

Skyscanner's response to Ofcom's Online Safety – fees and penalties consultation

Skyscanner welcomes the opportunity to respond to Ofcom's proposed approach to fees and penalties under the Online Safety regime.

Skyscanner is a travel metasearch site, or Vertical Search Service (VSS). We provide flight, hotel and car hire results to our users, which we source via Application Programming Interfaces (APIs) with our commercial partners. Users can only search for this very narrow set of results, with a range of features making it impossible for users to search for or encounter any other type of content on our service.

We recognise the importance of improving the online experience for all people in the UK, and particularly the need to ensure that children are safe when using the internet. Achieving this in a way that is proportionate and does not diminish the attractiveness of the UK's incredibly successful tech sector to domestic and international investors is a tall order, as is achieving the numerous other objectives imposed by the Act itself.

In both the Illegal Content Codes of Practice and the categorisation thresholds, Ofcom has done a commendable job of ensuring that obligations are proportionate to the risk posed by a service, regardless of its size. When it comes to search services, the risk of a user encountering illegal content is determined in large part by how search content is sourced (does the service crawl the open web and is it in theory possible to search for any website?) and by how easy it is for a user to search for illegal content themselves. VSS do not crawl the open web, sourcing their content from APIs provided by their commercial partners instead. The content provided by VSS is also normally narrowly focussed on a particular topic, such as travel results in our case. Ofcom has therefore found that VSS pose a "materially" lower risk of illegal content compared to other types of search service.

This evidence-based finding has led Ofcom to impose fewer illegal content obligations on low-risk VSS, and to exempt VSS from any categorisation. This is absolutely the right approach. It ensures that those services that do pose a meaningful risk of illegal harm must comply with a range of new obligations to improve online safety, while those services that are lower risk face a more proportionate burden.

Ensuring that innovative UK digital businesses are not subject to costs and regulations that are irrelevant to their business is vital if Ofcom is going to help the Government achieve its objective of boosting UK economic growth generally, and the competitiveness of the digital and tech industries specifically, as per its Industrial Strategy.

Unfortunately, Ofcom has not taken the same proportionate approach as before when it comes to its proposals for the fees and penalties regime.

We believe that the decision not to take a varied approach by service type, and specifically not to exempt VSS from the regime, is disproportionate and unfair. Ofcom currently



estimates that between 20-40 firms, out of the more than 100,000 services in scope, would have to pay fees under its proposals. To put this another way, this represents between 0.02-0.04% of all regulated services, despite Ofcom's self-set objective to ensure that fees are paid by a reasonable number and range of providers. As it stands, that would mean some extremely low-risk sites will be among the handful of firms required to pay for the regulatory supervision of smaller, much riskier sites for which the Online Safety Act was designed. That is neither proportionate nor fair, and it does not represent a 'reasonable range'.

It also sends a negative signal to digital businesses wishing to enter or expand in the UK: that this is an economy where successful businesses must pay for the harms created by other sites, while those same sites avoid any such financial burden. Not only is this unfair, but it puts companies like ours at a competitive disadvantage vis-à-vis smaller but potentially riskier services, skewing the incentives to keep users safe online in the wrong direction. Ofcom has not sufficiently explained why it has proposed to abandon the 'polluter pays' principle, which is widely regarded as good regulatory practice.

We believe that exempting VSS from the fees regime would be the most straight-forward means of re-introducing proportionality and fairness to the fees regime. This would have numerous benefits. It would be evidence-based, since Ofcom has found these services to pose a materially lower risk of illegal content compared to many of the other kinds of services it will be regulating. It would be consistent with Ofcom's proposals elsewhere, given that VSS have been exempted from the categorisation process.¹ And it would be fair, because these services are likely to require limited attention from Ofcom and therefore generate little regulatory cost.

This exemption could be combined with an approach whereby those firms that will require the greatest attention from Ofcom (and therefore generate the most regulatory spend), such as social media services and Part 5 services, pay higher fees than other services. Alternatively, a mechanism could be established for collecting fees from the riskiest firms, regardless of size. In rejecting these approaches, Ofcom appears to have prioritised the principle of "stability" over the others (particularly proportionality), without explaining why this principle should take precedence and justifying its predictably negative impact on low-risk service providers and the UK growth landscape more broadly.

The idea that "the types of services, or particular features of services, attracting regulatory attention is likely to vary over time" is not particularly convincing. While there is undoubtedly going to be some change, as technology develops, the same kinds of services and features have been driving online harm for many years now, and so the idea that there will be significant, regular changes to the types of service requiring most of Ofcom's regulatory attention is unlikely. Adopting a risk-based approach would therefore not, in our view, undermine the principle of stability.

¹ Ofcom also has a general duty under the Communications Act 2003 to ensure that regulatory activity is "consistent".



We also do not believe that it would be impractical for providers of riskier services to pay higher fees. Ofcom has carried out a significant amount of research into the types of service and the service functionalities that fundamentally increase the risk of illegal harm. It must also, as the responsible regulator, have a good insight into which firms pose a high risk from illegal content via the exercise of its day-to-day functions. While we accept that these approaches are somewhat more complex than the one proposed, we do not believe they are prohibitively so, and Ofcom has certainly provided no convincing argument for why they would be.

Ofcom has a series of general duties, including to make sure that its regulatory action is “proportionate”, “consistent”, and “targeted only at cases in which action is needed.” It must also “have regard to the desirability of promoting competition in relevant markets and encouraging investment and innovation.” Unfortunately, the decision not to use its powers to vary the fees regime by service type or to exempt certain types of service means that some large but extremely low-risk firms will be liable to pay fees, while many of the riskiest firms on the internet (including some fairly large ones) will not have to pay anything towards the functioning of a regime that is required in large part because of the harms emanating from those same services.

We strongly encourage Ofcom to revisit its decision not to vary fees by service type, so that the fees regime can be as proportionate as its proposals elsewhere to date. We believe this would be the most reasonable, consistent, fair, and proportionate approach, and this has therefore formed the focus of our consultation response. Beyond this, we agree with the comments submitted by Online Travel UK (of which we are a member) regarding the fee regime more widely, including their points on referable revenue, transparency, predictability, confidentiality, and timelines.