

The Online Safety Act 2023 Categorisation Thresholds

Lead department	Department for Science, Innovation and Technology
Summary of proposal	Sets the thresholds for Category 1 (large user-to-user services), 2A (large search services) and 2B (other regulated user-to-user services) under the Online Safety Act 2023.
Submission type	Impact assessment (IA) – 20 September 2024
Legislation type	Secondary legislation
Implementation date	2024
Policy stage	Final
RPC reference	RPC-DSIT-5361(1)
Opinion type	Formal
Date of issue	11 October 2024

RPC opinion

Rating¹	RPC opinion
Fit for purpose	The IA provides a satisfactory updated assessment of the direct impacts on business and impacts on small and microbusinesses. The IA would benefit from providing greater and clearer cross-referencing to the enactment stage IA in places. The IA's discussion of options would benefit from providing information on how Ofcom arrived at its categorisation thresholds, in particular why categorisation based on size and functionality was chosen over one based on size or functionality.

Business impact target assessment

	Department assessment	RPC validated
Classification	Qualifying regulatory provision (IN)	Qualifying regulatory provision (IN)
Equivalent annual net direct cost to business (EANDCB)	£15.4 million	£15.4 million (2019 prices; 2020 present value base year)
Business impact target (BIT) score	£77.0 million	£77.0 million
Business net present value	-£133.0 million	
Overall net present value	Not quantified	

¹ The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the [Better Regulation Framework](#). The RPC rating is fit for purpose or not fit for purpose.

RPC summary

Category	Quality	RPC comments
EANDCB	Green	The thresholds set have resulted in fewer businesses in the highest two categories than that estimated in the enactment stage IA and therefore a reduction in the estimated direct cost to business. This IA would benefit from cross-referencing back to that IA more clearly.
Small and micro business assessment (SaMBA)	Green	This IA updates the enactment stage IA's estimates of the number of SMBs affected by categorisation, with only one small business falling into the lowest category. The enactment stage IA addressed exemption, disproportionality and mitigation in detail.
Rationale and options	Satisfactory	Combined with the detailed discussion in the enactment stage IA, the Department's discussion of rationale and options is satisfactory. The IA's discussion of options would benefit from providing information on how Ofcom arrived at its decisions on categorisation thresholds and alternative levels that were rejected and why. In particular, the IA should address why Ofcom opted for categorisation based upon size and functionality rather than size or functionality.
Cost-benefit analysis	Satisfactory	The IA uses the cost data from the enactment stage IA, scaled by the revised estimates of the number of platforms expected to fall into the categories. The IA would benefit from discussing further the two areas where it has been unable to produce monetised estimates. The IA could also provide details of the evidence and data used by Ofcom in setting the thresholds.
Wider impacts	Satisfactory	The IA discusses innovation and competition risks. The IA would benefit from drawing from the enactment stage IA's discussion around the risk of disincentivising these businesses' willingness to invest in the UK. The IA could also discuss the extent to which the categorisation thresholds and associated duties compare with requirements in other jurisdictions, and how far any alignment might mitigate this risk.
Monitoring and evaluation plan	Satisfactory	The enactment stage provided a good and detailed M&E plan. The present IA would benefit from providing greater discussion of how the review of the thresholds might be carried out, in particular how the proportionality of the additional duties to the level of risk of harm and size/capacity of the providers might be assessed. This could include M&E plans in relation to small but potentially high-risk sites/platforms.

Background

The RPC recently issued a fit-for-purpose opinion on the enactment stage IA for the Online Safety Act 2023.² That IA presented an indicative figure of £263 million (2019 prices, 2020 present value base year) for the equivalent annual net direct cost to business (EANDCB). The IA noted that the direct business impact of the measure depended on matters that would be detailed in secondary legislation and in Ofcom's codes of practice and would be subject to consultation and further IAs. The present IA is on one of those pieces of secondary legislation.

Summary of proposal

The Online Safety Act (OSA) 2023 created a new regulatory framework establishing a duty of care on companies to improve the safety of their users online, which will be overseen and enforced by Ofcom. The new regulatory framework applies to any service:

- which hosts user generated content (UGC) which can be accessed by users in the UK; and/or
- facilitates private or public interaction between service users, one or more of whom is in the UK;
- search engines; and
- any service which publishes pornographic content which can be accessed by users in the UK.

The measure provided for the following three categories:

- Category 1 - likely to be the highest risk and 'highest reach user to user' platforms, e.g. the largest social media sites and pornography sites, which will have additional duties with regard to content that is harmful to adults;
- Category 2A - the highest risk and highest reach search services, e.g. the largest online search engines; and
- Category 2B - high-risk, high-reach platforms that may not necessarily meet the Category 1 threshold.

It was considered that platforms in these categories presented the highest risk and therefore would have additional duties under the Act. A duty is given to the Secretary of State under Schedule 11 of the OSA to make regulations specifying threshold conditions for categorisation, as soon as reasonably practicable after receiving advice from Ofcom. The proposal subject to the present IA specifies these threshold conditions.

EANDCB

The proposed thresholds mean that fewer platforms are now expected to fall into categories 1 and 2A (best estimate down from 20 in the enactment stage IA to 15 now), although with more platforms in category 2B (up from 15 to 28). The greater

² 'The Online Safety Act 2023', RPC-DSIT-4347(5) 25 September 2024.

level of estimated compliance costs on category 1 and 2A providers outweighs the larger increase in category 2B providers, so that overall cost estimates have fallen. The IA estimates a net direct cost of £133 million, compared to £187 million previously, in present value over ten years. This translates to an EANDCB figure of £15.4 million (2019 prices, 2020 present value base year).

This cost relates only to the additional duties imposed by categorisation. As noted above, the enactment stage IA estimated an indicative EANDCB figure of £263 million. The reduction in cost associated with categorisation amounts to around a 2 per cent reduction in the estimated overall cost of the OSA.

The IA would benefit from providing clearer cross-referencing to the relevant costs in the enactment stage IA. In particular, the revised compliance costs in table 3 (pages 7-8) could be mapped more clearly to the estimates in table 5 (pages 32-33) of the enactment stage IA. The tables allow a broad comparison, which appears to support a cost reduction of the order presented in the IA (£54 million), but it would be helpful if the presentation allowed a more exact comparison.

The IA presents an annual average cost of £13.2 million; however, the IA would benefit from explaining that this cost is not evenly spread over the ten-year appraisal period. There is a higher cost in year two in relation to the fraudulent advertising duty. While this matches the profile in the enactment stage IA, the present IA would benefit from explaining this profile.

The IA notes that user-to-user services that meet the relevant functionalities for category 1 and whose UK users of user-to-user services are at least 75 per cent of the threshold for category 1, will be placed on an 'Emerging Services List' by Ofcom. Given that this list was not mentioned in the enactment stage IA, the present IA would benefit from discussing further the impacts of this, both in terms of potentially extending costs to businesses not yet in scope but who may benefit from being given time to prepare for becoming in scope. Furthermore, the IA could also address the likelihood of businesses on this list exceeding the threshold and becoming subject to the measure over the ten-year appraisal period.

The IA notes that providing user empowerment duties cannot be appraised at this time because Ofcom has not defined how providers can comply (paragraph 28, page 10). The IA would benefit from discussing the likely scale of the cost to category 1 service providers and whether an estimate will be made in due course by Ofcom. Similarly, the IA notes that Ofcom will be producing a code of practice on the duties related to protections for news publisher and journalistic content, and content of democratic importance (paragraph 44, page 11). The IA would benefit from justifying further why it expects compliance costs to be minimal and clarifying whether Ofcom will provide an estimate of cost when it produces its code of practice.

The estimated cost to the categorised businesses from the additional duties forms well under 10 per cent of the overall cost to business of the OSA. This would appear to be because overall costs are dominated by content moderation, potentially applying to all online service providers, but the IA would benefit from explaining this more specifically.

Finally, the IA should include a revised ‘running total’ of the estimated overall EANDCB of the OSA, which would appear to be slightly lower than that presented in the enactment stage IA.

SaMBA

The IA for the enactment stage IA included a strong SaMBA, which addressed exemption, disproportionality and mitigation. The present IA notes that it is expected that no small or microbusinesses are expected to fall into categories 1 or 2A, with only one small business in category 2B. The IA would benefit from discussing the balance between avoiding the burdens on SMBs that would result from being subject to additional category 1 duties against the potential benefit of small platforms set up to cause harm being in scope of those duties. The IA estimates that around three medium-sized businesses could also fall into category 2B. It is noted that duties are significantly less in this category than in the higher two categories. The assessment would benefit from discussing whether SMBs or, more likely, medium-sized businesses are likely to be on the emerging services list.

Rationale and options

The enactment stage IA provided a good discussion of the rationale for intervention. The present IA would benefit from cross-referencing the enactment stage IA on the rationale and justification for the additional duties on categorised companies. The IA would also benefit from discussing the implications of Artificial Intelligence (AI) generated content and its rapid pace of change for the categorisation measure, including how it might affect compliance with the additional duties faced by these businesses.

The IA’s discussion of options would benefit from providing information on how Ofcom arrived at its decisions on categorisation thresholds and alternative levels that were rejected and why. In particular, the IA could usefully set out why Ofcom opted for a threshold of size and functionality for category 1 rather than size or functionality, which appeared to be an option under the Act. Within this, the IA could explain how Ofcom assessed (and rejected) the possibility of riskier types of service being categorised without reference to a numerical threshold and how it considered the issue of some larger platforms caught by categorisation based on size having lower risk levels than smaller sites.

Cost-benefit analysis

Evidence and data

The IA uses the cost data from the enactment stage IA, scaled by the revised estimates of the number of platforms expected to fall into the categories. This appears to be reasonable, as the enactment stage IA has been produced very recently and the estimates were strengthened following consultation. However, some of the estimates in that IA were more illustrative than definitive and the present IA would benefit from discussing the level of confidence in the data supporting the

costing of the additional duties for categorised businesses. The IA would also benefit from describing further the evidence and data used by Ofcom in setting the threshold levels. In particular, it would be useful for the IA to describe how Ofcom assessed the evidence it received from industry and civil society on factors for determining its categorisations (particularly where Ofcom reported that it needed more evidence to address gaps /concerns).

Risk and uncertainty

The IA notes that it has been unable to cost the impact of user empowerment duties and duties related to protections for news publisher and journalistic content, and content of democratic importance. The IA would benefit from discussing the possible scale of these impacts and justifying further where they are described as likely to be minimal.

The RPC's opinion on the enactment stage IA noted that the assessment would benefit from discussing the subjective nature of some key terms used in the Act and the consequent difficulties in defining them. The present IA would benefit from explaining how the various content definitions in the Act will interact with existing definitions and other regulatory frameworks, in the context of the corresponding obligations on platforms in the different categorisations.

Modelling, benefits and break-even analysis

As with the enactment stage IA, the Department is unable to monetise benefits but includes a 'break-even' analysis. This notes that a reduction of 0.02 to 0.09 per cent in the estimated £254 billion of detriment caused by online harms in the UK would offset the estimated cost of this measure. The IA would benefit from discussing more specifically the relative risk associated with the platforms in the categories and the cost of the additional duties being incurred by them. The break-even analysis appears more suited to the comparison in the enactment stage IA, where the estimate was that a 1.2 per cent fall in the detriment would offset the overall cost of the OSA. Given that the £54 million reduction in cost in respect of categorisation represents only around a 2 per cent fall in the overall estimated cost of the OSA, the overall break-even analysis for the OSA appears to be broadly unchanged.

Wider impacts

The enactment stage IA provided detailed assessments of wider impacts, including on trade, innovation and competition. The present IA discusses innovation and competition risks associated the categorisation thresholds but considers these to be mitigated by the tiered approach. The IA would benefit from discussing whether the tiers (and emerging services list) could discourage technology businesses from growing. This could also address the risk of potentially harmful sites/platforms choosing to remain small, or have many smaller sites, to avoid having to comply. Given that the categories apply to the largest businesses, the IA would benefit from drawing from the enactment stage IA's discussion around the risk of disincentivising these businesses' willingness to invest in the UK. The IA could also discuss the extent to which the categorisation thresholds and measures compare with

requirements in other jurisdictions, such as the EU's Digital Services Act. This could include, to the extent that these align, how far this might reduce regulatory compliance costs for platforms operating across different markets, potentially mitigating against disincentives to invest.

The IA would benefit from discussing the cost implications for Ofcom and any other public bodies in terms of establishing and enforcing the additional duties for businesses in the categories.

Monitoring and evaluation plan

The enactment stage provided a good and detailed M&E plan. There will be a wholesale review of the OSA two-to-five years after the last of the provisions come into force. The present IA notes that the thresholds for category 1, 2A and 2B services are not permanently fixed and there are provisions for amending or replacing the regulations, following further research carried out by Ofcom. The IA would benefit from indicating how the assessment of the cost-effectiveness of the thresholds might be carried out, in particular how the proportionality of the additional duties to the level of risk of harm and size/capacity of the providers might be assessed. In particular, the plan could address how it will monitor the impact of small but potentially high-risk sites/platforms that fall below the categorisation thresholds.

The RPC considers that a robust, well-planned and targeted post-implementation review is needed to ensure that there is sufficient evidence to make these evaluations. The plan could include an initial discussion of data that might be used, questions to be addressed and possible metrics. The plan could also discuss how AI and the challenges presented by its rapid pace of change would be addressed. The plan should include discussion around adaptability to evolving trends across the different forms of online content, including AI, and how that impacts the different categorisations.

Regulatory Policy Committee

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Two Committee members did not participate in the scrutiny of this case to avoid a potential conflict of interest.