

EXPLANATORY MEMORANDUM TO
THE AUDIOVISUAL MEDIA SERVICES REGULATIONS 2020
2020 No. 1062

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The Regulations transpose Directive (EU) 2018/1808, which amends Directive 2010/13/EU (known as the Audiovisual Media Services Directive (AVMSD)), into UK law. The AVMSD governs EU-wide coordination of national legislation on certain audiovisual media. The 2018 revising Directive aligns rules for on-demand programme services (ODPS) with those for linear TV, and introduces rules for video-sharing platforms (VSPs) for the first time.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the Regulations are subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Minister of State for Media and Data has made the following statement regarding Human Rights:

“In my view the provisions of the Audiovisual Media Services Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 These Regulations are being made in order to transpose Directive (EU) 2018/1808 into UK law. The Directive amends the AVMSD, the majority of which is given effect in UK law by provisions in the Communications Act 2003 (c. 21) (“the 2003 Act”). The Regulations amend the 2003 Act as required to transpose Directive (EU) 2018/1808 (and certain other relevant enactments).

- 6.2 It was necessary to notify certain measures in the Regulations to the Commission under Directive (EU) 2015/1535 (the Technical Standards and Regulations Directive). Although the majority of the Regulations simply transpose the Directive requirements (and such provisions are not notifiable), there are some additional elements not strictly required by the Directive, but which form part of UK transposition.
- 6.3 The first element is the requirement for a provider of a VSP to provide advance notification to the national regulatory authority before providing a VSP service. This puts the national regulatory authority on notice that the service is within scope of regulation. The second element is the requirement for a VSP provider to pay a fee to the national regulatory authority to cover a fair proportion of the costs of regulation. The Regulations also make minor amendments to existing provisions in the 2003 Act requiring advance notification to the national regulatory authority before providing an ODPS, which is the third element. These elements were all notified to the Commission. The three month standstill period ended on 16 September 2020 without the government being informed of any objections to the proposed measures.
- 6.4 Part 3 of the 2003 Act concerns linear TV and Part 4A concerns ODPS, and the Regulations make amendments to both these Parts. The Regulations insert a new Part 4B into the 2003 Act concerning VSPs.

7. Policy background

What is being done and why?

- 7.1 The Audiovisual Media Services Directive (AVMSD) governs coordination of national legislation on audiovisual media. See the Transposition Table which accompanies these Regulations on legislation.gov.uk for full details of how the revised Directive has been transposed. The main features of the 2018 revising Directive are the alignment of rules for ODPS with those for linear TV, and the introduction of rules for VSPs for the first time. The UK already meets a number of the new requirements in the revised AVMSD, which therefore do not require further implementation. For example, the UK already restricts advertising for foods high in fat, salt and sugar. The following requirements are the main features of the revising Directive which have required transposition.

Aligning rules for ODPS with those for linear TV

- 7.2 As an increasing number of consumers access audiovisual content online, the revising Directive seeks to level the playing field between different types of providers. It removes the distinction between linear TV and ODPS in the application of rules to protect audiences from harm. Audiovisual media services, which now include both linear TV and ODPS, will be required to protect minors from harmful content using measures proportionate to the potential harm, including through selecting the time of the broadcast, age verification tools or other technical measures. The Regulations enact this by ensuring that standards and advertising rules for ODPS are equivalent to those for linear. This is achieved through amendments and additions to Part 4A of the 2003 Act, which applies to ODPS. The changes ensure that viewers can expect equal standards and protections however they choose to access content.

Introducing rules for VSPs

- 7.3 The new statutory framework will mean that for the first time UK online services whose principal purpose (or an essential functionality of the service) is to provide access to the public to videos uploaded to the service by users, will fall within the scope of statutory regulation. The AVMSD requires VSP providers to take ‘appropriate measures’ to achieve specified protection purposes. The protection purposes are:
- i. to protect minors from content and advertising that might impair their physical, mental or moral development;
 - ii. to protect the general public from content and advertising that incites violence or hatred towards people with certain protected characteristics;
 - iii. to protect the general public from content and advertising that is a criminal offence under EU law to circulate (i.e. terrorist content, content containing child sexual exploitation and abuse, and racist/xenophobic content).
- 7.4 The system does not involve direct regulation of content on VSPs, which is the approach for linear TV and ODPS regulation. Instead, regulation is of the systems which VSP providers have in place to deliver the protection purposes. This reflects the different level of control that service providers have over the content provided by the respective services. For linear TV and ODPS, that is a high level of control because they have editorial responsibility for the content. VSP providers do not have editorial responsibility for content, as videos are uploaded by users; VSP providers are merely responsible for the organisation of content on the services that they provide.
- 7.5 The legislation makes provision for the ‘appropriate regulatory authority’ as the regulator. This will in the first instance be Ofcom, but Ofcom has the power to designate any body corporate to be the appropriate regulatory authority (a co-regulator). Any such body however must be a fit and proper body to be designated, have consented to be designated, have access to sufficient financial resources to carry out the regulatory functions, be independent of VPSs, and have regard to certain specified regulatory principles.

Appropriate measures

- 7.6 The Directive specifies ten measures which VSP providers can take to achieve the protection purposes under the revised Directive. These measures include having in place and applying certain terms and conditions of service for users; establishing and operating flagging and reporting mechanisms, age verification systems, systems to rate the content and easy-to-access complaints procedures; the provision of parental control systems; and the provision of media literacy measures and tools.
- 7.7 In line with the Directive, when considering which measures are needed to adequately protect users, VSP providers must take into account the nature of the content in question, the harm it may cause, the characteristics of persons to be protected as well as rights and legitimate interests (including the rights of the VSP provider, the person uploading the material and the general public interest, so for example privacy rights and the right to freedom of expression). VSP providers can take into account whether measures would be appropriate and proportionate. VSP providers will not necessarily need to adopt all ten measures listed in the Directive.

7.8 VSP providers will also be required to provide their users with an impartial redress mechanism for the settlement of disputes between users and the VSP provider. Ofcom is seeking views from industry and stakeholders on what form this should take and will issue guidance on this mechanism following consultation with industry.

Enforcement

- 7.9 There are various sources of information that could trigger enforcement action to assess whether a VSP provider has met the regulatory requirements. These may include for example: a spike in complaints to the appropriate regulatory authority (although the authority does not have a role in dealing with individual complaints); information received via compliance reporting; consumer research; referrals from interested parties, such as consumer interest organisations or those with specialist understanding of relevant issues; a whistle-blower; or intelligence received through other regulators.
- 7.10 The regulatory authority can use information gathering powers to investigate potential contraventions (with the power to enforce these should a VSP provider fail to respond). With regard to enforcement and sanctions, the appropriate regulatory authority will have a range of formal enforcement powers, similar to those under Part 3A of the 2003 Act for ODPS.
- 7.11 These include the power to issue an enforcement notice and impose a financial penalty if the authority determine that:
- i. a VSP provider has failed to provide advance notification of intention to provide a VSP service;
 - ii. a VSP provider has failed to take a measure which the authority consider would be appropriate to achieve the protection purposes, or that it has failed to implement the appropriate measures so as to achieve the protection purposes;
 - iii. there is or has been a breach of the duties of VSP providers;
 - iv. there is or has been a failure to inform viewers that a video contains an audiovisual commercial communication (where the VSP provider is aware that it does); or
 - v. there is or has been or a failure to provide an out of court redress mechanism.
- 7.12 Enforcement notices must specify the determination made by the appropriate regulatory authority, and specify steps for compliance. The regulatory authority has power to impose a financial penalty of up to 5% of a VSP provider's 'applicable qualifying revenue' (as defined) or £250,000 (whichever is greater) to ensure deterrence.
- 7.13 The appropriate regulatory authority also has power to issue a direction to suspend or restrict the entitlement to provide a VSP where there is a continuing breach of requirements despite an enforcement notice and/or penalty. The giving of such a direction has to be appropriate and proportionate to the seriousness of the breach. Breach of a direction is a criminal offence.
- 7.14 Ofcom will set out its view about the approach to enforcement, including the procedures it will follow in regulatory investigations, in enforcement guidelines.

Notification

- 7.15 The appropriate regulatory authority will oversee a notification regime for VSP providers established or deemed to be established in the UK. This means that VSP providers will be required to notify the authority that they provide a service that meets the statutory definition of a VSP and pay an annual fee set by the authority.
- 7.16 The Regulations include transitional provision, specifying that, in relation to VSPs which are already operating when the advance notification requirement comes into force on 6 April 2021, providers will be required to notify that they are already providing the service (rather than intending to do so) by 6 of May 2021. Once VSP providers have notified the authority in regard to the services they provide, Ofcom must establish and maintain a list of VSPs within UK jurisdiction.
- 7.17 Ofcom will be required to notify the European Commission of the contents of the list of VSP providers and of any updates to it.

Increased protection against harmful content for minors and the general public

- 7.18 The revised Directive requires that the most harmful content is subject to the strongest protections, such as age assurance or technical measures. It also reinforces protection on linear TV and ODPS against incitement to violence or hatred and public provocation to commit terrorist offences. The Regulations amend the 2003 Act to ensure that Ofcom is able to enforce these requirements for linear, ODPS and VSPs.

Updated rules for advertising, sponsorship and product placement

- 7.19 The revised AVMSD strengthens provisions to protect the public from inappropriate audiovisual commercial communications. There are existing rules governing advertising, and the Regulations amend the 2003 Act to include: prohibition of audiovisual commercial communications for electronic cigarettes and refill containers; and of product placement by undertakings whose principal activity is the manufacture or sale of electronic cigarettes or electronic cigarette refill containers, for linear TV and ODPS.
- 7.20 Advertising that is marketed, sold or arranged by VSP providers is subject to content requirements (because the provider has a high level of control over such advertising), e.g. prohibition of advertising of cigarettes or other tobacco products, and electronic cigarettes or electronic cigarette refill containers. Whereas in relation to videos uploaded to the service by users, the requirement is for VSP providers to take ‘appropriate measures’ to achieve the protection purposes, reflecting the lower level of control that the provider has over content on the service.

Extend quotas for ‘European works’

- 7.21 The revised AVMSD places obligations to promote European works for ODPS, who must have at least a 30% share of European works content in their catalogue and to ensure the prominence of this content. European works are audiovisual productions originating in a Member State or a State which is a party to the European Convention on Transfrontier Television, or made under an agreement between the European Union and a third country. This means that works originating in the UK will continue to be eligible to count towards quotas for such works throughout the European Union after the end of the transition period, a major asset to UK producers. The Regulations amends the 2003 Act to place this requirement on ODPS (previously this requirement was only placed on linear TV).

'Signal Integrity'

- 7.22 The revised AVMSD also contains measures relating to 'signal integrity.' These measures prohibit audiovisual media services from being shortened, altered, interrupted, or overlaid for commercial purposes, without the explicit consent of the media service provider.
- 7.23 In line with the government's recent approach to implementing EU Law during the transition period, transposed EU law will be subject to a sunset clause unless there are strong reasons why it should not be. The majority of provisions in the revised AVMSD being implemented align with government policy and will not be subject to a sunset clause.
- 7.24 However, 'signal integrity' will be sunsetted and cease to have effect after the end of the transition period. There is a lack of evidence that the behaviour prohibited by the provisions occurs in the UK. Furthermore, the relationship between parties that the provision seeks to regulate could be dealt with within contractual arrangements.

'Country of destination' levies for linear and on-demand services

- 7.25 The revised AVMSD allows the optional imposition of financial contributions upon media service providers, including those established in a different Member State but that are targeting their national audiences. As the Directive is being implemented following the government's guiding principles for implementing EU legislation, including ensuring that the UK does not go beyond the minimum requirements of the measure which is being transposed, save in exceptional circumstances, this provision is not being implemented.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 These Regulations do not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 These Regulations are not a consolidation. The majority of the amendments made are to primary legislation.

10. Consultation outcome

- 10.1 A consultation ran from 29 May to 22 August 2019, followed by a separate consultation between 23 July to 17 September 2019, which sought views on new requirements for video-sharing platforms, as well as proposed interim measures to implement these. The original and follow-up consultations received 35 and 20 responses respectively, from a broad range of interested stakeholders.
- 10.2 The majority of respondents agreed with the government's implementation approach in key areas, including aligning the protection of minors requirements between linear and ODPS; the use of the existing regulatory framework to implement advertising requirements, including for VSPs; implementing European Works quotas; and implementing new rules for VSPs.
- 10.3 There were some concerns that the Directive's definition of VSP was unclear. The majority of the stakeholders were broadly supportive of a requirement for the regulatory authority to issue guidance about how to determine whether entities fall

into scope as VSPs, though some noted the need for cooperation with the European Commission and other regulators to establish this.

A summary of the full consultation can be found here:

<https://www.gov.uk/government/consultations/audiovisual-media-services/outcome/audiovisual-media-services-government-response-to-public-consultations-on-the-governments-implementation-proposals>.

11. Guidance

- 11.1 Ofcom will be issuing new guidance and updating existing guidance, codes and license conditions, for various aspects of the Directive. For Broadcast services, this will include: obligations on service providers; content standards; and accessibility. For ODPS this will include: guidance for services to help them understand whether they meet this definition and fall under UK jurisdiction; content standards; and European Works.

Guidance for VSPs

- 11.2 Ofcom will publish guidance to help VSP providers understand what is required in order to comply with their new obligations.
- 11.3 The legislation will define VSP in accordance with the AVMSD criteria and Ofcom will issue guidance for services to help them understand whether they meet this definition and fall under UK jurisdiction. This guidance, which Ofcom plans to publish in draft form for consultation, will take into account the ‘essential functionality’ guidelines which have been published by the European Commission (‘Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the AVMSD’, available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2020.223.01.0003.01.ENG&toc=OJ:C:2020:223:TOC).
- 11.4 Ofcom will also have a duty in legislation to produce guidance on the application of the ‘appropriate measures’ which VSP providers can take to protect users. Ofcom’s guidance will make clear that VSP providers must take into account freedom of expression when designing and implementing their systems to protect users from the required areas of harm.

12. Impact

- 12.1 The impact on business, charities or voluntary bodies is estimated to be £9.82 million equivalent annual net direct cost to business. The impact will affect linear broadcasters, ODPS and VSP providers. The impacts on linear broadcasters are expected to be zero, since the UK already satisfies the advertising provisions in the amending AVMSD. The impacts and costs to business relating to OPDS will mainly result from the increased investment in UK content, as ODPS providers will now be required to meet quotas relating to where their content originates from to promote European works within OPDS.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses, however, section 3 of the 2003 Act requires that enforcement action by Ofcom is proportionate. With regards to European Works quotas requirements, there are exemptions for services with a low turnover or low audience share, or where the regulatory authority considers that requiring the provider to comply would be impracticable or unjustified because of the nature or theme of the service.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that the Department for Digital, Culture, Media and Sport will continue to work closely with Ofcom and relevant industry and consumer representative organisations to address any concerns appropriately if any arise. In relation to assessing the implementation of the VSP regime, we will be commencing research to assess this, carried out by external consultants over the next three years, in three annual phases. The evaluation will take place through interviews with the VSPs in scope of the regime. This will:
- i. allow both parties to better understand the burdens to business under the VSP regime and how to address these for the upcoming online harms statutory regime;
 - ii. offer valuable insight into the practicalities of delivery and implementation which is likely to be applicable to the online harms regime; and
 - iii. offer insight into business readiness and how organisations in scope cope with regulation and compliance.
- 14.2 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, The Minister of State for Media and Data has made the following statement:

“I consider that it is not appropriate to make provision for review of the amendments made by these Regulations, firstly because in respect of regulation of linear TV and on-demand programme services the amendments are to an existing regime which is in primary legislation and it would not make sense to review the amendments in isolation; and secondly because in respect of the regulation of video-sharing platform services, the 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, and that regime will have its own statutory post-legislative review process.”

15. Contact

- 15.1 Michal Cichowlas at the Department for Digital, Culture, Media and Sport, Telephone: 0207 211 6826 or email: michal.cichowlas@dcms.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Janis Makarewich-Hall, Deputy Director for Press, Radio and Media Freedom, at the Department for Digital, Culture, Media and Sport, can confirm that this Explanatory Memorandum meets the required standard.

The Minister of State for Media and Data at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.