

Digital Markets Competition Regime Draft Guidance

Public Interest News Foundation submission to the Competition and Markets Authority

15 July 2024

Introduction

The Public Interest News Foundation welcomes the Competition and Markets Authority draft guidance on the Digital Markets Competition Regime and is grateful for the opportunities we have had to engage with the Digital Markets Unit prior to and throughout this consultation process.

On the whole, we believe this comprehensive guidance will empower the DMU to regulate effectively and fairly. We believe it introduces significant degrees of flexibility and transparency that will be crucial for its work and that must not only be preserved in the final guidance, but also enhanced.

In this submission, as in our engagement with policymakers and the CMA since 2022, we will stress the need for expeditiousness, flexibility, transparency and accessibility as the DMU undertakes its herculean task of regulating the UK's ever-changing digital marketplace and restoring fairness to it.

These considerations are critical for the new regime to create a digital economy that works as well for its small, independent parties as it does its largest and most powerful corporations. From the perspective of the UK's independent news publishing sector, with which we work closely, **the regime will be undermined and ineffective if these factors are not prioritised, at great risk to the sector itself and the consumers that rely on it in all corners of the country.**

Regime must be time-efficient to serve its purpose

Our main concerns involve the length of the regime.

The novelty of the approach and the need to establish fair and balanced regulatory precedent understandably require meticulous information-gathering and decision-making processes. We believe, however, that the DMU also needs to be mindful of **not undermining the purpose of the regime by making it inaccessible to smaller players that cannot afford to engage in, or financially survive, what might become a years-long process from investigations to enforcement.**

We appreciate that the DMU has indicated a capacity to launch concurrent conduct requirement (CR) and strategic market status (SMS) investigations, which will, we hope, mitigate some of the lengthiness of the process. We hope the regulator will pursue this option.

Additionally, while the DMU cannot reduce statutory timeframes introduced by the DMCCA, we believe that it should take steps to reduce timeframes wherever it does have discretion. This includes:

- Setting implementation dates for CRs, interim enforcement orders and enforcement orders that require SMS firms to act quickly;
- Triggering noncompliance investigations when a breach is reported as urgently as possible, taking into account the size and economic need of the relevant third party;
- Balancing the need for extensive input during consultations with the accrued harm of delaying enforcement against anticompetitive conduct.

Algorithm investigations must be retrospective

We are very pleased to see the extensive information gathering powers the guidance allows the DMU, including in regard to algorithms.

Publishers have suffered tremendously from sporadic algorithm changes over the years, drastically reducing traffic and therefore revenue, particularly in the past 12 months¹. As news has been deprioritised, **platforms have artificially devalued news content, which we fear will have pre-emptively disadvantaged news publishers in commercial negotiations that might take place.**

We are therefore also pleased that the CMA may require a firm to obtain or generate information as to how its algorithmic code has changed over time, and believe this should include retroactive tests when possible, including to demonstrate how news has fared in SMS firms' algorithm prioritisation.

Consultations must be accessible to smaller parties

When running consultations and investigations, we believe the DMU should consider how much capacity third parties need to have to provide the necessary information.

For the regime to work for small, independent news publishers that participate in the digital economy and offer an invaluable service to their consumers, those publishers must be heard when regulatory decisions are being considered and made.

However, the typical independent publisher in the UK employs² two staff members—down from three in 2022—who oversee both the editorial and administrative sides of

¹ BBC: '[Google just updated its algorithm. The Internet will never be the same.](#)' 25 May 2024

² PINF '[Index of Independent News Publishing in the UK 2024](#)'

their enterprises, and don't have the capacity to respond to onerous and very technical consultations, nor the financial ability to hire legal counsel to support them in doing so.

Consultations should therefore remain as brief as possible and **use clear and direct language that is accessible to parties without a deep knowledge of competition law or the means to seek legal support.**

If a consultation is unavoidably complex, *pro bono* support should be made available to all digital economy players that need it to participate effectively.

To allow for consultation periods to be brief and direct, it is important for DMU to have ongoing dialogue with small, independent publishers and bodies that represent them so that consultation periods can be reasonably short.

We believe it would be helpful for the DMU to invest in communications and relationship-building with these parts of the digital economy in order to make this possible and achieve the aim of the regime.

Clarity and flexibility on collective bargaining are needed

Small businesses have for years suffered as a result of big tech market domination and conduct in the UK's digital economy, and they must be allowed to band together when bargaining with those firms.

In order to ensure that collective bargaining is available and that smaller third parties and trade associations attempting to pursue it do not inadvertently violate competition law, further clarity from the DMU is needed around competition issues such as cartels and price fixing in the context of the new regime. The legislation is intended to enable collective bargaining among by relevant third parties, and this intention must not be undermined.

We hope therefore that the regime will not be unduly restricted by interpretations of competition law that prohibit smaller parties of different sizes or which produce different content from bargaining collectively if the approach broadly complies with the relevant legal principles.

This is a groundbreaking regime which merits flexible approaches, and when it comes to the diverse spectrum of independent news publishers in the UK, this is an area where flexibility will introduce much more robust competition.

Forward-looking assessment should not undermine regulation

The five-year forward-looking assessment that the DMU must carry out in order to determine strategic market status should not be abused by firms to avoid designation.

This may be addressed in part by placing the burden of proof on the firm under SMS investigation rather than the DMU to show that the firm will not have entrenched market power five years in the future. If the burden sits on the DMU, this will thwart the intention

of the legislation, which was to designate firms with entrenched market power, except where this power is demonstrably waning.

About the Public Interest News Foundation:

The Public Interest News Foundation (PINF) is the first charity in the UK with a remit to promote public interest news. Through the News for All campaign, we are working with a growing coalition of news providers and others to ensure that everyone in the UK can benefit from sustainable independent news.

In July 2023 and along with over 100 journalists, economists, free speech advocates and trade bodies (including BBC Media Action), we co-authored and adopted '[Big Tech and Journalism: Principles for Fair Compensation](#).' We hope these will guide the successful design and implementation of the new regulatory regime.

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