

News Media Association Response to DCMS Audiovisual Media Services: Consultation Document

The News Media Association represents the national, regional and local news media industry. Our members span all sectors of the industry, from the largest group to small family owned companies. They publish around 1000 titles, in print and online, including both national newspaper titles such as The Times, The Sun, The Telegraph, the Guardian, The Daily Mail and the Daily Mirror and regional and local titles, such as the Yorkshire Post, the Kent Messenger, the Monmouthshire Beacon and the East Anglian Daily Times. Our members' titles are read by 48 million adults each month, in print and online. These publishers are also by far the largest investors in news journalism, accounting for around 58 per cent of the spend on original news content in the UK. The NMA and its members support the system of advertising self-regulation and codes upheld by the ASA and independent system of press regulation and Editors' Code of Practice, with the majority of its members in membership of IPSO.

The NMA and its members have welcomed the Government's repeated public commitment to press freedom, summarized by the then DCMS Secretary of State in his public letter:

'the Government's stance on press regulation has not changed. The Government strongly supports press freedom and editorial independence. A vibrant, independent, plural and free press that is able to hold the powerful to account is essential to our democracy. High quality journalism also plays a key part in tackling misinformation and disinformation

[Jeremy Wright's response to the Society of Editors and sent to the NMA, IPSO - GOV.UK,](#)

The previous Foreign Secretary announced that the Government will put in place a press freedom audit of all prospective legislation: *'For our part, the British government will ensure that whenever we propose or amend a law, we will consider the potential impact on press freedom'*.

[Media freedom and journalists under threat'](#)

The NMA and industry have also appreciated their longstanding dialogue with the DCMS and Ofcom on the scope of the AVMS regime and avoidance of adverse impact upon press freedom. Our key concern is that implementation of the revised AVMSD should not result in any broadening of the scope of the statutory AVMS regime or the remit of Ofcom or any other statutory regulator in respect of news publishers, newspaper websites and news brands' online editorial and advertising content. We trust that DCMS Government and Ofcom will take scrupulous care to safeguard press freedom in framing any UK primary legislation, secondary legislation, codes or guidance, so that newspapers remain outside the scope of the AVMSD implementing legislation and any other related legislation, co-regulation or other regulatory measure.

Any legislation should be framed so as to provide strong press freedom safeguards, exemptions and restrictions that clearly and effectively exclude news publishers and their editorial and advertising content, irrespective of platform of distribution, from the scope of any revised regulatory regime and from the remit of any statutory regulator. This should apply not just to implementation of the revised directive, but also to its interaction or integration with any wider regulatory changes independently instigated by the UK government. These include any changes arising from the AVMS consultation paper, the consultation on interim approach to implementing requirements for video-sharing platforms in the AVMSD 2018, the Online Harms White Paper, ICO codes under the Data Protection Act 2018 including the proposed statutory Age Appropriate Design Code, the DCMS consultation on further advertising restrictions on HFSS and 'online watershed' and the DCMS review of online advertising regulation.

As the consultation paper suggests that the Government intends to integrate the revised AVMS regime, with the proposals in the Online Harms White Paper and the requirements of the ICO Age Appropriate Design Code, the NMA's responses to the relevant consultation are attached for consideration as part of our response to this consultation. These set out the industry's strong and united opposition to the online harms and ICO proposals. In view of their threat to press freedom, press sustainability and business impact. The Online Harms White Paper poses a grave threat to press freedom. A robust, comprehensive exemption for news publishers, their websites and their content, however distributed, would be necessary if the Government develops its proposals. This includes exemption for their content disseminated through third party platforms. The draft ICO age appropriate design code would wreak havoc on the independent commercial news publishers' business. Unless amended, it would undermine the news media industry, its journalism and business innovation online. The ICO draft code would require commercial news media publishers to choose between their online news services being devoid of audience or stripped of advertising, with even editorial content subject to ICO judgment and sanction, irrespective of compliance with general law and codes upheld by the courts and relevant regulators.

In view of the potential complicated interaction between AVMSD implementation, Online Harms White Paper, online advertising regulation review and statutory ICO codes, we would be happy to meet with DCMS to discuss these issues in more detail. For avoidance of doubt, we would not countenance imposition of these consultations' proposed measures upon news publishers or accept any purported justification that this might be a prerequisite or consequence of AVMSD implementation.

Consultation Paper Scope and newspaper websites

The NMA and its members have greatly appreciated the longstanding constructive discussions with DCMS and Ofcom.

We therefore welcome the helpful statements in paragraph 21 of the consultation paper and footnote 10 which confirm that newspaper websites remain outside the scope of the 2018 directive and that any interpretation of 'standalone parts of newspapers' websites' which might fall within scope should be reflective of the current position:

'21. While newspaper websites remain outside the scope of the 2018 Directive, standalone parts of newspapers' websites providing video services do fall into scope [10]. However, the occasional use of videos on websites, blogs and news portals falls outside the scope of the new provision.

[10] This is reflective of the position under the existing Directive as interpreted in accordance with EU case law, [where "an assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper must focus on whether that service as such has content and form which is independent of that of the journalistic activity of the operator of the website at issue, and is not merely an indissociable complement to that activity, in particular as a result of the links between the audio-visual offer and the offer in text form"] (see Case C-347/14).

(For avoidance of doubt, the NMA notes that neither the current regime nor the revised directive stipulate that only 'occasional' use of video is a requirement for the normal exclusion from scope of electronic versions of newspapers. We assume that the consultation paper is helpfully stating that 'occasional' use of video on websites, blogs and portals falls outside the scope of the new provisions.)

The current directive recital 28 provides that

(28)The scope of this Directive should not cover electronic versions of newspapers and magazines.

If the UK were no longer an EU member state but wished to revise the UK AVMS regime in any circumstances, the NMA would be happy to be consulted upon and discuss any reinforcement of exclusion from scope of news publishers and newspaper websites or any part of them, or any redefinition of statutory AVMS scope and remit.

Otherwise, the NMA's key concern is that the Government will ensure that any AVMSD implementing legislation does not extend the scope of the AVMS regime and remit of Ofcom in respect of news publishers and their digital services. The new legislative regime must ensure that newspaper websites and activities which currently fall outside the scope and remit of the AVMS regime should continue to fall outside the revised regime with reference to EU case law Case C-347/14 as above and Ofcom's decision in the appeal by Sun Video and the consequent withdrawal of determinations against the websites of the Sunday Times, Telegraph, Independent, Guardian, FT and Elle (published 21 December 2011).

The revised regime must also continue to allow innovation and development of the use of video on newspaper websites, as these evolve to ensure that the ever-growing audience for NMA members' trusted editorial content continues to be attracted and engaged. Video content will continue to be relevant to the editorial coverage provided in any section of a newspaper website, whether as a component of an accurate, immediate general news report or specialist feature. News publishers must also continue to be free to design and organize their websites and to offer their ever-evolving digital services to their audience in the most convenient and accessible manner. They must retain the ability to determine how their website content might be best presented and navigated, without fear that the inclusion of video content or provision of any index to video content will subject them to statutory control through implementation of the revised AVMSD. It is important that the revised AVMS regime does not chill or restrain innovation by news publishers, or audience access and engagement with their content.

The NMA's understanding is that the revised directive ought not effect any substantive change to AVMSD scope and Ofcom remit in respect of news publishers. We trust that the Government will ensure that implementation cannot in practice result in any 'regulatory creep' and any new legislation will be drafted to make sure that news publishers' online activities and websites which are not within scope of the current regime will not be enmeshed in the future statutory AVMS regime.

We understand that DCMS and Ofcom recognize the importance of Recital 6 of the revised AVMSD. Hence, we would expect that the new regime's implementation and application in practice will take account of the recital's express exclusion from scope of electronic versions of newspapers which carry video clips or allow some video sharing.

*Recital (6): Where a dissociable section of a service constitutes a video-sharing platform service for the purposes of Directive 2010/13/EU, only that section should be covered by that Directive, and only as regards programmes and user-generated videos. **Video clips embedded in the editorial content of electronic versions of newspapers and magazines and animated images such as GIFs should not be covered by Directive 2010/13/EU.** The definition of a video-sharing platform service should not cover non-economic activities, such as the provision of audio-visual content on private websites and non-commercial communities of interest.*

We also note that the DCMS consultation on the interim approach to implementing requirements relating to video sharing platforms at para 5 page 3 helpfully states that '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.'

Recital 3 also makes it clear that newspapers websites can generally carry video or enable video sharing without falling within scope of the AVMSD. The regulatory regime would not be triggered unless the 'stand-alone' 'dissociable' from the main activity of the service provider criteria are also satisfied, in addition to all other criteria, in the circumstances of the particular case. We also note that the Recital 3 also makes clear that 'A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audio-visual offer and the main activity such as providing news in written form.'

R (3) Directive 2010/13/EU should remain applicable only to those services the principal purpose of which is the provision of programmes in order to inform, entertain or educate. The principal purpose requirement should also be considered to be met if the service has audio-visual content and form which are dissociable from the main activity of the service provider, such as stand-alone parts of online newspapers featuring audio-visual programmes or user-generated videos where those parts can be considered dissociable from their main activity. A service should be considered to be merely an indissociable complement to the main activity as a result of the links between the audio-visual offer and the main activity such as providing news in written form. As such, channels or any other audio-visual services under the editorial responsibility of a provider can constitute audio-visual media services in themselves, even if they are offered on a video-sharing platform which is characterised by the absence of editorial responsibility. In such cases, it will fall to the providers with editorial responsibility to comply with Directive 2010/13/EU.

The NMA would strongly oppose any Government proposals for implementation of the revised AVMSD, including all the new regulatory requirements relating to video sharing platforms, or related legislation including the online harms white paper, which might deliberately or inadvertently extend and impose AVMSD or related requirements, restrictions, liabilities and sanctions upon news publishers, newspaper websites, content and services where these are outside scope of the AVMSD.

As stated above and in the attached submissions, the NM and its members have also strongly opposed the application to news publishers of the general proposals set out in the consultations on online harms white paper, draft ICO age appropriate design code, extension of HFSS advertising and would expect such opposition also to be taken into account by the review of online advertising regulation.

The NMA and its members would be happy to discuss these matters in more detail.

Scope and advertising regulation

The News Media Association and its members support the self-regulatory system for advertising, upheld by the Advertising Standards Authority. The NMA is represented on AsBof and the Committee of Advertising Practice. The NMA has stressed to the DCMS that the tech companies should make a proper contribution to the funding of the ASA system – and the addition of any responsibilities in respect of regulation of video sharing platforms only strengthens the case for increased tech company funding to sustain the system.

Ofcom has designated the ASA to regulate advertising in the on-demand services notified under the Audio-Visual Media Services Directive, using rules that have been copied out of the Communications Act (as amended) in an Appendix to the CAP Code.

The NMA would oppose any manner of implementation of the revised AVMS directive that would entail any change to the self-regulatory status of the non-broadcast CAP Code applicable to news publishers' advertising and marketing activities, including newspapers' websites and digital activities, which fall outside the scope of the revised AVMSD. We would strongly oppose any extension of co-regulation, statutory underpinning and the remit of Ofcom or other statutory regulator to newspapers' websites or other matters which do not fall within scope of the revised AVMSD. We would therefore also oppose any extension or broader application of the 2018 Directive's prohibition on audio visual service providers' and video sharing platforms providers' processing of minors' personal data for commercial purposes such as direct marketing, profiling and behaviourally target advertising in certain circumstances. Such prohibitions- and other restrictions, duties, responsibilities, liabilities and sanctions- must be scrupulously confined to those within scope of the revised directive and must not be extended to those outside its scope.

The NMA would also, as stated above, oppose any generally applicable extension of regulatory, co-regulatory, or legislative controls or any regulator's remit by purported reference to the AVMSD 2018, so that these additional controls would then also apply news publishers, their websites, their advertising or editorial content, or other activities, even though these would be outside the scope of the 2018 directive.

We also refer you again to the NMA's and industry's opposition to the general proposals set out in the DCMS/Home Office white paper on online harms, ICO age appropriate design code and DCMS consultation on extension of advertising restrictions on HFSS, irrespective of any interaction with implementation of the 2018 AVMSD,

We would be happy to discuss any advertising aspect of the interaction between the DCMS online advertising regulation review, implementation of the revised, AVMSD directive, online harms white paper, HFSS consultation and other matters currently under consideration by the DCMS and other Government departments.

Media literacy

The NMA and its member news publishers engaged in their own media literacy initiatives are very happy to continue discussions with the DCMS and Government, including follow up to their participation in the Ministerial Round Tables. If the DCMS or Ofcom intended to explore any other aspects of media literacy or the duty to promote media literacy under the Communications Act 2003, the NMA would welcome early consultation and discussion.

Optional Amendments: Transparency of ownership of audio-visual media ownership providers

Any optional change to transparency of ownership of audio-visual media ownership providers should not place new burdens upon news publishers. The NMA does not consider that any additional measures are necessary in respect of transparency of newspaper ownership. Newspaper and cross-media ownership, mergers and transfers are subject to the requirements of the statutory media ownership regime, including the Enterprise Act 2002, the Communications Act 2003 and related legislation, in addition to the general requirements of the Companies Act 2006. The Newspaper Libel and Registration Act 1881 requirement of a register of unincorporated newspaper publishers was deliberately repealed as a deregulatory measure in 2015.

The NMA and its members would be happy to discuss any issues in more detail. Please let us know if you would like the NMA to facilitate any meeting.

News Media Association

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