DMG Media response to the Digital Markets Taskforce Call for Information

1. This response is made on behalf of DMG Media, publisher of the Daily Mail, Mail on Sunday, MailOnline, Metro, Metro.co.uk, the i and inews. MailOnline is one of the largest digital news websites in the world, with full editorial and commercial operations in the UK, the US and Australia.

2. We first make some general comments on the Competition and Markets Authority Final Report on online platforms and digital advertising (the "CMA Final Report"), before providing answers to the specific questions asked in the Call for Information.

Introduction – comments on the CMA Final Report and next steps

3. DMG Media commends the CMA on the very high quality of its Final Report. Its research into the highly complex ecosystem of digital advertising has been extremely thorough. It has developed a very good understanding of the difficulties faced by companies like ours in maintaining a fair and balanced business relationship with platforms which, due to their strategic gatekeeper positions, are unavoidable trading partners in the markets they dominate. We fully endorse most of the recommendations it has made.

4. However we do have a number of concerns. The first involves timing:

    - It is now more than two years since Dame Frances Cairncross was asked to undertake the Cairncross Review. Her report recommended codes of conduct for online platforms.

    - This was followed by the Furman Review which recommended a pro-competitive regulatory regime to unlock competition in digital markets, also based on codes of conduct applying to firms with Strategic Market Status (SMS), which would be applied by a dedicated Digital Markets Unit (DMU).

    - We then had the CMA Market Study Interim Report, followed by the Final Report, both of which also recommended a pro-competitive regime comprising codes of conduct applying to SMS firms, plus specific pro-competitive interventions.

5. In our view the case built by Cairncross, Furman and now the CMA is unanswerable: We had hoped the CMA Final Report would lead directly to the setting up of the Digital Markets Unit, which would be responsible for drawing up enforceable codes of conduct and set them in operation. But that has not happened, and instead there is yet another consultation, to be followed by yet another report, not due until the end of this year.

6. Worse, we understand from conversations with the Department for Business, Energy and Industrial Strategy (BEIS) that the report of the Taskforce will be followed by yet another consultation and another report, before work begins on legislation to set up the Digital Markets Unit originally recommended by the Furman Review, and give it statutory powers. If this is the case it is hard to imagine legislation coming into force before 2022 and the Digital Markets Unit being functional before 2023 – a full five years since the Cairncross Review was commissioned. And then the codes of conduct will still have to be developed.

7. Meanwhile the problems the Cairncross Review was intended to address not only remain unresolved, but have been seriously exacerbated by the effects of the Covid-19 crisis. In the few weeks since the CMA Final Report was published, Reach Plc, the UK's largest regional publisher, announced another 550 redundancies[1]. Meanwhile, the Guardian has announced 180 redundancies[2], and even the state-funded BBC, now facing its own digital nemesis in streaming services, is axing 450 news jobs[3]. These are very unlikely to be the last redundancies in the industry, and it is more than likely that parts of the UK will have no local news coverage by the time the Digital Markets Unit is finally set up and functional.

8. We find it hard to understand the need for repeated consultations and reports addressing the same basic problem. There have been enough reports explaining why competition in various digital markets is not effective so that intervention is needed. It is now time for action. It is vital that the Taskforce makes concrete recommendations which can be passed directly and promptly into legislation. Some of the issues the Taskforce purports to address have been examined several times already, while others go far beyond the remit of the CMA Final Report and can only lead to further delay. For instance:

    - The Taskforce seeks stakeholders' views on the exact criteria to designate firms as having SMS status. Yet this issue is thoroughly addressed in the CMA Final Report, which made it clear that both Google and Facebook are highly likely to meet any criteria for identifying SMS firms.

    - The Taskforce also asks whether the proposals in the CMA Final Report for a code of conduct could be extended to online platforms not funded by digital advertising, such as online marketplaces and app stores. One should bear in mind that it took the CMA more than a

[1] https://www.telegraph.co.uk/business/2020/07/07/daily-mirror-publisher-reach-cut-550-jobs/.
[2] https://www.theguardian.com/media/2020/jul/15/guardian-announces-plans-to-cut-180-jobs.
[3] https://www.bbc.co.uk/news/entertainment-arts-53263793.

year's work and two reports totalling nearly 2300 pages just to address online platforms funded by digital advertising; examining other types of digital platforms will only delay any pro-competition initiative. Considering the compelling evidence gathered by the CMA, as laid down in its Final Report, the most sensible strategy would be, as a matter of priority, to swiftly develop codes of conduct applying to the platforms scrutinized by the CMA (namely Google and Facebook) and then consider whether similar codes should be developed for other platforms. Unless action is taken quickly, any subsequent intervention will be of little value in preserving (let alone restoring) effective competition in markets where Google and Facebook operate.

9. Second, the Taskforce's ambition to ensure there is no conflict between any new pro-competition legislation with existing and proposed UK regimes, including the new Online Harms regime,[4] may lead to additional delays. While any new legislation to unlock digital competition may involve complex technical issues, online harms legislation raises fundamental philosophical questions around freedom of expression which we believe will prove extremely challenging.

10. For example, it may not be too difficult to define child exploitation and terrorist content (though defining the latter while allowing news reporting may prove problematic). However, defining misinformation and abuse of public figures in a way which does not penalize the open debate on which democracy rests will be extraordinarily difficult. Even more problematic is that, unless online harms regulation operates only in response to complaints, platforms such as search engines will be expected to determine in the microseconds that it takes to respond to a search query whether or not a piece of content qualifies as misinformation. Search engines and social media news feeds will have to rely on algorithms, which in practice will probably mean keyword-blocking, an extremely blunt instrument. Denying the public access to information from some sources but not others is censorship in disguise, and made no less palatable by the fact it is carried out by commercial organisations rather than the Chinese government.

11. This raises the prospect of pro-competition legislation being further delayed by the inevitable debate over online harms legislation, aspects of which may be very hard to justify in a democratic society.

12. We therefore strongly recommend that, while any pro-competition legislation should take account of possible online harms legislation, it should *not* depend on the progress of the latter. Pro-competition legislation is urgently needed, and the extremely detailed analysis of the CMA in its Final Report (accompanied by compelling evidence) has already laid down the groundwork for establishing the Digital Markets Unit and developing enforceable codes of conduct.

[4] See e.g., Competition and Markets Authority, Call for information, Digital Markets Taskforce, 1 July 2020, available at https://assets.publishing.service.gov.uk/media/5efc5e433a6f4023c77a135c/Call_for_information_July2020.pdf, paragraph 2.51.

13. Third, even if action is taken today it may to be too late for some news publishers. As the digital news publisher with the largest audience in Australia (apart from the Australian Broadcasting Corporation) we are following closely the Australian Competition and Consumer Commission's (ACCC) ongoing work on the issue of payment for news content. The purpose of this is to introduce a mandatory code of conduct under which platforms will be obliged to pay news publishers for the content they use.

14. The Digital Markets Taskforce will be aware that on the day of submission of this response the Australian government published draft legislation based on the ACCC's recommendations[5]. Naturally we will need time to study this legislation, but our overall assessment is that the measures proposed are simple and effective, and address three major problems: payment for content, arbitrary changes to and discrimination in algorithms, and data transparency. The legislation does not deal with anticompetitive practices in digital advertising, but the ACCC is still working in that area.

15. Key elements of the legislation which we fully endorse and hope could be adopted in the UK include:

- Platforms will be obliged to enter into negotiations with publishers over payment for content. They will also be obliged to supply the information necessary for publishers to determine the value of their content to platforms.
- If negotiations do not result in agreement within three months, publishers will be entitled to take the issue to binding arbitration. If it is then not resolved within ten days both sides must make a final offer and the arbitrator will choose between the two or, if it is in the public interest, impose a settlement.
- Platforms must give 28 days' notice of algorithm changes – and must inform publishers how they can minimise damage to their search and social media rankings. If platforms believe they need to make emergency changes they must show any changes are in the public interest and supply an explanation to publishers within 48 hours
- Platforms will be forbidden to discriminate against publishers in algorithms. This appears to be aimed at preventing platforms from replacing Australian content they must pay for with free foreign content.
- Platforms must supply information on how data is used
- Platforms must have a mechanism to give publishers control over reader comments when their content appears on platform services

[5] https://www.accc.gov.au/system/files/Exposure%20Draft%20Bill%20-%20TREASURY%20LAWS%20AMENDENT%20%28NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%29%20BILL%202020.pdf

https://www.accc.gov.au/system/files/Exposure%20Draft%20EM%20-%20NEWS%20MEDIA%20AND%20DIGITAL%20PLATFORMS%20MANDATORY%20BARGAINING%20CODE%20BILL%202020.pdf

https://www.accc.gov.au/system/files/Q%26As%20Draft%20news%20media%20and%20digital%20platforms%20mandatory%20bargaining%20code.pdf

- Penalties for non-compliance could be up to A$10m, or ten per cent of the platform's annual turnover in Australia.

16. There remain some elements which we believe require further examination, in particular the definition of news content which would qualify a publisher to benefit from the legislation, which at first sight seems narrow and arbitrary. We are seeking further clarification, and will address any problems in our response to the Australian government's consultation on the draft legislation, which we will be submitting at the end of August. We will provide a copy to the Taskforce.

17. The issue of payment for news content was not part of the CMA's market study remit and is only briefly mentioned in the Final Report. Throughout the years news publishers in the EU (e.g., Germany, Spain) have sought payment for their news content from digital platforms relying on copyright – in almost all cases to no avail,[6] given that platforms typically respond by threatening to remove publisher content unless the news publisher waives its copyright. British news publishers therefore did not press the CMA to explore what appeared to be a blind alley. However, the ACCC and the Australian government appear to have found a route through these problems that will bear fruit, and we believe that platforms are now beginning to recognise that payment for content is an inevitability. It is no coincidence that Google recently announced that it will start paying news publishers for content in Australia, Germany and Brazil, three jurisdictions in which legislators have paid most attention to this issue.[7]

18. Mandating digital platforms to negotiate with news publishers over payment for their content in line with the Australian model would be of particular benefit to the most hard-pressed local and regional news publishers, because it would provide a steady and predictable revenue stream, in the same way as newspaper cover prices once did.

19. We believe urgent consideration should now be given to including payment for content in the remit of the DMU's codes of conduct. News content should be a 'must carry' obligation for platforms with SMS status, and negotiations for payment on the Australian model should also be mandatory.

20. In the meantime we have had discussions with the Department for Digital, Culture, Media and Sport ("DCMS") about the possibility of ordering negotiations over payment for content on the Australian model as an urgent measure to keep the news publishing industry alive while a code of conduct controlling Google and Facebook's anti-competitive practices is put in place. The DCMS should maintain the ability to order such negotiations in particular if, as we fear, any pro-competition legislation is to be subject to further delay.

---

[6] One notable exception is France, where the Autorité de la concurrence issued in April 2020 interim measures against Google mandating it to enter into good faith negotiations with French publishers over payment for their copyright-protected material. See Press Release, "Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP (Agence France Presse)", 9 April 2020, available at https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-has-granted-requests-urgent-interim-measures-presented-press. Google has appealed the decision.

[7] https://www.cnbc.com/2020/06/25/google-will-pay-some-news-publishers-to-license-content.html

21. Finally, there is one element in the CMA's recommendations which causes us serious concern. The CMA Final Report is critical of Facebook's policy of making use of its services conditional on the user accepting personalised advertising, which relies on pervasive data collection. The CMA thus recommends users should be given a choice of whether they should receive personalised advertising or not, which it calls Fairness by Design ("FBD"):

> "We therefore **recommend that, as part of the legislation for the DMU, the government gives the DMU the power to require platforms to provide consumers with the choice not to share their data for the purposes of personalised advertising**. This should include powers to influence the presentation of the choice, including defaults."[8]

22. The CMA goes even further to suggest that "opted out of personalised advertising" should be the default setting:

> "Setting the default to 'opted out of personalised advertising' would maximise protection, particularly for those that cannot or do not wish to engage. But, perhaps more importantly, setting a default opt out (so that consumers would not have their data used for personalised advertising unless they actively agreed to it) would reset the balance between platforms and consumers. It would put the onus on the platform to do more to engage with consumers to explain the benefits that could arise from personalised advertising, and to encourage consumers to make an active choice."[9]

23. The CMA estimates that contextual advertising, which would be still permitted, generates only 30 per cent of the revenue produced by personalised advertising. DMG Media's own experience suggests this is an optimistic estimate. A digital service, whether it is a social media network or news content, costs money to produce. In essence the CMA is recommending that consumers be given a choice – either pay £1 or pay 30 pence.

24. The Final Report suggests many consumers may prefer to opt in for personalised advertising. However, our experience is that while consumers may tell researchers they value online privacy, in practice they give it little thought. What they really value on the internet is speed of response. They regard choice screens as an irritant and will simply press whichever button looks as though it will take them most quickly to the service or content they are looking for. If the quickest and easiest option is one that only delivers 30 per cent of current revenue to the provider of the service, that is the one which virtually all users will choose.

25. Of course it would be nice if consumers could enjoy the benefits of the internet without paying for it in any form. But without a value exchange there is no revenue for the content provider in the first instance. That is particularly true of news content, where society rightly demands that news

[8] CMA Final Report, Appendix X, available at https://assets.publishing.service.gov.uk/media/5efc4756e90e075c5492d5b7/Appendix_X_-_assessment_of_pro-competition_interventions_to_enable_consumer_choice_over_personalised_advertising.pdf, paragraph 88.
[9] Id., paragraph 114.

publishers employ trained journalists; that facts are checked and codes of practice observed; and that legal responsibility is taken. All this is expensive and must be paid for. Contextual advertising will not do that. Unless the vast majority of news sites' users continue to allow their data to be used for personalised advertising, online news will no longer be a viable business – or will have to move behind paywalls.

26. We understand FBD is aimed primarily at Facebook, which makes acceptance of personalised advertising a condition of using its service, and the CMA is aware of the threat the FBD duty poses to news publishers. It concludes it should not apply to news publishers – but only in the first instance:

> "Publishers in particular, were concerned that it would be disproportionate and could be detrimental to online news publishers that are funded by advertising to apply the FBD duty to them… having carefully considered responses and the evidence we have seen, as well as the most effective way to implement the remedies, we conclude that in the first instance, the DMU should apply the duty only to platforms with SMS."[10]

27. However we are concerned that the possibility is left open of applying FBD to news publishers at some point in the future. This would be like obliging news agents to put a sign in their window saying the Daily Mail is free but customers can pay 70p if they prefer to. How many would pay their 70p? We cannot emphasise too strongly that all the work the CMA has done in trying to create a fair business relationship between the platforms and news publishers will be undone if we are prevented from serving personalised advertising. Fairness by Design would not be fair at all if it were applied to our industry.

Response to Questions in the Digital Markets Taskforce Call for Information

Scope of a new approach

1. **What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why? In particular:**

- **The Furman Review refers to 'significant market power,' 'strategic bottleneck', 'gateway', 'relative market power' and 'economic dependence':**

[10] CMA Final Report, Appendix Y, available at https://assets.publishing.service.gov.uk/media/5efc3faae90e075c4e144c69/Appendix_Y_-_Fairness_by_Design_Final_Version_v.8.pdf paragraphs 113-5.

– How should these terms be interpreted?

– How do they relate to each other?

– What role, if any, should each concept play in the SMS criteria?

28. A variety of criteria could be used to assess whether a given platform has SMS status. At paragraph 6.30 of its Interim Report, the CMA observed that:

"the following criteria provide a useful starting point for assessing whether a digital platform should be considered to have SMS and hence be subject to the code of conduct:

- the platform has enduring market power over a relevant market;
- the platform acts as an important gateway for businesses to access a significant portion of consumers; and
- businesses depend on the platform to access users on 'other' side of the market."[11]

29. We believe that the above criteria make sense. We have the following additional suggestions:
    - As to the first criterion (enduring market power) one could add the presence of high barriers to entry (due for example to: large economies of scale, data advantages as well as strong direct and indirect network effects).
    - As to the second criterion, one could add the lack of user multi-homing.
    - Some form of vertical integration could be an additional criterion.

30. In our view, given the position of Google and Facebook in their respective core markets (general search and social media), there is little doubt these companies hold SMS status. Google's unparalleled position across the ad tech value chain is also likely to confer on it SMS status in open display advertising. Google and Facebook's position of strength results in a complete imbalance in bargaining power between these platforms and news publishers, as the CMA observed in its Final Report.[12]

31. There are numerous digital news publishers in the UK, some controlled by traditional newspaper groups, others by broadcasters, yet more by new entrants to the market. No single news publisher is likely to hold market power, given that cross-media ownership and plurality rules prevent news publishers from controlling more than around 25% market share.

32. However, as news consumption has moved online, news publishers have grown heavily dependent on Google and Facebook to generate user traffic, which is then monetised either through advertising or subscriptions or a combination thereof. Google is a virtual monopolist in general search, with a market share around 90% for the last ten years,[13] while Facebook is by far the most significant player in social media, with its platforms (Facebook, Instagram, WhatsApp) having a

[11] In the Final Report (paragraph 7.56), the CMA similarly noted it would expect the SMS designation criteria to include "*firms that have obtained gatekeeper positions and have enduring market power over the users of their products*".
[12] CMA Final Report, paragraph 5.358.
[13] CMA Final Report, paragraph 3.17.

combined market share of 73% as of February 2020.[14] As the CMA noted, Google and Facebook account collectively for up to 38% of overall traffic for UK news publishers.[15] The result is that "*publishers […] have very little choice but to accept the terms offered by these platforms, given their market power*."[16]

33. In turn, this market power enables these platforms to engage in a variety of problematic practices, including:
    - The imposition of business contracts on a non-negotiable, take-it-or-leave-it basis;
    - Bundling services and leveraging control in one market to gain dominance in another, adjacent market – for instance Google tying access to YouTube to its DSP services;
    - Unilaterally imposing rules to prevent publishers from improving revenue by using the services of competitors – for instance Google's use of its significant market power in the market for ad server for publishers to preference its ad exchange to the detriment of other ad exchanges, as well as well its subsequent efforts to eliminate header bidding; and
    - Making changes to algorithms without warning, explanation, or means of redress, creating serious harm to news publishers' whose viewability is suddenly and inexplicably diminished.

- **Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms could be used as a starting point for these criteria?**

34. A variety of proposals have been made to identify the platforms that should be subject to *ex ante* regulation by the European Union. All these proposals have their merits and in many ways rely on a similar set of criteria, although they may be organised in a different way.

35. In our view the concept of SMS status should be sufficiently broad to capture digital gatekeepers, while avoiding extending such status to platforms whose ability to create harm is limited. It should therefore be neither under-inclusive nor over-inclusive.

36. It is also important that the criteria selected be sufficiently straightforward to avoid implementation difficulties.

- **What evidence could be used when assessing whether the criteria have been met?**

37. The criteria suggested by the CMA are essentially of a qualitative nature. While the CMA may wish to collect any information needed from companies that are potential target for the SMS status, it seems that there is already considerable evidence from a wide range of sources (competition

[14] CMA Final Report, paragraph 3.171.
[15] CMA Final Report, paragraph 5.363.
[16] CMA Final Report, paragraph 5.366.

proceedings against Google at EU and national level, merger cases, and the various reports conducted by the CMA, ACCC, etc.) confirming that Google and Facebook qualify as SMS firms.

38. More generally, when assessing whether a firm holds SMS status the regulator (e.g., the Digital Markets Unit) could consider a range of indicia, such as: high market shares (and their persistence over time), the existence of strong barriers to entry, the financial strength of the platform, access to unique data, evidence of regulatory power over its customers.[17]

2. What implications should follow when a firm is designated as having SMS?

For example:

- **Should a SMS designation enable remedies beyond a code of conduct to be deployed?**

39. Yes, because of the dynamic nature of digital markets and the evolving nature of digital gatekeepers' practices (as illustrated by Google's conduct in ad tech), there is a risk that a code of conduct may fail to capture some practices (or that the practices of SMS firms evolve in order to escape their obligations under the code of conduct). Hence, it makes sense to allow the Digital Markets Unit to adopt tailor-made remedies for SMS firms on an *ad hoc* basis.

- **Should SMS status apply to the corporate group as a whole?**

40. We agree with the CMA's proposal in paragraph 7.65 of its Final Report that the SMS status should apply to the corporate group as a whole, for several reasons.

    - First, this would be the simplest approach, as carving out some parts of a firm's business from SMS status may be difficult in practice. Worse, if SMS status did not apply to the whole group it could escape its obligations by simply reorganizing its subsidiaries.

    - Second, while the SMS firm would be expected to wield market power in a specific "core" market (e.g., general search in the case of Google), it is important that the Digital Markets Unit would be able to address the firm's conduct affecting adjacent markets. Applying the SMS status to the corporate group would reflect a firm's business as a whole rather than its position in one or two specific markets.

    - Third, platforms such as Google and Facebook engage in vertical leveraging, hence their market power may shift from one market to another. In our experience, the main purpose of platforms colonising

    - adjacent markets and/or acquiring competitors is to protect or expand market dominance in their core market, a form of defensive leveraging.

[17] See also CMA Final Report, paragraph 7.57.

- **Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?**

41. No, for the reasons explained above.

3. **What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular:**

    - **What are the criteria that should define which activities fall within the remit of this regime?**

42. Considering the difficulty in putting forward a future-proof definition of "digital markets", it makes sense to define broadly the scope of the pro-competition regime to capture all markets exhibiting network effects and where the provision of services is linked to the collection and/or processing of data. This would only be a preliminary step, since the Digital Markets Unit would still have to identify a specific firm as holding SMS status.

    - **Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.**

43. Paragraph 2.13 of the Furman Review provides that "*[m]arkets based upon digital platforms, with network-based and data-driven business models, show a tendency to tip towards a single winner*."

44. We entirely agree with the Furman Review that some digital markets characterised by network effects are unusually prone to tipping. Hence, intervention is needed either to prevent markets from tipping or, if tipping has occurred, to control the market power of the monopolist firm. Our experience is that the markets for search and social media have already tipped, and that codes of conduct should apply to Google and Facebook to control their market power.

4. **What future in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?**

45. It is difficult for us to identify future developments in digital technology or markets that are most relevant to the Taskforce's work. It is however clear from our experience as a news publisher that the practices of SMS firms such as Google and Facebook (and other digital gatekeepers) regularly evolve in a way that is not helpful for the news publishing industry. After all, one should not forget that while Google and Facebook are (unavoidable) trading partners for news publishers (as sources of user traffic), at the same time they compete with them for advertising dollars. In fact, Google and Facebook capture the lion's share of digital advertising. Their interests are thus far from being aligned with those of news publishers.

46. However, we would draw the Taskforce's attention to a number of important ongoing developments in online advertising and ad tech.

47. First, the ability to identify users remains a critical topic across both web and app environments, as it is necessary to perform personalised advertising and other fundamental advertising functions (e.g., measuring conversions and applying frequency caps). Without user based targeting we must rely on contextual targeting, which is not standardised across the industry and results to significantly less revenue for publishers.

48. Even so, identifying users on the open web is becoming increasingly difficult as all popular browsers (Safari, Firefox, and soon Chrome) clamp down on third-party cookies, the primary tracking method and thus a fundamental building block of online advertising. We understand the removal of third-party cookies in Google Chrome is still going ahead as planned – yet progress on alternatives to third-party cookies within the context of Google's Privacy Sandbox has been limited, causing panic among members of the ad tech community.[18] In any event, as the CMA observed, even if some of the Privacy Sandbox proposals are implemented, they will turn Chrome into the key bottleneck for ad tech.[19] This would come with grave concern, given Google's historical record of using its position in one part of the ad tech chain (e.g., publisher ad serving) to favour its position elsewhere (e.g., ad exchanges).

49. As far as app advertising is concerned, Apple's recent announcement that, as of September 2020, app developers will be required to explicitly request a user's permission before accessing their IDFA (ID for advertisers; this ID is used to anonymously identify app users on iOS) will likely lead to a large increase in the number of app users refusing to offer their IDFA and thus being impossible to identify. Apple has offered a framework for mobile marketing attribution called 'SKAdNetwork' to replace IDFA usage, however initial criticism indicates that the solution underestimates the complexity and structure of server-side bidding and attribution via advertising SDKs.

50. The removal of the IDFA is expected to lead to a significant decrease in publisher revenue. According to internal DMG Media data, an iOS app ad request with no IDFA results in approximately 47-76% lower publisher revenue. We are not currently aware of any plans by Google to replicate this action and remove the AAID (Android Advertising ID) across Android devices – but it would be a serious problem if it were to do so.

51. Third, fee level transparency across the ad tech supply chain remains a problem (see e.g., the recent ISBA study[20] which was unable to attribute 15% of ad spend to a particular source), and whilst transparency gathers vocal support from ad tech intermediaries, the speed of progress in reality is slow.

---

[18] https://www.adexchanger.com/online-advertising/w3c-ad-tech-members-panicked-about-slow-progress-for-third-party-cookie-alternative/.
[19] CMA Final Report, paragraph 5.236.
[20] https://www.isba.org.uk/media/2424/executive-summary-programmatic-supply-chain-transparency-study.pdf

52. As regards Covid-19, the pandemic has caused a sudden and significant decrease in advertiser spend across all platforms and verticals. Our UK programmatic revenues went almost overnight from year-on-year growth to 23% decline. Whilst some brands begin spending again, they are doing so much more cautiously than before. Content and keyword blocking is utilised extensively to avoid association with topics brands perceive to be negative. Spend has been shifting towards direct response channels (i.e. ads selling products or services directly from the page, rather than advertising building a brand) where the return on ad spend and consumer online behaviours can be more accurately measured. The uncertainty around future consumer spending patterns has caused continued lower spend on desktop and mobile video and rich media creative formats, which typically have provided publishers a higher yield, but are now viewed as a luxury.

53. The increase in demand for direct response advertising will likely further strengthen Google's dominance in ad tech. From Q1 to Q2 2020 Google Ads, whose demand is typically direct response focused, has increased its share of our UK programmatic revenue by around 18%.

54. Some of these effects have been mitigated by short term spikes in traffic volumes, caused by public interest in the pandemic and Black Lives Matter protests. However, we do not anticipate advertising spend returning to pre-Covid-19 levels until late 2021, if not later, which only puts increased pressure on the remaining independent ad tech businesses and the ad-funded publisher model. This in turn is expected to reinforce Google's market dominance. It is thus more important than ever to take action and mandate Google to negotiate with news publishers over payment for content following the Australian model while at the same time developing pro-competitive measures to ensure effective competition.

Remedies for addressing harm

5. What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?

55. Dominant digital platforms may use their market power to *exploit* their customers (business users or consumers) e.g., by increasing prices or reducing the quality of their services, as well as to *exclude* actual or potential competitors. In particular, a digital platform may use its market power in a core market to expand and conquer adjacent markets (e.g., by leveraging its existing user base and the vast troves of data it has on users) and/or protect and further entrench its dominant position in the core market.

56. The result is eventually consumer harm; a reduction in competition may only lead to less consumer choice and innovation, since the dominant digital platform will have less incentives to invest and innovate, thus weakening economic and technological progress.

57. In the case of ad-funded digital platforms (e.g., Google and Facebook), a reduction in competition may lead to lower quality of the provided service, for instance in the form of reduced privacy and

increased collection of personal data, which then translates to higher prices paid by advertisers and more profit for the platform. In the case of non-ad-funded digital platforms, a reduction in competition may lead to higher prices for consumers (e.g., higher prices for apps in the case of an app store).

58. As regards the effects that may arise from the exercise of market power by Google/Facebook in particular, we entirely agree with the findings of the CMA Final Report set out in Appendices M and S, with the exception of the issue of payment for content, which was not examined in depth by the CMA. As explained elsewhere we believe the recent work of the ACCC on the subject is very significant and may well provide a model for similar intervention in the UK.

59. We do not intend to reiterate all the findings of the CMA Final Report, but the essential problems are that:
    - Google and Facebook are unavoidable business partners
    - They use their market dominance to impose contract terms and business practices without negotiation.
    - They use our content without compensation.
    - They can, and do, change the operations of algorithms without warning, explanation, means of redress, or compensation for consequent damage to businesses.
    - In the case of Google, they operate vertically-integrated digital auctions in which they set the rules and act as both buyer and seller.
    - They limit our ability to monetise our content, and maximise their revenue, through a variety of anti-competitive practices. As regards Google, such practices include (a) imposing Unifies Pricing, (b) tying access to YouTube inventory to use of its own DSP services, and (c) linking demand from Google's DSPs to AdX and AdX to Google's publisher ad server, leaving publishers little choice but to use the latter.

60. We have much less experience of working with platforms other than Google and Facebook. There may be similar anti-competitive practices, but we are not in a position to provide evidence. We would, however, point out that we have a payment for content contract with Snap – which of course is not a dominant social media platform – which delivers acknowledged revenue benefits to both parties. This undermines the argument made by Google and Facebook that news content has little or no value to them.

6. In relation to the code of conduct:

- **Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?**

61. We are not in a position to comment on the applicability of the code structure suggested by the Final Report to other digital markets, as we have little (if any) experience of them. It seems, however, that the proposed structure comprising high-level objectives, which are then fleshed out in principles, which are in turn fleshed out in more detail in supporting guidance, would strike the

right balance between the flexibility required to develop a future-proof code of conduct for fast-moving digital markets and the need for upfront clarity and legal certainty for affected companies.

- **To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?**

62. The objectives of 'Fair trading', 'Open choices' and 'Trust and transparency' seem well suited to tackle the negative effects arising from the exercise of market power by dominant digital platforms described in our response to Question 5. As the CMA explains in the Final Report, the objective of 'Fair trading' aims to address *exploitative* behaviour of digital platforms while the objective of 'Open choices' targets *exclusionary* conduct, ensuring that customers are free to choose between the services of the dominant platform and alternatives offered by rivals. 'Trust and transparency' seeks to increase transparency, which in many markets (e.g., in digital advertising) is of crucial importance for effective competition (as otherwise customers cannot compare the services and the fees charged by various service providers), while in other markets (e.g., general search) it alleviates concerns of exploitation (e.g., concerns over sudden algorithmic changes that alter rankings in inexplicable ways).

63. We are of the view that the specific proposals outlined in Appendix U of the CMA Final Report would go a long way to achieving the objectives of 'Fair trading', 'Open choices', and 'Trust and transparency', thus controlling the effects of the market power of digital platforms. The most relevant proposals for DMG Media include:
    - contractual terms concerning the ability of publishers to monetise their content should be objectively justifiable;[21]
    - platforms should not be able to impose their own advertising software on publishers when they use platforms' publishing software (e.g., AMP and Instant Articles);[22]
    - platforms should not unduly influence competitive processes or outcomes in a way that favours a platform's own services, or services for which the platform derives a commercial benefit, over rival services;[23]
    - platforms should not rank preferentially content published in their own publishing software such as AMP or IA;[24]
    - platforms should explain the operation of ranking algorithms and advertising auctions and to allow audit and scrutiny of their operation by the regulator;[25]

[21] CMA Final Report, Appendix U, available at https://assets.publishing.service.gov.uk/media/5efb5fab3a6f4023d242ed4f/Appendix_U_-_The_Code_v.6.pdf, paragraph 94.
[22] Id., paragraph 95.
[23] Id., paragraph 123.
[24] Id., paragraph 128.
[25] Id., paragraph 149.

- platforms should give fair warning of changes to the operation of algorithms where these are likely to have a material effect on users, and to explain the basis of these changes;[26]
- Google AdX should participate in header bidding, thereby improving interoperability between AdX and non-Google ad servers;[27]
- fees charged to an advertiser or publisher by a Google or Facebook owned intermediary should be transparent to the advertiser or publisher concerned.[28]

64. As noted elsewhere, we strongly believe there should be an additional principle that platforms should be obliged to pay for news content they use, and if payment cannot be settled by negotiation, it should be imposed by binding arbitration based on the model proposed by the ACCC.

65. In any event, as the CMA itself acknowledges, the code of conduct will be limited to *controlling* the effects arising from digital platforms exercising market power with the aim of *preserving* competition. Yet in some cases merely preserving competition may not suffice. In cases where there is no credible prospect of market entry, specific pro-competitive interventions (e.g., separation remedies or remedies to increase interoperability) may be required in order to *promote* competition. See also our response to Question 8.

66. We also support the CMA's recommendations on the powers the Digital Markets Unit should be given. In particular, the Digital Markets Unit should have the power to:
    - compel information from SMS firms and other market participants;
    - carry out own-initiative investigations and investigations stemming from complaints;
    - put in place interim measures pending the outcome of an investigation, for example to suspend or reverse the implementation of a potentially harmful decision by an SMS firm, backed up by financial penalties for non-compliance;
    - publish reports on its work and the industry more generally, balancing the need for transparency against industry players' interests in protecting their confidential information;
    - appoint a monitoring trustee to monitor and oversee compliance by an SMS firm; and
    - co-ordinate and share information with UK regulators such as the CMA, the ICO and Ofcom, and with overseas authorities with similar objectives, provided the DMU is satisfied that confidential information will be treated appropriately.

67. However, we believe the Digital Markets Unit should also have the power to award compensation where a publisher has suffered material financial damage as a result of actions by an SMS firm breaching the code of conduct. Given the global operation and vast revenues of the platforms, financial penalties for non-compliance will have to be extremely large if they are to have any deterrent effect. Should there be heightened scrutiny of acquisitions by SMS firms through a separate merger control regime? What should be the jurisdictional and substantive components of such a regime?

[26] Id., paragraph 149.
[27] Id., paragraph 144.
[28] Id., paragraph 173.

68. We understand the CMA envisaged the DMU making ruling on anti-competitive practices, which could then be followed by claims for damages in the courts. However smaller publishers do not have the resource to make a complaint to a regulator and then employ lawyers to make a further claim through the courts – quite possibly for sums of money which, though significant to a small publishers, would be dwarfed by the legal fees if they do not win. This in turn may deter small publishers from making complaints in the first instance. Regulation will be much more effective if it operates as a one-stop shop where complaints are investigated and, where appropriate, compensation awarded promptly.

69. Yes, we think acquisitions by SMS firms should be subject to heightened scrutiny. Mergers such as Google / DoubleClick, Facebook / WhatsApp and Facebook / Instagram (which was not even examined by the European Commission as it did not meet the jurisdictional criteria) and subsequent market outcomes (Google using DoubleClick to conquer the ad tech ecosystem; Facebook combining data from WhatsApp despite its representations before the European Commission; and Instagram evolving to a very strong competitor in social networks) show that competition authorities have been rather too optimistic. Put another way, competition authorities have placed too much emphasis on the negative effects of an incorrect intervention compared to the negative effects of an incorrect clearance, and have not always appreciated the significant amounts of money the acquirer was willing to pay for the target company (e.g., Facebook paying $ 19 billion to acquire WhatsApp). While evaluating market outcomes with the benefit of hindsight is always easy, the Lear Report commissioned by the CMA explained that on the basis of the evidence available at the time, the analysis of competition authorities was in certain respects incomplete.

7. What remedies are required to address the sources of market power held by digital platforms?

70. As mentioned above, the code of conduct envisaged in the CMA Final Report would aim at controlling the effects stemming from the exercise of market power, rather than addressing the root of the problem, namely the existence of market power in the first place. To this end, specific pro-competitive interventions, including separation remedies, would be required. While such interventions have the potential to transform the market structure and should thus be used with caution, they may deliver substantial benefits to consumers in the form of increased competition, consumer choice and innovation.

- **What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights?**

71. Remedies involving access to data and data interoperability have the ability to strengthen competition, allowing new entrants to challenge the position of the incumbent platform, which may be extremely hard without access to certain data. For instance, the bedrock of personalised advertising is user identity, the ability to identify users and then tie data to such users. This is why the “walled gardens” of Google and Facebook capture the lion’s share of digital ad spend; their

platforms boast vast logged-in audiences, i.e. they combine scale (many users) with the ability to accurately identify each single user, and collect data on the activity of such user both on- and off-platform in order to create a super-profile, which is then sold to marketers. But even in the case of non-personalised advertising, the ability to identify users is necessary in order to perform fundamental functions such as frequency capping, conversion measurement and attribution.

- **Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?**

72. Yes, separation remedies (ranging from full structural separation, namely divestiture, to softer forms of separation, such as operational or accounting separation) should be available as part of a new pro-competition regime. Of course, considering their potential to alter the market (but also benefit consumers) such remedies should be used with great caution and only when the expected benefits are likely to outweigh any negative effects stemming from the separation. Again, this is an issue that can be determined only on an *ad hoc* basis, having regard to the facts of the specific case.

73. However, based on the compelling evidence presented by the CMA in its Final Report, we think there is already a strong case to order at least some form of separation remedies with regard to Google's position in open display advertising. Google has achieved a unique position, whereby it has the strongest (and most likely dominant) position across each step of the ad tech value chain. This end-to-end vertical integration creates serious conflicts of interests and has allowed Google to engage in a variety of leveraging practices to strengthen its position in various parts of the ad tech chain. Google is in a very peculiar position whereby it operates the largest ad exchange while also representing buyers and sellers in the auction; this unavoidably creates serious conflicts of interests, which may be effectively solved only through some form of separation remedies.

8. Are tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?

- **Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?**

74. The existence of market power in itself is not problematic under competition law. Rather, a dominant undertaking is prohibited from *abusing* such market power.

75. However, experience shows that digital markets characterized by strong direct and indirect network effects are prone to tipping. Once the market has tipped, the position of the winner becomes entrenched and extremely difficult to challenge for new entrants, given the typically high barriers to entry (strong network effects; economies of scale and scope; access to vast amounts of data). For instance, Google has been a virtual monopolist in general search for more than a decade. In turn, the lack of any credible market entry threat weakens the incentives of the winner to continue to innovate. In other words, once a market has tipped, it may be too late for any

intervention to take place. For this reason, it makes sense to provide for the ability to engage in pre-emptive action to prevent a market from (irreversibly) tipping to a digital platform.

- **What measures, if any, are needed to address information asymmetries and imbalances of power between businesses (such as third-party sellers on marketplaces and providers of apps) and platforms?**
- **Dominant digital platforms often benefit from superior information compared to their business users. This is because the ability of business users to reach users on the other side often hinges on their ranking in the platform's results, which in turn is determined according to opaque algorithms which the platform may suddenly update. What measures, if any, are needed to enable consumers to exert more control over use of their data?**

76. While legislation such as the General Data Protection Regulation and the Data Protection Act have improved substantially the level of data protection for data subjects, more could be done to increase consumers' control over use of their data, especially by large digital platforms. For instance, Facebook should not be allowed to condition the use of its services to the collection and processing of data which is not necessary to deliver its service, as only then is user consent to the collection and processing of personal data freely given. Google should 'unbundle' the numerous purposes for which it collects and processes data, allowing users to give specific and granular consent according to each purpose.

- **What role (if any) is there for open or common standards or interoperability to promote competition and innovation across digital markets? In which markets or types of markets? What form should these take?**

77. Open standards and interoperability have the potential to greatly promote competition and innovation across digital markets, giving customers of a dominant digital platform the ability to choose rival complementary products. It is hard to provide a more detailed response in the abstract, considering that the benefits (and any potential drawbacks) of such interventions can only be appraised having regard to particular markets.

78. However, based on the evidence presented in the CMA Final Report, we are confident that interoperability measures can go a long way to promoting competition in digital advertising, and in particular open display advertising, where Google has currently the strongest (and probably dominant) position across the ad tech chain. We refrain from expressing views on other digital markets as we have little (if any) experience of them.

79. As far as open display advertising is concerned, Google has linked Google Ads demand with its ad exchange AdX, and in turn has linked AdX to its publisher ad server. As a result, competition in the market for publisher ad servers is reduced, as publishers are reluctant to switch to a rival ad server and lose access to Google demand. The natural remedy for this market distortion would be to

mandate Google to make AdX demand available to rival ad servers on the same terms and functionality as it is made currently available to Google's own ad server. Technologically this could be done by mandating Google to have AdX participate in header bidding.

80. In addition, since 2016 Google has linked access to YouTube inventory (which is highly valued by advertisers) to the use of its own DSP services, a leveraging practice held by the CMA as increasing Google's market power in the market for DSPs.[29] Again, this could be solved through a set of interoperability measures, whereby third-party DSPs would be allowed to purchase YouTube inventory, just like they could before 2016. It should be noted that the CMA dismissed the privacy arguments raised by Google to justify its policy change to cut third-party DSPs' access to YouTube inventory.[30]

Procedure and structure of a new pro-competition approach

9. Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?

81. Yes, we fully endorse the Taskforce's view that the key characteristics to be considered when designing the procedure of the new pro-competition approach should be that of speed, flexibility, clarity and legal certainty.

82. In order to deliver effective and timely outcomes in fast-moving digital markets, the new regime must be designed in a manner that allows for swift action on behalf of the Digital Markets Unit (including ordering interim measures). This should of course be balanced against the reasonable rights of defence of the SMS firm.

83. In addition, for any pro-competition approach to pass the test of time, the Digital Markets Unit should have the flexibility to respond to new technological developments and challenges. Again, care must be taken to ensure that such flexibility will not create unacceptable legal uncertainty, which could discourage innovation. In practice, guidance issued by the Digital Markets Unit accompanying the code(s) of conduct could go a long way to addressing any concerns over clarity and legal certainty.

10. What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms and for imposing a code of conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?

84. In line with our response to Question 10, we think that when assessing the detailed design of the procedural framework for each proposed function under any new pro-competition approach, the

[29] CMA Final Report, paragraph 5.264.
[30] CMA Final Report, paragraph 5.265.

Taskforce should have in mind the need to ensure swift and effective action (speed) that stands the test of time (flexibility) while at the same time observing reasonable rights of defence and providing appropriate guidance to ensure legal certainty.

11. What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?

85. We very much welcome the fact that the ICO and Ofcom are working with the CMA within the context of the Digital Markets Taskforce. One of the reasons that some of the problems identified in the CMA Final Report have emerged is that the only internet regulator in the UK for the last 20 years has been the ICO, which is only concerned with data privacy. An over-focus on data privacy at the expense of competition issues has allowed Google and Facebook to establish near monopolies in search and social media and engage in a variety of anti-competitive practices.

86. As detailed in the Introduction, a similar single-minded focus on privacy led to an ICO Age Appropriate Design Code which, in its original draft form not only threatened to put news websites out of business, but would have prevented anyone under the age of 18 from accessing news websites, in clear breach of Article 10 of the European Convention on Human Rights. Eventually, after several protests, the ICO agreed to add a set of FAQs which address our concerns as news publishers. We agree with the CMA that future privacy regulation should be competition neutral, and it should take into account freedom of expression.

87. The only part of the British economy which functioned without any interruption during the Covid-19 crisis was the digital economy. Yet services in the digital economy, from online shopping to the dissemination of news online costs time and effort and will not happen unless that time and effort is rewarded. Therefore there have to be value exchanges.

88. This may involve money, as when we buy goods online, or consumers may prefer to exchange data, as when they read news without any monetary consideration. What will not work is a regulatory regime where businesses are expected to invest time and effort in producing an expensive product, such as news, only to provide it to users without receiving any value in exchange. Yet this appears to us to be the fundamental implication of the Fairness by Design duty, if applied to news publishers.

89. Our final concern relates to online harms legislation. Again we welcome the fact that the Taskforce is taking account of pending legislation on this issue. As we set out in the Introduction, defining content promoting child sexual abuse and terrorism may be relatively straightforward, but defining misinformation will be extraordinarily difficult, and should not be entrusted to commercial organisations which have neither the means nor the locus to decide what the public should be allowed to say and read.

90. News publishers sometimes make mistakes, but they are accountable for the information they publish, and take care that facts are accurate and distinguished from opinions. In our view defining misinformation and preventing its spread on the internet is an immensely difficult task, fraught with risks, and any legislative initiative will stir controversy which may take long to resolve. For this reason we believe that establishing a pro-competitive regime for digital markets should not be linked to (and thus delayed by) online harms legislation; for news publishers, time is of the essence.

91. If the government is really concerned about misinformation it should be doing everything it can to create a digital economy in which publishers of reliable news can flourish, not delaying action until they die.

Peter Wright

Editor Emeritus

DMG Media

[redacted]

[redacted]

July 2020