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CARNEGIE UK TRUST SUBMISSION TO CONSULTATION ON ONLINE ADVERTISING RESTRICTIONS FOR PRODUCTS HIGH IN FAT, SUGAR AND SALT (HFSS)

December 2020

1. We are responding to this consultation from the perspective of our expertise in developing the "duty of care" regulatory model for reduction of online harms and include references to our work below.

About our work

2. In early 2018, Professor Lorna Woods (Professor of Internet Law at the University of Essex and member of the Human Rights Centre there) 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. The proposals were published in a series of blogs and publications for Carnegie and developed further in evidence to Parliamentary Committees[1]. In April 2019, the government's Online Harms White Paper[2] proposed a statutory duty of care enforced by a regulator in a variant of the Carnegie model and we welcome the fact that the final response to the White Paper consultation (published on 15th December[3]) continues to draw on our work, though we need to analyse the detail of that further. In December 2019, we published a draft bill[4] to implement a statutory duty of care regime, based upon our full policy document of the previous April[5]. Professor Woods also published a comprehensive paper on the statutory duty of care and fundamental freedoms, including freedom of expression.[6]

3. We are concerned that the proposals for online advertising restrictions for HFSS foods put forward by the Department for Health and Social Care (DHSC) do not fully take account of, or align with, the proposals developed by the Department for Digital, Culture, Media and Sport (DCMS) and that – without a more strategic and coherent overview of what constitutes harm online, particularly where children are concerned – the government risks establishing two mutually exclusive regulatory approaches that then bring many of the same platforms and services within scope of both.

4. The DHSC consultation document does not mention the ongoing work on Online Harms while the DCMS Online Harms White Paper consultation response only mentions these proposals (and not even in their most recent form) in passing: "as part of the government's Childhood Obesity Plan, DCMS and the Department of Health and Social Care launched a consultation on 18 March 2019 on introducing a 9pm watershed on TV advertising of products high in fat, salt or sugar, and similar protections for children viewing adverts online".

1 Our work can be found here: https://www.carnegieuktrust.org.uk/project/harm-reduction-in-social-media/

2 https://www.gov.uk/government/consultations/online-harms-white-paper

3 https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper

4 https://www.carnegieuktrust.org.uk/publications/draft-online-harm-bill/

5 https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/04/08091652/Online-harm-reduction-a-statutory-duty-of-care-and-regulator.pdf

6 https://www.carnegieuktrust.org.uk/publications/doc-fundamental-freedoms/

5. We note that the DHSC proposals aim to bring in a consistent approach to the protection of children from exposure to HFSS advertising between broadcast media and online platforms. Given that children's exposure to HFSS advertising is defined by the Government as a form of harm then it is appropriate that they should be protected from it equally, whether viewing broadcast media or online media.

6. We are concerned that the approach being taken in the HFSS consultation, based on evidence that the previous regulatory approach was failing, does not start from the same systemic starting point as the wider online harms proposals but from the perspective of managing the appearance of content online. For example, the consultation document notes that the ASA evidence shows "continued inadvertent breaches of HFSS rules": eg, finding between April and June this year that there was HFSS advertising on 49% of children's websites and 71% of YouTube channels aimed at children with 29 different HFSS advertisers responsible for the breaches. The consultation document concludes from this that there is "a widespread problem, rather than a more isolated failure".

7. The consultation document then goes on to deduce from the lack of evidence to the contrary that "we do not consider that this addresses fundamental concerns about flaws in the system by which advertising is targeted, which are magnified as children spend more time online, and further undermined by a lack of transparency." We read from this that the government feels that systems-based controls don't work well enough so the response needs to be a content-focused solution, in the form of "total online restriction on HFSS advertising .. to effectively reduce children's online HFSS exposure and signal to industry, consumers and parents the government's determination to tackle it." We question whether a self-regulatory regime which relies on targeted advertising is the same as a general systemic approach, which takes into account techniques such as effective age verification for services (where appropriate); KYC controls over advertisers advertising placement and which further includes review and assessment obligations on the effectiveness of any such measures.

8. We have further concerns with the proposal then to "appoint a statutory regulator with overall responsibility for the regulation of the restriction, with discretionary powers to take effective action against advertisers who breach the rules, especially in cases of more serious or repeat breaches. We propose that the day-to-day responsibility for applying the rules, considering complaints, provisioning guidance and training material to industry would remain with the ASA, recognising their expertise and experience in regulating advertising."

9. We appreciate the challenges the ASA is under in discharging their duties under the CAP code to restrict targeting of online adverts to under-18s, particularly as set out in the Centre for Data Ethics and Innovation report on Online Targeting earlier this year.

> "**Advertisers, not the online platforms they use to advertise, are primarily responsible for following the CAP code, but publishers and other intermediaries share a secondary responsibility for compliance.** The CAP code also covers advertising claims made on advertisers' own websites and other non-paid-for space under their control, for example organic Facebook posts, tweets, and influencer marketing in social media. The ASA's current strategy, More Impact Online, aims to improve the regulation of online advertising. This includes addressing misleading content and inappropriate targeting **and working more closely with platforms (which provide the tools for advertisers to target their adverts online) …** as it is not a statutory regulator, the ASA does not have information gathering powers, although it works with statutory partners

that do and has an established programme for gathering data informally. It does not have formal sanctions or fining powers, but its decisions have a reputational effect and can generate negative publicity for the advertisers concerned. It has a range of non-statutory sanctions for non-compliance, such as withdrawal of access to advertising space. It works with a number of regulators that have formal 'backstop' powers in different areas: the ICO, Ofcom, the Gambling Commission and the FCA. It can refer illegal advertising to Trading Standards. [7]

10. We do not, however, think that introducing a total ban on online advertising aimed at children and then appointing a new regulator to enforce it (whether a new public body or an existing one) is the right response, particularly given that these proposals have no interlocking point (according to either the DHSC or the recent DCMS publications) with the new Online Harms regulatory system; as the Government's recent full response to the consultation on the Online Harms White Paper makes clear, services within scope would be under an obligation to protect children from harm even arising in content that was not criminal. Indeed, riskier services (which includes those with a large user base) would be obliged to take steps in relation to adults. The reference to a consideration as to whether "other actors in the online advertising ecosystem should have responsibility for advertising that breaches an online restriction" also further muddies the waters – and the lines of regulatory oversight – with the proposals set out in the Online Harms White paper response.

11. We have written recently on how a system of "interlocking regulation" could ensure that the new Online Harms framework – a systemic, risk-based proposal that should (if designed correctly) bite at the platform level rather than the level of individual pieces of content – can be broad in scope to address multiple harms to users online without overwhelming Ofcom as the lead regulator. In summary, this involves simply giving powers to specialist regulators with responsibility for other sectors (such as the ASA in relation to online advertising, or the CMA or Trading Standards in relation to consumer harms) to be able to work with Ofcom, eg in identifying and handing over evidence of harm occurring on the platforms that Ofcom is designated to regulator. We would urge officials to consider this approach and design the HFSS regulatory proposals in tandem with the wider online harms framework rather than continuing with an option to appoint another statutory body to work with the ASA on this. We have included our blog post setting out this thinking in the annex and it can be found at the following link: https://www.carnegieuktrust.org.uk/blog/online-harms-interlocking-regulation/

12. We are happy to provide further information or talk DHSC officials through our work, if helpful.

Carnegie UK Trust
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7 https://www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations

ANNEX

Online Harms - Interlocking Regulation (September 2020)

The statutory duty of care approach to online harms gives regulators a new route to protect the vulnerable and make markets work better where social media might have caused harm. The statutory duty approach focuses on systemic issues with social media services rather than individual complaints or breaches. Many regulators encounter the use of social media to breach rules they administer and these could also constitute breaches of the statutory duty of care at a systemic level. The Online Harms White Paper uses the example of social media to sell knives or other age-restricted goods to minors – and the problems might be more effectively dealt with through that route. While action on individual user complaints remains with these regulators, enforcement of the statutory duty of care lies with OFCOM, the government's likely online harm regulator. To avoid overburdening OFCOM, provide a simple path for the other regulators and certainty for companies and victims, some sort of process is needed to manage the interlocking of regulatory regimes.

This blog post proposes a system of regulatory interlock based on existing principles of regulatory co-operation, which is light touch and maintains focus on systemic issues not individual cases. Over the operational lifetime of Online Harms legislation there will be pressure to add (and possibly remove) issues to the scope of regulation – describing a system at the outset provides for orderly growth or shrinkage.

Online Harms Regime

We refer in this document to the regime we set out with Carnegie UK Trust in a draft Bill in late 2019 which proposed amendments to the Communications Act 2003. The Carnegie model is of online platform services subject to a statutory duty of care to prevent reasonably foreseeable harms arising to people as a result of the operation of those services. OFCOM is the regulator we proposed to enforce this systemic regime. A systemic regime does not generally deal with individual cases but looks at service design and business operation. The government's Online Harms White Paper sets out a similar regime.

Context

All of life (if not everyone in the world) is on the Internet, and even more specifically on social media platforms. "In real life" Parliament has created many specialist regulatory systems to prevent harm to people and make markets work better in many sectors – for example, food, trading standards, financial services, or elections. These specialist regimes complement and sometimes engage both the criminal and civil law. The way social media have been designed or are operated sometimes make it hard for these regulatory regimes to protect people and allow markets to function. Regulators complain that they do not have a route to influence social media platforms in relation to the operation of their regimes[1] even when harm appears to be being caused by the operation of social media services. The e-commerce directive (which the UK appears likely to retain after Brexit) specifically allows duties of care to be imposed upon service providers.

How does a general online harm regulator like Ofcom and the companies subject to the duty, address harms evidenced or foreseen in other specialist regulatory regimes? We know from Ofcom research[2] that the top four online harms experienced by adults (spam, fraud/scams, hacking/security, data/privacy)

all are addressed in part by other regimes (criminal, regulatory and civil). This data suggests that those regimes are not working well.

Conversely, how can OFCOM, the general online harm regulator tap into the expertise of specialist regulators? How do the specialist regulators identifying online harms tap into the statutory duty of care? There are of course precedents from other areas of regulation for systems of nominating lead regulators and regulators working together[3] and OFCOM already works with many other regulators in many different ways from full concurrency to simple co-ordination. From these examples, we have developed a model for interlocking regulation.

Interlocking regulation

We propose a mechanism that allows or requires regulators to work together on issues that fall within a specialist regime but also constitute or contribute to harm within the online harms regime. Allowing formal 'interlocking regulation' would help both victims and social media companies have more certainty about how regimes work than an ad hoc approach. In such a system, OFCOM should only be considering evidence of **systemic** harms presented by another regulator, **not adjudicating an individual fraud, scam or other case,** which remains the responsibility of a specialist regulator.

As part of the online harms, legislation Ofcom would be obliged to consider complaints about systemic issues from regulators designated in legislation.
National regulators such as the Financial Conduct Authority or the Food Standards Agency would likely be on the list which could be added to from time to time by statutory instrument. Where many regulators operate in parallel at a local level, such as Trading Standards Services (TSS) then OFCOM could follow a process analogous to the Regulatory Enforcement and Sanctions Act (RESA) and ask Trading Standards services to nominate a body to raise systemic issues on behalf of all TSSs. Some regulators do have the competence to act systemically on social media services – notably the ICO and CMA. These regulators would not need to use this mechanism because of this competence; the existing mechanisms for cooperation/concurrence will continue unaffected.

Ofcom would be empowered to determine the details of the process, including format of a complaint process, supporting evidence etc. The essential elements of any such process would indicate the nature of the problem, together with evidence of level of incidence and how it arises. It may be that the specialist regulator could suggest which elements of the regulated service are contributing to the problem, but that determination lies in OFCOM's remit. The specialist regulator should demonstrate evidence of dialogue with the regulated service, even if that is one-sided, and set out an assertion of the systemic issue enabling the harm to happen.

The process could work like this: a local TSS identifies cases of a type of scam perpetrated repeatedly using a social media platform that has led to complaints through their regulatory regime and harm to customers. The TSS has raised this with the online harms regulated platform but the scam continues; insofar as the platform has made any attempt to deal with the issue it has been unsuccessful. The TSS suspects that there is a systemic failure to prevent harm, perhaps with weak KYC allowing repeat offences from scammers (as they republish on the platform under another name after being shut down) or a perpetrator is using the system as intended and causing harm (e.g. targeting ads to vulnerable groups), but the platform operator had not thought this through at the design stage. The TSS presents this in a dossier to OFCOM through the nominated route to begin a dialogue with OFCOM about the alleged systemic problems leading to harm. OFCOM's role is to examine this systemic issue only. OFCOM does not

adjudicate individual cases/instances of harm. **The burden is on the specialist regulator to present the case clearly enough with sufficient evidence that OFCOM can assess the strength of the case and have enough information to understand the nature of the problem.**
An effective interlocking regulatory approach reduces the load on OFCOM – and they would not have to maintain a standing force of experts in areas covered by other regulatory regimes as they might under concurrency of powers. It provides a manageable route for OFCOM to work with other regulators building on its track record of regulatory co-operation. Current OFCOM enforcement guidelines allow it to launch investigations on receipt of information from other regulators and even to consider whether other regulators should do an investigation instead.[4] OFCOM also has concurrent Competition Act powers over postal and communications markets and experience liaising with the CMA. The new Digital Regulation Cooperation Forum arising from the CMA report into digital advertising markets, heralds a new, substantial area of regulatory co-operation. The regulatory interlock process could feed into the new Forum or vice versa.

This regulatory interlock approach would fit into the Carnegie draft Bill. The draft Bill does not limit the scope of harms. To allow for regulatory interlock on systemic issues as above requires a clause that requires OFCOM to define after consultation a process to receive and assess evidence from regulators established in law of systemic harms arising from the operation of regulated services. This could be similar to draft clause 8 where a 'super complaint' process is described. While the super complaint mechanism is different from regulatory interlock, it does provide a point where recognised civil society actors can formally interact with the regulatory system. In this, there are similarities between the mechanisms.

The government suggests in the White Paper and the interim response that 'consumer' harms would be excluded. It has been explained to us that this is due to perceived complexity of OFCOM's task. We suggest that the model above removes concerns about complexity and would fit well with the government's commitment to a systemic approach which we understand might not define harms on the face of the Bill. If there is no limitation on scope of harms, then a clause as described above could enable interlock in a manageable way.

Endnotes

1 For example, see evidence given to the Home Affairs Select Committee on 3 June 2020 by the City of London Police and the National Economic Crime Centre https://www.parliamentlive.tv/Event/Index/6f8da59b-0daf-473d-90f7-4dde9509dfc7

2 See page 45 of chart pack https://www.ofcom.org.uk/research-and-data/internet-and-on-demand-research/internet-use-and-attitudes/internet-users-experience-of-harm-online

3 See for instance http://www.legislation.gov.uk/ukpga/2008/13/contents

4 OFCOM 'Enforcement Guidelines for Regulatory Investigation' includes references to other regulators as being alternative routes of action and sources of information that might trigger an investigation 'whether there are other alternative proceedings that are likely to achieve the same ends, or deal with the same issues, as the potential investigation. This could include, for example, whether other agencies may be better placed to investigate the complaint or whether planned market reviews may address the potential harm;' …
'and in response to information provided to us by other bodies (for example, where other regulatory bodies, MPs, consumer organisations or the press draw our attention to complaints they have received about a particular issue). https://www.ofcom.org.uk/__data/assets/pdf_file/0015/102516/Enforcement-guidelines-for-regulatory-investigations.pdf Recently the ICO, CMA and Ofcom have announced a Digital Regulation Co-operation Forum (https://www.gov.uk/government/publications/digital-regulation-cooperation-forum)