

ONLINE SAFETY AND THE EUROS – THREE YEARS ON



As a result of the COVID-19 pandemic, the 2020 UEFA European Football Championship was postponed, to commence in June 2021. Following a year of lockdowns, remote working, and online social media trends, spectators were poised more than ever to post their reactions to the tournament online. In July 2021, I wrote about the online racist abuse levelled at three young players, Bukayo Saka, Marcus Rashford, and Jadon Sancho, by users in response to the players' performance during the final penalty shootout, and how Parliament might tackle the issue of online harms, with reference to what was then the Online Safety Bill. Three years after the torrent of abuse received by England players, police officers have visited the England team to offer reassurance that the improved co-operation from social media companies means they will be better protected when the Euros return this summer.

The major change in the last three years has been the coming into force of the Online Safety Act 2023 ("The Act"), which received Royal Assent on 26th October 2023, creating a new regime for the regulation of social media and online activity. Under The Act, OFCOM is the regulator of two specific types of internet services – user-to-user services ("U2U") and search services. A U2U is an internet service through which users may encounter content which is directly generated by other users on the service,

or which is uploaded to or shared on the service. The most explicit example of U2Us are popular social media sites. Search services are defined as internet services that are, or include, a search engine. As part of its new powers, OFCOM regulates U2Us and search services which have a significant number of UK users, or where UK users form one of the target markets for the service. In addition, a U2U or a search service will fall under OFCOM's remit where the service is capable of being used in the UK by individuals, and there are reasonable grounds to believe that there is a material risk of significant harm to individuals in the UK presented by the service's content.

Section 10 of The Act creates a duty for all regulated U2U services to take reasonable and proportionate measures to prevent individuals from encountering "priority illegal content" through the service, to mitigate and manage the risk of "priority offences" being commissioned or facilitated through the service, and to mitigate and manage the risk of harm to individuals. Further, s.10 creates a duty to minimise the length of time priority illegal content is present on the service, and to take down such content when the service provider is made aware of it. Priority offences and priority illegal content are defined in Schedules 5, 6 and 7, and include terrorism offences and content, child sexual exploitation and abuse offences and content, and a number of other offences including firearms, drugs, public order and harassment offences. Included within the list of priority offences under Schedule 7 are offences under sections 31 and 32 Crime and Disorder Act 1998 (racially or religiously aggravated public order and harassment offences). Section 27 repeats these provisions for search services.

Whilst s.10 applies to all regulated services, s.15 creates a further duty for "Category 1" services which may afford some protection. Under this section, category 1 services must, so far as is proportionate, include feature which adult users may use or apply if they wish to increase their control over content. The purpose of this provision is to allow users to reduce the likelihood of encountering content of a certain type, or to ensure users are alerted to the presence of certain content, in order to protect the user

from viewing unwanted or harmful content. Although category 1 services are yet to be defined, on March 25 2024, OFCOM published its advice to the Secretary of State on categorisation, which included the recommendation that a category 1 service be a service which meets one of two sets of conditions:

Condition 1 –

- i) The use of a content recommender system on its service; and
- ii) Have more than 34 million UK users on the user-to-user part of the service, representing c.50% of the UK population.

Condition 2 –

- i) Have a functionality that offers users the ability to forward or re-share user-generated content with other users of the service; and
- ii) The use of a content recommender system on its service; and
- iii) Have more than 7 million UK users on the user-to-user part of the service representing c.10% of the UK population.

In order to ensure services comply with the duties set out in the Act, OFCOM has the power to require information of service providers to enable OFCOM to carry out its online safety functions, including to investigate whether a provider has failed to comply with any such duties. OFCOM may conduct interviews, inspect and audit premises, and ultimately issue notices of contravention, confirmation decisions and financial penalties. A failure to comply with any requirement imposed by a confirmation decision issued by OFCOM is an offence triable either way, carrying a maximum of two years' imprisonment.

The new regime for the regulation of internet services is very much in its infancy. It is expected over the coming months and years that OFCOM will provide more codes of practice and guidance documents to ensure users are sufficiently protected when

using online services. Although there is still more to be done, it is clear that the Euros 2020 taught valuable lessons of how online services can be abused, and that it is necessary to impose a duty on the service providers to ensure online safety.

7th May 2024

Mahesh Karu

Barrister

Two Harcourt Buildings