



**Consultation on the UK Government's Proposed Approach to
Implementing the Audiovisual Media Services Directive 2018
BBC Response**

August 2019

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Protection of Minors

1. Do you agree with our proposed approach to amend s368E of the Communications Act 2003 to align the protection of minor requirements for linear and on-demand?

- a. Yes
- b. No
- c. If No, please give details.

2. Noting that Recital 19 envisages that a system of that viewers should be provided with sufficient information regarding the nature of the content, should be equally applicable to both video-on-demand and linear services. Do you consider that Ofcom updating the relevant sections of the Broadcasting Code would be enough to sufficiently meet this requirement?

- a. Yes
- b. No
- c. If no, please give details

3. If no, what would be your preferred way of introducing a new requirement for ensuring that viewers have sufficient information about the nature of content on video-on-demand catalogues? Could you indicate from the following:

- a. Using acoustic warning
- b. Content descriptors
- c. Visual symbols
- d. Age-ratings
- e. Other means (please specify) NA

4. Should the measures above use standardised system of content descriptors or age-ratings used for broadcast and/or video-on-demand?

BBC iPlayer already complies with the new Directive through content descriptors, 'G for Guidance' and the parental lock. This is a well-established system that the other UK PSBs adopted with Ofcom's support, and that audiences understand and value.

In particular, BBC parental tools for BBC iPlayer are effective across all platforms and devices. Long form text labels alert users to the appropriateness of content. Audiences are used to these as part of the pre-schedule announcement for broadcasting, and may balance a specific warning (e.g. violence) against the citizen value of a genre (e.g. a current affairs documentary) and their expectations of the BBC, channel and programme. Content descriptors are supplemented by a prominent 'G' for Guidance symbol indicating when a programme contains content which might not be suitable for children, which is the on-demand equivalent of the 'watershed' for linear programmes. The BBC and other PSBs also use their audience understanding, reach and brands to drive awareness of parental controls and wider online safety issues, and to increase media literacy.

Imposing a different 'standardised system' does not seem appropriate. By setting principles for minimum harmonisation, the Directive rightly enables the provision of content descriptors and other tools that reflect audience needs and expectations for a particular service and type of content. It allows for an industry-led approach in the first instance, which is focused on supporting audience understanding and choice. We would be concerned that imposing another standardised system, as was debated in Europe, could go against audience preferences and risks creating implementation delays as well as costs and uncertainty for providers that already have effective systems in place. We welcomed the UK government's negotiating approach of ensuring the requirements of the 2018 AVMS Directive remain principles-based.

In conclusion, the BBC and other PSBs already comply with Article 6a and ODPS in general are well regulated. This is a case of some ODPS enhancing the tools they offer. To support compliance we would favour Ofcom sharing best practice examples with industry and with other audiovisual regulators, and we would be happy to share the BBC's experiences. Overall we consider UK government is right to focus its policy development on the protection of minors on those Video Sharing Platforms with lesser standards.

The consultation paper also refers to a new measure on a minor's personal data (Articles 6a(2) and 28b(3)). We would like to clarify that the AVMSD does not place a blanket restriction on the processing of minors' personal data for commercial purposes, as could be misunderstood from the consultation document paragraph 34. Article 6a(2) clearly relates to personal data obtained for the specific safeguarding measures set out in Article 6a(1) only, i.e.: 'Personal data of minors collected or otherwise generated by media service providers pursuant to paragraph 1 shall not be processed for commercial purposes...' [emphasis added]. This is also clear from Recital 21 of the AVMSD: 'Regulation (EU) 2016/679 of the European Parliament and the Council recognises that

children merit specific protection with regard to the processing of their personal data. The establishment of child protection mechanisms by media service providers inevitably leads to the processing of the personal data of minors. Given that such mechanisms aim at protecting children, personal data of minors processed in the framework of technical child protection measures should not be used for commercial purposes [emphasis added].

In addition, we would like to clarify that Article 8 of the GDPR does not only allow ‘the processing of children’s personal data to the extent that consent is given or authorised by the holder of parental responsibility over the child’ as stated in paragraph 34 of the consultation document. All other lawful grounds of processing set out in Article 6 GDPR are also available. It is simply that, where an online society service is offered directly to a child and the provider is relying on consent as its lawful basis of processing the child’s personal data, the additional obligations under Article 8 GDPR also apply.

As a result of the above clarifications on the scope of Article 6a(2) AVMS and Article 8 GDPR, we would disagree with the consultation statement that Article 6a(2) AVMS ‘goes further than the requirements set out in Article 8 of the GDPR’, and the consultation’s proposal that ‘A specific amendment will need to be made to the Communications Act 2003 in a new section to ensure that this requirement applicable to audiovisual media service providers and VSPs are prohibited from further processing of minors personal data’. Instead we would favour a simple copy out, which makes clear that the limitation applies to the processing of minors’ personal data collected or otherwise generated pursuant to compliance with Article 6a(1) for safeguarding measures only.

As regards the substance of Article 6a(2), we would note that any guidance on how personal data collected for the purposes of Article 6a(1) may be appropriately ring-fenced needs to be clear and practical considering the operational realities and likely challenges for the audiovisual sector, and consistent with other relevant codes of practice including any future ICO Age Appropriate Design Code.

It is worth clarifying that the BBC UK public service does not process such data for ‘commercial purposes’. Rather, it is processed for public service purposes, to fulfil the BBC’s duties under the BBC Charter and Agreement. The responsible use of data is especially important for ensuring that BBC content and services can reach and remain relevant to younger audiences. For example, it enables us to deliver personalised recommendations and trails to help young audiences discover new BBC content and services to surprise and inspire, delivering maximum value to all audiences. Disrupting the delivery of that public service mission is not the policy objective of the AVMS.

We would like to add a final point on age verification tools. These are one of the suggested ways to comply with Article 6a(1), alongside selecting the time of broadcast or other technical measures. The Directive is right to allow for different measures as ‘appropriate’, and to require these to be ‘proportionate to the potential harm of the programme’. In our response to the recent ICO consultation on Age Appropriate Design,

and in our joint submission to the ICO with the other public service broadcasters, we noted that we would have significant in-principle concerns with the idea of requiring universal age gating procedures for whole services such as the whole of BBC iPlayer. That would significantly inhibit our ability to offer a universal service free at the point of use as required under the BBC Charter and Agreement. We would also question how any age verification mechanism might work in practice. The BBC carried out a market review of age verification mechanisms in 2018. It was clear that the services available in the market were very immature and were not able to offer a reliable, scalable solution. In addition, any such solution would typically involve the large scale collection and processing of additional personal data.

5. What would the benefits/obstacles be for introducing a standardised system to such content?

As in our response to Question 4, we believe that the current UK approach should be maintained, enabling ODPS to continue offering audiences well-established controls that reflect their needs and expectations, and avoiding gold-plating of the EU Directive and any unnecessary delays or costs, contrary to the Transposition Guidance.

6. Should the government consider a self or co-regulatory model for provision of sufficient information to protect minors?

The provision of information on BBC ODPS is already well regulated under the BBC Editorial Guidelines and the Ofcom Broadcasting Code. We expect this approach to continue.

Accessibility

10. The government's preferred approach is to consider the recommendations set out in Ofcom's report on accessibility for on-demand regarding the design and implementation of accessibility for on-demand; in the event that time-scales do not align with the implementation deadline of 19 September 2020 that copy-out is used to update the wording s368BC for video-on-demand of the Communications Act 2003. Do you agree with this approach?

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

We're content with DCMS's proposed approach. and look forward to engaging with DCMS and Ofcom on putting an appropriate Code in place for ODPS. Under the BBC

Framework Agreement, Ofcom already has the ability to introduce a Code of Practice for access services on BBC ODPS.

At present we do not expect a new Code to drive additional cost. However, this does depend on how the Code is implemented. We are already required to provide access services for our broadcast channels. In line with the principle of proportionality, not all of the channels are subject to the same level of access services requirements due to their audience share. This flows through into what we are able provide when delivering those services on-demand. If the ODPS requirements went beyond our broadcast requirements, this would generate proportionately significant costs, in order to respectively introduce and increase provision on the two channels with low audience share (BBC Alba, BBC Parliament).

11. Do you agree with the government's preferred approach to ensure that the accessibility of emergency communications is made through existing provisions in Section 336 of the Communications Act?

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

European Works

12. We propose that government amends the Communications Act 2003 to ensure that Ofcom produces a report every two years on the European Works quotas and prominence obligations, via copy-out. Do you agree?

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

13. We propose that government amends the Communications Act 2003 to ensure that Ofcom has to produce guidance on prominence of European Works in video-on-demand catalogues. Do you agree?

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

16. What would be your preferred way of introducing a new prominence requirement for European works content on video-on-demand catalogues?

We welcome the proposal for Ofcom to produce guidance. In general, it will be important to consider audience behaviour, needs and expectations on the one hand, and the different types of ODPS business model and interface design on the other. The branding and attribution of a work is an important element to deliver the benefits of prominence in practice, because it enables audiences to understand the content's source.

18. Do you consider that the current level of funding for European Works in the UK is sufficient? Please provide evidence.

The existing European works quota for linear channels supports investment in the production of high quality UK works and their distribution in the UK and across the EU - driving UK programme exports. It also supports valuable co-production partnerships between UK and European producers and broadcasters including BBC Studios. This enables investment in new content of scale and ambition that we could not fund from the licence fee alone and - through the involvement of the BBC - content that also reflects audiences' daily lives and gives opportunities to new talent.

We understand that the European Commission and Ofcom will provide guidance on the calculation of and compliance with the new VOD quota. This must secure the public policy aim of furthering investment in and the availability of European/UK works in VOD services, rewarding the inclusion of high quality works and avoiding loopholes such as a simple reduction in the long tail of non-European works, or a short-form work having the same weight as a high quality drama episode or a feature film.

We expect Ofcom to consider the need for any further measures to support audience access to high quality UK works through its overall policy work, noting the fundamental role played by the BBC and other PSBs.

20. Are there alternative methods of funding European Works that you wish to provide views on?

We would like to underline the vital role of the UK's PSB prominence rules in securing investment in UK works. The BBC welcomes the recent recommendations from Ofcom to update the PSB prominence regime for online and on-demand viewing. These recommendations need to be enacted without delay to ensure that viewers can continue to find and access the PSBs' linear and on-demand services, across a range of connected devices. These updates are critical to ensuring the aims of PSB continue to be delivered. PSB programming intended for UK audiences and (in the case of the BBC) paid for by them must be widely available and easy to find, with audiences presented with as many opportunities as possible to consume them. This helps to reinforce the virtuous circle of

content investment by the PSBs, who still account for c.80% of all UK TV original content investment. Updates to the UK's statute also need to build in flexibility so in the future rules can quickly be adapted to changes in technology and viewer behaviour.

Indeed, PSB and the BBC have never been more important to investment in distinctively British stories, programmes that bring society together, and trusted analysis of the world around us. Our programme exports and international services strengthen Britain's reputation as a creative nation, promoting trade and inward investment. Doctor Foster, Luther, Orphan Black, Call the Midwife, Top of the Lake, Sherlock, Forces of Nature, Blue Planet II and Planet Earth II have all been exported to over 200 countries.

However, investment by PSB has been hit by cost inflation and other factors. In 2018/19, the BBC's funding for UK services was 24% below where it would have been had the cost of the licence fee risen with inflation since 10/11. Advertising revenues have been a challenge for the commercial PSBs. At the same time, SVOD activity has brought many benefits but also driven up costs for talent, rights and ideas. There is super-inflation in drama, comedy and, increasingly, in other genres. It is clear that, if PSB investment in distinctive UK content is cut, global SVOD does not make up the difference. And that is not its business – PSB is unique. We look forward to discussing ways to strengthen PSB for new generations in the upcoming Ofcom PSB Review.

25. What would be your preferred way of introducing a new requirement for ensuring that appropriate and proportionate measures to ensure that audiovisual media services provided by media service providers are not, without the explicit consent of those providers, overlaid for commercial purposes or modified?

The BBC welcomes the implementation of Article 7b, so that up to date tools are in place to ensure that the BBC's programmes and audiovisual media services are not overlaid for commercial purposes or modified, without the BBC's explicit consent. As stated in Recital 26, we consider that such measures are important to 'protect the editorial responsibility of media service providers and the audiovisual value chain' and to enable the BBC to deliver the public policy objectives set out by UK government in the BBC Charter and Agreement.

In particular, the BBC must 'act in the public interest, serving all audiences through the provision of impartial, high-quality and distinctive output and services...'; 'Its content should be provided to the highest editorial standards'; 'The BBC must be independent in all matters concerning the fulfilment of its Mission and the promotion of the Public Purposes, particularly as regards editorial and creative decisions, the times and manner in which its output and services are supplied...'. These principles are reflected in the BBC's Editorial Guidelines and in the Ofcom Broadcasting Code. The BBC Editorial Guidelines state: 'The BBC's reputation and the strength of its brand in the UK and around the world are based upon its fundamental values of editorial integrity, independence and impartiality. These values are central both to the BBC's Public Services and our Commercial Services. Audiences everywhere must be able to trust the

BBC. In order to achieve that, our impartiality, editorial integrity and independence must not be compromised by outside interests and arrangements. We must maintain independent editorial control over our content'. The licence fee funded UK Public Services must not broadcast sponsored editorial content or carry advertising, and may not give the impression that a UK Public Service is sponsored. Meanwhile Section 9 of the Ofcom Broadcasting Code requires broadcasters to 'maintain independent editorial control over programming', including BBC ODPS.

However, these principles are under pressure. The 'undertakings' (as per Recital 26) that distribute or display programmes and AVMS have increasing commercial incentives to promote their own content and services, or to enter into financial arrangements to promote another party's content and services. Advances in technical functionality enable such undertakings to do so by overlaying or modifying programmes and AVMS, without the media service providers' authorisation. Today, they are able to, for example:

- alter metadata provided by the media service provider so that, for example, the EPG listing includes the name of an advertiser or sponsor
- use so-called 'X-ray' functionality to lay text or other content over a paused programme, with the possibility to offer links out
- interfere with full-screen programming by adding a voice-over, digital onscreen graphics (DOGs) or interactivity, or squeezing the end credits
- insert alternative pictures or sound over the editorial content
- replace the media service provider's trailers, or insert pre-roll or mid-roll advertisements
- take a broadcast stream and re-encode it for distribution to their customers, causing a deterioration in quality contrary to what is offered by the broadcaster and, in the BBC's case, expected by our audiences. This can also affect consumers' perceptions and enjoyment of new standards like UHD. The BBC plays a key role in standards development and in introducing new technology to audiences, with benefits for innovation in the rest of the sector

All of these activities disrupt the editorial responsibility of the media service provider. Existing solutions are not adequate. In the past, third parties have used BBC content with pre-roll advertising and other commercial overlays in circumstances where neither copyright law nor passing off have been able to provide a clear remedy. However, this type of activity is effectively commercialising BBC content and interferes with the BBC's public service responsibilities.

Equally, it is not adequate to rely on contractual negotiations between media service providers and the undertakings that distribute or display their programmes and services. Under the Framework Agreement, the BBC is required to make the UK public services 'widely available' (s.61-62), while the commercial PSBs are subject to 'must offer' under s272 and s273 Communications Act 2003. These obligations affect the broadcaster's

bargaining position towards undertakings that play a meaningful role in reaching audiences.

In light of the above, when implementing Article 7b AVMS in the UK, the concepts of 'modify' and 'overlay' must be capable of a broad application to remain relevant over time. We would also like to offer some observations on the exceptions.

Recital 26 of the AVMSD refers to an exception where an overlay is 'solely initiated or authorised by the recipient' (note that this does not apply in the context of modifications or other interference). However, Article 7b itself requires a balancing act between the legitimate interests of users and of content providers. The legitimate interests of users here encompasses wider interests than preferences about overlays, including the enjoyment of PSB content and services, receiving full value from the licence fee, and the legitimate expectation of no commercialisation of the BBC UK public services. Therefore 'solely initiated or authorised' must require positive and direct action by the end user, through active opt-ins in relation to a particular programme. Arguably, users should be made aware of the possibility to withdraw consent on a periodic basis. Government and Ofcom must be careful not to create a loophole for undertakings by allowing default consent or settings. This tight interpretation of direct action is necessary considering that the provision relates to the integrity of the programme or service itself.

Recital 26 also refers to 'data compression techniques which reduce the size of a data file and other techniques to adapt a service to the distribution means, such as resolution and coding, without any modification of the content'. We would confirm that, where data compression techniques change the quality of the programme or the AVMS (as in the list of examples above), that is a 'modification of the content' and is not covered by the exception.

We agree with the principle in Recital 26 that simple and obvious platform functionality like volume bars is permitted.

Lastly we would like to comment on the scope of the 'undertakings' that are subject to the prohibition in Article 7b. The subject matter to be protected is 'programmes and audiovisual media services' (per Recital 26). Any legislative obligation to respect the integrity of these programmes and services must therefore be imposed on all persons involved in or having the power to influence their distribution and display to end users. Specifically, the legislation will need to capture practices of both:

- i. Persons who meet the definitions of ECNs and ECS, including the new definitions to be implemented in the UK via the European Electronic Communications Code; and
- ii. All other persons (whether licensed or not) involved in or having the power to influence the distribution and display of the programmes and services to end users.

The inclusion of the second category is important:

- to future-proof the legislative framework from developments in technology and business models;
- to protect providers of ‘programmes and audiovisual media services’ whose content is modified or overlaid whether used without authorisation (e.g. illegal streaming) or used legitimately, where existing legal remedies are not adequate or sufficiently prompt to take down those modifications or overlays; and
- in the case of the BBC, to achieve reciprocity for our obligation to make the UK public services ‘widely available’ under s61 and 62 of the Framework Agreement. Since those distribution obligations are owed to ‘third parties’ and require FRND treatment of ‘third parties’, it is imperative that all such ‘third parties’ are subject to the same obligations under the implementation of Article 7b AVMS, and in a similarly future proof and technology neutral way (see also the BBC Editorial Guidelines 16.1 and the Ofcom Distribution Guidelines footnote 2 which echo this non-exhaustive approach to defining such ‘third parties’¹).

The BBC would be happy to engage further with DCMS on how to best secure the public policy objectives of Article 7b AVMS and the wider objectives of the BBC and public service broadcasting through the implementation of Article 7b and regulation by Ofcom. We would also welcome the opportunity to provide further input to Ofcom, for example to inform any guidance for the undertakings distributing or displaying programmes and AVMS.

Media Literacy

26. In addition to the measures described in the section on Media Literacy, are there any other legislative and non-legislative measures government should be taking to fulfil the obligations of promoting the development of media literacy skills set out in Article 33a(1)?

The BBC welcomes the attention paid to media literacy in the AVMSD. The reference to ‘critical thinking skills required to exercise judgment, analyse complex realities and recognise the difference between opinion and fact’ has become especially important given the rise of disinformation.

¹ BBC Editorial Guidelines 16.1: ‘Distribution refers to the making available of content to viewers, listeners and other users. It can take a wide variety of forms across numerous different technologies and platforms and has to evolve constantly as new technologies and platforms are developed. It covers a broad range of activities including: transmission of broadcast TV and radio signals received directly by audiences, syndication of services to managed platforms, publishing individual assets to open online platforms’.
Ofcom Distribution Guidelines: ‘platform’... the mechanism through which the BBC’s public services are distributed to audiences, for example, digital terrestrial TV, satellite, cable, analogue and digital radio, IP and broadband. Our definition refers to all aspects of distribution from the BBC to its audiences, including transmission (e.g. TV and radio broadcast networks, internet networks) and the devices, software and applications used to consume the public services (e.g. set top boxes, smart TVs, games consoles, mobile devices and apps).

The BBC is active in media literacy for audiences of all ages, including a special focus on news literacy, and we would be happy to share our expertise to support DCMS's further consultation and Ofcom's research. For example:

- Reality Check is the BBC's fact-checking service, which runs in a variety of formats across TV, radio and online, including social media
- BBC Young Reporter, in partnership with schools, youth organisations and charities, empowers 11-18 year olds to navigate, understand and create news. It offers mentoring to up to 1,000 schools from some of the most respected and well-known BBC journalists, and resources for teachers
- BBC iReporter is an online interactive game by Aardman Animations, putting young people in the heart of a news room as a journalist on a breaking story – what is real and what is fake? It has been played by over 115,000 people
- BBC is also a member of the News Literacy Network lead by the National Literacy Trust, with involvement by BBC Young Reporter/BBC News
- Internationally, BBC World Service has launched a Beyond Fake News season with a focus on global media literacy. It includes a special season of programming across the BBC's networks in Africa, India, Asia Pacific, Europe and the Americas, smaller BBC Young Reporter-type initiatives in India, Kenya and Brazil, hackathons and original research

Of course the BBC's most important contribution to combatting disinformation is its high quality, reliable news and information. BBC News ranks number one around the world for trust, reliability and independence. As such, we supported the proposal in the Online Harms White Paper for a draft Code of Conduct on disinformation that would promote authoritative news providers. While the BBC's news services have high levels of reach and consumption, the Reuters Digital News Report 2019 found that overall almost half of under 35s in the UK start their news journey with social media and just a third go directly to news providers. At the same time, we have seen an increase in the use of news aggregator apps, which often come bundled with connected devices. These environments are all much more likely to use algorithms to select stories. However, prominence and attribution are key so that trusted news sources can be easily found. They are also vital for the sustainability of high-quality journalism. We are working with platforms and other publishers to address these issues but, as the market develops, it is necessary to ensure that high quality news sources remain prominent and easy to identify as a matter of principle.

General

We understand that DCMS will consider whether it is in the UK's interests to adopt provisions of the 2018 AVMS Directive in the event that the UK leaves the EU before the implementation deadline of September 2020. We strongly support the application of the obligations in relation to European works as those benefit investment in UK production and support UK co-production deals and exports to Europe. We would also like to emphasise the importance of implementing Article 7b prohibiting the unauthorised modification or overlay of programmes and AVMS in the UK. We understand that policy around video sharing platforms, media literacy and the prominence of trusted news sources will be taken forward as part of the Online Harms White Paper.

Lastly, we would note that some reciprocal arrangements such as 'country of origin' may cease to function upon Brexit, subject to any future arrangements. In that case government will need to correct some gaps in regulation – namely for ODPS and video-sharing platforms established in the EU and serving the UK (some of which are major players). Otherwise they could become unregulated, contrary to UK consumer interests and the imperative of a fairly balanced regulatory approach across the UK's media ecosystem.

-ENDS-