

# FACEBOOK 'REGULATION': A PROCESS NOT A TEXT

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# Facebook 'Regulation': a process not a text<sup>1</sup>

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## Abstract

Discussions of platform governance frequently focus on issues of platform liability and online harm to the exclusion of other issues; perpetuate the myth that 'the internet' is unregulated; reinforce the same internet exceptionalism as the Silicon Valley companies themselves; and, by adopting the language of governance rather than regulation, diminish the role of the state. Over the last three years, UK governments, lawmakers and regulators, with expert advice, have contributed to the development of a broader range of regulatory concerns and options, leading to an emergent political economy of advertiser-funded platforms. These politicians and regulators have engaged in a process of sense-making, building their discursive capacity in a range of technical and novel issues. Studying an 'actually existing' regulatory process as it emerges enables us to look afresh at concepts of platform regulation and governance. This working paper has a particular focus on the regulatory approach to Facebook, which is presented as a case study. But it engages more widely with the issues of platform regulation through a careful interpretive analysis of official documentation from the UK government, regulatory and parliamentary bodies, and company reports. The regulatory process uncovered builds on existing regulatory frameworks and illustrates that platform regulation is a process, not a finished text.

## Introduction

There is a recurrent tendency in political commentary about major Big Tech platforms to assert that 'they must be regulated', as though they exist in some kind of regulatory limbo. As the House of Lords Communications Committee commented in 2019, the internet is not, in fact, 'a lawless "Wild West"' (House of Lords, 2019:3), and as the UK Competition and Markets Authority (CMA) says in a useful summary of relevant law, the idea that online services are not regulated is

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'misplaced' (CMA, 2019b). The form of regulation may not be to our, or their, satisfaction, but regulation there surely is. In the UK, prior to the Coronavirus pandemic, there was a deepening range of regulatory intervention in respect of platforms. While it is not yet clear how this will turn out, it bears studying as an example of a developing regulatory process.

In considering the regulation of Facebook as 'a process' rather than as a finished text, I am seeking to establish that the issue with Facebook is not that it is unregulated, but that it is under-regulated. Facebook has been regulated from the moment it became incorporated as a company under Delaware law in 2004 (Kirkpatrick, 2011). As Sunstein points out (2017), Facebook users own their own Facebook accounts as they are governed by property law. Facebook was issued with a consent order by the FTC in 2012 in relation to privacy and data issues (FTC, 2012b). A public company since 2012, it is regulated by the Securities and Exchange Commission (SEC, 2012). Its acquisition of Instagram in 2012 was approved by regulators in the United States and Europe, including the UK (FTC, 2012a; OFT, 2012). Its acquisition of WhatsApp was approved by the FTC and the European Commission (FTC, 2014; EC, 2014). It was fined by the European Commission in 2017 over breaches of its undertakings in relation to the 2014 WhatsApp acquisition (EC, 2017). It is bound by laws regarding illegal content in many countries: how it implements its obligations under those laws is more of a question. The Indian Telecommunications Regulatory Authority essentially blocked its Free Basics plans in 2015 (Bhatia, 2016). Facebook itself acknowledged that the E.U.'s General Data Protection Regulation had affected user numbers in Europe (Facebook, 2018a). Belgian regulators ruled against tracking of users in 2018 (BBC, 2019a). Facebook accepted, though not without litigation, the imposition of a fine from the UK Information Commissioner's Office (ICO) in 2019 (ICO, 2019d). It is currently litigating the Bundeskartellamt's decision on the legality of its advertising practices in Germany (Colangelo, 2019). It has also disputed a two million euro fine under the German NetzDG Act (Delcker, 2019). It faces antitrust litigation by 47 US States (New York Governor's Office, 2019). The Australian Government is now taking forward an 'implementation roadmap' for the Australia Consumer and Competition Commission's report on the Google/Facebook advertising duopoly (Australian Government, 2019). The Irish Data Protection Commissioner had 10 outstanding cases against Facebook companies at the end of 2018 (DPC, 2018; Scropton, 2019). Litigated or regulated settlements litter Facebook's history from 2004 to 2019. Facebook has been subject to a continuing process of regulation over time and across different territories. A significant variety of UK regulators and advisory bodies have a degree of oversight or interest in Facebook's activities (see Table One). The notion of a digital services tax (HM Treasury, 2018a) should also be considered an issue of potential regulation.

A further reason why we should consider the regulation of Facebook as a 'process' relates to what Barrett and Kreiss (2019) usefully conceptualise as 'platform transience'. Facebook in 2020 is not the Facebook of 2004 or even of 2012 or 2014. As Barrett and Kreiss say, platform transience is demonstrated through Facebook's policies, procedures and affordances. This 'transience' can be affected by normative pressure from external stakeholders such as the media, politicians, users, or governments. It is also demonstrated through Facebook's emerging data-driven monopolistic business practices (Lovdahl Gormsen and Llanos, 2019; Srinivasan, 2019; Zuboff, 2019), its acquisitions (Andrews, 2019a:4-6), its governance structure (Andrews, 2019a:17) and its ambitions, such as its electronic currency plans, recently the subject of an intervention by the Governor of the Bank of England (Carney, 2019). Nor should we overlook its so-called 'privacy pivot', involving moves towards a fully encrypted system for all its key social networks (Zuckerberg, 2019), and the integration of their 'underlying technical infrastructure' (Isaac, 2019a) now attracting interest from politicians, regulators and the security services (House of Commons, 2019a; Hern, 2019; Home Office, 2019a; Knowles and Dean, 2019). We can also trace this 'platform transience' in the development of Facebook's own regulatory narrative, documented clearly in the University of Wisconsin's Zuckerberg Files (Zuckerberg Files, nd; Hoffman et al, 2018), from a general emphasis on the seriousness of its internal policing practices and its external ambitions of making the world more open and connected (Zuckerberg, 2017) to its acceptance of the case for regulation (Zuckerberg, 2020a) and its positioning as a US national champion in the face of Chinese digital apps such as Tik-Tok (Facebook, 2019a; Mac, 2019).

Regulation doesn't happen simply in a governmental context. Facebook's conduct is regulated by the media, public and parliamentary pressure, and by other market players, all of which is part of the 'process' of regulation. Discussion of the 'regulation' of Facebook also opens up consideration of regulation of other Big Tech companies. I shall follow the House of Lords Select Committee on Artificial Intelligence in defining 'Big Tech' as companies 'who have built business models partially, or largely, focused on the "aggregation of data and provision of cloud services"' (House of Lords, 2018a:45). These issues are related to, but separate from, consideration of the regulation of 'the internet', however we may wish to define that.

I use the term 'regulation' rather than the term 'governance' popularised in the age of networks (for a useful account see Collins, 2009: 51-9) and familiar to us from three particular literatures: political science (for example, Bevir and Rhodes, 2003); internet governance (for example, Harcourt et al, 2020; Carr, 2016) and corporate governance (for example, Wright et al, 2014). Internet 'governance' as a field of study has itself come under critical scrutiny in recent years

(Van Eeten and Mueller, 2013; Epstein et al, 2016; Hofmann et al, 2017). More recently, amongst others, Gorwa has sought to establish concepts regarding 'platform governance' (2019a and b).

My use of 'regulation' rather than 'governance' stems not only from its common usage in political discourse, where there is a belief that these are to a degree different things, but also from a desire to re-establish the role of the state in promoting countervailing power (Galbraith, 1952 (1963)) to achieve public value (Moore, 1995; Picard and Pickard, 2017:8) and to address this issue in terms of a site of contestation for power. Regulation is a process but it can also be a struggle (Pohle et al, 2016). Koop and Lodge (2017) have demonstrated that uses of the term 'regulation' in academic discourse can often spill over into discussions of governance in any case, including forms of self-regulation. Bartle and Vass (2007:889-91), looking inter alia at the UK communications regulator The Office of Communications (Ofcom), suggest that self-regulatory and voluntary approaches 'are rarely entirely detached from the state' and that the state itself may promote self-regulation via legislation, citing the 2003 Communications Act as an example. There is not the space here for a full consideration of the terms *governance* and *regulation* when it comes to platforms such as Facebook, but it is worth observing that in theoretical discussions around governance, the corporate governance of Facebook and Google gets less attention than it deserves. As the Stigler Center report (2019) says,

Google voting stock is controlled by two individuals, Sergey Brin and Larry Page; Facebook by one, Mark Zuckerberg. Thus, three individuals have total control over the personalized, obscure news feeds of billions of human beings.

My focus is also on regulation **of** Facebook, rather than regulation **by** Facebook, though I recognise that platforms can and do regulate user and institutional behaviour (DeNardis and Hackl, 2015; Napoli 2015; Gillespie, 2017; Caplan and boyd, 2018; Gorwa 2019a; Suzor, 2018). I regard 'platform governance' as too wide a term for manageably examining regulatory and governance issues (Cf. Nooren et al, 2018) - the issues raised by Uber and Airbnb may on occasion relate to similar concerns to those raised by Facebook, but those are likely to be captured by regulations around data protection and privacy rather than within a general concept of 'platforms'. In any case, there are differences between advertising-funded platforms and non-advertising funded platforms, as the CMA points out (CMA,2019a). To be clear, I am talking about social media platforms, with Facebook as an exemplar. Gorwa and more recently Karpf (2019) have pointed to a disconnect between scholars from different disciplines in their approach to issues of governance and regulation in the digital sphere. I agree with this and I would argue that there is now a rich body of empirical research material based on parliamentary, legislative, regulatory, governmental and international institutional documentation which is rarely discussed in detail by communications scholars but which should certainly concern political and

public administration scholarship if we are to move from the aspirational to the concrete in terms of regulation. Indeed, more than this, it is a proper focus for communications research. All of this material suggests that the state still has 'a unique set of powers and resources' (Marinetto, 2003) and a primary role in the process of regulation (or governance, if you prefer).

Some suggest that we need a comprehensive reconceptualisation of platform power (van Dijck et al, 2019). I will argue in this working paper that governments, regulators and law-makers, including in the UK, are collectively going through a process of sense-making (Weick, 1995 and 2001) in their reflections on Facebook and other Big Tech companies, and that this process has intensified in the UK since 2017. Prior to this, the drive for regulation had principally come from within the media sector, and media scholars had been the most prominent in making the case within the academy (Iosifidis and Andrews, 2018). The predominant regulatory emphases had been on the protection of children and the disparity of treatment between social media companies and media companies on content issues. In part this resulted in the 2017 Digital Economy Act with its provisions on online pornography and the creation of an age-verification regulator (subsequently dropped - see Department of Culture, Media, and Sport (DCMS), 2019b), and the creation of a code of practice for social media companies in respect of bullying and other behaviour subsequently, after consultation, published by DCMS (2019a). Other proposals had been advanced for a wider regulatory framework (see, for example, Foster, 2012).

This situational bias has now been replaced as wider considerations have grown in prominence, including other online harms, data security and surveillance, anti-terrorism, cyber-security, algorithmic accountability and competition policy issues. A range of reports have been produced by civil society organisations, academic institutions, parliamentary committees, regulators and government departments, and legislation has been passed and implemented in some territories. Deeper understanding has been developed of what individual Big Tech companies fundamentally are, and whether they pose new and different challenges to what has gone before. Underlying this is one fundamental question: are they fundamentally new kinds of entities, requiring a different kind of regulatory framework, or can they be regulated according to existing regulatory systems? My argument is that they are new entities, and their power - defined by Khan (2018) in economic terms as gatekeeping power, leveraging power, and information power - requires a new regulatory framework. That said, their regulation will also be integrated with existing legislative and regulatory measures. There is a process of regulation unfolding over time.

<b>UK Statutory or non-statutory Regulator/Advisory Body/Government Department</b>	<b>Domain of interest</b>
Advertising Standards Authority	Advertising
Bank of England	Cryptocurrency/electronic currency
British Board of Film Classification	Age related content
Centre for Data Ethics and Innovation	Algorithms/AI/microtargeting
Committee on Standards in Public Life	Social media abuse/AI in public life
Competition and Markets Authority	Competition, Anti-Trust and Fair Trade
Direct Marketing Commission	Direct Marketing
Electoral Commission	Online electioneering, including electoral advertising
Financial Conduct Authority	Financial services online, data, crowdfunding, cryptocurrency
Gambling Commission	Betting
IMPRESS	Press (Industry)
Intellectual Property Office	Copyright/IPR
IPSO	Press (Leveson-recommended)
Information Commissioner's Office	Data Collection, Processing and Protection; microtargeting, adtech, age appropriate design
Internet Watchdog Foundation	Online content/child abuse removal/child protection
Investigatory Powers Commissioner	Supervises issues of warrants etc for electronic interception under the 2016 Investigatory Powers Act
Law Commission	Reviews of existing law eg Elections and Online harms
Ofcom	Online service platforms, broadcast content, telecommunications, competition in the media/telecom sector
Phone-paid Services Authority	Telephone-billed apps and services
Prudential Regulation Authority	Online activities of financial institutions
Government Departments	
BEIS	Consumer, Competition, Innovation Policy, Furman
Cabinet Office	Election law
DCMS	Online harms, media policy. Telecommunications policy, Cairncross Review
Home Office and Security Services/GCHQ/Police and CITRU/NCA/National Cyber Security Centre	Cybersecurity, terrorism and far-right extremism, online harms.
HM Treasury	Digital and other taxation, financial services, Furman

**Table 1 Source: House of Lords Communications Committee/Author's notes**

## Data, Methods, Theory

This is an empirical study of developments relating to the regulation of Facebook in the UK in the period 2017-2020, which forms part of a larger study of Facebook as an evolving entity (Andrews, 2019a). This has been based on a qualitative and interpretive content analysis of UK news coverage about Facebook and documentary analysis of the public and political reaction to a range of issues with political salience, including online harms of various kinds, data protection, advertising, elections, security, competition and regulatory proposals. Political, parliamentary and regulatory documents have been analysed in an iterative process as has Facebook documentation, including policy statements, blogs by its chief executive, quarterly earnings statements, submissions to regulatory bodies, and publicly available legal documentation. Parallel developments in other jurisdictions - with the EU now considered another jurisdiction in the context of Brexit - have been noted and considered where they may help to elucidate policy proposals in the UK, gathered from a wide range of institutional and media newsletters, social media and other reports. An inductive analysis has then been carried out of key regulatory themes and a number of regulatory battlegrounds identified which go beyond the issue of 'online harms'. The key regulatory documents identified in the UK and considered for this work are outlined in Table Two. The key parliamentary reports and inquiries are listed in Table Three.

<b>Government Department/Regulator</b>	<b>Relevant documents</b>
ASA	More Impact Online
Bank of England	The Growing Challenges for Monetary Policy in the current International Monetary and Financial System. Speech by the Governor, Mark Carney (2019)
BEIS	Industrial Strategy (2017) Consumer Markets Green Paper (2018) Draft Strategic Steer to the CMA (2019) Strategic Steer to the CMA (2019) Competition Law Review (2019) AI Review (2018) AI Sector Deal (2018)
Cabinet Office	National Security Capability Review (2018) Protecting the Debate: Intimidation, Influence and information: consultation (2018) Protecting the Debate: Intimidation, Influence and information. Government Response (2019)



Centre for Data Ethics and Innovation	Review of Online Targeting: final report and recommendations (2020)
Committee on Standards in Public Life	Intimidation in Public Life (2017) Intimidation in Public Life. Notes of 'Meeting with Facebook (2017)
Competition and Markets Authority	Online Platforms and Digital Advertising Market Study: Interim Report (2019) Appendix A, The Legal Framework. Online Platforms and Digital Advertising Market Study Interim Report (2019)
DCMS	The Cairncross Review: a sustainable future for journalism (2019) Code of Practice for Social Media Providers (2019) Digital Charter (2018) Digital Economy Act (2017) Internet Safety Green Paper (2017) Online Harms White Paper (2019) Online Harms: Initial Consultation Response (2020)
Electoral Commission	Digital campaigning – improving transparency for voters (2018)
Home Office	Joint Letter to Mark Zuckerberg (2019) Written Testimony of Chloe Squires to the Judiciary Committee US Senate Hearing (2019)
Information Commissioner's Office	Investigation into Data Analytics for political purposes: Update (2018) Democracy disrupted? (2018) Investigation into Data Analytics for political purposes: action we've taken (2018) Facebook Ireland monetary penalty notice (2018) Statement on an agreement reached between Facebook and the ICO (2019) Summary Report of adtech Fact Finding Forum (2019) Adtech Market Research Report (2019) Update Report into Adtech and RTB (2019) Age-Appropriate Design Code (2020)
Law Commission	Abusive and offensive online communications: a scoping report (2018)
Law Commission/Scottish Law Commission	Electoral Law: a final report (2020) Electoral Law: an interim report (2016)

HM Treasury	Unlocking Digital Competition (Furman Report)(2019) Digital Services Tax consultation (2018) Corporate Taxation and the Digital Economy: Position Paper (2017) Digital Services Tax: Update (2018) The Economic Value of Data (2018) Budget Reports, 2017, 2018, 2019, 2020.
Ofcom	Addressing harmful online content: a perspective from broadcasting and on-demand standards regulation (2018) Internet users experience of harm online. (2018) Internet users' online experiences and attitudes: Qualitative research summary (2019) Online market failures and harms (2019)

**Table 2**

<b>Legislative Committee</b>	<b>Inquiries and Reports</b>
House of Commons Home Affairs Select Committee	Hate Crime: Abuse, Hate and Extremism Online (2017) Oral evidence session with Facebook and Youtube (2019)
House of Commons Digital, Culture, Media and Sport Committee	Disinformation and Fake News: Interim Report (2018) Note by the Chair and Selected Documents Ordered from Six4Three (2018) Disinformation and Fake News: Final Report (2019) The launch of the sub-committee on disinformation (2019)
House of Commons Scientific and Technology Committee	Responsible use of data (2014) Algorithms in Decision-making (2018) Impact of Social Media and Screen Use on Young People's Health (2019)
House of Commons Public Administration and Constitutional Affairs Committee	Electoral Law: the urgent need for review (2019)
House of Lords Select Committee on Artificial Intelligence	AI in the UK - Ready, Willing, and Able? (2018)
House of Lords Communications Committee	UK Advertising in a Digital Age (2018) The Internet - to Regulate or Not to Regulate (2019)

House of Lords Select Committee on Democracy and Digital Technologies	Oral evidence session with Facebook (2020)
House of Lords Select Committee on Communications and Digital	Inquiry into the Future of Journalism (2020)

**Table 3**

For convenience, it is possible to separate Facebook regulation into broadly two kinds: structural, pertaining to Facebook’s significant market power (Ofcom, 2016) and its political power of functional sovereignty (Pasquale, 2017), which both afford Facebook its instrumental role in relation to markets and the state; and sectoral, pertaining to Facebook’s consequential impacts in certain arenas such as the media, elections, public health and consumer protection, and so on. This is simply a helpful conceptual break-down in order to manage the developing flood of material, and I appreciate that others may have different ways of ordering this. Within the structural, I include data and advertising issues which have opened up the space for examination of Facebook’s operations by competition regulators in different jurisdictions including the UK, Australia, Germany, Italy, the EU and the United States amongst others. I focus here on several battlegrounds: the structural – competition issues in respect of fair trading, data, advertising, as well as the cybersecurity issue of encryption; and the sectoral – online harms, fair elections, taxation and electronic currencies. Within this framework I seek to pick out emerging issues.

I take the UK as an exemplar, but there are parallel actions in other jurisdictions. Bradshaw et al (2018) state that at least 43 countries have proposed laws on disinformation since 2016: Marsden et al (2019) identify over 40 national laws against disinformation. For the UK, these issues matter not least because the process of leaving the European Union raises significant questions of regulatory alignment and trade policy, in particular with the European Union and the United States. The United States has ensured that clauses on digital services are contained in its recent trade treaty with Canada and Mexico, which limit platform liability (USTR, 2019). The European Union has identified data standards as one difficult issue for resolution in its trade talks with the United Kingdom (Espinoza and Khan, 2019). Reconciling these matters may prove a challenge. Influential think-tanks in the United States, such as the American Enterprise institute, see European regulation, for example, as erecting tariffs by other means (Lyons, 2018).

Governments, regulators and law-makers, including in the UK, are going through a process of sense-making in their reflections on Facebook and other Big Tech companies as they build their discursive capacity (Andrews, 2019b) on these issues. Discursive capacity, which I draw on from the work of Schmidt (2008, 2010, 2011) on ‘discursive institutionalism’, involves the organisational

and conceptual ability of governments and regulators to manage a deliberative process of problem-sensing, problem-definition and problem-solving (Hoppe, 2011), engaging with policy actors within a specific sphere of activity. These policy actors may be better resourced – and this is certainly true in the field of social media – to shape the public policy discourse than the governments or regulators who have to determine the public interest. They are also careful to utilise existing narratives that underpin societal thinking about regulation (Cohen, 2018). The challenge for governments, and regulators, is to identify and cultivate the necessary skills to address or head off emerging policy challenges: discursive capacity requires the ability to frame problems in terms that are capable of an accepted, shared and endorsed public or political consensus (Andrews, 2019b).

Problems, notes Schoen (1983:40):

do not present themselves to the practitioners as givens. They must be constructed from the materials or problematic situations which are puzzling, troubling, and uncertain.

This is certainly the case here. As the UK's Information Commissioner has said of her inquiry into data analytics in elections and referendums:

When we opened our investigation into the use of data analytics for political purposes in May 2017, we had little idea of what was to come.

Eighteen months later, multiple jurisdictions are struggling to retain fundamental democratic principles in the face of opaque digital technologies. (ICO, 2018c)

Between 500 and 700 terabytes of data – the equivalent of over 50 billion pages – were recovered from the premises of Cambridge Analytica by the ICO, following media stories about illegal use of Facebook users' data. Dozens of servers were seized, as well as mobile telephones, storage devices, tablets, laptops, financial records and paperwork. Social media platforms, political parties, data brokers and credit reference agencies started to question their own processes 'sending ripples through the big data eco-system'. Forty ICO staff were involved, including forensic IT specialists. The Commissioner said this was 'the most complex data protection investigation we have ever conducted' (ICO, 2018c). With many of the actors discussing the issues in public forums including parliamentary inquiries, the ICO had to 'review, reconsider and rethink elements of the evidence previously presented'.

Understanding these issues involves a process of 'sense-making'. Sense-making now has a significant literature, building principally though not exclusively on the work of the social psychologist Karl E. Weick (1995 and 2001), emphasising it as a continuing process, contingent, building narrative understanding through sequencing developments so that they can be more easily understood by the collective. It is, as Mathias (2018:91) describes it, in her examination of how civil servants in the UK and New Zealand reach decisions: 'an active process in which people,

when facing a moment of uncertainty, try to work out what's going on, and then take action based on what they have sensed'.

Researchers have criticised 'regulation by outrage' (Bunting, 2018a) or 'indignation' (Ananny and Gillespie) or 'a shotgun approach' (Keller, 2018a) but emotional responses are part of the problem-identification and sense-making that lead law-makers and regulators to consider questions of regulation. As Iosifidis and Andrews argue (2019), 'moral panics have their uses'. Wahl-Jorgensen (2019) emphasises 'that we need to take emotion seriously as a force in mediated public life'. I come in praise of shock and outrage as key motivators for political action: we might call this the 'affective' approach to regulation. As Papacharissi (2015:15) says, affect contributes to sense-making. Affect conditions the political response of politicians, just as it can drive social movements. Mark Zuckerberg's non-engagement with committees of lawmakers, as with the UK House of Commons Digital, Culture, Media and Sport Select Committee, or the International Grand Committee, for example, can drive their affective reaction to Facebook as a corporation (Knowles, 2020b).

Separately, competition authorities have had to make sense of a highly complex online advertising market and give consideration to questions of market power in a context where services are provided not on the basis of price but in exchange for data and attention. Coyle (2016) observed in respect of platforms that economists 'have for now left competition authorities with more questions than answers'. But there is now a growing pile of competition authority reports on digital platforms (Bundeskartellamt, 2019; ACCC, 2018 and 2019; CMA, 2019a) as they undertake detailed analyses and gather evidence, including through public hearings (FTC, 2019a; DoJ, 2020) and recruit expert opinion (EC, 2019; Furman, 2019). Meanwhile, UK doctors have pointed out the difficulties of researching social media harms when the companies control access to the data, a further problem of information asymmetry (BBC, 2020a).

Competition law, says Ezrachi (2017), like other legal disciplines, 'is a social construct' that stems from the social values and norms of each jurisdiction. Weick (1995:31) carefully - and in my view helpfully - deconstructs the process of law-making as a process of sense-making: 'when people enact laws, they take undefined space, time and action and draw lines, establish categories, and coin labels that create new features of the environment that did not exist before'. This is perhaps never more true than when seeking to legislate in new and previously unexamined policy areas such as data-driven algorithmically-managed social media.

## Shaping the UK regulatory context

The 2017 UK Conservative Party's manifesto, produced to set out its policy positions in the general election, set out a bold objective on online regulation:

we will take up leadership in a new arena, where concern is shared around the world: we will be the global leader in the regulation of the use of personal data and the internet.

The manifesto promised that the UK would be 'the safest place to be online' and that online rules should reflect those that operated offline. A Conservative government would work 'with industry' to find technological solutions. They would also expect companies to help in the protection of minors from images of pornography, violence and other 'age-inappropriate' imagery; there would be 'a responsibility' on industry not to direct users – 'even unintentionally' to hate speech, pornography or other sources of harm; there will be a 'responsibility' also 'on platforms to enable the reporting of 'inappropriate, bullying, harmful or illegal content with take-down on a comply or explain basis'. The government would 'push the internet companies' to deliver on their commitments to build tools that would identify and remove terrorist propaganda – and there should be no safe space or capability for terrorists to communicate online.

The manifesto also promised to ensure that legitimate content creators were rewarded for their online content, and that there was consistency between the regulation of offline and online content.

Then came a fundamental statement:

Some people say that it is not for government to regulate when it comes to technology and the internet. We disagree.

While recognising that government could not do things alone, 'it is for government, not private companies, to protect the security of people and ensure the fairness of rules by which people and businesses abide.' Protecting consumers from unfair behaviour, ensuring free markets can operate effectively, fairly and securely, was a matter for governments to secure, so a regulatory framework would be established in law to ensure that 'digital companies, social media platforms and content providers' abided by the rules. There would be a sanctions regime for regulators to issue fines and prosecute and legal requirements on companies to take down offending material. There would be a levy on social media companies to support awareness and preventative activity to combat online harms. The manifesto recalled that the UK was a world leader thirty years earlier in regulating embryology, and the same could be true in the digital world.

The manifesto recognised the need for international co-operation on many of these issues and said that an international legal framework was required as with financial services and trade. But

tackling these issues could 'demonstrate, even in the face of unprecedented change, the good that government can do' (Conservative Party, 2017).

Within this manifesto were several of the key problematic concepts which have dogged online regulation. Leaving aside the specific question of regulating online harms, including those that were not illegal, the challenges of which have been identified by several commentators (see, amongst others, Keller, 2019b; Smith, 2020), the manifesto's promises crystallized first into the *Internet Safety Green Paper* (DCMS, 2017) and then into the *Online Harms White Paper* (DCMS, 2019a). The manifesto took aim at the consensus around platform liability, and what Moore and Tambini (2018) call the 'first generation' internet legislation in the UK, Europe and the United States. This includes Section 230 of the US Communications Decency Act of 1996, the EU's E-Commerce Directive of 2000, and the UK's 2003 Communications Act (Kohl, 2012). The first two limited the liability of internet platforms as carriers of information akin to ISPs. The UK's legislation had created Ofcom in 2003 without a remit for regulation of the Internet. The principles underlying S230 and the E-Commerce directive are now under challenge in jurisdictions around the world.

The manifesto's declaration that 'some people say that it is not for government to regulate when it comes to technology and the internet' reads as a deliberate assault on Silicon Valley libertarianism, famously encapsulated in John Perry Barlow's 1996 'Declaration of the Independence of Cyberspace' (EFF, 1996). The manifesto was a clear reaction to this 'internet exceptionalism' (MacCarthy, 2009). While some would argue that national sovereignty in technological regulation had never seriously been under challenge (Drezner, 2004), the 2017 Conservative manifesto statement specifically asserted that American companies would not go unchallenged simply because their management, board and headquarters were located outside the UK.

But the manifesto also effectively re-confirmed a myth that the internet – whatever that was – was unregulated. As Vaidhyanathan (2018: 100) says, 'the internet has never been a global, open, distributed "network of networks" that can connect all of humanity'. The internet is not a thing that exists as a singular entity. It is 'an accidental megastructure' or 'a multi-layered structure of software, hardware and network "stacks" that arrange different technologies vertically within a modular, interdependent order' (Brattin, 2015). Some parts of these stacks are heavily regulated by states, others less so: the logics of different parts of 'the Stack' also impose their own ordering and regulating – and commercial organisations have overlain their own stacks on top of this (Greenfield, 2017: 275-287). (For a simple explanation of the interlocking layers from a UK perspective, see Collins, 2009: 62).

The manifesto also slips between talk of 'digital companies', 'the internet', 'social media platforms', 'industry', and 'content providers'. There is a danger of mis-conceptualization here. Sometimes these terms may stand for the same thing, sometimes they may be different. However, the effect of these concepts, taken together, is that they give the impression that internet regulation is about *content* rather than other things. Perhaps it is not surprising that in 2016, the chief executive of Ofcom, Sharon White, said she did not believe that this body should regulate Twitter, Facebook or Google (Newman and White, 2016). Just a few months after the 2017 General Election, while agreeing that Facebook and Google were publishers, she again stated that she didn't 'think regulation is the answer because I think it is really hard to navigate the boundary between regulation and censorship of the internet' (Bell, 2017). Nor is surprising that in 2018 the House of Lords Communications Committee was asking for evidence on the question 'The Internet: to regulate or not to regulate?' (House of Lords, 2018b). As Winseck points out (2019), in recent years there has been a mounting tide to treat social media platforms and search companies as media organisations which should be regulated as such. This has also encouraged the drive to thinking of internet regulation as content regulation.

The 2017 Conservative manifesto commitments were taken forward in a number of areas. The 2019 Conservative manifesto was a much more modest document all round. In respect of online regulation, it reiterated commitments on online harms and the protection of children and the most vulnerable, and ensuring no safe spaces for terrorists online, while at the same time asserting a commitment to defending freedom of expression and 'the invaluable role of a free press'. It also included a commitment to the Digital Services Tax (Conservative Party, 2019).

### Cambridge Analytica: punctuating Zuckerberg's equilibrium

Although Facebook had already been the subject of resistance over what Gorwa (2019a) calls 'platform war stories' relating to Russian interference in the US presidential election and Brexit (US Senate, 2018; DOJ, 2019), it was the Cambridge Analytica scandal exposed in March 2018 by the *Observer*, the *New York Times* and *Channel Four* which turbo-charged a number of parliamentary/legislative, governmental and regulatory investigations internationally, building on work initially published in the *Observer* in 2017. This resulted in Facebook chief executive Mark Zuckerberg being called to give evidence before Congress. He also gave evidence to a European Parliament hearing, and met with Irish lawmakers on a visit to Dublin (Weckler, 2019), but refused invitations from the UK House of Commons and the Canadian House of Commons, including when these were meeting with legislators from a dozen or so other jurisdictions, collectively constituted as the International Grand Committee (House of Commons, 2018b; CBC, 2018; Lomas 2019; O'Sullivan and Newton, 2019).



The unprecedented international co-operation between legislators gathered in the International Grand Committee has also been matched by international co-operation between regulators and law enforcement agencies. Following the UK Information Commissioner's raid on Cambridge Analytica's London headquarters in March 2018, information was shared with the FTC, the FBI, the Irish DPC and other agencies and regulators overseas (International Grand Committee, 2018).

Since then, Facebook has faced fines from the UK Information Commissioner, the US Federal Trade Commission and the US Securities and Exchanges Commission. The Canadian information commissioner found that Facebook had violated data laws and planned court proceedings (OPC, 2019). Facebook was also fined for Cambridge Analytica data issues in Brazil and Australia (Brito, 2019, Lomas, 2020b). The SEC said that Facebook had made 'misleading disclosures' in its public filings for more than two years (SEC, 2019). The FTC laid down a series of actions affecting Facebook's internal procedures which Facebook must take on board to comply with the law (FTC, 2019b).

The essential issue in the Cambridge Analytica case was that the company obtained 87 million Facebook user profiles harvested by a personality quiz app, some of which may have been used in US elections. A key question relating to the Cambridge Analytica issue remains unresolved at present, namely who in Facebook knew what and when? The *Guardian* originally published material about Cambridge Analytica in December 2015 (Davies, 2015). Over time a series of questions has emerged as to when senior executives, including Zuckerberg, knew about the issue, and the matter is currently being litigated by the Attorney-General for Washington DC in the District of Columbia Supreme Court, with Facebook seeking to restrict access to certain documents. The case is ongoing at the time of writing (DC Courts, 2020). California has also sued Facebook for relevant internal emails and other documents in relation to data privacy (Kang and McCabe, 2019).

Some argue that regulation tends to favour larger companies (Aznar, 2020). Yet the internal strains of simultaneously managing related issues within multiple jurisdictions and legislatures and maintaining message consistency would be significant for any corporation. In Facebook's case it is fighting on many fronts at the same time on diverse issues. It is little surprise that Facebook is one of the largest spenders on lobbying in the US and the European Union (Reklaitis, 2019; Cavallone, 2020), recruiting 'an army' of lobbyists to deal with the wide range of enquiries under way (Dodds, 2019). Facebook's founder is also protected by a corporate governance structure which gives him considerable control with few compensating obligations (Andrews, 2019a:17).

In due course, we may look back on the Cambridge Analytica scandal as the ‘triggering event’ (Dearing and Rogers, 1996) which provoked and reinforced greater scrutiny of Facebook, leading to a process of regulation in many Western jurisdictions: a process in which Facebook’s equilibrium was well and truly punctuated (Cairney, 2011: 199).

## Regimes of regulation

Regulation, according to Koop and Lodge (2017: 105) may be defined as ‘intentional intervention in the activities of a target population, where the intervention is typically direct - involving binding standard-setting, monitoring and sanctioning - and exercised by public-sector actors on the economic activities of private-sector actors’. Regulation is devised, amongst other reasons, to ensure corrective action against perceived harms. I will focus on the role of regulation to prevent harms occurring or re-occurring. As Facebook investor Roger McNamee suggests (2019:113), regulation can act to change its behavioural incentives. Former UK Ofcom chief executive, Ed Richards, has spoken of the value of such incentives:

By and large, if you can achieve an objective through a nudge mechanism, an incentive, a co-ordination or something of that kind, if you are confident that you can achieve the outcome, that must be a better way of doing it, generally speaking. In my experience it depends on whether the companies feel that it is consistent with what they would generally like to do anyway. There is often an incentives problem, I think (House of Lords, 2014:8).

However, Richards confirms that where companies do not want to do something, then they will resist if they know that the regulator does not have the powers to make them do so (House of Lords, 2014). Former Ofcom regulator, Robin Foster (2012: 9), says that based on what can be learned from media regulation, the self-regulation of companies like Facebook shows that ‘there are advantages in having some form of statutory underpinning, to secure public trust and clear and independent accountability’. According to the House of Commons DCMS Select Committee, as a result of the NetzDG act in Germany, Facebook has contracted more content moderators there than elsewhere in Europe (House of Commons, 2018a). As a result of Germany’s laws against holocaust denial, Facebook Policy Head Sir Nick Clegg confirmed, Facebook has developed the capacity to geo-block offending content (Rachman, 2019).

Regulation incentivises - and disincentivises - certain kinds of behaviour. So does taxation. Franklin Foer (2017) says that Big Tech companies owe their dominance not only to innovation but also to ‘tax avoidance’. Facebook will find itself subject to new kinds of digital taxes. In his 2018 budget, the UK Chancellor of the Exchequer, Philip Hammond, announced a new Digital Services Tax which, following a consultation (HM Treasury (HMT), 2018), is now planned to be levied on the revenues of the ‘Big Tech’ companies from 2020. This followed speculation over some months that an EU-wide tax would be imposed to prevent companies using tax arbitrage

to ensure that they were taxed in the lowest possible tax jurisdictions, using complicated mechanisms of internal re-charging to re-state their profits in EU member states. There had been discussions within the OECD over this. Facebook has accepted that it may have to pay more tax (Hamilton, 2020). The full range of taxation measures has yet to be deployed. A number of groups have suggested levies on the advertising revenues of companies such as Facebook and Google. Like so many other issues, political debate on these issues is emergent rather than conclusive. Taxation is one way to address the negative externalities of platforms such as Facebook or to fund social goods such as independent news.

Lessig (1999) argued that there were four modalities of regulation: law, social norms, markets, and architecture. To take one of these, Galbraith argued long ago (1952 (1963)) that market action could produce corrective action. Recently, Facebook has been targeted by actions from other companies in the market. In 2018, Apple told Facebook that its Onavo app breached Apple's app store rules, so Facebook had to withdraw the app (Seetharaman, 2018). Unilever recently announced it would not target children younger than 13 with advertising on social media platforms, including Facebook and Instagram (Joseph, 2020). Facebook has now announced new advertising placement controls to give advertisers more control over the content against which their advertisements appear (Hutchinson, 2020), but advertiser pressure continues to grow (Vranica, 2020), Civil Rights organisations are now putting pressure on major brands to pull advertising from Facebook (Seetheraman, 2020) with some immediate success (Goodfellow, 2020).

Hirschmann's famous (1970) conceptualization suggests consumers of goods and services have essentially two options: exit, and voice. Saurwein et al (2015), looking at algorithmic risk regulation, envisage a series of steps from consumer withdrawal from a service through to state regulation. But it is hard to exit from Facebook if all of your friends are there (CMA, 2019a). Voice, on the other hand, has become a more powerful option when amplified by media or political intervention. Media interventions can themselves become a form of corrective action, according to Mulligan and Griffin (2018), citing as evidence Carole Cadwalladr's 2016 *Observer* story on how Google searches promoted holocaust denial. Ofcom's research demonstrates parents' concerns about online services (Ofcom, 2019b). The ICO investigations into data analytics were triggered by reports in the *Observer* (ICO, 2018a). Barrett and Kreiss (2019) refer to these as 'normative pressure from external stakeholders'. Facebook itself has acknowledged that 'unfavorable media coverage could negatively affect our business' (Facebook, 2016: 13) and its quarterly financial returns refer to risks associated with 'government actions that could restrict access to

our products or impair our ability to sell advertising in certain countries; litigation and government inquiries' (Facebook, 2020a: 3).

Political reinforcement of individual complaints may force companies into corrective action, as with the Christchurch call following the live-streamed murders by a right-wing terrorist in New Zealand, or as happened with Instagram following the tragic suicide of Molly Russell and the political reaction to that (BBC, 2019b), which is regularly cited in media reports of corporate actions by Instagram and actions by regulators (Wagner, 2019; Forster, 2020; Wright, 2020; Thompson, 2019a). Facebook's quarterly Transparency Reports reveal how many millions of violent or graphic posts, including of child sexual exploitation and abuse, have been removed by the company (see, for example, Facebook 2019b).

The publication of internal Facebook emails by the House of Commons Digital Culture, Media and Sport committee in 2018 and 2019, provided evidence for CMA conclusions relating to data exclusion of Twitter's Vine service and Facebook's possible discriminatory data-sharing with certain commercial partners (House of Commons, 2018a, 2019a; Campbell, 2019; Solon and Farivar, 2019a and b; CMA, 2019a). More recently, these documents have stimulated a further lawsuit by app developers (Skelton, 2020).

Internal stakeholders in the form of Facebook employees and former employees themselves, and contracted Facebook content moderators, have shown resistance to their employer, whether individually through leaks and articles (Eisenstat, 2019; Kulwin, 2018; Newton, 2019a and b; Levy, 2019) or through collective action, such as their open letter to Mark Zuckerberg on political advertising in the autumn of 2019 (Isaac, 2019b), walkouts (Frenkel et al, 2020) or legal action (Gray, 2019; Hern, 2019b). Former Facebook executives and investors have also become vocal critics (Hughes, 2019; Mcnamee, 2019).

Gillespie (2018b) points out that the moderating role of social media companies, implemented through both the community guidelines they adopt and the active content moderation process they manage in relation to specific complaints, as well as their compliance with laws on illegal content, are key to their operation as platforms, even if, as he rightly argues, the Facebook content moderation guidelines leaked in 2017 looked 'cobbled together'. We also have evidence that commercial factors influence Facebook's decisions on whether to remove content (Channel Four, 2018). Moderation also takes a huge toll on moderators (Newton, 2019a and b; Gray, 2019), and Facebook is now paying out \$52 million to former moderators who developed PTSD (Newton, 2020e).

Facebook has announced a \$130million investment in a new Oversight Board (Clegg, 2019 Harris, 2019; Huber, 2019; Levy, 2020a). Scholars have raised many questions about this and its operation (see Douek, 2019a and b; Keller, 2019a.; Van Loo, 2020). There is no doubt that Facebook systems can anticipate and prevent the uploading of certain kinds of material (Rachman, 2019). Social media companies would prefer their users to be self-policing – hence, to use community guidelines – but as they are not, they have to moderate, and in Facebook’s case, at ‘industrial scale’, as Caplan (2019) says. But as Gillespie remarks (2018b: 6) ‘the very fact of moderation shapes social media platforms as tools, as institutions, and as cultural phenomena.’ The reality is that whatever regulatory structure is put in place for policing online content, company self-regulation by Facebook and others will form a part. Regulatory proposals range from reliance on the general law, public pressure, company self-regulation, agreed industry collective norms of self-regulation by trade bodies, formal co-regulation – known in Germany as ‘regulated self-regulation’ (Brown and Marsden 2013; Marsden et al, 2019), involving co-operation by companies and regulators according to agreed codes of conduct, and formal regulation set down in and underpinned by statute.

Conceiving of regulation as a dynamic ‘process’, then, allows us to conceptualise regulation over time, from the identification of a problem to the development of regulatory mechanisms to address it and then the necessary enforcement actions, which may themselves be challenged in litigation by those being regulated.

### Facebook’s litigated narrative

Facebook sometimes uses litigation to challenge regulatory outcomes before they are finalised, allowing agreed and sometimes ‘no-fault’ outcomes to be adopted. To list but five examples since 2019:

- In its earnings report in January 2020, Facebook confirmed that it would pay \$550 million to settle a class-action suit in Illinois regarding facial recognition technology (Facebook, 2020b; Singer and Isaac, 2020).
- The SEC action against Facebook in 2019 resulted in an agreed settlement of \$100 million. (‘Without admitting or denying the SEC’s allegations, Facebook has agreed to the entry of a final judgment ordering a \$100 million penalty and permanently enjoining it from violating Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and Section 13(a) of the Securities Exchange Act of 1934, and Rules 12b-20, 13a-1, 13a-13, and 13a-15(a) thereunder’)(SEC, 2019).
- The FTC action of 2019 resulted in a settlement for \$5 billion plus a range of actions to be taken by Facebook designed to better protect user data. (‘Following extensive

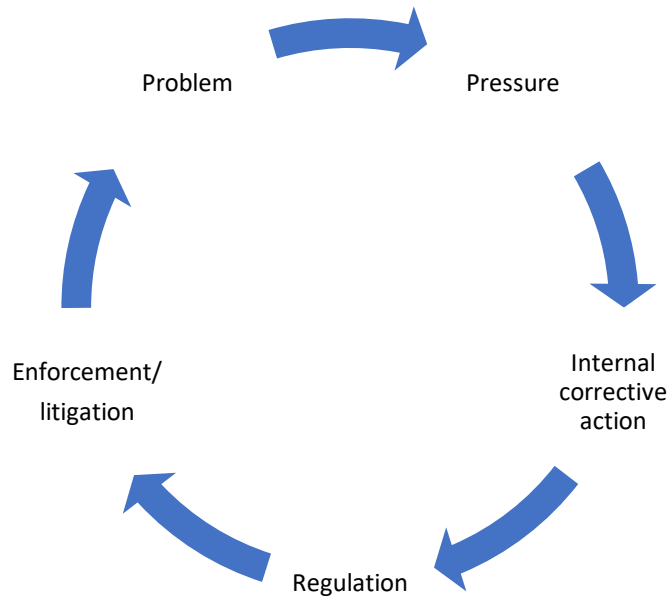
negotiations, the parties have settled the Complaint's allegations by the Stipulated Order')(FTC, 2019c).

- The Information Commission Officer's £500,000 Monetary Penalty Notice (MPN) against Facebook in 2019 resulted in a settlement under which both sides paid their legal costs. Facebook agreed to pay the £500,000 but admitted no liability ('An agreement has now been reached between the parties. As part of this agreement, Facebook and the ICO have agreed to withdraw their respective appeals. Facebook has agreed to pay the £500,000 fine but has made no admission of liability in relation to the MPN')(ICO, 2019d).
- In November 2019, Facebook paid \$40 million to settle a case in the Oakland Division of the US District Court of the Northern District of California brought by advertisers who complained that Facebook had fraudulently inflated viewing metrics - 'the average watch times' of videos shown on the platform. Facebook said: 'This lawsuit is without merit but we believe resolving this case is in the best interests of the company and advertisers' (Sloane, 2019).

Facebook also continues to contest the 2019 German Bundeskartellamt ruling on its data collection and advertising procedures in the German courts (Colangelo, 2019).

It is not possible to state that this is a deliberate overall strategy by Facebook and no doubt the organisation would state that each case is treated on its merits. But agreed settlements have the advantage of limiting court proceedings which could require the public release of internal company documentation. It is not surprising that so many of the regulatory reports relevant to Facebook produced between 2018 and 2020 refer to the need for regulators to have strong information-gathering powers.

Figure One helps us to conceptualise the process of regulation:



**Figure 1**

Some see Facebook’s latest moves to integrate and encrypt their core services as an attempt to avoid regulation, allowing them to deny knowledge of harmful content being shared. This worries lawmakers globally and has contributed to the increasing focus on Facebook from a state security perspective (Home Office, 2019a).

### A new kind of entity?

Communication policy, says Mansell (2015), has always been ‘concerned with the exercise of power – both market power and political power’. The concerns that Facebook raises for regulators derive from its size and dominance, its wealth, the variety of services it provides, its vertical integration, its cutting edge science, its ability to leverage into other markets and services, its integration into our daily and political lives, and its ownership structure. As Carr (2014) said, ‘we have had a hard time thinking clearly about companies like Facebook and Google because we have never before had to deal with companies like Google and Facebook’.

There has been a long debate about whether Facebook is a publisher or a media company. Facebook’s preferred position is that it is a new kind of entity, according to its chief executive:

Facebook is a new kind of platform. It’s not a traditional technology company. It’s not a traditional media company. (Gibbs, 2016)

In 2020, Zuckerberg said it should be regulated like something in between a telecom company and a newspaper (Reuters, 2020a). The House of Commons DCMS Select Committee (2018a) argued for a new category of 'tech company' that was neither platform or publisher.

Definitions of their role has changed over time. For many years they were called 'intermediaries' by academics and regulators (Foster, 2014; Helberger et al, 2015; Tambini and Labo, 2016) – a term which Facebook (Bickert, 2020) adopts in its recent White Paper on online content moderation, saying:

Despite their best efforts to thwart the spread of harmful content, internet platforms are intermediaries, not the speakers, of such speech, and it would be impractical and harmful to require internet platforms to approve each post before allowing it.

But platforms are not intermediaries, says Gillespie (2018a): 'Platforms do not just mediate public discourse: they constitute it.' They are not 'neutral' (Chander and Krishnamurthy, 2018). Even the term 'Platforms' is a concept which reflects these companies' own 'discursive power' (Gillespie, 2010). For some, such as Bill Gates, a platform is defined by its ability to make money for all who use it, not accrue the bulk of the value for itself (Thompson, 2018). Thompson (2015,2017) chooses to define Facebook as an 'aggregator'.

Zuckerberg has also stated on many occasions that Facebook is a utility – a social utility or social infrastructure (Andrews, 2019a). Utilities and infrastructure are clearly regulated. Approaching dominant platforms as utilities has been strongly argued by academics and policy-makers (Crane, 2018; Rahman, 2018a and b; Ghosh, 2019). Big Tech companies have been called platform utilities, attention utilities, and information utilities (Warren, 2019; Hindman, 2018; Andrews, 2019a). Data has been said to be 'an essential facility' (Tucker, 2019; Warner, 2018). Feld (2019) has called for a 'digital platform act' in the United States. The House of Lords Committee on Artificial Intelligence referred to Big Tech companies as data monopolies: the UK ICO referred to them as information monopolies (House of Lords, 2018a). For Stucke (2018), they are data-opolies. The Furman review (2019) accepted that they shared 'some important characteristics with natural monopolies' but said that it was too early to conclude that competition policy could not work. The centrality of data to their business model is now under investigation by data protection and competition authorities. Facebook is clearly an advertising platform and its role in the advertising market, along with that of Google, has recently become key to examinations of market power in the eyes of competition authorities around the world (ACCC, 2018 and 2019; Bundeskartellamt, 2019; CMA, 2019a).

Many commentators focus on the uniqueness of the platforms and their business models. Furman (2019:23) says that 'the scale and breadth of data that large digital companies have been



able to amass, usually generated as a by-product of an activity, is unprecedented'. The centrality of that data to their business model is unique. There is clear concentration in certain markets such as search, social media and online advertising, and incumbents have had a significant data advantage which has been a barrier to entry and therefore is likely to lead to unchallenged persistent dominance because of their market power. They present a 'unique set of policy challenges' (Ofcom, 2019a).

Platforms such as Facebook and Google have significant economic power. This has been analysed in competition terms. Concepts such as structural market power have existed in competition policy for some time (see, for example, Ofcom, 2016). Furman (2019:10) introduces the concept of 'strategic market status, with enduring market power over a strategic bottleneck market', and this definition has been taken up by the CMA (2019). The Australian competition authority has referred to their 'strategic market power' (ACCC, 2018).

Platforms also have 'significant social and political power' (Centre for Data Ethics and Innovation (CDEI), 2020). They are 'uniquely powerful political actors': 'Google and Facebook may be the most powerful political agents of our time'. They are able to pay for the best talent, complicating oversight, and they can 'use information asymmetries to by-pass regulations without much awareness' (Stigler, 2019). They have what Pasquale (2017) called 'functional sovereignty'. This has led some to refer to Facebook as 'a sovereign state' or polity (Farrell, Levi and O'Reilly, 2018; Rosenberg, 2019; Howell, 2020) or Facebookistan (MacKinnon, 2010, 2012; Chander 2011; Coll, 2012; Mills, 2015). Denmark has appointed a digital ambassador specifically to liaise with Silicon Valley companies and China in what it has termed 'techplomacy' (Techamb, 2017). Platforms have also been called 'Digital Switzerlands', with a claim that they are both on a par with nation-states and also 'neutral', a claim that Eichensehr (2018) dismantles.

Facebook's scale, dominance, indispensability and intimacy are factors driving regulatory action. Martin Moore and Damian Tambini state (2018) that digital platforms operate not only on a scale bigger than previous regulatory challenges, giving them structural dominance, but also have explicit political and social aims and perform genuine civic functions. Tarleton Gillespie (2018a) says that social media platforms are neither conduit nor content, nor just network or media, but a hybrid not previously anticipated in regulation: 'a fundamentally new information configuration, materially, institutionally, financially, and socially'. Plantin et al (2018) note how they have become indispensable to people. They also have an intimate relationship with users (Yiu, 2019). They seek to become 'the operating system of our lives' (Vaidhyathan, 2018). These are all different ways of asserting the centrality of such platforms to social, economic, political and cultural life.

## **UK Regulatory approaches to Facebook**

Although 'online harms' often attract the bulk of media attention, the new challenges to Facebook's power come from the intersection of data protection policy and competition policy which is under active discussion both at academic and institutional levels and in consumer lobbying in the EU and publisher lobbying globally (Barrett, 2018; Stucke and Grunes, 2016; Helberger et al, 2017; Just, 2018; Hoofnagle et al, 2019; Colangelo and Maggolino, 2018; Wu, 2018; Srinivasan, 2019; Ezrachi, 2018; BEUC, 2018; DCN, 2018). There are concerns about Facebook as a threat (1) to state security (Home Office, 2019a) and (2) to financial markets (Carney, 2019).

Drawing on available empirical research, it is clear that there is a significant and growing range of areas of regulatory interest in Facebook in the UK, including the 'online harms' question that is generally discussed as the main focus of platform regulation. Some regulators, notably those with horizontal responsibilities, such as the Information Commissioner's Office and the Competition and Markets Authority, may have roles which arise in a number of these issues. But sectoral regulators such as Ofcom may also have interests in a number of policy domains. Ofcom (2019a) has also drawn attention to the interlocking nature of these matters, and has argued that market failure may have a significant impact on, for example, the development of online harms. This economic perspective restores political economy to the heart of discussions about platforms, displacing a narrow focus on measures to address harms through platform liability for harmful and illegal content alone. Ofcom argues that market failures can contribute to consumer and societal harms, taking a broader definition than that in the UK Government's *Online Harms White Paper*, including competition, consumer, data protection, cyber security, media policy, content policy and public health, and interventions can benefit from tackling several market failures at once, tackling several harms at once, with the effective 'trading off' of specific harms.

Ofcom's document (2019a) notes that there are clear interactions between harms and market failures which create policy overlaps. Adopting 'a single "policy lens"' risks not addressing the problem effectively. The economic analysis presented acknowledges that the risk of regulatory failure is high, as these companies are concentrated, global, move at a fast pace, are driven by complex business models and are handling a vast range of content. Business models can disguise the cause of harms. Platforms have an incentive to maintain attention and accumulate personal data, and this logic drives approaches to privacy, content, diversity exposure, addiction, data analytics and algorithms, personalization of advertising, information asymmetry and behavioural biases. Regulators need to prioritise and take a proportionate response. Future outcomes are hard to predict, and consumers and producers may react in

unanticipated ways. Remedies are likely 'to be more effective if they address each of the different market failures which are at the source of a harm' (2019a:38). Regulations need to be flexible, to emphasis opportunities for market entry and innovation, and need to be future-proofed.

The range of regulatory approaches is driven to some extent by regulatory mandates and the institutional logics of government departments and regulators, given their foundational legislation and the laws and regulations for which they are responsible. Ofcom's economic analysis identifies 'complex interactions' which require cooperation between regulators.

### Online Harms

The UK Government's principal intervention on online harms came in the April 2019 *Online Harms White Paper* (DCMS, 2019a), supplemented by the *Digital Charter* (DCMS, 2018) and the *Code of Practice for Providers of Online Social Media Platforms* (DCMS, 2019b). The White Paper built on the 2017 *Internet Safety Strategy Green Paper* (DCMS, 2017a), the *Digital Strategy* (DCMS, 2017b) and sections of the 2017 Digital Economy Act which imposed responsibilities on social media companies to agree to a code of conduct and accept age-verification regulation by the British Board of Film Classification (BBFC). Subsequent announcements from DCMS have confirmed that the age-verification proposals have been dropped (DCMS, 2019b). The White Paper acknowledged that there was existing regulation but described what it called 'a fragmented regulatory environment'.

The UK Government's *Initial Consultation Response* was published in February 2020 (DCMS, 2020a). This confirmed that Ofcom was considered to be the preferred choice as online regulator, because 'this would allow us to build on Ofcom's expertise, avoid fragmentation of the regulatory landscape and enable quick progress on this important issue'. Ofcom has both content and competition responsibilities already and 'organisational expertise, robustness, and experience of delivering challenging, high-profile remits across a range of sectors'. Ofcom had contributed to the discussions on the evolving policy, drawing lessons from its engagement with broadcasting and on-demand standards regulation (Ofcom, 2018a), recognising that existing frameworks could not be transferred 'wholesale' to online, but certain principles could be relevant. It also argued that the same piece of content could be regulated differently depending on how it was consumed: 'differences in regulation appear increasingly arbitrary'. Ofcom also published research on users' online concerns (2018b). Other regulators, such as the Financial Conduct Authority, wanted various kinds of online scams to be included in the regulatory approach.

The *Initial Consultation Response* confirmed the White Paper's plans for a duty of care on social media providers to be set down in regulation. There would be an emphasis on companies being able to prove that they had systems to provide such a duty of care. The proposals had been amended following the consultation after concerns expressed about freedom of expression and which businesses were in scope. It was also felt that the list of harms was drawn too broadly. There would be greater transparency about content removal. Legal content posted by adults would not be prohibited.

There had been criticism that the original White Paper appeared likely to clamp down on content that was regarded as harmful but was not illegal (Keller, 2019b; Smith, 2020), resulting in a 'Digital Nanny State' (Dutton, 2020). The revised approach is to focus on the wider systems and processes that platforms have in place (what Bunting (2018b) calls 'procedural accountability'), with a 'differentiated approach' to illegal content from that which is legal but potentially harmful. A focus on processes is familiar to legal scholars (Bambauer, 2018). The new regulatory framework would require companies 'to explicitly state what content and behaviour is acceptable' and to enforce this 'effectively, consistently and transparently'. There should be higher levels of protection for children. Illegal content must be 'removed expeditiously', and the risk of it appearing should be 'minimised by effective systems'. Threats to national security and the physical safety of children would demand 'particularly robust action'. Clarity was given on the nature of companies 'in scope' – platforms driven by user-generated content, rather than any company with a social media page. Companies would have to commit to transparency reports as indicated in the original White Paper and there would be a 'Multi-stakeholder Transparency Working Group' chaired by the Minister for Digital and Broadband, and a Consumer Forum for Communications. The government would shortly be publishing its first Transparency Report based on social media companies reporting.

In terms of enforcement, it was important that company executives 'are sufficiently incentivised to take online safety seriously'. The White Paper had proposed that there should be provisions for 'senior management liability' and 'business disruption measures' to which the government was giving further consideration.

This was a legislative priority for the government. While legislative preparations continued other wider measures were being introduced including:

- Interim codes of practice on terrorist and child sexual exploitation and abuse (CSEA) content and activity;
- The Transparency Report;

- A report into the safety technology ecosystem;
- Wider regulation and governance of the digital landscape including election integrity.

The UK's Law Commission (2018) has reviewed existing legislation on abusive and offensive online communications such as the Malicious Communications Act and its overlaps with other legislation and gaps in scope. A recent decision by the European Court of Justice has also suggested that takedown notices could be enforced across the EU and beyond (Allison, 2019).

### Public Safety and National Security

The debate on security issues in cyberspace involves 'a complex interplay of forces and contexts' (Hintz and Dencik, 2016). Platforms have been a focus of national security and public safety concerns for some time, with the UK government regarding itself as a leader in the field of combating terrorism online (House of Commons, 2017a and b). Conflicts between technology companies and the security services have raised fundamental questions about accountability of private and public agencies (Lodge, 2017). Issues such as disinformation have ridden up the political agenda in the context of Coordinated Inauthentic Behaviour (CIB), with six Select Committees coming together to consider disinformation (House of Commons, 2019c) and a new House of Lords Committee on Democracy and Digital Technologies (House of Lords, 2020). Recent research illustrates that this still remains a significant challenge (NATO, 2019). International action has been taken, with platform co-operation, in forums such as the EU (EC, 2018a and b). The UK's broad approach was set out in the 2018 *National Security Capability Review* (Cabinet Office, 2018a). Addressing CIB requires detailed and regular pressure and actions from governments and platforms (Facebook, 2019c), with the Coronavirus outbreak providing the latest example (BBC, 2020b). As the Stigler review noted (2019), and the Mueller indictments confirmed (Special Counsel, 2018), hostile state actors have learned how to exploit platform power, and that of Facebook in particular, though this has had more public exposure in the USA than in the UK: indeed, some of the material produced for the US Senate has given a more in-depth overview than that available in the UK (US Senate, 2018).

On an operational level, the Metropolitan Police Counter Terrorism Internet Referral Unit (CTIRU) assesses material against UK terrorism legislation and refers it to platforms for removal. Though there is legal provision for the police to issue a takedown notice to platforms under the 2006 Terrorism Act, on the whole as the main providers are headquartered overseas the police work on a voluntary basis with platforms. The main ones, including Facebook, now cooperate through the Global Internet Forum to Counter Terrorism (GIFCT) established in 2017. It is widely recognised that Facebook has had considerable success in addressing particularly ISIS/DAESH-related terrorist organisation, propaganda and recruitment material, though not completely

(Waters and Postings, 2018) and it has invested more on security in recent years (Thompson, 2020).

More recently, the announcement by Mark Zuckerberg of Facebook's 'privacy pivot' (Zuckerberg, 2019) has raised specific concerns from the UK, Australian, Canadian, US and New Zealand Governments – the 'Five Eyes' governments – regarding access by law enforcement agencies to the communications of criminals, terrorists and 'those who threaten public safety' (Home Office, 2019a). Zuckerberg said:

I believe the future of communication will increasingly shift to private, encrypted services where people can be confident what they say to each other stays secure and their messages and content won't stick around forever. This is the future I hope we will help bring about.

We plan to build this the way we've developed WhatsApp: focus on the most fundamental and private use case -- messaging -- make it as secure as possible, and then build more ways for people to interact on top of that, including calls, video chats, groups, stories, businesses, payments, commerce, and ultimately a platform for many other kinds of private services (Zuckerberg, 2019).

As the Home Office Director of National Security, Chloe Squires, said in written testimony to the US Senate Judiciary Committee Inquiry, 'there is a particular challenge when companies design their services in such a way that even they cannot see the content of their users' communications' (Home Office, 2019b: 1). This would not only hamper law enforcement but also diminish Facebook's 'own ability to identify and tackle the most serious illegal content and activity running over its platform, including grooming, indecent imagery of children, terrorist propaganda and attack planning' (Home Office, 2019b:2). She gave evidence that this would remove 12 million reports to the National Center for Missing and Exploited Children every year, noting 'in 2018, those reports will have led to more than 2500 arrests by UK law enforcement and almost 3000 children safeguarded in the UK alone'. Her evidence stated passionately:

That is in only one country. That is only in one year. That is based on referrals from only one company. That is what we stand to lose. (Home Office, 2019b: 4)

She noted that the National Society for the Prevention of Cruelty to Children (NSPCC) estimated that on average there were 11 reports of online sex crimes in the UK from Facebook services every single day. Facebook had confirmed that it had acted against 26 million pieces of terrorist content between October 2017 and March 2019 and that the company had not quantified how much of that material would have escaped detection if end-to-end encryption had been in place. Over 100 charities and academics from around the world have written to Facebook asking for its plans to be halted (BBC, 2020c).

The UK Home Secretary was the lead signatory on a letter to Mark Zuckerberg along with the US and Australian governments in October 2019 urging him not to go along with these plans (Home

Office, 2019a) without putting protections in place. The letter noted that ‘more than 99% of the content Facebook takes action against – both for child sexual exploitation and terrorism – is identified by your safety systems, rather than by reports from users’. Facebook responded through a letter from WhatsApp Head Will Cathcart and Facebook Messenger Head Stan Chudnovsky, rejecting the request, arguing:

Cybersecurity experts have repeatedly proven that when you weaken any part of an encrypted system, you weaken it for everyone, everywhere. The ‘backdoor’ access you are demanding for law enforcement would be a gift to criminals, hackers and repressive regimes, creating a way for them to enter our systems and leaving every person on our platforms more vulnerable to real-life harm. It is simply impossible to create such a backdoor for one purpose and not expect others to try and open it. (Facebook, 2019d:1)

Home Office concerns have been reinforced by statements from the UK security services (Fisher, 2018) and police (Holden, 2018), and the Defence Secretary (Shipman, 2020), based on UK encryption security principles expressed by national cybersecurity leaders (Levy and Robinson, 2018). India is also seeking to legislate for traceability of messaging (Newton, 2020a, Mehta, 2020).

Facebook endorsed the Christchurch call to action (Facebook, 2019e; Thompson, 2019a) after the New Zealand terrorist action live-streamed on Facebook, though actions fell short of the prohibition of live-streaming called for shortly afterwards by the UK Digital Minister (Andrews, 2019a). There is no doubt that encryption raises complex issues: former FBI Director James Comey recalls President Obama wrestling with this as one of the most intractable issues he had come across (Comey, 2018).

## Elections

There is widespread consensus that the UK’s electoral laws have not kept pace with digital technology (House of Commons, 2019a; APPGECT, 2020; Naik, 2019). Dommett (2019) identified 230 discrete recommendations from 14 Parliamentary Committees and other relevant bodies for reform. The Prime Minister’s chief of staff, Dominic Cummings, has himself said that electoral laws are out of date (Cadwalladr and Townsend, 2019). The Electoral Commission (EC) put forward specific recommendations (2018), calling for legal changes for digital imprints stating who is behind the campaign and who created it, more clarity from campaigners on digital spending, clarity on the prohibition of spending by foreign organisations and individuals, larger fines and strengthened enforcement, including information-gathering powers for the commission. It called on social media companies to work with the Commission to improve their policies, labelling political advertising and ensuring their political advert databases were in alignment with UK rules. There were also reports from the Law Commission (2016 and 2020) and the House of Commons Public Administration and Constitutional Affairs Committee (House of

Commons, 2019b). Facebook has announced a series of changes to its own policing of election advertising since the 2016 US Presidential election (see, for example, Facebook, 2018b), but made it clear that it would not prevent election candidates telling lies (Facebook, 2019a; Gold and O'Sullivan, 2019).

Following the 2017 UK General Election, the Committee on Standards in Public Life (CPSL) was asked to review the question of intimidation of candidates in elections. The CPSL report found that social media had 'accelerated and enabled intimidatory behaviour', acted as though they had little liability, and that companies like Facebook, Twitter and Google were not just platforms for people to post material but also shaped what users see. The UK government, the report suggested, should legislate to shift liability toward social media companies, which should also be forced to provide automated techniques to deal with intimidatory content, prevent pile-ons, develop more tools for users to report, take decisions faster and remove content more quickly, and report on their performance on taking down such material, and actively provide safety advice to candidates. Meanwhile, the Government should introduce a new electoral offence of intimidation (CPSL, 2017a and b).

The UK Government has consulted on its response to both the Electoral Commission and CPSL reports (Cabinet Office, 2018b and 2019) indicating it is minded to introduce a new offence, introduce a digital imprint regime, and strengthen the Electoral Commission's powers and sanctions. However, in the absence of new legislation, the 2019 General Election went ahead with a range of inauthentic advertising from unregulated groups, such as the Fair Tax Campaign and continual use of data mining.

#### Data analytics and advertising technology

The Cambridge Analytica case specifically led to an inquiry into the use of data analytics in political campaigns by the Information Commissioner's Office (ICO, 2018a, b, c) following reports by the *Observer* newspaper in 2017. Following further reports by the *Observer*, *Channel Four News* and the *New York Times* in March 2018 'the inquiry eventually broadened and has become the largest investigation of its type by any Data Protection Authority involving social media platforms, data brokers, analytics firms, academic institutions, political parties and campaign groups' (ICO, 2018a:2). The key allegations centred on data use in the 2016 UK referendum on EU membership and the US Presidential election leading to warning letters to political parties, prosecutions of Cambridge Analytica's parent company SCL, auditing of Cambridge University's data lab, action against campaigners Leave.EU and a relevant company, Eldon insurance, a fine of £500,000 to Facebook, and reference of the Canadian company Aggregate IQ to Canadian authorities for non-compliance with the ICO.



The ICO had to use its full range of powers but also to seek more, which were granted in the 2018 Data Protection Act, following pressure from the House of Commons Digital, Culture, Media and Sport Select Committee (House of Commons, 2018a), which itself undertook a series of hearings with key representatives of Cambridge Analytica. There was significant international and inter-agency cooperation with the National Crime Agency, the Electoral Commission, the Irish Data Protection Commissioner (as the lead EU data protection authority for Facebook) and regulatory and law enforcement bodies in the US and Canada. Facebook's fine was an indication of the seriousness of its breaches and would have been higher if GDPR had been in operation. Facebook was guilty of 'repeated failures' to protect user data. The ICO said that the Government should legislate for a statutory code of practice for the use of personal data in political campaigns and review the regulatory gaps in the 'content and provenance and jurisdictional scope of political advertising online'. The ICO also called for an 'ethical pause' in the use of these micro-targeting technologies (ICO, 2018b). Indeed, it is micro-targeting which many researchers, and Facebook employees, say forms the biggest threat (Vaidhyanathan, 2019; Isaacs, 2019b) and so does the chair of the US Federal Election Commission (Weintraub, 2019), although others point out how it can enhance voter participation (Baldwin-Philippi et al, 2020) Mozilla and others called for a moratorium during the 2019 UK general election. The ICO launched a code of practice for political data (ICO, 2019e).

The ICO's work on data analytics in political campaigns (ICO, 2018b) explained how Facebook's advertising system worked. Mark Zuckerberg and former Facebook advertising manager Antonio Garcia Martinez have explained how the real-time bidding for Facebook advertisements works (Andrews, 2019a: 41). More recently, the ICO has led examinations of advertising technology. Initial consumer research it carried out with the aid of Ofcom (ICO, 2019b) indicated that people accepted that websites display advertising in return for free access. While they want advertisements that are relevant to them, they feel they have little control, and once they are shown how adtech works 'there is a notable shift in perceptions towards websites showing adverts as being unacceptable' (ICO, 2019b:5). The ICO held an industry fact-finding forum (ICO, 2019a) on the back of this research which enabled it 'to better understand the challenges and views of the different aspects of a complex system' (MacDougall, 2019).

The ICO's *Update report into Adtech and RTB* (Real-time bidding) sought to establish whether RTB complied with GDPR and The Privacy and Electronic Communications Regulations (ICO, 2019c). They had specific concerns about special category data – data identified under GDPR as:

- personal data revealing **racial or ethnic origin**;
- personal data revealing **political opinions**;

- personal data revealing **religious or philosophical beliefs**;
- personal data revealing **trade union membership**;
- **genetic data**;
- **biometric data** (where used for identification purposes);
- data concerning **health**;
- data concerning a person's **sex life**; and
- data concerning a person's **sexual orientation**. (ICO, 2019c)

In general, the ICO was concerned about the lawful basis of adtech, in particular that the creation and sharing of personal data profiles was 'disproportionate, intrusive and unfair', with one visit to a website resulting in a person's personal data being seen by hundreds of organisations. There were major issues of consent and transparency, and dangers of data leakage across the supply chain.

Overall, the ICO felt that the adtech industry 'appears immature in its understanding of data protection requirements'. Individuals could have no guarantees about the security of their data:

Thousands of organisations are processing billions of bid requests in the UK each week with (at best) inconsistent application of adequate technical and organisational measures to secure the data in transit and at rest, and with little or no consideration as to the requirements of data protection law about international transfers of personal data. (ICO, 2019c:23)

The ICO's concerns could not be addressed without intervention, but this needed to be measured and adaptive, because this was 'an extremely complex market involving multiple technologies and actors' (ICO, 2019c:4). They noted that industry was taking some action. They also had concerns about the 'economic vulnerability' of smaller publishers. The adtech ecosystem was complex, with some market participants playing multiple roles. It appeared that Google and the Internet Advertising Bureau made some practical changes as a result of this (MacDougall, 2020), but some were dragging their feet, meaning that further regulatory action was likely.

### Competition, Mergers and Antitrust and Consumer Protection

The UK Government's *Industrial Strategy* was firmly rooted in the exploitation of data and new technologies (Department for Business, Energy, and Industrial Strategy (BEIS), 2017). Competition issues in digital markets have been on the agenda of the UK government since the publication of the *Consumer Markets Green Paper* in April 2018 (BEIS, 2018). This called for digital markets 'that work for consumers' with a focus on data portability and competition enforcement. The online advertising market, and its dominance by Facebook and Google, was specifically cited and will be addressed in the next section. The paper noted that 'platforms operating in digital markets pose challenges to the established techniques for assessing competition in markets'.

These markets were shaped by network effects and were marked by concentration. Platforms could lock in consumers 'or leverage their market power to detrimentally influence other markets'. The consultation sought views on digital platforms, agglomeration, data algorithms and consolidation of consumers. The document included a draft strategic steer to the Competition and Markets Authority which included the need to 'address the challenges of the digital economy', including anti-competitive behaviour. Subsequently, the Secretary of State for Business, Energy and Industrial Strategy published the final Strategic Steer to the CMA stressing the need for swifter conclusion of competition inquiries (BEIS, 2019a). BEIS also published the *Competition Law Review*(2019b), which noted 'particular concerns have also been raised about the ability of the current regime to deal effectively and swiftly with concerns in digital markets', promising a subsequent Competition Green Paper.

Recent statements by both the chief executive and Chair of the CMA have indicated an acceptance that merger control in digital markets had been a failure. The chair, Lord Tyrie referred to 'underenforcement' in respect of digital mergers. The chief executive, Andrea Coscelli, said Facebook's acquisitions of WhatsApp and Instagram had been examples of 'merger control gone wrong' and the Instagram acquisition had given Facebook an unforeseen 'competitive advantage' (Beioley, 2020). In evidence to the House of Lords, the CMA had previously suggested that 'the creation of data monopolies' could be added as a fourth public interest category when judging mergers (House of Lords, 2018d). A paper from the Bank of England has also concluded that 'the incumbency advantage of dominant platforms is, arguably, the most prominent competition issue in the area of competition policy' (Siciliani and Giovannetti, 2019:33).

The UK Treasury and the Department for Business, Energy and Industrial Strategy (BEIS) had jointly commissioned the Digital Competition Expert Panel, whose report *Unlocking Digital Competition* has become known as the Furman report (2019), named after its chair. The report said that standard competition policy tools could play a role but needed updating. The focus needed to be on promoting competition, fostering new entrants, and benefitting consumers. There needed to be a code of conduct for the biggest platforms, data mobility, open standards and data openness. The Panel disagreed that platforms were natural monopolies which needed utility regulation but said that there needed to be a clear set of rules to limit anti-competitive activities by the most significant platforms and reduce structural barriers to competition. Merger control should be more active and focused on innovation. There needed to be clearer ex ante rules but also post-merger antitrust enforcement, which also needed to be faster and more

effective, with more interim measures. The EU is also currently considering greater use of interim measures (Satariano, 2019).

The Panel noted that digital markets were subject to 'tipping' in which the winner took most of the market. Competition alone could not deal with tipping – there needed to be intervention. The report noted that 'governments and regulators are at an enormous informational disadvantage relative to technology companies' (Furman, 2019:4). Well-functioning digital markets with more choice for consumers could also help address some online harm issues, forcing competition on the basis of quality and consumer care. The UK needed a Digital Markets Unit with strong links to the CMA, Ofcom and the ICO, able to impose measures where a company had 'strategic market status, with enduring market power over a strategic bottleneck market'(Furman, 2019:10). The report noted Facebook's acquisitions of WhatsApp and Instagram and Google's acquisitions of Doubleclick and Youtube had faced little questioning. Of 400 acquisitions by the largest firms, none had been blocked and few had conditions attached. In terms of merger policy, there needed to be a reset. Harm to innovation and potential competition – preventing the emergence of a potential competitor – should be part of the CMA's assessment. The report warned about 'the threat of killer acquisitions'. Digital companies with strategic market status must notify the CMA of planned acquisitions. There needed to be a legislative change so that the CMA could take a 'balance of harms' approach. The CMA should retrospectively review cases not brought, use its interim measures powers more, and strengthen its information-gathering powers. The evolution of algorithms and artificial intelligence should be monitored by the government, the CMA and the CDEI to avoid anti-competitive behaviour. The CMA should conduct a market study into the digital advertising market. The UK government should encourage a pro-competition approach to competition policy internationally, in co-operation with governments and competition authorities overseas as digital competition reviews were already underway in Australia, France, Germany, Israel, Japan, the US and the EU. It said that there was some evidence of tensions between competition law and data protection law, including with GDPR. The CMA has subsequently said it wanted tougher powers to take action against Big Tech companies (Espinoza and Beioley, 2020).

In identifying strategic market status, Furman (2019:23) said 'the scale and breadth of data that large digital companies have been able to amass, usually generated as a by-product of an activity, is unprecedented'. The centrality of this data to their business models was unique, leading to concentration in specific markets like search and social media and online advertising. Incumbents had a clear data advantage which led to permanent dominance and market power. Markets could not therefore be considered 'freely contestable'. Specifically in respect of

Facebook, Furman noted that the Cambridge Analytica scandal, and the discriminatory sharing of data exposed by the House of Commons DCMS Select Committee publication of documents from the Six4Three court case in California (Solon and Farivar, 2019 a and b), could be interpreted as 'an indicator of low quality caused by a lack of competition', (Furman, 2019:43). The OFT might have been at fault in allowing Facebook's acquisition of Instagram.

Data as the focus of anti-trust policy can also be seen in recent statements from the US Department of Justice and the European Commission (McGill, 2020; Faroohar, 2020). The FTC in the United States is also now looking into past acquisitions by Big Tech companies to identify whether their acquisitions constitute a 'kill zone' (Kamepalli et al, 2019) intended to eliminate emergent competition (Eichlin and de Fays, 2020). Facebook has now produced new tools allowing users to understand how data is gathered on them offline (Lomas 2020a). Other proposals have been made to address the value of data (Coyle et al, 2020), or to treat it as a public good akin to spectrum (Napoli, 2019a, b, c).

### The Online Advertising Market

The CMA had been urged by the House of Lords Communications Select Committee (2018c, 2019), the House of Commons DCMS Select Committee (2019a), the Furman Review (2019), the Cairncross Review (2019) and the Chancellor of the Exchequer (Hammond, 2019) to conduct a review of the online advertising market but for some time the regulator had warned that Brexit preparations were an obstacle to this (House of Lords, 2018d; House of Commons, 2018a). Its interim report (2019a) was published shortly after the 2019 UK General Election.

The CMA noted that Google and Facebook consumed 30% of UK Internet users' time. Google had 90% of search advertising; Facebook nearly 50% of display. The CMA (2019a, :6) was 'concerned that they are now both so large and have such extensive access to data that potential rivals can no longer compete on equal terms'. That could be a block on innovation and could force consumers to give up more data than they wished. The CMA (2019a:6) wished to consult on a range of interventions including a code of conduct to govern the behaviour of 'platforms with market power', rules to give consumers greater control over data; and interventions to address the market power of Google and Facebook (including data access remedies, consumer default avoidance, measures to increase interoperability and structural interventions). The report was also intended, alongside Furman and the Stigler inquiry in the US, which included 30 prominent global academic specialists, to contribute to the debate on 'online platforms' regulation. There was a need for a sound understanding of the business models of advertiser-funded platforms, which were different from those of non-advertiser funded platforms.

The issues the CMA (2019a:8-12) was considering were important because of the focus on the consequences of the lack of competition: services were paid for by advertising, and in an uncompetitive market costs to consumers for advertised products could rise; if content providers received less than they should in revenue they would be unable to invest sufficiently in content generation; limited choice meant consumers had less control over their data use; and finally, it was plausible that competition concerns about market power and asymmetric information might exacerbate broader online harms. Key characteristics of the online advertising market were network effects and economies of scale; consumers defaulted to recommended options to save time; unequal access to user data; lack of transparency; vertical integration and conflicts of interest. These could be mutually reinforcing and lead to 'substantial barriers to expansion'. In the social media market in the previous decade there had only been a few new entrants and only Instagram was really successful. The CMA wanted to know if that was because of its acquisition by Facebook.

Facebook users don't usually change their advertising settings so they are opted-in to personalised ads by default. Facebook and Google's tags on so many websites give them a substantial competitive advantage on consumer behaviour tracking and are a barrier to entry. Decision-making by algorithm means a lack of transparency and asymmetric information for market participants. News outlets have insufficient information on News Feed changes. Advertisers have inadequate information on advertising effectiveness, with no independent verification. Facebook therefore had clear market power in respect of display advertising and the ability to exploit its market power. Facebook's family of applications helped to protect it from competition. Vertical integration was a major issue, especially in the case of Google.

The CMA(2019a:20) found 'that the profitability of both Google and Facebook has been well above any reasonable estimate of what we would expect in a competitive market for many years'. This was evidence that was 'consistent with the exploitation of market power'. They also had exclusionary power and were able to leverage their operations into other markets. Competition to Google and Facebook could be assisted by a code of conduct applicable to the two main players. This included transparency and data rules, including options to use services without advertising, opting in to advertisements rather than opting out; and fairness in design to avoid dark patterns which made finding privacy options hard. Facebook could be required to interoperate some features with competitors; its power to impose restrictions on competitors could be prevented and access to its previous Application Programming Interface (API), allowing users to interact with the other online services, could be restored. It might be necessary to

consider the break-up of Facebook and Instagram. Or, the separation of business operations, sometimes called ring-fencing, could be an option.

The CMA (2019a:278) recognised that some antitrust remedies, such as structural separation, which were being canvassed (see Khan, 2019; Tambini, 2019a), required international action and were not unilaterally open to the UK. Google and Facebook presented 'a truly global antitrust challenge facing governments and regulators'. The CMA was cooperating with a wide range of competition authorities internationally. The UK Government has now opened a consultation on online advertising (DCMS, 2020b). Many commentators have drawn attention to how the platforms are making money from dubious advertising, such as 'vaccine alternatives', banned in other media (Rushton, 2019). The Advertising Standards Authority's (ASA) 2019-23 strategy document, *More Impact Online*, commits it to investing further in online regulation which it acknowledges is regarded by many as a 'Wild West' (ASA, 2018).

### Media sustainability

A range of scholars have made the case persuasively that Facebook exhibits the same characteristics as a media company. Academics and policy advocates have long argued that platforms like Facebook need to be incorporated into sector-specific legislation on media plurality and diversity, designed to support a healthy public sphere with diverse media sources, content and exposure (Foster, 2012; Napoli and Caplan, 2017; Tambini and Labo, 2014; Flew et al, 2019; Napoli, 2019b). Facebook has resisted such a definition, although when announcing changes to the Facebook Newsfeed in 2013 Mark Zuckerberg said: 'What we're trying to do is give everyone in the world the best personalized newspaper we can' (Kim, 2014). More recently, seeking to resist the California court case brought by the app-maker Six4Three, Facebook lawyers said that the right to deny data to Six4Three and other developers was 'a quintessential publisher function' comparing this to the right of a newspaper (Levin, 2018). Facebook is now in the market for original video content, it supports a major journalism project and shows sports in a number of international territories. More recently, it has produced a dedicated News Tab and aims to do more to direct traffic to publishers (Brown, 2019). However, the News Feed algorithm has been regularly tweaked, reducing the number of news items it carries (a useful summary can be found at Wallaroomedia.com, 2019). Facebook is also hiring journalists (Ha, 2019).

On a definitional basis, some argue (Rajan, 2016) that media companies create, post, curate, distribute and monetise content. In the UK, Channel Four, is an example of this kind of organisation, and has operated on a publisher-broadcaster model of publishing content produced by others. Facebook's algorithm curates content, and it produces edited videos of users' activity for them to post to their pages. As Gillespie (2018b: 43) points out, Facebook's

decision to change the News Feed from a chronologically curated flow of information to an algorithmically-chosen selection was profitable for the platform, but that shift makes Facebook more liable for the content that is made available, as it was producing 'a media commodity'. Its situation is therefore very different from being a mere conduit, as it has been shaping user interaction, as one FTC Commissioner pointed out (Chopra, 2019, drawing on Sylvain, 2018a and b; and see Keller, 2018b).

Facebook's famous censorship of the naked young Vietnamese girl fleeing a napalm attack, became the subject of a row with the editor of the Norwegian newspaper *Aftenposten* and the Norwegian Prime Minister. Its regular censorship of breast-feeding photographs, and breast cancer awareness programmes, naked statues, and many other examples, as well as deliberate actions to remove material offensive to governments around the world are all examples of an editorial role being played. The Australian Competition and Consumer Commission (ACCC) has said platforms like Facebook 'increasingly perform similar functions to media businesses, such as selecting and curating content, evaluating content, and ranking and arranging content online' (ACCC, 2019: 15).

The question is, however, what kind of remedies can be applied without attacking similar freedoms enjoyed by media companies. That is why Vaidhyanathan (2018), Unger (2019) Winseck (2019), and others point to the importance of political economy and also using regulatory principles drawn from, for example, telecommunications policy, to set the boundaries for regulatory policy in this field.

Antitrust measures alone will not of course address the media deficit (Napoli, 2019b; Pickard, 2020). Facebook has disrupted the global media ecosystem and its dominance, and its practices, including adaptations to the News Feed algorithm, have helped to impose a dependency relationship upon the media sector as a whole (Andrews, 2019a). The UK's *Cairncross Review* (2019) examined how to create a sustainable future for journalism. There was a need to reset the 'unbalanced' relationship between news media organisations and news aggregating platforms, with new codes of conduct overseen by a regulator. Cairncross's conclusions have been reinforced by academic research and industry surveys.

The review asked whether the media market is a fair one, or whether the growth of big online platforms – especially Google and Facebook – has created distortions that justify government intervention, noting the platforms' dominance of advertising and its essential control of access to news. The impact had been particularly strong in the area of public interest news, 'activities which are important public goods, essential to the preservation of an accountable democracy,



with poor market incentives for supply (and limited demand) (Cairncross,2019:6). Cairncross noted the drive to more clickbait in news formats, seeking to grab attention, and the impact that this had on the kind of news being reported or supported.

Facebook was emerging as a clear competitor to local news organisations, as Facebook Groups were coming to provide forms of local community information, albeit not independently corroborated or effectively resourced. As well as new funding sources for public interest news in the form of public subsidies, including innovation funding via Nesta, and an extension of the BBC local reporting scheme. Cairncross identified the platform's role in online advertising as requiring investigation by the CMA.

The review (Cairncross, 2019: 90-103) made a number of suggestions aimed at addressing the platform/publisher imbalance. These included a new code of conduct to rebalance the relationship. This would govern commercial relationships, and would be overseen by a regulator with power to insist on compliance with minimum requirements. The regulator would need a full set of powers to command information; there should be a news quality obligation on platforms under regulatory supervision, with a reporting requirement initially; and there should be investment in media literacy. Cairncross's concern with regard to platform power have now largely been overtaken by the CMA inquiry. In the US, the Stigler review (2019) has suggested that the Section 230 privileges granted in law to the platforms had operated as a form of subsidy not available to media organisations which were liable for content on their platforms, and that arguably this principle might also be applied to EU law.

### Taxation of the Digital Economy

Mark Zuckerberg appears resigned to Facebook paying more tax (Carrell, 2020; Facebook, 2020b). Pressure groups have demonstrated that Facebook shifts profits into tax havens (Taxwatch, 2019). Estimates of the loss of Facebook and Google taxes within the EU ranged between one and five billion euros between 2013-15 (Tang and Bussink, 2017). Facebook has previously had to adjust its figures for where its 2015 revenues had been obtained (Facebook, 2017). It presently faces a challenge from the Inland Revenue Service over its Dublin tax arrangements (White, 2020).

In the UK, a series of Treasury (HMT) documents has paved the way for the Digital Services Tax, intended to be levied from the 2020-21 Financial Year. The Treasury argued in *Corporate Taxation and the Digital Economy: position paper* (HMT, 2017) that multinational profits should be taxed in the countries where they generated value. The Treasury had worked with the OECD on various initiatives to address this (see, for example, OECD, 2017). International corporate

taxation rules must recognise the digital economy and ensure that for the large digital companies 'their UK corporate tax payments are commensurate with the value they generate from the UK market and specifically the participation of UK users' (HMT, 2017:2). Prior to this, the former Chancellor, George Osborne, had announced a tax deal with Google in 2016 whereby it paid £130 million as a settlement, having previously paid no tax (Kwong, 2016).

The document confirmed that the UK would press for reforms to the international taxation framework and explore interim options such as a tax on UK revenues. Echoing statements by Chancellor Philip Hammond in his Budget Speech (2017), the document said that the UK would take action against multinational groups especially in the digital sector 'who achieve low-tax outcomes by holding their valuable intangible assets such as intellectual property in low-tax countries where they have limited economic substance' (HMT, 2017:3).

In March 2018, the Treasury published an update (HMT, 2018a) reinforcing the message that the tax system had not kept pace with changes, following feedback from stakeholders. It noted that user participation and engagement were an important aspect of digital value creation. The Government's preference remained for international tax reform through the OECD, but in the absence of that it would consider interim measures such as revenue-based taxes.

Prior to the Furman Expert Panel, the Treasury published *The Economic Value of Data* (HMT, 2018b), which noted the significant growth in data produced since 2015 and its likely future growth, not least through the development of the 'Internet of Things', with much of the data being collected taking the form of 'exhaust' data - the by-products of other uses - and unstructured data. Data was 'an unexploited asset' whose value may not be recognised. That value was both economic and social. It used the example of data being used to assist transport planning in London as an example of an improvement to public wellbeing. Other factors were the development of artificial intelligence, and the need to plan for that, as the AI Review had demonstrated (Hall and Pesenti, 2017). Attention was also drawn to the use of algorithms, which the new Centre for Data Ethics and Innovation was examining, and issues of copyright, as well as Data Protection, with the 2018 Data Protection Act and the GDPR at the core of that. There were challenges in the use of public data. Interoperability and standards needed to be mandated: examples given cited the CMA in ensuring Open Banking and the powers that government had taken in the Bus Services Act over private sector bus data. The DBEIS *Green Paper on Modernising Consumer Markets* had also promised a Smart Data review. Data need to be protected through anonymisation and depersonalization. Putting the UK at the forefront in AI and data was reflected in actions such as the *AI Sector deal* (BEIS, 2018b), the *Digital Charter* (DCMS, 2018) and the *Digital Strategy* (2017b); 1000 new PhDs in AI were planned.

The Chancellor confirmed plans for a digital services tax in his 2018 budget and alongside that the Treasury published the *Digital Services Tax: Consultation* document (HMT, 2018c). The document said that the international taxation framework was failing to take account of a new source of value creation – ‘certain highly-digitalised business models that derive value from the participation of their users’ (HMT, 2018c:3). While the OECD process was key, until that concluded there was a need for interim measures, specifically a tax on certain business practices. The Digital Services Tax would be a narrowly-targeted tax on the UK revenues of digital businesses ‘that are considered to derive significant value from the participation of their users’ (HMT, 2018c:4). It would apply from April 2020. The businesses targeted are online platforms such as Google, Facebook, Apple and Amazon. The businesses in scope were social media platforms, search engines or online marketplaces which globally derived more than £500 million in revenues, generating more than £25 million for these services from UK user participation. User participation was defined as content generation, depth of engagement, network effects and externalities, and contribution to brand. Detailed definitions were given of the meanings of social media platforms, search engines and online marketplaces – deeper, indeed, than those provided in the Digital Economy Act. The tax was estimated to raise £5 million in 2019-20; £275 million in 2020-1, rising to £440 million by 2023-4. These revenue figures were revised upwards in the 2020 UK Budget (HMT, 2020) which confirmed that the tax would go ahead pending international agreement. Draft legislation and guidance was published in 2019 (HMT, 2019a and b).

### Age-appropriate services and design

In January 2020, the ICO published its final version of the Age Appropriate Design Code. It was estimated that 20% of internet users were children. The Information Commissioner said (ICO, 2020:4) that ‘a generation from now, I believe we will look back and find it peculiar that online services weren’t always designed with children in mind.’ The code set down standards which would affect a range of services from social media platforms to connected toys. It requires digital services to provide children automatically with ‘a built-in baseline of data protection’ whenever they download an app or game or visit a website. It draws on standards from GDPR and the 2018 Data Protection Act and is likely to come into effect by autumn 2021 (ICO, 2020:5).

### Algorithmic accountability and transparency

The UK government asked the new Centre for Data Ethics and Innovation to consider the issue of online targeting. The CDEI made three sets of recommendations:

- online harms regulation should ensure that companies that operate online targeting systems are held to higher standards of accountability;
- operation of online targeting should be made more transparent to enable social understanding of these systems;
- people should be given greater control over the way they are targeted.

The report (CDEI, 2020) said online targeting systems too often operate without sufficient transparency and accountability, falling short of the OECD's human-centred principles on AI. The CDEI noted that online targeting 'has been blamed for a number of harms' (CDEI, 2020:5) including the erosion of autonomy and exploitation of people's vulnerabilities such as mental health, the undermining of democracy and society including radicalisation and polarisation and increased discrimination.

The CDEI specifically focused on personalised advertising and content recommendation systems. Online targeting, it said, was 'at the core of the online business model':

Recommendation systems encourage users to spend more time on these platforms. This leads to the collection of more data, increases the effectiveness of the recommendations and of the platforms' personalised advertising products, and makes them more attractive to advertisers. (CDEI,2020:13)

Every action a user took enabled the platforms to extract more data. The CDEI said that online targeting systems should not be designed to maximise user engagement.

Online targeting had put 'a handful of global online platform businesses in positions of enormous power to predict and influence behaviour.' They had 'significant social and political power' (CDEI, 2020:5, 31). Their power derived from observing users' behaviour, influencing perception through the flow of information, prediction and influence, and control of expression. Other actors could exploit that power, including terrorist groups and hostile state actors. The CDEI said that existing regulators' powers and self-regulation were inadequate to deal with this. The public did not want targeting stopped but they did want high standards of accountability and transparency, and meaningful control over how they were targeted. Online targeting presented specific regulatory challenges: by its nature, it is not transparent to users or regulators unlike broadcast content, and online platforms are international businesses, with Google and Facebook specifically named as being in scope. There were specific problems of self-regulation, namely information asymmetry, platform control of rules, and incentives that are aligned with reputation management not public policy goals.

Democratic governments had a legitimate interest in how these platforms operated. The new regulatory regime should be developed to promote responsibility and transparency and

safeguard human rights by design. The new online harms regulator should strengthen oversight of targeting, working alongside the ICO, taking a 'systemic' approach. The online harms regulator should have a statutory duty to protect and respect freedom of expression and privacy. The regulator would need information gathering powers and 'should have the power to require platforms to give independent experts secure access to their data to enable further testing of compliance with the code' using these powers proportionately and with a duty to protect privacy and commercial confidentiality. Platforms should be required to maintain online archives 'of personalised advertising that pose particular societal risks', such as jobs, credit and housing, age-restricted products, and political advertising. There should be 'formal coordination mechanisms between the online harms regulator, the ICO and the CMA, and effective operational coordination between other regulators. Regulators had recognised the need to recruit data science experts, and the Financial Conduct Authority (FCA), with its RegTech and Advanced Analytics department, might be 'an important partner for other regulators as they develop their data capability'. Regulators should coordinate digital literacy campaigns. Governments should support the development of 'data intermediaries' which could rebalance power towards users. The CDEI endorses the CMA's 'fairness by design' proposals (CDEI, 2020: 91-2).

### Electronic currencies and the stability of the financial system

Facebook formally announced its plans for the Libra 'stablecoin' cryptocurrency in June 2019 with 27 other companies (Facebook, 2019f; Libra, 2019), to be run by its new Calibra subsidiary, following months of speculation. Facebook positioned its idea in the rhetoric of global altruism:

For many people around the world, even basic financial services are still out of reach: almost half of the adults in the world don't have an active bank account and those numbers are worse in developing countries and even worse for women. The cost of that exclusion is high – approximately 70% of small businesses in developing countries lack access to credit and \$25 billion is lost by migrants every year through remittance fees. (Facebook, 2019f)

Immediately, concerns were raised about the crypto-currency's uses and its potential threats to the banking, stock market and currency systems. The company faced scrutiny in Congress (House of Representatives, 2019) and from EU regulators (Chee, 2019). Zuckerberg admitted in evidence he gave to the House committee that Facebook wasn't in a good place to be trusted to launch such a new service:

I understand we're not the ideal messenger right now. We've faced a lot of issues over the past few years, and I'm sure people wish it was anyone but Facebook putting this idea forward. (House of Representatives, 2019:1)

Libra has marked Zuckerberg's next-stage plan for the development of Facebook, which includes building a private e-commerce business on the WhatsApp platform, using the Chinese

app Wechat as its basic model. Facebook has tested payments on WhatsApp in India, as Zuckerberg told analysts at the company's October 2019 earnings call (Facebook, 2019g). It has also aimed to consolidate its payment features into a single product to be called Facebook Pay (Thompson, 2019c).

In the UK context, the Bank of England has oversight of these issues. Facebook's ability to move into this market is a direct result of the power it has to leverage its way into other markets, identified by Furman and the CMA. Bank of England Governor Mark Carney set out his view in a speech at Jackson Hole in August 2019:

[T]he relatively high costs of domestic and cross border electronic payments are encouraging innovation, with new entrants applying new technologies to offer lower cost, more convenient retail payment services.

The most high profile of these has been Libra – a new payments infrastructure based on an international stablecoin fully backed by reserve assets in a basket of currencies including the US dollar, the euro, and sterling. It could be exchanged between users on messaging platforms and with participating retailers. (Carney, 2019:15)

He noted that there were a host of fundamental issues that Libra must address, ranging from privacy to money laundering and finance of terrorism and operational resilience. Noting that 'it could have substantial implications for both monetary and financial stability', he laid down a warning that touched on the failures of social media regulation to date:

The Bank of England and other regulators have been clear that unlike in social media, for which standards and regulations are only now being developed after the technologies have been adopted by billions of users, the terms of engagement for any new systemic private payments system must be in force well in advance of any launch (Carney, 2019: 15).

Since then, a number of the founding partners have left the project, including PayPal, Mastercard eBay and Visa (Brandom, 2019). EU Finance Ministers have agreed that no stablecoin currency should launch in the EU until key legal, regulatory and oversight issues have been resolved (Valero, 2019). It remains to be seen what will become of Facebook's venture, which has been renamed Novi (Porter, 2020).

### **Regulatory coordination**

The UK Government's *Consumer Markets Green Paper* said that regulators should prevent harm, without stifling innovation, and work together through the UK Regulators' Network. Current and future digital and data challenges 'require the government and regulators to work together, while respecting regulators' independence'. Coordination needed to be strengthened. Better cross-cutting work was needed. A joint government-regulator Consumer Forum would be created, chaired by the Minister for Consumer Affairs.

It is striking how many of the documents reviewed here emphasise the need for regulatory coordination. This is a sign of the wide-ranging nature of Facebook and Google's operations, their market power and their functional sovereignty. The importance of regulatory coordination has also been stressed by a number of independent reports and by academics (LSE, 2018; Tambini, 2019b). The CDEI report says regulators should develop formal coordination mechanisms and reinforces the need for regulatory coordination and coherence, suggesting that the FCA's long-standing work in the area of algorithms could be of practical relevance. As Black and Murray (2019:15) argue:

New regulatory regimes rarely land newly minted, in perfect form and onto a blank canvas: they are always situated in an existing context often thick with existing norms and rules, with existing organisational structures, and amongst actors with particular behaviours, cognitive frameworks, capacities and motivations.

Historically, UK regulators have collaborated together in developing design proposals for new regulators, as happened in the creation of Ofcom in 2002 (ITC, 2001; Towers Perrin, 2001).

The documents discussed here also identify potential tensions between different policy ambitions, for example in respect of the interaction of competition policy and data protection, identified by Furman, the CMA and the CDEI, as well as regulatory overlaps mentioned by the CDEI.

The regulators emphasise the ways in which they are cooperating and coordinating their activities both domestically and internationally. Domestically, Ofcom says that it has a joint programme of work with the ICO. Its report on economic harms makes reference to Furman and Cairncross and the Behavioural Insights Team amongst others and confirms that it is working closely with the ICO and the CMA 'sharing expertise on communications services, ex-ante competition regulation and data privacy' (Ofcom, 2019a:11). Ofcom's (2019b) consumer research on attitudes to internet use refers to advice on research and design from the ICO. The ICO refers to advice from Ofcom. The CMA is discussing the interaction of competition and data protection policy issues with the ICO. Its report on online advertising draws on material from Ofcom and the ICO. The UK's concurrency framework (CMA, 2019c) governs the ways in which the CMA and sectoral regulators decide who will take the lead on specific investigations where they have concurrent powers. The CDEI identified eight regulators with interests in the field of micro-targeting. The ICO and Electoral Commission and Cabinet Office had contact over the range of issues being considered in the context of Cambridge Analytica, and the ICO also worked with the National Crime Agency over this and took advice from the Insolvency Service and FCA. They had also worked with the BBFC, the ASA and the National Cyber Security Centre (Denham, 2018). The Furman review team was supported by a cross-departmental secretariat.

Internationally, there has also been significant cooperation. Over Cambridge Analytica, the ICO made referrals to international law enforcement agencies including the FBI (International Grand Committee, 2018), and worked with its counterparts in the US such as the FTC (see FTC, 2020) and Canada's Privacy Commissioner (See McEvoy, 2019), as well as the Irish DPC as the lead EU data protection authority for Facebook. Pertinently, a complaint has been filed with the EU as to whether the DPC is properly resourced (Kobie, 2020). The CMA is in discussion with 7 other competition authorities internationally and its report draws on material from the Australian Competition and Consumer Commission and the Stigler Commission in the US Ofcom's work on market failures and harms draws on Furman, Stigler and the EU expert panel.

### **Brexit, Trade Policy and the threat to platform regulation**

It is clear that the UK has been developing a significant suite of regulatory proposals over the last three years in respect of the major social media and search platforms which increasingly focus on the ways in which their business models contribute to the generation of online, social and economic harms. This has seen the resurgence of political economy as a key element. However, regulatory proposals which have a specific impact on Big Tech companies headquartered in the United States acquire a particular sensitivity, given the geopolitical necessity for the UK in securing a trade deal with the United States following Britain's departure from the European Union.

The United States sees technology regulation and taxation as discrimination against its domestic companies. This is a bipartisan theme in the United States. Facebook and others have effectively exploited trade treaty negotiations to dilute legislative threats internationally. They have made sure that 'platform liability' - holding the Big Tech companies accountable for what happens on their sites - is a trade issue for the United States. The United States Trade Representative recently saluted the new trade agreement with Canada and Mexico which includes a clause to 'limit the civil liability of Internet platforms for third-party content that such platforms host or process, outside of the realm of intellectual property enforcement, thereby enhancing the economic viability of these engines of growth that depend on user interaction and user content' (USTR, 2019).

There have been suggestions that, in this context, the Government is set to water down its online harm proposals (Swinford et al, 2020). When the UK Government published its negotiating position for a trade deal with the United States, former chair of the House of Commons DCMS Select Committee, Damian Collins, asked the Secretary of State for International Trade whether the UK Government would prevent such a clause being inserted in the agreement that would



prevent action against Online Harms. The Secretary of State told him that the UK stood by its Online Harms proposals and the US Trade Agreement would not affect that (Collins, 2020a). Collins has also made the point that the global regulation Facebook seeks is simply the company's excuse for delaying regulation (Collins, 2020b).

In the United States, libertarian think-tanks like the American Enterprise Institute have said that the EU's General Data Protection Regulation represent trade tariffs or barriers by other means, and data deals should be incorporated in trade talks. The Prime Minister said that the UK would develop independent policies on data protection, suggesting a possible departure from GDPR (Hansard, 2020). Data provisions are a major issue for the EU (Council for the European Union, 2020).

The UK has already said it will not implement the EU Copyright Directive (BBC 2020d). Its position on the e-Privacy Directive, which could also have a significant impact on Facebook and Google's ability to leverage data in advertising (DCN, 2017) is unclear. Free-market think-tanks in the US have articulated issues that will require negotiation with the UK (Barfield, 2020). US lawmakers have warned the UK that a trade deal would be unlikely if the digital taxation proposals went ahead, and the then Chancellor was confronted on this at Davos by the US Treasury Chief (Reid, 2020). Although UK Prime Minister Boris Johnson has spoken of unfair competition from untaxed Big Tech companies (Swinford and Jones, 2019), post-Brexit the desperation to secure a deal might be overwhelming (Woodcock, 2019). Within US politics, this is not simply a Republican issue. In the past, Barack Obama attacked EU action against the major platforms as protectionist (Farrell, 2015). However, addressing the power of Big Tech is also a bipartisan issue (Crane, 2018).

## **Conclusion**

Platform regulation has been called 'a regulatory challenge on a scale not seen since the early debates over nuclear weapons' (Jenkins, 2019). The scale of scrutiny for regulators is huge, as indicated by the ICO's seizure of hundreds of terabytes of data as evidence (ICO, 2018a, b, c). Platform transience (Barrett and Kreiss, 2019) is fast paced, as spelt out in Facebook's slogan 'Move Fast and Break Things' (SEC, 2012). Platforms have been granted the freedom to leverage their operations into other markets, extending horizontally and excluding others, as the CMA (2019a) notes. At the same time, their vertical integration affords them advantages and it is too soon to say whether legislation such as GDPR is able to unpick this, as Furman (2019) and the CMA have identified. There still remain several open cases against Facebook companies, as the Irish

DPC (2020) recently confirmed. Platform power is underpinned by complex interactions in policy, as Ofcom (2019a) has noted.

What empirical research shows is that the UK has developed a level of regulatory expertise over the last three years which has identified the bulk of challenges caused by platforms such as Facebook and Google. That gamut of regulatory expertise has also identified potential solutions, many of which fall into the category of political economy, and which do not receive as much attention as actions to address online harms. For many of us, the actions identified may fall short of what we would like to see, and the urgency of implementation may be lagging. But nevertheless, there is a suite of options open to regulators and lawmakers. Political understanding of the issues of the issues is also growing (Greene, 2019; Schechter, 2019).

These are international challenges, but regulators are co-operating in unprecedented ways (ICO, 2018a, b,c; CMA, 2019a), and developing a shared analysis. Although the focus in this working paper is on the UK, most of the issues identified and approaches taken apply also to the USA, Australia, Canada, Germany, France, Italy and the EU in general.

For many, Facebook dominance drives the agenda, along with a growing distrust of Facebook's seriousness about these issues, no matter the avowed commitment of its senior figures. Facebook now commands little confidence, because it has been found wanting before, and because its decisions have appeared inconsistent, contradictory, capricious, and compromised by the profit motive (Channel Four, 2018; Cohen, 2019). Legislative and regulatory frustration with Facebook and other platforms has turned to the question of visiting criminal penalties on the senior managements of platform companies (DCMS, 2019a). If company founders want outright company control under the US's generous ownership models, and corporate governance is failing, then personal responsibility may have to be reinforced with stringent personal legal obligations for company behaviour.

There will not be a Google Act or a Facebook Act, and we are clearly some way from a Digital Platform Act (Feld, 2019). Instead, this is an unfolding process of regulation, in which users, civic society, media pressure, political inquiries, regulatory rules, actions and pressures, legislative action by governments and probably litigation will all play their part. So will shock, moral outrage and indignation. But regulators are getting savvier about their definitions of the platforms, with a focus now on advertising-funded platforms (CMA, 2019a) and a clear understanding of the categories of social media, search and online marketplace (HMT, 2018c).

There are obvious limitations to the scope of this working paper. One is its focus on the UK It has principally been produced through documentary analysis. It would be valuable to supplement this

with elite interviews with senior people in the regulatory bodies and government departments, as well as political figures, to understand more about the developing sense-making process and the level of regulatory co-operation domestically and internationally, as well as the push-back from those whose companies are the targets of regulation. The valuable work done by the University of Wisconsin's Zuckerberg Files project in documenting the twists and turns of the Facebook narrative could perhaps be supplemented by a specific focus on Facebook regulatory and legislative submissions across different jurisdictions. This would be a valuable project for researchers to collaborate on internationally.

It is interesting to see how regulators have been unwilling to allow Facebook to disrupt the international finance system with its Libra project (Carney, 2019; Knowles, 2019). If only the same pre-emptive vigilance had been paid to our democratic system! In advance of the 2020 US Presidential election, Zuckerberg has come out fighting on this point, claiming that the company has learned lessons from 2016 (Jack, 2020), which is, by all accounts, a new strategy (Scola, 2020; Isaac et al, 2020). He has sought to bolster Facebook's credibility by recruitment of big names from politics and the media to its Oversight Board (Naughton, 2020; Rusbridger, 2020).

The Coronavirus crisis has been an opportunity for Facebook and other 'Big Tech' companies to demonstrate their value to the wider community (Isaac et al, 2020; Forman, 2020). New Facebook groups have been set up as people share enthusiasms, organise volunteer activities, coordinate business deliveries, raise funds for health and social care projects, hold online activities including religious services, and much else. The company has donated substantial sums to small businesses and made use of its data-gathering to help track population behaviour in the pandemic, and developed its own symptom tracker (Newton, 2020b, c and d; Wong, 2020; Zuckerberg, 2020b).

Facebook has sought to demonstrate how it can block misinformation and disinformation about COVID-19, including anti-quarantine pages (Ghaffary, 2020). This has had a degree of success, though it has not been one hundred per cent effective (Avaaz, 2020; Fortson, 2020; Jack, 2020). But the success has simply drawn attention to Facebook's failure to do this for other issues (Frier and Wagner, 2020). Although the libertarian right suggests that this has demonstrated the effectiveness of self-regulation (Pethokoukis, 2020), there are signs that governments and regulators have not pulled back from their regulatory initiatives (CPI, 2020a and b; Pedigo, 2020; Washington State, 2020). Australia is forcing them to share revenue with media companies (Taylor, 2020), with similar pressure now in the UK (Moore, 2020; *The Times*, 2020). Germany proposes to amend its competition law in respect of market-tipping (Weck, 2020). France is

imposing rapid take-down rules (Reuters, 2020b). Denmark is taking action against dark patterns in privacy consent pop-ups (Kjaer, 2020). Anti-trust hearings in the States are pending (Feroohar, 2020). President Trump has published a draft order threatening the S230 exemptions of platforms (Romm and Dawsey, 2020).

Criticism of Facebook's corporate governance will continue, even if shareholder actions fail and independent directors decline to re-stand (Duke, 2020; Isaac et al, 2020). Recent news that Facebook has known since 2016 that its recommendation algorithms stimulate engagement with extremist messages in Facebook Groups will provoke even deeper scrutiny (Horwitz and Seetharaman, 2020).

Facebook continues to expand, buying GIPHY, the gif-generator for its data and affordances (Gartenberg, 2020), starting a rival to Zoom (Lerman, 2020), and expanding into shopping in competition with Amazon (Murphy, 2020), although Facebook's Libra project presently appears to have been scaled back in the face of regulatory concerns (Stacey and Murphy, 2019). Scrutiny will continue in the run-up to the 2020 US Presidential election (Bogost and Madrigal, 2020), but Facebook and others are using the COVID-19 crisis to lobby against initiatives such as the UK's Digital Services Tax (Aldrick and Hurley, 2020). Prior to the current crisis, however, Zuckerberg's trip to Brussels in pursuit of Facebook's own regulatory proposals (Egan, 2019; Bickert, 2020) did not appear to have cut much ice with EU regulators (Knowles, 2020a).

As this working paper was going to press, further developments illustrated its central thesis. The CMA published its final report on the online advertising market. Further regulation of the role of social media in elections was demanded by a House of Lords Committee. Facebook lost the next stage of its battle in Germany against the Bundeskartellamt competition decision. A wide range of major advertisers confirmed their participation in an advertising boycott for the month of July 2020.

This brings me back to my starting-point. Facebook is *not* unregulated: it is *under*-regulated. Regulation, as we have seen, is a process, not a finalised text. To borrow a phrase from Facebook's early days, done is better than perfect. The struggle continues – we take our victories where we can.

## Glossary

ASA	Advertising Standards Authority
BBFC	British Board of Film Classification
CDEI	Centre for Data Ethics and Innovation
CSPL	Committee on Standards in Public Life
CMA	Competition and Markets Authority
EC	Electoral Commission
FCA	Financial Conduct Authority
ICO	Information Commissioner's Office
LC	Law Commission
Ofcom	The Office of Communications

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