

The News Media Association’s response to the Competition and Markets Authority’s [Interim Report](#): “*Mobile Ecosystems Market Study Interim Report*”

1. Background

- 1.1. The News Media Association (the “**NMA**”) is the voice of UK national, regional and local newspapers in all their print and digital forms - a £4 billion sector read by more than 46 million adults every month in print and online. Our members publish over 900 news media titles - from The Times, The Guardian, The Daily Telegraph and the Daily Mirror to the Manchester Evening News, Kent Messenger, and the Monmouthshire Beacon.
- 1.2. The NMA welcomes the Mobile Ecosystems Market Study Interim Report (the “**Report**”) published by the Competition and Markets Authority (the “**CMA**”). The Report adds to the roster of quality work that the CMA has undertaken in the digital market space. The NMA is particularly pleased with the Report’s provisional findings that, due to their actions in browser, app stores and operating systems, both Apple and Google would satisfy the SMS test. As representatives of an industry which is suffering from the anti-competitive practices of large companies, with whom we have no option but to trade, the NMA wholeheartedly supports this conclusion.

2. Refusal to Bring Forward a Market Investigation Reference

- 2.1. Against the backdrop of excellent work undertaken by the CMA, we are disappointed by the CMA’s indication that it will not make a market investigation reference. The CMA’s market study final report on “*Online Platforms and Digital Advertising*”,¹ published 1 July 2020, over 19 months ago, pledged:

*“We are optimistic that, following the report of the Taskforce, the government will be ready to take forward the necessary legislation for establishing the Digital Markets Unit in good time. If that turns out not to be the case, or if some of our recommendations are judged not to be well-suited to the emerging new regime, then the CMA will stand ready to take direct action of its own through a market investigation. The CMA will keep this option under review following the conclusion of the Taskforce”.*²

- 2.2. Following this, in October 2020 Dr Andrea Coscelli gave another public commitment, specifically to direct action against Google and Facebook through a “*combination of antitrust and market investigation references*” if, a year from the publication of the CMA’s Digital Taskforce Report, the UK Government had not handed down new laws

¹ CMA [Market Study](#) on Online Platforms and Digital Advertising, Final report.

² Para 10.28 CMA [Market Study](#) on Online Platforms and Digital Advertising, Final report.

for a regulatory framework.³ At the time, we raised concerns that the new laws should also apply to Apple, due to its stranglehold over: i) the rules it sets on webkit powered browsers; ii) mandated payment services within the App Store; and iii) the complete discretion it has over its app review process. We are pleased that in the Report, the CMA confirms that based on its assessment to date, *“Apple would meet the government’s conditions... for possible SMS designation by the DMU... for... its iOS operating system and the devices on which it is installed, its app store, and its browser and browser engine.”*⁴

- 2.3. Once more, we see a similar commitment from the CMA to revisit its decision to not bring forward a market investigation reference made in the Report, provided that the legislation required to bring the proposed pro-competition regime into force *“is not laid before Parliament for some time”*.⁵
- 2.4. We are concerned we have seen promises of a market investigation in the event of there being a delay, before. Had the CMA known that the government would not have produced a bill to Parliament by February 2020, it may have decided to push forward with, and concluded, a market investigation in 2020, with remedies in place by now. Instead, we are without remedies, and are still waiting for the enabling legislation that will then allow the Digital Markets Unit (“DMU”) to produce codes of conduct and make pro-competition interventions. Even at our most optimistic, we are unlikely to see remedies in place until the end of 2023-2024.
- 2.5. On the basis of the continued harm being perpetrated on both consumers and businesses as a result of dominance in the markets for online advertising and related mobile ecosystems, this response is a statement of strong support for the CMA to bring forward a market investigation and immediate interventions to end the deeply dysfunctional market that precludes news publishers from realising fair returns for their content.

3. Delay to the Digital Markets Unit

- 3.1. The NMA and its members are firmly of the opinion that the government should urgently confirm its plans to bring forward legislation to underpin a new pro-competition regime and the DMU. Indeed, the news media industry has called for assistance on the unfair trade relationships between digital platforms and news titles for over a decade. Most recently, the NMA has called for the DMU’s legislation to be expedited in our responses to the consultations concerning: i) the CMA’s *“Annual plan 2022-2023”*; and ii) the DCMS and BEIS’ *“A New Pro-Competition Regime for Digital Markets”*. The latter consultation closed over 18 weeks ago, and we still await a response from the government.
- 3.2. Concern about the undue delay to the process of putting the DMU on a statutory footing was heard at a recent session of the Communications and Digital Committee’s

³ Financial Times, [“Top UK competition official threatens action against Google and Facebook”](#).

⁴ Para 64 CMA’s Mobile Ecosystems Market Study [Interim Report](#).

⁵ Para 9.12 CMA’s Mobile Ecosystems Market Study [Interim Report](#).

oral evidence session with competition experts Dr Liza Lovdahl Gormsen and Professor Damien Geradin. Professor Geradin spoke of the UK initially being a global leader in digital regulations in 2018, considering regulations that were not being “discussed on the Continent or anywhere else”.⁶ Geradin then notes that the UK has since stalled - “we are almost four years later, and still no legislation”. In a regulatory environment that is no longer constrained by negotiation with member states in the EU, this is particularly disappointing.

- 3.3. We especially agree with Geradin that there has been “consultation on the top of consultation [vis-à-vis the new pro-competition regime] ... there must be a time for action”. The NMA and its members have responded (and continue to respond) to multiple consultations and requests for evidence from various governmental bodies, which oftentimes duplicate questions previously answered. It is important to note that repetition of questions without action causes delays and forces consumers and businesses to operate in a dysfunctional market for an ever-growing period.
- 3.4. Exacerbating these delays, the NMA understands from oral evidence given by Dr Andrea Coscelli to the Business, Energy and Industrial Strategy Committee that the DMU has only hired 50 of the 250 staff it has budgeted for.⁷ Dr Coscelli concedes that he expects to hire another 10 staff members this year, but it is clear that the remaining recruitment relies on the legislation being sufficiently advanced, before funds are released. With no known timetable available for the legislation, there is no telling when a fully staffed DMU, ready to replace the work otherwise done via the CMA’s market investigations, will be operational.

4. International Developments

- 4.1. The research, reports and consultations undertaken by the CMA have been of the highest quality. In fact, the CMA’s work, paid for by British taxpayers, is the foundation of most, if not all, the international developments in digital regulation. Much to everyone’s frustrations, presumably not least the CMA’s, such international developments are now outstripping practical implementation of that work in the UK.
- 4.2. In the European Union, the Digital Markets Act (“DMA”) is anticipated to be agreed by Easter, ratified during the summer, and put into effect during 2023.⁸ In 2018, the European Commission’s approach to regulating digital markets was at a nascent stage, only gaining momentum in 2020. This highlights the speed at which international bodies and countries are developing and negotiating digital regulation in response to a persisting and growing structural phenomenon. There are fears that the DMA is not nearly such a good solution as the DMU could potentially be, because it will enforce one code of conduct across all platforms, rather than tailored codes for different

⁶ [Parliament TV](#) Communications and Digital Committee on Digital Markets Unit, 1 February 2022.

⁷ Mlex [story](#), Victoria Ibitoye “Delay to UK antitrust watchdog’s digital markets unit not a key concern, Coscelli says”.

⁸ As confirmed in this Financial Times [story](#), “Google in last-ditch lobbying attempt to influence incoming EU tech rules”.

platforms.⁹ The NMA is concerned that once the DMA is established, it may be tricky for the UK Government to adopt a different line (in the form of the DMU), since Google and others could argue that it is unreasonable to expect them to comply with two different codes in one continent. Geradin echoes these concerns, stating that “*while Briton Could have been a rule setter, it might end up being a rule taker*”.¹⁰ This jeopardises the decade of hard work from the news media industry, as well as that of the CMA, DCMS and BEIS *inter alios*.

- 4.3. As the CMA is aware, Australia led the way in 2021 by implementing the mandatory news media bargaining code introduced by the Australian Competition and Consumer Commission. The code’s influence is widespread, encouraging Canada to announce plans to incorporate its bargaining code into law this year - senior industry sources expect the legislation to come into force by the summer or early autumn of 2022.¹¹ Amongst other examples, South Korea has moved to regulate Google and Apple’s control of app-store payments. Japan has implemented the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms.
- 4.4. In short, the government needs to clearly set out its timetable for introducing the legislation to Parliament which will support the DMU and provide it with the statutory tools it needs to work effectively. This will enable the CMA to plan ahead and move resources to convert both the online advertising and mobile ecosystem market studies to a market investigation phase.

5. **Evidence for a Market Investigation**

- 5.1. We believe that the CMA has clearly evidenced the need for a market investigation. Between the Cairncross Review,¹² the Furman Review,¹³ and the CMA market study on Online Platforms and Digital Advertising,¹⁴ it is clear that consumers and businesses – including local, regional and national news media businesses - are suffering as a direct result of dominant practices by digital platforms including Facebook, Apple and Google. This conclusion is echoed by the House of Lords Communications and Digital Committee, who, in their latest report on freedom of expression in the digital age, stated: “[t]he broken market has made it more difficult for news publishers to survive, let alone thrive”.¹⁵
- 5.2. The harm identified in the above-mentioned reviews has not ceased since their publication. Delay to the pro-competition regime has only exacerbated issues. The profits of Apple, Google and Facebook are now far higher than they were at the start

⁹ [Parliament TV](#) Communications and Digital Committee on Digital Markets Unit, 1 February 2022.

¹⁰ [Parliament TV](#) Communications and Digital Committee on Digital Markets Unit, 1 February 2022.

¹¹ Press Gazette’s [article](#), “*Canada’s news industry expects up to \$150m annual windfall from Australia-style big tech crackdown*”.

¹² The Cairncross [Review](#): a sustainable future for journalism.

¹³ Unlocking digital competition, [Report](#) of the Digital Competition Expert Panel.

¹⁴ CMA [Market Study](#) on Online Platforms and Digital Advertising, Final report.

¹⁵ House of Lords Communications and Digital Committee First [Report](#) of Session 2021-22 on “Freedom for all? Freedom of Expression in the Digital Age”.

of the CMA's investigations.¹⁶ It is regrettable that unequivocal empirical evidence demonstrating the unfair commercial relationship between publishers and platforms has not led to action. It is vital that the CMA understands that the news media cannot continue to invest in the high-quality journalism that is essential for democracy and society in such anti-competitive conditions – action must now be the highest priority.

6. **Conclusion**

- 6.1. The Government has committed to ensure the *“UK’s media and press sectors are able to flourish online”*.¹⁷ Indeed, the Government has been clear that the digital regulation regime must:

“support our objectives on press sustainability, helping to rebalance the relationship between publishers and the online platforms on which they increasingly rely”.¹⁸

- 6.2. It is, therefore, crucial that the government publishes its legislative timetable for the DMU, allowing the CMA to plan and move resources to convert both the online advertising and mobile ecosystem market studies to a market investigation phase *without delay* in order to address the anti-competitive digital environment in which the news media operates. The NMA would welcome discussion with the CMA on this matter. We would also welcome the government releasing required funds to enable the CMA to fully operationalise the DMU and prepare it for the new pro-competition regime.
- 6.3. We would be grateful if the CMA could confirm whether it has received guarantees that the legislative footing for the DMU is forthcoming.

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¹⁶ The Guardian [story](#), “Google, Apple and Microsoft report record-breaking profits”.

¹⁷ This is a tenet of one of the Government’s three key objectives - *“Promoting a flourishing democratic society”*, as seen in DCMS’ [policy paper](#) *“Digital Regulation: Driving growth and unlocking innovation”*.

¹⁸ DCMS’ [policy paper](#) *“Digital Regulation: Driving growth and unlocking innovation”*.