PREISKEL & CO

Competition and Markets Authority
The Cabot
25 Cabot Square
London
E14 4QZ

For the attention of:
mobilesms@cma.gov.uk

By email only

[redacted]

[redacted]
www.preiskel.com

Our Ref: TC/ADM838
28 July 2026

Dear Mobile SMS team,

Re: Movement for an Open Web submission on the CMA's proposed steering conduct requirements for the mobile platforms of Apple and Google

We represent Movement for an Open Web ("**MOW**"). We are responding to the CMA's consultations on the steering conduct requirements for Apple and Google.[1]

We welcome the restrictions the CMA seeks to place on Google and Apple in its Steering CRs as a step in the right direction towards addressing their quasi-regulatory[2] monopoly power in mobile app stores. However, we consider that these restrictions do not go far enough, and that the CMA may fall short of its stated goal.

This submission highlights four specific concessions made to Apple and Google that cut against the CMA's aim "to ensure that developers can make meaningful choices regarding steering to end-users and trade on fair and reasonable terms with [Apple/Google],"[3] as well as a more fundamental issue with the CRs as a whole.

We note the following concessions in the proposed conduct requirements and append below them our comments.

1. Apple and Google are permitted to prevent, restrict or limit a developer from including within its apps and associated metadata an End-user Redirection Mechanism which redirects an End-user to external websites to complete a Steered Transaction "where such conduct is strictly necessary for an objectively justifiable purpose of preventing malware, fraud, unlawful content or content harmful to children."[4]

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[1] CMA, *Consultation: Steering Conduct Requirement – Google's Mobile Platform* (30 June 2026) [henceforth, "*Google CR*"]; CMA, *Consultation: Steering Conduct Requirement – Apple's Mobile Platform* (30 June 2026) [henceforth, "*Apple CR*"]
[2] CMA, *Mobile ecosystems – Market study final report* (10 June 2022) [henceforth, "*MEMS Report*"] p 258, para 7.9 & p 75, para 7.73.
[3] *Google CR,* p 12, para 2.5; *Apple* CR, p 11, para 2.5.
[4] *Google CR*, p 20, para 3(b); *Apple CR*, p 19, para 3(b).

Apple and Google often [redacted] privacy and security for others [redacted] [redacted] To avoid this concession becoming a shield for unnecessary and discriminatory restrictions, the CMA should clarify, with reference to examples, the meaning of "Strictly Necessary" and "Objectively justifiable", as well as how quantification of impact is to be assessed.

Apple's system is rigorous and objective but [redacted]. In order to get onto the Apple App Store, for example, an app needs to first go through automated filters, before being stress tested by an Apple employee in its App Review department.[6] Apps are reviewed according to Apple's own Guidelines, chief among the principles of which is safety.[7] Google's security model is broadly similar.[8] This would seem to obviate the need to allow Apple and Google to impede developer steering on the same grounds. In other words, this concession, though obviously well-meaning, may well become an unnecessary [redacted] route for these [redacted] to prevent steering and [redacted] their mobile ecosystem.

2. Apple and Google "may introduce a single interstitial screen where an End-user is directed through an End-user Redirection Mechanism,"[9] with some caveats as to the design and content of that interstitial screen.

We would point, in regard to this concession, to paragraph 7(b) of the proposed Conduct Requirements, which tells us that the interstitial screen must not have the "purpose **<u>or effect</u>** of discouraging an End-user from completing a transaction outside of the in-app purchasing system."[10] The CMA accepts that all such screens have this effect, purely as a result of introducing friction to the steer – as is recognised in paragraph 8 of the same: "**<u>Except for the interstitial screen</u>** referred to in paragraph 7, [Apple/Google] must not introduce **<u>additional frictions</u>**…."[11]

The CMA, then, recognises in paragraph 8 that the interstitial screen constitutes a transactional friction, which definitionally has the effect of discouraging the completion of a transaction. It recognises in paragraph 7(b) that such an effect is anathema to the Steering CRs themselves. Following this chain of logic, we do not understand why the CMA is permitting Apple and Google the use of an interstitial screen in the first place, and think it appropriate for this concession to be removed from the Conduct Requirements. If, however, it is to be applied, then it should be applied on a non-discriminatory basis to all, including to Google and Apple.

3. Apple and Google "may require developers to pay a Steering Fee to [them] in respect of Steered Transactions … [provided that such a Fee] is fair and reasonable"[12] by reference to the principles adumbrated in paragraph 10.

It seems to us wholly inappropriate to permit Apple and Google to charge developers for the ability to steer.

The assumption is that a content supplier should pay for distribution like an electricity producer pays for distribution. There is a significant economic difference between content in a digital platform and

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[5] See *Dr Rachael Kent v Apple* [2025] CAT 67 paras 732-746.
[6] Ibid. para 89.
[7] Apple, 'App Review Guidelines' (accessed 22/07/2026)
[8] CMA, *Mobile ecosystems market study – Appendix N: potential interventions to promote competition in native app distribution* (10 June 2022) p N18, para 76.
[9] *Google CR*, p 21, para 7; *Apple CR*, p 20, para 7.
[10] *Google CR*, p 21; *Apple CR*, p 20 (emphasis supplied).
[11] *Google CR*, p 21; *Apple CR*, p 20 (emphasis supplied).
[12] *Google CR*, p 21, para 9; *Apple CR*, pp 20-21, para 9.

electricity supplied via a utility. Content is the destination users want and distribution is the means with which they access it. Think of the latest film or series on Netflix: the distribution technology is the streaming platform while the content is the product that the consumers are looking to consume.

Moreover, desirable content may be very valuable to the distributor: it generates interest and interaction, that interaction generating data which can be used to advertise products to users. Advertising platforms such as Google and Apple (which exclusively provides access to Apple device users' data to Google via the companies' Information Services Agreement) make money from this interaction data. The more interactions, the greater the opportunity to identify intention to purchase. Also, high frequency refresh data is vital for AI RAG training. So it may be that certain websites are more valuable to the distributor than the distributor is to the content provider – but the true value cannot be identified because content is locked into the walled garden.

The CMA considered this in the past and we provided the attached letter[13] in response, which appears to again be highly relevant now.

The problem with these companies' steering policies has been twofold, involving both over-charging (cf. their app store commissions)[14] and prevention of access to end-user data: developers have been unable to steer end-users to their own sites and, thereby blocked from interacting with their own customers, have been deprived of data about consumers' needs.[15]

Even caveated with 'principles', we fail to understand why Apple and Google should be permitted to monetise steering. There is no technological hurdle involved in permitting developers to provide links to their own websites, and they can provide their own payments systems. There is thus nothing for which Apple and Google merit compensation.

The only barrier involved is a contractual one, imposed by Apple and Google themselves. They already monetise their app stores through commissions: we see no economic rationale to permit the monetisation of steering as well. We encourage the CMA to align its approach with that of the European Commission in this regard.[16]

4. The CMA deems it "appropriate to leave a degree of flexibility in relation to how [Apple/Google] applies [the Steering Fee principles] in practice, subject to being able to demonstrate to the CMA's satisfaction that its approach takes account of each of the principles (as defined and specified in the conduct requirement) in a suitable way."[17]

We consider this final concession to be tantamount to a breach of an axiomatic principle of natural justice: *nemo iudex in sua causa*. No one shall be a judge in their own cause. Whilst we accept to some degree that the more technical requirements imposed under the DMCCA require some latitude to be conceded to the impugned firm as to the exact method of implementation, we fail to understand why similar concessions need to be made in respect of what is, at heart, an economic judgement call. Whilst the cost-based principle and the value-based principle to be applied are explained in some length in the proposed conduct requirements,[18] their novelty – combined with the nebulous description of their

[13] 'Access to Information and Content: A Briefing Note' – see pp 5-14 of this submission.
[14] See *Kent v Apple* (n 5).
[15] See Basecamp et al, Joint Industry Letter to EVP Vestager (17 January 2023): Apple's unfair restrictions include "restrictions to developers' access to data of their own users."
[16] See EU Digital Markets Act Art 5(4): "The gatekeeper shall allow business users, *free of charge*, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper." (Emphasis supplied.)
[17] *Google CR*, p 27, para 9; *Apple CR*, pp 26-27, para 9.
[18] *Google CR*, pp 22-24, paras 10-13; *Apple CR*, pp 21-23, paras 10-13.

interaction quoted above – renders their actual application ripe for [redacted] by Apple and Google. Given these twin aspects of the Steering Fee principles, we consider it inapposite to afford Apple and Google such flexibility, especially given that to do so contravenes such a basic legal principle.[19]

More fundamentally, though it is obviously to be welcomed that the CMA is seeking to mitigate the ways in which Apple and Google can [redacted] their monopoly powers in their respective app stores, we consider that it would be more apposite simply to take these monopoly powers away in the first place.

App stores are not necessary for third-party software to be installed onto mobile devices, in the same way that they've never been necessary for software to be installed onto personal computers. Rather, as noted in the CMA's Mobile Ecosystems Market Study, Apple does not allow users to sideload (i.e. download apps away from the App Store) on its devices;[20] whilst in order to sideload on Android, a user has to go through multiple steps and faces several warnings in the process, deterring her from doing so.[21]

Apple and Google's enforcement of the use of app stores, then, is an incident of their quasi-regulatory role as ecosystem orchestrators, and any revenue they extract therefrom – whether in the form of a commission or a 'Steering Fee' – should be considered a monopoly rent, rather than the result of competition on the merits. In the interest of securing an open web, it would be better to do away with app stores entirely, so as to remove the intermediary friction between developers and end users, and to prevent Apple and Google from [redacted] in their respective mobile ecosystems.

We remain available should the CMA have any questions and would welcome a meeting to discuss our submission.

Yours sincerely,

[redacted]

Preiskel & Co LLP

See overleaf – Access to Information and Content: A Briefing Note (submitted to the CMA in March 2023)

[19] See further our Submission on the CMA's proposed conduct requirements on Google in General Search and Search Advertising (25 February 2026) p 34: "Due Process requires independent adjudication, not only Google's self-assessment" et seq.
[20] *MEMS Report* (n 2), p 110, para 4.101.
[21] Ibid. p 113, para 4.115.

Access to Information and Content: A Briefing Note[1]

Opportunities for economic growth

Nowadays, when people wish to purchase goods or compare prices, they look online. Whether people are searching for things to buy from washing machines to trainers, they look online. Whether paying the bills; gas electricity or telecoms, it is again largely now done online. Whether reading newspaper, or listening to music or playing a game, yet again, it is done online. This gives platforms a great deal of power and creates a problem for sellers: online platforms control what people see, what they are presented with and what information they receive. The platforms enable or disable access to everything. The power of the platform is then exerted against suppliers and competing providers that use the Open Web to distribute their products.

UK Governments have for years thought about what they can do to increase innovation, productivity, growth and jobs. State backing for different technologies, or picking winners is widely recognised as likely to end in failure. However, like cutting government red tape that gets in the way of business growth, stopping dominant platforms from [redacted], is equally stifling for smaller businesses.

This brief outlines the problems created by online platforms and canvasses potential solutions to them in the light of the forthcoming reform to UK Competition Law. It is aimed at policy makers in Government and provides a brief for parliamentarians. It focuses on the key issues for policy decision makers in light of experience in the UK and elsewhere. Annex 1 then addresses specific issues on the CMA and Ofcom's discussion paper on Access to Content.

The problems are at least is fourfold:

1) Platform control over information about people's demands (and the impact that has on prices and limiting general product innovation).
2) Platform control over distribution, (such as the presentation and display) and the value of digital content in generating engagement and data for platforms.
3) Platform control over browsers and end user devices prevents switching and use of Open Web competitors; (and hence control over how users can access rivals' systems and websites).
4) Platform accumulation of identifiable Personal Data.

All need to be addressed.

1. Digital Platforms affect the value of everything and innovation generally: is a reset and removal of the "innovation tax" needed?

The primary competition issue is that the number of outlets for online products has become very small. All outlets are filtered through two browser engines to be seen by anyone using any computer, mobile, laptop or other device connected to the internet. The basic problem is that Google and Apple control 95% of the browsers and operating systems for mobile devices, which means they also control the shop front for the web. It is like having only two online shop fronts: each controlling which websites and apps users see, and each preventing the use of rivals' apps, products and their distribution systems.[2]

Each of Google and Apple also have all the information about what people are looking for or bought and what is happening to change in demand over time, and they keep that information to themselves.

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[1] Tim Cowen, Barrister, Chair, Antitrust Practice, Preiskel & Co LLP and former Chief Counsel Competition Law and Public Policy for BT Group, with some responsibility the access undertakings that created Open Reach, and subsequently, for many years with responsibility for their application and compliance as one of BT's General Counsel. Counsel to the Movement for an Open Web.

[2] Moreover, each prevents the use of rival access methods based on open web standards (e.g., "progressive web apps").

The problem has been described as one of "concentrated markets" or an "inequality of bargaining power[3]". In economic terms there is a "monopsony" issue. In a cost-of-living crisis does that expression understate its importance? The reality is that the power of the platforms adds costs to all online advertising and sales and all products sold online.[4] A £500 "overcharge" per UK household was calculated by the CMA in 2020[5].

However, that calculation does not factor in *the tax on innovation* arising from only the platforms controlling information about changing demand and the denial of that information to rivals. In normal, competitive markets, suppliers understand what their customers want and don't want. They get information either directly from selling to customers or via competing distribution channels vying to help them innovate.

By comparison, the platforms gather information about consumers' needs, wants and desires - and keep it to themselves. They use the information for determining what people want or might want and in promoting and displaying products to them, and in engineering improvements to their own products. But all suppliers in all markets need information to build products that better meet consumer needs.

That information used to be known by every real-world shopkeeper, distributor, and to their suppliers and manufacturers. There were also competing suppliers and distributors in competing supply chains seeking to meet these end-customers' demands in different ways. While it's basic to product innovation to "know your customer" and to understand what they like and didn't like, it is then vital for product and process innovation for competing businesses to change what they do and make things that people want. However, the platforms elbow out competing websites and rival digital shopkeepers because they are vertically integrated. This means they have technology and systems designed to promoting their own products and services and don't use alternatives. They also have an interest in denying rivals who run competing technology and systems any information with which to improve what they are doing. Cutting out those further down competing supply chains undermines rivalry and innovation in process and product development. It prevents changes to create improvements at lower prices.

Loss of information needed for innovation may be difficult to calculate but is nevertheless a real cost or "tax on innovation". Competition on the merits from all players, big or small, is needed to eliminate the current "innovation tax" that is extracted. Removing this taxes would also support a modern strategy to improve UK innovation, productivity, growth and jobs.

2. **Platform control over distribution and value from content[6]**

Worldwide, authorities and legislators are trying to find remedies. Legislation has been passed in the EU[7] and is proposed in the USA and UK. Court cases abound everywhere under existing laws. These deal with issues of "self-preference" and "conflict of interest" which are central to the U.S. Department of Justice's landmark cases against Google[8].

But what is the core problem that needs to be fixed? In Australia the problem was seen to be an unavoidable distributor and payment for content. Use of the platforms was seen to be something that

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[3]See 2021 OFCOM and the CMA joint "advice" to DCMS ("the Advice") about value for content. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073411/Platforms_publishers_advice._A.pdf

[4] see Andy Haldane at the bank of England in 2018: https://www.bankofengland.co.uk/-/media/boe/files/speech/2018/market-power-and-monetary-policy-speech-by-andy-haldane.pdf

[5] "The costs of digital advertising, which amount to around £14 billion in the UK in 2019, or £500 per household, are reflected in the prices of goods and services across the economy. These costs are likely to be higher than they would be in a more competitive market, and this will be felt in the prices that consumers pay for hotels, flights, consumer electronics, books, insurance and many other products that make heavy use of digital advertising." Para 9 CMA Online Markets Study 2020: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf

[6] https://newsmediauk.org/wp-content/uploads/2022/10/Value_of_UK_News_to_Digital_Platforms_-_Final.pdf

[7] Regulation (EU) 2022/1925 (Digital Market Act); Regulation (EU) 2022/2065 (Digital Services Act).

[8] See USA vs Google 2021 and USA vs Google 2023.

needs to be compensated. A designation system was proposed subject to arbitration[9]. If it had been put in place it would have created a mechanism for ascertaining the price or payment for content. However, that approach does not recognise the value of the content to the platforms in terms of generating data to target ads and in attracting users and in generating engagement and repeat use[10].

Platforms are often described as acting in "two sided markets". On the consumer side by controlling information about consumers' demands, on the business side by controlling the supply of products via the platforms. This misses the value that content suppliers bring to the platforms: people don't want to watch Google's home screen - they want to search and find things and access news, music films and do things like paying their bills.

The value of content depends on what is being viewed and how often. For example, news provides frequently updated content on a wide range of topics of interest to users, including breaking news, sport, politics, entertainment, product reviews, alongside a wide variety of other topics. Users who engage with news content tend to do so frequently, providing "fresh", or frequently updated data relevant to a user's current interests and intent. This data is very valuable for advertisers. In November 2021, Ofcom and the CMA recognized that considering a "wider view" – that is, all of the benefits which accrue to Google and Facebook from the use of publisher content by their platforms – is important to estimating the value of content to the platforms, and that to avoid considering these benefits would be to risk significantly underestimating that value.[11] Also[12] news features in a lot more that 50% of user queries and drives user engagement. Google recognises user trust is important and trades on trusted content provided by others. Value can thus be assessed as relating both to data for advertising and from user engagement and needs to be reviewed over time.[13]

Where access to platforms is required, as interfaces between systems for advertising are many and varied, and many products are sold via their apps and apps stores, it is also critical that the terms of interoperability operate on a fair reasonable and non-discriminatory basis. These terms need to ensure that quality of service and quality of experience are not discriminatory.

3) Platform control over browsers and end user devices prevents switching and use of Open Web competitors; (and hence control over how users can access rivals' systems and websites).

The mental picture adopted toward access regulation is typically one of users accessing a network and traditional remedies that enable switching from one network supplier to another and the interconnection between networks that is needed then come to mind. The key issue of switching to competitors has, however, changed over time as the internet and end user devices owned by the platforms are now being used to access everything.

Since platform owners control end user devices, they control critical information and systems used for switching to rivals. They own the browser and operating systems on user devices. They can [redacted] then use that control to prevent switching to alternatives. They interfere in the direct relationships between end users and rival online businesses using the Open Web.

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[9] UK legislative redress for news publishers should not be modelled on the Australian News Media Bargaining Codes - Movement For An Open Web. https://movementforanopenweb.com/uk-legislative-redress-for-news-publishers-should-not-be-modelled-on-the-australian-news-media-bargaining-codes/

[10] Presupposing solutions that entrench centralization is also highly problematic for several reasons. Such an agreement allowed and supported even greater centralisation and dependence on the platforms. It didn't promote independent access to customers over the Open Web. Neither did it address the all-important issue of non-discriminatory interoperability between the platforms and the computer systems used by their competitors. Moreover, the Australian model has never been put in place. What has been done via a waiver exercised by the Government was to allow the platforms to impose a "deal" on the press. In the short term this means the press are dependent on being paid by the platforms. The risks to media independence, plurality and freedom of expression are then increased.

[11] https://newsmediauk.org/wp-content/uploads/2022/10/Value_of_UK_News_to_Digital_Platforms_-_Final.pdf

[12] See details of the NMA datatset in Google Benefit from News Content, June 2019 page 19 https://www.newsmediaalliance.org/wp-content/uploads/2019/06/Google-Benefit-from-News-Content.pdf .

[13] https://newsmediauk.org/wp-content/uploads/2022/10/Value_of_UK_News_to_Digital_Platforms_-_Final.pdf

The switching issue starts with digital platforms' global "sign-in" systems. They continually prompt billions of people to register and log in – gathering information via their "sign-in" processes. They then collect information about what people are looking for, what they see, and what they buy. They monitor and capture every interaction with every touch point. They gather browser data, app data, operating system data, product and search data. All such data is combined and used, both for promoting their own products and for generating advertising income. Overall, the issue is control over people and steering their choices.

As detailed by the U.S. Department of Justice they have spent [redacted] blocking access to information from other sources on the web such as header wrappers[14] and pseudonymous identifiers stored in cookies.[15] When rivals could bypass the platforms, the prices of advertising went down and the margin of the content suppliers (news publishers) went up. To prevent that happening again, platforms [redacted] browser settings to block access to web data.[16]

Since the platforms monopolize information, the remedy must then provide alternative access to information to enable users to switch. The CMA has identified several alternatives that should be fostered to improve switching in any remedy, such as common identifiers for pseudonymous data and Personal Information Management systems for identity-linked data[17]. Alternatives such as Preference Express and Swan Community as well as Tim Berners' Lee's Solid are available, but their promotion in remedies is also likely to be necessary given the prevalence of the platforms.

3. **Platform accumulation of personal data**

Digital platforms collect personal information from the devices on our desks, in our pockets, or on our wrists. They gather ***data*** from "touch points" about all our interactions, from search histories to the place on the page we view online. The more the touch points, the more data and the greater the platform's knowledge. The greater the knowledge, the more valuable their ads and the greater their grip on product innovation.

They also use sign in processes mentioned above to obtain personal identity information, as well as operate webmail systems and also multi-factor authentication systems to collect additional identity-linked information. All of these solutions increase the privacy risks to individuals through their excessive gathering of identity-linked personal information. The information gathered is then used for all of the platforms' purposes. However, their centralised system represents a much higher level of risk to privacy than arises from a person signing into an individual news website or visiting separate websites operating over the Open Web without being forced to authenticate and divulge their identity.

4. **Conclusions**

What is clear is that where platforms control information, they increase their rewards from using others' content, creating engagement and data for their own advertising. Their profits are then derived from [redacted] satisfying consumer demand. Two examples may illustrate the issue:

- In relation to music and games, where Our Price, Virgin or HMV sold music and games from shops, we now have Google or Apple selling music and games online. They control access to

[14] See https://www.justice.gov/opa/press-release/file/1563746/download para 248 under the heading "Google blocks the use of standard Header Bidding on Accelerated Mobile Pages.

[15] See for example Google's acquisition of Double Click that gave it control over the cookies that monitor the section of a site that the user is browsing, shows them ads for things they might be interested in. e.g if you are on a news website and visit the sports pages adverts for match tickets may be shown: https://www.theguardian.com/technology/2012/apr/23/doubleclick-tracking-trackers-cookies-web-monitoring its AdSense and Customer Match products pool data about users interests. Publishers have tried to use Header bidding to compete with Google, increasing the relevance of ads, and reducing prices, but Google introduced AMP software on its Android devices to block out header bidding competition using .See USA vs Google https://www.justice.gov/opa/video/justice-department-sues-google-monopolizing-digital-advertising-technologies. Apple's ITP project also blocks access to web data used by competitors such as cookie data. Both aim to block cookie data used by third parties while using cookie and other data themselves.

[16] See CMA's decision concerning Google's browser changes called the "Privacy Sandbox".

[17] See CMA 2020 Final Report on Online Platforms and Digital Advertising. and in particular, Annex Z.

all information. Their power as distributors is so great that even Spotify doesn't know who its customers are – the billing is done by the app store owners. They take up to 30% as a fee. As digital platforms, they over-charge [redacted]. In music, the major labels and Spotify then control all the information about sales which is withheld from songwriters under non-disclosure agreements. The record labels control information and don't do so badly and their profits have steadily increased over time. Songwriters are exploited, as they have no information and no bargaining power.

5. In relation to news, though we can still buy a newspaper in WH Smith or the local newsagent, when selling online news, newspaper businesses are competing for ad revenue with platforms. News publishers not appearing in search rankings quickly loose business – but are competing with the platforms for advertiser spend. Such competition is handicapped by the fact that it depends on information known to the online outlet. The platforms have this information in huge quantities and increasingly control sign-in, not only to their own products but to access to a wide range of products, including publishing rivals, over the web[18]. As owners of the operating systems and browsers on 95% of devices or more worldwide, Google and Apple can [redacted], blocked access to information and alternative sources of information[19] that might be used by publishing rivals. They are using news and other content and [redacted]. This is clearly a competition problem but it is also a major threat to media plurality, democratic discourse, and freedom of expression.

From a user's perspective, meaningful consumer choice begins with control over what is browsed, searched and seen. From a seller's perspective, making a sale starts with getting your product in front of consumers. Suppliers need brand recognition, promotion of their products and making consumers aware of both their existence and benefits. So much depends on getting consumers attention and hence page ranking, and visibility, and matching people interested in buying with relevant ads and their suppliers. However, only the platforms have the information to know what we, as shoppers, are looking for and hence can control advertising and product placement, as well as what we see and when and how links and ads are presented. Digital shopkeepers who own their own websites and present their products for us to peruse are increasingly becoming suppliers to the platforms and dependent upon them for their incomes. Overall the platforms have all the information and in commercial terms "hold all the cards".

If competition on the merits is to be restored, then equality of access to consumers and information about their interests is vital and needs to be available to all online businesses. This is similar but qualitatively and quantitatively different from the situation with other types of networks[20] where similar problems may have arisen in the past.[21]

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[18] See for example Google's News Showcase.

[19] See https://www.justice.gov/opa/press-release/file/1563746/download at 248 under the title " Google outright blocks use of Standard Header Bidding on Accelerated Mobile Pages."

[20] Such as utility network interconnection in water gas telecoms or energy.

[21] The Advice sees the issues are threefold: First, news publishers compete with the large platforms for user attention and as suppliers of digital advertising inventory on their websites – they are thus affected by the market power and data advantages of the large platforms, which allow them to provide more effective targeted advertising and attribution services, and in turn earn much higher advertising revenues. Second, news publishers are frequently reliant on the platforms' advertising intermediation services when selling digital advertising inventory. Third, news publishers use the user-facing elements of the platforms' services (such as search, news services and social media) for content discovery and to drive consumers back to their own websites.

Annex 1 Specific issues with Access to Content

Online products: a Fair Split of Joint Value?

OFCOM and the CMA have published a joint "advice" ("**the Advice**"[22]) that recognises the problem of "inequality of bargaining power". The Advice suggests **a fair split of joint value**[23]. It is noted that content providers typically argue for all the benefits that accrue from the use of their content by platforms. This view includes "the value of data acquired by platforms" or 'Data benefits' when users interact with their content as well as the contribution of their content to attracting users.[24]

The Advice also fails to appreciate the terms of interoperability between platforms that control information about individuals, and the inter-operating computer systems of competing publishers. To be clear, each publisher needs to understand web data about its site visitors, which is available from their use of the web and websites. They do not need to know the identity of these visitors. However, even pseudonymous, de-identified data in the form of IDs for advertisers or basic web data is being controlled or blocked by the platforms [redacted]

Since the platform determines the frequency of which content gets viewed, then visibility and volume of sales by competitors is capable of being determined by the platform. If the frequency, latency, quality of service and quality of experience that is achieved via interoperability is not tightly defined and subject to immediate injunction for breach, then the platform will in practice control the market, even if the content supplier controls the price.

Where Open Web and competitive switching is not possible, FRAND for interoperability is also needed to ensure non-discrimination at the level of the engineering between interconnecting systems. Without it, any platform can use its control over its technology to [redacted] "throttle" rivals' speeds of interoperation. [redacted] In effect competitive neutrality is needed between platforms' advertising technology and the distribution systems that interconnect and allow people to view news and other content (including content from broadcasters, music films, etc.).

What is not addressed.

Without access to timely information about what people are buying, what they are interested in and data enabling competing business-facing systems to meet that need as fast as the platforms do, any remedy presupposes the centralized position and use of the platforms. So alternative mechanisms for individual-controlled information (such as SWAN, Solid, etc.) are needed, and then where access is mandated:

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[22] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1073411/Platforms_publishers_advice._A.pdf

[23] In Section 5 the Advice references: The joint value should include the incremental benefits and costs accruing to both to the SMS firm and the content provider from using the content; The assessment of joint value should take a broad view of value created through use of content by SMS firms and not just include advertising revenue from paid advertising placed around the content; The assessment of joint value should be carried out collectively for all UK publishers of a particular type of content, i.e. joint value should be the value created from use of content from all providers of a certain type of content (e.g. news) by an SMS firm; Joint value should include value generated by the use of copyrighted content, but this does not include any obligation to remunerate harmful content; Compensation for use of content should ensure content providers receive a fair split of joint value between SMS firms and content providers; and Compensation for use of content should not unduly discriminate between content providers

[24] We note the discussion (5.25 P49) that Google and Facebook have argued for a narrow view, where the monetary benefits to them are limited to the revenues that accrue from advertising that is placed around or on the same page as the content ('Direct advertising' in table 5.1).

[25] For example, when devices are connected to the internet, data is available about them in the form of user agent string data. Data is also available about URL and internet router addresses which is use for addressing messages, and users leave page impressions: as used by search engines' such as Google search.

- Interoperability needs to be addressed as part of the solution. Access to real-time information and data is thus needed for equality of service via interconnection and the equality of end user experience.
- The terms of interoperability need to be defined via benchmarking and cannot be defined by negotiation with a dominant platform.
- Specific performance remedies will also be needed for the terms to be enforced quickly.

We therefore suggest the value of the content needs to be established according to tried and tested methods for assessing value, including established methods for assessing Fair, Reasonable and Non-Discriminatory (FRAND) value in legal systems. [26]

Interoperability cannot be sensibly negotiated between a publisher seeking access to a platform. This is due to the inequality of bargaining power between the publisher and the platform. The terms thus need to be set with relation to objective benchmarks. If not, any negotiation would lead to unreasonable terms being imposed on publishers by the platforms[27]. Dynamic interoperability checks also need to be included. The Advice thus underrates the importance of the terms of use of the platform by competitors. Solutions like the Australian News Media Bargaining Code[28] which would appear to presuppose platform dependency and undermine an independent news industry, should be avoided.

Online products: news, music and games

Just as with news products, access issues arise for music, games and other digital products. It was recognised by the CMA in its 2022 Music Streaming Market Study[29] that nondisclosure and lack of information about use and trends and sales is a major problem facing songwriters. This pattern is repeated with news publishers and games. In each case, competing providers seeking to sell products via distributors with market power and critically important information. Those distributors have massive conflicts due to their own advertising businesses and are competing with all that use online advertising to promote their products. In these circumstances the commercial terms of interconnection between systems cannot be left to negotiation.

Web Data must be freely available.

Web data (especially if not linked to the identity of individuals), needs to continue to be available to all businesses that rely on the internet. We need intervention that prevents internet gatekeepers from blocking access to the basic web data that arises when someone uses a device to connect to the internet. The guiding principle must be that web data should be freely available – it is engineering information and without it the web won't work!

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[26] As explained above the Australian News Media Bargaining code does not sufficiently consider interoperability. It is mainly concerned with the determination of price and payment for content.

[27] The speed of matching supply and demand in ad exchanges, depends on software, number of communications hops and interactions required, software used, and such things as the colocation of the systems that are interoperating. To ensure competition is not distorted the following is needed: QOS needs to be reflected in key performance indicators and guaranteed in service level terms to cover product matters such as latency, packet loss, bit rate, throughput, availability, jitter and other technical factors relevant to the service. For example, the quality of interconnection for a voice over IP product will be engineered differently from systems for the transmission and reproduction of images. Unlike text or voice products, images depend on pixel count of the end user's device (dependent on news publisher accessing the end user User-Agent String of data that is carried by the HTTP about end user device, screen parameters and memory), as well as the screen resolution capability of the users' screen and its refresh rate. Whether static images or video are to be rendered also affect the QOS, its interoperation and access requirements for those seeking interconnection. QOS will also depend on the sharing of business-to-business input data gathered by the platform from users interacting with the publisher's content via alternative advertising technology. In principle, any data generated by end users accessing publishers' content via a platform, the default position ought to be that any such end user input data should be shared with the publisher by the platform. QOE is about the end user experience irrespective of technical parameters. The ITU has adopted a definition "the degree of delight or annoyance of the user of an application or service." See Recommendation ITU-T P.10/G100. System factors include network and systems engineering that may overlap with QOS measures but should not be confused with those factors. The purpose of the QOE measure is to assess the outcome for end users. In the context of remedies to competition issues, QOE can be measured by how well the system is working for end users. Suitable QOE parameters could be assessed against end user surveys

[28] Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 (legislation.gov.au)

[29] See where NDAs are recognized as an issue since they prevents songwriters from having visibility of streams and value. .CMA Final Report Music and Streaming at page 71.

The importance of dynamic systems interoperability

One risk arising from a negotiated set of interconnection terms can be seen as "specification risk": that the platform only agrees to supply interoperability against request, creating time limited technical specifications and hence time limited interoperability that can be rapidly overtaken by technological change. If only a standard contracting model is adopted (as contemplated in the Advice), it could allow the platforms to upgrade and favour their own systems by comparison with rivals.[30] In an extreme case, the day after agreement is reached on terms, a system or software change or upgrade may make the rivals' products unworkable or competitively disadvantaged and/or unattractive.

Dynamic system upgrades can be addressed with reference to own use. Where, for example, a system upgrade is implemented by the platform it can be required to be supplied to all interoperating publishers and their technology partners on FRAND terms. This is an important cross check and mechanism to address dynamic and changing demand as well as supply.

Current platform products in use will have been designed to meet prior demand. Newer products may need to change to meet changing end user demands. Identification of demand specifications such as is used in product development may be needed by the DMU to assess product design. Visibility of end user demand, and independent regulatory oversight of such internal product design documents created by the platforms is likely to be merited.

The potential for "data trusts"

One attractive solution is the creation of "data trusts". This idea has a key issue relating to data ownership. There is no law in England that provides that data is owned by the end user, even personal data is only protected as to its use. There is a data base law that protects intellectual property in databases, such as are created when data is processed and comingled and used. So, there are legal restrictions on what others can do with personal data (but GDPR does not presuppose ownership is at the individual level even over "personal data").

What happens in online advertising is that advertisers separate identity-linked personal data from an random deidentified ID that is then used for advertising. The ID For Advertising or IDFA has long been used to facilitate the funding the free and open web. Since about 2017, however, it has been withdrawn from general use, first by Apple and then by Google. They continue to use the Mobile Advertising IDs (MAIDs), but their withdrawal from general use has placed competing advertisers and businesses at a major disadvantage.

A trustee or steward of an MAID would enable them to be used by all and restore a level playing field. the current position is one of self-preference and [redacted] ; if each MAID were supplied to all on FRAND terms competition on the merits could be enabled. Trusts could also be established in interoperable and personal ID management systems such as SWAN Community, Preference Express and Solid.

Digital products often involve the licencing of intellectual property[31]. Where property is used by another, or misused, the basic principle is that the owners is entitled to an account of profits. Further, to

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[30] Such as has been seen in relation to *Google vs Oracle* litigation where Google used systems compatibility "as a club" and **with relation to Chrome, Google used frequent upgrades to limit user experience of compatibility with its browser rivals: "***Market participants must adhere to these standards or risk their technology no longer being compatible with most websites. Market participants explain that Google will often build features quickly without using the standard-setting process or giving smaller browsers time to implement new features. Once web developers start building to these specifications, however, smaller browsers are under pressure to quickly implement these changes, often with little notice. If smaller browsers cannot keep up, users are flooded with "[b]rowser not supported" messages on webpages that have already built to Chrome's specifications. Several market participants told the Subcommittee that they felt "bullied" by this process.*"

[31] We agree that Google search uses "snippets". The Advice notes that Google and other search engines may scrape hyperlinks, snippets and headlines from news publishers to display amongst general search results. Snippets and scraping of News headlines involve the taking of news content and reproducing it or copying it. This may breach copyright. Payment is then payable, usually assessed against licences by volume of use or with an account of profits.

allow a platform to keep data generated from users' interaction with another's content would otherwise offend against the legal principle of unjust enrichment.

Worldwide benchmarks: FRAND for interconnection

The Advice does not address exploitation of the end user or foreclosure of rivals. Exploitative harm can be remedied by reference to whether the exploitation is "in itself" problematic (with relation to systems of cost modelling such as LRAIC) or with relation to benchmarked terms. The Court of Appeal has recently had occasion to assess the issues and affirmed that the exploitation can be assessed in both ways and with relation to benchmarking to prevent the risk arising. We commend the Court of Appeal Judgement [see *Pfizer/Flynn/CMA* at page 90 Ref[32]]. Exploitative harm can be assessed against either being exploitative in themselves (being too high with relation to the costs involved) or with relation to a basket of benchmarked terms assessed as part of a FRAND determination.[33]

To avoid exploitative harm arising in interconnection, Quality of Service and Quality of Experience "QOS" or "QOE" terms need to be set against the position that would apply had they been negotiated under conditions of competition. For example, if they had been negotiated between two parties with an equal bargaining positions. When looking at worldwide precedents, one of the most important is *Microsoft vs Motorola*. In that case, which was the first case in which a federal judge determined what "fair, reasonable and non-discriminatory" meant in practice, the central principle adopted was a form of benchmarking with reference to prevailing alternatives and alternative prices that could be applicable.[34]

Fair Compensation: a misunderstanding of value?

The Advice takes the idea of "fair compensation". The activity of the platform is referred to in the Advice as "hosting" for which some contribution should be paid.

This is inapt. Platforms have derived "value" where they have controlled information and [redacted] and obtained market power. Further payment adds to their profits, not to costs; [redacted] so should not be baked into the new system. Platform income has also already contributed to the joint and common costs already incurred and sunk in the existing platform business. Additional use of hosting should not then be treated as "incremental" or apportioned to publishers that use those platforms for distribution: publishers would prefer to access information (such as they did with header bidding) and create their own competing distribution systems to avoid use of platforms.[35]

The proposed "Fair Split" of joint value also misunderstands principles established for centuries in legal systems. "**Substitution**" is referenced which only partly captures the issue of the platform taking another's content and making money from it that it then keeps. In para 5.8, the Advice refers to "combined benefit". That approach would imply the government or a regulator would be enabling a [redacted] to go at least partly unremedied and needs to reflect the legal reality and principles of law.[36] For example the table on page 47 refers to an example of copyright

[32] See also EU Commission Decision and Court ruling in the As Efficient Competitor, or AEC benchmarking methodology
[33] See discussion about this issue in COA judgement of Sir Nicholas Green in CMA/Phizer/Flynn at The Competition And Markets Authority v Flynn Pharma Ltd & Anor (Rev 3) [2020] EWCA Civ 339 (10 March 2020) (bailii.org), particularly relevant sections from paragraph 153 onwards.
[34] MICROSOFT CORPORATION v. MOTOROLA INC | FindLaw
[35] Any apportionment is also a well-known joint and common costs issue that arises in access and utility regulation: any such apportionment is likely to be arbitrary.
[36] Para 5.8 states: "Where platforms have strong bargaining power it is likely that they will capture a large proportion of this joint value. Indeed, if many content providers view the services of platforms as being must have, it is possible that the platforms could capture almost all of this joint surplus. Accordingly, although the value creation is two-way, the publisher may have to accept current terms based on little or no financial remuneration for content even if the consequence is that the majority of joint value is retained by the platforms."

infringement but does not appreciate the application of value for use, the ability of the owner to control misuse such as the springboard doctrine and unjust enrichment or tracing remedies.[37]

Addressing issues on inequality of bargaining power.

Inequality of bargaining power could potentially be addressed in a code that governs terms with a data trust arrangement as discussed above. Under the code, competition and fair value might best be achieved if:

- Competing and alternative channels are fostered. This accords with the UK policy of promoting effective competition in the interests of consumers.
- Any negotiation of prices, terms and conditions need to be seen as the allocation of risk and reward (and impacts the profit of either party to the deal). Terms and compliance with terms ensure that revenues and profits are received and achieved. In circumstances of one-sided bargaining positions, terms may mis-allocate risks to those least able to bear them. This may then increase the profits for the player with stronger bargaining power. Benchmarking of a starting point would prevent this type of harm and ensure consistency with the law on abuse of dominance: see the Court of Appeal in *Pfizer/Flynn*.[38]
- A system of "reward for dependency" risks entrenching the platform and may contribute toward a more monopolistic outcome, lowering incentive to innovate and by-pass the platforms using existing and new technologies.[39]
- An account of profits could be preferred as the mechanism to cross check the quantification of the value that the platform has received for its enrichment from use of others' content.
- Since frequency of content being seen is determined by the platform, then presentation and display and visibility and volume of sales by competitors is determined by the platform. If price were to be solely determined by the content supplier, if the frequency, latency, quality of service and quality of experience is not tightly defined and subject to immediate injunction for breach, the platform would in practice control the market.
- All contracts with platforms need remedies for breach. Ensuring continued presentation and display of time critical content such as news would suggest that specific performance obligations need to be built into the contracts and backed with interim measures.

A negotiated approach can never establish the value of the public interest in the diversity of views, the plurality of news or the freedom of expression – these risks to the public interest need to be safeguarded by an additional remedy or remedies consistent with the UK's media plurality rules. The DMU needs to secure the vitality and importance of direct trading relationships between online news publishers and their reading public, without let or hindrance and free from interference. A truly independent press requires economic freedom to operate online.

[37] P47 "Substitution effects – Where users interact with a content provider's content within the services of an SMS firm this may lead to a reduction in the number of users visiting the content provider's web properties. For example, a user may see a news headline in search results but not click through to the news article, therefore the content provider is unable to monetize this user interaction with its content through advertising."
[38] The Competition And Markets Authority v Flynn Pharma Ltd & Anor (Rev 3) [2020] EWCA Civ 339 (10 March 2020) (bailii.org)
[39] Put another way, in line with a Long Run Average Incremental Cost model (but without total service mark-ups) and designed to promote competition and entry, content providers could only pay the incremental cost of usage and not be charged for benefits accrued from establishing and existing market dominance, to help promote competition and reduce the forward looking prospect for further exploitation or foreclosure.