

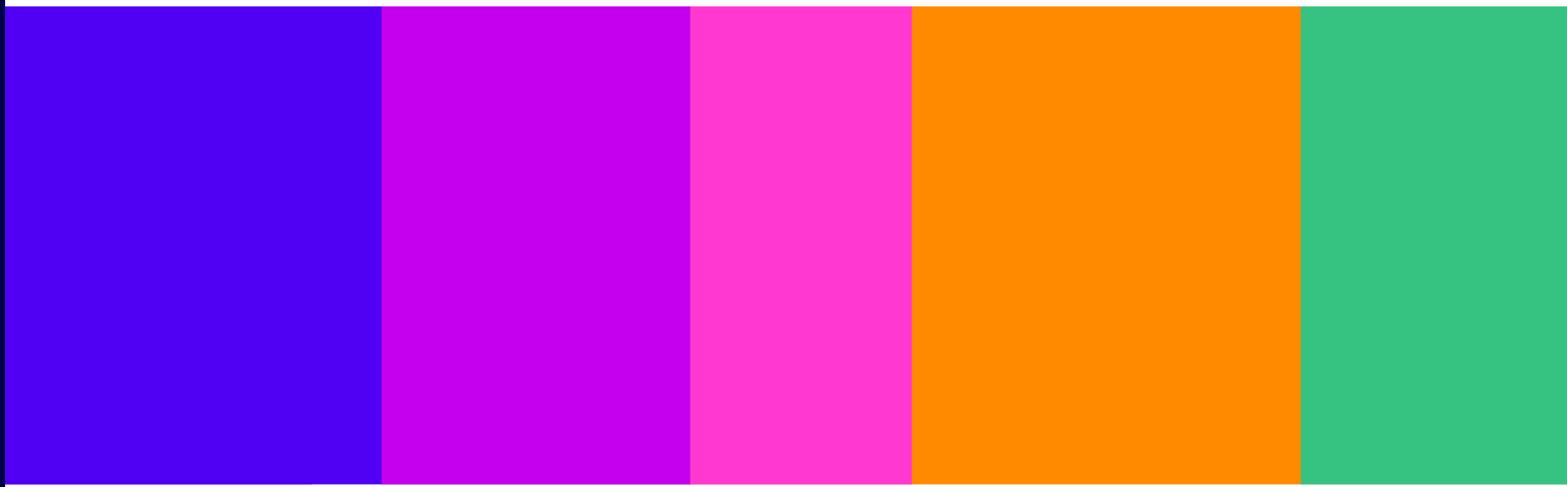
Protecting people from illegal harms online

Annex 9: Guidance on content
communicated 'publicly' and 'privately'
under the Online Safety Act

DRAFT FOR CONSULTATION

Published 9 November 2023

Closing date for responses: 23 February 2024



A9. Guidance on content communicated ‘publicly’ and ‘privately’ under the Online Safety Act

About this document

- A9.1 This document provides high-level guidance on the concepts of content communicated ‘publicly’ and ‘privately’ within the Online Safety Act 2023 (the ‘Act’).
- A9.2 It is intended to assist providers of user-to-user services that are looking to comply with their online safety duties by taking measures set out by Ofcom in a Code of Practice which relate specifically to content communicated ‘publicly’.
- A9.3 A provider taking such a measure will need to ensure that it is taken in relation to all content communicated ‘publicly’ by means of the service (subject to any further relevant provision in the measure). It is for providers in the first instance to assess for themselves (taking this guidance into account) the content that is communicated ‘publicly’. However, section 232 of the Act specifies a number of factors that Ofcom must in particular consider when deciding whether content is communicated ‘publicly’ or ‘privately’. These should accordingly also be the starting point for providers. This document builds upon those factors, providing high-level guidance on how we would expect to approach this when determining if a provider has properly applied measures recommended in a Code of Practice to content communicated ‘publicly’.
- A9.4 This guidance is intended to be relevant to services of all sizes and kinds, and is not intended to set out precisely where the boundaries between content communicated ‘publicly’ and ‘privately’ lie.¹ Each case will be considered on its own merits.

Role and status of this guidance

- A9.5 One of Ofcom’s regulatory principles is that Ofcom will regulate in a transparent manner. Guidance can serve as a useful means to achieving this principle and to increasing understanding of Ofcom’s approach to regulation.
- A9.6 Whether or not a provider has applied measures set out in a Code of Practice to content communicated ‘publicly’ will usually turn on the specific facts in each case. Providers should seek their own independent advice if they are unsure about this, taking into account the facts relevant to their service. Ofcom cannot, as a matter of law, fetter its discretion as to any future decision. Accordingly, although this guidance sets out at a high-level the approach Ofcom would normally expect to take, it does not have binding legal effect, and each case will be considered on its own merits.

¹ Please note that some offences specified as priority offences in the Act also use concepts of ‘public’ and ‘private’, but this guidance is not relevant to interpreting those offences. Please see our [draft] Illegal Content Judgements Guidance in relation to those offences.

A9.7 If Ofcom decides to depart from this guidance, it will set out its reasons for doing so. This guidance may also be subject to revision from time to time. This may be, for example, to reflect experience from our supervisory and enforcement work, or in light of changing technological developments.

Structure

A9.8 This guidance is structured as follows:

- Relevant statutory framework
- General guidance about the concepts of content communicated ‘publicly’ and ‘privately’
- Guidance on each of the statutory factors

Relevant statutory framework

A9.9 The Act provides Ofcom with the power, if it considers it appropriate to do so, to include in a Code of Practice a measure describing the use of a kind of technology (paragraph 13(1) of Schedule 4). This includes the power to set a measure describing the use of ‘proactive technology’ as a way (or one of the ways) of complying with some of the duties set out in the Act.²

A9.10 A1.10 Proactive technology is defined in section 231 of the Act. Broadly speaking, this refers to: (i) ‘content identification technology’, *except* where this is used in response to a report from a user or other person about particular content; (ii) ‘user profiling technology’ (which excludes technology deployed in the circumstances referred to in section 231(5) of the Act); and (iii) ‘behaviour identification technology’, *except* where this is used in response to concerns identified by another person or an automated tool about a particular user.

A9.11 The Act refers to measures describing the use of proactive technology as ‘**proactive technology measures**’. There are constraints however on Ofcom’s power to include proactive technology measures in a Code of Practice. Importantly, where the technology operates (or may operate) by analysing user-generated content or metadata relating to such content, the measure may not recommend the use of the technology to analyse user-generated content³ communicated privately, or metadata relating to user-generated content communicated privately (paragraph 13(4) of Schedule 4).

A9.12 Section 232(2) of the Act specifies three factors which Ofcom must, in particular, consider when deciding whether content is communicated ‘publicly’ or ‘privately’ by means of a service. These are:

- the number of individuals in the United Kingdom who are able to access the content by means of the service;

² Paragraph 13(3) of Schedule 4 to the Act provides that a proactive technology measure may be recommended only for the purpose of compliance with illegal content, children’s online safety or fraudulent advertising duties (specifically, those duties set out in sections 10(2), 10(3), 12(2), 12(3), 27(2), 27(3), 29(2), 29(3), 38(1) or 39(1)).

³ User-generated content is defined in section 55(3) of the Act.

- any restrictions on who may access the content by means of the service (for example, a requirement for approval or permission from a user, or the provider, of the service);
- the ease with which the content may be forwarded to or shared with: (i) users of the service other than those who originally encounter it; or (ii) users of another internet service.

A9.13 As explained above, this document is intended to provide further practical guidance to providers of user-to-user services on the concepts of content communicated ‘publicly’ and ‘privately’ insofar as they are relevant to measures set out in any of Ofcom’s Codes of Practice.

A9.14 For completeness, we note that any proactive technology measures included by Ofcom in a Code of Practice which recommend analysis of user-generated content or metadata relating to such content are limited to ‘regulated user-generated content’ or metadata relating to regulated user-generated content. This excludes:

- a) emails;
- b) SMS messages;
- c) MMS messages;
- d) one-to-one live aural communications;
- e) comments and reviews on provider content;
- f) identifying content that accompanies content within any of (a) to (e); and
- g) news publisher content.⁴

Accordingly, irrespective of whether such content might be considered as communicated ‘publicly’ or ‘privately’, proactive technology measures do not recommend analysis of these specific types of user-generated content (or metadata related to such content).

General guidance

A9.15 The question is whether the *communication* of the content is public or private, rather than whether the content itself is of a ‘private’ nature. As a result, whether content is communicated ‘publicly’ or ‘privately’ for the purposes of the Act will not necessarily align with whether that content engages users’ (or other individuals’) rights to privacy under Article 8 of the European Convention on Human Rights.⁵

A9.16 When determining whether a provider has applied measures to all content communicated ‘publicly’, we expect to take a pragmatic approach. In particular:

- We recognise that providers will need to make decisions about whether content is communicated ‘publicly’ at scale, and do not expect providers to make judgements about this at the level of individual pieces of content present on their service. Rather, when considering if a provider has acted in accordance with a measure set in a Code of Practice, we expect our focus to be on the systems and processes operated for this purpose and their outcomes.

⁴ News publisher content is defined in section 55(8) of the Act.

⁵ For example, it is possible that users might have a right to privacy under Article 8 of the ECHR in relation to content which is communicated ‘publicly’ for the purposes of the Act. Conversely, users may not have a right to privacy under Article 8 of the ECHR in relation to content which is nevertheless communicated ‘privately’ for the purposes of the Act.

- We expect providers to make their assessment based on the information reasonably available to them that is relevant to all three factors, and the inferences they may reasonably be expected to make in light of this.

A9.17 Whether content is communicated ‘publicly’ or ‘privately’ will depend on the relevant factual context, to be determined taking account of each of the statutory factors and any other factors that Ofcom considers relevant.

A9.18 Services may identify one or more additional factors which they consider relevant to assessing whether content has been communicated ‘publicly’ on their service. We would expect services in this case to record, and be able to justify, why they consider these to be relevant. Any decision on whether those factors are relevant (and, if so, how they should be appropriately taken into account by services) will ultimately rest with Ofcom.

A9.19 Factors that we would *not* expect to be relevant to the question of whether content has been communicated ‘publicly’ or ‘privately’ include:

- The fact that content has been generated, shared or uploaded by a user that has anonymity or is using a pseudonym.
- The fact that content (or any parts of the service on which that content is generated, shared or uploaded) is labelled as ‘private’.

A9.20 Providers should be mindful that:

- The Act does not provide that any one statutory factor should carry greater weight than another, and all three statutory factors (and any other relevant factors) will need to be considered in the round.
- Whether content has been communicated ‘publicly’ or ‘privately’ may change over time. For example, content may only have been accessible to a small user group when it was first uploaded and have been communicated ‘privately’. If, however, changes are made to the access restrictions such that a far larger number of users are able to access that content, it may subsequently become content communicated ‘publicly’.⁶
- The fact that content was originally communicated ‘privately’ when it was generated, uploaded or shared to a service does not mean that any subsequent communications of that same content (for example, ‘reposts’ of that same content by other users) should also be considered as communicated ‘privately’.

Guidance on each of the statutory factors

Number of UK individuals able to access the content (A)

A9.21 As explained above, Ofcom is required by section 232(2)(a) of the Act to consider the number of individuals in the United Kingdom who are able to access the content by means of the service.

A9.22 To identify how many users are able to access the content, any access restrictions on who may access the content by means of the service (i.e., the second statutory factor) need to be taken into account. We discuss these separately from paragraph A9.26 below.

⁶ For the purpose of applying any measures set in a Code of Practice that recommend analysis of content communicated ‘publicly’ before or as soon as practicable after it can be encountered by users, we would expect content whose status changes from being communicated ‘privately’ to ‘publicly’ to be analysed before or as soon as practicable after it becomes content communicated ‘publicly’.

A9.23 The more individuals in the UK are able to access the content, the more likely it is to be communicated publicly. Importantly, content does not need to be accessible by all internet users to be considered as communicated ‘publicly’. Where it is accessible to a substantial section of the public, it should be considered as communicated ‘publicly’.⁷

A9.24 Services should be mindful that:

- This statutory factor refers to individuals in the United Kingdom. This is consistent with the scope of the safety duties in relation to user-to-user services, which (where expressed to apply in relation to users of a service) extend only to the design, operation and use of the service as it affects United Kingdom users of the service.⁸
- This refers to the number of such individuals who are ‘able’ to access the content by means of the service, rather than the number of individuals that are in fact accessing (or have in fact accessed) the content. The fact that content has only been accessed by a small number of users in practice does not preclude it being considered to be communicated ‘publicly’. Conversely, where there is evidence that a large number of users have in fact accessed content (and therefore are demonstrably able to access it) this may be a highly relevant factor in deciding whether it has been communicated ‘publicly’, even if some access restrictions appear to be in place.
- The fact that it may be difficult for individuals to access the content (for example, because users need to take time to locate the content and it is not easily discoverable) does not mean that content should be considered as communicated ‘privately’.

A9.25 We recognise that there may be limitations in the provider’s knowledge about the number of individuals that are in fact able to access content (given the information available to it). For example, a user may choose to share their password to their account with other users without the service provider’s knowledge. As explained at paragraph A9.16 above, we expect providers to make their assessment of whether content has been communicated ‘publicly’ or ‘privately’ based on the information reasonably available to them.

Access restrictions (B)

A9.26 Ofcom is required by section 232(2)(b) of the Act to consider any restrictions on who may access the content by means of the service. The Act gives as examples of access restrictions a requirement for approval or permission from a user, or the provider, of the service.

A9.27 In general terms, it is relevant to consider any features that affect user access to the content, including any ‘settings’ affecting who may access content which are applied either by the user or the service provider. This could include, for example, whether there are default ‘privacy’ settings in place to restrict access to the content, or whether the user has restricted the content’s availability to other users of the service (e.g., whether the user has stopped other users seeing the content without their active permission).

A9.28 Unless the provider has evidence to the contrary, we would generally expect the following to constitute access restrictions:

⁷ This is the case irrespective of the second and third statutory factors (i.e., any access restrictions on that content, or the ease with which that content can be shared with or forwarded to other users of the service other than those who originally encounter it or users of another internet service).

⁸ See s.8(3) of the Act.

- A requirement for an individual to enter credentials (for example, a password or biometrics) before being able to access the content.
- A requirement for an individual to receive an invite or obtain permission from another user before being able to access the content.
- A requirement for users to have access to a decryption key in order to access the content, where that key is only available to specific individuals.

A9.29 Whilst a restriction on accessing content based on age verification or age estimation would amount to an access restriction in principle and may result in a section of the public being unable to access the content, we would not expect this by itself to mean that such content is communicated ‘privately’. This is because, in the absence of any other restrictions, the content would remain accessible to a substantial section of the public.

A9.30 There are also some important constraints on what can constitute access restrictions for the purposes of determining whether content has been communicated ‘publicly’ or ‘privately’. In particular, section 232(3) specifies that the following do *not* count as restrictions on access:

- A requirement to log in to or register with a service (or part of a service).
- A requirement to make a payment or take out a subscription in order to access a service (or part of a service) or to access particular content.
- Inability to access a service (or part of a service) or to access particular content except by using particular technology or a particular kind of device (as long as that technology or device is generally available to the public). This would include, for instance, a service accessible by app installable only on a particular mobile OS.

A9.31 In addition to the above, we do *not* expect the following to be considered as access restrictions for these purposes:

- A requirement for user identity verification before content can be accessed on a service.
- The fact that there is no search functionality on a service, making it more difficult in practice for individuals to locate the content. What is relevant is whether it is discoverable / accessible by members of the public.
- The fact that there are restrictions on who can interact with or respond to content (for example, by commenting on it).
- The fact that the technical design of the service means that it has only limited capacity to accommodate concurrent users.

A9.32 If there are no access restrictions in place, then the content should be considered as accessible to all UK internet users for the purpose of the first statutory factor.

A9.33 Providers should be mindful that:

- The fact that there are access restrictions on a service does not necessarily, by itself, mean that content on that service is communicated ‘privately’. Ofcom would still expect a service provider to consider how many individuals in the UK are able to access the content⁹, and the ease with which it can be forwarded to or shared

⁹ As explained above, where it is (notwithstanding any access restrictions) accessible to a substantial section of the public, it should be considered as communicated ‘publicly’.

with users of the service other than those who originally encounter it, or with users of another internet service.¹⁰

- The fact that content is accessible only to individuals that are part of the same community or organisation (for example, because they are employees of the same company)¹¹ may amount to an access restriction. However, consistent with (i) above, this is not by itself sufficient to result in that content being considered communicated ‘privately’.
- Even if messages shared amongst a group are properly to be considered as communicated ‘privately’, other content associated with that group may be considered as communicated ‘publicly’ if the access restrictions do not extend to that content. For example, even if messages shared between a small number of users are considered as communicated ‘privately’, it is possible that the name and profile picture for that group should be considered as content communicated ‘publicly’ if they can be accessed by all users on that service.
- The effect of access restrictions may change over time. For example, if default privacy settings apply when content is first shared but those settings are subsequently changed to allow the content to be more widely accessible, this could mean that content which was originally communicated privately is subsequently considered as communicated publicly, and vice versa

Sharing/forwarding of content (C)

A9.34 Ofcom is required by section 232(2)(c)] of the Act to consider the ease with which the content may be forwarded to or shared with:

- users of the service other than those who originally encounter it; or
- users of another internet service.

A9.35 We consider the focus of this factor to be on any features, functionalities or settings included in a service which facilitate the forwarding to or sharing of content with individuals that do not already have access to that content. Examples might include:

- Functionality that facilitates the ‘reposting’ of content (either on the same or a different internet service).
- Functionality that enables users to ‘tag’ in any other user of the service (or another service).
- Functionality that enables those with access to a ‘closed’ user group to add further individuals to that user group and, in doing so, to provide them with access to historic content.

A9.36 Further, the focus should not in our view be on the ease with which the content might be forwarded or shared by the person who uploaded or generated it. The focus should instead be on the ease with which it may be forwarded or shared by the *recipients* of that communication.

¹⁰ Providers should be mindful, as discussed in relation to sharing/forwarding of content, that the design of some access restrictions may encourage or facilitate the sharing or forwarding of content with users of the service other than those who originally encounter it, or with users of another internet service. For example, where a user can send an unlimited number of invites to individuals without any form of identifier associated with those individuals (such as email address). See, for example, paragraph A9.35iii. below.

¹¹ Part 1 of Schedule 1 to the Act describes a number of services that are exempt from the safety duties set out in Part 3 of the Act. Measures set out in Ofcom’s Codes of Practice will not therefore apply in respect of such services. These include some internal business services – see, in particular, paragraphs 7 and 8 of that Part.

- A9.37 The easier it is for recipients to share or forward content with individuals other than those who originally encounter it (whether by means of the service or another internet service) using features, functionalities or settings included in the service, the more likely it is to be considered as content communicated ‘publicly’.
- A9.38 Where a service does include functionality to share or forward content to others, any restrictions or ‘frictions’ incorporated within that functionality should be considered and may act to limit the ease with which the content may be shared or forwarded. For example:
- Where content may only be shared with or forwarded to other users about which the sharing user has prior identifying information (such as knowledge of their mobile number or email address).
 - Where content may only be shared with or forwarded to a limited number of individuals at a time (for example, through the use of a quantitative forwarding limit).
 - Where relevant restrictions on content access, in line with the second statutory factor, are in place. For example, where the content can be shared from a closed group to an undefined audience, but requiring members to be individually invited and accepted by privileged group members and where the content is thereafter encrypted (with only specific users having access to a decryption key).
- A9.39 We recognise that it is possible for content to be shared or forwarded from any internet service (for example, by a user taking a screenshot of that content and then sending it to another user, or by a user who has been given a password to access specific content choosing to share that password with other individuals) and that it may be virtually impossible for services to use technical means to prevent online content from being shared in this way. We do not expect this to indicate that content can be forwarded or shared with ease for the purpose of this third statutory factor.
- A9.40 Services should be mindful that:
- This factor requires a qualitative judgment to be made about the ease with which content *may* be subsequently shared or forwarded. The fact that content has not in fact been forwarded or shared with users of the service other than those who originally encounter it (or users of another internet service) does not mean that that content may not be shared or forwarded in such a way with ease. Conversely, where there is evidence that content has been shared with a large number of users (and therefore it is demonstrably easy to share or forward it) this may be a highly relevant factor in deciding whether it has been communicated ‘publicly’.
 - The fact that it is easy to share or forward content is not necessarily, and by itself, determinative that content has been communicated ‘publicly’. Ofcom would still expect providers to consider how many individuals in the UK are able to access the content, and any restrictions on who may access the content by means of the service.
 - Similarly, the fact that it is *not* easy to share or forward content is not by itself determinative that such content has been communicated ‘privately’. As noted at paragraph A9.23 above, where content is already accessible to all or a substantial section of the public, it should be considered as having been communicated ‘publicly’.
- A9.41 Providers’ risk assessments will consider, amongst other things, how easily, quickly and widely content may be disseminated by the service – and the level of risk of functionalities of the service facilitating the presence or dissemination of content. We would expect service

providers' risk assessments and views on the ease with which content may be shared or forwarded (for the purposes of considering whether content should be considered as communicated 'publicly') to be consistent.