

WRITTEN EVIDENCE SUBMITTED BY TELEGRAPH MEDIA  
GROUP (DMCCB25)

# Digital Markets, Competition and Consumers Bill

Response to House of Commons Public Bill Committee 18 May  
2023 Call for Written Evidence

## Executive summary

- 1 The Digital Markets, Competition and Consumers Bill (**Bill**) marks an important step in addressing the bargaining power imbalance between authoritative journalistic content and the large online platforms. We support the Bill's overall approach, creating *ex ante* regulatory powers for the Competition and Market Authority (**CMA**) to ensure that value created for the platforms by content such as news is not extracted and appropriated by them – but shared with the producers.
- 2 We believe that, with some limited amendment, the Bill could support the continuation of a vibrant news media sector, recognising the changes which online platforms have brought to how news media content is consumed, how advertising revenue is earned and the importance of subscription revenues. The UK regime could be a pioneering effort to recognise the contribution of news production to society and democratic discourse and to address the power imbalance with dominant digital platforms.
- 3 The Bill is ambiguous regarding the CMA's power to “designate” the large platforms funded by digital advertising, and to impose conduct requirements as envisaged in the November 2021 advice by the CMA and Ofcom to DCMS<sup>1</sup> (**DCMS Advice**) with respect to those platforms' use of and extraction of value from news publishers' content. This ambiguity risks the regime not achieving the desired ends, including being frustrated and delayed by legal challenges .
- 4 In particular, it is essential that the Bill unambiguously empowers the CMA to impose conduct requirements (under section 19) of the sort envisaged in the DCMS Advice. The final offer “*backstop*” enforcement mechanism is essential to achieving workable solutions, but will only work if the Bill clearly empowers the CMA to impose such conduct requirements in the first place.
- 5 The Bill's provisions on subscription cancellation and renewal should help to give confidence to subscribers, but there is a risk of over-prescription which could have perverse effects. The Bill should set standards and empower the CMA to police them rather than setting out precise procedural arrangements.
- 6 We believe the Bill should therefore be clearer, including in:
  - (a) designation (section 2) and digital activities (section 3(1));
  - (b) position of strategic significance (section 6);
  - (c) conduct requirements power (section 19) and permitted types of conduct requirement (section 20);
  - (d) conduct investigations (section 26);
  - (e) countervailing benefits exemption (section 29);
  - (f) renewal notices (sections 250 and 251); and

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<sup>1</sup> CMA/Ofcom November 2021 report [Platforms and content providers, including news publishers: Advice to DCMS on the application of a code of conduct](#) .

- (g) subscription cancellation (section 252).

## Introduction

- 7 This is Telegraph Media Group's (**TMG**) response to the [18 May 2023 call for written evidence](#) of the House of Commons Public Bill Committee (**Committee**). We welcome this opportunity to contribute to the Committee's scrutiny, and are willing to supplement this response in any way that the Committee would find helpful.

### A. DIGITAL MARKETS AND PROPOSED COMPETITION LAW REFORMS (PARTS 1 AND 2 OF THE BILL)

#### Overview

- 8 The Bill would institute a pro-competition *ex ante* regulatory regime for digital markets characterised by the dominance of one or a small number of firms. It would create a regime for designating strategic market status (**SMS**) undertakings and imposing on them conduct requirements and/or pro-competition interventions (**PCIs**), to address both the sources of market power and the harms that result from its exercise.
- 9 We welcome the framework the Bill would create. Recourse to *ex ante* regulation is appropriate where the market power of digital platforms has become rapidly entrenched, and *ex post* intervention to restore competition has failed. The Bill aims at redressing appropriation by platforms of value created by counterparties through exercise of platform power.
- 10 The Bill could be improved by more explicit support for news publishers vis-à-vis the major online platforms. The digital world has brought huge changes to the way content is accessed and consumed, but also to the way production of news media content is financed by advertising and reader revenues. For news publishing organisations, traditional newspaper sales (and directly associated advertising revenues) are in steady structural decline. Over the past 30 years, news publishers have seen advertising revenue reduce from more than half total revenue to less than a third. This decline is not offset by growth in online revenues, acutely so for online advertising revenue.
- 11 The Bill should directly address the position of news publishers. Successive Governments have underlined the importance of a free press as an essential pillar of democracy. The maintenance of the UK's news media sector relies on the ability of news publishers to secure adequate revenue from the content they generate. The Bill represents an important opportunity to ensure that this issue is addressed and a pro-competitive market sustains a vibrant media sector.

#### *CMA and Ofcom Reports*

- 12 The DCMS Advice and the CMA July 2020 [Online platforms and digital advertising market study final report](#) (**Report**) are major drivers for the Bill, detailing the "unassailable incumbency advantage"<sup>2</sup> of the two largest platforms, and proposing mechanisms to address the resulting market imbalance. This response is extensively informed by the Report and the DCMS Advice.

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<sup>2</sup> Paragraph 22 Report.

### *The Bill*

- 13 The Bill must unambiguously empower the CMA to address the imbalance by imposing conduct requirements (under section 19 of the Bill) of the sort envisaged in the DCMS Advice.
- 14 In particular, the final offer mechanism (**FOM**) provided for in section 38<sup>3</sup>, which would be a suitable mechanism to enforce compensation and fair bargaining for news publishers' content, is subject to a pre-condition that the designated SMS undertaking has breached an enforcement order concerning a conduct requirement (section 38(2)). So the FOM will only be available as the “*backstop*” enforcement mechanism provided the Bill empowers the CMA to impose such conduct requirements in the first place: the Bill should be clearer in this respect. In the House of Commons Second Reading debate, the Minister confirmed that the FOM could help the news industry.
- 15 Some further changes would ensure that the Bill unambiguously empowers the CMA to impose effective conduct requirements as envisaged in the DCMS Advice. These all fit within the Bill's framework of designation, conduct requirements, PCIs, and the FOM, which offers an appropriate and relatively rapid means to resolve distortions to the market resulting from the online platforms.

### ***Effects of limited competition in digital markets***

- 16 The Report and DCMS Advice describe<sup>4</sup> the ways in which businesses and consumers are affected by weak competition in digital advertising and related markets and the factors identified have not fundamentally changed since the Report and DCMS Advice were published.
- 17 News publishers' content directly and indirectly creates significant value for the large online platforms, which they could not expect in a properly competitive digital market, including through garnering information on consumer preferences for online ad sales and/or keeping consumers inside the platforms' ecosystems by pre-empting publishers from creating direct relationships with readers. This negatively affects news publishers such as TMG who increasingly rely on online subscriptions for revenue. In effect, the online platforms are using news publishers' content to enrich themselves at the publishers' expense.
- 18 For a news publisher, while online platforms can highlight specific content and thus attract consumers to a publisher's content, the overall summaries of content provided to consumers by the online platforms can also act as a barrier to the consumers subscribing or paying for the content, depending on the model chosen by the news publisher. Given the central role played by news publishers in financing the creation of original journalism<sup>5</sup>, it is important for the sustainability of authoritative journalism that news publishers are fairly and reasonably compensated for the value the large online platforms extract from publishers' content.

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<sup>3</sup> Modelled on the final arbitration offer mechanism provided for under the [Australian News Media and Digital Platforms Mandatory Bargaining Code at Section 52ZX](#).

<sup>4</sup> E.g. Sections 2 and 3 DCMS Advice.

<sup>5</sup> See [The Cairncross Review 12 February 2019](#) at p.18.

### ***Existing rules cannot address the challenges***

- 19 The existing competition rules (Competition Act 1998 and Enterprise Act 2002) are not sufficient to address the challenges.
- 20 There is currently no requirement on the large online platforms to pay news publishers fair and reasonable compensation for the considerable value they extract from the publishers' content.

### ***Striking the right balance between regulating digital markets and encouraging innovation***

- 21 In principle, we support the architecture of the Bill, particularly empowering the CMA to impose bespoke conduct requirements on designated SMS undertakings, supported by enforcement powers, the FOM and the power to make PCIs.
- 22 Innovation is not the prerogative of digital platforms. News publishers must also innovate – introducing new titles, formats, products and services that provide consumers with greater value. We cannot innovate if the benefit from the value we generate is undermined by the platforms extracting and appropriating the value. We are confident that the CMA will be able to strike the right balance between regulation and innovation incentives for all sides – one of the principal concerns identified in the Report was weak competition in digital advertising and related markets resulting in reduced innovation and choice. Giving news publishers equitable compensation for the value they create, currently extracted by the large online platforms, would enhance our ability to bring news media content to the digital audience in new ways.

### ***Proposed amendments to the Bill***

- 23 The Bill must unambiguously and explicitly empower the CMA to rectify the adverse consequences for news publishers of the imbalance of bargaining power vis-à-vis the large online platforms, by the imposition of conduct requirements (for example ensuring that news publishers can obtain fair and reasonable compensation for the use of publishers' content, including being provided by those platforms with the information/data required to assess this).
- 24 A number of issues in the Bill need to be addressed to ensure that the CMA unambiguously have the relevant powers and that the resulting conduct requirements (should the CMA impose them) are effective and fit-for-purpose.
- 25 Any ambiguity concerning the CMA's power to designate the large online platforms risks the regime not achieving the desired ends – compounded by delay (due to legal challenges) beyond the timescales provided for under the Bill. The clearer the Bill is in addressing the particular circumstances of news publishers, and in particular establishing the principle of fair and reasonable compensation flowing from the digital platforms to the publishers, the greater the prospect that equitable agreements can be reached in a timely fashion.
- 26 For instance:
  - (a) designation (section 2) and digital activities (section 3(1)): the concept of digital activity, in particular the provision of digital content, should include the ways in which the large online platforms make available news publishers' content on

their platforms/ecosystems (e.g. reproduction, placing, providing a link or extract etc.);

- (b) position of strategic significance (section 6): the operation of the Bill rightly hinges on designation. The conditions for SMS designation should include significant bargaining power imbalance with third party content providers whose content is used by the designated SMS undertaking;
- (c) conduct requirements power (section 19) and permitted types of conduct requirement (section 20):
  - (i) the three objectives (fair dealing; open choices; trust and transparency) listed in section 19(5) govern imposition of conduct requirements. “Users or potential users” must be clearly defined to include third party providers of content, whose content designated SMS undertakings use: otherwise the Bill’s ability to safeguard the interests of news publishers as identified in the DCMS Advice could too easily be frustrated by legal challenge;
  - (ii) the CMA must be clearly empowered to impose conduct requirements to:
    - (A) negotiate in good faith fair and reasonable compensation for value extracted from third party content; and
    - (B) make available the data/information relevant to assessing value to ensure a level playing field in such negotiations;
- (d) conduct investigations (section 26): it is very important that interested third parties have the ability to complain to the CMA with respect to any alleged breach of conduct requirements/final offer orders/PCIs, and the CMA’s investigation process should enable active involvement of a complainant, including providing the complainant with a reasoned explanation of the result. This will be significant to the success of the new regime and should be addressed in the Bill;
- (e) countervailing benefits exemption (section 29): this exemption is widely drafted and open to abuse. Large online platforms should not be given an easy mechanism to prolong/delay a conduct investigation. The exemption should be more narrowly scoped and contain safeguards to limit its potential for abuse by online platforms. For instance, it should be clear whether the CMA or the designated SMS undertaking bears the burden of proving that the exemption applies: the designated SMS undertaking should ideally bear the burden.

### ***Insights from other jurisdictions***

#### *EU*

- 27 The [2019 EU Copyright Directive](#) requires (Article 15) EU member states to give publishers of press publications direct copyright over “*the online use of their press publications by information society service providers*”. In the Report the CMA noted<sup>6</sup>

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<sup>6</sup> Paragraph 47, [Appendix S](#)

that “Publishers were sceptical that the Directive would have a material effect on their ability to negotiate with Google and Facebook over the use of their content if it were adopted into UK law” and this appears to have been one of the principal reasons why the CMA did not conclude on this issue in the Report, noting that “this issue may need to be revisited.” However, the implementation of Article 15 of the 2019 EU Copyright Directive does appear to have had a material effect on news publishers’ ability to negotiate compensation for use of their content. In particular:

- (a) in France it has led to Google [accepting](#) a binding framework for the negotiation of compensation for news publishers, including a requirement for Google to provide the information needed for the assessment of compensation;
- (b) in Germany it has led to Google [accepting](#) a number of important adjustments to the benefit of publishers, including a change to Google’s “contractual practice in such a way that press publishers will not face difficulties in asserting their general ancillary copyright”; and
- (c) the Spanish competition authority has an [ongoing investigation](#) into Google.

28 In May 2022 Google [announced](#) that “we’ve made more progress on our commitment to license press publisher content under the new law. We now have licensing agreements that cover more than 1,000 publications across eleven European countries, with many more discussions ongoing.”

29 Further, the [EU Digital Markets Act](#), at Articles 5(10) and 6(8), impose certain information provision obligations on gatekeepers towards publishers with respect to digital advertising.

#### US

30 The [Journalism Competition and Preservation Act of 2022](#) was reintroduced to the US Congress in March 2023 which, if passed, would set out a process through which certain broadcast or digital news providers may collectively negotiate with covered online platforms regarding use of the news providers’ content by the platforms.

31 In California, the [California Journalism Preservation Act](#) was [reported](#) on 1 June 2023 to have passed the Assembly floor with bipartisan support and now heads to the state Senate.

#### Elsewhere

32 As noted above, in Australia the [Australian News Media and Digital Platforms Mandatory Bargaining Code](#) is in force and is [reported](#) to have led to payments to Australian publishers of well over \$140 million. In April 2022, Canada proposed legislation on fair revenue sharing between digital platforms and news media, called the [Online News Act](#).

## B. PROPOSED REFORMS OF CONSUMER LAW ENFORCEMENT AND NEW CONSUMER RIGHTS (PARTS 3 AND 4 OF THE BILL)

### Overview

33 We welcome the Bill's aim to tackle 'subscription traps', in particular by requiring traders to provide certain pre-contract information. As a news publisher which relies on subscription income for part of our revenue, we have every interest in consumers feeling confident about the subscription arrangements. Given the nature of our product is the consumption of news, continued access and regular communications (which include the product itself, in the form of newsletters) mean our subscribers receive continual "reminders" that they have access to our product. We believe we already operate to a high standard in sending consumers renewal notifications and providing easy access to cancel should the consumer desire, but would always seek to improve this in response to customer feedback. Whilst the legislation must be sufficiently clear to ensure industry-wide compliance and effective enforcement, the draft is too prescriptive on the precise details of how to protect the consumer interest, and risks the unintended consequence of denying benefit, and being a potential nuisance, to consumers.

### Cancellation

34 If enacted as currently drafted, sub-sections 252(2) and (6) would give consumers the right to cancel a subscription contract in a single communication, without having to take any steps which are "**not reasonably necessary**" to end the contract, where such notification can be given "**by any means**", provided the notice from the consumer "*is sufficiently clear for the purpose of information the trader that the consumer is bringing the contract to an end*".

35 The concept of providing consumers with the ability to easily cancel contracts they have entered into (including subscription contracts) is not new. For example, the current law is found in regulation 32(2) and (3) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("**CCRs**"). This provision of the CCRs implements the corresponding provision of the Consumer Rights Directive (2011/83/EU).

36 Under the CCRs, consumers have the right to cancel certain distance contracts simply by informing the trader of their decision. Consumers may either use a model cancellation form or "*make any other clear statement*" (r.32(3)). In the case of dispute, the burden is on the consumer to show that they cancelled the contract within the relevant cancellation period (regulation 32(6), CCRs).

37 The European Commission guidance on the Directive says that "*for consumers, to contact traders quickly and to communicate with them efficiently is of fundamental importance for ensuring and effectively implementing consumer rights*"<sup>7</sup>. We agree. However, the concept of permitting cancellation with steps that are "*not reasonably necessary*" or "*by any other means*" - which derives from EU legislation - is too broad and imprecise and should be clarified in the legislation. The consumer must prove when and whether a cancellation notice has been given (s.265(7)). Nonetheless, the consumer would be entitled to send a cancellation notice by a method that is not

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<sup>7</sup> Guidance on the interpretation and application of Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, section 3.2.2.2. Available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229\(04\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC1229(04))



convenient, such as fax, an email address that is not regularly monitored or even by unconventional means.

- 38 There would be a negative impact for consumers and traders alike where there is no clarity on the methods of communication that are permitted. For the trader, it is operationally unwieldy and costly to provide for every unknown eventuality. Traders need to cost out and implement operational requirements (including with regard to acknowledging cancellations and reimbursements, as required by s.253(2)) in order to provide a streamlined process. Accordingly, routes by which cancellation notices can be sent should be widely available methods of communication (e.g. telephone, which we have found – particularly in the case of older subscribers – is frequently preferred), and clearly communicated to the consumer.
- 39 If traders are unable to properly plan, and options are not clear to consumers, we are concerned that the impact will be that consumers will be frustrated and the purpose of the Bill undermined, as it will restrict rather than facilitate quick and easy cancellation.
- 40 We are concerned that the requirement for a consumer to be able to cancel without having to take any steps which are not “**reasonably necessary**” will in practice preclude traders from providing options for the consumer to continue their subscription at a reduced rate or with additional benefits. When a consumer decides to cancel a subscription at a particular rate, we often use this opportunity to remind them of the benefits of the subscription; and may offer a reduced rate to continue. Removing this opportunity – which may be the effect of a prohibition on steps which are not “reasonably necessary” – would be of great detriment to those consumers who wish to take advantage of the benefits we can offer; especially in the current economic climate. There may be subscribers that want to consume our product, but do not have the financial means to do so at their current rate. We should be entitled to offer that opportunity; provided of course that by doing so we do not delay the process of cancellation for those who wish it.

### **Reminder Notices**

- 41 Sections 250 and 251 of the Bill require traders to send reminder notices. As drafted, traders will need to provide consumers with several communications specifically regarding their subscription: pre-contract information, cooling-off periods and renewal reminders.
- 42 Accordingly, consumers will receive a large number of communications in a short period of time and often in quick succession, particularly with respect to subscriptions with shorter terms (e.g. monthly). Most consumers will be subscribers to several services, with each trader sending a large number of communications under the Bill. Consumers will thus be bombarded with subscription communications, ‘desensitising’ them to such communications, even undermining trust in the services to which they subscribe. Consumers may feel overwhelmed by the communications and simply ‘ignore’ them. This will achieve the opposite of the Bill’s purpose. In our case, the product itself makes up part of our email communications, and this level of email communication may mean the quality product they are receiving gets lost, or we are not able to sign-post users of the product to other products or services they would be interested in.
- 43 In addition, the requirement for notices to be given within 3 and 5 days of renewal may suit some subscription services but not others – the Bill should not be prescriptive on

this point, but give the CMA power to determine whether a trader had reasonably reminded a consumer of the fact of their subscription. In our experience, the vast majority of our subscribers do not want to cancel a subscription and do not do so. Excessive reminder notices may serve to antagonise consumers, who wish to keep a subscription, but may decide not to do so if they are being constantly bombarded by what they consider to be “pestering” emails, where they already have information; particularly in respect of a cooling off period. Consumers already receive information with regard to cooling off twice during sign up, they may consider a further reminder a nuisance and cancel. We believe the Bill should leave open the option that subscribers are reminded of their subscriptions by the services they receive – in the case of The Telegraph, a typical digital subscriber receives daily communications by email from The Telegraph. This includes editorial newsletters (i.e. our product itself), information about subscriber rewards, and marketing of additional TMG subscriber products and services (these communications regularly address the recipient as a “subscriber”). In addition, a typical Telegraph digital subscriber will have at least 10 touch points with the Telegraph during the period of a week. We think this is a more than sufficient reminder of their ongoing subscription hence additional reminders are not only unnecessary but would be perceived as a nuisance.

- 44 As noted at paragraph **Error! Reference source not found.** above, we increasingly rely on subscription revenue in the face of significant decline in revenue from advertising and traditional newspaper sales. The unnecessary and excessive prescription in the Bill strikes at the heart of such essential subscription revenue source and thus pose a threat to the continued contribution of a vibrant news sector to democracy.
- 45 **Marketing communications:** the negative impact of the excessive number of renewal communications explained above is compounded by the fact that the Bill does not allow for marketing communication to be included in the notices. We consider the Bill is too prescriptive in that regard. Evidence shows that consumers benefit from receiving certain marketing communications, such as explaining and reminding them of the benefits of their subscription and providing discounts on renewals. Mandating renewal notices to be sent separately from supplementary marketing emails is likely to result in:
- (a) as noted above, constraining the trader’s ability to offer discounts (or other incentives) to a consumer who is considering cancelling their subscription, reducing a dynamic relationship to a binary one;
  - (b) consumers ignoring discount offers, thereby missing out on possible benefits; or
  - (c) consumers receiving a cumbersome and (from their perspective) confusing torrent of emails, making it difficult to understand the entirety of the renewal package, which they will have to piece together from the patchwork of communications they have received.
- 46 In addition, the Bill does not take sufficient account for the impact of data / privacy laws on limiting such marketing communications. For example, under the General Data Protection Regulation (GDPR), our ability to provide consumers with helpful information and discount opportunities is already severely restricted, although not seemingly prohibited by the Bill itself.

## ***Conclusion***

- 47 Particular in respect of shorter subscription contracts, traders should only be required to send notices at the beginning of the contract, containing the required pre-contract information, and clear information regarding renewals and applicable cooling-off periods, and that this information should be clearly set out in their online account. These requirements will ensure that customers have all the information they need at the beginning in one 'easy to find' place. For example, when a consumer is reminded of a subscription by seeing a charge on their account, they will be able to easily access the initial email from the trader or their online account setting out their rights, rather than having to sift through several emails. The Bill must achieve a fair balance between consumer user experience and providing information the consumer needs to avoid subscription traps: it is currently too prescriptive.

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