Your response

Introduction

Confidential? – No

Meta Platforms Inc. together with WhatsApp LLC, welcome the opportunity to participate in this consultation on fees and penalties (**the "Consultation"**) under the UK Online Safety Act (the "**OSA**" or the "**Act**") organised by the Office of Communications (**Ofcom**). Over the last several years, we have supported the development of the UK Online Safety framework by working with both the UK Government and Parliament, as well as Ofcom. We continue to remain committed to this effort.

At Meta Platforms Inc. ("**Meta**") and WhatsApp LLC ("**WhatsApp**"), we have years of experience in providing advice on regulatory regimes on content regulations and codes across the globe and in Europe, e.g. on the EU Digital Services Act (the "**DSA**") and the Irish Online Safety Media Regulation Act ("**OSMRA**"). We are pleased to leverage that experience and expertise to share our feedback on Ofcom's proposed regime.

Meta and WhatsApp are convinced that constructive dialogue is essential to create a workable regulatory framework for all stakeholders. We share Ofcom's objective to develop a **proportionate, clear and sustainable** supervision system. However, we believe some major adjustments of the process would be important to ensure the proposal aligns with such principles.

Question

Chapter 3.1

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.

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

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

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

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

Consultation 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)?

Please provide evidence to support your responses.

Your response

Confidential? – **N**

We have a number of comments on Ofcom's proposed approach to determining QWR for fees and penalties, and the other associated issues addressed in this Consultation. We set out our comments below, and refer back to them in our responses to other questions as relevant.

1. We disagree with Ofcom's proposed approach for splitting its costs between fee-paying providers

We recognise that the approach Ofcom proposes in the Consultation is informed by various principles, and we fully agree that it is necessary to make trade-offs between these principles in deciding on the appropriate approach, as set out at paras. 2.17 to 2.19 of the Consultation, e.g. the principles of proportionality, clarity and stability.

However, for extreme clarity, the UK OSA regime is based on regulating *risks in the UK*, applying a model where (simplified) all regulated services in the UK are in scope for many obligations and where regulated services which constitute *specific risks* or have *3 million+ monthly active users* in the UK are subject to more regulation than other regulated services. By contrast, the fee system (simplified) is set up on the basis that regardless of user numbers or risk level in the UK exclusively providers above a 250 million+ GBP worldwide revenue threshold (which Ofcom assumes to be circa 20-40), have to pay the costs for all of the more than 100,000 services that Ofcom envisaged to be in scope. The only link to the UK is that providers who make this group are excluded where they have less than 10 million referrable UK revenue.

We consider that Ofcom's current approach to:

(i) the proposed QWR range and threshold;

(ii) the UK referable revenue exemption; and

(iii) calculating fees,

over-emphasises workability (and we disagree in part with some of the underlying assumptions), at a significant expense of (in particular) proportionality. We note that workability was not one of the principles set out in the Secretary of State's guidance to Ofcom about OSA fees. In contrast, the guidance states that "[t]*he government expects Ofcom to put proportionality at the heart of its charging principles*".

We are concerned that the over-emphasis on workability (and underlying assumptions) will result in an overall approach that is disproportionate. It will result in fee splits between providers that do not adequately reflect the online safety-related costs that Ofcom is likely to incur in relation to each provider. We also think this approach will have a negative effect on stability, as the proposed method for balancing out the fee impact of increases in total QWR (by changing the percentage tariff) will be less effective in situations where a large provider has a significant increase in QWR.

We set out our concerns in more detail below, together with our *proposed changes* to Ofcom's current approach. Broadly, these changes are intended to bring a *manageable number of additional providers into the fee regime*, while maintaining a proportionate and stable fee split between a reasonable number and range of providers, and establishing *stronger links between the requirement to pay a fee and a*

provider's number of users in the UK.

i) The proposed QWR range and threshold

We note Ofcom's discussion at paras. 3.3.1 to 3.3.18 of the Consultation regarding the QWR threshold. We disagree with Ofcom's determination that the appropriate QWR range (within which the QWR threshold is to be set) is £200m to £500m, and with Ofcom's determination that the appropriate QWR threshold is £250m, for the reasons set out below. ***We propose that the appropriate QWR range is instead £65m to 100m***.

Limiting impact on SMEs

Ofcom refers to the £200m to £500m range as limiting the impact of fees on SMEs (as defined with reference to revenue), and states that this is one of the objectives of the QWR threshold. However, we note that a revenue threshold which is set high enough to exclude the vast majority of SMEs from the fee regime will limit the impact of that regime on SMEs to near zero, and setting a higher threshold will not materially limit that impact further. We also note that Ofcom's own analysis – which refers to thresholds set out in the Companies Act 2006, the Finance Act 2020 and other datapoints – states that "*revenue thresholds of £25m to £50m are typically associated with SMEs*", and that "*a QWR threshold that limits the impact on SMEs would be £25m to £50m or higher*", per paras. 3.3.9 and 3.3.10 of the Consultation.

While these thresholds are indicative, and the revenue thresholds associated with SMEs may be expected to slowly increase over time due to economic growth, inflation and other factors, Ofcom's analysis indicates that setting a revenue threshold in the region of £65m (i.e., the £50m maximum revenue threshold currently associated with SMEs plus 30% headroom to cover foreseeable increases in that threshold) would be sufficient to exclude the vast majority of SMEs from the OSA fee regime now and for the foreseeable future, and thereby limit the impact of that regime on SMEs to near zero. Setting a significantly higher revenue threshold of between £200m and £500m provides no additional material benefit to SMEs. Accordingly, we do not agree that the objective of limiting the impact of fees on SMEs justifies setting a threshold any higher than £65m.

Administrative and financial burden of fee regime

Ofcom goes on to state at para. 3.3.10 of the Consultation that setting a threshold as low as £50m would not be proportionate for two reasons. The first reason is that "*it would capture many relatively small providers of regulated services. This could increase the administrative and financial burden on such providers, which may be less able to bear the associated costs compared to larger providers, while also increasing our administrative costs as it would bring significant numbers of providers into the feepaying regime.*"

We do not agree that this justifies Ofcom's proposal to treat £200m as the lowest reasonable QWR threshold. While the providers that would be captured by a threshold of £50m or above may be relatively small (i.e., relative to the providers with revenues of £250m+ who would be captured by Ofcom's proposed threshold), they are – by Ofcom's own analysis and the definitions set by relevant UK statutes, as discussed above – large companies. They will already be required by the OSA to take various steps, by virtue of their regulated services, and should therefore already have processes in place to

identify and comply with the OSA's requirements. We do not believe that the additional steps to comply with Ofcom's fee regime would represent a material administrative or financial burden for such providers.

In addition, Ofcom's proposed 'single percentage' approach to calculating fees (which would set a provider's fee at approximately 0.02% of QWR, per para. 3.4.13 of the Consultation) would mean that a provider with £65m QWR would pay a fee of £13,000, and a provider with £100m QWR would pay a fee of £20,000. We do not believe that this would be a material financial burden for the vast majority of such providers. We understand Ofcom to agree with this position, per its comments in paras. 5.17 and 5.19 of the Consultation that "*the fee amounts* […] *would be relatively small, compared to the revenues and resources available to these providers. This should mitigate any adverse effects* […] *we expect that providers who meet the QWR threshold will typically have the capacity to pay these fees and incur any additional costs of compliance without giving rise to material adverse effects*".

To the extent there is any concern about the financial burden for providers with lower QWR, this could be straightforwardly addressed via a simple ***banding system*** that creates a small number of QWR-based bands and applies a lower percentage to calculate the fee for providers in lower bands. While we recognise that Ofcom decided not to adopt such an approach for the current proposal, due to having "*not identified an objective basis for adjusting the percentage tariff to be paid by those with a higher QWR compared to providers with a lower QWR*" (para. 3.4.16 of the Consultation), we note that Ofcom currently adopts such an approach for certain other fee structures (e.g., certain television and radio licence fees, as set out in Tables 4 and 10 of the 2023 / 24 Tariff Tables).

As Ofcom has previously acknowledged in its 2004 consultation on setting licence fees and administrative charges (at p.11), "[p]*rogressive tariff scales reduce the financial impact upon smaller operators* [and are] *generally pro-competitive*", and the fact that "[t]*he degree of progression is subjective*" is not an absolute barrier to implementing such a system. Even if setting these bands involves a degree of subjectivity, we do not consider this to be any more significant than the degree of subjectivity involved in setting the threshold for providers to be included in the fee regime. We consider that Ofcom would be able to identify appropriate percentage tariffs for each band based on the total QWR of providers within that band, and believe the basis for implementing a banding system would be that it is more proportionate than a single 'in or out' threshold (in line with Ofcom's principles for developing the fee regime) insofar as it lessens the financial burden for providers with lower QWR.

Impact on total QWR

Ofcom's second reason for considering a threshold as low as £50m to be disproportionate, per para. 3.3.10 of the Consultation, is that "*while a QWR threshold as low as £50m would significantly increase the number of providers paying fees, it is likely to only have a small impact on total QWR (i.e. the £350bn – £400bn estimate in paragraph 3.3.6) and would not reduce, to any significant extent, the share of fees payable by each of the larger qualifying providers.*"

While we recognise that a percentage-based fee calculation may mean that a lower QWR threshold only has a (proportionally) small impact on total QWR, we do not consider increasing total QWR (or reducing the amount paid by the largest providers) to be the point of a lower QWR threshold. Instead, we see the levying of an annual fee as an important tool to encourage compliance with the OSA, which will apply to

more providers if the QWR threshold is lowered.

A provider that is made aware of the requirement to pay a fee will (necessarily) be made aware of the fact that it is a regulated provider and that it is therefore required to comply with the OSA. While we anticipate that large and UK-based / UK-focused providers will already be aware of the OSA and be thinking about how it will affect them, this may not be the case for all regulated providers, particularly those that are (relatively) smaller and / or are primarily focused on other jurisdictions. Bringing such providers into the fee regime will help to ensure their prompt compliance.

In addition, the requirement to calculate and pay an annual fee serves as an annual reminder to a provider that it is regulated, that it is known to Ofcom, and that Ofcom may therefore at some point wish to understand how (and whether) the provider is complying with the OSA. This will help to encourage fee-paying providers to become and remain compliant.

It will also mean that Ofcom has annual contact with, and relatively up-to-date information about, the providers that are likely to make up a substantial part of its regulatory activity. If our proposal regarding consideration of UK MAU numbers (set out below) is adopted, Ofcom would also have annually updated UK MAU numbers for these providers' services, which would help to inform Ofcom's risk analyses, list of emerging Category 1 services, and categorisation decisions.

Fees paid by a reasonable number and range of providers

We note that one of Ofcom's objectives in considering the QWR threshold, in line with the principle of proportionality, is to "[e]*nsure fees are paid by a reasonable number and range of providers*", per para. 3.3.2(iii) of the Consultation. Ofcom anticipates that its current proposal would result in between 20 and 40 providers paying fees, and states that this represents "*a reasonable and manageable number of providers*" (our emphasis), per para. 3.3.13 of the Consultation.

In our view, given that Ofcom's own estimates suggest that more than 100,000 providers may be in scope of the OSA, a "*reasonable number and range*" could (in principle) include many more than 40 providers. We consider that including a number of (relatively) smaller providers in the fee regime would result in fees being paid by a more reasonable number and range of providers, and thus contribute to the proportionality of the fee regime, without significantly impacting the regime's 'workability' for Ofcom.

Overemphasis on 'workability' of fee regime

Given that proportionality does not require the QWR range to be set at £200m to £500m or the QWR threshold to be set at £250m, for the reasons discussed above, we see Ofcom's concern regarding the increase in its own administrative costs as being a significant driver of the current proposal.

However, while we recognise that lowering the QWR threshold to between £ 65m and 100m would increase the number of providers in scope of the fee regime, and thereby increase Ofcom's costs of administering that regime, we consider that this increase in costs would be outweighed by the benefits of extending the scope of the fee regime, and would not result in the fee regime being unworkably complex or expensive to administer.

Ofcom states at para. 3.3.12 of the Consultation that "[t]*here is a risk that the number of providers exceeding the QWR threshold could increase significantly if it was set below £200m, potentially resulting in a substantial number of providers liable to pay fees, which would significantly increase compliance burdens and could also create difficulties for administering the fees regime.*"

However, it is unclear what Ofcom considers to be a 'significant' increase, what evidence Ofcom has to indicate that £200m is the threshold below which there is a risk of such an increase, what the magnitude of this risk is, or why it is considered to be a sufficiently serious risk as to outweigh the benefits (as discussed above) of bringing more providers into the fee regime. We note that Ofcom states at para. 3.3.8 of the Consultation that "*we would expect the majority of* [the estimated 100,000 regulated] *providers to* [have] *revenues of less than £50m*)", which indicates that a QWR threshold within our proposed range is unlikely to result in an unmanageable number of providers being brought into the fee regime. We note that Ofcom regulates other sectors that involve charging fees to, and otherwise engaging with, substantially larger numbers of participants than would be included in Ofcom's proposed online safety fee regime (e.g., there are approx. 1,500 shared access licences paying annual fees as of October 2023, per para. 2.6 of Ofcom's November 2023 consultation on the shared access framework). We also note that the revenue data underlying Ofcom's QWR proposals appears to be limited to revenue estimates for a small number of larger providers (27 in total, per para. A6.4 of Annex 6 to the Consultation), most of whom have estimated QWR in excess of £200m. We do not consider this to be an adequate evidence base to justify Ofcom's conclusion that £200m is the lowest reasonable threshold.

We therefore propose that an appropriate and proportionate QWR range would be £65m to £100m. A threshold set within this range would capture large providers, which are able to bear the administrative and financial costs of paying fees. There is no indication that a threshold within this range would extend the fee regime to an unmanageable number of providers, and we consider that the increase in Ofcom's administrative costs would be more than offset by the expected compliance benefits of bringing large providers into the fee regime.

ii) Comments on Ofcom's UK referable revenue exemption, and our proposal to also introduce an additional entry point for providers reaching a certain number of UK MAU

<u>The UK referable revenue exemption</u>

We agree that there should be a link to the UK. We understand an exemption for providers whose UK referable revenue falls below a certain threshold within a qualifying period is included with the intention to reflect the fact that fees are intended to fund a UK regulatory regime. We note Ofcom's comment at para. 5.21 of the Consultation that the £10m threshold will mitigate the risk of certain providers finding the fees to be burdensome and disproportionate relative to their UK referable revenues. Ofcom further notes in the same paragraph that "[w]*hile we lack detailed evidence about large providers with a small UK user base, we consider it likely that an exemption threshold set at £10m is at an appropriate level to mitigate the risk of adverse effects*".

However, it is not clear what, if any, evidence underlies Ofcom's choice of £10m as the appropriate threshold to mitigate this risk. The lack of evidence about large providers with a small UK user base (as acknowledged by Ofcom) means that it is not clear that there are a meaningful number of providers who would benefit from this exemption – particularly given the small number of providers (between 20 and

40) that Ofcom estimates would be in scope of the fee regime if the £250m QWR threshold were to be adopted.

In addition, as discussed further below in relation to UK MAUs, we consider that the fee regime will be more proportionate if it better reflects the fact that it is funding Ofcom's work to protect UK users, and as such, we consider that *the fees charged under this regime should be more strongly linked to the number of UK users*.

Additional entry point

In order to achieve this in a proportionate way, we suggest including an **additional threshold for entry** into the fee regime, that is separate from the QWR threshold, and that relates to UK monthly active user (MAU) numbers. This would mean that a provider would be subject to the fee regime if (i) it has QWR that hits the designated threshold, or if (ii) any of its services have a number of UK MAUs (on the regulated part(s) of the service) that hits a designated threshold. We suggest that the latter threshold is set at 3 million UK MAUs, which is approximately 5% of the UK population and matches the UK MAU threshold recommended by Ofcom for services with direct messaging functionality to be designated as Category 2B services. A service's UK MAU numbers could be calculated in line with the methodology set out in the illegal content Codes of Practice.

This is likely to bring a limited number of additional providers into the fee regime, who (i) have a significant number of UK MAUs, and (ii) a significant amount of UK referable revenue (because they would need to be above the UK referable revenue exemption threshold), but (iii) do not have enough QWR to hit the QWR threshold. As such, these providers would be providing services that are popular in the UK and that derive a significant proportion of their revenue from the UK, so – in our view – it would be proportionate for them to be subject to the UK regulatory fee regime. For simplicity, we propose that the provider's fee would still be calculated on the basis of its QWR, regardless of whether it enters into the fee regime via the QWR threshold or the UK MAU threshold – the strengthening of the fee regime's links to the UK would be achieved by bringing certain providers into the regime on the basis of UK MAU numbers, rather than by using those numbers to determine their fee.

In support of this proposal, we note that Ofcom requested QWR data from 30 providers, which were selected on the basis that Ofcom considered they "*could be providing regulated services to a large number of users in the UK*" (per para. A6.1 of Annex 6 to the Consultation). However, of the 27 providers for which QWR could be estimated, 6 had QWR below £200m. This indicates that some proportion of providers which (in Ofcom's view) have a strong UK presence and reach a large number of UK users will not necessarily have QWR that is even within Ofcom's proposed range, let alone above Ofcom's proposed threshold. Including a separate UK MAU-based threshold would help to capture such providers, who should – in our view – be in scope of the fee regime, given their UK reach.

iii) The fee calculation

We are concerned that Ofcom's proposed approach to calculating fees (as set out in section 3.4 of the Consultation) does not adequately address the potential impacts of significant changes to the largest providers' QWR by not capping the proportion of total QWR that can be contributed by a single provider.

We address this in more detail and set out our proposed solutions below.

Cap on provider's contribution to total QWR

Under Ofcom's current approach, there is effectively no cap on the fee that a single provider may be required to pay, except that the fee cannot exceed Ofcom's budget for the relevant year (which is a cap that is unlikely to ever be hit).

This means that if one of the largest providers dramatically increases its QWR (e.g., due to the release of a new and highly successful product) in a way that is not matched by other large fee-paying providers, it may then find that its QWR represents a large proportion of the total QWR. The provider would then be required to pay a significantly higher fee that represents a large proportion of the total fees payable to Ofcom, with other providers paying significantly smaller amounts than they had previously paid, due to the 'single percentage' approach (and this is likely to be the case even if Ofcom reduces the percentage payable to reflect the likely increase in the total QWR). This is in line with Ofcom's comment at para. 3.4.18 of the Consultation that "[t]*o the extent the total QWR base grows more quickly than our regulatory costs (e.g. due to growth in the number of providers liable to pay fees and/or the growth in QWR amounts), the percentage tariff may reduce over time, though the fees paid by individual providers could increase should their share of the total QWR base increase*". We think this would be problematic, for a number of reasons.

First, it would have a negative effect on *stability*, insofar as the fee amounts payable by providers could change significantly year-on-year, particularly if a large provider's dramatic increase in QWR is a 'spike' that is not sustained in future years. While this could in principle be anticipated by providers (due to fees being charged on the basis of QWR from the qualifying period two years earlier), we do not think it is reasonable to expect providers to monitor the QWR of other providers in order to anticipate the fees that they may have to pay.

Second, even if a substantial increase in a provider's QWR is sustained over time, we think it is *problematic for a single provider to be responsible for supporting a large proportion of Ofcom's online safety budget*. This would undermine the spirit of the objective that fees should be paid by a reasonable number and range of providers (by significantly reducing the proportion of fees paid by other providers), and is liable to be misinterpreted as suggesting that the provider in question may receive different treatment from Ofcom.

We therefore propose that the fee calculation includes a cap on the extent to which a single provider's QWR is factored into the total QWR used to calculate the percentage tariff. For example, the total QWR may be £475bn, of which £115bn (24.2%) is the QWR of a single provider. If a cap were to be set at 20%, £25bn of the provider's QWR would be disregarded, meaning that the total QWR would be £450bn, of which £90bn (20%) is the provider's QWR. The single percentage tariff would then be calculated as proposed by Ofcom, on the basis of the adjusted total QWR.

This would mean that no single provider would be required to pay a fee covering more than 20% of Ofcom's budget. This would enhance proportionality by helping to ensure that a material proportion of total fees continue to be paid by a reasonable number and range of providers. It would also improve stability and predictability for providers, because significant year-to-year changes in the QWR of the

largest providers would not result in sudden and significant changes in other providers' fees.

2. Notes on Ofcom's overall 'bucket' of costs that will be covered by fees

Ofcom's current projections for online safety regulation costs (c. £70 million annually, per para. 3.4.10 of the Consultation) are based on the actual costs incurred to date, as set out in chart 2 on p.4 of the Tariff Tables.

We noted these costs have risen every year to date (e.g. £44 million in 2022/23, £54 million in 2023/2024, £71 million in 2024/2025). We appreciate there are substantial measures in place to safeguard two key principles on the overall 'bucket' of costs: clarity and proportionality:

- As noted at para. 2.4 of the Consultation, Ofcom's spending is subject to an overall cap set by the Treasury and DSIT, and Ofcom's income and expenditure are subject to audits by the National Audit Office, as well as Ofcom's own internal audit.
- Ofcom allocates costs to different sectors in line with the applicable Statement of Charging Principles (SoCP), with a planned consultation on the online safety SoCP in 2025.

We recognise the value of these measures in ensuring that Ofcom's costs are clear, proportionate and appropriately allocated. In addition to these measures, *we request that Ofcom considers any feedback that may be offered by providers (particularly those who pay fees) as to potential efficiencies and engages with any questions or concerns relating to online safety costs,* given that these will directly impact the fees payable by providers. While we recognise that such feedback, questions and concerns can be raised in the ordinary course of providers' engagement with Ofcom, we suggest that Ofcom considers designating a *contact point* for providers to raise such matters in order to facilitate communications with providers who do not otherwise have regular engagement with Ofcom.

3. Information to be shared with Ofcom

Information to be provided to Ofcom regarding QWR

We note that para. 4.12 of the Consultation states that "*evidence verifying the QWR amounts stated by providers [...] will likely include an explanation of the source of the data used (e.g. audited financial statements and management information); supporting calculations of QWR (e.g. by regulated service and type of revenue); a reconciliation of QWR and non-QWR amounts; annual financial statements (where possible); details of how revenue has been apportioned to regulated services (where relevant); and details of exchange rates used.*" However, the actual detail as to what evidence is required, and whether the same or similar evidence will be requested annually via RFI, is not set out in this Consultation or in the annexed materials. Accordingly, we are unable to make any comments regarding such evidence in this response.

We understand that Ofcom intends "*to publish additional materials at a later date, which will provide guidance on the process of notification and include examples of the evidence, documents and other information which will need to be provided upon notification*", per para. 4.2 of the Consultation. We request an opportunity to review and comment on Ofcom's proposed approach to, and drafts of, these

materials before they are finalised.

Senior manager declaration

We note Ofcom's proposal at para. 4.10(iii) of the Consultation that, for initial notifications and new fee cycle notifications, the provider (if it is an entity) must include a declaration made by a senior manager (as defined in s.103(4) OSA), to the effect that the evidence substantiating the details of the provider's regulated services and QWR is accurate and complete in all material respects.

We do not consider it to be necessary to include such a declaration, given that – as indicated by Ofcom at para. 4.14 of the Consultation – Ofcom will in any case seek to "*verify the QWR information provided as part of the notification and identify situations where providers may be over- or under-reporting QWR*". In addition, while we understand that this proposal is not intended to result in any liability attaching to the senior manager in question under s.110 OSA (because the notification is not an information notice), this is not stated explicitly in the Consultation or the relevant Annexes.

We therefore *propose that Ofcom remove the requirement for the declaration to be made by a senior manager, allowing it to instead be made by the provider. If Ofcom is of the view that the declaration must be made by a senior manager, we propose that Ofcom states explicitly in the Manner of Notification Document that this declaration will not result in any liability attaching to the senior manager in question under s.110 OSA.*

4. Approach to penalties

We disagree with Ofcom's proposed approach to determining QWR to calculate maximum penalties where two or more group undertakings are jointly liable for a breach. Specifically, we do not agree that QWR (for these purposes) should be defined as including revenues from services that are not regulated.

We recognise that Ofcom intends this proposal to enhance the deterrent effect of the maximum penalty that may be imposed in cases of joint and several liability, per para. 3.2.7 of the Consultation. However, we think this is unnecessary, disproportionate, and inconsistent, and hence not in line with Ofcom's regulatory principles.

First, we note that Ofcom's guidance suggests that it views the bar for imposing joint and several liability as being relatively low, particularly in cases where the provider has a parent company or controlling individual. At paras. 7.16 to 7.17 of Ofcom's enforcement guidance, Ofcom states that it may consider pursuing joint and several liability to be appropriate "*if we have grounds to believe that the Related Company or Controlling Individual had some responsibility for the failure under investigation. A Related Company which qualifies as a parent company or a Controlling Individual will generally meet this threshold because of their ability to exercise dominant influence or control over the service provider*" (although other factors regarding the degree of control actually exercised and the closeness of their links may also be taken into account).

This is in contrast to the position regarding other non-parent Related Companies, which – per para. 7.18 of the guidance – will generally only be jointly and severally liable if there is evidence that they have potentially contributed to the OSA breach in question (although Ofcom considers this to include, e.g.,

having provided "*a service, system or tool used in connection with the regulated service which may have played a part in the issue under investigation*", which is also a relatively low bar). In addition, Ofcom states at para. 7.19 of the guidance that it may pursue joint and several liability "*where we have reason to believe that any enforcement action we take may be more effective if a Related Company or Controlling Individual has joint and several liability with the service provider*", including where the provider's QWR may not be sufficient to allow Ofcom to set a penalty that is a sufficient deterrent.

Accordingly, Ofcom appears to take a broad view as to when it may pursue joint and several liability. The enforcement guidance suggests that Ofcom does not see this approach as being limited to exceptional situations or to instances where multiple group undertakings have made material contributions to an OSA breach, but instead sees it as being usable for the purposes of deterrence.

Second, Sch. 13 para. 5 OSA already provides that, where joint and several liability is imposed on two or more group undertakings, the maximum amount of the penalty is the greater of £18m or 10% of the entire group's QWR (not just the QWR of the undertakings that are liable). We consider that QWR could, for these purposes, be defined in the same way as Ofcom proposes to define it for the fee calculation – i.e., with reference to regulated services. In combination with the approach that Ofcom appears to intend regarding joint and several liability, this would still give Ofcom the ability to impose substantial penalties forming an effective deterrent for providers, without extending the OSA enforcement regime to impact group undertakings and business activities that have nothing to do with the OSA.

Conversely, extending QWR to cover the group's non-regulated services, combined with the low bar for making a provider's parent company or controlling individual jointly and severally liable for a provider's penalty (as set out in the enforcement guidance), and the fact that QWR for joint and several liability purposes includes the QWR of all of the provider's group undertakings, would result in many providers being subject to an unnecessarily and disproportionately high penalty cap.

Given this, we see no good reason for Ofcom to take an approach to defining QWR that is inconsistent with the approach it proposes to take in the context of fees. *We propose that a consistent definition should be adopted in both the fee and penalty contexts, and that it should be limited to revenue that is referable to the provision of regulated services.*

Question

Chapter 3.2

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.

Answer

Confidential? – **N**

We refer to our comments set out in response to Question 1 above, which set out our concerns with the proposal to determine the QWR of a group without taking into account whether revenues are attributable to the provision of a regulated service.

Question

Chapter 3.3

Consultation 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?

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

Consultation 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?

Please provide evidence to support your responses.

Answer

Question 5:

Confidential? – **N**

We refer to our comments set out in response to Question 1 above, which set out our concerns with the proposed range and threshold, and our alternative proposals.

Question 6:

Confidential? – **N**

We refer to our comments set out in response to Question 1 above, which set out our proposal to change the threshold for this exemption.

Question 7:

Confidential? – **N**

N/A

Question

Chapter 3.4

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.

Answer

Confidential? – **N**

We refer to our comments set out in response to Question 1 above, which set out our concerns with the proposed approach and our proposals for changes to that approach.

Question

Chapter 4

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

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

Answer

Question 9:

Confidential? – **N**

We refer to our comments set out in response to Question 1 above, which set out our concerns about the requirement for a declaration by a senior manager, and our proposed changes in relation to the declaration.

Question 10:

Confidential? – **N**

We refer to our comments set out in response to Question 1 above.

Question

Chapter 5

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

Answer

Confidential? – **N**

We refer to our comments set out in response to Question 1 above, which set out our views regarding the impact on SMEs and larger providers.

Question

Overall

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

Please provide evidence in support of your responses.

Answer

Confidential? – **N**

N/A

Question

Annex A7 questions

Consultation 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.

Consultation 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?

Consultation 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.

Answer

Confidential? – **N**

N/A

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