that the content generates for both the SMS firms and the content provider. In addition, certain types of content such as news content may be more valuable than other types of content because of the role it plays in attracting users to, and then keeping them on, the SMS firms' services. Even within a specific type of content, such as news content, some sources which are viewed as particularly reliable and/or have invested significantly in the creation of content may make a larger contribution to the joint value than some other sources.
- 5.33 In addition, a code should not be used to protect producers of harmful content. The guidance should not oblige firms to display or pay for content which is harmful.

***Compensation for use of content should ensure that content providers receive a fair share of joint value***

- 5.34 The joint value represents the combined value created between the SMS firms and content providers from the use of publishers' content. Without the contributions of both, the joint value would not be created in the first place. The level of compensation paid to content providers should ensure that a fair and reasonable share of this joint value is achieved between the SMS firm on the one hand and the collective of a particular type of content providers on the other. In principle this could involve a payment in either direction depending on the distribution of costs and benefits outlined above.
- 5.35 Although it is not necessarily the case, the current level of compensation is likely to be influenced by the bargaining power of the platforms: where platforms have strong bargaining power it is likely that they will capture a large proportion of the joint value (by offering low levels of compensation in return for using content). Indeed, if many content providers view the services of the large platforms as being must have, it is possible that the platforms could capture the vast majority of this joint value. As we note above, currently content providers receive little or no financial compensation from platforms for

using their content in their services (although the platforms argue that the content providers receive significant benefit in the form of additional traffic that is directed to their online properties).<sup>98</sup>

- 5.36 The regulator may be called upon in the event of a dispute to judge if the level of compensation results in content providers receiving a fair share of the joint value. It is not currently envisaged that the guidance will need to specify a preferred approach for assessing a fair and reasonable share of the joint value but instead this would be left to the parties involved to use a method that best applies to their particular circumstances. The emphasis in this situation would be on the SMS firm – as the party which is deemed to have SMS status – to evidence why compensation for use of content results in content providers receiving a fair and reasonable share of the joint value.
- 5.37 Our current view is that an outcome that is distorted by the significant bargaining power of the SMS firms is likely to be unfair, as the share of the joint value received by certain types of content providers may not reflect their overall contribution to its creation and because low prices for content may lead to a reduction in investment in content. A ‘fair share’ would be one which reflected the split that would be likely to occur if the SMS firms did not have significant bargaining power. The question that should be asked is, if there weren’t a significant imbalance of bargaining power, what share would the platforms keep and what would the publishers receive?
- 5.38 Any assessment of whether compensation results in a fair share of joint value of content providers would need to be based on objective criteria, which could be set out in the guidance. These criteria might include, for example (note: for indicative purposes only):
- Does the proposed level of compensation represent an improvement on the status quo which is likely to be distorted by excessive buyer power?
  - Does the proposed level of compensation enable the content provider to cover their reasonable incremental costs of producing content for use by the SMS firms and reflect the overall contribution of that content to the creation of the joint value?
  - Does the proposed level of compensation result in excessive profitability for the use of content by the SMS firm?

---

<sup>98</sup> Although the exact position varies from service to service.

- Is the proposed compensation split based on an objective and justifiable methodology (see Appendix D for a discussion of some possible methodologies)?
- Is the proposed level of compensation based on objective and justifiable evidence (such as market data)?
- Does the proposed level of compensation unduly discriminate against smaller content providers?

***Compensation for use of content should not unduly discriminate between content providers***

5.39 Without features that prevent undue discrimination, a framework could favour larger or more powerful publishers at the expense of smaller publishers. Smaller publishers have more limited bargaining power and it is possible that SMS firms could follow a ‘divide and conquer strategy’ by rewarding a small number of larger strategic players with favourable terms.

5.40 A code might usefully set out enforceable non-discrimination provisions to avoid this outcome, on which guidance could be provided for SMS firms to understand how the regulator would envisage it would be applied in practice. A non-discrimination requirement would not be intended to impose exactly the same terms on providers but to avoid unjustified distortions. The obligation would be a general obligation similar to the approach adopted in UK FRAND law.<sup>99</sup>

***Other areas that might be covered by the guidance***

5.41 In this section we outline some other areas, in addition to those outlined above, which could be included in a code guidance:

- Information sharing requirements; and
- Standard or reference contracts.

***Information sharing requirements***

5.42 Assessing joint value is complicated by that fact that there is significant information asymmetry between SMS firms and content providers. Neither SMS firms nor content providers are able to observe important elements that contribute to the creation of the joint value. SMS firms have significant

---

<sup>99</sup> See: [FRAND patent licensing: Supreme Court stays the course | Practical Law \(thomsonreuters.com\)](#).

informational advantages in assessing the value of content to them, whereas content providers are in a better position than the SMS firms to judge the extent to which use of their content by SMS firms contributes additional visits to their online properties.

- 5.43 Given this information asymmetry it would be difficult for the parties to come to an agreement independently without information sharing.
- 5.44 A code could require the SMS firm to provide content providers with the information they need to make an assessment of the value of their content to SMS firms. We note that information sharing has been a feature of approaches to payment for content issues in other jurisdictions. For example in France, the law requires that online platforms ‘provide press publishers and agencies with all the information relating to the uses of press publications by their users as well as all the information necessary for a transparent assessment of the remuneration [due for related rights] and its allocation’.<sup>100</sup>
- 5.45 Guidance should set out requirements on SMS firms to make certain types of information available to content providers.<sup>101</sup> The types of information covered by this would include information on how the content is being used and how users are interacting with the content as well as some information on advertising revenues from adverts placed alongside the content. The regulator may need to work with parties involved to determine exactly what information could usefully and feasibly be provided.

### *Standard contracts*

- 5.46 The obligation to provide fair and reasonable compensation for use of content could result in a significant requirement on SMS firms to negotiate and administer agreements with large numbers of content providers. In addition, the need to negotiate with SMS firms over payment for use of content could be a burden on many content providers, especially smaller publishers.
- 5.47 To reduce the time and cost associated with negotiations it may be a useful tool for the SMS firm to be able to offer a standard contract to some content providers. A standard offer is one that is common to a particular type of category of content provider rather than bespoke to an individual content

---

<sup>100</sup> Article L. 218-4 of the CPI, see: [Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions | Autorité de la concurrence \(autoritedelaconcurrence.fr\)](#).

<sup>101</sup> We note that the information asymmetry runs both ways, but the largest informational issue is the inability of content providers to observe key data on the value of their content to SMS firms and the guide would seek to reduce the asymmetry. Sharing of information by content providers on the value of the use of the content generate for them by driving users to their online properties would also facilitate the assessment of joint values however, the SMS code would only be able to place obligation on SMS firms.

provider. The ability for the SMS firm to make such an offer should be set out in the guidance.

## **6. Application of a code: enforcement and remedies for rectifying breaches**

6.1 The way a code applies in practice will depend on the mechanisms put in place for enforcing it and rectifying code breaches. This will be determined by the eventual legislative framework, which is still subject to consultation and the Parliamentary process, and we are not pre-judging what the DMU's ultimate enforcement powers will be. Instead, the aim here is to provide advice on the powers that we consider might be suitable to rectify code breaches.

### **Enforcing a code**

6.2 Our view is that a code should consist of a clear set of legally binding obligations on SMS firms, providing clarity about how SMS firms should behave when dealing with consumers and businesses, including publishers. However, these binding requirements should be principles-based, rather than a code setting prescriptive rules that would need to be followed. It would be for the SMS firm to show that any agreements relating to publisher content were consistent with requirements of a code.

6.3 In the event of a dispute between a platform and a publisher about the application of a code, the regulator would have the role of deciding whether a contract or given behaviour by the SMS firm was compliant. As part of this, the regulator would need to have effective powers to enable it to resolve disagreements – for example, through sufficient information-gathering and investigative powers and being able to require SMS firms to comply with the provisions of a code within a certain timescale, with an ability to impose penalties for breaches of a code.

6.4 In the first instance, having established a breach, we would expect the regulator to require the SMS firm to provide a description of the measures it proposes to take to ensure compliance with a code. The DMU could then work with the SMS firm to determine whether the change was sufficient and, if not, what else might be needed to make it so.

6.5 However, there may be cases, particularly in relation to issues like payment for content, where code breaches persist, and it is important that there is a backstop mechanism for resolving these in a timely way. Whilst we have flagged payment for content in isolation here, we recognise (as set out in table 5.1) that a wide range of factors, such as access to user data, might form part of a 'fair and reasonable' settlement. The presence of a backstop to determine

a solution compliant with a code should incentivise parties to engage with the process and reach a negotiated settlement earlier.

- 6.6 Specifically in relation to issues like payment for content, one option would be for the regulator itself to determine what is fair and reasonable as part of its administrative enforcement process. This would be a feasible approach, and may be appropriate and effective in some circumstances. However, in our regulatory experience making such determinations can, in other circumstances, be costly and time-consuming, for example due to the complexity of the case at hand or the quality of the information available to the regulator.
- 6.7 An alternative used in other contexts is arbitration or other forms of dispute resolution, which can in some cases be less costly and deliver speedier outcomes than administrative enforcement. The Australian experience shows that it would be beneficial for government to include powers for the regulator to use a form of binding arbitration as an alternative backstop power, in cases where breaches of the code could not otherwise be resolved.
- 6.8 Final offer arbitration is one form of binding arbitration<sup>102</sup> that has received much attention in discussions about payment for content given its inclusion in the Australian Media Bargaining Code (AMBC) – see Appendix B for more detail. Where parties cannot come to a negotiated agreement about remuneration, the AMBC sets out a process for an arbitration panel to select between two final offers made by the parties.<sup>103</sup> The AMBC is applied to designated digital platforms, and as of October 2021 no platforms have been designated. Consequently the arbitration process has not yet been applied in practice (nor have any other parts of the AMBC, for example notice of algorithm changes). However, various stakeholders have strongly suggested that the threat of designation under the AMBC, and the provision for arbitration within it, led to a series of voluntary agreements between platforms and publishers.<sup>104</sup>
- 6.9 The reason why this proposal is likely to be effective is that under final offer arbitration, the parties in dispute each provide their ‘final’ offer which the arbitrator then chooses between. In some circumstances this can have beneficial incentive properties; in particular, it incentivises the parties to reveal

---

<sup>102</sup> Binding arbitration is a common form of dispute resolution that is used by parties to avoid what can be costly or lengthy court or other enforcement proceedings.

<sup>103</sup> This is in contrast to conventional arbitration where the arbitrator makes an unconstrained settlement choice based on their own assessment of what is the right outcome.

<sup>104</sup> This was a point made by several stakeholders we spoke to. For a published example see Wilding, D. (2021), Why Are Google and Facebook Now Okay with Australia’s News Media Bargaining Code?, <https://promarket.org/2021/02/25/google-facebook-australia-newsbargaining-antitrust-accs-small-publishers/>.

their private valuations. It alters the threat-point in the event no voluntary agreement can be reached, as a party which presents an offer that favours itself too much will lead the arbitrator simply to choose the other party's proposal. This in turn creates an incentive for the parties to submit offers which are closer to a fair split of the joint value.<sup>105</sup>

- 6.10 There are however some differences between the Australian approach and how the proposed UK regime might operate in the context of an SMS code, which could lead to different enforcement mechanisms (which in the UK case are yet to be determined). The main difference is the overall structure of the regime. Australia has implemented new legislation specifically targeted at bargaining between digital platforms and news media, whereas the proposed UK approach is for codes of conduct on digital firms with SMS, including their relationships with publishers where appropriate.
- 6.11 Overall, the regulator will need effective enforcement powers to ensure compliance with a code. As above, we expect this to cover information-gathering and investigative powers, the power to direct an SMS firm to comply with an order, and fining powers to act as a deterrent. We also think there is a need for a backstop enforcement power, to ensure code breaches do not persist for long periods. In some circumstances we expect that the regulator determining what is fair and reasonable would be effective, but binding arbitration (and in particular final offer binding arbitration) has attractive properties that would be beneficial in some cases.

---

<sup>105</sup> See: [The ACCC's 'bargaining code': A path towards 'decentralised regulation' of dominant digital platforms?](#) Cristina Caffarra, Gregory Crawford 26 August 2020 for a more detailed discussion of the pro and cons of the Australian approach.

## **7. Impacts and limitations of code interventions**

### **Code impacts**

- 7.1 Applying the SMS code principles as described above could lead to significant benefits in setting a level playing field for the future relationship between platforms and publishers. It would increase certainty for both sides over acceptable contractual terms and increase transparency, for example around algorithms, and control over data. This would ultimately benefit consumers of publishers' content by ensuring that there are continued incentives to invest in high-quality content. Likewise, the protection it grants them would encourage news publishers to consider alternative (non-SMS firm) linked products, and drive efficiencies by allowing them to opt out of certain ancillary SMS firm products (and associated costs) to improve user experience.
- 7.2 We suggest publishers with unique content and greater brand value may benefit most under a code. For example, while fair value should consider the cumulative value of content (such as news) being available on the SMS firm's service, the firm may derive specific, additional value from publishers with content which is less substitutable, or with stronger brands which draw in particular audiences. Similarly, we would expect these publishers to do better from fair and non-discriminatory use of SMS recommendation algorithms, noting that the objective justifications for firms to discriminate may include relevance and user interest.

### **Limitations of code interventions**

- 7.3 It is important to recognise that an SMS code regime would not address all publishers' concerns; it would only be able to address the particular issues arising from bargaining power imbalance where platforms have a position of significant and ongoing market power in certain activities. It would not address the wider challenges facing online publishers' business models, or the broader relationship between publishers and smaller intermediary platforms without SMS. We would also note that we expect that the direct financial gains to news publishers from a code would be a relatively small percentage of their existing advertising revenues.
- 7.4 A code would also, by definition, only apply to those firms and activities that were designated as having SMS. While this is consistent with the focus on addressing the bargaining power concerns outlined in section 2, it would not

address publishers' concerns about the role of any online intermediaries that are not found to have SMS.<sup>106</sup>

- 7.5 Consistent with the scope of the government's request for advice, we have not carried out a detailed assessment of alternative proposals for addressing publishers' wider concerns. However, we have considered the interaction between our proposals for a code and wider policies and collective bargaining and copyright (outside of the guidance on payment for content).

### ***Collective bargaining***

- 7.6 One of the options we set out in Table D.1 in appendix D for determining a fair split of joint value is collective bargaining, which would mean all content providers or sets of certain types of content providers bargaining collectively with SMS firms, thereby offsetting to some extent the bargaining power advantage of SMS firms. We expand on this option in more detail here as it is something that is already forming part of the solution to the payment for content issue in other jurisdictions.
- 7.7 Bargaining collectively could have significant advantages in terms of increasing the efficiency of negotiations between parties as it would limit the number of parties that SMS firms need to negotiate with. In addition, content providers, most notably smaller ones with more limited resources, would benefit from efficiencies arising from the ability to negotiate collectively.
- 7.8 However, collective bargaining can facilitate direct interactions between the parties involved including, for example, the sharing of price-sensitive information,<sup>107</sup> and this can spill over into potentially anti-competitive behaviours in activities where content producers compete (for example in the publication of news content or the supply of online advertising). Collective bargaining is also associated with market power and can lead to situations where input prices are increased beyond a competitive level. As such, some forms of collective bargaining can infringe competition law.
- 7.9 Collective bargaining solutions are emerging in other EU jurisdictions, for example, France and Denmark, following implementation of the EU Copyright Directive. As we note above, the Copyright Directive establishes the rights of news publishers over copyrighted digital content (France and Denmark are

---

<sup>106</sup> Or those who lose SMS because of increased competition and erosion of their market power. The frequency of SMS designation assessments is to be determined in final legislation.

<sup>107</sup> A Collective Management Organisation (CMO), which we go on to discuss, is distinct from this as publishers are effectively delegating their rights to the CMO to negotiate on their behalf.

amongst the first EU states to fully implement this).<sup>108</sup> Many publishers in these countries have chosen to exercise their rights by choosing to negotiate with Google and Facebook for compensation for use of content through industry bodies or collective rights management organisations (CMOs).<sup>109,110</sup> As the Head of the Legal Department at Danske Medier, the Danish Media Association, noted, ‘it was obvious to us that the publishers’ right would be more valuable if publishers were given the possibility to manage it collectively’.

- 7.10 Although subject to regulation,<sup>111</sup> CMOs already operate in many parts of the UK economy, perhaps most notably in music licensing (through the PPL<sup>112</sup> and PRS<sup>113</sup>). There are also CMOs currently operating in the UK which manage collective rights on behalf of news publishers.<sup>114</sup> Currently these CMOs operate mainly in the area of licensing of media monitoring services and the subsequent use of material provided through these services to corporate clients. It is possible that, as has been the case in other jurisdictions, CMO-based solutions may emerge in the UK to negotiate on behalf of content providers with parties such as Google and Facebook over use of content once the rights of the content providers have been more clearly established (in this case through a code, rather than reform of copyright).
- 7.11 The AMBC goes further in facilitating collective bargaining as it explicitly allows for an exemption from competition law for Australian news publishers when negotiating with designated digital platforms. The bill which introduces the bargaining code ‘specifically authorises collective bargaining so that it does not contravene the restrictive trade practices provisions in the CCA [Competition and Consumer Act 2010].’<sup>115</sup> Although no platforms have as yet been designated under the AMBC and therefore, its provisions on collective bargaining are not applicable, the ACCC has separately authorised two groups to collectively bargain with each of Facebook and Google concerning

---

<sup>108</sup> In the case of France, following on from the implementation of the Copyright Directive the French Competition Authority conducted an abuse of dominance case against Google based on its failure to compensate news publishers in relation to use of their content following on from this right. See: [Autorité de la concurrence \(July 2003\), Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions.](#)

<sup>109</sup> A Collective Management Organisation (CMO) is a type of licensing body which grants rights on behalf of multiple rights holders in a single (‘blanket’) licence for a single payment.

<sup>110</sup> For Denmark see: [Publishers eye collective bargaining as way to take on platforms – EURACTIV.com](#), or France see: [Exclusive: Google’s \\$76 million deal with French publishers leaves many outlets infuriated | Reuters and Google ‘determined to find solution’ on ‘neighbouring rights’ for French press – EURACTIV.com](#).

<sup>111</sup> The conduct of UK CMOs is governed by the Collective Management of Copyright (EU Directive) Regulations 2016 (the CRM Regulations). In the UK the Intellectual Property Office is responsible for monitoring compliance with these. See: [Licensing bodies and collective management organisations - GOV.UK \(www.gov.uk\)](#).

<sup>112</sup> [PPL - UK and international recorded music royalty collection \(ppluk.com\)](#).

<sup>113</sup> [PRS for Music: royalties, music copyright and licensing](#).

<sup>114</sup> [NLA Media Access - Rights licensing and content distribution](#) and [Welcome to the Copyright Licensing Agency | Copyright Licensing Agency \(cla.co.uk\)](#).

<sup>115</sup> [ACCC Revised explanatory memorandum - 25 February 2021](#).

payment for news content.<sup>116</sup> There are also moves in the US<sup>117</sup> advocating for the introduction of a safe harbour from competition law for news publishers when negotiating with big tech firms.

- 7.12 An exemption from competition law for collective bargaining is something that would be beyond the scope of a code. Our current view is that the introduction of such an exemption would be disproportionate to the problem, especially given that there are already options for collective negotiation that content providers can pursue that would be compliant with competition law. In that regard, the Cairncross Review, which did not favour collective bargaining as a solution, noted that there are question marks about its benefits (in particular by reference to precedent in Germany, where this was attempted in 2013) and highlighted competition concerns, such as higher prices creating a barrier to entry and benefiting incumbents at the expense of smaller players and start-ups.<sup>118</sup> The Cairncross Review also observed that collective bargaining posed coordination challenges in getting publishers to agree in practice.

## **Copyright**

- 7.13 As noted above in paragraph 5.29, a code should only apply to content that is covered by UK copyright law. Precisely what content used by the biggest platforms is actually covered by copyright is an area of some uncertainty, given that whether or not particular content is protected will depend on the nature of the content. Whether or not content is protected by copyright is typically only tested and established in law where it is challenged, and ultimately is determined by a court taking into account the specific circumstances at hand, both in terms of the nature of the content (eg if it should be regarded as original, and exhibit a degree of labour, skill or judgement) and whether its use constitutes a restricted act (such as copying the content or issuing copies of the content to the public).<sup>119</sup> While it is therefore difficult to generalise, previous cases have found that certain hyperlinks are not covered by copyright,<sup>120</sup> whereas news headlines, short snippets and images have been found to be covered by copyright, at least in

---

<sup>116</sup> See: [Country Press Australia \(CPA\) | ACCC](#); and [Commercial Radio Australia | ACCC](#).

<sup>117</sup> [Factbox: How U.S. bills would help news media negotiate with Facebook, Google | Reuters](#). See draft bill introduced in the US Congress: [H.R.1735 - 117th Congress \(2021-2022\): Journalism Competition and Preservation Act of 2021](#).

<sup>118</sup> [The Cairncross Review: a sustainable future for journalism - GOV.UK \(www.gov.uk\)](#), pages 73 and 74.

<sup>119</sup> The [Intellectual Property Office](#) provides information about how copyright protects work and stops others using it without permission.

<sup>120</sup> For example, see Judgment of 13 February 2014, *Nils Svensson v Retriever Sverige AB*, C-466/12, EU:C:2014:76.

some circumstances.<sup>121</sup> Generally, whole articles or longer extracts from articles would be covered by copyright under UK law.

- 7.14 In view of the uncertainty about what content is covered by copyright law, it is possible that large platforms derive value from use of content that is not necessarily covered by UK copyright, such as the use of hyperlinks and (potentially) short snippets. To the extent such content is not covered by copyright, its use would be unlikely to be compensated for under a fair and reasonable obligation as part of a code. However, use of non-copyrighted content is unlikely fundamentally to undermine the potential benefits from the introduction of a fair and reasonable obligation under a code. This is because, at present, content providers already have difficulty securing fair and reasonable compensation for use of their copyrighted content as a consequence of the bargaining power held by the largest platforms. A future code (subject to future SMS designations) could help to ensure that they do obtain such compensation.
- 7.15 In some other jurisdictions, such as France and Denmark, there have been attempts, following the implementation of the EU Copyright Directive, to clarify news publishers' rights over the use of their online content by digital platforms through the implementation of a publisher's or neighbouring right. Prior to the implementation of the EU Copyright Directive, the extent of news publishers' rights over their online content was considered to be unclear because, in law, copyright rested with the individual or collective who created the content rather than the publisher.<sup>122</sup> The new laws seek to make it clear that the publisher has copyright over use of their online content, with exception that hyperlinks and short extracts are excluded.<sup>123</sup>
- 7.16 The implementation of these laws in France and Denmark, and the subsequent clarification of the right of news publishers over their online content, appears to have played a role in helping to facilitate the start of negotiations between Google and Facebook and news publishers over compensation for use of news content. A detailed consideration of a specific publisher's right (as included in the EU Copyright Directive), and its implications in terms of supporting fair and reasonable compensation for the

---

<sup>121</sup> For example, in relation to newspaper headlines, see *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890.

<sup>122</sup> Although it is possible that the author can (and in many cases – including in news publishing – does) hand over control of copyright to the publisher.

<sup>123</sup> [Article 15 of EU Directive on copyright and related rights in the Digital Single Market](#) states 'Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers. The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users. The protection granted under the first subparagraph shall not apply to acts of hyperlinking. The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication'.

use of content by platforms, is beyond the scope of this paper – but is perhaps something that could be usefully further considered by the government.

## Possible unintended consequences

7.17 It is important that we carefully consider the possible unintended consequences of intervention and develop strategies to mitigate those risks where possible. Given the legislative framework is yet to be finalised, it is not possible to be exhaustive at this stage. Some risks that we have already identified include:

- Extending protection to content providers may also help producers of harmful content monetise that content more effectively.  
*As noted above, a code should not be used to protect producers of harmful content. We would make it clear in the guidance that a code would not oblige firms to display or pay for content which is harmful.*
- Protection which favours incumbent news providers over smaller firms or new entrants could stifle entry and innovation.  
*Principles of non-discrimination, and guidance on transparency and standard contracts could be used to mitigate this concern.*
- Diminishing user experience: compelling platforms to pay for content, e.g. snippets, could lead them to remove that service from their product (i.e. removing snippets which users might value).  
*Over time we would expect the market to adapt and if users valued content snippets, news aggregators would offer them and share that value with the news publishers.*

## Other initiatives in this space

7.18 There are other initiatives underway which are worth referencing to note the potential for positive intervention in this space.

7.19 Ofcom is conducting a range of related work which may set obligations on online services in relation to news/content providers, e.g. they are/will be:

- Considering the rules governing the availability/promotion of public service material (inc. news) on connected TVs;
- Calling for input on the role of online aggregators & algorithms in content discovery online, and the implications of this for media plurality;

- Preparing for online safety regulation including obligations on some online services regarding mis and dis-information and the treatment of news publishers, journalistic content and democratic material on those services; and
- Expanding on existing media literacy initiatives, including continuing to provide research, encouraging media literacy actors to evaluate the impact of their work, and expanding on engagement activities, in particular through the Making Sense of Media Panel and Network.

7.20 The government is continuing with wider work regarding press sustainability, following the Cairncross Review. DCMS has indicated that action taken thus far includes zero rating of VAT on electronic subscriptions, an extension of an existing business rates relief on office space, a £2m pilot innovation fund, and publication of a media literacy strategy. News publishers have also benefited from a significant public information campaign across the local and national press during the pandemic, worth £35m in its first phase. The government is exploring further options to reduce costs and increase demand. We have limited detail at this stage but there are other interventions that may have a positive impact on news sustainability.

7.21 Finally, as noted in paragraph 3.33, there have been a number of recent and ongoing investigations in the UK and internationally particularly in relation to digital advertising. These are aiming to address the market power of the large platforms and are complementary with the proposed code interventions set out in this advice.

## Appendix A: Additional evidence on the case for a code

1. In this appendix we set out in more detail evidence referred to in Section 2 on:
  - The impact on news publisher traffic of the shutdown of Google News in Spain in 2014; and
  - Wider market failures in news and impact of digitalisation on news publishers.

### Case study evidence on the impact of the shutdown of Google News in Spain.

2. A Stanford Working paper found that ‘the shutdown of Google News [in Spain] reduces overall news consumption by about 20% for treatment users [i.e. Spanish users], and it reduces page views on publishers other than Google News by 10%. This decrease is concentrated around small publishers while large publishers do not see significant changes in their overall traffic.’<sup>124</sup>
3. A Nera Report in 2017<sup>125</sup> found a ‘decrease in traffic of more than 5% on average; 13% for small publications’. It also noted the closure of a number of news aggregators, potentially increasing consumer search times and reducing the consumption for news provision (they estimate a £2.8bn per annum loss in consumer surplus from this).
4. A working paper by [Calzada and Gil 2017](#)<sup>126</sup> found: ‘the shutdown of Google News in Spain decreased the number of daily visits to Spanish news outlets by 14%, and that this effect was larger in outlets with fewer overall daily visits and a lower share of international visitors. We also find some evidence suggesting that the shutdown decreased online advertisement revenues for larger online news outlets.’
5. Whilst the evidence from Spain is able to capture the impact on content publisher traffic attributable to a particular service (in this case Google News), there are difficulties in extrapolating long-term impacts. Although referral traffic falls in the short term, this may not be indicative of the longer-term impact: it is uncertain how markets would adjust or whether content publishers would be able to find their way around this.

---

<sup>124</sup> [The Impact of News Aggregators on Internet News Consumption: The Case of Localization By Susan Athey Mark Mobius.](#)

<sup>125</sup> [Nera \(2017\), Impact on Competition and Free Market of Google Tax or AEDE fee.](#)

<sup>126</sup> [Calzada and Gil \(2017\), What Do News Aggregators Do? Evidence from Google News in Spain and Germany.](#)

## Wider market failures in news and impact of digitalisation

6. The provision of online content has a number of market features that could lead to market failures and harm to consumers, many of which are unrelated to the bargaining power of SMS firms. However, market power on the part of these firms can exacerbate some of these issues.
7. We have focused on news publishing in particular because this is where public policy issues and concerns around sustainability of content production appear to be most acute.<sup>127</sup> Many of the features set out below apply more generally to the provision of online content. A code would cover all those who interact with the designated activity of SMS firm i.e. all content providers, but we may want to (for public policy reasons set out above) prioritise producing guidance specific to news publishers.
8. There are a number of features of the provision of online news content that could lead to market failure. These include:
  - **Information asymmetry** – consumers know less about quality of the information relative to the producer of that information. This can make it difficult for consumers to distinguish material containing false or misleading information from accurate content. In addition, it can be difficult for consumers to attribute news content to the source of the original content.
  - **Limited excludability** – whilst content is protected by copyright, it can be difficult for content providers to monetise their content if others can sell it on as their own.
  - **Non-rivalrous** – consumption of information by one user does not prevent the consumption of that same information by another user.
  - **News is an experience good** – consumers do not know whether information is valuable to them until they consume it. For this reason, news publishers often have to share some of the information they produce ‘for free’ in advance (e.g. through headlines, the front page, or snippets) to tempt readers to pay for more content. They can also overcome this by building a strong brand and a reputation for quality content.
  - **Positive externalities from news** – some news content, in particular public interest journalism, has positive spill over effects in that it delivers

---

<sup>127</sup> See, for example, [The Cairncross Review: A Sustainable Future for Journalism](#), February 2019.

benefits to society as a whole. These wider benefits are not captured as part of the private value that consumers place on news content.

- **Conflicts of interest** – the political or commercial interests of a news owner or financier or other power influences may threaten journalistic independence.

9. These features lead to a number of policy challenges in news publishing including:

- **Undersupply** – because news is an experience good, and consumption of this content is non-excludable and non-rivalrous, news producers can struggle to monetise their content which can lead to undersupply. In addition, there is substantial social or public interest value in the consumption of some types of news and consumers do not internalise these positive externalities when making decisions.
- **Undue influence** – journalistic independence may be threatened by political, commercial or advertiser interests. Recent changes in the market have narrowed the range of sources of income available to news producers, as print and direct advertiser revenues have declined. This may make them more susceptible to manipulation. Also, the increasing reliance on the internet to drive revenues may influence the nature of the news content produced with more focus on content that is likely to generate clicks
- **False information** – information asymmetries between consumers and content creators can make it difficult for consumers to identify and disregard false information. Where news content is not attributed clearly to a particular source, this can make it difficult for consumers to determine the quality of the information provided to them.

10. Traditionally news publishers have overcome many of these challenges by building strong brands for their content and bundling news articles together and with other content.

11. However, the traditional business model of news producers is being undermined as consumers increasingly access news digitally. In addition to the market power concerns addressed in this report, there are a range of further challenges, including:

- **Disintermediation** – news content is often discovered and/or consumed away from the publisher website. In addition to problems producers have monetising content in these circumstances this also creates issues around news producers' control over such content. This can lead to issues

around branding, attribution and unbundling as well as potential reputational issues, for example if the content should appear alongside inappropriate material.

- **Digital advertising** – there has been huge increase in the supply of advertising inventory which offers advertisers an array of alternatives News publishers also may find it more difficult to compete with these alternative options for advertising space if they are less able to target advertising effectively due to a lack of access to data.

12. The market power of firms with SMS has the potential to interact with and exacerbate some of these issues for news publishers identified above. For example, excessive bargaining power on the part of SMS firms may increase the difficulties news creators have in monetising their content which can lead to a worsening of the problem of undersupply. However, it is likely that many of these challenges would still exist in the absence of excessive bargaining power.

## Appendix B: International examples of interventions on payment for content

1. In this appendix we summarise some recent examples of intervention on payment for content from Australia and France.

### Australian Media Bargaining Code (AMBC)

2. On 25 February 2021 the Australian Parliament approved legislation implementing the AMBC.<sup>128</sup>
3. The ACCC found in the Final Report of its Digital Platform Inquiry (July 2019) that there was a bargaining power imbalance between leading digital platforms (each of Google and Facebook) and news media businesses, so that news media businesses are not able to negotiate for a share of the revenue generated by the digital platforms and to which the news content created by the news media businesses contributes. It was considered that government intervention was necessary because of the public benefit provided by the production and dissemination of news, and the importance of a strong independent media in a well-functioning democracy.<sup>129</sup>
4. The legislation establishes a mandatory code of conduct to address bargaining power imbalances between digital platform services and Australian news businesses. It incorporates the following key features:
  - bargaining in good faith – which requires designated digital platform corporations and registered news business corporations that have indicated an intention to bargain, to do so in good faith;
  - compulsory binding final offer arbitration – where parties cannot come to a negotiated agreement within 3 months about remuneration relating to the making available of covered news content on designated digital platform services, an arbitral panel will select between two final offers made by the bargaining parties;
  - information requests – during arbitration, either of the bargaining parties may request that the other bargaining party provide it with information if

---

<sup>128</sup> See: News media bargaining code [Final legislation | ACCC](#)

<sup>129</sup> [Page 7: Treasury Laws Amendment \(news media and digital platforms mandatory bargaining code\) bill 202: revised explanatory memorandum.](#)

the request is reasonable for the purposes of the arbitration. The requesting party must also give the panel a copy of the request;<sup>130</sup>

- general requirements – which includes a requirement for designated digital platform corporations to provide registered news business corporations with advance notification of planned changes that are likely to have a significant effect on covered news content a requirement to provide registered news business corporations with clear information about the collection and availability of data collected through users’ interactions with news content; and a requirement to develop a proposal to appropriately recognise original news content;
- non-differentiation requirements – responsible digital platform corporations must not differentiate between the news businesses participating in a code, or between participants and non-participants, or between non-participants because of matters that arise in relation to their participation or non-participation in a code;
- contracting out – the legislation recognises that a digital platform corporation may reach a commercial bargain with a news business outside a code about remuneration or other matters. It provides that parties who notify the ACCC of such agreements would not need to comply with the general requirements, bargaining and compulsory arbitration rules (as set out in the agreement);
- standard offers – digital platform corporations may make standard offers to news businesses, which are intended to reduce the time and cost associated with negotiations, particularly for smaller news businesses. If the parties notify the ACCC of an agreed standard offer, those parties do not need to comply with bargaining and compulsory arbitration (as set out in the agreement);<sup>131</sup> and
- collective bargaining - one or more registered news business corporations may form a group for the purpose of bargaining collectively with a responsible digital platform corporation under a code. The collective may nominate one of the group members or a third party to represent the group during the bargaining process.<sup>132</sup> The legislation specifically authorises collective bargaining so that it does not contravene the

---

<sup>130</sup> Paragraph 1.211: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>131</sup> Paragraph 1.9: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>132</sup> Paragraph 1.16: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

restrictive trade practices provisions in the Competition and Consumer Act.<sup>133</sup>

5. The legislation provides that the Minister (the Australian Treasurer) may designate a digital platform corporation and services that must comply with a code. The Minister may only designate a digital platform corporation and services if the Minister has considered whether there is a significant bargaining power imbalance between Australian news businesses and the digital platform corporation's corporate group, and whether the platform has made a significant contribution to the sustainability of the Australian news industry.<sup>134</sup> For a news business corporation to participate, it must be registered by the Australian Communication and Media Authority (ACMA). The ACMA must register a news business (and the applicant corporation as the registered news business corporation) if the applicant: has the primary purpose of creating and publishing 'core news content';<sup>135</sup> had an annual revenue above \$150,000 in the most recent year or in three of the five most recent years; and the news business operates predominantly for the purpose of creating and publishing news in Australia for the dominant purpose of serving Australian audiences.<sup>136</sup>

### ***Compulsory binding final offer arbitration***

6. If an agreement is not reached between the parties within three months of the registered news business corporation indicating an intention to bargain, the matter will be subject to compulsory binding arbitration (if the news business elects to begin arbitration).<sup>137</sup>
7. If a responsible digital platform corporation and a registered news business corporation are subject to compulsory arbitration, an arbitral panel chosen by the bargaining parties (or by the ACMA if the parties fail to agree on panel members) will select between the final offers made by the parties. Both parties must submit a final offer to the arbitral panel stating a remuneration amount. The amount must be expressed as a lump sum and is the amount of remuneration to be paid by the responsible digital platform corporation to the registered news business corporation in relation to making its covered news

---

<sup>133</sup> Paragraph 1.17: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>134</sup> Paragraph 1.10: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>135</sup> Content that reports, investigates or explains issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making, or current issues or events of public significance for Australians at a local, regional or national level'

<sup>136</sup> Paragraph 1.13: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>137</sup> Paragraph 1.19: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

content available on a designated digital platform service. The arbitral panel must accept one of those offers, unless it considers that the final offers are not in the public interest, in which case the arbitral panel may amend the more reasonable of the two offers.<sup>138</sup>

8. The arbitration process is set out in legislation. This includes the requirement to submit a final offer within a specified timeframe and the ability to make a submission to the panel on the final offer of the other party. In addition, the ACCC is able to make a submission to the panel. The arbitration is time limited and the panel must make the written final determination for remuneration no later than 35 business days (unless another deadline is prescribed in regulations) after the latest of the deadline for final offers.<sup>139</sup>
9. A failure to participate in arbitration in good faith is subject to a maximum civil penalty of the greatest of: AS\$10 million; three times the value of the benefit obtained and that is reasonably attributable to the act or omission; or 10% of annual turnover during the period of 12 months ending at the end of the month in which the act or omission occurred.<sup>140</sup>
10. In making a determination on the remuneration issue, the arbitration panel must consider:
  - the benefit (monetary or otherwise) of the registered news business' news content to the designated digital platform service and the benefit (monetary or otherwise) to the registered news business of the designated digital platform service making available the registered news business' covered news content;
  - the reasonable costs to the registered news business of producing covered news content;
  - the reasonable costs to the designated digital platform service of making available covered news content in Australia;
  - whether a particular amount of remuneration would place an undue burden on the commercial interests of the designated digital platform service; and

---

<sup>138</sup> Paragraphs 1.20 to 1.22: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>139</sup> Paragraphs 1.90 to 1.97: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>140</sup> Paragraph 1.188: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

- the bargaining power imbalance between Australian news businesses and the designated digital platform corporation. This allows the panel, in making their determination, to consider the outcome of a hypothetical scenario where commercial negotiations take place in the absence of the bargaining power imbalance.<sup>141</sup>

### ***Impact of the AMBC***

11. Shortly before the implementation of the AMBC legislation Google threatened to potentially withdraw services such as Google Search from Australia and Facebook did block all Australian news from its services from 18 February to 25 February 2021.<sup>142</sup>
12. However, Google quickly began signing agreements with several large media companies following negotiations with the federal government, indicating the government may be open to limiting the application of a code to the News Showcase product if enough publishers are on board.<sup>143</sup> It subsequently struck deals for use of news content within its showcase product with several large and medium sized publishers (e.g. NewsCorp,<sup>144</sup> Guardian<sup>145</sup> and Nine<sup>146</sup>). Deals with smaller publisher have been more difficult; however, Google recently signed a deal with Country Press Australia which represents 81 news publishers who publish 160 regional newspapers across Australia<sup>147</sup> after they were permitted to negotiate collectively with Google under the AMBC.<sup>148</sup>
13. Facebook agreed to reverse its ban on Australian news after negotiations with the government which concluded that the government may not apply a code to Facebook (i.e. designate them) if the company could demonstrate it has signed enough deals with news publishers to pay them for content.<sup>149</sup> Facebook has subsequently made deals with a number of news publishers

---

<sup>141</sup> Paragraphs 1.197 to 1.200: Treasury Laws Amendment (news media and digital platforms mandatory bargaining code) bill 202: revised explanatory memorandum.

<sup>142</sup> Google threatens to shut down search in Australia if digital news code goes ahead | Australian media | The Guardian.

<sup>143</sup> An update on the News Media Bargaining Code - Google (about.google).

<sup>144</sup> News Corp, Google sign global news deal (smh.com.au). Note the NewsCorp deal was wider than Just Australian and was in fact a global deal for use of its news by Google.

<sup>145</sup> Guardian Australia strikes deal with Google to join News Showcase | Google | The Guardian.

<sup>146</sup> Nine agrees to join Google News Showcase in Australia for reported \$30m a year | Australian media | The Guardian.

<sup>147</sup> Country Press Australia titles to join Google News Showcase (blog.google).

<sup>148</sup> ACCC proposes to authorise Country Press Australia collective bargaining with Google and Facebook | ACCC.

<sup>149</sup> Facebook reverses Australia news ban after government makes media code amendments | Australian media | The Guardian; Australia Passes Amended Media Code After Facebook, Google Protests (businessinsider.com).

such as NewsCorp,<sup>150</sup> the Guardian<sup>151</sup> and Seven West.<sup>152</sup> But there have been concerns voiced about smaller publishers not being able to secure deals (noting that some of these small publishers provide very 'niche' or specialised content, or content that many may not consider 'public interest journalism').<sup>153</sup>

14. The ACCC informed us that as at 6 October 2021, both companies have made voluntary agreements with a wide range of Australian news publishers of different scales, including:
  - Government-owned public service broadcasters ABC and SBS (Google only);
  - Large publishers and commercial broadcasters such as News Corp Australia, Nine Entertainment Co, Network Ten (Facebook only) and Seven West Media;
  - Mid-size and smaller digital natives including the Guardian (which is much smaller in Australia than the UK), Junkee Media, Solstice Media, Crikey, The New Daily, Schwartz Media and the Conversation;
  - Regional publishing groups Australian Community Media and Times News Groups and the small rural and regional newspapers represented by Country Press Australia.
15. At the time of writing (October 2021) no platforms had been designated under the AMBC. To date, all of the deals that have been made have been negotiated privately between Google and Facebook and the news media publishers without recourse to designation of Google and Facebook and the compulsory arbitration process (and thus our intelligence on deals struck is likely to be incomplete).

## **French Competition Authority abuse of dominance case against Google**

16. The French Competition Authority is pursuing an abuse of dominance case against Google based on a dispute with French publishers for remuneration of their copyright-protected content. The dispute follows on from the introduction in July 2019 of the French law implementing the EU Copyright Directive

---

<sup>150</sup> [News Corp and Sky News reach pay deal with Facebook, weeks after media bargaining code became law - ABC News.](#)

<sup>152</sup> [Seven West Media announces news agreement with Facebook - ABC News.](#)

<sup>152</sup> [Seven West Media announces news agreement with Facebook - ABC News.](#)

<sup>153</sup> [Facebook wraps up deals with Australian media firms, TV broadcaster SBS excluded | Reuters.](#)

(known as the IP Code). This law clarified the rights of news publishers in relation to the use of their copyrighted material online.

### ***Complaint and background to the case***

17. In July 2019, France was the first EU Member States to transpose the Copyright Directive, which requires online platforms to use 'best efforts' to ensure copyrighted material is not distributed without the rights holder's authorisation when it added a new chapter to the French Intellectual Property Code (the abovementioned IP Code). One of the major changes introduced by the Directive as implemented in the IPC was the creation of a related right (also referred to as 'neighbouring right') for press publishers to receive an appropriate share of the revenues generated from the online reproduction or representation of their publications.<sup>154</sup>
18. As well as introducing the neighbouring right, the IP Code specifies that publishers should be provided with all relevant information to allow them to transparently assess what compensation they are due. It also specifies that such compensation should take into account revenues derived from use of the material both directly and indirectly. France's IP Code goes beyond the Copyright Directive by specifying that the compensation should take into account quantitative and qualitative elements, including the contribution to political discourse and general information.<sup>155</sup>
19. In response to the introduction of the IP code in September 2019, Google announced it would no longer display article excerpts, photographs, infographics and videos, unless publishers have proactively asked for this to happen.<sup>156</sup> The vast majority of publishers allowed Google to display protected content without receiving any remuneration.<sup>157</sup> Publishers who did not allow Google to display protected content faced significant falls in traffic.<sup>158</sup>
20. In November 2019, complaints to the French Competition Authority were lodged by unions representing press publishers including Syndicat des

---

<sup>154</sup> See Article 15 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market. This clarifies that publishers (as opposed to just the individual authors) have rights over copyrighted content. In the past this has been unclear because copyright covers the author (not publisher) of the work although it is possible that the author can (and in many cases – certainly in news publishing – does) hand over control of copyright to the publisher. It also states that Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

<sup>155</sup> Article L. 218-4 of the IP Code. For an overview of the content of the new law see paragraphs 83 to 89 of: [Décision n° 20-MC-01 du 9 avril 2020 \(autoritedelaconurrence.fr\)](#).

<sup>156</sup> See paragraphs 90 to 95 of: [Décision n° 20-MC-01 du 9 avril 2020 \(autoritedelaconurrence.fr\)](#).

<sup>157</sup> See paragraphs 103 to 110 of: [Décision n° 20-MC-01 du 9 avril 2020 \(autoritedelaconurrence.fr\)](#).

<sup>158</sup> See paragraphs 111 to 125 of: [Décision n° 20-MC-01 du 9 avril 2020 \(autoritedelaconurrence.fr\)](#).

éditeurs de la presse magazine (SEPM) and Alliance de la presse d'information Générale (APIG and its members) and by the news agency Agence France-Presse (AFP).<sup>159</sup>

### **April 2020 decision by the French Competition Authority imposing interim measures<sup>160</sup>**

21. In April 2020, the French Competition Authority made a preliminary finding that the following conduct is likely to amount to an exploitative abuse of Google's dominance in the market for general search<sup>161</sup> in breach of competition law. It found that Google may have abused its dominant position by:
- **Imposing unfair trading conditions** – Google may have imposed on publishers and news agencies unfair transaction conditions which would have allowed it to avoid any form of negotiation and remuneration for the re-use and display of protected content under related rights.
  - **Circumventing the IP Code** – Google used the legal option to grant free licences for certain content in certain cases, deciding that generally no remuneration would be paid for the display of any protected content. This could not be reconciled with the purpose and scope of the law, which aimed to redefine the sharing of value in favour of press publishers vis-à-vis platforms, by assigning a related right which must give rise to remuneration, according to precise criteria. Furthermore, Google refused to provide publishers with the information necessary to determine the remuneration and considered that it could reproduce all the titles of the articles in their entirety, without seeking the publishers' agreement.
  - **Discrimination** – By imposing a principle of zero remuneration on all publishers without examining their respective situations Google may have treated economic actors with different situations in the same way, outside of any objective justification.
22. The French Competition Authority imposed a series of injunctions as interim measures with the objective of allowing publishers and news agencies to

---

<sup>159</sup> See paragraphs 1 to 3 of: [Décision n° 20-MC-01 du 9 avril 2020 \(autoritedelaconcurrence.fr\)](#).

<sup>160</sup> See: [Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP \(Agence France Presse\). | Autorité de la concurrence \(autoritedelaconcurrence.fr\)](#).

<sup>161</sup> The Autorité considered that Google is likely to hold a dominant position in the French market for general search services. Indeed, its market share is around 90% at the end of 2019. In addition, there are strong barriers to entry and expansion on this market, linked to significant investments necessary to develop a search engine technology, and to the effects of networks and experience such as to make Google's position even more difficult to contest by competitive engines wishing to develop.

engage in negotiations in good faith with Google in order to discuss both the terms of and remuneration for the re-use and display of their content. During the negotiation period, Google must observe a principle of neutrality in its use of press publishers' copyrighted content.

23. Google's negotiations with publishers and fine for non-compliance The interim measures decision required Google to within 3 months to conduct negotiations in good faith with publishers and news agencies on the remuneration for the re-use of their protected contents. This negotiation would retroactively cover fees due as of the entry into force of the law on 24 October 2019.
24. In February 2021, APIG and Google entered into an agreement which is reportedly worth \$76m (£55.8m) over 3 years, but few other publishers were able to conclude a similar arrangement.<sup>162</sup>
25. Following complaints from SEPM, APIG and AFP about Google's failure to comply with its injunction, the French Competition Authority launched an in-depth investigation into Google's conduct during the negotiations. It found that Google had not complied with several of the injunctions.<sup>163</sup>
26. Injunction 1 required Google to enter into good faith negotiations with publishers. The French Competition Authority found that Google had not complied because it had:
  - unilaterally imposed a requirement that the negotiations focus on its new Showcase service, where neighbouring rights for the use of protected content (for example in search results) are only 'an accessory component' and it had not provided for a specific financial valuation for these rights;
  - adopted an excessively restrictive definition of the concept of 'income derived from the display of press content' under the IP Code by considering that only advertising revenue (from Google Ads) on Google Search pages on which protected content is displayed should be included, while all other forms of indirect revenue generated by the presence of protected content on Google Search or on other services such as Google News or Discover should be excluded; and
  - refused to negotiate with press agencies over remuneration for their copyright protected content.

---

<sup>162</sup> [Google inks agreement in France on paying publishers for news reuse | TechCrunch.](#)

<sup>163</sup> [Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions | Autorité de la concurrence \(autoritedelaconcurrence.fr\)](#)

27. Injunction 2 required Google to provide information necessary for the transparent assessment of compensation due to publishers on the basis of the IP Code and the French Competition Authority found that it had failed to do so by only providing information that was partial, late, and insufficient to allow the publishers to establish a link between (i) Google's use of protected content, (ii) the revenues it earns and (iii) its compensation proposals.
28. Injunction 5 required Google to apply strict neutrality during the negotiations, so as not to affect the indexing, ranking and presentation of the protected content included by Google on its services. This had not been complied with because Google had linked the negotiation for remuneration for the current use of copyright-protected content to the conclusion of other partnerships that could have an impact on the display and indexing of publishers' content.
29. Injunction 6 required strict neutrality from Google in terms of other negotiations with publishers. This had been infringed because Google had linked discussions about possible compensation for current use of copyright-protected content to negotiations about its new Showcase service.
30. In July 2021, the French Competition Authority issued Google with a €500m fine for non-compliance with a set of interim measures/injunctions imposed on it in April 2020. These essentially required Google to negotiate in good faith with publishers. Apart from paying the fine, Google has now been ordered to:
  - propose a remuneration offer to publishers for use of their protected content that meets the 'good faith' requirements of the IP Code and Injunction 1 in the interim measures decision; and
  - provide publishers with the relevant information necessary for the transparent assessment of the compensation they are due (referred to as Injunction 2) – this must include an estimate of the total revenue generated in France by the display of protected content on Google's services, and an indication of the share of revenue generated by the publisher who has requested the remuneration offer.
31. Google will be subject to a daily penalty of up to €900,000 if it does not comply with these orders within 2 months. It has appealed the decision.<sup>164</sup>

Though not subject to the competition investigation Facebook recently, in October 2021 agreed a deal with APIG to pay for content shared by its users.<sup>165</sup>

---

<sup>164</sup> [Google appeals against €500m French fine in news copyright dispute | Google | The Guardian.](#)

<sup>165</sup> [France hails victory as Facebook agrees to pay newspapers for content | France | The Guardian.](#)

## Appendix C: Examples of the use of FRAND obligations in other contexts

1. The use of a fair and reasonable obligation for compensation or pricing is used in a number of different contexts such as utility regulation, where obligations are often placed on firms with market power to provide access to services on a fair and reasonable basis, as well as obligations to supply on fair and reasonable terms which are set out in commercial contracts, as in the case of standard essential patents. In practice these obligations usually involve a non-discrimination requirement in addition to a fair and reasonable obligation to ensure that there is no undue discrimination in the terms and conditions offered to different parties.
2. The level of detail on what is FRAND varies significantly from context to context, from very high-level principles (for example, that a price should be fair, reasonable and non-discriminatory) through to detailed methodologies for how prices should be set. We set out some examples of where a fair and reasonable obligation has been used in other contexts in Table C.1. below.

**Table C.1. Examples of where FRAND obligations have been used in other contexts**

Example	Level of detail on what is fair and reasonable	Description
Standard Essential Patents	Low	<p>Standard Setting Organisations (SSOs) – generally not-for-profit, member-based organisations – set standards (e.g. interoperability, technical or performance standards) that their members agree to adhere to.</p> <p>Some patents are declared to be standard essential patents (SEPs) and there is a requirement for members of SSOs to license SEPs on ‘royalty-free’ or FRAND terms.</p> <p>Licensing disputes are enforced by the courts.</p>
Ofcom Narrowband Market Review (2017)	Low	<p>‘We have decided that it is appropriate to impose an SMP condition requiring BT to provide network access where a third party reasonably requests it in the WFAEL, WCO, ISDN30 and ISDN2 markets in the UK excluding the Hull Area (for all ISDN lines in the transitional period and subsequently for existing ISDN lines only). We consider that the obligation is necessary to protect effective competition in downstream markets by ensuring that BT cannot refuse access at the wholesale level, thereby hindering competition and ultimately against consumers’ interests.</p> <p>The condition will require BT to provide network access on fair and reasonable terms, conditions and charges. Regarding charges, we are adopting an approach to the</p>

		evaluation of costs and margins consistent with that which would be adopted under ex post competition law. <sup>166</sup>
Ofcom Wholesale Fixed Telecoms Market Review 2021-26: Access to leased lines in HNR area	Low	'We therefore require that regulated wholesale leased lines in these areas are charged on a fair and reasonable basis to protect retail competition from the risk of price (margin) squeeze.' <sup>167</sup>
Ofcom Review of the Local Wholesale Access Market Statement on market definition, market power determinations and remedies 2010	Medium	<p>'We also consider that any pricing to be charged on a fair and reasonable basis under the network access obligations would be appropriate in order to promote efficiency and sustainable competition and provide the greatest possible benefits to end users by enabling competing providers to buy network access at levels that might be expected in a competitive market.</p> <p>Section 47(2) requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. The conditions are:</p> <ul style="list-style-type: none"> <li>• both objectively justifiable and a proportionate response in relation to the extent of competition in the markets analysed, as it ensures that BT and KCOM are unable to exploit their market power and enables competitors to purchase services at charges that would enable them to develop competing services to those of BT and KCOM in downstream markets to the benefit of consumers, whilst at the same time allowing BT and KCOM a fair rate of return that they would expect in competitive markets;</li> <li>• not unduly discriminatory, as it applies to both BT and KCOM and no other operator has SMP in these markets; and</li> <li>• transparent in that it is clear in its intention to ensure that BT and KCOM should set charges on a LRIC+ basis.'<sup>168</sup></li> </ul> <p>Note Ofcom replaced the fair and reasonable obligation requiring BT to set the Virtual Local Unbundled Access (VULA) charges with a condition to maintain a minimum differential between the wholesale VULA price and the price of the retail packages offered by BT that use VULA as an input supplemented by guidance on how compliance with the condition would be assessed.<sup>169</sup></p>
080 and 116 number ranges	High	Guidance on dispute resolution in relation to origination charges for calls to 080 and 116 numbers. <sup>170</sup>

<sup>166</sup> Paragraph 8.33 and 8.34: [Narrowband Market Review: Statement \(ofcom.org.uk\)](#).

<sup>167</sup> Paragraph 1.30, Ofcom: [Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-26 Volume 3: Non-pricing remedies](#).

<sup>168</sup> Paragraphs 5.81-5.82, Ofcom (2010): [Review of the wholesale local access market Statement on market definition, market power determinations and remedies](#).

<sup>169</sup> Paragraphs 4.62 to 4.72: [VULA margin statement - non-confidential \(ofcom.org.uk\)](#).

<sup>170</sup> Paragraph A1.12, Ofcom (2013): [080 and 116 number ranges Statement on dispute resolution guidance](#).

<p>Statement on dispute resolution guidance (2013)</p>		<p>Paragraph A.1.12 states:</p> <p>'In assessing whether origination payments are fair and reasonable, we will apply the following three cumulative principles, which we have previously used in other regulatory contexts:</p> <ul style="list-style-type: none"> <li>• Principle 1: originating communications providers ('OCPs') should not be denied the opportunity to recover their efficient costs of originating calls to a free-to-caller number range.</li> <li>• Principle 2: the origination charge should be beneficial to consumers, taking into account the following factors: <ul style="list-style-type: none"> <li>o Indirect effect: impact of the proposed origination charge on service provider ('SP') costs, and on callers through resulting relevant decisions by SPs such as exiting (or not joining) a free-to-caller number range with an impact on service availability, and cost mitigation measures;</li> <li>o Tariff package effect: impact of the proposed origination charge on OCPs' retail prices for other services; and</li> <li>o Competition effect: impact of the proposed origination charge on competition, whether beneficial or detrimental.</li> </ul> </li> <li>• Principle 3: the origination payment should be practical to implement.'</li> </ul> <p>What these principles mean is then set out in more detail over pages 31 to 42 (paragraphs. A1.18 to A1.64) of the guidance.</p>
--	--	---

***Detailed descriptions of fair and reasonable vs higher level description***

7.22 More detailed descriptions of the FRAND obligation would have the advantage of being more certain and predictable but may lack flexibility. More detailed descriptions tend to work best if the situation lends itself to detailed rules (for example, when there is good information available and the products and services involved are homogeneous and/or relatively well-specified) and the need for certainty in the operating environment of the parties involved is particularly important (for example, if significant levels of investment depend on the outcome). However, a more prescriptive approach is inherently less flexible and can lead to outcomes which are designed to meet the letter of the rules rather than being focused on solving the underlying issue. More prescription can also limit the flexibility of parties to come to an agreement that suits their particular circumstances and may not be robust to changes in the operating environment over time.

- 7.23 Higher-level descriptions tend to be more flexible but there can be uncertainty over precisely what they mean. Higher-level descriptions tend to work better where the parties involved would benefit from a greater degree of flexibility in meeting the requirement, for example if there is significant heterogeneity amongst the parties involved and therefore what is fair and reasonable varies significantly from case to case or in dynamic environments where the nature of what is fair and reasonable is likely to change significantly over time. In addition, higher-level descriptions avoid the need for regulators to specify in detail ex-ante what fair and reasonable looks like which can be difficult (and potentially lead to poor outcomes) in environments where the assessment is complex and where the regulator is at a significant information disadvantage compared to the parties involved in knowing what a fair and reasonable outcome might be. On the other hand, higher-level descriptions can make it difficult for the parties involved to understand precisely what is required of them. This uncertainty can make it difficult for parties to agree on what is fair and reasonable and also potentially result in a large number of disputes needing to be determined upon by the regulator.
- 7.24 In practice, regulators often apply a combination of higher-level and more detailed guidance, with the balance between the two depending on the circumstances at hand. This balance is not necessarily fixed, as there are examples in which the nature of the fair and reasonable obligation has shifted from being higher-level to being more prescriptive, and vice versa, as circumstances change.

## Appendix D: Methodology for establishing fair and reasonable prices used in other contexts.

1. The problem of establishing fair and reasonable prices in the absence of a clear market price is one that has been considered in many different contexts and numerous different approaches have been applied to it. Broadly the approaches fall into one of two broad categories:
  - Methods which directly assess what is a fair and reasonable price; and
  - Methods which first estimate the joint value and then calculate whether levels of compensation result in a fair share of this.
2. We have set out some approaches used in other contexts in establishing if prices are fair and reasonable in Table 5.3 below.

**Table D.1. Methods for establishing fair and reasonable prices used in other contexts**

Approach	Description	Brief analysis	Examples of use in FRAND context
<i>Methods which directly assess what is a fair or reasonable price</i>			
Benchmark prices	Establish benchmark prices for use of content in similar circumstances (e.g. licences for the use of content in media monitoring services) and use these as a basis for setting level of compensation to content providers	Benchmark pricing has been used in other regulatory contexts to determine prices. However, in this case it is likely to be difficult to find relevant benchmarks.	Comparable licences have been used as benchmark prices by courts in FRAND cases to split aggregate royalties between a patent implementer and licensors. <sup>171</sup>
Bottom-up cost-based	Price and compensation are based upon an assessment of the costs incurred.	This approach to determining prices is often applied to regulated utilities. However, assessing cost is potentially very information and resource intensive.  Cost-based pricing is often applied to regulated utilities	Used in examples of 'Review of the wholesale local access market: Statement on market definition, market power determinations and remedies' 2010 and '080 and 116 number ranges: Statement on dispute

<sup>171</sup> See Annex 8 of paper 'Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group' - full contribution' written for the EU.<sup>172</sup> See Annex 8 of paper 'Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group' - full contribution' written for the EU.

		as they tend to have high fixed and low marginal costs and this form of pricing allows for the recovery of large investment costs. In the case of use of content by SMS firms there are likely very low incremental costs of making content available for use in the SMS firms' services (compared to the cost of producing the content) and thus compensation based on costs is unlikely to be very different from the status quo.	resolution guidance' set out in Table C.1 above.
<i>Methods which first estimate the joint value and then calculate what a fair and reasonable split of this is.</i>			
Hypothetical competitive counterfactual	Assesses the split of joint value that would occur in the counterfactual situation where the SMS firms does not have market power. In this case the hypothetical counterfactual would mean that there are multiple suppliers of similar services to those offered by the SMS firm with whom the content provider would be free to negotiate terms for use of their content.	Conceptually what would be the outcome if the SMS firm did not have market power and the market in which they operated were competitive.  Requires a lot of assumptions and information (e.g. the nature of competition, the structure of costs, demand estimates, number of competitors, etc). Potential very complex and resource intensive and analysis is likely to be sensitive to assumptions.  Could potentially need to be applied to a large number of agreements.	Hypothetical and actual counterfactuals have been used by courts in FRAND cases to split aggregate royalties (e.g. through regression comparison to revenues of similar products which do not use an SEP; similar products' revenues with and without SEP; or hypothetical analysis of product revenue with and without SEP). <sup>172</sup>

<sup>172</sup> See Annex 8 of paper 'Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group' - full contribution' written for the EU.

Excessive profit approach	Assess what is a reasonable rate of return or profit for the SMS firms from their use of content with 'excess' profit being paid to content providers	Used in other regulatory spheres to determine 'fair' return to platform.  However, is likely to be very resource and information intensive.  This approach often requires quite subjective judgements and has been often been the focus of dispute from regulated companies in the past.	Profit splitting approaches have been used by courts in FRAND cases to split aggregate royalties between a patent implementer and licensors. <sup>173</sup>
Relative contributions of parties (the Shapley value)	More formal approach to fair distribution of joint value based on marginal contribution of each party to creating the joint value.	Accepted method of fairly distributing both gains and costs to several actors working in coalition used in a number of other contexts.  Potentially very information and resource intensive as need to estimate the joint value across all possible combinations of actors.  Not clear it will work well in the context where a gatekeeper has SMS. SMS firm contribution is likely to be large given it is integral to creation of joint value so outcome may not be very different from status quo.	This has been suggested in the economic literature as a possible solution to Fair Copyright Remuneration in the case of Music Radio. <sup>174</sup>  However, this was being put forward to determine fair remuneration in a context where bargaining power exists on the part of right holders through collective managements organizations. Not clear it will work well in the context where a gatekeeper has SMS.
Collective bargaining	Allowing all content providers or sets of content providers to bargain collectively with SMS firms thereby offsetting to some extent the bargaining power advantage of SMS firms.	Should, at least to some extent, offset the bargaining power advantage of SMS firms. In addition it avoids the need to complicated judgements and analysis.  Some forms of collective bargaining effective already in other types of right management (e.g. music.) However, it can potentially facilitate direct interaction between the content	Collective solutions are emerging in other jurisdictions, for example, France and Denmark, following implementation of the EU Copyright Directive. The Copyright Directive establishes the rights of news publishers over copyrighted digital content (France and Denmark are amongst the first EU states

<sup>173</sup> See Annex 8 of paper 'Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group' - full contribution' written for the EU.

<sup>174</sup> Watt (2010), Fair Copyright Remuneration: The Case of Music Radio, Review of Economic Research on Copyright Issues, Vol. 7, No. 2, pp. 21-37, 2010.

		<p>providers, potentially involving content providers discussing things amongst themselves and sharing information in breach of competition law. May require an exemption from completion law.</p> <p>May lead to negotiation failure – e.g. content blackouts. Particularly where there is incomplete information, content providers may need to ‘strike’ to learn how much the content is worth to the platform.</p>	<p>to fully implement this).<sup>175</sup></p> <p>The AMBC allows for an exemption from competition law. The bill which introduces the bargaining code ‘specifically authorises collective bargaining so that it does not contravene the restrictive trade practices provisions in the CCA [Competition and Consumer Act 2010].’<sup>176</sup></p>
--	--	--	--

3. Our current view is that there is no one preferable approach and that several of these approaches, if applied appropriately, could lead to a fair and reasonable level of compensation – as they have been shown to do so in other contexts. We therefore do not consider that the guidance should specify a preference but instead should leave it to the parties to justify why a method results in a fair and reasonable outcome. The emphasis in this situation would be on the SMS firm – as the party which is deemed to have SMS status – to evidence why the level of compensation is fair and reasonable.

---

<sup>175</sup> In the case of France, following on from the implementation of the Copyright Directive the French Competition Authority conducted an abuse of dominance case against Google based on its failure to compensate news publishers in relation to use of their content following on from this right. See: [Autorité de la concurrence \(July 2003\), Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions.](#)