

Online Safety Bill – Parliamentary Briefing from Microsoft

April 2022

Microsoft has long supported the aims of the Online Safety Bill. As a company, we have a history of working with governments, civil society, academia, and others in industry to promote online safety. When the draft Bill was published in May 2021, we raised several critical concerns with Government. While much progress has been made following the legislative scrutiny process carried out by the Joint Committee on the Draft Online Safety Bill, we believe there still remain critical issues with the Bill.

As with the draft Bill, the updated Bill does not give providers guidance on how to balance duties to both protect users from illegal content and content that is legal but harmful to children against duties to protect the rights of freedom of expression and privacy. This fundamental issue – which many across the UK have recognised – could have serious implications for freedom of speech in the UK, and should be addressed to ensure the Bill is effective across its aims.

Issue 1: It is unclear how the Bill will balance duties both to protect users and to uphold principles of freedom of expression

The Government has recently reiterated its commitment to upholding the principle of freedom of speech. Indeed, the Online Safety Bill makes a similar commitment to this principle. However, there is an inherent tension between the Bill's obligations for providers to protect users from illegal content and content that is legal but harmful to children, and the same providers' duties to protect the rights of freedom of expression and privacy.

For the Bill to achieve its stated objective of safeguarding freedom of expression, this tension must be resolved –through a recognition that tech companies should not be tasked with deciding what is illegal content. As per current process, the removal of illegal content should require a court order, building in an independent tribunal process that ensures that content is in fact illegal before requiring providers to remove it.

Issue 2: The Bill would create two-tier search engines in the UK

We urge Parliament to recognise the practical implications of the Bill's current requirements on search engines, and how this could impact some of the world's most valuable learning resources. A search engine that is expected to adapt the "design of functionalities, algorithms and other features" to minimise the chance of children accessing legal but harmful content goes beyond what is proportionate – in reality, this demands the building of an entirely new product, undermining the function of a search engine as an indexer of knowledge and information. The Bill, as it stands, would oblige search engines to censor lawful online content, age-gate users and operate separate search services for different age groups—all of which would inevitably chill freedom of access to information and other human rights.

Microsoft already has leading technology in place to minimise the risk of children’s exposure to harmful content, best exemplified by our SafeSearch tool. However, the Bill remains unclear in what Ofcom expects in this regard until an applicable code of practice is published. We anticipate the publication of this code of practice, and in the meantime we urge that these requirements on search engines are proportionate and recognise the purpose and positive impact of search engines in the dissemination of knowledge and information.

Issue 3: The development of Ofcom’s codes of practice must be an outcomes-focused and collaborative process, rooted in transparency

The Bill gives Ofcom the power to issue “codes of practice” relating to various duties of care and types of regulated content covering: terrorist and CSEA content, “recommended” measures to comply with “relevant duties” (Section 37(3)); and fraudulent adverts.

Given how critical these codes will be in supporting the objectives of the Bill, the development of these codes should involve a collaborative process between industry and Government prior to approval as these codes will define much of what businesses are expected to do in operationalising the obligations outlined in the Bill.

In this respect, Microsoft welcomes Ofcom’s willingness to work collaboratively with companies to help them understand their new obligations and what steps they need to take to protect their users from harm. However, this would be best achieved by the publication of *draft* codes of practice for public comment – the suggestion of which is absent from the Bill in its current form. This would not just benefit those companies, large and small, who are seeking to comply with the requirements and duties outlined in the Bill. It would also allow stakeholders across civil society and beyond to offer feedback on the measure and recommendations set out in the draft codes of practice.

Issue 4: More clarity is required on what is considered content that is ‘legal but harmful’ to children

As it exists currently, the Bill imposes additional duties of care on certain user to user services and search providers with respect to “content that is harmful to children” and (for Category 1 user to user services) also “content that is harmful to adults.” Content is harmful to children if it falls within categories that the Secretary of State will identify in secondary regulations, *or* if the content is “of a kind which presents a material risk of significant harm to an appreciable number of children in the United Kingdom” (Section 53(4)).

The lack of specificity here – and the resulting implications for freedom of speech – is problematic. The Bill, for example, does not define the phrase “appreciable number,” or clarify whether this should be calculated in absolute terms (e.g., 1000), or as a proportion of total users (e.g., 20%). To oblige providers to remove content based on non-specific parameters could unintentionally lead to the over-removal of content and, by extension, censorship and overreach – in clear opposition to one of the stated aims of the Bill: to safeguard freedom of expression online.

Issue 5: Tech companies should not be expected to determine what is illegal beyond child sexual exploitation and abuse (CESA) offences and terrorism offences

Microsoft is fully committed to stamping out CSEA and terrorist content across our platforms and Microsoft's existing use of technology to tackle such content represents best practice in the industry. However, while Schedule 7 of the updated Bill outlines and details the additional priority offences that were not given in the draft Bill – including assisting suicide, sexual exploitation and assisting illegal immigration – it is still unclear how tech companies will be reasonably expected to determine whether certain content is illegal or not, particularly without access to the wider context that such content might exist as part of.

CSEA and terrorism offences constitute much less ambiguous crimes than, for example, assisting illegal immigration or harassment. Parliament should also consider the broader societal implications of a Secretary of State being able to add to this list of offences as they see fit. In this respect, Microsoft agrees with the suggestion of the Joint Committee on the Online Safety Bill who recommended that Government, in bringing forward future criminal offences, consults with Ofcom and the Joint Committee as to whether they should be designated as priority illegal offences in the legislation that creates them.

Related to **Issue 1**, therefore, is an ongoing concern that tech companies are being given too much responsibility to assess what constitutes criminal content, without enough clarity in the Bill about how they will be reasonably be expected to do this. It also remains unclear how tech companies will be expected to monitor in real-time for such content – both practically, but while also maintaining user privacy.

Issue 6: Conflict-of-laws issues must be resolved now, before it is too late

The Bill is being developed in parallel to related legislation in other markets, including the EU, the USA and Australia. The European Union is in the process of updating the 2001 Electronic Commerce Directive in the form of the proposed [Digital Services Act](#), while policymakers in Australia and the United States, have offered their own laws or regulations governing content moderation. In many cases, these proposals take quite different approaches for promoting online safety to those set out in the Bill. In some cases, the Bill would impose diverging or even conflicting obligations on service providers to those set out in these other proposals.

Without aligning the Bill as closely as possible to these examples, unavoidable conflicts of laws may become apparent. For instance, there is a tension between the Bill's requirement for tech companies to address illegal or harmful content in private communications (e.g., a private video call) and EU data protection regulations such as the existing GDPR. Likewise, many third countries impose safeguards against wiretapping, and may define the concept of "wiretapping" such that it limits the ability of service providers to monitor any type of communications content without the user's explicit consent.

The Joint Committee has recommended that Ofcom should have the power to share information and to co-operate with international regulators at its discretion. Microsoft urges Parliament looks to align the Bill as closely as possible to legislation across the UK's main economic partners. We also propose a conflict-of-laws provision which would excuse tech companies for not complying with the Bill in circumstances where doing so would force them to violate another law to which they are bound.