March 15, 2022

RE: ITI letter concerning the UK Online Safety Bill

Dear Secretary of State,

We are writing to you on behalf of the Information Technology Industry Council (ITI) regarding the UK’s Online Safety Bill. ITI is the premier global advocate and thought leader for the information and communications technology (ICT) industry. ITI’s membership is comprised of 80 leading technology and innovation companies headquartered around the world from all corners of the information and communications technology (ICT) sector, including hardware, software, digital services, semiconductor, network equipment, and Internet companies.

ITI understands and recognizes the shared responsibility to maintain a safe, inclusive, and innovative online environment. As in every public space, harmful and illegal content can be found on platforms, and policymakers around the world have rightfully committed to ensuring the safety of their citizens and economies. Our companies are aware of their transformative role in society and are committed to contributing finding answers to the challenge of ensuring that the Internet stays a safe and open place for all. We support the general objective of clarifying roles and responsibilities for all actors in the online ecosystem.

However, some elements of the Online Safety Bill (hereinafter the Bill) raise concerns and continue to create uncertainty among different internet services. As such we are writing to you to offer these comments.

Provide Clarity on Illegal and Harmful Content

ITI welcomes the differentiation between illegal and harmful content but further agrees with the Joint Committee recommendation that regulatory efforts should focus on illegal content which concerns relevant offences as defined by the draft Bill before the adoption of the Law Commission’s proposal to reform the Communications and Hate Crime Offences Law, expanding the scope of illegal content. ITI is concerned that the new categories of illegal content may include harm offences that are not prevalent or even possible for regulated services, for instance, services designed to facilitate private file storage do not allow for illegal content to be searched, discovered of promoted. Compliance for lower-risk services will be disproportionate if the new Code of Practice requires all in-scope services to address the new list of priority offences. This will overburden lower risk services that do not experience the harms identified and may disrupt existing voluntary practices, which are often more effective and nuanced, that target where the harm-based offences exist.

With the exception of CSEA content which is always illegal, the challenge of identifying if priority illegal content meets the threshold of criminal offence is even greater for platforms that do not have the context to determine why a user is sharing material and whether their intention is good or bad. Proactive measures for priority illegal content could have unintended consequences and lead to over-removal. For instance, without a user report, it is not clear how a platform could assess whether a certain piece of posted content should be deemed as “revenge porn” or not. In addition, it is also unclear whether the use of automated technology will be extended to include the new list of priority illegal content and if Codes of Practice will be developed for each new criminal offence.
Furthermore, a number of important provisions leave critical definitions and methodologies to secondary legislation, such as the thresholds conditions for the categories 2A (search services) and 2B (user-to-user services that do not meet the threshold to be category 1) categories and types of harmful content. These are too central to the operation of the Bill to be left to secondary legislation and create uncertainty for service providers.

Therefore we urge that the recommendation from the Joint-Committee on the creation of a Safety by Design Code of Practice, setting out the steps that service providers will need to take to mitigate risk, be proportionate to the nature of the service, consider the context and risk profiles of services, provide for fair and non-discriminatory application, and strike the right balance with freedom of expression, rights of third parties, or potential impacts on other players for a healthy online ecosystem. The decision on whether content is harmful and or should be removed is vastly influenced by regional or national cultural context. Policymakers should cooperate with companies to develop solutions that fit the UK society.

Lastly, given the importance of this Bill, we want to highlight the need for all stakeholders to be able to feed into the legislative process. We appreciate the UK’s Government’s commitment to make the UK the safest place in the world to be online, and we urge Parliament, and the Department for Digital Culture Media and Sport to take time to get it right.

**Clarify Business-to-Business Services Exemption from the Scope**

The draft Bill defines in section 116(2) the provider of a user-to-user (“U2U”) service as an entity, and that entity alone, that has control over who can use the service, consequently it states in section 116(4) that a person who provides an “access facility” to a U2U service is not to be regarded as a person who has control over who can use that service.

We strongly believe that hosting services that do not store and disseminate information to the public, such as business-to-business (B2B) service providers should not be included in the definition of user-to-user services. As such, since the UK Government also gave a commitment under paragraph 21 of the Online Harms White Paper that B2B services would be out of scope, we recommend the draft Bill should deliver an actual explicit exemption of B2B services and products.

In order to remove any doubt that B2B services fall outside of scope, and that Government’s clear policy intention has legal force, we recommend that there should be an explicit exemption for B2B products and services included in the draft Bill as presented to parliament.

We believe that the most straightforward way to achieve the Government’s policy intention is by a general B2B exception written into section 2 of the draft Bill. Such an exemption would be entirely consistent with other statutes or statutory instruments which provide for exemptions where an activity or service is provided for the purposes of a business. Such examples can be found predominantly in UK statutes relating to financial services, including the Consumer Credit Act (1974), the Consumer Credit (Agreements) Regulations 2010/1014 and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2013/1881.

We therefore propose adding point (7) under section 2 (Meaning of user-to-user service and search service) to improve the draft bill.
• **Section 2 – Meaning of “user-to-user service” and “search service”**
  o (1) In this Act “user-to-user service” means an internet service by means of which content that is generated by a user of the service, or uploaded to or shared on the service by a user of the service, may be encountered by another user, or other users, of the service.
  o (2) In subsection (1) the reference to content that may be encountered by another user, or other users, of a service includes content that is capable of being shared with such a user or users by operation of a functionality of the service that allows the sharing of content.
  o (3) For the purposes of subsection (1) it does not matter what proportion of content present on a service is content described in that subsection.
  o (4) For the meaning of “content” and “encounter”, see section 137.
  o (5) In this Act “search service” means an internet service that – is, or includes, a search engine (see section 134); and is not a user-to-user service.
  o (6) For the purposes of this Act, a dissociable part of a user-to-user service, or a dissociable part of a search service, is to be regarded as not forming part of the service if the conditions in paragraph 4(2) of Schedule 1 (internal business services) are satisfied in relation to that part.
  o (7) For the purposes of this act a user-to-user service does not include an internet service of the type described in subsection (1) which is a service provided to a person or persons (whether entity or individual) in connection with or for the purpose of their business.

In addition to adding a new point under section 2, we also recommended that B2B services should be included in the exemption list as provided by Schedule 1.

**Provide Clarity in Child Safety Provisions**

ITI agrees with the Government and the Joint-Committee on enabling a safe online environment for children, as provided by Clause 10 of the Bill. We also appreciate the Committee in providing clarity on the definition of harm to children by aligning it with the 'likely to be accessed by a child' test adopted under the Age-Appropriate Design Codes (AADC.) However, Clause 10 suggests the possibility of general monitoring obligations, removal of legitimate content and the possibility of age gating. Even where well intentioned, the duties imposed on providers under Clause 10 can potentially deprive children and young persons in reaching useful content. Furthermore, we recommend additional clarity on Clause 10 as so as not to inadvertently create a general monitoring duty on providers.

Sincerely,

Guido Lobrano, ITI Vice President and Director General for Europe