



Department for
Digital, Culture
Media & Sport

Baroness Barran
Minister for Civil Society
4th Floor
100 Parliament Street
London SW1A 2BQ

www.gov.uk/dcms
enquiries@dcms.gov.uk

Lord Foster of Bath
Lord Mann
Lord Loomba
Lord Bhatia
Lord Naseby
The Earl of Erroll
Baroness Ritchie of Downpatrick

INT2020/27351/DC
4 December 2020

My Lords

I would like to thank you for your contributions during the debate on the Audiovisual Media Services (Amendment) (EU Exit) Regulations 2020.

I promised that I would write on a few matters that I did not have time to address during the debate. Many of those points were focused on the upcoming Online Harms regulatory framework, the department's work on age verification and the impact of EU negotiations on the video sharing platform (VSP) regime.

Firstly, I would like to address the points raised in relation to the statutory instrument that was debated on 27th November 2020. During the debate, there were questions in relation to Ofcom's regulatory remit under this statutory instrument. I would like to reiterate that the rules regarding jurisdiction in the Audiovisual Media Services Regulations 2020 (SI 2020/1062) are those set by Article 28a of the AVMS Directive.

Given that we have sought to retain Ofcom's current remit after the end of the transition period, Ofcom will only regulate and enforce against video sharing platforms if they fall under UK jurisdiction. As mentioned during the debate, well-known platforms such as YouTube, Facebook and Twitter are expected to fall under the jurisdiction of other EU member states and will therefore not be regulated by Ofcom. Where it is not clear which country has jurisdiction, for example with platforms such as TikTok, Ofcom will rely on informal cooperation with the relevant EU regulatory authorities. There may be a situation where a provider has no physical presence in the UK or the EEA and will therefore not be subject to regulation by Ofcom or any European regulator, however we are not currently aware of any specific examples. We believe that once regulation in

other EU member states commences, this will be effective enough to provide protection to UK users in the interim, until such time as our upcoming online harms legislation is introduced.

On the points raised regarding our reliance on EU case law after the end of the transition period, I would like to clarify that where Ofcom does have jurisdiction, the legislative framework containing the regulatory system in the UK is 'retained EU law'. This means that the legislation was introduced to give effect to EU obligations during a time that the UK was bound by EU law. The provisions of the European Union (Withdrawal) Act 2018 dealing with retained EU law will apply. As per Section 6 of that Act domestic courts are not bound by any principles laid down, or any decisions made, on or after the transition period by the Court of Justice of the European Court. However, the courts are free to look at such decisions for any persuasive value they may provide in relation to the interpretation of domestic legislation.

I also wanted to highlight the term 'required connection' which was raised during the debate. This term is referred to in section 368S(2)(d) (as amended by this instrument) and is a connection as described in new inserted subsections (3) to (6). The first ground for establishing a 'required connection' is Case A, if the platform is established in the UK as described, i.e. using a fixed establishment in the United Kingdom for an indefinite period and effectively pursuing an economic activity in doing so. If that connection does not exist, then it is necessary to consider whether Case B is made out. This is where the video sharing platform is not under the jurisdiction of an EEA State for the purposes of the AVMS Directive, but there is a group undertaking of the platform in the UK.

There were also points made regarding whether terrorist and criminal content will be in scope of this regime. UK-established VSPs will be required to have in place measures that are appropriate to protect the general public from content constituting criminal offences, which includes terrorist material. As the VSP regime itself will be regulating systems and not content, any terrorist content will be dealt with under the appropriate procedures and laws to deal with criminal activity.

One of the appropriate measures that video sharing platforms must consider taking in order to protect the public adequately is to establish and operate a complaints procedure which must be transparent, easy to use and effective, and must not affect the ability of a person to bring a claim in civil proceedings. Ofcom must draw up, and from time to time review and revise, guidance for providers of video-sharing platform services concerning which measures may be appropriate. As highlighted during the debate, if Ofcom find that a platform has not taken the appropriate measures to protect the public, enforcement action could be taken against such a platform.

During the debate, the point of cooperation between regulators was raised, in particular how the new Digital Markets Unit will engage with Ofcom. The Digital Markets Unit, which will be set up within the Competition and Markets Authority, will work closely with regulators including Ofcom to effectively introduce and enforce a new code to govern the behaviour of platforms that currently dominate the market, such as Google and Facebook, to ensure consumers and small businesses aren't disadvantaged.

I also wish to address all the concerns raised by members during the debate regarding the upcoming Online Harms legislation. I would like to reassure members that my department, and the Home Office, are working at pace to prepare this legislation. We will publish a Full Government Response to the Online Harms White Paper later this year. This will be followed by the legislation, which will be ready early next year. On the question of whether the forthcoming Online Harms legislation will undertake pre-legislative scrutiny, it is vital that we get this legislation right. We will make a final decision on pre-legislative scrutiny nearer the time of introduction, and this is of course subject to parliamentary time. We are mindful of the need to balance speed and scrutiny when introducing these measures, and Ministerial colleagues and I will continue to engage with members as we prepare legislation.

In relation to the points raised regarding the scope of the Online Harms regime, the legislation will increase protections for UK internet users, no matter where companies are based. We are clear that regulation must create a level playing field between companies that have a legal presence in the UK, and those which operate entirely from overseas. The Government is also deeply concerned about the scale and growth of financial crime online, including online fraud. We have consulted widely on the proposals set out in the Online Harms White Paper and will be setting out further details on the scope of regulation in the Full Government Response to the Online Harms White Paper. The framework will be proportionate and targeted, and it will not duplicate existing government activity or impose undue burdens on companies in scope.

I would also like to stress that protecting children is at the heart of our Online Harms agenda, and wider government priorities. Therefore, our proposals assume a higher level of protection for children than for the typical adult user. Ahead of the implementation of the new Online Harms regulatory framework, we will continue to encourage companies to take early action to address online harms and are developing a Safety by Design Framework, Government intends to publish this by Spring 2021. This will provide practical guidance on best practice platform design for user safety and help companies build safer online services and products. Alongside this, over the coming months we are also developing a 'one stop shop' which will provide companies with guidance on their current regulatory requirements for child online safety.

On the points raised on age checking and age verification, the revised AVMS Directive requires that the most harmful content is subject to the strongest protections, such as age assurance or more technical measures. Future Online Harms regulation will also ensure companies have appropriate systems and processes in place to tackle online harms. We expect that the Information Commissioner's Age Appropriate Design Code ("the Code"), which will come into force on September 2021, will ensure that companies take a risk-based approach to recognising the age of individual users and effectively applying the standards in the Code to child users.

I would also like to confirm that DCMS has contributed funds to the update of the Publicly Available Standard 1296 (PAS1296) and would welcome contributions from other relevant stakeholders. Whether funding is committed by other stakeholders and how much they contribute is not something that DCMS is responsible for. The British Standards Institute (BSI), who own the PAS, run the process for updating PAS1296 and securing funds.

On the points raised during the debate on the European Convention on Transfrontier Television (ECTT), I would like to emphasise that although, from 1 January 2021, the country of origin principle will no longer apply to services under UK jurisdiction broadcast into the EU, the ECTT will still apply. This means that the 20 EU countries that have signed up to ECTT must allow freedom of reception to broadcasting services under UK jurisdiction. The UK must also permit freedom of reception for services that originate from all countries that are party to the ECTT. The ECTT framework does not apply to on-demand programme services or video-sharing platform services. The Council of Europe is a key international forum for shaping a number of Government interests across the media and digital space. We will continue to work with our colleagues on the various Council of Europe committees that help develop international approaches and policy, including those related to television content and services.

To address the points raised in relation to US trade negotiations, the Government is committed to making the UK the safest place in the world to be online and the best place to start and grow a digital business. The Government will carefully consider any interaction between trade policy and online harms policy in future trade agreements. We stand by our online harms commitment and nothing agreed in the US trade deal will affect that.

Finally, I would like to confirm that the Regulations transposing the revised AVMSD will continue to be in force after the end of the transition period in a no-deal scenario. The Government will address any deficiencies and inoperabilities related to the Regulations arising from EU Exit, including through this statutory instrument.

I am copying this letter to all those who spoke in the debate and will place a copy in the House library.

With best wishes

A handwritten signature in blue ink that reads "Diana Barran". The signature is written in a cursive, flowing style.

Baroness Barran
Minister for Civil Society