

## DIGITAL MARKETS TASK FORCE

### News UK's response to Call for Information dated 1 July 2020

#### 1. INTRODUCTION AND GENERAL COMMENTS

- 1.1 This submission is made by News Corp UK & Ireland Limited (**News UK**) in response to the Digital Markets Taskforce (the **Taskforce**)'s Call for Information dated 1 July 2020.
- 1.2 As the Taskforce will be aware, News UK made detailed submissions to the Competition and Markets Authority (**CMA**) in the context of its online platforms and digital advertising market study (the **Market Study**). These reflected the central importance of digital advertising to News UK's business and explained why News UK has substantial concerns regarding the functioning of the digital advertising markets, in particular as a result of Google's market power and conduct. In this regard, while News UK agrees with the vast majority of the reasoning and analysis the Market Study report, there are certain aspects where the CMA's quantitative analysis does not capture fully the degree of exploitation of Google's market power, as described in detail in the CRA memorandum attached to this submission.
- 1.3 News UK understands that the Taskforce's focus is now to consider how the competition issues identified by the Market Study in relation to digital advertising markets (as well as the related social media and search markets) may apply to other platform markets, such as online marketplaces and app stores.<sup>1</sup> News UK's engagement with these markets is more limited and, in general, their functioning is not of the same existential importance to News UK as digital advertising markets. News UK has therefore focused its response to the Call for Information's specific questions on points emerging from its experience in digital advertising markets that it believes are of wider relevance.
- 1.4 Before responding to those questions, News UK would like to make some general comments regarding the approach to, and sequencing of, regulation in online platform markets. The essential point is that while it is entirely appropriate for the Taskforce to consider the case for regulation of platforms in markets other than digital advertising, it should not allow this to delay the implementation of remedies in digital advertising markets, where the case for action is already clear and urgent.
- 1.5 Unlike other online markets, digital advertising markets have now been subject to a year of detailed and rigorous scrutiny through the Market Study. The identity of the platforms requiring regulation in digital advertising markets is clear – Google and Facebook – regardless of what definitions and concepts are used (a point recognised in the Market Study report, as discussed below). Proposals for the design of that regulation have already been made in the Market Study report, and the report recognises that the content of a code of conduct may differ between SMS platforms, meaning it is not necessary to delay regulating Google and Facebook in order to achieve complete consistency across markets and platforms.<sup>2</sup> To add to this, publishers are under unprecedented pressure as a result of the pandemic, with rationalisation measures already announced by a number of publishers.

<sup>1</sup> Call for Information, paragraph 1.27.

<sup>2</sup> Market Study report, paragraph 7.69.



- 1.6 News UK therefore urges the Taskforce to invite the Government to act without delay to put in place the measures recommended by the Market Study report in relation to the platforms that dominate digital advertising markets. The relevant legislation should be sufficiently flexible to allow that regulation to be extended (with any appropriate modifications) to other platforms in other markets if warranted. However, achieving that goal does not require a concluded view on which other platforms or markets should be regulated, the detailed content of a code of conduct in each of those markets, or the scope for other remedies to be applied to those platforms.
- 1.7 News UK would be pleased to expand upon this or other points in this submission, and stands ready to provide any assistance required for the Taskforce to reach its conclusions as quickly as possible.

## 2. RESPONSES TO 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?

2.1 News UK does not have a detailed view on this issue since, as noted above, its concerns relate principally to online advertising, where Google and Facebook would clearly meet any reasonable criteria for “strategic market status”. As the Call for Information notes, the CMA’s Market Study concluded that both Google and Facebook would be highly likely to meet any criteria for SMS that are consistent with the Furman Review’ explanation of the concept. The CMA also observed that it would not expect a Digital Markets Unit or Government to need to conduct material further analysis, and that they could instead rely on the findings of the Market Study.<sup>3</sup>

2.2 However, in general terms, News UK believes that the criteria and definitions used should capture considerations such as the presence of high fixed costs, network effects and/or the ability to cross-subsidise between different activities. News UK agrees that concepts of “economic dependence” used in certain EU Member States could also play a role.<sup>4</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?

<sup>3</sup> Call for Information, paragraph 1.19; Market Study report, paragraph 7.58

<sup>4</sup> For discussion of this in the context of regulation of platforms, see e.g. Graef, “Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence”, *Yearbook of European Law*, Volume 39, 2019, p. 448-499, available online at <https://academic.oup.com/yel/article/doi/10.1093/yel/yez008/5622729>.



- **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)?**
- 2.3 News UK agrees that SMS should apply to the corporate group as a whole, for the reasons identified by the CMA in the Market Study.<sup>5</sup> However, News UK is concerned that limiting the substantive application of a code to “adjacent” markets creates a further hurdle to effective and prompt enforcement, by requiring the authority to define the market in which concerns arise (which is unlikely to be straightforward in complex digital markets) and engage in a potentially lengthy legal debate over adjacency. It would therefore be preferable for the code’s provisions to apply across the corporate group (both in relation to digital advertising platforms and other platforms with SMS in other markets).
- 2.4 News UK considers that where a firm is designated as having SMS, this should enable remedies beyond a code to be deployed. The position in digital advertising markets is instructive in this regard. As News UK submitted in response to the CMA’s interim report in the Market Study, a code may not restrict all of an SMS platform’s incentives to exploit their market position, and may be difficult to monitor. It is therefore desirable to consider remedies requiring separation between different aspects of platforms’ businesses, which would mitigate these challenges. For example, in the digital advertising context, News UK believes there remains a strong case for separation of Google’s ad server and ad exchange, which are currently both integrated in Google Ad Manager.<sup>6</sup> News UK notes that this is in line with the Market Study’s recommendation that the Digital Markets Unit should have powers to impose both operational and ownership separation.<sup>7</sup>
- 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.**
- 2.5 The Furman Review proposed a regime with a broad underlying scope in primary legislation based on economic features, in order to future-proof it against changing markets, with periodic reviews conducted by the Digital Markets Units to determine which markets have companies with SMS. News UK believes this approach is broadly correct. Seeking instead to identify all relevant markets in advance would both delay the implementation of effective regulation in markets where the case for action is already clear, and lead to a scope that quickly becomes outmoded in light of the pace of change in digital markets.
- 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?**
- 2.6 The advantages held by firms with privileged access to consumer data are likely to intensify with the development of machine learning.

<sup>5</sup> i.e. to allow the leveraging of market power into other markets to be addressed, to ensure all required information can be obtained, and to prevent corporate reorganisations being used to frustrate the operation of the Code (paragraph 7.65).

<sup>6</sup> News UK, Comments on the Interim Report, 11 February 2020, e.g. paragraph 1.3(iv).

<sup>7</sup> Market Study report, paragraph 7.119.



2.7 As noted above, the COVID-19 pandemic has placed publishers under unprecedented pressure. A 40% decline in print circulation as a result of the pandemic has been estimated, which would see lost circulation revenue in 2020 (versus 2019) of £244 million. The impact on advertising revenues is equally acute, with an estimated annual decline for newspaper publishers of 50% in print and 25% in online in 2020, amounting to a shortfall of £570 million in lost print advertising revenues and £210m in lost online advertising revenues across the sector.<sup>8</sup> This means properly functioning digital markets are more important than ever, as publishers need to be able to obtain a fair return on their content to remain sustainable.

**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?**

2.8 In the Market Study, the CMA identified both direct harm to consumers (users of the relevant platform) in terms of reduced innovation, restricted choice, lower quality and limited control over data, and indirect harms resulting from the adverse impact of platforms' conduct on other businesses (for example, the risk of the quality and range of publishers' content declining, to the detriment of society as a whole, as well as innovation being suppressed in emerging markets).<sup>9</sup> News UK would expect the anticompetitive effects of digital platforms' conduct in other markets to fall into broadly similar categories.

**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?**

2.9 Yes, News UK believes a code structure could be of use in other digital markets as a means of mitigating the imbalance of power between platforms and other market participant. However, as noted above, other interventions may also be required to address platforms' incentives at source. News UK does not have a concluded view on how the proposals made in the Market Study would need to be adapted to other markets, but would urge the Taskforce not to allow consideration of this issue to delay implementation of those proposals in relation to the markets within the scope of the Market Study.

**7. 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?**

2.10 Yes. The need for this is clear from the role of acquisitions in creating the market power held by the online platforms in digital advertising markets (e.g. Google/DoubleClick), as well as the phenomenon of "killer acquisitions".

2.11 Any such regime should either require notification of all acquisitions by SMS firms (without any jurisdictional threshold) or use a low value-based threshold. Traditional criteria based on

<sup>8</sup> Enders Analysis: Journalism on the Precipice, 15 May 2020.

<sup>9</sup> Market Study report, Chapter 6.



turnover, market share or share of supply risk missing acquisitions of nascent but important competitors.

2.12 As to the substance, close attention to network effects and dynamic competition would be required, and News UK agrees with the suggestion made in the Call for Information that the increased risk of harm posed by acquisitions by SMS firms may justify the use of a more cautious standard of proof. There may also be merit in the suggestion that non-competition concerns such as data protection be taken into account as part of the regime.<sup>10</sup>

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

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

2.13 As noted above, News UK believes that separation remedies (including the possibility of structural separation) have an important role to play in addressing platforms' incentives to exploit their market power at source. As observed by the CMA in the context of the Market Study, there is likely to be a strong case for some form of structural intervention where platforms are exposed to conflicts of interest and engage in self-preferencing behaviour (such as the conduct facilitated by Google's strong position as a publisher ad server, supply-side platform and demand-side platform).<sup>11</sup>

2.14 News UK agrees other remedies involving data access and interoperability may in principle help to erode platforms' market power by helping competitors to develop over time. However, as News UK has previously submitted, given the scale of certain platforms' dominance, the effects of such remedies are likely to be felt only in the long term, if at all (whereas separation remedies would be effective immediately).<sup>12</sup>

**9. Are 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)?**
- **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?**
- **What measures, if any, are needed to enable consumers to exert more control over use of their data?**

<sup>10</sup> Call for Information, paragraph 2.2.

<sup>11</sup> Market Study report, paragraphs 98-101.

<sup>12</sup> News UK, Comments on the Interim Report, 11 February 2020, paragraphs 4.5-4.7.



- **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?**
- 2.15 News UK would suggest that regulation should focus in the first instance on remedies applicable to platforms with SMS, where the need for action is clear. The case for remedies with broader application could be considered at a later stage, without delaying implementation in relation to SMS platforms such as Google.
- 10. Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?**
- 2.16 Yes, News UK agrees these principles should inform any regulatory approach, with speed and flexibility particularly essential in fast-moving digital markets.
- 11. 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.?**
- 2.17 As noted above, the procedural framework should prioritise speed and flexibility to ensure effectiveness. For example, News UK welcomes the CMA’s recommendation in the Market Study report that *“to achieve the objective of prompt intervention in these fast-moving markets”*, formal investigations under the code should be completed within a limited timetable of around six months. News UK also agrees with the CMA’s recommendation that a right of appeal should be on judicial review grounds.<sup>13</sup>
- 12. 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)?**
- 2.18 News UK recognises the need to consider the interaction between remedies in digital markets and data protection rules, and welcomes the CMA’s proposal to work with the ICO to *“encourage a modern view of data protection regulation, which empowers consumers and avoids favouring large integrated platforms over smaller publishers”*.<sup>14</sup>

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<sup>13</sup> Market Study report, paragraphs 7.96 and 7.99.

<sup>14</sup> Market Study Report, page 358.

