EXPLANATORY MEMORANDUM TO

THE ONLINE SAFETY ACT 2023 (CATEGORY 1, CATEGORY 2A AND CATEGORY 2B THRESHOLD CONDITIONS) REGULATIONS 2025

2025 No. 226

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Science, Innovation and Technology and is laid before Parliament by Command of His Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Declaration

2.1 The Rt Hon Peter Kyle MP, Secretary of State for Science, Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

2.2 Daniel Okubo, Deputy Director for Online Safety Policy and Regulation at the Department for Science, Innovation and Technology confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Charlotte Williams at the Department for Science, Innovation and Technology Telephone: 07864 246 120 or email: osaimplementation@dsit.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument stipulates threshold conditions which the Secretary of State must set under paragraph 1 of Schedule 11 to the Online Safety Act 2023 ("the OSA"). These are threshold conditions which a regulated user-to-user service, search service or combined service under Part 3 of the OSA must meet in order to be designated by Ofcom as a Category 1, Category 2A, or Category 2B service in a published register and thereby be subject to additional duties under the OSA. The threshold conditions for Category 1 will also be used by Ofcom to prepare a list of emerging Category 1 services. Services will be placed on the emerging list if they meet the conditions set out in section 97 of the OSA.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.3 The territorial application of this instrument (that is, where the instrument produced a practical effect) is England and Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The OSA provides for the procedure for the first regulations under paragraph 1 of Schedule 11 to the OSA. The Secretary of State is required to make regulations to set threshold conditions following research and advice provided by Ofcom[1]. In making these regulations there are specific factors that the Secretary of State had to consider, as set out in Schedule 11 to the OSA. In relation to Category 1 thresholds, the factors were amended during the passage of the OSA from the "level of risk of harm to adults from priority content that is harmful to adults disseminated by means of the service" to "how easily, quickly and widely regulated user-generated content is disseminated by means of the service." The OSA required Ofcom to undertake research on these factors and any other characteristics that Ofcom deemed relevant. Having considered Ofcom's advice, the Secretary of State has decided to follow it in making this instrument. Ofcom is named in the OSA as the independent regulator of online safety.

5.2 This instrument will stipulate the threshold conditions which Ofcom will use to determine whether the regulated services meet the threshold conditions to be considered a Category 1, 2A, or 2B service and to establish a register of categories of services. Once a service has been entered into the register, the service provider will need to comply with additional duties in force for the service's category.

5.3 Under the OSA, all regulated user-to-user services, search services or combined services will be required to tackle illegal content and, if their service is likely to be accessed by children, to protect children from harmful content. Categorised services will have additional duties; all (Category 1, 2A and 2B) have additional duties on transparency reporting and policies relating to disclosure of information about use of service by deceased child users. Category 2A services additionally have enhanced requirements on risk assessments and record keeping, as well as fraudulent advertising duties. Category 1 services are subject to the most additional duties, which include all the aforementioned duties, as well as duties relating to; terms of service; offering adults the option to verify their identity and filter out non-verified users; and optional user empowerment features which provides protection against content which does not meet the criminal threshold but that which adults may wish to have increased control over, including suicide, self-harm and eating disorder content, as well as content that is abusive or incites hate on certain characteristics. Finally, Category 1 services also have duties to protect news publisher and journalistic content, and content of democratic importance. Further detail on these duties can be found in the OSA's Explanatory Notes[2].

5.4 The Category 1 threshold conditions will capture user-to-user services that either: a) use a content recommender system and have an average number of monthly active UK users that exceeds 34 million on the user-to-user part of the service; or b) allow users to forward or re-share user-generated content and use a content recommender system and have an average number of monthly active UK users on the user-to-user part of the service that exceeds 7 million. A content recommender system refers to a system which is used by a service to recommend user-generated content to a user of a service, by using machine learning or other techniques. It does not include systems which only recommend a user's own content to the user.

[1] https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/categorisation-research-and-advice/
[2] https://www.legislation.gov.uk/ukpga/2023/50/notes/division/1/index.htm

5.5 Category 2A threshold conditions will capture search services and combined services (a regulated user-to-user service with a public search engine) that have an average number of monthly active UK users that exceeds 7 million on the search engine part of the service. The Category 2A threshold conditions expressly exclude search engines which allow users to only search selected websites and databases on a specified topic (such as a price comparison or job-listing service) through the use of an application programming interface with another entity/entities (this type of search service is sometimes referred to as a vertical search engine). This means that other search engines not meeting this definition are still in scope of the threshold conditions, such as general search or general downstream search engines, which use automated processes designed to find and organise content (known as crawling and indexing), and then algorithms to rank the content.

5.6 Category 2B threshold conditions will capture services that allow users to send direct messages and have an average number of monthly active UK users that exceed 3 million on the user-to-user part of the service. 'Direct messaging' is intended to capture direct messages between users of a service that cannot be seen by other users of the service unless the original sender or recipient takes further action, such as inviting another user to the group.

5.7 An amendment was made during the OSA's passage which made it possible to create threshold conditions for Category 1 and 2B services based solely on functionalities and any other characteristics/factors, without setting a user number threshold. This approach has not been taken, reflecting the fact that the Secretary of State must take into account the factors set out under Schedule 11 of the OSA, the evidence base and the risk of unintended consequences.

What was the previous policy, how is this different?

5.8 There was no previous policy on this specific area. These are the first Regulations for threshold conditions under Schedule 11 to the OSA.

6. Legislative and Legal Context

How has the law changed?

6.1 This is part of a new regulatory regime under the OSA and the first set of Regulations on setting the threshold conditions for Category 1, 2A and 2B services.

Why was this approach taken to change the law?

6.2 There is a duty under paragraph 1 of Schedule 11 to the OSA for these Regulations to be made to set threshold conditions for the three categories of online services. The Secretary of State has taken into account matters as specified in paragraph 1(5) to (7) of Schedule 11, and in accordance with paragraph 2(11) of that schedule, is making these Regulations following research carried out, and advice provided, by Ofcom.

7. Consultation

Summary of consultation outcome and methodology

7.1 The OSA does not require a consultation on the Regulations, but it does provide a procedure for the first Regulations on the threshold conditions which has been followed with this instrument. Pursuant to paragraph 2 of Schedule 11 of the OSA, Ofcom carried out research for the purposes of providing advice to the Secretary of State on the appropriate threshold conditions for Category 1, 2A and 2B and on 29 February 2024 provided that advice to the former Secretary of State. Before

conducting research, Ofcom undertook a call for evidence which sought input from interested parties, the responses of which can be read on Ofcom's website. The advice was published on Ofcom's website on 25 March 2024[3].

8. Applicable Guidance

8.1 Whilst there is no guidance in relation to the instrument itself, Ofcom is required by the OSA to produce codes of practice and guidance to assist providers in complying with their additional duties should their services meet the threshold conditions set out in this instrument. Once the register of categorised services is complete, Ofcom will publish draft codes for consultation. Once the codes have been finalised, they will be laid before Parliament and will be subject to the 40-day objection period. Once the codes are in force, services that follow them will be deemed compliant with the duties to which the code applies. Services can choose to take alternative measures to comply but must be able to demonstrate that these amount to compliance with the duty in question. Some of the additional duties will be informed by guidance rather than codes of practice. In October 2024, Ofcom published an updated roadmap setting out its approach to implementing the OSA[4].

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website. The Impact Assessment has been developed under the previous Better Regulation Framework[5], as pre-agreed with the Department for Business and Trade.

Impact on businesses, charities and voluntary bodies

9.2 The impact on business, charities, or voluntary bodies is estimated to be £55 million-£229 million (best estimate: £133 million) in aggregate to comply with the additional duties over a 10-year period. It also estimates that to offset the costs of compliance, the Regulations' provisions must prevent just 0.02%-0.09% of online harm over the 10-year period in question (Table 8 and paragraph 50 of the Impact Assessment). The impact on charities and voluntary bodies will depend on whether they are a user-to-user service, search service or combined service and meet the threshold conditions to be categorised.

9.3 As set out in paragraphs 48-53 of the Impact Assessment, a tiered approach to the Regulations' measures was taken, with Category 1 services required to comply with the most additional duties of the three categories. Tables 5, 6 and 7 in the Impact Assessment provide estimations for compliance costs for the categories. Ofcom's codes of practice and guidance on complying with additional duties will include proportionality considerations, so compliance costs will vary even among services in a single category.

9.4 The legislation may impact small businesses, but we do not anticipate it will impact micro businesses. The thresholds approach ensures the services in scope of Category 1 are subject to the most additional duties. There is no basis in legislation to exempt

[3] https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/categorisation-research-and-advice/
[4] https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/roadmap-to-regulation/
[5] Better regulation framework: interim guidance
https://assets.publishing.service.gov.uk/media/5f5b2b1ee90e0718dffc749d/better-regulation-guidance.pdf

SMEs from categorisation duties if they meet threshold conditions, but the Impact Assessment anticipates that no business with fewer than 50 employees will fall into Category 1 or 2A. The Impact Assessment also anticipates that no microbusinesses (fewer than 10 employees) will fall into Category 2B, but as the user number threshold is lower it may capture some small businesses. However, the duties on Category 2B are significantly reduced, meaning lower compliance costs for services falling into this category.

9.5 When preparing codes of practice to assist service providers in complying with additional duties, Ofcom must take into account the principle set out at Schedule 4 of the OSA that measures in codes of practice must be proportionate and technically feasible, and that while measures may be proportionate or technically feasible for one type or size of service or service provider, this may not be the case for another service or service provider with a different profile. Many of the additional duties have proportionality baked in; for example, in determining what is proportionate for compliance with duties to provide user empowerment features (as set out in section 15(2)), section 16 requires Ofcom to take into account the size and capacity of individual service providers, as well as the findings of the most recent user empowerment content assessment which includes an assessment of the incidence of relevant content, as set out in section 14.

9.6 Ofcom has a legal duty under section 7 of the Communications Act 2003 (as amended by section 93 of the OSA) to assess the impact of its codes of practice, and other significant proposals, on businesses. This will include a specific requirement to assess the impact of regulatory proposals on small and micro businesses. And as an organisation bound by the Communications Act 2003, Ofcom is required to have regard to the principle that regulatory activities should be transparent, accountable proportionate, consistent and targeted.

9.7 There is no, or no significant impact on the public sector because the majority of services that will meet the threshold conditions are provided by private sector organisations, and there are exemptions to the scope of the OSA already, for example certain services provided by public bodies, education or childcare providers will be exempt from the OSA, as per Schedule 1 to the OSA.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is to assess its impact as part of broader monitoring of implementation of the OSA regulatory framework. Section 178 of the OSA requires that the Secretary of State carry out a review of the framework between two and five years of all of Part 3 of the OSA coming into force, with a report being published and laid before Parliament.

10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Rt Hon Peter Kyle MP has made the following statement “It is not appropriate in the circumstances to make provision for review as this instrument will be reviewed as part of the wider review of the OSA regulatory framework. This review is due to take place two-five years after the last provisions in Part 3 of the Act come into force”.

10.3 The government will keep the threshold conditions under review and as provided for in the OSA can update them once in force following further research, either initiated by Ofcom or requested by the Secretary of State.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 This instrument comes into force the day after which it is made to facilitate the prompt implementation of the OSA. Once the Regulations are in force, Ofcom will need to gather information about services and make an assessment before designating them as a category of service in a published register. Ofcom aims to publish a register of categorised services in summer 2025. There will be a lead-in period for services to comply with additional duties because where codes are to be issued for duties they will not apply until the relevant codes are in force and before that can happen Ofcom will need to comply with consultation requirements and parliamentary procedure as set out in the OSA. Further the duties in relation to which Ofcom must publish guidance have not yet been commenced. The transparency duties are likely to be the first additional duty to apply as Ofcom intends to send the transparency notices requesting information on services after the publication of the register.

12. European Convention on Human Rights

12.1 The Secretary of State for Science, Innovation and Technology has made the following statement regarding Human Rights:

"In my view the provisions of the Online Safety Act 2023 (Category 1, Category 2A and Category 2B Threshold Conditions) Regulations 2025 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").