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Documento
de posición

21

Submission in response to OFCOM'S Consultation on transparency guidance

CELE

October 2024

CELE, Submission in response to OFCOM'S Consultation on transparency guidance,
Documento de posición No. 21, Centro de Estudios en Libertad de Expresión (CELE), Buenos Aires (2024)

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de Expresión y Acceso a la Información

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Submission in response to OFCOM’s consultation on its draft transparency reporting guidance

October 4, 2024

Buenos Aires, Argentina

At CELE, we celebrate OFCOM’s initiative of opening up these draft guidelines for feedback. We consider this a unique opportunity to provide more depth to analyzing transparency obligations to protect and promote freedom of expression. Public consultations like this one are a fundamental piece of the transparency of the OSA regime.

Ofcom’s approach for determining what information service providers should produce in their transparency reports.

For transparency reports to fulfill their role of providing clear and useful information about online content moderation, OFCOM should adopt an approach that considers the complexities of freedom of expression in the digital environment.

In this regard, when determining what information to request from service providers in its transparency reports in accordance with Schedule 8 of the Online Safety Act, OFCOM should consider the following aspects:

I. Clear definitions and uniform counting measures: The lack of common definitions for key terms used in content moderation, such as “case” or “content”, can lead to inconsistencies in the transparency reports filed by different providers. This has been acknowledged by OFCOM in this Consultation (Section 3.20) and in Annex A to this consultation (Section 3.11). OFCOM should establish precise definitions and uniform counting methods to ensure that reports from various platforms under Section 77 of the OSa are comparable. This is especially relevant for OFCOM to carry out their duties under Section 159 of the Online Safety Act to produce their own transparency reports that include conclusions from Section

77 company reports and a summary of measures mentioned in those reports which OFCOM considers to be good industry practices.

II. Distinction between illegal content and content that, while legal, may be considered harmful under the platform's terms of service:

Under Article 10 of the European Convention on Human Rights (hereinafter, ECHR), everyone has the right to freedom of expression, which encompasses the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. These freedoms may only be legitimately restricted upon fulfilling the three-prong test: legality, necessity, and proportionality. Restrictions need to be prescribed by law and necessary in a democratic society. They must also be proportionate and according to legitimate aims and purposes. Under Article 1 of the European Convention, states must respect and guarantee the rights therein recognized to everyone under their jurisdiction. Article 19 of the International Covenant on Civil and Political Rights (hereinafter, ICCPR) provides similar protections.

International human rights law and European human rights law require that states differentiate between illegal and permissible content.

There are differences as to what the state can expect service providers to do vis a vis illegal speech than what they may expect them to do regarding legally protected speech. Asking platforms to break down moderation requests based on this distinction will provide a more accurate view of how content is managed and how rules are enforced, avoiding a distorted picture of the digital ecosystem.

III. Detailed information on the origin of content removal requests:

Under Section 10 (3)(b) of the OSA, *“when the provider is alerted by a person to the presence of any illegal content, or becomes aware of it in any other way, swiftly take down such content”*. To understand the dynamics between state action, providers action, and their impact on freedom of expression, transparency reports should break down content removal requests according to their origin. This involves, at least, differentiating between requests coming from state

authorities (judicial or administrative), trusted flaggers (or any similar mechanism of prioritization or fast-track put in place by the provider), or “regular” users.

IV. An appropriate balance between quantitative and qualitative indicators: Section 3.25 of the consultation states that OFCOM’s information requirements will enable it to compare key metrics of safety performance over time. While quantitative indicators are useful for providing an overview, they need to be complemented with qualitative information to contextualize the figures and better understand the impact of content moderation on freedom of expression. Services might be comparable in some aspects and not comparable in others. The development of “safety metrics” could lead to an oversimplification of the terms of the discussion by diluting difficult policy discussions and incentivizing the over-removal of content.

For instance, in Figure 3 on Page 13 of the Consultation, it is stated that OFCOM could request *“standardised metrics that take a similar approach to other international jurisdictions, especially the EU. For instance, the current Digital Services Act transparency reporting requirements include measurement of the number of content removal actions taken by relevant services.”* In such an example, OFCOM should request contextualized information, such as the percentage of reported or moderated content that involves content listed in Sections 17, 18, and 19 of the OSA as “content of democratic importance”, “news publisher content” and “journalistic content”. In addition, platforms should provide clear and concise explanations for content moderation decisions, both for removed content and for content that remains online despite removal requests.

V. Case studies

The inclusion in transparency reports of case studies that illustrate how moderation policies are applied in practice would further enrich the qualitative analysis.

Companies could be asked to produce after-the-fact assessments of their processes, not in general and broad terms but as they worked in specific contexts, “as applied” to specific problems. Companies should be relatively free to choose the cases they decide to highlight, but these should be relevant to the OSA DSA implementation and address a wide sample of

issues the platform routinely addresses in their moderation processes. The [GNI's assessment toolkit](#) could serve as guidance for this effort.

VI. Other factors that Ofcom might consider in determining the contents of notices that are not set out in the draft guidance

We have suggested that OFCOM requires service providers to produce a great deal of qualitative information and even case studies. Those tasks are generally more time and resource-consuming than producing quantitative information and could prove disproportionate for some providers of categorized services. Therefore, by engaging with service providers directly, OFCOM could establish thresholds or determine, on an individual basis, whether they have actual capabilities to produce such reporting yearly.

For those providers that, per OFCOM determination, do not have such capabilities, it could be more adequate if they only update qualitative information when significant changes occur. Moreover, should they produce other transparency reports including qualitative reporting, or participate in complementary transparency-oriented efforts such as the Global Network Initiative, those inputs could be taken into account if applicable.

Thank you,



Agustina Del Campo

Director

Center for Studies on Freedom of Expression and Access to Information (CELE)

Consultation response form

Please complete this form in full and return to OS-Transparency@Ofcom.org.uk

Consultation title	Consultation: Transparency Guidance
Full name	Agustina Del Campo
Contact phone number	+54 9 11 6714 5750
Representing (delete as appropriate)	Organisation
Organisation name	Centro de Estudios en Libertad de Expresión y Acceso a la Información (CELE)
Email address	cele@palermo.edu

Confidentiality

We ask for your contact details along with your response so that we can engage with you on this consultation. For further information about how Ofcom handles your personal information and your corresponding rights, see [Ofcom general privacy statement](#)

Your details: We will keep your contact number and email address confidential. Is there anything else you want to keep confidential? Delete as appropriate.	Nothing
We will publish responses to this consultation on our website. Please indicate how much of your response you want to keep confidential (i.e. not published by Ofcom). Delete as appropriate.	None
We may want to reference your response in future publications (including our statement). For confidential responses, can Ofcom publish a reference to the contents of your response?	Yes

Your response

Question	Your response
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We welcome input from industry on the areas listed below. We encourage stakeholders to respond with feedback so that we can ensure that the guidance helps providers and other stakeholders understand:

A) Ofcom’s powers and providers’ duties for transparency reporting, as well as Ofcom’s approach to implementing the transparency regime.

B) Ofcom’s approach for determining what information service providers should produce in their transparency reports.

C) Ofcom’s plans to engage with providers prior to issuing transparency notices, and on what matters, and whether the proposed engagement plan will be sufficient for helping services to comply with their duties.

D) Ofcom’s plans to use the information in providers’ transparency reports in Ofcom’s own transparency reports.

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B) Ofcom’s approach for determining what information service providers should produce in their transparency reports.

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For instance, in Figure 3 on Page 13 of the Consultation, it is stated that OFCOM could request *“standardised metrics that take a similar approach to other international jurisdictions, especially the EU.*

	<p><i>For instance, the current Digital Services Act transparency reporting requirements include measurement of the number of content removal actions taken by relevant services.”</i> In such an example, OFCOM should request contextualized information, such as the percentage of reported or moderated content that involves content listed in Sections 17, 18, and 19 of the OSA as “content of democratic importance”, “news publisher content” and “journalistic content”. In addition, platforms should provide clear and concise explanations for content moderation decisions, both for removed content and for content that remains online despite removal requests.</p> <p>V. Case studies</p> <p>The inclusion in transparency reports of case studies that illustrate how moderation policies are applied in practice would further enrich the qualitative analysis.</p> <p>Companies could be asked to produce after-the-fact assessments of their processes, not in general and broad terms but as they worked in specific contexts, “as applied” to specific problems. Companies should be relatively free to choose the cases they decide to highlight, but these should be relevant to the OSA DSA implementation and address a wide sample of issues the platform routinely addresses in their moderation processes. The GNI’s assessment toolkit could serve as guidance for this effort.</p>
<p>Are there any aspects in the draft guidance where it would be helpful for additional detail or clarity to be provided?</p>	
<p>Are the suggested engagement activities set out in the draft guidance sufficient for providers to understand their duties and Ofcom’s expectations?</p>	

Question	Your response
<p>We are also seeking input that will help us understand if there are other matters that Ofcom should consider in our approach to determining the notices, beyond those that we set out in the guidance. The questions below seek input about any additional factors Ofcom should take into account in various stages of the process, including: to inform the content of transparency notices; in determining the format of providers’ transparency reports; and how the capacity of each provider can be best determined and evidenced.</p>	
<p>Are there any other factors that Ofcom might consider in our approach to determining the contents of notices that are not set out in the draft guidance?</p>	<p>We have suggested that OFCOM requires service providers to produce a great deal of qualitative information and even case studies. Those tasks are generally more time and</p>

	<p>resource-consuming than producing quantitative information and could prove disproportionate for some providers of categorized services. Therefore, by engaging with service providers directly, OFCOM could establish thresholds or determine, on an individual basis, whether they have actual capabilities to produce such reporting yearly.</p> <p>For those providers that, per OFCOM determination, do not have such capabilities, it could be more adequate if they only update qualitative information when significant changes occur. Moreover, should they produce other transparency reports including qualitative reporting, or participate in complementary transparency-oriented efforts such as the Global Network Initiative, those inputs could be taken into account if applicable.</p>
<p>Is there anything that Ofcom should have regard to (other than the factors discussed in the draft guidance) that may be relevant to the production of provider transparency reports? This might include factors that we should consider when deciding how much time to give providers to publish their transparency reports.</p>	
<p>What are the anticipated dependencies for producing transparency reports including in relation to any internal administrative processes and governance which may affect the timelines for producing reports? What information would be most useful for Ofcom to consider when assessing a provider's "capacity", by which we mean, the financial resources of the provider, and the level of technical expertise which is available to the service provider given its size and financial resources?</p>	
<p>Are there any matters within Schedule 8, Parts 1 and 2 of Act that may pose risks relating to confidentiality or commercial sensitivity as regards service providers, services or service users if published?</p>	

Question	Your response
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Finally, we are also seeking input into any matter that may be helpful for ensuring Ofcom's transparency reports are useful and accessible.

Beyond the requirements of the Act, are there any forms of insight that it would be useful for Ofcom to include in our own transparency reports? Why would that information be useful and how could you or a third party use it?

Do you have any comment on the most useful format(s) of services' transparency reports or Ofcom's transparency reports? How can Ofcom ensure that its own transparency reports are accessible? Provide specific evidence, if possible, of which formats are particularly effective for which audiences.

Question	Your response
Please provide any other comments you may have.	
General comments	

Please complete this form in full and return to OS-Transparency@Ofcom.org.uk