

Proposals for the regulation of advertising on video-sharing platforms

ITV PLC response

Context

As we all spend an increasing amount of our lives online, government and regulators are grappling with the implications for UK law and regulation. The sheer magnitude of the challenge and seeming-complexity of finding solutions has resulted in a series of discrete but interrelated approaches being taken in a sensible attempt to make progress. The risk is that a fragmented approach can, if not properly coordinated, lead to an overall approach that lacks coherence, and to a series of important issues going unaddressed.

This is well illustrated by the Online Safety Bill. Welcomed by many as having the potential to deliver improvements to online safety (particularly for children, mainly on bigger online platforms), the Bill does nothing to address online scam advertising (something the Financial Conduct Authority specifically called to be addressed within the Bill) nor to address harms that are caused directly and indirectly by online advertising more broadly.

The risk is also evident in the government's approach to HFSS advertising restrictions where, having sensibly concluded statutory regulation of online advertising was needed to offer protections to UK citizens comparable to those delivered on TV, it has then failed to follow that thought through to its logical conclusion and put in place statutory regulation of online advertising more broadly.

Ofcom is now consulting on proposals for a new regime of regulation for video sharing platforms. But it is a regime that applies only to a handful of VSPs - those few that happen to be established in the UK. For the rest, including many of the biggest (e.g. YouTube), it appears that the EU will continue to set and enforce the rules by which UK citizens may be protected. Even this level of protection is not guaranteed, though, as UK consumers would be unlikely to be able to successfully complain to EU regulators about harms occurring outside the EU (i.e. in the UK). Nor is there anything to stop VSPs offering bespoke products to UK consumers that are not regulated in the EU nor compliant with EU rules, leaving UK consumers potentially exposed to harm and without redress to a regulator. Furthermore, the proposed regime for VSPs applies only temporarily before it is abolished (rather than superseded) by the Online Safety Bill which, as noted above, fails to cover online advertising.

So in summary:

- Advertising on some of the lesser used online video sharing platforms in the UK will be regulated by law under the current proposals, but only temporarily.
- Those statutory protections will not be extended to cover the biggest platforms such as YouTube etc which will continue to be regulated by the EU.
- But even this limited regulation of advertising online will then cease to apply (in the UK) when the Online Safety Bill (which is supposed to protect people online) abolishes the VSP provisions subject to the current consultation that provide a basic layer of protection in relation to advertising online

The idea, as per Ofcom's consultation, that once the abolition of the VSP provisions is complete the self-regulatory system for online advertising "*will provide equivalent*

protections by regulating advertising on VSPs, as well as on other online platforms” simply does not stand up to scrutiny. In particular, under the current self-regulatory regime major online platforms currently bear no liability for the advertising they control, publish and profit from – and would not do so after the repeal of the VSP-specific rules on which Ofcom is consulting. Nor do they face any meaningful penalties for breaches of the rules – resulting in a regime based predominantly on ‘publication and take down’ rather than prevention.

Such an approach appears to snatch defeat from the jaws of victory: simply by bringing together the approaches set out in the Online Safety Bill and Ofcom’s VSP proposals, the government could go a long way towards establishing sensible, comprehensive and proportionate online platform and advertising regulation which ensures that:

- Online platforms are legally obliged to ensure compliance with rules online;
- There are clear legal and regulatory incentives for compliance;
- Non-compliance is viewed as risky and unattractive; and
- There is an effective and well-resourced regulator.

Together, the processes outlined above have already:

- Defined the major online platforms that should be subject to regulation (as per the Online Safety Bill: “Regulated service” means (a) a regulated user-to-user service, or (b) a regulated search service);
- Defined how online advertising controlled by these platforms might be regulated – with the ASA in the frontline as a statutory co-regulator alongside Ofcom (as statutory backstop), holding platforms responsible for the advertising they control and profit from;
- Explained how Ofcom might oversee ‘appropriate measures’ from platforms in relation to advertising which they do not control; and
- Defined in detail the concept of ‘control’ of advertising on VSPs/online platforms.

Ofcom notes that it has designed its proposals to be *“as simple, straightforward, and platform and technology neutral as possible.”* Such a regime would *“ensure continuity as far as possible, building on the existing self-regulatory system for online advertising.”*

With a handful of changes – such as adding the concept of ‘commercial benefit’ into considerations of whether platforms have (or could have) control over advertising, and ensuring that the regime requires platforms to take action before advertising is published, rather than after it is published and the harms have occurred, the regime could help deliver the government’s aspirations for a safer internet, and for fair and effective competition, without the need for extensive and unnecessary further work to reinvent the wheel.

Such an approach could simply adopt the current ASA framework of rules for online advertising, ensure that the platforms were held responsible for compliance as the publishers and beneficiaries of advertising, offer a strong statutory backstop in the form of Ofcom, with the ASA in the front line. Amongst other things such an approach would also deal with the issue of financial scams being advertised online about which the FCA and many others have been rightly extremely concerned.

Responses to consultation questions

Question 1: a) Do stakeholders agree with Ofcom's proposed guidance on control of advertising, including the application of the terms 'marketed, sold or arranged'? b) If you do not agree with the proposed guidance on control of advertising, please explain why, and include any alternative approaches.

We agree with Ofcom's approach to defining control and its interpretation of the Act's requirements in relation to advertising that online platforms market, sell or arrange. We agree that *"these terms, taken together, suggest an expansive understanding of what constitutes 'control', covering a wide range of activity undertaken by VSP providers in relation to the advertising that appears on their services."* This approach is critical in ensuring that major online platforms cannot simply choose to relinquish control - or to outsource control to third parties in the supply chain - in order to escape responsibility for compliance.

Liability for online platforms is important because, as the government concluded in relation to HFSS advertising recently, a *"...solution building on existing audience-based restrictions is...too dependent on an opaque and potentially porous system, over which the advertiser may sometimes have limited control..."*¹

Ofcom might strengthen the concept of control further by including within its approach the idea that where a platform and/or its affiliates are benefitting commercially from the advertising on their service that is also likely to be an indicator of actual or potential control of that advertising by the platform.

Question 2: a) Do stakeholders agree with Ofcom's proposed framework for regulating VSP-controlled advertising? b) If you do not agree with the proposed framework for regulating VSP-controlled advertising, please explain why, and include any alternative approaches for regulating advertising on VSPs.

We are in broad agreement with Ofcom's approach with one important caveat: the continued focus on addressing harms predominantly after the event. Ofcom's belief that citizens and consumers will be adequately protected by online platforms *"...taking prompt action to remove or edit advertising that may contravene the requirements..."* simply does not reflect the significant harms that the likes of the FCA and CMA have made clear are already occurring under such an approach today.

Nor does such an approach address the fact that the online platforms continue to profit from advertising that they publish in contravention of advertising rules even if it is subsequently removed. If online advertising regulation is to be effective, it is critical that online platforms are held accountable for advertising they publish that is in breach of the rules, and that the consequences require more than the repeated apologies and content removal after the event that we see today.

¹ <https://www.gov.uk/government/consultations/total-restriction-of-online-advertising-for-products-high-in-fat-sugar-and-salt-hfss/introducing-a-total-online-advertising-restriction-for-products-high-in-fat-sugar-and-salt-hfss>

In this context, we are concerned about Ofcom’s comments in relation to the pre-clearance of advertising, where it notes that:

“[its proposals] do not mandate a system of ‘pre-clearance’. Instead the approach is intended to provide the greatest possible flexibility, enabling VSP providers to work with the Committees of Advertising Practice (CAP) – the body responsible for the non-broadcast advertising code (the CAP Code) – and the ASA to determine how best to ensure that advertising that appears on their services is compliant with the applicable requirements.”

This could suggest a tolerance for harmful outcomes online not evident in relation to TV advertising. The idea of giving VSP providers “*the greatest possible flexibility*” would seem to come at the expense of consumer protections that might otherwise sensibly be pursued. Of course, pre-clearance may not be the right answer for online advertising. But we are yet to see an alternative that is as robust as pre-clearance in protecting consumers. Indeed, the government recently made clear its:

“...fundamental concerns about flaws in the system by which advertising is targeted, which are magnified as children spend more time online, and further undermined by a lack of transparency...[noting that a]...solution [for HFSS advertising] building on existing audience-based restrictions is therefore too dependent on an opaque and potentially porous system, over which the advertiser may sometimes have limited control...”

We are also concerned about Ofcom’s apparent focus on process alone – rather than the effectiveness of those processes in protecting consumers. For instance, Ofcom expects VSP providers to communicate the requirement to declare advertising clearly within platform terms and conditions (paragraph 6.17) and to ensure clarity and understanding about how to do so (6.18). But this ignores the reality that most terms and conditions go unread, makes no assessment of the likelihood that such transparency would be effective in reducing consumer harm, appears to place no responsibility on the platform in relation to content that does not clearly identify advertising, nor suggest any consequences for breaches.

In the end, it is not the clarity of terms and conditions that matters, it’s whether clear terms and conditions are an effective tool in reducing consumer harm. There appears to be little lack of clarity in the rules today, yet the ASA has found “*...inconsistent disclosure [on Instagram] through Stories, posts and Reels, with our rules being followed (when posts were ads) only 35% of the time.*”² This suggests to us that compliance is undermined by both a lack of platform responsibility and the lack of serious consequences for breaches of the rules.

Question 3: a) Do stakeholders agree with Ofcom’s proposal to designate the ASA as a co-regulator for VSP-controlled advertising? b) If you do not agree that it would be appropriate to designate the ASA as a co-regulator for VSP advertising, please explain why, and include any alternative approaches.

We agree with Ofcom’s proposals to designate the ASA as a co-regulator for VSP-controlled advertising. In doing so, it is important that the ASA is given the tools it needs to discharge the role effectively. The ASA is currently doing its best to regulate online advertising but the

² <https://www.asa.org.uk/news/taking-action-against-non-compliant-influencers.html>

evidence shows that the current system of self-regulation does not work - particularly for major global online advertising platforms - because there are no effective sanctions, no common approach to determining who is seeing adverts online, and no visibility about what advertising is provided online. This has been noted by the Government, which recently concluded that children are frequently served restricted advertising due to:

“...the use of devices, online profiles and accounts shared between adults and children, and the communal viewing of content... the false reporting of users' ages...[and] predictive inaccuracy in using interest-based factors and other behavioural data as a proxy for age.³”

As noted above, the ASA itself has been open about the extent to which influencers are failing to adhere to current rules. The CMA has already intervened in the same area⁴. The FCA has repeatedly called for action in relation to online scam advertising. And the ASA's latest monitoring of online advertising found a significant rise in HFSS and gambling advertising online in breach of its rules during Q1 this year⁵.

It is therefore critical that the ASA is given all the necessary powers to hold online platforms to account, to give it access to data to prove the effectiveness of platform measures, and for there to be serious sanctions for online platforms in the event of non-compliance.

Question 4: a) Do stakeholders agree with Ofcom's proposed guidance on non-VSP-controlled advertising? b) If you do not agree with the proposed guidance on non-VSP-controlled advertising, please explain why, and include any alternative approaches.

Question 5: a) Do stakeholders agree with Ofcom's proposed approach to regulating non-VSP-controlled advertising? b) If you do not agree with the proposed approach to regulating non-VSP-controlled advertising, please explain why, and include any alternative approaches.

Our only comment is that, linked to our response to question 1 above, it is important that the concept of advertising that is not controlled by VSPs is not used as a loophole for VSPs to avoid their regulatory responsibilities.

³ <https://www.gov.uk/government/consultations/total-restriction-of-online-advertising-for-products-high-in-fat-sugar-and-salt-hfss/introducing-a-total-online-advertising-restriction-for-products-high-in-fat-sugar-and-salt-hfss>

⁴ <https://www.gov.uk/cma-cases/social-media-endorsements>

⁵ <https://www.asa.org.uk/uploads/assets/623a9818-b2d6-4efd-970ac4237a4fc525/CCTV-style-Online-monitoring-Q1-2021.pdf>