

We would like to draw your attention to the weighting given by Ofcom on the guidance of the European Commission (see paragraph 3.29 of the Consultation). Whilst we recognise the cross-border nature of VSPs, and agree in principle with the need for consistent regulation, nonetheless that guidance should not be given excessive weighting. The guidance does not derive from a mandatory legal requirement (unlike the Commission's guidance in respect of the share of European works under Article 13(7) of Directive 2010/13/EU ("**AVMSD**"). It rather derives from a non-binding recommendation at Recital (5) of Directive (EU) 2018/1808 amending AVMSD, which indicates a clear decision by the legislator to limit its standing.

Furthermore, with respect to the substance of the guidance, it is important to recognise that it is the view of one non-UK regulator, and does not constitute or replace the law. (A position which is particularly emphasized following the UK's exit from the EU.) The relevant law is set out in section 368S(2)(b) of the Communications Act 2003 (the "**Act**"), and the relevant question is whether the provision of videos to members of the public is an essential functionality of the service.

Below we discuss some of the areas where the guidance is flawed and which would place Ofcom in a difficult position if it were to rely upon it in a number of material respects. We have summarised the following key points here:-

- As a general observation, reliance on 'criteria' risks assuming the status of law which inevitably invites confusion and litigation. For the purpose of interpretation of the UK statute, Ofcom must consider and apply the meaning of the words "**essential** functionality" as a fundamental approach, not the extent to which a service meets the guidance's criteria.
- We emphasize the approach above because the guidance fails to acknowledge the significance and meaning of the word "essential". In simpler terms the test of "essential" means 'absolutely necessary'. It does not invite the possibility of 'incidental to' or 'peripheral to'. Without the proper clarity and reliance on "essential functionality," confusion will inevitably arise as it creates a position where the provision of video content on a service which is not absolutely necessary for the service to function nonetheless meets the essential functionality criterion. That cannot, nor should it, be correct. The guidance fails to create any meaningful margin, for a service to which the provision of video content is more than ancillary or minor, but less than essential. The guidance fails to take account of the context of the essential functionality criterion which was designed as a fail-safe in the legislation to ensure that the requirements on VSPs apply where video content forms a **very important** part of a service, but falls short of being its most important or "primary purpose." The guidance fails to make the proper distinction and in effect extends this fail-safe to include services of which video content forms **any** part.

We would encourage Ofcom to avoid the unwitting errors under the guidance and refrain from straying into areas of functionality which do not satisfy the section 368S(2)(b) condition of essentiality (albeit we acknowledge that a number of Ofcom's statements are qualified as non-determinative or non-exhaustive). By way of example:

- The introductory reference at paragraph 3.6 of the Consultation, to "*a service which hosts videos and which allows users to upload videos and engage with other users' content, supported by advertising or subscriptions*", which Ofcom considers may meet the definition of a VSP, fails to acknowledge or distinguish between the very wide spectrum of importance of such content within the service and the relevance of such functionality to the primary purpose of the service.
- The reference at paragraph 3.30, to the description of essential functionality in Recital (5) of Directive (EU) 2018/1808, makes the same mistake of construction as that made by the Commission, in construing **any** video functionality which is not ancillary or minor automatically to be "essential".
- On that basis, Ofcom overly focuses at paragraphs 3.31 and 3.32 on what constitutes "ancillary" and "minor" functionality, as opposed to examining what constitutes "essential" functionality.

We urge Ofcom to revisit its approach to the essential functionality criterion, and to refocus on the law as set out in 368S(2)(b) of the Act. Essential functionality should only mean absolutely necessary for the Service; or to put it another way, is the primary functionality of the service

**Question 3: Do you have any comments on proposed guidance around assessing whether a service is within jurisdiction of the UK?**

The country of origin principle, in particular the question of which EU member state is the country of origin of a given service provider, rests upon a determination of the place of establishment in accordance with general EU law. The significance is that the 'primary criteria' for a determination of the UK's jurisdiction under section 368S(4) (as amended) and (6) of the Act amount to a repetition of the EU establishment test. Therefore, where a VSP is established and has its centre of economic activity in an EEA member state, under the amended Act it will be treated as being outside the UK's jurisdiction. This amounts to a continuation of the position prior to 1 January 2020, under the original section 368S(4)), where the establishment of a service in an EEA member state other than the UK would have given rise to the direct application of the country of origin principle under the E-Commerce Directive.

Bearing in mind the comments in the previous paragraph, a major concern for service providers arises where it is possible for Ofcom and an EEA member state to apply different interpretations of the establishment test. I.e. a service provider may have established itself in that EEA member state and submitted itself to the jurisdiction of that regulator, but if Ofcom were to apply the establishment test differently, that could result in the service provider being subject to regulation by two different regulators in respect of broadly identical requirements. The application of the same establishment test by two different regulators should not result in two different answers – both regulators should answer the question referenced at paragraph 4.6 of the Consultation identically.

Inconsistent application of the establishment test would be highly prejudicial to operators who have structured their business and compliance functions on the basis of their long accepted country of origin. It would be unconscionable and disproportionate to require an operator potentially to undertake significant operational restructuring, in order to comply with requirements with which it already complies under the national law of the relevant EEA member state, for a short period of time until the passage of the Online Harms Bill. In addition, given the scope of the E-Commerce Directive, inconsistent application of the establishment test has potential to create disruption for service providers in the context of many areas other than VSP regulation, and requires coordination with regulators other than VSP regulators.

On the basis of the above, and noting Ofcom's welcome intentions expressed at paragraph 4.13 of the Consultation, we urge Ofcom to collaborate with relevant regulators in EEA member states as closely as possible, to ensure consistent application of the establishment test.