



Impress response to Ofcom's Categorisation: research and advice call for evidence

August 2023

We are pleased that Ofcom has decided to conduct a call for evidence on the research Ofcom must carry out to help prepare its advice for categorising regulated services under the Online Safety regime. This is an opportune time to address one of the more controversial and significant areas of the Online Safety regime: how the legislation impacts on news publishers operating in the UK.

Impress, as the UK's only recognised self-regulatory body for the press under Royal Charter, has long held and advocated for the position that the regime is likely to a) bring the news publishing sector into scope and b) could have perverse consequences on the freedom of the press to operate unfettered by statutory regulation.

This submission sets out:

- How news publishers are currently regulated under the Royal Charter framework.
- Impress' interpretation of the regime as it stands, qualified by the legislation's passage through Parliament, specifically: how news publisher's regulated user service function is likely to bring them in scope, how exempting criteria will apply to them, and Ofcom's obligations in relation to these two issues.
- Impress' recommendations in relation to Ofcom's obligations, principally:
 1. Ofcom must provide the industry with clear guidance as to how it intends to approach the issue of categorisation and exclusion of relevant news publishers.
 2. Ofcom should defer to the competence of approved regulators such as Impress or the Royal Charter oversight body, the Press Recognition Panel, in interpreting the legislation in relation to relevant news publishers.
 3. A clear assurance from Ofcom that UK news publishers regulated by Impress will not be impacted in any way by the regime.

Current system of regulation for UK news publishers

Compared to broadcasters, UK print and online news publishers currently are not subject to direct statutory regulatory oversight.¹ Most of these news publishers self-regulate and are not members of any industry or independent self-regulatory body (around 60% of UK news publishers operating).

94 publishers, responsible for over 1500 news titles, have joined industry complaints body, the Independent Press Standards Organisation, which has remit to respond and manage complaints about the content published on their news publisher's websites, including readers' letters and user comments on websites which the publication has moderated. This organisation is not a recognised independent regulator. See below.

121 news publishers, responsible for over 200 news titles, have joined approved regulator Impress, which has remit to regulate all content published on its news publishers' websites, including user comments.

Membership to both organisations is voluntary and enforced by contracts between the news publisher and the organisation.

The approved regulator status achieved by Impress is due to its adherence to the criteria set out in the Royal Charter for self-regulation of the press 2013 (Royal Charter). The Royal Charter created the Press Recognition Panel (PRP) and gives the PRP the authority to assess self-regulatory bodies who choose to apply for recognition, against the Royal Charter criteria. Impress is the only body to have applied and received recognition under the Royal Charter. Neither the PRP nor Impress are therefore, created by statute, and neither body is answerable to Parliament, the Government, or politicians. This framework preserves the independence of self-regulation, and press freedom. IPSO has not applied for recognition and does not have status as an approved independent regulator under the system.

The Royal Charter framework is recognised in the Crime and Courts Act 2013, specifically sections 34-42 (Publishers of news-related material: damages and costs). The legislation defines (s 41) a 'relevant publisher' and 'news-related material' for the purposes of the legislation:

- (1)...a person who, in the course of a business (whether or not carried on with a view to profit), publishes news-related material—
 - (a) which is written by different authors, and
 - (b) which is to any extent subject to editorial control.

- (2) News-related material is "subject to editorial control" if there is a person (whether or not the publisher of the material) who has editorial or equivalent responsibility for—
 - (a) the content of the material,
 - (b) how the material is to be presented, and

(c)the decision to publish it.

The definitions of a news publisher and news-related material are the only of their kind to exist in UK statute.

Impress currently assesses those that apply to join and be subject to our regulatory scheme against the criteria set out in the Crime and Courts Act 2013, alongside other substantive criteria to determine their fitness and suitability for regulation. Part of that is a qualitative judgment on their editorial output. We are the only body under the system of approved regulation entitled to do so.

The legislation goes on to say that any person or organisation that joins an approved regulator, becomes a relevant publisher by virtue of joining the regulator. Finally, the legislation gives protection to relevant publishers from exemplary damages and costs awards through the exercise of judicial discretion in civil cases involving relevant publishers. Part of the legislation has yet to be commenced and requires commencement by the Secretary of State. The Government has expressed its intention to repeal s 40 of the Crime and Courts Act: the costs award protection, and has made good on that intention by finding a legislative vehicle in the upcoming Media bill, currently subject to pre-legislative scrutiny.

Impress considers that should the Online Safety bill become law, it will create a new regime for the regulation of UK news publishers' platforms, where those platforms are in scope, and the statute creates a new and competing definition of a news publisher and news-related material in law, for the purposes of the online safety regime, and the regulation of news publishers.

Impress' interpretation of the Online Safety framework

The regime intends to impose duties on regulated service providers to identify, mitigate and manage the risks of harm of illegal content and activity, and content and activity that is harmful to children, empowering Ofcom to oversee compliance with those duties.

Regulated service providers include those that provide user to user services, or internet services which enable content generated on the service by users to be uploaded and shared and encountered by other users.

While secondary legislation will determine which service providers will fit into relevant Category 1, 2A and 2B - and while we still do not know which providers will fall within these categories and as a corollary which services fall outside, we understand that Ofcom will be required to maintain and publish a register of categories, and assess each regulated user to user service for the purposes of the register.

We understand that it is not the Government's intention that UK news publishers be captured by this legislation – this case has been made many times. However, regardless of its intention, the law is drafted in such a way that the functions of news publisher platforms meet the definition. Why is it the case that news publishers are likely to de facto be regulated service providers? It is not true, as some have argued,

that news publishers are merely inadvertently captured due to below the line comments, which are disapplied under s5(2)(ii) comments and reviews on provider content (see also s55(2)(e)). Many publishers now, are digital innovators, seeking to unlock the potentiality of their audience and services, by doing more than just publishing editorial content. Many news publishers provide features on their platforms where there is user to user engagement, such as message boards, forums, user uploads of content and others. Keeping readers/users on their platforms where they can monetise their attention and cross-sell additional products and services is now the primary model for commercial publishing.

Therefore, if it is the Government's object to exclude news publishers from the framework, it is necessary, for a specific exclusion for news publishers to be set out in the framework. S55(2)(g) excludes news publisher content from scope. Section 56 sets out what a recognised news publisher is, and therefore what content it produces that is excluded. The definition is a qualitative one, which requires interpretation of key terms, such as:

*56(2)...(c) is subject to a standards code,
(d) has policies and procedures for handling and resolving complaints*

The logic of the framework in relation to news publishers' exclusion is as follows: By virtue of publishing news publisher content or any of the other excluded content under s 55, while a publisher may by default be a regulated service provider, it will not be subject to any of the duties in relation to editorial content it produces.

This logic does not eclipse in totality a news publisher being subject to the scheme, it just presupposes the excluded functions cover all functions of a news publisher. As above, this is not the case, and is less likely as news publishers continue to compete for user engagement in the commercial market in ways described above.

Importantly, Ofcom has an obligation under the framework to determine who is included and who is excluded, and as above, maintain a register. As the news publisher exclusion is a qualitative definition, this will require Ofcom to assess and make evaluations of news publishers under the framework; it is not merely a Justice Potter test, that is, 'I know it when I see it.' These judgments require fine balancing against the legislative criteria.

Impress and the Press Recognition Panel have, to date, maintained that a regime that leads to this outcome is deeply unsatisfactory, considering the existing self-regulatory framework (underpinned by Royal Charter) for news publishing and classification of UK news publishers has operated successfully for the past 7 years. While Impress concedes that many news publishers voluntarily sit outside of the approved system, the new presumption in the Online Safety bill that Ofcom, an independent government body, will be empowered under the legislation to determine the status of news publishers for the purpose of statutory regulation (even for the purposes of excluding them from said regulation) is highly problematic for both press freedom and the ability of news publishers to self-regulate on a voluntary basis. Press freedom and press independence from state regulation has been a cornerstone of the UK's democracy for centuries. This regulatory creep sets a dangerous precedent and has not been effectively scrutinised. That UK news publishers may be answerable to competing systems of statutory regulation and self-

regulation is highly unsatisfactory. Furthermore, while Ofcom has competence to make such assessments in relation to broadcasters, per its statutory licensing remit, it does not in relation to UK news publishers.

We understand that responsibility for this does not fall on Ofcom, but rather successive governments who have failed to attend to this significant issue. Nevertheless, we would like to work closely with Ofcom, and look forward to the production of guidance that tries to minimise the impact that this will have on the sector.

Finally, we recognise that Ofcom may not see this as a priority issue under the regime and may look to practically avoid perverse consequences by building the register of regulated service providers through a notification scheme. Nevertheless, we anticipate that Ofcom is likely to encounter, as part of its duties under the framework, both instances of platforms seeking to avoid registration through the s55 exclusions and encounter service providers where balanced assessments under s 55 are required as part of Ofcom's exercise of its enforcement duties. We also consider that Ofcom will have to report on this eventuality as part of its reporting obligations under s 159 OFCOM's reports about news publisher content and journalistic content, and therefore will inevitably have to address this issue.

Recommendations

We consider the following actions should be taken by Ofcom to avoid the perverse consequences stated above and ensure effective operation of the online safety regime:

1. Ofcom must provide the industry with clear guidance as to how it intends to approach this issue, how it interprets the legislative criteria and what procedural approach it will take in relation to the operative parts of the framework as it impacts on the assessment and categorisation of news publishers, for the purposes of the exemption. This way all relevant stakeholders can better understand and manage the practicalities of the regime coming into effect.
2. When making assessments as to whether regulated service providers should benefit from the exemptions under s55, Ofcom should defer to the competence of approved regulators such as Impress or the oversight body, the Press Recognition Panel, in interpreting terms of the s 56 exemption for relevant news publishers to ensure legal continuity other statutory objects such as the Crime and Courts Act 2013.
3. Any UK news publisher regulated by Impress under our scheme, objectively meets the statutory definition of relevant news publisher for the purpose of the Online Safety regime. Ofcom should clarify its view on the matter and confirm that further assessment of UK news publishers regulated by Impress will not take place, as part of the discharge of Ofcom's duties under the regime. We would be pleased to cooperate further with Ofcom on this matter, so that we may be able to provide Impress-regulated publishers with assurance they will not be subject to the regime in any capacity.

Impress is grateful for the opportunity to express its advice in relation to the categorisation of regulated services under the Online Safety regime. We look forward to constructive dialogue with Ofcom on these issues, in the future.

About Impress

Impress is a champion for news that can be trusted. We work to ensure that our members can publish with integrity; so that the public can engage with confidence in an ever-changing media landscape. We operate a recognised scheme of independent press self-regulation that works in the public interest to protect freedom of expression, individual rights, and public safety.

Independent self-regulation ensures that the news sector can meet legal and ethical news publishing standards. The press has a powerful and influential role in UK society. Therefore, it is important that there is independent oversight of the impact the news publishing sector has on individuals and society, whilst maintaining robust mechanisms to prevent state and commercial interests from having any involvement in that oversight. Improving press standards is hugely popular among the UK public and has been ever since the Leveson Inquiry into culture and practice of the press. Extensive public engagement research carried out by the Universities of Leeds and Derby has shown that 80% of the UK public continue to support effective, independent press self-regulation of the press to this day.

Impress provides self-regulatory services to over 200 news brands, which reach 20% of the UK population each month; these publishers have voluntarily subscribed to the model of Royal Charter approved self-regulation since Impress first became recognised in October 2016. This includes a significant number of online news publications that specialise in investigative journalism. These publishers play a vital role in the news ecosystem by uncovering stories that often go on to appear in the national and international media.

Impress-regulated publishers tend to be small-to-medium sized businesses, charities, not-for-profits and cooperatives who do not generally have the resources to defend legal claims made against them by the rich and powerful. This makes them especially prone to the chilling effects of SLAPPs. Publishers are free to decide whether to sign up to Impress and do so on ethical and commercial grounds – because it mitigates their legal risks and helps build audience trust. It also enables them to head off vexatious claimants through checks and balances built into the self-regulatory system.