

Written evidence submitted by DMG Media

DMG Media response to the DCMS Select Committee call for evidence on online safety and online harms

1. This submission is made on behalf of DMG Media, publishers of the Daily Mail, Mail on Sunday, Metro and i newspapers; MailOnline, metro.co.uk and inews websites; and New Scientist magazine. It concentrates on issues of which we have direct experience as a leading British news publisher with extensive digital publishing operations in the USA and Australia as well as the UK.

A. Introduction and Executive Summary

2. We have no issue with the overall objectives of the Draft Online Safety Bill, which we strongly support as far as they relate to indisputable harms such as child sexual exploitation and terrorism. However we are deeply concerned that the lack of clear definitions of 'legal but harmful content', and the lack of a clear and concrete exemption for legitimate journalism produced by recognised news publishers, means that the Bill as drafted poses a very serious threat to freedom of expression. It must be amended to remove this risk.
3. A free and independent news media is a cornerstone of democracy, and the news media cannot be free and independent if the news it publishes is subject to interference and control by the Government, or other third parties such as external commercial interests. Given that broadcasters in the UK operate under Government licence and regulation (through Ofcom), Britain's claim to have a free news media rests on the press, and the newspapers and news websites they publish.
4. This was why the newspaper industry rejected Lord Justice Leveson's proposals for press recognition and regulation by a body ultimately established and sanctioned by Parliament, and instead submitted to voluntary self-regulation through the Editors' Code of Practice and the Independent Press Standards Organisation, of which all our titles except the New Scientist are members.

5. The draft Online Safety legislation threatens the freedom and independence of news websites in two main ways:
 - Through the imposition of the duty of care directly on our own websites, which would force them to edit content in line with a code of conduct established by politicians in statute, and drawn up and administered by a government body, Ofcom;
 - And indirectly, through the execution of the duty of care imposed on digital platforms such as Facebook and Google when our content is distributed through the social media and search platforms they control. In this case we would be forced to edit content in line with codes of conduct drawn up and administered by commercial monopolies, on which our websites are also dependent for much of their revenue
6. Between the publication of the Online Harms White Paper and the Online Safety Bill we had numerous meetings with the Department of Digital, Media, Culture and Sport, during which we argued that content produced by legitimate news publishers should be completely exempted from the proposed legislation. We argued that news publishers were not responsible for any of the harms the legislation was intended to address. On the contrary, if the government was concerned about harmful content and misinformation, it should be encouraging publishers of responsible, independently regulated news.
7. As far as direct traffic is concerned, we were assured that that our own websites would be out of scope of the legislation, and therefore untouched by it. We believe the draft legislation is intended to achieve this aim, but the way it has been drafted is unclear and appears to impose restrictions. We examine this further in Section B below, and make recommendations on how the legislation needs to be amended to address these issues.
8. Indirect traffic referred by social media and search engines was more problematic. We were assured that the duty of care imposed on digital platforms would not oblige them to apply online safety codes of conduct to our content when they distribute it. However nor would it prevent the platforms from applying the codes of conduct if they choose to do so. Instead, if our content were to be blocked or taken down, we would have to rely on 'Journalistic Protections'. This would be a system of appeal, set up and administered by the very commercial monopolies (online platforms) and state regulator (Ofcom), which make online safety legislation incompatible with a free and independent news media in the first place.

9. This would mean that when the public buy our newspapers in print form, or visit our websites directly, they would enjoy a genuinely free press, unrestricted by any restrictions or censorship imposed by the state or external commercial interests. When they try to access the same journalistic content via social media or search, they may find it blocked by commercial interests operating under rules ultimately set by the state. The rules may be intended for the good of society, but that is the argument the Chinese government makes for its control of news media.
10. We believe it is therefore incompatible with freedom of expression and democracy to apply the online safety duty of care to legitimate news publishers. Not only must news publishers have a full and complete exemption from the duty of care - as promised by the DCMS in public comments but still lacking from the actual text of the draft Bill – but the duty of care on the platforms must also include a prohibition, backed by penalties, on interfering with news publisher content. We examine this, and evidence of how online platforms are already turning themselves into quasi-regulators, in Parts B, C and D.

B. The exemption for news publishers' own websites, when visited directly by the public

11. As far as news publishers' own websites are concerned, the Government's response to the Online Harms White Paper¹ was very clear on how journalistic freedom would be protected:

1.10 Freedom of expression is at the heart of the regulatory framework and there will be strong safeguards to ensure that media freedom is upheld. Content and articles produced and published by news services on their own sites do not constitute user-generated content and so are out of scope. The government recognises the importance of below-the-line comments for enabling reader engagement with the news. User comments below articles on news publishers' sites will be explicitly exempted from scope. This will be achieved via the low-risk functionality exemption (see above).

12. We at DMG Media took this to mean that the news content on our websites would be unaffected by the Bill because it is not user-generated and therefore out of scope. Readers' comments, which are user-generated, would be protected by a specific exemption based on their limited functionality.

¹ <https://www.gov.uk/government/consultations/online-harms-white-paper/outcome/online-harms-white-paper-full-government-response>

13. However the fact that news websites include readers' comments has led some believe that paragraph 3 (7) of the draft Bill:

A user-to-user service or a search service is exempt if it is a service of a description that is exempt as provided for by Schedule 1.

to mean that the overall exemption for news publishers' websites rests on the continued limited functionality of readers' comments, as defined in Schedule 1, Clause 5 of the Bill:

A user-to-user service is exempt if the functionalities of the service are limited, such that users are able to communicate by means of the service only in the following ways—

(a) posting comments or reviews relating to content produced and published by the provider of the service (or by a person acting on behalf of the provider of the service);

(b) sharing such comments or reviews on a different internet service;

(c) expressing a view on such comments or reviews, or on content mentioned in sub-paragraph (a), by means of—

(i) applying a "like" or "dislike" button or other button of that nature,

(ii) applying an emoji or symbol of any kind,

(iii) engaging in yes/no voting, or

(iv) rating or scoring the content (or the comments or reviews) in any way (including giving star or numerical ratings)

14. If this interpretation is the case, it seems very unsatisfactory to us, for a number of reasons:

- If news publishers' websites are to be exempt from the Bill, that exemption should rest on their main function, which is the provision of news - not on the subsidiary function of providing a facility for readers to comment on the news.
- The limited functionality described in Clause 5 is based on the readers' comments services that are currently widely available. However, like everything else in the digital world, readers' comment services are subject to continuing innovation and development. Some news websites already offer more sophisticated functionality, such as games and workshops. DMG Media runs polls and quizzes and is looking at improving its service further. If the exemption for the entire news website rests on maintaining very limited functionality on readers' comments then innovation and improvement will be impossible. The tail will be wagging the dog.

- The limited functionality exemption is also unsatisfactory as the basis for the news publisher exemption because it can be repealed or amended by the Secretary of State without reference to Parliament under Clause 3(9)-(11) of the Bill. If this was the case it would allow any future authoritarian government to remove the news publisher exemption at will, which is clearly incompatible with press freedom.
15. We at DMG Media do not agree with this interpretation. Our reading of paragraph 1.10 is that it is describing two exemptions:
 - an overall exemption for news websites which rests on the fact the news content they publish is not user-generated and is therefore out of scope;
 - *and* a specific exemption for readers' comments, required because they are user-generated.
 16. However, unlike the Government Response to the White Paper, the Draft Bill makes no reference to news websites being out of scope, presumably on the basis of the legal principle that any digital service which is not specifically included in the Bill is therefore excluded.
 17. If that is the case, it is less than clear from the current draft Bill. This is novel legislation, as yet untried anywhere else in the world. Press freedom is under constant threat, and we have to be eternally vigilant to protect it. If the Government intends news publishers' websites to be out of the scope of the Bill, as it has said it does, then the Bill should be amended to make that expressly clear - and that exemption should rest on our websites' function as responsible providers of news, not on the current limitations of readers' comments.
 18. The Bill contains a very good definition of a news publisher in Section 40, and that should be the basis of a complete and watertight exemption.
 19. This exemption should protect not only news publishers' own websites, but also their content when it is distributed by online platforms through social media and search, to which we turn in Part C. The only circumstances when platforms should be free to take down or restrict access to news publisher content is when they are required to do so by legal or technical reasons other than compliance with the Online Safety Bill (e.g. the GDPR 'right to be forgotten'). The News Media Association has a detailed proposal for a digital kite-marking scheme which would enable platform algorithms to identify news publisher content electronically whenever they encounter it.
 20. We believe this complete exemption can be achieved with a limited number of amendments to the Bill:

- Section 2 of the Bill to be amended by the inclusion of an additional clause, making clear that Recognised News Publisher websites, as defined in s.40, are outside the scope of the Bill because their prime purpose is the publication of news, which is neither a user-to-user service nor a search engine;
- Section 14 to be amended to include an extension of the duty of care to prohibit user-to-user services from restricting or taking down content published by Recognised News Publishers;
- Section 14 also to be amended to require user-to-user services, if taking down or restricting content for reasons other than compliance with the Online Safety Bill (such as legal or technical requirements) to give Recognised News Publishers notice and reasons for their actions;
- Sections 14 and 70 to be amended to give the power to make complaints to Recognised News Publishers whose content has been taken down or restricted by a user-to-user service;
- Section 14 to be amended to allow for the operation of a Recognised News Publisher kite-marking scheme;
- and Section 18 to be amended to give the same protections to news publisher content when it is distributed by search services as would be achieved by the above amendments in respect of user-to-user services.

21. We and the News Media Association - which represents national, regional and local news publishers across the UK, of all political viewpoints - are working with lawyers on wording for these amendments, which we will be happy to share with the Committee at the appropriate time.

C. Will 'Journalistic Protections' prevent news publisher content being blocked or taken down when distributed on social media?

22. The position of news publishers' own websites under the Bill may be less than clear in the Bill as drafted, but we are ready to believe the Government did not intend they should be within its scope. The position of news publisher content when it is distributed by social media and search is far less satisfactory.
23. We and other news publishers have argued from the beginning that the only way to guarantee press freedom, and prevent digital news content becoming subject to a parallel system of regulation, sanctioned by the state and administered by commercial monopolies, is a complete and watertight exemption from the Bill.

24. For reasons that have never properly been explained, the Government has seemed very reluctant to provide this. The is what the Government Response to the White Paper said:

1.11 Journalistic content is shared across the internet, on social media, forums and other websites. Journalists use social media services to report directly to their audiences. This content is subject to in-scope services' existing content moderation processes. This can result in journalistic content being removed for vague reasons, with limited opportunities for appeal. Media stakeholders have raised concerns that regulation may result in increased takedowns of journalistic content.

1.12 In order to protect media freedom, legislation will include robust protections for journalistic content shared on in-scope services. The government will continue to engage with a wide range of stakeholders to develop proposals that protect the invaluable role of a free media and ensure that the UK is the safest place in the world to be online.

25. The 'robust protection for journalistic content' in the Bill begins with a partial exemption. It is clear from Section 39 (2) of the Bill that news publisher content is not classed as 'regulated content' and is therefore not subject to the duty of care under which the platforms can be fined up to 10pc of global revenue if they fail to provide and enforce codes of conduct. This is supported by a strong definition of a 'recognised news publisher' in Section 40.
26. However, while the draft Bill imposes no obligation on social media companies to 'moderate' (i.e. block or take down) content from recognised news publishers, neither does it place them under any obligation NOT to do so. Instead it relies on a duty to 'protect journalistic content', which is set out in Section 14:

A duty to operate a service using systems and processes designed to ensure that the importance of the free expression of journalistic content is taken into account when making decisions about... how to treat such content (especially decisions about whether to take it down or restrict users' access to it)

27. This is very weak indeed – all a social media company will have to do to justify blocking or taking down news publishers' content (which, far from being exempt, is specifically included in Section 14 (8)) is to show that it gave consideration to freedom of expression, but decided it is secondary to other issues. We very much doubt that would be anything more than an exercise in box-ticking. The fact that the authors of the bill expect that social media companies WILL block or take down legitimate content is demonstrated by the inclusion of an appeals process (section 14 (3)):

A duty, in relation to a decision by a provider to take down content or to restrict access to it, to make a dedicated and expedited complaints procedure available to a person who considers the content to be journalistic content and who is—

(a) the user who generated, uploaded or shared the content on the service,

or

(b) the creator of the content (see subsection (11)).

28. This appeals process is also very weak. News is a perishable commodity. If Facebook blocks a story it does not like, for whatever reason, there will be no value at all in having it restored after an appeals process which may take weeks or even months – particularly if stories from rival publishers on the same topic are not blocked. It will also impose an extra burden on publishers, which will have to employ staff to monitor whether content is being blocked and to take cases through a lengthy appeals process. Doubtless high profile cases will demand the use of lawyers, which will multiply the cost.
29. A further problem with the ‘journalistic protections’ is that the scope of the Bill is extraordinarily wide. No one would dispute that its primary targets, child sexual exploitation and terrorism, are evils which should be expurgated from the internet. However the Bill does not stop at these obvious and incontestable aims. It also requires social media companies, under threat of draconian penalties, to establish and enforce codes of conduct to prevent the sharing of content which is ‘legal but harmful’.
30. The definition in the Bill of ‘legal but harmful’ is vague in the extreme:

Content is within this subsection if the provider of the service has reasonable grounds to believe that the nature of the content is such that there is a material risk of the content having, or indirectly having, a significant adverse physical or psychological impact on an adult of ordinary sensibilities (“A”).

For the purposes of subsection (3), in the case of content which may reasonably be assumed to particularly affect people with a certain characteristic (or combination of characteristics), or to particularly affect a certain group of people, the provider is to assume that A possesses that characteristic (or combination of characteristics), or is a member of that group (as the case may be).²

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf s.46 (3) and (4).

31. Doubtless the intention is to protect individuals from trolling. But this is also precisely the argument – that no opinion can be expressed if it might cause psychological harm (i.e. offence) to any person or group of people – which has been used to justify the no-platforming of speakers in universities. Allowing such an approach to be extended to the news publishers would be a very serious development, since tech platforms would then be able to prevent access to content they do not like by arguing that, under the terms of the Bill as drafted, it could upset “an adult of ordinary sensibilities”.
32. We also believe the very concept of content that is legal but harmful is deeply flawed. If content is genuinely harmful it should be illegal – indeed, as the House of Lords Communications Committee report on Freedom of Expression³ noted, there is no shortage of legislation prohibiting harmful content; the problem is that it is not enforced. Parliament cannot just pass the buck by introducing the highly contentious concept of legal but harmful content, giving it the widest and vaguest definition possible, then leave its practical application to Ofcom and Facebook.
33. There is a very real danger – indeed almost a certainty - that every group with a grievance will claim that any news coverage that does not conform to their agenda will cause their members psychological harm. Members of Parliament should not imagine this will only affect one side of any particular argument: it will be easy enough for groups of all kinds of viewpoints, from across the political spectrum, to make such an argument. Unless news publishers are protected by a complete exemption, coverage of any contentious subject, from transgender rights to conflict in the Middle East, will become impossible.
34. The threat to freedom of expression is exacerbated by the fact that the Draft Bill also gives the Secretary of State for Digital, Culture, Media and Sport arbitrary and undefined powers to designate ‘*priority content that is harmful to adults*’.⁴ In the hands of a ruthless and authoritarian government this could rapidly become a tool to suppress political opposition.
35. We, and the rest of the news publishing industry, have argued ever since the original Online Harms White Paper was published that the combination of a vague, all-encompassing definition of ‘legal but harmful’ and draconian penalties for code breaches would cause social media companies to set their algorithms to block any content which might present a risk, wherever it came from and however legitimate it may be as a contribution to public debate.

³ <https://committees.parliament.uk/publications/6878/documents/72529/default/>

⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/985033/Draft_Online_Safety_Bill_Bookmarked.pdf s.46 (2)

36. This is not our only concern. We also fear one of the consequences of the Bill will be the development of a parallel system of press regulation. Our titles (with the exception of the New Scientist) are already regulated by IPSO, which has a well-established Code of Practice, complaints procedures, and rulings made by an independent committee with lay and industry members.
37. What will Facebook's code of conduct look like? We do not know. Will it define key concepts like accuracy, privacy and the public interest in the same way as the Editors' Code we currently follow, or differently? Is it compatible with freedom of expression and democracy in the UK for an American-owned commercial monopoly to be deciding what journalism the British public are entitled to read and what they are not? And is Ofcom the right body to oversee this, given that it is state institution regulating broadcasters which operate under licence, according to a code of practice which demands impartiality and prohibits causing offence, both of which are issues expressly excluded from the Editors' Code?
38. We ask these questions not only because they are very important points of principle but because our experience in the USA, where we are also one of the largest digital news publishers, shows that Facebook is rapidly turning into a quasi-regulator of news, and a very unsatisfactory one at that. This was acknowledged in the Government Response to the Online Harms White Paper, which described how online platforms' existing content moderation results in *'journalistic content being removed for vague reasons, with limited opportunities for appeal'*.
39. For a long time Facebook was the great champion of the First Amendment and was notoriously prepared to allow just about any content which was not clearly illegal, and sometimes even content that arguably crossed that line. It and other platforms also relied on s.230 of the United States Communications Decency Act, which gave it immunity from libel law so long as it did not itself create or edit the content it hosted.
40. Then last year Facebook suffered a major advertiser boycott⁵, following which it and Twitter banned Donald Trump. This is not the place to argue the rights and wrongs of that decision. However the company also started blocking a lot of other content, some of it at the behest of fact-checkers which in some cases we strongly suspect are lobby groups under another guise.
41. To cite a well-known example, one major issue was the possibility of Covid being the result of a lab escape at the Institute of Virology in Wuhan, seen by some as a conspiracy theory associated with Donald Trump. A decision by Facebook to

⁵ <https://www.cnn.com/2020/08/04/some-major-companies-will-keep-pausing-facebook-ads-as-boycott-ends.html>

block such content has now been reversed following a change of view by the Biden administration.⁶ Determining the origin of Covid is central to finding ways to prevent it, and it is deeply worrying if Facebook is suppressing/allowing debate to keep itself in step with what it perceives to be the political orthodoxy of the day.

42. There have been other instances since Facebook changed its policy. When President Biden announced a very ambitious climate change programme that some criticised for lack of detail on how the targets were to be achieved, our US website published a speculative story looking at the sort of measures which might be required to meet those targets. One suggestion was restrictions on meat consumption.
43. A Facebook-funded single-issue fact-checker called Climate Feedback read the story as though it was a factual news report and said it was inaccurate on the basis that Biden's plan did not explicitly include restrictions on meat consumption. As a result Facebook blocked access to the story.
44. Unlike IPSO here in the UK, neither Climate Feedback nor Facebook itself give news publishers any opportunity to defend their journalism before issuing what they call 'strikes' against stories. We complained to Climate Feedback, explaining how it had misread the story. It partially corrected its strike – so it is now contradictory – yet Facebook's ban is still in place.
45. We have no issue with Climate Feedback disagreeing with our story, even if it failed to understand that speculation is a perfectly acceptable journalistic device to demonstrate the lack of substance in a politician's promise. What is not acceptable is for Facebook to take an arbitrary decision to censor a story at the behest of one body with an agenda, and without any process.
46. Facebook has also blocked stories about the four homes accumulated by one of Black Lives Matter's founders, who has described herself as a 'trained Marxist'. Details of the properties, which did not include street addresses, first appeared on a property website. When the New York Post and DailyMail.com, our US website, published versions of the story, the BLM leader concerned complained to Facebook, which blocked the stories, again without reference to us.
47. Facebook's initial strike was not communicated to us, and when we published another article about developments in the story, we were warned that a second strike might result in all our Facebook content being demonetised.

⁶ <https://www.theguardian.com/technology/2021/may/27/facebook-lifts-ban-on-posts-claiming-covid-19-was-man-made>

48. The story was blocked under a Facebook Community Standards rule under which it may restrict access to images of private residences. The rule was no doubt introduced to prevent private individuals harassing other private individuals by posting pictures of their homes with malevolent comments.
49. However it makes no provision for journalism, unlike the Editors' Code of Practice, which protects the individual's reasonable expectation of privacy in their home, but also allows exceptions where the public interest is engaged. One prominent example of this was coverage of Dominic Cummings's now notorious trip to Barnard Castle, which involved publication of numerous pictures of his and his family's homes.
50. We are concerned that sections 12 and 23 of the Bill, which set out regulated services' duties concerning rights to freedom of expression and privacy, also make no reference to journalism or the public interest. This could mean that an important investigative story about a powerful individual, which was fully justified under the law and the Editors' Code, could still be banned on Facebook.
51. The BLM case has clearly concerned Facebook, which has referred it to its Oversight Board, to whom we have made a submission, suggesting that if Facebook is going to block journalistic content in such circumstances, then at the very least it needs to amend its Community Standards to allow editors to defend their journalism, particularly where the public interest is involved.
52. But this brings its own risks. It is quite clear that through the operation of its Community Standards and its Oversight Board, Facebook is turning itself into a quasi-regulator. We are very concerned that if this is given the sanction of official approval by Parliament through the Online Safety Bill, with Ofcom as the oversight regulator, Facebook will start receiving complaints from individuals seeking to chill legitimate journalistic inquiry into their activities, and lobby groups seeking to censor journalism which does not fit their agendas.
53. Facebook began blocking journalistic content in the USA following an advertising boycott organised by the campaign #StopHateForProfit. Although it is not linked, the UK organisation Stop Funding Hate has been trying for some years to censor news coverage it disagrees with by persuading advertisers to boycott publications. Its most recent campaign was against broadcaster GB News, where it tried to organise a boycott even before the station launched.
54. We believe it is incompatible with freedom of expression and media plurality for legitimate, responsible news content to be subject to blocking and take-down by a commercial organisation which is open to commercial pressures such as advertising boycotts, operates without due process, and has no authority to make judgments about the value of journalism.

55. Attempting to remedy this by making Facebook of a state-sanctioned system of regulation would make matters worse, not better, as it would create a competing, parallel system of regulation for the press, administered by a company which is bound to put its own commercial interest in maximising profits and maintaining market dominance before other considerations, including freedom of expression.
56. Given that the fundamental principle of the Online Safety Bill duty of care is to encourage social media platforms to vet content as cautiously as possible by threatening them with massive financial penalties if they do not do so, we also believe legitimate journalism and press freedom must be protected not only by a complete exemption from its provisions, but also by extending the duty of care to impose similar penalties on platforms that interfere with news publisher content (as defined in Section 40).
57. We believe the amendments to the Bill we have proposed in paragraph 19 would achieve those aims. We have also done considerable work with the News Media Association on devising a digital kite-marking scheme which would make this possible by enabling platform algorithms to recognise news publisher content automatically whenever they encounter it. We would be very happy to share this with the Committee.

D. Is there sufficient protection for news publisher content when distributed through search?

58. The position under the draft Bill of news publisher content when it is distributed by search engines is even less clear than it is for social media. It is true that the duty of care laid on search engines excludes news publishers (Section 18 (2)). It is also true that the duty of care applied to search engines only covers content that is illegal, at least as far as adults are concerned, though for children it also covers content that is harmful (Section 19 (3) and (4)). Search engines are required to carry out risks assessments then take steps (i.e. adjust their algorithms) to minimise the risk of users encountering content that is either illegal, or harmful to children.
59. As with social media, however, while the duty of care does not apply to news publisher content, there is also nothing to prevent search engines setting their algorithms to prevent content from any publisher being ranked in their search results if, whether for reasons of operational convenience, or commercial or political expedience, they choose to do so. Beyond a general duty to protect

freedom of expression (Section 23), there is no specific protection for journalism or news publisher content.

60. It is a matter of deep concern to us that there is a growing body of evidence that Google, the dominant search engine, sets its algorithms to favour certain news publishers and discriminate against others. As with social media we fear that the Online Safety Bill will legitimise and institutionalise the skewing of search algorithms to further the aims of a commercial monopoly, to the detriment of freedom of expression, a pluralistic media, and open democratic debate.
61. MailOnline is the most visited news website in the UK (excluding broadcasters)⁷ and the fifth most visited English-language news website in the world⁸. It would be logical therefore to expect, when a member of the public uses Google to search for a news subject such as 'Covid' or 'Brexit', that MailOnline stories would generally appear high up in the first page of search results.
62. That is not the case. Data from search analytics companies Sistrix and NewsDashboard UK shows that Google overwhelmingly favours two news websites - the Guardian and BBC - in search results and discriminates heavily against most other major British news websites, including and in some respects particularly MailOnline. Indeed MailOnline's share of search visibility for many important news search terms is close to zero – for example, for the term 'Covid' it was just 0.22pc for the month of July this year. Indeed, Google's algorithms have consistently reduced MailOnline's search visibility since 2013.
63. Search visibility is significant because it measures not the choices made by users, but the choices made by Google's algorithms when users make requests for particular search terms. The Sistrix search visibility index⁹ is the industry standard and measures Google's ranking across sets of representative keywords.
64. Particularly striking evidence that MailOnline was being discriminated against by Google came in 2019, when an algorithm change in early June cut MailOnline's search visibility by 50pc, while other news websites' visibility improved. Three months later, following protests to Google at the highest level, MailOnline's search visibility was equally suddenly restored. At neither point did we make any changes to the structure or presentation of the site which would explain its rejection or subsequent re-acceptance by Google's algorithms.
65. At the time we were only able to guess why Google had reduced MailOnline's search visibility. However when reviewing evidence for the Competition and

⁷ <https://pressgazette.co.uk/mail-online-biggest-uk-news-website-july-2021/>

⁸ <https://pressgazette.co.uk/top-50-largest-news-websites-in-the-world-sputnik-drudge-and-fox-see-biggest-traffic-falls-in-february/>

⁹ <https://www.sistrix.com/support/sistrix-visibility-index-explanation-background-and-calculation/>

Markets Authority’s (CMA) market study into online platforms and digital advertising, it became apparent to us that the June algorithm change coincided with the introduction by Google of its new Unified Pricing rules for digital ad markets. These rules had the effect of limiting the use by publishers of header bidding, a means of setting price floors which enabled us to fill more of our ad inventory with better-paying non-Google demand.

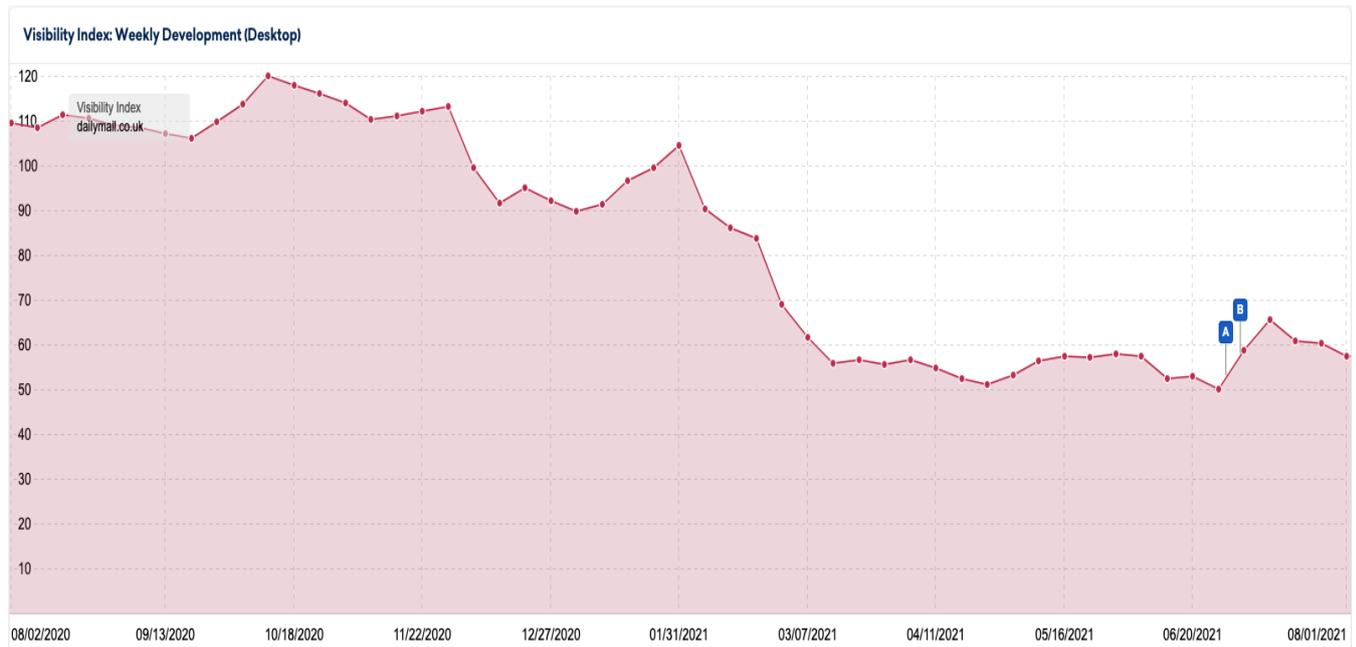
66. We have since learned that other major publishers which made use of header bidding, such as the News York Times and Conde Nast magazines, also saw search visibility drop in June 2019, though not as dramatically as MailOnline. The consequence of Unified Pricing was that by the end of the three-month period June-September 2019, Google had forced MailOnline to sell twice as much ad inventory through Google’s ad exchange, while Google paid half as much for each ad slot.

67. For most of 2020 MailOnline’s overall UK search visibility index, as measured by Sistrix, hovered at around 100 – only a quarter of the best figures recorded in 2012-15, but similar to the level before the dramatic drop in June 2019. However, from January this year we started to see another steady decline in MailOnline’s overall search visibility index, which has now stood for several months at just over 50, around half the level seen through most of 2020, and one-eighth of the 2012-2015 peak. (See Tables 1 and 2).

Table 1. MailOnline UK overall search visibility index (desktop) – last 10 years (source: Sistrix)



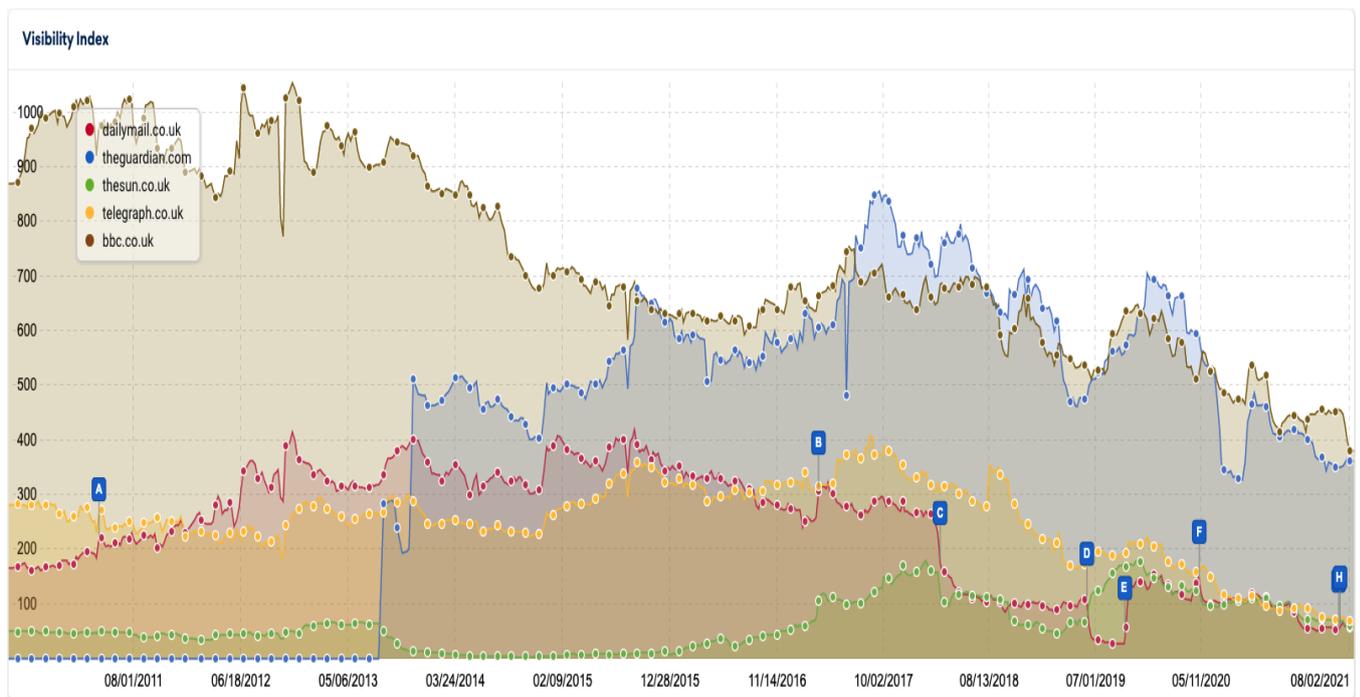
Table 2. MailOnline UK overall search visibility index (desktop) – last 12 months (source: Sistrix)



68. When MailOnline’s search visibility is plotted against its main UK rivals a disturbing pattern emerges. Pre-2015 Google heavily favoured the BBC, with the Guardian, MailOnline and Telegraph broadly grouped together¹⁰. From 2015 onwards two distinct groups start emerging. The Guardian and BBC are consistently favoured, with a visibility index currently standing at around 400, while the Mail, Telegraph and Sun are grouped together with consistently poor visibility, currently standing at around 50-75. (See Table 3 - this chart does not include the Mirror and Express, both of which score slightly below MailOnline).

Table 3. UK competitive search visibility last 10 years (source: Sistrix)

¹⁰ The Guardian had no visibility pre-2013 because at that point it changed to its current domain name, theguardian.com. The Sun had very low visibility 2013-15 because it was behind a paywall.



69. The implications for freedom of expression, media plurality and democratic debate should be obvious. How Google’s search algorithms work is the company’s most closely-guarded secret. Google tells the public:

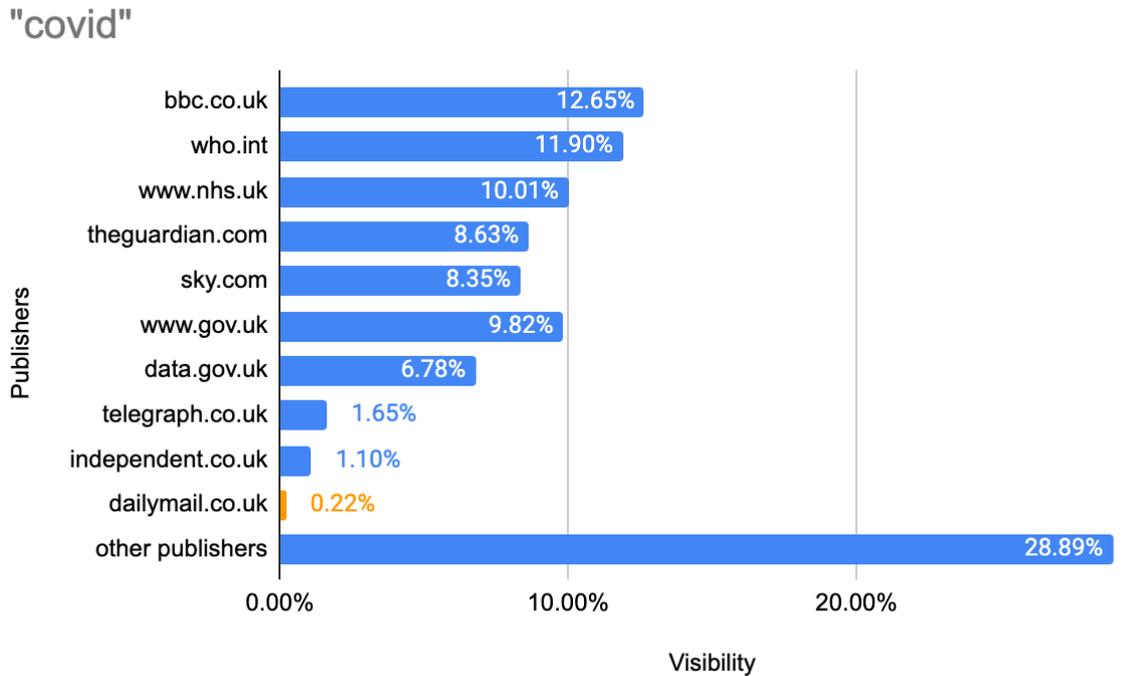
‘To give you the most useful information, Search algorithms look at many factors, including the words of your query, relevance and usability of pages, expertise of sources and your location and settings.’

The public place great faith in Google, and imagine that when they search for news on politics, health, business, or any number of other topics, Google’s emphasis on relevance and expertise means the content they are shown has been picked because it gives the most reliable and useful information. Unless they are students of search visibility they have no idea that when they search for news Google’s algorithms invariably steer them towards two particular news sources, the Guardian and BBC.

70. Moreover, there is nothing in the Bill as presently drafted to prevent Google from picking two other preferred news providers in the future, if it should suit its interests – indeed, as Table 3 shows, at times the Guardian’s own search visibility index has risen, then fallen sharply, as determined by Google’s whim.
71. This pattern is repeated across many search terms, as the following charts demonstrate. The most striking is Table 4, which shows shares of UK mobile search visibility for the term ‘Covid’ during July this year, in which the Telegraph and Independent each score barely over 1pc and MailOnline scores only 0.22pc,

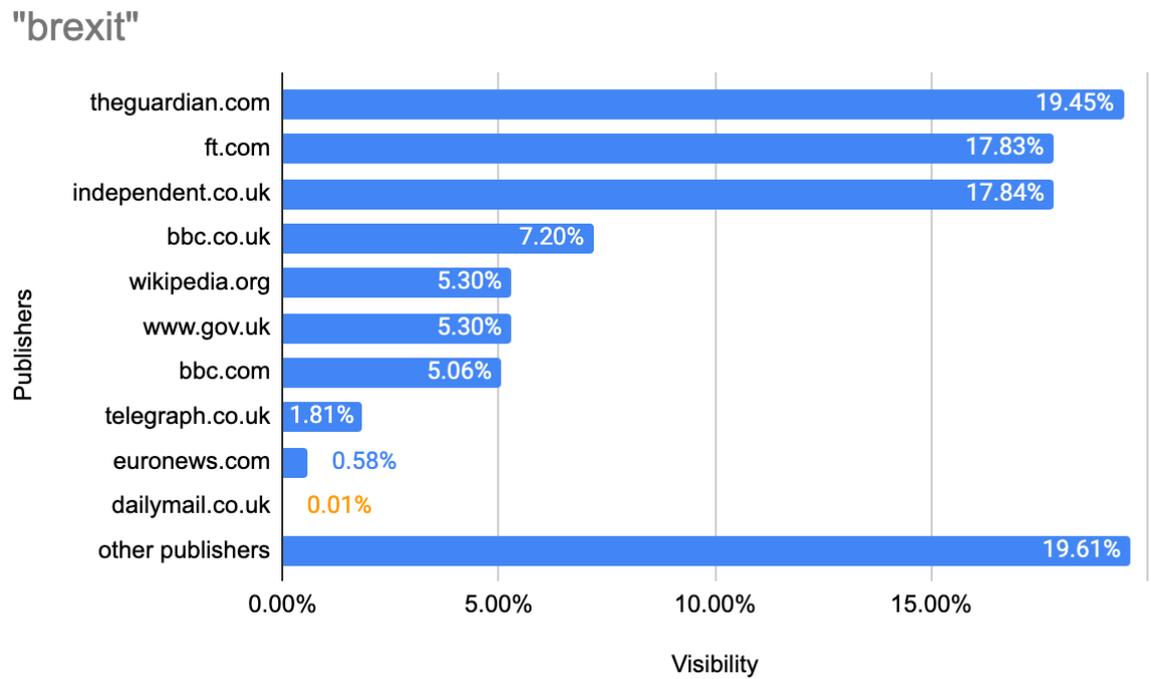
while the BBC scores 12.65pc – 58 times the visibility of MailOnline – putting it ahead of the World Health Organisation and NHS websites, and the Guardian on 8.63pc.

Table 4. 'Covid' - UK Mobile Overall Share of Search Visibility, July 4 – August 2, 2021.
(source: NewsDashboard UK)



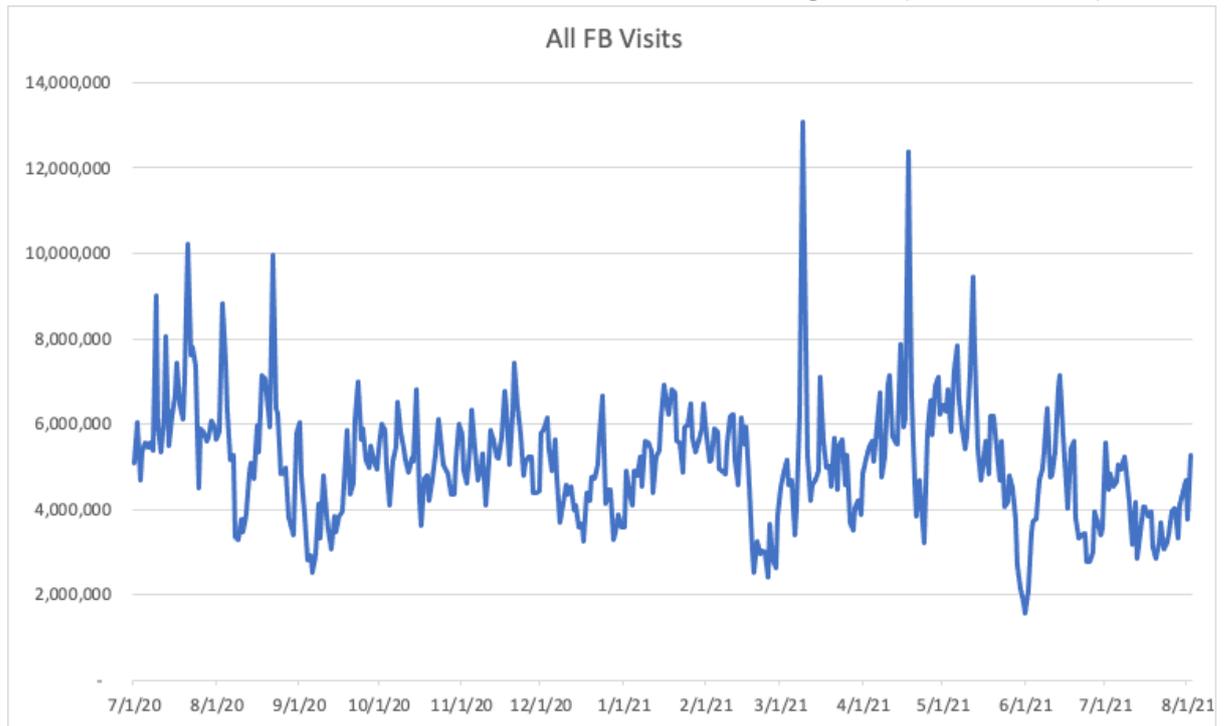
72. When it comes to politics, the Guardian is the winner for the term 'Brexit', along with other pro-Remain websites. Table 5 shows the Guardian scored 19.45pc, while the FT, not normally a good performer because of its paywall, won 17.83pc of Google search requests, closely followed by the Independent. Despite Brexit being a subject to which MailOnline devoted a great deal of coverage, MailOnline received close to zero – a derisory 0.1pc. This is not to repeat the arguments over Brexit, but to make the point that Google can and does direct search traffic overwhelmingly to one side of an issue only.

Table 5. 'Brexit' - UK Mobile Overall Share of Search Visibility, July 4 – August 2, 2021. (source: NewsDashboard UK)



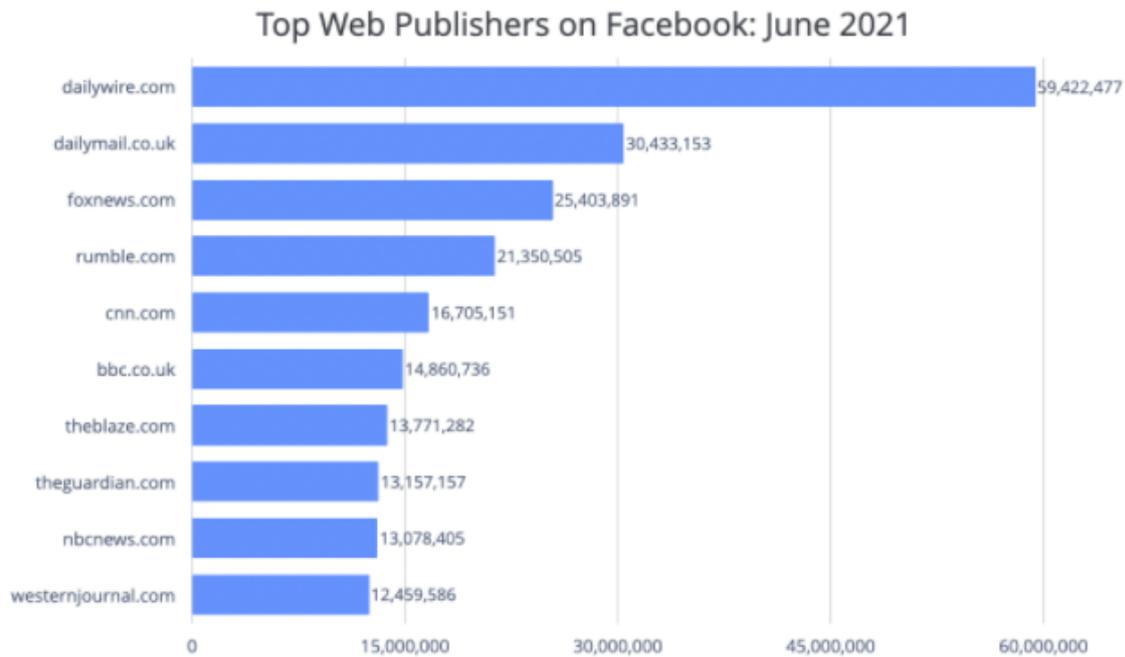
73. In contrast, traffic for Facebook, where results are determined by users' decisions to share content rather than choices made by the platform's algorithms, and therefore indicates which news the public rather than the platform prefers, tells a very different story. Despite fluctuations caused by individual stories going viral, MailOnline traffic has remained largely consistent over the last year, as table 7 shows.

Table 7. Facebook MailOnline article views – 12 months to August 1. (source: Adobe)



74. Indeed, global figures for June this year show MailOnline is the second most popular English-language news website across the whole of Facebook, receiving twice as many visits as the BBC and Guardian combined (see Table 8).

Table 8. Top publishers on Facebook, June 2021 (source: Newswhip)



*Source: NewsWhip API from June 2021

75. What are the reasons for this stark discrepancy? Google never explains how its algorithms work, so we cannot be certain why it discriminates so consistently against some publishers and in favour of others. We believe we now have a convincing case that its two dramatic algorithm changes in June and September 2019 were dictated by its commercial self-interest, and part of its successful campaign to maximise its profits by preventing publishers from using header bidding in digital advertising.
76. For the rest, it certainly appears that Google’s bias against MailOnline is much more pronounced when its algorithms are ranking political stories, than for stories of more general interest. Whether this is a deliberate company policy, or simply the result of unconscious bias on the part of the Californian web engineers programming algorithms preferring websites that echo their own left-liberal views, we cannot know. But it is clearly happening.
77. Our concerns about the commercial effects of discrimination in search led us to argue successfully that the Competition and Markets Authority should include search in its market study into online platforms and digital advertising. We maintained that it was impossible to plan our business without fair warning and explanation of algorithm changes, and without remedies when those changes cause commercial damage. The market study’s Final Report found:

‘It is clear that many publishers rely on Google and Facebook for a significant proportion of their traffic and that changes to key search algorithms by either of these can have a significant impact on publisher businesses. We would, therefore, consider it reasonable that publishers have sufficient explanation of how these algorithms work and sufficient notification of changes to them where they might notably impact upon their businesses. We consider that provision to publishers of sufficient explanation about how the key search algorithms work as well as explanation and notification of changes to these are areas that would appropriately be covered by the proposed code of conduct.’¹¹

78. Slowly, the government is putting in place regulatory structures to deal with these problems. The Digital Markets Unit recommended by the CMA has now started work, and is drawing up codes of conduct in advance of the forthcoming Digital Competition Bill, which will give it statutory powers. Its original remit was economic – to prevent Google reinforcing its dominant market position by directing traffic to its favoured publishers, and away from those such as MailOnline which seek to protect their revenue by using methods such as header bidding to secure advertising from non-Google sources.

¹¹ CMA Digital Advertising Market Study, Appendix S, p.10

79. However, news publishers are not just businesses, they are also participants in the political process – in particular those which are not broadcasters, and are therefore free to editorialise and campaign on the great issues of the day. Google’s policy in the UK over the last decade has been to direct search to the two publishers which it consistently favours – and marginalise other voices such as the Mail, Telegraph, Sun and the Mirror. This is a serious threat to a pluralistic media, and in turn to democracy. Whatever one’s political views, democracy cannot thrive unless all voices can be heard.
80. For nearly forty years the only digital regulator in the UK has been the Information Commissioner, which is solely focused on privacy. Google has consistently used privacy regulation as a reason to deny user data to rival companies in the digital advertising market, and move the digital advertising industry into its own walled garden. The damaging effect single-issue regulation has had on other matters of concern in the digital ecosystem – in this case commercial competition – was recognised by the CMS in its digital advertising market study and addressed by the Government when it set up the Digital Markets Unit, in which the ICO and Ofcom participate as well as the CMA.
81. We are very concerned that even before Parliament gives the DMU the promised statutory powers to impose codes of conduct that will require platform algorithms to operate in a way which is fair, consistent, transparent and non-discriminatory, online safety regulation without a clear, cast-iron exemption for news publishers will provide Google with a new lever to legitimise discrimination against those it does not favour.
82. Therefore it is vital not only that news publishers’ content is exempted from the duty of care as it applies to search engines, but that the duty of care is also extended so that search engines are prohibited from using it as a lever to operate their algorithms in ways that are arbitrary and/or discriminatory.

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