

# Designation of Video-Sharing Platform Services

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A Decision Framework Report  
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**Bringing Ingenuity to Life.**  
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### **Report Disclaimer**

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PA Consulting has made certain recommendations in this report using the information we have researched to assist Coimisiún na Meán to determine if a Video Sharing Platform Service (VSPS) falls within the definition of a VSPS and the jurisdiction of Ireland. PA are a management consulting firm and not authorised to provide legal advice and the implementation of the recommendations may require further legal advice or knowledge of aspects of Irish or international law that were not considered within the scope of this report.

# Precis

**This report provides a suggested decision framework for determining whether a video-sharing platform service (VSPS) is potentially in the regulatory scope of Coimisiún na Meán. It is provided by PA Consulting as independent advice to inform the approach An Coimisiún may take to designate ‘individual named services’.**

Coimisiún na Meán was established in March 2023 upon the enactment of the Online Safety and Media Regulation (OSMR) Act 2022. The Online Safety and Media Regulation Act 2022 amended the Broadcasting Act 2009 to establish An Coimisiún and dissolve the Broadcasting Authority of Ireland (BAI).

In addition to undertaking the functions of the BAI as the broadcasting regulator, An Coimisiún is to establish a regulatory framework for online safety. This will involve issuing a binding Online Safety Code for platforms that allow people to share and view video content on the internet.

In order to issue an online safety code that gives effect to the requirements of the Audiovisual Media Services Directive (AVMSD) Article 28b, An Coimisiún must formally ‘designate’ the category of ‘video-sharing platforms’ and any ‘named service’ “that appears to An Coimisiún to be a VSPS, the provider of which is under the jurisdiction of the State.”<sup>1</sup> If a service does appear to fall within scope and jurisdiction, it will be obliged to take measures to protect users from harm, and it will fall under the remit of the binding Online Safety Code.

This decision framework is intended to support An Coimisiún to identify ‘named services’ that are potentially in regulatory scope. As alluded to above, this involves considering two aspects:

1. Whether a service meets the definition of a VSPS as set out in the Broadcasting Act as amended
2. Whether the provider of the service is under the jurisdiction of the state.

This framework provides a methodical, evidence-based approach that guides the reader through a series of proposed questions to support the decision-making process. The questions are based on the criteria in the AVMSD, and the Broadcasting Act as amended. For each question, the decision framework includes:

- References to relevant legislation
- Reference documentation from the EU Commission, EU Member States, or other regulators
- Recommendations on a designation approach
- Signposts to potentially relevant indicators (qualities, characteristics, features, or functions of a VSPS that can be used to inform whether a service falls in or out of scope)
- Data and metrics that could be gathered to inform an assessment of whether there are indicators that support or refute the application of the criteria.

The report concludes with a series of recommendations regarding its current and future use. Information about the approaches taken in other jurisdictions are included in Annex B.

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<sup>1</sup> Online Safety Media Regulation (2022). Available at: <https://data.oireachtas.ie/ie/oireachtas/act/2022/41/eng/enacted/a4122.pdf>



# 1 Introduction

## 1.1 Purpose of this report

This report sets out a decision framework that could assist An Coimisiún in its assessment of whether a service is established in Ireland and meets the defining criteria of a video-sharing platform service (VSPS) as this is defined in Article 28a and 28b of the revised Audiovisual Media Services Directive (AVMSD) EU 2018/1808 and the 2009 Broadcasting Act as amended. The framework aims to provide the reader with an understanding of the questions, and indicators that can be explored as part of undertaking the designation of platforms. This report also identifies information sources that may be of assistance in making this determination.

Designation requires an overall assessment of a particular service, considering the specificities, and individual functionality of that service. The framework captured in this report provides a methodical, evidence-based approach that works through a series of steps, and questions that could be used to support the decision-making process.

This report is intended for an internal Coimisiún na Meán audience. However, it may be used to inform future engagement on VSPS regulation, which could be read by a wide range of stakeholders including the public, a VSPS itself, and other regulatory bodies. Wherever possible, plain English has been used, and the use of detailed legal wording has been kept to a minimum.

## 1.2 Structure of this report

Each of the questions that need to be investigated to make a determination is divided into a distinct section of the report, broken down into the following sub-sections:

- Legislation
- Reference documentation from the EU Commission, EU Member States, or other regulators
- PA Consulting recommendations on the approach to the specific question
- VSPS indicators
- Data and metrics.

## 1.3 Methodology

A qualitative approach focused on reviewing publicly available literature, and material concerning the regulation of VSPS was conducted to capture known information, insights, and research. The scope of this report was focused on the AVMSD, and OSMR legislation, and the designation of VSPS as relevant, and individual services. Legal analysis has not been undertaken as part of the development of this report, nor should the report be considered legal advice on any of the topics covered. PA is a management consulting firm, and is not authorised to provide legal advice. The implementation of any of the recommendations in this report may require further legal knowledge of aspects of Irish or international legislation, which were not considered within the scope of this document.

## PA's online safety expertise

PA works with UK and international governments, law enforcement agencies, regulators, and third sector partners (including the Internet Watch Foundation, and the UK National Society for the Prevention of Cruelty to Children – NSPCC) to understand how online harms are evolving globally (considering offender and victim behaviours, technology developments, and socio-economic factors).

PA has been involved with Online Harms regulation since 2018, and was the only consultancy to respond to the UK Government's first consultation on the topic. Since then, PA has continued to work with a range of UK public sector entities to prepare for online safety regulation, including with Ofcom on its 'A-SPARC' model to inform the regulation of VSPS, and the National Crime Agency.

PA has extensive expertise on the topic of children's online safety, which has developed and grown since facilitating the first series of multi-sector workshops convened by the UK government in 2014 to come up with potential solutions to improve children's online safety. PA is also a founding industry partner of the **WeProtect Global Alliance**, and has developed all three editions of the Global Threat Assessment of child sexual exploitation, and abuse online (in 2018, 2019, and 2021). At the time of writing, PA is leading the development of the 2023 edition of the report.

Through work across the defence and security sectors, PA has a complementary, in-depth understanding of other 'high-threat' harms (such as terrorism, violent extremism, and hate speech), and of the methods, technologies, and tools used by the platforms that host user-generated content to detect, assess, block, and remove harmful material.

## 2 Background and context

### 2.1 Legislation and designation overview

In 2018, the AVMSD was extended to cover the regulation of VSPS through new provisions (Article 28a and 28b), which provided for:

- “*The regulation of user-generated videos and audiovisual commercial communications on video-sharing platform services, such as YouTube;*
- *Strengthened rules for audiovisual commercial communications and content broadcast and made available on television and video-on-demand services;*
- *Providing more flexibility to television broadcasters in displaying television advertising;*
- *That Member States may impose a levy or investment obligation on media service providers to fund the production of European audiovisual works; and*
- *That Member States may make rules providing for the prominence of services of general public interest.”<sup>2</sup>*

In particular, the revised Directive requires EU Member States to regulate VSPS to ensure the protection of minors from harmful, and adverse content, and the general public from content that incites violence or hatred, or is illegal.

To transpose the AVMSD into national legislation, Ireland amended the 2009 Broadcasting Act by passing the Online Safety and Media Regulation Act 2022.

Under section 139G of the amended 2009 Broadcasting Act, An Coimisiún must:

**Designate as a category of service under section 139E the VSPS, the provider of which is under jurisdiction of the State;**

and separately,

**Designate as a named service under section 139E any relevant online services that appears to An Coimisiún to be a VSPS, the provider of which is under the jurisdiction of the State.<sup>3</sup>**

An Coimisiún must therefore designate VSPS as a category of service, and any individual services that appear to be a VSPS. This is for the purpose of issuing online safety code(s) that give effect to the requirements of AVMSD Article 28b, and aim to reduce the exposure of users to specific categories of harmful online content, as set out in Part 8A of the Broadcasting Act.

As part of determining individual and relevant online services, An Coimisiún will need to consider whether the service falls within the jurisdiction and scope of the definition of a VSPS, as set out in the Broadcasting Act as amended. If a service does appear to fall within scope, and jurisdiction, it will be obliged to take appropriate and proportionate measures to protect users of their service from harm, and it will fall under the remit of the binding online safety code(s).

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<sup>2</sup> Briefing for Incoming Online Safety Commissioner (2023), p. 6.

<sup>3</sup> Online Safety Media Regulation (2022). Available at: <https://data.oireachtas.ie/ie/oireachtas/act/2022/41/eng/enacted/a4122.pdf>

The AVMSD provides the following definition of a VSPS:

“a service [...] devoted to providing programmes, or user-generated videos, or both, to the general public, for which the video-sharing platform provider does not have editorial responsibility, in order to inform, entertain or educate, by means of electronic communication networks [...] and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging, and sequencing.”<sup>4</sup>

AVMS Directive EU 2018/1808

The Broadcasting Act as amended provides the following definition of a VSPS:

“a service [...] devoted to providing audiovisual programmes or user-generated videos, or both, by electronic communications networks, to the general public, in order to inform, entertain, or educate.

(3) A service is a video-sharing platform service within subsection (2) only if the provider of the service – (a) does not have effective control over the selection of the programmes and videos referred to in that subsection, but (b) determines their organisation, by automatic means or algorithms (including displaying, tagging and sequencing) or otherwise.<sup>5</sup>

Online Safety and Media Regulation Act 2022

The colours above relate to following sections in this report.

## 2.2 User-generated video context

**Providers are constantly evolving their services to maintain competitive advantage, and satisfy user demand. This changing landscape could be monitored to ensure awareness of trends.**

Since the COVID-19 pandemic, the popularity and presence of user-generated videos on services has increased significantly. Video content reportedly now generates 1,200 percent more shares than static content such as images or text.<sup>6</sup> Users are consuming video content more than ever, a trend noted by a Meta senior insights researcher: “short-form video consumption continues to rise, especially in younger generations [...]”<sup>7</sup> TikTok has responded to this increasing demand for video content. It has reached one billion users in just five years, outpacing its competitors such as Instagram, Facebook, and YouTube.<sup>8</sup> This demand for video sharing has resulted in platforms implementing changes geared towards video content; Instagram, Facebook, and Pinterest all now having dedicated ‘Reels’ or ‘Watch’ sections. The evolution of a provider, and the point at which a user is introduced to its service, may influence a user’s perception about whether it is a VSPS. This variation in user perceptions could also influence insights gained from attitudinal surveys, and contribute to the need for a designation approach that is evidence-based and objective.

**Emerging technologies – and their potential impact on the determination of individual, and relevant VSPS – will need to be regularly reviewed.**

<sup>4</sup> AVMS Directive (EU) 2018/1808 (2018). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&rid=9>

<sup>5</sup> Online Safety Media Regulation (2022). Available at: <https://data.oireachtas.ie/ie/oireachtas/act/2022/41/eng/enacted/a4122.pdf>

<sup>6</sup> Forbes, *How To Increase Engagement Through Video Marketing* (2022). Available at: <https://www.forbes.com/sites/jjawertz/2022/10/30/how-to-increase-engagement-through-video-marketing/>

<sup>7</sup> GWI, *Social: Behind the screens: 2023 trends report* (2023), p. 12. Available at: <https://www.gwi.com/reports/social>

<sup>8</sup> The Economist, *TikTok’s rapid growth shows the potency of video* (2021). Available at: <https://www.economist.com/graphic-detail/2021/10/07/tiktoks-rapid-growth-shows-the-potency-of-video>

There are a growing number of services using decentralised networks hosted on multiple servers. Mastodon, often referred to as the decentralised alternative to Twitter (now X), had over 10 million users worldwide in March 2023, up from 2.5 million in November 2022,<sup>9</sup> and saw a one million increase in active user numbers from October 2022 to January 2023.<sup>10</sup> Video-sharing service providers using decentralised networks may pose challenges when seeking to determine jurisdiction, and identify VSPS definition criteria, such as editorial responsibility.

There has been a significant increase in users of Generative AI, a form of artificial intelligence that can produce new outputs such as text, image, and audio based on previous data that it 'learns' from. This form of AI may pose challenges for the application of VSPS definition criteria, such as determining editorial responsibility, and defining 'user-generated video content'.

The video-sharing context, along with the introduction of emerging technologies, will therefore need to be regularly assessed to understand its potential impact on the designation of VSPS.

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<sup>9</sup> Statista, *Number of registered Mastodon users worldwide as of March 2023 (2023)*. Available at: <https://www.statista.com/statistics/1376022/global-registered-mastodon-users/>

<sup>10</sup> The Guardian, *Elon Musk drove more than a million people to Mastodon – but many aren't sticking around (2023)*. Available at: <https://www.theguardian.com/news/datablog/2023/jan/08/elon-musk-drove-more-than-a-million-people-to-mastodon-but-many-arent-sticking-around>

# 3 Recommended approach

PA Consulting recommends the use of a designation decision framework and systematic approach to determine whether a relevant service could potentially be a VSPS. The decision framework and approach should be used in conjunction with the guidance and information set out in this report. It should not, however, be considered legal advice or analysis on any of the matters concerned with the designation of individual services.

## 3.1 Decision framework

The framework consists of two decision trees.

- **Decision tree 1: Definition.** The first decision tree sets out an approach to applying the VSPS definition criteria.
- **Decision tree 2: Jurisdiction.** The second decision tree sets out a series of questions to help determine whether a service provider is in jurisdiction. In this report, jurisdiction is given limited consideration, using only publicly available information to set out high-level indicators of whether a company is based in Ireland. Further legal analysis, which does not form part of this report, would need to be conducted to answer the question of whether a service is in jurisdiction of the Irish State.

An affirmative outcome is required for both decision trees for a provider to appear to be within the scope of regulation.

The two decision trees are also shown in Annex A – Decision trees.

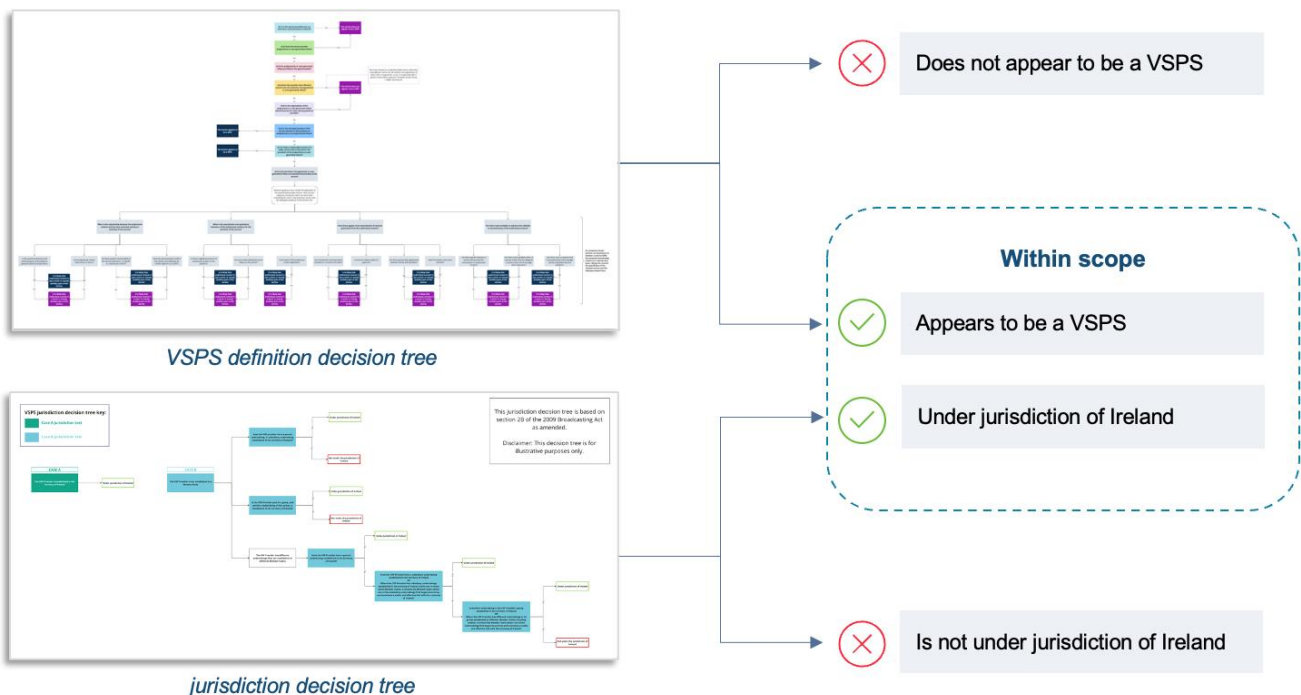


Figure 1 – VSPS decision trees

## 3.2 Systematic approach

Against each decision tree question, the following approach is recommended:

1. Independently collect preliminary open source information and data from the service website.

- a. Webpages likely to be of relevance for the majority decision tree questions include Terms of Service; Terms and Conditions; Privacy Policies; Support or FAQ webpages; the service's 'About Us' page; product specific pages; user agreements; and recent press releases from the provider and/ or service.
2. For services that are openly accessible, analyse its home page, content feed, or timeline to identify user functionality and features.
  - a. In particular, consider the service from the perspective of the video-sharing service user.
  - b. Consider the perceived amount of video content on the service; the different features available that are related to video; the presentation of content; and whether the user is being continuously encouraged to engage with video content.
3. If there is a lack of available open source data, seek to use secondary third-party sources.
  - a. When using third-party sources, consideration should be given to the credibility of the source. Ideally multiple peer-reviewed or reputable sources should be consulted to corroborate the information provided.
4. Collate the data and determine whether VSPS indicators captured in this report can be identified.
5. Make an initial assessment of whether the criteria can be applied to the service.
6. Draft and send information requests detailing the relevant data required from the provider.
7. Collate and analyse the data received from the provider.
8. Identify any gaps in the data, and outstanding areas for clarification.
9. Engage with the service if there is any additional information required.
10. Corroborate data provided by the service with relevant samples or subject matter experts, if required.

## 4 Is the service provided over an electronic communications network?

This section provides a summary of the AVMSD and OSMR legislation regarding 'service', and 'electronic communications network', as articulated in the definition of a VSPS. The section also gives an overview of relevant precedents or guidelines on these two terms, a PA Consulting recommended approach for the application of the criteria, and indicators and data that can be used in support.

### 4.1 Legislation

Service	
AVMSD	Video-sharing platform service means a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union. Video-sharing platform provider is also defined within the Directive as 'the natural or legal person who provides a video-sharing platform service'.
OSMR	Mirrors the definition of service included in the AVMSD and specifically calls out subsection (3) within the meaning of Articles 56 and 57 of the Treaty on the Functioning of the European Union.

**Article 57 of the Treaty on the Functioning of the European Union:** A service is defined as activities of an industrial, commercial, craftsmen, or professional nature that are normally provided for remuneration.<sup>11</sup>

Electronic communications network	
AVMSD	VSPS means a service "...by means of electronic communications networks within the meaning of point (a) of Article 2 Directive 2002/21/EC..."
OSMR	States that a VSPS is provided by an electronic communications network.

**Article 2 of Directive 2002/21/EC:** An 'electronic communications network' is defined as "transmission and systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed."<sup>12</sup>

<sup>11</sup> Article 57, Consolidated version of the Treaty on Functioning of the European Union. Available at: <https://www.legislation.gov.uk/eut/teec/article/57>

<sup>12</sup> Directive 2002/21/EC of the European Parliament and of the Council (2002). Available at: [https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF#:~:text=2.,EC%20\(Radio%20Spectrum%20Decision\)](https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0033:0050:EN:PDF#:~:text=2.,EC%20(Radio%20Spectrum%20Decision)).



## 4.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**Other regulators:** Guidance from the UK's communication regulator Ofcom guidance states that a service will only be considered a video-sharing platform if it is provided on a commercial basis.<sup>13</sup> Ofcom's definition does not cover non-economic activities or non-commercial communities of interest.<sup>14</sup>

'Commercial basis' is understood as "the capacity to generate revenue through commercial arrangements, rather than actual revenue or profit, will be a key indicator. Businesses that intend to generate revenue or profit, but have not yet achieved the sufficient scale to monetise, may be considered to be offered on a commercial basis."<sup>15</sup>

Ofcom guidance includes features that are likely to indicate that a service (or a 'dissociable section') is provided on a commercial basis. These features are:

- Advertising
- Subscription
- Transactions.

Further description of these features is provided in the Ofcom guidance.<sup>16</sup>

Ofcom defines an electronic communications network in accordance with the UK's Communication Act, meaning information shared over the internet, inclusive of mobile and fixed networks.<sup>17</sup>

## 4.3 PA Consulting recommendation on a designation approach

It is recommended the VSPS service and electronic communications network criteria are applied using the approach detailed in section 3.

The guidance in this section of the report identifies information, indicators, and data that could be considered. An extract of the decision tree that relates to the service and electronic communications network is shown at Figure 2.

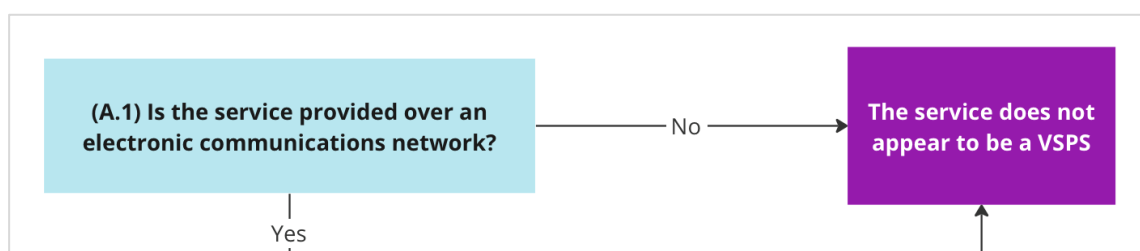


Figure 2 – Service and electronic communications network decision tree step

## 4.4 VSPS indicators

**Terminology:** In this section, 'indicator' is used to describe qualities, characteristics, features, or functions of a VSPS that can be used to determine whether a service falls in or out of scope.

<sup>13</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p. 14. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

<sup>14</sup> *Ibid.*, p. 14.

<sup>15</sup> *Ibid.*, p. 14.

<sup>16</sup> *Ibid.*, pp. 14-15.

<sup>17</sup> *Ibid.*, p. 14.

There is no threshold for the number of indicators that have to be present for a service to be within regulatory scope. Instead, indicators can be used to understand whether an online service could potentially be a VSPS.

### Indicators that a service is being provided can include the following:

The service generates revenue for the provider.

Commercial processes, or approaches implemented to generate revenue, including:

- Advertising
- Subscription models (including subscription to watch certain categories of video or access certain platform features)
- Pay-to-view
- Ability for users to purchase enhanced features
- Donations (such as creator tips)
- Merchandising
- Commercial arrangements with video creators.

### Indicators that a service is being provided over an electronic communications network can include the following:

Service is provided, and accessed through fixed internet.

Service is provided, and accessed through mobile internet.

## 4.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of these VSPS criteria could include consideration of the following data and metrics. Where this data could be sourced has also been included in the table below.

Data and metrics on service and electronic communications network	A	B	C
Annual revenue generated by the service		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
The presence or use of banner adverts, pre-, or mid-roll adverts	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Subscription models used	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Use of pay-to-view processes	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Ability for users to purchase enhanced features	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Commercial arrangements between the service, and video content creators (including brand deals, or sponsorship arrangements)			<input checked="" type="checkbox"/>
The service is accessed through the internet (mobile or fixed)	<input checked="" type="checkbox"/>		

#### Data source:

- A** Data that can be independently ascertained as a user of the service
- B** Data that can be ascertained from desk-based research using publicly available, third-party sources
- C** Data that would need to be requested from the specific service provider

## 5 Does the service provide programmes or user-generated videos?

This section of the report explores the ‘programmes’ and ‘user-generated videos’ criteria of the VSPS definition. Precedents and guidance on these terms, indicators of their presence, and data that can be used in support are captured.

### 5.1 Legislation

Programme	
AVMSD	Programme “means a set of moving images with or without sound constituting an individual item, irrespective of its length, within a schedule or a catalogue established by a media service provider, including feature-length films, video clips, sports events, situation comedies, documentations, children’s programme and original drama.”
OSMR	Programme “means a sound programme or audiovisual programme” Audio-visual programme “means a set of moving images with or without sound which, in the case of an audiovisual media service, constitutes an individual item, irrespective of its length, without a programme schedule or a catalogue.”

User-generated videos	
AVMSD	User-generated video “means a set of moving images, with or without sound, constituting an individual item, irrespective of its length, that is created by a user and uploaded to a video-sharing platform by that user or any other user.”
OSMR	User-generated content, in relation to a relevant online service, “means content created by a user of the service and uploaded to the service by that or another user.” User-generated video “means user-generated content consisting of a set of moving images with or without sound.”

### 5.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**Other EU Member States:** Many EU member states have not produced specific, detailed guidance on VSPS regulation, or the practical application of the definition of user-generated videos (see section **Error! Reference source not found.** for a summary of selected VSPS regimes). In transposing the AVMSD into national legislation, the majority of EU member states have verbatim used the AVMSD definition of video.<sup>18</sup> Finland, however, defines the term user-generated video by using the word ‘unit’, and France mentions user-generated content, but provides no definition for user-generated video.<sup>19</sup>

<sup>18</sup> Austria, Belgium, Bulgaria, Cyprus, Czechia, Germany, Denmark, Estonia, Spain, Greece, Croatia, Hungary, Italy, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Poland, Portugal, Romania, Sweden, Slovenia, Slovakia have all also verbatim transposed the ‘user-generated video’ text from the AVMSD – found in: European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful online content* (2021). Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2021-full-report/1680a43575>

<sup>19</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful online content* (2021), p. 207 and p. 219. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2021-full-report/1680a43575>

**Other regulators:** The definition of ‘video’ within Ofcom guidance includes both user-generated video, and programmes. The guidance states that practically, the definition of video includes a ‘diversity of content’ covering the following:<sup>20</sup>

- Livestreamed video
- Video formats that include static imagery
- Video formats without sound
- Video that is pre-recorded, and uploaded
- Short- and long-form video
- Videos created, and uploaded by individuals (user-generated video)
- Professional-grade video produced, commissioned, and uploaded by established media companies – including broadcast programmes, or programmes included as part of an on-demand programme service, where they are made available on a video-sharing platform.<sup>21</sup>

Ofcom guidance acknowledges that the variety of content encompassed under the term ‘video’ will result in different considerations about the appropriateness of measures implemented to protect users.

There are no guidelines from the EU Commission about the definition of user-generated videos or programmes. There are also currently no precedents on the treatment of video content produced by generative AI.

### 5.3 PA Consulting recommendation on a designation approach

It is recommended the VSPS programmes and user-generated videos criteria are applied using the approach detailed in section 3.

The guidance in this section identifies information, indicators, and data that could be considered. For example, a service’s website detailing products or features on offer as part of the service could be used to ascertain whether programmes or user-generated videos are provided to inform, entertain, or educate users.

An extract of the decision tree that relates to these criteria is included at Figure 3.

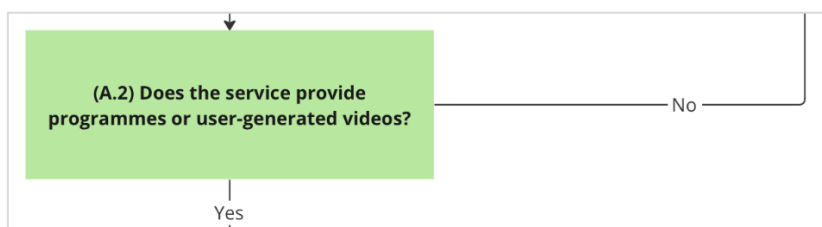


Figure 3 – Programmes and user-generated video decision tree step

### 5.4 VSPS indicators

**Indicators a service offers user-generated videos or programmes can include the following:**

Video content on the platform

Live-streaming

Channel feature where a user’s channel hosts the video content they have uploaded, as well as any live broadcasts

<sup>20</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p. 8. Available at:

[https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

<sup>21</sup> *Ibid.*, p.9.

Video formats that include static imagery
Pre-recorded video
Features encouraging users to upload their video content
Ephemeral video content
Professional or studio-grade video
Feature-length film
Sports events being broadcast
Situation comedies
Video/film documentaries
Children's programmes
Original drama
Broadcast programmes
<b>Indicators a service does not offer user-generated videos or programmes can include the following:</b>
Presence of only text or image content

## 5.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of this VSPS criteria could include consideration of the following data, and metrics. Where this data could be sourced from has also been included in the table below.

<b>Data and metrics on programmes or user-generated videos</b>	<b>A</b>	<b>B</b>	<b>C</b>
Platform features or functionality related to video upload, and sharing	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
The number of videos and/or programmes uploaded, and shared on the service monthly/quarterly/annually		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Presence of livestreaming features	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Percentage of video or programme content on the platform			<input checked="" type="checkbox"/>
Videos on the content feed/timeline/homepage of the service	<input checked="" type="checkbox"/>		
Specific clauses in the terms of service, relating to programme or user-generated video upload and sharing	<input checked="" type="checkbox"/>		
Presence of pre-recorded video	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>

### Data source:

- A** Data that can be independently ascertained as a user of the service
- B** Data that can be ascertained from desk-based research using publicly available, third-party sources
- C** Data that would need to be requested from the specific service provider

## 6 Are programmes or user-generated videos provided to the general public?

This section explores the ‘general public’ criterion that forms part of the definition of a VSPS. The legislative text regarding general public is captured, along with guidance from Ofcom, a PA Consulting recommended approach for application of the criterion, and indicators and data that can be collected in support.

### 6.1 Legislation

General public	
AVMSD	No specific definition is provided. The AVMSD does, however, note “video-sharing platform services provide audiovisual content that is increasingly accessed by the general public, in particular by young people.”
OSMR	No specific definition is provided within the legislation.

### 6.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**Other regulators:** Ofcom VSPS guidance interprets the provision of videos to the public as content that is not limited to particular individuals, but instead can be openly accessed by the public at large. The guidance goes on to note that the existence of subscription, registration, access controls, or age verification features does not itself stop videos from being accessible by the public.<sup>22</sup> Ofcom also states that if a service is provided using a closed network, for example a business intranet, it would not be considered publicly accessible.<sup>23</sup>

An Ofcom-commissioned report by Plum Consulting stated that file transfer, cloud storage, and peer-to-peer file sharing services would not constitute providing user-generated videos or programmes to the general public. The report stated that while these services ‘facilitate the storage or sharing’ of videos, these are ‘essentially private services’ whose primary purpose is not the provision of videos to the general public.<sup>24</sup>

### 6.3 PA Consulting recommendation on a designation approach

It is recommended the general public criterion is applied using the approach detailed in section 3. The guidance in this section identifies information, indicators, and data that could be considered. An extract of the decision tree that relates to the general public step of the VSPS definition is shown at Figure 4.

<sup>22</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), pp. 9-10. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

<sup>23</sup> *Ibid.*, pp. 9-10.

<sup>24</sup> Plum Consulting, *Understanding video-sharing platforms under UK jurisdiction* (2019). Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/865313/Understanding\\_VSPs\\_under\\_UK\\_jurisdiction.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865313/Understanding_VSPs_under_UK_jurisdiction.pdf)

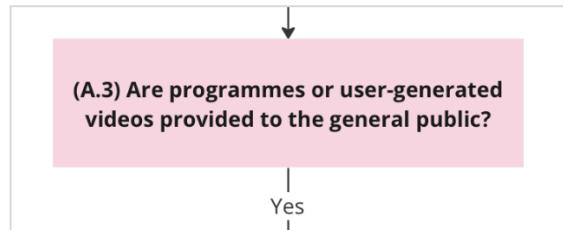


Figure 4 – General public decision tree step

## 6.4 VSPS indicators

Indicators that a service is available to the general public can include the following:	Indicators that a service is <u>not</u> available to the general public can include the following:
Openly accessible online services	Private website
Content is not restricted to certain individuals	Closed networks
	Business intranets

## 6.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of this VSPS criteria could include consideration of the following data and metrics. Where this data could be sourced from has also been included in the table below.

Data and metrics on general public	A	B	C
Whether the service can be accessed by the public at large	<input checked="" type="checkbox"/>		
Number of service users			<input checked="" type="checkbox"/>

### Data source:

- A** Data that can be independently ascertained as a user of the service
- B** Data that can be ascertained from desk-based research using publicly available, third-party sources
- C** Data that would need to be requested from the specific service provider

# 7 Does the provider have effective control over the selection of programmes or user-generated videos?

This section explores effective control over the selection of programmes or user-generated videos. This concept is linked to ‘editorial responsibility’. The AVMSD legislation specifically highlights the absence of editorial responsibility as a key criterion of a VSPS. The OSMR defines editorial responsibility as having effective control over the selection of programmes and videos, and organising these programmes or videos in schedule or catalogue. In the case of a VSPS, the provider does not have effective control over the selection of videos, and therefore would be deemed as not having editorial responsibility. This criterion, along with guidelines, indicators, and data, is captured in this section.

## 7.1 Legislation

The AVMSD states that video-sharing platform providers do not have editorial responsibility over a significant share of the content provided on their platforms. The OSMR states that a defining feature of a VSPS is that it does not have control over the selection of programmes and videos shared.

Effective control over the selection of programmes or user-generated videos and editorial responsibility	
AVMSD	“A video-sharing platform [...] is characterised by the absence of editorial responsibility.” “A significant share of the content provided on video-sharing platform services is not under the editorial responsibility of the video-sharing platform provider.”
OSMR	“A service is a video-sharing platform service within subsection (2) only if the provider of the service – (a) <b>does not have effective control over the selection of the programmes and videos</b> referred to in that subsection.” “ <b>Editorial responsibility</b> [...] means <b>effective control – (a) over the selection of the programmes</b> , and (b) over their organisation in a programme schedule or in a catalogue.”

## 7.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**European Audiovisual Observatory (Council of Europe):** An Observatory report focusing on online video sharing notes that the lack of platform involvement in the choice of content published is a key characteristic of an online video-sharing platform.<sup>25</sup>

**Other regulators:** The UK’s Communication Act section 368S(2)(c) states that “the person providing [the service or dissociable section] does not have general control over what videos are available on it.”<sup>26</sup> Ofcom guidance states that editorial responsibility for a service is understood to encompass two elements:

- 1) General control over what programmes are included in the range offered to users

<sup>25</sup> European Audiovisual Observatory, *Online video sharing: Offerings, audiences, economic aspects* (2018), p. 4. Available at: <https://rm.coe.int/online-video-sharing/16808b2e16>

<sup>26</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p.15. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)




2) General control over the manner in which the programmes are organised in that range.

Ofcom therefore states editorial responsibility “is determined at the point of selection of content *and* the organisation of that content.”<sup>27</sup> For a VSPS, a user is usually able to upload and share content without prior approval or intervention. Therefore, a VSPS does not determine the selection of videos, but instead the manner in which they are organised.

Ofcom also draws a distinction with on-demand programmes services, which do have editorial responsibility and exercise control over the programmes that are included in the range offered to users.<sup>28</sup>

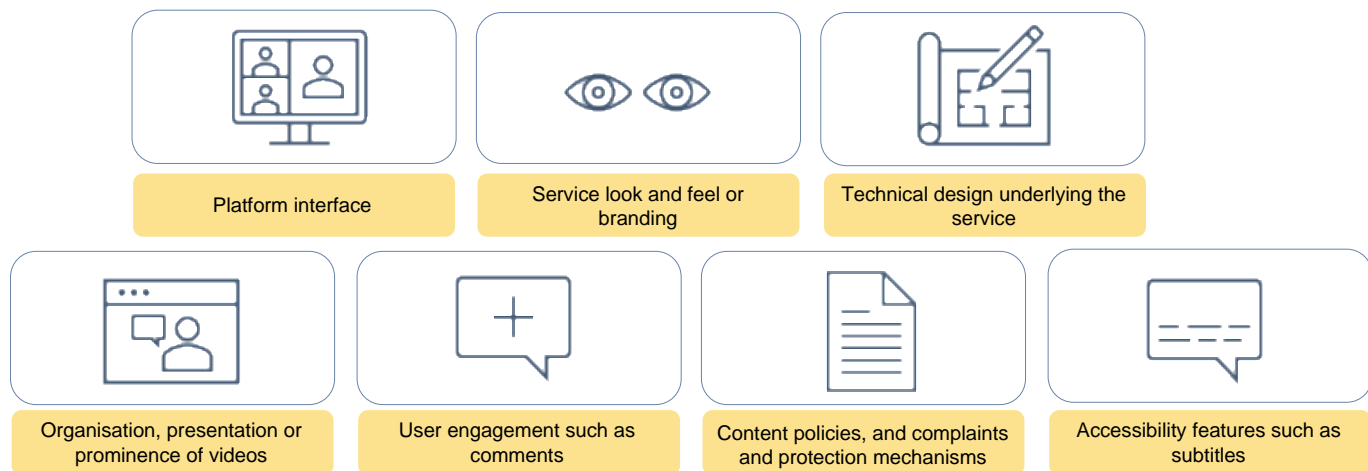
The difficulties associated with determining whether a service has editorial responsibility are acknowledged by Ofcom in its guidance. Ofcom states that it is helpful to use the broad principle that VSPS generally allow any third-party (or ‘user’) to share video content (subject to their terms of service or enforcement of their content policies).<sup>29</sup> In addition, Ofcom highlights commercial agreements and deals with content providers as being a useful source for analysis to determine where a service is the one making editorial decisions.<sup>30</sup>



**Ofcom’s position on content moderation and effective control**

Ofcom notes in its VSPS guidance that a service undertaking content moderation will not generally be considered as exercising control over the content available to users. Although a service may make checks on content, it does not generally play a proactive role in choosing the videos that are available.<sup>31</sup> In response to questions submitted as part of its public consultation, Ofcom clarified that although services will need to be considered on a case-by-case basis, “it is unlikely that ‘screening’ user-generated content for specific material would constitute ‘selection’ within this framework. This practice does not meaningfully affect the ‘range’ or ‘catalogue’ of content any more than checking for this content after the video has been surfaced.”<sup>32</sup>

Ofcom guidance states there are several elements that would not be indicative of general control over the videos on offer to users, despite being evidence of a provider having control over the components of its service.<sup>33</sup> These elements are shown in Figure 5.



<sup>27</sup> *Ibid.*, p. 16.

<sup>28</sup> *Ibid.*, p.16.

<sup>29</sup> *Ibid.*, p.16.

<sup>30</sup> *Ibid.*, pp.16-17.

<sup>31</sup> *Ibid.*, p.15.

<sup>32</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom? Statement* (2021), p. 11. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0024/215457/statement-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0024/215457/statement-video-sharing-platforms-who-needs-to-notify.pdf)

<sup>33</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p.17. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

Figure 5 – Platform elements that suggest provider control over service components, as opposed to user content<sup>34</sup>

### 7.3 PA Consulting recommendation on a designation approach

PA recommends that the VSPS effective control criterion is applied using the approach detailed in section 3. The guidance in this section of the report also identifies information, indicators, and data that could be considered. For example, the terms and conditions of a service could be considered to determine the services’ policy on control over the selection of videos, including upload. An extract of the decision tree that relates to the effective control step of the VSPS definition is shown at Figure 6.

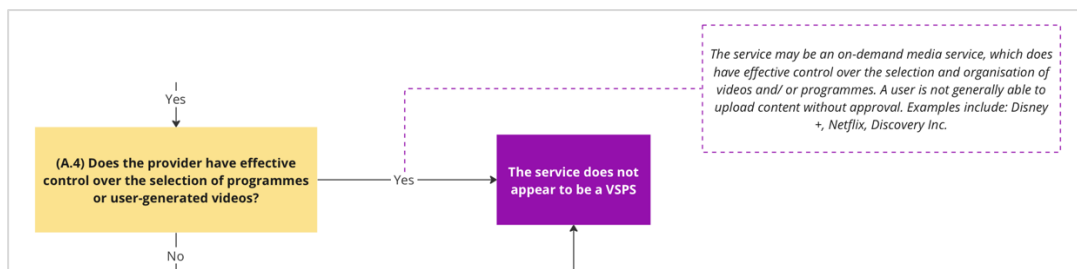


Figure 6 – Effective control decision tree step

### 7.4 VSPS indicators

Indicators that a service <u>does not</u> have effective control over the selection of content provided to users can include following:	Indicators that a service does have effective control over the selection of content provided to users can include the following:
Lack of effective control over content on the service	The provider has effective control over the selection, and organisation of videos or programmes offered to users
The provider does not upload content itself	The provider makes editorial decisions about the content that is uploaded
The provider does not have involvement or oversight in choosing the videos that are selected for users	Content is selected, and uploaded by the provider onto the service in accordance with a specific set of criteria
The provider allows any user to upload and/or share content (subject to terms of use) without prior approval	
The provider does not make editorial decisions about content that is uploaded	
Users have editorial rights for the content they have uploaded	

If indicators are not present, this does not necessarily mean that a service is not a VSPS. A decision about designation should be made based on all available information across the VSPS criteria.

<sup>34</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom* (2021) p. 17. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

## 7.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of this VSPS criteria could include consideration of the following data and metrics. Where this data could be sourced from has also been included in the table below.

Data and metrics on editorial responsibility	A	B	C
Whether there are approval systems in place for the uploading and sharing of content	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Number of videos or programmes uploaded to the service by users daily/monthly/quarterly/annually			<input checked="" type="checkbox"/>
Commercial agreements or deals between a service and content providers			<input checked="" type="checkbox"/>

### Data source:

- A Data that can be independently ascertained as a user of the service
- B Data that can be ascertained from desk-based research using publicly available, third-party sources
- C Data that would need to be requested from the specific service provider

## 8 Is the organisation of the programmes or user-generated videos determined by the video-sharing platform provider?

This section provides an overview of the definition criteria concerning the organisation of programmes or user-generated videos being determined by the provider. The AVMSD and OSMR legislation, existing guidance, PA Consulting recommendations, and indicators and data are detailed.

### 8.1 Legislation

‘Organisation of which is determined by the video-sharing platform provider’	
AVMSD	<p>“The service is devoted to providing programmes, user-generated videos, or both [...] and the organisation of which is determined by the video-sharing platform provider, including by automatic means or algorithms in particular by displaying, tagging and sequencing.”</p> <p>“A significant share of the content provided on video-sharing platform services is not under the editorial responsibility of the video-sharing platform provider. However, those providers typically determine the organisation of content, namely programmes, user-generated videos and audiovisual commercial communications, including by automatic means or algorithms. Therefore these providers should be required to take appropriate measures to protect minors from content that may impair their physical, mental or moral development.”</p>
OSMR	<p>“A service is a video-sharing platform service within subsection (2) only if the provider of the service – (a) does not have effective control over the selection of the programmes and videos referred to in that subsection, but (b) determines the organisation, by automatic means or algorithms (including displaying, tagging and sequencing) or otherwise.”</p>

### 8.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**European Audiovisual Observatory (Council of Europe) – The Legal Framework for Video-sharing Platforms:** The Observatory report notes that the ‘algorithmic or human curation of content’ is one of several principal features of a video-sharing platform.<sup>35</sup> It goes on to state that video-sharing platforms provide content that is matched to the preferences of users, “relying to a large extent on complex automated decision-process systems based on algorithms that filter content in order to personalise recommendations to users.”<sup>36</sup> Algorithms are used as part of online profiling, and tracking of users. Behavioural data (such as location and sensor data) is also used by providers.<sup>37</sup>

**Other regulators:** In accordance with the AVMSD, Ofcom guidance states that “while VSP providers do not have general control over what videos are available on their service, they are able to control the ways in which these videos are made available to users.”<sup>38</sup>

<sup>35</sup> European Audiovisual Observatory, *The Legal Framework for Video-sharing Platforms* (2018), p. 1. Available at: <https://rm.coe.int/the-legal-framework-for-video-sharing-platforms/16808b05ee>

<sup>36</sup> European Audiovisual Observatory, *The Legal Framework for Video-sharing Platforms* (2018), p. 10. Available at: <https://rm.coe.int/the-legal-framework-for-video-sharing-platforms/16808b05ee>

<sup>37</sup> *Ibid.*, pp. 10.

<sup>38</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom* (2021) p. 17. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

The guidance provides descriptions of tagging, displaying, and sequencing that are referred to in the AVMSD, noting that they could be used simultaneously and are not exhaustive examples:<sup>39</sup>

- Displaying – how videos appear to users, including content promotion or recommendation
- Tagging – how videos are sorted and categorised, by automatic means, or humans or both
- Sequencing – the order in which content appears to users.<sup>40</sup>

Ofcom distinguishes between generic or personalised content organisation in its guidance. Generic content organisation is where the content presented is the same for all users, and could be done on the basis of genre or the time the content was uploaded or posted. Conversely, personalised content organisation (which is used by many providers) is focused on presenting content to users based on factors known about the specific user. This could include their geographical location, or use of the service.<sup>41</sup>

Ofcom emphasises that services “do not need to have exclusive control over the organisation of content but are likely to have decisive control over its organisation.”<sup>42</sup> The following example of this is provided in the guidance:

- “For instance, many platform services rely on both explicit (e.g. sharing, liking content) and implicit (e.g., time spent watching) inputs from users to organise video content, but ultimately the provider determines if, when and how this affects the organisation of content.”<sup>43</sup>

### 8.3 PA Consulting recommendation on a designation approach

A key feature of a VSPS is that the provider determines how to organise the content presented to users, either through the use of automatic means, algorithms, or otherwise. This VSPS characteristic is specifically mentioned in the both the AVMSD and OSMR. This characteristic is significant because, as M. Z. Drunen notes, “platforms indeed outsource the production and publication of content to their users, and instead focus on organising and curating this content,” and “much of the control platforms exercise over this process is automated and directly influenced by the behaviour and preferences of their users.”<sup>44</sup>

Many providers use **content recommendation algorithms** to organise the content on their service. These algorithms seek to rank and return content that aligns as highly as possible with a user’s perceived interests. The content that ranks highly is presented on the user’s algorithmically generated content feed.

The user’s response to the content that the algorithm presents them is recorded, along with watch times and engagement, which would register a positive response. Scrolling past the content would be recorded as disinterest. This information contributes to finetuning the algorithm’s understanding of the user. The more content the user consumes, the better the algorithm becomes at presenting content the user is likely to consume.

The Harvard Kennedy School’s Belfer Center describes four main elements of content recommendation systems:<sup>45</sup>

1. **Content inventory:** Algorithms select from “an inventory of all new posts since the user last used or refreshed the platform.”<sup>46</sup>
2. **Data points and features:** This data is used by recommendation algorithms to make decisions, and predictions about user engagement with new content. Data includes connectivity, device, and account settings, content information, user demographics, expressed preferences, and engagement history.<sup>47</sup>

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<sup>39</sup> *Ibid.*, p. 17.

<sup>40</sup> *Ibid.*, p. 17.

<sup>41</sup> *Ibid.*, p. 18.

<sup>42</sup> *Ibid.*, p. 18.

<sup>43</sup> *Ibid.*, p. 18.

<sup>44</sup> M. Z. van Drunen, *The Post-Editorial Control Era: How EU media law matches platforms’ organisational control with cooperative responsibility* (2020), p. 167. Available at: <https://www.tandfonline.com/doi/epdf/10.1080/17577632.2020.1796067?needAccess=true&role=button>

<sup>45</sup> Harvard Kennedy School – Belfer Center, *Social Recommendation Algorithms* (2022), pp. 6-9. Available at: <https://www.belfercenter.org/sites/default/files/files/publication/Social%20Media%20Recommendation%20Algorithms%20Tech%20Primer.pdf>

<sup>46</sup> *Ibid.*, p. 7.

<sup>47</sup> *Ibid.*, p. 7.

3. **Prediction and candidate generation:** Signals are used to generate predictions on the likelihood of user engagement with content.<sup>48</sup>
4. **Relevance scores and final ranking:** A provider may use engagement prediction scores that are “weighted and combined into a ‘relevance’ score for each post, which reflects the company’s best estimate for how engaging the user will find it.”<sup>49</sup> These scores are used to decide the order in which content appears on a user’s feed. The Belfer Center report notes that across providers, there is not one single definition of ‘relevance’ (further detail is provided in the report on these differences).<sup>50</sup>

Understanding content recommendation algorithms is key to applying the organisation of content criteria within the VSPS definition.

PA recommends that the organisation of videos being determined by the provider criterion be applied using the approach detailed in section 3.

The guidance in this section of the report provides information on indicators, and data that could be considered. For example, a service’s privacy policies could provide information on whether user data is captured for the personalisation, and organisation of content. If necessary, technical expertise and advice could also be sought to provide further guidance on the use of automatic or algorithmic means to organise content.

An extract of the decision tree that relates to the organisation criterion of the VSPS definition is shown at Figure 7.

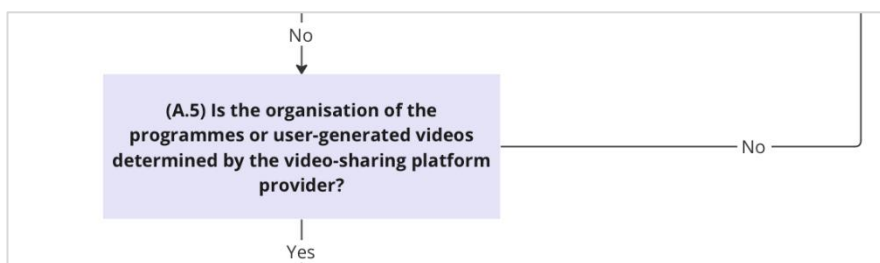


Figure 7 – Organisation decision tree step

## 8.4 VSPS indicators

### Indicators that the organisation of programmes or user-generated videos is determined by the video-sharing platform provider can include the following:

Recommending content based on previous views; curated content; content that matches the users’ profile; and content that is viewed by other members of the user’s network

Promoting particular videos

Personalised content delivery based on a user’s use of the service

Organising content by date

Organising content by genre

The service has decisive control over organising video content offered to users

Explicit inputs are used to organise content (sharing or liking content)

Implicit inputs are used to organise content (such as time spent watching)

Automated control over organising the content

<sup>48</sup> *Ibid.*, p. 8.

<sup>49</sup> *Ibid.*, p. 8.

<sup>50</sup> *Ibid.*

Organisation of content is influenced by user behaviour or user preferences
The home page has videos curated to the user's interests
The service has a personalised "feed" that users scroll down
Sidebars are displayed next to the main piece of content being viewed
Elements of content recommendation systems, such as: <ul style="list-style-type: none"> <li>• Content inventory</li> <li>• Data points, and features</li> <li>• Connectivity, device, and account settings</li> <li>• Information about the content itself</li> <li>• User demographics, expressed preferences, and engagement history</li> <li>• Prediction, and candidate generation</li> <li>• Relevance scores, and final ranking.</li> </ul>
Use of algorithms that determine suggestions for new content that the user has not yet subscribed to (such as news commentary channel)
Content recommendation algorithms being turned on by default

## 8.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of this VSPS criteria could include consideration of the following data and metrics. Where this data could be sourced from has also been included in the table below.

<b>Data and metrics on the organisation of programmes or user-generated videos being determined by the VSP provider</b>	<b>A</b>	<b>B</b>	<b>C</b>
Data on the functional logic used by the provider to determine how the platform interacts with users			<input checked="" type="checkbox"/>
Data on the use of content recommendation algorithms			<input checked="" type="checkbox"/>
Percentage of views on the service that come from the provider's recommendation (as opposed to self-directed searches or shared links)			<input checked="" type="checkbox"/>
Data on how machine learning is used to select and rank content that is predicted to be most relevant to a user			<input checked="" type="checkbox"/>
Publicly available blogs, reports, or press releases on the service's use of content recommendation algorithms		<input checked="" type="checkbox"/>	
Data on the use of the following to support recommendation systems: clustering; single value decomposition; liner and logistic regression; decision trees; neural networks			<input checked="" type="checkbox"/>
Presence of proprietary, distributed machine learning models that select, and curate the content the user sees on the service			<input checked="" type="checkbox"/>
Tagging or creating hashtags to aggregate content of a similar nature			<input checked="" type="checkbox"/>

Factors weighed in the automated decision making for content delivery, such as a user's past preferences, 'trending' topics, and demographic information about the user			<input checked="" type="checkbox"/>
Data regarding the 'inputs' to recommender algorithms for content organisation			<input checked="" type="checkbox"/>

**Data source:**

- A** Data that can be independently ascertained as a user of the service
- B** Data that can be ascertained from desk-based research using publicly available, third-party sources
- C** Data that would need to be requested from the specific service provider



## 9 Is the principal purpose of the service devoted to the provision of programmes or user-generated videos?

This section explores the concept of the principal purpose of a service being to provide programmes or user-generated videos. This criterion means that the main objective of a service is to encourage users to upload, consume, and share video content. The legislative text is detailed in this section, along with existing guidance, PA's recommended approach to the application of the criterion, and indicators, and data that can be used as part of an assessment.

### 9.1 Legislation

Principal purpose	
AVMSD	"Where <b>the principal purpose of the service</b> or a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public [...] in order to inform, entertain or educate."
OSMR	The OSMR text mirrors the AVMSD regarding principal purpose criteria.

### 9.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**EU Commission guidelines:** The EU Commission guidelines describe three categories of VSPS:

- 1) "Services whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;
- 2) Services of a wider nature offering, amongst other elements, a dissociable section whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;
- 3) Services for which an essential functionality is devoted to the provision of programmes, user-generated videos, or both, to the general public."<sup>51</sup>

The guidelines also note that these criteria are not necessarily mutually exclusive, and "in particular, services having a dissociable section which could constitute a video-sharing platform under the principal purpose criterion (category 2) may at the same time also qualify as a whole as a video-sharing platform on the basis of the essential functionality criterion (category 3)."<sup>52</sup>

**Other regulators:** Ofcom guidance on video-sharing platforms describes 'principal purpose' as "the main activity or objective of the service [...] and the extent to which the offering is built around video."<sup>53</sup> Ofcom notes it is important to consider wider market perspective, as well users' perspectives (such as how users have video content presented to them) when applying the principal purpose criteria.

<sup>51</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive (2020)*, p.2. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0707%2802%29>

<sup>52</sup> *Ibid.*, p. 2.

<sup>53</sup> Ofcom who needs to notify Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p. 10. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

To help determine if the principal purpose of a service is to provide videos to the general public (or a dissociable section), Ofcom provides the following indicators:

- Whether the service or a dissociable section refers to itself as a video-sharing service and markets itself or positions itself against competitors
- Whether the service or dissociable section is commonly referred to by others including users, press, or analysts, as a video-sharing service
- How content is presented or described, including consideration around whether video-sharing is the main draw for users, and the media, features or services beyond video-sharing.<sup>54</sup>

## 9.3 PA Consulting recommendation on a designation approach

PA recommends that the principal purpose VSPS criterion is applied using the approach detailed in section 3.

The guidance in this section of the report also identifies information, indicators, and data that could be considered.

An extract of the decision tree that relates to the ‘principal purpose’ criterion of the VSPS definition is shown at Figure 8.

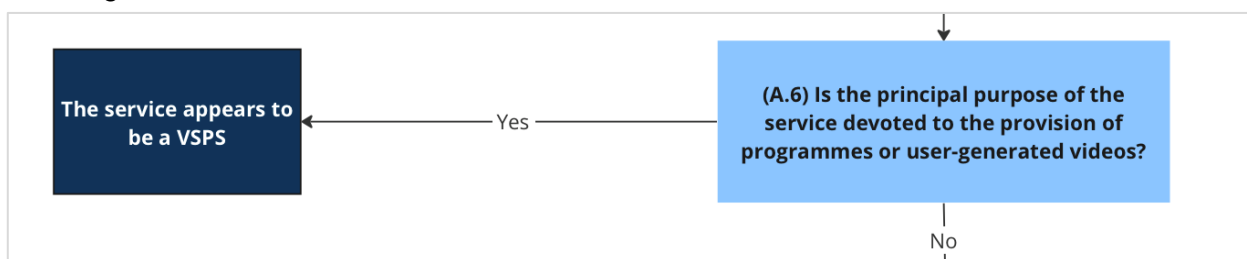


Figure 8 – Principal purpose decision tree step

Supporting questions that can be asked when determining if the principal purpose of a service is to provide videos and/or programmes include:

- How is content presented to the user?
- Is video sharing the main attraction for users of the service?
- Does the service provide media, features, or services beyond video-sharing?
- What proportion, and relevant prominence does video-sharing have on the service? How does this compare to other features the service offers?
- Is prominence given to videos on the site’s homepage or timeline?

## 9.4 VSPS indicators

**Indicators that the principal purpose of a service is to provide programmes and/ or user-generated videos can include the following:**

Service refers to itself as a VSPS

Service positions itself in the market as offering user-generated videos and/or programmes

Service positions itself against competitors based on offering user-generated videos and/or programmes

User-generated videos or programmes are the main draw for users

<sup>54</sup> *Ibid.*, p. 10.

User-generated videos or programmes are given prominence on the site
The media/press/market analysts refer to the service as a VSPS
Users commonly refer to the service as a VSPS
Significant proportion of user-generated videos or programmes are provided by the service

To note, if the indicators listed above are not present, this does not necessarily mean that a service is not a VSPS. Instead, the essential functionality criteria (captured in section 11) may be applicable. A decision about designation should be made based on all the available information across the VSPS criteria.

## 9.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of this VSPS criteria could include consideration of the following data, and metrics. Where this data could be sourced from has also been included in the table below.

Data and metrics on...	A	B	C
Registration with Company Records Office, other regulatory bodies, or trade bodies to identify whether the service refers to itself as a VSPS	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
The services' external branding and advertising campaigns	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Video sharing and/or editing support tools offered to users of the service	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Logos and branding to determine if it is similar/comparable to other video-sharing platforms (for example, use of the 'video play' button icon)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Similar features offered to other large video-sharing platforms	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Advertising in the same format, or through similar channels, as other large video-sharing platforms	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Internal strategy documentation			<input checked="" type="checkbox"/>
Internal competitor analysis reports			<input checked="" type="checkbox"/>
Internal M&A planning reports (to understand if the provider is intending to acquire other video-sharing providers)			<input checked="" type="checkbox"/>
Press information or announcements covering recent acquisitions of video-sharing providers		<input checked="" type="checkbox"/>	
User surveys (to understand if videos are the main attraction for users) <sup>55</sup>	<input checked="" type="checkbox"/>		
Landing page, timeline, or content feed with videos prominently displayed	<input checked="" type="checkbox"/>		
Shareholder reports, and information referring to video-sharing		<input checked="" type="checkbox"/>	
News articles referring to video-sharing aspects of the service		<input checked="" type="checkbox"/>	
Market data referring to video-sharing or uploading statistics		<input checked="" type="checkbox"/>	

<sup>55</sup> Existing user surveys could be reviewed to understand user attitudes. Alternatively new research could be commissioned.

Research commissioned by other regulators (capturing user attitudes <sup>56</sup> )		<input checked="" type="checkbox"/>	
Data on the format of posts (posts can have different formats containing videos, image, links, or text)			<input checked="" type="checkbox"/>
Percentage of videos on the service in comparison to other forms of content			<input checked="" type="checkbox"/>
Platform features or functionality related to video upload, consumption, or sharing	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
Volume of video content hosted on the service			<input checked="" type="checkbox"/>
Volume of content consumed by users			<input checked="" type="checkbox"/>
Average time spent per user per day on the service			<input checked="" type="checkbox"/>
Percentage of video content available on the service			<input checked="" type="checkbox"/>

**Data source:**

- A** Data that can be independently ascertained as a user of the service
- B** Data that can be ascertained from desk-based research using publicly available, third-party sources
- C** Data that would need to be requested from the specific service provider

<sup>56</sup> For example, Ofcom, *Online Nation Report (2022)*. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/238361/online-nation-2022-report.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/238361/online-nation-2022-report.pdf)

# 10 Is there a dissociable section of a wider service that is devoted to the provision of the programmes or user-generated videos?

## 10.1 Legislation

Dissociable section	
AVMSD	<p>“Where the principal purpose of the service or a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public [...] in order to inform, entertain or educate.”</p> <p>“Where a dissociable section of a service constitutes a video-sharing platform service for the purposes of Directive 2010/13/EU, only that section should be covered by that Directive, and only as regards programmes and user-generated videos.”</p>
OSMR	<p>The OSMR text mirrors the AVMSD regarding dissociable section.</p>

## 10.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**EU Commission guidelines:** The EU Commission guidelines describe three categories of VSPS:

- 1) “Services whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;
- 2) Services of a wider nature offering, amongst other elements, a dissociable section whose principal purpose is to provide programmes, user-generated videos, or both, to the general public;
- 3) Services for which an essential functionality is devoted to the provision of programmes, user-generated videos, or both, to the general public.”<sup>57</sup>

The guidelines also note that this criterion is not necessarily mutually exclusive and “in particular, services having a dissociable section which could constitute a video-sharing platform under the principal purpose criterion (category 2) may at the same time also qualify as a whole as a video-sharing platform on the basis of the essential functionality criterion (category 3).”<sup>58</sup>

**Other regulators:** Ofcom guidance emphasises that “for a dissociable section of the service to be a VSPS, it is necessary only to consider whether the principal purpose of the dissociable section is to provide videos to members of the public.”<sup>59</sup> When seeking to identify if a dissociable section of a service has the principal purpose of providing video, Ofcom states the dissociable section might “include a subdomain of a web property or a distinct part of an app or certain types of user accounts providing

<sup>57</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020), p.2. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0707%2802%29>

<sup>58</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020), p. 2. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0707%2802%29>

<sup>59</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p.8. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

access to video.”<sup>60</sup> The guidance emphasises that “technical features or product design alone are not the decisive factor in assessing whether part of a service constitutes a ‘dissociable section’.”<sup>61</sup>

As part of the application of the ‘dissociable section’ criterion, Ofcom suggests that services may wish to consider “the extent to which videos within that part are provided for their own value as a standalone feature, rather than as linked or supplementary to other forms of content on the service.”<sup>62</sup> It may also be relevant to consider if the section is “distinguished substantively” from the rest of the service “in terms of its purpose, content and form.”<sup>63</sup> Ofcom notes that there will be specificities for each service, but an illustrative example is provided:

“A standalone section of a newspaper website which is dedicated to hosting user-generated videos on the site might be considered as a dissociable section of that service, if the videos were independent of the written press articles. But, in a scenario where video was embedded in the editorial content, or there were other links between the audiovisual offer and the main activity of providing news in written form, such that the video was merely an indissociable complement to it, these would not be expected to fall within the VSP framework.”<sup>64</sup>

#### **An example of a dissociable section from Ofcom Guidance:**

During its first year regulating VSPS, Ofcom stated that only two sections of the well-known messaging app Snapchat were notified as in scope of its VSPS regulation. These two areas are Spotlight and Discover. Spotlight is a personalised feed for users showing popular user-generated content. Discover is a feed featuring curated content from verified media outlets and vetted content creators. Snapchat is most well-known for its messaging app that lets users exchange pictures and videos which are typically only available for a short period of time.<sup>65</sup>

## 10.3 PA Consulting recommendation on a designation approach

It is recommended the dissociable section VSPS criterion is applied using the approach detailed in section 3.

The guidance in this section also identifies information, indicators, and data that could be considered. An illustrative example of a dissociable section of a service (shown at Figure 10) has been included to support with the assessment of this criterion.

An extract of the decision tree that relates to the dissociable section criterion of the VSPS definition is shown at Figure 9.

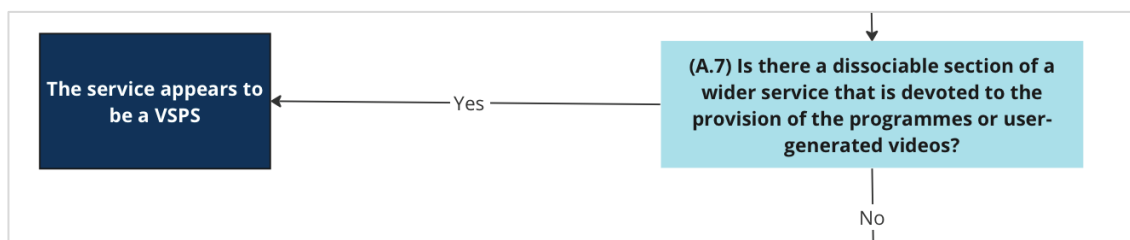


Figure 9 – Dissociable section decision tree step

<sup>60</sup> *Ibid.*, p. 11.

<sup>61</sup> *Ibid.*, p. 11.

<sup>62</sup> *Ibid.*, p. 11.

<sup>63</sup> *Ibid.*, p. 11.

<sup>64</sup> *Ibid.*, p. 11.

<sup>65</sup> Ofcom, *Ofcom’s first year of video-sharing platform regulation: What we found*, (2022), pp. 46-47. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0032/245579/2022-vsp-report.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0032/245579/2022-vsp-report.pdf)

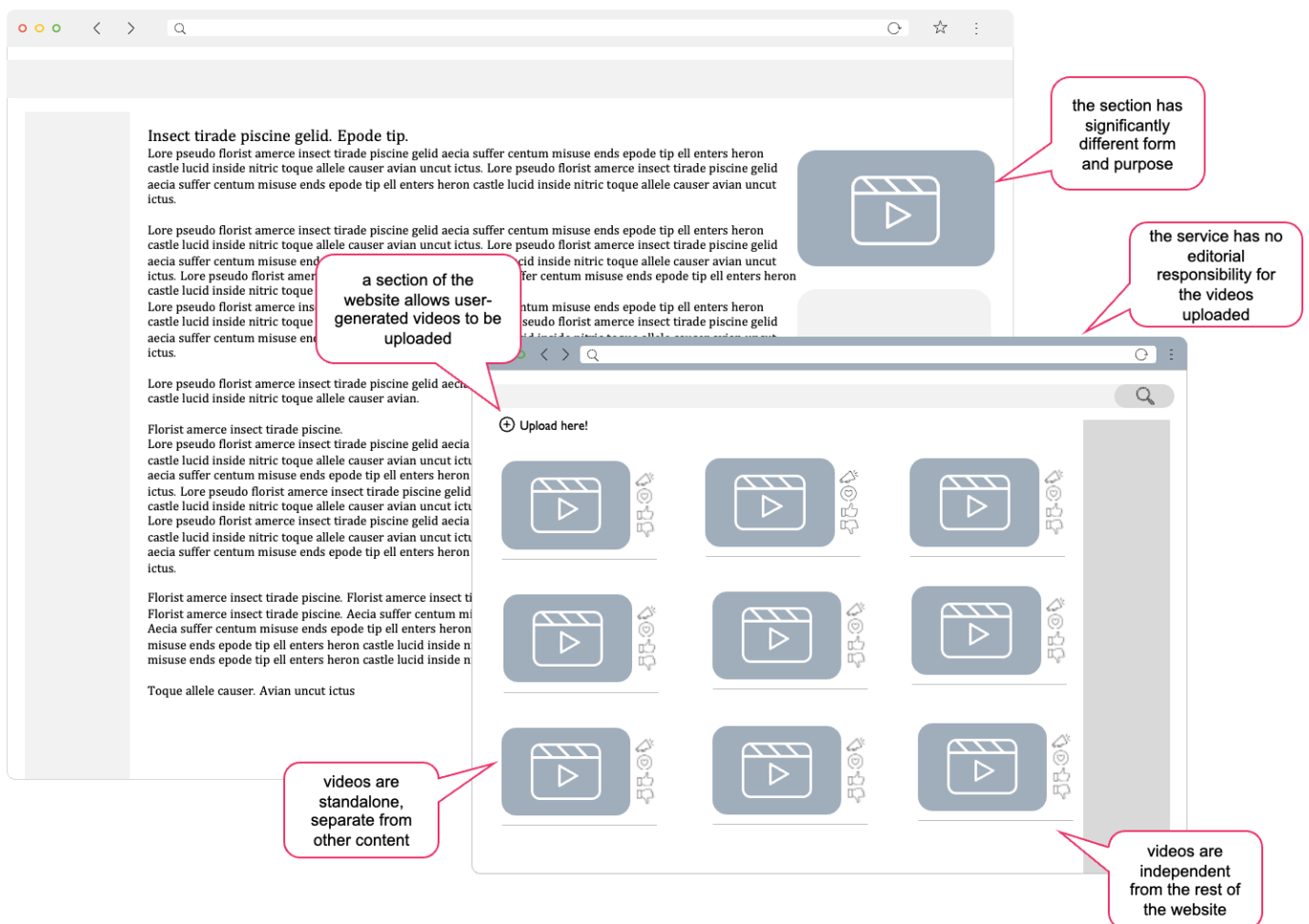


Figure 10 – Illustrative example of a dissociable section of a website<sup>66</sup>

## 10.4 VSPS indicators

**Indicators that a dissociable section of a VSPS has the principal purpose of providing programmes and/ or user-generated videos to the public can include the following:**

The section is different in content, form, or purpose to the rest of the service

A section of website allows user-generated videos to be uploaded

Videos are standalone, and separate from other content

Videos are independent from the rest of the website

The section is a subdomain of a web page

The section is a distinct part of an app

The section is only available to certain users

Use, amount, or reach of video content within the section is significant (in comparison with the rest of the service)

The section is a separate feed for video sharing

<sup>66</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), pp. 11-12. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

## 10.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of this VSPS criteria could include consideration of the following data and metrics. Where this data could be sourced from has also been included in the table below.

Data and metrics	A	B	C
Domain registration information		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Service organisational structures – data on whether the section has a different product team or is part of a separate organisational structure			<input checked="" type="checkbox"/>
Section-specific community guidelines or terms of service	<input checked="" type="checkbox"/>		
Section has a logo, branding, or format that differs from the rest of the service	<input checked="" type="checkbox"/>		
Section-specific registration process	<input checked="" type="checkbox"/>		
Section-specific payment criteria or processes	<input checked="" type="checkbox"/>		
Certain functionalities only available to users of the section	<input checked="" type="checkbox"/>		
Data on the number of videos within the section in comparison to the rest of the service			<input checked="" type="checkbox"/>
Percentage of videos uploaded and shared within the specific section, and as part of the wider service			<input checked="" type="checkbox"/>

### Data source:

- A Data that can be independently ascertained as a user of the service
- B Data that can be ascertained from desk-based research using publicly available, third-party sources
- C Data that would need to be requested from the specific service provider



# 11 Is the provision of programmes or user-generated videos an essential functionality of the service?

## 11.1 Legislation

Essential functionality	
AVMSD	<p>“Where the principal purpose of the service or a dissociable section thereof or an essential functionality of the service is devoted to providing programmes, user-generated videos, or both, to the general public [...] in order to inform, entertain or educate.”</p> <p>“While the aim of Directive 2010/13/EU is not to regulate social media services as such, a social media service should be covered if the provision of programmes and user-generated video constitutes an essential functionality of that service. The provision of programmes and user-generated videos could be considered to constitute an essential functionality of the social media service if the audiovisual content is not merely ancillary to, or does not constitute a minor part of, the activities of that social media service.”</p>
OSMR	<p>“In this Act, ‘video-sharing platform service’ means [...] where – (a) the principal purpose of the service is devoted to, (b) the principal purpose of a dissociable section of the service is devoted to, or (c) an essential functionality of the service is devoted to, providing audiovisual programmes or user-generated videos.”</p>

## 11.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**EU Commission:** The EU Commission has issued guidelines on the practical application of the essential functionality definition criterion to ensure effectiveness, clarity, and consistency. These guidelines state that for audiovisual content to constitute an essential functionality of the service, such content must not be merely ancillary to, or a minor part of, the activities to the service.

Therefore, if videos and/or programmes constitute a non-minor part of the service (for example, by contributing in an important manner to the attractiveness, functionality, or market success of the service), the essential functionality criterion can be applied.<sup>67</sup> Determining this, however, requires an overall assessment of the service, and the value of videos offered – taking into account both qualitative, and quantitative indicators. The EU guidelines also note that national regulatory authorities “should also pay particular attention to the users’ perspectives and, in particular, to the degree of their exposure to audiovisual content when accessing relevant services.”<sup>68</sup>

The EU Commission guidelines also note that VSPS “may be identified on the basis of the following three criteria: 1) Services whose principal purpose is to provide programmes, user-generated videos, or both, to the general public; 2) Services of a wider nature offering, amongst other elements, a dissociable section whose principal purpose is to provide programmes, user-generated videos, or both, to the general public; 3) Services for which *an essential functionality* is devoted to the provision of programmes, user-generated videos, or both, to the general public.”<sup>69</sup> The guidance goes on to highlight

<sup>67</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0707%2802%29>

<sup>68</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

<sup>69</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

that these three criteria are “not necessarily mutually exclusive” and that “in particular, services having a dissociable section which could constitute a video-sharing platform under the principal purpose criterion (category 2), may at the same time also qualify as a whole as a video-sharing platform on the basis of the essential functionality criterion (category 3).”<sup>70</sup>

The EU Commission guidelines identify four relevant indicators that can be considered when applying the essential functionality criteria, and seeking to understand the relevance of audiovisual content for the activities of the service. These indicators are:

**1. The relationship between the audiovisual content and the main economic activity or activities of the service**

- Generally, if video content has value as a standalone item, and is independent of other underlying economy activities on the platform service, it is unlikely to be merely ancillary, or a minor part, of the service.<sup>71</sup>

**2. Quantitative and qualitative relevance of audiovisual content for the activities of the service**

- The greater the importance and amount of video content on a service, the less likely it is that the content is merely ancillary, or a minor part of, the activities of the service. Both qualitative, and quantitative assessments of the amount of video content on a service can be undertaken.<sup>72</sup>

**3. Monetisation or revenue generation from the audiovisual content**

- If a platform generates revenue or monetises video content on its service, this generally indicates that the content is not merely ancillary, or a minor part of, the service’s activities.<sup>73</sup>

**4. Availability of tools aimed at enhancing the visibility or attractiveness of audiovisual content**

- Specific tools designed to boost the visibility or attractiveness of videos suggest the content is not merely ancillary, or a minor part of, the activities of the service.<sup>74</sup>

The four indicators should not be applied cumulatively, and the absence of one or more does not automatically mean that the service falls within the definition of a VSPS. Instead, the regulator must undertake an overall assessment of the service to determine if a sufficient number of indicators support the conclusion that the video content provided is not merely ancillary to, or a minor part, of the activities of the service.<sup>75</sup>

When assessing the amount and use of video content provided by a service (indicator #2), the EU Commission guidance encourages that evidence gathered is independent, meaningful, and reliable. The EU guidance states:

“National authorities are encouraged to gather or verify such data or elements autonomously or from sources independent from the service provider concerned. In the absence of precise data, national authorities may have recourse to relevant qualitative evidence, such as sample analysis or portions of the platform during a time lapse or surveys of users/ stakeholders.”<sup>76</sup>

To support with the assessment of essential functionality, the EU guidelines list a series of examples for each indicator, which have been summarised and listed in Table 1. The essential functionality indicators and examples are also graphically shown at Figure 12.

<sup>70</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

<sup>71</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

<sup>72</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

<sup>73</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

<sup>74</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

<sup>75</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

<sup>76</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a ‘video-sharing platform service’ under the Audiovisual Media Services Directive* (2020).

**Other regulators:** Ofcom guidance on the application of essential functionality states the presence of video on a service is not the sole test, and instead an analysis of the overall service is required, including the commercial and functional value of videos to the service.<sup>77</sup> The guidance notes:

“At a high level, providers might broadly consider whether the absence of video would, for instance, significantly reduce the amount of content on their service, the service’s utility or function, or its level of use by or attractiveness to users (including the extent to which it is able to attract commercial partners or advertisers).”<sup>78</sup>

Ofcom guidance states that if video content plays an insignificant role in the service overall, this might mean it is a minor part of the service, and this could be assessed quantitatively. Examples of quantitative assessments are detailed as being, “the items of video content as compared to other content on a platform, but also the reach or use of that content (e.g., in terms of time spent or users who access the content) or the revenue generated by that content.”<sup>79</sup> Conversely, Ofcom describes a qualitative assessment as involving consideration of whether “videos contribute to the core functionality or market success of the service, irrespective of quantitative considerations. Other relevant factors could include the amount of investment in video and the prominence given to video content.”<sup>80</sup>

## 11.3 PA Consulting recommendation on a designation approach

It is recommended the VSPS essential functionality criterion is applied using the approach detailed in section 3.

The guidance in this section also identifies information, indicators, and data that could be considered. An extract of the decision tree that relates to essential functionality is shown at Figure 11, along with a graphical depiction of indicators and examples, captured at Figure 12.

Supporting questions that can be asked when seeking to identify whether video content is merely ancillary, or minor part of, the activities of a service include:

- Would the absence of video significantly reduce the amount of content on the service, or the service’s utility or function?
- Would the absence of video significantly reduce the level of use, or its attractiveness to users?
- Would the absence of video significantly reduce the service’s ability to attract commercial partners or advertisers?
- Are videos being used on an e-commerce platform to show users using a product?
- Are videos uploaded exclusively with a view to supporting economic transactions?
- Are videos presenting particular goods or services with a view to potential or actual sale?
- Does the service host a significant number of videos?
- Do users consume a significant number of videos and/or programmes on the service?
- How much does the service invest in audiovisual content?
- How much prominence does the service give to audiovisual content?

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<sup>77</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p. 12. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

<sup>78</sup> *Ibid.*, p. 12.

<sup>79</sup> *Ibid.*, p. 13.

<sup>80</sup> *Ibid.*, p. 13.

(A.8) Is the provision of programmes or user-generated videos an essential functionality of the service?

National regulators must consider the application of the essential functionality criterion. There are four categories of indicators which can assist when considering the criteria. They have been used to form the subsequent questions in this decision tree.

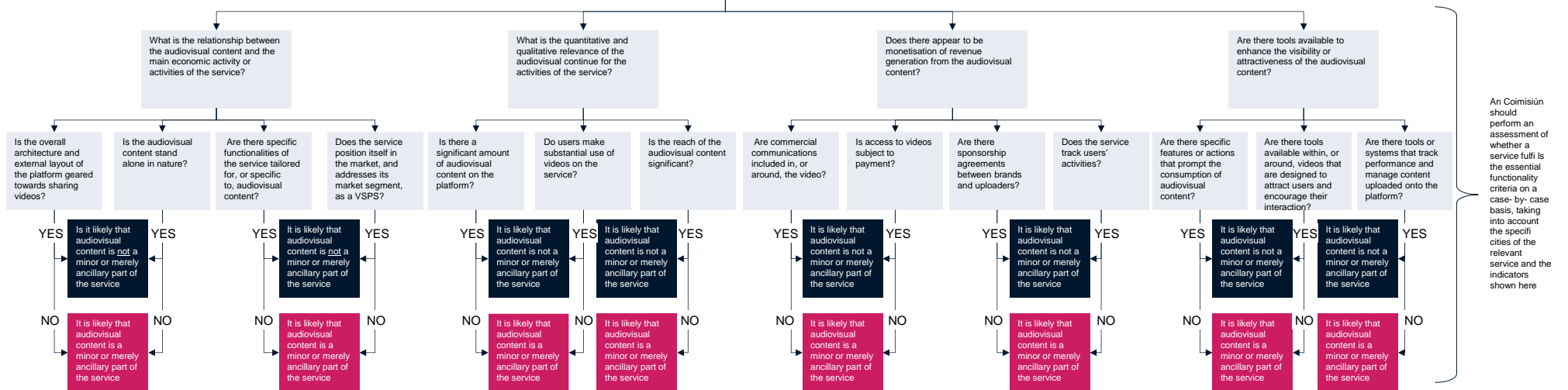


Figure 11 – Essential functionality decision tree step

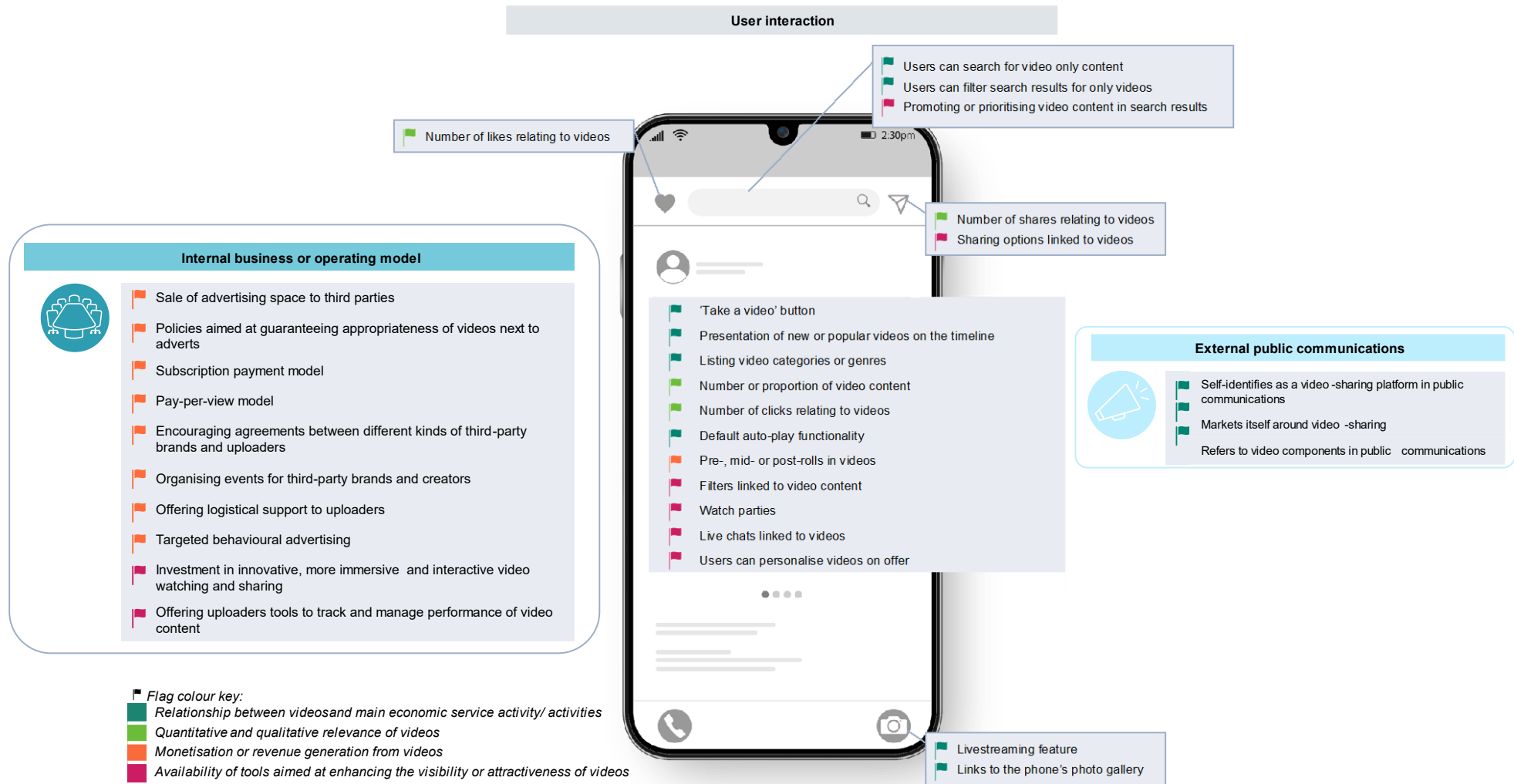


Figure 12 – Essential functionality indicators and examples

## 11.4 VSPS Indicators

Flag colour key:

- Relationship between videos and main economic service activity/ activities
- Quantitative and qualitative relevance of videos
- Monetisation or revenue generation from videos
- Availability of tools aimed at enhancing the visibility or attractiveness of videos

Indicators of essential functionality	A	B	C	Data and metrics
<p><b>The overall architecture and external layout of the platform is geared towards the sharing of content in order to inform, entertain, or educate users.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>• The platform timeline, sharing interface, or main pages include prominent video-sharing features</li> <li>• Presentation of new or popular videos</li> <li>• Live broadcasting</li> <li>• Suggesting that users watch new or popular videos</li> <li>• ‘Take a video’ button or feature</li> <li>• A direct link with the phone or computer gallery/photo storage, which enables users to upload video content</li> <li>• Listing video categories or genres.</li> </ul>	☑			<ul style="list-style-type: none"> <li>• Landing page, home page, and/or timeline of the website or app</li> <li>• Platform features or functionality related to the indicators listed.</li> </ul>
<p><b>Videos are uploaded or shared on the platform as ‘standalone’ in nature.</b></p> <p>Example provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>• Videos are watched by users because of their intrinsic informational, educational, or entertaining value</li> </ul>		☑		<ul style="list-style-type: none"> <li>• User surveys (existing user surveys could be reviewed, or new research could be commissioned)</li> <li>• Video engagement data (including number of shares; average time spent consuming video content per day;</li> </ul>

	<ul style="list-style-type: none"> <li>Users upload, share, or download videos as standalone items.</li> </ul>				average number of clicks, shares, or likes relating to video content per day per user).
	<p><b>The specific functionalities of the service are tailored for, or specific to, videos.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Existence of auto-play functionality, especially if enabled by default</li> <li>Livestreaming functionality</li> <li>Allowing users to search for only video content</li> <li>Allowing users to filter search results for only videos.</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>Landing page, home page, and/or timeline of the website or app</li> <li>Platform functionality specifically for video content.</li> </ul>
	<p><b>The service positions itself on the market, and the market segment it addresses as a video-sharing platform.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>The way the service self-identifies in public communications</li> <li>The way the service markets or advertises itself to users</li> <li>If the service specifically refers to its audiovisual components in public communications.</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>Service's adverts, public communications, and branding.</li> </ul>
	<p><b>A significant amount of audiovisual content is available on the platform.</b></p> <p>Example provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>The number or proportion of videos present on the service, and in comparison, to other types of available content.</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>For these two indicators the EU Commission guidance notes: "assessment should be based on reliable, independent and meaningful evidence... [Regulators] are encouraged to gather or verify such data or elements autonomously or from sources independent from the service provider concerned."<sup>81</sup> The source of this data will therefore need to be considered by An Coimisiún</li> <li>The number or proportion of videos uploaded, and shared on the platform in comparison with other types of content</li> <li>Percentage of video content on the service</li> <li>Number of videos uploaded to the service daily/monthly/quarterly</li> <li>Average number of clicks, shares, and likes relating to video content per user, per day</li> </ul>
	<p><b>Users make substantial use of videos available.</b></p> <p>Example provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Number of clicks, shares, and likes relating to videos.</li> </ul>	<input checked="" type="checkbox"/>			

<sup>81</sup> EU Commission, *Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive (2020)*, p. 5. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0707%2802%29>

				<ul style="list-style-type: none"> <li>In the absence of quantitative evidence from reliable sources, qualitative evidence could be used, such as sample analysis of portions of the platform during a time lapse or surveys of users/stakeholders.</li> </ul>
<p><b>Significant reach of audiovisual content on the service.</b></p> <p>Example provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Presence of popular video content aiming to inform, educate, or entertain users</li> <li>The target audience of the service, and whether it is used regularly by minors. As assessment should consider the degree of risk of exposure of minors to videos on the service.</li> </ul>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> <li>User engagement data including average number of uploads, likes, and shares per user; user demographics (including age); geographical reach of the service</li> <li>Widely viewed content reports</li> <li>Widely viewed domains, pages, posts, and links on a service</li> <li>Average number of video shares, and recommendations per day on the service.</li> </ul>
<p><b>Commercial communications are included in, or around, the video.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Pre-, mid- or post-rolls in videos</li> <li>Sale of advertising space to third parties</li> <li>Commercial communications are controlled by the service</li> <li>Policies aimed at guaranteeing the appropriateness of the audiovisual content, around or within which communications of a specific third-party brand would be displayed.</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>Service terms of use, and policy information</li> <li>Landing page, home page, and/or timeline of the website or app</li> <li>Percentage of revenue generated from the sale of advertising space</li> <li>Percentage of videos that include pre-, mid- or post-roll adverts.</li> </ul>
<p><b>Access to video content is subject to payment.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Subscription</li> <li>Pay-per-view.</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>Service terms of use, and policy information</li> <li>Landing page, home page, and/or timeline of the website or app</li> <li>Presence of premium payment channels or features</li> <li>Percentage of revenue generated by payment for video content.</li> </ul>
<p><b>Sponsorship or product placement agreements between brands and uploaders.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Encouraging agreements between different kinds of third-party brands of products and services and uploaders</li> <li>Organising events for third-party brands and creators</li> </ul>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		<ul style="list-style-type: none"> <li>Service terms of use, and policy information</li> <li>Homepage or business support pages of the website or app</li> <li>Number of events for third-party brands and creators organised monthly/quarterly/annually</li> <li>Quantity of third-party brands using the service</li> </ul>



	<ul style="list-style-type: none"> <li>Offering logistical support</li> <li>Brands entering into agreements with popular influencers or creators with large viewing figures. The presence of these arrangements indicates indirect monetisation of video content on the service.</li> </ul>				<ul style="list-style-type: none"> <li>Number of sponsorship or product placement agreements in place between brands and uploaders.</li> </ul>
	<p><b>Tracking users' interactions with video content.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Targeted behavioural advertising</li> <li>Data-sharing agreements</li> <li>Systems or tools available that retain users' attention and/or engagement.</li> </ul>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> <li>Service terms of use, and policy information</li> <li>Internal advertising policy documents</li> <li>Data-sharing agreements between the service, and uploaders</li> <li>Data on the use of targeted behavioural advertising.</li> </ul>
	<p><b>Specific features or actions that prompt users to consume video content.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Videos being shown or suggested on the main page or the platform's timeline, without any specific request or input by the user</li> <li>Promoting or prioritising audiovisual content in the results of the user searches</li> <li>Audiovisual content being actively pushed to the user.</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>Landing page, home page and/or timeline of the website or app</li> <li>Curated or 'For You' videos on offer to users (for example, in a display banner).</li> </ul>
	<p><b>Tools that are available within or around videos that are designed to attract users, and encourage their interaction.</b></p> <p>Examples provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>Filters linked to audiovisual content</li> <li>Sharing options linked to audiovisual content</li> <li>Live chats linked to audiovisual content</li> <li>Watch parties</li> <li>Development or investment made by services in innovative, more immersive, and interactive ways of sharing, and consuming audiovisual content</li> <li>The service supports a specific application for 'Smart TV'.</li> </ul>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<ul style="list-style-type: none"> <li>Landing page, home page and/or timeline features of the website or app that demonstrates the presence of indicators</li> <li>Internal investment strategy documents</li> <li>External funding or investment announcements by the provider.</li> </ul>

	<p><b>Tools or systems allowing users to select the audiovisual content they wish to be offered</b></p> <p>Example provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>• Allowing users the possibility to personalise their own audiovisual offer by declaring what they are interested in, or specifically opting out from certain types of content (such as. questionnaires or samples)</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>• Landing page, home page, and/or timeline features of the website or app that demonstrates the presence of indicators</li> <li>• User engagement, and preference data (including data on the use of personalisation by users).</li> </ul>
	<p><b>Tools or systems to track performance, and manage content upload.</b></p> <p>Example provided in the EU Commission guidance:</p> <ul style="list-style-type: none"> <li>• Offering uploaders tools to track, and manage the performance of content and give them a better understanding of the preferences of their viewers.</li> </ul>	<input checked="" type="checkbox"/>			<ul style="list-style-type: none"> <li>• Service terms of use, and policy information</li> <li>• Homepage or business support pages of the website or app that demonstrate the indicators captured</li> <li>• Data on tools offered to uploaders to understand the performance of their content.</li> </ul>

Table 1 – Essential functionality indicators

## 11.5 Data and metrics

An assessment of whether there are indicators that support or refute the application of this VSPS criteria could include consideration of the following data and metrics captured in Table 1. These haven't been repeated in this section.

### Data source:

- A Data that can be independently ascertained as a user of the service
- B Data that can be ascertained from desk-based research using publicly available, third-party sources
- C Data that would need to be requested from the specific service provider

# 12 Is the provider of the service under the jurisdiction of the State?

In this report, jurisdiction is only given limited consideration using publicly available information to set out high-level indicators of whether a company is based in Ireland. Further legal analysis, that does not form part of this report, would need to be conducted to answer the question of whether a service is in jurisdiction of the Irish state.

## 12.1 Legislation

Under the revised AVMSD, EU Member States are responsible for regulating the video-sharing platform services within their jurisdiction on a pan-European basis.

Once an individual service has been identified by An Coimisiún as potentially being a VSPS, it needs to be determined whether that service comes under the jurisdiction of the state of Ireland.

**AVMSD:** AVMSD Article 28a states that a provider of a video-sharing service is under the jurisdiction of a Member State if it meets one or more of the following tests:

1. The provider is established in the territory of the Member State (as defined in Article 3(1) of Directive 2000/31/EC). A provider being established means the provider pursues an economic activity using a fixed establishment in the State for a definite or indefinite period. However, it should be noted, the presence and use of the technology and technical means required to provide the service do not in of themselves constitute establishment of the provider.<sup>82</sup>
2. The provider is not established in the Member State, but it has a parent undertaking or subsidiary undertaking that is established on the territory of the Member State.
3. The provider is part of a group, and another undertaking of that group is established on the territory of the Member State.<sup>83</sup>

For tests two and three, if the parent undertaking, the subsidiary undertaking, or the other undertakings of the group are each established in different Member States, the provider shall be deemed to be established in the Member State where its parent undertaking is established, or in the absence of such an establishment in the Member State where its subsidiary is established, or in the absence of this establishment, in the Member State where the other undertaking of the group is established.

If there are several subsidiary undertakings and each is established in a different Member State, the provider is deemed to be established in the Member State where one of the subsidiary undertakings first began its activity – provided it maintains a stable, effective link with the economy of that Member State.<sup>84</sup>

The revised AVMSD also states:

“Establishing jurisdiction requires an assessment of factual situations against the criteria laid down in Directive 2010/13/EU. The assessment of such factual situations might lead to conflicting results. In applying the cooperation procedures provided for in that Directive, it is important that the Commission can base its findings on reliable facts. The European Regulators Group for Audiovisual Media Services (ERGA) should therefore be empowered to provide opinions on jurisdiction upon the Commission’s request. Where the Commission, in applying those cooperation procedures, decides to consult ERGA, it should inform the Contact Committee, including about notifications received from Member States under those cooperation procedures and about ERGA’s opinion.”<sup>85</sup>

<sup>82</sup> European Parliament, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>

<sup>83</sup> AVMS Directive (EU) 2018/1808 (2018). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&rid=9>

<sup>84</sup> *Ibid.*

<sup>85</sup> AVMS Directive (EU) 2018/1808 (2018). Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1808&rid=9>

**OSMR:** The legislation states the following about the meaning of ‘under the jurisdiction of the state’ for providers of the video-sharing platform services:

- 1) For the purpose of this Act, the question whether the provider of a video-sharing platform service is under the jurisdiction of the State (or another Member State) is to be determined in accordance with this section.
- 2) The provider of a video-sharing platform service is under the jurisdiction of a Member State if the provider is established in the territory of that state.
- 3) If the provider of a video-sharing platform service is not established in a Member State, then the provider is under the jurisdiction of a Member State if –
  - a) it has a parent undertaking or a subsidiary undertaking that is established in the territory of that state, or
  - b) it is part of a group, and another undertaking of that group is established in the territory of that state.
- 4) For the purposes of subsection (3), if in the provider’s case there are different undertakings (parent undertaking, subsidiary undertakings, or other undertakings in the same group) that are established in different Member States, the provider shall be deemed to be established –
  - a) if it has a parent undertaking that is established in a Member State, in that Member State,
  - b) if paragraph (a) does not apply, but it has a subsidiary undertaking established in a Member State, in that Member State, and
  - c) if paragraphs (a) and (b) do not apply but another undertaking in the group is established in a Member State, in that Member State.
- 5) If subsection (4)(b) applies but there are different subsidiary undertakings established in different Member States, the provider shall be deemed to be established in the Member State where one of the subsidiary undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State.
- 6) If subsection (4)(c) applies but there are different undertakings in the group established in the Member State where one of the undertakings first began its activity, provided that it maintains a stable and effective link with the economy of that Member State.
- 7) In this section –
  - a) ‘established’ has the same meaning as in Article 3(1) of the E-Commerce Directive;
  - b) ‘parent undertaking’ means an undertaking that controls one or more subsidiary undertakings;
  - c) ‘subsidiary undertaking’ means an undertaking controlled by a parent undertaking, including any subsidiary undertaking of an ultimate parent undertaking;
  - d) ‘group’ means a parent undertaking, all its subsidiary undertakings and all other undertakings having economic and legal organisational links to them.<sup>86</sup>

## 12.2 Reference documentation from the EU Commission, EU Member States, or other regulators

**Other regulators:** Ofcom guidance notes that the UK Communications Act stipulates with regards to jurisdiction that a provider “must consider whether they are providing the service, or the dissociable section of the service, using a fixed establishment in the UK for an indefinite period, and effectively pursuing an economic activity in doing so.”<sup>87</sup> Ofcom describes indicative, relevant factors providers may wish to consider regarding UK jurisdiction, although it is emphasised that the list of factors is not exhaustive:

- Whether the provider is registered in the UK

<sup>86</sup> Online Safety Media Regulation (2022). Available at: <https://data.oireachtas.ie/ie/oireachtas/act/2022/41/eng/enacted/a4122.pdf>

<sup>87</sup> Ofcom, *Video-sharing platforms: who needs to notify to Ofcom?* (2021), p.19. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf)

- Whether the provider has stable arrangements in the UK for the exercise of an economic activity relating to the provision of the service or the dissociable section of the service, including the presence of a UK subsidiary or, in some circumstances, the operation of an office in the UK or the presence of employees or agents of the company in the UK
- The nature of the economic activity carried out in the UK and how it relates to the overall service being provided.<sup>88</sup>

If a provider is established in both the UK and an EEA state, Ofcom states it “will be necessary to consider in which of the two locations the centre of the provider’s activities relating to the service, or the dissociable section of the service, is.”<sup>89</sup> Relevant factors to consider here are included within the Ofcom notification guidance. Neither the technical means, the location of technology supporting a website, nor where the service can be accessed under the UK regime, do not determine establishment in themselves.<sup>90</sup>

## 12.3 PA Consulting recommendation on a designation approach

A decision tree for application of the jurisdictional test has been created and is captured at Figure 14. Whether a company is based in Ireland could be assessed against the following factors:

- Registration with the Companies Registration Office Ireland, which acts as a central repository of public statutory information on Irish companies and businesses<sup>91</sup>
- Tech Ireland registration (Tech Ireland is a not-for-profit organisation that allows Irish companies to register and connect with other similar businesses)<sup>92</sup>
- Publicly available information on whether a service has its EU headquarters in Ireland.

Jurisdictional matters invoke complex legal questions, which are beyond PA’s expertise as an independent advisor on online safety. Therefore, the advice of legal counsel should be sought to complement the indicative factors listed above, as well as the decision tree provided at Figure 14.

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<sup>88</sup> *Ibid.*, p.19.

<sup>89</sup> *Ibid.*, p.19.

<sup>90</sup> *Ibid.*, p.19.

<sup>91</sup> Available at: <https://www.cro.ie/en-ie/>

<sup>92</sup> Available at: <https://www.techireland.org>

# 13 Conclusions and Recommendations

As part of the designation of individual and relevant online services, An Coimisiún must determine whether a service falls within the definition of a VSPS, and the jurisdiction of Ireland. This involves considering a number of different factors.

A decision framework has been developed to assist with this process. PA recommends that the framework and approach described in section 3 are used as part of the designation decision-making process.

In addition, this report recommends the following:

- Research into services is undertaken in alignment with the following principles:
  - An **independent** research approach is adopted, without prejudice or bias. Those conducting the research should remain impartial and objective, flagging any potential conflicts of interest, which are acted upon as appropriate
  - An **evidence-based** approach is undertaken to support decision making, and such evidence should be gathered and assessed from all available sources – both publicly available and from service providers
  - An **investigatory mindset** is adopted when approaching the research, and all data, and information gathered should be critically evaluated
  - Data provided by service providers is treated with **confidentiality**, and is held in accordance with privacy, and confidentiality policies
  - The approach recommended in section 3.2 is followed with **rigour**
  - The data collection and designation approaches are **transparent**
  - As part of **continuous learning**, the decision framework and approach are periodically revisited, and updated where appropriate to reflect the potential advent of new technologies, and processes adopted by VSPS.
- An Coimisiún could implement policies and procedures to enable relevant employees to conduct research into adult providers. Ethical considerations could also be assessed as part of this, including employee wellbeing, and consent. This research into adult VSPS may identify additional providers that fall within scope.
- The guidance and decision-making framework detailed in this report could be transitioned into use as part of business-as-usual activity. Accompanying training may need to be provided to ensure those who are applying the approach, and engaging with providers are comfortable with the criteria that determines if a service is within scope.
- An Coimisiún could consider conducting, at regular defined intervals, qualitative research into VSPS usage. This will inform both indicators captured in this report, and support understanding of trends in the consumption of user-generated video content and programmes.
- An Coimisiún could undertake regular horizon scanning of new emerging providers, and services to determine whether they may fall within scope. This horizon scanning could include identification of future emerging technology, and an assessment of its relevance and impact for VSPSs.

# 14 Annex A – Decision trees

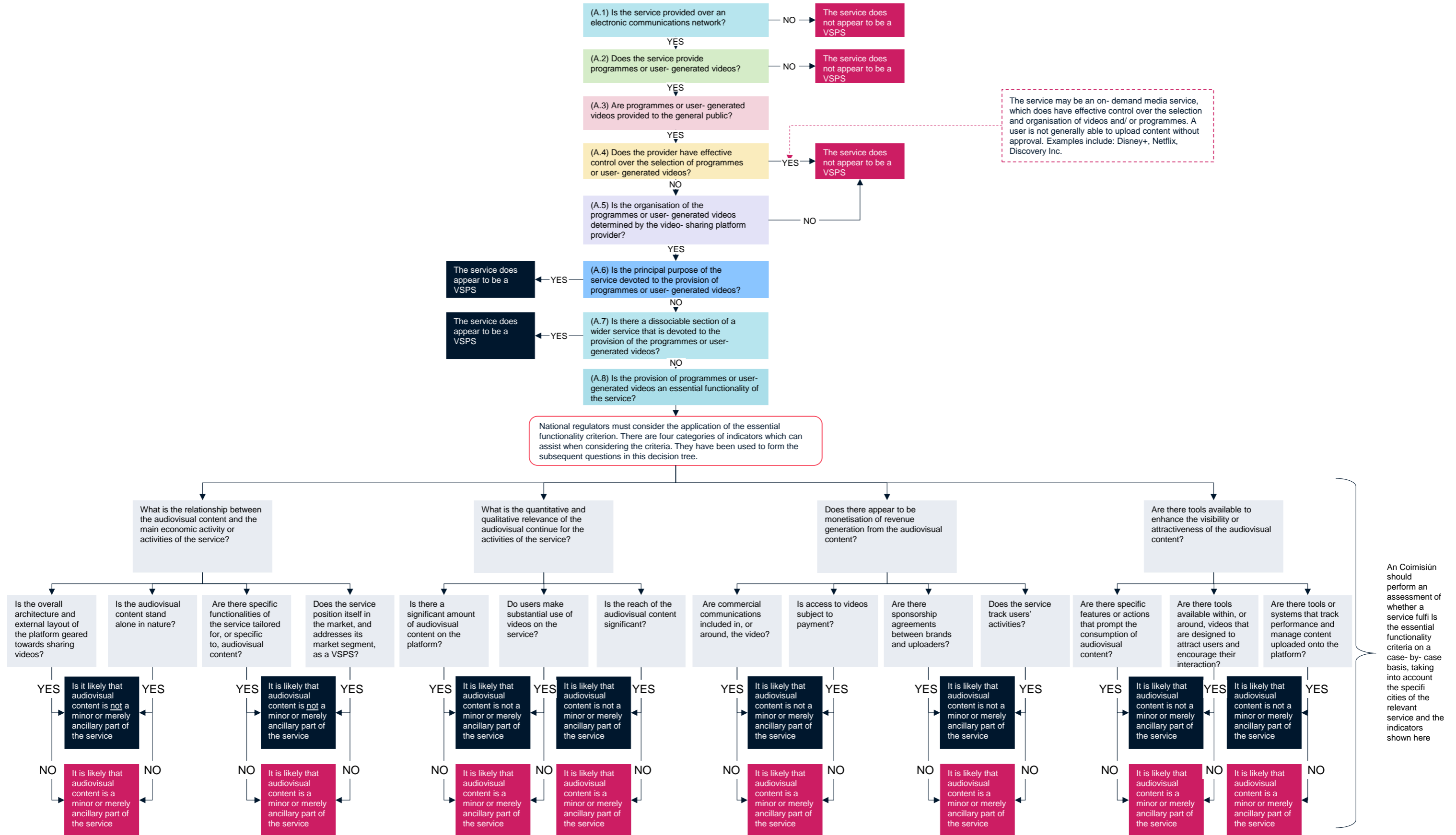


Figure 13 – VSPS definition decision tree



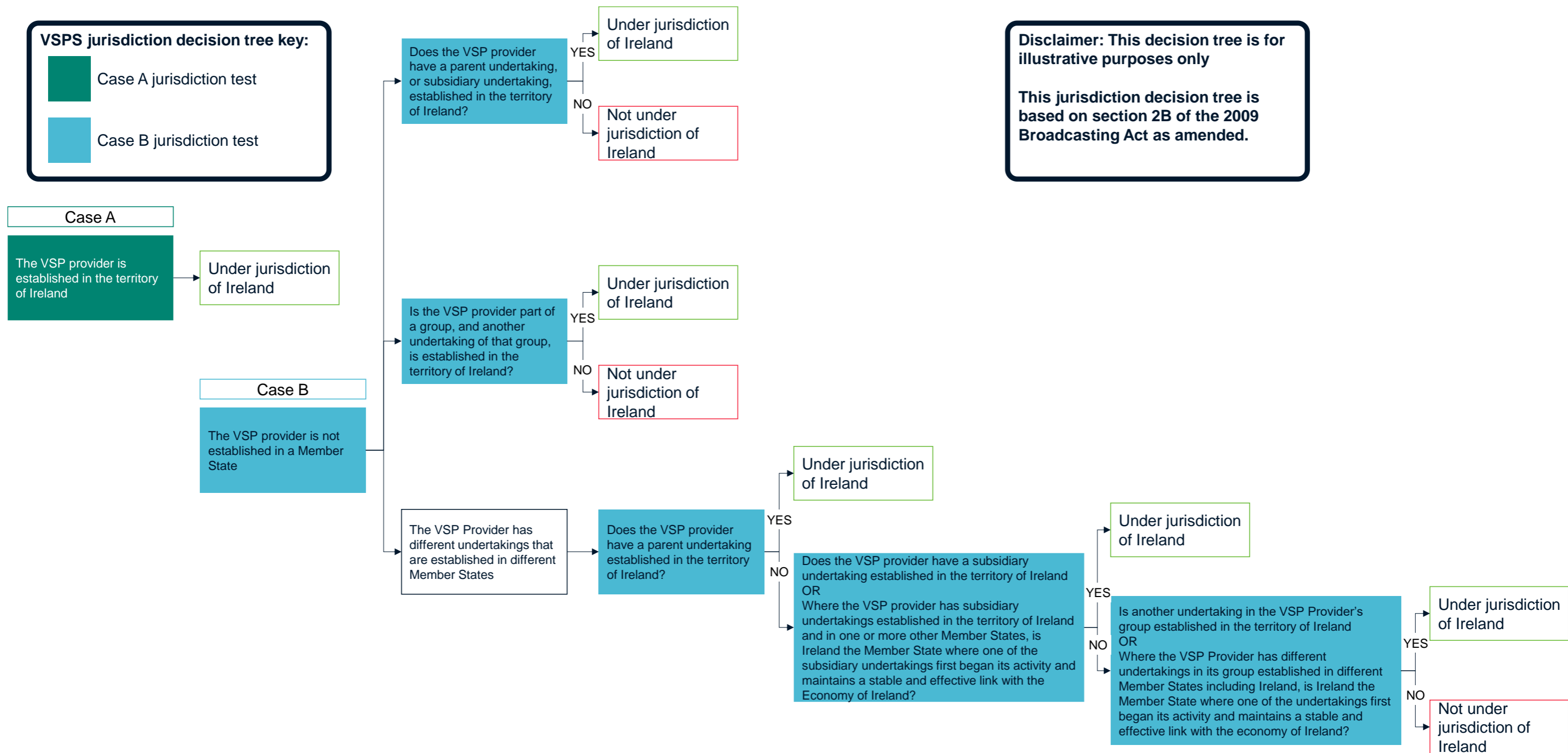



Figure 14 – Jurisdiction decision tree

# 15 Annex B – Review of other VSPS regulatory regimes

## 15.1 France

 <b>French VSPS regulatory regime</b>	
<b>Name of regulator</b>	Autorité de régulation de la communication audiovisuelle et numérique (Arcom) – the national media regulatory authority
<b>Relevant legislation</b>	<p>The provisions of the revised AVMSD related to VSPS are transposed into an Ordinance that replaces several articles of the 1986 Audiovisual Law (the Ordinance).</p> <p>Relevant primary legislation includes:</p> <ul style="list-style-type: none"> <li>• Decree related to commercial communications for the application of Articles 27 and 33 of the 1986 Audiovisual Law, and fixing the general principles defining the obligations of the publishers of services</li> <li>• Law of 19 October 2020 aimed at regulating the commercial exploitation of the image of children under the age of 16 on online platforms, amending the 1986 Audiovisual Law</li> <li>• Decree no 2021-1922, 30 December 2021, implementing Law no 86-107, 30 September 1986, on freedom of communication and fixing general principles about commercial communications on VSPS.<sup>93</sup></li> </ul>
<b>Definitions</b>	<p>Definitions:</p> <ul style="list-style-type: none"> <li>• The definition of a VSP service closely matches the wording of the revised AVMSD</li> <li>• No definition of user-generated video is specifically included in the national legislation, but the law does mention user-generated content (although it does not provide a definition).<sup>94</sup></li> </ul>
<b>Information and evidence used</b>	Information not publicly available.
<b>Features of the regulatory approach</b>	Information not publicly available.
<b>Types of systems, processes or tools required to comply with regulation</b>	<p>With regards to the measures set out in Article 28b (3) (a-j), the French national legislation sets out the following:<sup>95</sup></p> <ul style="list-style-type: none"> <li>• The Ordinance states that Arcom will have to specify measures for reporting, and flagging content, including processes for complaints resolution</li> <li>• Arcom will have to specify measures for age verification, and parental control systems</li> <li>• There is no specific provision within the Ordinance that refers to VSPS terms and conditions (measure (3) (a) Article 28b).</li> </ul>

<sup>93</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 209. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>


<sup>94</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), pp. 210-211. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>95</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), pp. 213-216. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

Priority areas	N/A
Studies, reports and research	<ul style="list-style-type: none"> <li>• Marc Le Roy: “Le nouveau droit des plateformes de partage de vidéo-sharing”, 202172</li> <li>• Loïc Peyen: “La publicité, l’argument environnemental et la loi Climat et Résilience: halte au greenwashing?”, 202173</li> <li>• Laurent Carrié: “Enfant influenceur: le contrôle parental sous contrôle de l’administration, du juge, des plateformes de partage de vidéos, du CSA [...] et de l’enfant”.<sup>96</sup></li> </ul>
Published material and guidance	N/A

Table 2 - French VSPS regulatory regime

## 15.2 Germany

 <b>German VSPS regulatory regime</b>	
<b>Name of regulator</b>	Landesmedienanstalten (State media authorities)
<b>Relevant legislation</b>	<p>In the main, the regulation of VSPS is based on Medienstaatsvertrag or MStV (the German Interstate Media Treaty) – a code of conduct for VSPS.</p> <p>Other relevant legislation includes:<sup>97</sup></p> <ul style="list-style-type: none"> <li>• The Network Enforcement Act (NetzDG)</li> <li>• The Telemedia Act (TMG)</li> <li>• The Interstate Treaty on the Protection of Minors in Media.</li> </ul>
<b>Definitions</b>	<p>Definitions:</p> <ul style="list-style-type: none"> <li>• There is some variation in the definition of a VSPS in the German legislation (which defines video-sharing services without reference to platforms) to avoid overlaps with other regulation</li> <li>• The definition of a ‘user-generated video’ is identical to the AVMSD text.<sup>98</sup></li> </ul>
<b>Information and evidence used</b>	N/A
<b>Features of regulatory approach</b>	<ul style="list-style-type: none"> <li>• <b>Registration</b> – VSPS in Germany will be recorded as part of a registration/notification system<sup>99</sup></li> <li>• <b>Self- and co-regulation</b> – the VSP framework builds on previous self- and co-regulation in media</li> <li>• <b>Reporting</b> – NetzDG imposes strict transparency requirements, stating: “social networks are obliged to set up an effective complaint mechanism and have reporting obligations. They have to produce a report every 6 months on how they have handled complaints.”<sup>100</sup></li> </ul>

<sup>96</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 63. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>97</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 147. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>98</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 148. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>99</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 156. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>


<sup>100</sup> European Commission, SMART 2018/0066 – Part D: *Study on the implementation of the new provisions in the revised AVMSD. Final Report* (2020), p. 100. Available at: <https://op.europa.eu/en/publication-detail/-/publication/6d536c6f-5c68-11eb-b487-01aa75ed71a1/language-en>

<b>Types of systems, processes or tools required to comply with regulation</b>	<p>With regards to the measures set out in Article 28b (3) (a-j), the German national legislation sets out the following:</p> <ul style="list-style-type: none"> <li>• VSPS should “effectively agree with their users that they are prohibited from distributing illegal audiovisual commercial communication”<sup>101</sup></li> <li>• VSPS should have a procedure for users to report complaints about illegal content on the service. This procedure must be effective and transparent</li> <li>• To fulfil their general obligations to protect minors, providers may “use technical means to make it impossible, or considerably more difficult, for them to take advantage of an offer, or provide the offer with an age rating that can be read by suitable youth protection programmes”<sup>102</sup> There is also a requirement for VSPS “to take appropriate measures to protect minors from offerings that impair their development”<sup>103</sup></li> <li>• The “establishment of a joint body for the arbitration of disputes between complainants or users affected by the complaint and the providers of video-sharing services.”<sup>104</sup></li> </ul>
<b>Priority areas</b>	N/A
<b>Commissioned studies, reports and research</b>	<p>Reports related to transposing of AVMSD into German national legislation:<sup>105</sup></p> <ul style="list-style-type: none"> <li>• Self- and co-regulation in the new AVMSD, 2019</li> <li>• First Public Consultation on the new State Media Treaty with submissions from academic institutes, associations and corporations, 2018</li> <li>• Second Public Consultation on the new State Media Treaty with submissions from academic institutes, associations and corporations, 2019.</li> </ul>
<b>Published material and guidance</b>	No guidelines or procedures have been published yet.

Table 3 – German VSPS regulatory regime

## 15.3 Netherlands

As of 2022, “it appears there are no VSPS which fall directly under the scope of the Dutch jurisdiction.”<sup>106</sup>

 <b>Dutch VSPS regulatory regime</b>	
<b>Name of regulator</b>	Commissariaat voor de Media (CvdM)
<b>Relevant legislation</b>	Provisions of the revised AVMSD related to VSPS have been transposed into the Media Act 2008 (Mediawet 2008)

<sup>101</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 151. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>102</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 152. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>103</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 152. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>104</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 153. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>105</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 158. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>106</sup> European Audiovisual Observatory, Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022), p. 343. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<b>Definitions</b>	Definitions: <sup>107</sup> <ul style="list-style-type: none"> <li>• The definition of a VSP service closely matches the wording of the revised AVMSD</li> <li>• The VSP provider definition mirrors the AVMSD verbatim</li> <li>• The definition of ‘user-generated video’ is identical to the AVMSD text.</li> </ul>
<b>Information and evidence used</b>	Not applicable as there are currently no VSPPS which fall within Dutch jurisdiction.
<b>Features of regulatory approach</b>	<ul style="list-style-type: none"> <li>• The regulation stipulates the obligation for VSPPS to develop codes of conduct encompassing all of the obligations stemming from the AVMSD</li> <li>• The code of conduct adopted by the VSPPS should include (as appropriate) the measures set out in Article 28b (3) (a-j)</li> <li>• CvdM maintains a list of VSPPS</li> <li>• VSPPS are required to notify 14 days prior to the launch of service</li> <li>• VSPPS are obliged to publish requested data (including contracts and jurisdiction) with CvdM</li> <li>• CvdM will monitor the codes of conduct.<sup>108</sup></li> </ul>
<b>Types of systems, processes or tools required to comply with regulation</b>	<ul style="list-style-type: none"> <li>• The code of conduct VSPPS are obliged to develop needs to contain, as appropriate, the measures from the revised AVMSD Article 28b (3).<sup>109</sup></li> </ul>
<b>Priority areas</b>	Not applicable as there are currently no VSPPS which fall within Dutch jurisdiction.
<b>Commissioned studies, reports and research</b>	Study by Radboud University and the University of Amsterdam commissioned by the Dutch Media Authority study: “How do minors experience sponsored video on YouTube?”, 2019. <sup>110</sup>
<b>Published material and guidance</b>	Not applicable as there are currently no VSPPS which fall within Dutch jurisdiction.

Table 4 - Dutch VSPPS regulatory regime

## 15.4 UK

The list of notified VSPPS established in the UK can be found [here](#). As of 5<sup>th</sup> April 2023, it includes:

AdmireMe.vip	BitChute	Brand New Tube
Fanzworld	fruitlab	Gatorjax
Lemon8	MintStars	OnlyFans
PocketStars	Qurio	Recast
RevealMe	Snapchat	The Sponsor Hub
Thomas Cook	Twitch	Vimeo.com


<sup>107</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update* (2022), p. 336. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>108</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update* (2022), pp. 342-343. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>109</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update* (2022), pp. 337-343. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>110</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update* (2022), p. 344. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

Table 5 – VSPS notified to Ofcom<sup>111</sup>

 <b>UK VSPS regulatory regime</b>	
<b>Name of regulator</b>	Office of Communications (Ofcom)
<b>Relevant legislation</b>	<p>The provisions of the revised AVMSD were transposed into Part 4B of the UK's Communications Act 2003 through the Audiovisual Media Services Regulation 2020.<sup>112</sup></p> <p>An Online Safety Bill has been proposed by the UK Government. If enacted, the Bill would also apply to VSPS, largely replacing the rules stemming from the transposition of AVMSD.</p>
<b>Definitions and scope</b>	<p>Definitions:<sup>113</sup></p> <ul style="list-style-type: none"> <li>• The definition of VSP service is in line with the AVMSD</li> <li>• The Communications Act and Ofcom guidance uses the term 'video', which includes programmes and user-generated videos</li> <li>• Ofcom guidance on notifications interprets the principal purpose as the main activity or objective of the platform, and dissociable section of it as a part of the platform that is sufficiently distinct from the rest of it. Ofcom guidance on essential functionality interprets it as meaning where the provision of videos contributes significantly to the commercial, and functional value of the service.</li> </ul>
<b>Information and evidence used</b>	Information not publicly available.
<b>Features of regulatory approach</b>	<p>Ofcom's VSP regime has four aims:</p> <ul style="list-style-type: none"> <li>• Raise standards in user protections</li> <li>• Rapidly identify and address areas of non-compliance</li> <li>• Increase transparency across the industry</li> <li>• Get industry and ourselves ready for the future, more comprehensive Online Safety regime.<sup>114</sup></li> </ul> <p>Ofcom's role is "not focused on determining whether particular items of content should or should not be made available or whether they comply with specific content standards", instead it seeks to "ensure platforms have safety systems and processes in place that provide effective protection to their users."<sup>115</sup></p>
<b>Types of systems, processes or tools required to comply with regulation</b>	<ul style="list-style-type: none"> <li>• Ofcom guidance sets out "measures that it considers central: effectively implemented terms and conditions, functionality requiring uploaders to identify restricted content, effective flagging and reporting mechanisms; and age verification"<sup>116</sup></li> </ul>

<sup>111</sup> Ofcom, Notified video-sharing platforms (2023). Available at: <https://www.ofcom.org.uk/online-safety/information-for-industry/vsp-regulation/notified-video-sharing-platforms>

<sup>112</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update* (2022), p. 429. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>113</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update* (2022), pp. 431-432. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>114</sup> Ofcom, Video-sharing platforms: Ofcom's plan and approach (2021), p. 10. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0016/226303/vsp-plan-approach.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0016/226303/vsp-plan-approach.pdf)

<sup>115</sup> Ofcom, Video-sharing platforms: Ofcom's plan and approach (2021), p. 12. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0016/226303/vsp-plan-approach.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0016/226303/vsp-plan-approach.pdf)

<sup>116</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update* (2022), p. 433. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

	<ul style="list-style-type: none"> <li>• Ofcom strongly encourages VSPA providers to conduct risk management processes to support their decisions about measures and collect data with which to track their effectiveness<sup>117</sup></li> <li>• With regards to the measures set out in Article 28b (3) (a-j), the UK national legislation sets out the following:<sup>118</sup> <ul style="list-style-type: none"> <li>○ Schedule 15A of the Communications Act sets out the measures that would be appropriate for VSPS to take to protect users. This includes specifics on setting out terms and conditions, such as specifying the prohibition for a user to upload a video containing relevant harmful material</li> <li>○ VSPS should establish, and operate user-friendly, and transparent measures for users to report or flag harmful online content. In addition, VSPS should explain to users the effect of their reporting or flagging of content</li> <li>○ VSPS should establish, and operate systems for obtaining assurance as to the age of potential viewers, and easy-to-use systems that allow users to rate harmful material</li> <li>○ That it is appropriate for VSPS to establish, and operate user-friendly, and transparent complaints procedures</li> <li>○ VSPS should provide for parental control systems in relation to restricted material</li> <li>○ VSPS should provide information, and tools that improve media literacy. The awareness of such information, and tools should also be raised.</li> </ul> </li> <li>• In terms of the practicability, and proportionality of the measures proposed, Ofcom guidance states that the elements to be considered include:<sup>119</sup> <ul style="list-style-type: none"> <li>○ Reach and resources of the service</li> <li>○ Nature of the service (functionalities and business model)</li> <li>○ Nature of the content</li> <li>○ Harm the content may cause</li> <li>○ Characteristics of the category of users to be protected</li> <li>○ Rights and interests of users.</li> </ul> </li> <li>• Ofcom in 2021 published video-sharing platform guidance on measures to protect users from harmful material.<sup>120</sup></li> </ul>
<p><b>Priority areas</b></p>	<p>Priority focus areas for the first year of regulation:</p> <ul style="list-style-type: none"> <li>• Reducing the risk of child sexual abuse material</li> <li>• Tackling hate and terror: ensuring that platforms’ terms and conditions effectively protect users from terrorist content, racism and xenophobia, and material likely to incite violence or hatred</li> <li>• Protections for under-18s (ensuring age-appropriate experiences)</li> <li>• Age verification on adult VSPS</li> <li>• Reporting and flagging: ensuring that flagging and reporting processes are effective and that VSPS increase user engagement with them.<sup>121</sup></li> </ul>

<sup>117</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022)*, p. 433. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>118</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022)*, pp. 433-435. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>119</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022)*, p. 439. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>

<sup>120</sup> Ofcom, Video-sharing platform guidance – guidance for providers on measures to protect users from harmful material (2021). Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0015/226302/vsp-harms-guidance.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0015/226302/vsp-harms-guidance.pdf)

<sup>121</sup> Ofcom, Video-sharing platforms: Ofcom’s plan and approach (2021), p. 12. Available at: [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0016/226303/vsp-plan-approach.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0016/226303/vsp-plan-approach.pdf)

<p><b>Commissioned studies, reports and research</b></p>	<p>Studies and reports include:<sup>122</sup></p> <ul style="list-style-type: none"> <li>• Plum Consulting on behalf of the UK Dept of Culture, Media &amp; Sport, Understanding VSPs under UK Jurisdiction, 202075</li> <li>• The Alan Turing Institute on behalf of Ofcom, Understanding online hate VSP Regulation and the broader context, 202176</li> <li>• The Institute for Connected Communities, University of East London on behalf of Ofcom, Research on the Protection of Minors, 202177</li> <li>• Yonder on behalf of Ofcom, User Experience of Potential Online Harms within Video - Sharing Platforms, 2021.</li> </ul>
<p><b>Published material and guidance</b></p>	<ul style="list-style-type: none"> <li>• Ofcom, 'Video-sharing platforms: who needs to notify to Ofcom? Guidance Notes.' <a href="https://www.ofcom.org.uk/_data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf">https://www.ofcom.org.uk/_data/assets/pdf_file/0023/215456/guidance-video-sharing-platforms-who-needs-to-notify.pdf</a></li> <li>• Ofcom, 'Guidance for providers on measures to protect users from harmful material.' <a href="https://www.ofcom.org.uk/_data/assets/pdf_file/0015/226302/vsp-harms-guidance.pdf">https://www.ofcom.org.uk/_data/assets/pdf_file/0015/226302/vsp-harms-guidance.pdf</a></li> <li>• Ofcom Statement, 'The regulation of advertising on video-sharing platforms.' <a href="https://www.ofcom.org.uk/_data/assets/pdf_file/0022/229009/vsp-advertising-statement.pdf">https://www.ofcom.org.uk/_data/assets/pdf_file/0022/229009/vsp-advertising-statement.pdf</a></li> </ul>

*Table 6 – UK VSPS regulatory regime*

<sup>122</sup> European Audiovisual Observatory, *Mapping of national rules applicable to video-sharing platforms: illegal and harmful content online – 2022 update (2022)*, p. 444. Available at: <https://rm.coe.int/mapping-on-video-sharing-platforms-2022-update/1680aa1b16>



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