

Your response


Question	Your response
Question 10: Do you have any comments on the draft guidance about the measure regarding complaints processes or on the regulatory requirement to provide for an impartial dispute resolution procedure?	<p>We would strongly recommend that Ofcom reconsider the criterion by which the dispute resolution processes are made fair, accessible and transparent. We understand that there may be reasons to adopt a cautious approach when describing the requirements of the measure; we noted from the Consultation document that a) the government did not intend to create an independent mechanism such as an ombudsmen or certified provider, b) in line with due proportionality, some platforms may be smaller and have fewer resources to devote to this measure, and c) the market for external third party suppliers for independent dispute resolution is immature. Nevertheless, the criterion sets an incredibly low threshold for settled best practice in the dispute resolution sector and risks undermining the intent of the legislation and the principles of the AVMS directive. We note this view was shared by other civil society groups in the response document such as SWGfit, Tech Against Terrorism and Article 19, and would urge OFCOM to take appropriate steps to rectify the Guidance and adopt this shared view.</p> <p>Currently, the Guidance advises that “measures should be designed and implemented in a way that does not unduly discriminate between users, introduce bias or result in inconsistent application” by ensuring the procedures are impartial, vis a vis, having “a designated person or team internally, with responsibility for carrying out the dispute resolution procedure and reaching final decisions, that is procedurally separate from the complaints or reporting and flagging process”. It further sets out that “the procedure should involve, at the very least, separate individuals dealing with the original complaint and the related dispute. The individuals should also be in separate teams, where the size of the platform allows for this.” From our experience, when it comes to implementing dispute resolution processes it is often the case that regulated subjects will defer to the minimum requirements of compliance rather than aspire to best practice, particularly those subjects that receive higher volumes of complaints and tend to engage in more problematic behaviour.</p> <p>So, while Ofcom advises that best practice or the most effective means of achieving impartiality would be to have an external, fully independent decision-making body or person, it is more likely that VSPs will adopt a compliance position that is</p>

least intrusive to their commercial interests. Further, it is likely that VSPs will only adopt to appoint external and fully independent decision-maker where they are compelled to do so, or alternatively, where regulatory incentives exist to drive them into higher standards of compliance.

As we set out in our submission response dated 4 September 2020, Ofcom could and should issue clear criteria to ensure that fairness, accessibility, and transparency are built into the measures, such as compliance being administered by a secretariat that is not under the direct employment or contractual control of the platform. In our regulatory experience, impartiality is not a matter of process as much as it is about independence of governance and decision-making. We foresee that, based on the current Guidance, it is unlikely that internal appointments at VSPs will lead to fair and impartial decision-making. The reasons for this are: a) those appointments will be made by internal line management, and their decision making will be overseen by and subject to VSP company directors; b) there are no checks and balances, or firewalls required under the Guidance issued by Ofcom; c) there are no requirements for sufficient experience or training in dispute resolution, balancing competing interests, or dealing with the public interest; and d) the guidance is unclear about how disputes about procedural fairness will be dealt with under the over-arching dispute resolution procedure, that is, conflicts of interest, unfairness, or bias in case management.

These issues go to the heart of public trust in the new regulations. If the dispute resolution process does not instil the public with confidence nor meets their needs as users, then the efficacy of the new regulations will be at risk. There is a strong evidence base for, and high-profile examples of, dispute resolution being undermined by poor practice, oversight, and industry collusion; ultimately most organisations or industries that must deal with appeal and dispute resolution internally fail. Examples include the systems for dealing with discrimination complaints to the UK's two main political parties (Equality & Human Rights Commission 2020; Singh, 2021 reports); child safeguarding issues in sports such as football and gymnastics which led to independent inquiries (Sheldon, 2020 and Whyte, ongoing reports); anti-doping issues in sport which led to the ultimate establishment of UK Anti-Doping and the National Anti Doping Panel; the BBC's failure to investigate complaints against Martin Bashir as set out in the Dyson, 2021 report; the Press Complaints Commission's failure to act independently of the press as set out in the Leveson Inquiry Report, 2012. Put simply, organisations have a poor track record of hearing appeals against themselves. These have all represented significant crises of governance that undermined public trust in regulation. Ofcom is in the best position to ensure that VSP regulation does not follow the precarious path

	<p>to low public trust in VSP services in the UK; however, robust requirements regarding independence and effectiveness are essential to realising that goal.</p> <p>Finally, we would also advise Ofcom to build some review measure into its oversight and set out the terms of that measure in the Guidance. For example, Ofcom would be able to make judgment and advise on instances where dispute resolution procedures are not being taken up (this is indicative of inaccessibility), or if the outcome of cases disproportionality favour VSPs (this is indicative of unfairness or partisan decision-making). Having a lever, such as on-going review with the option to recommend stricter requirements, would enable Ofcom to ensure there are checks and balances built into its oversight and ensure accountability (backed by statutory power) is an integral part of the dispute resolution process.</p>
<p>Question 16: Do you have any comments on any other part of the draft guidance?</p>	<p>We note that Ofcom has taken forward our suggestion by setting out in the Guidance that for some platforms it may be appropriate to consider an expedited process for the handling of disputes from broadcasters and other media outlets. Further, the Guidance sets out that VSPs are required to give careful consideration to claims and disputes which involve videos containing news content (including context and intention). Finally, the Guidance sets out that VSP providers should also take into account the impact such measures may have on the general public, including public interest content (which news is likely to fall within).</p> <p>We are concerned about the adequacy of these protections for news content, as they are not prescriptive, nor do they create mandatory obligations. Rather, the Guidance sets out a series of ‘considerations’ which platforms may be disposed to incorporate as part of their compliance with the Guidance. These considerations are discretionary and therefore permissive; we are concerned that the harms identified by IMPRESS regarding platform moderation of journalistic content made at points 10-20 of our consultation submission, dated 4 September 2020, are unlikely to be addressed by the current Guidance.</p> <p>This is particularly significant in the light of the recently published Draft Online Safety Bill which seeks to address harmful content on platforms that enable user interactivity. Section 14 of the Bill sets out clear and prescriptive requirements for the treatment of news content and redress for journalistic content. The absence of similar requirements in this Guidance creates a real risk of the perverse consequence of regulatory inconsistency; where journalism is treated</p>



differently and subject to different protections depending on which platform it is broadcast or published on – despite sitting under a single regulatory authority delegated to Ofcom.

We would encourage Ofcom to consider including more robust and mandatory requirements with respect to VSPs treatment of news content to ensure its special status is protected under VSP regulation. This would create regulatory coherence for subjects and users across the various systems of statutory regulation for platforms.