[GB] Ofcom consults on its guidance about how on-demand programme service providers comply with new requirements about European Works

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Ofcom has issued proposed guidance about how on-demand programme service ("ODPS") providers should comply with new requirements concerning European works under Section 368CB of the Communications Act 2003 ("the Act").

The proposed guidance reflects changes to the regulatory framework, effective since 1 November 2020, and will replace Ofcom's existing guidance on European works obligations for ODPS providers. The regulatory change arises from the UK's transposition of the revised Audiovisual Media Services Directive 2018 (AVMSD) into UK law, pursuant to the terms of the EU Withdrawal Agreement.

Under section 368CB (7) of the Act:" 'European works' are defined by reference to Article 1 of the AVMSD as meaning: a) works originating in European Union Member States; b) works originating in other European States party to the European Convention on Transfrontier Television of the Council of Europe ("the ECTT"); and c) works co-produced within the framework of agreements related to the audiovisual sector, concluded between the European Union and third countries, and fulfilling the conditions defined in each of those agreements."

The Directive imposes new requirements on ODPS providers to ensure that in each year prominence is achieved with, on average, at least 30% of the programmes included in their services are European works and help facilitate access to this programming. The AVMSD provides guidance as to how to calculate the 30% minimum. European works include content originating in European Union Member States and also works originating in other European States which are party to the European Convention on Transfrontier Television of the Council of Europe ("the ECTT"). The UK remains a party to the ECTT and therefore works originating in the UK are included as European works.

A person providing an ODPS must ensure the prominence of European works in their service. In Ofcom's view, there is no one-size-fits-all solution for securing prominence of European works. The regulator recognises that there are many providers, ranging from, for example, ITV Hub to Amazon, with different expectations from their users. As part of the proposed guidelines Ofcom encourages providers to be innovative in how they comply with this requirement,

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and to make use of new techniques and tools as they develop.

Ofcom has the responsibility to ensure that providers comply with the new requirements, which have been incorporated into Ofcom's ODPS rules and guidance as Rule 15. Section 368CB of the Act specifies that these requirements are to be interpreted in accordance with the European Commission guidelines on European works from July 2020. Ofcom's proposed guidance reflects those guidelines referring to them where appropriate.

Ofcom's proposed guidance is intended to assist providers understand how to meet the new requirements, including interpretation of the relevant lawful exemptions, plus explain the steps the regulator will use to ensure compliance by providers. The proposed guidance is intended to support ODPS providers to understand the application of the new quota for European works, the prominence requirement and applicable exemptions based on low audience (less than 1% of audience share), low turnover (annual income of less than GBP 1.7 million), or nature/theme of the service-for instance the European Works requirements do not apply to news, sports and teleshopping channels.

Furthermore, the draft guidance outlines Ofcom's proposed approach to securing compliance with the European works, including their suggested method of collecting data on how the requirements are being met and encouraging the exchange of best practices for making European works content prominent. Ofcom proposes to request information from providers in Spring 2023 and yearly thereafter. This information would include European works in providers catalogues; how they are making this content prominent; and, where relevant, reasons for why exemptions apply.

Ofcom is inviting all interested parties, particularly ODPS providers, the wider industry and other stakeholders, to comment on the proposed guidance. Comments about obligations relating to European works have to be submitted by 22 March 2022.

Once Ofcom has considered the responses, it plans to issue final guidance in Summer 2022. This guidance will accompany our existing guidance for ODPS providers, namely, on: the administrative rules (Rules 1- 9) and the rules regarding sponsorship and product placement (Rules 13 and 14); as well as our recently published guidance on measures to protect users from harmful material (Rules 10, 11 and 12).

Ofcom is encouraging providers to work collaboratively with them but if the regulator has a concern that a provider has contravened or is contravening their obligations, Ofcom will have investigative powers to demand information, and to issue an enforcement notification. Where appropriate Ofcom can impose a financial penalty that is proportionate to the contravention and not exceeding 5% of annual turnover or GBP 250 000 (whichever is the greater amount).

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Ofcom's On-demand programme services guidance. Consultation on guidance for ODPS providers on obligations relating to European works.

https://www.ofcom.org.uk/consultations-and-statements/category-2/odps-obligations-european-works

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