Uber's response to Ofcom's consultation on implementing fees and penalties under the Online Safety Act 2023

About Uber

Uber welcomes the opportunity to respond to Ofcom's consultation on fees and penalties under the Online Safety Act (OSA). The UK is one of Uber's most important markets, leading the way globally for Uber's investment in sustainability and, most recently, in AV technology through our partnership with UK AI pioneer, Wayve. **We are committed to safety at Uber and have robust processes in place to protect all those who use our platform. We support the objectives of the Online Safety Act to keep people safe from harm while online, especially children. However we have strong concerns regarding the proportionality of the impact of the proposed fees and penalties regime on 'lower risk' services, the degree of consultation with businesses responsible for 'low risk' services and the implications for growth and investment in our sector**. We stand ready to work alongside Ofcom and the Government ahead of the implementation of secondary legislation to support delivery of a regime that is fair and proportional while also achieving the original policy aims of the Online Safety Act.

Consultation 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 worldwide revenues*.**

We do not agree with Ofcom's approach of using "worldwide referable revenue" to calculate qualifying worldwide revenue (QWR) and strongly believe Ofcom should be using the "UK referable revenue" instead. Under the OSA, the duties in relation to regulated services only extend to the design, operation and use of the service in the UK and the design, operation and use of the service as it affects UK users (s.8(3), s.25(1) OSA). Given that the duties in the Act only apply insofar as the service affects the UK / UK users, it is disproportionate for fees to be calculated on a worldwide basis, when such an approach takes into account revenue generated by non-UK users. We strongly believe Ofcom should consider again the proportionality of this approach - particularly for 'low risk' services and platforms.

The current proposed regime risks stifling growth, by deterring business investment, and limiting consumer choice. There may be some circumstances in which a service that has a very large worldwide presence and a comparatively small UK presence (but above the £10m UK revenue threshold) is required to pay fees that are a disproportionately large proportion of their UK revenue. For example, a service that has a UK revenue of £50m and a worldwide revenue of £700m would be required to pay fees on the balance of £750m, despite the vast majority of this revenue being generated outside the UK. This may have the effect of encouraging these companies to withdraw from the UK. Furthermore, a service that has a large worldwide revenue but under £10m UK revenue is disincentivised from growing its UK offering, as a small increase in revenue may lead to huge cost, if it is brought outside the scope of the £10m exemption. In essence, this approach has a distortive effect on the market, because it penalises services that are bigger outside the UK. Large global businesses may also be dissuaded from launching

their products in the UK - or growing their business there - given that this regime would capture their worldwide revenue.

Revenue collected under the worldwide revenue approach also fails to take account of the differences between product offerings in different jurisdictions. Uber, as a worldwide business, is consistently innovating its offering, and as such will regularly create new features for the benefit of consumers. When these features are rolled out, they are sometimes only released in specific markets. Under Ofcom's current proposals, businesses like Uber are required to pay fees in relation to revenue generated by features and functionalities that are not even available to UK users, and might never be.

As noted above, Ofcom sets out an exemption that providers of regulated services whose UK referable revenue is less than £10m are exempt from paying fees. The inclusion of this exemption reflects an acknowledgement that the number of UK users is relevant for the purposes of paying fees and calculating potential fines. It is therefore inconsistent for this exemption to account for UK referable revenue, while QWR is based on worldwide revenue.

Finally, Ofcom has indicated that one of the reasons it has defined QWR by reference to worldwide revenues is practical convenience - that providers "may not account separately for revenues attributable to use of the service by users in the UK and users in the rest of the world" (para 3.1.11 consultation document). While this may be true for some providers, it is clearly not true for all. The regulations should therefore make clear that where providers do calculate UK revenue they should be permitted to use this figure. Providers who do not separate revenue in this way should be permitted to apportion their worldwide revenue from regulated services, between the UK and the rest of the world, on a just and reasonable basis with only the former category of revenue being relevant to the provider's OSA fees liability (providers are permitted to apportion revenue in this way in relation to the exemption for UK revenue discussed above, which indicates that Ofcom considers this to be an acceptable methodology). Of course, if a provider chooses to use their figure for worldwide revenue for administrative ease then that choice should be open to them.

In the alternative, we would encourage Ofcom to consider further exemptions (similar to the £10m UK revenue threshold) to ensure there are no unintended consequences from an unduly onerous regime. We are aware that Ofcom has implemented similar exemptions where they may have been unintended targets from other regulatory regimes.

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

While Uber supports in principle the apportioning of revenue on a "just and reasonable" basis, we would ask for further guidance in order to clarify how services should practically go about this.

Consultation 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 provide evidence in support of your response.

The definition of QWR for penalties, where the provider and one or more of the group undertakings are jointly and severally liable for the breach includes revenue "whether or not it is referable to any regulated service". We strongly believe it is disproportionate and inappropriate for this calculation to include non-referable revenue, as this takes into account revenue generated from non-regulated services. The purpose of the OSA is to make the use of internet services that are regulated safer for individuals in the UK (s.1 OSA). The services within scope of the regime are clearly set out in the Act itself, and Ofcom's functions (and the way in which it spends money) are in respect of these services only. The regime is not set up to address non-regulated services in any other respect, and as such should not take this revenue into account when calculating penalties.

Ofcom notes that the inclusion of non-regulated services in these circumstances is necessary for the calculation to be an "effective deterrent", but this is clearly not the case and not a proportionate approach: the potential penalty applicable under the regime, even when based on the revenue referable to the regulated service alone, is very high (and is therefore a sufficiently effective deterrent).

Consultation question 8: Do you agree with our proposed approach to setting the amount of fees payable by providers above the QWR threshold? Please provide evidence to support your response.

We note that the Consultation assumes an annual cost relating to online safety regulation of £70m, based on the costs associated with online safety work per the Ofcom Tariff Tables 2024/25, albeit this estimation may vary (para 3.4.10). It would be useful for companies to receive projections as to whether Ofcom anticipates that this budget will increase or decrease in the following financial years, to allow organisations to project anticipated fees payable to Ofcom in future financial years.

Furthermore, we consider that Ofcom should commit to a cap on the total fee that a service provider is required to pay. This is necessary to ensure that service providers are able to anticipate and manage the potential fees that they will be subject to in a given charging year. Without this commitment, service providers are unable to predict the potential amount of fees that they will be subject to in future. In order to adhere to the guidance set out by the Secretary of State, Ofcom should set out an upper limit that providers could be required to pay. Without this, providers are unable to consider their financial position in the future, which may act as a disincentive for companies to enter the UK.

This would align with the approach taken by other regulators, such as under the Digital Services Act in the EU. Furthermore, Ofcom should also commit to providing a rebate if they receive too great an amount of fees, similar to both the Bank of England's fees regime for the supervision of financial market infrastructure and Ofgem's licence fee regime, where any licence fee saving identified at year-end is returned by Ofgem to those who funded it.

Consultation question 12: Do you have further views / comments that you wish to make in respect of this consultation?

Tiered fees based on risk

We strongly recommend that Ofcom consider the *type of service* - and the inherent potential for risk within that service - as the determinant of the level of fees applied to services under the regime. Some services (for example Part 5 pornography services) are inherently more risky, and should therefore be required to pay a greater proportion of their referable revenue toward fees. We do not believe it is proportionate to require all other services to pay the same percentage of their revenue toward fees as the services that were the main reasons behind the development of the online safety regime initially.

We recognise that, in the Consultation, Ofcom considered whether providers of riskier services should pay higher fees and deemed that this would not be practicable, given the potential complexity for providers where multiple regulated services have varying risk levels, and the challenge of developing a measure of risk which is objective and comparable across services.

However the OSA clearly envisages that a different approach may be taken to the charging of fees in relation to different kinds of regulated service. s.88(5) of the Act sets out that Ofcom may make different provisions in its Statement of Charging Principle for "different kinds of regulated services". Ofcom has also already identified various types of service in both the "Overview of Regulated Services" document and in the Risk Profiles in its illegal harms Risk Assessment Guidance. These documents accurately capture the potential for harm (and therefore the way in which Ofcom's regulatory spend is generated) of each type of service; and are therefore a strong indicator of where Ofcom's regulatory efforts will be focussed over time.

Given the potential impact of the current proposals, we would encourage Ofcom to think further about implementing a tiered fees regime based on the type of service.

As an alternative, we would support a tiered regime based on categorisation to be the next best approach. This could be done by creating charging bands depending on the categorisation of a provider, with categorised providers paying a larger percentage of their revenue in fees. While categorisation is a less stable basis than the type of service, and therefore has the potential to change over time, Ofcom will have clear sight on emerging Category 1 services and will have a degree of certainty about future funding.

Ofcom's Categorisation Advice to the Secretary of State provides a strong rationale for charging categorised service providers a higher fee. In the Advice, Category 1 providers were chosen as a result of the potential for easy, quick and wide dissemination of information, through content recommender systems. These services could therefore be required to pay the highest amount of fees, for the reasons set out above. The approach to calculating fees should then be staggered between Category 1/2A and Category 2B providers.