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## **European Commission consultation on the Digital Strategy: A framework of analysis for an online regulatory regime**

Reflections from Ofcom

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The European Commission's Digital Strategy sets out the Commission's five-year plan to shape Europe's digital future. The Strategy identifies three main objectives: 'technology that works for the people; a fair and competitive economy; and an open, democratic and sustainable society'. The regulatory actions announced as part of the Strategy include the AI White Paper, the Digital Services Act (DSA) package and the European Democracy Action Plan.

Ofcom is the UK's regulator and competition authority for communications industries. We regulate the broadcast, telecommunications, spectrum and postal sectors. More recently, the UK government has confirmed that Ofcom will be the regulator for video-sharing platforms and is also minded to appoint Ofcom as the regulator for certain online harms.<sup>1</sup>

This document is Ofcom's contribution to the Commission's consultations. It represents our reflections based on recent publications by us and other organisations, and draws on our recent relevant experience and learnings around the issues being considered. We hope the Commission finds these reflections useful, and we look forward to continuing our dialogue over the coming months and years.

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<sup>1</sup> [Online Harms White Paper](#), Department for Digital Culture, Media & Sport and Home Office, updated February 2020

# Overview

As noted in Ofcom's 2018 discussion document *Addressing harmful online content*<sup>2</sup>, the internet has delivered major benefits to individuals and society. Its open nature is a vehicle for innovation that has enabled new business models and ways of delivering information, content and services. It has revolutionised how people communicate and access news, entertainment and other media, and how they learn and do business. In the UK, in June 2020 adults were spending record 4 hours a day online on average, up from just under three and a half hours in September 2019, a surge also attributed to the coronavirus pandemic.<sup>3</sup> We are also observing that consumers are increasingly mixing content and communications services online, for instance, using gaming platforms for messaging purposes.<sup>4</sup>

But this has not been without risks to consumers and well-functioning markets, including those posed by increasing concentration of market power<sup>5</sup>, the dissemination of illegal and harmful content, and online misinformation and disinformation, as well as by control over the collection and processing of user data.<sup>6</sup>

There is broad agreement, even by platforms<sup>7</sup> themselves, that some sort of regulation is needed. As early as March 2019, Mark Zuckerberg directly acknowledged the need for a more active role for governments and regulators<sup>8</sup> in the online space and has continually pledged his commitment to developing a regime to protect elections, guard against harmful content, privacy and data portability.<sup>9</sup> In terms of public opinion, Ofcom and the Information Commissioner Office's (ICO) joint research published in June 2020 found a significant level of support among UK adults for increased regulation across social media (66%), video sharing (57%) and instant messaging (56%).<sup>10</sup> In short, as recently noted by Mike Walker, the Competition Markets Authority's (CMA) Chief Economist, "the debate is not over whether to regulate the digital platforms, but over the form that this regulation will take."<sup>11</sup>

**In Part I, we briefly summarise the characteristics of online services and the harms they have the potential to create, both from the perspective of effective competition (traditionally regulated using**

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<sup>2</sup> *Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation*, Ofcom, September 2018

<sup>3</sup> *Online Nation 2020*, Ofcom, June 2020

<sup>4</sup> Ibid. We reported that one in ten (9%) UK game-playing adults have used a games social network such as Steam or Xbox Live in the past month. Of those who use the communication features of games and game related platforms, a third (33%) talk to friends more via these platforms than via other forms of online communication, and more than half (53%) talk about a wider range of topics than the games they are playing.

<sup>5</sup> See for example findings set out in Section 7 "The case for a pro-competition regulatory regime for platforms" of the CMA's *Online platforms and digital advertising: Market study final report*, July 2020

<sup>6</sup> *Update report into adtech and real time bidding*, Information Commissioner's Office (ICO), June 2019

<sup>7</sup> In this submission we refer to a platform simply as a service that connects different users.

<sup>8</sup> *Mark Zuckerberg: The Internet needs new rules. Let's start in these four areas*, Mark Zuckerberg, The Washington Post, March 2019

<sup>9</sup> On 17 February 2020, Facebook published its second White Paper setting out some questions that regulation might address: *Charting a Way Forward on Online Content Regulation*, Monika Bickert (Facebook), February 2020. See also *Mark Zuckerberg: Big Tech needs more regulation*, Financial Times, February 2020

<sup>10</sup> *Internet users' experience of potential online harms: summary of survey research*, ICO and Ofcom, January/February 2020

<sup>11</sup> *Competition policy and digital platforms: six uncontroversial propositions*, Mike Walker, European Competition Journal, 16:1, 1-10, 2020.

competition law and ex ante principles) and broader social harms (through various types of social regulation, including consumer protection, data privacy and audience protection through content regulation). **We note the various regulatory initiatives that have already been pursued to date, at both national and EU levels.**

These have been incremental and largely reactive responses to problems arising in different parts of the online ecosystem, and have drawn from existing regimes for dealing with competition concerns or content standards, which were developed to address offline challenges. While these remain a relevant foundation for approaching the new online challenges, it is likely **we will need to adapt** some of the regulatory tools, and/or plug any gaps where no tools currently exist. Some adaptations have already been made, such as the extension of audio-visual regulation to Video-Sharing Platforms (VSPs) under the revised Audiovisual Media Services (AVMS) Directive, and the inclusion of “number-independent interpersonal communications services” under the European Electronic Communications Code (EECC).

**In this vein, in Part 2, we provide some reflections on the relevance of the Significant Market Power (SMP) regime** (from the electronic communications regulatory framework) to the online space, and share some ideas on how one might approach the setting of a threshold for ex ante intervention and the of the scope of regulation online. We also describe the operation of the UK’s Market Investigations process, in the context of our concurrent competition powers with the CMA the UK’s competition authority, which is of particular relevance to the Commission’s proposals for a new competition tool (NCT). We note that the CMA is responding separately to the Commission’s consultations, and the Commission might wish to review our responses in parallel, in particular given the extent of the CMA’s expertise in competition and consumer enforcement and market investigations, and its recent in-depth market study into online platforms and digital advertising, which we refer to throughout this response.

Throughout the Digital Strategy, the Commission has identified the importance of addressing information asymmetries which currently exist between online platforms, on the one hand, and regulators, research communities and users, on the other. **We discuss the importance of greater transparency not only to help address these asymmetries, but, through iteration, to support targeted and proportionate regulatory interventions.**

In many respects the various regulatory regimes that now find themselves engaged in the online space have also historically operated **more or less in isolation** from each other. As a converged regulator Ofcom has had some experience of operating across some of these boundaries. Looking ahead, we will need to ensure that the regimes speak to each other, as they are all potentially engaged at once in the online space. **We discuss how greater coherence between the regimes and coordination between the relevant authorities can reduce any unhelpful duplication and the risk of interventions that cut across each other.** Coordination around information-gathering powers, and/or mechanisms for information-sharing, can also help to manage the regulatory burden, while close working and knowledge-sharing, including between regulatory authorities from different jurisdictions, can help to mitigate the information asymmetries described above and contribute to effective enforcement.

# 1. Online services and responding to the potential for new harms

## Key characteristics of online services

1.1 Online services can exhibit a number of characteristics which can contribute to user harms, and which might apply differently depending on the service in question. We briefly summarise these below on the basis of our own analysis and various other reports<sup>12</sup>:

- a) **They are uniquely placed to collect data**, both on users' behaviours and their characteristics, from which platforms can derive insights on user preferences and inform data-driven personalisation and targeting<sup>13</sup>, or indeed enhancement, of services. The scale and fungibility of data assets (i.e. data's ability, once collected, to be an input into a wide range of the services offered by the platforms) can be a source of market power which is less prevalent in the offline world<sup>14</sup>, particularly where data can be accessed and used in a way that is "non-replicable" by others.<sup>15</sup>
- b) **Network effects** mean that the more people use a product, the more appealing this product becomes for other users. These dynamics can make entry or expansion difficult for new entrants as, all else being equal, their small(er) network at launch is likely to be significantly less valuable to most prospective users than established large platforms. In markets with network effects, market power can arise and become entrenched. This is especially the case when consumers 'single-home', so the combination of network effects and single-homing can lead markets to 'tip' in favour of one or a few providers.

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<sup>12</sup> These are derived from our own analysis, as well as a number of published reports including: [Competition policy for the digital era](#), Cr  mer, de Montjoye and Schweitzer, European Commission, 2019; (in the US) [Stigler Committee on Digital Platforms: Final Report](#), Stigler Center for the Study of the Economy and the State, , 2019; (in Australia) [Digital Platforms Inquiry: Final Report](#), Australian Competition & Consumer Commission, June 2019; and (in the UK) [Unlocking digital competition](#) (the Furman Report), Report of the Digital Competition Expert Panel, March 2019, as well as the recently published [Online platforms and digital advertising: Market study final report](#), CMA, July 2020.

<sup>13</sup> Ofcom recently published a paper describing ways in which providers in the communications sector might use data – i.e. collecting information about customers, and processing it using algorithms, particularly machine learning algorithms – to personalise their interactions with customers. This ability facilitates personalised pricing, a form of price discrimination which already happens to some extent in our sectors but may become more prevalent in the future. Ofcom shares the results of qualitative research on consumer perceptions of personalised pricing of communications services. Our research found that the potential benefits of personalised pricing did not outweigh participants' concerns. With the exception of lower prices for low income households, there was a lack of faith in possible benefits, including expanding access to new or varied services (i.e. cheaper/better offers) as well as concerns over the use of data and lack of transparency. See: [Personalised pricing for communications: Making data work for consumers](#), Ofcom, August 2020.

<sup>14</sup> This contrasts with, for example, telecommunications services where an important source of market power is control over physical infrastructure, which generally cannot easily be deployed into multiple markets. The "non-rivalrous" nature of datasets is highlighted in the Furman Report (para 1.41), noting the comparative advantage this can offer to incumbent firms in digital markets discussed in Chapter 1 of that report.

<sup>15</sup> Potential competitors here include new entrants like more traditional actors like telecom operators or start-ups that do not (yet) have the sophisticated algorithms to compete.

- c) **The scope of some online players** (in terms of the range of services they offer<sup>16</sup> and the variety of product and geographic markets they operate across) can generate complex business models, often referred to as ecosystems, that can enable linkages between different services, and the leveraging of market power between different markets.
- d) **“Online” is global**, and partly due to low distribution costs, the same service can be accessed simultaneously in multiple jurisdictions, wherever the service provider might be established.
- e) **Informed user choice** is potentially complicated by the collection of behavioural data, which can allow suppliers to understand and leverage on biases, including through targeting, in new ways (and possibly more effectively than in some offline services).<sup>17</sup> As well as *reflecting* user preferences, data-based targeting can also *influence* user decision-making on a large scale and perhaps less visibly than simple marketing campaigns do in the offline world.
- f) **The dynamic and innovative nature** of the services offered, rather than prices alone, is a key competitive differentiator<sup>18</sup>, unlike the infrastructure industries that have traditionally been subject to ex ante regulation. Indeed, a number of services are provided “free” of monetary remuneration, but in exchange for access to user data.
- g) **Disruptive new services** can displace existing alternatives or create new markets overnight. This can generate substantial benefits for end users, who might enjoy a range of new or better services but might also require more agile regulatory approaches than those traditionally applied in “offline” industries, such as telecommunications or energy.

1.2 As discussed further below, these characteristics create risks in markets tipping in favour of one or very few providers due to cost savings from their size ('economies of scale') or their presence across a range of services ('economies of scope'). This can lead to limited competition *in* the market, which might not raise concerns if there is sufficient competition *for* the market (i.e. if firms with existing strong market positions face the threat of entry, expansion or even displacement by rivals). However, we have already seen a number of examples in recent years where persistently strong and profitable positions in a range of services have been found not to be open to potential competitors.

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<sup>16</sup> For example, Amazon’s, Facebook’s and Google’s global online properties cover different combinations of social media, search, retail, entertainment and technology.

<sup>17</sup> The CMA [\*Market Study Report \(2020\)\*](#) makes the following point on lack of transparency in paragraph 49: “One of the key functions of online platforms that are funded by digital advertising is to be able to identify and target users as they interact with the platform. This involves complex decision-making in real time using large quantities of data. This applies equally to user-facing services such as search and social media as to the operation of programmatic digital advertising: neither of these would be possible without the use of sophisticated algorithms. Yet one consequence of this reliance on ‘black box’ decision-making is that market participants find it difficult to understand or challenge how decisions are made and to exercise choice effectively”.

<sup>18</sup> Static efficiency (i.e. reducing prices on the basis of lower costs) matters less in these markets than dynamic efficiency which requires the use of innovation e.g. producing new products (or improving the quality of existing products) and creating new production processes to compete.

- 1.3 These characteristics also impact on the risks of, nature and scale of content-related harms in online markets, as compared with their offline antecedents. As we noted in our *Addressing harmful online content* paper<sup>19</sup>, online markets present particular challenges, including:
- a) **the scale** and sheer volume of text, audio and video generated or shared on online platforms
  - b) **the variety** of content types, voices and opinions
  - c) **the limited role** of platforms in the creation of that content: many online platforms do not create or commission the content accessed by their users, although they do have a role in determining what users see, and determine, through their terms and conditions, what kinds of content and speech are acceptable in their environments
  - d) **the wide variety and innovation** of the nature and features of online platform services, including the level of control over what content users see
  - e) **the multinational nature** of online platform operators.
- 1.4 These, together with the speed with which content can be disseminated and amplified online, make it challenging to secure traditional public policy or social objectives such as election integrity, security data privacy and the protection of minors from harmful or illegal content.<sup>20</sup>
- 1.5 Given the novel challenges posed, as we noted in our *Addressing harmful online content* paper, existing frameworks (developed for broadcasting and video-on-demand regulation) cannot simply be transferred wholesale to the online world.<sup>21</sup> The same can be said about the existing ex ante telecoms regime, as discussed in Part 2 below.

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<sup>19</sup> *Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation*, Ofcom, September 2018.

<sup>20</sup> Ofcom's latest commissioned research about users' concerns and experiences of online harms has found significant risks of harm posed by social media platforms. We found that 3 in 5 adults and 4 in 5 12-15 years old have had at least one potentially harmful experience online in the past 12 months, citing social media sites as the most common sources of harm (*Internet users' concerns about and experience of potential online harms*, Ofcom, June 2020). While adults' potentially harmful experiences are generally about spam emails, scams/fraud and fake news, offensive language remains the most commonly reported potential harm experienced by 12-15 year olds, with just over a quarter having come across bullying, abusive behaviour or threats online. The same research revealed that although two-thirds of adults feel the benefits of going online outweigh the risks, almost 8 in 10 would like websites to do more to keep them and others safe. In fact, just over half of adults trust that the most popular websites quickly remove illegal, offensive or harmful material content. This is also reflected by the fact that both adults and 12-15 year olds trust social media and video sharing sites the least, a trend that is driving high support for increased regulation of these types of media.

Furthermore, Ofcom's weekly news and information surveys during Covid-19 outbreak found that, at the height of the pandemic, nearly 1 in 2 respondents had come across false or misleading information about the virus (*Covid-19 news and information: consumption and attitudes*, Ofcom, 2020). While the figure has gradually decreased since the end of April, over a quarter of respondents still reported coming across misinformation at the end of June. The above findings highlight concerns about platforms' inability to halt the spread of illegal and harmful content, calling for regulatory intervention.

<sup>21</sup> *Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation*, Ofcom, September 2018.

## Current responses to online challenges and the need for a holistic approach

- 1.6 In responding to regulatory challenges posed by online services, we can start with existing regulatory regimes, including (i) economic regulation based on ex post competition and ex ante frameworks, such as the existing telecoms regulatory regime<sup>22</sup> (ii) content regulation including audio-visual media services regulation, (iii) and other horizontal regimes including consumer protection and data privacy measures. Each one contains important regulatory principles which will remain relevant online.
- 1.7 In some cases, existing tools might be found to be insufficient. For example, the European Commission's ambitious enforcement strategy has helped to **stress test existing competition rules** by taking decisive action against Google in three abuse of dominance cases resulting in significant fines<sup>23</sup> and, more recently, by beginning an investigation against Amazon.<sup>24</sup> On the back of this experience, it has identified relatively discrete areas where it considers enhanced powers and/or new rules might be needed to address a number of concerns (i.e. the ability to apply ex ante regulation to gatekeepers, or to use a new competition tool (NCT) to resolve structural problems in a market).
- 1.8 Over the last few years, the European Commission has also begun to introduce **new rules on some of the activities of certain platforms**. For instance, it imposed new requirements on VSPs (previously unregulated) to take appropriate measures to ensure citizens are protected from certain types of harmful content, as part of the review of the AVMS Directive.<sup>25</sup> The review of the Copyright Directive introduced new responsibilities for online content-sharing platforms in respect of the distribution and remuneration for copyrighted material.<sup>26</sup> The Platform-to-Business (P2B) Regulation imposed a number of transparency obligations on platforms in their relationships with business users.<sup>27</sup> The Recommendation on Tackling Illegal Content Online encourages companies to clarify 'notice and action', implement proactive tools for to find and take down illegal content, and protect human rights in making justifiable content removal decisions.<sup>28</sup>

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<sup>22</sup> We refer to the telecoms regulatory regime and the electronic communications framework interchangeably in this paper. From 21 December 2020, the EECC is due to consolidate and update the existing legal regime which was initially introduced in 2002 and most recently updated in 2009. The most relevant directives that will be in place until the EECC comes into force are: the Framework Directive 2002/21/EC, the Access Directive 2002/19/EC, the Authorisation Directive 2002/20/EC, the Better Regulation Directive 2009/140/EC, the Universal Service Directive 2002/22/EC and the Citizens' Rights Directive 2009/136/EC.

<sup>23</sup> The findings relating to the Google Shopping, Google Android and Google AdSense investigations can be found here:

[https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf),  
[https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40099/40099\\_9993\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf) and  
[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_1770](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770).

<sup>24</sup> On 17 July 2019 the European Commission opened a "formal antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules":

[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4291](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4291).

<sup>25</sup> Directive 2018/1808, November 2018.

<sup>26</sup> Directive 2019/790, April 2019.

<sup>27</sup> Regulation 2019/1150, June 2019.

<sup>28</sup> [A Europe that protects: Commission reinforces EU response to illegal content online](#), European Commission, March 2018.

- 1.9 Finally, the proposed Regulation on preventing the dissemination of terrorist content online would require hosting service providers to remove or restrict access to terrorist content within an hour of receipt of notice from a competent authority.<sup>29</sup> Notably the effects of these recent and proposed changes have yet to be fully assessed. More recently, the Commission convened online platforms to develop a Code of Practice on Disinformation, the implementation of parts of which were monitored and reported on by the European Regulators Group for Audiovisual Media Services (ERGA) in early 2020.<sup>30</sup>
- 1.10 At the same time, a number of Member States have begun to introduce **new national rules**, some of which are seen as risking incompatibility with the Country of Origin principle (on which VSP regulation under the AVMS Directive will still be based). And the greater the emphasis placed on increasing platforms' responsibility for the content they host, the louder the warnings that the liability exemptions at the heart of the eCommerce Directive might be compromised.
- 1.11 In the UK, we have seen recommendations for new tools for the regulation of online markets (where the Digital Competition Expert Panel recommended that a Digital Markets Unit (DMU) be set up to secure "competition, innovation, and beneficial outcomes for consumers and businesses"<sup>31</sup>), and proposals for a new regulatory regime to tackle a number of online harms.<sup>32</sup> The Cairncross Review<sup>33</sup> on the future of journalism, also published in 2019, made recommendations for the regulation of online advertising, news quality and media literacy.
- 1.12 Meanwhile, the CMA has recently published its final report on its *Online platforms and digital advertising: Market study* (Market Study Report)<sup>34</sup>, setting out its conclusions on the state of competition in the markets for search and social media, and making a number of recommendations for addressing the issues identified. The CMA has also looked at fake and misleading online reviews on Instagram/Facebook and eBay<sup>35</sup> and pressure selling and misleading discounts by hotel booking platforms Expedia, Booking.com, Agoda, Hotels.com, ebookers and trivago<sup>36</sup> – in both cases resulting in voluntary commitments from platforms.

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<sup>29</sup> [Proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online](#), European Commission, September 2018.

<sup>30</sup> [ERGA Report on disinformation: Assessment of the implementation of the Code of Practice](#), ERGA, 2020.

<sup>31</sup> Strategic recommendation A, [Unlocking digital competition](#) (the Furman Report), Report of the Digital Competition Expert Panel, March 2019.

<sup>32</sup> [Online Harms White Paper](#), Department for Digital, Culture, Media & Sport and Home Office, updated: February 2020.

<sup>33</sup> [The Cairncross Review: a sustainable future for journalism](#), Department for Digital, Culture, Media & Sport, February 2019.

<sup>34</sup> [Online platforms and digital advertising: Market study final report](#), CMA, July 2020.

<sup>35</sup> On 22 May 2020, the CMA secured commitments from Instagram, operated by Facebook, to tackle the risk that people can buy and sell fake and misleading reviews through the platform. This builds on the CMA's previous work on fake and misleading reviews, where it identified the trade of fake and misleading reviews on Facebook and eBay and, earlier in the year, secured commitments from those two platforms to tackle this issue (see [Fake and misleading online reviews trading](#), CMA, June 2019).

<sup>36</sup> [Hotel booking sites to make major changes after CMA probe](#), CMA, February 2020.

## Regimes need to speak to each other

- 1.13 In many cases for the first time, links are being drawn between platforms' strong market position (from a competition perspective) and the societal harms their activities might be causing. To secure an effective approach to online regulation, the existing regimes that are engaged – economic regulation, content regulation, and other horizontal regimes including consumer protection and data privacy measures – will need to speak to each other. Coherence between different regimes/analytical frameworks has always been important, and there are a number of examples where duties/institutional arrangements have been designed to ensure coherence in practice.<sup>37</sup> These might be useful starting points.
- 1.14 But the digitisation of the economy and rise of new platform business models has put these existing mechanisms under stress, both in terms of the appropriate regulatory tools and the inter-regime 'fabric'.
- 1.15 Their **public policy objectives** might be in tension and might therefore have to be explicitly balanced against each other (for example, protections against online harm/data protection regulation could increase barriers to market entry, while a competition regime might be seeking to reduce barriers and promote market entry). This is a key point stressed in Ofcom's recent call for evidence on the regulation of video sharing platforms, the first step in our work to implement the AVMS Directive's new obligations.<sup>38</sup>
- 1.16 There might be unintended consequences arising from potential inconsistencies between their **analytical frameworks and concepts** which risk creating regulatory lacunae or over-regulation. By extension, given the number of different regulatory authorities which might be engaged in the online space, there could be a risk of duplication or of regulatory interventions that cut across each other.

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<sup>37</sup> Such examples include the concurrency arrangements between various economic regulators that operate in the UK along with a range of consumer law protections they are able to draw on, and the role of media plurality as a specific consideration in media mergers in the UK. For example, see Ofcom's [findings](#) on the proposed acquisition of Sky plc by 21st Century Fox, Inc in 2017 and our [public interest test](#) into the acquisition of JPIMedia Publications Limited (and therefore the 'i' newspaper) by Daily Mail and General Trust plc (2020). There is broader precedent for this kind of cross-regime dialogue. For example, wider policy considerations, such as the impact on labour markets have featured as part of the European Commission and national authorities' competition decisions since the regime's inception. More recently, following the Tata Steel and ThyssenKrupp merger decision in June 2019, the Commission highlighted in its press release that "[t]he EU takes action and is using the full potential of its trade defence toolbox to ensure a level playing-field for the EU steel industry and its ability to maintain jobs in the sector. ([https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_2948](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2948)). Broader aims identified recently in competition field include environmental protection (see, for example, [Shaping a digital future for Europe](#), Symposium on Digitalisation, The Hague, 3 February 2020), national security and digital sovereignty considerations (see, for example, [Internets of the World Conference](#), Copenhagen, 5 December 2019).

<sup>38</sup> In our [call for evidence on video-sharing platform regulation](#) (consultation open from July 2020 to September 2020), we stress that "with platforms of different size, scale and risk of harm and regulation needs to reflect this. In particular, regulators need to be alert to any unintended regulatory impact, such as the risk of distorting or harming competition, for example by raising barriers to entry" and that "good regulation should always support rather than hinder innovation".

## 2. Ofcom's reflections on the design of an effective online regulatory regime

- 2.1 In this section we draw from material we have published and work we have done, as well as from our experience of regulatory concurrency and our recent collaborations with the CMA and data privacy regulator, the ICO.
- 2.2 We begin by sharing our thinking on two particular areas pertinent to the Commission's proposals:
- **On the setting of a threshold for ex ante intervention** – we reflect on the relevance of the electronic communications framework in the online world, based on our experience of Significant Market Power (SMP) regulation under the European electronic communications framework, and the work ongoing in the UK around a new threshold for regulatory intervention applicable to firms with “Strategic Market Status” (SMS).
  - **On the proposal for a new competition tool (NCT)** – we describe our experience of concurrency with the CMA and in particular the operation of the UK's market investigation procedure.
- 2.3 We then provide more general reflections on the design of an effective online regulatory regime:
- what we have gleaned from an early interaction with online platforms – that **transparency and access to information** are key, and that an **iterative process** will help ensure targeted and proportionate regulation.
  - how **the different regulatory regimes are linked**. We draw on papers we have published in the last two years, including *Addressing Online Harmful Content* published in 2018, and *Online market failures and harms* from October 2019, and discuss the **importance of a dialogue** between the regimes' objectives, scope and definitions.
  - as well as a dialogue between regimes, we note **the importance of institutional cooperation between regulatory authorities**, both nationally (drawing from our ongoing regulatory cooperation with both the CMA and the ICO) and internationally (given the cross-border nature of online services).

### Lessons from ex ante economic regulation for a new online intervention threshold

- 2.4 In developing the framework of analysis for any potential ex ante regulation in the online space, and especially in defining the applicable threshold for intervention, we can look to established ex ante regulatory regimes that have delivered positive outcomes over time. One of these regimes is the European electronic communications framework.

- 2.5 The threshold for intervention here is determined by a finding of **SMP** of a telecoms operator(s). Put simply, in telecom markets that are susceptible to being regulated, an operator can become subject to regulatory requirements if the regulatory authority concludes that the entity has SMP by assessing whether a set of cumulative criteria are met.<sup>39</sup> By directing the firm's conduct, the regulation imposed on the SMP operator is designed to counter any negative effects on competition identified by this market assessment, ideally also shaping the nature and future dynamics of the competitive process.
- 2.6 Some of the features present in communications markets and which tend to result in SMP findings, such as vertical integration and network effects, are also prevalent in online markets, as described in Part 1 above. The concept of SMP is therefore a useful starting point in considering what characteristics a firm (or a set of firms) in an online market might need to have in order to meet the **threshold for regulatory intervention**.<sup>40</sup>
- 2.7 The Commission's SMP Guidelines provide a non-exhaustive list of criteria relevant to assessing SMP.<sup>41</sup> While there is some emphasis on the importance of market shares, the guidelines recognise that these alone might not be sufficient to find SMP and include other criteria such as the absence of, or low, countervailing buying power; product/services diversification (such as tying or bundling services to a core market); control of infrastructure not easily duplicated; direct and indirect network effects and vertical integration.
- 2.8 Several of these criteria could be useful both in assessing the state of competition in heterogenous and fast-moving online markets<sup>42</sup> and in determining where the threshold

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<sup>39</sup> The "three criteria test" means that all three cumulative conditions need to be met: (i) the presence of high and non-transitory structural, legal or regulatory entry barriers; (ii) a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and (iii) competition law alone is insufficient to adequately address the identified market failure(s).

<sup>40</sup> As part of similar considerations in the UK, the Furman Report also specifically identified the potential relevance of the SMP test to assess when regulatory measures should be imposed in the online sphere to firms described as having Strategic Market Status (SMS). ([Furman Report](#) (2019), para 2.117).

<sup>41</sup> [\*Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services\*](#), European Commission, April 2018.

<sup>42</sup> For instance:

- absence of, or low, countervailing buying power, particularly where SMEs use large online platforms to access consumers and have little to no bargaining power.
- product/services diversification such as tying or bundling services to a core market in ways that discourage multi-homing and create barriers to entry for potential competitors in connected markets.
- control of infrastructure not easily duplicated. For online platforms this is not necessarily physical infrastructure, but rather necessary inputs for businesses to access consumers or potential rivals to compete, such as data or customer base.
- direct and indirect network effects – the strength of network effects can be assessed by examining both how, and the extent to which, users gain benefits from the presence of other users on the same platform. The extent of multi-homing, and the nature and direction of network effects (e.g. positive, negative, one side or both sides) can inform the assessment of incentives to engage in exploitative practices on either side of the market.
- vertical integration, leading to a potential risk of leveraging inputs acquired in a platform's core market into other tightly connected markets. This concern could be extended to loosely connected markets that are not vertically related, leading to the foreclosure of rivals in a wider range of markets.

for any intervention online should lie. Over their lifetime, the SMP Guidelines have provided clarity and certainty for both regulators and industry participants, while allowing flexibility for the specifics of individual cases to be taken into account. Given the heterogeneous nature of online markets, we would expect these features to continue to be particularly important.

- 2.9 Given, the specific characteristics of, and challenges posed by, online markets, while there are significant similarities between the telecoms and online markets, it should be acknowledged that the SMP principles cannot simply be read across and applied “as they are” to online services. To the extent that some SMP principles can inform the development of the online regulatory framework, some adaptations are therefore likely to be needed.
- 2.10 For instance – a **wider range of factors** will need to be considered in assessing the relevant level of market power necessary to trigger intervention in online markets:
- a) SMP findings in infrastructure industries in many cases relate to natural monopolies in physical infrastructure, with cost advantages from scale and high barriers to entry. Online services are not necessarily natural monopolies in the same sense – their market power is likely to be derived from their access to large datasets on their users (rather than from the scale of their physical assets). Access to/control over user datasets and the processing of such data are therefore important considerations in assessing market power online.
  - b) Data, as one of the primary assets of online firms, is more fungible than physical infrastructure in telecoms markets, and provides more scope to be deployed across a wider range of markets/services. This can result in a platform potentially entrenching or leveraging market power across different markets. In online ecosystems, the potential for leveraging into markets that are more loosely connected to the core market (where the firm has market power) is different from the more familiar leveraging into tightly connected markets which are in the same value chain (e.g. with access to upstream wholesale inputs) in the telecoms space.
  - c) In the face of these factors, and especially given the potential for innovative disruption online, where the scope for new market entry will vary, the relevance of market share becomes less pertinent. In comparison, as noted in paragraph 55 of the SMP Guidelines, market shares in telecoms markets can give a reasonable indication of the market importance of a particular operator (even if they are not solely determinative in finding SMP).
- 2.11 In addition, the **forward-looking assessment**<sup>43</sup> carried out to determine if a market structure tends towards effective competition will be more challenging and potentially less predictable in dynamic and innovative online markets.

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<sup>43</sup> The forward-looking element of an ex ante market review in the telecoms sector is incorporated in the ‘three criteria test’, through which the Commission identifies telecoms markets that are susceptible to regulation.

- 2.12 As part of such an analysis, a regulator would normally consider expected trends in technological and market developments. In telecoms, it is possible to make a reasonably accurate assessment of the potential direction of a market evolution over the 5-year period of a market review. The services remain fundamentally the same (i.e. communications services, based on underlying connectivity), and while technology can evolve quickly, its implementation across physical networks can take time.
- 2.13 In online markets, this might be less straightforward. The tendency in some of these markets towards tipping means that market power could grow substantially in no time, but it could also be eroded relatively quickly by the entry and expansion of a rival, e.g. based on M&A activity or technological innovation.
- 2.14 While online services represent a new range of business models across the economy in both regulated and non-regulated sectors, not all activities of every online service provider will necessarily require regulation. For example, if a large platform enters a market that is completely unrelated to its existing regulated activities and where it can be considered as a challenger, due consideration would need to be given to whether the platform's new market activities also need to be subject to ex ante intervention.
- 2.15 In September 2018, the UK Government established a Digital Competition Expert Panel led by Jason Furman to consider the potential opportunities and challenges the emerging digital economy might pose for competition and pro-competition policy. The Panel published the Furman Report in March 2019<sup>44</sup>, in which it concluded that competition in online markets does not always work well, and that merger and antitrust enforcement alone were not well suited to addressing the issues identified.
- 2.16 The Furman Report noted the potential relevance of the SMP test to this analysis, but also noted the characteristics of market power which are particularly relevant to online platforms and their ability to act as bottlenecks, which it proposed should be incorporated in the development of a new threshold for regulatory intervention for online markets, known as **"Strategic Market Status" (SMS)**. The Furman Report also recommended the establishment of the DMU to implement pro-competition policies, including designating and applying regulatory measures such as codes of conduct to firms with SMS.
- 2.17 SMS was described as enduring market power over a 'strategic bottleneck market', but important aspects of what SMS might mean from a conceptual and regulatory standpoint were left open. The CMA's final Market Study Report<sup>45</sup>, focused on Google and Facebook, found a strong argument for a regulatory regime for online platforms funded by digital advertising and supported the high-level positions set out by the Furman Report, including interventions to regulate firms with SMS.

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<sup>44</sup> [Unlocking digital competition](#) (the Furman Report), Report of the Digital Competition Expert Panel, March 2019.

<sup>45</sup>The CMA's [Market Study Report](#) (July 2020) found that Google has had a share of supply in online search of around 90% for over a decade and that Facebook has an audience of over 43 million users in the UK, accounting for 84% of the British online population, as of February 2020.

- 2.18 In March 2020, the UK Government announced the creation of a Digital Markets Taskforce ('the Taskforce') (made up of the CMA, Ofcom and the ICO) to provide it with advice on the potential design and implementation of pro-competitive measures for unlocking competition in digital platform markets.<sup>46</sup> Its areas of focus include a methodology for designating firms with SMS, whether intervention might be justified in relation to firms falling outside the scope of SMS, and associated remedies.<sup>47</sup>
- 2.19 The Taskforce will also consider how an SMS regime might interact with other regimes, and what legislative design might be required to support that. Indeed, input from stakeholders<sup>48</sup> has recently been sought on which existing or proposed legal and regulatory regimes, such as the SMP regime in telecoms, could be used in developing the equivalent criteria for assessing whether a firm has SMS.
- 2.20 In addition to our reflections on the relevance of the SMP criteria and forward-looking market assessments to defining a threshold for intervention in online markets, Ofcom has begun to consider how one might approach setting the **scope of any eventual regulatory regime**, i.e. the firms to which the threshold test for any intervention could apply. We are considering three conceptual elements that might help develop our thinking on the scope of any regulation:
- a) Features that might make it particularly challenging for rivals to win customers from incumbents, giving rise to **enduring market power** in a 'core' market (including economies of scale and scope, data and personalisation, network effects, and limits to switching or multi-homing).
  - b) The extent to which platforms are able to act as **gateways**<sup>49</sup>, giving them bargaining power and in some circumstances making them a bottleneck or an unavoidable trading partner.
  - c) The fact that some platforms might be **strategic**, because they are particularly well-placed to leverage their market power into a wide range of 'connected' markets, and/or because of their scale, their wider commercial ecosystem, or because they are 'foundational' to access a range of other markets.
- 2.21 Each of these three elements is potentially relevant in assessing the scope of the regime:
- a) under a narrower methodology, the scope could encompass only companies characterised by *all three* elements, i.e. strategic gateways with enduring market power (area C in Figure 1 below).

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<sup>46</sup> <https://www.gov.uk/cma-cases/digital-markets-taskforce>

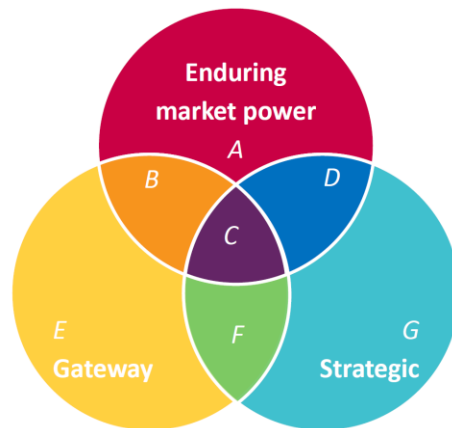
<sup>47</sup> [\*Digital markets taskforce: terms of reference\*](#), UK Government, March 2020.

<sup>48</sup> [\*Call for information: Digital Markets Taskforce\*](#), CMA, July 2020.

<sup>49</sup> We note that the DSA proposals relating to ex ante regulatory instrument refer to "large online platforms with significant network effects acting as gatekeepers". In this paper we use the term "gateway" and "gatekeeper" interchangeably, noting that the Furman Report refers to both.

- b) alternatively, a broader approach could cover a wider set of platforms with enduring market power, but which do not necessarily act as a gateway or have strategic importance (areas A, B and D in Figure 1 below).

**Figure 1 – Scope analysis**



## The UK's market investigation regime and our experience of concurrency

- 2.22 The proposals on the NCT recall some aspects of the UK regime. We have provided below some reflections, in particular on how, broadly speaking, concurrency works in the UK from Ofcom's perspective. We hope this might be useful in thinking about the design of a regime where multiple rules could affect the same markets and services, and where speed and agility are required.
- 2.23 Regulatory cooperation and concurrent responsibility for promoting competition can be beneficial for both the authorities involved, and the regulated stakeholders. Such arrangements can help ensure a coherent regime with clear responsibilities between authorities, which supports regulatory consistency, avoids duplication and lacunae, and leverages cross-sectoral and sector specific expertise. Last but not least, it can also provide flexibility in allocating and sharing resources and skills.
- 2.24 The regime allows for concurrent enforcement by the CMA and sector regulators<sup>50</sup>, so in the sectors for which it is responsible, Ofcom can:

<sup>50</sup> The existing concurrency framework was designed so that the CMA, the UK's primary competition authority, and sector regulators work more effectively together to improve competition and competition law enforcement in the regulated sectors. The arrangements were introduced in their current form by the Enterprise and Regulatory Reform Act 2013 and took effect from 1 April 2014. See also: [Annual report on concurrency](#), CMA, 2020.

- conduct **market studies**<sup>51</sup> and, if appropriate, make a **market investigation** reference (under which the CMA conducts an in-depth investigation to determine whether any feature, or combination of features, of a market in the UK creates an “adverse effect on competition” (AEC) and apply remedies to address the concerns identified).<sup>52</sup>
  - **apply UK competition law** (and EU law until 31 December 2020, the end of the transition period) to undertakings engaging in anticompetitive agreements or to the abuse of a dominant market position.
- 2.25 Looking specifically at the Market Investigation process in the context of concurrency, having received a reference from Ofcom, the power to conduct a Market Investigation sits exclusively with the CMA.<sup>53</sup> If, following the Market Investigation, the CMA finds an AEC, it will consider whether and what types of structural or behavioural remedies are appropriate to implement.
- 2.26 Although the CMA is solely responsible for the Market Investigation process, it can subsequently call on sector regulators (and their sector expertise) to help identify, design and assist with the implementation of remedies. It can also seek assistance with any future monitoring of these and the implementation of any on-going programmes aimed at enhancing competitive dynamics and consumer engagement in the market.<sup>54</sup>
- 2.27 Importantly, the remedies are not necessarily focused solely on the conduct of firms in the relevant market, but can address potentially problematic market features similar to those identified in the NCT proposal, such as harms arising from economies of scale and scope,

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<sup>51</sup> [\*Market Studies and Market Investigations: Supplemental guidance on the CMA’s approach\*](#), CMA, January 2014 (revised: July 2017), paras 1.5 and 1.11.

<sup>52</sup> The CMA has the power to formally assess whether a market is functioning well by carrying out a market study or market investigation. A market study examines the causes of *why* particular markets may not be working well, taking an overview of regulatory and other economic drivers and patterns of consumer and business behaviour. Both the CMA and Ofcom can conduct a market study, the end of which can lead to a range of outcomes, including:

- a clean bill of health
- actions which improve the quality and accessibility of information to consumers
- encouraging businesses in the market to self-regulate
- making recommendations to the Government to change regulations or public policy
- taking competition or consumer enforcement action, and
- making a market investigation reference to the CMA or accepting an Undertakings In Lieu of an investigation

Market investigations are more detailed examinations and assess whether there is an adverse effect on competition in a market (see Part 4 of the Enterprise Act 2002).

If the CMA finds an adverse effect on competition following a market investigation, it is required to consider whether remedies are appropriate. It may be the case that the market investigation identifies theories of harm relating to market-wide issues or practices, thereby suggesting market-wide (or symmetric), rather than firm-specific remedies.

<sup>53</sup> Under Part 4 of the Enterprise Act 2002 (EA02); see also Part 3 ‘Market Investigations’, [\*Market Studies and Market Investigations: Supplemental guidance on the CMA’s approach\*](#), CMA, January 2014 (revised July 2017) and [\*Memorandum of Understanding between the Competition and Markets Authority and Ofcom on the use of concurrent powers under consumer protection legislation\*](#), February 2015.

<sup>54</sup> For example, the CMA’s energy market investigation, which followed a reference by Ofgem and concluded in June 2016, resulted in a package of remedies including 26 recommendations to Ofgem ([\*Annual report on concurrency\*](#), CMA, April 2020, para 116).

network effects, regulatory and structural barriers, and consumer behavioural factors, all of which have been identified as common in the online space. The CMA's response to the Commission's consultations discusses its experience in this area in detail, including reflecting on the ways in which its experiences with market investigations can help to enhance the Commission's approach to designing the NCT.

- 2.28 Finally, the approach to market definition adopted in the context of Market Investigations can often be broader and more holistic than that used in abuse of dominance cases.<sup>55</sup>
- 2.29 The CMA's powers<sup>56</sup> are therefore more extensive and differ from those currently available to the Commission in the context of sector inquiries (where the current EU law provisions<sup>57</sup> do not allow for the Commission to adopt measures aimed at remedying the situation under investigation<sup>58</sup>). Clarity on the legal threshold that must be met for an in-depth investigation to be appropriate is therefore critical.<sup>59</sup>
- 2.30 For this same reason, robust regulatory oversight is also important. In the UK, this is secured through a range of measures, including: the separation between the CMA Board, (as the decision-makers who initiate a Market Investigation after a market study) and the CMA Panel (made up of independent decision-makers who make the formal findings at the end of a Market Investigation); and through the role of the Competition Appeals Tribunal, to which the CMA's decisions can be appealed.

## Transparency, information-gathering, iteration

- 2.31 A common theme across the Digital Strategy is the identification of significant information asymmetries between:
- regulated companies and regulators
  - regulated companies and other businesses
  - regulated companies and users
- 2.32 While the particular types of transparency and disclosure obligations required to address these three classes of information asymmetries will differ, any transparency obligations would need to be based on clear objectives, and be proportionate (taking into account the cost of disclosures as well as their anticipated benefits). Indeed, "more information" is not always the right solution to information asymmetries between platforms and users (the

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<sup>55</sup> For a recent discussion on this and other features relevant to the proposals, see *Market Investigations for Digital Platforms: Panacea or Complement?*, Amelia Fletcher, Centre for Competition Policy, University of East Anglia, August 2020, p5-6.

<sup>56</sup> The CMA's decision on whether to implement remedies and what these should be is informed both by the scope of the CMA's order-making powers under Schedule 8 to the Enterprise Act 2002 and by practical issues such as the number of parties concerned and their willingness to negotiate and agree undertakings in lieu.

<sup>57</sup> [Regulation 1/2003](#)

<sup>58</sup> The Commission may however be prompted to initiate changes to regulation/legislation, or investigations into suspected anti-competitive agreements or abuse of dominance by individual participants.

<sup>59</sup> As noted above, the Digital Markets Taskforce in the UK is specifically considering how the existing regimes, both with respect to Market Investigations and telecoms, and the applicable thresholds for intervention can successfully work well in practice.

volume and format of information provided can impact on users' engagement with, and ability to act on, that information<sup>60</sup>), and in some cases a better means of addressing the asymmetry might be to do nothing, or to use other regulatory levers (e.g. ex ante limitations on how user data is used).

- 2.33 For regulators, this is potentially different from the kind of transparency they are used to from the offline world, in terms of both scale and timing. Where previously periodic information requests would be fed into regular decision making (market reviews, enforcement), regulators will need to develop a greater understanding of the systems and structures of the online business models, and keep abreast of any changes to them, in any new regime. On the one hand, industry will need a degree of certainty about the scale and kinds of information that they will be required to provide. On the other hand, regulators will need a degree of flexibility to request a relatively broad range of information to allow them to judge how best to approach their (new) regulatory duties. A degree of cooperation around transparency from service providers along with robust information-gathering powers might help ensure more targeted (vs blanket, or misfired) and proportionate regulatory responses.
- 2.34 From the perspective of users, we are very familiar with retail information remedies from the electronic communications sector (e.g. in the recently adopted EECC, aimed at ensuring transparency of contractual terms). Key to any regulatory response to the challenges posed by online service providers, whether around economic regulation or around content harms, will be ensuring that users are equipped to make informed choices, so that they can help protect themselves from harm<sup>61</sup>. Regulators can play a significant role in helping to empower users, whether through research into consumer attitudes and expectations, support for educational initiatives, or working with platforms to ensure that they have regard to media literacy throughout their service provision, potentially impacting product/service design. As noted above, however, in some cases these initiatives might need to be accompanied by (or replaced by) other regulatory levers, such as limitations or prohibitions on certain practices.
- 2.35 Ofcom has experience of this. We have had a statutory duty to promote media literacy since 2003. For many years, we fulfilled this duty through a comprehensive research programme tracking media literacy over time, providing stakeholders and policymakers, both in the UK and beyond, with a rich understanding of user habits and attitudes, the role

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<sup>60</sup> For instance, see [The behavioural science of online harm and manipulation, and what to do about it](#), Costa, Halpern, the Behavioural Insights Team, April 2019.

<sup>61</sup> As noted in recent research on UK parents' and children's media use and attitudes, two-thirds of 12-15s who go online are aware of the reporting function available on many sites, apps and online games. Of all those who are aware of this and who say they have seen something that worried them, half (52%) say they had used the reporting function: [Children and parents: Media use and attitudes report 2019](#), Ofcom, February 2020. This report also contains a wealth of data about use of other protection tools, how children keep their profiles private, blocking and access management etc.

of media in their daily life, and the extent to which their own literacy might, or might not, have developed alongside their take-up of new communications technology.<sup>62</sup>

- 2.36 In 2019, Ofcom recast its role with the launch of the Making Sense of Media Programme, expanding our research toolkit, emphasising the centrality of media literacy to a wider range of online policy areas, and further developing our collaboration and coordination with media literacy constituencies in a number of ways. We are placing significant emphasis on the importance of evaluating media literacy initiatives, in order to build a common understanding of what works, and where resources should best be focused, and look forward to sharing our learnings with EU regulatory counterparts, the European Commission and the recently launched European Digital Media Observatory. Indeed, we note that media regulators across Europe are also increasingly encouraging media literacy initiatives and multi-stakeholder cooperation in this field.
- 2.37 Ofcom had the opportunity at the end of 2019 to contribute to the work of ERGA of monitoring online platforms' commitments made in the EU Code of Practice on Disinformation (the 'Disinformation Code'). Our work focused on platforms' transparency commitments around transparency of political advertising, but the Disinformation Code includes commitments around empowering consumers (aimed at improving the discoverability of a diverse range of news sources and viewpoints presented to them), and empowering the research community (aimed at granting researchers access to platforms' data necessary for a continuous monitoring of online disinformation).
- 2.38 Signatories to the Disinformation Code committed to making political advertising recognisable to users and clearly distinguishable from other types of content, and to enable public disclosure of political advertising, and to make reasonable efforts towards defining and devising approaches to publicly disclose 'issue-based advertising'.
- 2.39 While the Disinformation Code itself was voluntary, the process of monitoring the implementation of these commitments provided many useful lessons for all participating regulators, which were reflected in ERGA's report<sup>63</sup> and which tally with some of the regulatory principles Ofcom has previously identified in the context of online content regulation.<sup>64</sup>
- 2.40 We expect that a number of these lessons will be useful and relevant beyond the limited scope of the Disinformation Code, for instance informing how NRA carry out their duties in relation to the regulation of VSPs under the AVMS Directive. These lessons include that:
- **as this is a new area of regulation, regulators/platforms might need to 'test-and-evolve' the measures they take to respond to the dynamic nature of the market and**

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<sup>62</sup> Ofcom's yearly research into adults' media literacy gives detailed evidence on media use, attitudes and understanding among UK adults aged 16+: <https://www.ofcom.org.uk/research-and-data/media-literacy-research/adults>. Our research includes findings relating to parents' views about their children's media use, and the ways that parents seek to – or decide not to – monitor or limit use of different types of media: <https://www.ofcom.org.uk/research-and-data/media-literacy-research/childrens>.

<sup>63</sup> *ERGA Report on disinformation: Assessment of the implementation of the Code of Practice*, ERGA, 2020.

<sup>64</sup> *Addressing harmful online content, Ofcom, 2018*

**the potential for unintended consequences.** An iterative approach should result in gradual improvements over time.

- while a **principles-based approach with a focus on processes** affords platforms more flexibility in implementing appropriate measures and processes suitable to the specificities of their services and business models, it can also make it more challenging to develop measurable performance indicators and compare the effectiveness of measures across the online ecosystem.
- There is therefore a **balance to be struck between flexibility and verifiability**. This will be challenging to get right and might itself rely on iteration, but will in any event require that platforms and regulators share a clear understanding of regulatory objectives and ‘what good looks like’.
- **Transparency of the processes platforms put in place** would allow regulators and researchers to **better assess their effectiveness** and to work with platforms to identify any scope for improvements. Transparency would also build trust between regulators, stakeholders and the public.
- Given the vast volumes and complexity of data that online platforms hold (and on which their business models increasingly rely), an **open dialogue between regulators, platforms and civil society** about **data availability and access** will also be useful to help in assessing the effectiveness of the regulatory approach in delivering the shared objectives.
- **Transparency is also essential to enabling users to interact with a service and to make informed choices.** In the case of the Disinformation Code, transparency would enable them to identify political ads, who paid for them (and how much), and why they were targeted by the platform/advertiser. Indeed, **research on users’ behaviours and preferences**, and insights into how users interact with the tools made available to them, could help shape any transparency obligations that might come to be applied in a future online regulatory regime.

2.41 Ofcom’s first experience applying some of these lessons will come in the context of our forthcoming responsibilities for the regulation of VSPs. For example, in our public call for evidence on this topic published in July 2020, we discussed our expectation that we will have powers to collect information from VSPs in conjunction with a robust enforcement framework.<sup>65</sup> We will also continue to build our evidence base on people’s understanding of how online content is produced, funded and organised, what tools are available to protect themselves and their children, and where to address their concerns. As we gain further knowledge and practical experience in this area, we intend to share learnings with the UK Government as it continues its thinking around a wider regulatory regime for online harms. We hope to have the opportunity to do the same with our European regulatory

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<sup>65</sup> [Call for evidence on video-sharing platform regulation, Ofcom](#), Consultation open from July 2020 to September 2020.

counterparts, and to contribute to the Commission’s thinking on how to advance its work in this area.

- 2.42 Ultimately, the regulation of the online space is new to both regulators and service providers. Getting it right will require an ongoing dialogue between them and an iterative approach in which regulators and industry continually learn from each other and improve their respective practices, reflecting changes in consumer behaviours and expectations, in service innovation, and in changes in the types of harm that occur and the ways in which harms materialise, with input from civil society. While we should expect and indeed strive for a degree of iteration, however, this should not lead to regulated companies becoming complacent or reactive in anticipation of the next iteration of regulatory instruction. Rather, a more collaborative regulatory relationship than many might have experienced until now will be in all parties’ interests, oriented around a shared understanding of the public policy objectives being pursued.<sup>66</sup>

## Enhancing the regulatory dialogue between existing regimes

- 2.43 As the UK communications regulator, Ofcom already has some limited powers and duties relevant to some online services. We regulate the infrastructure over which online services are delivered and we set the standards for some categories of online content services (video-on demand). We will soon become the UK’s regulatory authority for VSPs under the AVMS Directive. Our powers to enforce competition law and to conduct market studies include some services delivered online. We also have duties to promote awareness and understanding of all types of electronic communications media, which we are doing through our Making Sense of Media Programme, working with fellow regulators, Government, industry, the third sector and academics.
- 2.44 Ofcom recently published two papers discussing approaches to the potential harms arising from the provision of online services.
- 2.45 In 2018 Ofcom published *Addressing harmful online content*<sup>67</sup>, a contribution to the debates taking place about the potential for standards-based regulation of online content. We drew on our experience of regulating the UK’s audio-visual sector (broadcast and on-demand video), and highlighted key lessons and insights that might inform the principles underpinning any new regulatory model for online content.
- 2.46 The paper noted the major benefits of the internet enjoyed by both individuals and society as a whole, but reflected on the nature of the individual and societal risks that resulted from the dramatic increases of time and activity that UK citizens now spent online. These reflections were based in part on public debates and developments in public policy, and in

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<sup>66</sup> As we noted in our [call for evidence on the regulation of VSPs](#), “VSP regulation of this nature is new and untested, both in the UK and globally, so it is important that Ofcom can work constructively alongside industry to develop the foundations both for this regime and any future online regulation. We need to ensure that Ofcom’s guidance is informed by robust evidence, best practice and an understanding of the current capabilities of different services.”

<sup>67</sup> *Addressing harmful online content: A perspective from broadcasting and on-demand standards regulation*, Ofcom, September 2018. The views expressed in the paper have since evolved in the context of our preparation for the regulation of VSPs under the AVMS Directive, and we discuss these in more detail below.

part on the research mentioned above, conducted by Ofcom in 2019 (and repeated in 2020), in collaboration with the ICO, into internet users' concerns about and experience of potential online harm<sup>68</sup>. Concerns and areas of risk included:

- Exposure to harmful content and conduct
- Risks to privacy and personal data
- Security and resilience [of both services and infrastructure]
- Potential anti-competitive dynamics of online markets
- Concerns around the relationship between online platforms and publishers
- Copyright and intellectual property concerns
- Addictive behaviour

2.47 Having identified a range of potential content-related harms causing concerns to the public and policymakers, we published a second paper in October 2019, *Online market failures and harms*, where we examined from an economic perspective how various harms that arise online could relate to each other, by exploring common industry characteristics and the market failures at their source.<sup>69</sup> The 2019 paper represents an evolution in Ofcom's thinking and an early example of the need for a regulatory "dialogue", in this case between the content regime and ex ante competition regulation.

2.48 Indeed, we sought to apply a more integrated analytical matrix to assess whether and how various market failures, specific to the operation of the online markets with the characteristics noted above, can cause or exacerbate individual or societal harms. In this way, we illustrated how the framework of economic analysis can shed light on potential links between economic regulation and other policy objectives:

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<sup>68</sup> [\*Internet users' concerns about and experience of potential online harms\*](#), Ofcom, 2020 and 2019. Detailed commentary on this evidence base, including more detail on use and attitudes to online services in the UK is available in our [Online Nation Summary report](#) (2020).

<sup>69</sup> [\*Online market failures and harms\*](#), Ofcom, October 2019.

Figure 2: Market failures that can contribute to consumer and societal harms online

Market failures	Market power	Barriers to switching	Info asymmetry	Behavioural biases	Externalities
Harms					
Competition harms					
Fraudulent/unfair business practices					
Unfair price personalisation					
Harm to privacy					
Data breach					
Security and resilience issues					
Risks to media plurality and quality					
Content and conduct harms					
Harm to wellbeing					

Ofcom

- 2.49 For example, the **market failures** identified in the paper included a set of relatively well-established scenarios such as **market power** (due to market concentration and low likelihood of new entry<sup>70</sup>), **barriers to switching or to multi-homing** for users (for example due to a lack of interoperability between platforms), and **information asymmetries** (due to the inability of consumers to identify the best course of action, especially if they are lacking relevant information or technical knowledge<sup>71</sup>).

<sup>70</sup> [Online platforms and digital advertising: Market study final report](#), CMA, July 2020.

<sup>71</sup> For instance, consumers often accept terms and conditions without reading them, and therefore are often unaware of how much data they are sharing as they access services online. The impact of this is particularly relevant online, where connected devices combined with data analytics allow providers to observe and infer more about consumers than what is typically feasible offline.

- 2.50 We also identified two additional market failures, relating to **behavioural biases**<sup>72</sup> (that mean consumers do not always choose the best course of action) and **other externalities**<sup>73</sup> (where online consumers and providers might not always consider the impact of their actions on wider society). While these are not new considerations in the analysis of the operation of markets for competition and ex ante regulation, they are relevant in assessing social impacts that reach beyond competition policy.
- 2.51 Similarly, the definition of **online harm** used in that paper included a broad set of negative effects that go beyond both the traditional concept of “**competition harms**” (which tend to encompass higher prices, lower quality and lack of innovation) and the **content and conduct harms** identified in the UK Government’s Online Harms White Paper.<sup>74</sup> They also included the following additional negative effects<sup>75</sup>:
- fraud and unfair business practices
  - unfair price personalisation
  - harms to privacy, data breaches
  - security and resilience issues
  - risks to media plurality and quality
  - harms to wellbeing
- 2.52 The paper went on to consider how each of the market failures relates to each harm. It noted that the complex interactions between market failures and harms can create links between different harms and their respective policy areas. These links can in certain cases be stronger than those we observe in more traditional services, in part due to the role data and algorithms can play in causing or exacerbating a range of harms.<sup>76</sup>
- 2.53 The paper essentially concluded that an individual consumer or societal harm can result from (or be exacerbated by) a range of different market failures, either individually or in combination, and that a given type of market failure can contribute to multiple harms across different policy areas. As noted above, the links that can exist between different harms can create overlaps and tensions between policy aims. By extension, interventions to address harms need to be carefully designed to avoid undesirable or unintended

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<sup>72</sup> For example, people might find it difficult to trade off the immediate benefits of accessing a ‘free’ service (such as social media) with the potential longer-term costs of sharing their data (such as the risks of fraud following a data breach). Access to data and data analytics allow online providers to understand consumer biases in more immediate and intricate ways. The potential to test the impact of changes to services at lower cost, sometimes in a personalised way, means that there is more scope for online providers to leverage these biases to influence consumers’ choices in novel ways.

<sup>73</sup> In terms of the impact on wider society, this might be the case if content-curation algorithms which seek to maximise consumer attention do not account for potential harm to individual users’ wellbeing, for example, where consumers’ attention might be captured most strongly by harmful content. These algorithms might also fail to acknowledge the potential for wider societal impacts arising, for example, from disinformation.

<sup>74</sup> [\*Online Harms White Paper\*](#), Department for Digital, Culture, Media & Sport and Home Office, updated: February 2020.

<sup>75</sup> These are harms identified by UK policy reviews, alongside related issues raised as part of the wider public debate.

<sup>76</sup> The paper identifies three related factors (also listed as some of the characteristics of online) that mean these links may be stronger in online services: the tendency towards concentrated markets that results in market power, the drive for data and attention and tailoring of services based on data analytics and algorithmic adjustments.

consequences, such as duplication or the inadvertent undermining of public policy objectives in an adjacent regime.<sup>77</sup>

- 2.54 There might also be opportunities for identifying potential synergies between regimes. These synergies can, in turn, deliver positive outcomes for the authorities involved, in advancing coherent and mutually enhancing aims. For instance, in 2019 the German competition regulator took action against Facebook for abusing a dominant position on grounds derived from data protection regulation.<sup>78</sup> The decision of the Bundeskartellamt was appealed by Facebook and its finding of abuse of dominance by Facebook has been recently confirmed by Germany's highest court on appeal.<sup>79</sup>
- 2.55 Another potential cross-over was identified by the CMA, which considered content harms as part of its Market Study Report on the digital advertising market: "Finally, concerns relating to online platforms funded by digital advertising can lead to wider social, political and cultural harm through the decline of authoritative and reliable news media, the resultant spread of 'fake news' and the decline of the local press which is often a significant force in sustaining communities."<sup>80</sup> Thus a problem (in this case market power in online advertising) in one regime (competition) might actually help explain the causes of a harm (fake news, decline of legitimate news media) that is identified in another regime (online harms, media pluralism), and could help inform appropriate – coordinated – regulatory responses.
- 2.56 **Turning to the Digital Strategy**, we note that the Commission has set out the high-level policy objectives of the DSA<sup>81</sup>:
- To ensure EU SME platforms can scale up and, by implication, compete with global services by harmonising rules and procedures and reducing administrative burdens
  - To make the internet safer for users by modernising rules and making platforms act more responsibly – the regulatory framework should balance safety and security with fundamental rights and freedoms
  - To increase accountability and cooperation between competent authorities, in part to avoid fragmentation of regulation across the EU

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<sup>77</sup> We have since developed this work further in interactions with the CMA in the context of preparatory work undertaken in setting up the DMU.

<sup>78</sup> [\*Case summary: Facebook, Exploitative business terms pursuant to Section 19\(1\) GWB for inadequate data processing\*](#), Bundeskartellamt, February 2019. In its press release, the Federal court [stated](#): "The lack of choice for Facebook users not only affects their personal autonomy and the protection of their right to informational self-determination, which is also protected by the GDPR [General Data Protection Regulation]. Against the background of the high hurdles to change that exist for the users of the network ("lock-in effects"), it also represents an exploitation of the users that is relevant under antitrust law, because competition is no longer effective due to Facebook's dominant position."

<sup>79</sup> [\*German cartel office to take Facebook case to High Court\*](#), Joseph Nasr, Reuters, August 2019. The full court decision is still due to be published.

<sup>80</sup> [\*Online platforms and digital advertising: Market study final report\*](#), CMA, July 2020.

<sup>81</sup> [\*Commission launches consultation to seek views on Digital Services Act package\*](#), European Commission, June 2020: "Europe needs a modernised regulatory framework to reduce the ever increasing regulatory fragmentation across Member States, to better ensure that everyone across Europe is protected online as they are offline and to offer to all European businesses a level playing field to innovate, grow and compete globally. Users' safety as well as the respect of their fundamental rights, in particular their freedom of expression, must be systematically guaranteed."

- 2.57 The Commission has also launched a proposal for a European Democracy Action Plan (EDAP) whose overarching objective of supporting the EU’s democratic structures is to be achieved by – and recognises the links between – ensuring the integrity of elections, tackling disinformation and reinforcing media freedom and pluralism.
- 2.58 The next stage towards developing proposals, including legislative ones, will be to define more specific regulatory objectives by reference to the particular outcomes to be achieved (e.g. the reduction of exposure to harmful content or conduct, the protection of privacy, the prevention of data or security breaches, sustainable competition, the prevention of unfair business practices or of harm to wellbeing and, potentially the tackling of any new consumer harms that might arise in the online world or be exacerbated by it, such as misinformation).
- 2.59 Being specific about the regulatory objectives will help inform what (new) concepts or legal tests or triggers for intervention might need to be developed. It will also help to surface overlaps and potential areas of conflict between the relevant regulatory regimes. It will be important to consider how the different regulatory regimes which might be engaged in the context of the Digital Strategy could complement each other, and proactively seek out such touchpoints – developing new approaches in tandem – to promote coherence and greater efficacy, i.e. pursuing coherence by design. The pursuit of coherence might also mean explicitly acknowledging that there might be trade-offs between policy objectives (and in some cases that the policy objectives or regulatory tools of one regime might inadvertently undermine those of another). Doing this should help ensure that informed regulatory decisions are made.
- 2.60 By way of example, we note that several elements of the Commission’s Digital Strategy have as an objective the reduction of exposure (and the effects of exposure) to potentially harmful (including illegal) content online. This is an objective of the Digital Services Act package (“Risks for the safety of citizens online and the protection of their fundamental rights”) but is also to be found at the heart of the Commission’s EDAP proposals. While it is true that there are a range of different tools available to pursue this objective (e.g. the introduction of harmonised regulatory obligations, support for media literacy and a pluralistic media environment), it will be important to develop these in tandem to ensure they are mutually consistent and reinforcing, and do not inadvertently undermine each other’s effectiveness.
- 2.61 Clarity about the policy objectives will also be relevant to determining the scope of regulation, where one might consider the nature of the services, the harms they might cause, and their particular status within their respective markets and sectors. The different regulatory regimes that currently apply in the online space targeted by the Digital Strategy also have **overlapping but different scopes, and overlapping but different terminology**. It will be crucial to address this at the earliest stage. It would be especially worth considering the extent to which the framework that is eventually developed for determining the scope for intervention by economic regulation, which we discuss in our reflections on the SMP and SMS concepts above, might also be relevant to determining any interventions around content-related and other social harms. For instance, the Commission’s proposals include

the possibility of updating the eCommerce Directive, and potentially to “harmonise a set of specific, binding and proportionate obligations, specifying the different responsibilities in particular for online platform services”. The Inception Impact Assessment (IIA) on the “Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services” refers variously to “online platforms”, “large online platforms”, “digital services” and “intermediaries”. It also develops the idea of services – including media-sharing ones – that “intermediate” information<sup>82</sup>. The concept of the “intermediary” therefore seems likely to be central to any new regulatory approach, which raises a number of issues around the possible future scope of regulation:

- The **eCommerce Directive** (eCD) currently applies to “Information Society Services” (ISSs) as defined through an amendment to the Directive on the provision of information in the field of technical standards and regulations. This is “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”. The eCD then identifies three distinct subsets of ISS<sup>83</sup> in order to set criteria for the Directive’s limited liability regime – mere conduits, caching providers, and hosting providers. In practice, most online intermediaries would fall under “hosting providers” (e.g. social media sites). But while the term “intermediary” is used in the eCD, it is not formally defined and so cannot be used to assess the scope of the Directive.
- The concept of an intermediary service in the eCD was developed in the context of *limiting* the liability of platforms (safe harbour principle<sup>84</sup>). In other words, where online services function as intermediaries of content/information they passively host, they are not liable for that content/information provided they do not have actual knowledge of illegal activity or information and act expeditiously upon obtaining such knowledge. This has resulted in a framework that limits the application and reach of sector-specific policy instruments, such as the AVMS Directive, the Copyright Directive and the several Commission Recommendations.
- Meanwhile, the **P2B Regulation** applies to “Online Intermediary Services” (OISs – online marketplaces such as Amazon, app stores, social media for business such as Facebook, Instagram, and price comparison tools such as Google Shopping) and “Online Search Engines” (OSEs – such as Google, and includes the return of results “in

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<sup>82</sup> For example, the IIA refers to “an entirely new set of issues [that] has also emerged with the scale of information intermediated online: recommender systems and online advertising play an important part in optimising consumers’ access to information”.

<sup>83</sup> Mere conduits (Article 12) provide network access services or network transmission services. These include connection to the internet via modems or lines and those who connect subparts of the internet. Caching providers (article 13) include ‘proxy servers’ which store data automatically for a limited amount of time for the ease of onward transmission. Hosting providers (article 14) store data which is selected and provided by users for an unlimited amount of time.

<sup>84</sup> Safe harbours do not prevent intermediaries from taking measures against infringement of third-party rights either through injunctions or duties of care. Exemptions have a horizontal scope, covering all types of illegal content (e.g. copyright infringements and defamation) as well as both civil and criminal liability. Limited liability protection is only available to passive hosts, which leads to the argument that it disincentivises intermediaries from taking more action to tackle problematic content because they might thus lose their “passive” status and therefore their protection from liability for making such content available.

any format” including voice). OISs, in turn, are defined as a subset of ISS (as defined in the eCD).

- Yet while the eCD applies to all ISSs, the P2B Regulation only applies to a subset<sup>85</sup>. And the subsets of ISS defined in the eCD are not the same as the subset used in P2B. Thus, if the P2B Regulation is to be used as the starting point for the potential ex ante regulatory elements of the DSA, it will be necessary to rationalise its scope and that of the eCD. Failure to do so could undermine the Commission’s stated aim to “strengthen the Single Market for digital services and foster innovation and competitiveness of the European online environment”.

- 2.62 In considering the meaning and legal definition of “intermediary”, the Commission might also consider how the position of a platform as a go-between among two or more parties, which themselves are involved in the transmission/dissemination process, might differ to a position where such decisions are taken by the intermediary itself. If the intermediary essentially acts as an agent of others and does not initiate decisions to disseminate or transmit, this would be consistent with the liability exemption afforded by the eCD. But if the regime seeks to potentially enhance the responsibility of such entities, it might be that a different word, such as platform or gatekeeper, would be more descriptive of the role performed by the organisation without the loaded meaning that intermediary might bring.
- 2.63 The Commission might also consider how concepts of gatekeepers within the economic regulatory framework being developed might be related to the notion of an internet intermediary under the eCD. For instance, there have been a number of attempts to define online intermediaries on the basis of the concept of a “gatekeeper”.<sup>86</sup>
- 2.64 It might also be worth considering distinguishing, particularly in the context of the eCD review or the introduction of a new DSA, between **content** intermediaries (such as social networks or messaging services, i.e. those that actively intermediate *speech*) and online marketplaces (selling physical goods or services), as suggested by digital rights group EDRi in its position paper on the DSA.<sup>87</sup> French regulator ARCEP, for instance, distinguishes between the platform as “bottleneck” and exploiter of network effects, and the platform as “the gatekeeper of access to a variety of digital content, through the establishment of one or more algorithms to classify or reference the information presented to the user from a large amount of content”.<sup>88</sup>
- 2.65 Finally, it is worth bearing in mind that, depending on the criteria chosen to define a coherent scope for the regulation of online services, the concept of “online platforms”

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<sup>85</sup> To fall within the category of OIS, must be an ISS and meet these criteria

- they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;
- they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers.

<sup>86</sup> [Unlocking digital competition](#) (the Furman Report), Report of the Digital Competition Expert Panel, March 2019; [Digital Platforms Inquiry: Final Report](#), ACCC, June 2019; [Competition policy for the digital era](#), Cr  mer, de Montjoye and Schweitzer, European Commission, 2019.

<sup>87</sup> [Platform Regulation Done Right: EDRi Position Paper on the EU Digital Services Act](#), EDRi, April 2020.

<sup>88</sup> [Rapport d’information sur les plateformes num  riques](#), La Commission des Affaires   conomiques, June 2020.

could end up capturing a very wide range of business types, sectors and markets, which might not all warrant the same/same degree of regulatory attention. Indeed, however we deal with overlaps in definition, we would not necessarily expect that the scope of the various regimes would be the same (i.e. that they would all capture the same services), given that different regimes will have been designed to address different harms. It will be important, in approaching the question of definitions and terminology, to ensure that these differences in intended scope remain clear. The Commission will doubtless receive many responses to its consultation about the breadth of services that might be covered by any or all of the proposed interventions, and we hope that in taking a coherent approach to definitions across the regulatory instruments, developing them in tandem, will in itself create some natural scope boundaries. Our comments above in relation to Ofcom's own work, together with colleagues from the CMA and ICO, in developing the scope of any new regime and potential threshold for intervention are made with this in mind.

## The importance of regulatory/institutional coordination/collaboration

- 2.66 In drawing from and adapting existing regulatory regimes to the online world, the challenge – for both the EU and the UK – will be to ensure a robust, clear and coherent, analytical framework that allows the policy objectives, scope and rules applicable to each area to work together in a coordinated, targeted and proportionate manner that provides legal certainty and mitigates risks to innovation. But institutional coordination is also important to ensure coherent regulatory design and implementation. Institutional coordination can also play an important role in improving regulatory efficiency and the proportionality of regulatory actions (such as information-gathering requests, which will play a central role in any regulatory regime).
- 2.67 The **institutional architecture** between the various responsible authorities – both nationally and regionally, will therefore need to “hang together” well – including ensuring that cooperation arrangements between authorities works effectively. The importance of this inter-regime dialogue was already recognised early on at the EU level, with the launch in 2016 of the Digital Clearinghouse, a voluntary network of regulators involved in the enforcement of legal regimes in digital markets, focusing on data protection, consumer and competition law.<sup>89</sup>
- 2.68 It will of course be important to minimise any obstacles to this kind of coordination, and to ensure conditions for information-sharing between national regulatory authorities that might be engaged in the oversight of online service providers under any eventual regulatory regime.
- 2.69 We can consider as an example the concurrent arrangements in the UK described above in the context of Market Investigations, which also enables sectoral regulators, such as Ofcom, to provide:

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<sup>89</sup> <https://www.digitalclearinghouse.org/>

- expert sector advice, practical experience and support to the CMA on specific case-work, such as in the context of media mergers or telecoms mergers<sup>90</sup>
  - information-sharing with the CMA, such as in relation to any potential infringement of the competition rules<sup>91</sup> along with relevant internal guidance and template documents
  - active involvement of personnel at key stages of an investigation, such as digital forensics support, and
  - knowledge-sharing through secondments.
- 2.70 Generally speaking, this coordination has worked well, as demonstrated by the work described in the annual Concurrency Reports.<sup>92</sup> The institutional arrangements in the UK have resulted in continued cooperation between the authorities, supported by a range of publicly available practical arrangements which provide detailed descriptions of case allocations.<sup>93</sup> This transparency, along with clear governance around regulatory decision-making and a robust appeals process, are important to support certainty for stakeholders.
- 2.71 As noted above, on the back of the Furman Report, Ofcom has also been working with the CMA as part of the CMA-led **Digital Markets Taskforce** to provide the UK Government with advice on the design and implementation of pro-competitive measures for digital platform markets. As well as building upon our shared expertise around competition regulation, the Taskforce recognises the potential for any competition regulation to interact with existing and new sectoral rules, such as VSP regulation under the AVMS Directive. Indeed, evidence of the interaction between regulatory regimes can be found in the CMA's Market Study Report, which concluded that a code of conduct under the VSP regime could potentially address several of the concerns that it had identified in the search, social media and digital advertising markets.<sup>94</sup>
- 2.72 Separate to the Taskforce, which was convened by the UK Government, the CMA, ICO and Ofcom have on their own initiative formed a **Digital Regulation Cooperation Forum (DRCF)**<sup>95</sup> to support regulatory coordination in the regulation of digital services (where we each have a role to play), and cooperation on areas of mutual importance. The aim is for a coherent, informed and responsive regulation of the UK digital economy.
- 2.73 Looking in particular at our duties to protect users from harmful and illegal content under the revised AVMS Directive, a potentially complex online regulatory landscape is emerging

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<sup>90</sup> For example, Ofcom is currently providing sector expertise in support of the CMA's interest in the Virgin/O2 merger which, at this stage, seems likely to be notified by the parties to the European Commission. Over the past year, we have also supplied information to the CMA in the context of an investigations into the Bauer Media Group's acquisitions of certain radio businesses.

<sup>91</sup> Regulation 9 of UK Competition Act 1998 (Concurrency) Regulations 2014.

<sup>92</sup> [Annual report on concurrency](#), CMA, 2020; [Annual report on concurrency](#), CMA, 2019.

<sup>93</sup> These arrangements are set out in various documents including a number of Memoranda of Understanding with the concurrent competition regulators: [Ofcom/CMA MOU on concurrent competition powers \(2016\)](#); [Ofcom/CMA MOU on the use of concurrent powers under consumer protection legislation \(2015\)](#); the [Competition Act 1998 \(Concurrency\) Regulations 2014](#); and [Regulated Industries: Guidance on concurrent application of competition law to regulated industries](#), CMA, March 2014.

<sup>94</sup> [Online platforms and digital advertising: Market study final report](#), CMA, July 2020.

<sup>95</sup> [www.gov.uk/government/publications/digital-regulation-cooperation-forum](http://www.gov.uk/government/publications/digital-regulation-cooperation-forum)

which will require substantial collaboration between national regulators. In the UK, for example, VSP regulation around the protection of minors will need to interact with the ICO Age Appropriate Design Code<sup>96</sup>, which seeks to safeguard children’s personal data on services likely to be accessed by them.

- 2.74 As noted above, Ofcom has also worked with the ICO on a series of reports that aim to quantify concerns about, and reported experience of, online harms, namely in respect to: content that people view, read or listen to online, interactions with other users, data/privacy and hacking/security. Ofcom published the latest research findings, the third report of the series, in June 2020.<sup>97</sup>
- 2.75 It will also be important to ensure effective cooperation, and a degree of coordination, between regulatory authorities in different countries (both within the EU and beyond), given the cross-border and pan-regional nature of the businesses whose activities they will be responsible for supervising. International collaboration will also be key given the global scale of, and the speed of developments in, online markets. As well as sharing insights about common tools (e.g. the use of algorithms, and the impact of behavioural bias), there is substantial benefit to be gained by international intelligence sharing (which could help spotting emerging problems early) and the sharing of experiences of what works and what does not.
- 2.76 Engineering a culture of International collaboration into the design of these frameworks should also help ensure that national/regional initiatives do not emerge in a vacuum, minimising unwarranted divergences in regulatory approach, mitigating the risk of forum-shopping and the creation of regulatory safe-havens, managing the regulatory burden on stakeholders, and facilitating regulatory cooperation for cross-border enforcement.<sup>98</sup> In that spirit, Ofcom looks forward to a continued constructive engagement with our European colleagues over the coming months and years.

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<sup>96</sup> [\*Age appropriate design: a code of practice for online services\*](#), ICO, August 2020.

<sup>97</sup> [\*Internet users’ concerns about and experience of potential online harms\*](#), Ofcom, June 2020.

<sup>98</sup> As we noted in our [\*call for evidence on video-sharing platform regulation\*](#) (2020), “Ofcom will continue to work closely with international regulators to understand their approaches to VSP regulation and ensure that consumers in the UK are protected from harmful content across all VSPs, and that we meet our obligations to users of UK-based services. This will require regular dialogue and sharing of best practice between Ofcom and the National Regulatory Authorities in EU Member States, as well as working collaboratively to establish effective mechanisms for handling cross-border issues. Ofcom already has strong working relationships with such regulators, and we aim to build on these as we move into new VSP regulation and any future role we have in online harms regulation.”