Written evidence submitted by the News Media Association (DMCCB11)

1. Executive Summary

1.1. The News Media Association (the "**NMA**") is the voice of UK national, regional, and local news media in all their print and digital forms - a £4 billion sector read by more than 47.2 million adults every month. Our members publish around 900 news media titles - from The Times, The Guardian, The Daily Telegraph and the Daily Mirror to the Manchester Evening News, Kent Messenger, and the Monmouthshire Beacon.

Priorities:

- **Digital Markets: The Appeals Standard -** The judicial review ("**JR**") standard for appeals must be maintained, as any weakening would seriously undermine the efficacy of the new pro-competition regime. Judicial review will ensure speedy resolution and allow the expert Competition and Markets Authority (the "**CMA**") to effectively discharge its functions in the interests of UK consumers. Big Tech firms have a strong incentive to argue for provisions that would obstruct or delay CMA decision making, and a full merits or 'judicial review-plus' standard would give them great scope to do so.
- **Digital Markets: The Interests of Citizens -** The CMA should be given a duty to further the interests of citizens, as well as consumers when conducting its digital market functions. This will ensure that the CMA prioritises tackling anti-competitive conduct in the interests of all in UK society, including conduct that threatens media plurality, data privacy, and online safety.
- **Digital Markets: Payment for Content and Final Offer Mechanism** - The Final Offer Mechanism (the "**FOM**") should be made available earlier in the enforcement process, whilst still allowing the CMA to proceed with other enforcement tools if it considers FOM to be unnecessary. This would strike the right balance between ensuring that SMS firms are sufficiently incentivised to negotiate with publishers for the value of news content whilst ensuring that platforms and publishers are not rushed into the FOM without it being warranted.
- **Digital Markets: Anti-Leveraging Requirement -** As currently drafted, the Conduct Requirement ("**CR**") category 20(3)(c) appears inadequate to prevent anti-competitive leveraging from a non-designated to a designated activity. The CR should be amended to prevent SMS firms from expanding their substantial and entrenched market power, whilst ensuring that any remedies imposed by the CMA are directly connected to the designated activity.
- **Subscription Contracts: A Proportionate, Principles-Based Approach -** The Bill's approach to subscriptions contract regulations goes far beyond the principles-based approach the government set out in response to its consultation. The Bill contains inflexible and arbitrary provisions that have not been properly consulted on. This has led to a corresponding increase in estimated implementation costs from £16 million to £467 million, with a significant lack of clarity on how the detail of these proposals will benefit consumers. There should be a renewed focus on creating an evidence and principles-based approach to tackling consumer harm.

- **Subscriptions Contracts: Ending of Contracts -** The rigid language of Clause 252(1), which mandates termination in a single communication without any steps beyond what is reasonably necessary, may hinder the provision of improved subscription offers that are in the best interest of the consumer and aligned with the principles of good customer service.
- **Subscriptions Contracts: Cooling-off Period -** The removal of the cooling-off period should be considered, given the existence of renewal notices and the potential risks associated with insufficiently analysed requirements on businesses and consumers.

2. Background

2.1. Big Tech platforms, such as social media and search platforms, are absolutely essential to the digital news ecosystem. Due to their substantial and entrenched market power, news publishers are reliant on these platforms as key discovery gateways for news and are unable to compete with platforms as suppliers of digital advertising inventory. Publishers have consequently become heavily dependent on platforms, principally in two ways. Firstly, for the user-facing elements of their services, which are critical to driving users back to publisher websites for content discovery. This reliance puts platforms in a powerful bargaining position, enabling them to dictate the terms of the relationship and act as an essential gateway for news publishers. Secondly, news publishers often depend on the advertising intermediation services owned and operated by those same platforms, with Google, in particular, dominant at every stage of the intermediation process. There is no other market in which one company would be allowed to play multiple roles on both the demand and supply sides. Google can extract data from publishers while self-preferencing its own services and inventory sources,[1] leaving news publishers at a significant disadvantage. This greatly limits publishers' ability to generate revenue and maintain a sustainable business model, putting the future of trusted, professionally produced news in jeopardy.

2.2. The Digital Markets, Competition and Consumers Bill (the "**Bill**") is, therefore, a hugely welcome step forward towards creating a fairer digital economy, delivering real benefits for publishers and society. The Bill will grant the Digital Markets Unit (the "**DMU**") within the CMA the teeth it needs to open up the market between news publishers and platforms, paving the way for a truly sustainable future for local, regional, and national journalism in every corner of the UK. We congratulate the government, civil servants, the CMA and the DMU for creating world-leading legislation that will tackle the root causes of concerns surrounding digital competition.

2.3. Any amendments to the Bill should not water down the fundamental principles of this vital piece of legislation, ensuring that the new pro-competition regime reflects the intentions of the government and other experts who have set out the framework for the new regulator in meticulous detail over several years.

[1] Ofcom and CMA, "*Platforms and Content Providers, Including News Publishers*", November 2021; see also for further reading "*U.S. and Plaintiff States V. Google LLC*", 2023

2.4. Connected to this, the Public Bill Committee (the "**Committee**") should have a high level of confidence in the ability of the CMA to carry out the digital markets function in Chapter 1 of the Bill. The CMA is internationally recognised as an expert regulator, rivalling the influence and impact of significantly larger jurisdictions such as the United States and the European Union. Its groundbreaking market studies into the digital advertising and mobile ecosystems markets have provided an impetus to competition regulators in advanced economies the world over, and its work and findings are regarded as coherent and of the highest quality by its peers. The regulator has risen to the challenge set by fast-moving digital markets, with a groundbreaking Data, Technology and Analytics (DaTA) Unit bringing together data science, engineering, technology insight, behavioural science, eDiscovery and digital forensics.[2] The CMA's expertise and international reputation should be front of mind as changes to the Bill are considered.

2.5. The NMA welcomes the Committee's call for evidence and forthcoming scrutiny of the Bill. To assist, our response seeks to provide recommendations for the Committee's consideration regarding the digital markets and consumer aspects of the Bill.

3. Competition

3.1. *Narrowed Regulatory Scope*

Interest of Citizens

3.1.1. From the outset, it is important to highlight that the scope of the DMU has deviated from the original intentions put forward by the Digital Markets Taskforce (the "**DMT**") in their advice to the government provided in December 2020.[3] The first recommendation from the DMT was for the government to establish the DMU with the objective of advancing the interests of consumers *and citizens* in digital markets, by promoting competition and fostering innovation.[4] The DMT believed that anchoring the regime in consumer interests was crucial, but they also emphasised the significance of digital markets supporting the rights of UK citizens, including those pertaining to privacy, data protection, and free speech.[5]

3.1.2. However, the Bill does not incorporate a statutory obligation to promote competition for the benefit of citizens. Consequently, the DMU's capacity to consider broader policy issues that have been central to the DMU's creation since the 2019 Furman Review may be limited.[6] Indeed, the Digital Regulation Cooperation Forum has acknowledged the interconnections between digital competition and other policy

[2] CMA, "*The technology-led transformation of competition and consumer agencies: the CMA's experience*", June 2022
[3] Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020
[4] Pg. 22, Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020
[5] Pg. 22, Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020
[6] Digital Competition Expert Panel, "*Unlocking Digital Competition*", March 2019

goals, such as data privacy,[7] and online safety.[8] Therefore, the exclusion of a duty to consider the interests of UK citizens has adverse implications for the substance of any CR or other remedy, as well as the DMU's ability to balance competing objectives. To clarify, a duty to further the interest of citizens would not distract or complicate the DMU's core duty of promoting competition, but instead, ensure that it is empowered to tackle key policy areas through the promotion of competition. This will ensure that the DMU prioritises tackling anti-competitive conduct in the interests of all in UK society.

3.1.3. Specific to the news media industry, an interests of citizens duty would allow the DMU to prioritise tackling anti-competitive conduct that harms media plurality. Platform and publisher relationships have always been a key target for DMU regulation, as evidenced by Ofcom and the CMA publishing Advice to the Department for Digital, Culture, Media and Sport (as it was then) on how the DMU's CRs could be applied to platforms and news publishers.[9] A financially sustainable and plural media is critical in ensuring that UK citizens can engage with the world around them and participate in democratic processes: in short, a fundamental public good.

3.1.4. For clarity, absent this duty, the current pure competition focus would still allow the CMA to implement solutions which will level the playing field between platforms and the news publishing sector (such as a requirement to trade on fair and reasonable terms with publishers when negotiating for the value of news content). Our concern is that the absence of an interests of citizens duty may mean that competition solutions that could support a sustainable and plural media may not be used as effectively as they could be, resulting in sub-optimal solutions. Unduly constraining the CMA in its ability to implement solutions that will benefit citizens would represent an immense missed opportunity. There is also a risk that the CMA would sometimes tacitly account for wider policy issues but without setting out its decision making in a clear manner.

3.1.5. Smaller, and local news publishers will benefit in particular from an interests of citizens duty. An enhanced focus on media plurality would ensure that efforts to promote competition do not result in a small coterie of larger publishers dealing on a more level playing field with platforms, with smaller publishers not receiving the same benefits.

3.1.6. Such a duty would also allow the CMA to fully capitalise on the substantial synergies between digital competition objectives, and other digital policy objectives such as data privacy and online safety. The CMA and the Information Commissioner's Office have stated that meaningful user choice and control are fundamental to robust data protections and effective competition.[10] In its Online Platforms and Digital Advertising

[7] CMA and ICO, "*Competition and Data Protection in Digital Markets: A Joint Statement Between the CMA and the ICO*", 19 May 2021
[8] CMA and Ofcom, "*Online Safety and Competition in Digital Markets: A Joint Statement Between the CMA and Ofcom*", 14 July 2022
[9] Ofcom and CMA, "*Platforms and Content Providers, Including News Publishers*", November 2021
[10] Pg. 19 CMA and ICO, *"Competition and data protection in digital markets: a joint statement between the CMA and the ICO*", May 2021

Market Study, the CMA identified data privacy as a key factor to be taken into account when appraising data-related interventions, placing an emphasis on approaches that can reduce friction and facilitate informed decision-making on the part of consumers, notably through the Fairness by Design.[11] Without an interests of citizens duty, it is less clear that the CMA could explicitly account for data privacy when implementing and prioritising remedies.

3.1.7. Consequently, we strongly believe that the Committee should evaluate the merits of upholding the initial advice from the DMT and grant the CMA a duty to further the interests of citizens when fulfilling its digital markets functions.

Strategic Significance

3.1.8. To fulfil the Strategic Market Status ("**SMS**") conditions for a digital activity to be designated, a firm must possess substantial and entrenched market power,[12] as well as hold a position of strategic significance.[13] The DMT emphasised that it was crucial for a firm's market status to not be solely based on substantial and entrenched market power but also to provide it with a strategic advantage.[14] In assessing factors that indicate a firm's strategic position, the DMT proposed that the CMA should consider whether the firm's activity has *"significant impacts on markets that may have broader social or cultural importance"* alongside four other factors.[15] The other four conditions - only one of which must be met for an activity to be considered to have strategic significance - have been placed in the Bill, but the condition relating to social or cultural importance is absent.

3.1.9. Although only one of the conditions in Clause 6 need be met for an activity to give a firm a position of strategic significance, it is likely the CMA will prioritise the designation of activities that meet most or all of the conditions (as this will be a useful indication of the extent of the significance). The impact of a firm's market power is likely to be accentuated if it is consequential for a social or culturally important market.[16]

3.1.10. Therefore, allowing the CMA to consider an activity's social and cultural impact would be critical in ensuring that digital activities that have the biggest influence on UK businesses and consumers are designated as a priority (or indeed, designated at all). The consideration of a firm's broader impact on society may also be important

[11] Pg. T10 CMA, *"Appendix T: our approach to assessing data remedies, Online platforms and digital advertising market study"*, July 2020; Pg. 1 CMA, *"Appendix Y: choice architecture and Fairness by Design, Online platforms and digital advertising market study"*, July 2020

[12] Clause 5 "*Digital Markets Competition Consumers Bill*", April 2023

[13] Clause 6 "*Digital Markets Competition Consumers Bill*", April 2023

[14] Pg. 30 Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020.

[15] Pg. 31 Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020.

[16] Pg. B18 Digital Markets Taskforce, "*Appendix B – The SMS regime: designating SMS firms, A new pro-competition regime for digital markets*", December 2020

because of its influence over critical infrastructure or its access to sensitive healthcare data.[17]

PCI Adverse Effect on Competition Test

3.1.11. The Bill grants the CMA the authority to issue a Pro-Competition Intervention ("**PCI**") when it determines that a factor, or combination of factors, related to a relevant digital activity is negatively impacting competition, and issuing the PCI would likely contribute to, or be beneficial for remedying, mitigating, or preventing the adverse effect on competition.[18] This test, known as the Adverse Effect on Competition ("**AEC**") test, is analogous to what is available through the current market investigation regime.

3.1.12. However, the DMT recommended the inclusion of "*consumers*" in the AEC test,[19] creating an Adverse Effect on Competition and Consumers ("**AECC**") test. This addition would empower the regulator to address consumer harm without always having to demonstrate that competition had been undermined, which would be useful in circumstances where the link between competition and consumer harm is not entirely explicit.[20] This is relevant for data privacy, where not allowing proper user choice over the collection of data can harm competition - as firms are less incentivised to make data privacy a point of competition - but also has a direct and harmful impact on consumers.[21] An AECC test would therefore allow the CMA to better consider the synergies between competition and other digital policy objectives.

3.1.13. The CMA has previously recommended that a new, overriding statutory consumer interest duty be introduced for the regulator and the courts, stating: "[*I*]*nterventions based on competition alone are not always sufficient to protect the interests of consumers, or to do so in a timely manner*".[22] This is particularly pertinent in digital markets where new forms of consumer harm such as data harvesting and personalised pricing have been created, and where some consumers lacking digital skills are particularly vulnerable.

3.1.14. Despite the DMT's recommendation, the AECC test has not been incorporated into the Bill,[23] which maintains the more constrained AEC test. The government has expressed the opinion that the existing AEC test can and should be broadly interpreted to encompass consumer harms, albeit through a competition lens.[24] However,

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[17] Pg. B18 Digital Markets Taskforce, "*Appendix B – The SMS regime: designating SMS firms, A new pro-competition regime for digital markets*", December 2020
[18] Clause 44(1) "*Digital Markets Competition Consumers Bill*", April 2023
[19] Pg. 45 Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020
[20] Pg. D27 Digital Markets Taskforce, "*Appendix D: The SMS regime: the pro competition interventions, A new pro-competition regime for digital markets*", December 2020
[21] Pg. 19 CMA and ICO, "*Competition and data protection in digital markets: a joint statement between the CMA and the ICO*", May 2021
[22] Pg. 9 CMA, "*Letter from Andrew Tyrie, CMA Chair, to the Secretary of State for Business, Energy and Industrial Strategy*", February 2019
[23] Pg. 36 DCMS and BEIS, "*A New Pro-Competition Regime for Digital Markets*", July 2021
[24] Pg. 36 DCMS and BEIS, "*A New Pro-Competition Regime for Digital Markets*", July 2021.

without explicit reference in the Bill that the regulator must consider consumers, there is no legal guarantee that this will consistently occur, or in a timely manner.

3.1.15. The Bill would be enhanced to better protect consumers if the AECC test, as proposed by the DMT, was included. This would ensure that consumer welfare is explicitly considered when assessing the need for intervention, rather than relying solely on a competition-focused perspective.

3.2. ***Designation***

Digital Activities

3.2.1. Although we are confident in its wording, we recommend that the Committee stress tests the definition of a "*digital activity*."[25] In order to be designated by the CMA, a firm must possess SMS in a digital activity. Currently, a digital activity is defined as the provision of a service via the internet, the provision of digital content, or any other activity conducted for these purposes. Even when a service is provided through a combination of the internet and an electronic communications service, it is still considered to be provided via the internet, as per the definition given by the Communications Act 2003, Section 32(2).

3.2.2. If the definition of "*digital activity*" is not sufficiently broad, it could hinder the CMA's ability to designate activities where Big Tech firms hold entrenched market power, or it may create opportunities for platforms to delay designation.

3.2.3. For instance, a digital activity being defined as the provision of a service via the internet may see firms seek to exclude operating systems on a technicality (e.g. Apple's iOS). The government's intention to include operating systems is clearly set out in the Bill's explanatory notes, which make several references to operating systems as examples.[26] However, for surety, the Committee should test whether the definition of digital activity does realise the government's intention.

3.2.4. Responding to its consultation, the government mentioned that they were exploring options for periodically updating the criteria to keep pace with the rapidly evolving digital markets.[27] However, the legislation does not appear to include a mechanism that would allow for the updating of the criteria.

3.2.5. We recommend that the Committee carefully scrutinise the Bill's definition of "*digital activities*" and assess whether the definition is sufficiently future-proof and inclusive of emerging technologies.

Existing Market Studies

[25] Clause 3 "*Digital Markets Competition Consumers Bill*", April 2023
[26] "*Explanatory Notes, Digital Markets, Competition and Consumer Bill,*" April 2023
[27] Pg. 16 HM Government "*Government Response to the Consultation on a New Pro-Competition Regime for Digital Markets*", May 2022.

3.2.6. The Bill allows for nine-month (or 12 months with an extension) designation assessments to occur concurrently with the writing of CRs.[28] This provision facilitates the timely implementation of the regime. However, it is notable that the CMA has not been explicitly granted the authority to utilise its existing Market Study Reports in the designation process. It is crucial to ensure that the designation process is efficient and that the CMA is permitted to utilise the existing market studies it has undertaken, now and in the future.

3.2.7. To enhance the expeditious operationalisation of the regime, it is recommended that the Bill explicitly grants the CMA the authority to consider and incorporate its existing Market Study Reports in the designation process. This would provide surety that the CMA can leverage the valuable insights and findings from its previous market studies, promoting efficiency and informed decision-making in the designation assessments. Undertaking a designation process from scratch for each case would impose significant and unnecessary burdens on the CMA.

3.2.8. There is precedent for legislation preventing unnecessary duplication of work already conducted before the law came into force. The Domestic Gas and Electricity (Tariff Cap) Act 2018 clarifies that: "*Consultation undertaken before this Act is passed is as effective for the purposes of subsection (3) as consultation undertaken after it is passed*."[29] This gives formal effect to past consultations which the impacted parties had the chance to contribute to.

Timeframe for Designation

3.2.9. To ensure that designation occurs expeditiously following Royal Assent, it would be helpful for the timeframes to reflect the large body of existing work that the CMA has conducted in its Market Studies and other investigations.

3.2.10. Clause 14(2) could be amended as follows:

"*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***."

3.2.11. This would make clear that the CMA can and should take significantly less time to designate a digital activity when it has already conducted an in-depth analysis of a market and specific services.

3.3. ***Imposing CRs***

[28] Clause 14 "*Digital Markets Competition Consumer Bill*", April 2023
[29] Section 2(4), "*Domestic Gas and Electricity (Tariff Cap) Act 2018*", 2018

Expeditiously imposing CRs

3.3.1. There is a deadline for investigating breaches of CRs in the Bill, but no deadline for writing and imposing the CRs.[30] For the initial set of CRs that the CMA will produce, it should not be necessary to take a significant amount of time to consult on and construct the remedies given the significant pool of existing analysis and evidence that the regulator has at its disposal.

3.3.2. Clause 19(1) could be amended thus:

> "*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*."

3.3.3. To complement this, Clause 24(1)(a) could be amended to limit the consultation period on proposed CRs:

> "*carry out a public consultation* ***lasting a maximum of 6 weeks*** *on the conduct requirement which it proposes to impose*[…]"

3.4. ***Anti-Leveraging CR***

Effective Anti-Leveraging Power

3.4.1. Under Clause 20(3)(c), one of the permitted CR categories is preventing an 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]".* In other words, the anti-leveraging provision prevents the designated undertaking from conducting activities in non-designated areas of its business in a way that is likely to materially enhance the undertaking's market power or strategic position in relation to the relevant digital activity. This may include, for example, preventing an undertaking with SMS in video streaming from including a default setting in its search engine which automatically redirects users to the designated undertaking's video streaming service.

3.4.2. However, as currently drafted, this CR appears inadequate to prevent anti-competitive leveraging from a non-designated to a designated activity. This would mean that firms could shore up their substantial and entrenched power in a designated activity with no remedies available. For example, if Apple News is not designated, Apple could freely impose unfair terms on news publishers via Apple News contracts, circumventing CR terms where they hold market power e.g. its App Store and Operating System (which are likely to be designated digital activities).

[30] Clause 30 "*Digital Markets Competition Consumers Bill*", April 2023; Clause 19 "Digital Markets Competition Consumer Bill", April 2023

3.4.3. It is right the CMA is not given the agency to unduly constrain a firm's ability to conduct business in non-designated activities. Yet 20(3)(c) could be sensibly amended to prevent the type of anti-competitive conduct set out above, whilst ensuring that any CRs imposed by the CMA are directly connected to the designated activity:

"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****."*

3.4.4. This drafting ensures that the CMA will be able to tackle anti-competitive leveraging into a designated activity, whilst protecting SMS firms from undue interference in non-designated activities.

3.5. ***Countervailing Benefits Exemption***

Protecting the Countervailing Benefits Exemptions

3.5.1. When the CMA has set a CR and is making an investigation of a suspected breach, the CMA must close the investigation without making a finding if the SMS firm can demonstrate that the countervailing benefits exemption applies.[31] The countervailing benefits exemption is applicable when the conduct to which the investigation relates gives rise to benefits to users or potential users of the digital activity, and these benefits outweigh any detrimental impact on competition resulting from a breach of the CR.[32] Additionally, the conduct must be indispensable and proportionate to achieve the benefits and should not eliminate or prevent effective competition.[33]

3.5.2. However, the countervailing benefits exemption may be exploited as a loophole to breach CRs, particularly if its scope is expanded further during the Bill's passage. If the exemption is overly broad, SMS firms will have the ability to evade CR compliance by citing ostensible security and privacy claims to obscure the process. They may also inundate the CMA with an excessive number of claims, diverting the CMA's resources away from other essential tasks. It is right that, for a countervailing benefits exemption to apply, the conduct in question must be indispensable and proportionate to achieve the benefits and should not eliminate or prevent effective competition.[34] These provisions will help deter the misuse of the countervailing benefits exemption, which could undermine the regulatory framework, and it is crucial not to dilute them.

3.5.3. The countervailing benefits exemption draws on Section 9 of the Competition Act 1998 (which exempts agreements from the Chapter One prohibition on anti-competitive agreements) and the relevant customer benefit test under Section 134(7) of the

[31] Clause 28 "*Digital Markets Competition Consumers Bill*", April 2023
[32] Clause 29(2) "*Digital Markets Competition Consumers Bill*", April 2023
[33] Clause 29(2) "*Digital Markets Competition Consumers Bill*", April 2023
[34] Clause 29(2)(c)(d) "*Digital Markets Competition Consumers Bill*", April 2023

Enterprise Act 2002.[35] These exemptions are purposely narrowly defined and interpreted, resulting in limited usage. However, the countervailing benefits exemption is not an exact replica of these provisions. Therefore, we must be cautious that this new exemption remains open to interpretation by the court, where SMS firms have the greatest advantage as they can leverage their immense legal resources.

3.5.4. We recommend that the Committee carefully scrutinises the exemption to ensure it is sufficiently narrow, preventing SMS firms from frequently challenging investigations into CR breaches for their own gain. It is essential to be cautious of any attempts by Big Tech companies to weaken these provisions, as it would undermine the integrity of the pro-competition regime.

3.5.5. In particular, it is essential that Clause 29(2)(c) is retained and not watered down, ensuring that the exemption can only be accessed when a CR breach is "*indispensable and proportionate to the realisation of the benefits".*[36] This means that the CMA must be satisfied that there is no other reasonable way for the SMS firm to realise the same benefits through an alternative means that has a less anti-competitive effect.

3.5.6. Indispensability is a well understood concept in UK competition law.[37] In its guidance on the Section 9 exemption in the Competition Act 1998 in relation to vertical agreements – agreements entered into by firms operating at different levels of a market - the CMA notes that undertakings must: "*explain and demonstrate why seemingly realistic and significantly less restrictive alternatives would be significantly less efficient. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the vertical restraint in question is treated as indispensable*."[38]

3.5.7. If applied to the new Bill, this could mean SMS firms would have to prove that compliance with the CR would result in significantly reduced benefits for users. Absent the indispensability condition in the countervailing benefits exemption, SMS firms could regularly evade CR compliance unnecessarily and without consumer benefits being realised.

3.5.8. For clarity, we believe that all other conditions in Clause 29 should also be retained.[39] Given that there are very few bona fide instances where anti-competitive conduct creates greater benefits than harm, the exemption in the Bill could be narrowed further. This could be done via the inclusion of an exhaustive list of the permitted types of countervailing benefits that could be claimed by SMS firms (just as there is a permitted list of CRs).

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[35] Section 9(1)(b)(i) "*Competition Act 1998,*", 1998; Section 134(7), "*Enterprise Act 2002*", 2002
[36] Clause 29(2)(c) "*Digital Markets Competition and Consumers Bill*", April 2023
[37] Section 9(1)(b)(i) "*Competition Act 1998,*", 1998
[38] Pg. 95 CMA, *"Vertical agreements block exemption order guidance",* July 2022
[39] Clause 29 "*Digital Markets Competition and Consumers Bill*", April 2023

3.6. ***CR to trade on fair and reasonable terms / FOM***

Fair and reasonable negotiations for the value of news content

3.6.1. Under the "*fair dealing*" objective and CR 20(2)(a) the CMA would be able to introduce a requirement for SMS firms to trade on fair and reasonable terms with news publishers, ensuring that dominant search engines and social media platforms negotiate for the value that news content brings to their platforms.

3.6.2. For a detailed explanation of the necessity of CR 20(2)(a) and the FOM and the immense positive impact on UK journalism we urge the Committee to refer to the NMA paper: "*Fair and Reasonable: How the Digital Markets Unit would support a sustainable and plural UK news ecosystem*."[40] This NMA paper sets out why news content brings significant value to digital platforms and why the system of negotiation contained in the Bill is both necessary and justified.

Protracted FOM Process

3.6.3. The process of facilitating fair negotiations for news content involves the implementation of a CR that mandates SMS firms to provide fair and reasonable terms.[41] However, it should be noted that a significant amount of time may be required for instances of non-compliance to become evident. If there are suspicions of non-compliance, the CMA is responsible for conducting an investigation,[42] which has the potential to extend for a period of up to six months. If a breach is discovered, the CMA possesses the authority to issue an enforcement order.[43] Subsequently, if the SMS firm persists in non-compliance, the CMA may determine that the firm has breached the enforcement order as well.[44] Once again, it is worth noting that a significant period of time may be necessary for instances of non-compliance with an enforcement order to become apparent. Prior to initiating the FOM process, the CMA is obligated to assess whether FOM represents the sole appropriate measure.[45] The FOM process itself can encompass a timeframe of up to 6 months, excluding any potential extensions.

3.6.4. This timeline highlights the concern surrounding the extended duration of the enforcement process prior to FOM, which is the critical incentive for parties to negotiate. Delays may significantly impede the expeditious resolution of disputes and hinder the prompt handling of matters pertaining to fair and reasonable terms.

3.6.5. While we acknowledge the FOM is intended as a last resort, and the government's belief in the efficacy of a participative approach to engage platforms, it is evident that the enforcement procedure is notably lengthy when compared to the tailored

[40] News Media Association, "*Fair and Reasonable: How the Digital Markets Unit would support a sustainable and plural UK news ecosystem*", June 2023
[41] Clause 19 and 20 "*Digital Markets Competition Consumers Bill*", April 2023
[42] Clause 26 "*Digital Markets Competition Consumers Bill*", April 2023
[43] Clause 31 "*Digital Markets Competition Consumers Bill*", April 2023
[44] Clause 38(1) "*Digital Markets Competition Consumers Bill*", April 2023
[45] Clause 39(1) "*Digital Markets Competition Consumers Bill*", April 2023

payment for content mechanisms implemented in Australia and Canada. This may allow SMS firms to frustrate enforcement and leave smaller and local publishers facing a choice of accepting an initial offer which they know not to be fair or reasonable, or expending significant time and resources following the protracted enforcement process.

3.6.6. A sensible solution would be to make FOM available earlier in the enforcement process. Clause 38(3), which states that the second condition necessary for the CMA to initiate the FOM is that an SMS firm has "*breached an enforcement order, other than an interim enforcement order*," could be changed to "*breached a conduct requirement*". Importantly, the third condition – that the CMA must consider if FOM is the only appropriate remedy, and proceed with other enforcement tools if it judges they will be effective – should be retained alongside this amendment. This would ensure that the FOM process is not triggered unnecessarily, allowing the CMA to proceed with an enforcement order and further remedies if they believe these will be effective.

3.6.7. This amendment would strike the right balance between ensuring that SMS firms are sufficiently incentivised to negotiate and ensuring that platforms and publishers are not rushed into the FOM without it being warranted. For example, if the CMA considered that CR 20(2)(a) had been breached, but a relatively minor shift in negotiations (for example, in the metrics used to calculate the value of content, or enhanced information sharing) would remedy the breach, they could decide that the FOM was unnecessary and proceed with an enforcement order. However, if the SMS firm was refusing to negotiate at all, or offering terms that were blatantly nugatory or based on unsupportable metrics, it could decide to implement FOM at this earlier stage.

3.6.8. For the avoidance of doubt, under this proposal, the CMA could still choose to initiate FOM later in the enforcement process e.g., following the breach of an enforcement order.

3.6.9. Platforms typically guard their information closely, and information sharing requirements only come into force once FOM has begun.[46] The government wishes FOM to remain a last resort, but informational asymmetries would prevent fair and reasonable terms from being negotiated earlier in the pathway. The Committee should also look to ensure that the enforcement powers for CR 20(2)(a) and other CRs will guarantee publishers' access to the information necessary to negotiate fair and reasonable terms, or whether further information sharing requirements are necessary prior to the FOM.

3.6.10. By making the FOM available (but not mandatory) earlier in the enforcement process, the CMA would be empowered to take swift action and expedite the resolution of cases, thereby promoting greater accountability and compliance within the regulated framework.

[46] Clause 39(4) "Digital Markets Competition and Consumers Bill", April 2023

3.7. ***CR and PCI Interaction***

CR Review and Monitoring

3.7.1. Under Clause 25 of the Bill, the CMA has a responsibility to review and assess CRs.[47] This includes deciding whether to modify or revoke a CR, monitoring compliance with CRs, and determining whether to initiate a conduct investigation.

3.7.2. However, the DMT also suggested that the regulator should monitor firms' activities to identify CR breaches and remedies under code orders ***or PCIs***.[48] The monitoring conducted by the DMU would not only inform future priorities for designation assessments and updates to the code but *also* identify areas where PCI investigations may be necessary.

3.7.3. This is important, as the CRs and the PCIs are complementary tools, capable of addressing different but linked problems and having different effects. The PCIs will be particularly useful when the CRs are proving insufficient in managing the harmful effects of a firm's market power, making it natural that the DMU should consider such remedies in conjunction with CR compliance. For example, a CR could prevent self-preferencing in the online advertising market, but a PCI requiring functional separation of an SMS firm's vertically integrated ad tech businesses could remove the incentive for self-preferencing if the CR proved ineffective.

3.7.4. If the CMA were mandated to consider potential PCI investigations as part of its CR monitoring duties, it would be important that such a duty did not compel or unduly push the regulator towards PCI remedies unnecessarily. Instead, the benefit would be derived from the efficiencies of considering PCIs alongside CR monitoring. There would also be a potential benefit of enhanced SMS firm compliance, as the prospect of the CMA considering potential PCI investigations would provide a strong indication of the more far-reaching remedies available if a CR were not complied with.

3.8. ***Third Party Engagement***

Third Party Contributions to Consultations

3.8.1. The Bill outlines several instances where the CMA is required to conduct public consultations. These include decisions resulting from SMS investigations,[49] decisions resulting from CR investigations,[50] proposed decisions resulting from PCI investigations,[51] and the terms of pro-competition orders before their issuance.[52] However, there appears to be a lack of opportunities for non-SMS firms to engage with

[47] Clause 25 "*Digital Markets Competition Consumers Bill*", April 2023
[48] Pg. 46 Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020
[49] Clause 13 "*Digital Markets Competition Consumers Bill*", April 2023
[50] Clause 24 "*Digital Markets Competition Consumers Bill*", April 2023
[51] Clause 47 "*Digital Markets Competition Consumers Bill*", April 2023
[52] Clause 52 "*Digital Markets Competition Consumers Bill*", April 2023

CMA decisions through consultation. The limited capacity of third party stakeholders to fully contribute to the design of rules and interventions could result in SMS firms exerting greater influence and shaping these decisions in their favour.

3.8.2. Moreover, there is a lack of third party consultation on key CMA decisions, such as conduct investigations related to CR breaches,[53] accessing the countervailing benefits exemption,[54] issuing enforcement orders,[55] issuing interim enforcement orders,[56] revoking enforcement orders,[57] accepting commitments from SMS firms,[58] and releasing SMS firms from commitments. While the CMA is required to consider representations made by the SMS firm in some of the abovementioned cases, there is no mention that a relevant third party stakeholder 'must' be consulted with, who may provide valuable evidence. Whilst much of these instances are focused on enforcement, and the CMA is bound to ensure that SMS firms have a right to a defence, non-SMS firms will hold a wealth of information that will be relevant to establishing whether an SMS firm is conducting anti-competitive conduct and what remedies would be appropriate.

3.8.3. It would be beneficial to clarify the reasons behind the limited consultation opportunities provided in the Bill and whether the absence of specific consultation provisions prevents the CMA from engaging with third parties altogether. Of course, it may be that the CMA fully intends to consult with third parties when useful in the instances set out above, and the legislation has only been drafted in this way to minimise the CMA's statutory obligations to aid speedy enforcement in turn. If this is the case, it would be useful if assurances could be provided by the government that this is the intention in order to mitigate the need for the Bill to be amended.

3.8.4. Absent such assurances, addressing these concerns by expanding the instances of third party consultation and ensuring meaningful engagement with stakeholders would enhance transparency, accountability, and efficacy in the decision-making process.

Access to Information

3.8.5. There is an apparent lack of provisions to ensure that third parties have the same access to the data and analysis that will be available to SMS firms, which could have a determinantal impact on publishers; indeed, there are already substantial informational asymmetries between Big Tech firms likely to be designated with SMS, and the third parties that rely on them to conduct their businesses.

3.8.6. At present, the Bill only requires that a summary of the regulator's findings and reasoning be published at certain points. Under Clause 67, the CMA will have the

[53] Clauses 26-30 "*Digital Markets Competition Consumers Bill*", April 2023
[54] Clause 29 "*Digital Markets Competition Consumers Bill*", April 2023
[55] Clause 31 "*Digital Markets Competition Consumers Bill*", April 2023
[56] Clause 32 "*Digital Markets Competition Consumers Bill*", April 2023
[57] Clause 34 "*Digital Markets Competition Consumers Bill*", April 2023
[58] Clause 36 "*Digital Markets Competition Consumers Bill*", April 2023

ability to request any information required from SMS firms.[59] It would of course not be appropriate for non-SMS firms to have access to all sensitive commercial information held by the CMA, but additional third-party rights would be instrumental in ensuring non-SMS firms are able to properly participate in the CMA's decision-making process, which aids enforcement in turn.

3.9. ***Enforcement***

Participative Approach

3.9.1. If the CMA has reasonable grounds to suspect that a CR has been breached, it may initiate a formal conduct investigation.[60] However, the Bill does not currently provide for more 'participatory' routes to address CR breaches.

3.9.2. The DMT recommended that, when appropriate, the regulator should aim to resolve concerns through a participative approach,[61] engaging with relevant parties to achieve a swift and effective resolution.

3.9.3. Conducting formal investigations requires significant resources and considering the potentially high volume of claimed CR breaches, the CMA will need to prioritise its actions. To address this, it could be advantageous for the CMA to engage in more informal discussions with third parties and SMS firms when reasonable evidence of a breach is presented. This approach would allow the SMS firm to modify its conduct without the need for a lengthy investigation, concurrently enabling the CMA to focus on the most serious or disputed breaches via formal investigation.

3.9.4. It may of course be that the CMA fully intends to adopt a participative approach to enforcement in the first instance and that such provisions are absent from the legislation because they are unnecessary for the CMA to do so (or that such processes will be set out in guidance). If this is the case, it would be useful if assurances could be provided by the government that this is the intention in order to mitigate the need for the Bill to be amended.

3.9.5. It should be noted that any conversations and remedies agreed upon could still be publicly disclosed and subject to monitoring to ensure ongoing compliance.

Appeals Standards

3.9.6. We are aware of Big Tech lobbying efforts towards a 'full merits' review, the benefit to SMS firms being that they could re-run judicial decisions to get a better outcome the second time around. We would urge great caution against moving away from the normal JR standard, as a full merits review would see more, and lengthier reviews, fundamentally undermining the efficacy of DMU decisions. Appeals, particularly in the case of CR enforcement orders and FOOs, will be crucial for publishers.

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[59] Clause 67 "*Digital Markets Competition Consumers Bill*", April 2023
[60] Clause 26 "*Digital Markets Competition Consumers Bill*", April 2023
[61] Pg. 48 Digital Markets Taskforce, "*A New Pro-Competition Regime for Digital Markets*", December 2020

3.9.7. We are aware of a proposal for a 'JR+' standard for appeals interventions, where the Competition Appeal Tribunal ("**CAT**") would consider appeals based on JR principles but take due account of the merits. Under this standard, appeals concerning basic functions of the regulator, such as designations, information requests, and investigations, would likely be subject to appeal on purely judicial review grounds. However, significant decisions, such as major fines and PCIs, would likely require the CAT to assess the merits of the case and not solely focus on procedural compliance. The 'JR+' standard would be accompanied by a six-month deadline for CAT decisions.

3.9.8. Whilst Ofcom decisions appealed on the JR standard have previously been 'flexed' to allow the consideration of merits, this was due to the need to demonstrate that reviews complied with European Union law, rather than a deliberate decision made by the government or the regulator. Now that the UK is no longer a member of the European Union, there is no rationale for creating a new appeals process. Further, placing a time limit on merits appeals appears to be entirely impractical, as it is highly doubtful that intense merits appeals can be completed to an appropriate standard in the same time as a JR appeal.

3.9.9. We agree with Minister Paul Scully MP that JR is "*is the most proportionate approach and will help ensure that the DMU is equipped to address the specific challenges posed by dynamic digital markets*".[62] Maintaining JR has several significant advantages that are indispensable to the efficacy of the new pro-competition regime:

i. **Consistency with similar CMA regimes**: The existing regime that is most analogous to the DMU regime is the CMA's market investigation tool. A PCI that the DMU may make under the Bill mirrors the types of intervention the CMA may make following a market investigation under the Enterprise Act 2002, and both share the same legal test of proving an "*adverse effect on competition*."

ii. **Regulatory consistency with other forward-looking regimes**: JR aligns with the standards applied by regulatory bodies like Ofcom, Ofwat, and Ofgem, which also focus on forward-looking assessments. JR is also the standard for mergers, where the CMA conducts forward-looking evaluations.

iii. **Speed and prompt outcomes**: JR appeals allow the DMU to act promptly, providing certainty for SMS firms and challenger firms to plan their businesses. Lengthy full merits appeals would reduce certainty, delay regulatory decisions, and invite unmeritorious appeals, impeding innovation and growth.

iv. **Expertise**: Recognising the complexity of digital markets, the DMU was in-part established with the intention of being an expert regulator. Allowing the non-expert CAT to make regulatory judgments would contradict the rationale behind the new regime.

[62] HM Government, *"Paul Scully to Bim Afolami – Hansard Correction"*, May 2023

v. **Resource allocation**: The potential for full merits appeals from SMS firms allows them to leverage their resources and lawyers to their benefit to protract the review via appeals, draining the DMU's tax supported funding.

vi. **Deterrence**: As a result of the resource drain that full merits appeals could have on the DMU, it may deter them from acting in crucial areas that they would have otherwise done.

vii. **Delayed benefits for businesses and consumers**: If full merits appeals are allowed, SMS firms may not consider a DMU decision as final until the appeal is heard. This would result in delays in realising business and consumer benefits even if the DMU's decision is upheld.

viii. **Consistency across jurisdictions:** In the European Union, the Commission will likely run cases analogous to the CMA under the Digital Markets Act. The appeal standard under the Act is closer to JR than a merits appeal.

3.9.10. It is clear that, whilst potential SMS firms have an understandable wish to see proper checks and balances overseeing the CMA's decisions, they also have the incentive to argue for provisions that would obstruct or delay the regime.[63] Advocates of changing the appeals standard may also foresee that a judge who has no remit to make a decision coherent with the CMA's digital markets objectives may be more likely to reach decisions more advantageous to SMS firms with a full merits standard.

3.9.11. The JR standard must be maintained in the Bill as a matter of priority. Any weakening will fundamentally undermine the ability of the CMA to tackle anti-competitive conduct in digital markets.

4. Subscription Contract Reform

4.1. *Achieving a Proportionate, Principles-Based Approach*

Overly Prescriptive Provisions

4.1.1. The NMA supports the government's ambition to better protect consumers from bad business practices in the subscriptions market, ensuring that consumers are not trapped into contracts that they do not value. However, the Bill's approach to subscriptions contract regulations goes far beyond the principles-based approach the government set out in response to its consultation.[64]

4.1.2. There are a great many instances in the Bill where the government has set extremely prescriptive requirements, several of which have not been consulted on. All businesses, regardless of size or resource, will have to comply with extremely rigid measures. The government's original consultation estimated that compliance costs

[63] Tom Smith and David Gallagher, "*In Defence of Judicial Review: The established UK appeal standard is the best approach for a dynamic digital economy",* May 2023

[64] HM Government, *"Reforming competition and consumer policy: government response",* April 2022

would be between £8 million to £16 million, yet the Bill's Impact Assessment now estimated implementation costs of up to £467 million (not including substantial ongoing costs).[65]

4.1.3. The sharp increase in business costs is indicative of the government's change in approach, with the Bill's requirements going far beyond the stated aims in the consultation and the consumer detriment that the original proposals were developed to target. At best, overly prescriptive requirements will have a very marginal increase in consumer benefits compared to a principles-based approach, but will also have a chilling effect on business investment. The government's own analysis has found that only 5% of subscriptions contracts are "*unwanted*" (meaning that the consumer wishes to cancel the contract).[66] In fact, any increase in consumer benefit may be wiped out by implementation and ongoing costs being passed on to consumers.

4.1.4. When responding to consultation on its original proposals the government noted that the proposals it would take forward would "*mitigat[e] concerns raised about business costs*".[67] However, the departure from the principles set out by the government in its preceding consultation work means that the new provisions contained in the Bill have not undergone proper consultation or assessment. The addition of cooling-off rights at a very late stage accentuates this problem further.

4.1.5. We urge the Committee to explore the sharp contrast between the government's initial approach set out in its consultation work, and the Bill's inflexible and arbitrary approach. A renewed focus on tackling clearly evidenced instances of consumer harm with a proportionate approach is in the interests of consumers and the businesses that create the products and services that consumers rely on.

4.2. ***Ending of a Contract***

Single Communication and Reasonably Necessary Steps

4.2.1. Traders are required under Clause 252(1) to establish procedures that enable consumers to terminate subscription contracts with a single communication, without imposing any steps that are not reasonably necessary to end the contract.[68] In the case of online contracts, consumers must have the option to cancel the contract online.[69] However, we have concerns about the potential impact these requirements may have on publishers and consumers.

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[65] HM Government, *"Consumer and competition reform: Subscriptions regulations, Impact Assessment"*, July 2021; Pg. 3 HM Government, *"Digital Markets, Competition and Consumers Bill: Impact Assessment – Subscription measures"*, April 2023

[66] Pg. 19 HM Government, *"Digital Markets, Competition and Consumers Bill: Impact Assessment – Subscription measures"*, April 2023

[67] HM Government, *"Reforming competition and consumer policy: government response"*, April 2022

[68] Clause 252(1) "*Digital Markets Competition Consumers Bill*", April 2023

[69] Clause 252(4) "*Digital Markets Competition Consumers Bill*", April 2023

4.2.2. Firstly, when consumers express their intention to cancel a subscription, publishers often provide discounted or legacy pricing options. This is because consumers may wish to terminate the subscription not because they no longer desire the product, but due to financial considerations. Opting for reduced-price offers benefits both the publisher and the consumer, as it allows the subscription to continue at a price that the consumer is happy with. The rigid language of the Clause 252(1), which mandates termination in a single communication without any steps beyond what is reasonably necessary, may hinder the provision of such offers that are in the best interest of the consumer and aligned with the principles of good customer service.

4.2.3. Secondly, these provisions likely prohibit the solicitation of brief feedback and hinder the opportunity for publishers to improve their services. Feedback, whether obtained online or via call, is invaluable for publishers in enhancing their products and ensuring an optimal experience for remaining consumers. Requesting feedback is not a mere formality for publishers but an essential aspect of good customer service aimed at continuous improvement. In certain instances, when consumers choose to cancel their subscription over the phone despite being satisfied with the journalism, they may express concerns about ongoing technical issues, for example. Call centre representatives are oftentimes equipped to address such issues, resulting in some consumers opting to remain subscribed once their issues are resolved. It is important to recognise that seeking feedback and providing assistance in such cases should not be considered an unnecessary or burdensome step. While we acknowledge the need to prevent unscrupulous Traders from employing unreasonable tactics to keep consumers locked into contracts, any policy solutions should not be overly blunt measures that inadvertently impact well-intentioned Traders.

4.2.4. We urge the Committee to reconsider the wording of Clause 252. For example, rather than requiring contracts to be ended "*in a single communication*" and "without having to take any steps which are not reasonably necessary," it could provide "*A Trader must make arrangements to enable a consumer to exercise a right to bring a subscription contract to an end* ***in a timely and straightforward manner***." To note, an obligation for Traders to "*ensure their consumers are able to exit a contract in a straightforward and timely way*" is the sensible principle that the government committed to in response to its consultation.[70]

4.2.5. Alternatively, the Committee may wish to consider providing an exhaustive list of instances where additional steps should not be deemed unnecessary. This list could specifically include scenarios such as proposing reduced offers and soliciting feedback via the phone or other appropriate means.

Communication by Any Means

4.2.6. Clause 252(6) allows a consumer to cancel their subscription by "*any means*" so long as it is sufficiently clear for the purposes of informing the Trader that the consumer is bringing the contract to an end.[71]

[70] HM Government, *"Reforming competition and consumer policy: government response",* April 2022
[71] Clause 252(6) "*Digital Markets Competition Consumers Bill*", April 2023

4.2.7. This provision is excessively broad, encompassing not only the exit channels provided by Traders but also communication methods such as Tweets, Facebook messages, postal mail, or e-mail. This creates significant complexities for businesses to effectively manage. Moreover, it fails to specify the intended recipients of cancellation notifications. For instance, Facebook and Twitter messages may not be handled by individuals responsible for subscription contracts. As a result, publishers of all sizes would need to allocate resources to train multiple staff members on how to handle such notices. This provision places an undue burden on businesses, going far beyond the original proposal for exiting to be "*straightforward and timely*" and should be removed from the Bill.[72]

4.2.8. The issues set out above are accentuated by inflexible timeframes set for providing end of contract cancellation notices, and the stipulation that such notices are effective on the date they are sent rather than the date they are received.

4.3. ***Renewal Notices***

Renewal Notices

4.3.1. Traders have to issue reminder notices to consumers explaining that a subscription contract will continue, and a renewal payment will be due unless the consumer takes steps to end it.[73] Reminder notices do not need to be issued more frequently than once every six months even if the payments arise more frequently than that.[74] Part Three of Schedule 20 sets out the information that must be included in the Trader's reminder notice to the consumer.[75]

4.3.2. The reminder notice must be given between three and five working days before the cancellation date (meaning the last day on which the consumer can end the contract and avoid becoming liable for the next renewal payment).[76] However, for subscription contracts that renew for a period of 12 months or more, an extra reminder notice must be given between 10 and 14 working days before the cancellation date.[77]

4.3.3. For the Bill to set a precise two-day window when a reminder must be sent within a six month window, or in a four and two-day window in a 12-month window, is highly prescriptive. The precise detail of the content of the reminder notice, and the ability of the Secretary of State to set out additional information and timing requirements by regulation, only adds to the burden for businesses. This goes far beyond the government's proposal in its response to its consultation.[78]

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[72] HM Government, *"Reforming competition and consumer policy: government response",* April 2022
[73] Clause 250(1) "*Digital Markets Competition Consumers Bill*", April 2023
[74] Clause 250(2) "*Digital Markets Competition Consumers Bill*", April 2023
[75] Part 3 of Schedule 20 "*Digital Markets Competition Consumers Bill*", April 2023
[76]Clause 251(3) "*Digital Markets Competition Consumers Bill*", April 2023
[77] Clause 251(5) and (6) "*Digital Markets Competition Consumers Bill*", April 2023
[78] HM Government, *"Reforming competition and consumer policy: government response,",* April 2022

4.3.4. Our concern with renewal notices is twofold. Firstly, publishers, including those that are financially vulnerable as a result of the digital markets' imbalance, which the Bill seeks to address, may be required to invest in technology to monitor subscription lifecycles in order to comply with these regulations. This would place an additional financial burden on them. Secondly, when considering the overall impact of the subscription contract reform provisions, including the cooling-off period and pre-contract information requirements, the provisions in the Bill appear disproportionate, as discussed further below.

4.3.5. We strongly believe that it is essential for any Trader to provide clear and comprehensive information to consumers before they enter a free, discounted, or paid-for subscription. The inclusion of pre-contract information provisions in the Bill is appropriate in this regard.[79] However, by ensuring that the pre-contract information contains explicit instructions and details about renewal, the need for frequent renewal notifications that entail additional costs for Traders is mitigated. Once a cooling-off period has been added to the equation, the burden on subscription providers is highly disproportionate.

4.4. ***Cooling-Off Rights***

Cooling-Off Rights

4.4.1. The Bill provides that a consumer can cancel a subscription contract, without penalty, during the initial cooling-off period and any renewal cooling-off period.[80] During the initial cooling-off period, consumers are given 14 days after entering a subscription contract (or once they have received their goods) to cancel their subscription without incurring a penalty.[81] Renewal cooling-off period provide consumers 14 days after a '*relevant renewal*' to cancel.[82] A relevant renewal is a specific type of renewal that triggers the renewal cooling-off period and occurs when: (a) a consumer first becomes liable for a renewal payment after a free-trial or reduced-price trial period; or (b) a consumer becomes liable for a renewal payment and the next payment is not due for 12 months or more - or no further payments are due, but the contract continues for 12 months or more.[83]

4.4.2. We have similar concerns regarding the cooling-off period as we do with the renewal notices. Firstly, the implementation and maintenance of technology will be required to initiate cooling-off periods. Secondly, when viewed in conjunction with the other provisions in this Chapter, the cooling-off period becomes unduly burdensome.

4.4.3. Consider the hypothetical example of a discounted trial lasting for two weeks that automatically renews for a period of 12 months. The pre-contract information will

[79] Clause 248 "*Digital Markets Competition Consumers Bill*", April 2023
[80] Clause 256(1) "*Digital Markets Competition Consumers Bill*", April 2023
[81] Clause 257(1) "*Digital Markets Competition Consumers Bill*" April 2023
[82] Clause 257(2) "*Digital Markets Competition Consumers Bill*" April 2023
[83] Clause 257(3) "*Digital Markets Competition Consumers Bill*" April 2023

clearly state the auto-renewal terms of the contract.[84] Once the consumer enters the discounted trial, they are entitled to an initial cooling-off period of 14 days during which they can cancel the contract.[85] In addition, two renewal notices must be sent, one between 10-14 days and another between 3-5 working days before the renewal date,[86] considering the upcoming 12-month term. Following this first roll-over, another cooling-off period of 14 days is provided.[87] Therefore, in this scenario, our understanding is that within a period of two weeks, the consumer has received two renewal notices and has had two cooling-off periods. When the contract comes up for a renewal period of 12 months again, two notices are required, one between 10-14 days and another between 3-5 working days before renewal,[88] and a renewal cooling-off period of 14 days is granted once more.[89] To our reading of the Bill, in a span of just over 12 months, the provisions would require a total of seven instances of renewal notices and cooling-off periods for one consumer, out of potentially thousands.

4.4.4. Another key concern is that the impact of subscription contract reform, particularly in relation to the cooling-off period, has not been carefully considered. The Regulatory Policy Committee, which is the independent regulatory scrutiny body for the UK government, has rated the impact assessment for the Digital Markets, Competition and Consumers Bill as "*not fit for purpose*."[90]

4.4.5. This is because the Department for Business and Trade's impact assessment regarding subscription contract reform is "*insufficiently analysed*." The Regulatory Policy Committee says:

> "*The assessment of the subscription traps reforms IA [Impact Assessment], specifically that for the cooling-off requirements and the interaction between it and the other policy options to be introduced, remains insufficiently analysed. As a result, the RPC [Regulatory Policy Committee] is unable to fully validate the EANDCB [Equivalent Annual Net Direct Cost to Business] figure and, therefore, to certify that the IA is completely fit for purpose*."[91]
>
> *"[T]he assessment of the impacts of the cooling-off requirements in the 'Subscription traps reforms' IA, are not sufficiently supported by evidence. In particular, there is a risk that the IA has overestimated the impact of the policy package intervention on reducing the number of unwanted subscriptions."*[92]

4.4.6. The Department for Business and Trade issued questions to the NMA regarding the impact of a cooling-off period initially on 17 March 2023, with feedback required by 29 March 2023. Less than a month later, the Bill was introduced to Parliament on 25

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[84] Clause 248 "*Digital Markets Competition Consumers Bill*", April 2023
[85] Clause 257(1) "*Digital Markets Competition and Consumers Bill*", April 2023
[86] Clause 251(5) and (6) "*Digital Markets Competition and Consumers Bill*", April 2023
[87] Clause 257(3) "*Digital Markets Competition and Consumers Bill*", April 2023
[88] Clause 251(5) and (6) "*Digital Markets Competition and Consumers Bill"*, April 2023
[89] Clause 257(3) "*Digital Markets Competition and Consumers Bill*", April 2023
[90] Regulatory Policy Committee, *"Digital Markets, Competition and Consumers Bill IA"*, May 2023
[91] Regulatory Policy Committee, *"Digital Markets, Competition and Consumers Bill IA"*, May 2023
[92] Regulatory Policy Committee, *"Digital Markets, Competition and Consumers Bill IA"*, May 2023

April 2023. While we acknowledge the efforts of those involved in developing such policies and do not fault them for the constrained timeline, it is important to highlight that a comprehensive impact assessment could not have been conducted within such a short timeframe. As a result, we are faced with subscription reform policies that lack a solid evidentiary basis, and it is, therefore, prudent to exercise caution before enacting them into law.

4.4.7. Furthermore, we understand from members that a cooling-off right is problematic when publishers provide consumers with hard-copy coupons to exchange for newspapers. If a consumer cancels their subscription within the cooling-off period, they can still use the coupons received, which creates an issue for the publisher as there is no reasonable way to revoke those coupons.

4.4.8. In addition, the Bill does not appear to provide a transition period to implement these measures, as was the case with similar legislation. The implementation of GDPR requirements provided more than two years to prepare for changes to data protection law. The government must commit to a similar transitionary approach.

4.4.9. We urge the Committee to consider removing the cooling-off period requirements, given the existence of renewal notices and the potential risks associated with insufficiently analysed cooling-off requirements.

4.5. *Offering Auto-Renewal or Rollover Terms*

Offering Auto-Renewal or Rollover Terms

4.5.1. It was proposed at the second reading debate of the Bill that a requirement should be introduced to compel businesses to offer consumers a choice of taking subscriptions without auto-renewal or rollover terms.[93] This proposal should not be taken forward.

4.5.2. In its response to the consultation on the subscription contract proposals, the government noted responses which stated that such a proposal would undermine business models that rely on subscriptions.[94] These views are unsurprising, given that this proposal would force businesses that have been built on a subscriptions model to offer their product on a non-subscription basis. This proposal would go far beyond the existing proposals by regulating the very basis upon which a product is offered to the consumer, rather than preventing consumer detriment at key stages in the customer journey.

4.5.3. The blanket application of such a requirement would be particularly disproportionate for subscriptions contracts where the consumer can exit at any month. The government's own impact assessment notes that such a choice "*adds no further benefit*" for such contracts, so "*not all subscriptions may need to be subject to this kind*

[93] House of Commons Hansard. "*Digital Markets, Competition and Consumers Bill. Volume 732: debated on Wednesday 17 May 2023*", May 2023

[94] HM Government, *"Reforming competition and consumer policy: government response",* April 2022

of regulation".[95] Those proposing this policy option should be clear if they accept this reasoning.

4.5.4. It is unclear how such a proposal would interact with the other provisions already in the Bill. There is no indication that this new requirement would mean the other provisions contained in this Chapter of the Bill would be subsequently modified or removed to reflect the fact that consumers would have the ability to take a subscription without rollover terms.

4.5.5. This is significant: the government's impact assessment assesses an alternative policy package to that contained in the Bill, and it includes the auto-renewal proposal. Crucially, this package adds the auto-renewal proposal set out above to the provisions in the Bill and an additional requirement for consumers to have to explicitly opt-in to continuing a subscription before the end of a low-cost or free trial – *and removes the cooling-off rights*.

4.5.6. The government states that there is a "*full overlap between the subscriptions targeted by the autorenewing and opt-in proposals on the one side and the cooling-off proposal on the other side*", meaning that "*a colling-off period would not add value in this policy context*".[96] Therefore, if the auto-renew proposals were taken forward, the Committee should make clear that the cooling-off rights should be removed from the Bill as they will add no value for consumers but still require significant costs from businesses to implement.

4.5.7. This proposal is so far reaching that we feel it is mandatory that significant further assessment of impacts must be considered before law is created, both of the proposal *per se* and its interaction with other requirements.

12 June 2023

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[95] Pg. 45 HM Government, *"Digital Markets, Competition and Consumers Bill: Impact Assessment – Subscription measures",* April 2023
[96] Pg. 50, "*"Digital Markets, Competition and Consumers Bill: Impact Assessment – Subscription measures",* April 2023