

**Briefing Paper**  
**Digital Markets, Competition and Consumers Bill**  
**Part 1 – Digital Markets**

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 46.1 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.

**NMA Priorities**

- **Must be clarified or removed - Secretary of State approval of CMA guidance:** At a minimum, a short time limit for the Secretary of State’s approval of guidance must be placed in the Bill to prevent delays. Restricting the CMA’s independence could reduce business confidence in the UK’s regulatory environment, so it would be best to remove the requirement for Secretary of State approval entirely.
- **Must be removed - Countervailing benefits exemption:** Government amendments have heightened the risk that the exemption could be used to avoid compliance with the CMA’s Conduct Requirements (“CRs”). Given the remote chance that anti-competitive conduct will bring more benefit than harm, the standalone exemption should be replaced with provisions that allow the CMA to consider consumer benefits without being compelled to close an investigation into breaches of CRs.
- **Must be clarified - Accounting for consumer benefits and proportionality in the setting of Conduct Requirements:** We appreciate the Government’s wish to add clarity, but these amendments have created an additional appeal ground: the court may interpret the amendments as creating a heightened level of proportionality in Judicial Review appeals, and a heightened level of proof of consumer benefits. Impeding the CMA’s ability to intervene in rapidly moving digital markets will harm the efficiency of the regime. To prevent delays, the Government should make clear how these requirements align with the CMA’s existing duties and standards.
- **Must be strengthened - Payment for content and Final Offer Mechanism:** The Final Offer Mechanism (the “FOM”) should be made available earlier in the enforcement process, when a CR to trade on fair and reasonable terms is first breached. This will ensure that firms designated with Strategic Markets Status (“SMS”) are properly incentivised to negotiate with publishers for the value of news content.
- **Must be strengthened - Anti-leveraging requirement:** CR [20\(3\)\(c\)](#) is intended to prevent SMS firms evading CRs, but as presently drafted it is inadequate to prevent SMS firms from shifting their anti-competitive behaviour to evade enforcement. The anti-leveraging CR should be amended to ensure that all instances of anti-competitive behaviour that are linked to a designated digital activity can be targeted by the CMA.
- **Must not be weakened further - The appeals standard:** It should be made clear on the face of the Bill that ‘Full Merits’ appeals are strictly limited to decisions on the level of fines and the decision to issue a fine, not regulatory decisions.

**Secretary of State Approval of CMA Guidance:** Binding guidance will allow the pro-competition regime to be flexible, targeted and proportionate, with the CMA to setting out how CRs apply to specific digital services. The guidance will also set out how the CMA plans to carry out its duties and is thus essential to the proper functioning of the regime.

Government amendments have given the Secretary of State the power to approve CMA guidance, before which it cannot be published. There is no time limit or detail on how the Secretary of State should give approval. This could mean significant delays in the CMA being able to use its powers or mean the guidance could become out of date soon after approval. A 'lobbying bottleneck' could be created, where Big Tech firms who have failed to convince the CMA with evidence would be able to lobby Government Ministers.

***At a minimum, a short time limit - 30 days or less - for the Secretary of State's approval of guidance must be placed in the Bill to prevent delays which could fundamentally undermine a regime tasked with regulating fast-moving digital markets. Even with a time limit, given the CMA is an expert regulator with the best access to data and information about digital markets, this amendment is neither necessary nor beneficial. Such a clear restriction of the CMA's independence could reduce business confidence in the UK's regulatory environment, so the removal of this requirement should be considered.***

**Countervailing Benefits Exemption:** The countervailing benefits exemption - [Clause 29](#) - allows the CMA to close an investigation into a breach of a CR if an SMS firm can demonstrate that its anti-competitive conduct produces benefits which outweigh the harms.

Government amendments have changed the test for the exemption from "indispensability" - a recognised competition law standard that ensures a Big Tech firm cannot proceed with anti-competitive conduct without good reason - to an untested and uncertain standard. There is a danger that this untested standard could allow Big Tech firms to evade compliance and continue with conduct that harms UK businesses and consumers. It creates scope to inundate the CMA with an excessive number of claims of consumer benefit, diverting the CMA's limited resources away from essential tasks. It is highly unlikely that anti-competitive conduct by global monopolies will ever have a consumer benefit, so this amendment should be heavily scrutinised.

***At a minimum, the "indispensability" standard should be reinstated. But, a standalone exemption remains unnecessary given the extremely remote chance that anti-competitive conduct creates benefits which outweigh the harms, and other provisions in the Bill that provide significant safeguards. Under [Clause 27](#), SMS firms are able to make representations to the CMA before the regulator finds that it has breached a CR, whilst under [Clause 25](#) the CMA must keep under review whether to impose, vary or revoke a CR. The Bill should be amended to explicitly allow the CMA to consider potential consumer benefits under [Clause 27](#), but without the standalone exemption - [Clause 29](#) - that would force the CMA to close a conduct investigation.***

**Accounting for Consumer Benefits and Proportionality in the Setting of Conduct Requirements:** The Government has amended the Bill to require the CMA to have regard for:

(i) the consumer benefits stemming from intervention before imposing a CR; and (ii) the proportionality of their decision before setting a CR or Pro-Competitive Intervention (“PCI”).

It is questionable whether the express reference to proportionality is necessary given that - in existing and analogous CMA processes - existing caselaw imposes a requirement of proportionality through Judicial Review. Similarly, the CMA already has an overarching legislative duty to further the interests of consumers through competition, so the benefit of explicitly referencing consumers on the face of this legislation is unclear.

Taken together, these requirements create an additional barrier to the CMA’s ability to act swiftly to prevent anti-competitive conduct in the interests of UK businesses and consumers and create significant uncertainty.

***We appreciate the Government's wish to add clarity but these amendments have created an additional appeal ground as the court may interpret the amendments as creating a heightened level of proportionality in Judicial Review appeals, as well as requiring a heightened level of proof of consumer benefits. Impeding the CMA’s ability to intervene in rapidly moving digital markets will harm the efficiency of the regime. The Government should make clear how these requirements align with the CMA’s existing duties and standards.***

**Final Offer Mechanism:** Google and Meta’s overwhelming market power means that trusted news publishers are not compensated fairly for the significant value that their content creates for platforms – [estimated at around £1bn](#) per year in the UK. The CMA will be able to require SMS firms to negotiate fair and reasonable terms - [Clause 20\(2\)\(a\)](#) - including payment for the value of news content. Big Tech have opposed this provision, yet the Bill would only ensure that they negotiate fair terms. If they believe that their platforms bring more value to publishers than vice versa, why not back the legislation and negotiate? For an explanation of why such measures are necessary and justified, [click here](#).

If SMS firms refuse to negotiate, and other enforcement remedies prove ineffective, the CMA will be able to initiate the FOM - [Clause 38](#). The FOM will require the CMA to choose between two bids made by the parties. This tool is designed to allow for, and to incentivise, sincere private negotiations between the two parties.

However, [the extended nature of the enforcement process prior to the FOM](#) means that it could take years for the FOM – which itself could take six months – to be reached when SMS firms do not negotiate in good faith, allowing SMS firms to delay and frustrate enforcement and pressure publishers into accepting unfair terms. This stands in contrast to the Australian News Media Bargaining Code where strict timelines mean that every step combined – bargaining, mediation and final offer arbitration if required – would take just over six months.

We agree with Government that the FOM should be a last resort, but it should be a last resort because it is a credible incentive to negotiate, rather than being such a distant prospect that publishers are compelled to accept sub-optimal deals from SMS firms.

***To act as a credible incentive, the FOM should be available after a CR to trade on fair and reasonable terms has first been breached. Importantly, the condition that the CMA must consider if FOM is the only appropriate remedy before initiating it - and proceed with other enforcement tools if it judges they will be effective - should be retained. This 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.***

**Anti-Leveraging Requirement:** The regime created by the Bill will only apply to certain activities within an SMS firm, rather than the whole firm, but the CMA may find that SMS firms can simply move their conduct to a non-SMS activity to evade the regime. CR [20\(3\)\(c\)](#) allows the CMA to intervene in non-SMS activities to prevent a firm evading rules by leveraging its power in a non-designated activity. An effective anti-leveraging requirement is critical to the success of the regime, as without it the efficacy of all other CRs will be severely limited: the CMA could be left unable to address anti-competitive conduct even if it is directly related to a designated activity.

For example, if Apple News is not designated, Apple could impose unfair terms on news publishers via Apple News contracts, circumventing CR terms where they hold market power e.g. its App Store (which is likely to be designated digital activity). Equally, Apple or Google could easily shift their 30% fee for developers from an app store service fee to an operating system license.

In both cases, SMS firms could claim that their conduct does not increase their market power in a designated activity, even though their ability to act anticompetitively is directly linked to their power in a designated activity. At best, this would see the CMA having to constantly designate new activities in an attempt to catch up, or at worst the regulator would be unable to combat anti-competitive behaviour at all.

***The anti-leveraging requirement is currently too narrowly drawn to capture many potential cases of anti-competitive leveraging, setting an extremely high bar for intervention. Allowing Big Tech to evade CRs in this way would seriously undermine the CMA's ability to rebalance digital markets. The requirement should be strengthened so that it captures any anti-competitive conduct that is connected to a designated activity, whilst ensuring that any remedies imposed by the CMA are directly connected to the regulated service.***

**Appeals Standard:** We applaud the Government in maintaining the judicial review standard for appeals on regulatory decisions, but the Bill has been amended to allow 'Full Merits' appeals for penalty decisions, i.e. fines.

Introducing 'Full Merits' appeals for all regulatory decisions would have allowed complex, lengthy, and costly legal wrangling, which would render the new regime ineffective. Therefore, it must be clarified that the amendment only allows 'Full Merits' appeals for both: (i) the level of the fine; and (ii) the decision to issue a fine.

It must not permit a review of:

- The CMA's decision to create a Conduct Requirement or whether a PCI should be implemented;
- The CMA's decision on whether a Conduct Requirement has been breached; and
- The CMA's decision on how to remedy a breach.

***The Government should make clear on the face of the Bill that 'Full Merits' appeals are strictly limited to decisions on the level of fines and the decision to issue a fine.***

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