Consultation on implementing fees and penalties under the Online Safety Act 2023: techUK response

January 2025

techUK is responding to Ofcom's consultation on implementing fees and penalties under the Online Safety Act 2023 (the Consultation) on behalf of our members with an interest in this area. We appreciate the opportunity to provide feedback on the proposals outlined in the Consultation. We are aware that significant work is being done within Ofcom to help industry prepare for the online safety regime, and we welcome the engagement it has conducted so far.

On the specifics of the fees and penalties regime, we would like to raise a number of points.

1. **Qualifying Worldwide Revenue and exemptions**

Overview

Under the proposals set out in the Consultation, we understand that Ofcom intend to define Qualifying Worldwide Revenue (QWR) as *"the total amount of revenue the provider receives that is referable to a regulated service under the Act. This means revenue that arises in connection with the provision of the service, comprising all of its parts, anywhere in the world (i.e. regardless of whether or not such revenue may be attributable to the use of the service in the UK). For fees, this revenue would be calculated over the 'qualifying period'"* (3.1.1).

Ofcom's intention to use what it calls "the worldwide referable revenue approach" to calculate QWR (as opposed to the UK referable revenue approach, which it considered but disregarded) takes account of all revenue referable to the regulated service anywhere in the world. This is disproportionate and inappropriate given that Ofcom's role only relates to the service as used by UK users, and so Ofcom should not be calculating fees on the basis of the operation of the service outside the UK.

Although the Online Safety Act requires Ofcom to charge fees based on the principle of QWR, the OSA also provides Ofcom with discretion to determine how QWR should be calculated. The proposed calculation of QWR set out in the consultation presents several challenges for providers of regulated services and the broader industry, as we set out further below. In particular, the application of QWR for supervisory fees and the approach to exemptions risks disincentivising the introduction of new services into the UK.

We are pleased to see that Ofcom have acknowledged these concerns in part by proposing that providers of a regulated service will be exempt from duties under the OSA to notify Ofcom and pay fees where that provider's UK referable revenue is less than £10m in a qualifying period (the Exemption Proposal). However, not only does the Exemption Proposal fail to redress this issue, the fact that the exemption threshold of £10m in UK-referable revenue applies on an aggregate basis to all of a provider's regulated services, significantly undermines the proportionality of the Exemption Proposal, as we explain further below.

Challenges with the Exemption Proposal

Approaching the exemption on an aggregate basis means that, for providers with multiple regulated services, once one regulated service surpasses the £10m threshold, all other current or future regulated services will have their QWR counted regardless of UK-referable revenue, or the community impact such services have in the UK.

As the OSA's relevant duties only apply insofar as the service affects the UK / UK users (s.8(3), 25(1) OSA), defining QWR beyond the UK-facing service risks and including revenue generated from non-UK users being disproportionate in nature, and goes beyond the purpose of the OSA to make regulated services safer for individuals in the UK. Under the worldwide revenue approach, Ofcom is inappropriately attempting to recover revenue generated by the user of the service by non-UK users.

Furthermore, and as discussed further below, the proposed approach may lead to services that have a large worldwide presence but a small or non-existent UK presence being excessively penalised under the regime, and therefore disincentivised to grow in or enter into the UK market. This risks acting as a barrier to growth and limiting consumer choice in the UK.

If the worldwide revenue approach is taken, and revenue other than the qualifying revenue attributable to UK users is taken into account, there is also a risk that providers of regulated services will face duplicate charges from multiple regulators, many of whom are establishing similar fee regimes. This separation is crucial to ensure fair and accurate compliance with regulatory frameworks across jurisdictions.

Aggregating global revenues for the calculation of QWR may disincentivise global providers from introducing new regulated services into, or maintaining smaller regulated within, the UK. This is because doing so would immediately enlarge the QWR used for annual supervisory fees, regardless of the community or financial impact of such services on the UK, or the impact such services have on Ofcom's oversight.

To illustrate our point, we provide the following example of a provider that offers multiple, distinct, services:

- **Service 1**: Generates over £250m in global revenue, £50m of which is referable to the UK.
- **Service 2**: This is a new service that the provider is considering launching in the UK, and which, once launched, would be considered a regulated service for the purposes of the OSA. Service 2 currently generates £400m in global revenue, but none of it is referable to the UK as the service has not yet been introduced to the UK market.

Under the current exemption proposal, because Service 1 already exceeds the £10m exemption threshold, we understand that launching Service 2 in the UK would immediately increase the provider's total QWR for fees to £650m. The risk of immediately inflated fees may discourage the provider from launching Service 2 in the UK, limiting innovation, competition, and consumer choice in the market.

In the alternative, if the exemption applied on a per-service basis, the provider would still be liable to pay supervisory fees, but these would more accurately reflect regulated services with community and financial impacts in the UK. Once Service 2 is introduced and reaches a set UK-referable revenue threshold, then the incorporation of its global revenue into the provider's total QWR would be more proportionate and reasonable. We recommend, however, that the appropriateness of the £10m threshold under this alternative approach be revisited and adjusted.

This alternative approach not only encourages innovation and investment in the UK but also aligns with Ofcom's stated principles of proportionality, transparency, and fairness, ensuring a more effective and equitable regulatory framework.

As a final note on the exemption proposal, we would welcome clarity from Ofcom on whether its intention is for the definition of 'UK referable revenue' to include revenue derived from non-UK users. For instance, revenue from European users is fully recorded under the UK legal entity, even though services provided to these users are not regulated by Ofcom. As the relevant duties only apply insofar as the service affects the UK / UK users, it is disproportionate (and contrary to the scope of the OSA) for QWR to be defined beyond the UK-facing service and for fees to be calculated in relation to non-UK users. Given the scope of the OSA, it is unreasonable for Ofcom to take irrelevant considerations, such as revenue that is referable to, for example, the use of the regulated service by non-UK users, into account when determining QWR.

If this revenue is not carefully separated from the qualifying revenue attributable to UK users, there is also a risk that providers of regulated services will face duplicate charges from multiple regulators, many of whom are establishing similar fee regimes. This separation is crucial to ensure fair and accurate compliance with regulatory frameworks across jurisdictions.

Additional challenges with the proposed determination of QWR

In addition to the challenges outlined above, we would also like to highlight the challenges that certain providers of regulated services will face where QWR is used as the deciding metric rather than profit. This approach could disproportionately affect high revenue, low profit services under the current proposals. Whilst Ofcom have argued that online services eligible to meet the required threshold of £250m QWR "would have the means to pay" (3.4.8.iv), our members' experiences suggest otherwise. Indeed, it is not uncommon for a fast-growing online service to operate at a loss in its early years of activity.

Additionally, for some services there may also be commercial sensitivities around publishing country-specific revenue figures. For example, this could have significant implications for companies with high download volumes but lower conversion rates to paid subscriptions.

We would therefore encourage Ofcom to consider further exem4ptions based on scenarios where providers of regulated services may have high revenue, but low profitability. Providers of multiple services should also have flexibility to apply the exemption to, for example, a newer, loss-making product, when making their overall QWR calculations, else the introduction of new products will be discouraged.

Such a distinction is not uncommon – the fees under both the EU's Digital Services Act and the UK's Digital Services Tax use calculations that see an exemption for companies operating at a loss on a worldwide bases, as reported on their financial statements. Any such mechanism would, of course, need robust confidentiality protections to prevent competitive harm to regulated services.

We also understand that Ofcom have considered and discounted the use of risk or categorisation in its proposals (3.4.8.ii - 3.4.8.iii) on the basis that the risk profile of a service might vary drastically year on year, although in reality, the risk profile or categorisation of a service is unlikely to change substantially from year to year, or at least a fluctuation in revenue appears equally likely.

Ensuring a fair and transparent fee regime

Finally, we would like to make the point that compliance with the regulatory regime (paying the fees) should not come at the cost of investing in practical risk mitigation efforts (online safety staffing costs and other technical innovations), which many of our members invest heavily in.

We would like to explore whether, as part of the risk assessment process, Ofcom would explore further exemptions based on risk, considering what is and isn't harmful to users and providing reassurances to services that are able to actively demonstrate a low risk profile and/or significant investments in online safety. This would ensure that companies are not disincentivised from investing in online safety as a result of increased regulatory compliance costs. A more risk-based model would, in fact, incentivise companies in reducing their risk profile by investing in more robust safety measures, in the knowledge that doing successfully so could lead to lower fees.

While our members understand the need to regulate online safety, and continue to invest heavily in ensuring that their services are as safe as possible for all users, Ofcom must ensure the fee regime adheres to the principle of proportionality, applying fees fairly across regulated providers. For example, while global revenue thresholds may be appropriate for penalty calculations in cases of non-compliance, applying them to determine routine regulatory fees creates disproportionate burdens on compliant services investing in safety.

The current proposals therefore risk penalising services that already invest heavily in user safety and collaborate with Ofcom, rather than targeting smaller services that can cause significant harm which will not be captured.

Confidentiality

Additionally, for some services there may also be commercial sensitivities around publishing country-specific revenue figures. For example, this could have significant implications for companies with high download volumes but lower conversion rates to paid subscriptions. As such, Ofcom should confirm that its intention is not to publish any commercially sensitive information, and where possible Ofcom will aggregate or summarise information to avoid sharing service providers' confidential financial information.

Regulated vs non-regulated services

Numerous providers offer multiple services that are both captured in the act (regulated and therefore subject to the fees regime) and those that are not (non-regulated, and therefore not subject to the fees regime). Ofcom has proposed that the revenues from regulated and non-regulated services must be split and correctly apportioned when it comes to determining what a service provider is required to pay under the fees regime.

Such 'blended' services are increasingly common, such as music streaming services (non-regulated) with accompanying chat functions (regulated). In such cases where the revenue for the regulated part of the service cannot be easily split out, Ofcom has encouraged an apportionment process based on a 'just and reasonable' approach. Our members would welcome further clarity from the regulator on what exactly this could entail, which may require a series of individual engagements with the regulator to avoid any potential future conflicts.

This is particularly relevant to advertising. In the above example, advertising revenue from ads on the chat service would be considered in scope, but revenue from adverts on the music streaming service itself would not be considered.

Additionally, many services offer both consumer (which are in scope) and business-to-business (B2B) services (which are not). We would appreciate clarity from Ofcom to confirm that, for companies with a mix of enterprise and consumer users, revenue from purely B2B services - i.e. services purchased by enterprise customers - are excluded from Ofcom's definition of 'Qualifying Worldwide' Revenue'.

Other areas of potential confusion arise when a parent company/group is involved. Under these proposals, revenues that are received by a parent company or other group entity must still be included in the provider's calculations whether or not it is referable to any regulated service". It seems disproportionate and inappropriate for this calculation to include non-referable revenue, as this takes into account revenue generated from non-regulated services as well.

In some instance, the involvement of a parent company could also lead to double-counting and disproportionate fees when multiple subsidiaries are regulated. Instead, each regulated service should be assessed based on its own revenue, not that of its parent group.

In some instances, services have ancillary or minor features that are in scope of the OSA, where the revenue generated is minimal, but calculating an exact revenue figure is extremely difficult. Rather than requiring providers to calculate the exact revenue, providers should be able to exclude these features from methodology calculations where their impact on QWR would be disproportionate to the administrative burden involved in the calculation. Further guidance on this and other apportionment queries would be welcome.

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Penalties where group undertakings are jointly and severally liable for a breach

Ofcom's draft guidance proposes that for situations where providers and other group entities are found jointly and severally liable for a breach, the group QWR should be defined by reference to revenue "whether or not it is referable to any regulated service". We understand the possible argument that, in theory, higher penalties increase deterrence. However, we suggest it would be more straightforward, both for businesses and for Ofcom, to use the same definition of QWR for the maximum penalty cap in the case of joint and several liability as in other cases.

It would be disproportionate and inappropriate for this calculation to include non-referable revenue, as this takes into account revenue generated from non-regulated services which are not subject to the OSA's duties. It is not consistent with the purpose of the OSA (which focuses on making the use of regulated services safer for individuals in the UK) for Ofcom to take this approach. Ofcom's regulatory spend will be generated as a result of regulated services, and revenue generated by non-regulated services is therefore irrelevant and should not be taken into account.

The alternative approach proposed above would provide more clarity and certainty for businesses, and ensures the fine is proportionate to the relevant QWR of the parts of companies regulated under the OSA. It also means there is more certainty and less unnecessary complexity for product teams within businesses whose products are not within the scope of the OSA, but where other products in the business are.

Ofcom notes that one of the reasons it has taken this approach is to ensure that the penalty is an "effective deterrent". However, Ofcom's proposed approach is disproportionate to achieve its aim: group entities still have an incentive to ensure compliance across the group without needing to take into account revenue attributable to non-regulated services.

We therefore recommend that Ofcom aligns the definition of QWR across the fees and penalties regime, as there is no legitimate basis for a divergence of approach.

2. Administrative burden

We would like to highlight that in addition to the fees themselves, compliance with this regime places a significant burden on online service providers, who will be required to take on additional legal, compliance and accounting expenditures at the expense of investment elsewhere in their businesses. As above, we would encourage tailored engagement with specific firms where possible to make this process as smooth as possible and mitigate the risk of misinterpretation of terms such as 'just and reasonable'.

One option that could lessen this burden would be to adopt a tiered approach to fee calculation similar to the approach currently undertaken by the ICO – something that Ofcom has previously considered, but one which our members would encourage it to reconsider.

Another would be acknowledging the administrative responsibilities placed on companies – for example, distinguishing between accidental non-disclosure and a deliberate manipulation of accounts. We would also like to ensure that Ofcom has the specialist expertise required to examine and audit accounts in instances of non-compliance or challenges. In both cases, the presence of independent external auditors might assist.

3. Proposed spend

In calculating this regime, Ofcom requested information from around 20 online service providers likely to be in scope of the proposals (3.3.12), however the regulator notes that it expects the eventual number of providers brought in scope to be higher than this. Based on publicly available revenue figures, the proposed rate would appear to generate fees significantly exceeding Ofcom's stated operational needs.

Under Ofcom's proposed approach, the maximum amount of fees that a service provider may be subject to is not currently clear, and has the potential to be prohibitively high. As such, we recommend that Ofcom both sets out how it will calculate its proposed spend in advance of the relevant charging year, including a breakdown of its spending, and sets a cap on the total fee a service provider is required to pay.

The above steps would ensure that providers can foresee the extent of costs they will have to pay – including the potential maximum – which ensures that the fees payable are proportionate, foreseeable and manageable. Under the current approach, providers cannot make financial plans for future years, as they do not know the maximum amount that they could be required to pay. This may act as a disincentive for companies to enter and grow in the industry.

4. Further engagement

Once again, we are grateful to Ofcom for the ability to feed into these proposals, and will continue to engage with the regulator in implementing the regime under the OSA.