HM Government's Online Harms White Paper

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Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content.

CCP Response to the consultation on the Online Harms White Paper

1. We welcome the opportunity to respond to the proposals of Her Majesty's Government as outlined in the Online Harms White Paper. The Government should be commended for attempting to coherently tackle a large number of the very complex challenges that have come with the expansion of the internet and pervasiveness of online services in our lives. The White Paper is comprehensive in its identification of harms and ambitious in its approach. This carries with it some serious risks, most notably to freedom of expression and to UK innovation. In our response we aim to help the Government mitigate these risks should it take these proposals forward.

2. Before addressing the questions posed, we must address two underlying issues with the harms in scope. The first of these is the conflation of illegal and legal content or behaviour. We urge the Government to maintain a clear distinction between illegal behaviour resulting in harm and legal behaviour resulting in ham both in the language it uses and in its approach. With illegal activity, such as the distribution of CSEA imagery, sale of illegal weapons, or incitement to violence, the aim of online policy should be to help prevent such activity and to put in place reliable, accountable mechanisms for online services to co-operate with law enforcement in the proper investigation and prosecution of such crimes, with due process. When legal content or activity is in question, there is a real danger in placing responsibility on private companies to determine what is harmful, especially if the incentives are stacked towards caution by significant penalties and personal liability, as well as the existing pressure from users and advertisers. The risks to freedom of expression must also be acknowledged as potential harms. The aim of policy should be to guide the balancing of rights and interests, and to ensure the transparency and accountability of the measures taken.

3. The second issue is that, while it makes sense to focus only on harms to individuals, those affecting organisations, such as companies or civil society groups, are sometimes closely linked to harm to individuals. As the White Paper points out, advertising plays a crucial role in the digital economy. The business models based on the gathering and selling of user data, monetizing user generated content, and ever more precise personalisation are enabling mechanisms behind many of the harms the White Paper attempts to address. The lack of transparency in finance and data flows, concentration within the ecosystem, barriers to entry due to the tipping effects of data acquisition, and other competition issues may seem to be ones that affect organisations rather than individuals, but line is actually quite blurry. Dealing with structural and 'organisation' problems may be more effective ways to reduce harms to individuals than trying to police content, especially legal content.

4. Because there of the link between structural issues and individual harms, as an overall suggestion, we recommend the government foresee and make explicit much greater coordination with the Competition and Market Authority (CMA) and the Information Commissioner's Office than is currently discussed in the White Paper. Enabling data portability, greater competition, and user choice, while instituting

transparency in financial and data practices so that regulators and users can effectively monitor providers may reduce the need for penalising companies for their moderation of content and user activity. If a new regulator is established or Ofcom's powers are extended, harmonisation will be needed to avoid further fragmentation of the regulatory landscape. A complex and fragmented regulatory landscape can make it difficult for companies, especially smaller ones, to be compliant and may amount to a barrier for new entrants into the market.

Question 1: Beyond the measures set out in this White Paper, should the government do more to build a culture of transparency, trust and accountability across industry and, if so, what?

5. Creating greater transparency and accountability to users is arguably more important for encouraging companies offering online services to prevent harms than fines or other punitive measures, and the White Paper is right to emphasise this aim. Point 3.20 is crucial as the ability to require information from companies on an ad hoc basis in relation to particular areas of concern is a valuable regulatory power, especially in industries known for opacity. However, this should not be limited to the measures being taken to prevent harm or sharing in-house or commissioned research as is described in the White Paper. In order to also address the structural issues mentioned above, and to assess certain measures, transparency in the money flows, data flows and probably algorithm designs will also be necessary.

6. For example, one of the measures that YouTube takes against users posting content that might not be illegal, but may be inflammatory or extremist, is to disable their monetization. Assessing the effectiveness and proportionality of such measures would require information about the advertising income lost to the platform and perhaps whether certain advertisers have been associated with certain kinds of problematic content.[1] One of the objectives of greater transparency is to provide citizens information to help them make choices about their use of services, perhaps to ones with greater protections or to ones that are more libertarian. For this they must have choices. Therefore transparency is also needed in order to identify conditions that might generate barriers to entry to alternative services. This is an area where close collaboration with the CMA and the ICO, as mentioned above, should be encouraged. In both cases default transparency of the advertising trade and other information related to the monetization of content would be needed. The French *Sapin Law*, which requires transparency in the advertising industry is a good model for some aspects of what is required, although, some practical details are yet to be fine-tuned via decree.[2]

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[1] The EU Code of Practice on Disinformation has been signed by the major associations of the advertising industry representing advertisers and media agencies as well as the online services companies because they also are crucial to efforts to disincentivise such content.

[2] For a discussion of this law as a model see Broughton Micova, S. and Jacques, S. (2019) *The Playing Field in Audiovisual Advertising.* Centre on Regulation in Europe, available at: https://cerre.eu/sites/cerre/files/cerre_playingfieldaudiovisualadvertising_2019april.pdf

Question 2: Should designated bodies be able to bring 'super complaints' to the regulator in specific and clearly evidenced circumstances?

7. The complaints-based model for dealing with content is a good one that has a long history in both press self-regulation and broadcasting regulation. The White Paper suggests 'designated bodies' might be allowed to bring 'super complaints' to a regulator if they are not satisfied with the redress mechanisms of an online service provider. Maintaining the necessary distinction between illegal and legal content and activity, we assume here that this 'super complaints' mechanism would apply to complaints about legal content or activity, and that relevant law enforcement agencies would be the appropriate place for those related to illegal content or activity.

8. It is useful in this context to refer back to the recommendations made by the Leveson inquiry into the Culture, Practices and Ethics of the Press for the regulation of the UK Press.[3] Though they were meant to apply to a self-regulatory body, they are relevant also to the second instance mechanism described in the White Paper as 'super complaints'. Leveson was clear that complaints could be made by anyone, including third parties on behalf of individuals or groups. Not only 'designated bodies', but other groups of individuals or groups representing individuals should be able to raise complaints. These could be, for example, a disability charity in relation to disablist content, or an informal group of female gamers who are unsatisfied with a service's response to sexist and harassing comments on their game videos. The policy aim here must be enabling free expression, with the understanding that some individuals' expression is being stifled in the current environment by the legal yet vicious and harmful speech of others. Such a mechanism must be equally open to those who feel their speech or activity online has been overly restricted in the name of protecting others from harm.

9. The White Paper rightly does not envision this 'super complaints' mechanism as playing the role of resolving disputes between individuals and online services. This mechanism should be for identifying systemic failures in the moderation of the services or discriminatory practices. The requirement, however, should not be 'evidenced circumstances' as stated in the White Paper, but instead it should be the collective nature of the harm. Evidence can be difficult to gather for those without regulatory powers (complainants) because of the nature of online companies. The specific and collective nature of the circumstance should be the criteria and then the investigation by a regulator that has the power to command the necessary data should generate the evidence. Only in this way can persistent discrimination, over-restriction of expression, or ineffectiveness in enabling the speech of marginalized groups be identified.

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[3] See the Report of the Inquiry published 29 November, 2012
https://www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press

Question 4: What role should Parliament play in scrutinising the work of the regulator, including the development of codes of practice?

10. Parliament should scrutinize the work of the regulator proposed no more than it currently does the work of Ofcom, and neither Parliament nor Government should have any role in the development of codes of practices. The development of codes of practice should be multistakeholder processes that include industry, civil society, academics, and any relevant public institutions.

Question 5: Are proposals for the online platforms and services in scope of the regulatory framework a suitable basis for an effective and proportionate approach?

11. The all-encompassing scope of the White Paper is problematic and this is largely due to its conflation of illegal and legal content and activities. While illegal activity or content such as the sharing of CSEA content or the organisation of terrorism would need to be covered by a wide-reaching scope, the scope should not be so wide for dealing with legal content and activity. Size and reach should matter. One of the reasons broadcasting content is regulated is because of its reach. The number of users is a useful measure of reach, so a threshold should be set such as the one set out in the German NetzDG law.[4] User should be defined so as not to mean simply one-off visitors to a site, but those who have agreed to the terms and conditions of a service and regularly make use of it. For a service to be deemed above the threshold their user numbers should be above the threshold for a designated period of time.

12. We have concerns as to the compliance of the proposed actions with the E-commerce Directive. Although the White Paper confirms its compatibility with the Directive in paragraph 41, the solutions proposed in section 6.16 amount to targeted unlimited filtering which was specifically rejected as incompatible by the Court of Justice of the European Union in the *Netlog* case.[5]

Question 8: What further steps could be taken to ensure the regulator will act in a targeted and proportionate manner?

13. The first step would be to give it a clear mandate and powers which, as discussed above, would entail a more nuanced scope that distinguishes between illegal and legal content and activity. In defining the mandate and scope, the Government must be careful not to render illegal content that is currently legal without duly justifying why the online environment would merit making something illegal that is not illegal in the offline environment. For example, bullying is a harmful behaviour against which schools and workplaces undertake a variety of measures, but it is not illegal. While online services may be expected to undertake sufficient measures to prevent

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[4] This is the Network Enforcement Act (Netzdurchsetzunggesetz, NetzDG) adopted in September 2017, which can be found in English here https://germanlawarchive.iuscomp.org/?p=1245

[5] The 'Netlog case', SABAM v. Netlog NV (C-360/10) dealt with measures for enforcing copyright including the type of measure and potential consequences of its use.

and deal with bullying behaviour online, the powers given to the regulator should not effectively render that behaviour illegal.

14. Another step would be to ensure the regulator is accountable to the public. This could include a requirement that impact assessments be conducted before the imposition of some enforcement measures, which might include modelling, and should include the retention of judicial review as an option for companies, organisations and individuals affected by the regulator's decisions.

15. The White Paper seems to intend a push towards technical solutions with some kind of human review of the outcomes of these solutions. Another aspect of ensuring proportionality would be to clearly designate who will bear the costs of developing these solutions, testing these in any impact assessment phase, and maintaining them. The White Paper includes some measures to support SMEs, however, the Government should make clear the long-term arrangements, including thresholds at which any potential new entrant is no longer considered an SME for the purposes of any assistance or the imposition of costs related to compliance.

Question 10: Should an online harms regulator be: (i) a new public body, or (ii) an existing public body?

16. A new public body is not necessary. The aims of the White Paper should be achieved by the expansion of the mandate and powers of Ofcom and coordination among other existing public bodies such as the CMA and the ICO. Our suggestion that Ofcom take on this role is not only about avoiding the additional expense and fragmentation that the creation of new public body might entail. Ofcom has a long history of dealing with content issues and monitoring the moderation of content by companies with editorial responsibility. Therefore the institutional culture will be attuned to the considerations that are involved in matters of balancing communication rights with other rights and public interests. Ofcom has the statutory duty to have at its heart the interests of individuals both as consumers, who merit protection, and citizens, who must be enabled to participate in society.

Question 12: Should the regulator be empowered to i) disrupt business activities, or ii) undertake ISP blocking, or iii) implement a regime for senior management liability? What, if any, further powers should be available to the regulator?

17. The White Paper proposes some pretty extreme enforcement mechanisms, and all three of those listed in question 12 are ones that may be disproportionate for dealing with legal content and activity. While there is evidence that there are harms that must be addressed, including that the expression of many individuals is being stifled by the behaviour of others, an overly powerful and interventionist regulatory regime can also be dangerous. If the powers listed in question 12 are to be part of the repertoire of the regulator, they should be reserved for highly limited circumstances and there must checks on their use such as appeal, judicial review, and public reporting requirements.

18. The most important power of the regulator will be to require information and transparency reporting, and emphasis should be placed on these tools for enabling accountability to the public. Incentives for online service providers to deal effectively with legal content and activity that might be harmful already exist in the form of advertisers' interest in appearing with 'brand safe' content and users' desire to have a good user experience. Where content or activity crosses the line into hate speech or incitement, the UK already has legislation that provide penalties for stirring up hatred[6]. Where content or activity amounts to the distribution of CSEA or inciting terrorism other laws apply.

19. An additional measure that the Government should consider is the conduct of regular or ad hoc audits of the systems that online services have in place, or requiring that external audits be conducted, in a similar manner to the practice in the financial sector. These would be complementary to the transparency reporting and focus on evaluating the outcome of the controls the online services have instituted, such as flagging and take down or algorithmic filtering. Another potential measure is requiring services to allocate a certain percentage of revenue to funds aimed at supporting initiatives to help counter the alleged harms, such as anti-bullying programmes, support for victims of harassment, fact checkers, or investigative journalism. Such measures should only apply to services over a certain threshold in order to ensure proportionality and avoid erecting barriers to entry.

20. It remains of the utmost importance that the potential harm to freedom of expression be properly included in any criteria for assessing compliance and effectiveness. Measuring effectiveness solely in the speed and rate of take downs is not sufficient. Any audit or monitoring of systems for preventing harm must also be able to identify any discrimination or if the speech of some is being overly restricted.

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[6] Section 4 of the Public Order Act 1986 as amended by the 2006 Racial and Religious Hatred Act and the 2008 Criminal Justice and Immigration Act