## Guardian News & Media response to the Competition and Markets Authority Consultation on the Digital Markets Competition Regime Guidance

## **About Guardian News & Media**

Guardian News and Media (GNM), the publisher of theguardian.com and the Guardian and Observer newspapers. It is a subsidiary of Guardian Media Group, which is a British-owned, independent, commercial news media organisation. GNM has a global reputation and audience for award-winning public-interest investigative journalism, including their exposures of the Windrush scandal and Cambridge Analytica, as well as a partner in a number of global data-led projects such as the Paradise, Panama and Pandora Papers and the Pegasus Project and, most recently, the Swiss bank leak involving Credit Suisse.

## **Response to the Consultation**

GNM welcomes the opportunity to respond to the Competition & Market Authority's (CMA) consultation on digital markets competition regime guidance. Over the last two decades, the promise of competition and innovation on the open web has been gradually supplanted by the reality of digital markets that are increasingly controlled by a small number of large global technology companies.

For the many varied businesses that rely on these platforms to distribute and monetise their products and services, and for consumers that have to accept take it or leave it terms to use these services, the new powers within the Digital Markets and Consumer Competition Act (DMCCA) should begin to redress the imbalances of power that have developed over time.

These same companies are now racing to dominate the world of generative AI (genAI) technologies, leveraging existing dominant positions in search, social media, and operating systems development to leverage the data needed to build and ground these technologies, and the consumer relationships to integrate these technologies into the next wave of digital products and services. This race poses grave issues for the future of consumer competition, privacy and media plurality, which require an observant, experienced and permanently vigilant digital regulator to have the tools to engender fair and effective competition.

After years of thorough investigation, evidence gathering, many months of policy development, and scrutiny by both Houses of Parliament, it is vital that the powers granted to the Competition and Markets Authority under Part 1 of the Digital Markets, Competition and Consumers Act are brought into force swiftly and effectively to begin level the playing field between business, consumers and tech platforms with strategic market status (SMS).

Free and fair competition online is not separate from the government's growth agenda, rather it is central to ensuring broad based growth and innovation in Britain's digital economy, by encouraging investment in UK based digital businesses. In this way, British news brands such as GNM can thrive, ensuring that citizens in Britain - and across the world - can access news and information from trusted independent news brands.

In this short submission, we include a summary of the conclusions that are included in the more detailed submission by the News Media Association (NMA), of which we are a member, and whose submission we support.

We believe that the published Guidance is drafted in an appropriate form for a forward-looking regime, with flexibility, adaptability, and responsiveness at its core. Such guidance is essential if the CMA is to regulate digital markets in an effective way, being able to apply its new powers to the diverse range of business models employed by potential SMS firms.

We strongly encourage the CMA to maintain this flexible, adaptable, and responsive approach as it finalises the Guidance. Narrowing the scope of the powers given to the CMA by the DMCCA, or tying the regulator to unnecessary procedural activities, for example by applying an unduly rigid approach to its regulatory tasks, would severely hamper the regulator's ability to drive innovation and growth in digital markets for the benefit of consumers.

Areas where useful clarifications or changes to the draft Guidance include:

- 1. In several areas, ensuring that third party views are sought and accounted for in the CMA's decision-making processes, and that there is as much transparency as possible regarding the CMA's decision-making processes. This will be essential in ensuring that the CMA prioritises interventions that will have the most impact for consumers, and ensuring that the participative approach favoured by the CMA is successful.
- 2. When considering the consumer benefits that flow from the introduction of conduct requirements (CRs), the Guidance should make clear that the interests of citizens more broadly can and will be taken into account. Many CRs could both directly benefit the consumer of a service in economic terms, whilst also having substantial synergies with benefits to citizens.
- 3. In determining the appropriate form of a CR, whilst we appreciate that an outcomes-based CR may be preferable, the CMA should consider all options (including a more prescriptive, action-based CR) as a matter of course. The implementation of the EU Digital Markets Act has demonstrated that broad high-level requirements can give SMS firms the scope to evade the spirit and letter of the law. It is better to set a more specific CR in the knowledge that it may need to be updated more regularly, than to set something so flexible that it will give agency to SMS firms to evade compliance.
- 4. When a CR has an implementation period, the CMA should state that it will make short term interim CRs to be included in the main CR that prevent an SMS firm taking any action that will impede the effectiveness of a CR before it comes into force.
- 5. It should be clearly stated that behavioural remedies applied through a pro-competitive intervention (PCI) overlap with the remedies that could also be applied through a CR. This is important, as CRs will be a more agile and swift power, and the CMA should not be limited in their ability to use CRs to place significant behavioural requirements on SMS firms.
- 6. The CMA should not delay enforcement unduly in the expectation that SMS firms will directly engage in good faith with third parties, and should

- recognise that in many instances a participative approach will simply not be appropriate.
- 7. With regards to the FOM, given that a CR of the type allowed under 20(2)(a) is unique in having the FOM as a backstop, the Guidance should make clear that the CMA will sometimes expedite its standard enforcement processes for 20(2)(a), for example if an SMS firm is simply refusing to engage with a third party.
- 8. When considering if a breach of an EO related to 20(2)(a) could be satisfactorily addressed within a "reasonable timeframe" by exercising one if its digital markets functions other than the FOM, the Guidance should given that the FOM has a six month time limit make clear that the CMA will generally not consider a timeframe significantly longer than six months to be reasonable.
- 9. When considering if third parties should be allowed to negotiate collectively under the FOM, the CMA should also have regard and this should be the principal consideration as to whether the third parties wish to be 'joined third parties'/'grouped third parties'.

To emphasise that GNM broadly welcomes the draft Guidance and approach taken by the CMA, which has moved quickly to consult following Royal Assent of the Act. We hope that the CMA continues to move at pace as it finalises the Guidance after consultation, and that Minister's will approve the suggested approach, so that the new regime can begin to deliver for consumers and businesses who are dependent on firms with SMS.

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