

## Response to CMA call for information on “Algorithms, competition and consumer harm”

### 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, including being cited by all three major parties’ spokespeople plus the Bishop of Oxford in the Online Harms Full Response debate in December 2020<sup>1</sup>. We have previously submitted evidence to the CMA’s Digital Markets Strategy, its investigation into Digital Mergers<sup>2</sup> and to its investigation into Online Reviews<sup>3</sup>.
2. We welcome the CMA’s report on algorithms and consumer harms. Our focus in our response to is very much on the synergies between the harms to the individual (consumers) that arise as a result of the use of algorithms for personalisation and targeting of consumers with the harms to users of social media through similar techniques.
3. We fully agree with the CMA’s preliminary comments that: “we note that some algorithmic systems are complex, especially those involving machine learning algorithms, and their behaviour and harms may not be perfectly anticipated by developers and firms. Nevertheless, firms are responsible for effective oversight of such systems, which should include robust governance, holistic impact assessments, monitoring and evaluation.” This accountability for systems, processes and governance – underpinned by continuous risk assessments – is at the heart of our proposals for a statutory duty of care<sup>4</sup> and, we believe, should underpin the government’s regulatory framework. Moreover, the application of the precautionary principle, which we explore in our 2019 full reference paper<sup>5</sup>, fully covers the risks that arise where the behaviour of complex systems may not be “perfectly anticipated” by developers and firms.
4. We would also like to acknowledge upfront that we very much welcome the formalisation of the work of the Digital Regulation Co-operation Forum and the confirmation that the CMA’s work on algorithms will be one of its priorities in its programme for the next year. This kind of regulatory co-operation is vital to ensuring that the online harms regime works as effectively as possible and – as we have set out in our work on “regulatory interlock” – is key to ensuring

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<sup>1</sup> <https://hansard.parliament.uk/Lords/2020-12-16/debates/1D51CE41-5856-4ED3-81F5-F8DC16963CE7/OnlineHarmsConsultation>

<sup>2</sup> [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2019/07/24161924/Competition-Markets-Authority-paper-.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2019/07/24161924/Competition-Markets-Authority-paper-.pdf)

<sup>3</sup> [https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie\\_uk\\_trust/2020/08/05135226/CMA-Online-reviews.pdf](https://d1ssu070pg2v9i.cloudfront.net/pex/carnegie_uk_trust/2020/08/05135226/CMA-Online-reviews.pdf)

<sup>4</sup> <https://www.carnegieuktrust.org.uk/project/harm-reduction-in-social-media/>

<sup>5</sup> [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)

that the legislative scope can cover consumer harms, including online fraud and scams, while not overburdening the remit of Ofcom in implementing the regime.<sup>6</sup>

#### Response to the call for information

5. We do not go through the detailed questions in the call for evidence here but very much welcome the CMA's detailed and informed consideration of the spectrum of harms that may arise from the design and implementation of algorithms. We note that many of the ways in which harm emerge for consumers – including through choice architecture, recommendation and filtering algorithms, dark patterns – equally apply to the ways in which harm on social media arises from similar personalisation techniques which lead to the promotion and targeting of harmful content to individuals. We would like to see greater, more holistic consideration given to these systemic design decisions by all the departments and regulators currently working to reduce harm across online platforms. The CMA's lead here is important and could help the government, particularly DCMS and Ofcom, move the debate on "harm" online from one that is about the content that users or consumers view while online to one that is much more focused on the system and design choices made by firms whose algorithms decide how that content is shared, targeted and promoted to users.
6. A further consideration is the question of the damage to the marketplace of ideas, especially through personalisation of ads – while the model is often used in relation to political debate it could also be used in re products/services/suppliers (ie consumers are not able to choose freely because they don't know what is available to other people and it is also very hard to start talking about it to other people because of lack of transparency)? This might also tie into concerns that the CMA has about fake reviews.
7. Similarly, the CMA's consideration of how to investigate harm caused by algorithms, both with and without access to the firms' data and algorithms, and its consideration of the regulatory techniques required to keep up when a firms' algorithm is regularly updated, is welcome and informed. We welcome the very clear call, in the report's conclusion, that: "If algorithmic systems are not explainable and transparent, it may also make it increasingly difficult for regulators to challenge ineffective measures to counter harms. Due to the various harms identified in this paper, firms must ensure that they are able to explain how their algorithmic systems work".
8. Again, the clarity of this approach and understanding that without such systemic transparency and the ability to assess and audit firms' algorithms is directly relevant to the approach we would recommend in the wider online harms framework. Consistency in approach and regulatory alignment would not just assist the regulators, in reducing the risk of duplicatory or inconsistent approaches leading to partial or obfuscatory disclosures from those firms to the individual regulators. A shared approach would also be welcomed by (or at the very least reduce resistance) from the major platforms and firms whose activities may require compliance to multiple regulatory bodies. We would urge the CMA to share their expertise and thinking on this with DCMS and Ofcom as they consider the information-gathering and investigatory techniques, and related regulatory powers, that should be written into the upcoming Online Safety Bill. We note, however, that the document refers to discrimination and working with ICO and EHRC but not Ofcom, which we wondered is an omission.

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<sup>6</sup> <https://www.carnegieuktrust.org.uk/blog/online-harms-interlocking-regulation/>

9. A further consideration is adtech itself (including techniques for audience segmentation; controls and safeguards around those choices as well as visibility of that segmentation) because the issues and harms span the three main regulatory regimes (ICO, CMA and Ofcom).
10. Finally, the commitment to the need for collaboration is important. We note that the CMA confirms that “subject to any legal restrictions, we can also collaborate with other regulators by sharing information, such as complaints submitted that might indicate where an algorithmic harm is arising, or where there are specific cases that raise issues for multiple regulators, such as data protection and consumer issues. In particular, we will continue to collaborate with the ICO and Ofcom and develop our joint capabilities as part of the [Digital Regulation Cooperation Forum \(DRCF\)](#).” We welcome the recent publication of the DRCF’s annual work programme and the prominence that this work on algorithms is given within that plan.
11. Again, we would urge the CMA to use its influence to ensure that the advanced thinking that it is undertaking can be adopted by DCMS and other policymaking departments in the design of the forthcoming Online Safety legislation. In particular, that the forthcoming legislation could explicitly allow for a system of “regulatory interlock” – as described in our blog from September 2020<sup>7</sup> - between the three DRCF participants as well as any number of other sector- or industry- specific regulators that otherwise struggle to address the scale of harm occurring to consumers online, whether through scams, fraud, faulty products or unsafe goods. The collaborative process the CMA outlines – where either information is shared on the nature of harm being seen by one regulator with another (our main concern in this regard would be that Ofcom would be empowered to seek and accept such evidence from others that it can address through its online harms regulatory powers) or where multiple regulators work on specific cases that cut across their remits.
12. The CMA’s willingness to assert that such collaboration is possible, and indeed advisable, is in stark contrast to the position taken by DCMS in, for example, suggesting that existing regulatory powers and enforcement mechanisms are sufficient for dealing with consumer harms.<sup>8</sup>

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<sup>7</sup> <https://www.carnegieuktrust.org.uk/blog/online-harms-interlocking-regulation/>

<sup>8</sup> See: “The government has determined that the fraud threat will be most effectively tackled by other mechanisms and as such the legislation will not require companies to tackle online fraud”; and “in order to avoid regulatory duplication the sale of unsafe products will be excluded from the online harms regulatory framework” (Box 4, [Full Government response to the Online Harms White Paper](#))

## **Annex: About our work**

13. 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.
14. 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>9</sup>. The Lords Communications Committee<sup>10</sup> and the Commons Science and Technology Committee<sup>11</sup> both endorsed the Carnegie model, as have a number of civil society organisations<sup>12</sup>. In April 2019, the government's Online Harms White Paper<sup>13</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.
15. In December 2019, while waiting for the Government to bring forward its own legislative plans, we published a draft bill<sup>14</sup> to implement a statutory duty of care regime, based upon our full policy document of the previous April<sup>15</sup>. We are also supporting Lord McNally on his Private Bill (The Online Harm Reduction Regulator (Report) Bill)<sup>16</sup>, introduced into the House of Lords on 14 January 2020 and awaiting its second reading, 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. We are still analysing the Government's full response of December 2020 and, further to our initial response, will publish our assessment on that in due course<sup>17</sup>.

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<sup>9</sup> 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/>

<sup>10</sup> <https://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2017/the-internet-to-regulate-or-not-to-regulate/>

<sup>11</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/822/82202.htm>

<sup>12</sup> 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>

<sup>13</sup> <https://www.gov.uk/government/consultations/online-harms-white-paper>

<sup>14</sup> <https://www.carnegieuktrust.org.uk/publications/draft-online-harm-bill/>

<sup>15</sup> [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>16</sup> <https://services.parliament.uk/bills/2019-21/onlineharmreductionregulatorreportbill.html>

<sup>17</sup> <https://www.carnegieuktrust.org.uk/news/online-harms-initial-response/>