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# Video-sharing platforms: who needs to notify to Ofcom?

## Statement

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[Statement: Video-sharing platforms – who needs to notify to Ofcom?](#) – Welsh overview

**STATEMENT:**

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# 1. Overview

## Notification requirements – in brief

New regulations applying to UK-established video-sharing platform (VSP) services came into force on 1 November 2020. From 6 April 2021, VSP providers in UK jurisdiction are legally obliged to submit a formal notification of their service to Ofcom.

Providers must make their own assessment of whether their service meets the statutory criteria and should therefore be notified. The guidance, [Video-sharing platforms: who needs to notify to Ofcom?](#) (referred to as “the final guidance”), published alongside this statement is intended to help providers understand whether they fall within scope of the definition of a VSP for the purposes of the Communications Act 2003.

Where it appears to Ofcom that a service meets the statutory criteria but has not notified to us, we have statutory powers to request information in order to make an assessment, and to take enforcement action if a provider has failed to notify. This can include a financial sanction and directing the provider to notify.

We consulted on draft guidance [Video-sharing platforms: who needs to notify to Ofcom?](#) (referred to as “the consultation document”) between 19 November 2020 and 14 January 2021.

The purpose of our guidance is to help service providers understand:

- a) whether they are providing a service that is subject to the statutory framework for VSP services under the Communications Act 2003 (“the Act”); and
- b) when and how they might need to notify their service to Ofcom.

We received 10 responses in total: six from service providers, two from trade associations and two from individuals. We have carefully considered all responses in finalising our guidance and have published all non-confidential responses on [our website](#). We also discussed our guidance during the consultation period with service providers and other regulatory authorities. Where appropriate, we have reflected their comments in this statement and our final guidance.

We received responses on a range of issues raised by the draft guidance, including concepts specific to the criteria in the Act such as ‘essential functionality’, ‘dissociable section’ and ‘general control’, as well as wider considerations such as freedom of expression and the regulation of online news services. We set these out in detail, and our conclusions, in section 2 of this document.

We have published our final guidance alongside this statement. The most notable changes to our guidance are around the following points:

- a) **Dissociable section** – we have made changes to the final guidance document to clarify that this criterion relates specifically to the ‘principal purpose’ test and should be considered against the wider service’s principal purpose or essential functionality.
- b) **Essential functionality** – we have clarified our use of the European Commission’s essential functionality guidelines and high-level approach to the concept in our final guidance.

- c) **General control over what videos are available** – we have added further examples to clarify our guidance in this area, in response to specific points raised during the consultation.
- d) **Jurisdiction** – we have removed references to the criteria for establishment in the UK during the transition period, following the UK's departure from the European Union on 31 December 2020.

In section 3 of this document, we outline the further clarifications which have been made in response to developments in the legal framework and the development of our notification web portal.

Providers can email Ofcom at [VSPRegulation@ofcom.org.uk](mailto:VSPRegulation@ofcom.org.uk) if they have any questions about the final notification and scope requirements. However, we are unable to provide legal advice about individual services and it remains the responsibility of each provider to satisfy the relevant legal obligations around notification.

## 2. Consultation responses and Ofcom's conclusions

- 2.1 This section summarises the key issues raised by respondents and Ofcom's response to them, including changes we have made to the final guidance document. The final guidance has been published alongside this statement on our website.
- 2.2 Our consultation document asked five questions, based broadly on the VSP criteria set out in the Act and the process of notification. We also asked respondents whether they had any other comments.

**Question 1:** Do you have any comments on proposed guidance around subsection 1 of section 368S of the Act – whether the provision of videos to members of the public is the principal purpose of the service or a dissociable section of the service, or an essential functionality of the service?

**Question 2:** Do you have any comments on proposed guidance around subsections 2(a)-(c) of section 368S of the Act – provision via an electronic communications network; provision on a commercial basis; and the level of control providers have over videos?

**Question 3:** Do you have any comments on proposed guidance around assessing whether a service is within jurisdiction of the UK?

**Question 4:** Do you have any comments on proposed guidance around notification of a service, including the detail provided in Annex 2?

**Question 5:** Do you have any comments on any other part of the guidance which is not explicitly set out in questions 1-4?

- 2.3 This statement is structured along the same lines as these questions, taking each of the relevant issues raised by respondents in turn.

### Providing videos to the public as an essential functionality of a service, or principal purpose of a service or dissociable section (Q1)

#### Provision of 'videos' and 'programmes'

- 2.4 In paragraphs 3.16-3.19 of the consultation document, Ofcom set out that the term 'videos', defined in the Act under section 368Z13, encompasses a diversity of content, including professional-grade video produced, commissioned and uploaded by established media companies.

#### What respondents said

- 2.5 One respondent recommended that Ofcom more clearly delineate between content that is created by users and content that is created by professionals. It was noted that the

“Commission’s [essential functionality] guidelines explicitly highlight ‘the role played by user generated videos’ in determining whether or not a platform is a VSP” and that “the Directive intends for professional video content, created by media organisations, which is not already captured by existing codes relating to news media and journalism, to be regulated under the new rules for on-demand platform services (ODPS) rather than those for VSPs.” This response also suggested that regulating content created by media organisations in the same way as user-generated content would risk “further confusing an already complex regulatory environment”.

### Ofcom’s response

- 2.6 The legal framework at both a European and UK level makes clear that VSPs include both programmes and user-generated video and this is reflected in the broad definition of “video” in section 368Z13.
- 2.7 Under Article 1 of the 2018 revised Audiovisual Media Services Directive (“the 2018 Directive”), the provision of both programmes<sup>1</sup> and user-generated video<sup>2</sup> are central to the definition of a VSP: “the principal purpose of the service or of a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility”.
- 2.8 Under the transposing Act:
- a) A **VSP** is defined in section 368S(1) as having the principal purpose or essential functionality of the “provision of videos to members of the public”; and
  - b) **Videos** are defined broadly in section 368Z13 as “a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which constitutes an individual item irrespective of its length (and which is not an audiovisual commercial communication)”.
- 2.9 The Audiovisual Media Services Directive distinguishes the differing levels of control that providers have over the content that is available, rather than the type of content itself, which in practice could be similar on both ODPS and VSP services. Consequently, ODPS regulation reflects the fact that on-demand providers control what content is available on their service; whereas the VSP regime recognises that the content is provided by third parties (whoever they may be). ODPS regulation therefore sets standards rules for the content of programmes, similar to television, while VSP regulation is aimed at the systems and measures providers have in place to protect users from harmful material. The key

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<sup>1</sup> **Programmes** are defined as “a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature-length films, video clips, sports events, situation comedies, documentaries, children’s programmes and original drama”.

<sup>2</sup> **User-generated video** is defined in Article 1 of the 2018 Directive as “a set of moving images with or without sound constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user.”

determinant, therefore, is not the identity of the content creator but the level of control the provider has over that content being made available to its users.

- 2.10 We have considered this point at paragraph 3.49 of the final guidance and consider the relationship between ODPS and VSP regulation further from paragraph 2.40 of this statement.

## **Livestreaming**

### **What respondents said**

- 2.11 One respondent to our consultation wanted clarification around whether it is the intention to specifically provide a definition of ‘livestreaming’ within legislation or guidance.
- 2.12 The respondent noted that the legislation refers to video-sharing platforms generally, without specific reference to livestreaming and that the 2018 Directive referred to “programmes, user-generated videos or both [...] the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing”.
- 2.13 The respondent was concerned that the diversity of services caught by the legal definition of a ‘VSP’ was not clearly acknowledged, despite having implications for the way that the Regulations are implemented.

### **Ofcom’s response**

- 2.14 Livestreaming is captured under the broad definition of ‘video’, which reflects the approach of the 2018 Directive. Notably, the European Commission’s original proposals for the amendments to the Audiovisual Media Services Directive referred to the ‘storage’ of a ‘large amount’ of content, though this wording was revised. Further, a Recital proposed by the Council of the European Union which referred to the measures applicable to video-sharing platforms being designed to deal only with stored content was not adopted into the text of the 2018 Directive.<sup>3</sup> The final version of the 2018 Directive consequently does not include any exception for livestreaming.
- 2.15 Noting the diversity of content and range of services captured by the legal definition of a VSP, we have added a short explanatory reference to livestreaming at paragraph 3.13 of the final guidance. We have also acknowledged the diversity of video content on VSPs both here and at paragraph 3.5 of the final guidance. Further consideration to the specific functionality of the range of services falling under the definition of a VSP will be given in our draft Guidance for providers on regulatory requirements and measures to protect users from harmful material, which will be published for consultation later this spring.

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<sup>3</sup> See: Note from [General Secretariat of the Council of the European Union](#) (17 April 2018)

## Reference to the European Commission’s guidelines on essential functionality

- 2.16 In paragraphs 3.29 to 3.34 of the consultation document, we made reference to the European Commission’s [guidelines](#) on the practical application of the essential functionality criterion in our consideration of ‘essential functionality’.

### What respondents said

- 2.17 One industry response questioned the emphasis Ofcom placed on the European Commission’s guidelines. Though it recognised the cross-border nature of VSPs and need for consistent regulation, it was concerned that the guidelines were given excessive weighting, and that “it is important to recognise that it is the view of one non-UK regulator, and does not constitute or replace the law”. In line with this, it recommended that Ofcom revisit its approach to essential functionality to focus on the criteria in UK law, as set out in section 368S(1)(b) of the Act.

### Ofcom’s response

- 2.18 Ofcom accepts that the primary focus of our guidance on essential functionality should be on the criteria in section 368S. The Commission guidelines were never intended to be prioritised over the UK legislation, although they are clearly relevant and provide context around the criteria in the 2018 Directive and the underlying legal concepts which have been reflected in domestic legislation. The guidelines are also important in the context of helping to maintain a consistent approach to implementation between the UK and EU member states.
- 2.19 For clarity, we have amended references to the guidelines in our final guidance, as well as removed reference to the Commission’s guidelines in section 2 of our final guidance, on the ‘legal framework’.
- 2.20 We have made clear at paragraph 3.35 of the final guidance document that the Commission’s guidelines provide indicators of essential functionality, rather than ‘criteria’ or a ‘checklist’ of things that a platform must have in place to be considered within scope or must not have in place to be considered out of scope. Demonstrating that a service has the ‘essential functionality’ of providing videos to the public under section 368S(1)(b) will rely on analysis of a service in its entirety.

## Essential functionality

- 2.21 In paragraphs 3.28 to 3.35 of the consultation document, we considered the ‘essential functionality’ criterion.

### What respondents said

- 2.22 As set out above, one respondent was concerned that Ofcom relied too heavily on the European Commission’s essential functionality guidelines. It suggested that the essential



functionality guidelines failed to acknowledge the meaning of the word ‘essential’ and did not create a meaningful margin for services to which the provision of video is more than ancillary or minor, but less than essential. The respondent considered that essential functionality had been designed as a ‘fail-safe’ to ensure that, where video is a very important part of a service, but falls short of a ‘primary purpose’, that service would still be covered by the legislation. However, the essential functionality guidelines appear to extend this fail-safe to include services of which video content forms *any* part.

- 2.23 The respondent suggested that Ofcom made similar errors in its interpretation of ‘essential functionality’, notably:
- a) At paragraph 3.30 of the consultation document, Ofcom had misconstrued any video functionality which is not ancillary or minor to be “essential” necessarily;
  - b) As a result, the consultation document focused overly in paragraphs 3.31 and 3.32 on what constitutes “ancillary” and “minor” functionality, rather than on what is “essential”; and
  - c) At paragraph 3.6(a) of the consultation document, by referencing “a service which hosts videos and which allows users to upload videos and engage with other users’ content, supported by advertising or subscriptions”, Ofcom failed to acknowledge the wide spectrum of services encompassed by this description and varying importance of video content to each of them.
- 2.24 It was recommended that Ofcom revise its approach to essential functionality, suggesting that essential functionality should only mean “absolutely necessary” for the service or, put another way, its primary functionality.

### Ofcom’s response

- 2.25 We recognise that video not being a ‘minor part’ of or ‘merely ancillary’ to a service does not *necessarily* mean that it is essential (noting the wording of Recital 5 that this ‘could’ indicate essential functionality); and the importance of considering ‘essential functionality’ as a concept in itself. We have added drafting at paragraph 3.32 of the guidance to reflect this. We do not consider that essential functionality means “absolutely necessary” (i.e. that the service could not exist without it) or “primary functionality”, as this would in effect bring it in line with the principal purpose test. We suggest that providers might broadly consider whether the absence of video would, for instance, significantly reduce the amount of content on their service, the service’s utility or function, or its level of use by or attractiveness to users (including the extent to which it is able to attract commercial partners or advertisers).
- 2.26 Though we agree that any video functionality which is not ancillary or minor is not essential automatically, Recital 5 does conceptualise ‘essential functionality’ in opposition to what is not ‘minor’ or ‘merely ancillary’ and, as such, we do find it helpful to have considered the meaning of these concepts as at paragraphs 3.31 and 3.32 of the consultation document. We have made minimal changes to our consideration of these concepts, now at paragraphs 3.33 and 3.34 of the final guidance, but have updated

drafting in paragraph 3.31 (paragraph 3.30 of the consultation document) to reflect more of the context provided in Recital 5.

- 2.27 We have also clarified the example at paragraph 3.6(a) of the consultation document (3.7(a) of the final guidance).

## Video as a ‘minor part’ of a service

- 2.28 In our consideration of ‘essential functionality’, the consultation document explored the meaning of video as a ‘minor part’ of a service at paragraphs 3.30 and 3.32.

### What respondents said

- 2.29 One industry respondent highlighted the principle at 3.32 of the consultation document, agreeing that public video content should be “considered as a ‘minor part’ of a service where it plays an insignificant role in the service overall”.
- 2.30 Its response explained that many online platforms offer several different elements or aspects of their service, accessible in different areas of the platform, but suggested that not all of these elements will represent an “essential functionality” of the overall service; rather some will be only a “minor part.” The response suggested that, if an element of a service is significantly less used or less visited than the core platform, it cannot be considered an “essential functionality” and should not be subject to VSP regulations.
- 2.31 The response also agreed with Ofcom that whether video is a ‘minor part’ of a service could be assessed on a quantitative basis, recommending the use of comparative analysis to determine which elements of a platform are an “essential functionality”. For instance, if the amount of public user-generated video content shared in a distinct element of a platform represents only a small proportion (e.g. 10% or less) of overall user-generated content on the platform, this should be deemed a “minor part” (and not subject to regulation as a VSP).

### Ofcom’s response

- 2.32 We note that the consideration in the consultation document and final guidance of a ‘minor part’ of a service is within the context of its ‘essential functionality’ which, under the Act, only applies to the service as a whole. Where an element of a service is so distinctive as to be considered a ‘dissociable section’ of it, it may still have the ‘principal purpose’ of providing videos to the public, for which the ‘minor part’ consideration would not be relevant. To clarify this point, we have moved the guidance on the ‘dissociable section’ of a service within the section on a ‘principal purpose’.
- 2.33 However, if the relevant element of the service *is not* wholly distinctive from the rest, it will still be relevant to consider its place (and the importance of video) within the wider service overall under the ‘essential functionality’ criteria.
- 2.34 We agree that quantitative and comparative analysis can be used to assess the criteria here. However, at this stage, we do not intend to specify the amount of video on a platform or an element of a platform to determine its essential functionality (‘thresholds’),

given that the relevant metrics vary on a case-by-case basis. For instance, taking the example provided, where the amount of public video on an element of a service represents ~10% or less of the overall user-generated content shared on the platform. In this case, though video could account for less than 10% of the total items of content on the platform, it could represent a much higher figure in terms of reach, or length of time spent consuming that content, or content that is monetised. We have noted that a range of quantitative measures may be relevant here and that it is not possible to define clear thresholds at paragraph 3.34 of our final guidance document.

- 2.35 More generally, it should be noted that any quantitative measures suggested in the guidance are not intended to set ‘thresholds’, nor are they the only relevant indicators determining whether a service meets the legal criteria. Quantitative indicators may not always be available and, in many instances, qualitative assessments around service functionality, purpose or business model are key factors for consideration. We have also clarified this point at paragraph 3.4 of the final guidance.

## **Dissociable section**

- 2.36 In paragraphs 3.10-3.15 of the consultation document, we considered the ‘dissociable section’ concept to help providers’ assess whether their service as a whole, or a distinct part of it, would meet the definition of a VSP.

## **What respondents said**

- 2.37 We received feedback from another audiovisual regulatory authority during the consultation period. It was considered that the guidance could make greater reference to the considerations of the New Media Online (NMO) decision which acts as the basis of the ‘dissociable section’ concept. Further, it was noted that providers should also reasonably consider their service’s overall ‘principal purpose’ or ‘essential functionality’ before considering the application of the dissociable section criteria.

## **Ofcom’s response**

- 2.38 As explained above, we have moved the guidance around the ‘dissociable section’ concept into the consideration of a service’s principal purpose to clarify the relevance of these concepts.
- 2.39 Ofcom acknowledges the points raised to us during the consultation period, and has made relevant changes to the final guidance document to:
- a) bring the example from what was previously paragraph 3.13 of the consultation document up to paragraph 3.26 of the final guidance, to take the lead more closely from the relevant case law;
  - b) clarify the role of technical architecture in such assessments, citing the NMO case at paragraph 3.25 of the final guidance;
  - c) make our consideration of the relevant factors in paragraph 3.27 of the final guidance (previously paragraphs 3.12 and 3.14 of the consultation document) more concise; and

- d) reiterate the importance of considering services in their entirety at paragraph 3.29.

## General control, and provision through an electronic communications network and on a commercial basis (Q2)

### Relationship between VSPs and ODPS

- 2.40 As set out above, Ofcom recognises that in certain cases, the criteria and regulatory frameworks for ODPS and VSP services are intersectional. In paragraph 2.4 of our consultation document, we set out that there may be cases where “a platform consists of a distinguishable ODPS and VSP service, where a dissociable section of VSP service meets the ODPS criteria, or where a VSP service carries an ODPS.” Each of these scenarios are difficult to assess in the abstract, and specific cases should be assessed on their own facts.

#### What respondents said

- 2.41 In stakeholder engagement during the consultation period, some providers already subject to ODPS regulation raised concerns that their services, or elements of them, would be ‘double regulated’ as VSPs.

#### Ofcom’s response

- 2.42 The intention of VSP regulation is not to ‘double regulate’ services which are already subject to the provisions of the ODPS framework. Recital 3 of the 2018 Directive recognises that the VSP and ODPS frameworks are intersectional, noting for instance that channels or services under the editorial responsibility of a provider can be offered on a video-sharing platform. In these instances, those providers will need to continue to comply with ODPS provisions under the 2010 Directive.
- 2.43 Ofcom acknowledges that the regulatory environment is complex, though notes that a *single service* should not be subject to regulation as both an ODPS and VSP, as it cannot be both an ODPS (characterised by editorial control) and a VSP (characterised by the lack of full editorial control) simultaneously. A single platform or provider may offer multiple ‘services’, some of which are ODPS and some VSPs. We have made amendments at paragraph 2.14 of our final guidance to clarify instances where *providers* may need to consider both regulatory frameworks regarding distinctive aspects of their offering.
- 2.44 We have also clarified at paragraph 3.8(c) of the guidance that certain services which simply act as ‘gateways’ to other ODPS or VSP services may not be considered as VSPs themselves, such as TV interfaces.
- 2.45 Further, we have made additional clarification at paragraphs 3.49 and 3.50 of the guidance around the provision of content on VSP services by users and the different factors that might indicate control over the range of content available on providers’ services.

## General control over what videos are available

- 2.46 One of the key factors in assessing a service is the level of control it has over (a) what videos are available on it (the ‘range’ or ‘selection’); and (b) the organisation of videos within the service. Our consultation document set out that while ODPS services are determined to have control in both aspects, VSPs typically do not determine the selection of videos on their service.
- 2.47 At paragraph 3.47 of the consultation document, we set out that “Undertaking content moderation will generally not be considered as exercising control over what videos are available for the purposes of the Act.”

### What respondents said

- 2.48 One respondent agreed with Ofcom’s view that undertaking content moderation – in itself – should not exclude services from VSP regulation, and that “the key determinant will be the role the service plays in actively choosing the selection of content available on the service.” The response argued that while reactive content moderation does not equate to selection of content, effective pre-moderation – or screening of content to determine whether or not it can be surfaced to users – advances beyond this point and meets the objectives of the AVMSD in protecting users from illegal or harmful content before it is surfaced. It was recommended that Ofcom state in its guidance that effective pre-moderation or ‘screening’ should exclude platforms from regulation as a VSP.

### Ofcom’s response

- 2.49 Given the variety of ways in which content moderation methods may be implemented, each case will need to be assessed closely and on its own basis. It is unlikely that ‘screening’ user-generated content for specific material would constitute ‘selection’ within this framework. This practice may not meaningfully affect the ‘range’ or ‘catalogue’ of content any more than checking for this content after the video has been surfaced. However, providers may exert more control where they, for instance, decide which user submissions are uploaded, in order to collate a specific catalogue of content. We have updated the guidance at paragraph 3.51 to reflect this point.
- 2.50 If a service has general control over the selection of content and meets the criteria for an ODPS service, it will be subject to the corresponding [ODPS framework in Part 4A of the Act](#). As noted above, ODPS providers must ensure that their service complies with content-specific rules under the ODPS framework, whereas the VSP framework reflects the fact that providers do not have general control over what videos are available and requires providers to protect users through measures relating to the systems and process they have in place.

## Establishment and jurisdiction (Q3)

- 2.51 Section 4 of our consultation document outlined the criteria and contextual factors around determining whether a provider is within UK jurisdiction. As the consultation was

published ahead of the UK's exit from the EU on 31 December 2020, it encompassed both the transition criteria<sup>4</sup> and post-transition criteria,<sup>5</sup> while the final guidance only makes reference to the latter. In that section, we also outlined our approach to co-operation with European national regulatory authorities.

## Proposed amendments to jurisdictional criteria

### What respondents said

- 2.52 The Age Verification Providers Association (AVPA) wrote that, when applying section 386S(5), as amended by the [Audiovisual Media Services \(Amendment\) \(EU Exit\) Regulations 2020](#), Ofcom “should not consider a service to fall under the jurisdiction of an EEA State if that state has not yet commenced the required legislation to incorporate the Directive into their domestic law.” This would prevent affording services a ‘safe-harbour’ in the time before transposition in that State.

### Ofcom's response

- 2.53 We note that the relevant legal tests for determining jurisdiction are defined in Part 4B of the Act and refer to the existence of the required connection of a VSP provider with the United Kingdom, i.e.:

- a) **Case A:** where the provider provides the service or dissociable section using a fixed establishment in the United Kingdom for an indefinite period and effectively pursues an economic activity in doing so;
  - i) In this case, where it is necessary to determine between a number of places of establishment in the EEA or the United Kingdom, a service or dissociable section will be regarded as provided from the place of establishment which is the centre of the provider's activities regarding that service or dissociable section.
- b) **Case B:** where the provider is not under the jurisdiction of an EEA state for the purposes of the Audiovisual Media Services Directive, and has a group undertaking in the United Kingdom;
  - i) In this case, a provider will be considered not to be under the jurisdiction of an EEA state if it is: (a) not established on the territory of an EEA state in accordance with paragraph (1) of Article 28a of the AVMSD; or (b) not deemed to be established on the territory of any EEA state in accordance with paragraphs (2) to (4) of that same Article.

- 2.54 The applicable legal tests do not allow for a consideration of whether the EEA state where the relevant VSP provider is established has implemented the provisions of the 2018

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<sup>4</sup> Deriving from the AVMSD as transposed into section 368S(2)(d) of the Act.

<sup>5</sup> Deriving from the [Audiovisual Media Services \(Amendment\) \(EU Exit\) Regulations 2020](#), amending sections 368S(2)-(9) of the Act.

Directive. In order to determine jurisdiction, Ofcom is required to have regard to a provider's presence in the EEA in all circumstances.

## Establishment in the post-transition period

### What respondents said

- 2.55 One industry respondent noted that determining whether a platform is in UK jurisdiction may not be clear cut in all situations and appreciated that it is not possible to provide a definitive list of factors. They suggested that the indicative list provided at paragraph 4.6 of the consultation document was helpful.
- 2.56 Another industry respondent noted that the case A criteria for a determination of the UK's jurisdiction under section 368S(4) (as amended) and (6) of the Act amount to a repetition of the EU establishment test and a continuation of the position prior to 1 January 2020, where the establishment of a service in an EEA member state other than the UK would have given rise to the direct application of the country of origin principle under the E-Commerce Directive.
- 2.57 This response highlighted providers' concerns that Ofcom and another regulator in an EEA state could apply different interpretations of the establishment test, noting that inconsistent application of the establishment test would be prejudicial and disruptive in several areas of regulation for operators who have structured their business on the basis of the country of origin principle. It suggested that, where they are considering the 'centre of activities' (the question at paragraph 4.6 of the consultation document), two regulators should not come to different conclusions.
- 2.58 Another respondent asked Ofcom to provide clarification at paragraphs 4.10(c) and 4.10(d) of the consultation document around where jurisdiction would fall to the UK or an EEA state, including around whether there could be a 'centre of activities' in both the UK and in the EU. They also queried whether determining that a provider's centre of activities is in the UK would rule it out of being in jurisdiction of an EU member state. They also suggested Ofcom clarify that where the centre of the provider's activities relating to the VSP is an EU member state, jurisdiction will fall to the EU member state.

### Ofcom's response

- 2.59 Ofcom appreciates the precedent set by the country of origin principle and notes that, under Part 4B of the Act, the presence of a provider in the EEA is an integral part of the assessment of UK jurisdiction under both case A (where the centre of activities of a VSP with presence both in the UK and the EEA is to be determined) and case B (with reference to the establishment of group undertakings) criteria.
- 2.60 However, whether EEA states will take into consideration the presence of a provider in the UK when determining whether they have jurisdiction over that provider is a matter of EU law. Situations in which the same provider falls within the jurisdiction of both the UK and an EEA state may be unavoidable, for example, in cases where a provider is pursuing an effective economic activity in both countries but its centre of activity is in the UK. In these



circumstances, the relevant provider would be established in the UK under the case A criteria in the Act but may also fall under the jurisdiction of the relevant EEA state pursuant to its national legislation transposing the 2018 Directive.

- 2.61 In other cases, a provider may fall under the jurisdiction of both the UK and an EEA state as a result of the way in which has structured its services across the two countries (see paragraph 2.73 below and paragraph 4.6 in the final guidance).
- 2.62 Where possible, Ofcom will endeavour to work with national regulatory authorities (NRAs) in EEA states in order to ensure regulatory consistency. We discuss this further in the next section.
- 2.63 We have made changes at paragraph 4.10 of the final guidance document to clarify how the criteria may apply in the post-transition period, including clarification at 4.10(c) that where the centre of the provider's activities relating to the VSP is an EU member state, jurisdiction will fall to the EU member state. We have also made distinction between the scenarios in 4.10(c) and 4.10(d) of the consultation document (now 4.10(b) and 4.10(e) of the final guidance).

## **Co-operation with European authorities**

### **What respondents said**

- 2.64 Following on from their concerns outlined in paragraphs 2.56 and 2.57 above, one respondent welcomed Ofcom's intention to co-operate with relevant NRAs, as set out at 4.13 of the consultation document, and encouraged "Ofcom to collaborate with relevant regulators in EEA member states as closely as possible, to ensure consistent application of the establishment test".
- 2.65 Another respondent asked for clarification around the legal framework at paragraph 4.13 of the consultation document, where we noted that Ofcom would continue to have oversight of services in UK jurisdiction which are accessible to users across the EEA. Ofcom was asked to clarify where it would continue to cooperate with EU NRAs, assuming this would be in relation to the examples set out in paragraphs 4.10(a) and 4.10(b) of the consultation document (which refer to where a VSP provider's sole establishment is in the UK).
- 2.66 Another response noted the need for Ofcom to be "mindful of the risks that potentially divergent approaches to VSP regulation pose to the competitiveness of UK digital markets", and the importance of close regulatory alignment and cooperation with European authorities.

### **Ofcom's response**

- 2.67 In the post-transition period, Ofcom will continue to co-operate with NRAs in EEA states for the purposes of the AVMS Regulations. Government has laid [a statutory instrument](#), amending section 368Z12 of the Act, to provide Ofcom with the power to co-operate with national regulatory authorities in the EEA, for the purposes of facilitating the carrying out



of our functions under Part 4B of the Act, or the carrying out by the other national regulatory authorities of their functions under the AVMSD in relation to VSPs.

2.68 Circumstances in which Ofcom may consider it appropriate to co-operate with NRAs in EEA states may include:

- a) addressing jurisdictional matters, such as determining where a provider's centre of activities as regards the relevant VSP service is;
- b) where an NRA in an EEA state wants to bring concerns regarding a service which is available to users in that state – but the provider of which is solely established in the UK – to Ofcom's attention, or vice versa;
- c) co-ordinating enforcement action, where possible, in cases where the same VSP provider falls under the jurisdiction of both the UK and an EEA state; or
- d) broader engagement with NRAs in EEA states to ensure cross-border compliance and the exchange of best practices.

2.69 We have made changes at paragraphs 4.13 and 4.14 of the final guidance document to clarify these circumstances, with reference to the draft amendments to section 368Z12.

## Other areas of clarification in Ofcom's guidance

### What respondents said

2.70 One respondent asked Ofcom to provide additional clarification regarding scenarios where a VSP service has more than one provider across Europe.

2.71 This respondent also asked for clarification at paragraph 4.4(a) of the consultation document regarding the significance of a provider's central administration or head office, including whether this is in reference to a European or global head office.

2.72 This respondent also suggested that Ofcom's guidance could more clearly reflect the wording of the [Audiovisual Media Services \(Amendment\) \(EU Exit\) Regulations 2020](#), with reference to case A and case B, the definition of 'VSP provider' and the references to 'EEA states', rather than EU member states.

### Ofcom's response

2.73 Ofcom recognises that there may be instances where the entity that provides the VSP service in the UK is different to the entity that provides the service in the EEA. In these instances, providers would need to assess whether the entity providing the UK service is established in the UK pursuant to the case A criteria. In addition to the factors set out in paragraphs 4.3 and 4.5 of the final guidance, providers may need to consider, as part of that assessment, the extent to which any UK service differs from the corresponding EEA service or where the relevant functions for the UK service are carried out. We have set this out at paragraph 4.6 of the guidance document.

2.74 Ofcom considers that the location of a provider's central administration or head office will be most relevant when considering its centre of activities within the UK and EEA areas, and

have therefore moved this indicator into paragraph 4.5 of our final guidance. We note that this alone is not the sole indicator of a providers' centre of activities as regards the VSP service. We have also clarified, at paragraph 4.3 of the final guidance, that a UK subsidiary may constitute a 'fixed establishment in the UK' for the purposes of the case A criteria.

- 2.75 We have reviewed the wording in the final guidance to clarify that what matters when it comes to determining jurisdiction under the Act is the place of establishment of the VSP provider *in relation to the relevant service*. The provider of the relevant VSP service will ordinarily be the entity named in its terms and conditions as the provider of the relevant service. However, the country where that provider is incorporated will not *necessarily* be the same as the place where it is established, or is deemed to be established, pursuant to the Act in relation to the VSP service in question.
- 2.76 For simplicity, we have removed references to 'primary' and 'secondary' criteria as in our draft consultation document to match the references to 'case A' and 'case B' criteria as in Part 4B of the Act.
- 2.77 As regards the references to EEA states or EU member states, we note that the process of incorporating the Audiovisual Media Services Directive into the EEA agreement remains ongoing. In order to align the wording of the guidance to the wording of the Act and to future-proof the guidance for when the process has been completed, we have changed references to EU member states to EEA states. We have provided a link to the relevant EFTA website, monitoring the progress of the incorporation process at footnote 24 of the final guidance document.

## Notification (Q4)

### Notification information

- 2.78 In section 5 of our consultation document, we outlined the relevant legal obligations around notification and the process of notification, providing indication of the type of information that might be collected at notification in Annex 2.

### What respondents said

- 2.79 One response queried the relevance or need for the provision of information required at paragraph A2.2(h) of Annex 2 – information relating to how the service is within UK jurisdiction.
- 2.80 Another considered that Ofcom may wish to seek "information on the beneficial ownership of the service, rather than confining itself to the specific legal entity operating it".
- 2.81 Another response broadly agreed that the information likely to be required by Ofcom at notification is reasonable, though questioned the rationale for providing a public contact (as proposed at paragraph A2.2(f) of the consultation document), where a relevant person's details would be published on Ofcom's website. It was noted that this could open said person up to multiple vexatious communications from unverifiable sources.

## Ofcom's response

- 2.82 Collecting information around how the service is within UK jurisdiction will help Ofcom understand and assess cases where cooperation with EEA states is needed, as outlined in paragraphs 2.68 of this document.
- 2.83 While information relating to how a VSP provider is within UK jurisdiction may include information on beneficial ownership, particularly under case B where establishment for the purposes of the Act relies a group undertaking, Ofcom does not believe it will be necessary to collect this information ordinarily. Under section 368Z10, Ofcom may collect similar information in a specific case, where it is relevant to its determining whether a person falls under the jurisdiction of the UK.
- 2.84 We recognise the risk highlighted around a public contact and clarify both here and in our final guidance at paragraph A2.2(f) that this does not need to be a personal contact – for instance, providers may wish to cite the contact details of a provider, service or department.

## Other comments on the consultation (Q5)

### Application to online news

#### What respondents said

- 2.85 The News Media Association (NMA) welcomed that Ofcom had provided specific examples around news at paragraphs 3.7(b) and 3.13 of the consultation document, as well as the note at paragraph 5.5(a) that a provider taking editorial control over the content of a service would mean it ceases to be a notifiable VSP.
- 2.86 The NMA continued that “oversight of the new regime must be carefully framed to avoid bringing online newspapers and their content, whether on newspapers’ own websites or on third party platforms into scope of the AVMS Regulations”. The NMA asked for further clarification in particular around:
- a) The ability of news publishers to organise, offer and present video content in ways which attract and retain an audience, including their ability to innovate and develop services without falling within scope of the Directive;
  - b) Livestreamed content which is journalistic content in itself (not simply “embedded within journalistic content”) should not fall within scope, and this should be set out for the avoidance of doubt;
  - c) Newspapers’ video content must remain wholly exempt from AVMS regulation and outside of Ofcom’s enforcement activity, including both editorial content and advertising (which could be mischaracterised as ‘dissociated’ from the main purpose); and

- d) The maintenance of the self-regulatory status of the ASA and CAP code in respect to news publishers and their advertising, processing and related practices, and this should be set out for the avoidance of doubt.
- 2.87 The NMA added that, when enforcing the regime, Ofcom must avoid the “indirect imposition of controls over newspaper video content out of scope of the AVMS Regulations, by VSPs within scope of the AVMS regime”. The NMA wrote, it is “vital that Ofcom’s enforcement of the regime does not put news publishers and their trusted, lawful, code-compliant, video journalistic content, at risk of refusal, restriction or exploitation by video sharing platforms”.

### Ofcom’s response

- 2.88 Government has made clear that newspaper websites as a whole are outside the scope of the regulations, except where they provide a dissociable service independent of the main journalistic activities of the service provider. In its May 2019 response to its consultation on Audiovisual Media Services, DCMS made it plain that news providers’ services may fall within scope depending on the facts of the case: “standalone parts of newspapers’ websites providing video services which are independent of the journalistic activities in content and form do fall into scope”.<sup>6</sup>
- 2.89 As such, news providers’ services may fall within scope where a dissociable part of their service meets the VSP criteria – for instance, if a standalone section of their service was dedicated to allowing users to upload content, with no connection to the main activity of providing news in written form. We anticipate such occasions to be very rare, however, given that news providers often exert editorial control over the content made available on their services – therefore not meeting the relevant criteria for a VSP under section 368S(2)(c)(i) of the Act, around not having general control over what videos are available on the service.
- 2.90 DCMS continued, “The use of videos on websites, blogs and news portals which are connected to the journalistic activities falls outside the scope of the new provisions”, which Ofcom also interprets to include livestreamed content. Ofcom has clarified the principle of connections between the main activity of providing news in written form and video in paragraph 3.26 of the final document, and the potential role of video as an ancillary accessory to news in written form at paragraph 3.33.
- 2.91 In regard to advertising on VSP services which are within scope, we will consult in the coming months on proposals for the regulation of advertising on video-sharing platforms, including how we will co-regulate with the ASA.
- 2.92 Users (which might include online newspapers) of services which are within scope will continue to be subject to the relevant providers’ terms and conditions around both video content and advertising. There is no carve-out in law for content or advertisements from

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<sup>6</sup> DCMS, [Consultation outcome: Audiovisual Media Services, Government response to public consultations on the government’s implementation proposals](#) (24 July 2019)

news organisations appearing on VSPs. Regarding the indirect imposition of controls, our upcoming draft guidance on the regulatory requirements and measures will outline how providers must take into account the rights and legitimate interest of their users in the application of appropriate measures, and the specific requirement to have a dispute procedure to ensure users are able to challenge content-related decisions.

- 2.93 For services that do not fall within scope, the content of their advertising will not be subject to statutory regulation. Regulatory investigations (for their individual pieces of content) will remain within the self-regulatory system of the ASA.

## **Freedom of expression**

### **What respondents said**

- 2.94 Ofcom received two responses from individuals raising concerns about freedom of speech and access to services. We also received a handful of emails from private individuals concerned that regulation of VSPs would result in censorship.
- 2.95 Many of these responses and emails focused on concerns around news and information. One respondent highlighted that, “just because the information in a video may not be the view of the mainstream media or the majority of the general public, it doesn’t mean it isn’t true.” This respondent also asked for clarification around the notification process, querying whether “notification mean[s] that OFCOM has to be told in advance what they may be posting, and if so, does this mean that OFCOM has complete or large control over what is/isn’t uploaded?”

### **Ofcom’s response**

- 2.96 Ofcom is required to act in accordance with Article 10 of the European Convention of Human Rights and uphold freedom of expression in the carrying out of its regulatory duties. Article 10 recognises that people must be able to freely share and receive ideas and information without unnecessary interference.
- 2.97 VSP regulation is focused on several specific areas of harm, meaning providers are required to implement appropriate measures to protect under 18s from material which might impair their physical, mental or moral development; and to protect the general public from criminal content and material likely to incite violence or hatred. In the implementation of measures, providers should take into account the rights and legitimate interests of users and ensure they provide opportunities for users to challenge content-related decisions. Our draft guidance on the regulatory requirements and measures will provide more detail on these issues when it is published for consultation later this spring.
- 2.98 Under the VSP Framework, notification will not require providers to tell Ofcom in advance of what is posted to their service, nor will Ofcom have any control over what is or is not uploaded to the service.

## Online harms

- 2.99 In paragraph 2.7 of the consultation document, we noted that “The Government has stated its intention for VSP regulation in the UK under Part 4B to be superseded by new legislation to be introduced following the Online Harms Bill.”

### What respondents said

- 2.100 A respondent noted Government’s intention for VSP regulation to be superseded by new regulation following the Online Harms Bill. While noting this is ultimately a matter for Government, the response suggested that Ofcom – as regulator of VSP requirements under the AVMSD and proposed regulator for new online harms rules – should acknowledge the temporary nature of VSP regulation. Ofcom was asked to work with Government to ensure a “sunset clause” for VSP regulation, thus avoiding a situation where platforms are subject to multiple regulatory regimes, and recommended that Ofcom make clear in the guidance that VSP regulation represents interim requirements ahead of the Online Harms Bill.

### Ofcom’s response

- 2.101 We acknowledge this point and also note that, in December 2020, Government re-stated its intention for the VSP Regulations to be superseded by the new Online Safety Bill by repealing the Audiovisual Media Services Regulations 2020.<sup>7</sup> Ofcom will operate the VSP framework until such time as it is no longer in force and will ensure that there is support for services transitioning to the future online harms regime.
- 2.102 Reflecting this point, we have added further clarification around our operation of the VSP framework at paragraph 2.4 of our final guidance document.

## Historic form and functionality

### What respondents said

- 2.103 The AVPA noted in its response to questions 1 and 2 of the consultation that “there will be a strong incentive for websites to make superficial changes in order to evade regulation”, and therefore recommended that assessment of whether a service meets the legal criteria should also make reference to its historic form and functionality.

### Ofcom’s response

- 2.104 Ofcom notes that the legal framework (section 368V of the Act) makes room for VSP providers to apply ‘significant differences’ to a notified service, but that they should inform Ofcom of this. VSP providers must also inform Ofcom before they cease operation of a notified VSP service.
- 2.105 However, to the extent that a service was within the scope of the regime as of 1 November 2020, the rules apply to that service unless or until the changes take effect – this is the case

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<sup>7</sup> [Online Harms White Paper: Full government response to the consultation](#) (December 2020).

**Statement: Video-sharing platforms – who needs to notify to Ofcom?**

regardless of whether or not the service has notified. While the service is within the scope of the regime, it is required to comply with the rules.

## 3. Other changes

- 3.1 Our overview has been updated to reflect the final status of the guidance. We have also made changes to section 2 of the final guidance document (Background and legislative context), further to those outlined above, to reflect the UK's exit from the European Union on 31 December 2020 and the provisions of the two statutory instruments laid by Government.
- 3.2 In section 4 of the final guidance (Jurisdiction) we have removed all references to the criteria for establishment during the transition period.
- 3.3 In parallel to our consultation, we have been developing our web portal for notification. We have made changes to section 5 of our final guidance to reflect the development of this system.
- 3.4 Where relevant, we have also made non-substantive changes to our text to better reflect the criteria and wording in the Act.