



Video-Sharing Platform Regulation

September 2020

1. Introduction

As a family brand in over 12 million UK homes, and over 37 million homes across Europe, the safety of our customers, and their children, is of fundamental importance to us. As such, we welcome the new safety requirements entailed in the Audiovisual Media Services Directive (“AVMSD”) and its particular focus on child protection. This complements the Government’s ambitious aim to make the UK the safest place to be online.

Ofcom has highlighted that it will build on Video Sharing Platforms (“VSPs”) regulation to inform its approach to regulation of services under the online harms regime. We also note that the Information Commissioner’s Office’s Age Appropriate Design Code (“ICO’s AADC”) came into force on 2 September 2020. It is therefore crucial that the steps taken now create a solid building block and are consistent with the approach envisaged in the broader regime.

Sky’s content platforms do not fall in scope of the VSP regulation; however, we take many steps to protect our viewers and customers and, as such, have insights into content regulation. In addition, as a responsible licenced broadcaster and an on demand programme service (“ODPS”) provider, we comply with the AVMSD and as an ISP we apply a ‘safety by default’ principle, ensuring our internet filters are switched on automatically for all customers.

Despite the regulation of our content in certain media and platforms, the widespread uptake of connected TVs and other smart devices has meant that we increasingly find our content appearing alongside harmful unregulated content, often hosted on VSPs. Furthermore, with the increasing use of encryption, exemplified by the rollout of the DNS over HTTPS internet protocol (“DoH”) by several major browser companies and application providers, the effective protection provided by our technical safety tools is being undermined. In this context, it is important that VSPs put measures in place to protect minors from harmful content and that they, alongside other actors in the ecosystem, play their part in offering parental controls.

Self-regulation by VSPs has failed to tackle the serious harms posed to both adult and child users of online platforms. As such, the VSP measures within the AVMSD are an important step forward and should be implemented in a way consistent with the Government’s broader ambition to make the UK the safest place to be online in the world. Given the scale of harms affecting users, Ofcom should seek to bring about widespread regulatory compliance with this regime as soon as possible.

In overseeing this regime, Ofcom should ensure that enforcement is meaningful and capable of effecting positive change. In line with this, a regulatory approach that relies on self-declaration of compliance from VSPs and the implementation of optional safety measures is not acceptable. Instead, Ofcom should set clear expectations about which safety measures are required in different contexts and should use information gathering powers and sanctions to ensure compliance. Overall the VSP regulatory framework must be straightforward, broad and future-proofed, accommodating emerging technical developments.

2. Video-Sharing Platform (VSP) Regulation

Sky strongly supports the UK Government's commitment to tackle online harms and to be a world leader in this space. The AVMSD's clear objective of protecting children is well targeted and it is right that VSPs have been added as a new category of regulated service to take account of changes in the online landscape since the last revision of the Directive. Ahead of the new online harms regime coming into force in the UK, the implementation of the VSP regulation will form an important opportunity to road test regulation of online platforms and should form a strong basis for Ofcom's future regulation in this area. We note that Member States were required to implement the AVMSD by 19 September 2020 and believe that VSPs should be compliant as soon as practically possible thereafter. With this in mind, we would urge Ofcom to publish the full range of regulatory guidance at the earliest opportunity.

Scope

The scope set out in the call for evidence is appropriately targeted at VSP platforms which are often particularly popular with children and can pose a significant risk to all users given the nature of content hosted, efficacy of moderation and lack of existing regulation.

Ofcom's Online Nation 2020 report highlighted the popularity of VSPs amongst children, with its finding that 98 per cent of UK online 8-15 year olds use VSPs.¹ VSPs are increasingly popular amongst children, with almost half of children in the UK watching more YouTube per week than TV, Netflix or Amazon Prime Video.²

Alongside engagement with more traditional VSPs, children's awareness of live streaming platforms, such as Twitch and Facebook Live, is also high and continues to increase.³ This upward trend in the use of VSPs by children is concerning given the scale of online harm reported by children. Research published by Ofcom last year indicated that 79 per cent of 12-15 year old Internet users were subject to a harmful experience online in the past twelve months.⁴ This research also indicated that, amongst child users, VSPs score some of the lowest trust ratings in terms of protecting users from offensive content.⁵

The AVMSD provides for a minimum level of harmonised rules across Member States but Member States are empowered to introduce measures which exceed these minimum standards in the public interest. This allows the Government and Ofcom to bridge the gap between VSP regulation and UK's approach to online harms.

Ofcom should take a broad interpretation of scope, ensuring the regime is sufficiently flexible to take into account rapidly evolving technologies and business models in this area and to ensure that all intended VSPs are captured by the regulations.

¹ 'Online Nation 2020 Report', Ofcom, 24th June 2020 (https://www.ofcom.org.uk/_data/assets/pdf_file/0027/196407/online-nation-2020-report.pdf)

² 'Media Nations 2020 UK Report', Ofcom, 5th August 2020 (https://www.ofcom.org.uk/_data/assets/pdf_file/0010/200503/media-nations-2020-uk-report.pdf)

³ 'Children and parents: Media use and attitudes report 2019', Ofcom, 4th February 2020, (https://www.ofcom.org.uk/_data/assets/pdf_file/0023/190616/children-media-use-attitudes-2019-report.pdf)

⁴ 'Internet users' concerns about and experience of potential online harms', Ofcom and Jigsaw Research, May 2019 (https://www.ofcom.org.uk/_data/assets/pdf_file/0028/149068/online-harms-chart-pack.pdf)

⁵ Ibid

This is supported by the European Commission's Communication issued in July 2020 to assist Member States.⁶ It offers guidance on a number of questions of scope by introducing qualitative measures and suggests national regulatory authorities should pay particular attention to the users' perspective and, in particular, to the degree of their exposure to audiovisual content when accessing the relevant services.

In contrast, we note and are concerned by the report compiled by Plum Consulting which only identifies six potential VSPs that would come under UK jurisdiction. Some of these omissions appear to be on the basis of narrow definitional exclusions. For example, Plum suggests that platforms, such as Snapchat, may be out of scope as a large amount of the video content they host is professionally produced by third-party publishers rather than user generated.⁷ To exclude platforms on these or other technical basis would be to act against the spirit of the regulation. If a platform hosts a significant amount of user-generated content and, crucially, there is no moderation process between the generation and upload of content by a user and the availability of that content to other users, there is a higher risk of harm to users. This is a key differentiating factor that sets VSPs apart from other forms of audiovisual platforms and services.

We are aware of other UK VSPs, including platforms who have already stated they will oppose the VSP regulation on the basis of free speech. It will be important for Ofcom to carry out thorough research to identify UK VSPs. VSPs with the most troubling content are the least likely to be willing to co-operate with regulatory oversight. As such, Ofcom will need to consider how to deal with VSPs who fail to notify.

We support Ofcom's plan to work closely with National Regulatory Authorities in EU Member States and establish effective mechanisms for handling cross border issues. This cooperation will be key in ensuring the sharing of best practice and identifying and closing any gaps in legislation in the UK and EU; particularly following the commencement of the online harms regime.

Measures to protect users

Many of the measures that are envisaged in AVMSD that VSP might deploy, are already performed by responsible service providers in other realms. In this response to Ofcom's call for evidence, we have set out some of the measures we have put in place to protect users. As a broadcaster, platform operator and an ISP, we offer a suite of tools for families, ranging from parental oversight controls, content rating systems, age appropriate content filters and alternative platforms designed specifically for children. Such measures could be successfully introduced by VSPs to protect minors on their platforms.

One of the key controls ISPs have implemented are parental controls tools. These operate across the whole home network, and on individual devices used by children. They allow parents to restrict content that they perceive might be harmful. To date, they have been a very effective tool protecting UK children, however there are

⁶ 'Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive', European Commission, 7th July 2020 (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)

⁷ 'Understanding video-sharing platforms under UK jurisdiction - A report for the Department for Digital, Culture, Media & Sport', Plum Consulting, December 2019 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865313/Understanding_VSPs_under_UK_jurisdiction.pdf)

increased moves towards encryption, for example with introduction of the DoH internet standard. This is being deployed by several browser companies and application providers. This threatens the efficacy of ISP parental controls that are reliant on unencrypted traffic to be able to ascertain what should or shouldn't be filtered.

It is no longer feasible to rely on ISPs as the primary source of parental controls. Instead, it will be necessary for measures to be introduced at points further along the value chain, including at platform or VSP level, to ensure users are kept safe as Internet architecture evolves. Policymakers should be aware of threats to ongoing efficacy and consider how any gaps might be filled by agile implementation of AVMSD and the ICO AADC as well as the broader UK online harms regime.

There is a risk that the regulatory framework, as set out in the call for evidence, creates a disconnect between the objective of protecting VSP users and giving flexibility to VSPs so they are free to decide which mitigations are appropriate and proportionate for protecting users from differing categories of content. Ultimately, it should be the regulator's responsibility to ensure that platforms put user safety first and that children are effectively safeguarded. Otherwise there is a risk that platforms hosting harmful content would be able to opt for weak mitigations based on their own assessment of risk.

Furthermore, without a consistent approach to online safety mitigations, significant gulfs would remain between the safety standards in place across platforms, with many likely to revert to a lowest common denominator approach. This lack of consistency exacerbates uncertainty amongst users and parents about how to stay safe, and keep their children safe, online. Such an outcome would fail to satisfy the intentions of the regulation, leaving users, particularly children, at risk from harmful and illegal content.

Instead, Ofcom should take a clear position in both its guidance and its approach to enforcement, prescribing which mitigations are appropriate for each category of content. Ofcom should take a risk-based approach to regulation, taking into account both the nature of content hosted by the VSP in question and the age demographic of users. For example, where there is content that poses a harm to children but is less harmful to adults, such as certain violent or sexualised content, mitigations such as age assurance could be put in place to manage risk in a targeted manner. More broadly, effective moderation can negate the need for implementing many of the other ten measures identified in the AVMSD.

Furthermore, Ofcom should set clear expectations regarding how each measure can be implemented effectively. For example, the Plum Consulting report suggests that the 'liking' functionality available on some VSPs is equivalent to a 'user-friendly system for users to rate content', as set out in the AVMSD; however, on most major platforms, the number of 'likes' is not a proxy for a value rating.⁸ Instead, 'liking' is better seen as a measure of engagement with a piece of content. It should be noted that content that attracts a great deal of engagement, including a large number of 'likes', is often in some way provocative.

⁸ 'Understanding video-sharing platforms under UK jurisdiction - A report for the Department for Digital, Culture, Media & Sport', Plum Consulting, December 2019, (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865313/Understanding_VSPs_under_UK_jurisdiction.pdf)

Content that is widely liked can often be harmful in nature, as illustrated by a recent report by Avaaz which found that twelve alarmist disinformation narratives about the anti-racism protests in May 2020 went viral, attracting 26 million views and over 1.5m 'likes' on Facebook.⁹ Furthermore, a study carried out by the Guardian found that user engagement, including 'liking', with anti-vaccine conspiracy theory posts on Facebook trebled in August of this year.¹⁰ On this basis, the intentions of the AVMSD regulation would not be realised if 'liking' functionality was accepted as a form of content rating. Ofcom should eliminate ambiguity on these issues by prescribing what constitutes provision of safety measures by VSPs.

Greater consistency in the approach to safety mitigations across VSPs would promote greater confidence in parents and would make digital literacy guidance more straightforward. To be effective, the mitigations undertaken by platforms must be complemented by an education and awareness scheme undertaken by Government, industry and third sector organisations.

As a founder of Internet Matters, we are fully aware of the power of education, and are proud of the reach the organisation has had since it was established. Internet Matters has become the go-to resource for supporting families to navigate the online world, with over 3 million UK families aware of the organisation and 82 per cent of parents stating they felt better prepared to handle online issues with their child after visiting the site.¹¹ There are however, many different initiatives being undertaken at this time and it will be important that going forward there is greater coordination across the sector to avoid duplication. Furthermore, there should be greater consideration given to the relative effectiveness of different interventions and an assessment of where investment could be most effectively made to ensure evidence-based activities.

Ofcom can use its expertise and resource to identify parts of the regime where there is poor understanding or awareness amongst users. Ofcom can then work with existing organisations, such as Internet Matters, to carry out outreach, develop messaging and coordinate awareness campaigns.

Compliance and Enforcement

Ensuring compliance with the expectations of protection enshrined in AVMSD is crucial and will only be achieved with robust enforcement. We support the core sanctioning powers proposed for Ofcom, including the ability to issue fines of up to 5% of applicable qualifying revenue. To ensure effective oversight, Ofcom's information gathering powers for VSPs should be extended to obtaining evidence which enables the assessment of the effectiveness of mitigations, the level of severity and proliferation of online harms taking place on a given platform and to inform regulatory priorities. Crucially, Ofcom should have the power to gather information to ascertain if a platform meets the definitional requirements to be considered a VSP, and should have sufficient sanctions to protect the British public, if such a provider fails to co-operate.

⁹ 'Anti-Racism Protests: Divisive disinformation narratives go viral on Facebook, racking up over 26 million estimated views', Avaaz, 12th June 2020, (https://secure.avaaz.org/campaign/en/anti_protest_disinformation/)

¹⁰ 'Guardian analysis prompts calls for new drive to combat conspiracy theories', Guardian, 19th September 2020 (<https://www.theguardian.com/media/2020/sep/19/engagement-anti-vaccine-facebook-posts-trebles-one-month-coronavirus>)

¹¹ 'About Us', Internet Matters (<https://www.internetmatters.org/about-us>)

We would also emphasise that the regime will need to be compatible with current technical arrangements. With the rollout of DoH by major browser companies and application providers, the ability of ISPs to play a significant role in blocking or filtering non-compliant sites or content is significantly reduced and, as such, this cannot be relied upon as an enforcement tool of last resort.

The onus should be on companies to demonstrate their compliance to Ofcom. VSPs should be able to show that children are not accessing harmful content on their platforms and that adult users are given the tools they need to safely navigate content.

Advertising

AVMSD now extends advertising obligations beyond linear broadcast and on demand services to include VSPs.

In implementing AVMSD the UK Government has recognised that the existing self-regulatory system for online is not sufficient to meet the requirements of AVMSD, and instead relevant powers should be given to Ofcom.

We believe this is a vital development and will provide a regulatory basis for broader UK Government policies, for example the recent announcement to implement an online ban for advertising of HFSS products.¹² We understand that the Government is to consult on how it brings about such a ban online.

It will be important that regulation of online advertising is consistent with the statutory framework for broadcast advertising, where the broadcaster is responsible for compliance with serious potential sanctions for regulatory failure, with Ofcom acting as the backstop regulator.

This is in contrast to the self-regulatory system for online advertising which has no statutory backstop or statutory regulator, or meaningful sanctions. Moreover, it does not make the platform publisher (YouTube, Facebook, Twitter, etc.) responsible for the advertising which it carries, profits from and controls. Compliance rests only with the many advertisers who provide their advertisements.

We also note that whilst DCMS expects many of the measures in the VSP implementation to be superseded by the wider online harms framework, those in relation to commercial communications are expected to persist. It is therefore important that the model for regulating VSP advertising is robust and capable of being deployed more broadly as the UK regulatory ecosystem for advertising evolves.

We support requirements aimed at protecting against advertising-related harms and for transparent VSP advertising. Given the long tail of advertisers that appear on their platform it is essential, for any regulatory system to be effective, that the platforms themselves are held accountable, in the same way that broadcasters are. This should be the case for all advertising on VSPs regardless of whether directly marketed or sold by the VSP or indirectly placed on the VSP, but which they nevertheless benefit from.

¹² 'New obesity strategy unveiled as country urged to lose weight to beat coronavirus (COVID-19) and protect the NHS', Department of Health and Social Care, 27th July 2020 (<https://www.gov.uk/government/news/new-obesity-strategy-unveiled-as-country-urged-to-lose-weight-to-beat-coronavirus-covid-19-and-protect-the-nhs>)

Ofcom's Approach

We support Ofcom's approach to VSP regulation in aligning with the principles set out in Ofcom's 2018 report 'Addressing harmful content online'.¹³

The VSP framework should be aligned with other parts of UK regulation and Ofcom should seek to ensure that the various online harms regulatory initiatives are drawn together in a coherent manner. This will help to ensure a consistency of approach across platforms and will make it easier for companies to understand what is expected of them and for users to better comprehend what measures are in place to keep them safe.

The ICO's AADC will play a strong complimentary role in keeping children safe online and protecting children's data and privacy. By implementing effective age appropriate design, freedom of expression can be bolstered as there is a reduced need to moderate all content with children in mind. Ofcom should work closely with the ICO to ensure a coordinated approach and to avoid the risk of double-regulation.

Likewise, the measures proposed by the Digital Markets Taskforce to enhance competition in digital platform markets will form an important part of the regulatory landscape and it will be important for the regimes to align.

In the call for evidence, it is noted that the VSP regulations will come into force in April 2021 but will not be applied until at least Summer 2021. We welcome Ofcom's decision to take robust enforcement action ahead of this time in egregious or illegal instances but, given the scale of harm taking place, Ofcom should seek to narrow the compliance grace period. Furthermore, VSPs should be encouraged to take action as soon as possible to address harms ahead of implementation, securing early compliance.

3. Questions

PART A QUESTION 1: Are you providing a UK-established service that is likely to meet the AVMSD definition of a VSP?

Sky's services do not meet the AVMSD definition of a VSP, nor is the intention of the directive to capture the range of audiovisual services provided by Sky.

The directive targets online platforms that facilitate the sharing of videos but without editorial responsibility. Greater clarity is, however, needed on the definition of VSPs as set out by the AVMSD.

There should be a clear principle that ensures there is no 'double regulation'. We therefore support Ofcom's approach set out in para 2.52 that it will "*issue scope guidance to help services interpret the legislative criteria and understand which regime [a service] will be required to notify under and therefore what obligations will apply*".

For example, if a service qualifies as an ODPS, it should not also be possible for it to be regulated as a VSP. Given the editorial control ODPS providers have over their

¹³ 'Addressing harmful online content A perspective from broadcasting and on-demand standards regulation', Ofcom, 18th September 2018 (https://www.ofcom.org.uk/_data/assets/pdf_file/0022/120991/Addressing-harmful-online-content.pdf)

content, and also, by definition, control over the organisation of that content, we do not believe they should be caught by VSP scope but further clarity would be helpful. Similarly it should be clarified that where a platform is, within the wider user interface, making algorithmic or editorial recommendations to content from a third party's ODPS or app, for example by linking to 'top picks' or 'most viewed' content, it does not fall under the definition of a VSP as this would not seem to align with the intention of the regulation.

PART B QUESTION 19: What examples are there of effective use and implementation of any of the measures listed in article 28(b)(3) the AVMSD 2018?

Notwithstanding that Sky is not a VSP, as a responsible business we adhere to a number of standards, as set out in the AVMSD designed to protect adult and child users and we have developed many products to assist our customers.

Terms and conditions which prohibit uploading of inappropriate and illegal content, and content which may impair the development of minors

Sky has an acceptable use policy for uploading of content to our website. We use moderators to ensure inappropriate and illegal content is not uploaded and that racist and abusive comments are removed.

We have robust compliance measures and processes to ensure that none of Sky's linear channels or ODPS have inappropriate and illegal content and content which may impair the development of minors.

Terms and conditions for users/advertisers which prohibit inappropriate advertising

As a broadcaster, Sky adheres to BCAP/CAP Advertising Rules for all linear and on demand services. We have control and responsibility for all the adverts we offer and we have an effective pre-transmission compliance system. We are also fully transparent about the advertising we serve on our TV channels and the audiences to whom it is served, keeping copies of everything broadcast.

We do not serve adverts on our Sky Kids App. Broadcast regulation also has various provisions to protect children from inappropriate or harmful advertising.

Broadcasters are obliged to ensure separation between editorial and advertising with clear signalling of any production placement, with detailed rules about how to do so. There are also specific rules about product placement around children's programmes, with restrictions on due prominence of products

User-friendly mechanisms for users to flag inappropriate content on the service

We have a dedicated mechanism for viewers to get in touch with us, via Sky Viewer Relations, regarding questions about content or to flag concerns about inappropriate content.

Mechanisms to explain to users what has been done about flagged content

Our Viewer Relations team explain to users what has been done about flagged content.

Age verification systems for age-sensitive content

All Sky subscribers have to be over 18, however we recognize that other users in the household may have access to our content. We therefore offer a range of measures to protect audiences.

For Sky Cinema and Sky Store we age rate all of our linear and on demand assets. Sky Cinema content is rated internally to Sky standards, whereas Sky Store content is rated using the BBFC framework. For our linear programming we apply appropriate warnings before scheduled programmes and in the electronic programme guide if necessary. Beyond our broadcast services, we also apply age warnings, which are determined by our internal compliance team, to content on our social media platforms.

We do not offer any R18 content.

Parental control systems that can be activated by the end-user

We offer a range of parental controls to Sky users that apply across our product range.

Controlling access to Apps & videos - Parents can block access to online videos and certain apps on Sky Q.

Kids Safe Mode (Sky Q) - Allows parents to use their TV pin to lock their Sky Q box to the Kids section. Once Kids Safe Mode is activated, kids can only see and explore age-appropriate content for 0-12 year olds, all non-Kids content, including live TV channels, recordings, on-demand shows and apps is blocked until the setting is turned off. Kids Safe Mode can be activated on any Sky Q box in the home, allowing parents to watch their favourite shows in one room and the kids to watch TV safely in another.

Sky Go - If age restrictions are set on Sky Q, they will be replicated on Sky Go. Sky Go also offers some additional parental controls. Shows rated 12, 15 or 18 which are viewed before the watershed on the app are always PIN-protected, even if PIN-protection on the Sky Q box is turned off. Adult channels and recordings cannot be viewed on Sky Go regardless of parental settings.

Sky Kids App - Our kid-friendly app provides a streaming service that allows children to watch their favourite TV shows on demand with a compatible mobile or tablet. Parents are able to create separate profiles for each child which age-gates the content that is served. The app complies with the 5Rights Safety by Design principles.

PIN Protection - We offer PIN protection which can be turned on by parents for pre-watershed shows, purchases or rentals via the Sky Store or Box Office, to lock individual recordings and to restrict shows at all times based on their age rating. Mandatory PIN protection cannot be disabled for broadcast services where it is required. In addition to this, our internal compliance team can require PINs to be applied for certain post-watershed content available on demand in order to safeguard users.

Family Setting - This setting can be used to turn on PIN-protection for any rated shows watched before the watershed, as well as for any purchases or rentals. It will also hide all adult channels and recordings.

Adult Channels - Adult channels are blocked by default on the electronic programme guide; however, end users can choose to unblock these if they wish.

Parents' Guide - Our content guide for parents, developed in conjunction with Common Sense Media, is designed to give families the extra details they need to make more informed choices about what movies they watch. The Parents Guide contains in-depth ratings for more than 3,500 movie, providing a zero-five rating across seven categories: Violence & Scariness, Positive Messages, Consumerism, Sexy Stuff, Positive Role Models & Representation, Language, Drinking, Drugs & Smoking, Educational Value.

Sky Broadband Shield - As an ISP we offer all of our customers network filtering tools that protect all devices on the home network from various categories of content, configurable by the customer, such as malware, weapons, or pornography. Broadband Shield also lets customers set their own watersheds for the internet.

Sky Broadband Buddy - This enables parents to manage each screen in their home from an app on their phone or tablet. Sky Broadband Buddy allows parents to create tailored filters for each member of the family, set regular usage limits and bedtimes, pause the Internet in the home for one person or the whole family, see which sites are visited by family members and set rewards for family members within the app.

Transparent and effective complaints process for the implementation of measures related to flagging inappropriate content and parental controls

Our complaints process is clearly set out on both the Sky.com website and on Ofcom's website. Sky's Content Compliance and Policy and Viewer Relations teams have a robust internal process to deal with broadcast and standards complaints. We also provide customers information about how to can communicate with the appropriate regulators (Ofcom or ASA) with details available on Sky.com.

Media literacy measures and tools, and raising users' awareness of these tools

As a founding member of Internet Matters, we are committed to using education to empower parents and children online, providing them with the skills and knowledge to use the Internet safely and smartly, enabling them to benefit from all the online world has to offer. We continue to collaborate with Internet Matters on the production of advice and resources for families.

PART B QUESTION 20: What examples are there of measures which have fallen short of expectations regarding users' protection and why?

The fact that social media platforms have fallen short of users' expectations is extremely well documented. The precise failings are often difficult to quantify due to the information asymmetries and lack of regulatory oversight. However, the growing concern across civil society has led to third party investigations that document some of the shortcomings in relation to failure to act satisfactorily to combat harms, uphold terms and conditions and respond to user complaints about content. Whilst not all UK VSPs, below are just a few recent examples where platforms have fallen short of expectations regarding users' protection.

- An Avaaz investigation found that over twenty per cent of the views for the top one hundred global warming related videos were on climate misinformation videos.¹⁴ Avaaz also found that the nature of YouTube's recommendation algorithm meant that misinformation videos may be more likely to 'go viral' and attract significant levels of engagement.
- A BBC investigation found that despite TikTok's Community Guidelines forbidding "public posts or private messages to harass underage users", users who posted sexually explicit messages to children were allowed to remain on the platform.¹⁵ Furthermore, following reports about several hundred sexual comments, TikTok failed to remove all of the inappropriate messages in question.
- In July 2020, grime artist Wiley posted a series of antisemitic posts across social media sites and VSPs and, despite attracting widescale attention as well as reports about the content, there was poor responsiveness from platforms. This lack of swift action, despite clear breach of community standards, led to harmful content being seen and shared widely. For example, on Twitter alone Wiley posted 534 tweets before eventually being temporarily suspended. He then posted another 65 tweets on his reinstatement. In total, his tweets attracted 306 million impressions despite clearly breaching Twitter's community guidelines.
- The Institute of Strategic Dialogue identified significant non-compliance by YouTube, amongst other platforms, with the EU's Code of Practice on Disinformation, in particular around political advertising.¹⁶
- The Center for Countering Digital Hate analysed 912 posts containing harmful disinformation that were reported to social media platforms including VSPs and found that fewer than 1 in 20 posts were dealt with effectively.¹⁷

Such occurrences demonstrate that voluntary self-regulation is insufficient to protect platform users. A robust regulatory framework is needed to clarify what users can expect from VSPs in terms of safety standards and to ensure VSPs act in a proportionate and accountable way to keep users safe on their platforms.

PART B QUESTION 21: What indicators of potential harm should Ofcom be aware of as part of its ongoing monitoring and compliance activities on VSP services?

Ofcom's framework of harm indicators for VSPs should be consistent with its broader work as the online harms regulator, and be informed by that work. This will undoubtedly include detailed analysis of the scale of reports received by VSPs against different harms, as well as assessments of the actions VSPs take with respect to these reports.

¹⁴ 'Why is YouTube Broadcasting Climate Misinformation to Millions?', Avaaz, 16th January 2020 (https://secure.avaaz.org/campaign/en/youtube_climate_misinformation)

¹⁵ 'Video app TikTok fails to remove online predators', BBC Trending, 5th April 2019, (<https://www.bbc.co.uk/news/blogs-trending-47813350>)

¹⁶ 'Cracking the Code: An Evaluation of the EU Code of Practice on Disinformation', Institute for Strategic Dialogue, June 2020 (https://www.isdglobal.org/wp-content/uploads/2020/06/isd_Cracking-the-Code.pdf)

¹⁷ 'Failure to Act: How tech giants continue to defy calls to rein in vaccine misinformation', Centre for Countering Digital Hate, 2020 (<https://www.counterhate.co.uk/failure-to-act>)

PART B QUESTION 22: The AVMSD 2018 requires VSPs to take appropriate measures to protect minors from content which ‘may impair their physical, mental or moral development’. Which types of content do you consider relevant under this? Which measures do you consider most appropriate to protect minors?

Broadcast services adhere to regulatory standards originating from AVMSD that ensure minors are protected from potentially harmful content. Ofcom should use its experience in broadcast regulation to inform VSP regulation, particularly drawing from the rules set out in the Broadcasting code which have been tried and tested in protecting minors.

For example, rule 1.1 in Ofcom’s Broadcasting Code is a prohibition on content that could “seriously impair the physical, mental or moral development of people under eighteen”.¹⁸ This section of the Code deals with topics that may cause harm or offence for children, including drug use, violence and dangerous behavior, offensive language, sexual material, nudity and paranormal practices which purport to be real. Likewise, Section Three of the Broadcasting Code addresses crime, disorder, hatred and abuse and includes rules restricting material containing hate speech or that likely to incite crime.

VSPs should ensure that their terms of use factor in the potential harms envisaged in the AVMSD. VSPs should then assess the range of measures envisaged in the directive to effectively enforce their terms of use taking into account the demographic of users and the nature of content uploaded to the site. For example, VSPs with many minors as users could carry out thorough content moderation, implement parental controls and enforce child-centered terms and conditions. Whereas VSPs which host content which is likely to be harmful to children should mitigate this risk by putting in place age assurance measures.

VSPs which host adult content for which there are legal standards in place, namely content which would be certificated as R18 under BBFC guidelines, must have the most robust protections in place. This is in line with the AVMSD¹⁹ which states that on audiovisual media services, “The most harmful content, such as gratuitous violence and pornography, shall be subject to the strictest measures”. Furthermore, Rule 11 of Ofcom’s ODPS Guidance²⁰ states that, “An ODPS must not contain any specially restricted material unless the material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it”. Such restrictions should also apply to VSPs hosting content of this nature, with Ofcom enforcing the operation of strong age verification mechanisms in these instances.

PART B QUESTION 23: What challenges might VSP providers face in the practical and proportionate adoption of measures that Ofcom should be aware of?

Understanding the age of platform users, with a level of certainty correspondent to the nature of content hosted on that platform will be fundamental to implementing targeted safety measures. In some instances, this will call for rigorous age assurance

¹⁸ The Ofcom Broadcasting Code, Ofcom, January 2019 (https://www.ofcom.org.uk/_data/assets/pdf_file/0016/132073/Broadcast-Code-Full.pdf)

¹⁹ Audiovisual Media Services Directive, 14th November 2018 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&from=EN>)

²⁰ ‘Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS)’, Ofcom, 20th May 2016 (https://www.ofcom.org.uk/_data/assets/pdf_file/0022/54922/rules_and_guidance.pdf)

procedures which may have repercussions on privacy and will necessitate robust data protection practices.

This approach is aligned with that set out by the Government, which committed to take forward the targeted age verification proposals, originally set out in the Digital Economy Act, in the new online harms regulatory regime.²¹

PART B QUESTION 24: How should VSPs balance their users' rights to freedom of expression, and what metrics should they use to monitor this? What role do you see for a regulator?

In order to act responsibly, VSPs must act in a fair and responsible manner when balancing rights to freedom of expression with the need to protect users. Companies should take a proportionate, risk-based and accountable approach to content management. This can be facilitated by giving users the right to appeal to VSPs about decisions regarding specific pieces of content.

VSPs should also publish transparency reports, providing both the regulator and users with meaningful information about processes for dealing with harmful content, how much content has been affected by safety mitigations and how many complaints or appeals about specific pieces of content have been received, including from users who believe uploaded content has wrongfully been taken down. In analysing the transparency reporting information, Ofcom can also gauge how effectively companies are managing harms and whether their approach is striking the right balance between rights and safety.

The regulator should also take into account the age demographics of users of each VSP. There should be stronger safety mitigations in place on platforms where a high number of users are children, whereas platforms with primarily adult users can give further weight to freedom of expression. Platforms can also implement age appropriate design which, when effectively utilised, can reduce the need for all content to be managed with children in mind, thus bolstering freedom of expression.

PART B QUESTION 25: How should VSPs provide for an out of court redress mechanism for the impartial settlement of disputes between users and VSP providers? (see paragraph 2.32 and article 28(b)(7) in annex 5).

It is not practical for the regulator to arbitrate individual disputes between users and VSPs about specific pieces of content, given this, it is important that platforms have mechanisms in place to address user complaints. VSPs should be transparent about their guidelines and processes for managing content and should provide users with a mechanism for appealing decisions about specific pieces of content. The outcomes of these appeals should be set out in transparency reports published by VSPs.

PART B QUESTION 26: How might Ofcom best support VSPs to continue to innovate to keep users safe?

Ofcom should have a duty to support innovation amongst VSPs. This can be achieved through the hosting of regulatory sandboxes and the establishment of mechanisms for VSPs to share best practice experience.

²¹ Statement on online harms, Nicky Morgan MP, 16th October 2019 (<https://questions-statements.parliament.uk/written-statements/detail/2019-10-16/HCWS13>)

PART B QUESTION 27: How can Ofcom best support businesses to comply with the new requirements?

Ofcom should produce regular reports on best practice to act as a guide for VSPs. The sharing of best practice information can also be facilitated by the regulation through the coordination of industry working groups, such groups can also provide fora for platforms to share any issues they may be encountering. Ofcom can work with trade associations and other industry representatives to ensure the effective dissemination of information across industry.

PART B QUESTION 28: Do you have any views on the set of principles set out in paragraph 2.49 (protection and assurance, freedom of expression, adaptability over time, transparency, robust enforcement, independence and proportionality), and balancing the tensions that may sometimes occur between them?

It is right that this regulation is principles-led and we are supportive of the principles set out in the call for evidence. In order to balance the tensions between these principles, Ofcom should take a proportionate, risk-based, approach. When regulating, Ofcom should take into account the severity and scale of harm in question, the actions of companies according to their size and resources, and the age demographic of their users.

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