

## **NUJ submission to the Competition and Markets Authority consultation on digital markets competition regime guidance.**

July 2024

1. The National Union of Journalists (NUJ) is the voice for journalism and journalists in the UK and Ireland. It was founded in 1907 and has more than 30,000 members working in broadcasting, newspapers, news agencies, magazines, book publishing, public relations, photography, videography and digital media. The NUJ is not affiliated to any political party.
2. The NUJ welcomes the opportunity to contribute views to this consultation, crucial to the CMA's actions for platforms designated with Strategic Market Status (SMS) and the effective enforcement and monitoring of competition requirements. The union supports transparent oversight and welcomes action ensuring an improved playing field for publishers to receive fair payment for content, and improved access to information.
3. When considering links to the United Kingdom, the NUJ agrees with the CMA's definition of 'carrying on business' to include 'a wide range of activity that has an impact on the UK' without the need for an undertaking to have a place of business based in the UK. This is likely to ensure businesses that should be designated as having SMS do not evade the process by avoiding a physical presence. However, the union is concerned that the CMA's action taking into account regulatory developments when making a forward-looking assessment could hinder the process if not properly considered. Regulatory developments whilst important can involve lengthy timescales including consultations and the CMA should not prevent designation unless significant progress has already occurred.
4. We welcome the CMA's approach of determining a position of strategic significance through assessment of whether one condition has been met. The NUJ also supports the statement that the examples are not exhaustive, recognising this suits the landscape in which platforms operate in.
5. When deciding whether to begin an SMS investigation, the CMA should consider evidence gathered through external stakeholders such as market challenger firms able to provide information on the impact of an undertaking. This would complement outlined sources that will be considered including the CMA's own research and workstreams.
6. Challenger firms should be afforded the same right as firms investigated and be allowed to make oral representations. This will ensure the CMA obtains evidence and insight from wholly relevant stakeholders including on gaps in information firms may not be forthcoming with.

7. The NUJ supports publication of the SMS decision notice in the interests of transparency.
8. The NUJ has long called for fair and transparent structures enabling journalists and publishers to be rewarded for their material used to educate and inform the public. At present, the imbalance between platforms and publishers has resulted in large companies generating advertising revenue and attracting users without providing a share of profits back to publishers. This is despite the important role news content plays in upholding democracy.
9. The NUJ welcomes digital markets competition guidance considering both direct and indirect benefits for consumers arising from the imposition of conduct requirements. The union also agrees with the CMA's ability to impose a conduct requirement that applies to conduct in an activity other than the relevant digital activity, for the purpose of preventing an SMS firm from carrying on activities that could materially increase its market power or share in relation to the digital activity. It is crucial approaches adopted by the CMA sufficiently consider how tech giants may manoeuvre processes to continue to benefit at the expense of smaller publishers.
10. When assessing whether a potential conduct requirement is likely to be effective in achieving its intended aim, the CMA should consider requirements imposed by UK regulators and international legislators. At present, guidance indicates this action *may* be taken, but the union would support this included in factors proactively considered, as action by other regulators could serve as evidence on how successful conduct requirements imposed by the CMA may be.
11. The NUJ stresses that interpretive notes accompanying conduct requirements must complement information already provided and not include critical information needed to ensure compliance.
12. The union is concerned the implementation period between when a conduct requirement is imposed and when it comes into force could be used by firms to change their behaviour to evade compliance with set rules. In cases where requirements do not come into force immediately, the CMA should consider an intermediate step that allows for scrutiny of firms.
13. Language should be strengthened to provide clarity that SMS firms *must* publish a summary compliance report in relation to relevant competition requirements. The guidance recognises the importance of this information not only for CMA compliance but to third parties too. This change should be made to reflect the CMA's commitment to promoting transparency. The CMA can again support this aim by always publishing its provisional findings into suspected breaches of competition requirements.

14. On assessing whether a factor or factors is having an adverse effect on competition, the NUJ understands the CMA will consider 'competition-enhancing efficiencies' that may outweigh anti-competitive factors. We welcome guidance stating the CMA must consider if efficiencies could have been achieved in other potentially less restrictive ways. The Digital Markets, Competition and Consumers Act is long-awaited legislation that will help hold companies accountable. The union believes robust resistance must be in place to ward off false claims of efficiencies. We also agree with the CMA having no prescriptive list of evidence it will consider in its assessments of adverse effects on competition.
15. The NUJ welcomes acceptance of complaints by third parties to the CMA on an anonymous basis. However, to strengthen confidence in engagement, the CMA should permit complaints including evidence provided on a confidential basis, with an agreement not to disclose the identity of a third party should this be sought. Guidance states "Complainants can also make a complaint anonymously, although this may limit the extent to which the CMA is able to investigate the complaint if the CMA is not able to verify information in the complaint or contact the complainant to request more information." We believe more detailed investigations can be made if the CMA instils confidence in parties, that their anonymity can be retained alongside a thorough complaints process.
16. The NUJ supports the ability of third parties to group together to submit collective submissions under the Final Offer Mechanism. Third parties including publishers may feel better able to engage in the process if able to do so. Whilst we accept the CMA will consider "key differences in third parties' circumstances or bargaining power" that could lead to varying views on what are fair and reasonable terms, the act of organisation and approach by a group of third parties should be considered an informed one indicating a desire to negotiate collectively and should not be declined.
17. The NUJ welcomes explanation in the guidance of how the countervailing benefits exemption will be considered by the CMA. It is important firms are unable to rely on the CBE in an investigation, as benefits to users would already have been considered. Close monitoring of the use of the CBE is essential to ensure its use is as intended. This is of particular importance as the former DSIT parliamentary Under Secretary of State when commenting on the Conservative government's decision to amend wording removing "indispensable" in relation to benefits realised by consumers said on the change: *"I hope I can reassure noble Lords that the Government's view is that the standard—the height of the threshold—is, indeed, equivalent. The Government still believe that the clarity provided by simplifying the language provides greater certainty to all businesses, while ensuring that consumers get the best outcomes"*.
18. The NUJ welcomes engagement with the CMA.