

# SUBMISSION TO COMPETITION AND MARKETS AUTHORITY (CMA) INVESTIGATION INTO ONLINE REVIEWS

June 2020

## Summary

- The duty of care regime for online harms reduction – proposed by Carnegie UK Trust and adopted, at least in part, by the UK Government in its Online Harms White Paper – is a systemic approach to regulation of social media platforms and other services which allow user interaction to address harms that may arise from user-generated content.
- ‘Marketplace’ sites which allow people to sell on another’s company’s platform are often themselves user-generated content and can be used as vectors for a wide variety of consumer or economic harms; we believe there is a strong case for marketplace sites/services also coming into the new online harms regime.
- Fake or misleading reviews are user-generated content that are a source of reasonably foreseeable harm and operators of services on which they arise should take reasonable steps to prevent them at a systemic level.
- A mechanism is required to enable regulators reporting harms arising through fake reviews (e.g. a Local Authority’s Trading Standards Department) to work with the new online harms regulator (likely OFCOM) where action is required from the platform operator. For instance, OFCOM could be obliged to consider representations from other regulators where a systemic online harm has arisen from another regulated area.
- We set out below some further detail on this approach.

## Introduction

1. We have worked extensively on online harms issues for a number of years and our work has been influential on government and parliament. We have previously submitted evidence to the CMA’s Digital Markets Strategy and its investigation into Digital Mergers.
2. This short note provides an update on our thinking, particularly in relation to the means by which regulators might work together to support Ofcom, as the new lead regulator in the Government’s proposed Online Harms framework, to address a broad swathe of harms, including fake reviews, to consumers and users of online services.

## About our work

3. The Carnegie UK Trust was set up in 1913 by Scottish-American philanthropist Andrew Carnegie to improve the wellbeing of the people of the United Kingdom and Ireland. Our founding deed gave the Trust a mandate to reinterpret our broad mission over the passage of time, to respond accordingly to the most pressing issues of the day and we have worked on digital policy issues for a number of years.
4. In early 2018, Professor Lorna Woods (Professor of Internet Law at the University of Essex) and former civil servant William Perrin started work to develop a model to reduce online harms through a statutory duty of care, enforced by a regulator. We see this as an overarching duty under which social media platforms would be required to reduce the risk of reasonably foreseeable harm occurring on their platform. As well as harms arising from illegal conduct, such as child sexual abuse and exploitation or terrorism, we would see the duty encompassing harms such as economic/consumer harms (whether or not the result of criminal activity), disinformation/misinformation and harms to democracy. The proposals were published in a series of blogs and publications for Carnegie and developed further in evidence to Parliamentary Committees<sup>1</sup>. The Lords Communications Committee<sup>2</sup> and the Commons Science and Technology Committee<sup>3</sup> both endorsed the Carnegie model, as have a number of civil society organisations<sup>4</sup>. In April 2019, the government's Online Harms White Paper<sup>5</sup>, produced under the then Secretary of State for Digital, Culture, Media and Sport (DCMS), Jeremy Wright, proposed a statutory duty of care enforced by a regulator in a variant of the Carnegie model. France<sup>6</sup>.
5. In December 2019, while waiting for the Government to bring forward its own legislative plans, we published a draft bill<sup>7</sup> to implement a statutory duty of care regime, based upon our full policy document of the previous April<sup>8</sup>. We are also supporting Lord McNally on his Private Bill (The Online Harm Reduction Regulator (Report) Bill)<sup>9</sup>, introduced into the House of Lords on 14 January 2020, which would provide an opportunity for full Parliamentary debate on the nature of the regulatory regime and, if passed, empower OFCOM to prepare for its introduction.

## Protecting consumers online

6. We are pleased that the CMA's Digital Markets Strategy work acknowledges that consumers are not adequately served or protected by the online status quo, where a small number of dominant platforms have been largely untouched by competition law or other regulation. It is no longer tenable that consumers have lower levels of protection online in relation to scams and fraud than they would do offline, especially given the reach of online scams and the prevalence which disproportionately impact

1 Our work, including blogs, papers and submissions to Parliamentary Committees and consultations, can be found here: <https://www.carnegieuktrust.org.uk/project/harm-reduction-in-social-media/>

2 <https://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2017/the-internet-to-regulate-or-not-to-regulate/>

3 <https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/822/82202.htm>

4 For example, NSPCC: <https://www.nspcc.org.uk/globalassets/documents/news/taming-the-wild-west-web-regulate-social-networks.pdf>; Children's Commissioner: <https://www.childrenscommissioner.gov.uk/2019/02/06/childrens-commissioner-publishes-a-statutory-duty-of-care-for-online-service-providers/>; Royal Society for Public Health: <https://www.rsph.org.uk/our-work/policy/wellbeing/new-filters.html>

5 <https://www.gov.uk/government/consultations/online-harms-white-paper>

6 <http://www.iicom.org/images/iic/themes/news/Reports/French-social-media-framework---May-2019.pdf>

7 <https://www.carnegieuktrust.org.uk/publications/draft-online-harm-bill/>

8 [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf)

9 <https://services.parliament.uk/bills/2019-21/onlineharmreductionregulatorreportbill.html>

vulnerable groups, such as the elderly<sup>10</sup>. Fake reviews combine fraud with a manipulation of the online information environment that replicates elements of another significant online harm: misinformation and disinformation. As the scope of your investigation indicates, these are systemic issues rather than issues of content to be dealt with at the level of individual users or individual pieces of user-generated content: the responsibility for dealing with such misleading or fraudulent activity lies with the platforms, websites or online marketplaces which host or perpetuate the spread of the reviews.

7. We are concerned, however, that such issues will not be dealt with holistically within the proposed Online Harms legislation, which is currently being framed as applying to harms arising from serious criminal offences (child sexual abuse and exploitation, terrorism) with other “legal but harmful” issues being dealt with through companies’ terms and conditions. The recent DCMS Interim Response<sup>11</sup> to the Online Harms White Paper consultation was helpful, but still leaves many questions unanswered. We regret the delays in bringing forward final policy proposals and a firm timetable for a Bill and are concerned about the apparent narrowing of the scope of harms to be covered by the legislation to those which can be clearly defined as “illegal”, though it does not seem that all harms arising from any criminal activity will necessarily be within the regime. The Government has recently indicated that the strong case made for the inclusion of economic harms by consumer organisations<sup>12</sup> and organisations concerned about the scale of financial crime online<sup>13</sup>, including the National Centre for Economic Crime,<sup>14</sup> has not been accepted.
8. The Coronavirus pandemic has only served to underline the need for urgent action on online fraud and other activities that harm consumers. The National Crime Agency and Victim Support have both recently reported on a surge in online scams targeting vulnerable or self-isolating people during the lockdown<sup>15</sup>. Evidence is emerging of widespread fraudulent activity on eBay; for example, a recent report charted significant scams relating to the sale of vehicles during lockdown<sup>16</sup>. The Medicines and Healthcare Regulatory Authority has undertaken action to deal with the sale of fake products and devices online during the pandemic.<sup>17</sup> The Advertising Standards Authority noted false and misleading claims in relation to Covid19, taking action in particular with regard to adverts for vitamin injections and drips.<sup>18</sup>
9. In the area of fake reviews, online fraud intersects with another area of harm that is currently not covered by the online harms proposals: misinformation and disinformation. Again, this is an area

10 We note, however, that the recent enactment of the Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020 affords the CMA powers to issue an “online interface order” to facilitate the removal of online content or to restrict access to websites where there is a risk of serious harm to consumers and no alternative measures would be wholly effective. We envisage that these regulations would affect social media platforms and possibly search engines, as well as online marketplaces. (<https://www.legislation.gov.uk/uksi/2020/484/made>). We do not see any conflict between the introduction of a statutory duty of care for online harm reduction and the new regulations, specifically the online interface order and would suggest that – should the CMA use such orders – then it might notify Ofcom. See further para 17.

11 <https://www.gov.uk/government/consultations/online-harms-white-paper/public-feedback/online-harms-white-paper-initial-consultation-response>

12 <https://www.which.co.uk/policy/consumers/5234/onlinemarketplaces>

13 <https://www.ukfinance.org.uk/system/files/Online-harms%20white%20paper.pdf>

14 <https://committees.parliament.uk/oralevidence/451/default/>

15 <https://www.bbc.co.uk/news/uk-52288675>; <https://www.bbc.co.uk/news/business-52664539>

16 <https://www.theguardian.com/money/2020/may/04/fraudsters-use-covid-lockdown-to-scam-motorhome-buyers>

17 <https://www.gov.uk/government/news/uk-medicines-and-medical-devices-regulator-investigating-14-cases-of-fake-or-unlicensed-covid-19-medical-products>

18 <https://www.asa.org.uk/news/enforcing-the-rules-for-prescription-only-medicines-and-vitamin-shots.html>; and <https://www.asa.org.uk/news/advertising-iv-drips-coronavirus-covid-19.html>

where prevalence has increased during the pandemic and Covid19-specific misinformation and disinformation are resulting in significant real-world harms, such as poorer health outcomes and damage to 5G infrastructure.

10. The spread of fake reviews also has real-world effects when consumers are tricked into buying unsafe or dangerous products. A recent investigation by Which? showed that consumers are more than twice as likely to buy a poor-quality product that has been boosted by fake reviews than when the same product was advertised without the fake endorsements<sup>19</sup>.
11. The platform on which the reviews are hosted is not neutral in this regard; they are not merely a place where those reviews are found. The design of the platform is designed and the safeguards that are (or are not) built in affect the ease with which fake reviews may be posted. The way that information flows on platforms is likely to make the problem worse: for example, there are no “know your customer” obligations to require authentication of the identity of sellers online; advertising functions are likely to be manipulated by scammers to target vulnerable groups on platforms; and no requirement for enforceable terms and conditions for advertisers on platforms.

### Addressing fake reviews under the online harms legislation

12. We have written previously about the opportunity that the UK has to design and implement a world-leading regulation system to limit the harms that arise from online platforms. (See our letter to the former DCMS Secretary of State, Nicky Morgan<sup>20</sup>.) We hope that the UK government will continue to ensure that the wider regulatory landscape – including digital markets, digital advertising and data legislation – delivers the right balance of consumer protection and online safety while also providing opportunities for innovation and growth across the tech sector, without penalising SMEs.
13. This can be achieved without limiting the online harms regime to those harms that lie only within the boundaries of criminal law, though many of the scams are likely to be criminal offences in themselves. There are many areas where a regulatory system penalises people for things that are not criminal offences and where a regulator and the companies that are regulated are trusted to make a judgement – e.g. advertising, radio and TV broadcasting, utility regulation. In broadcasting, OFCOM is charged with ensuring: ‘that generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material.’<sup>21</sup> Such a limitation would also introduce in these regulated areas a difference of approach between on-line and off-line activity.
14. DCMS ministers have spoken recently about disinformation falling into a “harmful but legal” category and we believe that this is how the Government is also likely to categorise many economic harms – and therefore exclude them from the proposed legislation. This may therefore lead to a gap in protection between online and offline worlds, which is especially problematic given the reach afforded on platforms. But this distinction – one that looks at harms primarily through the lens of content – overlooks the fact that it is not only the harmful content in itself that causes problems but the speed and scale of its spread and promotion, a spread encouraged and facilitated by the platforms’ own system design. The impact of misleading or fake user-generated content, whether it leads to economic harms (in the case of fake reviews or online scams) or public health harms (in the case of false health

<sup>19</sup> <https://www.which.co.uk/news/2020/05/the-real-impact-of-fake-reviews/>

<sup>20</sup> <https://www.carnegieuktrust.org.uk/news/draft-online-harm-bill-dcms-letter/>

<sup>21</sup> In this regard, Ofcom has taken decisions and imposed sanctions on broadcasters recently to address Covid19 mis/dis-information: e.g. <https://www.ofcom.gov.uk/about-ofcom/latest/features-and-news/david-icke-and-eamonn-holmes-decision>

advice or anti-vaxx material), is exacerbated by the platforms' algorithms, recommender models, reliance on user profiling and micro-targeting<sup>22</sup>. A significant part of the problem, in our view, relates to these information flows, and this is an aspect that does not readily fit a framework designed around a distinction on whether content is illegal or legal but harmful.

15. An illegal/legal but harmful distinction is poorly defined and risks undermining the systemic nature of a duty of care, which we describe in detail in our full reference paper<sup>23</sup>. It removes responsibility for its design and business choices from the platform and keeps the burden on society at large. The distinction creates an arbitrary line and a bias towards retrospective rather than 'reasonably foreseeable' action. Illegal/legal implicitly suggests waiting for something bad to happen to categorise it as criminal and then decide whether something should have been done with it.
16. The emergence of significant new consumer harms during the course of the Covid19 pandemic has strengthened our view that consumer harms should be in the scope of the online harms proposals, whether or not the cause of those harms constitutes a criminal offence, but it raises questions of how the online regulator should know about issues that fall within the areas of expertise of other specialist bodies.
17. The issues should be straightforward to deal with. A mechanism for interlocking regulation should be provided. While currently many regulators co-operate, it seems to us preferable that a formal mechanism should be provide so as to avoid any problems with competence, to ensure transparency in the process and where relevant to protect users' rights. We propose a simple mechanism: if any competent regulator or other statutory body identifies a new vector for online harm that breaches their own specialist regulatory regime – such as the prevalence of fake or misleading reviews on online marketplaces – they should be able to hand a dossier to OFCOM to assess and, if appropriate, process in the online harms regime requiring operators to take appropriate steps to mitigate against the identified harm. For example in the case of online fraud or scams, where the Financial Conduct Authority, as the regulator for financial services, might gather evidence to demonstrate the scale or nature of economic harm arising online and pass this to OFCOM to take up with the platforms concerned under the online harms regime. Mechanisms are not limited to 'take down' but could be the introduction of 'know your advertiser' rules; or processes around detecting unusual activity (e.g. where a user is posting reviews across an unlikely range of products). Such interlocking regulation would protect consumers and increase the effectiveness of regulators such as the Competition and Markets Authority or the Financial Conduct Authority that have found it hard to get purchase with online companies.
18. We hope that this note aids the development of your thinking in this area. We will be working further on the idea of "interlocking regulation" within online harms and will be happy to share this, when published, with your teams.

Carnegie UK Trust  
June 2020

<sup>22</sup> See the recent report by the Centre for Data Ethics and Innovation, which recommended that online targeting be subject to the duty of care: <https://www.gov.uk/government/publications/cdei-review-of-online-targeting>

<sup>23</sup> See [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf)