

techUK response to Audiovisual Media Services Directive consultation

21st August 2019

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About techUK

techUK represents the companies and technologies that are defining today the world that we will live in tomorrow. The tech industry is creating jobs and growth across the UK. More than 850 companies are members of techUK. Collectively they employ more than 700,000 people, about half of all tech sector jobs in the UK. These companies range from leading FTSE 100 companies to new innovative start-ups. Most of our members are small and medium sized businesses.

Executive Summary

techUK supports the implementation of the Audio-Visual Media Services Directive (AVMS-D) in the UK. The media environment has changed significantly over the last decade, necessitating an examination of the rules and regulations to ensure they remain fit for purpose.

The UK has led Europe in this changing media landscape, from broadcasters offering on demand services (VoD), the growth of pay-TV to a high adoption rate of subscription services (SVoD) and Video Sharing Platforms (VSPs). Most TV sets on sale today have smart functionality and the viewer of today is the ultimate beneficiary of this expansion in content choice. Supported by high speed mobile and fixed broadband, new service providers and access points, consumers now expect to watch content when and on what device they want. This expansion of choice has helped create the right environment for more diverse talent to flourish, contributing to the overall success of the creative industries.

However, it is crucial that we get new rules and regulations right. To this end techUK has been working with members domestically and through European bodies and institutions to create the best possible framework that addresses concerns while protecting creativity and innovation.

techUK is encouraged that DCMS intends to keep the Online Harms White Paper as the primary method to implement sections of AVMS-D and ensure these two legislative efforts align. techUK also calls on DCMS to not change the Committee on Advertising Practice's code (CAP Code) and retain the intermediary liability definitions outlined in the e-Commerce Directive.

However, we have concerns that without clarity and precision the implementation of the AVMS-D in the UK could not only fail to achieve its objectives but lead to serious unintended consequences that could create major risks for industry and users alike.

Throughout the consultation there is a reliance on future guidance and deferring to Ofcom which means some of the key issues remain unclear or unresolved. Definitions for core concepts including what is a Video Service Provider or how to count European works, for example remain unclear and we encourage DCMS to clarify these definitions and make sure they align with those of the European Commission. It would therefore be helpful if DCMS set out exactly the proposed role of Ofcom, the extent of their powers, for example, on information gathering, enforcement and the

scope of their ability to interpret sections of the legislation while also taking a more active role in shaping the remit of Ofcom.

Online content providers and device manufacturers operate in global operating environments and if the UK diverged, or included services in scope that others did not, compliance will be exceptionally difficult to manage. When approaching transposition, the UK should seek to fully align with EU legislation to avoid compliance issues.

techUK also stresses the importance of supporting the strong and vibrant creative sector in the UK and recognising how online platforms have made it easier for innovative and diverse content creators to reach audiences in a way not previously possible. Making such creators potentially register with Ofcom and imposing TV channel like regulation is disproportionate and will harm the sector. techUK believes DCMS should re-examine the proportionality of this specific proposal and consider a tiered approach, reflecting how audiences have different expectations from VoD/SVoD services, broadcasters (public service and paid for) and VSPs. They all have different business models and trying to regulate them in the same way is not appropriate or effective.

In summary, when considering the UK approach to AVMS-D we urge the Government to:

- Ensure coherence between AVMS-D and domestic or European legislation such as the Online Harms White Paper, ICO Age Appropriate Design Code, GDPR and e-commerce Directive.
- Provide clear and precise definitions across that board that align with the rest of Europe.
- Maintain proportionate compliance processes and sanctions.
- Recognise that the user expectations and business models differ between broadcasters, device manufacturers and online platforms, therefore one set of rules will not work effectively.
- Implement AVMS-D regardless of the outcome of Brexit.

These recommendations are discussed in more detail below.

Alignment with other domestic legislation and regulation

DCMS needs to outline exactly how the AVMS-D and Online Harms White Paper inter-relate, especially around Ofcom's proposed role as an interim regulator. As highlighted in techUK's response to the White Paper, there are significant concerns on the functioning and role of the independent regulator. Key questions remain unanswered on the priorities, scope, funding and powers of the regulator and the need for answers is even more pressing given that Ofcom may have this role as an interim measure.

The Online Harms White Paper covers fundamental issues around society and the digital economy, engaging fundamental rights such as freedom of expression. As such it requires the highest level of scrutiny, transparency, engagement and democratic oversight. The list of harms, economic impact on the digital economy and a lack of separation between 'illegal' and 'legal, but harmful' content is a long way off being resolved. It is therefore crucial that industry and stakeholders have a clear understanding and roadmap of how these two pieces of legislation interrelate and the legislative mechanisms for how these will be delivered.

The AVMS-D should also not extend the scope of The General Data Protection Regulation (GDPR), an increasingly global standard and the proposed UK approach goes beyond GDPR and is problematic for device owners with multiple users (like the family PC or living room TV) and platforms. Restrictions around data collection for age-verification purposes are overly broad and may prevent the processor from using that data for any other purpose and could even prevent data collected for other purposes being used to help verify the age of a user. DCMS needs to be mindful too of the ICO Age-Appropriate Design Code, as there will be a situation where this and AVMS-D implemented by different regulators and ensure that AVMS-D data protection requirements do not conflict with other Data Protection Authorities with jurisdiction of platforms offering services in the UK.

Instead, techUK believes a fundamental issue like online safety requires the highest scrutiny, which means primary legislation with clear Parliamentary input. Therefore, using the AVMS-D as a backstop for introducing certain elements of the White Paper is inappropriate.

The implementation of AVMS-D must not create a situation where companies face contradicting legal requirements, especially as AVMS providers already operate in a tightly regulated space. DCMS should also be mindful of other policy discussions still underway.

DCMS needs to ensure data-processing restrictions outlined above do not conflict with the ICO Age Appropriate Design Code or similar with happening with other Data Protection Authorities holding jurisdiction. The HFSS restrictions on advertising to children and the CAP Code also need to be factored into discussions and DCMS should do all it can to measure how AVMS-D implementation works with these other policy measures, and we particularly support DCMS retaining the definitions of intermediary liability as set out in the e-Commerce Directive.

Regarding the ongoing policy discussions that could impact AVMS providers in the future, there is debate and a recent Ofcom review on prominence. AVMS-D should not be used to determine prominence, even in part, without factoring in the work happening with Ofcom, DCMS and techUK on extending prominence to online environments.

Clear definitions

techUK is concerned about the lack of clarity with regards to scope and definitions for what is and isn't illegal. A primary concern for members is defining a 'Video Sharing Platform' (VSP) which could bring a whole range of services into scope, which is why techUK believes that the UK definition should align with the one in the Directive.

Keeping all definitions aligned with Europe is a principle that the UK needs to follow throughout the AVMS-D implementation to avoid a fragmented market which sees costs and compliance processes inhibiting consumers from accessing the content they want.

Proportionate sanctions and scope-creep

When the UK is determining its interpretation of the Directive, it is crucial that the compliance requirements and sanctions for non-compliance are sensible and proportionate, with only the most serious, repeated and systemic cases of non-compliance sanctioned. The UK is home to an exceptionally strong creative sector, and members are concerned that the 'TV-like' definition could see small and often single person operations need to register with Ofcom and face regulations that inhibit

these content creators by making them follow complex legal processes that may see them choose not to share or produce content.

There are numerous ways to deliver audio-visual content and what works for traditional linear broadcasting does not often work for on-demand or user-generated content. All providers are keen to ensure safety, but this must be done in a way that respects the different user experiences. For example, applying rules to individual channels on a VSP platform will create a situation where content providers self-censor which would result in reduced choice, less diverse content and people dissuaded from uploading due to compliance processes. This restricts freedom of expression and could see content providers have to base themselves outside of the UK to serve their audiences.

Brexit

Whilst Brexit is specifically not in the scope of this consultation it cannot be ignored. DCMS should set out clearly what it intends to do for AVMS-D in all foreseeable Brexit outcomes, including no-deal. Members have expressed a preference to align with the EU on AVMS-D requirements, even in the event of a no-deal outcome. Moving away from EU legislative principles such as the Country of Origin will be very problematic for industry.

Overall the UK needs to ensure complete alignment with the European Commission and that the implementation does not conflict with other laws, regulations or policy discussions. DCMS must also give clarity on the role of Ofcom and that deferring to unpublished guidance could lead to ill-fitting regulation. AVMS-D touches on some key issues around online content and given the fast-changing media environment is not something we can afford to get wrong.

Response

1 Questions relating to implementation

1. Do you agree with our proposed approach to amend s.368E of the Communications Act 2003 to align the protection of minor requirements for linear and on-demand?

techUK believes there is merit in updating the rules around protecting minors as media provision evolves, however there are inherent differences between linear and on-demand services that means one set of rules can not fit different operators effectively.

One specific example is how to approach age verification where approaches for linear broadcast (where one piece of content follows another) but is technically extremely difficult to manage for VSPs where hundreds of hours of content are uploaded each minute. Consumers interact with on-demand differently from TV and the main consumer benefit is not having to be bound by schedules.

Parental control is effective, and the best approach is to reform s368E to allow for flexible self-regulation that allows protections to keep up with consumer habits and evolving technologies. Industry has also seen examples including dedicated children's sections in on-demand services and VSPs.

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?

Updating the relevant sections of the Broadcasting Code would be helpful and we believe is sufficient in meeting this requirement. Consumer demands and VoD providers' own initiatives and effective self-regulation such as applying the BBFC age-rating system and individual content descriptors has resulted in a good range of bespoke descriptors.

Industry believes a mandatory standard system of content descriptors does not seem to be necessary as it would only add to already available information (for example age-ratings, information on genre, actors, storyline), which would risk overloading and confusing consumers due to the vast amount of already provided content information.

4. Should the measures above use standardised system of content descriptors or age-ratings used for broadcast and/or video-on-demand? 5. What would the benefits/obstacles be for introducing a standardised system to such content?

A mandatory standard of content descriptors or age-ratings would not be appropriate for media providers operating internationally. The ability to offer tailored descriptors according to local language and cultural sensitivities means they will be taken more notice of compared to a standard descriptor set that does not understand local market conditions and expectations. This is reflective of the wider debate on online content and a UK led standards system may not be appropriate or effective in other territories. To truly maximise the safety of users, the UK should look to co-operate internationally.

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

Self-regulatory measures applied by on-demand service providers have proved to be overwhelmingly successful in protecting minors, therefore we do not believe further regulation would be helpful and would instead concentrate on ensuring better coordination and that best practice/tools are shared.

7. The government invites views on how best to implement the requirement to ensure that VSPs comply with the relevant advertising provisions, noting that the Directive encourages the use of co-regulation by Member States to meet its aims, and that there already exists a co-regulatory framework for advertising on linear broadcast and VoD in the UK.

Members strongly support proposals to retain the self-regulatory (non-broadcast) code and to amend the annex to expand areas subject to the statutory back stop. This retains the overall integrity of the CAP code for non-broadcast and avoids a scenario where mixed media services apply different codes to different services regardless of whether a service is AVMS or not. This appropriately aligns regulation to how inventory is now sold programmatically in the online/on-demand world.

On liability for advertising creative, the DCMS should note that the market is moving towards advertiser-led compliance with ad content rules (i.e.: the approach taken in non-broadcast). Any extension of the broadcast rules which hold content providers responsible for compliance is unlikely to survive contact with the reality of how inventory is sold programmatically. DCMS will need to consult further on this matter

and take this into consideration in the review of digital advertising regulation which is now underway.

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?

It is crucial that the Ofcom accessibility work takes precedence, especially as we believe that it already exceeds the AVMS-D requirements. Policy should align with the Ofcom work and AVMS-D does not contradict the European Accessibility Act. If there is a contradiction, the result could be a confusing requirement for two sets of the same accessibility information (i.e. subtitling) be applied at the same time.

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?

techUK supports this as the UK should align with other European markets on the reporting back of quotas and prominence. However, Ofcom should work with other EU regulators to ensure alignment of reporting criteria and a single type of reporting that works across all markets.

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?

techUK supports this proposal, however the content of the guidance must align with the European Commission guidance to reduce the complexity of compliance across borders.

14. Are there core framework elements that should be included in this requirement to produce guidance?

techUK would encourage guidance to be aligned with European Commission guidance so members have a consistency of approach.

In terms of format of any guidance, it should set out how it defines European works (which should mirror definition of 'European work' in the original EU legislation) and clarify how the quota shall be calculated (e.g. title count basis, with TV shows calculated on a 'season' basis).

15. Noting that prominence in on-line catalogues could encompass a wide range of practices (e.g. separate section, dedicated search, information on home page), please indicate which would consider would be appropriate:

b. Dedicated search

The tagging of content and marking as to whether it is a European work on the tile or in the description is a significant logistical and technical consideration. Considering the UK has exceptionally strong productions, and that viewers are well informed (especially as tiles mark content with the original producer in most instances) the other options would not offer any value or consumer benefit.

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

Across all connected services, original UK content and their providers is already highly prominent, discoverable and available to watch. However, the ability to search for EU works in the mind of consumers is second to a personalised viewer/user experience (i.e. recommendations and related titles) so quality and relevance should be the overriding criteria for surfacing content, and a market led approach will ensure EU works are prominent, particularly in the UK which makes up a high proportion of content.

The introduction of prominence obligations should be considered in parallel with current discussions on expanding existing public service broadcaster ("PSB") prominence obligations to on-demand providers. To the extent prominence obligations exist in respect of both PSBs and European works, measures adopted to comply with any PSB prominence obligations should not contradict.

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

The UK television industry is a global success story. Demand for skills is higher than demand and studios have completed or are due to undergo expansion.

19. The government currently has no plans to introduce a levy, however, do you think a levy scheme to fund European Works could be an effective way to provide funding? Please explain why.

A levy is not an effective way to fund European Works. The media industry is undergoing major changes and new entrants which results in more choice for viewers. As there are more providers of audio-visual media, we are seeing significant new investments in European content to meet demand. Furthermore, prominence obligations ensure that audio-visual works are adequately 'findable' in VOD catalogues. On this basis, our members see no need to impose financial obligations which will act as barriers to new players and create industry distortions. In the specific context of the UK, the strength of British content means there is no funding gap in the UK and a levy could remove incentives for producers to develop new content.

21. Do you agree with the proposed approach of implementing the provisions pertaining to VSPs in the 2018 Directive through the regulatory framework outlined in the Online Harms White Paper?

The UK implementation of the AVMS-D needs to be faithful and fully aligned to the scope and requirements of the original Directive. This means not extending the scope to other services not in the legislation. Government should seek to influence the drafting of the forthcoming guidance from the European Commission so that the definition is interpreted narrowly. techUK looks forward to responding to the additional consultation on defining a VSP and stresses the need to align definitions with those of the EU.

23. Do you agree with the approach set out in paragraph 82 to appoint Ofcom as an interim regulator in the appoint Ofcom as the National Regulatory Authority as an interim measure if required?

techUK agrees with the approach, however, we would urge Ofcom and DCMS to quickly set out their regulatory approach, how long the interim period will be and what exactly would and would not be in their remit.

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 approach should only have enforcement for serious and repeated non-compliance with the Article. The Directive requires Member States to impose “reasonable and proportionate” restrictions on commercial overlays over content, and the UK should have a flexible approach that does not inhibit a manufacturer or copyright owner from being able to monetise content uploaded via a third party. The margins on devices are increasingly marginal and using these overlays help keep manufacturing sustainable and the prices down for consumers across the board. Restricting overlays also jeopardises the personalised experience that is where devices are moving to.

2 Questions relating to business impact

1. Will the additional references in jurisdiction criteria, relating to the location of staff making programme related decisions, or the reference to editorial decisions, relating to the day-to-day activity, affect you or your business?

Industry believes that moving away from the Country of origin principle is difficult for businesses offering services in several jurisdictions. Business making devices or providing content internationally find it challenging to manage compliance when a single Directive is implemented differently in different markets. For example, they may be registered with different Data Protection Authority, or not have ‘on the ground’ expertise that understand each market. Overall this makes it more difficult and costly to provide digital media services. Furthermore, after the UK leaves the EU, the principle needs to be maintained and DCMS should commit to not extending the scope of AVMS-D to services already subject to implementation of AVMS-D.

3. Do you expect the new measure which restricts processing, collecting or otherwise generating personal data of minors for commercial purposes set out in Article 6a(2) to impact your audiovisual media service (or video sharing platform in the case of VSP providers)?

Our members operating in the VSP markets have serious reservations about the practicalities of classifying what is and isn’t minors’ data. The AVMS-D deviates from and goes further than GDPR requirements around the data protection of minors and techUK believes that this contradiction needs to be resolved before implementation, with DCMS making representations to the European Commission. The UK Government must also reconcile the implementation of AVMS-D with the evolving legal interpretations of GDPR in relation to data processing of minors.

A real-world issue to highlight where implementing Article 6(2)a is hard is how to detect and classify who is inputting data on a platform. For example, when devices are shared (for example a living room smart-TV or family PC).

4. Noting the government preferred approach to update s368 of the Communications Act 2003 to align the protection of minors requirements for video on demand with linear television, which would anticipate Ofcom to do a corresponding update to the Broadcasting Code. Do you expect the new measure on providing sufficient information to viewers about content which may impair the physical, mental or moral development of minors, by providing sufficient information to viewers about the nature of the content, as set out in Article 6a(3), to impact your audiovisual media service?

Members have severe concerns on this, mainly due to the lack of information on timings, the potential overlaps and contradictions in the Online Harms White Paper and what counts as sufficient information.

5. Would a standardised system of content descriptors or age-ratings used for broadcast and/or video-on-demand to provide sufficient information to viewers about content impact on your audiovisual media service?

There has been some convergence on how information is displayed, and this has been done via industry consensus and without the need for regulation. The UK needs a system that allows for a flexible approach that allows AVMS providers to set their own standards to suit new types of content and which can be applied across multiple territories.

7. Would reporting obligations, set out in Article 7(2) of the 2018 Directive, occur any administrative costs to your business? If so, can you quantify them [answers must be provided as total cost in pounds sterling]?

Our members are concerned about the split between device requirements (under the European Accessibility Act and UK Ofcom regulations) and the AVMS-D requirements.

8. Would the development of accessibility action plans in respect of continuously and progressively making services more accessible to persons with disabilities, as set out in Article 7(3), occur any administrative costs to your business?

Accessibility has been a key part of what many techUK members have done regarding service provision, with audio and visual aids now commonplace. This has come about via industry led initiatives, standardisation and not through action-plans which are unnecessary.

10. For on-demand providers, how much of your catalogue currently consists of European works (based on minutage)?

techUK does not hold this data from members but must stress that without the outstanding EU Commission guidance that sets out clearly how the percentage of EU works will be determined, this question cannot be accurately answered.

Members would prefer the share of European works to be calculated by the number of available titles. For TV shows this would be at the number of series/seasons available rather than by episodes/hours. This should also apply across the entire catalogue as opposed by distribution model. Lastly the share of European works must be across all Member States and techUK urges DCMS to make these representations to the European Commission as it develops the guidance. Government should be

open to the application of exceptions for services with low turnover/audience and where quotas would be impracticable or unjustified.

12. Will meeting the new 30% requirement of European works in on-demand catalogues financially impact your business?

Some members said they will have to increase their licencing and EU content rights in other EU markets, which would result in increased costs for members offering AVMS.

Currently there is no metadata for determining if content is a 'European work' so designing software to access to this metadata will incur significant costs for members. This will take the form of engineering costs to manage the metadata and administrative costs as teams need to engage with the original content providers to find out if a title is or is not a 'European work'. Again, without the guidance it will be impossible to quantify. As above, Government should be open to the application of exceptions for services with low turnover/audience and where quotas would be impracticable or unjustified.

13. Will making European Works prominent in you catalogues financially impact on your business?

Without more information about prominence and what that includes, impacts cannot be identified. From analyses conducted by members though, they feel that UK content is already extremely prominent, and any prominence discussions should look at the wider contractual arrangements that are overly mandating to device manufacturers.

14. Noting that the European Commission is required by Article 13 to publish guidance on the definition of low audience and low turnover. Do you anticipate that your on-demand service to be exempt from the obligations on the basis of a low audience or low turnover definition?

The requirements and desire to serve all audiences means that there are always going to be niche providers and audiences. This exemption is very important to allow content providers to enter the market and gain audiences and make sure that all audiences can get served by content they want.

15. Do you expect the new reporting obligations mentioned in paragraph 66 to generate any additional costs to your business?

Without specifically setting out what is and is not counting towards the quota and what counts as prominence it is hard to tell. For some catalogues, it means adding in specific pieces of metadata to each one, which is costly and problematic.

17. Which European Union countries do you generate revenue from?

Our members operate globally, with most members interested in AVMS-D having strong sales in most major EU markets.

18. Do you expect the new provision, set out in Article 7b, will generate any impact on your media service?

Restricting overlays will remove a small, but growing revenue source from device manufacturers, who are making smaller and smaller margins. Being able to offer additional services helps keep the costs down for viewers and may even make some TV models unprofitable, forcing manufacturers to remove models from the UK market.

3 Questions relating to economic impacts of AVMS-D

21. How would your business familiarise itself with the implications of these changes? Would you use in-house legal support, seek external legal advice or neither?

Not having the clarity of how rules will apply in different Brexit outcomes, plus the lack of definitions and deferring to forthcoming guidance means business is having to engage a much higher level of external legal support, plus internal resource than if DCMS had the definitions upfront.

22. How much time (in hours) would it take for you/your staff/trademark owners to familiarise yourself with the legal implications of the changes required by the Directive? How much would the use of staff time for this purpose cost your business?

The lack of definitions and the deferring to Ofcom and EU guidance has resulted in use in house and external resources to research all the potential outcomes. Members have also highlighted by the fragmentation of establishment rules will increase compliance costs, as they will not be able to rely on a single team of compliance specialists based in a central location.

23. Are there any costs to you/your business beyond staff time? For example, preparation of guidance or amending existing licence agreements. Please outline what costs these are, and the financial cost to your business?

The lack of clarity of the Brexit implications to AVMS-D, plus the lack of definitions and deferral to not yet produced and published guidance means contractual clauses have not been updated. Some members have undergone technical changes to implement different scenarios, which has major costs in engineering, unnecessary hosting and storage costs as well as legal and consultancy costs.