

23rd December 2024

Attn: The United Kingdom Office of Communications

Riverside House
2a Southwark Bridge Road
London
SE1 9HA

OFFICIAL RESPONSE

Re: Response to Ofcom's Consultation on Online Safety Fees and Penalties

We appreciate the opportunity to contribute to this important discussion. Below please find our responses to Ofcom's consultation on implementing fees and penalties under the Online Safety Act 2023 ("the Act").

**Question 1: Do you agree with our proposed approach to determining QWR?
We would welcome comments in particular on:**

a) Our proposal to define QWR by reference to the UK revenues

We respectfully disagree with the proposal to define Qualifying Worldwide Revenue ("QWR") by reference to worldwide revenues arising in connection with the provision of regulated services anywhere in the world. We strongly believe that the calculation of both fees and penalties **should be based exclusively on UK-derived revenues** from regulated services.

The primary purpose of the Act is to protect UK users. Including revenues generated from other jurisdictions extends beyond the territorial scope of the Act and contradicts the principle of regulatory jurisdiction. Applying worldwide revenue calculations to international service providers with minimal UK market presence imposes a disproportionate burden and could negatively impact competition, innovation, and investment in the UK market.

Moreover, this approach may fail the established proportionality test set forth in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69:

- (1) The legislative objective is sufficiently important to justify limiting a fundamental right: while protecting UK users is indeed a sufficiently important legislative objective, the worldwide revenue approach exceeds this territorial aim.
- (2) The measures designed to meet the legislative objective are rationally connected to it: calculating fees and penalties based on global revenues lacks rational connection to the objective of UK user protection.
- (3) The means used to impair the right or freedom are no more than is necessary to accomplish the objective: an expansive financial measure goes far beyond what is necessary to accomplish the regulatory objective, especially

considering that many international providers may derive only a small fraction of their revenue from UK operations.

Thus, our recommendations would be to (1) develop clear guidelines for attributing revenue to UK users, (2) establish transparent methodologies for reporting and calculating UK-specific revenues, setting proportionate thresholds based on UK market activity and (3) consider different business models and revenue streams in the calculation framework, particularly for international companies.

b) Our proposals in relation to apportioning revenue to the regulated service

We support Ofcom's proposal to allow providers to apportion revenues on a "just and reasonable" basis to commit to the diversity of various business models.

At the same time, we kindly suggest that Ofcom provides illustrative examples and/or particular guidelines to assist providers in applying this principle in practise.

c) Our proposed approach to requiring QWR to be aggregated across all regulated services provided by the provider

In general aggregating QWR across all regulated services provided by a provider is reasonable, but this approach should be balanced with the need to avoid disproportionate burdens on providers offering a wide range of services, particularly if some services generate minimal UK revenue.

We respectfully recommend that Ofcom considers mechanisms to mitigate potential negative impacts on providers with diverse portfolios, (e.g. applying thresholds based on UK-derived revenues).

d) Our proposal to take account of revenues received by another group undertaking in the determination of QWR

We understand the logic for including revenues received by other group undertakings when determining QWR, however, we believe that this approach may lead to complexity and unintended consequences, particularly for multinational groups with varied structures and, therefore, in our opinion, should be avoided.

In any case, we respectfully recommend that Ofcom ensures that any inclusion of group revenues is strictly limited to revenues directly attributable to the provision of regulated services to UK users.

Question 2: Do you agree with our proposed definition of 'qualifying period'?

We agree with Ofcom's proposal to define the "qualifying period" as the second calendar year preceding the one within which the charging year begins. Based on our practice, this approach allows providers to compile the necessary financial information in a timely manner.

Question 3: Do you have any views on our proposal not to issue a statement to Part 4B services (VSPs) (under paragraph 21 of Schedule 17 to the Act)?

Given the anticipated repeal of the VSP regime and the limited number of providers affected, it appears reasonable to manage any issues through direct engagement rather than formal statements.

Question 4: Do you agree with our proposal for determining the QWR of a group, when calculating the maximum penalty that may be imposed on a provider and one or more group undertakings which are jointly and severally liable for a breach under the Act, i.e., that it is determined as the sum of the worldwide revenues of the provider and each of its group undertakings, whether or not attributable to the provision of a regulated service?

Please also see the answer to the Question 1 above.

We disagree with the proposal to determine the QWR of a group by summing the worldwide revenues of the provider and its group undertakings, regardless of whether the revenues are attributable to the provision of regulated services, because such an approach will result in disproportionate penalties towards providers.

We recommend that the calculation of maximum penalties should be based on revenues derived from UK-regulated services to establish fair and proportionate approach. Including global revenues unrelated to regulated services lacks a connection to the objective of enforcing compliance with the Act and may discourage international investment in the UK market.

Question 5: Do you have any comments on our proposed advice to the Secretary of State to set a QWR threshold figure within the range of £200m to £500m, with a preferred figure of £250m, for all types of regulated services?

Conceptually we agree that setting a QWR threshold is necessary to limit the impact on SMEs. However, as it was outlined above, we strongly believe that the proposed threshold of £250 million may still capture providers with minimal UK presence or modest revenues from regulated services.

We recommend that the threshold be based solely on UK-derived revenues rather than worldwide revenues to ensure proportionality.

Question 6: Do you have any comments on our proposed exemption for providers with UK revenue less than £10m in a qualifying period?

We support the proposed exemption for providers with UK revenues less than £10 million in a qualifying period, as this exemption corroborates the principle of proportionality and helps prevent imposing disproportionate fees on providers with minimal UK revenues. We believe that this exemption and threshold should also apply in the event that Ofcom takes the view that only UK revenues are relevant for the purposes of calculating fees and penalties.

Question 7: Do you agree that an exemption for services contributing to the public interest is not required at this time given the proposed QWR threshold and UK revenue exemption?

We agree that the existing exemptions should be enough to lift unnecessary burdens from not-for-profit and charitable organizations.

At the same time, we recommend that Ofcom remains open to revisiting this matter in case there will be evidence indicating that public interest services are adversely affected.

Question 8: Do you agree with our proposed approach to setting the amount of fees payable by providers above the QWR threshold?

As previously stated, we believe fees should be based on UK-derived revenues rather than worldwide revenues to ensure proportionality and fairness.

We suggest that Ofcom reassesses the fee structure to reflect revenues attributable to UK-regulated activities.

Question 9: Do you agree with our proposals relating to supporting evidence, documentation and other information, and the manner of notification, as reflected in our Notification Regulations (Annex 10)?

We kindly request that Ofcom ensures the requirements do not impose unnecessary administrative burdens on providers, as providing supporting evidence and documentation may be considered such.

Therefore, we recommend that Ofcom provides clear guidance and templates to assist providers in preparing the required documentation. Additionally, we ask Ofcom to consider proportionality in the level of detail requested from providers with straightforward revenue structures, limiting it to what is strictly necessary. Currently, it remains unclear, including based on Annex 10, what information or documentation would be sufficient.

Question 10: Do you have any comments on the proposed Manner of Notification document in Annex 11 accompanying the Notification Regulations?

We have reviewed the proposed Manner of Notification document and find it generally acceptable.

The only matter to consider is that Ofcom provides adequate support and guidance for providers during the initial implementation phase.

Question 11: Do you agree with our assessment of the potential impact of our proposals? If you disagree, please explain why.

The main stumbling block is the conclusion that determining QWR based on worldwide revenues will not have significant adverse effects. As outlined in our responses above, basing fees and penalties on global revenues imposes disproportionate burdens on

international providers and may discourage investment and innovation in the UK market.

Question 12: Do you have further views or comments that you wish to make in respect of this consultation?

No.

Question A1: In relation to our equality impact assessment, do you agree with our assessment of the potential impact of our proposals on equality groups? If you disagree, please explain why.

We generally agree with Ofcom's assessment that the proposals are unlikely to have a negative impact on equality groups. However, it is crucial to continue monitoring the impact on equality groups to avoid unintended consequences among serving vulnerable or underserved communities.

Question A2: Are you currently aware of any providers of regulated services targeting or providing support in any way to specific equality groups that are likely to generate a QWR that meets or exceeds the proposed threshold?

At this time, we are not aware of any providers targeting specific equality groups that would meet or exceed the proposed QWR threshold.

Question A3: In relation to our Welsh language assessment, do you agree that our proposals are likely to have positive, or more positive impacts on opportunities to use Welsh and treating Welsh no less favourably than English? If you disagree, please explain why, including how you consider these proposals could be revised to have positive effects or more positive effects, or no adverse effects or fewer adverse effects on opportunities to use Welsh and treating Welsh no less favourably than English.

We agree that the proposals are likely to have a positive impact on opportunities to use Welsh and treat Welsh no less favourably than English in order to create a truly bilingual environment where Welsh speakers can confidently engage and be engaged.

Please do not hesitate to contact us if you require any further information or clarification on our responses.

Yours sincerely,

