

## **NON-CONFIDENTIAL**

### **Guardian Media Group response to Digital Markets Taskforce Call for Information**

#### **About Guardian Media Group**

Guardian Media Group (GMG) is one of the UK's leading commercial media organisations and a British-owned, independent, news media business. GMG owns Guardian News & Media, the publisher of theguardian.com and the Guardian and Observer newspapers, which have produced globally acclaimed investigations, including investigating the Paradise Papers and Panama Papers, and Cambridge Analytica. As well as being the UK's largest quality news brands, the Guardian and Observer have pioneered a highly distinctive, open approach to publishing on the web and have achieved significant global audience growth over the past 20 years. Our endowment fund and portfolio of other holdings exist to support the Guardian's journalism by providing financial returns over time.

#### **Introduction**

GMG welcomes the opportunity to respond to the CMA Digital Market Taskforce's (DMT) Call for Information. Over the last twelve months, the CMA digital advertising market study team has developed a thorough understanding of the dysfunction at the heart of the online advertising market, and the conflicts of interest that sit at its heart. The market study has created a fine body of evidence, which complements the Furman and Cairncross reviews. The challenges posed by dominance in the digital economy are now well detailed and documented throughout these reports. Given the extent of these challenges, we are pleased that the CMA has had assurances from the government that it is *"committed to taking forward pro-competitive reforms in this area, which are consistent with the findings and aims of this market study."*<sup>1</sup>

All of these reports confirm that the policies and behaviours of the largest tech companies have created a digital economy in which there is an absence of fair and effective competition. It is also clear from the CMA's work that the dominance of a small number of large platforms in digital markets is actively harming consumers and businesses operating in the digital economy, with real world financial consequences. The CMA's profitability analysis "suggests that between them, Google and Facebook were able to earn more than £2 billion of profits in 2018 over and above what was required to sufficiently reward investors with a fair return." That is £2 billion that, in a more competitive market, would either be retained by consumers through lower prices, or be distributed more widely across businesses operating in the digital economy, to the benefit of the companies with which those platforms compete. By way of comparison, those super normal profits account for more than the entire annual circulation revenues of every local and national UK news publisher combined for 2017, or over four times the total online advertising revenues of local and national publishers in the same year.<sup>2</sup>

Equally, in terms of consumer privacy rights, the CMA's final report of its digital advertising market study (Final Report) adds to the growing body of international evidence on the concerning data collection practices of these platforms, which enable the accretion of these super normal profits. For example, at present UK consumers have no choice as to whether they allow their data to be used for the purposes of personalised advertising on the most popular social media platforms, while (as the CMA notes) participation in these platforms is seen as a 'must have' - a factor that has grown during the Covid-19 lockdown period - meaning that UK consumers are presently powerless to assert their rights.

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<sup>1</sup> Page 34, Final Report.

<sup>2</sup> Page 6,

[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](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)

Given the scale of concerns identified by the Furman and CMA reviews, we welcome the speed with which the CMA has established the DMT, with a view to implementing the CMA's recommendations for a Digital Markets Unit (DMU), and associated codes of practice. We note that in some other countries, most notably in Australia, regulators are moving quickly to develop and implement mandatory codes of practice that seek to ameliorate identified asymmetries of power in digital markets in order to drive fair and effective competition in those markets. We therefore support the CMA's proposal to coordinate its actions as far as possible with other regulators, on an international basis.

Taken together, these reports provide a suite of recommendations that, if implemented by Ministers, could start to level the playing field in many online markets, including digital advertising, thereby enabling greater competition, innovation and growth, to the benefit of advertisers, publishers, citizens and the wider economy. It is vital that the work of the DMT maintains momentum in order to stimulate a pro-competitive environment, in which transparent, accountable, innovative products and services emerge, to the benefit of UK consumers and the wider economy.

### Specific questions

#### **1. What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why? In particular:**

• **The Furman Review refers to 'significant market power,' 'strategic bottleneck,' 'gateway,' 'relative market power' and 'economic dependence':**

– **How should these terms be interpreted?**

– **How do they relate to each other?**

– **What role, if any, should each concept play in the SMS criteria?**

• **Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms, could be used as a starting point for these criteria?**

• **What evidence could be used when assessing whether the criteria have been met?**

We agree with the CMA's proposed definition of SMS "*as a position of enduring market power or control over a strategic gateway market with the consequence that the platform enjoys a powerful negotiating position resulting in a position of business dependency*".<sup>3</sup> Similarly, we agree that types of evidence that would point to SMS, include: "*measures of shares of supply in the consumer facing market; the extent of reach across consumers; share of digital advertising revenues; control over the rules or standards which apply in the market, and the ability to obtain and control unique data that is applicable outside the market*".<sup>4</sup>

We agree that both Google and Facebook have enduring market power and act as gatekeepers of online traffic, creating a relationship of dependency with publishers and other businesses.<sup>5</sup> We endorse the CMA's recommendation that the government should designate both firms as having SMS at the outset of the regime<sup>6</sup>.

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<sup>3</sup> CMA Market Study on Online Platforms and Digital Advertising, Final report para 7.55

<sup>4</sup> Final report, para 7.57

<sup>5</sup> Final report, para 7.59-7.64

<sup>6</sup> Appendix U, para 25

We suggest that, given its market share of handset sales and its rigid use of rule setting powers over the iOS ecosystem, Safari and app store, SMS designation should also be applied to Apple at the outset of the regime.

We would suggest that a number of the criteria originally set out in Oftel's 2002 'market review guidelines: criteria for the assessment of significant market power'<sup>7</sup>, are applicable by analogy when considering which firms have SMS, for example:

- **Control of infrastructure that is not easily duplicated** - while telecoms legislation has focused on the build out of physical infrastructure, this principle could equally apply to key technology infrastructure, for example the infrastructure that connects buy and sell-side partners in the world of online advertising.
- **Technological advantages or superiority** - advantages in the digital environment are usually linked to a platform's superior data collection capability, which translates into an ability to deploy intelligence for the purpose of personalised digital advertising.
- **Product/services diversification (eg bundled products or services)** - bundling, whether of services, for example in relation to buy-side and sell-side advertising technology, or of products in consumer facing markets, serves to distort competition in favour of incumbent digital players.
- **Vertical integration** - this entrenches dominance in two ways in digital markets: "*by making new market entry harder due to control of upstream or downstream markets*", and "*through the potential ability to lever market power into upstream or downstream markets, thereby adversely affecting competition*". Identifying examples of digital businesses using vertical integration to favour group products or companies in an anticompetitive manner may be harder in digital markets, however, due to it being built into algorithms or code, rather than arising from more readily identifiable behaviour in the telecoms world.<sup>8</sup>

## **2. What implications should follow when a firm is designated as having SMS? For example:**

- **Should a SMS designation enable remedies beyond a code of conduct to be deployed?**
- **Should SMS status apply to the corporate group as a whole?**
- **Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?**

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

The establishment of the DMU should build on relevant experience in other sectors, particularly on the limits of codes and separation agreements that have been brokered by regulators in lieu of full legal separation. In particular, Ofcom's recent decision to move beyond BT's 2005 separation undertakings<sup>9</sup>, by ordering the full legal separation of BT Openreach, demonstrates the limits of regulated codes and agreements versus actual legal separation. While the separation undertakings achieved a great deal in terms of enabling market entry and greater competition, the move to legal separation demonstrates the need for regulators to carefully

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<sup>7</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0028/86482/smpg0802.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0028/86482/smpg0802.pdf)

<sup>8</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-1/strengthening-openreachs-independence>

<sup>9</sup> <https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2005/ofcom-accepts-undertakings-from-board-of-bt-group-plc-on-operational-separation>

monitor the impact of those undertakings on competition, and to be willing to escalate interventions where evidence suggests it is appropriate to do so.

It is important therefore that, in addition to policing the SMS code of conduct, the DMU - and the CMA - remains empowered to implement targeted structural interventions that address the causes of market power, not just to develop codes of practice that seek to ameliorate the negative effects of that power. It is vital that, once a company is designated as having SMS, and is thus subject to the code, that does not preclude that entity from being the subject of a further pro-competitive intervention, should the code prove inadequate.

Whether an SMS designation should be a prerequisite for a firm to be the object of a pro-competitive intervention is a more complex question. We agree with the CMA that certain pro-competitive interventions should only be applied to firms with SMS, while others should be applied more widely.

It is vital that remedies in the Final Report, such as the choice requirement and ‘fairness by design’ obligations, apply discretely to SMS businesses that do not currently provide those choices to consumers. In response to the interim report, GMG suggested that the “*news media and wider publishing industries will offer this level of granular consent through the development of the industry’s IAB TCF framework, and therefore should not be subject to the same duty.*” We therefore agree with the final report that this intervention should apply “*initially only to platforms with SMS*”<sup>10</sup>.

Other pro-competitive remedies outlined in the Final Report, some of the other remedies will only apply to businesses operating in the absence of SMS status. For example, in relation to the mandation of transparency of bid data through the roll-out of a common impression or transaction ID, it is absolutely vital and necessary that this intervention applies uniformly to all market actors operating across the open display advertising market.

Finally, we agree with the Final Report’s recommendations that SMS designation should apply to the corporate group as a whole, rather than a single entity. Ensuring that the principles and practices outlined in the report apply to every group business will ensure that SMS businesses can’t simply continue trading in unfair ways through acquired or nascent businesses within a portfolio of incumbent businesses.

### **3. What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular:**

- **What are the criteria that should define which activities fall within the remit of this regime?**
- **Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.**

The activities covered in the Final Report -- online advertising, search, and social media -- should certainly be included within the remit of any future pro-competition regime. In addition, the bottleneck power exerted by transaction-based platforms (such as Apple) should also be within scope, for two clear and present reasons.

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<sup>10</sup> 8.126, Final Report

- First, the degree to which the Covid-19 crisis has eviscerated the online advertising market has further highlighted the need for publishers and other online businesses to develop business models that enable them to engage users in making direct payments.
- Second, the ongoing degradation of key aspects of online advertising infrastructure such as the loss of IDFAs<sup>11</sup> in iOS, and third party cookies more broadly, will mean that more businesses will seek to generate direct reader revenues in order to fund investment in high quality content such as professional journalism.

GMG agrees with the Furman Review that the pro-competition regime should have a broad scope in primary legislation based on characteristics such as “*significant direct or indirect network effects, limited offsetting effects of multi-homing and differentiation, and significant sources of non-contestability*”.

In terms of the frequency of the statutory review of markets, we agree that a review every 3 to 5 years is appropriate. However, there should be a mechanism through which an early review could be triggered, if relevant concerns are raised with the DMU.

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

##### Online advertising

The Covid-19 crisis has exacerbated existing market trends in relation to the online advertising market, on which many publishers have, in part or full, relied as a revenue stream to fund crucial investment in journalism. When combined with the ongoing implementation of GDPR related consent management platforms (CMP) - which enable users to make granular decisions about permissioning the use of their personal data - and fundamental challenges to underlying industry infrastructure such as third party cookies, the online advertising market is experiencing significant flux and change for independent online publishers. By contrast, Google, Facebook, Apple and Amazon continue to deliver astonishing levels of growth and profitability despite the Covid-19 crisis driving huge declines in profitability across the wider global economy<sup>12</sup>.

This disparity between the downturn experienced by independent publishers versus the vast profitability of these platforms is partly due to the fact that they provide ‘must have’ products and services in consumers’ lives. This enables them to take policy positions - such as not providing consumers with their GDPR right to opt-in to the use of their personal data for the purpose of target online advertising - that consumers may not otherwise readily accept. As the CMA notes in its Final Report, in “*almost all cases across the social media platforms that we reviewed including Facebook and Instagram, consumers automatically have their data used for personalised advertising. With the exception of TikTok, all other social media platforms make this a pre-condition of using their services and consumers are unable to turn off personalised advertising.*”<sup>13</sup>

Such divergent approaches to compliance with data protection law are already distorting market expectations towards the purchase of targeted advertising on social media platforms. In the absence of regulatory action to enable UK consumers to enforce their GDPR rights in relation to the practices of SMS platforms, the distortion of the market is likely to accelerate in the months and years ahead.

##### Subscriptions and other in-app payments

<sup>11</sup> <https://www.adexchanger.com/mobile/apple-is-putting-idfa-use-under-the-microscope/>

<sup>12</sup> <https://www.theguardian.com/business/2020/jul/30/amazon-apple-facebook-google-profits-earnings>

<sup>13</sup> P185, Final Report

As we note above in response to question 3, a central focus for many news publishers and other independent businesses is the development of regular recurring reader revenues, whether through subscriptions to products or services or via voluntary contributions to support high quality journalism. This means that the application of principles of fair and effective competition to transaction based marketplaces will become ever more vital as we seek to sustain a vibrant plural digital economy.

GMG has previously expressed concern to the CMA about the way in which Apple applies its 'bottleneck power' to extract monopoly rents from app developers and media companies who wish to build a business based on regular recurring reader revenues on iOS devices. Apple exerts this power by refusing to allow iOS app developers to provide payment options other than Apple's proprietary payment services. Apple's policies also prevent iOS developers marketing to those users in order to let them know that they can subscribe or contribute to those services outside of the iOS ecosystem.

As a result of this application of 'bottleneck power', when GMG enabled functionality to process contributions within the Guardian iOS app, Apple's developer review guidelines required the bundling of its own inefficient in-app purchasing option, as a condition of sale within the iOS store<sup>14</sup>. Apple takes 30% of that transaction revenue, despite the processing of that payment representing a marginal cost to Apple. As well as rigidly tethering developers to the use of Apple's proprietary in-app payment service, Apple's review guidelines also prevent developers from using any kind of in-app advertising or marketing to ask readers to subscribe or contribute via the open web<sup>15</sup>.

As a result of Apple's use of its review guidelines to remove competition for payment services, as a point of principle GMG has turned off contribution functionality within the iOS app. This decision has a commercial cost, with internal modelling suggesting that contributions through the iOS app could drive a gross uplift of 5-20% in terms of existing reader revenues.

Apple's policy decision to prevent in-app competition from potentially more efficient third party in-app payment functionality has meant that GMG has had to develop a bespoke strategy for iOS users, in which iOS users are encouraged to subscribe to the Guardian's premium iOS app. Even in this circumstance, if a reader subscribes to the premium app, at a cost of £5.99, 30% of this goes straight to Apple in year one, falling to 15% if that subscriber stays with that app in year 2 and beyond. By contrast, third party payment service providers such as Stripe or Paypal take a payment fee of 0.1% and 3.4% respectively. The disparity is stark and indicative of Apple's market power.

In addition to the financial cost of Apple's policy of forcing the bundled use of its own in-app payment system, consumers are harmed by the fact that developers are prevented from knowing details of who those customers are. This means that app creators such as publishers are unable to communicate with their own customers, nor are they able to ensure that those customers are not paying twice for the same service.

While this is an issue that is already felt acutely by publishers like GMG, its impact is likely to increase more in the future, as publisher business models come under further strain.

## **Questions for input and evidence – remedies**

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<sup>14</sup> See section 3.1 of the Apple Store Review Guidelines, <https://developer.apple.com/app-store/review/guidelines/#in-app-purchase>

<sup>15</sup> See section 3.1.3(a) of the Apple Store Review Guidelines <https://developer.apple.com/app-store/review/guidelines/#in-app-purchase>

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

In GMG's response to the Statement of Scope on the Digital Advertising Market Study, we raised concerns that *"the existing CMA statement of scope does not include the impact of Apple's policies and practices within the scope of its examination of competition in the digital advertising market. As the report commissioned by the Stigler Center at Chicago Booth notes, Apple has a hugely influential role at the heart of the digital ecosystem, both in terms of its commercial dealings with dominant search and social platforms, its ability to set the rules and policies that suppress digital advertising and marketing that reaches iOS users, and its policy on tying in-app payments to its own proprietary payment services."* We express concern in this submission - particularly in response to question 4 above - that it is essential that Apple's ability to exercise market power to capture an excessive share of customer revenues, while reducing the ability of publishers and other dependent businesses to develop alternative payment and distribution options, is captured within the DMU's remit and associated codes.

The norms by which the digital advertising market currently functions have been defined by two platforms with SMS, Google and Facebook, in ways that benefit them. For example, both companies have set the expectations of advertisers and media agencies about the level of personalisation and targeting with which digital advertising should be traded. But in doing so, and often in the name of free speech, they have been found to pursue greater advertising revenues for themselves over wider societal goals such as fairness<sup>16</sup>, public health<sup>17</sup>, equality and decency<sup>18</sup>.

Together they have centralised the economic potential of the online advertising market, generating multi-billions of pounds of super profits on an annual basis, and dictating the terms on which the digital advertising market and content licensing in a digital world are run. This is no more clearly articulated than in the recent refusal of the Facebook's CEO and key stockholder to listen and act on the concerns of civil rights campaigners<sup>19</sup> or advertisers that backed their calls for reform, noting that the advertiser boycotts will end 'soon enough'<sup>20</sup>, presumably because he is aware that advertisers presently have very little option other than to buy advertising inventory through Facebook companies if they are to reach a social media audience.

The Final Report describes a market that is structured to reward products and services that attract attention at any cost. Users of those platforms have no choice but to allow those platforms to facilitate opportunities for advertisers to follow them across the web at the lowest possible price. This approach to advertising is creating negative externalities in societies across the world, with which governments are urgently trying to come to terms. There is widespread consumer and societal harm as a result of a business model that flattens hierarchies of content, and monetises its end users solely based on who they are, rather than the quality of the content that they are reading, or the quality of the environment in which they are reading it.

In recent months, Facebook has invested in research suggesting that its advertising business is a driver of wider economic growth<sup>21</sup>. But the fact that Facebook's advertising *may* be a factor in driving economic growth is irrelevant to important questions posed by the CMA report. Namely,

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<sup>16</sup> For example <https://www.theguardian.com/technology/2019/mar/28/facebook-ads-housing-discrimination-charges-us-government-hud>

<sup>17</sup> For example <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2020/08/Follow-the-Money-3-Aug.pdf>  
<https://www.wired.com/story/bill-gates-on-Covid-most-us-tests-are-completely-garbage/>

<sup>18</sup> For example <https://www.theguardian.com/technology/2020/jun/30/third-of-advertisers-may-boycott-facebook-in-hate-speech-revolt>

<sup>19</sup> <https://www.theguardian.com/technology/2020/jul/07/facebook-boycott-hate-speech-mark-zuckerberg-meeting>

<sup>20</sup> <https://www.theguardian.com/technology/2020/jul/02/mark-zuckerberg-advertisers-boycott-facebook-back-soon-enough>

<sup>21</sup> <https://www.oecd.org/sdd/business-stats/the-future-of-business-survey.htm>

is Facebook a business with SMS? Does Facebook operate fairly and in accordance with the law in the markets in which it operates? The publication of reports demonstrating that a monopolist is growing its wealth and share of the market is not a sign that markets are working well, nor is it a positive outcome that regulators should seek to protect. It should instead be seen as evidence of the need for regulators to act to enforce competition in digital markets. As the Final Report notes, the CMA would “*expect these excess profits to be shared more freely with consumers in a more competitive market.*”<sup>22</sup>

As we note in response to question 4, the Final Report highlights the way in which online platforms do not allow users a choice as to whether their personal data can be used for the purpose of personalised online advertising, in order to use that service. This finding sits in tension with advice from the ICO, which directs publishers against the use of ‘cookie walls’ or a ‘take it or leave it approach’<sup>23</sup>. With this in mind, one way in which regulators should level the playing field in the digital economy is for data protection authorities to enforce key aspects of data protection laws, such as GDPR, with equal force against online platforms with SMS, as they propose to do in relation to independent publishers.

### Focusing on the fundamental causes of market dysfunction

Dysfunction and dominance at the heart of the online advertising market have been enabled, in part, by a lack of uniform standards or clear rules on data disclosure. Opacity at the heart of the online advertising market has led to concerns about the lack of transparency of auction processes, and raised big questions about whether businesses with SMS should be allowed to own and operate businesses that occupy positions across the advertising supply chain, due to the potential for conflicts of influence to business operations.

While the CMA is right to pursue a principles based code of practice for implementation by the DMU, to enable the DMU to root out behaviour that conflicts with the code will necessitate that market participants - acting to alert the DMU to demonstrably bad practices - and the DMU itself have access to high quality market data in a timely manner, and in a format that can be easily analysed and acted upon.

In respect of the CMA’s recommendation of creating a common transaction ID, this could be achieved by mandating the use of a common standardised RTB protocol - based on the openRTB protocol - to underpin auctions in the programmatic marketplace. The openRTB protocol, owned by the IAB tech lab - an associated group of the Internet Advertising Bureau (IAB) - requires reform to ensure that vendors complete mandatory data fields with common values in order to ensure that data passed between intermediaries in the market is uniform in nature. The use of common market data would enable publishers, advertisers and regulators to use that data for the purpose of audit, analysis and vendor performance management.

Ensuring that such data is made available to advertisers and publishers by all parties in the value chain - whether dominant or nascent - would align the incentives of market actors, creating competition, accountability and innovation, creating a healthier more diverse digital economy to the ultimate benefit of UK consumers. This intervention could negate the need for a separate intervention to force SMS platforms to set out the fees they take, as those fee levels would become self-evident through analysis of standardised auction data.

Similarly, with mandated access to consistent auction data in a standardised form made available by SMS platforms, the need for those two parties to provide insight into how auction mechanisms work would be elucidated by analysis of market data, rather than relying on the platforms themselves to set out the details of how algorithms function. The nature of the auction

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<sup>22</sup> Page 11, Final Report

<sup>23</sup> <https://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/how-do-we-comply-with-the-cookie-rules/>



mechanisms could become self-evident through analysis of the data, and could be used by individual publishers, and the new regulator, to act where necessary.

Access to high quality market data would also enable the DMU to gain greater insight into the sort of practices identified in appendix M of the CMA's Final Report.

## **6. In relation to the code of conduct:**

**• Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?**

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

GMG supports the CMA's recommendation that the code be backed by a statute setting out three broad objectives – fair dealing, open choices, and trust and transparency – under which the DMT, and subsequently the DMU, would develop principles and detailed guidance. We also agree that each SMS firm should have its own tailored code to address the unique relationship each has with dependent businesses, including publishers, in the case of Google and Facebook.

GMG supports the proposed content for the code of conduct in the Final Report, and agrees with each of the recommended principles in Chapter 7 and Appendix U that aim to rebalance the commercial relationship between platforms and publishers, including ensuring that:

- publishers are able to exercise additional control over how their content is shown on platforms;<sup>24</sup>
- contractual terms concerning the ability of publishers to monetise their content be objectively justifiable;<sup>25</sup>
- appropriate user consent is sought to ensure disaggregated user data can be shared with the relevant publishers when hosting publisher content;<sup>26</sup>
- SMS platforms do not impose their own advertising software on publishers when they use platforms' publishing software like AMP or IA;<sup>27</sup>
- they do not prefer their own customers over third parties who use other intermediaries;<sup>28</sup>
- they do not preference content using their publishing software like AMP and IA in features like Top Stories or the news carousel at the top of general search results;<sup>29</sup>
- AdX and non-google ad servers are interoperable by requiring AdX to participate in header bidding;<sup>30</sup>
- the operation of search and news feed ranking algorithms and advertising auctions are subject to audit and scrutiny of their operation by the DMU;<sup>31</sup>
- fair warning is provided about changes to the operation of algorithms where these are likely to have a material effect on users, and to explain the basis of these changes; and <sup>32</sup>

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<sup>24</sup> Appendix U, para 92

<sup>25</sup> Appendix U, para 94

<sup>26</sup> Appendix U, para 86

<sup>27</sup> Appendix U, para 95

<sup>28</sup> Appendix U, para 123

<sup>29</sup> Appendix U, para 128

<sup>30</sup> Appendix U, para 144

<sup>31</sup> Appendix U, para 149

<sup>32</sup> Appendix U, para 166

- SMS platforms provide transparent information on remuneration mechanisms so that publishers can make more informed decisions about how they use the platform’s services to monetise their content.<sup>33</sup>

We support the CMA’s recommendations on the procedures and powers necessary for the DMU to conduct investigations and enforce the code<sup>34</sup>. In particular, we welcome recommendations that would enable the DMU to:

- carry out investigations under the code on its own initiative and in response to complaints;
- investigate other conduct that intentionally or negligently inflicts harm;
- Compel the provision of information from the firms it is investigating;
- appoint a monitoring trustee to monitor and oversee compliance by an SMS firm;
- put in place interim measures pending the outcome of an investigation;
- make orders, and block, suspend or unwind decisions to enforce the code;
- impose penalties for non-compliance with such orders;
- impose substantial penalties for conduct that intentionally or negligently inflicts harm; and
- publish reports on its work and the industry more generally and co-ordinate and share information with UK regulators such as CMA, ICO and Ofcom, and with overseas authorities.

We also agree that investigations under the code should where possible be conducted in a limited timeframe, such as six months from their launch. More complex investigations, such as those relating to pro-competitive interventions or intentional or negligent harms, should still be conducted with relative speed compared to current competition enforcement.

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

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

While we agree that there should be increased scrutiny of acquisitions by SMS firms (already apparent in recent CMA merger cases), we would question whether there should be a separate merger regime, given the added complexity and uncertainty this would create. It is imperative that the measures to address the source of platforms’ market power and rebalance their relationship with publishers be promptly brought into force. The development of a separate SMS-based merger regime would be likely to slow down this process.

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

As we note in response to question 5, a key way in which to level the playing field in the digital economy would be for data protection authorities to enforce key data protection laws such as GDPR with equal force against online platforms with SMS, as they do against independent publishers. We agree that the imposition of a choice requirement and a ‘fairness by design’ obligation will explicitly set out the obligations of SMS platforms in relation to how the options they must provide to consumers.

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<sup>33</sup> Appendix U, para 175

<sup>34</sup> Final report, para 7.94-7.101

The CMA's proposed 'choice requirement'<sup>35</sup> has the potential to limit the ability of SMS platforms to exploit the collection of personal data for one purpose, in order to use that personal data for another commercial purpose. The CMA is right to reject suggestions by Facebook<sup>36</sup> that it would be disproportionately affected by the proposed 'choice requirement' obligation. In fact, the present distortion of the online advertising market is due to the fact that Facebook does not provide its users with a choice as to whether their personal data is used by Facebook for the purpose of personalised online advertising. This lack of choice contrasts sharply with the practices of publishers, who are required to offer granular levels of choice to consumers in order to gain consent for personalised advertising<sup>37</sup>. It is precisely because Facebook's existing market position is based on, and facilitated by, a lack of customer choice that a choice-based remedy would affect it more materially than others. Indeed, such an outcome would be a sign of the remedy's success, rather than a flaw.

In relation to online marketplaces, it is essential that the DMU immediately addresses the use of app store policies by SMS companies to prevent competition in payment services. As noted above, this issue is particularly acute in relation to Apple's app store review guidelines, which not only prevent the use of third party payment services within apps, but also prevent developers from letting their users know that they can subscribe to the same app via alternate means (such as the developer's own website). We are not in a position to offer a finished package of remedies that would address this issue but suggest the DMU should focus on the need to facilitate consumer choice in payment systems and to break the current rigid tie between the app store and associated content payment mechanism.

More broadly, we agree with the recommended powers available to the DMU in respect of these interventions, including the power to assess and implement them and to monitor, amend and revoke the interventions over time to ensure the regime is future proof and flexible.<sup>38</sup> We support the CMA's recommendation that the statutory test the DMU would have to satisfy to carry out an intervention should be narrowly scoped in each case to ensure that the outcomes are deliverable within a reasonable timescale, subject to transparency and consultation rights.<sup>39</sup> The 12-month statutory deadline is also appropriate for this purpose.<sup>40</sup>

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

In the context of online advertising, as we note above in response to question 5, there is a clear and pressing need for the online advertising industry to standardise the market data that is generated through online advertising transactions. Access to high quality market data is also essential to enable publishers to understand which advertisers have successfully, and unsuccessfully, sought to buy advertising inventory on their website. This data is crucial to enable publishers to build direct relationships with advertisers, rather than being reliant on the open marketplace - which is typically subject to higher fees and greater market uncertainty - as the only source of demand through which they can build an advertising business. Our view is that the CMA's recommendation of creating a common transaction ID, could be achieved through the improvement of existing RTB data protocols.

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<sup>35</sup> 8.87 of the Final Report

<sup>36</sup> 8.117 of the Final Report

<sup>37</sup> <https://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/>

<sup>38</sup> Final report, para 7.122-126

<sup>39</sup> Final report, para 7.124

<sup>40</sup> Final report, para 7.128

Whatever form the DMU determines a transaction or impression ID solution should take, the mandating of such an ID is preferable to a reliance on the use of contract based transparency and access requirements, which invariably falter when requested in relation to platforms with SMS. It is also essential that the requirement to produce and provide access to high quality market data is not specific to a single technological form of online advertising. For while the current paradigm of online advertising markets relies on the use of cookies and real time bidding in order to process programmatic advertising trades, the longevity of this paradigm is threatened by the degradation of third party cookies within online environments. It is vital that, whichever technology solution underpins the next online advertising paradigm, the same obligation to produce and provide high quality market data to publishers and advertisers applies to market participants.

In relation to the provision of customer data to publishers, we welcome the CMA's acknowledgement that *"Google and Facebook are able to collect and use individual data from consumers who interact with content on the publisher websites through the use of Google and Facebook analytics service"* and that *"publishers do not have access to the same level of data on consumer interaction with their own content when hosted on Google and Facebook properties"*.<sup>41</sup> We agree with the recommendation that the codes of conduct should *"oblige platforms to ensure that the appropriate user consent is sought to ensure disaggregated user data can be shared with the relevant publishers when hosting publisher content"*.<sup>42</sup>

More broadly, it is welcome that the CMA has recognised the need for much greater collaboration with the ICO on issues that sit at the intersection between data protection and competition law. It is essential that the DMU is vigilant to the use of data protection law as a means to reduce competition in online markets, and is open to concerns raised by market participants about behaviours by SMS businesses that exploit the complexity of this intersection for their own commercial gain. To reiterate a point made earlier in this submission, GMG strongly believes in the right of UK citizens to exercise the rights afforded to them under the Data Protection Act 2018, and believes that these rights should be afforded to UK citizens by all companies operating in the UK, regardless of size or market power.

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

The CMA has discovered fundamental conflicts of interest at the heart of the digital advertising ecosystem, the effects of which are likely to be prolonged into the future. The separation of SMS businesses back into distinct business units should be considered where such action would remedy the conflicts of interest identified by the CMA. Such separation would provide advertisers, publishers and consumers with transparency and clarity on how data is used, and the outcomes that are achieved by individual SMS business advertising products.

As we note above in response to question 2 regarding measures taken to combat the market power of the former state owned monopoly BT Plc, it is important to be realistic about how long the effective regulatory separation of dominant companies can take in practice. We note that, in addition to multiple proposals around separation remedies, the CMA suggests other measures, such as the imposition of data silos<sup>43</sup>. We agree that this remedy could *"prevent SMS firms from using data from services where they have market power in other markets where it has an adverse effect on competition"* and provide an alternative to pursuance of physical separation.

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<sup>41</sup> Appendix U, para 97

<sup>42</sup> Appendix U, para 99

<sup>43</sup> 8.237 of the Final Report

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

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

Questions regarding the tools that are required to prevent the emergence of new SMS gateways emerging to dominate digital markets are important, but should be a secondary consideration compared to the pressing need to implement recommendations that tackle *existing* market power. If a pre-emptive competition tool is to be developed by the DMT, this should follow the establishment of a DMU equipped to enforce the code and carry out pro-competitive interventions to address current concerns.

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

Whether in relation to the sale of online advertising, or the development of subscriptions or other reader revenue streams, information is vital to enable publishers to build viable long term business models. While the volumes of traffic that reach the websites of publishers from SMS platforms fluctuates, the ability to access key data points about that audience is vital in order to plan investment and resource allocation, to drive product innovation, and to understand whether that traffic has the potential to generate economic growth (or not). It is, in short, vital information to those seeking to build and sustain an independent business.

There is an underlying tension, identified in the Final Report, between the need for publishers to understand how and when products they produce are consumed, and the objective of digital platforms with SMS to control the monetisation of their user base, whether through online advertising (Google and Facebook) or subscription services (Apple).

New data protection laws such as the GDPR have sought to empower consumers by enabling them to control the use of their personal data in ways that they determine. It is vital however, that regulators are similarly empowered to ensure that SMS companies do not seek to exploit these laws in order to benefit their own businesses, for example by withholding or degrading information that would otherwise be provided to online business users of those services.

In terms of how such degradation of data quality arises in practice, in the context of online advertising transactions, the CMA notes Google's decision to remove time stamp data from bid requests as one example of where GDPR has been used to justify a reduction in the provision of crucial data. At the same time, Google has provided advertisers with more data, introducing a new piece of information sent to AdX after an auction is completed – the 'minimum bid to win' - which informs buyers about the lowest price they could have bid in order to win the impression. This new piece of data means that advertisers, or those acting on their behalf, can use that data to lower their pricing in order to avoid spending more than they would otherwise need to in order to win an auction. Buyers achieve this by using the new data to write algorithms that keep lowering their bids in order to push the price paid to the lowest price level, rather than bidding what the ad impression is worth to the advertiser, which is how a true first price auction should work. The effect of these two changes is to empower the buy side, whilst weakening the position of the sell side, thereby further entrenching existing market power and reducing market efficiency.

In the context of subscription and transaction based products, Apple's approach to the provision of app user data is highly restrictive, providing app developers with no access to data about individuals who subscribe to products through the iOS store. This policy restriction on access to user data, thereby preventing publishers from building meaningful engagement with readers or

using that data for customer service purposes. In addition, Apple use its developer review guidelines to require the bundling of its own inefficient in-app purchasing option, as a condition of sale within the iOS store<sup>44</sup>. As a consequence, Apple takes 30% of that transaction revenue, despite the processing of that payment representing a marginal cost to Apple. As well as rigidly tethering developers to the use of Apple’s proprietary in-app payment service, Apple’s review guidelines also prevent developers from using any kind of in-app advertising or marketing to ask readers to subscribe or contribute via the open web<sup>45</sup>.

These policies cause consumer harm through the need for developers to charge higher prices to take account of the mandatory 30% fee to Apple, whilst causing consumer detriment as a result of the inability for publishers to cross-match consumers who purchase subscriptions directly via first party websites, who may then also purchase a subscription via the iOS store. This can lead to a poor level of customer service, in some cases leading to consumers paying twice for the same product. In addition, Apple has recently announced that iOS developers seeking approval for listing in the App Store will have to provide a mandatory log-in<sup>46</sup>, which is likely to further disintermediate app developers from their customers, and enable Apple to retain the customer data and relationship with consumers.

GMG agrees with the CMA that SMS platforms - including Google, Facebook and Apple - *“have a clear incentive to apply a stricter interpretation of the requirements of data protection regulation when it comes to sharing data with third parties than for the use and sharing of data within their own ecosystems. Further, if vertically-integrated platforms are successful in interpreting data protection regulation in this way, this may create an artificial incentive in the long run towards greater vertical integration, as a way of circumventing regulatory constraints.”*<sup>47</sup>

GMG welcomes the CMA’s commitment to working closely with the ICO to understand the degree which GDPR is used by SMS platforms is used as a way to prevent legitimate data sharing with businesses that use those platforms. GMG particularly welcomes the concept of ‘competition neutrality<sup>48</sup>’, to ensure that vertically integrated SMS platforms cannot use personal data from consumers for one purpose, share that data with a group business for another purpose, but then refuse to provide that data to third party businesses with whom they compete. This is relevant in the context of digital advertising, but also in terms of the refusal to provide user data in the context of marketplaces such as app stores.

In addition to supporting the CMA codes of conduct, we support each of the CMA’s recommendations collated above in response to Q6. The DMT should also consider the ongoing work of the ACCC to impose a mandatory bargaining code in relation to the use of journalism by SMS platforms<sup>49</sup>, and consider how a similar code could be implemented as part of the broader DMU package.

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

GMG welcomes the CMA’s recommendation for the imposition of a choice requirement and a ‘fairness by design’ obligation on SMS platforms.<sup>50</sup> In our response to the CMA interim

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<sup>44</sup> See section 3.1 of the Apple Store Review Guidelines, <https://developer.apple.com/app-store/review/guidelines/#in-app-purchase>

<sup>45</sup> See section 3.1.3(a) of the Apple Store Review Guidelines <https://developer.apple.com/app-store/review/guidelines/#in-app-purchase>

<sup>46</sup> <https://www.theverge.com/interface/2019/6/5/18653113/apple-sign-in-single-sign-on-antitrust-competition>

<sup>47</sup> 5.239, Final Report

<sup>48</sup> 8.252, Final Report

<sup>49</sup> <https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code>

<sup>50</sup> Final report, para 8.78-8.82

response, we suggested that the “*news media and wider publishing industries will offer this level of granular consent through the development of the industry’s IAB TCF framework, and therefore should not be subject to the same duty.*” GMG agrees that the ‘fairness by design’ duty on platforms with SMS would be a positive intervention to the benefit of UK consumers. It would help consumers to understand how their data is being used within walled garden environments, and to control the use of that data according to their personal preferences.

GMG welcomes the CMA recommendation to impose data separation (or data silo) interventions that would prohibit platforms from combining certain categories of data within their ecosystems<sup>51</sup>. It is vital that, where consumers consent to the use of data for one purpose, this cannot be used by large SMS platforms for another purpose. This intervention would help to support consumer choice about how their data is used, driving the market to develop products that are avowedly privacy enhancing, rather than enabling an environment that encourages data collection at all costs.

Regarding proposals to simplify and centralise consent<sup>52</sup>, one of the main issues preventing the adoption of the draft ePrivacy regulation was concern expressed by independent businesses about the potential power that the centralisation of these controls would provide to browser and ecosystem vendors.<sup>53</sup> It is essential that the centralisation of consent mechanisms does not inadvertently exacerbate the existing power of dominant platforms and ecosystem gatekeepers. This is particularly important in the context of developing plans to migrate the process<sup>54</sup> of ad serving to a series of browser APIs as a replacement for the common standard of third party cookies.

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

As we note in response to Q5, the online advertising market has evolved organically to operate in the absence of a common market data standard. The consequences of this are starkly illustrated by the recent PWC/ISBA report<sup>55</sup>, which was unable to attribute around 15% of advertising expenditure flowing across the marketplace. As we note above, the production and provision of market data produced to a common standard would enable publishers, advertisers and regulators to use that data for the purpose of audit, analysis and vendor performance management.

In terms of interoperability measures discussed in the Final Report<sup>56</sup> it is important that the imposition of any new interoperability requirements do not inadvertently lead to the further enhancement of SMS platforms’ market power versus challenger businesses seeking to compete in the same marketplace. While data mobility remedies may have some positive consumer benefits, e.g. in terms of enabling users to move media and playlists from one proprietary platform environment to another, we agree with CMA analysis that due to “*market failures in the consumer-facing and digital advertising markets... powers to introduce consumer choice and separation interventions are also required.*”<sup>57</sup>

We welcome the CMA’s approach to the principle of “open choices” within recommendations for a code of practice. Ensuring the SMS platforms provide services in an unbundled way has

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<sup>51</sup> Para 105, Final Report

<sup>52</sup> Para 8.254

<sup>53</sup> <https://digiday.com/media/eprivacy-looming-nightmare-publishers/>

<sup>54</sup> <https://headerbidding.co/google-privacy-sandbox/>

<sup>55</sup> <https://www.isba.org.uk/knowledge/digital-media/programmable-supply-chain-transparency-study/>

<sup>56</sup> Paras 92, 93, Final Report

<sup>57</sup> 7.109, Final Report

the potential to drive competition and innovation in digital markets. Once again, a relevant market parallel, in terms of separating the activities of incumbent online platforms with strategic market status, are the measures taken to introduce competition in the UK broadband market. Through the introduction of local loop unbundling in order to create effective retail competition, and a focus on delivering competition in the wholesale broadband market by analysing and capping the fees charged for wholesale services provided by the incumbent provider, BT, Ofcom has created competition, investment and innovative new services for UK consumers.<sup>58</sup>

## DESIGNING PROCEDURES AND STRUCTURES

**Q10. Are the proposed key characteristics of speed, flexibility, clarity, and legal certainty the right ones for a new approach to deliver effective outcomes?**

**Q11. What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms and for imposing a code of conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?**

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

GMG agrees with the CMA's views<sup>59</sup>, in relation to the powers and procedures required to bring the codes of practice into force.

In relation to the interaction between the work of the DMT and other ongoing policy work around data protection, and the government's flagship online harms legislation, there is a need to see each of these strands in a holistic manner. It is vital to recognise that the digital advertising market, in its current form, does not incentivise investment in the dissemination of accurate news and high-quality content. It rewards products and services that attract attention, regardless of quality or harm, and facilitates opportunities for advertisers to follow audiences across the web at the lowest possible price. It is a market that is opaque by design, preventing advertisers from knowing where their advertising impressions land.

It is vital that the government takes a strategic focus on the underlying drivers of the harms perpetrated on SMS platforms and, in parallel with the creation of an online harms framework, seeks to inject competition and innovation into an online marketplace that has become dominated by a very small number of gatekeepers.

It is nevertheless essential that efforts to solve the issue of online harms are seen primarily through the lens of competition, rather than as an attempt to regulate speech. The danger otherwise, is that in seeking to tackle online harms through the regulation of speech, there are unintended consequences for the ability of citizens to consume a wide variety of news and information and to express themselves online. An overly zealous approach to the regulation of speech could not only have a negative impact on the business models of organisations that do invest in high-quality journalism, but also on the rights of individual citizens to participate in democracy. Obligations to monitor and take down specified categories of 'harmful', but not illegal content in specific or automated ways, could also lock in market dominance, rather than creating an environment in which much needed competition to incumbents with SMS emerges.

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<sup>58</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0028/29647/context.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0028/29647/context.pdf)

<sup>59</sup> Page 27, [https://assets.publishing.service.gov.uk/media/5efc5e433a6f4023c77a135c/Call\\_for\\_information\\_July2020.pdf](https://assets.publishing.service.gov.uk/media/5efc5e433a6f4023c77a135c/Call_for_information_July2020.pdf)



When combined with the existing infringements of consumer privacy rights identified in the Final Report, this would be a very bad outcome indeed for the consumer.

In the short term, it is clear that - purely in relation to the economic harms identified by the CMA, and the codes of practice designed to combat those harms - the CMA has the credibility, expertise and institutional infrastructure to operationalise these codes as soon as possible. It is vital that, as the government considers the regulation of online harms, it ensures that there is close cooperation between regulators of the privacy and economic harms caused by platforms with SMS. We welcome the CMA's approach to collaboration with the ICO to achieve competition neutrality in data protection regulation, and believe that joint working between competition, data protection and media regulators will be vital to ensure both fair and effective competition in digital markets, and the equitable enforcement of consumer privacy rights.

The issues raised by the Call for Information are complex and wide-ranging. As such, there is a limit on how far they can be adequately addressed by the DMT's relatively short consultation and our response to it. We therefore look forward to exploring these issues in more depth with the DMT and successor bodies in due course.

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