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**TO: COMPETITION COMMISSION OF SOUTH AFRICA**  
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**COMPETITION IN THE DIGITAL ECONOMY**  
**SUBMISSION BY MEDIA MONITORING AFRICA**

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## INTRODUCTION

1. Media Monitoring Africa (MMA) welcomes the opportunity to make submissions on the Draft Paper on Competition in the Digital Economy (Draft Paper). MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are media ethics, media quality and media freedom. MMA aims to contribute to this vision by being the premier media watchdog in Africa to promote a free, fair, ethical and critical media culture. MMA has over 27 years' experience in media monitoring and direct engagement with media, civil society organisations and citizens. MMA is the only independent organisation that analyses and engages with media according to this framework.<sup>1</sup> MMA has previously made submissions to the Competition Commission in respect of the data services market inquiry.<sup>2</sup>
2. As a point of departure, MMA shares the view that the digital economy presents crucial opportunities to address unemployment, inequality and poverty in South Africa, but that these opportunities are not yet being appropriately harnessed. According to the report of the Presidential Commission on the Fourth Industrial Revolution (Presidential Commission), citing research from the World Bank Group, it was noted that:<sup>3</sup>

"In 2016, the global digital economy was worth some \$11.5 trillion – equivalent to 15.5 percent of the world's overall GDP. It is expected to reach 25 percent in less than a decade, quickly outpacing the growth of the overall economy. However, countries like South Africa are still currently only capturing a fraction of this growth and need to strategically invest in the foundational elements of the digital economy to keep pace."
3. The report of the Presidential Commission noted further that countries in Africa are trailing considerably behind developed markets in their share of the digital economy, which is a trajectory that is likely to continue and fuels a growing global digital divide.<sup>4</sup> It is deeply concerning that the most vulnerable segments of our population – including those who lack education and financial means – are likely to be most negatively affected by the transition to the digital economy and excluded from the benefits that it has to offer.
4. Despite the obvious benefits of the digital economy, it also presents incumbent risks. As an important source of news, digital platforms can impact the proper functioning of democracy. Of particular concern, the use of algorithms may determine what content is amplified or suppressed, which may have far-reaching consequences when the consideration is informed by partisan considerations. In the current digital economy where there are only a handful of dominant platforms, this challenge is compounded by the exclusion of new competitors

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<sup>1</sup> For more about MMA, please visit: [www.mediamonitoringafrica.org](http://www.mediamonitoringafrica.org).

<sup>2</sup> The submission can be accessed here: <https://mediamonitoringafrica.org/wp-content/uploads/2018/10/MMA-DSMI-Submission-Non-confidential-1-Nov-2017-1.pdf>.

<sup>3</sup> Presidential Commission, 'Diagnostic report: Summary and key findings', January 2020 at p 40.

<sup>4</sup> Id.

entering the market due to high barriers to entry.<sup>5</sup> The consequence of the disparity in market power between users and platforms means that users are unable to negotiate the ways in which their data is processed or determine the diversity of information which they are exposed to on the platform. With no viable alternatives, users are forced to consent or give up the ease of communication afforded by such platforms. These practices fundamentally impact the public's exercise of the triad of information rights, namely freedom of expression, access to information and privacy.

5. At the crux of this submission is a key issue that the Draft Paper does not address: the role that competition in the digital economy can play in fostering and promoting public interest journalism. Drawing on work being done in other jurisdictions on this issue, this submission will offer insight into how the Draft Paper can be adapted to address this critical issue.
6. This submission is structured in two parts:
  - 6.1. In **Part I**, we set out several overarching considerations that we submit should inform the content and approach of the Draft Paper, as well as the work of the Competition Commission going forward. These considerations are informed by a rights-based approach in the public interest that seeks to ensure that there is equal enjoyment for all persons in South Africa of the benefits that the digital economy can offer.
  - 6.2. In **Part II**, we focus specifically on how the Competition Commission, and the role of competition law more broadly, can serve to foster and promote public interest journalism. In this regard, we start by highlighting the importance of public interest journalism for the realisation of the right to freedom of expression, as well as political rights and democratic processes. We then turn to set out our specific recommendations that we propose should be incorporated into the Draft Paper.
7. These are dealt with in turn below.

## **PART I: OVERARCHING CONSIDERATIONS**

### **Need for a rights-based approach in the public interest**

8. As noted in the Draft Paper, the unique nature of the digital economy – with its rapid rate of change, conglomerate concentration, and informed consumers – has required the Competition Commission to approach competition regulation with a different mindset. In doing so, MMA urges the Competition Commission to treat the Constitution of the Republic of South Africa, 1996 (the Constitution) as a fundamental starting point. Concerns raised by the lack of competition are not simply economic – they raise significant political and social concerns

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<sup>5</sup> Digital Freedom Fund, 'The need for digital rights protections in upcoming EU competition law consultations', 25 June 2020.

which fundamentally impact human rights.<sup>6</sup> Accordingly, any response to competition in the digital economy must consider the impact of digitisation on human rights in order to inform the development of competition regulation in a way that respects, protects and promotes such rights.

9. There are a number of provisions of the Constitution that are relevant in this regard. Section 1 of the Constitution makes clear that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>7</sup> The state is required to respect, protect, promote and fulfil the rights in the Bill of Rights, which consequently requires the state to take both positive and negative measures to realise the fundamental rights of people in South Africa.<sup>8</sup> The Bill of Rights also binds all organs of state,<sup>9</sup> as well as natural and juristic persons to the extent applicable.<sup>10</sup>
10. As South Africa seeks to harness the benefits of technology and realise the impact of the digital economy, it is imperative that any strategy has a clear constitutional underpinning. This includes reference to the following rights:
  - 10.1. **Equality and non-discrimination:** Equality includes the full and equal enjoyment of all rights and freedoms.<sup>11</sup> Neither the state nor any person may unfairly discriminate against any person on any of the prohibited grounds, which includes race, gender, sex, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.<sup>12</sup> Additionally, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) includes in the definition of “prohibited ground” any other ground that causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner.<sup>13</sup>
  - 10.2. **Information rights:** The Constitution provides for the right to freedom of expression, access to information and privacy.<sup>14</sup> In particular, the right to freedom of expression includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.<sup>15</sup> The freedom to receive or impart information or ideas is emphasised by the right of access to information, which guarantees that everyone has the right to information held by the state, as well as to any information

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<sup>6</sup> European Commission, ‘Competition policy for the digital era’, 2019.

<sup>7</sup> Section 1(a) of the Constitution.

<sup>8</sup> Section 7(2) of the Constitution.

<sup>9</sup> Section 8(1) of the Constitution.

<sup>10</sup> Section 8(2) of the Constitution.

<sup>11</sup> Section 9(2) of the Constitution.

<sup>12</sup> Section 9(3) and (4) of the Constitution.

<sup>13</sup> Section 1 of PEPUDA.

<sup>14</sup> Section 14 of the Constitution.

<sup>15</sup> Section 16(1) of the Constitution.

held by another person that is required for the exercise or protection of any rights.<sup>16</sup> Moreover, the Constitution provides that everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed.<sup>17</sup>

- 10.3. ***Best interests of the child:*** The Constitution stipulates that a child’s best interests are of paramount importance in every matter concerning the child. The Constitutional Court has explained that children do not have the same capacity as adults to protect themselves, and are therefore more in need of protection in line with their best interests.<sup>18</sup> This entails an obligation for the law to do all that it can to create conditions that protect children and expand their opportunities, so that they can lead productive and happy lives.<sup>19</sup> With reference to the interplay of the abovementioned rights, the Constitutional Court has held that the “analysis of the right to privacy is even more pressing when dealing with children”, including on the basis that the “protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy”.<sup>20</sup>
11. These rights play a critical role in the development and implementation of any strategy or recommendations on the digital economy. For example, with regard to the right to equality, it must be central to the strategy that all persons are able to enjoy the benefits of the digital economy, without deepening existing socio-economic divides or causing systemic disadvantage to those who cannot afford to enjoy the benefits of technology. The strategy should be characterised by openness, transparency and accountability, which requires the free flow of information and the protection and promotion of the media. Additionally, any strategy must pay due regard to vulnerable or marginalised groups of persons, including children whose best interests must be considered as key to the approach.
12. A failure to adopt such an approach will not only lead to legitimate questions being raised as to whose interest the digital economy is being regulated, but it will also almost certainly work to favour certain powerful vested interests, ultimately defeating the goal and purpose of the Competition Commission.
13. ***Accordingly, MMA proposes that the Draft Paper makes clear that it is framed by a rights-based approach in the public interest, and identifies the particular rights that are of key relevance to the issues pertaining to competition in the digital economy.***

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<sup>16</sup> Section 32(1) of the Constitution.

<sup>17</sup> Section 14(d) of the Constitution.

<sup>18</sup> De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 63.

<sup>19</sup> S v M [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 20.

<sup>20</sup> Centre for Child Law v Media 24 Limited [2019] ZACC 46 at para 49.

## Realisation of universal, meaningful access to the internet for all persons

14. As noted by the Presidential Commission, broadband internet and data are foundational to the digital economy.<sup>21</sup> However, there persists a significant digital divide in South Africa, which results in the exclusion of millions of South Africans from the ability to participate in the digital economy. This is as a result of a confluence of factors, including the exorbitantly high cost to communicate, the delays in the release and allocation of spectrum, barriers in the licensing of new entrants to the market, misconceptions about the internet and a lack of digital literacy skills. While the Competition Commission's data services market inquiry was an important starting point on this issue, it is clear that significant work still needs to be done.
15. Notably, despite the mandatory price reductions resulting from the data services market inquiry, MMA remains concerned that this has brought little relief in practice. As noted in a recent policy brief published by Research ICT Africa:<sup>22</sup>
  - 15.1. **Prices remain anti-poor:** Due to lack of regulation and an inherently imperfect market, even after the reduction, prices remain anti-poor.
  - 15.2. **Need to bring the unconnected online:** The price reduction also does not provide any relief to the nearly half of South Africans that remain offline. Any strategy to reduce prices has to be accompanied by one to bring the unconnected online.
16. Any strategy regarding the digital economy will only be just and equitable if it acknowledges the need for all persons in South Africa to be able to participate in the digital economy. This necessarily requires that the digital divide be bridged by ensuring that there is universal, meaningful access for all persons in South Africa, with a prioritisation on vulnerable and marginalised groups. This is consonant with South Africa's domestic and international law commitments, including through the National Development Plan, South Africa Connect and the revised Declaration of Principles on Freedom of Expression and Access to Information adopted by the African Commission on Human and Peoples' Rights..
17. **Accordingly, MMA proposes that the Draft Paper expressly recognises the foundational role that universal, meaningful access to the internet plays in achieving participation and competition in the digital economy.**

## Privacy and consumer protection

18. Data is central to the livelihood of the digital economy. However, the exploitation or misuse of such data may violate the privacy and consumer protection rights of affected persons. While MMA welcomes the recognition in the Draft Paper of the importance of data privacy, we submit

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<sup>21</sup> Presidential Commission, above n 3 at p 42.

<sup>22</sup> Research ICT Africa, 'Despite reduction in mobile data tariffs, data still expensive in South Africa', June 2020.

that section should go further. For instance, the Draft Paper should include recommendations regarding the following:

- 18.1. **Consent:** MMA proposes that the Draft Paper makes clear that the approach to the use of data in the digital economy should be a consent-driven one. In this regard, the Protection of Personal Information Act 4 of 2013 (POPIA) defines consent as a “voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information”.<sup>23</sup> MMA prefers the more robust definition contained in the European Union’s General Data Protection Regulation (GDPR), which defines consent as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.<sup>24</sup>
  - 18.2. **Interoperability:** As noted in the Draft Paper, the nature of digital markets is such that there exists a high degree of interdependency and interoperability between different platforms provided by different vendors. Indeed, interoperability is fundamental to an open internet. MMA proposes that the Draft Paper include a recommendation regarding interoperability, to allow competing digital platforms to interconnect with dominant firms to ensure that users can communicate across platforms and services. This is an important pro-competitive measure that can serve to reduce barriers to entry for new market players.
  - 18.3. **Data portability:** In practice, consumers experience various challenges when moving from one digital platform to another, including challenges in migrating their data to a competitor. A requirement regarding data portability can be a remedy to this challenge, particularly to enable a consumer to port or rebuild their profile or relevant data on a competing digital platform. While POPIA does not directly address data portability, regard may be had to the right to data portability contained in the GDPR, which provides that data subjects have a right to receive the personal data concerning him or her in a structured, commonly used and machine-readable format, and have the right to transmit such data to another controller without hindrance.<sup>25</sup> In exercising the right to data portability, data subjects have the right to have the personal data transmitted directly from one controller to another, where technically feasible.<sup>26</sup>
19. Further to the above, when discussing consumer protection, it is important to recognise the crucial role that digital literacy has in ensuring that consumers are aware of their rights when participating in the digital economy. As much as getting people online is an imperative,

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<sup>23</sup> Section 1 of POPIA.

<sup>24</sup> Article 4(10) of the GDPR.

<sup>25</sup> Article 20(1) of the GDPR.

<sup>26</sup> Article 20(2) of the GDPR.

ensuring that they are safe online – and can make effective use of its benefits – is a critical corollary of this. At present, a lack of digital literacy is emerging as a significant barrier to internet use, which requires a range of competencies including finding, evaluating and managing information online; interacting, sharing and collaborating online; developing and creating content; safely using protection features; and knowing how to solve problems and be creative. This includes making informed choices regarding the personal content they communicate, understanding the importance of privacy and avoiding risk, all while exercising their right to freedom of expression online.<sup>27</sup> As MMA has previously noted:<sup>28</sup>

“Digital literacy can simply be understood as a set of necessary skills for using the internet. It can enable participation and information sharing. It also denotes a range of professional computing skills. Notably, digital literacy equips an individual with the ‘capability to achieve other valued outputs in life, especially in the modern digital economy.’ Being digitally literate is crucial for employability and is a core enabler of economic transformation. In addition to these elements, digital literacy also empowers people to look after their digital footprint, stay safe online and also know and understand how to deal with some of the possible dangers of being online.”

20. MMA submits that the Draft Paper should expressly outline the need to develop the following key competences: access and operate in digital environments safely and effectively; critically evaluate information; communicate safely, responsibly and effectively through digital technologies; create digital content; respect others online; and participate online and contribute to online civic engagement.<sup>29</sup> By developing these competencies, this will serve to foster competition in the digital economy, both by increasing the number of suppliers and consumers of goods and services via digital platforms.
21. ***Accordingly, MMA proposes that the Draft Paper expand on its current discussion regarding privacy and consumer protection by addressing the abovementioned issues, including consent, data portability, interoperability and the need for digital literacy.***

### **Need for coordination and multi-stakeholder engagement**

22. MMA welcomes the suggestion in the Draft Paper that South Africa can play a key coordinating role on this issue, both in the Southern African Development Community (SADC) and in Africa more broadly. However, MMA submits that, on the issue of coordination, there is an important issue that is not addressed: the need for coordination and multi-stakeholder engagement across different departments, regulators and private sector actors domestically.

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<sup>27</sup> UNICEF, ‘Children’s online privacy and freedom of expression’, 2018.

<sup>28</sup> MMA, ‘Submissions on Draft National Youth Policy for 2020-2030’, 2020.

<sup>29</sup> UNICEF, above n 27.

23. in terms of section 41(1)(c) of the Constitution: “[a]ll spheres of government and all organs of state within each sphere must provide effective, transparent, accountable, and coherent government for the Republic as a whole” and must “co-operate with one another in mutual trust and good faith by coordinating their actions and legislation with one another”.<sup>30</sup> As MMA has previously noted:<sup>31</sup>

“[T]here is a lack of any overarching internet governance policy on how current and proposed legislation that deals with information and digital rights regulation is to be managed by the different role-players or on how co-ordination amongst the various role-players is to function. In the absence of a clear government internet governance policy and legislative guidance, an unduly complex structure of oversight is in the process of being created.

The result is that that people in South Africa, civil society organisations, and members of the media, among others, need to navigate an overly complex regulatory landscape in order to engage in public participation, make submissions, conduct their business, and, ultimately, defend and protect their information rights. Additionally, this poses significant challenges to government’s coordinated and effective implementation of the existing regulatory provisions, and may result in overlapping mandates or aspects not being assigned or accounted for by appropriate functionaries.”

24. Accordingly, we propose the establishment of an Interdepartmental Steering Committee (ISC) on Internet Governance to address relevant matters, including access to the internet and the implications of the digital economy. It is proposed that the ISC on Internet Governance would bring together different government departments, including the Office of the Presidency; the Department of Communications and Digital Technologies; the Department of Justice and Constitutional Development; the Department of Basic Education; the Department of Higher Education, Science and Technology; and National Treasury. It should also include the relevant regulators, including the Competition Commission, the Independent Communications Authority of South Africa (ICASA) and the Information Regulator.
25. Further to the above, and drawing inspiration from the Judicial Services Commission, it is proposed that the ISC on Internet Governance should include two representatives from opposition parties represented in the National Assembly; two teachers of law or members of the legal profession with knowledge of internet governance laws; two technical experts in internet governance; and two members of civil society working on internet governance. The last-mentioned categories of persons should be selected following a public call for nominations.
26. In our submission, the objects of the ISC on Internet Governance should reflect a broader internet governance mandate and the multi-disciplinary, cross-cutting challenges that these issues present. Our proposal to include opposition parties, members of the legal profession, technical experts and civil society seeks to ensure accountability, a diversity of views and the requisite technical expertise.

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<sup>30</sup> Section 41(1)(h)(iv) of the Constitution.

<sup>31</sup> MMA, ‘Submission to the Competition Commission of South Africa’, 2019 at p 13.

27. ***Accordingly, MMA proposes that the Draft Paper include a recommendation for the establishment of an ISC on Internet Governance as part of the recommendations contained therein.***

### **Structure of the Draft Paper**

28. We note that, while the Draft Paper is rich in content and extensively details the novel difficulties created by technological advancement, the recommendations are comparatively sparse, and in some instances absent. The recommendations are scattered throughout the Draft Paper and their inclusion in and amongst the content makes them difficult to discern. We are concerned that if the recommendations are not clearly delineated and emphasised and do not provide sufficient detail, they may not be meaningfully implemented.
29. ***Accordingly, MMA proposes that a separate section for the recommendations should be included at the end of each chapter, and that such recommendations must be specific and detailed.***

## **PART II: COMPETITION IN THE DIGITAL ECONOMY AND PUBLIC INTEREST JOURNALISM**

### **Relevance to the Draft Paper**

30. The Draft Paper recognises the digital disruption in broadcasting, as well as the changes occasioned by new technologies on the ways in which content is accessed. However, the Draft Paper only deals with this insofar as calling for a technology-neutral approach, without differentiating between firms which operate traditionally or on digital platforms. MMA submits that digitalisation has had a significant impact on the media industry, particularly public interest journalism, and that the consequences of this have not been addressed in the Draft Paper. In light of the important role played by the media in the functioning of democracy, the sector requires specific consideration by the Competition Commission.

### **Importance of public interest journalism**

31. The importance of the right to freedom of expression cannot be gainsaid. Our courts have repeatedly recognised the importance of the right to freedom of expression. The Constitutional Court has described it as “a *sine qua non* for every person’s right to realise her or his full potential as a human being”.<sup>32</sup> It is both a fundamental right in itself, as well as a crucial enabling right necessary to realise an array of other rights and the founding values contained in the Constitution. As explained by the Constitutional Court:<sup>33</sup>

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<sup>32</sup> Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Others [1996] ZACC 7 at para 26.

<sup>33</sup> South African National Defence Union v Minister of Defence and Another [1999] ZACC 7 at para 7.

“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”

32. Importantly, section 16(1)(a) of the Constitution expressly recognises freedom of the press and other media as an integral element of the right to freedom of expression. This is in recognition of the indispensable role that the media plays in fostering democracy and the free flow of information. This presents both a right and a duty on the media. In this regard, the Constitutional Court has posited that:<sup>34</sup>

“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.”

33. The need to foster and promote public interest journalism is an imperative for all sectors, as it is through such journalism that both public and private sector actors can be held to account, the citizenry can be empowered to make informed political choices, and wrongdoings and rights violations can be subjected to appropriate scrutiny. This in turn serves to achieve the founding constitutional values of openness and accountability in a democratic society.

### **Consequences of the digital economy on public interest journalism**

34. Technological advancement has precipitated the dissemination of vast amounts of information online, and traditional media organisations have had to adapt their business models to include digital platforms. The migration online has allowed for cheaper dissemination costs, while production costs remain high.<sup>35</sup> The consequence of this has been a global trend towards the concentration of media ownership.<sup>36</sup>
35. The United Nations Educational, Scientific and Cultural Organization (UNESCO) defines the concentration of media ownership as “an increase in the presence of a company or a reduction in the number of media companies in any market as a result of several possible processes: acquisitions, mergers, agreements with other companies or even the disappearance of

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<sup>34</sup> Khumalo and Others v Holomisa [2002] ZACC 12 at para 24.

<sup>35</sup> Centre for Media Pluralism and Media Freedom, ‘Adapting the understanding of media market plurality to the new digital realities’, May 2019.

<sup>36</sup> UNESCO, ‘Concentration of media ownership and freedom of expression: Global standards and implications for the Americas’, 2017 at p 9.

competitors.”<sup>37</sup> The issues surrounding concentration are coupled with complexities concerning the proliferation of platforms which redistribute existing content and convergence by distribution platforms. This has made it increasingly difficult to monitor concentration as a result of media platforms adapting the ways in which they disseminate content. Accordingly, there are no longer defined media markets which allow for easy monitoring of concentration.<sup>38</sup>

36. Concentration of media ownership has been described as the biggest threat to media pluralism.<sup>39</sup> A reduction in the number of content producers limits diversity of ideas and opinions. Such concentration undermines the free flow of information which impacts, and often limits, the rights to freedom of expression, access to information and the proper functioning of democracy.
37. UNESCO has identified the challenges to media freedom and pluralism which concern concentration of media ownership as follows:<sup>40</sup>
  - 37.1. Excessive influence of media owners or advertising clients on politicians and government, and the covert manipulation of political decisions in favour of hidden economic interests.
  - 37.2. The concentration of ownership of commercial media, and the influence this might have in the political space, whether concentration of ownership in the hands of ruling politicians, concentration of all media in a country within the hands of a single owner, or concentration of all media in the hands of foreign owners.
  - 37.3. The effect of media concentration and changing business models in reducing the quality of journalism (investigative or otherwise), restricting the degrees of editorial freedom and the erosion in the quality of working conditions and job security for journalists.
  - 37.4. The lack of media ownership transparency and opacity of funding sources.
  - 37.5. Potential conflicts of interest arising from journalists’ closeness to business interests.
38. These challenges are exacerbated by high barriers to entry, which exclude small and community-based media organisations. This is coupled with difficulties associated with keeping up with changing technology and adapted ways of disseminating information. These challenges have become more prevalent in the context of Covid-19; as explained by the South

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<sup>37</sup> Id at p 10.

<sup>38</sup> Id.

<sup>39</sup> Centre for Media Pluralism and Media Freedom, above n 35.

<sup>40</sup> UNESCO, above n 36.

African National Editors' Forum: "For many years, South Africa's news industry and in particular, its print media, has bucked international trends by managing to stay afloat by claiming a slice of an ever reducing pie of advertising revenue. The Covid-19 pandemic has effectively taken that pie away and what is left is a news industry desperately looking for new ways of sustaining itself while audience demands for timely, credible but free news surges."<sup>41</sup>

39. Without countervailing measures such concentration increases over time, and there is accordingly a duty on states to take steps in order to promote media diversity. In General Comment No. 34 to the International Covenant on Civil and Political Rights, the United Nations Human Rights committee noted that:<sup>42</sup>

"[E]ffective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression ... [C]onsequently, State parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views."

40. Competition law functions to promote diversity and preserve competition by guarding against dominance and allowing new players to enter the market. It is accordingly well positioned to ensure diversity in the media and the continuation of public interest journalism. A number of other jurisdictions – including the United Kingdom, Australia and the United States – have called on competition authorities to promote competition in the digital economy as a means to foster and promote public interest journalism. These recommendations are outlined below.

## United Kingdom

41. In 2019, the United Kingdom published the Cairncross Review, which looked into issues pertaining to a sustainable future for journalism.<sup>43</sup> The Cairncross Review was asked to consider the sustainability of the production and distribution of high-quality journalism, and especially the future of the press, in the dramatically changing digital economy. In particular, the Cairncross Review looked at the overall state of the news media market, the threats to the financial sustainability of publishers, the impact of search engines and social media platforms, and the role of digital advertising. As explained:<sup>44</sup>

"The goal of the Review has not been to protect news publishing companies themselves, but to advocate measures that will ensure the market in which they operate is efficient, and to defend their most democratically significant outputs. As such, the Review focused on the following two areas:

First, is the market in which publishers now operate a fair one, or has the rapid growth of the big online platforms – especially Google and Facebook – created distortions that justify government intervention? The platforms now not only take a large share of the market for advertising, they also provide the routes that many people use to find news online. The Review offers some recommendations intended to create

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<sup>41</sup> South African National Editors' Forum, 'Covid-19 impact on journalism report: Interim', June 2020 at p 5.

<sup>42</sup> CCPR/C/GC/34, September 2011 at para 40.

<sup>43</sup> Cairncross, 'The Cairncross review: A sustainable future for journalism', February 2019.

<sup>44</sup> Id at pp 5-6.

a better balance between publishers and platforms, and to persuade the online platforms to use their position in more accountable ways.

Second, how should society continue to support the monitoring of, and reporting on, the activities of public bodies not just in central government, but also in localities: local councils, courts, inquests? This area of reporting, which this Review calls “public-interest news”, has always been one of the most important functions of journalism, and brings undeniable public benefit. At a national level, it attracts considerable reader interest. However, at a local level, the story is different. Now that it is possible to see online how many people read reports of local councils, for instance, it is all too evident that the numbers rarely justify the cost of sending a reporter. So here are activities which are important public goods, essential to the preservation of an accountable democracy, with poor market incentives for supply (and limited demand), but which it would be inappropriate for the state to finance directly.”

42. The Cairncross Review noted the rapid scale of change presented by the digital economy, which saw a drop in the sales of printed papers and advertising revenue. It also noted that the switch to online has changed the way people find and absorb news: “They are much less likely to see the mixed bundle of politics, finance, entertainment and sport that constitutes many papers, and more likely to see an individual story, chosen by a computer program and not necessarily clearly labelled with the name of a particular publisher. This “unbundled” experience has implications for the visibility of public-interest news and for trust in news.”<sup>45</sup>
43. In sum, the Cairncross Review made the following recommendations:
  - 43.1. **Market study:** The Competition Commission should conduct a market study of online advertising. This is necessary in light of the difficulty in obtaining reliable information concerning the operation of online advertising. The study should investigate the various players involved and make recommendations, if necessary, in order to ensure fair competition.
  - 43.2. **Codes of conduct:** Online platforms should develop codes of conduct which regulate their commercial relationship with news publishers. The purpose of the code is to rectify the power imbalance that exists between online platforms and news publishers concerning the distribution of news and online advertising. Such codes could sufficiently constrain online platforms whilst still allowing for individual negotiation with news publishers which accounts for differences in reach and online advertising. The codes should be overseen by a regulator who is able to enforce compliance and provide guidance on the content of such codes. The Cairncross Review makes the following recommendations concerning the content of such codes:
    - 43.2.1. Online platforms should commit to the publication of a specified amount of content contained in an article on its platform. The indexing of news articles on an online platform has increased traffic to the publisher’s website, but if too much of the content is included on the online platform

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<sup>45</sup> Id at p 6.

it reduces the need to click through, decreasing traffic to news publishers' sites.

- 43.2.2. Online platforms should commit to notify news publishers of intended changes to algorithms which may impact the ways in which their content is ranked.
- 43.2.3. Online platforms should increase transparency by making the shares of online revenue available.
- 43.2.4. Online platforms should pledge to work with news publishers to determine how content is presented.
- 43.2.5. Online platforms should commit to assist publishers to understand the rules concerning the ranking of content.
- 43.2.6. Online platforms should share information concerning their readers' behaviour.

43.3. ***Oversight over the mechanisms to identify news quality:*** The Cairncross Review noted that online platforms have a responsibility to monitor untrustworthy news sources and to educate readers on the reliability of different sources. It recommended that governments place an obligation on online platforms to assist users in distinguishing between good quality news and unreliable news. In acknowledging the importance of such a job, it recommended that the initiatives and mechanisms implemented by the online platforms should be put under regulatory oversight. In so doing, the regulatory authority should define objectives and measure improvements. Furthermore, the role of the regulator should simply be to gather information on the steps taken by the online platforms in order to understand their effectiveness, which may be expanded if it becomes apparent that the steps taken by the online platforms have not increased the distribution of high-quality news. This expanded role may, in the future, entail the development of best practice guidelines on the presentation of news content on online platforms.

43.4. ***Media literacy:*** The government should work with relevant stakeholders, including online platforms, news publishers, civil society organisations and academics to develop a media literacy strategy. This is necessary to equip adults and children with the necessary skills to navigate information online in order to understand the sources of information and determine what is reliable. The Cairncross Review noted that online platforms will be an important stakeholder when developing this strategy because they understand their users' knowledge and behaviour.

- 43.5. **Investigate market impact:** The Cairncross Review recommended that an assessment should be done on whether the BBC is effectively re-directing traffic to other commercial publishers, especially local ones. Although this recommendation relates specifically to the BBC, it may be applied to other significant players in the broadcasting space.
- 43.6. **Fund:** The Cairncross Review recommended that the government set up a fund aimed at exploring and developing new tools and approaches to improve public-interest news. The fund should focus on increasing innovation in the sector and should have clearly defined objectives. The Cairncross Review recommended a focus on the following: business solutions for local journalism; supporting the use of data analytics to understand when readers are likely to pay; innovative use of artificial intelligence to increase journalistic quality and reduce cost, and mechanisms which aim to attract new audiences.
- 43.7. **Tax relief:** The Cairncross Review recommended utilising tax measures in order to reduce publishers' reliance on advertising revenue. Specifically, it proposed reducing or zero-rating VAT rates for electronic publications. It further recommended the introduction of tax relief for online news content and local and investigative content.
- 43.8. **Financial support for local news:** Financial support should be provided to local news publishers. Such support should be provided by government and private actors. The Cairncross Review acknowledged that reliance on the government could undermine the media's role as an effective watchdog, and noted that the provision of funding is only a short-term solution.
- 43.9. **Establish an institute for public interest news:** An independent institute should be established which aims to safeguard the future of public-interest news. The institute could receive public and private funds and should work with multiple stakeholders to improve the quality of online news. The institute should be insulated from political interference and any commercial obligations. The Cairncross Review recommended that the institute be responsible for the following: centralise funding for the media sector; oversee the fund established for innovation; establish and encourage good practice for public-interest news; work towards increasing media literacy in collaboration with relevant stakeholders; conduct research and engage with government bodies to assist with disseminating information in ways that are accessible.

## Australia

44. Between 2018 to 2019, the Australian Competition and Consumer Commission (ACCC) conducted a digital platform inquiry, which concluded in its [final report](#) that certain digital platforms had distorted advertising and local media markets, making it difficult for advertisers

to monetise their content.<sup>46</sup> The ACCC resolved that a voluntary code of conduct would not solve the issue and a mandatory code was necessary. Accordingly, a Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill, 2020 (the Code) was drafted.

45. The Code aims to address the power imbalance between Australian news organisations and digital platforms in order to encourage competition, increase consumer protection and enable sustainable media in a digital world. The Code does so by providing four sets of requirements to guide the relationship between digital platforms and news organisations. These include:
  - 45.1. **Bargaining rules:** This requires that digital platforms and news businesses, which have indicated an intention to bargain, do so in good faith.
  - 45.2. **Compulsory arbitration rules:** In the event that the parties cannot agree about the remuneration of news content, an arbitration panel will choose between two final offers made by the parties.
  - 45.3. **Minimum standards:** These prescribe that digital platforms must notify news organisations in advance of the following: algorithmic changes; information about the availability and collection of user data; and changes that would affect the presentation and accessibility of news content.
  - 45.4. **Non-discrimination requirements:** Digital platforms are required to prevent digital platform services from disadvantaging the news content of a news organisation.
46. The Code currently applies to Facebook and Google, but subsequent instruments may be developed in the future to include additional platforms. The Treasurer determines which digital platforms must comply. For News Organisations to participate in the Code, they must be registered with the Australian Communications and Media Authority, which will occur if they have annual revenue of above \$150 000 and their news business meets the following requirements: the business relates to core news content; the business is subject to professional journalistic standards; the business operates predominantly in Australia for Australian audiences.
47. All commercial negotiations between online platforms and news organisations which fall within the scope of application of the Code, may not result in the conclusion of agreements which violate the Code. News organisations are permitted to form a group in order to collectively bargain with the online platform. If an agreement cannot be reached within three months, the matter is automatically subject to arbitration, where the panel will decide between two final offers.

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<sup>46</sup> ACCC, 'Digital platforms inquiry: Final report', July 2019.

## United States

48. In 2020, the Subcommittee on Antitrust, Commercial Law and Administrative Law of the Committee on the Judiciary (the Subcommittee), which forms part of the House of Representatives, released its majority staff report and recommendations following its investigation of competition in digital markets.<sup>47</sup> While the report included a number of recommendations on restoring competition in the digital economy, its findings regarding a free and diverse press are particularly relevant for present purposes.
49. As noted by the Subcommittee: “A free and diverse press is essential to a vibrant democracy. Whether exposing corruption in government, informing citizens, or holding power to account, independent journalism sustains our democracy by facilitating public discourse”. However, the Subcommittee noted further that, since 2006, the news industry has been in economy freefall, primarily due to a massive decrease in advertising revenue. In this regard, both print and broadcast news organisations rely heavily on advertising revenue to support their operations, and the market shifted to digital platforms, news organisations have seen the value of their advertising space plummet steeply.
50. According to the Subcommittee: “[T]he rise of market power online has corresponded with a significant decline in the availability of trustworthy sources of news. Through dominating both digital advertising and key communication platforms, Google and Facebook have outsized power over the distribution and monetization of trustworthy sources of news online, creating an uneven playing field in which news publishers are beholden to their decisions.”
51. In order to address this imbalance, it was recommended that legislation be considered to provide news publishers and broadcasters with a narrowly tailored and temporary safe harbour to collectively bargain with dominant online platforms.

## Proposed next steps

52. MMA submits that the need to foster and promote public interest journalism in the context of the digital economy is clearly a relevant competition-related issue that ought to be addressed in the Draft Paper, as has been done by other competition authorities in various jurisdictions. Given MMA’s expertise, MMA is in a position to assist with this, be it through drafting or reviewing the additional section.
53. The recommendations set out above from our review of the United Kingdom, Australia and the United States are all important, and should be considered by the Competition Commission. That said, MMA notes that an additional consideration that has not been raised is the zero-rating of access to the websites of publishers of public interest journalism. MMA submits that, in a similar vein to the recommendation made by the Competition Commission in the data

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<sup>47</sup> Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, ‘Investigation of competition in digital markets: Majority staff report and recommendations’, 2020.

services market inquiry, it is well within the scope of the Competition Commission to recommend here too that such websites be zero-rated by the relevant private sector actors – through an appropriate process to be followed – in order to promote the competitiveness of these websites in the digital economy.

54. Alternatively, and perhaps in addition to, MMA proposes that the Competition Commission explore the possibility of establishing an independently managed fund to support public interest journalism that is funded in part by the key players in the digital economy. This idea has also been referenced in the recently published Draft White Paper on Audio and Audio Visual Services.
55. Furthermore, MMA urges the Competition Commission to use its convening power to bring together relevant stakeholders, including the online platforms, media organisations, civil society and others, to develop a strategy to address the competitive challenges experienced by the media in the digital economy. Such convening should necessarily also address the appropriateness and applicability of a code of conduct between media organisations and online platforms, as has been posited in Australia and the United States.
56. ***Accordingly, MMA proposes that the Draft Paper be updated to include a section on the need to foster and promote the competitiveness of public interest journalism in the digital economy. In doing so, MMA proposes that the Draft Paper should expressly recommend that the websites of publishers of public interest journalism be zero-rated; that an independent public interest content fund is established; and that a convening should be held with all relevant stakeholders to develop a strategy to address the competitive challenges experienced by the media in the digital economy.***

## CONCLUDING REMARKS

57. MMA appreciates the opportunity to provide this submission on this important issue. MMA remains available to assist the Competition Commission, including by providing further written or oral submissions at the appropriate time. Please do not hesitate to contact us if we can provide any additional information.

**Media Monitoring Africa  
Johannesburg, 2020**