

July 1, 2019

Online Harms Team
DCMS
100 Parliament Street
London
SW1A 2BQ
United Kingdom

RE: Comments of ACT | The App Association to HM Government on its *Online Harms White Paper (April 2019)*

I. Introduction and Statement of Interest

ACT | The App Association (App Association) appreciates the opportunity to submit views to Her Majesty's (HM) Government's Online Harms Team on the April 2019-published *Online Harms White Paper*.¹ We appreciate HM Government's efforts to develop online safety measures that also support innovation and a thriving digital economy.

The App Association represents thousands of small business software application development companies and technology firms, located both in and outside of the United Kingdom (UK). These companies create technologies that generate internet of things (IoT) use cases across consumer and enterprise contexts and are primary drivers of the global digital economy. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately £1.02 trillion and is responsible for tens of millions of jobs around the world, including nearly 350,000 jobs in the UK. Alongside the world's rapid embrace of mobile technology, our members provide innovative solutions that power IoT, a market projected to be worth more than £11.4 trillion by 2022,² across modalities and segments of the economy.

¹ HM Government, *Online Harms White Paper* (April 2019), available at <https://www.gov.uk/government/consultations/online-harms-white-paper> (White Paper).

² "Global IoT Market Value Could Exceed \$14 Trillion," ECN (April 2018), available at <https://www.ecnmag.com/blog/2018/04/infographic-global-iot-market-value-could-exceed-14-trillion>.

Our members are at the forefront of innovation, practicing responsible and efficient data usage to solve problems identified across consumer and enterprise use cases. Their customers have strong data security and privacy expectations, and as such, utilizing the most advanced technical protection mechanisms (e.g., end-to-end encryption) is a market-driven necessity. Consumers depend on our members to keep their valuable data safe and secure, therefore, maintaining consumer trust is the bedrock of our members' triumphs. They respect the efforts and enforcement authority of various competition agencies in the data protection sphere. Our members commit themselves to advancing consumer protection priorities, including those of HM Government. The App Association agrees that HM Government's efforts to address online harms is important and timely; it also presents HM Government with a unique opportunity for global leadership in addressing emerging policymaker concerns with online consumer harms.

Generally, we strongly urge HM Government to avoid creating unnecessary legal obstacles and confusion for small business digital economy innovators. Should HM Government put laws into place that have the new independent regulator applying arbitrary standards without proper checks and balances, our members will face much more uncertainty and may face unnecessary hurdles in the digital economy due to the cost of compliance.

Based on the above, we offer specific input on various proposals in HM Government's white paper:

Scope of Harms

- The App Association strongly urges HM Government to create an understanding and clear definition of these harms as acts or practices that cause or are likely to cause substantial injury to consumers. We strongly discourage "likely to be permitted" language to mean "possible," which could attach legal liability to commercial activity based on under-demonstrated and/or theoretical harms. The App Association believes that HM Government should not deem an act or practice harmful unless it is injurious in its net effects, and that any HM Government agency or agencies implementing such a law enact this innovation- and consumer-friendly approach. Further, we strongly encourage HM Government to avoid ensnaring small companies in unnecessary and costly government proceedings to fight ill-defined allegations of "unfair" acts or practices. Without a rigorous analysis framework, a UK agency will run the risk of pursuing hypothetical injuries in a manner that will hinder small businesses' investment and innovation.

- The App Association supports HM Government’s proposal to exclude from the scope of harms “[a]ll harms to organisations, such as companies, as opposed to harms suffered by individuals;” “harms relating to most aspects of competition law, most cases of intellectual property violation, and the organisational response to many cases of fraudulent activity;” “[a]ll harms suffered by individuals that result directly from a breach of the data protection legislation, including distress arising from intrusion, harm from unfair processing, and any financial losses;” “[a]ll harms suffered by individuals resulting directly from a breach of cyber security or hacking;” and “[a]ll harms suffered by individuals on the dark web rather than the open internet.”³

A New Regulatory Framework & Regulation in Practice

- The App Association strongly urges HM Government to cautiously and carefully approach its stated goal of establishing a new statutory duty of care. HM Government should take all practicable steps to ensure that it does not create a new regulatory regime that is too disparate from consumer protection norms that are relied upon in business and compliance planning. Further, we incorporate our above views regarding the scope of harms here.
- Any new approach to addressing online harms should be flexible and scalable, permitting tailored approaches to consumer protection as necessitated by specific use cases, thus these principles should be expressly included in the law. Therefore, we support the white paper’s proposal to ensure the use of a risk-based approach and proportionality in regulatory practice.⁴ App Association members have limited resources and are unable to spend the large amounts of money on outside counsel and consultants that larger companies have the ability to access. Should HM Government take an approach that is too rigid, it will suppress the UK’s digital economy startups and small businesses to the advantage of larger incumbents and unduly limit access to digital economy startups and small business innovations from abroad, ultimately damaging the public interest.
- The App Association is concerned that the new regulatory framework, and the new independent regulator, proposed by HM Government may hold too much authority to make arbitrary decisions. We strongly encourage HM Government to ensure adequate checks and balances on this new independent regulator.
- The App Association supports HM Government’s proposal to “[p]rovide support to start-ups and SMEs to help them fulfill their legal obligations in a proportionate and effective manner.”⁵

³ White Paper at 31-32.

⁴ White Paper at 54-55.

⁵ White Paper at 54.

- Regarding how the new independent regulator should determine a basis for funding contributions from industry, we strongly urge HM Government to codify a *de minimus* level that will preserve small business digital economy innovators' ability to utilize their limited funds through research and development and hiring.

Enforcement

- The App Association strongly supports HM Government providing as much clarity as possible regarding enforcement. We believe this information should be provided in a clear and easily-understood manner in accessible formats.
- HM Government should foster a culture of compliance by providing an easily-understood code of conduct that may be used for self-assessments. Furthermore, we urge HM Government to encourage companies, particularly the digital economy's small businesses that the App Association represents, to attest to and document adherence to this code of conduct, in return receiving a safe harbor from liability under related online harms laws and regulations.
- We discourage HM Government from creating mandatory certifications that would be conducted by third parties. Such certifications are very often expensive and will unduly drain resources from digital economy small businesses when larger companies would experience a net benefit due to being able to absorb such costs.
- We strongly urge HM Government to ease the path to compliance for those that may find themselves facing liability with regard to this new duty of care for online harms. For example, HM Government should ensure that any company accused of violating new online harms rules be afforded an informal remediation avenue before formal enforcement proceedings are initiated. This informal period will save our small business members from expensive and unnecessary legal fees.

Technology, Education & Awareness

- The App Association believes that one of the most effective ways to reduce online harms is through education and partnership. We support HM Government's proposals to "work with leading industry bodies and other regulators to support innovation and growth in this area and encourage the adoption of safety technologies" as well as to "work with the industry and civil society to develop a safety by design framework, linking up with existing legal obligations around data protection by design and secure by design principles, to make it easier for start-ups and small businesses to embed safety during the development or update of products and services."⁶

⁶ White Paper at 77.

The App Association appreciates HM Government's consideration of our responses above. We urge HM Government to contact the undersigned with any questions or ways that we can assist moving forward.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Scarpelli', with a stylized flourish at the end.

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