

# RESPONSE TO COMPETITION AND MARKETS AUTHORITY CALL FOR EVIDENCE ON DIGITAL MERGERS

July 2019

1. We have worked extensively on online harms issues over the past year and our work has been influential on government and parliament. This short note lists three summary observations that might be of interest to the Authority and describes the work we have done in the adjacent area of online harm reduction, on which we have also attached a fuller paper for reference.

## User-generated content tech platforms are products of regulation

2. In our extensive work on the regulation of technology companies, we have found it helpful to strike down the myth that modern digital platform companies are bastions of entrepreneurial competition. The big tech platforms that host content made by others are fundamentally creatures of regulation. Regulation shields them from much of the responsibility of newspapers, TV companies, radio stations etc from what people post on their platforms. The user generated content platforms are dependent on rules in the USA, NAFTA and Europe that make them a 'mere conduit' for the material of others. It has allowed them to grow to colossal size without having to invest much (compared to their revenues) in responsibility. Back in 2000 when less than 5% of the population had used the internet and no one knew what would happen this approach made sense. It no longer does today.

## Algorithmic bias has been regulated since 1984

3. It is often forgotten that competition authorities in the USA and the EU/EC have a long history of regulating to mitigate competition and societal harms arising from electronic networks that use algorithms to display information. Regulatory work on algorithms used to anti-competitive advantage in Computerised Reservation Systems for airline ticketing go back to the 1980s. In 1984, Congress introduced rules<sup>1</sup> to combat 'screen bias' in how information was displayed on information systems run by airlines. There were then only a few ticketing systems (essentially two) and no market entry. The EC and then EU introduced extensive regulations thereafter including Regulation No 2299/89 in 1989.
4. This body of work also formed the intellectual basis in the 1990s for UK, then EU policy (Access Directive 2002/19/EC) on EPG regulation for due prominence in which William Perrin now a Trustee of Carnegie UK Trust was involved as a DTI and Downing Street civil servant. The Access Directive

<sup>1</sup> United Press International (Feb. 9, 1984) 'Government to issue air reservation rules' by Judith Dugan. See <https://www.upi.com/Archives/1984/02/09/Government-to-issue-air-reservation-rules/2723445150800/>

draws out the inter-relationships between competition law and wider societal issues that the CMA has noted in its Digital Markets Strategy:

*‘Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television. (Recital 10)’*

5. OFCOM went on in 2004 to set rules for EPGs reflecting competition and broadcasting objectives and continues to keep them in force, last updated in 2014<sup>2</sup>. The amendment of the Audio Visual Media Services Directive preserves the ability of Member States to maintain EPGs<sup>3</sup> (Recital 25):

*“Directive 2010/13/EU is without prejudice to the ability of Member States to impose obligations to ensure the appropriate prominence of content of general interest under defined general interest objectives such as media pluralism, freedom of speech and cultural diversity. Such obligations should only be imposed where they are necessary to meet general interest objectives clearly defined by Member States in accordance with Union law. Where Member States decide to impose rules on appropriate prominence, they should only impose proportionate obligations on undertakings in the interests of legitimate public policy considerations.”*

## No awareness of price paid by consumer

6. Useful survey work by Doteveryone<sup>4</sup> suggests that people have little conception of price paid. In our paper (see below) we say that:

*“Indeed, there is a good case to make for market failure in social media and messaging services – at a basic level, people do not comprehend the price they are paying to use a service; research by doteveryone revealed that 70% of people ‘don’t realise free apps make money from data’, and 62% ‘don’t realise social media make money from data’ . Without basic awareness of price and value amongst consumers it will be hard for a market to operate efficiently, if at all, and this market is currently one which sees a number of super-dominant operators.”*

This is intrinsic to assessing whether competition can ever work in such an environment. With no awareness of price by the consumer, the service provider can continue to extract surplus far beyond marginal cost with little or no response from the consumer to what I paid for goods would be a strong signal to switch supplier if commensurate consumer value increases were not obtained.

## Children as valuable customers – special competition considerations?

7. It is unusual for the CMA to consider a market where children (people under 18 years old) are especially active as consumers. A number of experts have flagged up the special vulnerability of children as consumers of digital products and services and design features of digital platforms apparently designed to manipulate children’s behaviour<sup>5</sup>. We would suggest that the CMA pay special attention to the effects of the digital advertising and related markets on children and to

<sup>2</sup> Ofcom Code on Electronic Programme Guides <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/epg-code>

<sup>3</sup> DIRECTIVE (EU) 2018/1808 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L1808&from=EN>

<sup>4</sup> See <https://understanding.doteveryone.org.uk/>

<sup>5</sup> See the work of 5Rights Foundation <https://5rightsfoundation.com/resources.html> and Sonia Livingstone et al at LSE <https://blogs.lse.ac.uk/mediapolicyproject/2019/07/09/data-and-privacy-in-the-digital-age-from-evidence-to-policy/> also the UNICEF paper ‘Children and Digital Advertising’ December 2018

consider whether there are special competition issues. For instance the fundamental ability to give meaningful consent as well as market definition – is there a separate market for digital advertising to children, does market concentration have a particularly heavy impact on children? Brands have for decades made huge efforts to influence the behaviour of the young and establish lifetime patterns of consumption. Special rules exist for children’s advertising in many media forms that reflect their developmental inability to make the same judgements as adults. The advent of digital media has enabled the aggregation of data about young people. The Age Appropriate Design Code now emerging from the ICO applies special rules to data use.

- 8 We feel that there would be a substantial gap in the CMA’s work if it did not give special consideration to the competition effects on children.

## Our work on social media harm reduction

9. This note also covers a full reference paper that sets out work we have carried out to develop a proposal for a statutory duty of care for harm reduction on social media.
10. In 2018-2019, Professor Lorna Woods (Professor of Internet Law in the School of Law at the University of Essex) and William Perrin (a Carnegie UK Trustee and former UK government Civil Servant) developed a public policy proposal to improve the safety of some users of internet services in the United Kingdom through a statutory duty of care enforced by a regulator. Woods and Perrin’s work under the aegis of Carnegie UK Trust took the form of many blog posts, presentations and seminars.
11. The attached reference paper, drawing together our work on a statutory duty of care was published in April 2019, just prior to the publication of the Online Harms White Paper. It can also be viewed, along with all the other material relating to this proposal and a full recent response to the DCMS consultation on the Online Harms White Paper, on the Carnegie UK Trust website: <https://www.carnegieuktrust.org.uk/project/harm-reduction-in-social-media/>
12. Our work has influenced the recommendations of a number of bodies, including: the House of Commons Science and Technology Committee, the Lords Communications Committee, the NSPCC, the Children’s Commissioner, the UK Chief Medical Officers, the APPG on Social Media and Young People and the Labour Party.<sup>6</sup> A statutory duty of care has been adopted – though not fully as we envisaged – by the Government as the basis for its Online Harms White Paper proposals<sup>7</sup>. Most recently, though it did not refer to our work, a report to the French Ministry of Digital Affairs referenced a “duty of care” as the proposed basis for social media regulation.<sup>8</sup>
13. While not directly focused on competition law or the harms that arise from digital mergers, our work has been cognisant of the wider legislative and regulatory context into which any new regulatory model must fit. It addresses the particular challenge posed by new and innovative

6 <https://www.nspcc.org.uk/globalassets/documents/news/taming-the-wild-west-web-regulate-social-networks.pdf>; <https://www.childrenscommissioner.gov.uk/2019/02/06/childrens-commissioner-publishes-a-statutory-duty-of-care-for-online-service-providers/>; <https://www.gov.uk/government/publications/uk-cmo-commentary-on-screen-time-and-social-media-map-of-reviews/>; <https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/822/82202.htm>; <https://labour.org.uk/press/tom-watson-speech-fixing-distorted-digital-market/>; <https://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2017/the-internet-to-regulate-or-not-to-regulate/>; <https://www.rsph.org.uk/our-work/policy/wellbeing/new-filters.html>

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

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

technologies with reference to the precautionary principle<sup>9</sup>, which may be of interest to the CMA in its own deliberations, and also to the established approach of regulating in the public interest for externalities and harms to members of the public. During the consultation period, we have worked closely with other organisations and consumer groups who have an interest in how consumer harms emerge on online platforms (for example, copyright infringement, fake reviews, scams and the sale of unsafe products) and who see the explicit exclusion of economic harms from the DCMS scope as an error. (See our response to the White Paper consultation for more detail on why we think this should be included<sup>10</sup>.)

14. Another angle that is relevant to this enquiry is the fact that the desire to gain data for advertising revenue has driven at least some of the problematic design choices of the major platforms; for example, a focus on user engagement as a business priority means that content that gets user engagement is rewarded, which then drives more and more extreme content (on whatever topic the user is engaged in). This then becomes exacerbated by the size of the major platforms: they are sufficiently large that they have difficulty in keeping on top of the problem, and – even where they make headway with a significant proportion of problematic content, the remainder will still be a big issue. Our duty of care proposals have relevance here: it seeks not just to tackle dealing with problems once they've arisen but also to address the conditions that shape the way content is created/shared. Design choices around frictionless communication also influence the ease with which content can spread across platforms.
15. Finally, given that many of the harms we focus on in our work have a societal impact – such as the impact on democracy of the spread of disinformation and the abuse or intimidation of public figures – there may also be a case to be made for an extension of the public interest test found in ss 42 et seq Enterprise Act to apply to mergers in this context.
16. There are many moving parts in this landscape, and many government and regulatory organisations undertaking concurrent reviews of bits of it. Protecting users from harm – however it manifests itself - has to be at the heart of all those proposals. The dominance of a small number of platforms is part, but not all, of the problem and a statutory duty of care does not displace the design and implementation of competition law that is fit for the digital age. However, we would urge the CMA to ensure that any new regulatory regime takes account of its principles and seeks to join up with the online harms regulator at the earliest opportunity.
17. We are happy to speak to you further about our proposals or assist in any way in the next phase of the CMA's review.

Carnegie UK Trust  
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9 United Kingdom Interdepartmental Liaison Group on Risk Assessment (UK-ILGRA), The Precautionary Principle: Policy and Application, available: <http://www.hse.gov.uk/aboutus/meetings/committees/ilgra/pppa.htm>

10 <https://www.carnegieuktrust.org.uk/publications/response-to-the-online-harms-white-paper/>