



Internet Association Response To Ofcom Call For Evidence: Video-Sharing Platform (“VSP”) Regulation

1. Introduction

Internet Association (“IA”) welcomes the opportunity to respond to Ofcom’s call for evidence on video-sharing platform (“VSP”) regulation.

IA represents over 40 of the world’s leading internet companies¹ and is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA’s mission is to foster innovation, promote economic growth, and empower people through the free and open internet. In 2018, IA established a London office to constructively engage in the internet public policy debate in the UK.

We are firm believers in the benefits that technology brings to everyday life and the economy, and for the potential that internet innovation has to transform society for the better. IA economic analysis shows that the internet sector contributes £45 billion to the UK economy each year, and is responsible for nearly 80,000 businesses and around 400,000 jobs.² Recent IA polling found that three-quarters of British people believe that the internet had “made their lives easier and more enjoyable.”³

IA believes that the internet sector needs a balanced policy and regulatory environment to continue, and grow, its contribution to the UK economy, consumers, and society in the future. The internet sector can be a vital post-pandemic growth-driver, but there is a risk to this potential if policies and regulations are introduced which will damage the ability of the internet sector to: 1) drive UK economic growth; 2) provide services that people value highly; and 3) make a positive contribution to society.

Within IA’s membership there are companies that offer services which could meet the definition of a VSP, and which could also fall under Ofcom regulatory jurisdiction. Other potential VSP services offered by IA member companies could fall under the jurisdiction of another European country. Further, IA notes that the UK government’s long-term intent is for VSP regulation under the Audiovisual Media Services Directive (“AVMSD”) to be delivered by its Online Harms White Paper (“OHWP”) proposals, and that the specific VSP regime is therefore an interim measure.

Given all of this, in this response IA seeks to provide general evidence and information, irrespective of where potential member company VSP services may be regulated, and to engage on issues that are also relevant to the UK government’s eventual online harms regulatory framework. In 2019, IA responded to the DCMS consultations on AVMSD implementation in general in August, and specifically on VSP regulation in September, and this document builds on those two responses.

2. Internet Companies Take Significant Action To Keep People Safe Online

IA notes that the AVMSD has three main aims with regards to areas which should be regulated, and requires that Member States put in place appropriate measures to protect:

¹ IA Member Company List: <https://uk.internetassociation.org/our-members/>

² <https://uk.internetassociation.org/publications/measuring-the-uk-internet-sector/>

³ <https://uk.internetassociation.org/internet-association-launches-uk-presence-with-poll-showing-overwhelming-public-backing/>



- a) minors from programmes, user-generated videos, and audiovisual commercial communications that may impair their physical, mental, or moral development;
- b) the general public from programmes, user-generated videos, and audiovisual commercial communications containing incitement to violence or hatred; and
- c) the general public from programmes, user-generated videos, and audiovisual commercial communications containing content which is a criminal offence (for example provocation to commit a terrorist offence or child pornography).

The internet industry is absolutely committed to these protections, and to reducing harms more broadly. Nobody wants the internet to be a place where anyone feels unsafe, or people are misled. IA recognises that there are legitimate concerns about illegal and harmful content, and internet companies take meaningful steps to protect people from harm on their services. Initiatives span both online content and commercial communications, and include:

- Investing significant resources in both human content moderation and, partnering with third sector organisations and researchers, developing machine-learning technology to detect and remove harmful material more quickly.
- Working closely with law enforcement, and forming the Global Internet Forum to Counter Terrorism (GIFCT) to curtail the spread of terrorism and violent extremism online.
- Partnering with a number of organisations across the globe, including the Internet Watch Foundation, to work together to remove harmful CSAM from the internet.
- Forming internal online safety councils and designating employee teams to improve online safety and promote a productive and welcoming environment online.
- Creating clear pathways for people to report inappropriate or harmful content, so that it can be addressed under companies' terms and conditions.
- Investing in fact-checking services and using AI and other technology to tackle false information.
- Publishing detailed transparency reports which help people understand the prevalence of harmful content on their services and action taken by companies to remove that content.
- Educating users about how online services operate and how to make the best use of them. Efforts to educate people on what is appropriate on online platforms helps guide behaviour and can help minimise the need for moderation.

Of particular relevance to AVMSD implementation is the work of IA member companies with the European Commission since 2016 to implement a Code Of Conduct On Countering Illegal Hate Speech Online. IA believes that this Code Of Conduct is a good example of industry working with policymakers to develop solutions that protect people from harmful content in a balanced, proportionate manner, and sets a positive benchmark for future codes.

IA notes that the AVMSD lists a number of measures in relation to VSPs that may achieve the aims of the AVMSD in protecting users:

- i. including in the terms and conditions of a service, and enforcing, the Directive's requirements to protect minors, and limit incitement to violence or hatred and EU criminal offences;



- ii. including in the terms and conditions of a service, and enforcing, the Directive's requirements around video advertisements;
- iii. creating a functionality whereby users can declare whether there are any advertisements in videos they upload;
- iv. providing transparent and user-friendly mechanisms that allow users to report or flag videos which are harmful as defined by the Directive. The provider must also explain to users of the platform what effect has been given to reports and flagging by users;
- v. establishing and operating effective age verification mechanisms with respect to content which may impair the physical, mental or moral development of minors;
- vi. creating a system whereby users can rate content harmful content as defined by the Directive;
- vii. providing parental control systems with respect to content which may impair the physical, mental or moral development of minors;
- viii. establishing and operating transparent, easy-to-use and effective procedures for handling and resolving users' complaints about videos; and
- ix. promoting media literacy on the service and introduce tools to raise users' awareness of media literacy.

IA member companies already take a number of measures to protect users from harmful content (as set out above), and are further assessing their provisions in the light of the requirements in the AVMSD.

3. Internet Association Welcomes A Number Of Points In Ofcom's Call For Evidence

3.1 Risk-Based And Proportionate Approach

IA welcomes Ofcom's stated intention to be risk-based and proportionate, and notes Paragraph 2.28 of the call for evidence which states "it will be for VSPs to decide which measures are appropriate and proportionate based on their own assessment of the risk of harm. In doing so, VSPs will be able to take into account the level of resources available to them and will not necessarily need to adopt all 10 measures listed in the Directive".

The internet sector – or even VSPs as a sub-sector – is not a homogenous entity, so tailoring regulatory approaches to specific types of service and/or specific types of problem is key to an effective response. As a result of the differences across the sector, the industry takes a diversity of approaches to tackling online harms – the wide range of services and business models means there is no one-size-fits-all approach. This is also true of regulation, and it is therefore welcome that Ofcom recognises that there should be different regulatory expectations on companies depending on their particular circumstances. IA believes that regulation should be proportionate in terms of the scale of harms prevalent on a service, and also in terms of the economic development stage and size of the platform.



3.2 Recognition That Online Regulation Is Different From Linear Or On-Demand Regulation

IA welcomes Ofcom’s recognition, set out in Paragraph 2.47 of the call for evidence, that “the online space is different to other regulated areas” and that therefore “Ofcom will also adopt proportionate, innovative, agile, and iterative regulatory approaches to reflect this”. The AVMSD itself recognises that there are major differences between traditional media and VSPs. As a result, more targeted rules are proposed which take into account the specific nature of different services. For example, the AVMSD rightly recognises that VSPs do not have editorial control over content, and as a result it sets out different requirements compared to those placed on television broadcasters or video on-demand (“VoD”) services.

The internet enables content creators – and the creative economy more broadly – to thrive with, for example, millions of hours of video content uploaded each year to services such as YouTube. At the same time, this sheer scale means that the exact same regulatory tools and models that are used in other forms of media are ill-suited to online services. Internet platforms have unlocked human creativity, but the scale of creative content makes it impossible to take the same approach to moderation as taken with previous technologies like TV or radio. IA welcomes Ofcom’s recognition that the online space is different to other regulated areas.

3.3 Protections For Freedom Of Expression

IA also welcomes Ofcom’s statement, at Paragraph 2.31 of the call for evidence, that its “guidance will make clear that VSPs must take into account the freedom of expression of their users in accordance with the AVMSD and under Article 10 of the European Convention on Human Rights when designing and implementing their systems to protect users from the specified areas of harm”.

The fundamental strength of the internet is its openness, and the unprecedented ability it gives to everyone to have a voice. The internet has flourished in part because platforms permit users to post and share information without fear that those platforms will be held liable for third-party content, and it is important that the VSP regulatory framework does not encourage VSP service providers to engage in over-censorship, with a consequential impact on freedom of speech. IA believes that this is a vital area that needs to be at the forefront of thinking as policymakers and regulators develop both the VSP regulatory framework and wider online harms regulatory proposals.

3.4 Practical Considerations – Consultative Approach And Reasonable Implementation Period

Finally, IA welcomes two practical elements of Ofcom’s approach to regulation: a) its consultative process for developing the regulatory framework; and b) its intention to provide a reasonable implementation period to give companies time to comply.

Best practice is for regulators and policymakers to set out a deliberative process of consultation and debate with the aim of developing balanced regulation that takes into account a range of competing factors. IA therefore welcomes Ofcom’s approach of gathering information via this call for evidence, then setting out future steps for consultation on regulatory mechanisms such as guidance documents. IA believes that a thorough process, involving industry input, is more likely to lead to good regulatory outcomes. As part of this process, IA encourages Ofcom to undertake and publish economic impact assessments of its regulatory proposals.



Further, IA welcomes Ofcom's plans to allow a reasonable transitional period to enable companies to comply with the new regulations. While companies already take many of the digital safety measures referenced in the AVMSD, there needs to be time for review and further risk-assessment, and in the event that new mechanisms of tools are needed, these take time to be integrated into existing products. Ofcom's pragmatic approach to implementation is therefore welcome.

4. Principles For VSP Regulation

4.1 Ofcom's Proposed Principles

IA notes and welcomes Ofcom's proposed principles for regulating VSPs, as set out in Paragraph 2.49 in the call for evidence, namely:

- "Protection and assurance – VSP regulation will start putting some statutory protections in place for consumers ahead of the broader online harms framework;
- "Safeguarding freedom of expression – people should be able to freely share and receive ideas and information without unnecessary interference;
- "Adaptability over time – Ofcom's guidance must therefore offer flexibility for VSPs to adopt the approaches and technologies that are most appropriate for their platform to protect their users;
- "Transparency – both for regulated services and for the actions and decisions taken by the regulator;
- "Robust enforcement – against non-compliance, through proportionate and meaningful sanctions;
- "Independence – independent governance and decision-making builds credibility and public trust;
- "Proportionality – will continue to be a key principle in our regulatory approach. Ofcom is duty-bound to act in a proportionate manner in carrying out its functions and this will be particularly important in the online context."

4.2 Internet Association Online Harms Principles

In particular, IA and its member companies agree with the importance of proportionality in regulation, for the reasons set out in Section 3.1 of this response. As part of IA's engagement with the government on the OHWP, in 2019 IA proposed a number of regulatory policy principles which it believes can help achieve proportionate regulation. IA believes that any future online platform regulation should:

- Be targeted at specific harms, using a risk-based approach;
- Provide flexibility to adapt to changing technologies, different services and evolving societal expectations;
- Maintain the intermediary liability protections that enable the internet to deliver significant benefits for consumers, society and the economy;
- Be technically possible to implement in practice, and also take into account that resources available for this type of activity vary between companies (i.e. solutions are commercially possible);
- Provide clarity and certainty for consumers, citizens and internet companies;
- Recognise the distinction between public and private communications.



IA hopes that these principles have been useful to policymakers so far, and encourages Ofcom, where relevant, to also take account of these principles as it considers its approach to VSP regulation. IA notes that there is a strong degree of consistency between Ofcom's VSP regulatory principles and IA's online harms regulatory principles, and hopes that this broad alignment is a good starting point for Ofcom and the industry to engage further as the regulatory framework develops.

As the call for evidence states, there are potential tensions between these principles. Should such conflicts emerge, IA encourages Ofcom to be consultative with industry and other stakeholders on its approach, and explicit and transparent in both its decision-making and in explaining how it has weighed the evidence and made trade-offs between competing objectives.

5. Areas In The Call For Evidence Where Further Work And Clarification Is Needed

5.1 Definition of VSP

As set out in Section 3.4 above, IA notes and welcomes the fact that Ofcom intends to consult on guidance for services to help them understand whether they meet the definition of VSP, taking into account the 'essential functionality' guidelines which have been published by the European Commission.

Industry would welcome further clarity on the services in scope of regulation. Without clarity and precision there is a risk of unintended consequences, and IA looks forward to Ofcom's consultation in this area. IA believes that the definition of a VSP should be sufficiently precise such that it does not capture an overly broad range of services where the risk of harm is low and where a high regulatory burden would therefore be disproportionate. Further, IA believes it is important regulators clarify that merely having video sharing capabilities on a platform is not enough to meet the principal purpose test.

5.2 Out Of Court Redress Mechanisms

IA notes the requirements in the AVMSD that Member States shall ensure that out-of-court redress mechanisms are available for the settlement of disputes between users and VSPs, and that such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law.

Ofcom states at Paragraph 2.32 of the call for evidence that "given the sheer volume of user-generated content shared on VSPs, it is not practical to establish a complaints-based regime as exists in broadcasting and on-demand regulation" and notes that instead "DCMS propose that a function of the regulator should be to oversee the requirement for VSPs to have an effective and easy to access complaints process and a requirement that they must also have a redress mechanism in place that provides an external independent appeals process."

IA has a number of points to make in relation to how these requirements might be implemented in practice.

- First, IA agrees with Ofcom and the government's view that, given the sheer volume of audio-visual content shared on VSPs online, it would not be practicable to establish a similar complaints regime as exists for linear broadcasting. Further, should a regulator be given the role of deciding on individual content issues, there is a risk that it could be forced into deciding on



issues which are more appropriate for the courts.

- Second, IA agrees that users need to be able to use easy to access complaints functions – and VSPs already provide flagging mechanisms for users to identify potentially inappropriate content, which would meet this objective.
- Third, IA queries how the requirement for VSPs to provide an impartial out-of-court redress mechanism (i.e. external independent appeals process) would work in practice. Any out-of-court redress mechanism must be manageable, practical, and scalable. Similar mechanisms in other areas, such as the European Commission’s Online Dispute Resolution platform, have not been a success and IA believes that policymakers should proceed carefully in this area. Further, some VSPs may also be subject to the complaint-handling system under P2B Regulation, so it is important to either take a consistent approach or alternatively consider a “one stop shop” across all regulation requiring redress mechanisms of this nature.

5.3 Information Gathering Requirements

IA agrees that information gathering powers are a necessary part of the toolkit for a regulator or co-regulator.

However, IA believes that these powers need to be balanced and accompanied by limitations to ensure the reasonableness and proportionality of information requests. The provisions in Section 368O of the Communications Act 2003 allow Ofcom to require “all such information as they consider necessary”, which appears on its face to be a very broad power and could be used to justify disproportionate information requests. IA would be concerned if broad information gathering powers were used to seek information from VSPs which are regulated in other jurisdictions, or used as a “fishing expedition” to determine whether or not a service is a VSP.

In addition, IA would be very concerned if information gathering powers were used to require companies to publicly disclose explanations about the way algorithms operate. IA member companies are already engaging in transparency around rankings and why content appears – for example by providing overviews of how their platforms operate. However, algorithms are often the IP of internet companies, and are what make them unique and different from competitors. In a free and open economy, sharing confidential business information such as this would be unfair. Further, algorithms help platforms tackle bad actors. IA believes it is important to ensure that these bad actors are not empowered with information that enables them to act inappropriately. For all these reasons, we are concerned about calls for algorithmic transparency that would diminish the user experience and empower bad actors.

More broadly on the point of commercial sensitivity and information disclosure, we encourage Ofcom to carefully consider the level of information that may be required for itself as the regulator to perform its functions, and which can be provided in private, versus information that may be required for distribution to the wider public.

5.4 Co-Regulatory Solutions

IA notes that the AMSD allows for co-regulation, and IA believes generally that co- and self-regulation can be more effective ways of achieving regulatory objectives. IA has previously set out its support of self-regulatory and co-regulatory models in its response to the OHWP and previous AVMSD and VSP



consultations, and reiterates in this response that these models are tried and tested in delivering desired policy outcomes, with the benefit of ongoing input from subject-matter experts from industry.

In relation to content regulation, we note that while Ofcom will be the National Regulatory Authority, the framework would allow for a co-regulator to be established. We note that there is currently no co-regulatory body for VSP content regulation, and IA encourages Ofcom to look closely at how it can engage with industry on regulatory solutions given the benefits of co-regulation in terms of enabling greater industry expertise and input, and flexibility in regulation.

In relation to commercial communication regulation, the UK already has a good track record of co- and self-regulation through Ofcom, the ASA, and the Committees of Advertising Practice (CAP). Ofcom states at Paragraph 2.44 of the call for evidence that it will “consider possible co-regulatory approaches to regulating advertising on VSPs.” IA supports a similar co-regulatory approach for VSP advertising regulation to that in place already for VoD advertising regulation, through the ASA and Ofcom.

Finally, IA encourages Ofcom to maintain oversight over any co-regulatory bodies to ensure that they adhere to the government’s objective of applying the minimum standards required by the Directive, rather than introducing “gold-plated” regulation.

5.5 Interaction With Other Platform Regulation

The intermediary liability protections in the E-Commerce Directive are critical enablers for the internet’s contribution to the economy and society. IA therefore strongly welcomes the statement by the government in its 2019 AVMSD consultation document that “*any measures under the new rules will need to remain compatible with the liability exemption for digital intermediaries in the E-Commerce Directive*”.

While the overall policy intent is clear, IA believes it is important for Ofcom as regulator to consider this point carefully when developing and applying the regulatory framework – especially in relation to flagging and reporting mechanisms, content ratings, and hate speech – in order to ensure that the intermediary liability protections in the E-Commerce Directive are not inadvertently undermined.

6. Conclusion

IA welcomes the opportunity to respond to Ofcom’s call for evidence on VSP regulation. IA supports balanced, proportionate regulation that achieves the joint objectives of protecting people from harm online and ensuring that the internet can continue to deliver benefits to the economy and society.

IA has proposed a number of regulatory policy principles, in relation to the OHWP, which it believes can help deliver these outcomes. Given the interrelationship between the OHWP proposals and the regulation of VSPs under the AVMSD, IA encourages Ofcom to take these principles into account as it develops regulation further in this area.

IA hopes that this evidence is useful to Ofcom as it develops its VSP regulatory thinking further, and looks forward to engaging with the consultation process as it unfolds in the coming months.

Internet Association
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