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**POSITION PAPER:
THE SUSTAINABILITY OF
JOURNALISM AND COMPETITION
IN THE DIGITAL ECONOMY**



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ACRONYMS

ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACHPR	African Commission on Human and Peoples’ Rights
AIP	Association of Independent Publishers
CMA	Competition and Markets Authority (United Kingdom)
EFF	Electronic Frontier Foundation
EU	European Union
FTC	Federal Trade Commission (United States)
FAANGs	Facebook, Amazon, Apple, Netflix, and Google
ICCPR	International Covenant on Civil and Political Rights
ICO	Information Commissioner’s Office (United Kingdom)
JTI	Journalism Trust Initiative
MDDA	Media Development and Diversity Agency
OECD	Economic Co-operation and Development
PSS	Publishers Support Services
RSF	Reporters sans frontières
SABC	South African Broadcasting Corporation
SANEF	South African National Editors’ Forum
SBS	Special Broadcasting Service (Australia)
UK	United Kingdom
US	United States
VAT	Value-Added Tax

EXECUTIVE SUMMARY

Policymakers in multiple jurisdictions have shown growing concern that rapid technological development and the growing dominance of digital platform companies such as Facebook (recently renamed “Meta Inc.”) and Google have accelerated the sustainability crisis of journalism. In South Africa, Google and Facebook’s dominance in the digital advertising industry has contributed to a significant loss in revenue over recent years and it has made the digital transition harder for print news publishers — particularly community media — preventing many from attempting to make the transition.

Several policy options have been touted in various jurisdictions. The Australian News Media Bargaining Code, passed in 2021, is often cited as a potential model for other countries seeking to level the playing field between international technology platforms and local news publishers. In South Africa, the Competition Commission has initiated the Online Intermediation Platforms Market Inquiry seeking to evaluate competition in the digital economy and, as a result, there is some momentum in the South African market towards considering competition-related initiatives to rebalance the power of technology platforms.

This Position Paper reports on the findings of a research project conducted from late-2021 to early-2022 involving consultations with a range of stakeholders in the news media and digital advertising industries, regulators, and government officials, as well as extensive desk research on the state of knowledge on related initiatives around the world which use competition law processes to advance the sustainability of journalism. It is intended as a resource for regulators, stakeholders in the news media sector, and other supporters of journalism sustainability in South Africa and beyond to better understand the advantages, challenges, and nuances of pursuing competition-based regulation or reform in the digital economy in South Africa.

It finds that interventions aimed at securing payments from technology platforms to news publishers may have short-term benefits but are unlikely to address some of the fundamental challenges for the sustainability of journalism. One element of the problem concerns the appropriation of news content by technology platforms without compensation. Efforts in Europe, notably in Spain,¹ and more recently the European Union’s (EU) Copyright Directive, passed in 2019,² are notable in this regard. These initiatives aim to address the issue of news publishers losing “click-throughs” due to technology platforms publishing headlines and snippets of content that give readers sufficient information to disincentivise reading the full article. However, these initiatives do not address the fundamental issue of news media’s competitiveness in today’s digital advertising industry.

News publishers are presently unable to compete with technology platforms that can sell the ability to micro-target audiences, based on data harvested about the preferences of billions of users. News publishers also lack information about where ad spend goes, how placement decisions are made, and how algorithm changes might affect their revenue. Solutions to this

¹ News Media Alliance, ‘Google News Shutdown in Spain Was Not as Bad as Google Would Have You Believe,’ (2019) (accessible [here](#)).

² European Union, ‘Directive (EU) 2019/790 of the European Parliament And Of The Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC,’ (2019) at Article 54 (accessible [here](#)).

fundamental element of the problem are complicated and require addressing some of the broader challenges associated with technology platforms, such as a lack of transparency over their operation and their monopoly in the use of big data.

Media bargaining codes — such as the code implemented in Australia — may be effective in generating short-term resources for struggling news publishers, although they are unlikely to address the structural challenges of the digital advertising industry which leaves news publishers inherently disadvantaged. At best, such codes may generate greater transparency for news publishers by incorporating data-sharing requirements by technology platforms, but the Australian experience has demonstrated that technology platforms are unlikely to concede ground in this regard.

In the event that a media bargaining code or related initiative in South Africa is considered, it should be guided by principles aimed at minimising the risks associated with this approach. Responsible implementation in the South African context requires:

- **an inclusive approach** that enables collective bargaining on behalf of small news publishers in order to address the risk of greater market concentration in the media and less media diversity;
- **ensuring criteria for determining levels of compensation** that do not disincentivise innovation or exacerbate market incentives for poor-quality journalism;
- **introducing safeguards** that ensure that decisions about participation are made by an impartial, reputable, and representative industry body;
- **ensuring that final payment terms are transparently disclosed** to enable accountability; and
- **avoiding undermining the fundamentally open nature of the internet** or limiting access to news by precipitating the removal of news content from technology platforms.

There is also scope for other forms of competition-focused regulation, given the dominance of technology platforms in the digital advertising industry. Such initiatives may not necessarily be directly targeted at advancing payment agreements between technology platforms and news publishers in South Africa but may nevertheless have positive downstream consequences for the news media by engendering greater competition, transparency, and accountability in the digital advertising industry, which may create a more enabling environment for the sustainability of journalism.

These initiatives include comprehensive competition regulation in the digital economy more broadly, increased local taxation of the technology platforms, reforms within the operation of the digital advertising industry, and other efforts to increase the competitiveness of news publishers in the digital advertising market, such as the selling of pooled advertising or extending news regulation to technology platforms.

Ultimately, this Position Paper is intended as a resource for regulators, stakeholders in the news media sector, and other supporters of media freedom and sustainability in South Africa to better understand the advantages, challenges, and nuances of pursuing competition-based regulation or reform in the digital economy in South Africa.

1. INTRODUCTION

1.1. Background

The South African National Editors' Forum (SANEF) is a non-profit organisation whose members are editors, senior journalists, and journalism trainers from across South Africa. SANEF is committed to championing South Africa's hard-won freedom of expression and promoting quality, ethics, and diversity in the South African media. SANEF promotes excellence in journalism through, among others, championing media freedom, preparing policy submissions and research, and engaging in education and training programmes. SANEF's mandate to protect and promote journalism includes advancing sustainability strategies for journalism.

In May 2021, SANEF published a research report presenting a series of policy options to promote media sustainability drawn from local, regional, and international comparative practices and examples for further deliberation and debate. The report noted that the advent of the internet has brought both opportunities and challenges for universal access to public interest journalism. Notably, it has resulted in significant declines in print circulation and advertising revenue that threatens the survival of public interest journalism.

The challenges for producers of news content are severe, resulting in declines in the quality of content produced, the loss of experienced editorial staff from the industry, the incentivisation of clickbait and controversial content, and a resulting crisis of trust in the media. With these challenges exacerbated by the COVID-19 pandemic, SANEF identified the urgent need to develop strategies to achieve media sustainability and realise universal access to public interest journalism for all persons in South Africa.

As one of twelve proposed approaches, the report noted international developments in strategies to advance the sustainability of journalism that included developments in Australia and the United States relating to fostering competition in the digital economy, including through enhanced engagement with the so-called FAANGs (Facebook, Amazon, Apple, Netflix, and Google). In the South African context, the report suggested areas of engagement with South Africa's Competition Commission.

Following that report, SANEF conducted further research into one of the strategies identified therein: fostering fair competition in the digital economy. This Position Paper summarises the findings of this research and is intended to assess the feasibility of competition reform in South Africa aimed at advancing the sustainability and independence of journalism and achieving a fair and equitable relationship between news media and technology platforms in the digital economy. It seeks to uncover emerging perspectives on the potential for, and limitations of, competition regulation to enhance the sustainability of independent journalism, particularly in the South African context.

It is important to note that the problem, as it relates to the sustainability of journalism, is multi-faceted and does not have a singular cause. However, as this Position Paper demonstrates, a lack of competition in the digital economy is a primary, direct cause that media stakeholders are unable to control or influence without large-scale and concerted action combined with governmental regulation. It is therefore an area that requires the Competition Commissions'

urgent attention.

The methodology for this Position Paper consisted of desktop research to map existing research and data on competition-based initiatives for advancing the sustainability of journalism in comparable foreign jurisdictions, and engagement with a range of stakeholders from the media, non-profit, and digital advertising sectors in South Africa, as well as with members of the Competition Commission and government stakeholders. The result is a collation of the findings of these processes.

Ultimately, this Position Paper is intended as a resource for regulators, stakeholders in the news media sector, and other supporters of media freedom and sustainability in South Africa to better understand the advantages, challenges, and nuances of pursuing competition-based regulation or reform in the digital economy in South Africa.

1.2. Role of the media

To underscore the importance of finding viable solutions for advancing the sustainability of journalism, it is important to understand the crucial role played by journalists and the provision of credible news in the functioning of healthy democratic systems. The vitality of democracy depends on a free, independent, and pluralistic press, which informs and enables civic life. The importance of this role cannot be overstated.

The right to freedom of expression is enshrined in section 16 of South Africa’s Constitution, which protects the right to freedom of expression, including freedom of the press and other media. South Africa’s national commitment to the tenet of freedom of expression is joined by the commitments it has made under international law, including article 9 of the African Charter on Human and Peoples’ Rights (**ACHPR**)³ and article 19 of the International Covenant on Civil and Political Rights (**ICCPR**)⁴. In 2021, in *amaBhungane v Minister of Justice and Correctional Services and Others*, the Constitutional Court reaffirmed “the constitutional importance of the media in our democratic society” and acknowledged that “[t]he Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.”⁵

Informing the citizenry is a key role of news publishers, which in turn is crucial to equipping citizens to exercise and vindicate their rights. Journalism in South Africa has, in recent years, further demonstrated its immense contributions to holding government and the private sector accountable.⁶ High-quality, accessible news is a public good, and it directly serves the public interest.

³ African Charter on Human and Peoples’ Rights (**ACHPR**) (1981) (accessible [here](#)).

⁴ International Covenant on Civil and Political Rights (**ICCPR**) (1966) (accessible [here](#)).

⁵ *amaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3 at para 115.

⁶ Herman Wasserman, ‘The state of South African media: a space to contest democracy,’ *Publizistik* (2020) (accessible [here](#)).

In a country as diverse as South Africa — in language, politics, culture, and identities — that faces continuing inequities in the divides of race, class, and gender, media diversity is a crucial component of media freedom. A diverse media that represents different people and voices helps guarantee that a plurality of viewpoints and interests are represented in the public domain, including those that may not be aired through media that are dominated by mainstream commercial or government influence.⁷ In 2002, the South African government committed itself to foster media diversity by establishing the Media Development and Diversity Agency (**MDDA**) “for media development and diversity that is conducive to public discourse which reflects the needs and aspirations of all South Africans.”⁸ In the 2002 MDDA Position Paper, media diversity is defined as including two dimensions:⁹

- (i) affordable access by all to the widest range of opinion and information sources, and
- (ii) equitable representation within the media regarding, amongst others, ownership, staffing, audience, language, and format of media.

These echo commitments made in the 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa, which states:¹⁰

“States shall take positive measures to promote a diverse and pluralistic media, which shall facilitate the promotion of free flow of information and ideas, access to media and other means of communication, access to non-discriminatory and non-stereotyped information, access to the media by poor and rural communities, the promotion of transparency and diversity in media ownership, the promotion of local African languages, content and voices, and the promotion of the use of local languages in public affairs.”

Despite this clear imperative, media diversity in South Africa has not yet reached these ideals. The Independent Panel Report on the Inquiry into Media Ethics and Credibility, chaired by Judge (retired) Kathleen Satchwell (**Satchwell Report**) found that “[o]ligopoly and lack of diversity persist, narrowing the public space for access to information and debate in a socio-political and economic landscape where English and Afrikaans dominate all platforms, pay-walls encroach, data is expensive, and online access limited.”¹¹

In 2021, the World Press Freedom Index published by Reporters sans frontières (**RSF**) found the state of media freedom in South Africa to be “guaranteed but fragile.” The Index noted some of the recent obstacles to media freedom in South Africa, including spying on journalists by state intelligence agencies, the harassment of journalists (especially women journalists), and the threatening of journalists covering police conduct during the COVID-19 pandemic.¹² The financial

⁷ Jane Duncan and Julie Reid, ‘Toward a measurement tool for the monitoring of media diversity and pluralism in South Africa: A public-centred approach,’ *Communication: South African Journal for Communication Theory and Research* (2013) (accessible [here](#)).

⁸ Media Development and Diversity Agency Act 14 of 2002 (accessible [here](#)).

⁹ Media Development and Diversity Agency, ‘Position Paper’, 2002 (accessible [here](#)).

¹⁰ Principle 17 of the African Commission on Human and People’s Rights, ‘Declaration of Principles on Freedom of Expression and Access to Information in Africa’, October 2019 (accessible [here](#)).

¹¹ Kathleen Satchwell et al, ‘Independent Panel Report: Inquiry into Media Ethics and Credibility’, (2021, updated in April 2021) (accessible [here](#)).

¹² Reporters Without Borders, ‘South Africa’, April 2021 (accessible [here](#)).

pressures on the news media resulting from the collapse of the print advertising model have only exacerbated these challenges and the ability of the media to fulfil this crucial role in the democratic system.

1.3. Defining “journalism”

The concept of journalism is not universally defined, and the advent of the internet has further blurred lines between citizen journalism and news media professionals working in investigative, broadcast, print, and digital journalism. As discussed, the importance of a free and independent press media is universally acknowledged as a critical pillar of democracy, but the importance of different forms of journalism is unclear. Various terms are often used synonymously for the specific type of journalism that is a public good and deserving of support, such as “public interest journalism,” “quality journalism”, “investigative journalism”, and “accountability journalism.”¹³

The Cairncross Review, established to consider the sustainability of high-quality journalism in the United Kingdom (**UK**) in 2018, distinguishes between “high-quality journalism” and “public interest news,” suggesting that while the former is desirable, it may not justify specific interventions to ensure protection.¹⁴ It argues that investigative and campaigning journalism along with reporting on the daily activities of public institutions are particularly important and worthy of protection as a democratic necessity.¹⁵

Australia’s Mandatory News Media Bargaining Code has been cited as a potential model for other countries considering competition-based approaches to the sustainability of journalism. The Code covers only “core news,” defined as “content that reports, investigates, or explains issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or current issues or events of public significance for Australians at a local, regional or national level,” as well as “content that reports, investigates or explains current issues or events of interest to Australians.”¹⁶

SANEF’s 2021 report on media sustainability also distinguishes between “journalism which is a necessary pre-requisite to the full exercise of the democratic function and other forms of reportage which are less relevant to enhancing democratic legitimacy,” but which are nonetheless equally deserving of protection, though perhaps less so for targeted support by media sustainability strategies.¹⁷ Definitionally, the 2021 report proposed the following definition of public-interest journalism for consideration:¹⁸

“Public interest journalism refers to journalistic activity that is central to the democratic function and the protection and promotion of the South African Constitution, including

¹³ Australian Senate, ‘Select Committee on the Future of Public Interest Journalism Report’, (2018) (accessible [here](#)).

¹⁴ Frances Cairncross, ‘The Cairncross Review: A sustainable future for journalism’, (2019) at p. 14 (accessible [here](#)).

¹⁵ Id at p. 17.

¹⁶ ‘Treasury Laws Amendment (News Media And Digital Platforms Mandatory Bargaining Code) Bill 2021,’ (2021) at 51A (accessible [here](#)).

¹⁷ SANEF, ‘Media Sustainability and Universal Access to Public Interest Journalism: Strategies and Considerations,’ (2021) (accessible [here](#)).

¹⁸ SANEF above n. 17.

investigative journalism, reporting on the daily affairs of public institutions, and local journalism focused on the generation of public interest stories in towns and villages and underserved rural areas.”

On the one hand, a broad and inclusive definition of journalism for the purposes of journalism sustainability strategies enables all publishers to monetise the content that they produce and their audiences. On the other, efforts to raise funds should not simply line the pockets of large corporations or unethical content producers, which would serve only to exacerbate the challenges facing public interest journalism. This topic is further discussed in section 6.4. below which evaluates various factors for determining who sits at any hypothetical negotiating table.

For the present purposes, several definitions are presently in use across the sector. As discussions around the sustainability of journalism continue, SANEF’s present working definition of public interest journalism is as follows:

“Public interest journalism is journalism that is independent of political, commercial, or factional interest, producing verified and verifiable information for an intended audience and which is transparent in its methods of pursuing the truth for the sake of the common good, while being careful to do no harm; and it complies with voluntary industry ethical codes and complaints mechanisms such as the Press Council of South Africa and/or the Broadcast Complaints Commission of South Africa.”

1.4. Defining “technology platforms”

Major technology platforms play an increasingly substantial and important role in society, but in the South African context, not all major technology platforms are as influential as others. The entities most relevant to the present discussion are Facebook and Google due to their dominance in the digital advertising industry and the role they play in enabling access to news. Google provides access to news content through its search engine, the largest and most used in the world, and aggregates news headlines and ‘snippets’ for Google News and the new Google News Showcase, a dedicated news service that has not yet launched in South Africa.¹⁹ Google’s parent company, Alphabet, also plays a crucial role in providing the underlying architecture of the digital advertising industry, including operating the leading advertising exchange and the leading intermediaries that facilitate trading among ad buyers and sellers, as well as being one of the largest sellers of ad space globally.²⁰

Facebook, under its parent company Meta, enables users to post and share news with their followers, and for news organisations to do the same on their user accounts. News publishers may also pay to “promote” their content to a broader audience. Instagram, owned by Facebook, plays a similar role.

Apple plays a limited role through the provision of its Apple News service, which is not widely used in South Africa. Likewise, the other members of the ‘FAANGs’ — Amazon and Netflix, with Microsoft occasionally added — have not come under significant scrutiny for their role in the

¹⁹ Harry Dugmore, ‘Thinking globally, acting locally’ (2021) (accessible [here](#)).

²⁰ Dina Srinivasan, ‘Why Google Dominates Advertising Markets Competition Policy Should Lean on the Principles of Financial Market Regulation,’ (2020) (accessible [here](#)).

digital advertising and news media industries, and so will not be explicitly addressed in this paper.

2. THE ONLINE INTERMEDIATION PLATFORMS MARKET INQUIRY

2.1. SANEF’s understanding of the Inquiry

The Competition Commission of South Africa (**Commission**) initiated the Online Intermediation Platforms Market Inquiry (**Inquiry**) in February 2021, which seeks to review the “tendency of many digital platform markets to both product/service line and conglomerate concentration that is subsequently difficult to reverse once entrenched.”²¹ SANEF understands that the Inquiry follows from the Commission’s strategic view on regulating competition in the digital economy published in 2020, which considered written submissions and consultations with stakeholders and set out the “ways in which South Africa’s competition laws can be implemented to achieve equitable outcomes in the digital economy and the Competition Commission’s intentions in this regard.”²²

The strategic view acknowledges several market power concerns that are relevant to discussions on the sustainability of journalism. The Commission has also acknowledged the interrelated nature of privacy and competition concerns in the digital realm, noting that “[w]hile consumer protection law remains the main legislation to address potential big data harm to individual privacy — as opposed to competition law — personal information has become the currency with which consumers purchase services from digital markets where the product is “free,” which makes the protection of personal information an issue that extends beyond consumer protection laws”, calling, as a result, for greater coordination between regulators in developing countries.²³ Nevertheless, the Terms of Reference make it clear that the Inquiry specifically excludes broader data privacy issues.²⁴

The Competition Commission has stated that “competition law [is required] to not only consider new theories of harm but also to act proactively against potential entrenchment strategies to ensure markets are contestable and prevent irreversible concentration.”²⁵ As a result, SANEF submits this Position Paper for consideration by the Commission, noting that the Inquiry released a Provisional Report in July 2022 in which it acknowledges submissions and debate about the relevance of issues of news sustainability to the Inquiry. It is SANEF’s understanding of the report that the Inquiry has concluded that issues related to digital advertising do not fall within the scope of the Inquiry, but, acknowledging the legitimacy of the concerns raised, the report recommends that they be addressed “through a separate process, including potentially a more focused market inquiry.”²⁶ A final report is expected by 18 November 2022, concluding the Commission’s 18-month process.

2.2. Sustainability of Journalism and the Inquiry

²¹ Competition Commission South Africa, ‘Online Intermediation Platforms Market Inquiry: Terms of Reference,’ (2021) (accessible [here](#)).

²² Competition Commission, ‘Competition in the Digital Economy,’ (2020) (accessible [here](#)).

²³ Id at p. 8.

²⁴ Competition Commission above n. 21.

²⁵ Id.

²⁶ Online Intermediation Platforms Market Inquiry, ‘Provisional Summary Report,’ at p. 45 (accessible [here](#)).

The Terms of Reference for the Inquiry emphasise that the scope of digital platforms is wide and provide that an inquiry of such breadth would be impractical, choosing instead to narrow the scope of the Inquiry to a particular set of issues, notably “online intermediation platforms” such as eCommerce services, online classifieds, food delivery services, and accommodation aggregators.²⁷ SANEF acknowledges that the scope of the Inquiry excludes a focus on search and social media platforms, and broader aspects of the digital advertising industry, except where these pose a barrier to business users’ participation in the online economy or if digital advertising or search platforms also offer online intermediation services.

The Terms of Reference, along with the Provisional Report, note that digital advertising continues to be a candidate for a market inquiry but emphasise that digital advertising markets are global in nature and that interventions “to improve the contestability of these markets most likely need to occur on a global scale for global competitors to emerge.”²⁸ The Commission states that the best course of action going forward may include a further market inquiry, targeted abuse of dominance investigations, or over-arching regulation.²⁹

While the Inquiry is not focused on digital advertising, it is examining related topics that might influence the workings of digital advertising and the news media, such as how search engines (including those that are not headquartered in South Africa — such as FAANGs companies) affect the rankings of sites, which in turn might raise questions about how news content is ranked. As the topics of this Inquiry are interconnected with issues of the sustainability of journalism, SANEF presents this Position Paper in order to assist the Commission as it determines whether and how to consider competition issues in digital advertising

SANEF emphasises the urgency of addressing competition in the digital advertising industry for three reasons:

- (i) **First, the impact on the news media sector necessitates immediate action to protect the sustainability of this crucial pillar of democracy.**
- (ii) **Second, the progress being made in other jurisdictions risks overtaking domestic efforts, and it is important that South Africa demonstrates its leadership in developing local responses to this global set of issues.**
- (iii) **Finally, noting growing concern around the power and influence wielded by major technology platforms on the news media sector and other aspects of democracy, it is important to develop appropriate regulatory responses to ensure accountability.**

²⁷ Id.

²⁸ Competition Commission above n. 21.

²⁹ Id.

3. DEFINING THE PROBLEM

3.1. Background to the digital transition

Rapid technological development and the rising dominance of the “tech platforms” over recent decades have led to significant changes in the media landscape. Policymakers in a range of jurisdictions have shown growing concern that these changes in the digital economy, along with the growing power of certain digital platforms, such as Facebook and Google, have accelerated the sustainability crisis of the news media.³⁰

The problem has been defined extensively, not least in SANEF’s 2021 report, ‘Media Sustainability and Universal Access to Public Interest Journalism,’ which lays out the challenges occasioned by the advent of the internet, the fall in revenues that stemmed from declines in print circulation, and the difficulties faced by the news media in monetising their content in the digital era.³¹ For example, total print revenue, measured by ad spend, made up 40% of total ad spend in South Africa in 2004, a figure which dropped to only 21% by 2017.³² The challenges experienced by news publishers have only been exacerbated by the COVID-19 pandemic, which has further reduced advertising revenue for print and digital media and precipitated new economic and staffing challenges.³³

The role of technology platforms in driving or exacerbating the sustainability crisis of journalism continues to be a matter of debate, with a lack of information about the inner workings of the digital advertising industry complicating efforts by news publishers to adapt to the digital domain.

3.2. Misappropriation of content

Initial efforts to address the dominance of technology platforms in digital advertising and the consequences for news media focused on the use of publishers’ content by these platforms. Some harm does occur through the appropriation (or misappropriation) of content from news publishers used on technology platforms. A survey by the European Commission found that 47% of Europeans who access news through news aggregators, online social media, or search engines do not click on the links and access the original articles, depriving news publishers of valuable traffic.³⁴

Google News, a platform that collates and links to news content from third parties, closed in Spain in late 2014 in response to legislation that would have forced Google to pay a central, collective licensing fee to republish headlines or snippets of news.³⁵ Local media outlets were divided over

³⁰ Centre for Media Pluralism and Media Freedom, ‘Adapting the understanding of media market plurality to the new digital realities’, May 2019, accessible [here](#).

³¹ SANEF, ‘Media Sustainability and Universal Access to Public Interest Journalism: Strategies and Considerations,’ (2021) (accessible [here](#)).

³² Dugmore above n. 19 at p. 11.

³³ Reginald Rumney, ‘SANEF’s COVID-19 impact on journalism report (interim)’, (2020) (accessible [here](#)).

³⁴ News Media Alliance, ‘Google News Shutdown in Spain Was Not as Bad as Google Would Have You Believe,’ (2019) (accessible [here](#)).

³⁵ Reuters, ‘Spain adopts EU copyright law, paving way for Google News to return,’ (2021) (accessible [here](#)).

whether the law was beneficial to the industry, but research has since found that the reduction in traffic to Spanish news publishers following the closure was low and temporary, with some news publishers seeing significant spikes in traffic and the loss in referral traffic from Google being replaced with organic traffic growth.³⁶ However, small publishers suffered greater reductions in traffic than larger publishers and that there was a significant overall decline in news consumption.³⁷

There may, therefore, be some benefit to regulation mandating the compensation of news publishers for use of their content by tech platforms, with the potential downside of this approach (the removal of news content from tech platforms entirely) proving less detrimental for news publishers than anticipated. In 2019, the European Union (EU) passed a new Copyright Directive, which creates a “Publisher’s Right” in Article 55, granting publishers an independent right to protect their content against unauthorised uses by online platforms.³⁸ Spain adopted the Copyright Directive in November 2021, which removed the collective fee and allowed Google to reach individual or group agreements directly with news publishers.³⁹ As a result, Google News announced its return to Spain in November 2021.⁴⁰

These initiatives aim to specifically address the issue of news publishers losing ‘click-throughs’ due to technology platforms publishing headlines and snippets of content that provide readers with sufficient information to disincentivise reading the full article. However, while the Google case-study is a relatively clear-cut case of the appropriation of news content, there are structural differences in how news content appears on other technology platforms, notably Facebook, Twitter, and YouTube: in these instances, news publishers usually publish their own content to these platforms *voluntarily*.

3.3. Structural disadvantages for news publishers

The challenges of the sustainability of journalism go beyond the appropriation of content without compensation. On a deeper level, news media suffer from a structural loss of competitiveness in the advertising market, which has significantly reduced their revenue. At its core, this problem relates to the nature of the digital advertising industry, in which multinational corporations with billions of users can sell the ability to micro-target audiences, based on data harvested about their preferences, to advertisers on an unprecedented scale. News media publishers, with small audiences, about which they lack the extensive data that technology platforms hold, struggle to attract advertising spend.⁴¹

³⁶ News Media Alliance above n. 34

³⁷ Joshua Benton, ‘Google is threatening to kill Google News in Europe if the EU goes ahead with its “snippet tax,”’ Nieman Lab (2019) (accessible [here](#)).

³⁸ European Union, ‘Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC,’ (2019) (accessible [here](#)).

³⁹ News Media Alliance above n. 36.

⁴⁰ Euro News, ‘Google News returns to Spain after the country adopts new EU copyright law,’ (2021) (accessible [here](#)).

⁴¹ It should be noted that enabling news publishers access to the same data about audiences that technology platforms benefit from is not necessarily a solution. There are serious concerns about data privacy and the model of “surveillance capitalism” on which some technology platforms operate, and it is therefore not recommended that the enhanced collection and sharing of user data is a solution. Rather, the surveillance capitalism model itself should be considered and, possibly, reformed. Sociologist

Added to this is the issue of brand risk, with many advertisers being hesitant to place their brand next to potentially controversial news stories and hard news in general. As the Electronic Frontier Foundation (**EFF**) points out, “the tech giant’s profit centre is not “stealing” news media content: it’s “stealing” its advertising.”⁴²

3.4. Nature of the digital advertising economy

An additional piece of the problem stems from a lack of competition and transparency in the digital advertising industry, in which technology platforms control multiple parts of the value chain, and advertisers and publishers have limited bargaining power and limited information on their share of total ad spend, how placement decisions are made, and how performance metrics are determined.

Google, for example, owns and operates Google Ads, which enables advertisers to bid to place advertisements on Google Search results, as well as operating one of the dominant ad exchanges in the world (formerly the DoubleClick Ad Exchange, now part of the Google Marketing Platform), and being one of the largest sellers of ad space through the Search platform. Google products are dominant across all stages, operating both on behalf of ad-buyers and on behalf of ad-sellers.⁴³

A study by British advertising group, ISBA, which represents 3,000 brands, found that for every dollar spent on digital ads in the United Kingdom (**UK**), Google takes as much 42 cents, and as a result, “for major brands and websites, it is difficult — some say nearly impossible — to buy or sell the advertising that funds much of the internet without using Google's products.”⁴⁴ The same study found that 15 cents of every dollar of ad spend, or a total of about \$9 billion in the UK market alone, cannot be accounted for. The UK’s Competition and Markets Authority found that Google had as much as 90% of the market share in some segments of the ad tech stack and about 50% in others.⁴⁵

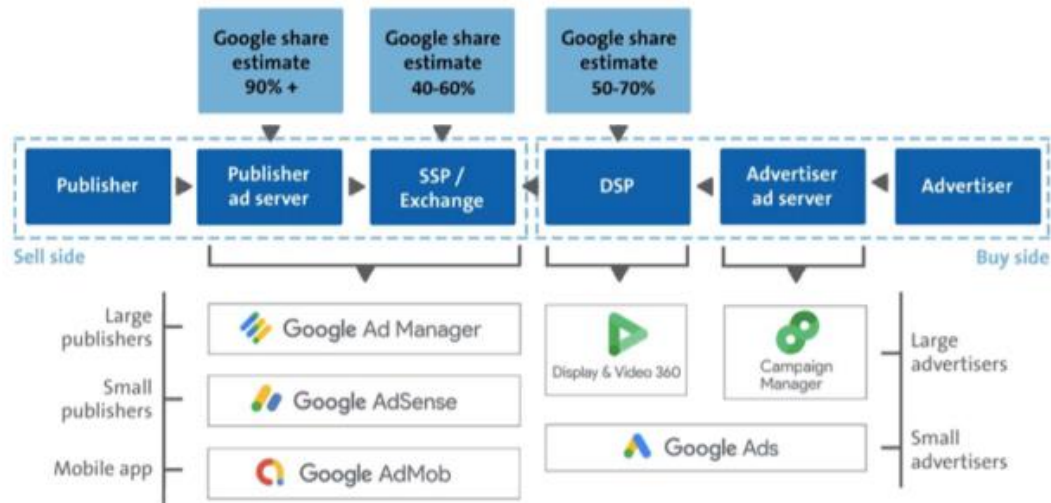
Shoshana Zuboff uses the term “surveillance capitalism” to describe the new, modern form of capitalism prevalent in today’s society that “unilaterally claims human experience as free raw material for translation into behavioural data. Although some of these data are applied to service improvement, the rest are declared as a proprietary behavioural surplus, fed into advanced manufacturing processes known as ‘machine intelligence’, and fabricated into prediction products that anticipate what you will do now, soon, and later. Finally, these prediction products are traded in a new kind of marketplace that I call behavioural futures markets. Surveillance capitalists have grown immensely wealthy from these trading operations, for many companies are willing to lay bets on our future behaviour.” (see [here](#)).

⁴² Katherine Trendacosta and Danny O’Brien, ‘An Antitrust Exemption for News Media Won’t Take Us Back to the Time Before Big Tech,’ Electronic Frontier Foundation (2021) (accessible [here](#)).

⁴³ Politico, ‘Google dominates online ads — and DOJ may be ready to pounce,’ (2020) (accessible [here](#)).

⁴⁴ Id.

⁴⁵ Competition and Markets Authority, ‘Online platforms and digital advertising: Market study interim report.’ (2019) (accessible [here](#)).



A visual representation of Google’s dominance in digital advertising.⁴⁶

The Australian Competition and Consumer Commission (ACCC) found that for each A\$100 spent by advertisers, Google receives A\$47 and Facebook receives A\$24.⁴⁷ In the United States, figures were similar in 2018 (60% of the digital advertising industry going to Google or Facebook) with the notable addition that the proportion was found to be even higher at the local level, with Google and Facebook claiming 77% of digital advertising revenue in local news markets.⁴⁸ Although the dearth of figures released by Facebook and Google complicates efforts to fully analyse the situation, it appears that the share received by publishers is also rapidly decreasing. In 2010, Google had announced that publishers were receiving 68% of online ad revenue for content advertisement and 51% for search ads, but these figures appear to have declined significantly since then.⁴⁹

This dominance⁵⁰ means that media publishers are dependent on a small number of technology platforms for the revenue that drives their businesses, with few viable alternatives, while lacking crucial information about how those platforms operate, how much of a cut they take, and how to properly plan and adapt to them. It means that ad buyers and ad budget holders place ads almost exclusively with the large technology platforms, bypassing the news media. In the context of South Africa, it has also arguably contributed to preventing community media, a critical sector serving information to the most underserved sections of the public, from successfully

⁴⁶ Filippo Lancieri, ‘How Google and Facebook Made Digital Advertising Markets Increasingly Opaque to Protect Their Dominance,’ ProMarket (2020) (accessible [here](#)).

⁴⁷ Jansen Baier, ‘Why Google and Facebook Pay For News in Australia, And How the US Might Follow,’ Media File (2021) (accessible [here](#)).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Note that the term is used in a practical, not legalistic, sense here. The European Digital Markets Act, which aims to ensure that large online platforms behave in a fair way online, defines criteria by which a large online platform would qualify as a “gatekeeper” and sets out a number of rules for gatekeepers, such as that they must allow their business users to access the data that they generate in their use of the gatekeeper’s platform and must provide companies advertising on their platform with the tools and information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper: European Commission, ‘The Digital Markets Act: ensuring fair and open digital markets,’ (accessible [here](#)).

transitioning to digital due to the difficulties of monetising online content.⁵¹ In a world in which internet penetration will continue to increase in the coming years, and the need for content that speaks to under-served communities through digital channels is increasing, it is concerning that community media outlets report that, from their perspective, it is a difficult decision to attempt the transition to digital due to the inability to continue to monetise their content on those channels.

In the larger scheme of the history of news media, it is clear that news media publishers have struggled to effectively transition their print advertising revenue to the digital domain at least, in part, because of increased competition in the online advertising market (arguably, along with the dominance of technology platforms in those markets), and because of the difficulties of monetising content in an online domain in which news content can be easily and quickly reproduced and reutilised.⁵²

As a result, the quality and quantity of public-interest journalism has declined across the world, and in South Africa.⁵³ At the same time, mis- and disinformation have been enabled to flourish on online platforms and increasing concentration in the news media industry has impacted the diversity of perspectives, voices, and interests reflected in journalism. In the South African context, this period of transition has coincided with a challenging period politically for the news media, with growing political attacks on institutions of journalism, accusations of media capture, and genuine frustration at the failures of the industry to fully transform in the post-apartheid era.⁵⁴

⁵¹ Interviews with stakeholders.

⁵² OECD, 'Competition Issues concerning News Media and Digital Platforms,' (2021) (accessible [here](#)).

⁵³ UNESCO, 'Journalism is a public good: World trends in freedom of expression and media development; Global report 2021/2022,' (2022) (accessible [here](#)).

⁵⁴ Kathleen Satchwell et al, 'Independent Panel Report: Inquiry into Media Ethics and Credibility', (2021, updated in April 2021) (accessible [here](#)).

4. COMPARABLE PROCESSES IN OTHER JURISDICTIONS

Commonly, initiatives in other jurisdictions have relied either on pursuing abuse-of-dominance cases or new regulations or legislation in the domain of either competition or copyright.

4.1. Abuse of dominance approaches

The Commission’s 2020 report on competition in the digital economy sets out several features of digital markets that inform the Commission’s stance on the abuse of dominance in digital markets:⁵⁵

“First, the global reach of digital markets means that conduct found to be anti-competitive in one jurisdiction could easily be considered anticompetitive in other jurisdictions. Second, digital markets tend to be “tipping markets” which means that there is a likelihood for the rapid expansion of one large dominant platform within a particular market. Examples are Amazon.com in the US, Alibaba in China, and Takealot in South Africa. Finally, regulated incumbents tend to be at a disadvantage when global unregulated digital firms enter the local market. Cases against dominant digital companies are often challenging to investigate because of jurisdictional reach and the high bar set by legislation to prove an abuse-of-dominance contravention.”

The same report notes several concerns about abuse of dominance that are relevant to the problems facing news publishers in the digital advertising industry. It notes that market power becomes concerning when a vertically integrated digital firm benefits from owning a platform while also competing with sellers on that platform, and that conglomeration can be concerning even where several big players are competing, particularly in the South African context in which market concentration levels are already high.⁵⁶ It also emphasises that global cooperation and coordination is a key part of the strategy the Commission intends to pursue, particularly with regard to Google, Facebook, and Apple.⁵⁷

Several competition regulators have initiated investigations on dominance within the digital advertising industry, particularly with regard to Google. The French Autorité de la concurrence (**the Autorité**) found that Google abused its dominant position in the market for ad servers for publishers’ websites and mobile applications and favoured its own ad server and advertising space sales platform.⁵⁸ In its final decision, the Autorité imposed a fine of EUR220 million and made commitments offered by Google to ensure interoperability of other auction platforms with its ad server mandatory for a period of three years.⁵⁹

An ongoing investigation by the EU Competition Commissioner is focusing on Google’s use of data in its digital advertising business, particularly examining the obligation to use Google products to purchase online ads on YouTube, whether there is favouring of Google’s ad exchange by Google products, and “the restrictions placed by Google on the ability of third parties, such as advertisers,

⁵⁵ Competition Commission, ‘Competition in the Digital Economy,’ (2020) at p. 6-7 (accessible [here](#)).

⁵⁶ Id at p. 7.

⁵⁷ Id.

⁵⁸ Autorité de la concurrence, ‘Décision n° 21-D-11 du 7 juin 2021 relative à des pratiques mises en oeuvre dans le secteur de la publicité sur Internet,’ (2021) (accessible [here](#)).

⁵⁹ Id.

publishers, or competing online display advertising intermediaries, to access data about user identity or user behaviour which is available to Google's own advertising intermediation services.”⁶⁰ While this process is ongoing, reports have indicated that Google may be looking to settle.⁶¹

In December 2020, the United States (US) Department of Justice, along with eleven state Attorneys-General, filed a civil antitrust lawsuit accusing Google of illegally abusing its dominance of the technology that runs the digital advertising industry.⁶² The complaint claims that Google overcharged publishers for ads, edged out rivals who attempted to challenge its dominance in the sector, and had reached an agreement with Facebook to limit its efforts to compete with Google for ad spending. In November 2021, the group of states filed an amended complaint further accusing Google of using monopolistic and coercive tactics with advertisers in its efforts to dominate and drive out competition in online advertising.⁶³

In January 2021, the UK's Competition Marketing Authority (CMA) opened an investigation into Google's proposed changes to disable third-party cookies on its Chrome browser and replace them with new tools for targeting advertising that it argued better protect consumers' privacy.⁶⁴ In June 2021, the CMA concluded its investigation, in which it worked closely with the UK's privacy regulator, the Information Commissioner's Office (ICO), resulting in Google committing not to discriminate in favour of its own advertising and ad tech tools.

4.2. Competition-based processes

Australia

In 2021, the Australian Parliament passed into law a mandatory bargaining code between news media and tech platforms.⁶⁵ Overseen by the ACCC, the News Media Bargaining Code establishes a “negotiate and arbitrate” model which requires designated technology platform companies to enter into agreements with news publishers for remuneration of news content displayed on those platforms. In the event that the parties cannot come to an agreement, the Code mandates mediation and then arbitration.⁶⁶ The Code also entitles registered news publishers to be notified at least 14 days before any changes to a technology platform's algorithms, if a change would have a significant effect on referral traffic from the platform.⁶⁷ The Code does not apply automatically to any company, in particular, but establishes a process for Australia's Treasurer to designate specific companies which are subject to the Code.

⁶⁰ European Commission, ‘Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector,’ (2021) (accessible [here](#)).

⁶¹ Reuters, ‘Google loses challenge against EU antitrust ruling, \$2.8-bln fine,’ (2021) (accessible [here](#)).

⁶² New York Times, ‘10 States Accuse Google of Abusing Monopoly in Online Ads,’ (2020) (accessible [here](#)).

⁶³ Reuters, ‘U.S. states file updated antitrust complaint against Alphabet's Google,’ (2021) (accessible [here](#)).

⁶⁴ OECD, ‘Competition Issues concerning News Media and Digital Platforms,’ (2021) at p. 28 (accessible [here](#)).

⁶⁵ Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill’ (2021) (accessible [here](#)).

⁶⁶ OECD, ‘Competition Issues concerning News Media and Digital Platforms,’ (2021) at p. 32 (accessible [here](#)).

⁶⁷ News Media and Digital Platforms Mandatory Bargaining Code, 51S.

The Code also provides for a form of exemption for technology platforms: in determining whether a company should be designated as subject to the Code, the government should take into consideration whether the company “has made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses (including agreements to remunerate those businesses for their news content).”⁶⁸

As a result, and before the Code’s adoption, but after much back-and-forth, both Google and Facebook entered into voluntary agreements with a range of news publishers in Australia and have therefore not been designated in the Code as yet.

Canada

The Canadian government has indicated that it is considering adapting the Australian approach to produce its own legislation,⁶⁹ with the Heritage Minister, whose office oversees media and communications, pledging to bring a similar bill, and the Prime Minister promising coordinated efforts with the Australian Prime Minister to ensure that technology platforms pay for the content on their platforms.⁷⁰ Canada’s Competition Bureau also recently obtained a court order to pursue an investigation into whether Google’s advertising business is harming competition in Canada.⁷¹

United Kingdom

In the UK, the Department for Digital, Culture, Media and Sport commissioned the Cairncross Review to look at the sustainability of journalism in the context of drastic changes to the digital economy. The Review recommended a code of conduct be signed between technology companies and publishers which would include agreements on payments, notification of changes to algorithms, and restrictions on the amount of content to be included in indexes.⁷²

In January 2022, it was revealed that draft legislation is being prepared in the UK that closely resembles the Australian Code, with a regime that would require negotiation over payment deals which, if unsuccessful, would lead to independent arbitration, overseen by the newly established Digital Markets Unit.⁷³

The UK’s CMA has also called on the British government to create a new regulatory regime to address the market dominance of technology platforms over the local news industry, after finding that local news publishers are reliant on Google and Facebook for almost 40% of all visits to their sites.⁷⁴

⁶⁸ News Media and Digital Platforms Mandatory Bargaining Code, 51E(3)b.

⁶⁹ Statement by the Prime Minister of Canada, 23 February 2021, accessible [here](#).

⁷⁰ Daniel Van Boom, ‘Facebook could block news in Canada like it did in Australia,’ CNet (2021) (accessible [here](#)).

⁷¹ ‘Statement by the Competition Bureau Canada,’ 22 October 2021, accessible [here](#).

⁷² ‘The Cairncross Review: A Sustainable Future for Journalism,’ (2019) accessible [here](#).

⁷³ Business Standard, ‘Google, Facebook may be forced to pay British newspapers for their stories,’ (2022) (accessible [here](#)).

⁷⁴ Statement of the CMA, July 2020, accessible [here](#).

United States

Lawmakers in the US have tabled draft legislation seeking to enable news publishers to collectively bargain with dominant online platforms. The Journalism Competition and Preservation Act of 2021 seeks to create a four-year “safe harbour” from antitrust law for print, broadcast, and digital news companies to collectively negotiate compensation terms for their news stories with the largest online platforms.⁷⁵

Other competition-driven processes are also in progress. In October 2021, the Attorney-General of Texas filed a complaint on behalf of sixteen states and Puerto Rico in the Southern District of New York alleging that Google placed undue influence on its bidding system to ensure that its exchange would win over competitors, agreed on quotas with Facebook for how often Facebook would win publishers' auctions, and that Google uses its market power to extract 22% to 42% of the ad revenues that would otherwise have flowed to online publishers, newspapers, and other content producers.

4.3. Copyright-based processes

European Union

In 2019, the EU passed a new Copyright Directive which mandates EU member states to give copyright protection to news publishers for the re-use of their content by news aggregators and similar services.⁷⁶ The copyright protection does not apply to hyperlinking, the use of very short extracts, and the private or non-commercial use of news content by individuals. The Copyright Directive has compelled a re-configuration of the relationship between news publishers and prominent news aggregators in several EU member states.

In France, one of the first countries to domesticate the Copyright Directive, courts recently upheld an order for Google to open negotiations with French publishers over payments for reusing their news content after protracted negotiations,⁷⁷ and Google signed a deal with one major publishers' association in early 2021.⁷⁸ Negotiations between Google and other publishers appear to have stalled,⁷⁹ while Facebook announced that a similar agreement had been reached in France in October 2021.⁸⁰

In Germany, the Federal Cartel Office, the Bundeskartellamt, has also begun implementing legislation as required by the Copyright Directive. Under broader competition law, the Bundeskartellamt has also initiated proceedings against Google's parent company, Alphabet,⁸¹ to

⁷⁵ The National Law Review, ‘The Journalism Competition and Preservation Act of 2021: Conflicts between Social, Political and Legal Aspects of Google's Use of Copyrighted News Material,’ March 2021, accessible [here](#).

⁷⁶ Article 15, EU Directive 2019/790.

⁷⁷ AP News, ‘French court: Google must open payment talks with publishers’, (2020) (accessible [here](#)).

⁷⁸ TechCrunch, ‘Google inks agreement in France on paying publishers for news reuse’, January 2021, accessible [here](#).

⁷⁹ Reuters, ‘Exclusive: French antitrust investigators say Google breached its orders on talks with news publishers - sources’, February 2021, accessible [here](#).

⁸⁰ TechCrunch, ‘Facebook agrees to pay French publishers for news reuse’, October 2021, accessible [here](#).

⁸¹ Statement by the Bundeskartellamt, June 2021, accessible [here](#).

examine the working of the Google News Showcase under a new competition law tool,⁸² which is currently ongoing. This is in addition to prior proceedings initiated against Facebook⁸³ and Amazon⁸⁴ based on the same tool.

As discussed above, Spain adopted regulations in 2014 mandating that technology platforms pay news publishers to republish headlines or snippets of news, with the result that Google pulled the News Showcase product from the country entirely and restricted sharing content from news publishers on Search. However, Spain adopted the Copyright Directive in November 2021, which removed the collective fee and allowed Google to reach individual or group agreements directly with news publishers,⁸⁵ and, as a result, Google News returned to Spain in November 2021.⁸⁶

Japan

Japan enacted amendments to its Copyright Act in 2009 that prescribed that displaying snippets and thumbnails along with URLs in search services is legal to the extent deemed necessary for the search and the provision of the results.⁸⁷ New amendments in 2018 clarified further that the display of content needed to be limited to “minor exploitation” and should be based on the percentage of the overall content being displayed.⁸⁸

In September 2021, Google rolled out News Showcase in Japan, announcing that as part of the program it would pay fees to 40 publishers.⁸⁹

Other countries

Other countries have likewise considered copyright-driven regulation but have opted not to pursue it for various reasons. As the Organisation for Economic Co-operation and Development (OECD) reported:

“In its 2020 market study, the CMA considered the option to give publishers rights to compensation for use of their content by digital platforms. However, it concluded that, based on the experience from other jurisdictions (in particular those that had enacted copyright laws that allowed to charge news aggregators for snippets), such remedies are not very effective or can reduce traffic to publishers.”⁹⁰

In Australia, the competition authorities also chose not to endorse a proposal by the Australian Copyright Agency to pursue a copyright-based licensing regime because it was unclear why this

⁸² German Competition Act, GWB, January 2021, accessible [here](#).

⁸³ Statement by the Bundeskartellamt, January 2021, accessible [here](#).

⁸⁴ Statement by the Bundeskartellamt, May 2021, accessible [here](#).

⁸⁵ News Media Alliance above n. 36.

⁸⁶ Euro News, ‘Google News returns to Spain after the country adopts new EU copyright law,’ (2021) (accessible [here](#)).

⁸⁷ OECD above n.52 at p. 29.

⁸⁸ Id.

⁸⁹ The Japan Times, ‘Google launches News Showcase service in Japan, will pay fees to 40 publishers,’ (2021) (accessible [here](#)).

⁹⁰ OECD, ‘Competition Issues concerning News Media and Digital Platforms,’ (2021) at p. 29 (accessible [here](#)).

compensation should be limited to news content and because it could have created incentives for platforms to reduce the circulation of news content on their platforms.⁹¹

⁹¹ Id.

5. ISSUES FOR CONSIDERATION

South Africa is fortunate to benefit from the experience of other jurisdictions in considering the appropriateness of competition and copyright regulation to advance the sustainability of journalism, and to address a lack of competitiveness in the digital economy. In reviewing initiatives in other jurisdictions as well as considering the specific context of the South African media landscape, it is clear that while there are a number of short-term benefits to a media-bargaining code approach (or similarly, a copyright-based approach, as discussed above), there are also considerable challenges and potential unintended consequences that should be addressed to ensure the efficacy and sustainability of any such approach in South Africa.

5.1. Short-term benefits

Stakeholders interviewed for this Position Paper and the literature strongly emphasises the need for an immediate cash injection for news publishers in South Africa and indicate that sources available in other countries, such as additional public funding or considerable audience revenue, remain improbable here. Media bargaining codes such as the Code implemented in Australia may be effective in generating short-term resources for struggling news publishers and provide breathing space for innovations at a more fundamental level.

They can also be an effective method for generating greater transparency for news publishers by incorporating data-sharing requirements by technology platforms, although the Australian experience has demonstrated that technology platforms may be unlikely to concede ground in this regard. Google has argued that providing advance notice of algorithm changes would enable news publishers to “game the system” and would constitute an unfair advantage over other content publishers.⁹² It also argued that the sheer scale of algorithm updates made annually makes notification impractical and creates a system that is effectively a waiting period in which necessary updates will be delayed in certain jurisdictions.⁹³

Nevertheless, if responsibly implemented, a media bargaining code could be beneficial in the short term for news publishers in South Africa by creating space for research and advocacy on more fundamental issues within the sector, including those relating to the role of the technology platforms.

Further, the competition or copyright-based approach of securing payments for news publishers appears to be the most feasible form of funding for news in the immediate term given the existing momentum from other countries. There is a valid argument for capitalising on the concessions made by technology platforms in other jurisdictions such as Australia. The recent agreement between Twitter and the Nigerian government is also instructive: the government ended a seven-month ban of Twitter, imposed in response to a content moderation decision that removed one of the President’s tweets, after the technology platform agreed to register in Nigeria, appoint a designated country representative, and comply with local tax obligations in exchange for its

⁹² Anya Schiffrin et al, ‘Saving Journalism: A Vision for the Post-Covid World,’ (2021) at p. 21 (accessible [here](#)).

⁹³ Google, ‘13 things you need to know about the News Media Bargaining Code,’ (2020) (accessible [here](#)).

unbanning.⁹⁴ The government subsequently announced its intention to impose the same requirements on other social media platforms operating in the country.⁹⁵

Finally, it should be noted that a competition process is likely to move faster than other forms of legislative reform, especially if it spurs a voluntary negotiations process or a voluntary code, which, at this stage, appears likely.

5.2. Systemic issues

A fundamental criticism of this approach to regulation is that it fails to address the inherent market failures of the news production industry and makes platform companies solely responsible for a complex and multi-faceted problem.⁹⁶ While the dominance of technology platforms in the digital advertising industry has had a significant impact on the revenues of news publishers in recent years, the sustainability challenges facing journalism stem from issues that are broader than the behaviour of technology platforms alone.⁹⁷ However, this does not negate the argument for technology platforms to be held accountable for the element of the problem for which they are responsible: *dominance that distorts the market on which a critical public good relies*.

It must, however, be acknowledged that media bargaining codes, as they have so far existed and are likely to exist, do not structurally reshape the dynamics of the digital advertising industry, and will not, on their own, result in the emergence of a viable new business model for public interest journalism. As a result, arguments have been made for broader and wider competition regulation of dominant technology platforms, based on two parts:⁹⁸

- (i) first, to challenge their dominance in the widespread collection of data, including to force the opaque and complex digital advertising market to be more transparent and fairer; and
- (ii) second, to break up the multifaceted technology platforms along the lines of traditional competition law. (Supporters of this approach argue that the sustainability of journalism should therefore be placed outside the bounds of these efforts but would nevertheless receive downstream benefits from them.)

The 2021 SANEF report on media sustainability elaborated on various alternative options available in the South African context which are not repeated here.⁹⁹ However, it should be emphasised that it is SANEF's view that comprehensive upstream regulation of technology

⁹⁴ BBC News, 'Twitter agrees to Nigeria's demands to end seven-month ban,' (2022) (accessible [here](#)).

⁹⁵ Dennis Erezi, 'Nigeria to impose Twitter conditions on other social media platforms,' The Guardian NG (2022) (accessible [here](#)).

⁹⁶ James Meese, 'Journalism Policy across the Commonwealth: Partial Answers to Public Problems, Digital Journalism,' (2020) (accessible [here](#)).

⁹⁷ Satchwell et al, above n.11.

⁹⁸ Id.

⁹⁹ Accessible [here](#). On its surface not a competition-related initiative, it is worth noting that the Commission may nevertheless play a role in ensuring that public or private funding schemes for journalism do not create unintended competition distortions or increased competition in the news media industry. See OECD, above n. 52 at p. 35. On other pathways toward sustainability, see Harry Dugmore, 'Thinking globally, acting locally' (accessible [here](#)).

platforms is a non-negotiable part of any solution to the sustainability of journalism. As a result, SANEF acknowledges that the Commission has also raised the possibility of broader competition regulation, noting in the Terms of Reference for the Online Intermediation Market Inquiry that over-arching regulation may be one of the best courses of action for addressing competition in digital advertising.¹⁰⁰

Policymakers in a range of jurisdictions are also beginning to consider broader competition regulation to “break up” the dominance of the major technology platforms across a multiplicity of industries, including search and e-commerce, and merging anti-trust regulation with privacy regulation. Lina Khan, the current Chairperson of the Federal Trade Commission (**FTC**), has previously called for more structural reforms to address the tech platforms’ market power, arguing that the structural separation of digital platforms from their advertising businesses “could potentially be justified on the basis of protecting the news media” and that this separation would “promote media diversity and protect journalism.”¹⁰¹

President Joe Biden has also indicated that he will seek to curb monopolies through a series of executive orders, calling on the Justice Department and the FTC to update their criteria for examining proposed corporate mergers.¹⁰² The US House Judiciary Committee approved a six-part package, the Ending Platform Monopolies Act,¹⁰³ in June 2021 that aims to “eliminate the conflicts of interest that arise from a dominant platform’s ownership and reach across multiple business lines.”¹⁰⁴ The proposed legislation would make it unlawful for a dominant online platform to simultaneously own another line of business when that dual ownership creates a conflict of interest, requiring companies in violation to divest lines of business where their gatekeeper power allows them to favour their own services or disadvantage rivals.¹⁰⁵

Regulators in Europe are also pursuing various paths. The European Commission has begun an antitrust investigation against Amazon focusing on how the company uses the data of third-party merchants on its platform to compete against them.¹⁰⁶ The German Bundeskartellamt ordered Facebook to stop collecting personal user data from third-party websites and using it to profile people without their consent.¹⁰⁷ Although ostensibly a data-protection violation, the regulator nevertheless saw it as a competition issue because the practice helps Facebook amass market power.¹⁰⁸ The UK’s ICO and the CMA likewise published a joint statement in May 2021 setting out their shared views on the relationship between competition and data protection in the digital

¹⁰⁰ Competition Commission at p. 9 above n. 21.

¹⁰¹ Khan, ‘The Separation of Platforms and Commerce,’ *Columbia Law Review*, Vol. 119 (2019) at p. 1068 (accessible [here](#)).

¹⁰² David Meyer and Nicole Goodkind, ‘What will the future of Big Tech regulation look like? Europe offers some clues,’ (2021) (accessible [here](#)).

¹⁰³ Accessible [here](#).

¹⁰⁴ ‘Jayapal’s Landmark Big Tech Legislation Passes House Judiciary Committee,’ Pramila Jayapal; Congresswoman for WA-07 (2021) (accessible [here](#)).

¹⁰⁵ *Id.*

¹⁰⁶ David Meyer, ‘Europe lays out Amazon antitrust charges, targeting its use of merchants’ data,’ (2020) (accessible [here](#)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

economy and highlighting the strong overlap between promoting and protecting competition in digital markets and safeguarding people’s data.¹⁰⁹

These examples demonstrate the close connection between competition and data protection regulation in the context of the digital economy in which technology platforms’ dominance in collecting and leveraging personal data has created dominance in various sectors, including digital advertising, and, arguably, contributes to the ongoing perpetuation of this dominance. In South Africa, researchers have been noted that “there are currently more regulatory resources to respond in a competition paradigm than in one of privacy,” particularly given that the country’s data protection legislation, the Protection of Personal Information Act 4 of 2013 (**POPIA**), only recently came fully into force on 1 July 2021.¹¹⁰

China has also been active in leveraging antitrust law to reign in technology giants in the country, fining Alibaba in April 2021 for having illegal exclusivity deals with merchants using its online shopping platforms and forcing Ant Group to separate its payment platform and financial products.¹¹¹ Food-delivery service, Meituan, is also currently subject to a competition probe and Tencent has been instructed to give up exclusive music licensing deals it had with global labels, and it has been stopped from merging with leading game-streaming sites Huya and DouYu.¹¹²

Despite these developments, there are numerous criticisms of the over-arching competition regulation approach in the South African context. First, the nature of the South African economy, as a small developing economy characterised by high levels of inequality and poverty, may imply that it has “a constrained ability to act decisively against the most economically powerful companies which also have limited physical presence” here.¹¹³ However, the Commission has strongly affirmed that its current Inquiry is “not restricted to platforms that have a physical presence in South Africa only. The scope of the [Inquiry] includes foreign-based online intermediation platforms that have an economic effect in South Africa even if such platforms do not have a physical presence in the country.”¹¹⁴

The Electronic Frontier Foundation has argued that the Australian government was unable to “take the obvious step of breaking up the monopolies — at least on the tech side — because those companies are based elsewhere. They are, of course, based in the United States, where they can, and should, be dealt with as monopolies, with their power and scope greatly reduced.”¹¹⁵ This raises the question of whether upstream competition regulation more broadly or even specifically in the digital advertising industry can or should only be tackled in the United States or Europe.

¹⁰⁹ Information Commissioner’s Office, ‘ICO and CMA set out blueprint for cooperation in digital markets,’ (2021) (accessible [here](#)).

¹¹⁰ ENSafrica, ‘POPIA is (still) definitely coming into effect on 1 July 2021,’ Lexology (2021) (accessible [here](#)).

¹¹¹ Meyer and Goodkind above n. 102.

¹¹² Id.

¹¹³ Firoz Cachalia and Jonathan Klaaren, ‘Opening View on Big Tech: Towards an African Paradigm of Regulating Big Tech,’ (2021) (accessible [here](#)).

¹¹⁴ Competition Commission South Africa, ‘Online Intermediation Platforms Market Inquiry Clarification on the Inquiry Scope,’ (2021) (accessible [here](#)).

¹¹⁵ Trandacosta and O’Brien above n. 42.

Second, the speed at which technology platforms operate is often incongruous with the speed of regulation, particularly such large-scale, potentially complicated, and forcefully contested regulation as the breaking up of dominant technology platforms. In response to this challenge, the European Commission’s proposed Digital Markets Act would attempt to stop antitrust abuses by “gatekeeper” companies before they happen.¹¹⁶

Finally, questions have been raised about whether breaking up these companies would be sustainable in the long term, especially given that underlying network dynamics, such as network effects and economies of scale, may continue to favour concentration.¹¹⁷ Critics have also pointed out that without finding long-term viable business models for news journalism, greater competition in the digital economy would only address part of the problem.¹¹⁸ In contradistinction, while it is acknowledged that technology platforms are not entirely responsible for the financial challenges of the news media industry, it is only appropriate that they be regulated to address any parts of the problem for which they are responsible.

Accordingly, and where needed, SANEF is supportive of any efforts made by the Commission to engage in related discussions and processes taking place around the world in order to ensure the contextual factors particular to South Africa are taken into consideration in regulatory efforts in the jurisdictions in which these companies are based.

5.3. Amplifying dominance

A common criticism levelled at media bargaining code initiatives is that they can inadvertently harm competition within the news industry by leading to outcomes that favour already-dominant publishers.¹¹⁹ By relying on pre-defined and pre-existing activity to determine qualifying news publishers and the level of compensation, these codes arguably bolster dominant media at the expense of small, local, community, and start-up media organisations. Similarly, the relatively high transaction costs for small news publishers to negotiate mean that the cost-benefit trade-off of participating in a negotiation process will be different for these parties. As a result, there is a tendency — unless concerted action is taken to the contrary — for media bargaining codes to predominantly include and to benefit large and dominant news publishers at the expense of others.

For example, the Chair of the ACCC was quoted as saying that under the Australian Code, news outlets benefit in proportion to their existing contribution to journalism, in other words, in proportion to the number of journalists they employ.¹²⁰ As Leaver points out:

“One of the most important facets of the Code was the inclusion of mechanisms to ensure that regional and small news publishers in Australia would be able to negotiate with Facebook and Google. While some might be able to band together and strike terms (and some already have)

¹¹⁶ European Council, ‘Regulating ‘big tech’: Council agrees on enhancing competition in the digital sphere,’ (2021) (accessible [here](#)).

¹¹⁷ Global Data, ‘Antitrust: The battle over digital monopolies is just getting started,’ (2021) (accessible [here](#)).

¹¹⁸ OECD, above n. 52 at p. 35.

¹¹⁹ Anya Schiffrin, ‘Saving journalism: worldwide interventions,’ (2022) (accessible [here](#)).

¹²⁰ Anya Schiffrin, ‘Five competition ministers discuss regulating Big Tech’, May 2021, accessible [here](#).

it is likely that many smaller news companies in Australia will miss out, since the deals being struck with the bigger news companies appear to be big enough to ensure they are not designated, and thus not subject to the Code.”¹²¹

An important component of Australia’s Code is that technology platforms may not discriminate against news businesses that are part of the Code through lower ranking or choosing to present news from non-member companies.¹²² This has led smaller outlets and alternative media outlets to complain that they would not only fail to meet the requirements of the Code, and therefore be excluded from any deals, but would also lose the ability to run articles on the platforms due to the non-discrimination provision.¹²³ Smaller publishers also complained to regulators that they are not being fairly remunerated by Google or Facebook under the new arrangements.¹²⁴

Google has acknowledged that its payment structure for News Showcase, its new voluntary news curation platform for which select news partners are compensated for their content,¹²⁵ favours large publishers over local publishers with smaller audiences.¹²⁶

In the United States, the proposed Journalism Competition and Preservation Act Bill has been criticised for possibly entrenching existing power relationships in media by creating a news media cartel, and deepening news organisations’ dependence on platforms.¹²⁷

The risk of entrenching media dominance is particularly acute in South Africa, where a significant proportion of the population relies on community media and the public broadcaster to access news and critical information. Only about 66% of South Africans access the internet while 95% regularly access information on TV.¹²⁸ In particular, people with lower incomes rely more heavily on TV and radio for access to the media. A lack of diversity in the media, both in terms of content and ownership, has been cited as a crucial problem facing the news media sector in South Africa. New research shows that “most South African citizens (most of whom are economically marginalised) are found to experience extremely low levels of media content diversity in their personal media diets.”¹²⁹ According to the Media Policy and Democracy Project, “the diversity of content in the media is important to society and democracy, and should reflect the widest range of cultural and political ideas possible because the media are integral to the individual’s formulation of opinions and ideas.”¹³⁰

¹²¹ Tama Leaver, ‘Going Dark: How Google and Facebook Fought the Australian News Media and Digital Platforms Mandatory Bargaining Code,’ (2021) (accessible [here](#)).

¹²² Anya Schiffrin et al, ‘Saving Journalism: A Vision for the Post-Covid World,’ (2021) (accessible [here](#)).

¹²³ Id at p. 20.

¹²⁴ Sydney Morning Herald, ‘ACCC, Senator Bragg to help small outlets strike Google, Facebook deals,’ (2021) accessible [here](#).

¹²⁵ Forbes, ‘Google’s News Showcase Teaches Executives What Not To Do,’ (2021) (accessible [here](#)).

¹²⁶ Digiday, ‘Google says publishers don’t want collective bargaining as it starts news partnership talks in the US. USA Today disagrees,’ (2021) (accessible [here](#)).

¹²⁷ Public Knowledge, ‘Can the Journalism Competition & Preservation Act Really Preserve Local Journalism? Public Knowledge Says “Probably Not.”,’ (2021) accessible [here](#).

¹²⁸ Kantar TNS, ‘The Establishment Survey,’ (2020) (accessible [here](#)).

¹²⁹ Julie Reid, ‘Media Diversity in South Africa: New Concepts from the Global South,’ (2022) (accessible [here](#)).

¹³⁰ Julie Reid, ‘Media Content Diversity in SA: Why is government still asking all the wrong questions?,’ Daily Maverick (2016) (accessible [here](#)).

The South African media industry also had competition-related challenges as a result of the dominance of a small number of large media corporations. In 2018, two South African print media companies, Independent Media and Caxton, were fined and ordered to implement several remedies in response to a finding by the Commission that the companies had agreed to offer similar discounts and payment terms to advertising agencies in a way that restricted competition.¹³¹ DStv also admitted to price-fixing in 2017.¹³²

In this context, there are justifiable concerns about an approach that would predominantly benefit already-dominant news publishers, potentially contributing to greater concentration and less competition, and creating headwinds for new voices to break into the sector. Critics have argued that media bargaining codes by their nature protect news media as it currently exists, and do not create room for nor incentivise innovation in the media, which is crucial to overcoming other aspects of the news media crisis, including the need for transformation in the news media industry in South Africa.¹³³

However, many alternative options raised for advancing the sustainability of journalism have likewise created tension between small and large publishers. Schiffrin et al highlight that “each benefits from different policies and types of support, and they are often at loggerheads.”¹³⁴ Advocates for a media bargaining code argue that the public interest role of journalism justifies regulation in the public interest. However, in countries where public-service media are either absent or seriously weakened, such regulation is likely to serve largely to benefit corporate actors whose primary objective is profit.¹³⁵ Critics, therefore, argue that instead of centring around news media, regulatory efforts should focus more explicitly on the public good.

It is therefore crucial that any regulatory interventions, or further negotiations with technology platforms, are broad and inclusive to mitigate the potential risk of benefitting only dominant publishers. An inclusive and collective front may also present negotiation as a more viable option to the technology platforms. However, experiences in Spain, France, and Australia have indicated that the platforms may prefer undertaking individual agreements with news publishers.

5.4. Media capture

A scenario in which news publishers become directly dependent on technology platforms for regular revenue raises concerns that this could distort news coverage of the platforms, and stifle critical coverage of increasingly influential actors in modern society.¹³⁶ In many African countries, news publishers already face efforts by their governments to influence editorial content and repress freedom of expression.¹³⁷ In South Africa, in particular, the Satchwell Report

¹³¹ Competition Commission of South Africa, ‘Media Statement: Media Companies Fined Millions For Cartel Conduct,’ (2018) (accessible [here](#)).

¹³² Id.

¹³³ James Meese above n. 96.

¹³⁴ Schiffrin et al, ‘Saving Journalism 2: Global Strategies and a Look at Investigative Journalism,’ (2022) (accessible [here](#)).

¹³⁵ James Meese above n. 96 at p. 15.

¹³⁶ Schiffrin et al above n. 134.

¹³⁷ Schiffrin et al above n. 134.

found that political structures have pressured the media at all levels and that journalists benefit from a ‘gravy train’ of largesse from external parties that skews reporting.¹³⁸

Initiatives that increase the potential for capture (or even the perception of capture) also risk further undermining the credibility of the news media, which is already under strain around the world. In South Africa, trust in news overall was measured at just 51% in 2021.¹³⁹ Initiatives that increase the risk of media capture should therefore be treated with caution.

5.5. Participation and inclusion

Any media bargaining code or similar intervention needs to arrive at an adequate definition of what *kind* of journalism or news production would benefit from the proceeds of such an arrangement. As discussed in the introduction, varying definitions have been used, including “high-quality journalism,” “public interest news,” “accountability journalism,” and “public service journalism.”¹⁴⁰

It is widely agreed among media stakeholders that in the South African context publishers must, at least, subscribe to a credible professional code such as the Press Code for press publications and the BCCSA Code of Conduct for broadcast journalism in order to benefit from any intervention aimed at sustaining journalism as a public good.

Another is that the publisher should be significantly engaged in the production of journalism in the public interest. In determining what qualifies for public interest journalism, the discussion in section 1.3. above may be instructive.

These decisions may be particularly difficult in the South African context in which the public relies heavily on community media and the public broadcaster and in which some elements of the media industry has been hollowed out and captured by political elements, raising questions about how to define independent or public interest news publishers.

This may call for an independent, trusted, and representative body to be responsible for defining the criteria through which news publishers would become eligible for payments, and for managing the disbursements of these payments. Stakeholders expressed concern that such decisions could be exclusionary if left to the technology platforms, government, or individual commercial news publishers.

Questions also exist regarding the participation of the South African Broadcasting Corporation (SABC) News division. Noting that the SABC is a public entity with an existing legislative framework and public funding sources, due consideration should be given to the fact that SABC News is the second largest online news platform in South Africa,¹⁴¹ with a clear public-interest mandate, and it is a major employer of journalists. The SABC is also unusually reliant on

¹³⁸ Satchwell et al, above n. 54.

¹³⁹ Reuters Institute, ‘Reuters Digital News Report: South Africa,’ (2021) (accessible [here](#)).

¹⁴⁰ SANEF above n. 17.

¹⁴¹ Reuters Institute, 2021 Digital News Report (2021) (accessible [here](#)).

commercial revenue compared to many other public broadcasters, meaning it suffers from the same challenges faced by other news publishers in the commercial sector.¹⁴²

There is precedent for public broadcasters being included within similar initiatives. Australia's Code was amended late in the process to include both the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS), the two public service broadcasting organisations in the country.¹⁴³ The development was credited with garnering the final votes in Parliament needed for the legislation to pass and was reported to result from concerns about the existing lack of diversity and competition in news media in Australia (where News Corp controls 70% of the newspaper market).¹⁴⁴ In South Africa, the SABC News Channel leads the 24-hour news market in the country, reaching 4,5 million viewers with isiXhosa and isiZulu news broadcasts,¹⁴⁵ many of whom are not able to access news through alternative sources. On the basis of precedent, the broadcaster's commercial profile and its public-interest mandate, there is strong cause for SABC News to be included in any sustainability intervention.

Various international standards to classify credible or independent journalism are in progress and may provide a mechanism to make decisions about participation in a media bargaining code. A prominent example is the Journalism Trust Initiative (JTI), which translates existing professional norms about journalism into a machine-readable code that enables the verification of quality and independence at media outlets.¹⁴⁶ Alternatively, it may be appropriate to work with industry bodies to develop a domestic standard for identifying credible producers of journalistic content.

5.6. Transparency

Ensuring transparency in the outcome of negotiations between technology platforms and news publishers is crucial for these approaches to be a viable solution. If such an approach intends to contribute to the public interest by advancing the dissemination of credible, reputable, and diverse news sources, that objective will not be met if opaque agreements enable greater consolidation and a lack of accountability to the public among news publishers. A lack of transparency over these agreements perpetuates the "black box" system already prevalent in digital advertising that locks out certain players and prevents accountability of both platforms and media.

The Australian experience showed that the technology platforms appear more willing to agree to payments than to commit to disclosures about their behaviour or how their products work. For example, technology platforms pushed back on an early provision of the Code which required that they provide media companies with advance notice of algorithm changes;¹⁴⁷ the requirement was eventually narrowed to require notification only in cases where the "dominant purpose" of the

¹⁴² Nearly 80% of the public broadcaster's total annual revenue comes from commercial sources: SABC Annual Report 2020 (accessible [here](#)).

¹⁴³ Lisa Visentin, 'ABC, SBS included in news media code as tech giants win concessions,' Sydney Morning Herald (2020) (accessible [here](#)).

¹⁴⁴ Anya Schiffrin et al, 'Saving Journalism: A Vision for the Post-Covid World,' (2021) (accessible [here](#)).

¹⁴⁵ SABC News, 'SABC News continues to record substantial audience growth,' (2020) (accessible [here](#)).

¹⁴⁶ Journalism Trust Initiative (accessible [here](#)).

¹⁴⁷ Lisa Visentin above n. 143.

change was to change the distribution of content on the platform and if the change is likely to have a “significant effect” on a news publishers’ referral traffic from the platform.¹⁴⁸ It also introduced an exclusion allowing information to be withheld if it would reveal a trade secret.¹⁴⁹

At least, and in order to address the criticism that media bargaining codes do not address the structural causes of media’s competitiveness, news publishers should be provided with information about the algorithmic decisions and changes that fundamentally affect their ability to earn revenue off their news production.

5.7. Payment amounts

Mandating that platforms should pay news publishers for their content also leads to the question of how a fair price is determined. France’s law, for example, provides that the price may be zero, but that content of higher quality should be valued accordingly. Under the Australian Code, news outlets are paid in proportion to their existing contribution to journalism,¹⁵⁰ but the Code also provides for technology platforms to factor in the value that they provide to news companies through referral traffic.¹⁵¹ Other measures include measures of audience and the quality of the content, all relatively subjective and contentious factors.

The risk in this regard is of perpetuating a system that incentivises sensational content, clickbait, or poor-quality content, rather than credible and high-quality journalism. Small investigative journalism outlets, for example, are likely to receive low payments if factors such as audience, number of staff members, or ‘followers’ on the platform are prioritised. This raises questions about whether such an initiative will achieve its intended purpose of helping to sustain public interest media at all, or inadvertently benefit large corporates and/or publishers who may produce low-quality, high-engagement content.

5.8. Access to news

A primary risk with mandating payments for news content is that technology platforms will react by removing news content entirely from their platforms, undermining efforts to advance access to credible information. Alternatively, there is a risk that platforms adjust their algorithms more subtly to punish news publishers.

Facebook attempted this approach in Australia, announcing the removal of all news content from the platform in the wake of announcements about the Code.¹⁵² In reality, Facebook’s ability to target news was not perfectly refined, and information and government pages, including health and emergency services were inadvertently blocked, leading to a major backlash.¹⁵³ After some concessions from the Australian government, Facebook restored news content in the country.

¹⁴⁸ Moulis Legal, ‘Fair shake of the (digital) sauce bottle - Australia’s news media bargaining code,’ Lexology (2021) (accessible [here](#)).

¹⁴⁹ Id.

¹⁵⁰ Columbia Journalism review, ‘Five competition ministers discuss regulating Big Tech’, May 2021, accessible [here](#).

¹⁵¹ Lisa Visentin above n. 143.

¹⁵² Facebook, ‘Changes to Sharing and Viewing News on Facebook in Australia,’ (2021) (accessible [here](#)).

¹⁵³ Amanda Meade et al, ‘Facebook reverses Australia news ban after government makes media code amendments,’ The Guardian (2021) (accessible [here](#)).

Although these targeting tools may become more refined over time, it remains an open question whether they will reach the level of accuracy needed for the “nuclear option” to be truly viable for technology platforms. In any case, the move was criticised for making Facebook’s public commitments to combat misinformation on their platforms appear “farcical.”¹⁵⁴

Around the same time, Google also experimented with removing or demoting current news in the search results available to a segment of Australian users.¹⁵⁵ In Germany, critics say Google pressured publishers to allow it to use snippets of their content for free, or risk being removed from the Google News platform entirely.¹⁵⁶ In France, Google attempted to avoid payment by no longer displaying snippets of content in news aggregation and search products, but the competition regulator ruled that Google’s unilateral withdrawal of snippets was an abuse of its dominant market position.¹⁵⁷ In Spain, Google took a similar approach by closing Google News Showcase in the country after the Spanish government passed legislation mandating centralised payments for the news industry.¹⁵⁸ As discussed above, the negative consequences for news publishers were not as significant as expected, with drops in referral traffic being only low and temporary.¹⁵⁹ However, after legislation placed a copyright on news snippets in Germany, German news publishers decided to provide their content for free in 2014 after experiencing a decline in traffic (the law itself was found to be invalid due to procedural issues).¹⁶⁰

The seriousness of the risks of the nuclear option are therefore not inherently clear. While technology platforms argue that news content makes up only a small percentage of the content shared on their platforms and drives little value for them, the intangible benefits of having news on the platforms may be larger and harder to measure. An argument could be made that technology platform under-state their reliance on news content for attracting users, under-estimating how news content contributes to the overall user experience. It is worth considering whether, in the event of a long-term removal of news from their platforms, the technology platforms themselves would suffer negative consequences. The answer to this question sheds light on the leverage held by news publishers in these negotiations. As Rod Sim, the chairman of the ACCC stated, “Google and Facebook need media, but they don’t need any particular media company.”¹⁶¹

In addition to threats of the total removal of news content, commentators have highlighted that regulatory proposals should be careful to avoid giving platforms the power (or incentive) to unilaterally stop linking to news content in order to avoid payments. Giving any entity the power to restrict linking — whether it be technology platforms wanting to avoid payments for news, or media outlets seeking to avoid their content being shared with platforms — can be problematic. It may undermine the sustainability of journalism and access to news, but also the free and open

¹⁵⁴ Belinda Barnet, ‘Blocking Australian news shows Facebook’s pledge to fight misinformation is farcical,’ The Guardian (2021) (accessible [here](#)).

¹⁵⁵ Leaver above n. 121.

¹⁵⁶ Tech Crunch, ‘Google Makes Google News In Germany Opt-In Only To Avoid Paying Fees Under New Copyright Law’, June 2021, accessible [here](#).

¹⁵⁷ TechCrunch, ‘Google inks agreement in France on paying publishers for news reuse’, January 2021, accessible [here](#).

¹⁵⁸ Reuters above n. 35.

¹⁵⁹ News Media Alliance above n. 34.

¹⁶⁰ Schiffrin et al above n.122.

¹⁶¹ Baier above no. 47.

nature of the internet, which makes it an increasingly important medium of speech and civic engagement.¹⁶²

5.9. Cross-border regulation

Due to the general regulatory complexity of competition-based initiatives to address the sustainability of journalism, and due to the problem being inherently transnational, there is a need for regional and global collaboration among competition regulators to share knowledge and target regulation where it is most appropriate. The Joint Statement of the Heads of Competition Authorities Dialogue on Regulation of Digital Markets, dated 18 February 2022, of which the Competition Commission is a signatory, is therefore commendable, and further efforts should be supported in this regard.¹⁶³

It is important to consider the potential consequences for other countries and regions, most importantly other countries in Africa, which may be likely to follow the approach adopted in South Africa or who may share the consequences of altered behaviour from the technology platforms as a result of developments here.

5.10. Negotiated/voluntary agreements

Efforts to advance competition regulation may be pre-empted either by self-initiated steps taken by the technology platforms and/or voluntary negotiations. Self-initiated action could include, for example, the launching of the Google News Showcase in South Africa, a platform that provides payment to publishers in exchange for profiling news content on a dedicated platform on Google's own terms. Such a step could pre-empt regulation and remove the momentum or motivation for pursuing regulatory reform. However, it bears reference that in other jurisdictions, Google News Showcase has been criticised as a public relations stunt that enables Google to remain "beloved enough to remain underregulated."¹⁶⁴

With regard to a voluntary code, it should be noted that in Australia, Google and Facebook signed deals with the largest Australian media organisations to license their content for the platforms' news-specific offerings,¹⁶⁵ which exempted them from being designated by the Code.¹⁶⁶ Google and Facebook also previously announced major investments with select publishers in various markets, which some analysts have suggested is designed to mitigate possible regulation.¹⁶⁷

¹⁶² Public Knowledge, 'America Needs a Public Interest Approach To Solving Big Tech Harms To News', February 2021, accessible [here](#).

¹⁶³ Africa Heads of Competition Dialogue, 'Joint Statement of the Heads of Competition Authorities Dialogue on Regulation of Digital Markets,' (2022) (accessible [here](#)).

¹⁶⁴ Joshua Benton, 'Google is giving \$1 billion to news publishers — to help convince governments not to take a whole lot more than that,' Nieman Lab (2020) (accessible [here](#)).

¹⁶⁵ Reuters, 'Australia's Nine signs Facebook, Google deals under new licensing regime', June 2021, accessible [here](#).

¹⁶⁶ Public Knowledge, 'Can the Journalism Competition & Preservation Act Really Preserve Local Journalism? Public Knowledge Says "Probably Not."' June 2021, accessible [here](#).

¹⁶⁷ AP News, 'Google to pay \$1 billion over 3 years for news content', October 2020, accessible [here](#). NiemanLab, 'On big tech and news publishers, Canada must follow Australia's lead,' (2021) (accessible [here](#)).

The prospect of voluntary negotiations raises questions regarding who would be included in these negotiations and may amplify existing concerns about the consequences for small, start-up, community, and the public broadcaster. In the event that voluntary negotiations supersede regulatory processes, there is a risk that decisions about who is invited to the table may be *ad hoc* and exclusionary. While the financial sustainability of commercial news publishers is in the public interest, the sustainability of the public broadcaster and community media is equally vital, particularly in the South African context.

While this is not in itself a weakness of the competition approach, it should be noted as a potential complication or diversion from pursuing regulation. An enabling framework must be set up through which voluntary negotiation can play out constructively. Such an enabling framework should ensure the following, among others:

- (i) A wide and diverse set of small news publishers are invited to the negotiations and assisted to negotiate collectively.**
- (ii) Responsible and appropriate means to determine who participates in negotiations — including testing for journalistic integrity — are adopted along with metrics to determine how much publishers are paid that ensure equality, inclusivity, and do not disincentivise innovation or exacerbate market incentives for poor-quality journalism or clickbait. This may include, for example incorporating metrics on public-interest focus or catering to a specific or minority audience. Relatedly, there may be a need to develop or implement an independently developed, trusted and media evaluation system for the South African context that would provide a viable tool for technology platforms to prioritise credible news, as well as to determine appropriate partners.**
- (iii) Decisions about participation are made by an impartial, reputable, and representative industry body.**
- (iv) Final payment terms are transparently disclosed to enable accountability.**
- (v) Agreements include an element of transparency over how the digital advertising industry works and advance notice of algorithm changes that affect news publishers' revenues is given, in order to enable improved future accountability of the platforms.**
- (vi) A mechanism through which provision can be made for these principles to be revised regularly to correct for any unforeseen consequences is developed, and that enables avoiding undermining the fundamentally open nature of the internet being compromised or access to news worsened by removing news content from technology platforms.**

6. ALTERNATIVE APPROACHES TO COMPETITION IN DIGITAL ADVERTISING

Noting that interventions aimed at securing payments from platforms to news publishers are unlikely to address some of the fundamental challenges for the sustainability of journalism, numerous other interventions have been proposed to advance the sustainability of journalism in South Africa, which, while not directly related to competition regulation, may nonetheless be informative for the Commission. SANEF recommends that these alternative approaches be viewed as complementary and not replacement strategies for addressing the multi-faceted challenge related to the sustainability of journalism.

6.1. Improve local taxation

Many commentators argue that a key cause of the lack of local accountability from technology platforms stems from their failure to contribute to domestic taxes in a substantial manner. Some argue that the Australian Code is a form of taxation, collecting funds from the technology platforms in order to fund a public good. However, in research on taxation as a strategy for the sustainability of journalism, economists argued that a general tax on technology platforms, with government funding journalism out of the general budget, is the ideal and most efficient form of taxation.¹⁶⁸

Another option is for a tax on technology platforms to automatically funnel to supporting journalism. Free Press Action has advocated, for example, for a tax on online advertising in the US which would be placed in a Public Interest Media Endowment to fund diverse, local, independent, and non-commercial news, ensuring that as the technology platforms' share of the digital advertising industry increases so do the funds that they contribute to journalism.¹⁶⁹ Economists agreed, however, that these options are difficult to implement in reality, leading to the demonstrated preference among policymakers to pursue mechanisms such as the Australian Code.¹⁷⁰

During the consultations in the preparation of this Position Paper, several stakeholders expressed concern that these types of broader taxation tools would be unlikely to result in significant direct benefit to journalism, given the many competing demands on the South African fiscus. Even in the case of earmarked funds, concerns were raised that the government would be responsible for allocating those funds among news publishers, given historical precedent for public funds being allocated to the media sector in a partisan way.¹⁷¹

Harry Dugmore notes that South Africa's National Treasury is reluctant to contemplate dedicated taxes, that dedicated taxes can easily be absorbed into the general fiscus, and that too many special taxes complicate what should ideally be a transparent and simple tax system.¹⁷² The Davis Tax Committee, established in 2013 to inquire into the role of the tax system in promoting

¹⁶⁸ Anya Schiffrin above n. 119.

¹⁶⁹ Timothy Karr, 'Cutting Deals with Big Tech Won't Save Journalism,' (2021) (accessible [here](#)).

¹⁷⁰ Anya Schiffrin above n. 119.

¹⁷¹ See for example, 'Judicial Inquiry into State Capture Report Part 1, Volume 2: The New Age' (2022) (accessible [here](#))

¹⁷² Dugmore above n.19 at p. 46.

inclusive economic development, has also recommended a tax on digital transactions,¹⁷³ a controversial measure in a country in which internet and mobile access remains low.¹⁷⁴

Other countries have made some progress with seeking greater taxation of technology platforms. Notably, the European Commission has leveraged competition law to restrict the agreements that these companies have with certain countries' tax authorities on the basis that they amount to illegal, market-distorting state aid.¹⁷⁵ While some of these rulings have since been overturned in court, others have prevailed.¹⁷⁶

Broader taxation efforts may rebalance power asymmetries in the digital advertising market by incorporating the full social costs of doing business into technology platforms' decision-making. The June 2021 announcement by finance ministers of the G7 that a global minimum corporate tax rate of 15% had been agreed is a promising start but has been criticised for being far too low to make a meaningful impact on the operations of the technology platforms¹⁷⁷

Conversely, there is also a case for more progressive tax policies in relation to journalism itself, as noted in the 2021 SANEF report on media sustainability: these could include making donations to news publishers tax-deductible, and other forms of tax relief.¹⁷⁸ Efforts to ease the Value-Added Tax (VAT) or other tax obligations of news publishers may also fall in this category. Indonesia announced a journalism stimulus package in July 2020 that included several mechanisms to increase the competitiveness of news media during the COVID-19 pandemic. As Anya Schiffrin points out:

“The core policies were abolition of the value-added tax for newsprint, suspension of electricity charges for the media industry, a decrease of 50% on corporate tax, and exemption of income tax for employees earning up to 200 million rupiah. In addition, there was a subsidy for news outlets which came in the form of direct payments, on the condition that outlets publish a certain number of stories each month advising Indonesians on how to handle COVID-19—such as stories related to social distancing, handwashing, and mask-wearing. The policies were controversial—some credited them with saving the journalism industry during the pandemic, but others saw it as an example of direct government intervention in what content was produced.”¹⁷⁹

¹⁷³ 'Davis Tax Committee: Second Interim Report On Base Erosion And Profit Shifting (BEPS) In South Africa,' (20) (accessible [here](#)).

¹⁷⁴ CIPESA, 'Digital Taxation Doing More Harm than Good for Access and Rights in Africa,' (2021) (accessible [here](#)). In 2014 South Africa also made income earned by non-resident providers of electronic services to consumers liable to VAT, which was extended to business-to-business providers in 2019 (see [here](#)).

¹⁷⁵ Meyer and Goodkind above n. 102.

¹⁷⁶ David Meyer, 'Apple just won a mammoth victory over Europe's 'tax lady.' But the fight is far from over,' *Forbes* (2020) (accessible [here](#)). Note, however, that the EU Commission has since appealed this ruling on Apple (see [here](#)).

¹⁷⁷ David Meyer and Vivienne Walt, 'Far too low': Tax justice campaigners push back against the G7's 15% minimum tax-rate pact,' *Forbes* (2021) (accessible [here](#)).

¹⁷⁸ SANEF above n. 17 at p. 41-42. Harry Dugmore's report 'Thinking globally, acting locally' sets out a number of additional taxation-related options for sustaining news media that have been piloted in other regions, see above n. 19.

¹⁷⁹ Anya Schiffrin above n. 119.

The COVID-19 pandemic was a catalyst for other journalism-support measures around the world as well. France¹⁸⁰ and Canada¹⁸¹ expanded existing tax credits while Tunisia started new ones.¹⁸² Tax credits for local news were included in the proposed Local Journalism Sustainability Act in the US and in November 2021, “one portion of the bill—a tax credit for local news organizations designed to undergird a portion of a journalist’s salary—passed the US House of Representatives as part of the Build Back Better Act.”¹⁸³ In Colombia, a Senator and a journalist pushed for a bill that proposed eliminating the tax on advertising for media outlets between 2021 and 2025, exempting all media outlets from the income tax for twenty years, and offering several economic incentives on subscriptions and payroll.¹⁸⁴

6.2. Reform digital advertising

The sustainability challenges for journalism today stem, at least in part, from a structural inability of the news media to compete in the digital advertising industry due to the dominance of technology platforms in harvesting and deploying mass data about online users and the resulting lack of transparency in the digital advertising industry that creates an imbalanced market. As a result, it is worth considering efforts to reform the digital advertising industry that would enable news publishers to improve their performance in the market and earn revenue rather than relying on a form of subsidisation. It should be emphasised that these efforts are likely to provide only marginal relief for news publishers, rather than wholesale improvements, but may be complementary to additional efforts.

Like news media, advertisers also suffer an asymmetrical power relationship with technology platforms: they lack transparency about where their clients’ advertising budget goes, the share of value taken by the platforms, and the metrics behind digital ad performance, and suffer higher prices because of the lack of competition in the industry. Stakeholders within the industry also report frustration with having no way to engage with platforms because of the lack of local staff presence, something also commonly cited by news media stakeholders.

There are reports of growing efforts within the industry to increase accountability and transparency from the technology platforms. In 2020, the New York Times reported that more than 1,000 companies stopped buying ads on Facebook to protest its handling of hate speech and misinformation, and major advertisers including Clorox and Coca-Cola, along with several large advertising agencies, pushed technology platforms to “give them more control over where and how their ads show up.”¹⁸⁵

It is therefore worth noting that there are various steps that can be taken within the industry that could contribute, on an aggregate level, to enhanced competition within the market.

¹⁸⁰ Jon Henley, ‘France gives tax credits to news subscribers in effort to rescue sector,’ *The Guardian* (2020) (accessible [here](#)).

¹⁸¹ Government of Canada, ‘Canadian journalism labour tax credit,’ (accessible [here](#)).

¹⁸² Schiffrin et al above n. 134 at p. 21.

¹⁸³ Id.

¹⁸⁴ Id.

¹⁸⁵ Tiffany Hsu, ‘Can This Relationship Be Saved? Big Tech and Big Advertisers Talk It Over.’ (2020) (accessible [here](#)).

6.3. Extend news regulation

As the OECD has pointed out:

“Digital platforms operate under fewer regulatory restraints and have lower regulatory compliance costs while performing comparable functions. This asymmetry may be reinforced by the fact that some digital platforms are becoming content generators or competing with traditional media for audio and video content rights. News outlets are often subject to detailed regulation, which can restrict their ability to generate revenue and increase their compliance costs. This type of regulation includes, for instance, requirements on the minimum amount of local content, the need to classify/restrict prohibited content or limitations as to the quantity of advertising... Moreover, while in some jurisdictions copyright and defamation laws may apply to digital platforms, the enforcement against these platforms’ present challenges.”¹⁸⁶

Some commentators argue that the stringent regulations that apply to the news media, which protect their credibility and the accuracy of the information they publish, should likewise apply to technology platforms that now play a central role in the publication and consumption of information in the digital domain. Supporters of this approach argue that building in the full costs of producing quality information would create a better incentive structure for technology platforms and rebalance the relationship between them and news media.

Intermediary liability is a closely related subject. Section 230 of the US Communications Decency Act exempts digital platforms from liability when they act as the publisher of the material posted by their users, including when platforms edit or fail to edit this material (with similar provisions existing in various jurisdictions).¹⁸⁷ Critics argue that this fails to disincentivise the production and promotion of poor-quality information or misinformation online, leaving credible news media struggling to compete.¹⁸⁸

In South Africa, Chapter 11 of the South African Electronic Communications Act 25 of 2002 provides for limited liability of internet intermediaries subject to a takedown notice condition. These provisions apply to members of the Internet Service Providers Association. An immediate response to takedown notices is necessary, failing which the immunity from liability is abandoned.¹⁸⁹

There may be room for further interrogating whether the approach to intermediary liability and the regulation of content publishers could be revised to further advance the sustainability of journalism. However, this approach carries associated risks, particularly in relation to the principle of freedom of expression online.

¹⁸⁶ OECD above n. 52 at p. 34.

¹⁸⁷ Media Defence, ‘Intermediary Liability,’ (accessible [here](#)).

¹⁸⁸ Id.

¹⁸⁹ Id.

6.4. Enhance the competitiveness of news publishers in digital advertising

If it is accepted that the nature of the problem relates to a fundamental inability to compete in a market that has been dominated by the technology platforms, it may be worth considering ways to improve the competitiveness of news publishers in the existing market through alternative means. SANEF acknowledges that, notwithstanding the role of technology platforms, news publishers also bear some responsibility for a decline in quality and lack of innovation in journalism, and a poor understanding of the digital market that has also contributed to the loss of revenue.

While individual news publishers may be unable to compete on ad targeting given the limited data they collect about their audiences, pooled collectives of news publishers may provide a more competitive option.¹⁹⁰ For example, in September 2021, the Washington Post launched its own digital advertising network that aims to provide the same ease and efficiency to marketers looking to buy ads as on platforms like Google and Facebook.¹⁹¹ This follows the launch in 2019 of Zeus Prime, a product that allows companies to buy ads in real-time, but which was only available to a small group of advertisers and enabled buying ads only on the Washington Post website. This new initiative may create a broader network of publishers, enabling any advertiser to buy and target ads across an array of publishers' websites. Vox Media has also launched an ad network that pools advertising inventory from other publishers.¹⁹²

It should be emphasised that these initiatives are seen as necessary and vital to advance the sustainability of journalism, but insufficient on their own to begin to tackle the systemic competition challenges facing the news media in South Africa today on a meaningful level. They are merely highlighted here as potential complementary solutions to what will necessarily be a multi-faceted approach to advancing the sustainability of journalism in South Africa.

¹⁹⁰ Id at p. 35.

¹⁹¹ Axios, 'Exclusive: The Washington Post launches digital ad network,' (2021) (accessible [here](#)).

¹⁹² Vox Media, 'Vox Media introduces Concert Ad Manager, a self serve tool for marketers,' (2020) (accessible [here](#)).

7. CONCLUSION

This Position Paper has noted that the dominance of larger technology platforms in the digital economy has had negative consequences for public interest journalism for a range of reasons, not least on news publishers. In particular, news publishers are unable to compete with these platforms' capacity to sell micro-targeted advertising that draws on the large-scale collection of personal data about their billion-strong audiences of users. Efforts that seek to subsidise news publishers rather than address these structural issues are, therefore, merely a blunt tool that risks creating negative externalities.

Nevertheless, there may be justification to pursue a media bargaining code, along the lines of that in Australia, if it can be carefully crafted to avoid these negative externalities and is complemented by alternative approaches that address various parts of the multifaceted, structural problem. The benefits of such an approach are an immediate in-flow of revenue, the opening of negotiations and lines of communication with technology platforms, and short-term protections for journalism while news publishers develop other, longer-term, and more effective solutions to sustainability. These measures may include direct funding support for journalism, protections against unilateral algorithmic changes by platforms, and tax subsidies or other related measures.

In the event that a media bargaining code or similar scheme in South Africa is preferred, SANEF is of the view that such a mechanism must include the following key tenets:

- (i) **Transparent, widely accepted, and industry-developed standards to measure the credibility and public interest value of news publishers should be adopted to determine participation in a bargaining code.**
- (ii) **Decisions about participation as well as compensation levels should be made fairly and transparently in a way that incorporates the perspective of industry bodies such as SANEF, the Association of Independent Publishers (AIP), and others.**
- (iii) **Transparent and regular reporting from technology platforms to disclose the volume and value of digital advertising transactions in South Africa should be mandated, along with an accompanying break-down detailing to which entities the value accrues.**
- (iv) **While voluntary negotiations may be encouraged, regulation should not incentivise technology platforms to engage in piecemeal commercial partnerships with individual news publishers in order to avoid or be exempted from regulation — as has previously been the case in other jurisdictions with Google News Showcase. Voluntary efforts such as Google News Showcase typically provide less transparency, give publishers and regulators less influence in negotiations, and enable dominant technology platforms to pick and choose publishers for direct negotiations instead of mandating an inclusive and comprehensive approach.**

- (v) **If voluntary negotiations pre-empt or precede any governmental regulation, it remains necessary for an over-arching framework to regulate the process and ensure transparency, fair negotiations, and inclusivity of the process.**
- (vi) **Additional, complementary efforts to advance the sustainability of journalism must continue to be pursued which may include taxation of the technology platforms, training and funding for media, or subsidies or tax breaks and benefits for news publishers.**

SANEF is committed to supporting the work of the Commission in the present and future inquires and remains available to assist the Commission, as needed.

ENDS.

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