

Written evidence submitted by DMG Media (DMCCB01)

Digital Markets, Competition and Consumers Bill

1. This submission is made on behalf of DMG Media, publishers of the Daily Mail, Mail on Sunday, MailOnline, Metro and metro.co.uk and, through its sister company Harmsworth Media, the i, inews and New Scientist.
2. We like to make clear at the outset that we greatly welcome this Bill, and congratulate the Government departments responsible for drafting it, as well as the Competition and Markets Authority (CMA) and the Digital Markets Unit (DMU) on whose work it builds, for creating legislation which will be a model for many other jurisdictions around the world. Its scope is both broad enough to give the DMU flexibility to deal with rapidly changing markets, and rigorous enough for market dominant tech platforms to be in no doubt that many current practices are going to have to change.
3. Inevitably there are one or two areas where the meaning might be made clearer and, given the precarious state of the news publishing industry, one or two where the DMU's processes might be speeded up.

Overall timing of the Bill

4. The Bill is the culmination of five years of work, beginning with the Cairncross Review in 2018, and continuing with the Furman Review, CMA Digital Advertising Market Study, and numerous subsequent consultations. During this time news publishers' digital revenues have fallen by another 20 per cent, while the market dominant online platforms have continued to make vast profits. It is therefore vital, if the UK is to maintain a sustainable and pluralistic news publishing industry, that the Bill becomes law without delay. We understand the hope is that the Commons Committee stage can be completed by the Parliamentary summer recess. We appreciate the Bill must then be carried over into the next session of Parliament after the King's Speech in the autumn. Of course, as the Bill is drafted, a number of significant actions can only be initiated once it becomes law. We therefore hope the Bill can complete its Parliamentary stages as soon as possible, ideally by Christmas or early next year.

Designating tech firms as having ‘strategic market status’

5. The tests the DMU must use for establishing SMS status generally appear to us to be well-judged, including that a firm’s activities must affect a “significant number of UK users and the activity... is likely to have an immediate, substantial and foreseeable effect on trade in the UK”. We trust any attempts by the online platforms to push back on this by arguing that the UK is only a small part of their overall business will be resisted.
6. We do have a concern that showing that SMS status must be “in respect of a digital activity” (Section 3) is an unnecessary limitation that will give rise to legal arguments about the definition of “digital”. It could for example be argued that “digital” excludes operating systems, which would undermine the whole Bill. We hope the DMU will be robust in face of any attempts by relevant platforms to avoid this definition.
7. A more significant issue is how long SMS designation takes – and whether the CMA/DMU should be enabled to take other actions in the meantime, rather than only after SMS designation has been formally established. The Bill provides for designation investigations to be completed within 9 months of their launch (Section 14), extendable by 3 months (Section 102), and that their scope may be updated part-way through but without extending the deadline.
8. At present, SMS designation investigations can only formally be started once the Bill becomes law. There is no provision for the DMU to rely on the findings of previous, recent CMA market studies (e.g. the CMA Digital Advertising Market Study, or the Mobile Ecosystems Market Study). It might therefore be helpful for Section 14, Clause 2 to make it clearer that 9 months is the maximum period for establishing SMS status (unless the CMA considers there are “special reasons” for a further 3 month extension, Section 102) and that a shorter period may be possible, for instance where the CMA has already undertaken previous work in relation to the activity in question within the last five years.

This would mean amending Section 14, Clause 2 to say (new wording in Italics):

The CMA must give the undertaking a notice (an “SMS decision notice”) setting out its decisions under subsection (1) on or before the last day of the period (“the SMS investigation period”) of 9 months beginning with the day on which the SMS investigation notice is given. *The SMS investigation period may be shortened by the CMA to a maximum of 6 months where the CMA has already undertaken significant previous in-depth investigation in the form of a concluded and published market study into the sector and activities in question in the last 5 years from the date of the start of the SMS investigation period.*

Conduct notices and requirements

9. As mentioned above, a key issue is whether the CMA/DMU should be enabled to take other actions such as preparing conduct requirements before SMS designation has been formally established.
10. If our reading of Section 24, Clause 3 is correct (*Consultation under subsection (1) may be carried out at the same time as consultation under section 13 (consultation on proposed designation)*), then the Bill is intended to allow the CMA/DMU to prepare and impose conduct requirements at the same time as strategic market status. It would be very helpful if the Bill could be amended to make this clear.
11. There is also a difference between (a) writing and imposing the conduct requirements, and then (b) investigating a breach of the conduct requirements. There currently appears to be a deadline for the latter (Section 30), but not the former. We therefore believe it would be helpful to have a deadline for the former added into Section 19 (suggested change in italics below). A deadline of three months would be long enough because the DMU should already have been working on the conduct requirements well before that date. This would only cover the initial set of conduct requirements because the DMU should be free to add further requirements later.

19 Power to impose conduct requirements

(1) The CMA may impose one or more conduct requirements on a designated undertaking *at the same time as, or within three months of, giving the SMS decision notice under section 14(2)*, by giving the undertaking a notice containing the information set out in section 21.

12. It might also be helpful for Section 24 to set a time limit on how long any consultation period on a proposed conduct requirement should take, amending Section 24, Clause 1 as follows (change in italics):

24 Consultation in relation to a conduct requirement

(1) Before imposing a conduct requirement on a designated undertaking, the CMA must—

- (a) carry out a public consultation *lasting a minimum of 2 weeks and maximum of 6 weeks* on the conduct requirement which it proposes to impose, and
- (b) bring the public consultation to the attention of such persons as it considers appropriate.

13. Similarly, our understanding is that Section 30 (Notice of findings), Clause 2 sets a maximum of 6 months for when the conduct notice must be given, from

commencement of the conduct investigation period, thereby imposing a six-month limit on conduct requirement investigations. However we note that the DMU is only required to publish a summary of its decision (Section 30, Clause 4) – and not immediately at the time of the notice. It would be helpful if the Bill could be amended to clarify what is meant by “as soon as reasonably practical” by setting a maximum of say one week. We would also suggest that instead of requiring a statement ‘summarising’ the contents of the notice the clause should be amended to require a statement ‘giving details’ of the notice, so that third parties have an opportunity properly to understand the findings and comment (see paragraph 17 below).

Final offer mechanism (FOM)

14. The final offer mechanism (Section 39) applies where the SMS firm provides services to a non-SMS firm (or receives services from it) and would breach a “fair and reasonable” conduct requirement by failing to agree a price for that service, and the DMU cannot satisfactorily address the breach by other means (Section 38). In this situation, both parties would submit their final price to the DMU (although the third party would not technically be obliged to do so) and the DMU would choose one of the two prices. The process would take 6 months (Section 40), extendable by 3 months (Section 102), and under the Bill as currently drafted, it would only start after the end of an enforcement investigation. It is not yet clear precisely when and how this process would be employed.
15. According to the flow chart on page 38 of the Explanatory Notes, it will require 13 separate stages for the CMA/DMU to impose a final offer payment order, which will still be subject to appeal before the CAT. We appreciate that Final Offer Mechanism is seen as a backstop. However, given that the FOM is intended to address a very serious imbalance of market power between dominant platforms on the one hand and pluralistic and highly competitive news publishers on the other – and therefore time is always on the side of the platforms – anything which can be done to remove stages and shorten the FOM process would be highly desirable.
16. We are particularly concerned that information sharing only takes place at Stage Eight of the FOM process, *after* an enforcement order against an SMS undertaking has been made and breached. Our experience when negotiating existing payment for content agreements with market dominant platforms is that despite repeated requests to see the metrics on which their offers have been based, platforms have always refused to supply any information. It is hard to know how news publishers will be able to make the case for the imposition of an enforcement order, or the CMA/DMU justify imposing one, unless information sharing is required to take place much earlier in the process – ideally at the outset. We suggest the Bill is amended to

require information sharing to take place as part of the conduct investigation (section 26).

Third party rights and transparency of process

17. In general, the CMA is keen on transparency and does its best to publish views and submissions it receives from both directly concerned and other relevant third parties during its merger and anti-trust investigations, subject to the redaction of certain commercially confidential information. However, the Bill as drafted only allows for a summary of the CMA's findings and reasoning to be published at a number of points. The CMA/DMU will have powers to request any information it requires (Section 67), which we assume will include such things as relevant algorithms, etc. We would not expect third parties to be able to access all such sensitive information as gathered by the DMU, but it would be good to have some additional third-party rights, in the interests of transparency.

Rather than list all such issues here, our lawyers Geradin Partners have helpfully prepared a table highlighting the many places in the Bill where the CMA/DMU is required only to publish a summary of its findings and reasoning. This table is supplied with this submission.

The firmwide leveraging principle

18. We are concerned that Section 20 of the Bill contains problematic drafting in providing for the so-called *firmwide leveraging principle*, believing this is unduly limited. The firmwide leveraging principle is important because the conduct requirements apply only to specific activities rather than to the SMS firm more generally. Since a SMS firm's market power undoubtedly spills over into non-SMS activities and it can harm competition there, the leveraging principle is necessary and important – and without it the definition of the SMS activity would come under too much strain. Say for example that the Apple App Store is designated but Apple News isn't. Apple could then still impose an unfair term in its Apple News contracts (e.g. about the use of news publishers' data or their copyright) and claim that the term isn't caught by the DMU because Apple News isn't designated (even though the commercial reality is that Apple can impose that term due to its App Store and Operating System market power), by arguing that's not where the unfair term happened and so legally it can't be caught.
19. The Bill currently states that conduct requirements are to prevent the SMS firm from "carrying on activities other than the [SMS activity] in a way that is likely to increase the [SMS firm's] market power materially, or bolster the strategic significance of its

position, in relation to the [SMS activity]”. We accept the principle that the CMA/DMU should be restricted to some extent in how much it can control non-SMS activities (i.e. it can’t just roam freely across the whole corporate group), but we feel that Section 20(3)(c) of the Bill, which is where the leveraging principle currently sits, could be further amended to say:

“carrying on activities other than the relevant digital activity in a way that is likely to harm competition in the relevant digital activity or the other activity, increase the undertaking’s market power materially, or bolster the strategic significance of its position, in relation to the relevant digital activity, provided that the conduct is related to the relevant digital activity.”

This would allow the CMA/DMU to tackle conduct that happens in the non-SMS activity while still retaining a clear connection with the SMS activity (and so be a legitimate matter for the DMU to address).

Damages

20. One other area in which more clarification would be useful is the question of damages. Section 31, Clause 3(c) empowers the CMA/DMU to impose on any SMS undertaking found to be in breach of a conduct requirement an obligation to “address any damage caused by the breach”. We understand that this would include providing financial recompense to victims of the breach. If that is correct, it would be very useful if this Clause could be clarified to make that clear. We would also welcome a fuller explanation of in what circumstances exemplary damages might be imposed (Section 122).

Conclusion

21. Once again, we would stress that in general we very much welcome the Bill and are most impressed with the careful thought which has clearly gone into drafting it. We also welcome the fact that it appears to have cross-party support, and very much hope it will complete its passage through Parliament without delay.

Peter Wright
Editor Emeritus
DMG Media
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Digital Markets, Competition and Consumers Bill - Consultation and Transparency Rights

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
<p>SMS Designation (Chapter 2)</p>	<p>When the CMA begins an SMS investigation it must give the relevant firm a notice stating, <i>inter alia</i>, the reasonable grounds for the investigation, as well as its purpose and scope (s.11).</p> <p>When the CMA decides to close an initial SMS investigation, it must give the firm concerned a notice to that effect (s.12).</p> <p>The CMA must give the firm a notice setting out its decision within 9 months (extendable by 3) of beginning the SMS investigation (s.14).</p> <p>The SMS decision notice must include, <i>inter alia</i>, a description of the SMS firm, a description of the digital activity with respect to which the designation has effect and the CMA's reasons for its decisions (s.15).</p>	<p>-</p>	<p>The CMA must carry out a public consultation on any decision that it is considering making as a result of an SMS investigation and bring that consultation to the attention of such persons as it considers appropriate (s.13).</p> <p>The CMA must publish a statement summarising the contents of the notice as soon as reasonably practicable after giving an SMS investigation notice (s.11) or a notice that it is closing the investigation (s.12).</p> <p>The CMA must publish a statement summarising the decision as soon as is reasonably practical (s.14).</p>

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
Conduct Requirements (Chapter 3)	The CMA may impose one or more conduct requirements on an SMS firm by giving the SMS firm a notice (s.19) that includes a statement of (a) the conduct requirement and the relevant digital activity to which it relates, and (b) the objective for the purposes of which the CMA considers it is appropriate to impose the conduct requirement (s.21).	The CMA must bring the consultation to the attention of those it considers appropriate (s.24).	<p>Before imposing or revoking a conduct requirement on an SMS firm, the CMA must carry out a public consultation (s.24).</p> <p>For the purposes of the public consultation, the CMA must publish the conduct requirement which the CMA proposes to impose and a statement of the permitted type of requirement to which the CMA considers the proposed conduct requirement belongs (s.24).</p>
Enforcement of Conduct Requirements (Chapter 3)	When the CMA begins a conduct investigation it must give a notice to the SMS firm which it suspects has breached a conduct requirement. The notice must include, <i>inter alia</i> , a statement of the conduct requirement which the CMA suspects has been breached, and a description of the conduct which the CMA suspects constituted the breach (s.26).	<p>The CMA may consult such persons as the CMA considers appropriate before making an enforcement order (including a revised version of an order) (s.31).</p> <p>The CMA may consult such persons as the CMA considers appropriate on any proposal to revoke an enforcement order (s.34).</p>	<p>As soon as reasonably practicable after giving the notice to the SMS firm starting the conduct investigation, the CMA must publish a statement summarising the contents of the notice (s.26).</p> <p>As soon as reasonably practicable after giving the notice to the SMS firm closing an investigation, the CMA must publish a statement summarising the contents of the notice (s.28).</p>

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
	<p>The CMA will give notice to the SMS firm stating the period, as determined by the CMA, within which the firm may make representations (s.26). These representations may lead the CMA to consider that the countervailing benefits exemption applies (s.29). In such cases, the conduct investigation must be closed without making a finding (see s.28).</p> <p>When closing a conduct investigation, the CMA must give a notice to the SMS firm stating the conduct requirement to which the investigation related, and the CMA's reasons for closing the investigation (s.28).</p> <p>The CMA must give a notice to the SMS firm within 6 months of the notice that began the conduct investigation, which states whether or not the CMA has found a breach and the reasons for its findings (s.30).</p>		<p>As soon as reasonably practicable after giving the notice to the SMS firm of its decision, the CMA must publish a statement summarising the contents of the notice (s.30).</p> <p>As soon as reasonably practicable after making an enforcement order (including a revised version of an order), the CMA must publish a statement summarising the contents of the order (s.31).</p> <p>As soon as reasonably practicable after giving a notice to a firm about an interim enforcement order, the CMA must publish a statement summarising the contents of the notice (s.32).</p>

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
	<p>Before making an interim enforcement order the CMA must give the SMS firm to which it would relate an opportunity to make representations. However, this duty does not apply where the CMA considers that compliance would substantially reduce the effectiveness of the order. Where the CMA makes an interim enforcement order without giving the SMS firm the opportunity to make representations, the CMA must give the firm a notice that includes the reasons for making the order without that opportunity and state the period, as determined by the CMA, within which the firm may now make representations in relation to the interim enforcement order (s.32). The CMA must consider the representations that it receives following the notice as soon as reasonably practicable (s.32).</p> <p>The CMA may accept an appropriate commitment from the SMS firm</p>		

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
	<p>subject to a conduct investigation as to its behaviour in respect of a conduct requirement to which the investigation relates. A commitment is appropriate where the CMA considers that compliance with the commitment by the SMS firm would mean that it would no longer be necessary to carry out a conduct investigation (s.36).</p>		
Final Offer Mechanism	<p>Where the CMA considers that a proposed transaction between an SMS firm and a third party meets the conditions for the final offer mechanism, it may require the undertaking to submit to the CMA payment terms (“final offer payment terms”) that it regards as fair and reasonable for the transaction (s38).</p> <p>The power to require final offer payment terms is exercised by giving a “final offer initiation notice” to the firm that must specify, <i>inter alia</i>, the party being addressed, the breach of</p>	<p>Where the CMA considers that a proposes transaction between an SMS firm and a third party meets the conditions for the final offer mechanism, it may invite the third party to submit to the CMA payment terms (“final offer payment terms”) that it regards as fair and reasonable for the transaction (s.38).</p> <p>The power to invite the third party to submit final offer payment terms is exercised by giving a “final offer initiation notice” to the firm that must specify, <i>inter alia</i>, the party being</p>	<p>As soon as reasonably practicable after giving a final offer initiation notice to an SMS firm or third party, the CMA must publish a statement that includes all the information contained in the notice and, if necessary, a summary of any further action that it is taking in relation to the breach of the enforcement order (s.39).</p> <p>As soon as reasonably practicable after giving a notice not to make a final offer order, the CMA must publish a statement summarising the contents of that notice (s.40).</p>

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
	<p>the enforcement order, and a summary of the proposed transaction (s.39).</p> <p>Where the CMA decides not to make a final offer order, it must give a notice to that effect to the SMS firm and the third party including the reasonable grounds for its decision (s.40).</p> <p>To facilitate the submission of final offer payment terms, the CMA may (a) use an information notice to require the SMS firm or third party to give information to the CMA, (b) share information between the SMS firm and the third party, and (c) specify the form or manner in which the final offer payment terms must be submitted (s.39).</p> <p>At the same time as making a final offer order that requires that the final offer payment terms are to be included as terms of the proposed</p>	<p>addressed, the breach of the enforcement order, and a summary of the proposed transaction (s.39).</p> <p>Where the CMA decides not to make a final offer order, it must give a notice to that effect to the SMS firm and the third party including the reasonable grounds for its decision (s.40).</p> <p>To facilitate the submission of final offer payment terms, the CMA may (a) use an information notice to require the SMS firm or third party to give information to the CMA, (b) share information between the SMS firm and the third party, and (c) specify the form or manner in which the final offer payment terms must be submitted (s.39).</p> <p>At the same time as making a final offer order that requires that the final offer payment terms are to be included as terms of the proposed transaction, the CMA must give the SMS firm and third</p>	<p>As soon as reasonably practicable after making a final offer order, the CMA must publish a statement summarising the contents of the final offer order and the notice given under subsection (s.41).</p> <p>As soon as reasonably practicable after revoking a final offer order, the CMA must publish a statement summarising the contents of the notice revoking the order (s.42).</p>

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
	<p>transaction, the CMA must give the SMS firm and third party a notice that includes: (a) a summary of the proposed transaction, (b) reasons for the order, and (c) a copy of the order (s.41).</p> <p>Where the CMA decides to revoke a final offer order, it must give a notice to that effect to the SMS firm and third party that includes the reasons for the decision (s.42).</p>	<p>party a notice that includes: (a) a summary of the proposed transaction, (b) reasons for the order, and (c) a copy of the order (s.41).</p> <p>Where the CMA decides to revoke a final offer order, it must give a notice to that effect to the SMS firm and third party that includes the reasons for the decision (s.42).</p>	
Pro-Competition Interventions (PCI) (Chapter 4)	<p>Where the CMA begins a PCI investigation, it must give the SMS firm a notice that states, <i>inter alia</i>, the reasonable grounds for the investigation, as well as its purpose and scope (s.46).</p> <p>The CMA must give the SMS firm a notice of the PCI decision resulting from the investigation on or before the last day of the period (the “PCI investigation period”) of 9 months [extendable by 3 months] beginning</p>	<p>Before making a final decision on whether to make a PCI as a result of a PCI investigation, the CMA must bring the public consultation to the attention of those it considers appropriate (s.47).</p> <p>Before revoking a pro-competition order, the CMA must bring the public consultation to the attention of such persons as it considers appropriate (s.52).</p>	<p>As soon as reasonably practicable after giving a notice to a firm about starting a PCI investigation, the CMA must publish a statement summarising the contents of the notice (s.46).</p> <p>Before making a final decision on whether to make a PCI as a result of a PCI investigation, the CMA must carry out a public consultation on its proposed decision (s.47). For the purposes of the consultation, the CMA must publish a statement setting out the CMA’s findings</p>

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
	<p>with the day on which the PCI investigation notice is given to the SMS firm (s.48).</p> <p>Where the CMA revokes a pro-competition order, it must give a notice to that effect to the SMS firm (s.51).</p>		<p>as a result of the investigation, and a description of any PCI which the CMA is considering making (s.47).</p> <p>Where the CMA revokes a pro-competition order, it must publish the notice as soon as reasonably practicable after giving it to the SMS firm (s.51).</p> <p>As soon as reasonably practicable after giving the SMS firm a notice of its PCI decision, the CMA must publish a copy (s.48).</p> <p>The CMA must carry out a public consultation on the terms of any pro-competition order before making it. This duty may be satisfied where (a) a draft pro-competition order was published for the purposes of that consultation, and (b) the CMA proposes to make a pro-competition order that is the same or materially the same as the draft pro-competition order (s.52).</p>

Relevant processes	SMS (Strategic Market Status) firm	Third parties affected by the relevant issue	The general public
			These duties do not apply in relation to the making of a replacement order which, in the opinion of the CMA, is not materially different from the order which it replaces (s.52).
Enforcement and Appeals (Chapter 7)	A person with a sufficient interest in any decision made by the CMA in connection with its digital market functions (including a decision not to exercise a function) may apply to the Tribunal in accordance with Tribunal rules for a review of that decision (s.101).	A person with a sufficient interest in any decision made by the CMA in connection with its digital market functions (including a decision not to exercise a function) may apply to the Tribunal in accordance with Tribunal rules for a review of that decision (s.101).	-

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