

PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Second Delegated Legislation Committee

DRAFT AUDIOVISUAL MEDIA SERVICES
(AMENDMENT) REGULATIONS 2021

Monday 19 April 2021

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor’s Room, House of Commons,

not later than

Friday 23 April 2021

© Parliamentary Copyright House of Commons 2021

This publication may be reproduced under the terms of the Open Parliament licence, which is published at www.parliament.uk/site-information/copyright/.

The Committee consisted of the following Members:

Chair: JULIE ELLIOTT

- | | |
|--|---|
| † Caulfield, Maria (<i>Lewes</i>) (Con) | † Rimmer, Ms Marie (<i>St Helens South and Whiston</i>) (Lab) |
| † Dinenage, Caroline (<i>Minister for Digital and Culture</i>) | Rutley, David (<i>Lord Commissioner of Her Majesty's Treasury</i>) |
| Docherty, Leo (<i>Aldershot</i>) (Con) | † Stone, Jamie (<i>Caithness, Sutherland and Easter Ross</i>) (LD) |
| Lamont, John (<i>Berwickshire, Roxburgh and Selkirk</i>) (Con) | Thomson, Richard (<i>Gordon</i>) (SNP) |
| McDonnell, John (<i>Hayes and Harlington</i>) (Lab) | † Throup, Maggie (<i>Lord Commissioner of Her Majesty's Treasury</i>) |
| Mann, Scott (<i>North Cornwall</i>) (Con) | † Tomlinson, Michael (<i>Lord Commissioner of Her Majesty's Treasury</i>) |
| Morris, James (<i>Lord Commissioner of Her Majesty's Treasury</i>) | |
| † Onwurah, Chi (<i>Newcastle upon Tyne Central</i>) (Lab) | Chloe Freeman, <i>Committee Clerk</i> |
| Osamor, Kate (<i>Edmonton</i>) (Lab/Co-op) | |
| Pursglove, Tom (<i>Corby</i>) (Con) | |
| Rees, Christina (<i>Neath</i>) (Lab/Co-op) | † attended the Committee |

Second Delegated Legislation Committee

Monday 19 April 2021

[JULIE ELLIOTT *in the Chair*]

Draft Audiovisual Media Services (Amendment) Regulations 2021

6 pm

The Minister for Digital and Culture (Caroline Dinenage):

I beg to move,

That the Committee has considered the draft Audiovisual Media Services (Amendment) Regulations 2021.

This instrument, laid in both Houses on 25 February, is being made under the European Union (Withdrawal) Act 2018. The regulations remedy certain failures of retained EU law arising from the withdrawal of the United Kingdom from the EU. Through this statutory instrument, we are seeking to address minor and technical issues in domestic law following the transposition of the audiovisual media services directive by the Audiovisual Media Services Regulations 2020. It is necessary to ensure that the law remains fit for purpose beyond the end of the transition period.

The regulations amend references to EU legislation, substituting domestic law references where appropriate and making references to EU legislation ambulatory where appropriate. They also remove the requirement for Ofcom to notify the European Commission of in-scope services falling within the UK's jurisdiction and address Ofcom's co-operation with EU member state regulators. These regulations were debated and approved by the House of Lords on 13 April.

I would like now to look quickly at the regulations in a little more detail. The EU's audiovisual media services directive, known as the AVMS directive, governs the co-ordination of national legislation on audiovisual media services. It was initially implemented into UK law in 2010, primarily by way of amendments to UK broadcasting legislation. The UK's Audiovisual Media Services Regulations 2020, which transposed the revised AVMS directive, were made and laid in Parliament on 30 September.

The 2020 regulations came into force on 1 November last year; for the first time, they introduced rules for video-sharing platform services. The Government have appointed Ofcom as the regulator for video-sharing platforms falling under the UK's jurisdiction. The rules ensure that platforms that have the required connection with the UK have appropriate systems and processes to protect the public, including minors, from illegal and harmful material. "Required connection with the UK" means that the platform provider is established in the UK or that a group undertaking of the provider is established in the UK and the service is not regulated by another EEA country. In those circumstances, Ofcom will have jurisdiction to regulate the video-sharing platform service.

The three requirements placed on video-sharing platforms under the 2020 regulations are: first, to take appropriate measures to protect minors from content harmful to

those under 18 years of age; secondly, to take appropriate measures to protect the general public from harmful and certain illegal content; and thirdly, to introduce standards around advertising.

Ofcom has published guidance on scope and jurisdiction. It is also continuing to actively engage with platforms that may be in scope of the regime. In March this year, Ofcom published draft guidance for consultation on the list of measures that video-sharing platforms can take to protect users from harmful material. More vigorous regulation will commence once all guidance on video-sharing platform regulation has been published later this year.

6.4 pm

Chi Onwurah (Newcastle upon Tyne Central) (Lab):

It is a great pleasure to serve under your chairship, Ms Elliott, and I welcome the rest of the Committee to this important statutory instrument. I thank the Minister for her opening remarks—here we are again, talking about audiovisual regulation without there being any online safety Bill in statute or in sight.

To begin with, I declare an interest: as the Minister is aware, before I entered Parliament I spent six years working for Ofcom as head of technology. As she mentioned, Ofcom has responsibility with regard to this SI. During my time there, it had responsibility for regulating broadcast audiovisual services and some responsibility for online audiovisual media services, which were beginning to grow in importance—although not always legally. Online audiovisual media services were nowhere near as widespread or important then as they have since become, and they have been especially critical during the pandemic. Video-sharing platforms, or VSPs, which are the core of the SI, have become a major presence in the lives of many people in this country—just look at TikTok or YouTube.

The SI follows on from two SIs of the same name that were laid in November and September 2020 and which put the UK's obligations in line with the European Union's audiovisual media services directive—AVMSD—in preparation for the end of the transition period at the end of last year. As the Minister said, the AVMSD introduced three key requirements for VSPs: to take measures to protect minors from content that is harmful to those under 18; to take appropriate measures to protect the general public from harmful and illegal content; and to introduce standards on advertising. It is notable that we are dependent on the directive for regulation because we do not have online harms legislation, and I want to emphasise that AVMSD should not be used as a replacement for robust UK online safety legislation.

As the Minister said, the SI makes technical changes to the definition of terms and to Ofcom's duties as a regulator, and it could potentially impact on the UK-EU working relationship. The SI includes changes to the definition of "European works". As part of the AVMSD's attempt to strengthen the competitiveness of the European audiovisual industry and to promote cultural diversity and heritage in Europe—I am sure they are ambitions that we all support—the European Union identified "European works". Such works are both linear and on-demand audiovisual media products. Under the AVMSD, 30% of on-demand programming services must be European works, so the SI laid in November brought that quota into UK law.

For a product to qualify as a European work, it must originate in a member state or third-party state, or have been co-produced within a framework of agreements between the EU and third countries. My understanding is that UK productions currently qualify as European works because the UK continues to be a signatory to the European convention on transfrontier television, and I hope the Minister will confirm that.

The changes made by the SI allow the definition of European works in UK law to adapt to and adopt unilateral changes to the definition of European works by the European Union. On the one hand, this allows flexibility and removes potential legislative barriers that may arise in the future, but on the other hand, it raises concerns over sovereignty, which I am sure the Minister remembers was a key issue in the Brexit debate. Should the European Union change the definition of European works to exclude audiovisual works created in third-party states and by signatories to the European convention on transfrontier television, I believe such a change would be automatically adopted into UK law, leaving UK audiovisual works outside the 30% quota. That could create a circumstance whereby UK audiovisual products are at a disadvantage and are not considered part of European works.

Can the Minister confirm whether any changes made by the EU to the definition of European works will be automatically transposed into UK law? If such a circumstance occurred, how quickly and by what means would the Government act to ensure that UK products are not placed at a disadvantage? It highlights the fact that, although we are still using European Union definitions, we have no say in how those definitions evolve. What guarantees has she received from the European Union that future changes to the definition of European works will not lead to the UK being excluded? What assessment has she made of the impact of such an exclusion, should it happen? Will unilateral changes by the European Union to the definition of European works be addressed in the forthcoming online safety Bill, which we have heard so much about even though we have yet to see even a draft?

I would hope that future negotiations between the European Union and the UK ensure ongoing agreement on this definition. However, it is clear from the draft regulations that the relationship with respect to the definition of European works is not reciprocal: the UK has adopted the European Union's definition without the European Union being forced to reflect or adopt any changes that the UK could make; I am not sure that in this case it could make any.

Back in November, I raised jurisprudence issues. Under the current rules, a VSP will come under UK jurisdiction if it has a fixed establishment in the UK and the centre of its economic activity relating to the relevant service is based in the UK, not in an EU member state. If the VSP is not established in the UK and no EU member state has jurisdiction over it, it will come under UK jurisdiction if it has a group undertaking established in the UK. The draft regulations and the AVMSD fail to provide a level playing field for online and offline services: they do not protect UK citizens from harmful content, either specifically for VSPs that do not have a group undertaking in the UK or generally, whereas offline broadcast services in the UK are subject to UK regulation.

A significant gap has opened up in online safety legislation. UK citizens and consumers are not adequately protected from harms under the current jurisprudence and regulatory regime, and the draft regulations do nothing to address that. Analysis commissioned by the Government shows that under the current rules-of-origin approach to jurisprudence, YouTube, Facebook, Instagram, Dailymotion and Twitter are all outside the UK's regulatory scope. What are the Government doing to build the regulatory framework that will protect UK citizens online? What role will the draft regulations play in that? I am sure that the Minister will refer to the online safety Bill; we look forward to more details on the timetable of its passage.

The Government may have left the UK without the regulatory framework that we need, but they have assigned it a regulator, as we heard from the Minister. We do not know how broad Ofcom's regulatory responsibilities will be—presumably they will be fleshed out in the online safety Bill, which we have yet to see—but the draft regulations do tell us one thing: Ofcom will not have a duty to inform the European Union of breaches of the AVMSD, because its duty to inform has been scaled back to a power that it “may” exercise. I understand that that is because EU states are not mandated to inform Ofcom of a breach, so the Government have decided to remove Ofcom's mandate to inform European Union states.

I think we can all agree that we would be safer if breaches were reported globally: one of the challenges of regulation in the online world is that it requires global co-operation and collaboration. The decision to stop Ofcom reporting breaches to the European Union has been made because we cannot obtain a reciprocal agreement. Did the Government seek to ensure reciprocity on the sharing of data breaches and of breach data? Have they assessed the impact of the decision on the flow of information between regulators? Failure to ensure that reciprocity is a failure of Government, and it could have implications for the UK's online safety relationship with the European Union, making us more vulnerable. I am concerned in particular that it may affect the information our regulator receives from friends and partner agencies in Europe. Will the Minister say a little about the future working relationship between UK regulators—Ofcom and the Information Commissioner's Office, for example—and European Union state regulators, particularly on reciprocity? Will she promise no regression in the sharing of information that may keep us safe online?

I have already touched on the reason why this is so important: the UK lacks any robust online harms legislation. The online safety Bill has been a decade in the making. It is startling to think that from 2010, starting with the coalition, the Government have presided over dramatic changes in the role of the internet, the web and the online world in our lives, but we have yet to see any online safety legislation. It took them nearly two years to issue a full response to their own consultation on the matter, despite huge increases in online threats because of the pandemic. I raised the threat of child abuse, online scams and misinformation in November, when I think we all agreed that legislation was way overdue. Six months later, we still have nothing beyond the promise of a reference in the Queen's Speech. I hope that the regulations are not a further sticking plaster to hide the Government's delaying on such a vital issue and that further delays will not materialise. The Minister's

[Chi Onwurah]

Department has stated that the online safety Bill will supersede the regulations, but as that Bill will probably not become law for another year, we have another year of uncertainty. Has the Minister assessed the impact that such uncertainty is having on the audiovisual sector?

Labour will not oppose the regulations because we do not believe that the Government can legislate quickly enough to address threats to online safety and jurisdiction concerns. However, we are greatly concerned about the holes in the UK's regulatory framework and the path that the Government are taking with our future relationship with the European Union, which should be one of collaboration and co-operation on the key subject of online safety. We need reassurance that the UK and the EU will work closely together without interruption or confusion, confirmation that the Government will prioritise the wellbeing of the UK audiovisual sector, and robust and substantial regulatory legislation to protect us online.

6.18 pm

Caroline Dinenage: I thank the hon. Lady for her questions. First, she mentioned Ofcom's duty, as opposed to a power, to co-operate with EU regulators and suggested that that could result in uncertainty regarding enforcement platforms whose services are used in the UK. In the post-transition period, co-operation continues to be of the utmost importance. The regulations provide Ofcom with the power to co-operate and collaborate with its EU member state counterparts. That is crucial, as she said, because we need to have that co-operation to keep people safe.

Co-operation and sharing of information between national regulatory authorities is really helpful in enabling authorities to fulfil their functions in the most effective and coherent way. Ofcom will be able to use the power to co-operate in a number of circumstances, including: co-ordinating enforcement action; ensuring substantial cross-border compliance; exchanging regulatory best practice, which we all want to adopt; and, most importantly, addressing jurisdictional matters such as determining where a provider is established, which will ensure that UK users are protected from illegal material that appears on a video-sharing platform that is not regulated by the UK.

In the absence of this statutory instrument, Ofcom will be able to engage only in non-specific informal co-operation with other EU regulators—things such as exchanging regulatory best practice, rather than, for example, co-ordinating enforcement action. This could result in a lack of transparency between regulators and lead to less effective protection of UK users, including, crucially, minors.

Although this instrument does not guarantee that EU counterparts will reciprocate and co-operate with Ofcom, these regulations show a willingness on behalf of the UK Government that Ofcom should engage and promote collaboration in this really important area of online safety. There should be no regression in reciprocity. It is really important to keep us all safe online. Leaving a duty to co-operate in place would be inappropriate because of the lack of reciprocity from EU member states, and would provide no incentives for EU national regulatory authorities to co-operate with Ofcom.

Chi Onwurah: I thank the Minister for her comments, which are enlightening. Were there discussions around maintaining a mutual reciprocal duty to co-operate on this issue?

Caroline Dinenage: I will drop the hon. Lady a line on that because I do not know for sure. She asked how long this will last and how it works in relation to the online safety Bill. As she knows, we are working at pace to prepare the legislation. It will be ready shortly and she will be able to cast her eyes over it in the near future. In the meantime, we are working closely with Ofcom and will continue to engage with parliamentarians as we prepare the legislation.

Of course, we recognise the importance of being online and the benefits that that brings, but we have seen most poignantly during the coronavirus period how online safety can be a major concern. There are serious risks that users, particularly children, currently face when they are online. It has been brought to a head over the past year, and the prevalence of illegal and harmful content and activity online is unacceptable and has become more so. We have made clear our intention to repeal the video-sharing platform regime in part 4B of the Communications Act 2003 once the more comprehensive online harms regime comes into force.

In the interim, through regulating and engaging with video-sharing platforms, Ofcom will have the unique opportunity to understand the potential challenges and opportunities to be harnessed with systems regulation. These vital learnings, combined with the scope to engage with UK-established video-sharing platforms, will no doubt strengthen the online harms regime once it comes into force.

This instrument ensures that the law remains clear and operable. It is required to remedy the failures of retained EU law arising from the withdrawal of the UK from the EU. The instrument will allow Ofcom to progress the implementation of the video-sharing platform regime and provide protections for UK users, especially minors.

The UK and EU have similar objectives, and we continue to share similar values when it comes to protecting users online. Through the introduction of a power to co-operate, we are signalling our commitment to working with our European and international partners. This engagement will strengthen our ability to keep UK users protected from illegal and harmful material on video-sharing platforms not established in the UK ahead of the upcoming online safety legislation.

Chi Onwurah: I thank the Minister for her comments. I also asked about European works and whether the definition of European works could be changed to exclude the UK at a future date.

Caroline Dinenage: Again, I will drop the hon. Lady a line on that.

Question put and agreed to.

6.24 pm

Committee rose.

