

**Meeting with Sir Nick Clegg, Vice-President for Global Affairs and Communications,
Facebook
3 February 2021**

You last met with Sir Nick on 16 April 2020 [REDACTED]

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How Ofcom is working with Government

The Government intends to bring draft legislation forward in 2021. Ofcom will not receive any new powers until the legislation has received Royal Assent. Ofcom will continue to work closely with Government through the passage of legislation and to provide technical advice on the statutory framework.

When Ofcom has been approved as the regulator by Parliament, it will continue to keep DCMS updated on progress relating to implementation of the regime, including on the development of codes of practice. The Government has said there will be a statutory obligation for us to consult with Ministers as we develop the Codes of practice. We will develop our own Codes on the basis of the latest available research, alongside wide-ranging engagement and formal consultation processes. These processes will involve a broad array of stakeholders including industry, government, consumer groups and civil society.

Ahead of the Online Safety Bill, Ofcom has recently acquired new powers to regulate UK-established video-sharing platforms through the transposition of the EU Audio-Visual Media Services Directive. We recently published a short regulatory guide on the new regime, ahead of developing and consulting on fuller regulatory guidance for industry in early 2021. We are also currently consulting on scope and jurisdiction guidance which will assist services to understand whether they provide a service which falls in scope of this new regime. We plan to finalise regulatory guidance for UK VSPs by next summer. We expect the VSP legislation to be repealed when the Online Safety Bill comes in.

Ofcom will also continue to promote media literacy under its existing duties and through our Making Sense of Media programme which, alongside our research, seeks to bring together a range of actors to help improve people’s media literacy skills online.

Enforcement

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It is for Government and Parliament to decide the appropriate enforcement mechanisms and sanctions. As set out in the Government’s response, its intention is that Ofcom will have the power to fine companies in breach of their duties up to £18m or 10% of turnover, whichever is higher. In the case of a multi-billion-dollar company, a penalty based on 10% of the company’s turnover could in theory be billions of pounds (although we will consider what is proportionate and appropriate in the circumstances). We note that the fine limit is also in line with existing powers of Ofcom, the Financial Conduct Authority and the Competition and Markets Authority in other areas. We will also have other enforcement sanctions, such as formally directing companies to specifically make improvements and various business disruption powers. We believe these will also be powerful enforcement tools.

The Government’s intention is that companies need not be based in the UK to be in scope of the proposed regime. Provided they can be accessed by UK users, Ofcom would be considering the risks they pose to UK consumers. We envisage drawing on a broad toolkit of measures to encourage compliance by overseas companies, including direct dialogue, liaison with overseas partners, and ultimately, powers to take enforcement action against overseas companies. We are discussing approaches to regulating online content with overseas regulators who have (or anticipate) comparable remits and will be working where possible to develop the interoperability of regulatory regimes. Our relationships with overseas regulators will be a key area for us to consider.

Under the proposed regime, Ofcom would have the power to impose in the most serious cases an escalating range of sanctions including fines and business disruption measures (such as ISP blocking or removal of payment services). Fines are a common sanction in regulatory enforcement actions. Business disruption measures have been successfully applied in the context of English copyright law, and by ISPs (co-ordinated by the Internet

Watch Foundation) to block material relating to Child Sexual Abuse and Exploitation, including material hosted on overseas websites.

Recent Facebook developments

Oversight Board first decisions published

Facebook's Oversight Board published its first five case decisions on 28 January: overturning four of Facebook's decisions, upholding one and issuing nine policy recommendations.¹ The cases covered four continents: Asia, Europe, North America and South America. For each case, Members decided whether the content violated Facebook's Community Standards and values. They also considered whether Facebook's removal of the content respected international human rights standards, including on freedom of expression and other human rights. The Board said members considered factors ranging from the nuances of language, to the user's intent and the context in which the content was posted. Nick Clegg has previously said he hopes the Oversight Board is "co-opted in some shape or form by governments".²

Trump ban and Oversight Board referral

Facebook said on Thursday 21 January it will refer its indefinite suspension of former President Donald Trump's account to its independent Oversight Board. This is the highest-profile referral to date for the Oversight Board, and a move that could lead to Trump either returning to the platform or facing a permanent suspension. Nick Clegg said in a blog post on 21 January that the company is referring the case to the company's oversight board.³ "We believe our decision was necessary and right," Clegg wrote. "Given its significance, we think it is important for the board to review it and reach an independent judgment on whether it should be upheld." The board indicated it will accept the referral, stating "A decision by the Board on this case will be binding on Facebook and determine whether Mr. Trump's suspension from access to Facebook and Instagram for an indefinite amount of time is overturned".

Facebook has asked the board two questions. Firstly, was Facebook's decision to indefinitely suspend Donald Trump's account correct, and should that suspension (which Facebook has said it will keep in place until the board issues its decision) be upheld or overturned? Secondly, does the board have any observations or recommendations about how Facebook should treat account suspensions when a user is a political leader? The board's decision on the first question is directly binding, and Facebook will follow the board's instructions on what to do with this particular account. The second question Facebook has referred is a request for policy guidance which will not be directly binding on the company.

More broadly, Mark Zuckerberg said on 27 January that Facebook was exploring ways "to turn down the temperature and discourage divisive conversation", particularly in users' news feeds. As part of this, the company would stop recommending political and civic groups to

¹ Oversight Board, <https://oversightboard.com/news/165523235084273-announcing-the-oversight-board-s-first-case-decisions/>

² New York Times, <https://www.nytimes.com/2021/01/24/business/media/trump-facebook-oversight-board.html>

³ Facebook, <https://about.fb.com/news/2021/01/referring-trump-suspension-to-oversight-board/>

users. In October, Facebook had temporarily switched off making such recommendations to US users specifically ahead of the election; that move is now permanent and affects users globally.

Facebook News

Since 26 January, stories from news outlets now appear in a dedicated Facebook feed in the UK. The UK launch of the Facebook News service is the first outside the US.⁴ Other titles featured include the Economist, Channel 4 News, STV, Daily Mail Group, DC Thomson, Financial Times, Sky News, Telegraph Media Group and regional titles such as those owned by JPI Media and the Midland News Association.

Facebook said the investment was intended to “support the industry in building sustainable business models”. Facebook said its launch in the US has shown it that 95% of the traffic to Facebook News publishers through that tab, are new readers who “have not interacted with those news outlets in the past”. However, it will also be seen as a strategic play by the company aimed at discouraging wider international regulation of the news media market – by showing that it is prepared to support local publishers without government intervention. For example, Australia has proposed a “news media bargaining code”, which would require tech companies to enter into negotiations for payment for content or face third party arbitration. Google has threatened to withdraw its search engine from Australia over the proposed plans.⁵

Nick Clegg argued in *The Telegraph* that “[Facebook] is neither a publisher – at least not in the traditional sense – nor is it a utility. There is no editor dictating the front page headline millions will read... Instead there are billions of 'front pages', each personalised to our individual tastes and preferences, and consisting of content created and shared by users themselves.”⁶

Facebook said products like Facebook News are more likely to sustainably support news journalism than a ‘pay-for-click’ model (which it argues would incentivise clickbait and volume over quality), while requiring technology companies to subsidise media companies (which the Australian proposals are argued to do) would risk skewing towards large corporations at the expense of the small local news providers most in need of support.

Q4 financial results (28/01/21)

Facebook posted record quarterly revenues: Q4 revenues for the Facebook group rose 33% to \$28.1bn,⁷ surpassing analyst expectations of an increase to \$26.4bn.⁸ Net income rose 53% to \$11.2bn, or \$3.88 a share. Monthly active users grew 12 per cent year-on-year to 2.8bn.

⁴ Facebook <https://about.fb.com/news/2021/01/new-destination-for-news-in-the-uk/>

⁵ BBC News <https://www.bbc.co.uk/news/world-australia-55760673>

⁶ The Telegraph <https://www.telegraph.co.uk/technology/2021/01/26/facebook-news-will-help-sustain-quality-journalism/>

⁷ Facebook, <https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx>

⁸ Financial Times, <https://www.ft.com/content/8d4f14d0-a30e-43e5-a8fc-e680d15e3261>

Facebook said it expects challenges in 2021 to its ad targeting revenue streams, notably “the impact of platform changes, notably iOS 14, as well as the evolving regulatory landscape”. (There are forthcoming privacy changes to Apple’s iOS 14 operating system, which requires applications on iPhones to obtain users’ permission to harvest advertisement targeting and tracking data). The company invested in “social commerce” across all its apps last year, launching Facebook Shops, which allows businesses to set up digital storefronts, as well as payments tools in several markets.

WhatsApp user privacy

WhatsApp in January was compelled to delay the rollout of an updated policy allowing it to share more transaction data with Facebook after the changes sparked privacy concerns and has led to an uptake in users downloading apps such as Signal and Telegram known for their strong privacy settings. Signal, which was not in the top 1,000 apps in UK at the beginning of the year, spent several days as the most downloaded app in the country, and has gained 7.5 million users globally.⁹

European Commission proposed EU ex ante regime and anti-trust investigations

The European Commission published their proposed approach to regulating digital markets on 15 December 2020, a week after the Digital Markets Taskforce delivered its advice to the UK Government. The proposals are set out in:

- the Digital Services Act (DSA) which updates the EU’s rules for illegal content, introduces a new transparency and accountability regime for online platforms’ content moderation and online advertising, and establishes enhanced responsibilities framework for “very large online platforms”.
- the Digital Markets Act (DMA) which establishes a new ex ante framework for the digital sector by imposing obligations on online companies that provide certain types of “core platform services” and are designated as “gatekeepers” on the basis of their size. The DMA also gives new powers to the Commission to run a more limited EU version of a market investigations regime that includes the ability to apply structural and behavioural remedies in limited circumstances of systemic non-compliance.

There is no doubt that Facebook’s operations would fall in scope of both these pillars of the EU regime under the definition of “very large online platforms” and “gatekeeper”, given the company’s size and the fact that social networks have been identified as a core service. Facebook responded to the Commission’s consultation to these proposals in the summer of 2020 in a succinct way that simply addressed each of the questions; it has not sought to make significant public comment on the proposals since December 2020. For context, Google and Amazon have been more vocal in challenging the DMA in particular, noting that at least some of these could have negative effects on innovation.

DG Competition has also reportedly (but not officially) started investigations in 2019 into Facebook’s e-marketplace and data practices on the grounds of abuse of dominance and coordinated action between competitors:

⁹ The Guardian, <https://www.theguardian.com/technology/2021/jan/26/uk-regulator-to-write-to-whatsapp-over-facebook-data-sharing>

- the e-market-place inquiry appears to focus on Facebook’s use of classified ads, with competitors alleging that its market power results in an unfair advantage due to self-preferencing, as well as the growth of the marketplace which has been linked in some way Facebook’s commercial ties with its rivals
- the use of data investigation is understood to cover how data is collected, combined and used from different sources so as to result in self-preferencing; and a method for Facebook to identify which companies to acquire because they represent a commercial threat.

US antitrust suits

On 9 December 2020 US authorities filed two significant antitrust suits against Facebook in Federal Court in Washington DC. The first, filed by the Federal Trade Commission (FTC) following an investigation launched in July 2019, alleges that Facebook has engaged in a systematic strategy to eliminate threats to its monopoly including the targeting and acquiring the potential companies representing competitive threats, namely Instagram and WhatsApp. It also alleges that Facebook has imposed anticompetitive conditions on third party developers’ access to interconnections on its platform, such as application programming interfaces (APIs) that allow developers’ apps to interface with Facebook. The FTC is seeking a permanent injunction in federal court that could require: divestiture of assets, including Instagram and WhatsApp; prohibit Facebook from imposing anticompetitive conditions on software developers’ and require Facebook to seek prior notice and approval for future mergers and acquisitions.

The second suit was filed by a multi-state coalition of state Attorneys General ,led by New York, alleging that Facebook has and continues to illegally stifle competition to protect its monopoly power. Like the FTC suit, this complaint also focusses on Facebook’s allegedly predatory acquisitions of Instagram and WhatsApp, and the company’s strategy towards APIs. It alleges a “buy or bury” approach, whereby if Facebook’s competitors refuse to be bought out it moves to stifle competition to increase pressure on the competitors. The complaint asks the court to halt Facebooks allegedly illegal and anticompetitive conduct, restrain Facebook from making further acquisition valued at or over \$10 million without advance notice to the plaintiff states, and provide any addition relief the court determines appropriate such as divestiture or restructuring.



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Online markets and CMA Digital Markets Taskforce

Ofcom supported the **CMA-led Digital Markets Taskforce**, which launched in July 2020 and delivered advice to Government on 8 December 2020. The advice proposed a new Digital Markets regime which would govern the most powerful tech firms – those with ‘strategic market status’ (SMS) – meaning those with substantial, entrenched market power and where the effects of that market power are particularly widespread or significant. A new ‘Digital Markets Unit’ (DMU) will ensure the ‘rules of the game’ are clear up-front, and work with powerful tech firms to ensure they comply with them. Additionally, the advice proposed reforms to wider competition and consumer protection laws.

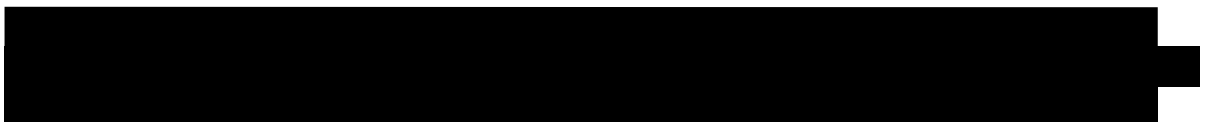
The three key proposed pillars of the regime for SMS firms were:

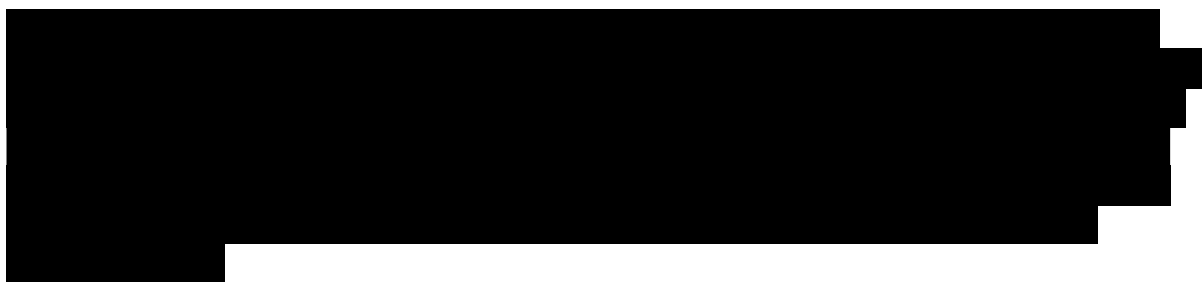
- **A new, legally binding code of conduct**, tailored to each firm and to where the evidence demonstrates problems might occur, designed and overseen by the DMU. The code will help to shape the behaviour of powerful digital firms, up front, and govern elements of how they do business with other companies and treat their users. There will be a range of powers available to the DMU to address any concerns, including the potential for significant penalties.
- **Pro-competitive interventions**, which can be used to address the sources of market power, allow competition to flourish and unlock the potential for transformative innovation by others in the market. An example of such an intervention could be imposing interoperability requirements on tech firms and better enabling consumers to control and share data.
- **Enhanced merger rules**, which would enable the CMA to apply closer scrutiny to transactions involving SMS firms. This would include it being mandatory to notify the CMA of a transaction, imposing a block on completing a deal until the CMA had investigated, and a change to more cautious legal test when looking at the likelihood of harm to consumers in order to address concerns about historic under-enforcement of mergers involving big tech firms.

Such a regime would likely impact Facebook; the CMA's July 2020 study on 'Online Platforms and Digital Advertising' conducted a detailed assessment of the market position of Facebook (and Google) in relation to digital advertising. The final Taskforce advice stated *"assessments for Google and Facebook, in relation to their activities in digital advertising should be prioritised, given the work of the CMA's online platforms and digital advertising market study. Progressing this work in advance should help to minimise any period between the regime coming into effect and the DMU being able to enforce against harmful conduct."* The advice also suggested that relevant sectors the DMU should initially prioritise *"online marketplaces, app stores, social networks, web browsers, online search engines, operating systems and cloud computing services"*. As such, it seems likely that designation of Facebook will come shortly after the regime has been established.

In particular, the Taskforce advice suggested that the DMU should ensure the code of conduct addresses the concerns about the effect of the power and position of SMS firms when dealing with publishers. It suggested the DMU could *"set out in guidance how the code principles should apply to trading between SMS firms and publishers... For example, the DMU could consider the extent to which it is reasonable for platforms to republish 'snippets' of content, and whether the terms on which they do this are fair."* The move towards a separate 'Facebook News' feed (discussed in detail below) may interact with this issue, particularly if the move is seen to reduce the imbalance between publishers and Facebook.

In November 2020, in response to the CMA's July 2020 market study on 'Online Platforms and Digital Advertising', the Government announced funding for the new 'Digital Markets Unit' which will sit within the CMA. The DMU will begin being set up in April 2021, prior to being formally put on a statutory footing 'as soon as Parliamentary time allows'. The response also committed Government to consulting on proposals for a new pro-competition regime 'in early 2021' and consulting on reforms to the wider approach to competition policy 'in 2021'.





Political advertising report: Insights into tools for online regulation: Findings from monitoring platforms' commitments to increase transparency of online political advertising

[Note that this report is due to be published on 4/2 i.e. after the meeting.]

- The voluntary Code of Practice on Disinformation was developed by major platforms in 2018 to tackle online disinformation and help to secure the integrity of democratic elections and debates online. We joined other regulators across Europe in monitoring the implementation of the Code during election periods.
- Ofcom's monitoring took place during the UK 2019 General Election and centred on a quantitative and qualitative review of the information made available by Google and Facebook on political advertising as part of their commitments under the Code.
- Our interest in undertaking this work was in developing experience in the use of codes of practice as regulatory tools for addressing online issues, demonstrating our credibility as an online regulator, and further involving ourselves in international online regulation policy debates.
- Our report discusses the lessons we learned from our monitoring exercise, which can contribute to the wider debates on how regulation can help to address online challenges. These can be summarised as the following: regulation may need to take an iterative approach; better transparency about platforms' processes would allow regulators to assess effectiveness and build trust; open dialogue between regulators, platforms and civil society about the proportionality of making data available can help ensure effective outcomes. Monitoring could also be strengthened by supplementing the analysis of platforms' data with other evidence, such as consumer research into how users engage with the measures platforms take.
- Our report discusses findings specific to platforms implementation of the Code of Practice, but relevant for consideration of future regulatory tools, which were the following:
 - The information provided by online platforms has potentially brought benefits to citizens.
 - However, there is scope for platforms to provide further information to users to increase transparency of political advertising.
 - We observed differences between different datasets supplied by the same platform, and the application of the Code across platforms.
 - We also observed potential gaps in platforms' implementation of the Code that risked limiting the effectiveness of the actions taken by platforms to make information available to their users and researchers.