

## SUBMISSION TO AUDIOVISUAL MEDIA SERVICES CONSULTATION

### Background

1. 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.<sup>1</sup>
2. 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>2</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>3</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>4</sup>
3. We welcomed the Government's adoption of a “duty of care” in its Online Harms White Paper proposal, though we have significant reservations about its proposed design which we have set out in the response to the consultation.<sup>5</sup>
4. This submission addresses the proposals set forward in the Audiovisual Media Services Directive (AVMSD) Consultation document, from the perspective of their fit with a (as yet

- 
1. We published a full reference paper, drawing together our work on a statutory duty of care in April 2019, just prior to the publication of the Online Harms White Paper:

[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)

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

[committee/inquiries/parliament-2017/the-internet-to-regulate-or-not-to-regulate/](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>

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

- <sup>4</sup> <http://www.iicom.org/images/iic/themes/news/Reports/French-social-media-framework---May-2019.pdf>

- <sup>5</sup> [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/07/04163920/Online-Harm-White-paper-.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/07/04163920/Online-Harm-White-paper-.pdf)

unconfirmed) systemic, risk-based duty of care, and drawing on the expertise of Professor Lorna Woods on European regulatory policy. Professor Woods would be happy to discuss this response further with DCMS officials.

### **Observations on the AVMSD and wider approaches to regulation of content online**

5. The introduction of the AVMSD is a significant development for video-sharing platforms and is being implemented at a time of significant flux in the policy landscape, both within the UK and in the EU. Its “fit” with other regulatory proposals will need to be thought through and, while we welcome the fact that this is covered in the Online Harms White Paper, there are significant uncertainties in relation to the timescales for the next steps on that work. We also note that transposition of the AVMSD is required under the terms of the Withdrawal Agreement, as its implementation date falls prior to the end of the Implementation Period”, but “if the UK leaves the European Union without a deal, we will not be bound to transpose the AVMSD into law” and that “existing broadcasting regulations will continue to apply” (Consultation Document, p4)
6. Given that the scope of services covered by the Online Harms White Paper is wider than the AVMSD, then a No Deal scenario does not necessarily throw up any particularly difficult boundaries. The proposal for a statutory duty of care (particularly if modelled more closely on our work) focuses on systemic change and therefore avoids the fact that content may appear multiple times in different jurisdictions; a systemic “duty of care” approach that focuses on the platforms mitigates the multiplicity conflicts in terms of the jurisdiction of regulatory schemes.
7. However, the points we have raised in our Online Harms White Paper consultation are worth repeating here. The duty of care, as proposed by the Government, is not clear on what a platform’s responsibility is in relation to online harms and consequently the sorts of steps that they might be required to take. The design choices made by the companies in constructing these platforms are not neutral; they have an impact on content and how it is shared. By contrast, older models (e.g. the e-Commerce Directive) have not expressly recognised this role in contributing to the creation of the problem but instead limited the role of the platforms to take-down and other ex post content creation mechanisms (e.g. moderation).
8. Based on the [evidence](#) of the Secretary of State to the DCMS Select Committee on 8 May 2019, we accept that the White Paper intended to move to a more systematic approach, in that he referred to the responsibility of the platforms. It is also possible to point to elements in the White Paper that reflect a recognition that the companies contribute to the development of the problem and therefore need to take steps earlier on in the system design process.
9. The White Paper envisages the existence of codes of practice. In itself, this is not a problem. Codes can be a useful mechanism for dealing with technical issues and allow the system to keep up to date in a swiftly changing environment. The difficulties arise from the way the proposed codes are drafted and structured. The Government has placed heavy textual emphasis on codes of practice to implement a duty of care. These are organised by reference to 11 different types of content, each with different specified actions that must be taken into account by the relevant operators. It may be that this approach was adopted as a vehicle to demonstrate to lobby groups that particular concerns would be met. In the codes, the Government chose to elaborate there is undue emphasis on notice and take down processes with the unfortunate consequence that the Government appears to prioritise these over the safety by design features inherent in a systemic statutory duty of care.

10. The focus in the draft codes on different types of content, while it allows for differentiation in terms of the intensity of action required by the operators, has the unfortunate side effect that platform operators will need to understand the boundaries between these different types of content in order to apply the appropriate code. In our view cross-cutting codes which focus on process and the routes to likely harm would be more appropriate. So, whatever route is taken to implement the AVMSD within the UK, it needs to intersect with a duty of care that is systemic, risk-based and proportionate.<sup>6</sup>

### **AVMSD observations**

11. In this section, we set out some other observations that are specific to the AVMSD.

#### Country of Origin

12. The consultation rightly states that the COO principle is the “cornerstone of the Directive”. In this regard – and has already been identified by the Broadcasting Authority of Ireland in its submission to the Irish Government’s consultation<sup>7</sup> – the approach of the Irish government to implementing AVMSD will in effect dictate the wider EU approach for many of the major platforms, including YouTube.

#### Protection of minors and protection of the general public

13. The AVMSD will require “that audiovisual media services that may impair the physical, mental, or moral development of minors (harmful content) are only made available in such a way as to ensure that minors will not normally hear or see them ... VSPs will have to adopt measures to protect minors.” This approach aligns with the way we envisage a statutory duty of care working in practice: It leaves the actual method and process to protect minors to the VSPs to determine rather than, as in the Online Harms White Paper, prescribing very specific actions according to the type of harmful content.
14. The simplicity of this part of the directive is also, in our view, welcome in the way that it a) defines what the duty is on AVMS and b) the definition of harmful content. We would propose that this approach should be the basis for any proposed UK regulation via the Online Harms bill to also apply to protecting children online. This would provide consistency for VSPs and other services.
15. We note that para 29.d needs to be aligned with the aims/objectives in the Age Appropriate Design Code (AADC) e protection of data collected from minors, and that the document makes no mention of the AADC in para 34, though it does refer to Article 8 of GDPR. Again, it is important that there is consistency in the various codes and other obligations on platforms and VSPs.

---

<sup>6</sup> Our full response to the Online Harms White Paper is here:  
[https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/07/04163920/Online-Harm-White-paper-.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/07/04163920/Online-Harm-White-paper-.pdf)

<sup>7</sup> <https://www.bai.ie/en/bai-publishes-submission-on-regulation-of-harmful-online-content-implementation-of-new-audiovisual-media-services-directive/>

16. We note the extension of the directive set out in para 29.e to “ensure AVMS do not contain any incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter or public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541”, but also a further example of inconsistency as hate against women is not expressly referenced in the Online Harms White Paper, though would clearly be within scope here.

#### Video sharing platforms

17. We note that the Government’s approach to implementing the AVMSD’s requirements pertaining to VSPs and the intention that this is incorporated into the legislation to give effect to the regulatory framework set out in the Online Harms White Paper. We also note that, if the Online Harms White Paper legislation is not passed in time to meet the implementation time for the 2018 Directive (September 2020), the UK plans to place the VSP requirements into UK law through an alternative mechanism and appoint Ofcom as the National Regulatory Authority as an interim measure. (paras 81-2, page 31)

18. Assuming that the Online Harms White Paper legislation is implemented before the deadline for AVMSD implementation, we agree that the Government’s proposal to incorporate the latter into the former is correct. We agree that the scope – of harms and of organisations covered – set out in the Online Harms White Paper is broad and, as such, can include the “principles outlined in the 2018 Directive to protect minors from harmful content and the general public from content that incites violence or hate and which constitutes a criminal offence”. (para 83, page 31)

19. We would however point out that by bundling this directive together with the Codes of practice set out in the White Paper, it exposes a further inconsistency in approach. As we point out in our full reference paper on the duty of care (April 2019), the AVMSD demonstrates how it is possible to design a regulatory system based on high level statements of relevant harms from the regulator from which the detail of the harms should be derived and set down in code. While the UK has decided to copy out the AVMSD for implementation in the UK, it is possible for any Member State to be more specific if required. That the UK has chosen not to, but then to take a different approach in relation to the Online Harms White Paper is unfortunate.

20. The Directive specifies that VSPs should be required to “take appropriate measures to protect:

- (a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a(1);
- (b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;
- (c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography as set out in Article 5(4) of Directive

2011/93/EU of the European Parliament and of the Council and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA”.

21. These are reasonably open-textured provisions, that allow a certain room for interpretation by the respective national regulators; this room for interpretation also allows context specific interpretations as well as those reacting to changing circumstances. This approach is also mirrored in the simple clarity of the AVMSD requirement “that audiovisual media services that may impair the physical, mental, or moral development of minors (harmful content) are only made available in such a way as to ensure that minors will not normally hear or see them”. This gives services considerable scope to identify a) the types of content that may be harmful in the way described, and b) the systemic or service design measures that they feel would be most appropriate to prevent minors hearing or seeing them. The regulator is then tasked with identifying whether those measures are sufficient to address the identified nature of the risk.
22. As we set out in our own response to the Online Harms White Paper consultation, we have significant concerns that the Government’s approach to both the definition of harms and the measures by which companies should aim to reduce the reasonably foreseeable risk of them occurring is too prescriptive. It moves away from the kind of systemic, principles-based approach we envisaged in our work and towards a notice-and-takedown regime that is primarily focused on different types of content rather than on cross-cutting design decisions that may lead to harmful outcomes.

**Carnegie UK Trust**  
**July 2019**

**Contact: [maeve@carnegieuk.org](mailto:maeve@carnegieuk.org)**