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# The regulation of advertising on video-sharing platforms

## Statement

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[The regulation of advertising on video-sharing platforms](#) – Welsh overview

**STATEMENT:**

Publication Date: 7 December 2021

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# 1. Overview

## Background and what we have decided – in brief

Ofcom has new powers to regulate UK-established video-sharing platforms (“VSPs”). These include a duty to ensure that standards around advertising on those platforms are met.

**Between 26 May and 28 July 2021, Ofcom consulted on proposals for regulating advertising on VSPs<sup>1</sup>.** In the consultation Ofcom set out our proposed approach, including a proposal to designate the Advertising Standards Authority (“ASA”) as a co-regulator and Ofcom’s preliminary assessment of the ASA against the relevant criteria for designating a co-regulator. The consultation also included draft guidance on control of advertising and the application of advertising-related appropriate measures to be taken by VSP providers.

The regulatory framework reflects the distinction in the legislation between advertising that is marketed, sold or arranged by the VSP provider and advertising that is not. Where advertising is marketed, sold or arranged by VSP providers themselves, they are directly responsible for ensuring compliance with the relevant requirements. For advertising not marketed, sold or arranged by them, VSP providers must take appropriate measures to ensure that such advertising meets the relevant requirements. There are also some differences in the requirements that apply to these two categories of advertising. Ofcom has issued guidance on the application of the distinction in the legislation between advertising that is under the control of the VSP provider and advertising that is not.

**We are designating the ASA as a co-regulator for VSP-controlled advertising.** The ASA will be responsible for day-to-day regulation of VSP-controlled advertising, with Ofcom acting as the statutory backstop regulator. Ofcom has existing co-regulatory arrangements with the ASA for the regulation of broadcast and on-demand advertising. For the reasons set out in the consultation and this statement, Ofcom is confident that it is appropriate to designate the ASA as a co-regulator for VSP-controlled advertising.

Ofcom will administer the framework for regulating non-VSP-controlled advertising and has issued guidance on the application of advertising-related appropriate measures. Ofcom is responsible for assessing the appropriateness of measures taken by VSP providers to protect users and has issued guidance to assist them in ensuring compliance. We expect VSP providers to have appropriate systems and processes in place, and to be able to explain these to Ofcom as part of our wider supervisory engagement. Recognising that the ASA currently regulates online advertising on a self-regulatory basis, we will collaborate with the ASA to identify any relevant information from its self-regulatory activity which it can provide us with to help inform our assessments of the appropriateness of measures taken by VSP providers to protect users.

This statement summarises the consultation responses, as well as Ofcom’s conclusions.

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<sup>1</sup> Ofcom, [Proposals for the regulation of advertising on video-sharing platforms – Consultation](#), May 2021.

## 2. Introduction

- 2.1 In November 2020, changes to the Communications Act 2003 (“the Act”) came into effect, which introduced regulatory requirements for UK-established video-sharing platforms (“VSPs”), and which gave Ofcom responsibility for enforcing these requirements. These changes transposed the 2018 revision to the Audiovisual Media Services Directive (“AVMSD”), via the Audiovisual Media Services Regulations 2020<sup>2</sup>. The statutory framework for the regulation of VSPs is set out in Part 4B of the Act. In this document we refer to this statutory framework as “the VSP Framework” or “the VSP Regime”.
- 2.2 Under the VSP Framework, VSP providers are required to take such of the measures set out as are appropriate to: protect under-18s from harmful content in videos; and protect the general public from videos containing content that incites violence or hatred, and certain types of illegal content. These general requirements apply to all VSP videos, as well as advertising<sup>3</sup>.
- 2.3 Ofcom has consulted separately and published guidance on these general requirements and the related measures (“the Harms and Measures Guidance”)<sup>4</sup>. We have also consulted and published guidance to help providers understand whether they fall within scope of the VSP Regime<sup>5</sup>.
- 2.4 The VSP Framework includes additional obligations relating specifically to advertising. These requirements are set out in summary below on p.7. How VSP providers are required to meet these requirements varies depending on whether the advertising is marketed, sold or arranged by the VSP provider.
- 2.5 The Government has stated that it intends for the VSP regulatory requirements set out in the Act to be superseded by the Online Safety Bill, once the latter comes into force<sup>6</sup>. However, the specific advertising requirements are expected to be repealed, with paid-for advertising not incorporated into the online safety regulatory framework.
- 2.6 In making this announcement, the Government stated that the self-regulatory system administered by the Advertising Standards Authority (“ASA”) – the independent advertising

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<sup>2</sup> [Audiovisual Media Services Regulations 2020](#)

<sup>3</sup> The Act refers to ‘audio-visual commercial communications’ (“AVCCs”). AVCCs are defined as follows: “Audiovisual commercial communication’ means a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which—(a) is designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity, and (b) accompanies or is included in a video in return for payment, or for other valuable consideration, or for self-promotional purposes; and forms of audiovisual commercial communication include advertising, sponsorship, teleshopping and product placement.’ For ease, ‘advertises’ and ‘advertising’ are used as a shorthand in this document.

<sup>4</sup> Ofcom, [Consultation – Guidance for video-sharing platform providers on measures to protect users from harmful material](#), March 2021; Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material – Statement](#), October 2021; Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

<sup>5</sup> Ofcom, [Consultation – Video-sharing platforms: Who needs to notify to Ofcom?](#), November 2020; Ofcom, [Statement - Video-sharing platforms: Who needs to notify Ofcom?](#), March 2021; Ofcom, [Guidance - Video-sharing platforms: Who needs to notify Ofcom?](#), March 2021.

<sup>6</sup> DCMS, [Online Harms White Paper: Full Government response to the consultation](#), December 2020.

regulator across all media in the UK – will continue to regulate advertising on VSP services, as well as other online platforms. The ASA will continue to take action against advertisers for contravening the self-regulatory rules set out in the UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing (“the CAP Code”)<sup>7</sup>. These rules provide protections that are broadly consistent with the principles of the VSP legislation and seek to address many of the potential harms identified.

- 2.7 In addition, the Government is committed to reviewing the online advertising ecosystem through its Online Advertising Programme, to ensure it is subject to appropriate regulation and that harms arising from this advertising are minimised.
- 2.8 Ofcom’s approach to regulating advertising on VSPs has been designed taking account of the expected interim nature of the statutory provisions and the ASA’s ongoing self-regulatory role. The approach reflects the statutory requirements that apply under the VSP Regime, which are limited to general advertising requirements, provisions on prohibited and restricted products, and the transparency of advertising. They do not, for example, cover misleadingness, fraud/scams, or political advertising. Our approach to regulating advertising on VSPs is not intended to establish a precedent for any potential future regulatory framework for online advertising, which is a matter for Government and Parliament.
- 2.9 Between 26 May and 28 July 2021, Ofcom consulted on proposals for regulating advertising on VSPs<sup>8</sup>. The consultation sought views on:
- Ofcom’s guidance on control of advertising, including the application of the terms ‘marketed, sold or arranged’;
  - the framework for regulating VSP-controlled advertising;
  - the designation of the ASA as a co-regulator for VSP-controlled advertising;
  - Ofcom’s guidance on non-VSP controlled advertising; and
  - Ofcom’s approach to regulating non-VSP-controlled advertising.
- 2.10 We received 17 responses in total and have carefully considered all responses in finalising our guidance and approach. We have published all non-confidential responses on [our website](#). We received responses on a range of issues across the five questions raised in the consultation. We set these out in detail, and our conclusions, in the rest of this statement. Ofcom’s designation of the ASA and our final guidance are included as annexes.
- 2.11 This statement summarises the consultation responses and presents Ofcom’s conclusions. The consultation and the statement are about the regulation of the specific advertising requirements that apply to VSP advertising.

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<sup>7</sup> CAP, [The CAP Code: The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing](#).

<sup>8</sup> Ofcom, [Proposals for the regulation of advertising on video-sharing platforms – Consultation](#), May 2021.

## Requirements for VSP advertising

- 2.12 Under the VSP Framework, VSP providers are required to take appropriate measures to protect under-18s from potentially harmful content in videos, and to protect the general public from videos containing content that incites violence or hatred and from other specific material the inclusion of which would be a criminal offence. There are also additional requirements which relate specifically to advertising on VSPs. These are set out in summary below<sup>9</sup>.

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<sup>9</sup> [Communications Act 2003](#), Part 4B, S368Z, S368Z1(1)(c) and Schedule 15A(4).

## The relevant advertising requirements

### General advertising requirements

Adverts included on a VSP:

- must be readily recognisable as such; and
- must not use techniques which exploit the possibility of conveying a message subliminally or surreptitiously.

Advertising on a VSP must not:

- prejudice respect for human dignity;
- include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
- encourage behaviour prejudicial to health or safety;
- encourage behaviour grossly prejudicial to the protection of the environment;
- cause physical, mental or moral detriment to persons under the age of 18;
- directly exhort such persons to purchase or rent goods or services in a manner which exploits their inexperience or credulity;
- directly encourage such persons to persuade their parents or others to purchase or rent goods or services;
- exploit the trust of such persons in parents, teachers or others; or
- unreasonably show such persons in dangerous situations.

### Prohibited and restricted products

Adverts for the following are prohibited: cigarettes and other tobacco products; electronic cigarettes and electronic cigarette refill containers; or any prescription-only medicine.

Adverts for alcoholic drinks must not be aimed at minors and must not encourage immoderate consumption of alcohol. They must also comply with the general advertising requirements set out above.

### Transparency of advertising

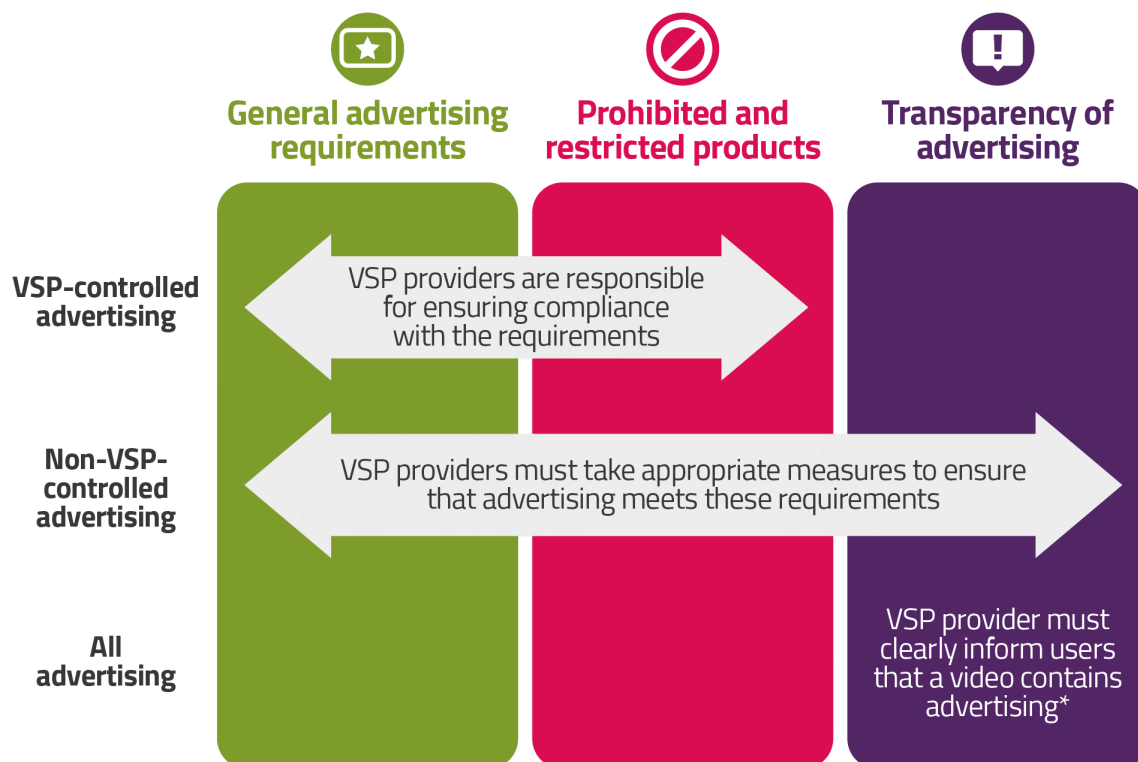
VSP providers must take such of the following measures as are appropriate to meet requirements relating to the transparency of advertising:

- make available a functionality for users who upload content to declare the presence of advertising as far as they know or can be reasonably expected to know; and
- include and apply in the terms and conditions of the service a requirement that users who upload content make use of that functionality as applicable.

In addition, VSP providers must clearly inform users that a video contains advertising where they have knowledge of this, or its presence has been declared by the uploader using the functionality provided.

## The proposed framework we consulted on

- 2.13 How VSP providers are required to comply with the relevant requirements summarised above depends on whether they are in control of the advertising or not (see Section 3).
- 2.14 Reflecting the distinction in the Act between the differing degrees of control VSPs have over advertising, Ofcom’s consultation proposed the following framework for regulating advertising on VSPs:
- In relation to advertising that is marketed, sold or arranged by the VSP provider (i.e. VSP-controlled advertising<sup>10</sup>), Ofcom proposed designating the ASA as a co-regulator (see Section 4).
  - In relation to advertising that is not marketed, sold or arranged by the VSP provider (i.e. non-VSP-controlled advertising<sup>11</sup>), Ofcom will remain responsible for assessing the appropriateness of measures taken by VSP providers to protect users (see Section 5).
- 2.15 The overall approach, as proposed in the consultation, is summarised below:



\*applies when the VSP provider has knowledge of this or it has been decalred to them by the uploader.

<sup>10</sup> In accordance with S368Y(1) of the Act, VSP providers must ensure that advertising they market, sell or arrange complies with the advertising requirements in S368X.

<sup>11</sup> Under S368Z1(1) of the Act VSP providers must take appropriate measures in relation to advertising they do not market, sell, or arrange to ensure the relevant advertising requirements set out in S368Z1(1)(c) are met.



## Consultation process and overview of responses

- 2.16 In the consultation, Ofcom set out its proposed approach as summarised above, including our proposal to designate the ASA as a co-regulator. The consultation also included Ofcom’s preliminary assessment of the ASA against the relevant criteria for designating a co-regulator, as well as draft guidance on: control of advertising; and the application of advertising-related appropriate measures to be taken by VSP providers.
- 2.17 As stated, we received 17 responses in total, and have carefully considered these in finalising our approach and guidance, publishing all non-confidential responses on [our website](#). A number of responses were confidential, and references to these have been anonymised or redacted in this statement. However, we have taken confidential responses fully into account, and sought to reflect the concerns raised by respondents in the statement as far as possible. We received inputs on a range of issues in response to the five questions raised in the consultation which are set out, together with our conclusions, in the rest of this document. These included issues relating to:
- the impact of the regulatory framework for VSP advertising on the advertising landscape;
  - VSP providers’ and advertisers’ respective roles and responsibility for advertising;
  - the clarity of the distinction between VSP-controlled and non-VSP controlled advertising;
  - the role of the ASA in relation to VSP-controlled advertising; and
  - the effectiveness of our approach to regulating non-VSP-controlled advertising in addressing potential harms to users, including the clarity and effectiveness of our guidance on advertising harms and measures.
- 2.18 We have carefully considered the consultation responses and set out our conclusions in the rest of this document. In summary, we have decided to proceed with our proposals for regulating advertising on VSPs, including designating the ASA as a co-regulator for VSP-controlled advertising. We have made minor changes to improve the clarity of our guidance by amending:
- our guidance on control of advertising, set out in Annex 1, to clarify the extent to which tools provided by VSP providers will be considered an indicator of VSP-controlled advertising (see Section 3), and to improve general clarity; and
  - our guidance on advertising harms and measures, set out in Annex 3, to clarify our expectations in relation to terms and conditions (see section 5), and to improve general clarity.

## 3. Control of advertising

- 3.1 In Section 4 of our consultation, we sought views on proposed guidance on the application of the terms ‘marketed, sold or arranged’, for the purpose of distinguishing between VSP-controlled advertising and non-VSP controlled advertising<sup>12</sup>. In proposing this guidance, Ofcom took account of the complexity of the online video advertising ecosystem, which involves a range of actors and intermediaries. Given this, and the potential for new and innovative methods of serving advertising to emerge, the proposed guidance was designed to be as platform- and technology-neutral as possible.
- 3.2 Our proposed guidance did not individually define the terms ‘market, sell or arrange’ as we considered that, taken together, these terms suggested an expansive understanding of what constitutes ‘control’, covering a wide range of activity undertaken by VSP providers in relation to the advertising that appears on their services. The proposed guidance was based on the broad principle that where a provider is involved in making the advertising available on the platform, that advertising is likely to be classified as VSP-controlled advertising. However, the consultation recognised that in some cases it may be necessary to look further into the relevant commercial arrangements relating to a specific form of advertising in order to determine whether this is under the control of the VSP provider. While it is the responsibility of the VSP provider to determine whether or not advertising on their service is under their control, we expect discussions about the scope of ‘marketed, sold or arranged’ to form part of ongoing engagement with providers.
- 3.3 Recognising the interim nature of the statutory provisions, Ofcom’s approach was designed to complement the existing self-regulatory system that applies to online advertising regulation. This approach reflected the Government’s stated intention for the regulatory approach to mirror that which applies to advertising on on-demand programme services.
- 3.4 The relevant consultation question is set out below:

### Question 1:

- a) Do stakeholders agree with Ofcom’s proposed guidance on control of advertising, including the application of the terms ‘marketed, sold or arranged’?
- b) If you do not agree with the proposed guidance on control of advertising, please explain why, and include any alternative approaches.

- 3.5 This section summarises the consultation responses, and Ofcom’s conclusions on control of advertising. Ofcom’s final guidance on control of advertising is at Annex 1.

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<sup>12</sup> This is the term used in sections 368Z and 368Z1(1)(c) of the Act – see footnotes 10 and 11 above.

## Consultation responses and Ofcom's conclusions

- 3.6 Responses to Question 1 focused mainly on the impact of the regulatory framework for VSP advertising on the advertising landscape or provided views on the specific wording of the proposed guidance. The responses raised questions about: the role of advertisers in the framework; the differences between the regulation of broadcast and online advertising; the advertising that the guidance captured under the definition of VSP-controlled advertising; and the clarity of the guidance.

### The regulatory framework for VSP advertising

- 3.7 In Section 4 of the consultation, we set out the challenge of distinguishing between VSP-controlled and non-VSP controlled advertising in a complex and fast-developing online video advertising ecosystem. Paragraph 4.10 of the consultation set out our proposed guidance on control of advertising and explained the two proposed frameworks for VSP-controlled and non-VSP-controlled advertising, which included suggestions on how providers may achieve compliance.

### What respondents said

- 3.8 The **Antisemitism Policy Trust, Channel 4, ISBA, ITV, SafeCast, SBC, Which?, 5Rights Foundation** and three other respondents broadly supported Ofcom's proposed guidance on control of advertising, including the application of the terms 'marketed, sold or arranged'.
- 3.9 **ISBA** suggested that advertisers welcomed a standardisation of regulatory approaches to advertising on online channels. It considered Ofcom's approach to determining control of advertising was future-facing and would allow for stable regulatory principles to be maintained despite developments in technology. It added that the advertising industry is seeking to unify definitions of harmful content through the World Federation of Advertisers' Global Alliance for Responsible Media ("GARM").
- 3.10 **ITV** welcomed Ofcom's expansive understanding of what constitutes 'control', considering that it is important that online platforms are liable for complying advertising on their service, as opposed to third parties in the advertising supply chain.
- 3.11 **Channel 4** welcomed that VSPs would be responsible for complying with the relevant requirements and expected to make advertisers and other third parties they engage with aware of these requirements. It said that a level playing field between online and broadcast advertising is needed to ensure adequate protection from harmful and illegal advertising, which it considered the current self-regulatory system administered by the ASA is failing to achieve. **Channel 4** added that VSP advertising should be pre-cleared before being made available on a platform.
- 3.12 **SBC** considered that Ofcom should impose the same rules on advertising breaks on all platforms, with a maximum of 12 minutes of advertising per hour and restrictions on content aimed at young people, to ensure a level playing field.

- 3.13 **5Rights Foundation** considered that in practice the distinction between VSP-controlled and non-VSP-controlled advertising set out in Ofcom’s guidance on control of advertising was unclear. It advocated a unified approach to regulating all online advertising, with robust enforcement powers. It also highlighted that targeted advertising poses serious risks to children through the excessive collection of their data and exposure to age-inappropriate products and services. It added that these risks are exacerbated by children often being unable to recognise commercial content. **5Rights Foundation** considered that targeted advertising should be subject to the strictest measures in accordance with the data processing requirements set out in the ICO’s Age Appropriate Design Code<sup>13</sup>. It suggested that the requirements for VSP advertising, set out on p.7 of this statement, should include a requirement that adverts must not use tools that target or extend the reach of the advert to target users under the age of 18.
- 3.14 **Which?** recognised that the online video advertising landscape is complex and agreed with Ofcom’s proposed application of the terms ‘marketed, sold or arranged’, providing that the non-exhaustive nature of the guidance did not allow anything to slip through. It proposed that VSPs should be required to verify business users and advertisers before publishing adverts (e.g. using the Know Your Business Customer principle as proposed in the European Commission’s Digital Service Act). It added that, where a non-compliant advert has been published, consumers should have access to easy-to-use reporting tools and expect communication on how their reports will be handled by VSPs.
- 3.15 One respondent stated that VSPs carry out a wide spectrum of activity within the scope of ‘marketed, sold or arranged’, and considered that the responsibilities set out in the guidance should reflect VSPs’ and advertisers’ respective roles in relation to advertising. It agreed that the role of VSPs should include providing tools, policies and processes to help advertisers comply with the relevant requirements. However, this respondent considered that the role that a VSP plays in selling and/or arranging advertising does not amount to control of the advertising, given the role of other parties in its content and targeting. It added that VSPs can play a limited ‘technical role’, and that advertisers, who as creators of the advertising have ‘direct control’, should be primarily responsible for complying with the requirements.
- 3.16 Another respondent considered that VSP providers should not be liable for the content of advertising that results from intermediary services they provide. [X] It added that Article 15(1) of Directive 2000/31/EC (“the E-Commerce Directive”) can provide intermediaries with associated legal safe harbours where requirements are met.

### Ofcom’s response

- 3.17 Ofcom notes the broad support for our approach, as well as **ISBA**’s observations on future-proofing the regulatory framework, and **ITV**’s comments on platform liability.

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<sup>13</sup> See: <https://ico.org.uk/media/for-organisations/guide-to-data-protection/key-data-protection-themes/age-appropriate-design-a-code-of-practice-for-online-services-2-1.pdf>.

- 3.18 **Channel 4** commented on the effectiveness of the advertising self-regulatory system. The statutory regulatory framework being introduced for VSP advertising, while distinct from the self-regulatory system, will build on it, providing new statutory protections for users from harmful advertising content.
- 3.19 We note concerns that VSP and broadcast advertising are not subject to the same regulations under this proposed framework. This includes views that Ofcom should require VSP providers to pre-clear advertising (**Channel 4**) and impose a limit of 12 minutes of advertising per hour (**SBC**). As Ofcom’s powers are derived from legislation, regulatory approaches to VSP advertising and broadcast advertising are based on the separate requirements that apply under the respective legislative frameworks. These legislative frameworks in turn reflect the differences between the broadcast and online advertising ecosystems. Ofcom is not empowered to alter or amend the requirements set under the VSP Framework. This would require changes to the legislation which would be a matter for Government and Parliament to decide.
- 3.20 In relation to **5Rights Foundation**’s comments, Ofcom has developed guidance on control of advertising. The framework for regulating VSP-controlled and non-VSP-controlled advertising reflects the distinction in the Act between advertising that is marketed, sold or arranged by VSP providers and advertising that is not, and the differences in the requirements, as well as the form of compliance, which apply in each case. In response to the suggestion that there should be specific restrictions on the use of targeting tools, the requirements that VSP providers must comply with under the VSP Framework are set out in legislation. As noted above, additional requirements would require further legislation, which is a matter for Government and Parliament. However, we note that there are a number of existing requirements which seek to protect under-18s from inappropriate advertising and make advertising easier to identify for all users. As set out in Ofcom’s guidance on measures to protect users from harmful material, if a measure is aimed at estimating the age of an under-18 user this should be done in a way that appropriately safeguards children’s personal data in line with the standards of the ICO’s Age Appropriate Design Code, as well as the ICO’s more general data protection requirements<sup>14</sup>.
- 3.21 It would also be a matter for Government and Parliament to take forward **Which?’s** suggestion that VSPs be required to verify business users and advertisers before publishing adverts. In response to **Which?’s** comments on the non-exhaustive nature of the guidance, Ofcom’s view is that this approach to guidance can best account for the complexity of the online advertising ecosystem, by remaining platform- and technology-neutral as far as possible. We consider that the ASA will effectively apply Ofcom’s guidance on control of advertising when enforcing the requirements, and that even when advertising is not controlled by the VSP provider, they must take appropriate measures to ensure that such advertising meets the relevant requirements.

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<sup>14</sup> Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

- 3.22 In response to wider concerns about the appropriate regulation of online advertising, we note that the Government has committed to reviewing this through its Online Advertising Programme<sup>15</sup>.
- 3.23 One respondent’s view was that the role that a VSP plays in marketing, selling and/or arranging advertising does not amount to control of the advertising. Ofcom’s guidance on control of advertising reflects the distinction in the Act between advertising that is controlled by the VSP provider and advertising that is not, and directly incorporates the terminology of the Act (i.e. ‘marketed, sold or arranged’). As noted above, advertisers will continue to have regulatory responsibility for their adverts under the self-regulatory system, in addition to the statutory requirements that VSP providers must comply with.
- 3.24 Regarding the concern expressed by another respondent that VSP providers should not be liable for advertising that results from intermediary services they provide, Ofcom’s view is that such services (e.g. matching an influencer and an advertiser) are unlikely to be considered VSP-controlled advertising, if the VSP provider is not sufficiently involved in making the advertising available, although this may depend on the specific facts of each case. [32] In response to the suggestion that the E-Commerce Directive would provide VSP providers acting as intermediaries with a legal safe harbour, we consider that the exemption from intermediary liability is only applicable in circumstances where advertising is not under the control of the provider.

### Suggestions for further clarity in the guidance

- 3.25 The guidance on control of advertising set out in paragraph 4.10 of the consultation included examples of when a VSP provider is involved in making advertising available on the platform, including ‘enabling advertisers to buy advertising on their platform, either directly or via a third-party; providing the tools to enable advertisers to serve advertising on their platform; and/or providing tools that enable advertisers to target or optimise the reach of their advert’.

#### What respondents said

- 3.26 **ITV** suggested that the guidance could be strengthened if it reflected that a likely indicator of control is where platforms or affiliated parties benefit commercially from advertising on their service.
- 3.27 Another respondent suggested that the guidance should include further examples of what types of advertising Ofcom considered to be ‘marketed, sold or arranged’.
- 3.28 An industry respondent considered that the guidance could include more definitive parameters for the definition of control and should be agreed and codified. It considered that the ASA and the Committees of Advertising Practice (“CAP”) should work with platforms to develop a practical definition of control. It also suggested that the guidance

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<sup>15</sup> See: <https://www.gov.uk/guidance/digital-regulation-overview-of-government-activity#online-advertising>.

should more clearly emphasise the role of advertisers in complying with the relevant requirements in the first instance, rather than platforms.

- 3.29 Another industry respondent stated that services do not simply sell advertising space on their platforms, and some paid-for content, such as promoted content (i.e. where a user pays for their videos or other content to be appear more prominently on the platform), would not be an audiovisual commercial communication (“AVCC”) as defined in the Act. It added that Ofcom should clarify that this type of content would not be considered VSP-controlled advertising. The respondent considered that Ofcom’s example of non-VSP-controlled advertising in the guidance (i.e. some influencer marketing) was consistent with its approach. It stated that Ofcom’s reference to the ‘provision of tools which enable advertisers to serve advertising’ was not a helpful indicator of control as it does not involve the sale of advertising space.
- 3.30 One respondent considered that the guidance should take account of the fact that advertisers may be operating in multiple jurisdictions and suggested that, to avoid complicating compliance for small- and medium-sized advertisers, terms and conditions should be streamlined and accessible. It added that VSP providers should not be required to proactively alert advertisers to every requirement in each individual jurisdiction. This respondent also suggested that the expectation for VSP providers to remove content should align with the ASA’s existing approach removing content that ‘may’ contravene requirements could be detrimental to advertisers and conflict with freedom of expression. It considered that the objective to ‘prevent’ recurring issues could be interpreted too broadly, potentially resulting in the removal of legitimate advertising, and suggesting that VSPs must use automated tools to enforce this.

### Ofcom’s response

- 3.31 In response to **ITV’s** view that a platform or affiliated party benefiting commercially from advertising should be treated as an indicator of control, we consider that this is a factor that will be taken into account by the regulator – for example, where a VSP provider enables ‘advertisers to buy advertising on their platform, either directly or via a third-party’. It is our view that a VSP provider involved in marketing, selling or arranging advertising is likely to do so in order to benefit commercially. We have amended our guidance to reflect that the regulator will be able to take into account a range of information, as appropriate, when determining whether a VSP provider has control over advertising.
- 3.32 We note respondents’ concerns that our guidance should include a more definitive, codified definition of ‘control’ with input from the ASA and CAP, or further examples of what Ofcom considers to be ‘marketed, sold or arranged’. Ofcom has consulted on a broad principles-based approach to determining control. We remain of the view that this approach is appropriate, taking into account the complexity of the online advertising ecosystem, and the diversity of the advertising models used by VSPs. While the guidance cannot account for all possible scenarios in which advertising is made available on a VSP, it provides clarity on the principles that will be applied in determining whether advertising is

marketed, sold or arranged by the VSP provider. The approach will enable the regulator to take into account a range of information (e.g. advertising models, information from VSPs, commercial arrangements) when making such determinations. We have amended the guidance to reflect this.

- 3.33 In response to an industry respondent’s view that the guidance should clarify that a user’s promoted content should not be considered to be VSP-controlled advertising, Ofcom’s view is that this will depend on the factors in each case. For example, if a promoted user post included a video that contained advertising, it would be relevant to consider if the VSP provider had marketed, sold or arranged this advert. However, the fact that a user has paid for a video to appear more prominently on the platform does not in itself mean it meets the definition of ‘AVCC’.
- 3.34 We have also considered this industry respondent’s concern about Ofcom’s reference in the draft guidance to ‘tools which enable advertisers to serve advertising’. We agree that the original reference to tools which ‘serve advertising’, when not read in conjunction with the rest of the guidance, was potentially too broad as a stand-alone indicator of control. On many platforms, the functionality which allows users to upload videos may also be used to serve advertising (e.g. influencer advertising), without the provider having any involvement in that advertising appearing on their service. We have removed this example so that the guidance now explains that Ofcom considers ‘marketed, sold or arranged’ by a VSP provider to include (but not be limited to) when providers are:
- ‘enabling advertisers to buy advertising on their platform, either directly or via a third-party; and/or
  - providing tools that enable advertisers to target or optimise the reach of their advert served on the provider’s platform.’
- 3.35 The finalised guidance on control of advertising is set out in Annex 1.
- 3.36 In response to the view that our guidance should take account that there may be differing legislative requirements in relation to advertising in different countries, the Act requires a VSP provider to comply with the relevant framework in its country of origin. We have produced guidance to assist providers in determining whether they meet the criteria for UK jurisdiction and need to notify Ofcom<sup>16</sup>. Further, while we agree that VSPs’ terms and conditions should be accessible to users, these terms and conditions need to be implemented effectively so as to meet the requirements of the VSP Framework.
- 3.37 Regarding the concern that that the expectation for VSP providers to remove content which may contravene the requirements is inconsistent with the ASA’s approach, Ofcom notes that the reference to providers ‘taking prompt action to remove or edit advertising that may contravene the requirements’ is included in our guidance as an example of how providers may achieve compliance with the requirements where they have control over the advertising.

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<sup>16</sup> Ofcom, [Video-sharing platforms: who needs to notify to Ofcom?](#), March 2021.



### Ofcom's conclusions

We have considered the points raised above regarding the proposed regulatory framework set out in Ofcom's guidance on control of advertising, and the application of the terms 'marketed, sold or arranged' that will determine whether advertising is under the control of the VSP provider or not.

We have concluded that our broad, platform- and technology-neutral interpretation of advertising that is 'marketed, sold or arranged', and the examples included, provides industry with a sufficiently clear approach to understanding the relevant obligations.

Respondents raised a number of important questions about the application of the terms 'marketed, sold or arranged' and, in particular, requested clarity on the extent to which tools provided by VSP providers will be considered an indicator of VSP-controlled advertising. We have therefore made some minor amendments to improve the clarity of our guidance on control of advertising.

Our finalised guidance is set out in Annex 1.

## 4. Regulating VSP-controlled advertising

- 4.1 Section 5 of the consultation set out our proposed framework for regulating VSP-controlled advertising. Under the VSP Regime, VSP-controlled advertising must comply with the general advertising requirements and the provisions on prohibited and restricted products set out on p.7.

### The proposed framework

- 4.2 Ofcom suggested that day-to-day regulation of VSP-controlled advertising would be administered primarily by the ASA. We proposed that the relevant requirements would be reflected in a VSP annex in the CAP Code, to be enforced by the ASA. Our approach included detail on the proposed complaints handling procedures and processes for investigation.
- 4.3 We set out that Ofcom would retain statutory backstop powers. Where the ASA consider a breach of the relevant requirements has occurred and that the breach is sufficiently serious or repeated, the ASA could refer the matter to Ofcom in order to consider whether we should exercise our powers, including imposing a statutory sanction on the VSP.
- 4.4 We suggested that the ASA would be designated the function set out in Section 368X(1) of the Act to take such steps as appear to it best calculated to secure providers of UK-established VSPs that are within scope of the regulations comply with the general advertising requirements and the provisions on prohibited and restricted products<sup>17</sup>.
- 4.5 We modelled our proposals on an established co-regulatory system we know to work well that is designed to minimise complexity, ensuring that statutory regulation and the self-regulatory system work well together – noting that the latter will continue when the former is no longer in force. We considered that the self-regulatory system operating as a first layer of protection would offer industry and consumers continuity and consistency.
- 4.6 We suggested that, to ensure transparency and accountability, the ASA would regularly report to Ofcom on matters such as: the number of complaints received; investigations launched for each rule of the VSP annex; and a breakdown of complaints against each relevant VSP provider that the ASA has upheld, partially upheld or not upheld.

### Ofcom’s assessment of the criteria for designating the ASA

- 4.7 As set out above, we proposed to designate the ASA as a co-regulator for VSP-controlled advertising. Section 5 of the consultation contained an assessment of the ASA against the statutory criteria for designating a co-regulator (as set out in section 368(T) of the Act) and Ofcom’s *Principles for Analysing Self- and Co-regulation*<sup>18</sup>.

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<sup>17</sup> See sections 368(Y)(1) and 368(Z) of the Act.

<sup>18</sup> These principles were last referred to in Ofcom’s [Renewal of the co-regulatory arrangements for broadcast advertising](#), November 2014.

- 4.8 We provisionally considered that the ASA would satisfy Ofcom’s criteria for designating it to be the co-regulator for advertising on VSPs, noting that Ofcom’s experience of working with the ASA in relation to broadcast and on-demand advertising provided us with confidence that an effective partnership can be developed for advertising on VSPs. We also considered that there was a benefit in having a single point of contact for consumers for advertising issues across all media.
- 4.9 The relevant consultation questions are set out below:

**Question 2:**

- a) Do stakeholders agree with Ofcom’s proposed framework for regulating VSP-controlled advertising?
- b) If you do not agree with the proposed framework for regulating VSP-controlled advertising, please explain why, and include any alternative approaches for regulating advertising on VSPs

**Question 3:**

- a) Do stakeholders agree with Ofcom’s proposal to designate the ASA as a co-regulator for VSP-controlled advertising?
- b) If you do not agree that it would be appropriate to designate the ASA as a co-regulator for VSP advertising, please explain why, and include any alternative approaches.

- 4.10 This section summarises the consultation responses, and Ofcom’s conclusions on regulating VSP-controlled advertising. The designation of the ASA is at Annex 2.

## Consultation responses and Ofcom’s conclusions

- 4.11 Responses to Question 2 demonstrated broad support for Ofcom’s proposed approach to regulating VSP-controlled advertising summarised above in paragraphs 4.2 to 4.6. Some respondents set out significant caveats and suggestions for improvement.
- 4.12 Responses to Question 3 also showed broad support for Ofcom’s proposal to designate the ASA as a co-regulator for VSP-controlled advertising. Again, some respondents qualified their support or made additional recommendations.

## Proposed framework for regulating VSP-controlled advertising

- 4.13 Question 2 asked stakeholders for views on the proposed framework for regulating VSP-controlled advertising, which was set out in paragraphs 5.13-5.31 of the consultation. We proposed to enter into a co-regulatory relationship for the regulation of VSP-controlled advertising, with day-to-day regulation administered primarily by the ASA, and Ofcom acting as the statutory backstop regulator.

### What respondents said

- 4.14 Several respondents broadly agreed with the proposals outlined in the consultation (with some caveats), including the **Antisemitism Policy Trust, Which?, SafeCast, ISBA, ITV, Channel 4, SBC** and four other respondents.
- 4.15 The **Institute of Alcohol Studies** welcomed restrictions on alcohol advertising but said that it did not agree with the proposed approach. It considered that the proposals did not adequately address problems with age-gating online, or the question of cross-border advertising. It said it would prefer for alcohol advertising online to be prohibited.
- 4.16 Welcoming the fact that the Government is reviewing online advertising regulation more broadly, **5Rights Foundation** said that this could be an opportunity to strengthen the existing self-regulatory system administered by the ASA. It recommended that Ofcom and the ASA should adopt a common definition of a child, and that children should not be subject to programmatic advertising on VSPs.
- 4.17 **Which?** proposed that the general advertising requirements summarised on p.7 of this statement could include a requirement to introduce measures to prevent fake and fraudulent advertising. It also suggested that VSPs must ensure that adverts are clearly labelled as such, so that consumers are aware when they are being advertised to.
- 4.18 **SafeCast** said that the proliferation of ad-blocking technologies had caused harm to legitimate advertising, while unregulated advertising had a negative impact on audiences' engagement with and enjoyment of advertising and other content. It recommended that advertising in all media should be traceable and compliant with regulation.
- 4.19 **ISBA** considered that the proposed approach would more closely align the regulation of online advertising with other media. It added that this would provide advertisers with a more predictable and suitable environment in which to operate, while offering assurance to audiences that reasonable regulatory steps are being taken. It suggested that the approach could be aligned with the framework developed by the World Federation of Advertisers' Global Alliance for Responsible Media (GARM), and that improved enforcement of age limits through improved verification techniques was required. It also proposed that VSPs should adopt content verification technologies, to ensure legitimate advertising is prominent and easily accessible within the self-serve systems provided by platforms.
- 4.20 **ITV** said it was important that the ASA was given the tools to discharge its role as co-regulator for VSP-controlled advertising effectively. It called for the ASA to be given the necessary powers to hold online platforms to account, including access to data, and serious sanctions in the event of non-compliance.
- 4.21 **ITV** also said it was concerned that the approach appeared to focus on addressing harms predominantly after the event. It considered that online platforms profit from non-compliant advertising, and should be held accountable for it, with meaningful consequences for contraventions of the rules. It also raised concerns that Ofcom appeared to concentrate on process, rather than the effectiveness of the systems put in place by VSP

- providers. Noting that Ofcom had not mandated a system of pre-clearance similar to that in place for broadcast advertising, ITV said it had not seen an alternative that provided a similar level of protection for consumers.
- 4.22 **SBC** believed that some VSP providers had adopted anti-competitive practices in relation to advertising. It argued that there should be a level playing field between broadcast and online, with the same limits on the amount of advertising that can be shown on TV introduced for VSPs, and that smaller advertisers should be required to pay to have their adverts cleared before they are run. It further suggested that the ASA should be able to take action against both VSP providers and advertisers.
- 4.23 While welcoming statutory regulation of advertising on VSPs (including formal enforcement powers for Ofcom) and the extent to which the proposed approach builds on existing models, **Channel 4** recommended that there should be a code of conduct that sets out minimum requirements and consistent standards so that the obligations on VSPs are made clear, as well as the penalties for non-compliance.
- 4.24 One industry respondent said that it already took steps to assist advertisers in complying with the self-regulatory CAP Code, but noted that the proposed approach to regulating VSP-controlled advertising went further in placing the responsibility for compliance on the VSP provider rather than the advertiser. It said that Ofcom should make clear that compliance is in the first instance the responsibility of advertisers rather than VSP providers. It argued that while VSPs should assist advertisers to meet their obligations, and remove non-compliant advertising when notified about it, they should not be ultimately responsible for advertisers' non-compliance.
- 4.25 The industry respondent also suggested that an additional section of the CAP Code should be created to focus on systems and processes. It also requested greater clarity on which matters would be referred to Ofcom under the co-regulatory relationship with the ASA.
- 4.26 Another industry respondent said there is a clear benefit in having a single point of contact for consumers, and a consistent approach from regulators, for advertising issues across all media. However, it was concerned that, as a content regulator, the ASA was not equipped to determine complex questions such as whether a platform is in scope of the regulations or whether advertising is VSP-controlled. It felt that there was a risk of the ASA acting outside its core expertise in these areas and argued that Ofcom should not act as a backstop regulator but take the lead in determining these questions.
- 4.27 One respondent raised concerns that VSP-controlled advertising would be interpreted too broadly, with VSPs treated as akin to broadcasters. [§<] It suggested that the different business model of VSPs would benefit from additional consideration and engagement, to assist Ofcom and the ASA in understanding the specific challenges faced by this sector.
- 4.28 Another respondent believed that Ofcom's proposed approach minimised complexity, while maximising the flexibility for individual VSPs to determine how to fulfil their regulatory responsibilities. However, it argued that primary responsibility for removing non-compliant advertising should fall on the advertiser rather than the VSP provider. It also

suggested that Ofcom should have the ability to intervene to ensure the ASA acted in accordance with Ofcom’s guidelines.

### Ofcom’s response

- 4.29 Ofcom notes the broad support among many respondents for its proposals for regulating VSP-controlled advertising, as well as the concerns raised by respondents and their alternative suggestions.
- 4.30 In response to calls for additional obligations to be placed on VSP providers and/or advertisers (**Institute of Alcohol Studies, 5Rights Foundation, Which?, SBC, ITV** and another respondent), Ofcom’s approach is based on the requirements that apply to VSP providers under the Act. The additional obligations proposed by respondents do not form part of the statutory requirements and further legislative change would be a matter for Government and Parliament.
- 4.31 Regarding **5Rights Foundation**’s suggestion that regulators should adopt a common definition of a child, Ofcom notes that the definition of a child varies across different regulatory frameworks, in accordance with the underlying legislation. For the VSP Framework, a child is defined as under the age of 18.
- 4.32 In response to **Which?**’s point about transparency, the VSP Framework requires under section 368Z(4) of the Act that VSP-controlled advertising is readily recognisable as such, (see p.7 of this statement). In addition, Ofcom’s guidance on non-VSP-controlled advertising (discussed in section 5 and included in Annex 3) reflects the measures set out in Schedule 15A of the Act which are designed to ensure the transparency of advertising.
- 4.33 In response to comments by **SafeCast** and **ISBA**, Ofcom’s approach is designed to be as platform- and technology-neutral as possible. We are not mandating particular technologically enabled approaches to compliance, in light of the diversity of the models adopted by VSPs. We have however consulted separately and published guidance on applying appropriate age assurance measures to protect under-18s<sup>19</sup>.
- 4.34 As noted above in relation to suggestions that VSP providers should be required to pre-clear advertising (**ITV**) and abide by a limit of 12 minutes of advertising per hour (**SBC**), Ofcom’s powers are derived from legislation, and regulatory approaches to VSP advertising and broadcast advertising reflect the relevant legislative frameworks. To be clear, Ofcom does not mandate pre-clearance for broadcast advertising either.
- 4.35 **Channel 4** recommended that a code of conduct be developed. Ofcom considers that the relevant requirements are set out in legislation. We have developed guidance on control of advertising (discussed in section 3 and set out in Annex 1) and advertising harms and measures (see section 5 and Annex 3) to assist VSP providers in complying with the requirements. As co-regulator for VSP-controlled advertising, the ASA will also be empowered to produce its own guidance, as appropriate.

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<sup>19</sup> Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

- 4.36 In response to an industry respondent’s view that compliance with the VSP requirements should be the responsibility of advertisers in the first instance, we note that the legislative framework for VSPs places responsibility for compliance on VSP providers, not advertisers. Our proposed approach has been designed to complement the existing self-regulatory system for online advertising (which places responsibility for compliance with the self-regulatory code on advertisers), and to build on established models for co-regulation. This approach will provide an additional layer of protection for consumers by holding VSP providers to account. As co-regulator for VSP-controlled advertising, Ofcom expects the ASA to operate fairly and consistently in the application of the relevant requirements, having regard to Ofcom’s guidance on control of advertising (see section 3 and Annex 1), as appropriate.
- 4.37 We also noted the industry respondent’s suggestion that a section of the CAP Code should be created to focus on systems and processes. [36] Ofcom has no role in the self-regulatory system, including the content of the CAP Code. We are designating the ASA as co-regulator for VSP-controlled advertising only, with Ofcom administering the framework for regulating non-VSP-controlled advertising, where providers must take appropriate measures to ensure advertising meets the relevant requirements. We are not designating any functions to the ASA in relation to non-VSP-controlled advertising; Ofcom remains responsible for issuing guidance on measures in line with our duty under section 368X(3) to draw up, and from time to time review and revise guidance for providers of VSP services concerning the measures set out in Schedule 15A. Our conclusions in relation to non-VSP-controlled advertising are set out in Section 5 of this statement.
- 4.38 Ofcom notes another industry respondent’s concern that the ASA is not equipped to determine whether a platform is in scope of the regulation. Ofcom has published guidance to help providers understand whether they fall within scope of Part 4B of the Act<sup>20</sup>, and will retain responsibility for matters of scope, including maintaining the list of notified service providers. In relation to the respondent’s concern that the ASA is not equipped to determine whether advertising is VSP-controlled, as stated above, the ASA will be required under the designation to operate fairly and consistently as a co-regulator, having regard to Ofcom’s guidance on control of advertising. Under the terms of the designation (see Annex 2), Ofcom is able to intervene as appropriate.
- 4.39 In response to concerns about VSP providers being treated as akin to broadcasters, VSP advertising and broadcast advertising are subject to different regulatory regimes, reflecting the relevant legislative framework in each case.
- 4.40 In response to the view that Ofcom should have the ability to intervene to ensure the ASA acts in accordance with Ofcom’s guidelines, the ASA has agreed to a set a key indicators (including complaints received, completed and upheld), and a structured review programme, as set out in the designation of the ASA (see Annex 2).

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<sup>20</sup> Ofcom, [Guidance - Video-sharing platforms: Who needs to notify Ofcom?](#), March 2021.

## Proposal to designate the ASA as a co-regulator

4.41 In paragraphs 5.32-5.64 of the consultation, Ofcom proposed to designate the ASA as a co-regulator for VSP-controlled advertising, based on an assessment of the ASA against the relevant criteria.

### What respondents said

- 4.42 Most respondents broadly welcomed the proposal for the ASA to be designated as a co-regulator for VSP-controlled advertising, including **Which?**, **5Rights Foundation**, **SafeCast**, **ISBA**, **SBC**, **ITV**, **Channel 4** and three other respondents.
- 4.43 In addition to supporting the proposal, **Which?** said it was in favour of increased cooperation between regulators in relation to online regulation more broadly.
- 4.44 **5Rights Foundation** said it was positive that Ofcom was building on existing models of co-regulation with the ASA. However, it also raised issues with the self-regulatory system for regulating online advertising currently administered by the ASA, which it said did not adequately protect children from harmful and age-inappropriate content. It referenced the requirements relating to children in the CAP Code and called for these to be strengthened.
- 4.45 The **Antisemitism Policy Trust** said that while its previous engagement with the ASA had been positive, it was concerned that the ASA did not regulate political advertising. It argued that this gap in regulation needed to be addressed.
- 4.46 While acknowledging the best efforts of the ASA to regulate online advertising currently, **ITV** considered that the self-regulatory system it administers is ineffective, citing issues with influencer advertising and inappropriate advertising seen by children, as well as the challenge of regulating online platforms with a global presence.
- 4.47 **ISBA** described the self-regulatory system administered by the ASA as world-leading and noted that the ASA is already working with major online platforms on a voluntary basis. It welcomed this informal arrangement being put on a statutory basis and considered that the ASA's funding had been appropriately considered by Ofcom.
- 4.48 The **Institute of Alcohol Studies** and **Alcohol Focus Scotland** said that they did not agree with the proposal to designate the ASA as a co-regulator for VSP-controlled advertising, citing issues with the self-regulatory system for online advertising administered by the ASA, including the reactive nature of regulation and a lack of robust sanctions. The **Institute of Alcohol Studies** and **Alcohol Focus Scotland** also argued that the ASA was not sufficiently independent of industry. Noting that the Government has stated its intention is for the regulatory regime for VSPs to be temporary, **Alcohol Focus Scotland** considered that a better approach would be for Ofcom to retain responsibility for all aspects of this regime for its duration.
- 4.49 Another industry respondent agreed that the ASA was well-placed to regulate VSP-controlled advertising, given its experience regulating online advertising on a self-regulatory basis. It pointed out that some platforms would be regulated by the ASA for the first time and called for guidance to communicate the experience of co-regulation in



relation to broadcast and on-demand advertising. It also argued that the ASA should be required to make determinations consistently and on a platform-neutral basis, following guidance and direction from Ofcom.

- 4.50 Another respondent considered that it was sensible and practical to build on existing models, and that the ASA was an appropriate co-regulator.
- 4.51 [§<]
- 4.52 **5Rights Foundation** and another respondent questioned why, given that Ofcom, the CMA and FCA are members of the Digital Regulation Cooperation Forum (“DRCF”), the ASA is not. It called for the ASA to be included in the DRCF.

### Ofcom’s response

- 4.53 Most respondents broadly supported the proposal to designate the ASA as a co-regulator for VSP-controlled advertising.
- 4.54 In response to the **Antisemitism Policy Trust’s** call for the regulation of political advertising, as set out above, Ofcom’s approach is based on the requirements that apply to VSP providers under the Act and further legislative change would be a matter for Government and Parliament.
- 4.55 In relation to concerns about the effectiveness of the self-regulatory system for online advertising administered by the ASA (**5Rights Foundation, ITV, the Institute of Alcohol Studies and Alcohol Focus Scotland**), Ofcom notes that these comments relate to the existing self-regulatory system, in which Ofcom has no role. As set out in the consultation, under our approach to regulating VSP-controlled advertising, such advertising will be regulated on a statutory basis through a co-regulatory relationship, with Ofcom having powers to enforce statutory sanctions, where appropriate. The designation requires the ASA to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; we consider that the ASA is experienced at having regard to these principles for the co-regulation of broadcast and on-demand advertising.
- 4.56 In response to the concerns about the ASA’s independence (the **Institute of Alcohol Studies and Alcohol Focus Scotland**), the designation criteria in section 368T of the Act expressly require Ofcom to consider if the ASA is sufficiently independent of providers of VSPs. As we explained in paragraphs 5.47 and 5.52 of the consultation, Ofcom’s assessment concluded that the ASA is independent of both Government and industry and has a transparent governance structure. The ASA’s adjudicating body, the ASA Council, is appointed by the ASA Chair and has a clear majority of members independent of industry.
- 4.57 We note **Alcohol Focus Scotland’s** suggestion for Ofcom to retain responsibility for all aspects of the proposed framework for regulating VSP advertising, given that the Government has stated that the VSP requirements will be superseded by the Online Safety Bill, and the VSP Framework is therefore expected to be temporary. The Act requires Ofcom to have regard to the extent to which our duties could be furthered or secured by

effective self-regulation and we considered that the ASA would meet the necessary criteria for designating it as the co-regulator for advertising on VSPs.

- 4.58 We also consider that there is a benefit in having a single point of contact for consumers for advertising issues across all media, and that the ASA already has experience of regulating online advertising on a self-regulatory basis. As the self-regulatory system will continue to operate once VSP regulation is no longer in force, we consider that designating the ASA as co-regulator will ensure the greatest possible degree of regulatory certainty and continuity for both consumers and industry.
- 4.59 We note the industry respondent’s request for more clarity on which matters will be referred to Ofcom under the co-regulatory relationship with the ASA. As set out above and in paragraph 5.22 of the consultation, the ASA will refer matters to Ofcom where it considers there has been a breach of the requirements that requires consideration of a statutory intervention. In addition, the ASA will also refer to Ofcom any cases where there is doubt or disagreement over whether the VSP provider markets, sells or arranges the relevant advertising, as set out in paragraph 5.24 of the consultation. For the avoidance of doubt, Ofcom will in all cases be able to exercise its powers under Part 4B of the Act concurrently or in place of the ASA (if the need were to arise). However, we do not expect such a need to arise on a routine basis.
- 4.60 In response to an industry respondent’s concerns about the powers Ofcom proposed to designate to the ASA, as stated above, Ofcom will retain statutory backstop powers under this proposal. In cases where the ASA considers there has been a breach of a relevant requirement, and that the breach is sufficiently serious or repeated, it can refer the matter to Ofcom to consider whether further action is required. This would involve Ofcom using its powers to investigate and confirm whether a VSP provider is in breach of its statutory obligations. If appropriate, Ofcom would give an enforcement notification and/or impose a statutory sanction such as a financial penalty and in the most serious cases – Ofcom has the power to suspend or restrict a service. Additionally, the ASA will be required to refer to Ofcom all cases where the potential contravention may be such as to justify immediate action and consideration by Ofcom of its power to suspend or restrict a service for inciting crime or disorder<sup>21</sup>.
- 4.61 In response to the comments about the DRCF, Ofcom noted that the DRCF (consisting of Ofcom, ICO, CMA and FCA) works closely with the ASA on matters relating to advertising as appropriate, as stated in its 2021/2022 plan of work<sup>22</sup>.

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<sup>21</sup> [Communications Act 2003](#), Part 4B, 368Z6.

<sup>22</sup> Digital Regulation Cooperation Form, [Plan of work for 2021 to 2022](#), March 2021.

### Ofcom's conclusions

Having taken account of the responses relating to our proposed framework for regulating VSP-controlled advertising, we have decided to proceed with the proposed approach with day-to-day regulation of VSP-controlled-advertising administered primarily by the ASA and Ofcom retaining statutory backstop powers. The relevant requirements will be reflected in a VSP annex in the CAP Code, to be enforced by the ASA.

It is our view that the proposed framework will build on the existing self-regulatory system for advertising and provide robust protections for consumers with a statutory backing. The ASA is an established co-regulatory partner and we are confident that it is appropriate for the ASA to take responsibility for the day-to-day regulation of VSP-controlled advertising, enforcing against rules set out in VSP annex to the CAP Code.

We have also decided to proceed to designate the ASA as our co-regulator. We have concluded that the ASA satisfies the criteria for designating it as a statutory co-regulator for VSP-controlled advertising, and that there are considerable benefits to consumers and industry in designating a body with experience of online advertising regulation, which will provide a single point of contact on advertising issues.

## 5. Regulating non-VSP-controlled advertising

- 5.1 In Section 6 of our consultation, we set out proposed guidance on the Schedule 15A measures that apply specifically to non-VSP-controlled advertising. These measures, summarised on p.7 of this statement, are designed to protect users from potentially harmful advertising.
- 5.2 Our proposals in relation to these measures were intended to operate within the overall framework for regulating VSPs, set out in the Harms and Measures Guidance statement.

### The proposed guidance

- 5.3 Our proposed guidance on advertising harms and measures set out Ofcom's expectations in relation to terms and conditions and the transparency of advertising. The final guidance is set out in Annex 3.

### The proposed approach

- 5.4 Section 6 of the consultation set out proposals as to how VSP providers should determine which of the measures to take to protect users from harmful material, with reference to the Harms and Measures Guidance. It also set out proposals as to how Ofcom will assess the appropriateness and effectiveness of measures taken by VSP providers to protect users. Reflecting the provisions in the Act, we set out that, where Ofcom determines that a VSP provider has failed to apply such of the measures set out in the Act as are appropriate to protect users, we may find them in breach of their statutory obligations.
- 5.5 We also proposed to use a range of information to assess the appropriateness and effectiveness of measures taken by VSP providers in relation to advertising, including information obtained from providers and information from the ASA's self-regulatory activities (such as investigations and breaches of rules in the wider CAP Code).
- 5.6 The relevant consultation questions are set out below:

**Question 4:**

- a) Do stakeholders agree with Ofcom’s proposed guidance on non-VSP-controlled advertising?
- b) If you do not agree with the proposed guidance on non-VSP-controlled advertising, please explain why, and include any alternative approaches.

**Question 5:**

- a) Do stakeholders agree with Ofcom’s proposed approach to regulating non-VSP-controlled advertising?
- b) If you do not agree with the proposed approach to regulating non-VSP-controlled advertising, please explain why, and include any alternative approaches.

5.7 This section summarises the responses to these questions, and Ofcom’s conclusions on regulating non-VSP-controlled advertising. Ofcom’s finalised guidance on advertising harms and measures is at Annex 3.

## Consultation responses and Ofcom’s conclusions

- 5.8 Responses to Question 4 broadly concerned the clarity and effectiveness of the measures proposed in the guidance on terms and conditions, the protection of under-18s and transparency. Some respondents proposed additional measures.
- 5.9 In response to Question 5, respondents focused on the likely effectiveness of the proposed approach to addressing potential harms to users resulting from non-VSP-controlled advertising. They also considered the clarity of the distinction between VSP-controlled and non-VSP controlled advertising and the respective roles of VSP providers and advertisers in relation to the proposed approach.

## Proposed guidance on non-VSP-controlled advertising

5.10 Paragraphs 6.7 to 6.23 of the consultation set out Ofcom’s proposed guidance on VSP-controlled advertising, which covers terms and conditions relating to advertising requirements, and measures relating to the transparency of advertising. The final guidance is set out in Annex 3 of this statement.

### What respondents said

- 5.11 **SBC, Which?** and another respondent said they broadly agreed with Ofcom’s proposed guidance on non-VSP-controlled advertising. **SBC** added that the guidance should be subject to regular review.
- 5.12 **Channel 4** welcomed the proposed approach to terms and conditions relating to advertising and the provision of a functionality for users uploading videos to declare whether they contain advertising. It maintained that there must be robust enforcement where VSP providers fail to take appropriate measures or to apply them effectively.

- 5.13 The **Antisemitism Policy Trust** welcomed that non-VSP-controlled advertising would be regulated, noting that it can lack transparency and promote harmful content. It argued that Ofcom should put in place specific protections including guidance around electoral advertising, to address what it saw as a gap in the regulation of online advertising.
- 5.14 The **Institute of Alcohol Studies** said it did not agree with Ofcom’s proposed approach to regulating non-VSP-controlled advertising. It considered that the proposals did not adequately address the issue of children’s exposure to alcohol advertising, problems with age-gating online, or the question of cross-border advertising. It advocated an alternative approach, where alcohol advertising online would be prohibited, regulated by an independent body.
- 5.15 Noting that the VSP regulatory requirements set out in the Act are expected to be superseded by the Online Safety Bill, **5Rights Foundation** argued that the planned inclusion in the latter of non-paid-for advertising (including some influencer advertising) meant that Ofcom’s guidance on non-VSP-controlled advertising should be incorporated into the Online Safety Bill and its accompanying codes.
- 5.16 **ISBA** said it would expect VSP providers to ensure users have a clear understanding of what constitutes harmful material and the requirements which apply to any advertising they upload.
- 5.17 Two respondents also broadly agreed with the guidance. In particular, one respondent welcomed the use of terms and conditions to communicate requirements to users, and the suggestion that advertising should be easily identifiable using a common labelling system (e.g. “#ad”). Another respondent supported the focus in the guidance on VSP providers providing users with information to assist them in adhering to the relevant requirements, while noting it was important that the level of control providers have over product placement or sponsorship in influencer advertising was taken into account in applying the guidance. It argued that as VSP providers typically play no role in marketing, selling or arranging this type of advertising, Ofcom should recognise their limited involvement and assign responsibility accordingly.
- 5.18 One respondent considered the guidance to be limited. [X] It also wished to ensure alignment between the proposed approach to enforcement and the existing activity of the ASA and the CMA, as well as the plans of DCMS. [X]

### Ofcom’s response

- 5.19 Ofcom notes the positive comments, summarised in paragraph 5.11 above, in relation to its proposed guidance on non-VSP-controlled advertising. The guidance will be reviewed as appropriate based on Ofcom’s experience of regulating non-VSP-controlled advertising.
- 5.20 The **Antisemitism Policy Trust**’s call for Ofcom to put in place specific protections in relation to electoral advertising goes beyond the scope of the consultation. Ofcom’s proposed guidance on non-VSP-controlled advertising is based on the statutory requirements and measures set out in the Act. Similarly, the **Institute of Alcohol Studies**’

proposal for a prohibition on alcohol advertising online would require legislation, which is a matter for Government and Parliament.

- 5.21 Regarding **5Rights Foundation**'s comments, Ofcom's proposed guidance on non-VSP-controlled advertising is based on the requirements that apply to VSP providers under the Act. The extent to which different forms of advertising are included in the Online Safety Bill is a matter for Government and Parliament.
- 5.22 In response to **ISBA**'s point, Ofcom's guidance on advertising harms and measures, as well as our wider Harms and Measures Guidance, will help ensure that VSP providers have a clear understanding of what constitutes harmful material and the requirements and measures that apply to advertising on their platforms.
- 5.23 In relation to **Channel 4**'s call for robust enforcement, Ofcom has separately published guidance on its approach to enforcement, which makes clear that where Ofcom identifies compliance concerns, we will take enforcement action, as appropriate, to help protect users from harm.<sup>23</sup>
- 5.24 Regarding influencer advertising, the Act recognises the differing degrees of control VSP providers may have over advertising on their service. This is reflected in the proposed framework for regulating advertising on VSPs. Ofcom's guidance on control of advertising further discusses influencer advertising, in relation
- 5.25 to the distinction between VSP-controlled and non-VSP-controlled advertising: 'Advertising can appear on a platform but not be marketed, sold or arranged by a VSP provider. For instance, influencer marketing may not meet this definition if the provider has not engaged with the influencer in relation to the advertising' (see Annex 1).
- 5.26 [X] In response to a respondent's concern about the alignment of regulation in this space, as stated above, through our membership of the DRCF we engages regularly with the ICO, CMA and FCA on areas of mutual importance concerning our respective remits for regulating online services. Our expectations with regard to the advertising measures are set out in our guidance on non-VSP-controlled advertising, which does not mandate a specific approach, due to the variation between services.

## Terms and conditions relating to advertising requirements

- 5.27 Paragraphs 6.7 to 6.12 of the consultation set out Ofcom's proposed guidance on terms and conditions relating to advertising requirements. This includes guidance on how to ensure this measure is effective, by clearly setting out terms and conditions and communicating them to users. The final guidance on terms and conditions is set out in paragraphs A3.2 to A3.7 in Annex 3 of this statement.

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<sup>23</sup> Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

### What respondents said

- 5.28 **Which?** said that terms and conditions relating to advertising should be properly and consistently enforced and that this should be auditable.
- 5.29 **ITV** argued that the key point was not the clarity of terms and conditions, but whether or not they are effective in protecting users from harm. It said that the rules enforced by the ASA under the self-regulatory system were not unclear, but still there was non-compliance, in particular in relation to transparency. In **ITV's** view, the main drivers of non-compliance in this space are a lack of platform responsibility and of sufficiently serious consequences for breaches of the rules.
- 5.30 The **Institute of Alcohol Studies** claimed there were grey areas in the proposed guidance, including in relation to terms and conditions. It was concerned there was a lack of clarity about what constituted advertising in the context of the requirements relating to advertising for alcoholic drinks, in particular whether product placement or unpaid placement (i.e. the use of products as props in videos) were included.
- 5.31 One respondent noted that users of VSP providers produce content across multiple jurisdictions and argued that the guidance on clearly communicating terms and conditions to users should take into account the global nature of VSPs.

### Ofcom's response

- 5.32 Ofcom notes the comments from **Which?**. Our approach to regulating non-VSP-controlled advertising, including the guidance on advertising harms and measures, is designed to help VSP providers to meet the relevant requirements under the VSP Framework, and to ensure that the requirements can be properly and consistently enforced.
- 5.33 In response to **ITV's** point about the effectiveness of terms and conditions relating to advertising requirements, Ofcom's guidance states that this measure is fundamental, and that we consider it unlikely that effective protection of users can be achieved without this measure in place and it being implemented effectively. We will take into account the effectiveness of VSP providers' implementation of terms and conditions, in assessing the appropriateness of the measures taken by providers. The guidance sets out our expectations that terms and conditions should clearly set out the requirements, and that VSP providers should clearly communicate these to users. We consider that the clarity of terms and conditions is an important part of ensuring their effectiveness.
- 5.34 **ITV** also commented on the need for platform responsibility and meaningful sanctions for non-compliance. Under the proposed framework for regulating advertising on VSPs, VSP providers are responsible for complying with requirements placed on them by the VSP Regime. Where Ofcom determines that a provider is in breach of its statutory obligations, we have the power to take appropriate enforcement action, including the power to impose statutory sanctions on providers.
- 5.35 In response to the **Institute of Alcohol Studies'** comments, 'AVCC' is defined in section 368Z13 of the Act, where it is specified that forms of AVCC include advertising,



sponsorship, teleshopping and product placement. Ofcom’s guidance on control of advertising further discusses influencer advertising, in relation to the distinction between VSP-controlled and non-VSP-controlled advertising (see Section 3 and Annex 1).

- 5.36 In response to the point about jurisdiction, VSPs in scope of UK jurisdiction must comply with the applicable requirements in UK law, regardless of the global nature of platforms.

## Under-18s

- 5.37 As summarised on p.7 of this statement, the VSP Framework includes specific requirements to protect users against potential harms related to advertising on VSPs, including that advertising on a VSP must not cause physical, mental or moral detriment to persons under the age of 18. There are a number of other general advertising requirements that are specifically concerned with under-18s. In addition, adverts for alcoholic drinks must not be aimed at minors and must not encourage immoderate consumption of alcohol. Ofcom’s guidance on non-VSP-controlled advertising covers terms and conditions relating to these requirements, as well as the other requirements that apply.

## What respondents said

- 5.38 **5Rights Foundation** disagreed with taking differing approaches to VSP-controlled and non-VSP-controlled advertising, and proposed the guidance should state that all advertising on VSPs must comply with the data processing requirements set out in the ICO’s Age Appropriate Design Code and the section of the ASA’s CAP Code dedicated to children. It believed the strictest measures to be necessary, due to the risks posed to children by advertising, and evidence from the ASA that age-restricted advertising is reaching this group. **5Rights Foundation** also proposed an addition to the requirements applying to VSP providers in relation to advertising, which would stipulate that adverts on VSPs must not use tools that target or extend the reach of the advert to target users under the age of 18.
- 5.39 The **Age Verification Providers Association** argued the guidance should be explicit that where a VSP may carry advertising unsuitable for children and young people the VSP provider should introduce an age assurance mechanism to an appropriate standard. It said this was the only way for VSP providers to protect under-18s from harm in relation to restricted products such as alcohol, other than by excluding advertising for such products altogether. In support of this, it pointed to the requirement under the VSP Framework that advertising on VSPs must not to cause physical, mental or moral detriment to under-18s.
- 5.40 **SafeCast** cited its previous submissions to DCMS and the ICO in advance of the Online Safety Bill. It argued for a form of self-applied content labelling and metadata filtering for user-generated videos, where users apply a suggested age rating during the upload process, which is checked by Artificial Intelligence and/or third-party reviewers. It suggested that this system could be promoted by regulators through the medium of technical standards. **SafeCast** maintained that its proposed approach would ensure inappropriate advertising (and other inappropriate content) was filtered away from children without imposing censorship.

- 5.41 **SafeCast** also advocated the inclusion of provenance, ownership and product placement metadata in all online advertising, to allow for inappropriate content to be filtered out automatically. It suggested that this system would prevent unfair competition by non-compliant advertisers and reduce consumer demand for ad-blocking. It also argued that age verification based on the individual attributes of a user was disproportionate, presented technical challenges, created privacy risks, and would require a proprietary system that could become a barrier to competition. **SafeCast** suggested that using the ‘school age’ (i.e. an age range based on the Key Stages of the UK National Curriculum), rather than the actual age of users, would be a preferable approach.
- 5.42 The **Institute of Alcohol Studies** pointed out that a user uploading a video containing advertising for an alcoholic drink would not know who will see it, and would therefore be unable to ensure it meets the requirement for such advertising not to be aimed at minors.

### Ofcom’s response

- 5.43 **5Rights Foundation’s** suggestions for additions to the guidance go beyond the requirements that apply to VSP providers under the VSP Regime. As stated above, Ofcom’s guidance on measures to protect users from harmful material sets out that if a measure is aimed at estimating the age of an under-18 user this should be done in a way that appropriately safeguards children’s personal data in line with the standards of the ICO’s Age Appropriate Design Code, as well as the ICO’s more general data protection requirements.<sup>24</sup>
- 5.44 In relation to **Age Verification Providers Association’s** and **SafeCast’s** comments, Ofcom has consulted separately and published guidance on applying appropriate age assurance measures to protect under-18s.<sup>25</sup> The guidance sets out Ofcom’s expectation for VSP providers to understand which age groups are using their services to ensure that material is age-appropriate, taking into account the different developmental needs and interests of under-18s. The guidance also includes a non-exhaustive list of considerations for effective age assurance that may guide VSP providers in being able to protect the youngest and most vulnerable under-18s. We note that VSP providers must take appropriate measures in response to the risk of advertising that has the potential to be harmful to under-18s; such measures may include access control measures such as age assurance and parental controls, or any other measure which achieves the required protection.
- 5.45 We note the **Institute of Alcohol Studies’** comments regarding the requirement for adverts for alcoholic drinks not to be aimed at minors, specifically that users uploading videos that contain advertising may not know who will see it. However, Ofcom considers that many users who engage in influencer advertising will have an idea of their target audience, and the content of a video is also relevant to determining what age group is aimed at.

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<sup>24</sup> Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

<sup>25</sup> [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

## Transparency of advertising

5.46 Paragraphs 6.13 to 6.23 of the consultation set out Ofcom’s proposed guidance on measures and requirements relating to the transparency of advertising. The relevant measures are: making available a functionality for users who upload content to declare the presence of advertising as far as they know or can be reasonably expected to know; and including and applying in the terms and conditions of the service a requirement that users who upload content make use of that functionality as applicable. In addition, there is a requirement that VSP providers must clearly inform users that a video contains advertising where they have knowledge of this, or its presence has been declared by the uploader using the functionality provided. The final guidance on transparency of advertising is set out in paragraphs A3.8 to A3.18 in Annex 3 of this statement.

### What respondents said

5.47 **Which?** said it was important for users to be aware when and how they are being advertised to.

5.48 **ISBA** considered it was essential that a failsafe functionality for users to declare advertising is built into the upload process. It expected that VSP providers would have the technical expertise to implement such a system effectively. It also advocated a clear and reliable labelling system, which would enable advertising to be easily identified, for example using the ASA’s proposed identifier “#ad”.

5.49 One industry respondent confirmed that it would be straightforward for it to introduce a functionality for users uploading videos to declare the presence of advertising. However, the respondent considered that for users to be prompted to make such a declaration whenever they upload a video would interfere with the user experience disproportionately, as the vast majority of users do not upload advertising. It considered that terms and conditions were a more proportionate way to achieve the desired outcome of making advertising transparent.

5.50 [✂]

5.51 Another industry respondent pointed to what it saw as inconsistencies in Ofcom’s guidance on transparency of advertising. It appeared to this respondent that the inclusion of terms and conditions to the effect that a user uploading a video must declare the presence of advertising had the effect of making it a mandatory requirement that VSP providers provide the functionality for users to do this. It requested clarity on this point.

5.52 The respondent also questioned the wording of the guidance set out in paragraph 6.13 of the consultation, which states that the legislation contains requirements which taken together are designed to ensure that advertising on VSPs, regardless of whether it is marketed, sold or arranged by providers, is transparent to users of the service. It suggested that this might be amended to clarify that the requirement to clearly inform users about the presence of advertising only applies where the VSP provider is aware that a video contains advertising (i.e. the provider knows that content uploaded to the service contains

advertising or the person who uploaded the content has told the VSP provider that this is the case), as set out in full in paragraph 6.19 of the consultation.

- 5.53 **Channel 4** said that VSP providers should immediately remove any advertising that has not been declared. It was also concerned that the requirements relating to transparency did not make providers sufficiently responsible for advertising on their services, or go far enough in ensuring children and other vulnerable groups are protected from harm. It asked why, if the technology exists to enable users uploading videos to declare the presence of advertising, providers could not ensure that such advertising adheres to the rules.
- 5.54 The **Institute of Alcohol Studies** questioned how the guidance in relation to the transparency of advertising would prevent children from being exposed to alcohol advertising.

#### Ofcom's response

- 5.55 **Which?'s** and **ISBA's** comments accord with Ofcom's proposed guidance on transparency of advertising. The VSP Framework includes measures and requirements that are designed to secure the transparency of advertising on VSPs. Our guidance encourages VSP providers to include the functionality for users uploading videos to declare the presence of advertising as a mandatory step in the video upload process, and also refers to the ASA's proposed identifier "#ad" as a model of good practice. However, it is for VSP providers to determine which measures are appropriate to protect users from harm, and how to implement these measures effectively on their service, having regard to Ofcom's guidance.
- 5.56 This point is relevant to the comments about the functionality to declare advertising. One industry respondent raised the question of whether it is mandatory for VSP providers to include terms and conditions to the effect that a user uploading a video must make use of the functionality provided to declare the presence of advertising. Ofcom has clarified the guidance to make clear that this expectation applies only where the VSP provider has taken the measure of providing such a functionality. The amended paragraph (paragraph A3.12 in the finalised guidance at Annex 3) reads: 'Where a VSP provider has taken the measure of providing a functionality to declare the presence of advertising, we expect the provider to communicate this requirement (i.e. to make use of the functionality to declare advertising) to users clearly within the terms and conditions. We would encourage VSP providers to include this requirement in a specific advertising-related section within the terms and conditions.'
- 5.57 We have also amended the guidance set out in paragraph 6.13 of the consultation (paragraph A3.8 in the finalised guidance at Annex 3). This industry respondent suggested that this section should be amended to make clear that the VSP provider is only required to clearly inform users that a video contains advertising applies where its presence has been declared using the functionality provided, or where the provider otherwise has knowledge of it. The amended passage now reads: 'Under the VSP Framework advertising must be transparent to users of the service. This principle applies to all VSP advertising, regardless

of whether it is marketed, sold or arranged by the provider of the service'<sup>26</sup>. We believe that this revised wording, which clarifies that the broad principle of transparency applies, is sufficiently clear.

- 5.58 In response to **Channel 4's** and the **Institute of Alcohol Studies'** comments, Ofcom's guidance on the transparency of advertising reflects the measures and requirements set out in the Act. It should be considered alongside the proposed guidance on terms and conditions relating to advertising requirements, as well as our published guidance on the full set of measures and our wider approach to regulating VSPs<sup>27</sup>.

## Proposed approach to regulating non-VSP-controlled advertising

- 5.59 Section 6 of the consultation set out Ofcom's proposed approach to regulating non-VSP-controlled advertising, within the overall framework for regulating VSPs, including proposals as to how VSP providers should determine which of the measures to take to protect users from harmful material, with reference to the Harms and Measures Guidance. It also set out proposals as to how Ofcom will assess the appropriateness and effectiveness of measures taken by VSP providers to protect users.

### What respondents said

- 5.60 **Which?, ISBA, SBC** and four other respondents said they broadly agreed with Ofcom's proposed approach to regulating non-VSP-controlled advertising.
- 5.61 One industry respondent appreciated the clarity provided in the consultation that the specific measures relevant to non-VSP-controlled advertising are to operate within Ofcom's wider regulation of VSPs, where the focus is on the systems and processes providers have in place.
- 5.62 Another industry respondent supported the proposal for the regulation of non-VSP-controlled advertising to remain with Ofcom, citing the interaction between the advertising-related measures and the wider measures set out in Schedule 15A of the Act.
- 5.63 While **Channel 4** recognised that VSPs have limited control over advertising they do not market, sell or arrange, it argued that in order to ensure adequate protection for users, the VSP provider and the advertiser should both be held accountable for non-compliant non-VSP-controlled advertising.
- 5.64 One respondent proposed that VSP providers should ensure that users who upload videos containing advertising are aware of the relevant requirements and that there are sanctions where these requirements are breached.
- 5.65 Another respondent referred to Ofcom's consumer research with content creators summarised in Annex 5 to the consultation, which found that these users could benefit from increased awareness of the relevant requirements, better understanding of the

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<sup>26</sup> [Communications Act 2003](#), Part 4B, S368Z1(6) and Schedule 15A(5).

<sup>27</sup> Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

consequences of non-compliance, and greater clarity on how advertising should be declared. It said regulators should take a lead on educating users about the relevant requirements, to ensure consistency across VSPs. It requested clarification on whether the references to educating users in the consultation constituted an obligation placed on VSP providers.

- 5.66 Another respondent welcomed the proposed flexibility for VSP providers in determining which measures are appropriate, the emphasis on practicality in assessing this, and the acknowledgement that providers have limited control over advertising they do not market, sell or arrange (though it added that this was also true of advertising that is noted marketed, sold or arranged by VSP providers).
- 5.67 This respondent also called for greater emphasis on the criteria of proportionality and practicality in assessing the appropriateness and effectiveness of measures taken by VSP providers, as well as confirmation that Ofcom's focus would be on systems and processes rather than individual pieces of content. It felt that this would mitigate against the risk of VSPs adopting an overly cautious approach resulting in inadvertent removal of legitimate advertising.

#### Ofcom's response

- 5.68 Ofcom notes the positive comments in relation to our proposed approach to regulating non-VSP-controlled advertising.
- 5.69 The VSP Regime imposes statutory obligations on VSP providers, rather than providers and advertisers as proposed by **Channel 4**. Alongside the framework for regulating advertising on VSPs, where the VSP provider will be accountable for meeting certain requirements, the ASA will continue to oversee the self-regulatory system, which will hold the advertiser to account in complying with the CAP Code. Taken together, this achieves a two-fold approach to protecting consumers from harm, with responsibilities for both VSPs and advertisers. In addition, Ofcom notes that further protection to consumers from misleading advertising is provided by law.
- 5.70 Ofcom's guidance on non-VSP-controlled advertising addresses the comments in relation to ensuring users are aware of the relevant requirements and potential sanctions in the event of non-compliance. Paragraphs 6.7 to 6.12 of the consultation set out guidance on terms and conditions relating to advertising requirements, including Ofcom's expectation that the requirements should be clearly communicated to users, as should the consequences of breaching terms and conditions.
- 5.71 Ofcom has drawn on its consumer research with content creators in formulating its proposed approach to regulating advertising on VSPs. We have developed guidance for VSP providers to help them understand the requirements of the VSP Framework and our expectations.
- 5.72 It is correct that under the proposed framework for regulating advertising on VSPs, the ASA will be designated as co-regulator for VSP-controlled advertising (see section 4), while Ofcom will, at the higher level of systems and processes, assess the appropriateness of

measures taken by the VSP in relation to non-VSP-controlled advertising. In addition, paragraphs 6.24 to 6.27 of the consultation considered the criteria set out in S368Z1 of the Act for assessing the practicality and proportionality of measures, focusing on the criterion most relevant to advertising, while cross-referencing the discussion of the broader application of these criteria in the Harms and Measures Guidance consultation<sup>28</sup>.

## Collaboration with the ASA

5.73 As set out in paragraphs 6.28 to 6.33 of the consultation, Ofcom will use a range of information in its assessments of the appropriateness and effectiveness of measures taken by VSP providers to protect users. For the advertising measures, this may include information obtained from providers, as well as relevant information that the ASA becomes aware of in the course of its self-regulatory activity, for example breaches of relevant rules in the CAP Code by non-VSP-controlled advertising appearing on Ofcom-regulated VSPs.

### What respondents said

- 5.74 **ISBA** welcomed the collaboration between Ofcom and the ASA in relation to non-VSP-controlled advertising.
- 5.75 One industry respondent said it was right that the ASA should provide information to Ofcom to inform our assessments of the measures taken by VSP providers to protect users. However, this respondent did not agree that a high volume of breaches of the CAP Code in relation to non-VSP-controlled advertising should necessarily be taken to indicate a serious failure by VSP providers to protect users from harm. It pointed to situations in which users who upload videos containing advertising entered into a commercial relationship independently of the VSP provider and did not disclose that relationship. It argued that providers should not be considered responsible for non-compliance in such instances. Rather, Ofcom should focus on the systems and processes VSPs have in place.
- 5.76 **5Rights Foundation** expressed concern that the self-regulatory system operated by the ASA was reactive, and in its view did not prevent children from seeing harmful content or rule out repeat breaches.

### Ofcom's response

- 5.77 Ofcom notes **ISBA's** support for our proposal to collaborate with the ASA.
- 5.78 In response to the industry respondent's concern about the relevance of CAP Code breaches to a VSP provider's compliance with the statutory requirements, Ofcom's approach to regulating non-VSP-controlled advertising is based on the systems and processes that VSP providers have in place to protect users. This approach reflects the VSP Framework. While a high volume of breaches of the self-regulatory CAP Code does not in

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<sup>28</sup> Ofcom, [Proposals for the regulation of advertising on video-sharing platforms](#), May 2021; Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

itself constitute non-compliance with the requirements placed on VSP providers, the CAP Code includes protections that are broadly consistent with the relevant provisions under the VSP Regime. Ofcom therefore considers a pattern of non-compliance to be a useful indicator of potential systemic issues with the measures in place on a VSP, particularly where a provider has failed to take steps to effectively mitigate a widespread or recurring issue. A range of other information may also be taken into account in these assessments.

- 5.79 In response to **5Rights Foundation**'s view that the ASA took a reactive approach to regulation, Ofcom notes that the ASA conducts a wide range of proactive work to protect consumers from harmful advertising as part of its More Impact Online strategy – for example, proactive monitoring of websites and the use of online avatars<sup>29</sup>.

### Ofcom's conclusions

We have considered respondents' views on Ofcom's proposed guidance on the Schedule 15A measures that apply specifically to non-VSP-controlled advertising, and the proposed approach to regulating non-VSP-controlled advertising.

We have decided to adopt, with minor amendments, the proposed guidance which provides industry with a clear understanding of Ofcom's expectations in relation to terms and conditions relating to advertising requirements and the transparency of advertising.

Responses highlighted opportunities for further clarity in the guidance, particularly in relation to our expectation to include terms and conditions relating to a functionality for users to declare the presence of advertising. We have therefore implemented minor amendments to clarify this expectation and to improve the general clarity of the guidance.

The finalised guidance on the measures that apply to non-VSP-controlled advertising is set out in Annex 3.

We have concluded that it is appropriate for Ofcom to retain responsibility for assessing the appropriateness and effectiveness of measures taken by VSP providers to protect users, and to use a range of information to inform this assessment, including information from the ASA. The details of how the ASA's provision of information to Ofcom will work in practice have been agreed between Ofcom, the ASA and the Committee of Advertising Practice ("CAP") in a letter [published alongside this statement](#).

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<sup>29</sup> See: <https://www.asa.org.uk/news/innovate-to-regulate-policing-ads-online.html>.



## 6. Impact assessment

- 6.1 The consultation did not contain a separate impact assessment document. Instead, the consultation document as a whole covered the key factors that are likely to have an impact on stakeholders (including citizens and consumers and VSP providers).
- 6.2 Ofcom did not receive any comments on our assessment of the impact of our proposals for regulating advertising on VSPs. We have reviewed our impact assessment in light of other comments we have received from respondents and the clarifications we have made to our guidance and consider that it remains valid. The main points are summarised below.
- 6.3 The Government has dealt separately with the impact in principle of VSP regulation on stakeholders, and of co-regulation in relation to advertising<sup>30</sup>. In the Harms and Measures Guidance consultation and statement, Ofcom assessed the potential impact of our general approach to VSP regulation and our draft VSP guidance<sup>31</sup>. We consider that this assessment also applies to VSP advertising regulation, and only deal with advertising-specific requirements and measures below.
- 6.4 Our assessment of the impact of Ofcom’s approach to regulating advertising on VSPs has been informed by our engagement with industry stakeholders, including responses to our Call for Evidence. These stakeholders include VSP providers and other interested parties.
- 6.5 The assessment has also been informed by the Government’s consultations on implementing the revised AVMSD and the provisions relating to VSPs<sup>32</sup>. In its response to these consultations, the Government noted that a majority of stakeholders had supported designating the ASA as Ofcom’s co-regulator for advertising on VSPs<sup>33</sup>.
- 6.6 The introduction of a regulatory framework for VSPs entails certain costs for VSP providers (i.e. in terms of the administrative burden and an enhanced compliance function). These need to be balanced against the benefits for citizens and consumers which are the aim of the legislation (i.e. protection from accessing harmful content). We believe that co-regulation will assist in securing these benefits.
- 6.7 We have considered whether the co-regulatory structure envisaged for the VSP Regime will impose any additional costs on VSP providers. In having to cooperate with the ASA as well as Ofcom (e.g. responding to requests for information about whether advertising is under the control of the VSP provider), VSP providers may incur some additional costs. However, the ASA already regulates advertising on UK-established VSPs on a self-regulatory basis, and our proposal will preserve the existing relationship with industry that

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<sup>30</sup> DCMS, [Impact Assessment – Revision of the Audiovisual Media Services Directive](#), January 2020.

<sup>31</sup> Ofcom, [Consultation – Guidance for video-sharing platform providers on measures to protect users from harmful material](#), March 2021; Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material – Statement](#), October 2021.

<sup>32</sup> DCMS, [Consultation: Audiovisual Media Services](#), May 2019; DCMS, Requirements for video-sharing platforms in the Audiovisual Media Services Directive, July 2019.

<sup>33</sup> DCMS, [Audiovisual Media Services, Government response to public consultations on the governments implementation proposals](#), July 2019.

the ASA has developed as part of its wider online strategy. We therefore expect these additional costs to be marginal.

- 6.8 Drawing on the success of our co-regulatory relationships with the ASA for broadcast and on-demand advertising, Ofcom intends for the co-regulation of VSP-controlled advertising to preserve and enhance that model. The ASA is widely recognised as a ‘one-stop shop’ for advertising complaints, with Ofcom acting as a statutory backstop in specific media. There is a benefit for industry and consumers in building on this established approach.
- 6.9 If the ASA had not been designated as a co-regulator, VSP providers would still have been required to engage with Ofcom in relation to advertising on their services. The designation of the ASA (see Annex 2) has been designed to minimise any unnecessary duplication of regulatory activity between Ofcom and the ASA, setting out clearly defined roles for all parties.
- 6.10 Ofcom has separately assessed the potential impact of our overall approach to regulating VSPs in the Harms and Measures Guidance consultation and statement<sup>34</sup>. We consider that assessment also applies to the advertising-specific requirements and measures which are to be regulated under this framework.
- 6.11 Ofcom’s guidance on advertising harms and measures (see Annex 3) is designed to afford VSP providers some flexibility in how they protect their users. However, there is one specific area where we have outlined certain expectations on VSP providers because without them we believe it is unlikely that users would be adequately protected. We have considered the potential impact of these specific expectations in Table 1 below. Table 2 reflects the impact of measures strongly encouraged to assist VSP providers in satisfying themselves that they are complying with their obligations in relation to advertising.

**Table 1: Measures which we consider are central to protect users**

Measure	Potential impact on VSPs	Expected benefits
Implementing and enforcing T&Cs relating to advertising requirements (see paragraphs A3.1 to A3.6).	Staff costs associated with reviewing, updating and enforcing T&Cs relating to advertising requirements, satisfying the principles of transparency and ease of use.	Our view is that this is necessary for any VSP provider to be able to protect its users. Appropriate and effectively enforced T&Cs are likely to discourage users from uploading content that they know is harmful and will result in sanctions or penalties. Therefore, this could reduce the risk that users encounter it.

<sup>34</sup> Ofcom, [Consultation – Guidance for video-sharing platform providers on measures to protect users from harmful material](#), March 2021; Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material – Statement](#), October 2021.

**Table 2: Measures strongly encouraged to support compliance**

Measure	Potential impact on VSPs	Expected benefits
Information collecting and measuring effectiveness	Staff costs to determine information that can indicate effectiveness of the measures.  Staff and systems infrastructure costs associated with collecting and analysing information on those measures.	Understanding the effectiveness of measures is vital for platforms to understand how well they are working to protect users from harmful content.  The collection of data and information would form an important aspect of this as it will help the provider to satisfy itself that it is complying with its obligations under the regime.

6.12 Finally, Ofcom notes that the Government has stated that its intention is for this system for regulating advertising on VSPs on a statutory basis to be temporary. The positive and negative impact, for citizens and consumers and VSP providers, will be accordingly limited. We have modelled our approach on the established system and as far as possible, and sought to minimise complexity in light of the expected temporary nature of the regime.

## Equality impact assessment

6.13 Section 149 of the Equality Act 2010 (the “EA 2010”) imposes a duty on Ofcom, when carrying out its functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. The EA 2010 also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.

6.14 Section 75 of the Northern Ireland Act 1998 (the “NIA 1998”) also imposes a duty on Ofcom, when carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations across a range of categories outlined in the NI 1998. Ofcom’s Revised Northern Ireland Equality Scheme explains how we comply with our statutory duties under the NI 1998<sup>35</sup>.

<sup>35</sup> Ofcom, Revised Northern Ireland Equality Scheme for Ofcom, [Revised Northern Ireland Equality Scheme](#), January 2014 (updated December 2019).

- 6.15 To help us comply with our duties under the EA 2010 and the NI 1998, we assess the impact of our proposals on persons sharing protected characteristics and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations. We do not consider that our approach to VSP advertising as set out in the consultation and this statement have equality implications under the EA 2010 or the NIA 1998.

## A1. Guidance on control of advertising

Ofcom considers advertising<sup>36</sup> to be marketed, sold or arranged by a VSP provider when a VSP provider is involved in making the advertising available on the platform, which may include (but is not limited to): enabling advertisers to buy advertising on their platform, either directly or via a third-party; and/or providing tools that enable advertisers to target or optimise the reach of their advert served on the provider's platform.

Advertising can appear on a platform but not be marketed, sold or arranged by a VSP provider. For instance, influencer marketing may not meet this definition if the provider has not engaged with the influencer in relation to the advertising. In addition, an advert posted by a brand (in the brand's capacity as a user) on a VSP that appears without any engagement between the brand and the VSP provider would not be considered to be under the provider's control.

The regulator will take into account a range of information (e.g. advertising models, information from VSPs, commercial arrangements) when determining whether advertising is marketed, sold or arranged by the VSP provider. While it is the responsibility of the VSP to determine whether or not advertising is under their control, we expect discussions about the scope of 'marketed, sold or arranged' to form part of ongoing engagement with providers. For both VSP-controlled and non-VSP controlled advertising, the legislation aims to secure the same types of consumer protections through two frameworks.

a) VSP providers are responsible for ensuring compliance with the general advertising requirements and provisions on prohibited and restricted products where the advertising is marketed, sold or arranged by them.<sup>37</sup> Providers may achieve compliance through a range of approaches, including but not limited to:

- i) ensuring that advertisers and other third-parties they engage with are aware of the relevant requirements (e.g. when setting out terms of a contract or during the development of advertising);
- ii) ensuring that tools they provide to assist advertisers alert those making use of them to the relevant requirements; and/or
- iii) taking prompt action to remove or edit advertising that may contravene the requirements and taking steps to prevent the recurrence of any issues identified with advertising on their platform.

It is for providers to determine the appropriate steps they should take to ensure that advertising they control is compliant with the requirements.

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<sup>36</sup> The Act refers to 'audio-visual commercial communications' ("AVCCs"). AVCCs are defined as follows: "Audiovisual commercial communication' means a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which—(a) is designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity, and (b) accompanies or is included in a video in return for payment, or for other valuable consideration, or for self-promotional purposes; and forms of audiovisual commercial communication include advertising, sponsorship, teleshopping and product placement.' For ease, 'advertises' and 'advertising' are used as a shorthand in this document.

b) Where the advertising is not marketed, sold or arranged by the VSP provider, VSP providers must take such of the measures set out in Schedule 15A of the Act as are appropriate for ensuring that advertising meets the general advertising requirements, provisions on prohibited and restricted products, and requirements relating to the transparency of advertising.<sup>38</sup>

c) In addition, VSP providers must clearly inform users that a video contains advertising (where they have knowledge of this or it has been declared to them by the uploader), regardless of whether or not they have marketed, sold or arranged that advertising.

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<sup>37</sup> In accordance with section 368Y(1) of the Act, VSP providers must ensure that advertising they market, sell or arrange complies with the advertising requirements in section 368X. These requirements are also set out on p.7 of this statement.

<sup>38</sup> Under section 368Z1(1) of the Act VSP providers must take appropriate measures in relation to advertising they do not market, sell, or arrange to ensure the relevant advertising requirements set out in section 368Z1(1)(c) are met.

## A2. Designation of the ASA

### Designation pursuant to section 368T of the Communications Act 2003 of the Advertising Standards Authority in relation to the regulation of audiovisual commercial communications included in video-sharing platform services

#### WHEREAS:

- (1) Section 368(T)(2) of the Communications Act 2003 ('the Act') confers functions on the Office of Communications ('Ofcom') for the regulation of video-sharing platform ('VSP') services, including the regulation of audiovisual commercial communications included in such services;<sup>39</sup>
- (2) Section 368Z13 defines 'audiovisual commercial communication' ('AVCC') as a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which is designed to promote (directly or indirectly) the goods, services or image of a person pursuing an economic activity and accompanies or is included in a video in return for payment, or for other valuable consideration, or for self-promotional purposes. Forms of AVCC include advertising, sponsorship, teleshopping and product placement;
- (3) Section 368Z(1) of the Act distinguishes between AVCCs that are marketed, sold or arranged by the provider and AVCCs that are not. VSP providers are legally responsible for ensuring that AVCCs they market, sell or arrange meet certain requirements to protect users from potential harm. In this Designation we refer to this type of AVCC as 'VSP-controlled advertising';
- (4) Section 368T(1) of the Act confers a power on Ofcom to designate any body corporate satisfying the criteria set out in section 368T(9) to be, to the extent provided for in the Designation, the appropriate regulatory authority for the purposes of any provision of Part 4B of the Act;
- (5) Ofcom issued a public consultation on 26 May 2021<sup>40</sup> seeking views on its proposals for the regulation of AVCCs included in VSPs. These included a proposal to designate the Advertising Standards Authority Limited (Registered number 733214) ('the ASA') in relation to VSP-controlled advertising and also included Ofcom's preliminary assessment of the ASA against the criteria set out in section 368T(9);
- (6) Ofcom published a [statement](#) on 7 December 2021<sup>41</sup> which included its final assessment and reasons for deciding to designate the ASA in accordance with the proposals set out in the consultation. Accordingly, and to the extent provided for in this Designation, Ofcom is

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<sup>39</sup> Inserted by the Audiovisual Media Services Regulations 2020.

<sup>40</sup> Ofcom, [Consultation – Proposals for the regulation of advertising on video-sharing platforms](#), May 2021.

<sup>41</sup> Ofcom, Statement - The Regulation of advertising on video-sharing platforms, December 2021.

designating the ASA to be the appropriate regulatory authority under Part 4B of the Act for the purpose of VSP-controlled advertising;

(7) Ofcom, in making this Designation, is satisfied that:

- i. the ASA is a fit and proper body to be so designated;
- ii. the ASA has consented to being so designated;
- iii. the ASA has access to financial resources that are adequate to ensure the effective performance of the Designated Duty;
- iv. the ASA is sufficiently independent of providers of VSP services; and
- v. the ASA will ensure, in performing the Designated Duty, that it takes all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in exercising its powers, including in particular: to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;

(8) In concluding the above, Ofcom has taken particular account of its existing co-regulatory arrangements with the ASA for the regulation of broadcast and on-demand advertising, the existing self-regulatory system for online advertising administered by the ASA, and responses to the consultation referred to in Recital 5;

(9) Ofcom is satisfied that in making this Designation it has acted in accordance with its duties under the Act.

**NOW THEREFORE BY VIRTUE OF PART 4B OF THE COMMUNICATIONS ACT 2003, OFCOM HEREBY MAKES THE FOLLOWING DESIGNATION:**

1. The Office of Communications ('Ofcom'), in exercise of the powers conferred on it under section 368T of the Communications Act 2003 ('the Act'), hereby designates the Advertising Standards Authority Limited (Registered number 733214) ('the ASA'), for the period specified in Paragraph 11 below, to be the appropriate regulatory authority (as defined in section 368Z13 of the Act) for the purpose set out in Paragraph 5 of this Designation in relation to VSP-controlled advertising, to such extent, and subject to the Obligations, Conditions and other such circumstances, as described in this Designation.
2. This Designation incorporates the Schedule which forms part of this Designation for all purposes and includes such variations as from time to time may be made by Ofcom in accordance with paragraphs 9 and 10 of this Designation.



3. This Designation shall be legally binding and, as Ofcom's designee, the ASA shall be liable to Ofcom for any failure to carry out the Designated Duty in accordance with the terms of this Designation.

### **Interpretation of terms**

4. The following terms referred to in this Designation shall have the following meanings:
  - (i) 'Audiovisual commercial communication' or 'AVCC' means a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which (a) is designed to promote (directly or indirectly) the goods, services or image of a person pursuing an economic activity, and (b) accompanies or is included in a video in return for payment, or for other valuable consideration, or for self-promotional purposes; and forms of AVCC include advertising, sponsorship, teleshopping and product placement;
  - (ii) 'Designated Duty' has the meaning given in Paragraph 5 of this Designation;
  - (iii) 'Rules' shall be construed in accordance with Paragraphs 7(ii) and 7(iii) of this Designation;
  - (iv) 'relevant requirements of the Act' means the requirement set out in section 368Y(1) of the Act as it applies in relation to section 368Z of the Act;
  - (v) 'Notified Service Provider' means a provider of a VSP service which has been notified to Ofcom in accordance with section 368V of the Act;
  - (vi) 'VSP-controlled advertising' refers to an 'AVCC' that, in accordance with section 368Z(1) of the Act, is marketed, sold or arranged by the VSP provider.

Other terms and expressions used in this Designation shall have the meanings given to them in the Act.

### **The Designated Duty**

5. Ofcom designates the ASA to carry out the following duty:
  - (i) in accordance with section 368X(1) of the Act, to take such steps as appear to the ASA best calculated to secure that every Notified Service Provider complies with the relevant requirements of the Act.

### **Powers**

6. In carrying out the Designated Duty the ASA may exercise the following Powers, in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:

- (i) to determine, following a complaint or otherwise, whether a Notified Service Provider is contravening or has contravened any of the Rules;
- (ii) to draw up, and review and revise as appropriate, interpretive guidance concerning the Rules; and
- (iii) to carry out, commission or support (financially or otherwise) research in connection with its Designated Duty.

### **Obligations and Conditions**

7. In carrying out the Designated Duty and in exercising the Powers set out in Paragraph 6 above the ASA shall take such steps as appear to the ASA best calculated to comply with the following Obligations and Conditions:

#### *General*

- (i) to ensure that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:
  - a. to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;
  - b. to have regard, in relation to the carrying out of the Designated Duty, to the circumstances in which it may be necessary to carry out an impact assessment in accordance with Ofcom's duty under section 7 of the Act; and
  - c. to have regard, as appropriate, to complying and securing that its staff comply with section 393 of the Act (confidentiality);
  - d. to act in accordance with public law duties, including the duty of fairness.

#### *Rules and guidance*

- (ii) to publish (or have published) Rules for the purpose of securing that every Notified Service Provider complies with the relevant requirements of the Act;
- (iii) to ensure that the Rules are expressed as the relevant requirements of the Act (as amended from time to time) without material additions or omissions;

## Statement – Proposals for the regulation of advertising on video-sharing platforms

- (iv) to consult with Ofcom in securing the preparation of interpretative guidance to the Rules (and any subsequent material changes to that guidance), before it is published (or any changes to it are published);
- (v) to ensure that any guidance that the ASA draws up pursuant to this Designation is designed to aid interpretation of the Rules in light of the relevant requirements of the Act;

### *Compliance*

- (vi) to secure that every Notified Service Provider complies with the Rules relating to VSP-controlled advertising;

### *Scope*

- (vii) to determine, following a complaint or otherwise, whether a video is accompanied by or includes an AVCC;
- (viii) to determine, following a complaint or otherwise, whether an AVCC is included in a VSP service which has been notified to Ofcom in accordance with section 368V of the Act;
- (ix) to determine, following a complaint or otherwise, whether an AVCC constitutes VSP-controlled advertising, in accordance with relevant guidance drawn up by Ofcom;

### *Complaints handling, assessments/investigations and reporting obligations*

- (x) to have in place and publish appropriate and robust complaints handling processes for the assessment, investigation and adjudication of complaints in order to carry out the Designated Duty, such processes to be formulated in consultation with Ofcom;
- (xi) to handle complaints received by it in accordance with its obligations in this Designation ensuring that all complaints assessed under the statutory rules are recorded as such;
- (xii) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
- (xiii) to comply with the reporting obligations set out in the Schedule to this Designation;

### *Referrals*

- (xiv) following referral or appeal to Ofcom, to accept any decision of Ofcom as to whether AVCCs are included in a VSP service, and/or whether those AVCCs constitute VSP-controlled advertising;

- (xv) to inform Ofcom promptly of each case where the ASA is unable to secure compliance with the Rules, including where, in the opinion of the Chief Executive of the ASA, or such other official of the ASA as they may authorise, a Notified Service Provider has:
- a. failed to comply fully and promptly with a decision of the ASA;
  - b. failed to cooperate fully and promptly with reasonable requests of the ASA, including but not limited to requests for the provision of information relating to their degree of control over advertising included in their platforms; or
  - c. has committed one or more breaches of the Rules of sufficient seriousness so as to warrant in the ASA's opinion investigation by Ofcom;

and to refer those matters to Ofcom (together with copies of all the relevant evidence and submissions) for consideration by Ofcom with a view to the exercise of powers reserved to Ofcom;

- (xvi) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where the ASA considers that a Notified Service Provider may have breached the Rules due to the inclusion in the service of an AVCC that contains material likely to encourage or to incite the commission of crime, or to lead to disorder, where the potential contravention may be such as to justify the need for Ofcom to take urgent action under section 368Z6 of the Act (suspension or restriction of service for inciting crime or disorder);

#### *Cooperation with Ofcom*

- (xvii) to cooperate fully with Ofcom at all times, including:
- a. to consult Ofcom, as appropriate, in cases where there is any doubt in connection with the Designated Duty and/or the ASA's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and
  - b. to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
- (xviii) to inform Ofcom in cases where it is unclear whether a service that has not been notified to Ofcom in accordance with section 368V of the Act constitutes a VSP service for the purposes of section 368S(1) of the Act, and it appears on the face of it that there may have been a contravention of the Rules;

- (xix) to consult Ofcom in cases where it is unclear whether a video is accompanied by or includes an AVCC;
  - (xx) to consult Ofcom in cases where it is unclear whether an AVCC constitutes VSP-controlled advertising;
  - (xxi) to consult Ofcom, as appropriate, where there is a lack of clarity in connection with the operation of any of the ASA's Powers, Obligations and Conditions or any other provision of this Designation;
  - (xxii) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Duty for any reason and/or can no longer satisfy the relevant requirements of section 368T(9) to be the appropriate regulatory authority in relation to the Designated Duty and in each case to use its best endeavours to resolve any such issues promptly; and
  - (xxiii) in the event that the ASA no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Duty and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Duty, setting out its reasons.
8. For the avoidance of doubt, this Designation shall not be revoked except in accordance with Paragraphs 15 and 16 below.

#### **Variation of this Designation**

9. Ofcom may vary this Designation at any time, subject to Ofcom notifying the ASA in writing not less than thirty days prior to the date that the proposed variation is to come into force in order to give the ASA a reasonable opportunity to comment or, exceptionally, in such lesser period as Ofcom considers appropriate.
10. The ASA may also request a variation of this Designation at any time for Ofcom's consideration. Any variation will take effect only on Ofcom signing and issuing a notice of variation to that effect.

#### **Duration of this Designation**

11. This Designation is to have effect from 7 December 2021 and to continue until:
- a. 31 October 2024 ('the expiry date'), or
  - b. the relevant provisions of the Act regarding the regulation of VSPs are superseded by the Online Safety Bill (as enacted), or

c. until such time as it is revoked in accordance with Paragraphs 15 and 16 below.

12. No less than twelve months before the expiry date, Ofcom and the ASA shall discuss in good faith a renewal of this Designation for such period as they may agree; the decision whether or not to renew shall rest with Ofcom.

#### **Review of this Designation**

13. Ofcom may review this Designation at any time where, in Ofcom’s reasonable opinion, regulatory development, including any changes in relevant legislation, make it appropriate to do so.

#### **Publication of this Designation**

14. Ofcom shall publish this Designation in such manner as it considers appropriate for bringing it to the attention of persons who, in its opinion, are likely to be affected by it. The ASA shall publish this Designation in the same manner as Ofcom and subsequent to Ofcom having first published it.

#### **Revocation of this Designation**

15. Ofcom may revoke this Designation in accordance with section 368T(7) of the Act.

16. Ofcom must revoke this Designation if it is no longer satisfied that the ASA is able to satisfy the requirements for being the appropriate regulatory authority set out in section 368T(9) of the Act or if the ASA no longer consents to being designated, having first notified Ofcom in accordance with the obligations in Paragraph 7(xxiii) above.

17. In exercising its powers to revoke under Paragraphs 15 and 16 above, Ofcom will give reasonable notice to the ASA of its intention to revoke and will give the ASA an opportunity to make representations and, where in the circumstances Ofcom considers it appropriate, an opportunity to take any remedial steps within such period as Ofcom requires; that period of notice being of such period as Ofcom shall determine to be appropriate in all the circumstances.

#### **For the Avoidance of Doubt**

18. The duties and obligations that apply to each of Ofcom and the ASA as an appropriate regulatory authority include the obligations and conditions that apply to the ASA under Paragraph 7 of this Designation.

19. For the avoidance of doubt, the ASA is not the appropriate regulatory authority in relation to any function set out in the Act that does not relate to the Designated Duty (including in particular, all functions not relating to AVCCs that constitute VSP-controlled advertising, the

power under section 368Z2 of the Act to determine in relation to AVCCs included in an VSP service that a Notified Service Provider is contravening or has contravened the relevant requirements of the Act and the powers under section 368Z(4) to 368Z(8) associated with the enforcement of those requirements).

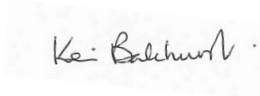
20. Where the ASA has determined that there has been a contravention of the Rules, and referred the case to Ofcom, Ofcom will determine whether there has been a contravention of any of the relevant requirements of the Act, and the ASA's investigation and recommendation will not be binding on Ofcom;
21. Any Notice given by the ASA under Paragraph 7 (xxii) and (xxiii) above, would not have the effect of revoking this Designation unless or until Ofcom decided to revoke in accordance with Paragraphs 15 and 16 above.
22. The ASA may not designate or otherwise appoint any body or person to act as the appropriate regulatory authority in its place.
23. Where the ASA is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose concurrently with or in place of the ASA (section 368T(3) of the Act) and will notify the ASA as appropriate.
24. To the extent that no body is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose (section 368T(2) of the Act).
25. Where there is any inconsistency or conflict between the provisions of this Designation and the provisions of the Act, the provisions of the Act shall prevail.

#### **Ofcom's Commitments to the ASA**

26. Ofcom shall consider any referrals from the ASA promptly and if having taken into account any representations from the relevant Notified Service Provider, Ofcom determines that section 368Y of the Act has been contravened, take such steps as it considers appropriate by way of enforcement action against the Notified Service Provider.
27. Where appropriate, Ofcom undertakes to keep the ASA informed of its intended actions during this process, subject to any confidentiality requirements or any legal restriction on disclosure.
28. Subject to any restriction in law, Ofcom shall provide the ASA with such assistance and information as the ASA may reasonably require from time to time under section 368T(4) and 10(c) of the Act, including, where appropriate, assisting in relation to the carrying out of impact assessments.

29. Ofcom shall have regard to any comments made by the ASA under Paragraph 9 and shall consider in good faith any requests made by the ASA from time to time under Paragraph 10 for a variation of the Designation.

Signed:



Date: 30/11/2021

**Kevin Bakhurst**

**Group Director, Broadcasting and Online Content**

**Person duly authorised in accordance with Paragraph 18 of the Schedule to the Office of Communications Act 2002**

## **SCHEDULE**

### **Reporting Obligations and Key Performance Indicators**

#### **Reporting Obligations**

1. The ASA shall report to Ofcom on the carrying out of its Designated Duty as set out below.
2. The ASA shall by no later than the end of April each year, provide Ofcom with a written report detailing its exercise of the Designated Duty in the preceding calendar year.
3. The report shall include quantitative and qualitative information regarding complaints received and handled and the monitoring of the standards set out in the Rules.
4. In particular, the report in paragraph 3 of this Schedule, shall include the following information:
  - (i) Number of complaints received about VSP-controlled advertising on notified VSPs broken down to show the number of complaints received in respect of each such service;
  - (ii) The number of VSP-controlled advertisements on notified VSPs about which complaints have been received broken down in respect of each individual VSP;
  - (iii) Prior to investigation, the number of VSP-controlled advertisements assessed against the statutory rules and which rules they are assessed against (an assessment of such



an advertisement against one or more statutory rules is henceforth referred to as a “case”). These should be broken down in respect of each individual VSP;

- (iv) Number of cases taken to investigation stage under the statutory rules, the rules they were investigated under and the status of those investigations i.e. 'informal investigation' and 'formal investigation' (using the same categories as for completed broadcast advertising cases). These should be broken down in respect of each individual VSP;
  - (v) The number of cases that after investigation were (a) upheld and (b) upheld in part and the rules they breached, and whether or not the investigation was referred to Ofcom for consideration of a Sanction. These should be broken down in respect of each individual VSP;
5. The Chair and/or Chief Executive of the ASA will report in person on the matters set out in this designation to Ofcom's Content Board at meetings of the Content Board as reasonably requested by Ofcom.
  6. The ASA shall forthwith provide such information and assistance to Ofcom as Ofcom shall from time to time reasonably require for purposes connected with Ofcom's (or another designated body's) functions under Part 4A of the Act and generally to assist Ofcom to review how effectively the ASA has exercised, or is exercising its Designated Duty.

**Key Performance Indicators**

7. The ASA shall seek to resolve 80% of cases within the number of working days indicated in the table below, depending on the nature of the case.

<b>Turnaround times for complaint cases (in working days)</b>	
No Additional Investigation	15
No Additional Investigation after Council Decision	20
Informal Investigation	35
Formal Investigation (Harm & Offence)	60
Formal Investigation (Misleadingness)	115

## A3. Guidance on advertising harms and measures

A3.1 Under the VSP Framework, VSP providers are required to take such of the measures listed in Schedule 15A of the Act as are appropriate to ensure the protection of minors from restricted material<sup>42</sup>, and the protection of the general public from relevant harmful material<sup>43</sup>, in all videos, as well as advertising<sup>44</sup>, regardless of whether it is under the control of the VSP provider. Schedule 15A also includes additional measures that apply specifically to non-VSP-controlled advertising (i.e. advertising that is not marketed, sold or arranged by the VSP provider). Ofcom’s guidance in relation to these measures is intended to operate within the overall framework for regulating VSPs set out in the Harms and Measures Guidance statement<sup>45</sup>. It is important that providers read the below proposals in conjunction with Ofcom’s Harms and Measures Guidance<sup>46</sup>, as well as our guidance on control of advertising, to ensure they have a full understanding of how the VSP Framework is applied in relation to advertising.

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<sup>42</sup> As set out in the Harms and Measures Guidance, restricted material refers to videos which have or would be likely to be given an R18 certificate, or which have been or would likely be refused a certificate. It also includes other material that might impair the physical, mental or moral development of under-18s.

<sup>43</sup> As set out in the Harms and Measures Guidance, relevant harmful material refers to any material likely to incite violence or hatred against a group of persons or a member of a group of persons based on particular grounds. It also refers to material the inclusion of which would be a criminal offence under laws relating to terrorism; child sexual abuse material; and racism and xenophobia.

<sup>44</sup> The Act refers to ‘audio-visual commercial communications’ (“AVCCs”). AVCCs are defined as follows: “Audiovisual commercial communication’ means a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which—(a) is designed to promote, directly or indirectly, the goods, services or image of a natural or legal person pursuing an economic activity, and (b) accompanies or is included in a video in return for payment, or for other valuable consideration, or for self-promotional purposes; and forms of audiovisual commercial communication include advertising, sponsorship, teleshopping and product placement.’ For ease, ‘advertises’ and ‘advertising’ are used as a shorthand in this document.

<sup>45</sup> Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material – Statement](#), October 2021.

<sup>46</sup> Ofcom, [Video-sharing platform guidance: Guidance for providers on measures to protect users from harmful material](#), October 2021.

## Terms and conditions relating to advertising requirements

Include terms and conditions to the effect that—

- (a) a person must not upload to the service a video containing advertising for a prohibited product,
- (b) a person must not upload to the service a video containing advertising for an alcoholic drink unless it meets the general advertising requirements and the requirements in relation to restricted products, and
- (c) a person must not upload to the service a video containing advertising for anything else unless it meets the general advertising requirements.

- A3.2 Ofcom considers this measure as fundamental to the VSP Framework, and we consider it is unlikely that effective protection of users can be achieved without having this measure in place and it being implemented effectively.
- A3.3 Terms and conditions in the context of VSP regulation may include community guidelines; community standards; terms of service; or any other phrases used to describe a set of rules or standards which govern the type of content permitted on a VSP.
- A3.4 We expect terms and conditions relating to advertising to be clear about the general advertising requirements and provisions on prohibited and restricted products (set out in the Communications Act 2003, Part 4B, S368Z, S368Z1(1)(c) and Schedule 15A), and for VSP providers to clearly communicate those terms to their users.<sup>47</sup> We would encourage VSP providers to have a specific advertising-related section within their terms and conditions for these requirements, which should include a clear explanation of what material constitutes advertising and is therefore subject to the requirements.
- A3.5 We also encourage VSP providers to produce a user-friendly summary of the advertising requirements. Any such summary should use simple language, minimise jargon and avoid technical terms.
- A3.6 VSP providers should provide examples of what would and would not be permitted to comply with these advertising requirements.
- A3.7 The consequences of breaching terms and conditions also need to be clear to all users. In addition, VSP providers may wish to consider the role that peer-to-peer learning and advice can play potentially in increasing understanding of advertising rules among users<sup>48</sup>.

## Transparency of advertising

- A3.8 Under the VSP Framework advertising must be transparent to users of the service. This principle applies to all VSP advertising, regardless of whether it is marketed, sold or

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<sup>47</sup> These requirements are set out on p.7 of this statement.

<sup>48</sup> Yonder, [User experience of potential online harms within video-sharing platforms: a report for Ofcom](#), March 2021.

arranged by the provider of the service<sup>49</sup>. The relevant requirements and appropriate measures to ensure transparency, and the guidance relating to these measures, are outlined below.

### Functionality for users to declare advertising

Provide functionality for a person uploading a video to the service to declare whether, as far as they know or can reasonably be expected to know, the video contains advertising.

- A3.9 This measure relates to VSP providers putting in place a functionality for users who upload user-generated videos to declare whether or not those videos contain advertising. Such a functionality should be easy to use, accessible for all users, and suitable for all devices which may be used to upload videos to the platform.
- A3.10 To ensure that users engage with this functionality, we encourage providers to include it as a mandatory step in the video upload process. For example, users could be prevented from completing the video upload process until they have confirmed whether or not the video contains advertising.
- A3.11 An example of best practice would be for this functionality to also enable users to provide additional information about the advertising contained within the video, such as the third party with which the person uploading the content has partnered and the product or service being advertised. On some platforms, this functionality could enable the person uploading the content to “tag” the relevant third parties in the video.

### Terms and conditions about declaring advertising

Include terms and conditions to the effect that a person uploading a video must use the functionality to make such a declaration.

- A3.12 Where a VSP provider has taken the measure of providing a functionality to declare the presence of advertising, we expect the provider to communicate this requirement (i.e. to make use of the functionality to declare advertising) to users clearly within the terms and conditions. We would encourage VSP providers to include this requirement in a specific advertising-related section within the terms and conditions.
- A3.13 VSP providers should ensure clarity and understanding among users about how to declare advertising on their platform.<sup>50</sup> As with all terms and conditions, these terms and conditions must be robustly and consistently enforced to ensure effective implementation.

### Communicating the presence of advertising to users

- A3.14 The legislation requires that, where a VSP provider is aware that a video contains advertising (i.e. the provider knows that content uploaded to the service contains

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<sup>49</sup> [Communications Act 2003](#), Part 4B, Section 368Z1(6) and Schedule 15A(5).

<sup>50</sup> Ofcom/Yonder, User experience of potential online harms within video-sharing platforms: a report for Yonder, March 2021.

advertising or the person who uploaded the content has told the VSP provider that this is the case), the VSP provider must clearly inform its users about the presence of the advertising<sup>51</sup>.

- A3.15 We recommend that, once advertising has been declared using the above functionality, VSP providers use an automated system to communicate its presence to users. Providers must also communicate the presence of any other advertising which they know about, and it is for the provider to determine whether this is done through an automatic or manual process.
- A3.16 We encourage VSP providers to communicate the presence of advertising in a consistent way across their platform, such as through the use of a singular predetermined word or phrase. For example, the ASA already encourages the use of a clear and prominent identifier, such as “#ad”, to communicate to audiences the presence of advertising in social media posts<sup>52</sup>. VSP providers may wish to adopt a similar approach to inform users about the presence of the advertising across their platforms.
- A3.17 We expect information about the presence of advertising to be displayed prominently to users. We also expect such communication to take place as early as possible in a user’s exposure to the advertising. Depending on the nature of the platform, this may be before the user views the content or at the point at which the user views the content. Regardless, users should not need to click on, or otherwise engage with, the content to be informed that it is advertising.
- A3.18 In line with the example of best practice outlined above, where the person who uploaded the content has provided additional information about the advertising, such as the third-party with which they have partnered or the product or service being advertised, we would expect this information to also be clearly communicated to users.

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<sup>51</sup> [Communications Act 2003](#), Part 4B, S368Z1(6).

<sup>52</sup> See: <https://www.asa.org.uk/advice-online/recognising-ads-social-media.html>