

VSP Regulation Team
Ofcom

By email

14 January 2021

Dear VSP Regulation Team,

Thank you for the opportunity to comment on Ofcom's draft guidance to help platforms understand if they need to notify that they are providing a video-sharing platform (VSP) service. Overall, we feel the guidance is clear and helpful, and a useful tool for platforms in determining whether they fall in scope of regulation. However, we recommend a few minor adjustments and clarifications to the guidance to properly reflect the intent, and deliver the objectives behind, the EU Audiovisual Media Services Directive (AVMSD).

Please find our responses to Ofcom's questions below.

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?

Ofcom's draft guidance points towards, and says platforms should have regard to, the [European Commission's guidelines](#) on the practical application of the "essential functionality" criterion of the definition of a VSP under the AVMSD. The Commission's guidelines - which include a clarifying section on "social media," highlighting the risks of user-generated content which facilitates the "possibility for users to shape and influence the opinions of other users" as justification for the inclusion of "certain social media services" within scope of the new VSP rules - make clear that the objectives of the new VSP requirements are to protect users from illegal or harmful content publicly created and/or broadcast by users.

The Commission's guidelines explicitly highlight "the role played by user generated videos" in determining whether or not a platform is a VSP. It is clear 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. **Ofcom's guidance should more clearly delineate between content created by users (intended to be in scope of VSP regulation) and content created by professionals and media organisations.** Suggesting that content created by media organisations could be regulated in the same way as user-generated content risks further confusing an already complex regulatory environment, with different sets of rules potentially being applied to types of content depending on where in an app or service they might be surfaced.

We agree with Ofcom's position that VSP regulation should focus on public content (defined by Ofcom as "content that is openly accessible to the public at large and not limited to specific

individuals”). As the consultation document notes, an important principle behind the AVMSD was “the potential for online services to influence large numbers of people in a similar manner to traditional television and broadcast services.” The intent was clearly to capture user-generated content with a similar wide reach, rather than everyday users’ private communications to their friends and family.

We agree with Ofcom that (user generated, public) video content should be “considered as a ‘minor part’ of a service where it plays an insignificant role in the service overall,” and that this could be assessed on a quantitative basis. Many online platforms offer several different elements or aspects of their service, accessible in different areas of the platform. Not all of these elements will represent an “essential functionality” of the overall service; indeed some will be only a “minor part.” If an element of an app or service is significantly less used or visited than the core platform, it cannot be considered an “essential functionality” and should not be subject to VSP regulations. **We recommend the use of comparative analysis to determine which elements of a platform are deemed an “essential functionality” of the service.** For example, if the amount of user-generated public video content shared in a distinct element of a platform represents only a small proportion (say, 10% or less) of overall user-generated content shared on the platform, this should be deemed a “minor part” of the service and should not be subject to regulation.

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?

In the draft guidance, Ofcom states that one of the “defining criteria” of a VSP, as set out in section 368S(2) of the Communications Act 2003, is that “the person providing [the service or dissociable section] does not have general control over what videos are available on it, but does have general control over the manner in which videos are organised on it.”

We agree that platforms that exercise general control over what videos are available on their service should not be considered in scope of VSP regulation. This is in keeping with the AVMSD, which defines a VSP as: “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.” Further, the Directive defines editorial responsibility as “the exercise of effective control both over the selection of the programmes and over their organisation... in a catalogue. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.”

We agree with Ofcom’s decision 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.” This is absolutely right. Reactive content moderation does not equate to selection of content. However, we would argue that effective pre-moderation, or screening of content to determine whether or not it can be surfaced to users, goes further than such reactive moderation, and meets the overall objectives of the AVMSD by protecting users from illegal or harmful content before it can be surfaced. **We recommend clarifying Ofcom’s guidance to illustrate that the exercise of effective pre-moderation or screening should exclude platforms, or distinct elements of platforms, from VSP regulation.**

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

We agree that a VSP should be deemed in UK jurisdiction *“if it provides the service, or a dissociable section of the service, through a fixed establishment in the UK for an indefinite period, and effectively pursues an economic activity in doing so,”* and agree with the criteria listed by Ofcom to determine this. This is in keeping with the Country of Origin principle.

However, particularly now that the UK is no longer a part of the EU, Ofcom will be mindful of the risks that potentially divergent approaches to VSP regulation pose to the competitiveness of UK digital markets. Ofcom will need to be cognisant of the importance of ensuring close regulatory alignment and cooperation with the new Irish Media Commission.

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

We broadly agree that the information likely to be required by Ofcom in any notification form is reasonable.

However, we question the rationale for providing a public contact, where a relevant person’s details would be published on Ofcom’s website. This has the potential to open up said person to multiple vexatious communications from unverifiable sources.

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

As this guidance notes, the Government has stated its intention for VSP regulation to be superseded by new regulation introduced following the Online Harms Bill. The Minister of State for Digital and Media has also been clear on this point, saying last October that this regulation “is intended to be replaced by a new statutory regime dealing with online harms which will be given effect by way of primary legislation.” While ultimately this is a matter for Government, as both regulator for the new the VSP requirements under the AVMSD, and proposed regulator for new online harms rules, Ofcom should note the temporary nature of VSP regulation and work with Government to ensure a “sunset clause” for VSP regulation, to avoid a situation where platforms are subject to multiple, competing regulatory regimes. **We recommend that Ofcom’s guidance should make clear that VSP regulation represents interim requirements which will be superseded by new rules following the Online Harms Bill.**

Thank you again for the opportunity to comment on this draft guidance. We hope this response helps Ofcom to develop an approach to VSP regulation which clearly delivers the aims and objectives of the AVMSD.

Yours sincerely,

Snap Inc.