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News Media Europe submission to the European Commission public consultations on the “Digital Services Act package (DSA)” and the “New Competition Tool (NCT)”

News Media Europe (NME) represents the progressive news media industry in Europe – over 2,500 media companies including newspapers, radio, television and internet. News Media Europe is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing the news brands, which are one of the most vital parts of Europe’s creative industries.

Recommendations

- **NME welcomes plans to establish a DSA and NCT and calls on the European Commission for ambitious legislative proposals to shape a safer, more competitive and inclusive digital future for Europe;**
- **NME stresses that discussions related to the DSA and the NCT are difficult but timely, with the recognition that certain platforms routinely engage in harmful market conduct at the expense of other actors, including the news media;**
- **NME highlights that large online platforms are exerting negative pressure on the media industry and by extension on media pluralism, by extracting excess rents that prevent the proper funding of content and journalism in particular;**
- **NME supports a strengthened secondary liability framework for intermediaries that acknowledges differences between content hosts and content producers, and that offers a conditional safe harbour;**
- **NME stresses the need for a robust ex-ante DSA framework to regulate the market conduct of digital gatekeepers, by prohibiting practices with clear harmful effects such as self-preferencing and data disintermediation;**
- **NME stresses the need for a market-based NCT instrument alongside ex-ante rules to address the current enforcement gap, and sees added value in an NCT that allows swift intervention in markets, with the ability to impose remedies;**
- **NME stresses that discussions on the sensitivities associated with certain forms of online advertisement should take due consideration of existing European data protection and privacy regulation.**

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1. Introductory remarks

News Media Europe welcomes the opportunity to take part in the evidence-gathering exercise towards the Digital Services Act (DSA) package and the New Competition Tool (NCT). Our feedback will focus mainly on the review of the intermediary liability regime, the responsibilities of online intermediaries, issues arising from digital gatekeepers alongside broader structural competition issues in digital markets, and the introduction of a new competition tool.

Press publishers in particular have important expectations associated with the DSA and NCT, with the hope that they will support the key democratic function of professional journalism in a fair and inclusive digital environment. With this in mind, these instruments should actively contribute towards enhanced media freedom and creating a level-playing field between news media and tech companies.

The DSA in particular constitutes a unique opportunity to promote responsible actors in the online space by focusing on the regulation of intermediaries. It is clear that such intermediaries now play a critical if not systemic role in society across a broad range of issues that span beyond mere economic considerations. Indeed, it is crucial that the impact of large platforms on the plurality and sustainability of the media is addressed.

In our view, the DSA should therefore contribute to strengthening freedom of expression, editorial control, the protection of journalistic sources, and the financial independence of journalism, while the NCT should complement a clear set of robust ex-ante rules foreseen in the DSA package to ensure a coherent competition framework that can tackle the abusive market conduct of certain platforms.

Importantly, the DSA should not undermine existing media-specific legislation such as the Audiovisual Media Services Directive (EU) 2018/1808 and the Copyright Directive (EU) 2019/790. If overlaps are inevitable, they should strengthen media-specific regimes, not undermine them, and preserve existing and effective forms of regulation which continue to prove their effectiveness in maintaining high standards of journalism.

The governance of a future DSA should involve cooperation between competent national authorities and coordination at EU level to bring procedural efficiencies and improved cross-border enforcement. The creation of a European agency should only be considered on the basis of practical necessity.

2. The impact of major platforms on media pluralism

The emergence of online platforms over the past two decades has contributed positively to the spread of online news content, helping news publishers to reach

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greater audiences than ever before. However, online platforms have also had a huge adverse impact on media pluralism in Europe and beyond globally.

There are multiple underlying reasons for this, but above all is the understanding that the phenomenal growth and profits achieved by certain platforms have taken place at the expense of other market participants.

It has become clear over recent years that large and powerful online platforms have overtaken media companies and content producers in their capacity as the main beneficiaries of digital media content¹. Certain large online platforms are able through intermediation to monetise the biggest share of the value of third-party content, mainly through advertising.

Indeed, certain online platforms now profit disproportionately from third-party content that they do not produce, ultimately to the detriment of media plurality. That is particularly true when one considers what the real added value of their service is: mere intermediation. Yet with the unique structure of digital markets, platforms are able to extract significant excess value from third-party content that sits in sharp contrast with the actual value they offer.

This means that it has become much more difficult to develop self-sufficient, sustainable businesses in the news industry, which also undermines the ability of the market to sustain more companies and therefore greater media plurality in the form of higher participation in the market. That, in turn, has been a key driver of growth in market concentration since economies of scale have become a necessity to maintain profitability.

Overall, this broader shift in the allocation of profits along the media value-chain has created a serious and fundamental problem. The profits derived from monetising content are no longer flowing back to media companies and producers of content, and instead stay within platforms ecosystems, which in turn further undermines business models and content production in the broader media sector.

Ultimately, unless a direct and fair split approach to advertising revenues derived from monetisation of third party content is adopted, or some form of “new deal for online media” is achieved, it is very likely that problems related to funding of media content will persist and worsen, in particular when it comes to news content because it is so reliant on advertising for funding in the first place².

Both Google and Facebook often reduce the debate about the commercial and social value of journalistic content to a simplistic argument which suggests that the provision

¹ Digital Content Next (2017) Distributed Content Revenue Benchmark Report ([link](#))

² Australian Competition & Consumer Commission (2019) Digital platforms inquiry ([link](#))

of web traffic constitutes a one-way, altruistic and charity-like exchange of value in favour of publishers, who in turn should be grateful for the mere existence of these platforms.

This is of course a deeply flawed reasoning and demonstrates poor judgement and a lack of consideration for other non-commercial concerns of a broader, social value. This line of reasoning also completely ignores and dismisses the fact that it is third party content, including journalistic content, that brings users in the first place to platforms.

While the ability of the biggest technology platforms to act independently of other market participants increases, they also play an important role in defining future formats for digital content and are already attempting to unilaterally dictate and shape the future of news, powered through artificial intelligence and machine learning. Google's Google Assistant and Amazon's Alexa voice-based assistant are good examples of this³.

Such products already show that providing traffic, advertising revenues, brand attribution or any form of payment or remuneration if any to media companies and content producers, are not concerns at all. This is deeply concerning for several reasons as it reinforces the abusive cycle of exploitation of third-party content along lines that undermine the principle of fair market competition on the merits.

3. The liability regime of digital services acting as intermediaries

The scope of the DSA and its liability regime should not cover news content producers, press publications and works of a journalistic nature. The news sector already has effective mechanisms in place to deal with content-based issues. In particular, the newspapers industry is subject to independent regulators' scrutiny that set high standards of journalism as well as restrictions above and beyond the law. Therefore, the DSA should focus exclusively on online intermediaries. Our comments will focus on the following aspects of the liability regime:

- Illegal content: the notice-and-take-down mechanism
- Reviewing the ECD liability regime for online intermediaries
- Clarifying responsibilities for online platforms
- Disinformation as harmful content

³ Oxford Reuters Institute for the Study of Journalism (2018) The Future of Voice and the Implications for News ([link](#))

3.1 Illegal content: the notice-and-take-down mechanism

The experience of news publishers in dealing with illegal content online includes illegal advertising, defamatory statements, intellectual property infringements and others, but often focuses on copyright violations, which we will use as a basis to illustrate and discuss a typical reporting procedure and the measures that may consequently be taken. We wish to stress that the DSA should not try to re-write the Copyright Directive (EU) 2019/790, but rather address situations unforeseen by the law so far.

Press publishers or their collective management organisations regularly monitor whether their content is being illegally reproduced on websites or online intermediaries such as social media, search engines, aggregators, etc. Journalists can also contact press publishers when their articles are reproduced without consent.

In such case, press publishers have two options on how to proceed: either contacting the author of the post directly (the alleged infringer) or the online intermediary (the host).

Generally speaking, infringers are genuinely not aware of copyright law and most of them will remove the content upon notification – with or without some persuasion – while only a few will refuse to take action. The situation becomes more complex when the unlawful reproduction takes place in closed social media groups (e.g. Facebook, WhatsApp, Telegram) since it is difficult to identify the unlawful reproduction of content or the person responsible for the group. Once the administrator is identified, press publishers are only able to contact the administrator through the messaging service (e.g. Messenger). Yet the message can simply be ignored, which brings an end to the procedure. As more social media groups turn private or closed, i.e. you need to be approved as a member to see what is posted within the group, it becomes increasingly difficult for rightsholders to monitor illegal reproductions.

Another option is to contact the online intermediary. News producers or their representatives can send the intermediary a warning letter which would typically provide detailed information about which laws are being violated, clear examples of violations on the website or the platform, which solutions are available and the steps to take to implement these solutions. The warning letter would give the opportunity to either remove the content, conclude a license or change the content into a lawful format. When no action is taken, a settlement is sent out.

Press publishers can also notify illegal content through the online intermediary's own reporting procedure. While information about the reporting procedure is generally fairly accessible, the procedure itself typically proves extremely tedious and inefficient, with ample scope for improvement.

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The experience of news publishers is that reporting procedures are excessively time-consuming and that by the time they are concluded, illegal content is uploaded multiple times and broadly disseminated. Filling in a form for every infringing upload is simply impossible. Press publishers could spend infinite resources filling in complaints and yet only a marginal number of infringements would be addressed on large social networks.

Social media must be forced to take more responsibility towards repeating infringers and provide a more efficient reporting system to rightsholders. We suggest:

- The introduction of precise timeframes to make each step of the notice-and-action procedure more efficient;
- The obligation for the intermediary to actively verify the notified content and quickly follow-up with the flagger;
- The obligation for the online intermediary to notify users of the decision to remove content with justifications;
- Transparent and productive communication between the notifier and the intermediary with a direct line, in the same time zone as the notifier and in the local language. We are of the view that platforms could be much more transparent with rightsholders, the same way that users who post illegal content are informed on why their posts are removed from a page.
- Building up on the recent CJEU case law⁴, a stay-down obligation, preventing reappearance of the illegal content once and for all. The Court ruled that an intermediary “can be ordered to remove content identical and equivalent to that found illegal” and that such injunction may produce effects “worldwide”. We think this is positive development insofar as the rightsholder would only have to notify one illegal upload to have all “identical or equivalent infringing contents” removed across borders or on all the company’s services.

To summarise, the notice-and-action mechanism deserves clarification and clear procedural steps, from the reception of the notification to follow-up communications and decisions on removal. Also, intermediaries should be bound by a stay-down obligation to avoid multiple complaints on the same content.

Online intermediaries should be obliged to follow procedural steps based on the clear principle that failure to do so would result in enhanced liability. It is in platforms’ own interests to act and keep their services free from content that is obviously and by nature

⁴ Eva Glawischnig-Piesczek vs Facebook Ireland Limited (Case C-18/18)

illegal, such as terrorist content, child pornography, incitement to violence, hate speech, etc. This is less obvious for other types of content that become illegal because they are uploaded without the rightsholders' authorisation. In both cases, platforms should diligently and swiftly engage in the procedure against illegal content.

Lastly, while there is merit for the DSA to clarify and harmonise the regime at EU level, national authorities should remain competent to enforce illegal content rules.

3.2 Reviewing the eCommerce Directive liability regime for online intermediaries

While we think that some principles of the eCommerce Directive 2000/31/EC (ECD) remain relevant, such as the harmonised liability exemptions, we also believe the DSA should not shy away from improving the liability framework to promote a safer and fairer digital space.

When discussing how such an outcome may be achieved, it is necessary to take due consideration for the ban on general monitoring obligations. While the general ban is well-founded, it should not be used by platforms to turn a blind eye on illegal content circulating on their services. The Internet of today brings risks that did not exist at the time when the ECD was adopted more than twenty years ago. Therefore, it is important to acknowledge that a certain degree of monitoring obligation is desirable and necessary to make platforms more accountable towards business partners, public authorities and most importantly the safety of users.

While we believe that the protection of fundamental rights online is crucial - an argument that our own industry is particularly receptive to - we think that technologies and human review working together can provide the right balance to content moderation and should form the basis for further work in this area. Supporting technologies are important in the fight against illegal content and bring added-value even when human intervention and oversight remain relevant to provide a nuanced assessment.

Second, when it comes to the liability exemptions, the distinction between passive and active hosts (Recital 42) is of crucial importance since it determines whether a host may benefit from the safe harbour. However, experience shows that the distinction is rather unclear and does not encourage platforms to become (pro)active due to the risk of not qualifying for the exemptions, and can lead to inconsistent application of the law. This ambiguity also makes it difficult for press publishers to start legal proceedings when they believe there is an online infringement. Furthermore, we expect that this dichotomy will only become more uncertain as business models evolve. It is therefore important that the DSA addresses this issue.

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We propose to clarify that an intermediary may be “active” whenever it performs “curation”, meaning, when it plays an active role towards the content it hosts. Curation for instance happens when content is presented in an attractive way, categorised, selected or promoted, and can involve some degree of control over content. Hence curation is important because it implies some degree of knowledge about content, which in turn can determine liability according to the existing framework.

Having said this, we wish to highlight that it is crucial to distinguish between “curation” and “content creation”. Online intermediaries are not content producers even though they increasingly curate third party content. To put it simply, social media and editorial media operate under different business models, with different purposes, and thus call for distinct legal qualifications and regimes.

An editorial media, such as a press publisher or a news broadcaster, is one that is primarily liable for its own content. This includes situations where the editorial media publishes and takes responsibility for a third party’s content (e.g. a letter to the editor-in-chief, an opinion, etc). Concretely, press publishers that have editorial control over their own Internet publications do not benefit from the liability exemptions of Article 14 ECD because they do not act as intermediaries⁵. Therefore, news media is primarily and fully liable for the content it produces. On the other hand, a social media hosts and distributes content uploaded by its users: it is already secondarily liable for third party content and can benefit from the ECD liability exemptions under certain conditions.

Now, the distinction becomes more and more blurry as business models evolve on both sides. Social media increasingly curates third party content to propose tailored pages. While editorial media increasingly introduces User-Generated Content (UGC) by encouraging readers and viewers to engage with news rather than passively consuming it, e.g. when uploading the video of a witnessed event, commenting through live chats, etc. However, the business model for social media is essentially based on UGC whereas editorial media incorporates UGC as an accessory to illustrate or comment its own editorial content. The DSA should therefore define a liability regime for social media different from that of editorial news media.

For practical reasons, there is strong merit in considering whether creating new categories of hosting services, such as “social networks” that are in practice in between publishers and distributors, which would be accompanied by a defined and clarified set of legal responsibilities and liability⁶. Such list should not be prescriptive but rather welcome new business models and include evolving obligations.

⁵ Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others, CJEU (Case C-291/13): “Consequently, since a newspaper publishing company which posts an online version of a newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered to be an ‘intermediary service provider’ within the meaning of Articles 12 to 14 of Directive 2000/31, whether or not access to that website is free of charge.” para [45]

⁶ Schibsted (2019) Report “Ensuring democracy and freedom of speech online – a need for a balanced regulation of social networks” ([link](#))

In any event, it is important that the appropriate online intermediary regime should be reinforced by a clear principle of secondary liability. Under the ECD, online intermediaries are subject to a secondary (or limited) liability for the content they do not own. This is a good principle. Yet the current regime does not encourage online intermediaries to take action against certain types of illegal content and experience shows that self-regulation so far continues to fall short of expectations. Therefore, we suggest the DSA introduces enhanced secondary liability attached to some duty of care obligations for major platforms.

3.3 Clarifying responsibilities for online platforms

In our view, it is important that the DSA becomes an instrument to promote responsible actors in the online space. As mentioned, while we agree with the basic principles of the eCommerce Directive, what is missing is the notion of due diligence or duty of care. In our view, platforms should take reasonable steps to keep users safe and prevent harming other users as a direct consequence of the activity performed on their services. Now, some online platforms often hide behind “the responsibility of their users” instead of owning up to their own accountability. This status quo cannot be tolerated for major platforms who could be doing much more.

In theory whether a platform is big or not, the problems and accountability remain the same. But a differentiation based on a threshold system could be put in place (e.g. based on income or number of users) or using existing instruments under competition law (e.g. market dominance). For instance, such duty of care could apply to “systemic” platforms that have become so influential on all aspects of life and the economy, including culture, creativity, politics, social life and electronic commerce, that they must carry a special responsibility towards society. We further develop this notion in the “gatekeeper power” section.

Hosting platforms that are found “systemic” in nature should only benefit from the safe harbour rules applicable under Article 14 ECD provided that they meet clear duty of care obligations. This means that large platforms that are fundamental to the architecture of the internet should be bound by special obligations to avoid turning a blind eye on illegal activities occurring on their services. For instance, business-to-business intermediaries could be subject to a “know-your-business-customer” duty requiring identity checks on the basis of official documents (e.g. corporate registration, postal address, identity card, etc) to prevent fake accounts or pirate websites from prospering. Also, UGC platforms, web browsers, search engines or aggregators, could be bound by a “share-with-care” obligation, by warning users to think twice before sharing or redirecting users to lawful options. External auditing could serve to verify whether such duties have been diligently carried out.

To summarise, the DSA could build on the existing liability regime by clearly defining secondary liability for online intermediaries. For instance, we propose making curation

an indicator that the platform has *knowledge* over the substance of the content to determine liability. Systemic platforms would only benefit from the secondary liability exemptions provided that they perform special duty of care obligations. Such duty of care obligations should in no circumstance apply to news publishers which already follow thorough editorial processes and assume clearly defined legal responsibilities for the nature of their content. As such, intermediaries should also not interfere with editorial content integrity and media independence by exercising duty of care or other standards in relation to professional news content. Otherwise, online intermediaries' new compliance practices and algorithms risk delisting, deranking or removing publishers' content.

3.4 Disinformation as harmful content

The DSA is the opportunity to clarify the rules applicable to online intermediaries in the fight against disinformation. However, such rules must respect media freedom and fundamental rights such as access to information and freedom of expression. Hence, we believe that the DSA should not regulate content but rather encourage platforms to put measures in place to promote trustful sources, become more accountable to the public, work with independent fact checkers, and demonetise disinformation by removing their ability to profit from advertising. Currently, platforms are not sufficiently incentivised to put such measures in place.

For instance, there can be a significant financial incentive to fabricate and disseminate fake news, as content published online can benefit from advertising revenue. Producers of fake news notably compete with trusted media providers for the attention of readers and for advertising revenues. Therefore, professional journalistic content and trusted sources could be put more in the spotlight to give users better access to reliable information.

We suggest the DSA imposes algorithmic transparency rules on hosting service providers to ensure the distribution of a diversity of opinions and variety of contents online. In particular, hosting service providers should be subject to accountability rules towards news producers with regards to the monetization and distribution of their content. A functioning Digital Single Market should ensure that quality content, especially professional journalism, is given more prominence and attracts more user traffic than illegal or harmful content.

Fact-checking UGC can be a solution in the fight against disinformation while avoiding over-removal. However, it is important to preserve the integrity of professional news media content that has already been fact-checked and subject to strict journalistic guidelines. In other words, responsibility should never extend to the review of editorial content to respect media independence and freedom. Nor should platforms' own standards result in the removal or otherwise undermining of the integrity of journalistic

content. Our industry already has in place national press complaint systems to deal with concerns associated with professionally edited news content.

Also, the decision as to whether content is “acceptable” should not be left to tech companies’ private policies or community standards. One issue is that disinformation may be subject to different definitions from one Member State to another and such fragmentation can lead to legal uncertainty. In our view, EU guidance could clarify what can constitute “disinformation”, e.g. the notion of “intention” to differentiate an inaccurate statement from conscious misinformation, the exclusion of parody and satire to preserve media freedom, or generally the exclusion of any definition that could be used as a justification for legal restraints on news media publishers’ content, which is already subject to national laws and the industry’s own codes of conduct.

That said, decisions related to UGC should be taken in line with cultural differences and national rules for freedom of speech. Therefore, regulatory scrutiny and enforcement on disinformation should for now be left to national authorities. However, if self-regulatory efforts continue to fall short of expectations, the natural way forward would be additional intervention possibly in the form of co-regulation. Yet there remains a question mark as to whether this would be best achieved at EU or national level. In any event, improved coordination between Member States would yield better results.

4. The gatekeeper power of online platforms

News organisations in Europe, whether publishers, radio or tv broadcasters, must develop a strong and sustainable online presence in order to fulfil their mission and commercial objectives, whether through the development of own tools or through partnerships with third-party commercial entities.

In practice, the size of companies involved in the production and distribution of news and the ways in which news consumption is evolving means that publishers very often have to work with large online platforms who, by virtue of market structures, have both the ability and incentive to engage in anti-competitive practices that distort competition⁷.

This observation relates mainly but not exclusively to large and powerful platform operators that have become “systemic” digital gatekeepers, who are unavoidable partners and control access to key markets. Such gatekeepers are able to determine the trading conditions for third parties, and to behave independently of other actors in the online marketplace due to the market power afforded to them by their strategic position as intermediaries.

⁷ J. Crémer, Y-A. de Montjoye and H. Schweitzer (2018) Report on “Competition policy for the digital era” ([link](#))

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As such, large platforms can control access to audiences, monetisation tools, data and more. Such platforms are present across a range of markets of key importance for news companies, including search, social networks, app stores, over-the-top communications services, and content aggregators, which enables them to leverage their market power into neighbouring markets to the detriment of existing and potential competitors, including news publishers at large.

EU competition law is inherently flexible enough to address many of the concerns shared by the news media. Yet, it is also by itself insufficient to solve all of the problems identified, and complementary regulation is therefore required in the form of ex-ante regulation⁸⁹. Below, we explore a number of recurrent areas of concern identified by our industry over the past years, and also provide some case studies, which we believe should inform EU policy makers, across a non-exhaustive range of issues including:

- Challenges with digital gatekeepers
- Disintermediation problems
- Competition concerns of news publishers in online advertising
- Lack of transparency in the ad-tech supply chain
- Problems with bargaining power in digital markets
- Dealing with imbalances in bargaining power

4.1 Challenges with digital gatekeepers

News publishers are heavily reliant on a few large and powerful intermediaries to do business, notably Google and Facebook, across a number of core business functions such as content licensing and distribution, audience and advertisement analytics, advertising, and other supporting technology services.

The relationship with these platforms is a complicated one, as previously highlighted in our contribution, since they both offer services used by publishers but also compete with them for the same revenue, while controlling the access to key markets as well as the rules that govern such access.

These specific structural market conditions, combined with the use of commercial practices by platforms that raise concerns of an anti-competitive nature, have increasingly resulted in discussions revolving around the concept of “digital gatekeepers”.

We believe this problem identification accurately captures the relevant market dynamics at play, especially when it comes to the understanding that certain platforms

⁸ Digital Competition Expert Panel chaired by J. Furman (2019) Unlocking Digital Competition ([link](#))

⁹ Stigler Center Committee on Digital Platforms (2019) Final Report and Policy brief on Digital Platforms ([link](#))

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can also assume a “systemic” role in the marketplace, without necessarily having a “dominant” position in the market within the meaning of EU competition law.

Digital gatekeepers are of particular concern to news publishers when they build their activities on a strategic market position. This is because such strategic positions in the market may not always satisfy the conditions for dominance that has traditionally guided work in the field of EU competition law. In such cases, competition authorities have very limited powers to prevent market conduct that can still result in significant harm for the marketplace and consumers.

It is furthermore important that the role of certain large platforms be recognised as “systemic” in their role across a variety of regulatory purposes, as the European Commission acknowledged in its Communication on Shaping Europe’s Digital Future, and regulators should not shy away from understating this reality¹⁰. Such systemic platforms essentially control access to large markets that can hardly be ignored by smaller third-party operators, creating an uneven relationship of dependency, and can also have significant broader social, political and cultural implications for society.

In a stricter economic sense, systemic platforms constitute unavoidable partners, which is the experience that news publishers have in relation to several of the big technology firms such as Google, Facebook and Apple. As such, they can and should in our view also be seen as systemic gatekeepers. The economic model of these platform operators means that much of the content on the internet is now accessed via their platforms, including news and journalistic content, and it is clear that a major relationship of dependency has developed over time.

The problem of excessive dependency has now reached a critical juncture that is exacerbated by the economic models of certain intermediation platforms which continue to leverage their strategic position in the market to forcibly disintermediate other industries. In practice, certain systemic gatekeepers are now largely able to set the terms and conditions that govern the distribution and accessing of news content via their platforms independently of what other third-party commercial partners do, demonstrating their ability to behave independently of other market participants and competitors.

This dynamic is particularly acute and most visible when it comes to access to data-related issues, with the prevailing concern of news publishers being the phenomenon of data disintermediation. Both Google and Facebook are able to strong arm news publishers through their respective publishing tools, Google Accelerated Mobile Pages “AMP” and Facebook Instant Articles into giving up any rights on user data or on the data that results from their own commercial activities to the benefit of the closed data ecosystems or walled-gardens that these digital gatekeepers are able to thus reinforce.

¹⁰ European Commission (2020) Communication on “Shaping Europe’s Digital Future” ([link](#))

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This puts news publishers in a difficult position in relation to systemic gatekeepers since publishers cannot afford to forego the benefits of having access to the market and user base that these platform operators can provide access to, in order to retain an economically sound footing in the marketplace. News publishers are in this sense coerced to accept unenviable trading conditions and are as such locked in the closed platform ecosystems that systemic gatekeepers develop, alongside their userbase and corresponding data space.

Looking to the not so distant future, the rise of smart speakers, voice assistants and similar audio-based technologies, raise significant concerns about a handful of companies becoming gatekeepers at the centre of much regulatory debate. Such internet-of-things devices are likely to rapidly grow to control access to key markets and become unavoidable partners, and the way in which the underlying search function of such devices respond to queries will have a major impact on the media sector¹¹.

Overall, it is clear to us that there are several ways in which gatekeepers can be looked at and defined. Most importantly for the news industry, is the recognition that certain large platforms in particular take on a systemic character in their importance as commercial partners, and as such become “unavoidable partners”. They are effectively gatekeepers to users, data, and entire markets.

The notion of gatekeepers is not a notion that should be restricted by existing EU competition law constructs, and should instead be flexible to address the current shortcoming of the competition framework. The importance of specific criteria in determining which platforms should qualify as “gatekeepers”, and consequently be included in the scope of a stronger, ex-ante framework for large platforms, should be further investigated in the framework of an impact assessment study.

4.2 Disintermediation problems

As the digital economy evolves, many new online platforms that act as intermediaries emerge and bring valuable and innovative services to the marketplace. That is in principle a positive and welcome development that can drive new, mutually beneficial commercial partnerships and bring more choice for consumers.

However, when the market power of intermediaries or their strategic market position is used to forcibly impose or exacerbate disintermediation effects at the expense of the legitimate activities of third-party businesses, with the effect of coercing such businesses into accepting otherwise unacceptable terms and conditions, such intermediaries raise strong concerns about harmful anti-competitive behaviour.

¹¹ Oxford Reuters Institute for the Study of Journalism (2018) The Future of Voice and the Implications for News ([link](#))

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Disintermediation can take many forms and gatekeeping platforms such as Google and Facebook have been central to the harmful disintermediation process that has taken place between news publishers and their audiences over the past 20 years. This development is highly regrettable since intermediation by online platforms is not inherently harmful and could in theory be harnessed to drive healthy competition in digital markets.

Platforms such as Google and Facebook go to great lengths to control the interfaces through which news content is delivered on their platforms and to claim exclusive ownership of users and client relationships. They also further disintermediate the advertising side of the market as well as audiences, and by extension they also disintermediate publishers from data that is critical to the development of sustainable digital business models.

Disintermediation problems related to data are particularly urgent to address since data serves not only as input for key business processes, but for innovation, for the development of new products and services, and for spotting emerging market trends. On a broader level, data allows businesses to better engage with their consumers and audiences and enables digital business models to thrive. This is particularly relevant when considering the need to attract paying customers in the form of subscribers. In practice, publishers need to be able to access data if they are to be able to offer good services and to compete with large platforms.

News publishers may try to bypass the data ecosystems of large platforms and to develop their own capabilities as competitors, by creating first party data spaces which can have multiple purposes. When that is possible, more publishing, analytical and trading functions can be brought in house and allow for companies to further develop and diversify their business models and strategic capabilities through organic growth.

This approach, however, can only succeed if digital platforms do not interfere with the ability of publishers to collect and process data associated with their products and audiences, and if they do not artificially restrict the right of legitimate businesses operating on their platforms to collect and process that data. This problem posed by data disintermediation can be illustrated through several industry products belonging to Google, Apple and Facebook, amongst others.

In the case of Apple's App Store, for example, Apple claims to have ownership of the relationship with users of apps developed by third party developers that are made available on its App Store platform. Whereas many news publishers spend significant amounts of time and effort to develop apps to better engage with audiences, and in a

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spirit of good faith, publishers are only given little to no access to user data because Apple considers that it owns the said data¹².

Apple considers that it owns the said data because the terms and conditions governing the use of the App Store for app developers stipulate that Apple is the contractual party with whom end-users of apps enter into an agreement. The Commission's decision to open a formal probe into the App Store and the number of complaints concerning Apple's policy is testament to the seriousness of the concerns raised over time by such practices.

It needs to be assessed whether the imposition of terms by platforms such as Apple that systematically disintermediate data and/or seek to limit access to data, constitute an abuse of dominance, and it is equally necessary to assess whether such terms can be considered unfair and anti-competitive in light of this. Yet such issues may also arise in situations where a given platform may not be dominant per se in a strict sense, but instead may still be regarded as a digital gatekeeper with important "intermediary power".

Here, the Spotify-Apple anti-trust investigation of the European Commission may prove to be a case in point. Apple claims that it is not dominant in any market, and instead faces intense competition in a range of markets such as music, streaming, phones, laptops, etc.

On the other hand, if one follows the logic of the 2018 Android decision¹³, it could be argued that Apple faces no competition in app stores for Apple's iOS, and that Apple is therefore the default monopolist in this market and thus holds a dominant position, and that its App Store rules are therefore capable of producing exclusionary and exploitative effects on app developers at large.

The case goes to demonstrate how a finding of dominance, which could have a decisive impact on the finding of whether certain practices are abusive, anti-competitive and harmful under the current regulatory framework, can vary in outcome as a function of the market definition process. Regardless of the outcome of this particular case, it follows that it is conceivable that more situations may arise whereby a firm may not be necessarily dominant because of the definition of the relevant market but could still be engaged in practices with harmful effects on the market and consumers that warrant some form of intervention.

For instance, Apple recently announced that the newest iteration of its operating system "iOS 14" for its desktop and mobile devices will include a new feature: when clicking on news links, Apple News+ subscribers, instead of being redirected to

¹² The Netherlands Authority for Consumers & Markets (2019) Market study into mobile app stores ([link](#))

¹³ European Commission (2018) Press Release "Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine" ([link](#))

publishers' websites, will be directed to the Apple News + app (this would apply when news publishers are part of the Apple News+ licensing programme)¹⁴.

This effectively amounts to harmful form of data disintermediation which will keep users in the Apple closed data ecosystem to the detriment of publishers who will consequently lose access to valuable data. In this scenario, Apple is leveraging its position as a gatekeeper, without necessarily doing so on the basis of a dominant market position.

App stores, in general, also raise a broader question going forward about who should be considered the owner of data, and by extension who should have the legitimate right to access data held by intermediaries. In many cases, such data is essential so that the right level of service can be provided to users and so that businesses may develop their own capabilities and digital business models. Cutting off third parties from accessing such data therefore does not seem fair or legitimate.

In fact, it appears counterintuitive that intermediary platforms rather than app developers should own and control access to such key data. When a user navigates the app of a news publisher and benefits from journalistic content on it, it is clear the user is doing so primarily in a capacity as a consumer of a product or service supplied by the app developer. In that case, the fact the content is accessed via, for example, either an app store belonging to Apple or Google, is merely coincidental.

We therefore believe that the DSA should impose a legitimate data access obligation on platforms acting as gatekeepers towards third-party commercial partners operating on their platform. This would go a long way towards balancing competition in the long-term, in ways that competition policy cannot address, especially when non-dominant firms are concerned, and give recognition to legitimate online business models. Such an obligation should explicitly include app stores in its scope.

Doing so would require a competent regulator to have both powers to collect information from companies involved in data disintermediation, but also to be able to impose tailor-made remedies to specific market participants going forward.

4.3 Competition concerns of news publishers in online advertising

Industry experts refer to the online advertisement market as “the duopoly” because of the overwhelming market dominance of Google and Facebook, respectively in the search and display/non-search markets. The high levels of concentration in these markets put at significant risk the economic sustainability of present and potential

¹⁴ TechCrunch (2020) iOS 14 redirects web links from News+ publishers directly to the Apple News app ([link](#))

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future business models for news organisations, and media more broadly speaking, that rely on advertising¹⁵.

In practice, this is reflected by the very limited share of revenues derived from the selling of advertising space that contribute towards the bottom line of publishers, and disproportionately high share of profits that are absorbed by various advertising technology companies along the value chain.

There is no comprehensive and definitive study identifying across markets the typical or average split and distribution of revenues. But the existing literature and anecdotal evidence, probably more on the optimistic side of the discussion, point to news publishers struggling in most cases to achieve even half every 1 EUR spent by advertisers at the other end of the supply chain. This is often referred to as the so-called “ad tech tax” that ultimately remains difficult to explain and which we elaborate on in the following section.

Overall, it is concerning to observe the continued trend and paradox of increased popularity and monetisation of digital media content, in particular as regards journalistic content, while the financial gains derived from that very content, or the proportion of those profits that goes back to benefit content producers, remains very limited. In this sense, the main beneficiaries of content monetisation through advertising are now large and powerful online platforms which intermediate, distribute and monetise third-party content.

It is of particular concern for the news industry that certain platforms not only distribute news content, but also compete for advertising revenue with news organisations while supplying them with advertising technology-related services. This can contribute to exacerbating the gatekeeper relationship between large platforms and news publishers and in this sense, large platforms may have become unavoidable partners to an even greater extent which enables them to impose unenviable terms and conditions.

In addition, we note that several platforms increasingly compete with news publishers for the provision of news-related products and services, as evidenced by the growing number of journalists that these platforms are hiring to support their product development teams. This is a testament to their intent to move into news-related neighbouring markets, in a bid to extract further value from publishers, possibly through greater disintermediation.

As such, competition with news publishers no longer only takes place along the lines of advertising revenues. Google, Facebook and Apple all have such products (e.g. Google News, Google Discovery, Google Accelerated Mobile Pages “AMP”, Google Subscribe, Google Assistant, Facebook Instant Articles, Facebook News Tab, Apple

¹⁵ Competition and Markets Authority (2020) Online platforms and digital advertising report ([link](#))

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News+), with varying degrees of editorial control being applied to the content itself. Of particular concern is the rise of voice assistants from various technology companies, who would provide voice-based news aggregation services.

Another issue that deserves particular importance from the perspective of online advertising, is the shift that internet browsers are forcing through the phasing out of third-party cookies, which are fundamentally essential to the ways in which digital advertising companies currently operate, except for Google who is largely able to provide advertising services on a first-party basis due to the vast swathes of data it has accumulated over time through its many products and services.

This is why the announced phasing out of third-party cookies by Google by 2022¹⁶ through the Google Chrome internet browser raises strong concerns about the exclusionary effects it would have on the rest of the online advertising industry. This is of particular concern when one considers that Google already holds a dominant position both in the market for web browsers and the online advertising market, which could as a result become further entrenched.

Google has justified its decision to phase out third-party cookies as informed by privacy concerns, following similar moves by Mozilla's Firefox and Apple's Safari browsers. Yet, it seems that eliminating third-party cookies only, if anything, maintains the ability of companies such as Google and Facebook to track users, while preventing their competitors in the advertising sector from doing the same, thus strengthening their position as gatekeepers. In practice, it will become harder for other digital advertising companies to conduct their activities such as browser-based targeting, cross-site tracking, frequency capping and retargeting, which are essential parameters of competition.

Indeed, the move would also not affect the quantity and depth of tracking that Google itself would continue to conduct, and therefore raises important questions about whether this decision is really motivated by privacy concerns, or by abusive anti-competitive behaviour with clear exclusionary effects on competitors, since unlike Mozilla and Apple, Google has a clearly dominant position and important market power in browsers that it can leverage in the online advertising market.

Addressing the concerns raised in relation to online advertising would require a competent regulator to have both powers to collect information from companies involved in online advertising, but also to be able to impose tailor-made remedies to one or several market participants going forward.

¹⁶ Google Chrome Blogpost (2020) Building a more private web: a path towards making third party cookies obsolete ([link](#))

4.4 Lack of transparency in the ad-tech supply chain

Transparency in the marketplace is a basic requisite for the development of a healthy competitive environment. Unfortunately, transparency is too often lacking the case in the ad-tech ecosystem and it is clear to us that much more can be done to improve transparency to the benefit of all participants involved, businesses and consumers alike¹⁷.

It was hoped that the online advertising supply chain's overall transparency situation would improve from a data protection point of view with the General Data Protection Regulation (EU) 2016/679 (GDPR), but that has not consistently been the case across the entire advertising ecosystem.

Indeed, Google has been able to exploit the GDPR to its own advantage to entrench its market position by offering to deliver all advertising technology services in the ad tech stack while also refusing to share data with publishers, preventing them from effectively competing and developing their own capabilities. In doing so, it has also become clear that the data protection standards applied by Google for internal purposes, as opposed to in relation to data sharing with third parties, are by comparison less restrictive.

Furthermore, it has become clear that in addition to issues associated with data protection, there are also broader and more basic transparency concerns that persist as regards auction mechanisms and bidding processes, matching functions, pricing, hidden fees, remuneration of intermediaries, as well as the wider competitive process.

A recent study by PwC UK suggests that 15% of every British Pound spent by advertisers “disappear” in the supply chain and cannot be accounted for, a situation which in our understanding reflects the market reality in other parts of Europe as well¹⁸. It follows that there are legitimate questions and concerns about the way in which parts of the ad tech ecosystem work.

Shedding light on the competitive process is complicated because of the difficulty involved in gathering the information necessary to make a good assessment of the landscape. It is notoriously difficult to map out the precise scope of activity of firms involved in online advertising intermediation at technical level alongside market shares, and how such parameters may reflect different competitive processes.

In this sense, greater transparency across the industry, mandated through regulation, should be seriously considered as a way of ensuring that news publishers can obtain a better deal in the online advertising market. This could notably be achieved by

¹⁷ Algoware (2019) An overview of the Programmatic Advertising Ecosystem: Opportunities and Challenges ([link](#))

¹⁸ PricewaterhouseCoopers (2020) ISBA Programmatic Supply Chain Transparency Study ([link](#))

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mandating the development of a transparent, industry-wide standardised process of billing and receipt for ad tech services.

Yet, this would remain insufficient to address the current concerns shared by news publishers and other parts of the advertising ecosystem. When discussing the lack of transparency in ad-tech, it is also important to discuss the role of the Google advertising machinery specifically, since it plays such an important role throughout the entire supply chain from picking the relevant ads, to placing them and measuring their effectiveness on publishers' websites.

As the European Commission recently noted as part the Google-Fitbit merger review procedure¹⁹, Google is already dominant in online search advertising, it holds a strong market position in online display advertising and, importantly for this discussion, it also holds a strong market position in the supply of ad tech services.

Because Google's market power across these key online advertising markets is so strong, it is equally concerning to observe the absence of full transparency and disclosure on how it determines its commercial offerings and how they may artificially deflate the bottom line of commercial partners through higher prices that harm business users and consumers.

It is commonplace for industry commentators to refer to the Google advertising ecosystem as a "black box"²⁰, where advertisers do not know why they are paying a certain price to put out their ads and do not know whether they are getting the best value for their money, and vice versa when it comes to online publishers.

Central to this concern is the realisation that Google operates with conflicts of interest as it is significantly active both on the sell and buy-side of the advertising market, with a strong position at each stage of the value chain²¹. On the basis of its uniquely strong market power in advertising, Google is able to charge significantly higher prices to advertisers than its competitors.

In this sense, Google has the ability and incentive to exploit its position on both sides of the market by engaging in exclusionary conduct through self-preferencing. In doing so, Google is able to leverage its strong position to make it harder for third parties to compete on the merits. Google's significant data advantage and the absence of meaningful competition in search advertising, from where Google leveraged its strong market position to enter the open display market, only aggravate this concern.

¹⁹ European Commission (2020) Press Release "Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by Google" ([link](#))

²⁰ New York Times (2019) The Online Ad World Is Murky. A Group of Companies Wants to Fix That. ([link](#))

²¹ Competition and Markets Authority (2020) Online platforms and digital advertising report ([link](#))

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This creates several risks for rivals such as anti-competitive tying/bundling and a lack of interoperability. This can be exemplified with the merger of Google's "Double Click for Publishers DFP" (Ad server) and "Ad Exchange AdX" (supply-side platform and ad exchange) products into "Google Ad Manager" in 2018.

At its very core, Google's online advertising business is about the real-time electronic buying and selling of ads and advertising space through an advertising exchange. In essence, this business replicates the structure of traded financial markets, except that in Google's case, it is a single company that simultaneously operates the leading trade venue and the leading buyers and sellers. Google therefore engages in market conduct that would in other electronic trading markets be prohibited by law²². The status quo amounts to having leading banks running the most important stock exchanges.

It is therefore also essential, in addition to developing more transparent billing and receipting, to further investigate the online advertising value chain and Google's multiple roles thereof to determine if it is abusing its position as dominant firm and a systemic gatekeeper, and whether some form of structural separation or prohibition to be active on both the buy and sell sides of the market is consequently necessary to ensure the good functioning of the market.

This would require a competent regulator to have both powers to collect information from companies involved in the ad-tech ecosystem, but also to be able to impose tailor-made remedies to one or several market participants going forward.

4.5 Problems with bargaining power in digital markets

One of the key characteristics of the difficult relationship between digital gatekeepers and news publishers is the fundamental imbalance in bargaining power that consistently prevents third parties from securing better trading conditions and which, by extension, enable gatekeepers to operate independently of the rest of the marketplace.

Typically, this is reflected in the unilateral imposition of terms and conditions that third parties are coerced into accepting due to the gatekeeping role of platforms on which they rely and depend on to do business. A subsequent issue is that such terms and conditions are not always contestable since they may not necessarily constitute an anti-competitive practice with harmful effects within the meaning of EU competition law.

The concern that imbalances in negotiation power highlight between third parties and platforms are already serious and are likely to become worse with time unless policy intervention is carried out, as the European Commission rightly acknowledged in its preparatory work ahead of the Platform-to-Business Regulation (EU) 2019/1150²³.

²² D. Srinivasan (2020) Why Google Dominates Advertising Markets ([link](#))

²³ European Commission ((2018) Impact Assessment of the Platforms-to-Business Regulation Proposal ([link](#)))

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In particular, the case of bargaining power of news publishers needs to be considered in relation to Google, Facebook and Apple who should be seen as key digital gatekeepers notably but not exclusively because they constitute “unavoidable trading partners”²⁴.

This uneven relationship can be illustrated with several problems that publishers regularly refer to when discussing the issue of bargaining power, and which reflect to varying degrees the ability of gatekeepers to leverage their market power to entrench their own position in the marketplace.

For example, these gatekeepers can make sudden and unexplained changes to their basic search (or similar) algorithms, which can have an important, adverse impact on the web traffic of news publishers and on their financial performance and ability to develop their data capabilities in the longer-term. Repeated efforts to address this issue directly with these companies have yielded little to no attention at all to this ongoing problem. In this area, it is clear that additional rules of conduct of business rules are needed to ensure more predictability for businesses subject to rankings and other forms of indexation. In this respect, the rules in Art. 5 of the Platform-to-Business Regulation (EU) 2019/1150 on rankings under are necessary but not sufficient.

Increased algorithmic transparency should also serve the purpose of shedding light on the extent to which the revenues of platforms are linked to third-party media content. That in turn should help establish an equitable distribution of revenue between content producers and intermediaries.

Another important area of concern is the unilateral development and imposition of content delivery formats and standards on gatekeeping platforms, such as Google’s Accelerated Mobile Pages “AMP” and Facebook’s Instant Articles “IA”²⁵. Google’s AMP format has in particular also raised significant concerns in the broader open internet community²⁶.

For news publishers, the AMP standard is concerning because refusing to use it basically results in lower rankings in search and exclusion from news carousels found in the Google News and Google Discover products. As such, it amounts to exclusionary conduct. Furthermore, the AMP format also means that content is hosted and served directly via Google’s own proprietary servers and domains which means that users are kept within the Google ecosystem or walled-garden which reinforces its own market position.

²⁴ P. Alexiadis and A. de Stree (2020) EUI Working Papers: Designing an EU Intervention Standard for Digital Platforms ([link](#))

²⁵ Columbia Journalism Review (2018) Google’s new hands-off approach to AMP fails to satisfy its critics ([link](#))

²⁶ AMPletter.org (2018) A letter about Google AMP ([link](#))

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This creates several disadvantages for news publishers such as making it harder to build direct relationships with audiences, reducing the subscription conversion rates, limiting the use of interactives features in articles, damaging advertising revenues for publishers, and preventing the collection and processing of user data.

The AMP standard further comes with onerous terms and conditions that grant Google excessively broad present and future rights over content which would, in the absence of an imbalance in bargaining power, otherwise be rejected as unfair. These terms form in our view the basis for possible exploitative abuses.

Concerns broadly similar to Google's AMP exist in respect of Facebook's sister product "Instant Articles". With the development of a Facebook "News Tab" product, and its expected roll out in Europe this year or next, there are growing concerns that Facebook may coerce publishers into adopting the content delivery format standard by developing search rankings that penalise publishers that do not make use of it, resulting in exclusionary conduct similar to Google with AMP and the Google News and Google Discovery products.

As in the case of changing algorithms, both Google and Facebook have shown very little interest in sitting at the table with news publishers to discuss concerns associated with the AMP and IA products, which illustrates the problem of bargaining power that publishers face. For large gatekeeping platforms like Google and Facebook, it does not matter if a few publishers refuse or reject their products and terms and conditions at an important cost whereas the opposite is true for publishers who are dependent on fair access to those markets to develop a strong and sustainable digital presence.

A more recent illustration of this same problem can be observed in the ongoing dispute involving Google and French news publishers in relation to the implementation of the Copyright Directive (EU) 2019/790, which affords news publishers a new neighbouring right which entitles them to remuneration for the exploitation of their content.

This dispute, which we expected will be replicated in other Member States and beyond globally, as evidenced by recent developments in Australia²⁷, demonstrates the problematic nature of Google's bargaining power in relation to news publishers, raising important concerns from the perspective of competition law and provisions against the abuse of dominant positions.

Google is currently able to leverage its market power and far superior bargaining power to prevent the application of Article 15 of the new Copyright Directive (EU) 2019/790. The French competition authority found in its preliminary decision²⁸ that Google has potentially abused its dominant position in the search market by offering news

²⁷ Financial Times (2020) Google says Australian news rule threatens free search services ([link](#))

²⁸ Autorité de la Concurrence (2020) Press Release "Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news agency AFP (Agence France Presse)." ([link](#))

publishers inequitable terms that are also in breach of the spirit and objective of the Directive.

Last but not least, the terms and conditions governing the use of Apple's App Store can also be used as example of imbalance in bargaining power. In essence, it is equally difficult for news publishers to forego a presence on the Apple ecosystem and publishers are therefore forced to accept whatever terms and conditions Apple wishes to impose, even when this may amount to exploitative abuse.

Currently, publishers who develop their own apps face important restrictions on what they may communicate to their users through their apps, and the required use of Apple's proprietary in-app purchase system to sell content, which in turn is tied to a significant fee, and consequently eliminates competition in payments. Unfortunately, Apple has shown no interest in discussing those terms and conditions in the past, which also points towards bargaining power problems.

Regarding the specific issue of payments, we believe that additional regulation is needed to ensure open competition. This issue is not new, and EU legislation is already in place to ensure competition in payments when it comes to banking institutions through the second Payment Services Directive (EU) 2015/2366. We support similar legislation to avoid exploitative abuses.

The bargaining power issues identified demonstrate that a stronger form of regulatory incentive is needed to ensure more balance in the way in which platforms interact with news publishers. In our view, the introduction of an ex-ante framework with horizontal rules for large platforms, inter alia on self-preferencing and other forms of exclusionary and exploitative practices, must be an important element of the regulatory response.

4.6 Dealing with imbalances in bargaining power

Broader concerns over imbalances in bargaining power, specifically in relation to media players and news publishers in particular, are not new. Indeed, there have already been debates about whether the industry should be granted a waiver from anti-trust laws in order to engage in collective bargaining with systemic gatekeepers such as Google and Facebook. The idea is that such bargaining rights could cover different activities, such as terms and conditions of content distribution, and content monetisation via licensing and advertising.

That has indeed been the recommendation of several policy initiatives globally. In Australia, the ACCC has recommended a mandatory bargaining code of conduct to govern the relationship between news media and Google and Facebook, to address bargaining power imbalances²⁹. In the US, a bill "Journalism Competition and

²⁹ Australian Competition & Consumer Commission (2019) Digital platforms inquiry ([link](#))

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Preservation Act” is currently being debated in the anti-trust subcommittee of the Judiciary Committee³⁰, to grant news media a waiver from anti-trust law to allow them to enter into collective negotiations and increase their bargaining power.

Closer to home in Europe, the German legislator adopted a law in the form of the 9th Amendment Bill to the Act Against Restraints of Competition which entered into force in June 2017³¹. The amendments included inter alia an exemption from cartel rules for certain forms of cooperation between publishers of newspapers.

More recently, the UK competition authority as part of its “Online platforms and digital advertising” market study recommended the establishment of a pro-competitive digital regulatory regime, including the development of a code of conduct that would inter alia cover elements of the publisher-platform relationship, with issues such as control over content, content monetisation and access to user data being addressed³².

Our view at EU level is that it is clear that further tools, possibly along the lines of some of those described above, are needed to address the current acute imbalance in bargaining power between news publishers and systemic digital gatekeepers, possibly building further on the Platform-to-Business Regulation (EU) 2019/1150 instrument.

Experience from publishers demonstrates that it is very difficult to bring any of those platforms to the table in the first place, let alone to discuss the possibility of deviating from the anti-competitive baseline trading relationship that these systemic gatekeepers seek to impose on business users.

News Media Europe has previously called for news publishers to benefit from a General Block Exemption Regulation at EU level to allow for collective bargaining rights vis-à-vis certain digital gatekeepers that would ensure better negotiation power and immunity from anti-trust cartel rules. We wish to reiterate this call.

5. Addressing structural market problems through a New Competition Tool

The previous sections identified and described some of the key competition problems faced by news media when doing business in the digital economy. Even if some of those challenges are specific to the media sector and news publishers, it is also clear that many are not insofar as they also concern other businesses operating in digital markets in their capacity as business users of, or third parties to, large online platforms.

³⁰ US Congress (2019) Journalism Competition and Preservation Act of 2019 ([link](#))

³¹ Bundeskartellamt (2019) Act against Restraints of Competition ([link](#))

³² Competition and Markets Authority (2020) Online platforms and digital advertising report ([link](#))

5.1 Reflections on the scope and purpose of a new competition tool

The competition problems faced by news media warrant in our view the introduction of both ex-ante rules for digital gatekeepers and of a complementary new competition tool to preserve and restore dynamic competition in digital markets. In particular, the introduction of ex-ante rules for platforms is also in itself unlikely to be sufficient to address emerging competition concerns associated with digital markets given the pace at which such markets evolve. As such, the introduction of a new competition tool as a complementary instrument to ex-ante regulation becomes critically important to ensure a healthy competitive process.

In this sense, we believe that the proposed new competition tool could bring most added value to the EU competition framework as a horizontal, market-based instrument because it could accordingly provide a clear basis for market-wide interventions to proactively promote competition, not only on the basis of market conduct but also of market features. Such a change in the underlying approach to enforcement would in our view constitute positive and progressive change, but also at a more practical level address some of the substantive gaps or limitations associated with ex-ante regulation.

Some digital markets exhibit important structural risks for competition, while others experience a structural lack of competition. The latter in particular may arise notably but not exclusively when the concerned market is tipping or has already tipped, or when certain firms become insulated from dynamic competition because their strong market position becomes so entrenched that the market is no longer properly contestable. It is by now abundantly clear that digital market failures are more prevalent than some commentators would suggest, especially in light of repeated claims not supported by little to no evidence that digital markets experience intensive competition and that markets remain highly contestable.

It is clear that many market features can play an important role in producing such structural outcomes and they include but are not limited to market concentration, high vertical integration (and ensuing conflicts of interest), lack of multi-homing, lack of access to data, extreme economies of scale and scope, strong direct and indirect network effects, the gatekeeping role of some platforms and broader relationships of economic dependency, the development of platforms ecosystems or walled-gardens, and general lack of transparency. When combined, these dynamics favour the continued incumbency of large platforms and raise questions as to whether certain markets are even still contestable.

5.2 Harmful market conduct by large platforms not in the scope of the EU competition framework

At a more granular level, it is of particular concern that large platforms are able to leverage their market power, or strategic market position in the case of gatekeepers, from one market to another, or multiple others, in ways that are not possible for other market operators to replicate and that are inconsistent with the principle of competition on the merits. As such, it is important that the current regulatory toolbox is strengthened when it comes to platforms that are largely insulated from dynamic competition, and who engage in harmful market conduct, especially when the said conduct is identified in the absence of a finding of dominance within the meaning of EU competition law and Article 102 TFEU.

This is important because some platforms may in the absence of a dominant status in a given defined market still play a role of systemic importance in the marketplace, for instance by virtue of their role as gatekeepers, derived from their strategic position in the market as an intermediary. The market conduct of such gatekeepers is as such able to produce important exclusionary and exploitative effects to the detriment of other economic operators and consumers alike, that should raise serious concerns about harm.

It is therefore essential that the new competition tool does not become a dominance-based instrument. A case in point may be the emerging market smart speakers, voice assistants and similar internet-of-things audio-based technologies which raise significant concerns about a handful of companies that may become gatekeepers³³ in an oligopolistic market structure, where no single platform may necessarily achieve a market dominant status.

The French competition authority put forward earlier this year interesting proposals on digital gatekeepers³⁴, reflecting a progressive understanding of underlying theories of harm in digital markets applicable in the case of non-dominant undertakings. In that context, a number of harmful and abusive gatekeeper practices were identified as raising concerns including discrimination, preventing access to markets where the gatekeeper is not dominant, leveraging data where the gatekeeper is dominant, making interoperability more difficult, making portability more difficult, and making multihoming more difficult.

It is also clear that the current competition framework has reached its limits when it comes to markets that have already irreversibly tipped, or are about to tip, and that new and better use of restorative remedies, including interim measures, is needed

³³ Oxford Reuters Institute for the Study of Journalism (2018) The Future of Voice and the Implications for News ([link](#))

³⁴ Autorité de la Concurrence (2020) Contribution de l'Autorité de la concurrence au débat sur la politique de concurrence et les enjeux numériques ([link](#))

going forward. The new competition tool should therefore aim to address this enforcement gap. For this to be possible, the scope of the proposed instrument should cover both structural and non-structural (behavioural) remedies.

That is especially important given recent experience and difficulties associated with overseeing the effective implementation of behavioural remedies in digital markets, which we suspect will gradually lead to more prevalent use of structural remedies, especially if the aggressive market conduct of certain platforms remains unchanged. We furthermore wish to highlight the importance of explicitly including data-related remedies in the scope of the proposed instrument, including mandated access to data for third parties, mandated interoperability, and mandated data separation or prevention from integration.

5.3 How the new competition tool could address the concerns of the news media

Overall, it is our understanding that a new competition tool should be an instrument sufficiently flexible to address a variety of different competitive scenarios that may arise in digital markets. One of the main benefits of a new competition tool should therefore be to promote timely and efficient intervention in such markets before irreparable harm occurs, in what may be described as strengthening the preventive arm of competition policy. Keeping up with change in digital markets is already widely recognised as a major challenge for competition authorities that contributes to the enforcement gap³⁵. The proposed instrument should therefore seek to add value in this area.

Our submission identifies several situations where the imminent launch of new products and services by large platforms, or changes to terms and conditions, are the source of competition concerns, and where a new competition tool could be envisaged as an instrument capable of swift and proportionate intervention on justified grounds, before irreparable harm occurs. The market-wide intervention powers are also relevant in such cases to avoid “reinventing the wheel” in some scenarios, such as those involving Google’s harmful market conduct in vertical, specialised search markets.

So while it is clear that a number of procedural safeguards should be introduced as regards the new competition tool, both as a matter of general good law and to ensure that the tool is not misused, such safeguards should not be so burdensome as to undermine timely intervention in the market or to reproduce lengthy procedures traditionally associated with competition cases, or be opened to other abusive “delay tactics”. Any process of judicial review should benefit from a fast track procedure with competent courts of justice.

³⁵ J. Crémer, Y-A. de Montjoye and H. Schweitzer (2018) Report on “Competition policy for the digital era” ([link](#))

In any event, it remains essential for any new competition tool to have sufficient powers to pose a credible challenge to the systemic, anti-competitive market conduct of certain large online platforms. It is clear that large platforms are able to approach competition proceedings as a cost of doing business, while conversely for other businesses in digital markets the questions at stake are more often than not of an existential nature. The new competition tool should therefore act as a deterrent against harmful market conduct and bring more discipline to digital markets, with the understanding that dissuasiveness should remain a cornerstone of EU competition policy.

As concerns the relationship between the proposed new competition tool and other competition instruments, such as sector inquiries, enforcement through cases and the foreseen ex-ante rules, some clarifications would be needed regarding the preferred approach according to the circumstances. As previously iterated, we view one of the major benefits of a new competition tool as the ability to swiftly intervene in markets to prevent irreparable damage.

That will however only be possible if the substantive standard of proof to be met for imposing necessary and proportionate remedies is lowered, possibly reversed under specific circumstances, as compared to current practice in individual enforcement cases. Since the process should be open to judicial review and would not involve the formal finding of an infringement nor fines or other penalties, this seems to be a reasonable compromise approach that could safeguard procedural fairness while also ensuring the flexibility required to successfully operate the proposed instrument.

6. Emerging issues in online advertising

Online advertising plays a uniquely important role in funding journalism across Europe, at a time of important difficulties for our industry. The digital transformation of news publishers in particular continues to be a complicated process as the growth in digital revenues is often insufficient to offset lost revenues from the legacy print business.

Regulatory initiatives in the field of advertising are therefore of direct concern to our industry which, in the wake of important challenges in developing new content monetisation strategies, will continue to be very reliant on advertising revenues to be able to fund quality journalism in the foreseeable future.

Based on the European Commission public consultation and discussions in the European Parliament on the Digital Services Act, we wish to submit comments on a number of advertising-related themes:

- Transparency in commercial communications
- Political advertising
- Advertising Technology “Ad-Tech”

- Personal data and advertising

6.1 Transparency in commercial communications

There is absolutely no doubt that advertisement should be identifiable as advertisement, whether that is on paper or in a digital format³⁶. EU legislation already ensures in several ways that “commercial communications” should be identifiable as such, even if the precise standards through which this requirement is implemented currently varies depending on the Member State.

It is indeed also necessary to ensure that audiences are able to correctly identify who is communicating with them through online advertising, and who is paying for the ads that are being delivered to them, so that a safe and trusted online space is fostered.

With such concerns borne in mind, the news media industry continues to be very supportive of self-regulatory initiatives in the field of advertising as means of achieving good outcomes that balance all the interests at stake in this debate. Our industry proactively supports self-regulation as means of achieving more efficient and better results than through lengthy and burdensome regulatory procedures involving public authorities.

We and our members work together with self-regulatory organisations at European and national level to ensure that problems identified by consumers, regulators and businesses in relation to commercial communications, be they related to content or delivery, can be addressed in a good manner.

We are of the view that if there are concerns associated with the status quo concerning transparency requirements on commercial communications, that this should be raised as an issue with self-regulatory bodies in the first place to better understand whether legislation is even needed or justified. We remain available to further discuss the ongoing work in the field of advertising self-regulation.

6.2 Political advertising

The issue of political advertisement has received significant attention in recent years due to various interrelated developments. There have been suggestions that the EU should seek to further regulate such advertising, notably based on the understanding that what is illegal offline, should also be illegal online. We therefore share some observations below.

³⁶ International Chamber of Commerce (2018) Advertising and Marketing Communications Code ([link](#))

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Much of the discussion on political advertising follows from growing concerns about disinformation, election interference and large-scale manipulation taking place in the ecosystems of powerful online platforms.

Often, however, such political ads that are cause for concern are enabled by the mismanagement of citizens' data by large online platforms, who continue to face little to no accountability for their role and lack of transparency.

It is clear that large online platforms such as those operating as social networks could do much more to ensure that political advertising takes place under sound conditions. This includes but is not limited to transparency for users on why they are seeing certain ads, verifying the identity of advertisers, and revealing how much political advertisers are spending, for instance.

We therefore suggest that possible additional regulation should be targeted and limited in scope so as not to adversely impact editorial media that is already regulated and not the source of the concerns that tend to be raised (eg. print, journalistic outlets online, radio and tv).

In fact, more traditional forms of media such as print and broadcasters are in most EU countries, in one form or another, already covered by relevant legislation and laws that apply to political advertisement, notably through electoral law.

We therefore wish to avoid conflict with or overburdening existing systems that may already be functional, with additional regulation that could have the adverse effect of undermining existing measures or overburdening editorial media.

6.3 Advertising Technology “Ad-Tech”

The ad-tech and broader third-party ecosystem that characterises the contemporary online advertising industry is very important to news publishers because it allows news organisations to efficiently monetise their content without necessarily having to possess the relevant in-house technological knowledge and expertise. This is particularly useful for smaller and medium-sized businesses, such as local and regional publishers.

In practice, the use of advertising technology allows news publishers to drive a better match between the ads served and the audiences that they reach, meaning that such ads have a better conversion rate (ie. the desired outcome in terms of either raising awareness or leading to an actionable outcome such as the sale of a product or service). For this reason, advertising space can command a higher price with marketers, which helps to drive profitability.

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Working with third parties to form an online advertising supply-chain, however, also means that news organisations are only partially in control of the supply-chain. This loss of control is not inherently harmful but poses a number of challenges in the present environment in the absence of an appropriate overarching framework that helps ensure collective responsible behaviour and accountability in the marketplace.

The current challenges are in particular exacerbated by the presence of tech giants with immense market power who are in position to act unilaterally with no regard for other market participants. The strong position and vertical integration of Google along the ad-tech value chain is of major concern here. As such, it is clear to news publishers that much more can be done to improve transparency to the benefit of all participants involved.

While the overall situation has arguably improved from a data protection point of view since the GDPR came into force in 2018, there are still basic transparency concerns that persist as regards bidding processes and matching functions, pricing, hidden fees, and the wider competitive process. For instance, and as already explained in the section concerning gatekeepers, a recent study by PwC UK suggests that 15% of every British Pound spent by advertisers “disappear” in the supply chain and cannot be accounted for³⁷.

As news publishers seek to develop a trusted and safe digital environment in which to serve customers and to develop better products and solutions, they need to ensure that all of their partners act responsibly. It is therefore of the highest importance that news publishers, also being ultimately responsible for the impact that activities may have on direct users of their service, are able to conduct audit assessments of other participants in the supply-chain, even in the absence of direct contractual relationships with advertising intermediaries.

As industry best practice and norms evolve, such auditing practices are becoming more common place and accepted. However, not all market participants, least of which large online platforms, and in particular Google who maintains an extremely strong and vertically integrated presence throughout the online advertising market, are willing to accept to be transparently audited for the purpose of ensuring that acceptable standards are met in the broader process of serving ads to users. Regulation may therefore be needed to ensure that the use of audit procedures becomes possible.

While such effective, enforceable controls targeted against the platforms need to be implemented quickly, in the meantime, an immediate practical approach, could be to encourage the development of a self-regulatory system of transparent receipting and billing, enabling buyers and sellers of advertising inventory to better understand the

³⁷ PricewaterhouseCoopers (2020) ISBA Programmatic Supply Chain Transparency Study ([link](#))

underlying financial dealings that drive the distribution of profits along the online advertising value chain.

The importance of conducting such audits cannot be understated. There are concerns associated with competition law, consumer protection, data protection, privacy protection, disinformation, other forms of harmful content, and other illegal or bad ads. All of these possible areas of concern warrant some degree of access to all participants in the supply chain to ensure better control by first parties and to safeguard the best interest of legitimate businesses and consumers alike.

We stress that any new regime should be targeted at the platforms, neither placing new or broader legal responsibilities upon publishers, or allowing the platforms to shift their responsibilities to them, nor require publishers to perform unreasonable due diligence checks beyond normal contractual requirements, nor be placed at risk of legal liability for failure to do so.

6.4 Personal data and advertising

Following discussions on the DSA that have taken place in the European Parliament, we wish to highlight our industry's strong commitment to continue implementing the GDPR and the ePrivacy Directive (2002/58/EC), which are currently into force and which together constitute the core regulatory framework governing the online advertising industry.

We note that it has been suggested that this framework is insufficient to obtain meaningful user consent to the relevant data-driven operations used to deliver ads, which we strongly disagree with. News publishers provide ample and comprehensive information to website users and audiences about how online ads are served and make use of user information in the form of personal data.

Specifically, under the GDPR and ePrivacy framework, audiences already have transparent access to the type of data collected, the purpose for which they are processed, and can consent and withdraw consent or opt-out at any time.

It has also been suggested that another, additional layer of consent specific to advertising should be introduced. We view such proposals as redundant, unnecessary, burdensome, and inconsistent with existing rules. We further take the view that the current regulatory framework is fit for purpose and should not be undermined in this way.

This means that new proposals to create another layer of rules regarding profiling, tracking and targeting of users, or other opt-in or opt-out systems, and use of behavioural data, should be avoided altogether and at all costs. This will ensure that

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the current and already comprehensive data and privacy protection rulebook is applied in a consistent and effective manner.

We also wish to note that proposals to introduce so-called “accountability and fairness criteria” to algorithms used to target users with advertisement to allow the use of external audits could prove a very demanding and burdensome exercise. We suggest that existing tools in the field of audit are explored before considering any regulatory measures.