Sent via email: protectingchildren@ofcom.org.uk

17 July 2024

Dear Sir/Madam,

RE: Protecting children from harms online

FSB welcomes the opportunity to provide a response to the above consultation.

FSB is a non-profit making, grassroots and non-party political business organisation that represents members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

We welcome and are supportive of the aims of the consultation in securing a higher level of protection for children online. Small businesses, unlike larger ones, have fewer resources and therefore, are more likely to struggle to comply with new requirements, meaning that they are more likely to require additional support. Our research shows that the cumulative regulatory burden is one of the biggest barriers for small businesses, with almost two-thirds (62%) of small businesses citing the current domestic regulatory environment to be more of a burden than a benefit to their business.[1] The amount of regulatory requirements and their complexity such as poor design and inconsistencies continue to pose a challenge for small businesses year on year.

Overall, we welcome Ofcom's regulatory approach, that aims to balance any new requirements with risk and size of business, with fewer requirements placed on those that are small and low risk in comparison to multi-risk or larger services. However, we do have some key points that we raise throughout this consultation response, including:

- The cost of external advice is often prohibitive for small businesses and therefore, we would like Ofcom to consider simplified assessments for small and low risk services and also, consider what good assessments could look like in certain contexts or circumstances, to help small businesses comply.
- Small businesses tend to gold plate their compliance, meaning that if there is uncertainty over the requirements and fear of enforcement small businesses will over-comply, which can have a significant impact on their already stretched resources. This is why we ask that requirements are as simple and clear to understand as possible, and guidance is supported by examples.
- It is worth noting that small businesses are unlikely to have similar experience to risk assessments as larger ones, which may have dedicated teams for risk assessments and could already comply with a number of other existing frameworks, and therefore, it is likely that they may need additional time to comply and familiarise themselves with risk assessments.

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[1] FSB report, Escaping the Maze: How small businesses can thrive under the British Columbia regulatory model, 2021
https://www.fsb.org.uk/resource-report/escaping-the-maze.html

- Where small businesses are required to develop content policies or provide training, that either best practice examples are provided, free training is available, and/or content policy generator tools are created to help small businesses to comply.
- Any issues in relation to the guidance and compliance should be ironed out with large services first given that they are more likely to be high risk, and implementation should be staggered for smaller businesses to help to reduce some of the compliance burden.
- We ask that enforcement action is taken as a last resort, and as this new regulatory regime develops small businesses are afforded the education first approach where possible, and in particularly where decisions by small businesses have not been made in bad faith.

We have not commented on every section in the consultation, only where we believe there will be greater impact on small businesses.

Volume 2: Identifying the services children are using

Children's Access Assessments (Section 4).
Do you agree with our proposals in relation to children's access assessments, in particular the aspects below. Please provide evidence to support your view.
1. Our proposal that service providers should only conclude that children are not normally able to access a service where they are using highly effective age assurance?

For many small businesses implementing age assurance will be one of the more substantial costs, so Ofcom's assessment is right to assume that many will not be able to say that their services are not likely to be accessed by children, and that will consequently result in small low-risk services dedicating resources to conducting the access assessment. Therefore, we ask that the access assessment is proportionate to risk and size of the business, and consideration should be given to small businesses that are low risk to be given the opportunity to conduct more simplified assessments.

2. Our proposed approach to the child user condition, including our proposed interpretation of "significant number of users who are children" and the factors that service providers consider in assessing whether the child user condition is met?

While we do believe that giving a numerical threshold would help to reduce costs and provide certainty for businesses, we acknowledge that taking into consideration the wider context of the service instead of just a significant numbers of child users is in line with the ICO's children's code and will therefore help to alleviate some of the burden by the guidance being aligned. However, given that the assessment will be more complex than just identifying the number of children who are users of the service, we ask that businesses are appropriately supported, through guidance including examples, and clear and simple step-by-step processes that they can follow. The cost of external advice is often prohibitive for small businesses and therefore, we would like to see Ofcom to consider what good assessments could look like in certain contexts or circumstances, to help small businesses comply.

In terms of deciding whether the child user condition is met, we do believe it is sensible to assess whether the service provides benefits for children, whether the content or design appeals to children,

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and whether children form part of a service's commercial strategy. In particular in the case of the latter, we agree that if children form a part of a commercial strategy for a service, then the service is likely to attract a significant number of children.

3. Our proposed approach to the process for children's access assessments?

Our main concern with the children's access assessments is around the Ofcom's estimate of the time required to conduct such an assessment, which suggest that in most cases reading guidance, carrying out the assessment and recording the account should take a day or less. This is significant for small businesses, given that in most cases it will be the business owner who is also responsible for running the day-to-day business as well complying with all regulatory requirements. We recognise that this is likely to be an initial implementation rather than an ongoing administration cost particularly in terms of familiarising themselves with the guidance, nevertheless, this is very disproportionate to small businesses with only a handful of employees. We ask that this is reviewed and where possible, adapted for smaller services either through tailoring guidance, and if possible, considering more simplified access assessments to help reduce some of this burden.

It is positive to see that the list for producing evidence for children's assessments is not exhaustive and will allow businesses to be flexible when producing evidence. This is particularly important for smaller businesses, that may have less sophisticated tools but a very good understanding of various parts of the business. Smaller businesses are unlikely to be able to commission evidence reports and more likely to provide evidence of assessments themselves.

Volume 4: How should services assess the risk of online harms?
Governance and Accountability (Section 11)
15. Do you agree with the proposed governance measures to be included in the Children's Safety Codes?

We recognise the importance of governance and accountability arrangements in organisations being appropriately set so that they help to prevent risk of harm to children. We welcome that smaller services unless they are multi-risk will only need to name a person accountable to the most senior governance body, and that for proportionality most measures only relate to large or multi-risk services. We believe that this approach is proportionate to the risk of harm. It is worth noting that in most cases for small and micro businesses, this is likely to be the business owner looking after governance and accountability, and therefore, their responsibilities should be clearly communicated to them and where possible examples given about how to comply.

For small multi-risk services where content may be harmful to children, we would like to see appropriate guidance, and where relevant examples and training materials which can be used by small businesses published to help comply with the requirements. In particular, we would like to see how small businesses can set standards for employees around protecting children and ensure that staff involved in the design and operational management of the service are sufficiently trained. We recognise that compliance will vary from service to service but, our evidence shows that small businesses tend to gold plate, meaning that if there is uncertainty over the requirements and fear of

enforcement small businesses tend to over-comply, which can have a significant impact on their already stretched resources.

16. Do you agree with our assumption that the proposed governance measures for Children's Safety Codes could be implemented through the same process as the equivalent draft Illegal Content Codes?

Yes, we agree. We believe that the governance measures align well between the Children's Safety Codes and Illegal Content Codes in terms of responsibilities for small businesses, and for small firms in scope this will help to reduce some of the compliance burden in relation to the new requirements.

Children's Risk Assessment Guidance and Children's Risk Profiles' (Section 12)

17. What do you think about our proposals in relation to the Children's Risk Assessment Guidance?
19. Do you think the four-step risk assessment process and the Children's Risk Profiles are useful models to help services understand the risks that their services pose to children and comply with their child risk assessment obligations under the Act?

We do not oppose the guidance, particularly as it is intended to assist services in fulfilling their obligations. It is worth noting that small businesses are unlikely to have similar experience to risk assessments as larger ones, which may have dedicated teams for risk assessments and could already comply with a number of other existing frameworks, and therefore, it is likely that they may need additional time to comply as familiarisation could take longer for small businesses. However, we do agree that the four-step risk process is helpful for businesses to better understand their responsibilities including, how these align with the Act as well as to each of the relevant sections within the guidance.

As mentioned before, it is positive to see that the guidance aligns with illegal harms risk assessment, and that there are specific thresholds provided for assessing medium and high impact for child users based on a monthly basis. We believe that this will be helpful for businesses in identifying and assessing risk.

Our main concern remains on the cost of familiarisation with the guidance and the potential for small businesses to get caught out with substantial costs without the means for external advice or availability of additional staff to help. The guidance itself is also quite lengthy, and we would like to see this supplemented by outputs that would help to explain to small businesses their responsibilities through different outputs, for example videos and diagrams to help support compliance. Given that in most cases it will be larger businesses that are multi-risk and high risk, for any issues to be ironed out with larger businesses first in relation to the guidance and compliance, and staggering implementation for smaller businesses to help to reduce some of the compliance burden. This will afford smaller businesses some more time to familiarise themselves with any new requirements and effectively assess how these relate to their business.

Volume 5 – What should services do to mitigate the risk of online harms
Our proposals for the Children's Safety Codes (Section 13)
22. Do you agree with our proposed package of measures for the first Children's Safety Codes?

Yes, broadly the measures outlined seem appropriate for a variety of services that are included in scope. However, as we have mentioned previously, where possible this should be supported with signposting to relevant guidance and specific examples, so that smaller businesses are able to and effectively dedicate resources to each of the measures.

Developing the Children's Safety Codes: Our framework (Section 14)
25. Do you agree with our approach to developing the proposed measures for the Children's Safety Codes?

We are supportive of the measures being proportionate and sufficiently flexible for services to implement, provided that there will be flexibility for small businesses to demonstrate the effectiveness of compliance with each measure according to the size and risk of the business, and in line with the resources available to them.

26. Do you agree with our approach and proposed changes to the draft Illegal Content Codes to further protect children and accommodate for potential synergies in how systems and processes manage both content harmful to children and illegal content?

Yes, given that the two will go hand in hand in terms of the proposals for services in scope it makes sense that these are aligned, although we do recognise that in some cases measures for protection of children will be more stringent balanced with risk of harm given their vulnerability online.

27. Do you agree that most measures should apply to services that are either large services or smaller services that present a medium or high level of risk to children?

We do not oppose this, provided that it is recognised that smaller services that are medium or high risk will need help to comply, particularly during the initial implementation period.

28. Do you agree with our definition of 'large' and with how we apply this in our recommendations?

Yes.

29. Do you agree with our definition of 'multi-risk' and with how we apply this in our recommendations?

It seems sensible that services that are medium or high risk for two or more kinds of content harmful to children would be classed as multi-risk, regardless of size. We acknowledge that Ofcom's assessment states that this is more likely to be the case for larger services overall, however, where smaller services are in scope, we ask that appropriate support is provided where possible. For example, where there is a need to develop content policies or provide training, that either best practice examples are provided, free training is available, and/or content policy generator tools are created to help small businesses to comply.

30. Do you agree with the proposed measures that we recommend for all services, even those that are small and low-risk?

Terms of service, user reporting and content moderation processes being in place is integral to ensuring that businesses are able to demonstrate that they can mitigate risk of harm as and when it arises, and we agree that they should be kept updated as services develop. Some services may have the dedicated functionality in place already or at least functionality that is relatively easy to adapt however, some others and in particular if they are smaller will not have such functionality available or have processes that are manual rather than automated. This means that compliance can take some time, so we would like to see some flexibility afforded to such businesses particularly during the initial implementation period.

Content moderation U2U (Section 16)
36. Do you agree with our proposals? Please provide the underlying arguments and evidence that support your views.

We agree that all services should have in place systems and processes to swiftly action content that is harmful to children, and that content moderation could be done automatically or by humans, provided that it is reviewed and actioned appropriately. This is particularly important to smaller businesses who will not have resources that are to the same level of sophistication as larger businesses and therefore, where possible they should be able to adapt to their existing systems and processes as much as possible, provided that these are proportionate to the risk of harm.

We agree that services that need to comply with data protection in relation to content moderation should refer to ICO guidance in this space. Any supplementary guidance should be clearly signposted so that businesses are able to access it without additional strain on resources or delay in compliance.

User reporting and complaints (Section 18)
43. Do you agree with the proposed user reporting measures to be included in the draft Children's Safety Codes?

We do believe that services should have user reporting and complaints processes in place, that are easy to identify and report on as this will help businesses to identify and swiftly remove content as well as gather intelligence on the harms that their service may present to child users. We agree that it is likely that businesses will use the same complaints procedure for illegal harms as well as harms to children, therefore, there could be less overall burden on businesses provided that complaints are categorised.

Guidelines on handling complaints together with a clear and easy to follow criteria would be welcome. In addition to this, it would be beneficial for small businesses to see some guidance on the expected and reasonable timeframes on actioning complaints, taking into consideration availability of their resources.

Terms of service and publicly available statements (Section 19)
46. Do you agree with the proposed Terms of Service / Publicly Available Statements measures to be included in the Children's Safety Codes?
47. Can you identify any further characteristics that may improve the clarity and accessibility of terms and statements for children?

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We do not oppose the inclusion of proposed Terms of Service/Publicly Available Statements regarding protection of children and agree that they should be clear an accessible on all search and U2U services. We would welcome if consideration was given to appropriate tools for businesses and in particular smaller businesses to generate such statements. For example, ICO's privacy statement generator tool allows small businesses to generate a statement based on the information provided by the business including their sector, and data that they collect and hold. A similar tool would be helpful in alleviating burdens associated with generating statement as well as the uncertainty around compliance for small businesses.

Recommender systems (Section 20)
49. Do you agree with the proposed recommender systems measures to be included in the Children's Safety Codes?

It would seem sensible that the proposed recommender systems measures are included, with appropriate filters for child users in place for multi-risk and large services with existing recommender systems. We agree that recommender systems should be secure by design, this is particularly critical where those systems are sold to or used by smaller businesses. If Ofcom chooses to include non-designated content in such provisions, we would welcome clear guidelines in relation to this, to help businesses appropriately identify, assess and as well as build such systems.

User support (Section 21)
53. Do you agree with the proposed user support measures to be included in the Children's Safety Codes?

It would seem sensible that there is appropriate user support, including providing children with the option to accept or decline invitations to a group chat, mute and block users, and disable comments on their own posts. It is likely that many of the services will have some of the basic functionality to do so already, particularly those in scope that are medium or high risk. It would be beneficial to have specific guidance to help businesses to signpost children to age appropriate support materials at key points in the user journey, in particularly how existing guidance that services have could be adapted to child users.

Combined Impact Assessment (Section 23)
58. Do you agree that our package of proposed measures is proportionate, taking into account the impact on children's safety online as well as the implications on different kinds of services?

The package has the potential to be proportionate, if the suggestions that we have made around compliance are taken on board, including a staggered implementation period whereby small businesses have a longer initial period to comply than larger businesses.

We acknowledge that the proposed core measures that relate to all services, including small and low risk services, are required in order to help ensure online safety. It is right that small services that are low risk are only in scope of limited proposed measures, however, it is still worth highlighting that for businesses regardless of size, measures will be more costly if there are no existing measures in place, and those are much more likely to be small and low risk than large and high risk businesses.

Core measures such as naming a person to be accountable for compliance with safety duties, reporting and complaints, while limited when taken in consideration with all measures proposed for businesses regardless of size, for small and micro businesses in scope will be a substantial proportion of their overall regulatory compliance. It is likely that the person accountable as well as content moderator will be the business owner, so while these may not put an additional substantial cost it would still require dedication of significant resources from the business owner. Specially, initially where there will be substantial resources needed for familiarisation with new requirements and the associated guidance, and identifying how these relate to the business activities.

In terms of small but riskier services, who will have many more requirements in relation to protection of children, while we acknowledge that these are necessary, we would like to highlight that larger businesses are more likely to use more complex software, systems and processes and therefore, will have many more resources at their disposal. Therefore, it would not be wrong to assume that small businesses may take longer during implementation than estimates suggest and will require greater support than larger businesses. We ask that enforcement action is taken as a last resort, and as this new regulatory regime develops small businesses are afforded the education first approach where possible, and in particularly where decisions have not been made in bad faith.

We would welcome for there be a staggered approach in implementation and in particular with regard to smaller businesses being able to stage their compliance over time if they wish to spread resources in implementing some of those measures. For example, this could be done by first implementing core measures before the more specific risk-based ones to allow more time to familiarise themselves and invest in appropriate measures. We believe that this would help to alleviate some of the compliance burden on small business in balance with risk.

Yours sincerely,

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