

EDiMA Response – UK Online Harms White Paper

In recent years legislators have taken a sector- and problem-specific approach to digital policy-making, to respond to growing public concerns around the prevalence of illegal and/or harmful content online. This has resulted in a patchwork of initiatives at EU and Member State level which encompasses divergent – and sometimes, contradictory – rules for online services providers. The UK’s recent Online Harms White Paper is a notable attempt to take a more holistic approach to the regulation of the online space at a system level. As a representative of the platform economy, EDiMA supports a comprehensive approach to digital policy-making which takes account of the responsibilities of all actors in the online space, which would provide legal certainty to online service providers and workable solutions to the challenges raised by the presence of illegal and/or harmful content online.

Unfortunately, the White Paper raises many questions on fundamental issues ranging from definition and scope, to those of regulatory alignment and simple feasibility. These questions must be considered by legislators before an initiative of this magnitude is taken forward – or risk the creation of unclear legislation which leads to mass non-compliance and persistent issues with enforcement.

1. On the intentions and approach of the Paper

What is an “online harm”?

The White Paper proposes a new statutory “duty of care” that will apply to all “companies that provide services that allow, enable or facilitate users to share or discover user-generated content or interact with each other online”, under which they will be obliged to take steps to tackle content and activity that is considered “harmful”.

EDiMA concerns:

- The concept of “online harms” is incredibly broad, incorporating all types of activity and content which are illegal or undesirable, and which pose a physical or psychological threat to individuals and the general way of life in the UK. This broad approach to content and activity makes the application of the Paper a mammoth and impractical task, which fails to take account of important nuances. The Paper lists several types of “harms” (23 as a starting point), many of which are context specific, highly subjective and lacking a clear legal definition - depending on the individual or situation involved.
- The Paper uses the term “harm” to describe high threshold illegal content such as terrorist content and child sexual abuse material, and to describe issues which are more accurately described as societal issues – such as the issue of content which is illegally uploaded from prisons¹.
- Outside of the above concerns, the explicit list of harms is unmanageable - neither users nor SMEs have the capacity to understand all these sub-categories. For users, it will result in added friction in the reporting process, with a likely drop off in incomplete reports – this will be particularly notable in app reporting tools on a smartphone which will also be a terrible experience for a user who is trying to cram in the necessary information. For SMEs, this list

¹ UK Online Harms White Paper, page 15.

will result in additional cost and resource burdens in making sure they are able to understand and act upon all the categories. Additionally, in trying to come up with a fully comprehensive granular list of harms, it is inevitable that some will have been missed and that new ones will appear and have to be included at a later date (for example, electoral disinformation and male genital mutilation - neither are on the list, but both are recognised harms).

- The importance of the distinction between illegal activity/content and non-illegal but harmful activity/content² is not emphasised. It is imperative to acknowledge that the White Paper is advocating the regulation of legal but harmful activity, including censorship. It proposes the creation of a new framework in which a service provider will be obliged to use the same legal basis to tackle activity like revenge pornography as it does for online disinformation – despite the fact that one is a criminal activity and the other could be categorised as free speech. In this regard, the White Paper is encouraging the creation of a landscape in which private companies will be required to go further than the law and operate outside a clearly defined legal framework which does not currently recognise a definition of ‘legal but harmful’; companies will be delegated subjective moral and ethical judgements, which should sit with law-makers and Parliamentarians.
- In general, the White Paper presents a scenario in which users are all passive, and does not really acknowledge that the harms in question emanate from the users in public online spaces and not from the service providers themselves. While proliferation of illegal content in the online space is of course a concern here, the Paper places little importance on tackling the root behavioural issues which are prevalent in today’s digital society nor much consideration into how these behaviours may be improved.
- Finally, there is a lack of recognition in the White Paper of how the Internet can be a force for good: connecting people globally, supporting millions of jobs around the world and adding to customer experiences. A government must encourage innovation if it wishes to see this sector of the economy flourish; if the UK Government - or indeed any other government - wants the next Spotify or Skype to come from their home country, it must implement a regulatory framework which allows innovation and invention to grow.

EDiMA recommendations:

- Any holistic framework to tackle harmful content online should focus solely on illegal content for which there is a legal basis for the service provider to take action. An extension of the work to encompass content which is harmful but not illegal could separately be explored on a case-by-case basis, in a way that recognises the specificity of different types of harmful yet not illegal content, including in their legal standing. Otherwise, the list of 23 harms in the White Paper could be condensed into a manageable five or six categories, to allow for a practical reporting and companies' reporting management approach, as well as allowing a sustainable approach to accommodate new harms into one of the “category buckets” for the future Regulator.
- The framework put forward in this White Paper should aim to establish a balanced approach under which equal focus is placed on the role of the user. Citizens should be reminded of their societal obligations in terms of online behaviour. For example, a full-scale citizenship programme in schools and with adults would help to tackle some of the “harms” described in the paper at a source level, by making it clear that the state expects citizens in the same way online as they do offline.

² Table on page 31 does not make distinction between illegal and harmful content/activity.

- Additionally, as outlined in the White Paper, digital and media literacy and education is fundamental. However, government must go one step further and lead the way in a coherent and coordinated manner working with digital, broadcast and news media organisations, the education sector, researchers and civil society. Empowering users is a strategic pillar in addition to regulation in all its forms - including self-regulation, co-regulation and legislation - and must involve the entire online platform ecosystem in order to be successful.

2. On the “Duty of Care”

What is the scope of application?

The scope of the duty described in the White Paper is likely to capture most open online service providers. The Paper elaborates³ that the “duty of care” is targeted at services which enable two types of online activity: (i) the hosting, sharing and discovery of user-generated content; and, (ii) the facilitation of public and private online interaction.

Social media companies, public discussion forums, retailers that allow users to review products online, not-for-profit organisations, file sharing sites, search engines and cloud hosting providers are among the services explicitly included, in addition to messaging services (with a slightly differentiated approach to take account of privacy concerns).

EDiMA concerns:

- It is not clear whether caching services will be captured within the action of “facilitation”, nor whether services which provide vertical Internet architecture such as business-to-business cloud service providers fall within the scope.
- The Paper notes that a differentiated approach should be taken for private communications services, such that there should be no requirement to monitor content nor scan private channels for tightly defined illegal content. Unfortunately the Paper does not elaborate on how the definition of what constitutes “public” and “private” communications will be established, nor how this differentiated approach will work in practice when both types of communication can occur on the same service – especially when it comes to ensuring users’ fundamental right to privacy. Moreover, the inclusion of over-the-top communication service providers, while excluding traditional telephony and SMS, is inconsistent. Communication service providers, regulated separately through the upcoming Electronic Communication Code and ePrivacy Regulation, are therefore already subject to regulatory scrutiny. They also demand high levels of privacy and security, making a duty on such service-providers untenable.
- The Paper consistently confuses the notion of a company, a service and a service provider, and describes the scope of application using these three concepts interchangeably. Many companies offer very different types services, which are more or less naturally susceptible to very different types of illegal content or harmful content. For example, a social media service might be more susceptible to issues like hate speech, while a marketplace might be more susceptible to IP infringements. Continuing with this example, some companies offer both of these services via the same provider, and for a possible Regulator to take a company-specific approach rather than a service-specific approach will ultimately apply inflexible standards which do not take account of the variety of services within one entity. This raises functionality

³ Page 49.

questions when it comes to the application of “company specific” codes of practice by a potential new Regulator at a later stage.

EDiMA recommendations:

- The scope of a horizontal regulatory approach for the online space should define from the outset which layer of the Internet infrastructure is the intended focus of the framework and take a service- rather than a company-specific approach.
- The White Paper sets out that harms against organisations will be outside of scope. There is a difference between interactions between a customer and a business (B2C) e.g. a customer service chat and interactions between businesses (B2B) - with B2B no harms to individuals are involved and so it should be explicit that these are not within the scope of the White Paper. Moreover, in the case of certain types of B2B services – such as B2B cloud services – the service provider has entered into contractual arrangements that would prohibit the service provider from accessing the content that is stored on the B2B cloud by the customer.
- Electronic communication services, already treated in sector-specific rules and requiring specific privacy and security considerations, should also be taken out of the scope of this proposal. Otherwise the initiative runs the risk of inadvertently introducing mandatory monitoring of e.g. email, instant messaging, in-game messaging, etc., violating users’ fundamental right to privacy.

To whom is the “duty of care” owed?

Under UK tort law, a duty of care is established on the basis of a relationship with an individual and where there is risk of physical injury – even psychological injury is not as clearly substantiated in case law.

This would indicate that the “duty of care” as proposed in the White Paper is not *per se* a legal duty of care as defined in common law, raising question as to how the online harms “duty of care” will function in practice when it comes to litigation in UK courts.

EDiMA concerns:

- How will the necessary proximity between an individual and an online service provider be established for the purposes of a “duty of care”, never mind a relationship between the online service provider and the British society at large?
- How would an online service provider hypothetically owe a “duty of care” to victims of the harmful content who are not even users of the services themselves? It is suggested in the Paper⁴ that this will be the case, but no indication is provided as to how a causal connection would be established for an alleged victim in this instance.

EDiMA recommendation:

- A wealth of case law already exists for the concept of a duty of care in tort law, and the criteria required to establish a duty of care are not readily applicable to the online space. It is recommended that any obligation to act on the part of the online service provider is defined independently, taking the nuances of online relationships into account.

⁴ Page 42.

How can service providers discharge their duties?

The White Paper indicates that a service provider must observe different codes of practice – as many as 23 - as defined by the Regulator in order to respect its duty. Unfortunately, the White Paper fails to establish that a service provider can ever reach a point where it might have satisfied these duties. The White Paper envisages a scenario in which codes of practice set a base line for compliance but does not clarify how the Regulator will draft these codes nor whether these codes of practice are open-ended. Moreover, although the White Paper states that these duties ought to apply proportionately⁵, the onus is still on the service provider to reasonably justify its own practices where it has deviated from a code of practice⁶.

In addition, outside of the codes of practice there is an inherent expectation that the service provider must take a risk-based approach to proactively identify new possible harms or possibilities for abuse and notify them to the Regulator⁷.

EDiMA concerns:

- The codes will effectively establish minimum requirements for online service providers to operate in the UK market (at the very least), and it will be important that the Regulator is cognisant of the capabilities of companies of all sizes. For example, basing codes on certain industry best practices could run the risk that the practices of larger service providers would set the standards for the smaller ones.
- The White Paper seems to indicate that the future Regulator may adapt the codes on a regular basis; how is a service provider to keep abreast of and operate under numerous different codes of practice that must be adapted and recreated as different harms manifest online in different ways? It is not difficult to envisage a situation in which there are so many different codes of practice for an ever-growing list of harms, that compliance becomes a competitive advantage rather than a feasible reality.
- How is the service provider to prove that its alternative approach to a code of practice “will effectively deliver the same or greater level of impact”? The Paper does not specify whether a service provider will have to provide evidence to this effect on a rolling basis.
- On the risk-based approach, it seems that a service provider must be on a constant look out for possible risks, determine that the risk is great enough to take action outside of any codes of practice and do so in a manner that is also proportionate so that it does not impact on the fundamental rights of the users of the service.
- The White Paper leaves the possibility open that a service provider can be found liable for failing to identify a “harm” or act accordingly on a risk which is not covered by a code of practice but which the Regulator considers warranted further action.
- Why does the White Paper not incorporate a Good Samaritan principle in any part of the proposed framework? This would provide some protection for responsible service providers from what effectively resembles a framework of perpetual liability.

EDiMA recommendations:

⁵ Page 42.

⁶ Page 43.

⁷ Page 43.

- More clarity on the nature of the codes of practice is required, and the imposition of timelines for systematic review is advisable so that a service provider can operate within the codes with a level of legal certainty for their duties. Clarity on the process behind the development of codes of practice is also needed, and must include systematic consultation with the full and representative range of industry and civil society actors active in this area.
- An obligation on a service provider to take a risk-based approach to their service is inadvisable and irreconcilable with the e-Commerce Directive (more below), as the service provider will be obliged to constantly seek out possible areas of liability. Instead, an approach which allows a service provider to work off the harms it has already observed is advised, as it will allow the service provider to work to implement system-level solutions to issues which have been identified on the basis of valid notices.
- Finally, a Good Samaritan principle required for any framework which places proactive duties on the service provider to such a degree that it could impact the service provider's freedom to conduct a business.

3. On the relationship with the existing limited liability *acquis* and other existing bodies of law

How to reconcile proactive measures with the e-Commerce Directive and other relevant bodies of law?

It is evident from the White Paper that any efforts made by an online service provider to comply with its duties will include many variations of proactive measures.

When referring both to the immediate actions expected of service providers to tackle "harmful" content and to the codes of practice that will eventually come into place, the White Paper describes minimum "high-level expectations"⁸ such as preventing certain types of content from being made available to users, monitoring and addressing growing threats, proactive identification of certain types of content, moderation of speech, etc. – to name a few.

While it does refer to some legal instruments within the current regulatory landscape for specific types of content⁹, overall the White Paper seems to take the position that service providers are able to tackle many of the "harms" encountered online but are choosing not to do so because there is no regulatory structure in place to force the issue. At the same time, the White paper acknowledges that many service providers within the scope of the framework also fall within the scope of the limited liability regime of the e-Commerce Directive. Furthermore, the term "proactive measures" implies extensive data collection about users and a duty to assist law enforcement, both of which are already governed by a whole framework of law which included checks and balances to protect fundamental rights.

EDiMA concerns:

- In general, the White Paper does not clarify how any of the proactive measures can be reconciled with the fact that the e-Commerce Directive prohibits the imposition of a general monitoring obligation.
- Service providers will also be obliged to take a "risk-based" approach to their services by continuously monitoring for new potential harms which might have to be addressed in the future by the Regulator. How is this to be reconciled with the fact that Article 15 of the e-

⁸ Page 64.

⁹ Page 32.

Commerce Directive states that no obligation should be imposed on service providers to seek facts or circumstances relating to illegal activity on the service?

- The White Paper does not acknowledge that online service providers are already obliged to take action on illegal content or activity once it is made aware of the infringement on its service, and have adopted to that end effective notice and action mechanisms. The Paper also glosses over the many voluntary and successful self-regulatory initiatives and existing co-regulatory initiatives (e.g. codes of conduct on tackling hate speech, terrorist content and disinformation).
- The White Paper does not make it clear that there is currently no perfect technical solution which can identify hate speech or cyberbullying, and to attempt to put in place such a system will naturally infringe on users' freedom of speech. It is for this reason that the prohibition against a general monitoring obligation is included in the e-Commerce Directive.
- The White Paper also does not recognise the limitations of technology. For example, it is impossible to pro-actively moderate a live streaming service. The codes of practice will need to reflect and praise good actors within the confines of what is and is not technically possible.
- The Paper does not sufficiently acknowledge the existing legal framework governing data collation, data privacy and law enforcement, including the Investigatory Powers Act. This could lead to a situation where the duty over-rides this body of law and the checks and balances built into it. Similarly, it does not acknowledge the reality of international companies having to manage different bodies of data protection law.

EDiMA recommendations:

- The White Paper needs to take account of the regulatory framework which already governs many of the online service providers in the scope of the proposal. The e-Commerce Directive is fundamental legislation which underpins the online ecosystem - failing to reconcile the new proposal for a "duty of care" with a cornerstone piece of legislation leaves a considerable hole in this initiative. It is furthermore essential that existing self- and co-regulatory initiatives remain in place and that these could potentially be expanded to include other content areas as necessary.
- The classification of proactive measures as a minimum response to content which are subjectively harmful but not illegal fails to take account of the technical reality in which service providers operate and does not show due regard to the protection of users' freedom of speech – this should be given further consideration. A company which has to operate in the confines of an undefined legal but harmful framework will struggle to find a balance between proactive moderation and censoring free speech – it is unclear how they will navigate such an ambiguous term and it is unlikely it will be able to appease everyone with any decision it takes.
- The White Paper must clearly state that the duties cannot over-ride existing UK law governing data collection and law enforcement, as well relevant legal obligations outside of the UK. Any expectations to monitor "harmful" content must be explicitly in line with the powers Parliament has granted the Government.

4. On the Regulator

Who is the Regulator?

The White Paper proposes that a future Regulator will oversee compliance with the service providers' duties by drafting and enforcing codes of practice for different types of harmful content. It appears that there is a preference in the White Paper to extend the remit of Ofcom for this purpose¹⁰.

EDiMA concerns:

- While the rationale for extending the powers of an existing Regulator is fleshed out (e.g. the time required to set up a new body, costs involved), the Paper does not clarify how the UK will ensure that any Regulator under this framework will be equipped with the necessary expertise. The White Paper goes so far as to suggest that an existing Regulator might already have the necessary expertise to oversee a statutory duty for all possible online harms across all service providers under the scope¹¹.
- Any Regulator of this framework will require an in-depth, system-level and objective understanding of many different types of online service providers. To date, there is no Regulator in the UK with this level and breadth of technical expertise, and to use any existing regulator will inevitably skew the enforcement of the duty in a way which echoes the initial remit of the chosen Regulator (e.g. Ofcom's focus on linear audiovisual services). In this regard the reference to an empirical approach¹² involving academics and user consultation is welcome, however a specific role for the service providers within this process would provide valuable insight for any future Regulator under this framework.

EDiMA recommendations:

- If the decision is taken to proceed with an established Regulator for this role, a regular representative dialogue should be established for the new Regulator with external stakeholders included in the scope and impacted by the new framework (e.g. user representatives), which allows for meaningful technical input and advice.
- In addition, if an established Regulator is selected for this role it should be ensured that it is provided with the necessary resources required to effectively extend its remit to the regulation of "online harms".
- In order to take a reasoned approach to fulfil its remit, it is essential that the future Regulator is fully independent. Clarity and transparency are also required as to the overall remit of the Regulator.

How will the Regulator determine when the duties have been satisfied?

The White Paper states that when making an assessment as to whether a service provider has satisfied the duties, the future Regulator must take account of the principles of reasonableness and proportionality, the capacity of the companies affected and their reach.

EDiMA concerns:

- While these are key principles for any horizontal framework, it is not clear how this can function in practice. The Paper mentions¹³ that the Regulator will set out clear expectations as to what is expected of companies under the codes of practice, but it does not specify if this

¹⁰ Page 57.

¹¹ Page 57.

¹² Page 56.

¹³ Page 55.

will be specific to companies or service lines. If so, how often will these expectations be updated to take account of new factors (e.g. changing market realities, new technologies, new legal obligations either nationally or abroad)?

- The Paper does not clarify whether the Regulator should use specific metrics for each type of company or service line when deciding on compliance with its duties. It is suggested that data on user claims through complaints mechanisms is one metric against which the Regulator may compare the efficacy of a company's efforts¹⁴. However, the Paper does not take into account that the implementation of a particular code of practice may actually lead to a rise in user complaints, where due regard has not been paid to fundamental rights within the code itself.
- The Paper puts the emphasis on transparency reporting, which is commendable as it will allow consumers and authorities alike to have a better understanding of the measures taken by industry to address harmful content, and provide assurances regarding the safety of users. However, the Paper does not clarify how these requirements will be applied proportionately and take account of the differences between service providers.
- Outside of the codes of practice, service providers are also expected to keep an eye on possible risks of abuse within their services. How will the Regulator decide that this obligation has been discharged by service providers when there are no baseline standards (such as those which would presumably be set by a code of practice for a particular harm)? On what basis is a Regulator to determine that a particular risk was foreseeable?

EDiMA recommendations:

- As it stands, the White Paper raises so many unanswered questions as to how the Regulator is going to draft codes of practice, oversee them and enforce them, that it negates the efficacy of a principles-based duty. More clarity as to the standards which will be used to measure service providers' compliance with its duties is needed.
- As a guiding principle, the designated Regulator ought to be in a constant state of engagement and consultation with industry to ensure that any forthcoming codes of practice remain fit for the digital age. In addition, the Regulator should only act where there are demonstrable systemic failures by a service provider to respect its duties, and not on the basis of issues arising on individual pieces of content or activity.
- Should the decision be taken to move forward with an assessment of the service providers compliance with its various duties against the different codes of practice, the responsibility for the drafting of these codes should reside solely with the future Regulator, so as to avoid the possibility of overlapping and possibly contradictory codes being developed by different Government entities.
- Any transparency requirements must take proportionality into account, starting with the size and type of business and the scale of risk, while taking into account trade secrets, confidential commercial information and data protection. Transparency requirements should also be standardized internationally, to avoid different transparency templates and therefore additional administrative, financial and technical burdens on industry, and provide points of reference for comparison purposes.

How will the Regulator protect users' rights online?

¹⁴ Page 47.

According to the White Paper, the Regulator will have a “legal duty” to take account of innovation and protect users’ rights online¹⁵. The Regulator is also supposed to oversee the redress mechanisms for users of the online services in the scope.

EDiMA concerns:

- The Paper does not elaborate on how this legal duty can be reconciled with the various obligations which will be produced via the codes of practice. Proactive measures for many different types of non-illegal harms (relating to both content and activity) are categorised as minimum expectations for compliance, outside of additional (and presumably more stringent) obligations in the codes of practice. This will inevitably have adverse effects on the freedom of speech and the privacy of users of the online services.
- Reference is made to having effective recourse for users to flag concerns on different service lines for different types of harms, but these mechanisms are only available to users after they have felt the impact of a proactive measure.
- Considering the sheer number of harms listed under this framework and the fact that the White Paper is specifically proposing regulation on free speech in many instances, it is difficult to imagine how the Regulator’s legal duty to protect users’ rights can be discharged.

EDiMA recommendation:

- More engagement is required with civil society to fully elaborate on how users’ rights can be factored into this new framework. A narrowing of the scope of the White Paper to a focus on illegal harms should also be considered, so that any action on the part of the service provider is anchored in a strong legal basis which would take account of fundamental rights.

¹⁵ Page 56.