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Dear Ofcom

Response to consultation from Lord Bethell.

I wanted to raise the following concerns I and others share on Ofcom’s approach to its ‘Draft Guidance on Age Assurance and other Part 5 Duties for Service Providers Publishing Pornographic Content on Online Services.’

Achieving the intent of Parliament – where the draft regulations fail to meet their objectives.

During the Parliamentary process, the words “highly effective” were added to section 81(3) of the Act after much consultation and discussion between the Minister, Ofcom, myself, other Honourable Members of the House of Lords and a coalition of civil society members and child protection experts. The purpose of introducing that wording in the Act was to ensure that age assurance was ‘outcome-focused’ rather than focused on simply the methods and processes of age assurance.

In introducing the new wording, the Minister was very clear on the intent.

“[content providers] will need to be highly effective at correctly determining whether a particular user is a child. This new bar will achieve the intended outcome behind the amendments which we looked at in Committee, seeking to introduce a standard of “beyond reasonable doubt” for age assurance for pornography, while avoiding the risk of legal challenge or inadvertent loopholes.”¹

To be crystal clear, it was understood (1) in conversations with ministers, (2) during the debate on the bill and (3) from the words of the minister from the despatch box that highly effective age assurance systems must demonstrate that their certified expected outcomes are so robust that something like 95% of children under 18 are prevented from accessing primary

¹ Hansard HL Debate vol 831 no 189 col 1430 6th July 2023 URL <https://hansard.parliament.uk/lords/2023-07-06/debates/35CCD184-5828-4C47-AA19-D19D8AF44938/OnlineSafetyBill>

priority content, and more than 99% of children under 16 are prevented. It was agreed that the vague input measures in the draft bill did not cut it.

The Minister informed Parliament that the definition of ‘highly effective’ would meet the expectations of Parliamentarians, namely that age assurance should be set to a level of compliance akin to the criminal law standard of proof namely, ‘beyond reasonable doubt.’ However, Ofcom’s guidance fails to set out a definition of what it determines ‘highly effective’ to be.

While we accepted at the time that these exact words were not the correct language for inclusion in the final wording of the Online Safety Act, the principle was crucial. “Beyond a reasonable doubt” is an outcome-focused test in criminal law - a jury must be satisfied, to a high degree of certainty, that the case's outcome should result in the guilt of the accused. In terms of age verification, “beyond reasonable doubt” means “a high degree of certainty that no children are accessing pornographic content online”. This test is applied at the end of a criminal trial to ensure the evidence presented and the court process meets the requisite high standard of proof. Clearly, it was Parliament’s intention that Ofcom would define the standard age verification must achieve to satisfy the legislation.

Ofcom must define the standard by defining what ‘highly effective’ means. Disappointingly, the guidance fails to do what Parliament asked and expected.

In the draft regulations, the term ‘highly effective’ seems to serve only as a vague principle, and it creates uncertainty for both regulators and service providers. As Ofcom’s own Economics Director writes:

“... non-prescriptive and broadly stated principles may leave firms with less certainty on what conduct would or would not comply with these principles. As a result, principles can be less effective where companies interpret requirements in a lax way, unless the regulator can course correct by effective enforcement or by relying on reputational pressures. The opposite can also occur if a principles-based approach discourages positive actions because firms lack certainty on whether they satisfy the stated principles.”²

The regulatory context

Experience from other sectors seems to support the idea that taking a non-outcomes-based focus is unlikely to be successful. Within the field of financial regulation, the Financial Services Authority (as it was then named) have found that they have had to move through different regulatory regimes, going from self-regulation to a principles-based regulation, before ultimately settling on outcome-focused regulation following the 2008 financial crash.³ Other jurisdictions have come to similar conclusions about the need for outcomes-based measures within regulatory regimes. The Australian Government in 2013 had asked the

² Van den Brande (2021), Rules-based versus principle-based regulation – is there a clear front runner, Ofcom, [online] URL: <https://www.ofcom.org.uk/news-centre/2021/rules-versus-principles-based-regulation>, Date Accessed: 02/03/2024

³ Black J (2015), Chapter 8 – Regulatory Styles and Supervisory Strategies, In: Moloney N et al The Oxford Handbook of Financial Regulation, Online Edition

Australian Law Reform Commission to take of legislation around privacy in light of emerging technologies. The commission felt that a pure principles-based approach would not be sufficient and thought that a hybrid approach was required to supplement principles with more traditional regulation.⁴ It would be prudent to learn from the experience of the financial sector and not for us to rely on a principles without outcome-measures.

Overcoming the regulatory challenge

This lack of guidance on the meaning of ‘highly effective’ means there is no set standard for content providers to attain. This leaves both content providers and Ofcom in a quandary. If the guidance sets no standard as to what meets the statutory bar of ‘highly effective’ then there is nothing by which to judge if the content provider has met their obligations. I refer you back to my own experience during the COVID-19 pandemic when I was greatly impressed by the clarity of regulatory guidance by the MHRA, which set crystal-clear, well-judged targets which acted to encourage providers using innovation and investment in systems to step up to clear, ambitious regulatory standards.

Similarly, for age assurance to meet the statutory test of ‘highly effective’, the guidance should state a standard that content providers must attain. I and others would suggest that the term ‘highly effective’ needs to be defined and a percentage applied (we would suggest something like “99%” or something similarly clear and measurable) to the age assurance method whereby a content provider can prove that the technique and process employed prevents 99% of children accessing the content. Currently, age verification providers are confident that age assurance is accurate to 99% for identifying those under 16 years and 95% for 16-18 years.

And as my personal experience illustrates, necessity very often reigns. If Ofcom is not satisfied that the above is a true and accurate picture of age verification capabilities, then having a high outcome-based measure will result in content providers needing to innovate and develop, something the pornography industry and all others touched by these regulations are well adept at doing and something that both Ofcom and Parliament wish to encourage. However, suppose the guidance fails to include an outcome-based measure. In that case, content providers will choose the cheapest method allowable by the guidance, and there will be no encouragement for innovation and development within the industry. It will be cheaper to spend money contesting the standard than on meeting the standard. Indeed, without an outcome-based measure, as mandated by Parliament, there will be a ‘race to the bottom’, and content providers will implement the minimum standards, if even that.

Worrying signals of lack of seriousness

These concerns about the draft regulations are made in the context of concerns that Ofcom has not shown the level of enforcement necessary to curb harmful online material. In the recently published House of Commons Committee of Public Accounts Preparedness for Online Safety Regulation Thirteenth Report of Session 2023–24, Ofcom gave examples of

⁴ Australian Law Reform Commission (2013), For your information: Australian Privacy Law and Practice, Australian Government, [online] URL: <https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/>, Date Accessed: 29/02/2024

how it currently deals with non-compliance, explaining that ‘where non-compliance issues arise, it will approach services with an engagement-first attitude and would not normally move straight to enforcement.’⁵

This is deeply concerning. The pornography industry has repeatedly shown its disregard for laws requiring platforms to implement age verification. An engagement-first attitude is insufficient when the service providers in question actively avoid and disregard their duties. Further, Ofcom references its regulation of video sharing platforms as a high enforcement standard. Yet it has taken Ofcom anywhere from 2 to 3 years to take enforcement action against pornographic sites that failed to comply with the duties set out for them. This is an unacceptable amount of time for enforcement action.

The same is true for Video on Demand services. Ofcom has been the regulator for VODs since 2021, yet it has not yet moved to enforce the age verification requirements. To date no VoD service has had enforcement action taken against it for failure to comply with the Communications Act, while only one service is under investigation.

It is worth noting the speed with which the European Commission has acted to initiate enforcement through information requests to both Twitter and TikTok almost as soon it is acquired the powers to regulate Very Large Online Platforms directly. This is a far more effective approach to implementing a new law swiftly that makes a clear example of a high-profile sites on day one.

I am concerned that we will see the same lack of enforcement for service providers publishing pornographic content under the OSA.⁶

Assessment of the industry.

When assessing the realistic capabilities of the tech industry to implement effective age assurance, it is a mistake to limit engagement to the existing UK-based age assurance industry which is largely occupied by specialist SME operators with relatively small research and development budgets. No doubt, these companies will provide a conservative assessment of what is achievable because of the limited scope of their technology, the limited reach of their platforms and the challenges they have to partner with large firms or maverick, semi-legal operators (of the kind that dominate the porn industry).

Instead, Ofcom should take a more ambitious approach that assumes that the onus will be put onto the major platforms which have incredibly deep pockets, have a strong business incentive to ensure that their platforms are safe places for children, and have a remarkable track record of problem-solving when it comes to these sorts of challenges, so long as they prioritise their efforts. For instance, we should all respect the introduction of two-factor authorisation across the industry was a huge achievement that massively reduced the fraud epidemic. For instance, Facebook turned around the threats presented by Apple's App

⁵ House of Commons Committee of Public Accounts Preparedness for online safety regulation Thirteenth Report of Session 2023–24: <https://committees.parliament.uk/publications/43321/documents/215761/default/>

⁶ An investigation has been opened against one operator for failure to report service as well as failure to implement age verification, but no enforcement action has been proposed to date on foot of that investigation. See Investigation into Secure Live Media Ltd – Ofcom

Tracking Transparency privacy features, and its advertising revenues have boomed on the back of investment in new advertising technologies – a remarkable achievement that has surprised many observers. For instance, Meta has introduced incredibly effective and seamlessly executed end-to-end encryption across its platforms when it felt there was a strong commercial incentive. There are a number of hugely successful industry partnerships across the tech and content industries to protect privacy, defend and reward intellectual property, share revenues and fight off cybersecurity that are considerably more complex than the relatively simple challenges presented by age verification.

Although Ofcom may feel like the UK is ahead of the rest of the world in some aspects of age verification, it is worth remembering that these companies are facing the same pressures on AV in many other jurisdictions, including from many US state and federal courts and legislators, and the EU and European state legislators and courts. It is reasonable to expect that many major companies have already sunk significant resources into futureproofing their companies from the potential requirement to implement age verification so it is reasonable to think that much of this work has already been done and it is only necessary to turn on some of these features.

By way of conclusion, Ofcom should not take the huffing and puffing of technology companies about the complexity of these issues when they are clearly capable of undertaking much more complex challenges when there is a strong profit motive. Instead, Ofcom should take into consideration the remarkable achievements by the tech and content industries and demand the same level of ambition to investment of programming time, UX creativity and all the necessary disciplines necessary to make a seamless, successful age verification culture that protects are children from predators and internet filth.

Threat of judicial review – (a) The Guidance is Procedurally Improper

Section 81 of the Online Safety Act places a duty on a regulated provider of pornographic content to ensure, by the use of age verification or age estimation (or both), that children are generally not able to encounter pornography on their platform. The Act also places a duty on the regulated provider to set out a record of their measures and how they decided to take this course of action.

Under section 82, Ofcom is required to set out guidance on how a regulated provider can comply with those duties. The test by which Ofcom must judge if the duties have been kept is set out in section 81(3); namely, age verification/estimation must be ‘highly effective.’ The words ‘highly effective’ are not a principle; they are the standard that must be met to comply with the duties. It is for Ofcom to define what meets the standard of highly effective.

The draft consultation does not set out what meets the standard of highly effective and given that Parliament has tasked Ofcom with adjudicating what meets the standard of highly effective, to have failed to set out a clear definition is procedurally improper.

Fairness for users and regulated providers demands that Ofcom clearly states what does and does not meet the required legislative standard of highly effective. As Parliament needs, standards would not be uniform across the industry without a definition.

If Ofcom does not define highly effective, then a court will.

b. Enforcement

It is concerning that during the consultation period, Ofcom has indicated that any enforcement will follow a period of working with the industry to ensure compliance. This will only lead to further delay of age verification. For example, Ofcom is required to regulate VoDs for age verification, yet worryingly, many VoDs continue to ignore the requirements of the Communications Act, and some three years after assuming the powers, Ofcom has only now started to investigate breaches and take enforcement action. Three years is unacceptably long for enforcement. A clear statement of intent must be made by Ofcom that, unlike VODs, they will enforce the duties under part 5 of the Online Safety Act.

If highly effective is not adequately defined by Ofcom, this will lead to further delay in enforcement as different regulated providers will seek to implement different standards. If Ofcom fails to explain highly effective, it will delay enforcement and leave Ofcom open to challenge. Failing to enforce for three years after the guidance is issued will not be acceptable and will be judicially reviewed.

Conclusion.

When we brought in these measures, we understood that “highly effective” age assurance systems meant something like a system that demonstrated that their certified expected outcomes are such that more than 95% of children under 18 are prevented from accessing primary priority content, and more than 99% of children under 16 are prevented. These regulations fall far short of this.

If they are not amended there is a high risk if judicial review by parties who believe that Ofcom has not fulfilled its obligations to Parliament and the law (as outlined above). This will add delay to effective regulation and further harms to children, and create a distraction for Ofcom.

I implore you to rethink the Guidance as it is currently drafted and meets the mandate laid out for Ofcom in the Online Safety Act.

With best wishes and thanks



Lord Bethell