

IAB UK: Response to Consultation on Requirements for Video Sharing Platforms in the Audiovisual Media Services Directive

17 September 2019

Background

IAB UK is the trade association for digital advertising, representing over 1,200 of the UK's leading brands, agencies, media owners and technology providers. We have a [Board](#) comprised of 24 leading businesses in the sector. Our purpose is to build a sustainable future for digital advertising, a market that was worth £13.44bn in the UK in 2018.

The IAB is actively engaged in working towards the optimal policy and regulatory environment to support a sustainable future for digital advertising. We also develop and promote good practice to ensure a responsible medium.

Answers and comments

All answers and comments are restricted to provisions relating to advertising, and not to those relating to content.

Q1 Do you agree with the Government approach of transposing a definition for 'video sharing platforms' which sets out the minimum requirements of the Directive into UK law?

Yes

Q2 Do you agree that there is a role for regulatory authority (Ofcom) to provide and/or issue guidance to help service providers determine whether their services meet the definition of a video sharing platform?

Yes, but it is important for the regulatory authority to ensure its guidance avoids conflicting with or contradicting the Commission's guidance. The Government should consider how consistency between the two sets of guidance will be ensured.

Q5 Do you agree with the approach of:

- allowing for co-regulation in legislation;
- in practice for Ofcom to solely regulate content in the absence of an appropriate industry body; and
- for the ASA to be designated as the co-regulator for advertising?

In relation to advertising, the IAB agrees with co-regulation and with the designation of ASA as the co-regulator.

Q6 Should regulation of commercial communications on VSPs arising from AVMSD apply to:

- a) Advertising which appears anywhere on a service as a result of the user visiting that service e.g. in the margins or across the top of a webpage.
- b) Advertising which can only be viewed as a result of the user selecting a programme or user generated video to view.

The IAB believes option b) would be the most appropriate as this is most closely linked to the AVMSD's scope, which is audio visual content and advertising within that content. The Directive does not indicate that its scope extends to advertising on a VSP beyond those served as a result of the user selecting a programme or user generated video to view. Given that a VSP may have content that falls outside the AVMSD's scope as well as content that falls inside it, only the audio visual content and advertising directly linked to it should be included. This would be consistent with the rules for VOD under the present designation arrangement ("Advertising which can only be viewed as a result of the user selecting a programme or user generated video to view").

If the UK's interpretation of the AVMSD's provisions was that advertising that is not directly linked to audio visual content is in scope, this would create a different regulatory regime for that type of advertising, based on whether or not the media owner is classed as a VSP.

Q7 Do you agree that there should be a role for Ofcom in providing guidance to video sharing platforms about what appropriate measures are required to ensure compliance?

Yes, but that guidance should be created in conjunction with the co-regulator (ASA) where in relation to advertising.

Q8 How should Ofcom determine what measures are practicable and proportionate for different types of content, users and services?

Ofcom should consult industry, work with the ASA and consider the existing measures used by CAP and BCAP rules and guidance. Crucially, this should include taking into account the different ways in which adverts are sold online (e.g. whether directly or indirectly), as envisaged in article 28b(2) of the revised Directive:

"Member States shall ensure that the video-sharing platform providers under their jurisdiction take appropriate measures to comply with the requirements set out in Article 9(1) with respect to audiovisual commercial communications that are not marketed, sold or arranged by those video-sharing platform providers, taking into account the limited control exercised by those video-sharing platforms over those audiovisual commercial communications."

Q11 Noting the existing regime on demand programme services which provide for a range of sanctions noted above (which could include enforcement notices, financial penalties and the potential suspension or restriction to provide a service), do you agree that similar sanctions mechanisms can be applied to video-sharing platforms?

No, the sanctions and mechanisms for commercial communications should be considered separately and subject to a further consultation by Ofcom to ensure that the sanctions are appropriate and proportionate. For example, it is impossible to know whether 'qualifying revenue' in relation to a commercial communication would be proportionate without any clear definition of 'qualifying

revenue' existing, whether that qualifying revenue would fall directly under the VSP's control or not, etc.

Q12 Do you agree with Governments proposal that the maximum fine and other offences for video-sharing platforms mirror that of other services regulated AVMS services?

Q12a If you answered yes to the previous question (12), what should constitute 'qualifying revenue' for video sharing platforms?

No, the sanctions and mechanisms for commercial communications should be considered separately and subject to a further consultation by Ofcom to ensure that the sanctions are appropriate and proportionate. Stakeholders would need to understand how the existing fines were determined, and with what relevant criteria, in order to make a full assessment of what would be appropriate, proportionate.

Additional comments around the processing of minors' data for commercial purposes:

The Government's original consultation document¹ sets out an interpretation of the provisions in article 28b of the 2018 AVMSD which appears to us to be inaccurate, and with which we do not agree.

The 2018 Directive requires VSPs to put appropriate measures in place in order to protect minors from harmful content which may impair their physical, mental or moral development, (Article 28b(3), (f) and (h)²). Article 6a(2) of the Directive includes a similar restriction for linear television and on-demand service providers.

The final part of Article 28b states:

Personal data of minors collected or otherwise generated by video-sharing platform providers pursuant to points (f) and (h) of the third subparagraph shall not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising.

The UK Government's AVMSD consultation document states that the Directive "prohibits providers from processing minors' personal data for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising... This goes further than the requirements set out in Article 8 of the GDPR, which allows the processing of children's personal data to the extent that consent is given or authorised by the holder of parental responsibility over the child." (page 12, para 34)

The IAB notes that the provisions in Article 28b are clearly caveated ('pursuant to points (f) and (h)') to only apply to data collected or generated in the course of implementing controls to protect minors from certain types of content. The 2018 Directive does not, in our view, introduce an outright ban on VSPs otherwise processing minors' personal data for other purposes. To do so would be to conflict with existing legislation governing the use of personal data, i.e. the GDPR and ePrivacy Directive, and create a duplicate and contradictory regulatory regime for data protection in relation to a very specific type of activity by a very specific type of media service provider.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807651/Audiovisual_Media_Services_Consultation_Document.pdf

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02010L0013-20181218>

Recital 21 of the 2018 Directive states (our emphasis added):

*Regulation (EU) 2016/679 of the European Parliament and the Council (9) recognises that children merit specific protection with regard to the processing of their personal data. The establishment of child protection mechanisms by media service providers inevitably leads to the processing of the personal data of minors. Given that such mechanisms aim at protecting children, **personal data of minors processed in the framework of technical child protection measures should not be used for commercial purposes.***

Not only does the Government's interpretation of these provisions appear to be inaccurate, it would also be problematic as it could, in practice, restrict the ability of VSPs to process personal data in order to protect minors from age-restricted advertising.

As a minimum, the Government should set out its rationale for its interpretation of this provision in Article 28b as constituting an outright ban on any processing of minors' data for commercial purposes, when this is not prohibited by the GDPR. We would welcome the opportunity to discuss this point with the Government.