

## The News Media Association's response to the [Ofcom Consultation](#): Video-sharing platforms – who needs to notify to Ofcom?

### 1. Background

- 1.1. The News Media Association (“NMA”) is the voice of UK national, regional and local newspapers in all their print and digital forms - a £4 billion sector read by 49.2 million adults every month in print and online. Our members publish over 900 news media titles - from The Times, The Guardian, the Daily Mail and the Daily Mirror to the Yorkshire Post, Kent Messenger, and the Monmouthshire Beacon. Our membership spans the industry - from the largest groups to small, independent, family-owned companies publishing one or two local titles.
- 1.2. Collectively these publishers are by far the biggest investors in news, accounting for 58 per cent of the total spend on news provision in the UK. The Government and DCMS wish to sustain such high-quality journalism, particularly in the local and regional press. That investment in journalism is largely financed by advertising revenues from their print and online news publications and services.

### 2. Scope

- 2.1. The Audio-Visual Media Services (“AVMS”) Regulations applying to UK-established video-sharing platform (“VSP”) services came into force on 1 November 2020. VSPs are a type of online video service which allow users to upload and share videos with the public. From 6 April 2021, VSP providers within UK jurisdiction will be legally obliged to submit a formal notification of their service to Ofcom (‘to notify’). Ofcom has issued draft guidance, which is the subject of this Consultation, to help service providers self-assess whether they fall within the scope of the definition of a VSP for the purposes of the Communications Act 2003 and need to, therefore, notify Ofcom, under new AVMS Regulations.
- 2.2. The Communications Act sets out specific [criteria](#) which determine whether a service meets the definition of a VSP. The starting point is to determine whether: (i) the provision of videos to members of the public is the “*principal purpose*” of the service or of a dissociable section of the service; or (ii) the provision of videos to members of the public is an “*essential functionality*” of the service. If so, section 368S(2) of the Act then applies four further criteria to determine whether a service or a dissociable section of a service is a VSP. Significantly for online news media:
  - 2.2.1. At paragraph 3.7(b) the draft guidance provides that online newspapers are “*unlikely*” to fall under the definition of a VSP, provided “*videos are embedded within the journalistic or editorial content of the service.*”
  - 2.2.2. However, a ‘dissociable section’ of a service for the purposes of the draft guidance includes standalone parts of newspapers’ websites providing video services, which are independent of the journalistic activities in content and form.
  - 2.2.3. Of importance in determining whether a section of an online newspapers is “*dissociable*” is whether its purpose differs from the rest of the service. The draft guidance has helpfully provided the following examples:

- (i) Where “a standalone section of a newspaper website which is dedicated to hosting user-generated videos on the site might be considered as a dissociable section of that service, if the videos are independent of the written press articles;”
- (ii) In contrast, “a scenario where such video clips were embedded in the editorial content (e.g. as a result of links between the text and the clips), so that they are indissociably complimentary to the journalistic activity, these would not fall within the VSP framework.”

Where one or more dissociable sections of a service are considered to constitute a VSP, only those sections will be covered by the regulation.

2.2.4. Helpfully, part 5 of the Consultation which sets out notification requirements, clarifies that if the service takes editorial control of the content available on it the service ceases to be a notifiable VSP (paragraph 5.5(a) of the Consultation).

### **3. The NMA’s Position**

3.1. The NMA and industry have appreciated their longstanding dialogue with the DCMS and Ofcom on the scope of the AVMS regime and avoidance of adverse impact upon press freedom. To that end, the NMA responded comprehensively to the DCMS Audio-visual Media Services Consultation on 16 August 2019 (a copy of which we **enclose** with our response). Further to which, our key concern remains to ensure that implementation of the AVMS Regulations should not result in any broadening of the scope of the statutory AVMS regime or the remit of Ofcom in respect of news publishers, newspaper websites and news brands’ online editorial and advertising content.

3.2. The NMA welcome’s Ofcom’s draft guidance. In particular, the NMA is pleased to see that Ofcom has expressly issued direction in relation to the scope of the AVMS regime in relation to news media. We trust that Ofcom will take scrupulous care to safeguard press freedom in framing any guidance, so that newspapers rightly remain outside of scope. To that end, we are happy to be consulted upon and discuss any clarification of exclusion from scope of news publishers and newspaper websites or any part of them.

### **4. Response**

*Question 1: Do you have any comments on proposed guidance around subsection 1 of section 368S of the Act – whether the provision of videos to members of the public is the principal purpose of the service or a dissociable section of the service, or an essential functionality of the service?*

4.1. The NMA welcomes the clarification in the draft guidance, in particular the use examples provided in relation to news media.

4.2. Nevertheless, Ofcom guidance and the Ofcom oversight of the new regime must be carefully framed to avoid bringing online newspapers and their content, whether on newspapers’ own websites or on third party platforms into scope of the AVMS Regulations. NMA members must be able to continue their existing provision of video content without falling within scope of the new regime. They must be able to use video, whether originated by their journalists or others, on their websites without falling within scope of the directive. To this end, we identify a few areas of potential ambiguity that could benefit from further clarity:

- 4.2.1. It is important that news publishers remain able to organise, offer and present video content which attracts and retains an audience and be able to do so any way that such audiences find quickest and easiest to access and navigate without falling within scope of the Regulations. They must also be able to innovate and develop their services without fear or risk of falling with scope of the directive.
- 4.2.2. The latter also includes live streaming online news content generated by the publisher, a means by which some publishers use to reach their target audience using video content as the most appropriate medium. Given such news videos are journalistic in content themselves (and not simply “*embedded within journalistic or editorial content*”) they should not fall within scope. Nevertheless, it would be useful to have this example set out in the final Guidelines for the avoidance of doubt.
- 4.2.3. Newspapers, including newspaper websites’ video content, must remain wholly exempt from the AVMS regulatory regime and outside the remit of Ofcom’s that enforcement of the regime. This includes advertising as well as editorial content, which could be at risk of being mischaracterised as ‘disassociated’ from the main purpose. If so, this would be wholly wrong.
- 4.2.4. Advertising revenues are vital to the survival of news media, especially regional and independent online news. It is, therefore, imperative that the self-regulatory status of the ASA and CAP Code (who regulate advertising for news media) are maintained in respect of news publishers and their advertising, processing and related practices relating to their publications and websites outside the scope of the Regulations and this is made clear in the guidance of the avoidance of doubt.

*Question 2: Do you have any comments on proposed guidance around subsections 2(a)-(c) of section 368S of the Act – provision via an electronic communications network; provision on a commercial basis; and the level of control providers have over the service?*

- 4.3. When enforcing the regime, Ofcom must avoid the indirect imposition of controls over newspaper video content out of scope of the AVMS Regulations, by VSPs within scope of the AVMS regime. In particular, tech companies must not be able to exploit AVMS implementation to undermine news publishers’ audience and advertising revenues, which are the means of funding the UK’s independent, trusted journalism.
- 4.4. The dominance of the tech companies in search engines and social media means that they now play a very significant and unavoidable role in the dissemination of news publishers’ trusted content online and the audience which it attracts - as well as the advertising revenue which funds that trusted journalism. Therefore, it is also vital that Ofcom’s enforcement of the regime does not put news publishers and their trusted, lawful, code-compliant, video journalistic content, at risk of refusal, restriction or exploitation by video sharing platforms, due to the new requirements imposed upon VSPs by the AVMS Regulations and implementing legislation. Any risk of doing so would be very damaging to news publishers’ business models.

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