

Online Platforms Market Study
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Online Platforms and Digital Advertising NMA Response to the CMA Interim Report

1. INTRODUCTION

- 1.1 The News Media Association (NMA) is the voice of UK national, regional and local newspapers in all their print and digital forms. Our members publish around 1,000 news media titles, reaching almost 48 million adults each month¹. These publishers are by far the biggest investors in news in the UK, accounting for 58 per cent of the total spend on news provision². The services they provide – holding the powerful to account, informing and entertaining the public, and bringing together communities – are invaluable to the functioning of a healthy democracy and, in an era marked by disinformation, they are more important than ever.
- 1.2 All our members rely in large part on digital advertising revenue to fund their editorial content. The lack of competition in the digital advertising market has thus posed significant challenges for the sustainable provision of quality news. Similarly, Google and Facebook’s dominance in search and social media has forced publishers to accept unfair terms or risk being relegated to the margins of online spaces. We and our members therefore welcome the CMA’s attention to the news media industry in its Interim Report, and its uptake of many of our concerns and priorities. We largely support the CMA’s findings and proposals with comments and one notable exception: the preliminary decision not to make a market investigation reference.
- 1.3 We believe a market investigation is necessary to shed light on the open display advertising market and correct its most problematic aspects. The range of resources and investigative powers it affords, its apolitical nature and its scope for international cooperation make it the ideal vehicle to implement a targeted and effective separation. Moreover, far from ‘cutting across’ the government’s work in digital markets, an investigation would complement behavioural regulation by further informing it and, if necessary, filling in its gaps.
- 1.4 The following sections will expand on our views on the CMA’s findings, the proposed code of conduct, the possibility of tackling competition and privacy issues through data proposals, potential structural interventions and transparency requirements in the open display advertising market, and the merits of carrying out a market investigation.

2. THE CMA’S FINDINGS

INTERIM REPORT QUESTION 1 Do you agree with our descriptions of general search services and social media service, as set out in Chapters 2 and 3?

- 2.1 The NMA welcomes the assessment that “*limited competition and lack of transparency could mean that publishers get a lower share of the advertising revenues than in a more competitive market*” and that, as a consequence, “*the quality and range of important content such as news articles*”

¹ PAMCo Total Market Reach Tables, 2019. Available at <https://pamco.co.uk/pamco-data/latest-results/>

² Estimate by Mediatique Ltd
http://downloads.bbc.co.uk/aboutthebbc/insidethebbc/howwework/reports/pdf/mediatique_online_news_report_dec_2014.pdf



could decline”³. The Report’s acknowledgement that “at a broader social level, a thriving and competitive market for independent news and journalism is essential for an effective democracy”⁴ is also well received.

INTERIM REPORT QUESTION 7 Do you agree with our analysis and findings in relation to competition in digital advertising, as set out in Chapter 5?

2.2 The NMA agrees with the Interim Report’s account of competition in digital advertising. In particular, we welcome the CMA’s finding that Google faces strong conflicts of interest resulting from its operation of products throughout the supply chain and that it is able to leverage its market power from its advertising inventory in the open display market.

2.3 We agree wholeheartedly with the CMA’s analysis of the relationship between publishers and platforms and welcome its consideration of the points raised by the NMA and our members. We especially commend its acknowledgement of publishers’ reliance on platforms and the imbalance of power, resources and information which creates concerns such as changes to ranking algorithms without consultation or warning, platforms’ use of publishers’ content without compensation, their unilateral imposition of unfair terms, and the collection of readers’ data without reciprocation to news websites⁵.

3. PROPOSED INTERVENTIONS

Code of Conduct

I.1 Do you agree with the overall proposed approach of regulation in the sector through a code of conduct applying to SMS firms? What thresholds should be applied by the regulator in determining SMS and compliance with the code?

3.1 The NMA fully endorses the CMA’s proposal to recommend a pro-competitive code of conduct to complement ex post antitrust enforcement. We should stress that as an industry which depends on and embodies freedom of expression, we are not in favour of state-backed regulation as a matter of principle. However, the dominant market status of certain tech platforms has led to a situation in which publishers are unable to secure adequate reward for their investment in news content through normal commercial relationships. We have therefore concluded that the regulation of commercial arrangements between the platforms and publishers is necessary. In parallel, separation interventions and, in particular, the separation of Google’s ad server and ad exchange, should be considered through a market investigation. A dual approach is critical to achieving a fair and competitive market for publishers. The development and implementation of a pro-competitive regulatory regime could take several years, compared to a relatively quick market investigation and structural intervention. Many smaller titles are loss-making and in danger of closure, and national newspapers face similar difficulties over time. Unless swift and decisive action is taken to address competition concerns in the open display advertising market, the outlook for news publishers is bleak.

3.2 We agree that such a code should apply to digital platforms with a ‘strategic market status’, principally Google and Facebook, and that there should be sufficient flexibility in its language to allow new platforms to come into its scope if they present similar issues as SMS firms.

³ Interim Report, figure 2.7

⁴ Interim Report, paragraph 2.70

⁵ Interim Report, paragraph 5.259 onwards

3.3 As an over-arching principle, any firm with strategic market status should not be allowed to unilaterally impose practices and conditions on their business partners without reasonable warning and explanation or in any manner which is otherwise inconsistent with the code.

I.2 What are your views on our initial thinking on the list of potential rules described in the left column of Table 1?

3.4 The NMA welcomes the CMA's consideration of our earlier submission and those of our members in developing the potential rules to be included in a code of conduct.

3.5 We support each of the rules listed under the Fair Trading principle. However, we would add to the proposed guidelines in Table 1 that:

3.5.1 Agreements between platform and publisher should be clear and transparent and should not be imposed by one side on the other. The purpose should be to ensure that the revenue generated by news content is allocated fairly between news publishers and platforms.

3.5.2 Content ranking must be based on clear and open principles of fairness, applicable to all publishers as well as on sound and justifiable assessments of relevance and authority rather than subjective editorial judgments.

3.5.3 Where the platforms extract value from news publishers' content, whether directly or indirectly, they should negotiate fairly with publishers to determine how that value should be shared in order to ensure an appropriate level of compensation to publishers.

3.5.4 As the producers of original content, news publishers should have the right to control the extent to which their content is scraped as well as the length of related snippets displayed by platforms.

3.5.5 SMS Platforms must share all data they collect from publisher content online including through platform services such as AMP and Instant Articles.

3.5.6 Platforms must commit to work with publishers to develop products that ensure the prominence of individual news brands within their services. Site categorisation must apply to all sites on a fair and consistent basis, at an appropriately granular level, and without human bias.

3.6 The NMA further supports the CMA's examples of rules under the Open Choices principle. Under this principle we would also propose that:

3.6.1 SMS platforms must not impose, directly or indirectly (e.g. through decreased interoperability with competing products), their own advertising software on news publishers when they use platforms' publishing software like AMP and Instant Articles.

3.6.2 All SMS platforms should offer products that are interoperable with those developed by other developers in accordance with open industry standards.

3.6.3 SMS platforms should not require publishers to adhere only to their standards, products or services. Using one platform service in relation to which the platform has market power must not oblige a publisher to use its other services.

3.7 Finally, the NMA supports the CMA's examples of rules under the Trust and Transparency principle. However, we would go further:

3.7.1 In addition to explanation and notification obligations on platforms ahead of changes to content ranking, the platforms should be required to consult with publishers about such

changes. Complaints 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.

3.7.2 There should be end-to-end costs receipting in the digital ad market, through the creation of an open data standard, enabling advertisers and publishers to track advertising spend and fees charged across the digital ecosystem.

I.3 What are your views on the proposed form of regulation: a set of principles-based rules, supported where appropriate by guidance?

3.8 The NMA agrees with this approach. High level guidance alone could too easily be ignored, as is evident from the failure of voluntary codes within the music and grocery sectors. An overarching statutory code that embeds clear principles of fair dealing by the platforms articulated through more specific guidance is necessary to ensure it is sufficiently flexible to apply to emerging technologies and exploitative practices. In any event, the code of conduct should establish a minimum level of protection for all news publishers which would apply in case individual negotiations with SMS platforms do not bear fruit.

I.4 What powers should the regulators have in making SMS companies change behaviour and under what conditions?

3.9 The regulator's powers should include each of those listed in Appendix I, paragraph 17. Further, as provided by paragraph 19, there should be a complaints mechanism for consumers and business users and the regulator should have the power to adjudicate.

3.10 These must be statutory powers and they must be exercisable in respect of both existing and future practices.

I.5 What sanctions should apply where a SMS platform does not comply with or breaches orders under the code of conduct, and, what impact that might have on the speed and effectiveness of the regime, including any appeal process?

3.11 The NMA notes the CMA's proposal that breaches of the code would be met with 'appropriate sanctions' but that these would not include financial penalties⁶. We submit that financial penalties for non-compliance are necessary to subvert SMS firms' incentives to exploit their positions within the market.

3.12 Deliberate or flagrant breaches of the regulator's instructions and failure to comply with a demand for information or evidence should be subject to criminal sanction and compensation awards. Furthermore, civil remedies should apply for failure to disclose profits, commissions, fees and other relevant information from ad tech intermediaries.

3.13 Any concerns about the speed and effectiveness of the regime may be mitigated through interim measures or the imposition of penalties in administrative proceedings subsequent to a finding of an infringement.

I.6 How should the process of an investigation be defined? How would disputes under the code be tested and treated?

3.14 The NMA is not, at this stage, able to set out a detailed process for investigations under the code. We nevertheless agree with the CMA that, regardless of the exact process, investigations would

⁶ Appendix I, paragraph 17 and 23

have to be carried out in a timelier manner than competition enforcement, or the code's aims would be undermined⁷.

3.15 Given that oftentimes complainants will lack the necessary evidence due to the nature of the products involved, the regulator should use its investigative powers to obtain such information from the SMS platform. Since time is of the essence in digital markets, the regulator should also have the power to order interim measures to prevent the complainant from incurring serious harm.

I.7 Should the regulator be able to direct SMS firms to implement, or unwind, measures for the purpose of fulfilling the objectives of the code?

3.16 Yes, it is essential that the regulator be able to impose these remedies in addition to the financial and even criminal ones as mentioned in paragraphs 3.9 to 3.11 above.

I.8 What forms of reporting by SMS firms should be within the scope of the code?

3.17 The code should provide for SMS firms to report any information considered necessary for the regulator to monitor compliance and enforce the platforms' substantive obligations under the code. As a minimum this should include the information in paragraph 6.178 of the Interim Report.

INTERIM REPORT QUESTION 8: Do you agree with our assessment of the merits of a code of conduct for large online platforms funded by digital advertising?

3.18 The NMA fully supports the introduction of an enforceable code of conduct governing the relationship between platforms and business users and consumers. We agree with the CMA's analysis on the need for ex ante regulation to supplement ex post antitrust enforcement.

3.19 However, we would highlight that, as noted by the CMA, it is uncertain whether a code alone can appropriately address platforms' (and in particular Google's) incentives to exploit their position in the market⁸. It is therefore critical that the CMA address these issues holistically, through a combination of ex ante regulation, a market investigation, and any structural remedies found to be necessary through the investigation. See further section 4 of our response.

INTERIM REPORT QUESTION 9: Do you agree with the range of possible practices we have identified that could be considered under such a code of conduct?

3.20 The NMA supports the regulation of the practices identified by the CMA through a code of conduct, but we do not believe the range included in the Interim Report to be exhaustive. Additional practices that should come within the scope of the code of conduct are listed in our response to question I.2 (above).

Remedies Concerning User Data

INTERIM REPORT QUESTION 11: Have we identified the appropriate range of remedies to improve consumers' control over their data?

3.21 The NMA welcomes the CMA's acknowledgement that measures aimed at enhancing user privacy may be used by platforms to further entrench their position⁹. Ensuring a workable balance between privacy and competition should be at the centre of the CMA's work in this area.

3.22 Despite the CMA's helpful comments, we are concerned about its intention to consider obligating publishers to offer consumers the option to decline personalised advertising in the second half of

⁷ Appendix I, paragraph 25

⁸ Interim Report, paragraph 6.156

⁹ Interim Report, paragraph 6.119 onwards

the market study. Such an obligation would disproportionately harm ad-funded news publishers by truncating returns on their advertising inventory. This is an important consideration for consumer welfare because news publishers rely to a large extent on advertising revenue to conduct investigations, inform the public and generate meaningful public debate. These functions are essential to a healthy democratic process and are best delivered through a diverse range of trusted news media brands covering national and international issues and professional, well-funded newsrooms covering every town and city in the UK.

3.23 Moreover, news publishers differ from tech platforms in that no single news website constitutes an unavoidable social and commercial space and consumers have a genuine choice as to which publishers' websites they visit. As such, competition between titles, in conjunction with the minimum standards set by GDPR, act effective safeguards against the risk of publishers' abusing user data, rendering further regulatory intervention unwarranted.

INTERIM REPORT QUESTION 13: We have set out a number of specific questions relating to the potential interventions, which are discussed in the following appendices:

L: Potential interventions to improve personal data mobility

Do you have any views on the more technical questions in these documents?

3.24 The NMA does not at this stage have any detailed comments on the data portability measures considered in Appendix L. In general terms, our priority is that these should only be deployed in such a way to prevent gaming by large tech platforms and support a truly level playing field with respect to user data.

3.25 Moreover, the NMA is concerned that the roll out of the privacy-enhancing technologies (PETs) considered in Appendix L could make digital news provision unsustainable. We agree with the analysis that *"an increased 'coarseness' of user data available to publishers and advertisers might make targeting and attribution efforts less precise"* and that *"by reducing advertisers' targeting capabilities, publishers might incur significant revenue losses, jeopardising ad-supported models"*¹⁰. We would add that subscription-based models may not necessarily provide a solution for all but the largest national titles, which still rely on advertising revenue for a significant part of their funding¹¹. As such, the consumer detriment resulting from the deployment of PETs – that is, the decline in independent quality news – would certainly outweigh the benefits of increased control over data.

Separation Interventions in the Digital Advertising Market

M.3 Should the interventions be considered further as a priority either by the CMA or by a regulatory body in the future?

3.26 We welcome the CMA's concern with the conflicts of interest stemming from Google's position in both the demand and the supply side of the digital advertising market and the potential for Google to leverage its market power from its own inventory to foreclose competing intermediaries in the open display market. Due to the structural nature of these concerns, it is difficult to envision their being appropriately addressed by fairness and transparency requirements. Our view is that the range of separation interventions available to the CMA, and in particular the separation of Google's ad server from its ad exchange, should be considered through a market investigation.

¹⁰ Appendix L, paragraphs 132 and 134

¹¹ Mediatique, Overview of recent dynamics in the UK press market, 2018, p 66. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778155/180621_Mediatique_-_Overview_of_recent_dynamics_in_the_UK_press_market_-_Report_for_DCMS.pdf

3.27 Moreover, a market investigation and structural intervention could be achieved within a shorter timeframe compared to a code of conduct, granting relief to the many local and regional titles currently struggling to remain open. Separation options should therefore be explored through a market investigation over and above the development of a statutory code of conduct.

Transparency Interventions

M.14 Would the interventions, either individually or in combination, be effective in addressing the concerns identified in Chapter 5?

3.28 Yes, transparency interventions are crucial to enable competition in the digital advertising market and ensure publishers and advertisers get a fair return for their inventory and ad spend. Like the other behavioural remedies considered above, transparency interventions must cover current practices and be sufficiently flexible as to cover both current and future practices. Moreover, they must be implemented in combination with principles of openness and fair dealing.

M.15 Should the intervention be considered further as a priority either by the CMA or by a regulatory body in the future?

3.29 Yes, the NMA's view is that transparency interventions should be considered further by a regulatory body as part of the development of a code of conduct binding firms with strategic market status. See further our answer to question **M.18** below.

M.17 Would the benefits of the intervention be likely to outweigh the costs?

3.30 Yes, while we do not take the administrative costs of monitoring and enforcing a code lightly, we believe they are amply justified by the benefits involved for publishers, advertisers and ultimately consumers.

3.31 Transparency requirements would allow publishers to manage and monetise inventory more efficiently, monitor and report any undue intermediation fees or anti-competitive behaviour, and structure business strategies with a full understanding of the dynamics of advertising auctions. These benefits would be passed on to consumers who are best served by diverse range of well-funded, high-quality news titles covering every town and city across the UK.

M.18 Would transparency interventions be better addressed by a code of conduct as proposed in Chapter 6, for example by requiring Google and Facebook to comply with existing or future industry standards, or by a regulatory body given specific powers to address the lack of transparency?

3.32 Transparency interventions should be incorporated in the statutory code of conduct. As noted above, the code should be backed by a regulator with powers to monitor, launch investigations, request information and impose sanctions. We believe such a regulator should sit within the CMA, with the ability to call on other sectoral regulators for their expertise as and when required.

M.21 Would it be sufficient for the intervention to apply just to Google and Facebook or would the requirement also need to apply to all ad tech providers for it to work effectively?

3.33 Much like the application of the rest of the code of conduct, the transparency requirements should certainly apply to Google and Facebook, but they should also be sufficiently flexible as to apply to any firm which becomes an unavoidable business partner in digital advertising.

M.22 What information should be provided?

3.34 The NMA supports each of the transparency requirements listed in paragraph 6.178 of the Interim Report and paragraph 85 of Appendix M.

3.35 In particular, as set out in paragraph 3.7.2 above, we strongly endorse a requirement to report fees by all ad tech providers. We believe there should be full end-to-end costs receipting in the digital ad market.

3.36 Furthermore, we agree that there should be a requirement for intermediaries to provide bidding data to publishers and one that they provide transparency about the working of auctions. On this point, there should be full transparency around Google's ability to buy and sell ad inventories on the auctions it operates.

M.23 Should this information be provided to publishers to analyse or, alternatively, provided to a regulatory body for audit or review against stated auction rules?

3.37 Intermediation fees, bidding data and detailed information on how auctions work should be disclosed directly to publishers in order to foster trust within the market and enable them to understand whether they are getting value for money and, if not, adjust their behaviour.

3.38 Any difficulties surrounding the disclosure of sensitive information could be managed by aggregating and anonymising data. If this is the case, more detailed data should still be supplied to the regulator to allow it to carry out its monitoring activities.

In respect of all proposed measures:

INTERIM REPORT QUESTION 12 Have we identified the appropriate range of remedies to address conflicts of interest and a lack of transparency in digital advertising markets?

3.39 The NMA agrees with most of the CMA's analysis of the most appropriate remedies to address conflicts of interest and the lack of transparency in digital advertising markets. We agree in principle with the interventions aimed at levelling the playing field in social media and general search and we strongly support the decision to recommend the development of ex ante regulation, including the specific measures to promote transparency listed at paragraph 6.178 and in Appendix M. However, we believe that there is a need for further consideration of measures concerning user data to avoid cementing the market power of the SMS platforms. Furthermore, we remain in support of a market investigation into the open display advertising market.

INTERIM REPORT QUESTION 14 Do you have any views about the appropriate sequencing of the remedies we have identified?

3.40 A statutory code of conduct, including the transparency requirements discussed above, should be implemented as quickly as possible through primary legislation, to ease the strain imposed on publishers by Google and Facebook's unilateral conduct. In parallel, the CMA should conduct a market investigation to better understand the open display advertising market and consider whether structural remedies are necessary to complement the code of conduct. Even if the investigation establishes that structural remedies are not necessary, its findings will still be invaluable in further refining the code.

4. MARKET INVESTIGATION

INTERIM REPORT QUESTION 15 Do you agree with our assessment of the potential candidates for a market investigation, and what are your views on the merits of each?

4.1 Yes, the NMA agrees with the CMA's proposed candidates for a market investigation, especially the open display advertising market.

INTERIM REPORT QUESTION 16 Do you agree with our proposal not to make a market investigation reference at this stage?

- 4.2 The NMA welcomes the CMA's finding that there are reasonable grounds for suspecting that features of the open display advertising market, the search and search advertising market and the social media and display advertising market restrict or distort competition¹². We also agree with the CMA's determination that a market investigation reference would be an appropriate and proportionate response¹³. However, we respectfully disagree with the CMA's intentions not to make a market investigation reference relating to the open display advertising market.
- 4.3 The Furman Review and the Interim Report have, according to the Report itself, not uncovered the full extent of the issues within the open display advertising market¹⁴. With the range of resources and investigative powers it affords, its apolitical nature and its scope for international cooperation, a market investigation would provide the ideal forum for the CMA to shed light on a notoriously opaque market.
- 4.4 Once the CMA has attained a greater depth of understanding of the markets concerned, it would be in a far better position to determine whether a structural remedy is necessary and which form of separation, is most appropriate. While we believe the separation of Google's ad exchange and ad server is warranted, we welcome further insight into the market, the relationship between the two products and the best way to implement a separation. This would not only render a structural intervention more targeted and effective, but it would also lend it a greater level of legitimacy than if it were implemented without an investigation.
- 4.5 On this note, it is well-accepted that if structural separation of tech giants' products were pursued, it would require international cooperation. The CMA's political insulation makes it well-placed to collaborate with its counterparts in several European countries, the US, and Australia, all of which have done considerable work toward reigning in dominant tech firms.
- 4.6 The NMA is convinced that, rather than 'cutting across'¹⁵ the government's work in this area, a market investigation would complement it. As noted in section three, we share the CMA's doubts as to whether behavioural remedies alone can address the structural issues relating to the open display advertising market. By undertaking a market investigation, the CMA would be able to identify and fill in the gaps left by the behavioural approach while the latter would rightly be left to the government. Upon completion of the investigation in 2022, the CMA will be in a position to evaluate the form and effects of the code of conduct and tailor its response to complement that of the government or cure any of its shortcomings.
- 4.7 Finally, and most fundamentally, there is an urgent need for measures designed to put an end to Google's anticompetitive practices with respect to online display advertising (which is the main source of revenue for news publishers). As the digital market unit has not yet been put in place and the codes of conduct contemplated are still virtual in nature and will take some time to negotiate, there is therefore a significant danger that the measures needed to ensure that news publishers receive fair revenues for their inventory may be significantly delayed. Given the dire financial situation in which many UK news publishers are in, such a delay may be lethal.

¹² Interim Report, paragraph 7.5

¹³ Interim Report, paragraph 7.9

¹⁴ Interim Report, paragraphs 7.15-7.18

¹⁵ Interim Report, paragraphs 7.13-1.14

INTERIM REPORT QUESTION 17 Do you support recommendations to government as an effective route to implementing interventions in these areas?

4.8 The NMA supports recommendations to government as an effective route to implementing ex ante regulation. However, for the reasons cited above we view a market investigation as necessary to ascertain whether further intervention is needed and which remedy, if any, is most appropriate to complement pro-competitive regulation.

5. Further Work

INTERIM REPORT QUESTION 18 Do you agree we have identified the right areas for further work in the second half of the study, and are there any significant gaps?

5.1 With the exception of the CMA's intention to evaluate the controls over user data given to consumers by publishers, the NMA agrees with the areas for further work identified by the CMA.