EXPLANATORY MEMORANDUM TO

THE AUDIOVISUAL MEDIA SERVICES (AMENDMENT) REGULATIONS 2021

2021 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport and is laid before Parliament by Command of her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument is being made under section 8 of the European Union (Withdrawal) Act 2018 (EUWA) in order to address the remaining deficiencies arising in the operation of domestic law which transposes the revised Audiovisual Media Services Directive, Directive 2010/13/EU, (AVMSD or "the Directive")[1] as a result of the United Kingdom's exit from the European Union ("EU"). The instrument will address the remaining deficiencies that were not addressed in the Audiovisual Media Services (EU Exit) (Amendment) Regulations 2020 (S.I. 2020/1536).

Explanations

What did any relevant EU law do before exit day?

2.2 The UK transposed the EU's revised AVMSD through the Audiovisual Media Services Regulations 2020 ('the transposing Regulations') which were made and laid on the 30th September 2020.

2.3 The AVMSD is an EU-wide directive, governing coordination of national legislation on all audiovisual media. The primary objective of the original AVMSD was to ensure the effective operation of the internal market for broadcasting services by ensuring the freedom to provide broadcasting services throughout the EU.

2.4 The revised AVMSD coordinates broadcasting regulation to promote cross-border trade and the latest revision to the Directive aligns rules for linear TV and on-demand programme services (ODPS) by strengthening the requirements for these services. The Directive aims to modernise the existing rules by ensuring a level playing field between the traditional broadcasting sector i.e. television, and new services such as on-demand programme services (ODPS, e.g. Netflix) and video-sharing platforms (VSPs, e.g. YouTube). It introduced new rules for VSPs for the first time and will place requirements on UK-established VSPs to put in place systems to protect their users from harmful content and to take appropriate measures to protect minors from content which may impair their physical, mental or moral development.

2.5 The Audiovisual Media Services (Amendment) (EU Exit) Regulations 2020 (S.I. 2020/1536 - 'first fixing SI') was laid on 15 October (the majority of which came into force at 11pm on 31 December 2020) and addressed the most substantive deficiency

[1] Consolidated text available here: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601637872410&uri=CELEX:02010L0013-20181218

in the transposition of the Directive which would have arisen after the end of the transition period (31 December 2020). The fixes in the first fixing SI were to ensure that Ofcom has the remit to continue regulating VSPs established in the UK beyond the end of the transition period.

2.6 This statutory instrument addresses the remaining deficiencies and inoperabilities arising in the operation of the domestic law which transposed the AVMSD as a result of the United Kingdom's exit from the EU.

Why is it being changed?

2.7 Following the end of the transition period, certain technical elements of the AVMSD transposition are deficient because the UK is no longer treated as if it was a Member State in UK law and EU law no longer applies in the UK.

2.8 Requirements for Ofcom to produce lists of services providers, in order to notify the Commission, are no longer appropriate.

2.9 Certain cross-references to EU law are no longer operable without amendment. In places, references to the AVMSD in domestic legislation are to that Directive as it applies to EU member States, and for that reason ambulatory references are appropriate, for example in relation to European works.

2.10 Duties for Ofcom to co-operate with EU national regulatory authorities and the Commission are no longer appropriate, as there is no legal duty under EU law and no required reciprocity. However, jurisdiction determinations for VSPs have an interdependency with jurisdiction determinations in the EU, and there is a high degree of similarity of the regulatory regimes for both the UK and the EU currently.

What will it now do?

2.11 This statutory instrument will amend EU references, amend Ofcom's duty to maintain lists of regulated services by removing the duty to notify the Commission, ensure continuity for provisions governing quotas for European works and the guidelines for European works, and provide Ofcom with powers to co-operate and share information with EU/EEA regulators.

2.12 The transposing legislation requires Ofcom to establish and maintain up to date lists of providers of linear TV, ODPS and VSP services who are under UK jurisdiction and to notify the contents of that list and any updates to it to the European Commission. This statutory instrument removes the obligation to notify the Commission, and instead requires that Ofcom publish lists of the service providers that they regulate on their website.

2.13 This statutory instrument will also ensure relevance of the definition of European works, and the guidance relating to European works. Guidance issued by the European Commission will continue to have relevance in the UK should it be updated. European works quotas for linear and ODPS will continue to apply in the UK and productions originating in the UK will continue to qualify as European works, benefitting the UK production sector.

2.14 This statutory instrument also amends Ofcom's current duty to co-operate with other regulators. Currently Ofcom must take all necessary steps to provide such information and assistance to European Union Member States and to the European Commission as is required in order to comply with the AVMSD as it applies in relation to providers of ODPS and VSPs. Since the end of the transition period, the UK is a third country

and these duties are no longer in effect. However, a new duty to co-operate to replace these duties would not be appropriate as there will be no mandatory reciprocation.

2.15 This statutory instrument will therefore ensure that there are powers to co-operate and to share information with EU/EEA regulators. This power is helpful for Ofcom's functions as a regulator, and it is hoped it will incentivise other regulators to co-operate with Ofcom. Ofcom may use this power to:

- Seek information in relation to where a provider is located for the purpose of determining whether or not they fall within UK or EU jurisdiction;
- Share information they have relevant to an EU regulator's investigation, or their monitoring or reporting work, and also to receive information relevant to an Ofcom investigation; and
- Share information in relation to parallel investigations or to determine whether it should prioritise/de-prioritise a domestic investigation.

Online Harms Regulatory Framework

2.16 The Online Harms White Paper published in 2019 set out the government's intention to introduce a new duty of care on companies towards their users, with an independent regulator to oversee this framework. In February 2020, the government announced that it was minded to give Ofcom the role of the independent online harms regulator. On 15 December 2020, the Online Harms Full Government Response was published.

2.17 The Full Government Response reiterated that the Transposing Regulations share broadly similar objectives to the online harms regime. It is the government's preference for the requirements on UK-established VSPs to transition to, and be superseded by, the online harms regulatory framework, once the latter comes into force. This means that requirements on UK-established VSPs to have systems in place to protect users will be encompassed in the online harms legislation.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This statutory instrument was laid for sifting by the Sifting Committees on 1 February.

3.2 The European Statutory Instruments Committee considered that the negative procedure was appropriate.

3.3 The Secondary Legislation Scrutiny Committee recommended that, on balance, the instrument be made using the affirmative procedure because while replacing a duty on Ofcom to co-operate with regulators in the EU with a power to do so could be considered appropriate in the absence of mandatory reciprocity, this nevertheless creates some uncertainty with regard to the effectiveness of tackling online harm as key content providers are based and regulated in the EU. While tackling online harm is a policy issue that the Government has committed to address through an Online Harms Bill, there is currently not a clear timetable for this Bill and the House may welcome an opportunity to look into these issues.

3.4 In accordance with the Secondary Legislation Scrutiny Committee's recommendation, this instrument is now being laid for making under the affirmative procedure.

3.5 The Committee's attention is brought to regulations 7 and 14 of this instrument, which amend sections 368BA(4) and 368V(4), which were inserted by the Audiovisual Media Services Regulations 2020 (S.I. 2020/1062), and are not brought into force until 6th April 2021 (see regulations 1(3), 26 and 47 of that instrument). That is why regulation 1(3) of this instrument regarding commencement is drafted as it is.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.6 The territorial application of this instrument includes Scotland and Northern Ireland.

3.7 The powers under which this instrument is made cover the entire United Kingdom (see section 24 of the EUWA and section 411 of the Communications Act 2003). The enactments which are amended also have a United Kingdom extent.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom.

4.2 The territorial application of this instrument is the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister of State for Digital and Culture, Caroline Dinenage, has made the following statement regarding Human Rights:

"In my view the provisions of the Audiovisual Media Services (Amendment) Regulations 2021 are compatible with the Convention rights."

6. Legislative Context

6.1 See the text under the heading of 'Explanations' in section 2 for details of what legislation is being amended and why.

6.2 A previous instrument[2] addressed deficiencies in domestic legislation transposing the AVMSD. That instrument addressed deficiencies relating to determination of UK jurisdiction for VSPs.

7. Policy background

What is being done and why?

7.1 The AVMSD Regulations transposed the AVMSD. This statutory instrument addresses the remaining deficiencies and inoperabilities arising in the operation of the domestic law which transposed the AVMSD as a result of the United Kingdom's exit from the EU, for the reasons set out above in section 2.

Amendment of EU References

7.2 The references in the transposing Regulations which are being fixed include amending and substituting references to EU legislation with references to domestic law, removing obsolete definitions, removing requirements to notify certain information to the European Commission and substituting the *duty* on Ofcom to co-operate with *powers* for them to co-operate with EU regulators.

[2] The Audiovisual Media Services (EU Exit) (Amendment) Regulations 2020, SI 2020/1536

Duty to maintain a list of service providers

7.3 The transposed Regulations required Ofcom to establish and maintain up to date lists of providers of linear TV, ODPS and VSP services which are under UK jurisdiction and to notify the contents of that list and any updates to it to the European Commission. This statutory instrument removes the obligation to notify the Commission, and instead places a requirement on Ofcom to publish lists of the service providers that they regulate on their website.

European works guidelines

7.4 This statutory instrument will ensure relevance of the version of the definition of European works and of the European works guidelines which are in force after the UK's exit from the European Union, should the guidance issued by the European Commission be updated in future (but not if it is replaced).

7.5 The UK will continue to participate in the European works regime, as eligibility is based on either signature of the European Convention on Transfrontier Television (ECTT) or via EU membership. Eligibility is strongly in the UK's interests and reference to the relevant Commission guidance is evidence of the UK's commitment to the European works regime.

International Cooperation

7.6 Under the transposed Regulations, Ofcom must take all necessary steps to provide information and assistance to European Union Member States and to the European Commission as is required in order to comply with the AVMSD. Since the end of the transition period, the UK is a third country and these duties are no longer in effect.

7.7 The sharing of information by Ofcom with EU regulators is vital to ensure that UK users remain protected by supporting effective AVMSD regulatory regimes in EU Member States. Furthermore, in sharing information to assist with investigations into both illegal and harmful materials which appear in services, the UK is abiding by its commitment to protecting minors from damaging content online.

7.8 We anticipate that as a result of granting Ofcom the power to share information relating to investigations and jurisdiction, regulators in EU and EEA Member States will continue to cooperate with UK regulators. Granting Ofcom the power to co-operate will also incentivise other national regulators to cooperate if Ofcom engage with them. Through cooperation with other regulators in the EU and EEA, Ofcom can assist in the protection of UK users from harmful material on platforms established in EU/EEA states.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the EUWA in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the EU. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 There are no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

10.1 The EUWA does not require a formal consultation to take place for instruments relating to exit. A public consultation was not held so as to avoid prejudicing ongoing exit negotiations, and also because of the limited scope of policy options in relation to fixing deficiencies.

10.2 The Devolved Administrations have been informed of this instrument.

11. Guidance

11.1 The nominated regulatory authority, Ofcom, has published guidance on scope and jurisdiction in accordance with the Audiovisual Media Services Regulations 2020 and is engaging with VSPs to help them understand any new obligations. Ofcom also published 'A guide to the regulation of video-sharing platforms on 21 October 2020.

11.2 Ofcom will also have a duty in legislation to produce guidance on the application of the 'appropriate measures' which VSPs can take to protect users. Ofcom's guidance will make clear that VSPs must take into account freedom of expression when designing and implementing their systems to protect users from the required areas of harm.

12. Impact

12.1 There is a low impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this statutory instrument because there is a low level of impact per business. A De-Minimis Assessment (DMA) was completed ahead of the first fixing statutory instrument. It should be noted that the DMA was initially prepared to reflect a statutory instrument that would address all deficiencies in the Transposed Regulations. The DMA, therefore assessed the impact to businesses relating to all fixes associated with the Transposed Regulations.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses, however, section 3 of the Communications Act 2003 requires that enforcement action by Ofcom is proportionate.

14. Monitoring & review

14.1 The Government will continue to engage with the regulator, particularly in regard to the regulation of VSPs, particularly as the legislation relating to VSPs will be repealed and encompassed within the Online Harms regulatory framework.

15. Contact

15.1 Subul Ahsan (subul.ahsan@dcms.gov.uk/0794 7921326) and Emma Broadhurst (emma.broadhurst@dcms.gov.uk/0782644610) at the Department for Digital, Culture, Media and Sport can answer any queries regarding the instrument.

15.2 Orla MacRae at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 Caroline Dinenage MP, Minister for Digital and Culture at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.

Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 14, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 15, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Appropriateness statement

1.1 The Minister for Digital and Culture, Caroline Dinenage, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Audiovisual Media Services (Amendment) Regulations 2021 do no more than is appropriate".

1.2 This is the case because the instrument corrects legislative deficiencies arising from EU exit. It amends EU references and makes appropriate provision to correct deficiencies arising from withdrawal and to ensure the continued operation of the regulatory framework. Further detail is given in sections 2, 6 and 7 of this explanatory memorandum.

2. Good reasons

2.1 The Minister for Digital and Culture, Caroline Dinenage, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

2.2 These are that the instrument addresses failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU. The policy reasons for the changes are set out in section 7 of this explanatory memorandum.

3. Equalities

3.1 The Minister for Digital and Culture, Caroline Dinenage, has made the following statement:

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

3.2 The Minister for Digital and Culture, Caroline Dinenage, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In relation to the instrument, I, the Minister for Digital and Culture, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4. Explanations

4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.