# Publishers Association response to the CMA's consultation on the digital markets competition regime draft guidance

# About the Publishers Association and publishing

- The Publishers Association (PA) represents the UK's world-leading publishing sector. We are the trade association for UK book, journal, audio and digital publishers, spanning consumer, academic and education publishing.
- Publishing is a UK success story, worth £7.1 billion to the economy, supporting 84,000 jobs, and generating £4.4 billion in exports. It is one of the most resilient and successful of the UK's creative industries, which are worth a combined £126 billion in gross added value to the UK economy.
- The PA and its members were champions of the Digital Markets, Competition and Consumers (DMCC) Bill and welcome its passage into law. This is a vitally important Act of Parliament for many industries, regulating anti-competitive behaviour by companies with strategic market status (SMS) in digital markets.
- The PA welcomes the opportunity to respond to this consultation on draft guidance for the digital markets regime.

## **Executive Summary**

- The Publishers Association commends the Competition and Markets Authority's (CMA) intention to consult with third parties and affected industries throughout the implementation of the various aspects of the regime and to consider evidence from such stakeholders, particularly in respect to SMS designation, Conduct Requirements (CRs) and Pro-Competition Interventions (PCIs).
- However, the PA is keen to ensure that those third parties with the most targeted industry experience – particularly trade associations - do not become "faces in the crowd", and find that critical submissions of evidence are lost or diminished in amongst more general public submissions. Given the ability of trade bodies to support the CMA with deep industry knowledge and expertise, we would urge the CMA to specify in its guidance how it will proactively engage with them.
- For example, we believe the CMA could be clearer about the role of third parties and the importance of third-party evidence in the designation process. The PA represents 156 publishing companies, of which 130 are small-to-medium sized enterprises (SMEs). Most of our members lack the internal resource to engage with the CMA and they rely on the PA to make representations on their behalf. While we recognise the importance of flexibility, we ask that the guidance is more explicit about third party engagement, including setting specific expectations for how and when affected industries can engage. We would also welcome greater clarification on the CMA's proposals for targeted, bilateral engagement of third parties such as trade associations (as opposed to public consultations more broadly) and also suggest that a definition of "key" third party could help achieve this objective.

- We encourage the CMA to consider the role of third parties and affected industries in **drafting** CRs, rather than just commenting on CRs that have already been drafted. This would mean businesses at the 'coal face' of the regime can use their knowledge and expertise to contribute meaningfully to policy development and design, whilst helping to relieve the administrative burdens on the CMA in implementing the new regime.
- The PA looks forward to working with policymakers and the CMA on the implementation of the DMCC Act. We are committed to ongoing and constructive engagement to ensure the regime's effectiveness in regulating anti-competitive behaviour by companies in digital markets.

#### Strategic Market Status designation

The PA strongly urges the CMA to accept third party evidence as the *basis* for launching an SMS investigation, rather than only seeking it following the launch of the investigation. This is essential given the volumes and weight of evidence at the hands of affected industries. We also propose the CMA establishes an online portal or some other standard form for third parties to submit information easily.

## Basis for launching an SMS investigation

- Paragraph 2.68 details the potential evidence base which the CMA may draw from in determining whether to launch an SMS investigation, such as research and market intelligence. The PA seeks clarification about whether the CMA will share the evidence it has gathered about the potential SMS firm with third parties to assist them in responding to the invitation to comment (as referred to in paragraph 2.82) at the start of an SMS investigation.
- There does not appear to be a specific mechanism through which third parties can encourage the CMA to launch an investigation. The PA asks that the CMA establishes an online portal or some other standard form for submitting information, as part of its market intelligence function. Having a dedicated line of communication whereby third parties can state to the CMA: '[Company] should be designated as an SMS because [x]. Evidence suggests [z]' would facilitate information gathering and engagement from third parties. Importantly, it would help to reduce unnecessary burden on the CMA in sifting through submissions, thereby enhancing the efficacy of the regime.
- Paragraph 2.82 refers to the invitation to comment at the outset of an SMS investigation as allowing the CMA 'to gather evidence and perspectives from, among others, small and challenger businesses and consumer groups, as well as the larger technology firms'. The PA encourages the CMA to make explicit reference to trade associations in this list, given they are the voices of affected industries. Third parties such as trade bodies often represent smaller businesses that do not have the capacity to enact this engagement themselves.

#### Consultation on the proposed decision

 The PA welcomes the CMA's commitment to engage with third parties when consulting on the proposed decision, as set out in paragraph 2.83. We seek clarification from the CMA as to what the CMA considers a sufficient timeframe for a third party to respond. We strongly encourage that the guidance allows enough time for third parties to devise a thoughtful and evidence-based response.

## Further SMS investigations

• Paragraph 2.97 states 'the CMA may be able to conduct a further SMS investigation at a faster pace and complete it ahead of the statutory deadlines due to the information it will already have' from the initial investigation and ongoing monitoring. The PA welcomes efforts by the CMA to make processes as efficient as possible but encourages the CMA to pay due regard to new evidence from third parties and affected industries that has emerged since the initial SMS investigation.

## **Conduct requirements**

The PA welcomes the CMA's commitment to consulting third parties on CRs, particularly in respect of engaging them early on in the design process. However, we urge the CMA to consider a greater role for third parties, for instance in drafting CRs. We also underline the importance of making engagement between the CMA and affected companies as easy and accessible as possible, by establishing a dedicated 'CR Compliance Team' inside the regulator to field questions and submissions.

#### The CMA's analytical approach

- The PA welcomes the CMA's intention, as set out in paragraph 3.33, for third parties to be invited to comment 'early in the CR design process and/or when the CMA consults on proposed CRs'. We ask that the CMA provides clarification of what is considered 'early' so that stakeholders can plan their evidence gathering.
- At the same time, we would like the CMA to consider greater, more explicit involvement from third parties and affected industries in *designing* and *determining the effectiveness* of CRs. We note that trade associations have substantial 'on the ground' industry experience that would undoubtedly be helpful to the CMA during the creation process of CRs.

#### Procedure for imposing CRs

- The PA would like engagement between the CMA and third parties to be made as easy and accessible as possible. Given the likely importance to the SMS firm's compliance with CRs to other businesses, we ask that the CMA nominates a designated 'CR Compliance Team' so that ongoing issues can be communicated and resolved quickly. This will also minimise administrative burdens on the CMA.
- We welcome the sentiment set out in paragraph 3.33 around the CMA expecting 'the SMS firm and/or other relevant third parties to identify the likely effects of CRs and

provide the CMA with evidence of these'. The paragraph goes on to say 'Parties will have the opportunity to do this when the CMA issues any invitation to comment early in the CR design process and/or when the CMA consults on proposed CRs'. The PA insists that affected businesses and their third-party representatives can comment and encourages the CMA to indicate what it means by an 'early' invitation to comment.

- Within paragraphs 3.41 through to 3.47, the PA asks that the CMA explicitly refers to third parties and affected industries in the context of 'stakeholders'.
- We note that paragraph 3.53 states the CMA 'may publish interpretive notes'. We strongly encourage the CMA to commit to doing so, as the interpretive notes will be crucial to affected industries and their representatives in understanding the (projected) benefits of the CR and the regime more widely.
- The PA is concerned that paragraph 3.55 appears to grant SMS firms some leeway in interpreting the interpretive notes, and therefore 'it will be open to the SMS firm to take a different approach where the SMS firm is able to demonstrate to the CMA that its approach complies with the terms of the CR'. The PA asks that the CMA engages with third party stakeholders, including trade bodies, in cases where a designated SMS firm is seeking to take a different approach, as businesses' 'on the ground' industry experience can help the CMA to determine whether the proposed approach complies with the CR.

## **Pro-competition interventions**

The PA commends the CMA on its commitment to engage with third parties on the design and terms of the Pro-Competition Order (PCO). However, we seek clarification that third parties will play an important role in the regime, for instance, in respect to the CMA's consultation on PCO reviews.

#### Duty to review PCOs

• The PA seeks clarification from the CMA on whether third parties will be involved in the PCO review process, if at all. We note paragraphs 4.70 and 4.71 do not reference third parties. It may be that consultation with third parties is envisaged as coming under 'the effectiveness of the PCO', but would urge the CMA to make an explicit reference in the guidance if so, and that it gives examples such as trade bodies.

#### Assessing the effectiveness of the PCI

• We welcome the CMA's intention to have regard to a range of factors when assessing the effectiveness of the PCI. That being said, the PA is concerned that the guidance in paragraphs 4.31, 4.32 and 4.33 neglects to mention how it will make this assessment. We would encourage the CMA to consider views from third parties and affected industries as important 'on the ground' evidence.

#### Information gathering and engagement

• The PA appreciates the CMA committing in paragraph 4.54 to publish an invitation to comment at the outset of a PCI investigation, which sets out the scope of the investigation and seeks views and evidence on the CMA's area of concern related to the potential adverse effect on competition (AEC). The PA would encourage the CMA to provide clarification as to the expected timescales for third parties to submit responses so that they can plan their engagement.

# PCOs and Testing and trialling PCOs

- The draft guidance makes references to the CMA engaging with 'key third parties' in paragraphs 4.56 (on the consultation on the proposed decision) and in 4.63 (on the design and terms of the PCO), respectively. The PA encourages the CMA to define key third parties, in particular to include trade bodies.
- The PA seeks clarification of whether (and if applicable, to what extent), third parties will have the opportunity to provide evidence during a PCO trial period. Paragraph 4.69 suggests that the trial PCO will be subject to review, however it does not provide details on how this review will be carried out, nor what opportunities there might be for key third parties to share their views. We ask for further detail in the guidance on how the trial period will function from an external engagement perspective.

# Commitments

• The PA welcomes the CMA's intent in paragraph 4.89 to consider the potential effects that the proposed commitment may have on other market participants, consumers or business users. However, the PA urges the CMA to include explicit reference to engaging with these groups directly on the potential effects, or else explain how it envisages it will gauge the potential effects.

# Information gathering and engagement

• The PA is concerned that the language around seeking views in paragraph 4.54 is not as specific as the equivalent paragraph 2.82 on SMS designation. The latter includes reference to the CMA gathering evidence and perspectives from, 'among others, small and challenger businesses and consumer groups, as well as the larger technology firms'. The PA encourages the CMA to rectify this in paragraph 4.54, as well as adding explicit references to third parties in both paragraphs.

#### Conclusion

• The PA welcomes the Digital Markets, Competition and Consumers Act and commends the CMA's intention to consult with affected industries throughout various stages of the regime. However, we ask that the guidance is more explicit about the importance and role of third-party engagement. It is imperative that businesses affected by the new digital markets regime are heard throughout the whole process. The PA looks forward to further and constructive engagement with the CMA on this draft guidance as well as other aspects of implementing the digital markets regime.