

Public Interest News Foundation (PINF) and Impress—joint written evidence (DCC0029)

House of Lords Communications and Digital Select Committee inquiry 'Review of the Digital Markets, Competition and Consumers Bill'

The Public Interest News Foundation

The Public Interest News Foundation (PINF) is the first charity in the UK with a remit to promote public interest news. Through the News for All campaign, we are working with a growing coalition of news providers and other organisations that work to support them to ensure that everyone in the UK can benefit from sustainable independent news.

Executive Summary

1. We welcome the introduction of the Digital Markets, Competition and Consumers Bill and believe it can offer a comprehensive framework to regulate a remarkably unbalanced digital marketplace in the UK in which tech giants like Alphabet and Meta hold near-complete control over every aspect of every transaction that takes place with third parties such as news publishers.
2. With certain amendments and considerations, we believe the bill can sit among a much-needed comprehensive set of interventions that help introduce sustainability to the news industry, and in particular help the independent news sector survive and flourish.
3. We are optimistic about the **meaningful investigatory and sanctioning powers the legislation gives the Competition and Markets Authority's Digital Markets Unit**, and hope that policymakers will work to make sure they are not watered down as the bill proceeds through Parliament. We commend the holistic and nuanced approach enshrined in the bill in **considering different kinds of third parties and allowing for tailored Conduct Requirements for different undertakings**, in no small part because it results in future-proof legislation that can adapt to changes in technology. Specifically, we endorse the **provision allowing for collective negotiation during the final offer mechanism (FOM)** and the consideration given to **non-payment terms** such as data-sharing and notice of algorithmic change in addition to payment terms.
4. In this submission, we will comment on the provisions regarding **Secretary of State powers**, which we believe in their current form open implementation of the regulatory framework to unwelcome politicisation. We will recommend introducing language that ensures **collective bargaining for small publishers** is permitted before FOM is triggered, limiting SMS firms' **opportunities to obstruct** implementation and present **countervailing benefits**, and allowing

for the **introduction of FOM at an earlier stage** when appropriate in the bargaining process.

5. We believe the bill would address market imbalances in a more comprehensive and effective way if the DMU were **directed to consider the interests of citizens in addition to consumers**, allowing the regulator to tackle anti-competitive behaviour that in the case of news publishers harms media plurality (See also: News Media Association section 3.5).
6. We also believe that certain clarifications can be made in the legislation and its future implementation in order to avoid unintended consequences that may harm independent news providers in the UK, as we will show has happened in Australia as a result of the news media bargaining code introduced there in 2021.

Dominant technology platforms are free-riding on independent news in the UK

7. Digital technology has given journalists new opportunities to engage with the communities they serve. Devolution has given local authorities greater powers, which journalists could and should be monitoring. And citizens increasingly expect to have a voice in the complex decisions that affect us.
8. The good news is that media pioneers in the UK are building new forms of independent journalism that address these opportunities. Up and down the UK, they are launching independent news organisations that speak to, for and with the communities they serve.
9. The bad news is that these independent publishers are under-resourced and, compared to their corporate counterparts, victims of deeply entrenched and increasingly structural disadvantages in highly uncompetitive digital markets.
10. These publishers play a vital role in providing public interest news to otherwise hard- to-reach communities but, due to their size and the size of their audiences, are largely unable to generate the revenue they need to remain afloat. An estimated 400 independent publishers are serving communities around the UK.¹ According to the PINF Index of Independent News Publishing, the typical independent publisher is a social enterprise with turnover of around £89,000.² These are small but professional organisations that are committed to the public interest.
11. Research indicates that they are more trusted than corporate regional and national publishers, with a majority of the British public saying they trusts local news only when it is produced by outlets based in their areas.³ In addition to their contributions to

¹ See <https://pressgazette.co.uk/uk-independent-community-news-sector/>.

² See <https://www.publicinterestnews.org.uk/pinfindex>.

the UK's digital economy, they generate economic value for their communities, creating jobs, boosting local businesses, buying local services and ploughing any profits back into the communities they serve.

12. However, these news organisations have received barely any support from the government or technology companies, whilst their corporate competitors have received an array of public and private handouts. This distorts the market, making it impossible for start-up publishers to enter and for existing ones to survive, and has stifled the potential growth of the independent sector.
13. The news can be a profitable business, but profits have been lining the wrong pockets. In 2022, we estimated the UK's independent news sector's total revenue at £20-40 million. In the same year, Google and Meta generated an estimated £16.1 billion in UK advertising revenue.
14. Research suggests that high-quality news that is properly sourced, fact checked, and regularly updated generates significant profits, to the tune of £1 billion a year in the UK alone,⁴ for these dominant tech platforms.
15. Meanwhile, in the ten years preceding the Cairncross Review, 321 local news outlets were forced to close due to declining revenues, with more closing in the four years since, all to the detriment of the communities that they served.
16. Policymakers have been patching over the cracks in the legacy local press, while dominant tech firms have created a digital marketplace in which they control nearly every stage of nearly every transaction. They have positioned themselves as central intermediaries through which consumers reach or are provided with content. This allows them to capture data about use of the content by consumers, sell advertising based on that use, and capture value created by news and information firms.⁵ They hoard a lion's share of revenue and valuable user data generated for them by news providers, whilst the providers struggle to keep their lights on.
17. News providers have long protested their inability to negotiate for their share of the revenue with companies like Alphabet and Meta, whose size, influence, and control over first party data result in a power imbalance skewed heavily in their favour.

The Government has long promised to address this problem

³ See <https://www.publicinterestnews.org.uk/post/public-more-likely-to-trust-local-news-if-it-s-produced-locally>.

⁴ Professor Matthew Elliott, University of Cambridge, 'Value of News to Digital Platforms in the U.K. by Professor Matthew Elliott, University of Cambridge'. Published by the News Media Association

⁵ [Professor Robert Picard, 'Bargaining for Digital Compensation: An Analysis of Issues and Policy Options for Content Creators'](#). Published by the Public Interest News Foundation.

18. In 2019, the Cairncross Review of Public Interest Journalism found that dominant online platforms are able to impose unfair terms on news publishers, limiting publishers' ability to monetise their content and threatening the sustainability of the press.⁶
19. The Government, in its response to the review, agreed with that assessment, acknowledging that **'codes of conduct that formalise the relationships between news publishers and online platforms may help to rebalance that relationship.'**⁷ A year later, in response to the CMA's digital advertising market study, the Government confirmed that an enforceable code **'should also address the recommendation of the Cairncross Review to introduce codes governing the relationships between online platforms and news publishers, which will be a key step in ensuring the sustainability of high-quality journalism and news publishing.'**⁸
20. The Government repeated this commitment in its response to the consultation on the pro-competition regime in 2022,⁹ and, most recently, in its response to the DCMS select committee report on the sustainability of local journalism, highlighting that the powers given to the Digital Markets Unit through the current legislation will **'make an important contribution to the sustainability of the press.'**¹⁰
21. We believe certain amendments and clarifications regarding some of the provisions, specifically in Part 1, can use pro-competition measures in a way that is transformative and facilitates sustainability in many sectors, including news publishing – especially for small, independent outlets all around the UK.
22. In order to do that, the statutory powers the bill gives to the Competition and Markets Authority's Digital Markets Unit must be designed with the competitiveness of these small players in mind.

UK policymakers can learn from the strengths and weaknesses of the Australian News Media Bargaining Code

23. It is very possible for a regulatory framework to introduce unintended consequences that harm small players. Some of the

⁶ See <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism>.

⁷ See <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism/government-response-to-the-cairncross-review-a-sustainable-future-for-journalism>.

⁸ See <https://www.gov.uk/government/publications/government-response-to-the-cma-digital-advertising-market-study>.

⁹ See <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/outcome/a-new-pro-competition-regime-for-digital-markets-government-response-to-consultation>.

¹⁰ See <https://committees.parliament.uk/work/6536/sustainability-of-local-journalism/publications/>

provisions governing the relationship between platforms and third parties are in part based on the News Media Bargaining Code introduced in Australia in 2021. That is a far more specialised piece of legislation that does not bring about comprehensive regulation of digital markets in the way the DMCC bill is designed to, but we believe there are lessons to be learned from the effects of the Australian law nonetheless.

24. No firms have been designated under the Australian code, meaning Meta and Google have been allowed to choose publishers with whom to negotiate and, in Meta's case, cease negotiations completely within a year of the code's introduction. While the passage of the law led to investments in the journalism sector and some growth in journalism provision in some areas in the years since it was introduced, the sector has shrunk considerably with twice as many permanent contractions as expansions.¹¹ Nearly every single outlet that decreased its service or shut down were in regional and rural areas.¹²
25. The Australian code also excludes any publishers with an annual turnover less than AU\$150,000, which in the UK would lead to the exclusion of a large swathe of independent and local publishers.
26. This has led small, independent publishers to become even less competitive than they were before the code was introduced, causing damage to them and to the underrepresented communities they serve.
27. This is distinctly possible in the UK if the independent sector is not sufficiently considered in the legislation and would have devastating ramifications on affected communities who lose out on journalism that speaks to them, for them and with them and get edged out of countless democratic processes.

Secretary of State powers allow for unwelcome politicisation

28. The DMCC gives the Secretary of State (SoS) considerable powers that we believe may allow for politicisation of a regulator whose legitimacy depends on its distance from government. Where the CMA is overseeing the relationship between social media platforms and news publishers, there is a risk of political interference in media freedom. For example, the government could exempt platforms that favour them, or publishers that are critical of them.
29. The legislation grants SoS the power to amend:

¹¹ [Australian News Mapping Project](#), Public Interest Journalism Initiative

¹² [Review of the News Media and Digital Platforms Mandatory Bargaining Code](#), Public Interest Journalism Initiative, page 7

- a. The conditions for an undertaking to have SMS (Clause 6(2) and (3)),
 - b. The permitted types of conduct requirements (Clause 20(4) and (5)),
 - c. The period during which the DMU must decide which terms to include in the final transaction under final offer mechanism (Clause 40 (4) and (5)),
 - d. The amounts of penalties imposed by the DMU on individuals that fail to comply with the DMU's requests or give false or misleading information (Clause 86(7) and (8)),
 - e. In addition to requiring the DMU to gain the approval of SoS on its statement of policy (Clause 89(4) and (5)).
30. While our concerns rest in the extensive powers held by the SoS, democratic scrutiny over the decisions made by the DMU is still crucial. **Multiple options can be explored for what form that oversight may take. For example, parliament might grant enhanced oversight powers to a select committee and/or a new independent examiner or commissioner for the purposes of this legislation. We recommend examining legal precedent to identify an appropriate framework for this context.**

Publishers should benefit from collective negotiating before FOM

31. Under the final offer mechanism (FOM), the bill grants the CMA the power to regard two or more third parties as acting jointly in relation to a transaction (Clause 38(5)), which we understand to mean allowing for collective bargaining between third parties, including news publishers, once all other options have been exhausted and the final offer mechanism is triggered.
32. We would welcome confirmation that collective negotiation is permitted at all stages of the new regulatory framework and not only when FOM is triggered. **This could be satisfied by reaffirming the ability of content providers to appoint an industry body or a collective management organisation (CMO) to negotiate on their behalf, as is allowed in existing competition law.**
33. **This may also be added as an amendment to Clause 20 (2)(a), reading 'trade on fair and reasonable terms with individual third parties or multiple third parties that opt for collective negotiation;' or added as an additional subclause to Clause 20 (2), reading 'negotiate with individual third parties or multiple third parties that choose to negotiate collectively;'**

34. The individual impact of these firms on digital traffic, their limited abilities to individually negotiate effectively, and the feasibility of content producers and platforms to engage in multitudinous individual negotiations make collective bargaining appropriate. It magnifies the collective impact on the market of these providers to make effective negotiations feasible and maintains a market-based approach to establishing compensation.¹³
35. This would ensure that in multiple stages of the regulatory framework, under- resourced small and local publishers are able to benefit from this legislation in a meaningful way, even when not owned or operated by the same actor.

Maximum transparency is crucial during information-gathering

36. It is not clear from the bill whether and how far relevant data will be shared with the regulator, third parties and the public. This includes information gathered during SMS investigations (Clause 11), investigations to set (Clause 19) and enforce (Clause 26) Conduct Requirements, in addition to algorithm changes and first-party data relevant to publishers.
37. We would like to see the maximum possible transparency, so that academics, civil society, journalists and legislators can monitor the effectiveness of the new regime. **We recommend mandating that terms of agreements struck between SMS firms and third parties are communicated with the DMU, which can then periodically anonymise and aggregate the information and make it publicly available, allowing for multiple levels of scrutiny.**

SMS firms may abuse various opportunities to obstruct

38. The bill gives SMS firms numerous opportunities to obstruct through public consultations multiple stages of the DMU's statutory powers, including, among others, designation (Clause 13(1)), setting conduct requirements (Clause 24(1)), and deciding on pro-competition interventions (Clause 47(1)).
39. Not only do these required consultations significantly prolong the CMA's implementation of the various interventions it may introduce – leaving small publishers languishing before desperately needed competition interventions are implemented –, but they also give platforms with extensive resources what we believe are too many opportunities to fight effective regulation outside of a judicial context.
40. Additionally, the bill creates a 'countervailing benefits' exemption,

¹³ [Professor Robert Picard, 'Bargaining for Digital Compensation: An Analysis of Issues and Policy Options for Content Creators'](#). Published by the Public Interest News Foundation.

where platforms will be able to evade investigations where they can show that the service in question provides benefits to the consumer that outweigh any harms. This creates a loophole at the heart of the bill which must be closed or at least tightened.

41. In order to prevent SMS firms from unnecessarily hindering enforcement by claiming various alleged benefits of potentially uncompetitive practises, **the countervailing benefits exemptions may be strengthened by identifying specific and limited ranges of possible benefits to users and acceptable uncompetitive practices that qualify.**
42. **We therefore believe that in Clause 29, careful consideration and more restrictive definitions are needed of 'benefits to users' ((1)(a)), 'detrimental impact on competition' ((1)(b)), 'indispensable and proportionate' ((1)(c)), and 'effective competition' ((1)(d)).** (See also: News Media Association submission Section 3.5)
43. We also believe that, in assessing whether firms have substantial and entrenched market power (Clause 5(a)), a forward assessment of five years allows publishers to put forward unrealistic claims about the transience of their market status, creating another loophole in the legislation. **We recommend that the forward assessment be eliminated, focusing instead on retrospective and current assessments of their market dominance.**

FOM length and position in the process may compromise small publishers' ability to participate in the digital market

44. Once an SMS firm has been designated and conduct requirements have been imposed, the timeline outlined in the bill for investigations and enforcement is a cause for concern.
45. A significant amount of time is required for instances of non-compliance to become evident. If there are suspicions of non-compliance, the CMA is responsible for conducting an investigation 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. Subsequently, if the SMS firm persists in non-compliance, the CMA may determine that the firm has breached the enforcement order as well. Prior to initiating the FOM process, the CMA is obligated to assess whether FOM represents the sole appropriate measure. The FOM process itself can encompass a timeframe of up to six months, excluding any potential extensions.
46. Delays of this nature may significantly impede the expeditious resolution of disputes and hinder the prompt handling of matters pertaining to fair and reasonable terms.
47. While we acknowledge the FOM is viewed 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 payment for content mechanisms implemented in Australia and Canada. This may allow SMS firms to frustrate enforcement and leave smaller 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.

48. 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.
49. 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 negotiations were ongoing and a relatively minor change - 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 were 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.
50. 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.
51. By implementing these measures, 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.
52. In order to ensure FOM is treated as a backstop, **we believe payment for goods and services must explicitly be allowed as a type of enforcement order that the DMU may impose. Clause 31 should include a new subclause (4), reading: 'An enforcement order may require a designated undertaking to agree payment and/or non-payment terms with a third party that are reasonably determined by the CMA to be fair and reasonable.'**

53. Finally, in order to ensure that neither SMS firms nor third parties abuse FOM if it is triggered, **we recommend allowing the DMU one chance to require either or both parties to submit a revised offer if the offers they make are not deemed fair and reasonable. Section 39 should include a new subclause (4)(d), reading: 'require the designated undertaking and/or the third party to reconsider their final offer payment terms if in the reasonable view of the CMA these are not fair and reasonable.'**
54. This would not materially change the intention or spirit of the final offer mechanism, but give the DMU a further opportunity to ensure that it is enforcing fair and reasonable terms by triggering it.

Conclusion

55. Viewed together, we believe the proposed considerations will help make an impressive bill more directly beneficial to the third parties that need it the most; independent news providers who have long suffered from imbalanced market relationships with tech platforms.
56. Addressing market issues that plague news publishers through the DMCCB will not solve all problems facing journalism today, but it can bring about much-needed financial and structural support in the short term while we work on helping the sector grow and evolve to match the market realities of today.
57. If news publishers are prioritised in the Government's move toward a pro-competition regime in the UK, the DMCCB can simultaneously result in more competitive digital markets *and* more democratic societies served by news provision in the public interest.

26 June 2023