

Audio-visual Media Services Consultation

Response from Viacom International Media Networks

21st August 2019

Viacom International Media Networks (VIMN) welcomes the opportunity to respond to Ofcom's consultation on proposed changes to UK media regulation to reflect a series of revisions to the Audiovisual Media Services Directive (AVMSD) in 2018.

VIMN has been providing television services to UK audiences since 1987. It owns or part-owns and operates more than 25 TV channels in the UK attracting close to 12% of viewing among 16-34 year-olds, making it the third-biggest privately held broadcast media group in the UK market. VIMN channels offer the very best in music, comedy, kids and general entertainment programming through the Channel 5, MTV, Comedy Central and Nickelodeon brands. VIMN has a daily reach of over 20 million viewers. The vast majority are viewers to Channel 5, which reaches 14 million viewers each day.

VIMN is broadly supportive of the DCMS's approach to implementation and agrees that the changes outlined in the revisions to the AVMSD are likely to require no, or minimal legislative change for linear and VOD services. Consequently, any significant impact to VIMN revenues or operations are most likely to result from how new provisions are implemented by Ofcom, not necessarily the legal provisions themselves. In particular, we would note the following:

- Enhancing the protection of minors on VOD through the extension of broadcasting code rules on content description is a sensible approach. Ofcom must however allow a degree of flexibility for both linear and VOD services on the methods used to communicate with audiences.
- VIMN supports the government's preferred approach not to make legislative changes to increase the number of advertising minutes permitted in prime time. Liberalisation of advertising minutage would destabilise the entire commercial broadcasting ecosystem.
- New quota and prominence requirements for EU Works on VOD services must be implemented with minimal disruption to business and avoid intervention where there is no evidence of consumer harm. Exemptions for low revenue / low turnover services, as well as exemptions for thematic services, should be defined clearly in statute.
- VIMN supports the DCMS's proposal not to introduce a UK television levy programme. There is no evidence of harm or market failure that such a levy programme needs to address.

- Assuming the UK remains subject to the AVMSD in the foreseeable future, we would expect both Ofcom and the DCMS to continue to consult with industry extensively before any rule changes take place.

This consultation response addresses both questions on the implementation of new provisions and the questions on potential business impact. VIMN has opted to answer only those questions where it has a clear position at present.

IMPLEMENTATION OF NEW PROVISIONS

PROTECTION OF MINORS

Q 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?

There is already a provision in the Communications Act 2003 requiring linear broadcasters to provide sufficient information to viewers about content which may impair the physical, mental or moral development of minors. VIMN therefore agrees with the proposal to amend s368E of the Communications Act 2003 to apply the same obligation to VOD services.

Q 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?

Yes. The Broadcasting Code already places a series of obligations on linear broadcasters to ensure that viewers are provided with sufficient information about the content they may choose to view. Ofcom should consult on any changes it proposes to the Code as a result of AVMSD implementation. It is important that Ofcom's approach ensures consistency across notified services, whilst at the same time permitting a level of flexibility based on the nature of the service.

Q 3-6. Standardized systems of content descriptors for VOD.

VIMN does not believe it is appropriate to specify the means by which a content provider communicates with viewers in order to ensure that they have sufficient information about the nature of content on VOD catalogues. Acoustic warnings, content descriptors, visual symbols, and age-ratings (as noted in the consultation document) may all be suitable means for communicating to audiences and no one method should be favoured by regulation. Whilst one model may work for some services it may not be appropriate for all. Further, as user-interface designs continue to innovate there may be alternate means to communicate with audiences in

development that may actually be better than the traditional models noted in the consultation document. Government should instruct Ofcom to focus on outcomes for the audience and avoid prescriptive rules on communication methodology.

ADVERTISING

Q 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.

The ASA should be considered the primary organization to have responsibility for ensuring VSPs are compliant with their new obligations under the revised AVMSD. There does however remain a significant disparity in how linear and online services are treated. Specifically, the broadcaster has control and responsibility for the adverts that it offers to its viewers and must ensure compliance with the rules, whereas online advertising is the responsibility of the brands, not the platforms. Further, there is an effective system of pre-transmission compliance of advertising for linear services whereas enforcement for online platforms is ex-post and based on complaints. Both Ofcom and the ASA must work together, with input from industry, to address these disparities, raise standards and improve enforcement of online advertising.

Q 8. The Government's preferred approach is not to make legislative change with regard to the change of advertising minutes. Do you agree with this approach?

Yes VIMN agrees strongly. Changes to advertising minutes could have a profoundly destabilising impact on the industry as a whole.

Q 9. Do you consider that a review of the advertising minutes in the UK market should take place in relation to the liberalisation of scheduling of minutes set out in paragraphs 46-48?

No. VIMN is unaware of any evidence that suggests a liberalisation of advertising minutage could be to the benefit of either audiences or broadcasters. Rather it is likely to be very disruptive to the advertising market requiring broadcasters and advertisers to re-calibrate fee and deal structures, and lead to increased amounts of advertising at peak times.

ACCESSIBILITY

Q 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?

Yes. However it should be noted that VIMN supports CoBA's comments as follows: "the proposals from Ofcom are highly disproportionate in terms of the timeframe set out. The Ofcom proposals require full compatibility with access services targets within four years for on-demand, compared to ten for linear. It is disproportionate to require nascent on-demand services to meet targets that are comparable to linear services in less than half the time given for those linear services. This remains the case even with exceptions, the detail of which is as yet unspecified, and risks damaging innovation, choice and competition."

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?

VIMN has no preference regarding the Government's preferred methodology for implementing a new rule on the accessibility of emergency communications.

EUROPEAN WORKS

Q 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?

Yes. Ofcom is the most appropriate public body to carry out this work.

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?

Yes. VIMN supports Ofcom responsibility for developing guidance on prominence of European Works in video-on-demand catalogues. This must be done following consultation with industry.

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

Ofcom guidance should not be based on quantitative metrics as this could inhibit platform development. Ofcom's guidance to industry should demonstrate what best practice may look like. Any examples presented by Ofcom should be illustrative rather than definitive and prescriptive. A significant amount of differentiation and flexibility between platforms should be permitted as each VOD service has its own unique user interface that communicate with audiences in different ways.

Q 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?

All of these practices might be suitable for one platform, whilst only one of these practices might be suitable for another platform. Ofcom should not take a prescriptive approach.

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

VIMN does not favour any particular way of introducing a new prominence requirement. As noted in our response to question 15 there are multiple methods that may be suitable.

Q 17. Noting that the Commission is due to publish guidance in relation to low turnover and low audience, do you agree with the proposed approach that we allow for exemptions for quota and prominence obligations by amendment to section 368C(3) and 368Q (3) for the Welsh Authority of the Communications Act 2003?

Yes. VIMN has no objection to the proposal to change the Communications Act 2003.

Regarding the definitions for low turnover and low audience, we await the Commission's guidance. Any definition to be implemented in the UK should not operate at group revenues or share of viewing level. It would not be appropriate to include turnover for completely unrelated parts of a business, or share of viewing from unrelated channels within the same corporate group. Failure to do so could disincentive new and small players.

Further, under the revised AVMSD the UK is permitted to introduce an additional quota exemption for thematic services. We would support an exemption for thematic services and express our support for the definition put forward by the Association of Commercial Broadcasters in Europe (ACT) that they are, "[services] dedicated to a specific genre or topic and intended for a specific target audience." This might include services showing films, series or documentaries, but also news, sports or music services that meet this definition.

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

Yes. The PSB regime is the cornerstone of the UK production ecology with spending currently around £2.6 billion a year on first-run UK content. This investment is now augmented greatly by other sources. Taken together, non PSB sources including multichannel broadcasters, SVoDs, co-production are estimated to provide more than £1.5 billion annually for new UK television production. Co-productions between PSBs, multichannel broadcaster and SVOD services are also increasing, with 32 different companies having partnered with PSBs on co-commissions since 2014.

Q 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.

VIMN supports the government's position; it does not support the introduction of a levy scheme to fund European Works. As noted above there is presently a significant level of investment in European Works from both the PSB and non-PSB ecologies, including collaboration between the two. Without evidence of market failure we do not support such a scheme for the UK. Alongside investment in skills and training by the industry, the most significant regulatory intervention to boost local UK production over the past decade has been the tax incentive regime, which supports film, high-end drama, live-action children's TV, and animation.

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

Coupled with its ongoing support for tax incentive regime, government should continue to look at overhauling the Apprenticeships Levy Scheme. As DCMS is already aware, the creative industries are unable to fully access funds for training raised by the Apprenticeships Levy due to the rigidity of the scheme and its lack of applicability to careers in the creative sector. We therefore welcome the recent recognition by the Government of the "current difficulties" for the creative industries in taking advantage of the Levy. Its commitment of £100,000 to help deliver a Film and TV Apprenticeships pilot is a very positive step forwards. Longer term, a new Levy funded programme for film and TV would boost the sector.

VIDEO SHARING PLATFORMS

Q 20 – 24.

VIMN has no objection in principle to the implementation of the provisions pertaining to VSPs through the regulatory framework outlined in the Online Harms White Paper. As with our comments on advertising, our primary concern is consumer welfare and the need to address the disparities between linear broadcasters and online services – primarily the VSPs – in this regard. The Broadcasting Code offers clear rules to linear and VOD services to ensure that hate speech and misinformation are not disseminated, through a combination of ongoing monitoring and robust sanctions. An equally robust approach, with equally tough sanctions, must be introduced.

QUESTIONS ON BUSINESS IMPACT

Given we still await guidance from the EU and Ofcom on some aspects of AVMSD implementation we have elected to answer only those questions where we have a clear position at this time. We may be in touch with DCMS officials following further discussion internally and with industry partners.

COUNTRY OF ORIGIN

Q 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?

No, we do not anticipate any significant impact. The primary concern for broadcasters with regard to country of origin has been the impact to UK broadcasters as a result of the UK leaving the EU. Broadcasters have been required to re-organise licences for non-domestic services accordingly.

Q 2. Will the amended derogation procedures affect you or your business?

No. Amended derogation procedures to restrict a services transmission in case of serious risk to public health or public provocation to commit a terrorist offence will not affect VIMN.

PROTECTION OF MINORS

Q 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)?

An overly prescriptive or disproportionate approach could have serious consequences for business and for consumer choice. AVMSD (Art 6a) requires that personal data of minors is not used for commercial purposes. However, channels on a day-to-day basis directly market and promote their broadcast channels and VoD services to children by holding on-air and off-air competitions/promotional events; or competitions to attend channel premiere screenings, or to meet talent; or conducting public talent/star searches for children to appear in programmes. These direct marketing events/promotions involve collection and processing of children's data. When carried out in compliance with the GDPR (i.e. with parental consent), then such marketing activity should be deemed out of scope of the Article's intended reach.

Q 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?

As noted above an overly prescriptive or disproportionate approach could have serious consequences for business and consumer choice.

Q 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?

It is highly likely that a prescriptive and inflexible approach would create increased costs for platforms.

ADVERTISING

Q 6. Would the further prohibitions on alcohol and e-cigarette advertising as referenced in paragraph 45 have an impact on your business?

No. The introduction of additional rules for alcohol advertising content on VOD services, and the banning of e-cigarettes advertising on VOD services will not impact our business.

ACCESSIBILITY

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

As we have set out in response to the question on implementation, the proposed timeframe from Ofcom of four years is in our view disproportionate. This is less than half the equivalent timetable for linear channels and would create significant costs and operational challenges.

Q 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), incur any administrative costs to your business?

The creation of accessibility action plans would not in themselves create significant additional burdens but, as noted above, Ofcom's current proposals to extend accessibility obligations to VOD services will create significant costs and operational challenges.

Q 9. Would the new requirement on the accessibility of emergency communication have any impact on your business?

No. We do not anticipate any significant additional business impact.

EUROPEAN WORKS

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

In 2018 there were 370,278 minutes of programming available through My5, of which 46% (170,398) were European works.

Q 11. For on-demand providers, how much of your catalogue currently consists of European works (based on titles)?

In 2018 My5 carried 1323 titles, 41% (539) were European works.

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

No. We do not expect any significant financial burden as a result of the 30% requirement, provided that there is a clear exemption for thematic services that cater to niche audiences where it may not be appropriate to include European content, and also clear exemptions for services with small audiences and/or low turnover.

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

Provided prominence requirements are implemented with an appropriate level of flexibility so that platform operators do not need to significantly alter their user-interfaces there should be very little financial impact.

Q 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?

We are unable to offer comment on this at this time as we are yet to see the Commission's guidance.

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

Any additional reporting burdens will inevitably involve an operational cost. That said the obligation to report to Ofcom every two years on European Works and prominence can cause minimal disruption to broadcasters provided Ofcom create clear and comprehensive guidance for reporting, following a period of consultation with industry.

ECONOMIC IMPACT

20. What economic impact would new/amended provisions made by the 2018 Directive have on your business? How would the provisions lead to such impact?

As noted in the introduction to this consultation response, VIMN does not expect any significant economic impact from the new provisions provided they are implemented in a fair manner with a degree of flexibility and proportionality that creates minimal disruption for business.

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?

VIMN makes use of internal expertise, external counsel where required. VIMN is also a member of the Commercial Broadcasters Association (CoBA), the ACT, and the Motion Picture Association which provide additional insight to industry.

VIMN would be happy to speak with officials further to clarify or expand upon these remarks.

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