



Department for
Digital, Culture
Media & Sport

**Audiovisual Media Services: interim approach to
implementing requirements relating to Video
Sharing Platforms**

CONSULTATION DOCUMENT

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A. Defining Video Sharing Platforms (VSPs) and their jurisdiction

1. The most significant change brought about by the 2018 Directive is the extension of scope to include ‘video-sharing platforms’ (VSP). Previously the AVMS Directive only applied to video-on-demand and linear television services.
2. The revised Directive now includes a detailed definition for VSPs (Article 1, paragraph 1(aa)) as a service:

“...where the principle purpose or a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos or both to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communications networks... and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing” .

3. This definition, and provisions relating to VSPs, are supplemented by Recitals 3 to 7. These clearly outline that while the aim of the Directive is not to regulate social media services, certain social media services are an important medium for accessing programmes and user-generated videos and such services will be covered where they meet the definition of a VSP (i.e. where programmes and user-generated videos are an ‘essential functionality’ of the service).
4. Recognising that this definition may give rise to concerns around interpretation, as well as the ever changing nature of the market, the Commission is due to publish further guidance later this year with a view to provide assistance to regulators when determining if a service is a VSP. The Government itself recognises the need to ensure that, when translating this definition into law, it provides as much certainty as possible for businesses as to whether they are in scope of regulation. Here we envisage a role for Ofcom in providing or issuing guidance to help service providers determine whether their services meet the definition of VSPs.
5. Recital 6 of the revised directive also sets out what is not intended to be covered, for example video clips embedded in the editorial content of electronic versions of newspapers and magazines and animated images such as GIFs. It also sets out that the definition of VSPs does not cover non-economic activities, such as the provision of audiovisual content on private websites and non-commercial communities of interest.
6. The revised Directive also sets out criteria for determining the jurisdiction of VSPs under the Country of Origin principle (new Article 28a) and, therefore, which Member State’s national regulatory authority they are the responsibility of.

Proposed Government approach

7. For the purposes of interim implementation, the Government proposes:
 - to transpose into UK law a definition for ‘video sharing platforms’ which outlines the minimum requirements of the Directive, by setting out the key criteria of the

definition as set out in Article 1(aa) and further defining relevant terms in accordance with the Directive, for example:

- the meaning of programme as set out in Article 1(b);
- the meaning of user-generated video as set out in Article 1(ba); and
- the meaning of editorial responsibility as set out in Article 1(c).

8. We will also ensure that only those services provided by VSP providers that fall within the UK's jurisdiction under the Directive are captured by the legislation.

Questions on Implementation

Q1. Do you agree with the Government approach of transposing a definition for 'video sharing platforms' which sets out the minimum requirements of the Directive into UK law?

- a) Yes
- b) No
- c) If no, please explain why.

Q2. Do you agree that there is a role for regulatory authority (Ofcom) to provide and/or issue guidance to help service providers determine whether their services meet the definition of a video sharing platform?

- a) Yes
- b) No
- c) If no, please explain why.

Q3. If you are responding on behalf of a video sharing platform, given the Country of Origin Principle under which Member State's jurisdiction would you consider your company falling under? Please explain your answer.

Q3a. Can you list any other video sharing platforms which you expect would fall under the UK's jurisdiction? Please explain your answer.

B. The regulatory framework

9. The AVMS Directive requires the UK and other EU Member States to establish the necessary mechanisms to assess the measures taken by VSPs to fulfil the aims of the Directive, and entrust that assessment to a national regulatory authority (Article 28b (5)). The revised Directive also requires Member State to encourages the use of co-regulation to implement the measures to be imposed on VSPs (Article 28a(4) and Article 4(a)(1)). It does not provide for a system of self regulation, although allows for the fostering of self-regulation (Article 28(10) and 4a(2)).

10. In the Government's view, the 2018 Directive requires Member States to ensure that video-sharing platforms services are regulated by either:

- a formal system of regulation operated by State institutions and/or a legally established regulator such as Ofcom; or
 - a system of co-regulation whereby industry would itself take the lead on setting and enforcing standards, providing State institutions and/or a legally established regulator (such as Ofcom) powers to intervene as a last resort (i.e. a backstop).
11. In order to meet the requirements of the Directive to encourage co-regulation, the Government proposes to follow the approach used to implement the video-on-demand provisions, where legislation has been used to establish a regulatory regime but within a framework which permits and encourages co-regulation. Under such a framework, the national regulatory authority, Ofcom, would be given powers to regulate video-sharing platform services and ensure they comply with minimum standards and may appoint one or more bodies to act as co-regulator.
12. Such co-regulators would be designated by Ofcom, subject to meeting certain criteria, for example those set out in section 368B(9) of the Communications Act 2003, including that they are fit and proper, have access to sufficient resources, are sufficiently independent of video-sharing platform providers.
13. At present, no body has been established by the video-sharing platform industry that could be appointed as a co-regulator for content, so we anticipate Ofcom will remain the sole regulator in the interim. In relation to commercial communications on VSPs, this approach would still allow for the existing arrangements on video-on-demand and linear broadcast to be replicated - whereby Ofcom would be given statutory powers to regulate commercial communications, and could then designate the Advertising Standards Authority (ASA) as the co-regulator for advertising.

Questions on implementation

Q5. Do you agree with the approach of:

- allowing for co-regulation in legislation;
 - in practice for Ofcom to solely regulate content in the absence of an appropriate industry body; and
 - for the ASA to be designated as the co-regulator for advertising?
- a) Yes
b) No
c) If no, please explain the alternatives to consider

C. Content of regulation

14. The revised Directive has three main aims with regards to areas which should be regulated, and requires that Member States put in appropriate measures to protect:
- a) minors from programmes, user-generated videos and audiovisual commercial communications that may impair their physical, mental or moral development;

- b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred; and
- c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content which is a criminal offence (for example provocation to commit a terrorist offence or child pornography).

15. With specific regard to commercial communications, the revised Directive (Article 28b(2)) also requires Member States to ensure that video sharing platforms comply with additional content requirements set out in Article 9 (1) for advertising directly under their control, and take appropriate measures to comply with these requirements for advertising not directly under their control. Measures must also be taken to ensure that commercial communications on VSPs are clearly identified.

16. Commercial communications are defined in the Directive as images with or without sound which "accompany, or are included in, a programme or user-generated video". There are two possible interpretations of "accompany" in this context, and therefore which advertisements are in scope. We welcome views on which interpretation is most appropriate, noting that the existing co-regulatory regime applied to video-on-demand platforms applies only to the latter:

- Advertising which appears anywhere on the service as a result of the user visiting that service e.g. in the margins or across the top of a webpage.
- Advertising which can only be viewed as a result of the user selecting a programme or user generated video to view.

Appropriate measures

17. The revised Directive lists a number of measures in relation video-sharing platforms that may achieve these aims (28b (3)). These measures include:

- i. including in the terms and conditions of a service, and enforcing, the Directive's requirements to protect minors, and limit incitement to violence or hatred and EU criminal offences;
- ii. including in the terms and conditions of a service, and enforcing, the Directive's requirements around video advertisements.;
- iii. creating a functionality whereby users can declare whether there are any advertisements in videos they upload;
- iv. providing transparent and user-friendly mechanisms that allow users to report or flag videos which are harmful as defined by the Directive. The provider must also explain to users of the platform what effect has been given to reports and flagging by users;
- v. establishing and operating effective age verification mechanisms with respect to content which may impair the physical, mental or moral development of minors;
- vi. creating a system whereby users can rate content harmful content as defined by the Directive;
- vii. providing parental control systems with respect to content which may impair the physical, mental or moral development of minors;
- viii. establishing and operating transparent, easy-to-use and effective procedures for handling and resolving users' complaints about videos; and

- ix. promoting media literacy on the service and introduce tools to raise users' awareness of media literacy.
- 18. These measures are to be applied by VSPs, as appropriate, in light of the nature of the content in question, the type of person to be protected and the rights of those who have created or uploaded the content as well as the general public interest.
- 19. Member States are to ensure that all video-sharing platforms in their jurisdiction apply such measures - so long as they are practicable and proportionate, taking into account the size of the VSP and type of service provided. These measures shall, however, not lead to any ex-ante control measures or upload filtering. The national regulatory authority, Ofcom, shall be entrusted with assessing the appropriateness of measures applied by VSPs.
- 20. The Government proposes to implement the minimum requirements of the Directive by transposing into national legislation the measures to be imposed on video sharing platform providers within the regulatory framework (described above). We again envisage a role for the regulator in issuing guidance to providers on what steps VSPs should take to ensure compliance - including making an assessment about what measures are practicable and proportionate given the size of the provider and type of service.

Information gathering powers

- 21. The Government also proposes that Ofcom (and/or a relevant co-regulator) be given appropriate information gathering powers in order to fulfil their duties in relation to VSPs (similar to those provided to Ofcom under section 3680 of the Communications Act 2003 in relation to video on demand services).
- 22. This will enable Ofcom to compel VSPs to provide information, as appropriate, regarding the details of the service and its provider, the measures undertaken to protect users in line with the Directive and any other information required to fulfil the national regulatory authorities functions under the Directive. In addition to this, in order to initially ascertain whether a service is within its jurisdiction, powers should extend to requiring information from services that appear to them to be a video-sharing platform provider.

Questions on implementation

- Q6. Should regulation of commercial communications on VSPs arising from AVMSD apply to:
- Advertising which appears anywhere on a service as a result of the user visiting that service e.g. in the margins or across the top of a webpage.
 - Advertising which can only be viewed as a result of the user selecting a programme or user generated video to view.
- Q7. Do you agree that there should be a role for Ofcom in providing guidance to video sharing platforms about what appropriate measures are required to ensure compliance?
- Yes
 - No
 - If no, please explain the alternatives to consider.
- Q8. How should Ofcom determine what measures are practicable and proportionate for different types of content, users and services?
- Q9. Do you agree that Ofcom be given powers, similar to those under section 3680 of the Communications Act 2003, to require information from video-sharing platforms in order to fulfil their regulatory duties?
- Yes
 - No
 - If no, please explain the alternatives to consider.

D. Enforcement, redress and sanctions

23. Under the revised Directive, it is the obligation of Member States to ensure that VSPs within their jurisdiction comply with the requirements of the Directive. Member States also have to provide an up-to-date list of VSPs within their jurisdiction to the Commission.
24. Service providers falling within the scope of the legislation might, therefore, be required to:
- to obtain a licence from Ofcom (as with the current regime for television broadcasting);
 - to seek prior approval or to notify Ofcom before offering their services; or
 - they might simply be required to comply with the Code and Ofcom's general conditions (a variation of Ofcom's general conditions regime which is in place for the telecommunications networks and services industry).

25. The Government's current preference is for a notification requirement. This would allow Ofcom being to effectively identify, monitor and evaluate the regulatory compliance of platforms under its jurisdiction.

Sanctions

26. Member States also have discretion as to what powers of enforcement a regulator should have at its disposal to deliver a fair, proportionate and effective sanctions regime that ensures the UK meets its obligations.

27. Ofcom currently has a range of sanctions available under the video-on-demand regimes (set out in section 368I of the Communications Act 2003), these include the ability to serve enforcement notices and financial penalties.

28. For video-on-demand services, Ofcom has the power to issue maximum fines of the greater of £250k and 5% of the providers qualifying revenue, as they deem to be appropriate and proportionate. The Government proposes to mirror this maximum fine for video-sharing platforms. Offences also exist for failure to comply with enforcement measures, with Ofcom also having the power suspend or restrict the entitlement to provide a service.

Redress

29. Finally, the revised Directive requires that an impartial out-of-court redress mechanisms be available for the settlement of disputes between users and VSP providers - whilst not depriving users of existing legal protections (Article 28b(7)). Given the sheer volume of audio-visual content shared on video sharing platforms online, it would not be practicable to establish a similar complaints regime as exists for linear broadcasting.

30. The regulator, therefore, would oversee the requirements for VSPs to have an effective and easy to access complaints function, and to have an external independent appeals process.

Questions on implementation

Q10. Do you agree that video sharing platforms should be subject to a notification regime?

- a) Yes
- b) No
- c) If no, please explain the alternatives to consider.

Q11. Noting the existing regime on demand programme services which provide for a range of sanctions noted above (which could include enforcement notices, financial penalties and the potential suspension or restriction to provide a service), do you agree that similar sanctions mechanisms can be applied to video-sharing platforms?

- a) Yes
- b) No

c) If no, please explain the alternatives to consider.

Q12. Do you agree with Governments proposal that the maximum fine and other offences for video-sharing platforms mirror that of other services regulated AVMS services?

a) Yes

b) No

c) If no, please explain the alternatives to consider.

Q12a. If you answered yes to the previous question (12), what should constitute 'qualifying revenue' for video sharing platforms?

Q13. Do you agree that the regulator should oversee the requirements that video sharing platforms have an easy to access complaints function, and provide an external out-of-court redress mechanism?

a) Yes

b) No

c) If no, please explain the alternatives to consider.

E. Funding a new regulatory function

31. Government policy is that the cost of regulatory activities should be fully recovered from regulated industries wherever possible, whilst respecting the principles of proportionality. This means that we are considering options to ensure that Ofcom and the ASA receive appropriate funding.

32. This could be done through several potential funding mechanisms such as requiring a fee upon notification of the service to the regulator, ongoing fees or other charges. There are then numerous ways in which these charges could be structured, for example using notification fees, allowing the regulator to set an appropriate fee based on an estimate of costs, a risk-based charging scheme or intervention fees.

33. We propose giving Ofcom the appropriate powers, perhaps similar to those in section 368NA of the Communications Act 2003 in relation to on demand programme services, to raise fees in relation to the regulation of VSPs.

Questions on implementation

Q14. Do you agree for Ofcom in principle to charges fees to video-sharing platforms?

a) Yes

b) No

c) If no, please explain the alternatives to consider.

F. Ascertaining the potential impact on business

Questions relating to business impact

Q15. Would putting appropriate measures in place to protect minors affect the ability of users to access or use the service?

- a) Yes
- b) No
- c) If yes, please explain how.

Q16. Would putting appropriate measures in place to protect minors result in a loss of revenue?

- a) Yes
- b) No
- c) If yes, please provide an estimated figure.

Q17. Would putting appropriate measures in place to protect users from content containing incitement to violence or hatred affect the ability of users to access or use the service?

- a) Yes
- b) No
- c) If yes, please explain how.

Q18. Would putting appropriate measures in place to protect users from content containing incitement to violence or hatred result in a loss of revenue?

- a) Yes
- b) No
- c) If yes, please provide an estimated figure.

Q19. Would putting appropriate measures in place to protect users from containing content which is a criminal offence (for example provocation to commit a terrorist offence or child pornography) affect the ability of users to access or use the service?

- a) Yes
- b) No
- c) If yes, please explain how.

Q20. Would putting appropriate measures in place to protect users from content containing content which is a criminal offence (for example provocation to commit a terrorist offence or child pornography) in a loss of revenue?

- a) Yes
- b) No
- c) If yes, please provide an estimated figure.

Q21. Are you able to provide an estimate of the administrative cost of applying appropriate measures in relation to:

- a) Protection of minors
- b) Protections in relation to content containing incitement to violence or hatred
- c) Protections in relation to content which is a criminal offence

Q22. Are you able to provide an estimate of the number of hours to:

- a) Establish appropriate measures
- b) Maintaining a system of appropriate measures on an ongoing basis.

Q23. How would the proposal that the regulatory cost is levied from industry based on relevant turn-over affect your revenues and profits?

We would be very grateful to receive your response to these points, and on any other points which may be relevant, via email or letter to the addresses below by 5pm on 17 September 2019.

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