



THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

CONSULTATION ON PROPOSALS FOR IMPLEMENTATION

IN THE UNITED KINGDOM

DEPARTMENT FOR CULTURE, MEDIA AND SPORT

JULY 2008

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INTRODUCTION

1. The EU Audiovisual Media Services (AVMS) Directive came into force on 19 December 2007. The United Kingdom and other EU and EEA Member States¹ now have until 19 December 2009 to implement it in their domestic law.
2. The Directive revises and updates the existing Television Without Frontiers (TVWF) Directive, which was adopted in 1989 and amended in 1997. It is based on a proposal from the European Commission published on 13 December 2005. The final version was adopted as the Common Position of the Council of Ministers on 15 October 2007 and, without further amendment, by the European Parliament in its second reading on 29 November 2007.
3. A full consolidated text of the AVMS Directive is available with this consultation document. Further information about the TVWF and AVMS Directives is available on the European Commission's website at http://ec.europa.eu/avpolicy/reg/index_en.htm

What this consultation is about

4. This consultation document seeks views on the UK Government's proposals in relation to four specific issues in the AVMS Directive which are expected to require legislation in order to implement them in the United Kingdom. These are:
 - the extension of the scope of regulation to video-on-demand services and the clarification of the application of the Directive to scheduled television broadcasting services delivered over non-traditional platforms;
 - the introduction of a system for regulating the programme and advertising content of video-on-demand services which are established in the United Kingdom;
 - a formal prohibition in UK law of product placement in television and video-on-demand programming, subject to certain possible exemptions; and
 - controls over the content of satellite television broadcasts from outside the EU which can be received within the EU and are uplinked to a satellite from a ground station in the United Kingdom.
5. The Directive also introduces a provision allowing television broadcasters to take short extracts of other broadcasters' exclusive coverage of sports and other major events for use in news reports ("short reports"). The Government is considering this issue separately and will make an announcement about it at a later date.
6. Ofcom recently held a consultation on changes to the rules on advertising breaks in television broadcasting, which have become possible following liberalisations which the AVMS Directive introduces. This closed on 28 May 2008.

¹ As well as the 27 Member States of the EU, the AVMS Directive also applies to the three non-EU members of the European Economic Area (EEA) – Iceland, Liechtenstein and Norway. Throughout this consultation document, references to the EU should be taken to include the non-EU members of the EEA.

7. Ofcom will hold a further consultation later in 2008 on changes to the amount of advertising allowed in television broadcasting. You can find information about these consultations on Ofcom's website at www.ofcom.org.uk.
8. Other aspects of the Directive do not require legislation, and the Government does not propose to consult on implementation action in respect of them. However, for completeness, all parts of the Directive are included in the summary in Part 1.

Structure of this consultation document

9. Part 1 of this consultation document provides background information and a summary of the requirements of the AVMS Directive as a whole.
10. Parts 2-5 seek your views about the Government's specific proposals for legislation in the areas listed at paragraph 4 above, as follows:
 - Part 2: Scope – defining the services to be regulated
 - Part 3: Regulation of video-on-demand services
 - Part 4: Product Placement
 - Part 5: Satellite television broadcasts from outside the EU

How to Reply

11. We welcome your views on the questions set out in this document, and on any other issues raised by the Government's proposals, by **Friday 31 October 2008**.

Please send your reply to:

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12. If you have any questions or complaints about the process of consultation on these issues, please contact:

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Disclosure of responses

13. Please note that the Department will publish all responses in full, unless specifically requested not to do so. However, all information in responses, including personal information, may be subject to publication or disclosure under freedom of information legislation. If a correspondent requests confidentiality, this cannot be guaranteed and will only be possible if considered appropriate under the legislation.
14. Any such request should explain why confidentiality is necessary. Any automatic confidentiality disclaimer generated by your IT system will not be considered as such a request unless you specifically include a request, with an explanation, in the main text of your response.

PART 1 – SUMMARY OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE

Introduction

1. The Audiovisual Media Services (AVMS) Directive revises and updates the Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting, and in particular cross-border television broadcasting, in the EU since 1989.
2. The TVWF Directive has required every EU Member State to impose certain minimum standards on scheduled television services which originate in its jurisdiction. It has also required every Member State to ensure freedom of reception of scheduled television services from other Member States.
3. Member States can if they wish place their own extra content requirements onto television broadcast services which originate in their own jurisdiction. However, they cannot impose these additional standards on television broadcasts which originate from other EU Member States, even if these can be received in their own territory.
4. The TVWF Directive has therefore created a 'single market' in television broadcasting services across the EU. Member States are required to allow free reception of services from around the EU. At the same time, EU law guarantees minimum content standards for these services.

Extended scope

5. The most significant change introduced by the AVMS Directive is to extend the scope of the Directive. The TVWF Directive applied to scheduled television broadcasting services only. However, the AVMS Directive also applies to some on-demand services.
6. The AVMS Directive defines in some detail the types of 'on-demand' service which it covers, and Part 2 of this consultation document contains a discussion of this definition and its incorporation into UK law. However, the key point is that the Directive extends EU regulation to 'video-on-demand' services whose principal content is in the form of programmes and which compete for the same audience as television broadcasting. Taken together, these video-on-demand services and scheduled television broadcasting services make up the overall class of 'audiovisual media services' which the AVMS Directive is intended to regulate at the EU level.
7. The Directive also clarifies the status of television broadcasting services distributed exclusively on the Internet, by means of mobile phones, or by any other non-traditional platform. Under the Directive these services will be subject to the same regulatory regime as television broadcasting services on conventional platforms such as satellite, terrestrial or cable.

Three tiers of regulation

8. The AVMS Directive contains three distinct tiers of regulatory requirements which each Member State must apply to the audiovisual media services within its jurisdiction.

9. The **first tier of requirements** is set out in Articles 3a to 3g, and applies to all audiovisual media services, both scheduled and on-demand. Articles 3a to 3g require Member States to:
- ensure that service providers under their jurisdiction make certain information available to users, including at least their name, address and contact details, and their regulatory body (Article 3a);
 - ensure that services under their jurisdiction do not contain any incitement to hatred on grounds of race, sex, religion or nationality (Article 3b);
 - encourage service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability (Article 3c);
 - ensure that service providers under their jurisdiction do not transmit films outside periods agreed with rights holders (Article 3d);
 - ensure certain minimum standards in relation to advertising content (Article 3e);
 - ensure that sponsorship of programmes and services meets certain requirements (Article 3f); and
 - prohibit product placement, subject to certain defined exceptions which Member States can choose whether or not to adopt (Article 3g).
10. The **second tier of requirements** applies to on-demand services only. It is set out in Articles 3h and 3i. These Articles require Member States to:
- ensure that services whose content might be harmful to minors are made available only in ways that ensure that minors will not normally hear or see them (Article 3h); and
 - ensure that on-demand services promote the production of and access to European (including home-produced) work, where practicable and by appropriate means (Article 3i).
11. The **third tier of requirements** applies mainly to scheduled television broadcasting. It is set out in Articles 3j and 3k and from Articles 4 through to 23. These Articles repeat the requirements which the TVWF Directive made in respect of:
- public access to major sports and other events on free television (Article 3j);
 - quotas of European and independently-produced work in television broadcasting (Articles 4 and 5);
 - protection of minors in television broadcasting (Article 22); and
 - a right of reply to television broadcasts, or an equivalent remedy (Article 23).

12. They include significant relaxations in the rules on the amount of advertising which may be shown on television and changes to the rules on when advertising breaks can be included in programmes (Articles 10 to 20).
13. They also introduce a provision allowing broadcasters to take short extracts of other broadcasters' exclusive coverage of events for the purpose of including them in news reports in television broadcasting and allowing limited subsequent use in on-demand services (Article 3k).

Other changes in the AVMS Directive

14. The AVMS Directive also makes two other changes to the rules in the previous TVWF Directive. Both these changes concern television broadcasting services only.
15. The AVMS Directive:
 - changes the rules determining which Member State has jurisdiction over satellite television channels established outside the EU which can be received within the EU (Article 2.4); and
 - enhances existing procedures under which a Member State can raise concerns about television broadcasts received from a broadcaster established in another Member State which do not comply with the first Member State's own domestic rules (Articles 3.2 to 3.5).

PART 2 – SCOPE: THE DEFINITION OF AUDIOVISUAL MEDIA SERVICES

Current Position

1. The TVWF Directive applied EU-wide regulatory standards to scheduled television broadcasting services only. It set standards for both television programmes and advertising. However, it did not apply to any form of video-on-demand service. Although video-on-demand services were regulated at the EU level², this was only in relation to their commercial and technical activities.
2. Content standards for the BBC's video-on-demand services are overseen by the BBC Trust. Prior to the Communications Act 2003, other video-on-demand services effectively fell within the definition of broadcasting services and were regulated by Ofcom. The Act removed the requirement for these services to be regulated. Since then neither Ofcom nor any other agency has had a statutory responsibility for content standards in on-demand services provided by other providers. However, industry has set up two self-regulatory bodies for these services – the Association for Television On Demand (ATVOD) and the Independent Mobile Classification Body (IMCB).

What the AVMS Directive requires

3. The AVMS Directive makes two fundamental changes to the current position.
4. First, it leaves no doubt that Member States are required to apply EU regulatory standards to scheduled television services, regardless of their means of delivery. Scheduled television broadcasting services delivered exclusively over the Internet, or by mobile phone, are now subject to the same EU regulatory regime as television services delivered by the (previously) more conventional means of terrestrial, satellite or cable transmission.
5. Second, it brings the content of video-on-demand services within the scope of EU regulation. The Directive requires Member States to impose minimum regulatory standards on such services, just as it requires Member States to impose minimum regulatory standards on television broadcasting services. The standards involved however are different.
6. The UK Government will therefore need to legislate in order to:
 - transpose the definition of on-demand audiovisual media services into UK law, in order to delineate the class of video-on-demand services and advertising in such services to which regulation will apply, and to identify the type of service providers to be regulated; and
 - more generally reflect the slightly wider scope of the AVMS Directive.
7. As a matter of policy, the Government aims to draw into the scope of UK regulation a narrow range of services falling within the scope of the AVMS Directive, rather than extending regulation to a wide range of audiovisual services.

² by the Directive on electronic commerce (Directive 2000/31/EC)

The definitions in the AVMS Directive

8. Where the TVWF Directive applied only to television broadcasting, the AVMS Directive applies to all "audiovisual media services". Article 1(a) defines an audiovisual media service as:

"a service which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by means of electronic communications networks Such an audiovisual media service is either a television broadcast or an on-demand audiovisual media service and/or audiovisual commercial communication".

9. 'Television broadcast', 'on-demand audiovisual media service' and 'audiovisual commercial communication' are further defined in Article 1(e), (g) and (h) respectively.
10. The definitions in the AVMS Directive are platform-neutral – that is, they apply to all audiovisual media services delivered by any form of electronic communications network. Therefore they include services which are delivered over the internet and on mobile devices as well as those delivered over conventional television networks.
11. The effect of the definitions is that television broadcasting, as previously regulated by the TVWF Directive, becomes under the AVMS Directive a subset of audiovisual media services, and the scope of the Directive is extended to cover video-on-demand services as a second subset of audiovisual media services. The Directive also introduces the new category of audiovisual commercial communication, one type of which is television advertising.

Scheduled television broadcasting services

12. The AVMS Directive clarifies the position under EU law of scheduled television services which are transmitted exclusively by non-traditional means. Article 1(a) of the TVWF Directive defined scheduled television broadcast services (in part) as:

"the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public"

13. However, as noted in paragraphs 8 -11 above, under the AVMS Directive, scheduled television broadcasting is a subset of 'audiovisual media services' as a whole. 'Television broadcasting' is defined in Article 1(e) of the AVMS Directive as:

"an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule"

14. The specific reference in Article 1(a) of the AVMS Directive to 'electronic communications networks' (of all kinds) makes it clear that EU law in this area is technology neutral. That was less apparent in the TVWF Directive, with its less precise reference to services provided 'by wire or over the air'.
15. Ofcom has always aimed to apply the Communications Act 2003 in a platform-neutral manner. Nevertheless, the Government will assess whether any changes are necessary

to UK law in order to ensure that all scheduled television services provided from within UK jurisdiction, on whatever platform or platforms, are subject to regulatory control. For example, we will examine the definition in the Communications Act of 'television licensable content services' from this perspective³.

On-demand audiovisual media services

16. An "on-demand audiovisual media service" is defined in Article 1(g) of the AVMS Directive as:

"an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider."

This meaning sits within the overall definition of an audiovisual media service, set out in Article 1(a), with particular elements further defined in Articles 1(b), 1(c) and 1(d).

17. The definitions in these Articles are supplemented by Recitals 16 to 25. As is usual with an EU Directive, the rules set out in the Articles are to be interpreted in the light of the Recitals.
18. Put together, these Articles and Recitals mean that an on-demand service is covered by the AVMS Directive if all the following conditions are met:
- it is operated by a 'media service provider' (as defined in Article 1 (d)) within the jurisdiction of a Member State of the EU/EEA (as determined by Article 2);
 - the media service provider exercises editorial responsibility (as defined in Article 1 (c));
 - the principal purpose of the service is the provision of programmes (as defined in Article 1 (b));
 - the programmes are intended to inform, entertain, or educate the general public (Article 1(a) and Recital 18);
 - the media service provider sends the programmes to the user for viewing at a time chosen by the user; (Article 1(g));
 - it is a mass media service intended for reception by the general public and with the potential to have a clear impact on a significant proportion of the public (Recital 16);
 - it is 'television-like' (Recital 17) in that
 - it competes for the same audience as television broadcasting and

³ 'Television licensable content services' are, in effect, all scheduled UK television services which are not provided on analogue or digital terrestrial platforms, which have specific licensing regimes. See sections 232 et seq. of the 2003 Act.

- the nature and means of access to the service mean that reasonable consumer expectations of it (in terms of regulatory protection) would be the same as for television broadcasting.
19. It follows from the definition outlined above that many on-demand services which include audiovisual material are not covered by the Directive. The Recitals give some examples of services which are excluded from its scope:
- services which are primarily non-economic and not in competition with television broadcasting;
 - services allowing users to share user-generated content;
 - private correspondence and e-mails
 - services where the audiovisual content is incidental to the main purpose of the service;
 - gaming and gambling services;
 - online games;
 - search engines;
 - electronic versions of newspapers and magazines.
20. This list of exclusions was devised during the negotiation of the Directive in 2006 and 2007. Compared with the enormous and constantly growing variety of online and mobile services providing audiovisual content, the list is not and cannot be exhaustive.
21. Recital 25 of the Directive makes it clear that all the criteria set out at paragraph 18 above must be satisfied in order for a particular service to be covered. A service is therefore excluded from the terms of the Directive if, for example, its principal purpose is not the provision of 'programmes', or if it is not competing for the same audience as television broadcasting.
22. This excludes from the scope of the Directive an enormous swathe of new media services including those which are based around user-generated content, or which generate virtual worlds. As a result, the drafting of the Directive and the specific exclusions which it contains have the effect of reducing its scope to scheduled television broadcasting services and video-on-demand services.

Defining on-demand services in domestic law

23. In transposing the Directive into UK law, the UK Government's aim is to create a legislative definition of on-demand audiovisual media services which will deliver as much clarity as possible for both businesses and consumers in relation to:
- which services will be subject to regulation; and
 - who will be the regulated service provider responsible for ensuring compliance with the requirements of the Directive.

However, the overriding priority must be to secure the proper implementation of the Directive.

24. The Government proposes to translate the definition of on-demand audiovisual media services into UK law by amending the Communications Act 2003 to create and define

the concept of an "on-demand programme service" with the following principal elements:

- its principal facility is a "video-on-demand" service;
- it is mediated by a service provider exercising "editorial responsibility"; and
- it is made available for members of the public to use.

25. Each of these elements will then be further defined.

"Video-on-demand"

26. The definition of "video-on-demand" will encapsulate a number of key ideas:

- the user can make individual selections of programmes;
- the programmes must include programmes of a kind similar to those available on scheduled television broadcasting services;
- the user can watch the programmes at a time of his or her own choosing (although it may have to fall within a window specified by the service provider); and
- the programmes must be received by means of an electronic communications network.

27. The Government considers the requirement for there to be programmes of a kind similar to those available on television broadcasting services to be particularly important. It excludes many audiovisual services where the content is not in a format similar to television programmes. This would allow the development of new services which may include some video content but which will not be subject to the regulatory framework which applies to television broadcasting or on-demand audiovisual media services.

28. The requirement for programmes to be received by means of an electronic communications network will ensure that services such as mail-order DVD services are excluded. However, a service would be included if a programme selected by a user has to be downloaded to the user's equipment before he or she is able to watch it. A service might also be included if the user is selecting from a collection of programmes which have already been downloaded to his or her equipment. "Electronic communications network" is already defined in section 32 of the Communications Act 2003.

"Editorial Responsibility"

29. "Editorial responsibility" is defined in Article 1(c) of the Directive as being:

"the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services."

This definition identifies the person (or organisation) who controls the way in which an on-demand programme service is presented or organised and the programmes, services and facilities which are offered.

30. UK law uses the concept of “general control” to identify the person who must hold the licence for a scheduled television broadcasting service⁴. It aims to capture the right level of responsibility within the hierarchy of the broadcasting industry, and has worked in practice.
31. In relation to traditional linear TV, the body treated as providing the service, and therefore responsible from a regulatory point of view, is the person with general control over which programmes and other services and facilities are included in the service, whether or not he has control of the content of individual programmes or of the broadcasting distribution of the service. The operator of a broadcasting platform, such as a digital terrestrial multiplex, direct-to-home satellite television system or a cable television network, does not have regulatory responsibility because they do not have such general control.
32. Identifying who has general control over a video-on-demand service is more complex, because of the number of different ways in which an individual video-on-demand service may be offered to the public. It may be available over the internet as part of a stand-alone service where the content is provided by a single operator (and “branded” as such). Channel 4’s 4oD service and the BBC’s online iPlayer are services of this type.
33. In these cases, there is no ambiguity about who has regulatory responsibility. All the material is “branded” as belonging to the service provider, and will in many cases have been previously broadcast as part of the provider’s linear channel. It may have been produced or commissioned by the provider, or acquired from elsewhere, such as an independent producer or another channel. Even if so, the service provider brands it as part of its own offering and so takes responsibility for it in the same way as the broadcaster of a linear channel obtains content from a variety of sources but accepts responsibility for anything broadcast as part of the channel.
34. There are also video-on-demand providers who offer members of the public a package or bouquet of various video-on-demand services. For example, as well as providing their own package of programming, they may also provide access to packages of programming which are being separately offered to the public by other video-on-demand providers.
35. Some elements of such an ‘aggregated’ service may therefore be video-on-demand services in their own right. In these circumstances the provider of the ‘aggregated’ video-on-demand service will clearly have control over its own package of programming. In addition, it might have some degree of control over elements of the other video-on-demand services it is offering, such as:
- the selection of programmes;
 - the organisation of the catalogue through which programmes are selected; and/or
 - the provision of tools to enable audiences to manage access to potentially harmful content.
36. However, these elements of the other video-on-demand services which an ‘aggregated’ service is offering might equally remain under the control of their original providers. The original providers might perhaps retain control of the catalogue through which programmes are selected or of their access tools. The exact position will depend on the contractual arrangements between the companies involved.

⁴ Section 362(2) of the Communications Act 2003

37. If the original provider retains control of:

- the selection of programmes, and
- the organisation of the catalogue through which programmes are selected,

then the legislation will need to fix responsibility for the service entirely on the original provider and not on any 'aggregator' which includes the original provider's video-on-demand service within its offering to the public. But if the 'aggregator' controls these elements of the original provider's content, then there may be a case for fixing responsibility for those elements on the 'aggregator' rather than on the original provider.

38. For example, there may be occasions when controls which the original provider has placed on their content are not properly replicated by the 'aggregator', with the result that PIN controls on adult content are absent. That could be seen to be the responsibility of the 'aggregator' and not of the original provider.

39. We would welcome views on this issue. In circumstances where the provider of an 'aggregated' video-on-demand service has control over some elements of other video-on-demand services it is carrying, should the regulatory responsibility for those other services remain with their original providers or should the provider of the 'aggregated' service be made editorially responsible?

40. We also welcome views on a further question. Some 'aggregated' video-on-demand services provide access to video-on-demand services provided by operators who are outside the EU. However, the Government is required by the Directive to ensure that all the video-on-demand services available on the aggregator's service meet the standards set out in the Directive.

41. Where an 'aggregated' video-on-demand service provides access to a video-on-demand service from outside the EU, should the 'aggregated' service carry regulatory responsibility for the non-EU service it is providing? If not, what other options are there for ensuring that the UK can meet its responsibilities under the Directive in respect of the non-EU service?

42. In considering these questions, you might wish to bear in mind the discussion in Part 3 of this document about what 'regulatory responsibility' for a video-on-demand service would actually entail.

43. The Government does not envisage a licensing system such as exists with television broadcasting. Instead, the Government strongly prefers an industry-led co-regulatory solution in which the UK video-on-demand industry itself would take the lead in setting and implementing standards and would, where there were problems, be able to assess and deal with them in a flexible, practical way.

"Available for members of the public"

44. A service will be defined as being available for members of the public to use, even if users must subscribe to the service or specifically request access to it, provided that the opportunity to subscribe or request access is offered or made available to the public, in the UK or from the UK to any other EU Member State.

Ancillary and other services

45. For on-demand programme services which offer ancillary services or access to other services, the definition will aim to determine whether the service provider is responsible for the content of these ancillary or other services. Ancillary services might include special services for disabled people (such as subtitling, signing or audio description) or material related to the main programme (akin to the "extra features" often found on DVDs).
46. Where a service provider does not have general control over additional content that may be accessed from the main service, that additional content will not be covered by the definition of an ancillary service and will not, therefore, be treated as part of the main service. However, even if the service provider does not have general control over additional content that is available from its service, it might be required to take down the link to that service if a complaint about it is upheld.

"Mixed" offers

47. Offers which consist of both scheduled television broadcasts and an on-demand programme service will still require a licence from Ofcom in respect of the scheduled service and will be subject to regulation by Ofcom in respect of that service. In effect, these offers will be treated as consisting of two separate services for regulatory purposes.

QUESTIONS

Scheduled television broadcasting services

1. Does the Communications Act 2003 need to be amended in order to ensure that it covers all scheduled television services within UK jurisdiction regardless of the platform over which they are provided? If so, how?

On-demand audiovisual media services

2. Do the proposed definitions to be included in the Communications Act capture all the relevant elements of the definition of an on-demand audiovisual media service in the AVMS Directive?
3. Are there any services which you think should fall within the scope of regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might exclude?
4. Are there any services which you think should fall outside the scope of regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might include?
5. Is the concept of "general control" appropriate for determining the person or organisation subject to regulation in respect of a particular video-on-demand service?
6. If the provider of an 'aggregated' video-on-demand service has control over some elements of another video-on-demand service to which it provides access, to what extent and in what circumstances should the regulatory responsibility for that other service remain with its original provider and to what extent and in what circumstances should it transfer to the provider of the 'aggregated' service?
7. If an 'aggregated' video-on-demand service provides access to a video-on-demand service from outside the EU, should the provider of the 'aggregated' service have regulatory responsibility for the non-EU service? If not, what other options are there for ensuring that the UK can meet its obligations under the Directive in respect of the non-EU service?
8. What other types of additional content might video-on-demand services offer or provide access to? Do you envisage any difficulties in determining whether a service provider has general control over such content?
9. Is it appropriate to treat scheduled and on-demand parts of the same overall service differently for regulatory purposes? Do you envisage any difficulties in identifying the boundaries between the scheduled and on-demand parts of the same overall service and/or in making different parts of the same overall service subject to different regulatory requirements and different regulatory bodies?

The Government would also welcome information from respondents about the potential impact of the proposals for defining the scope in response to the five impact and competition assessment related questions at the end of the list of questions in Part 6.

PART 3 – REGULATION OF ON-DEMAND AUDIOVISUAL MEDIA SERVICES

Current Position

1. In the United Kingdom regulatory standards in television broadcasting have been applied for many years under successive Television Acts and Broadcasting Acts, supplemented most recently by the Communications Act 2003, and successive BBC Royal Charters and Agreements. Under the present model, standards are defined in Ofcom's Broadcasting Code and related Codes and guidance notes, which apply to all UK television broadcasters.
2. Content standards in television broadcasting are overseen by Ofcom and the BBC Trust. The BBC Trust also oversees content standards for the BBC's video-on-demand services. Until the Communications Act 2003, other video-on-demand services effectively fell within the definition of broadcasting services, but since then neither Ofcom nor any other agency has had a statutory responsibility for content standards in on-demand services provided by other providers.
3. The UK audiovisual industry has set up two self-regulatory bodies, the Association for Television on Demand (ATVOD) and the Independent Mobile Classification Body (IMCB). ATVOD and IMCB have agreed codes of practice with the service providers whom they cover and set up procedures for handling complaints from customers. You can find out more about ATVOD and IMCB on their websites: www.atvod.co.uk and www.imcb.org.uk. It should be noted that not all providers of video-on-demand audiovisual services are members of ATVOD or IMCB.
4. Standards in advertising on television are overseen by a co-regulatory arrangement between Ofcom, which has statutory responsibility, the Broadcast Committee of Advertising Practice (BCAP), which maintains the Television Advertising Standards Code⁵ under contract from Ofcom⁶, and the Advertising Standards Authority (ASA) which investigates complaints about apparent breaches of the Code.
5. There is only one significant respect in which current UK controls on commercial communications on television do not meet the requirements of the AVMS Directive. This is in relation to product placement. Product placement is currently prohibited in the UK under the terms of Ofcom's Broadcasting Code, but the Directive is likely to require a stronger, explicit prohibition in national law. Part 4 of this consultation considers the issues and options in relation to product placement.
6. Advertising in on-demand services is currently overseen by the Committee of Advertising Practice (CAP) which is a self-regulatory arrangement under the aegis of the ASA. CAP maintains the British Code of Advertising, Sales Promotion and Direct Marketing which applies to all non-broadcast advertising.
7. You can find out more about the ASA, CAP, BCAP and the advertising codes at www.asa.org.uk and www.cap.org.uk.

⁵ The statutory regime for Ofcom's standards code in relation to advertising is contained in sections 319 and 321 of the Communications Act 2003; in particular, see sections 319(1), 2(h), 2(i) and (3).

⁶ Ofcom have contracted out this function by Order (SI 2004/1975) under the Communications Act 2003 and the Deregulation and Contracting Out Act 1994.

What the AVMS Directive requires

8. The AVMS Directive sets out a series of standards and requirements for all audiovisual media services, for video-on-demand services only, and for television broadcasting only (see Part 1, paragraphs 8-12). Member States must ensure that service providers observe these standards and requirements (or, in a few cases, encourage them to do so). In relation to television broadcasting, for most of the requirements of the Directive, the BBC Trust, Ofcom and the ASA/BCAP already have the power to act and need only to adjust their codes to reflect changes in the requirements between the TVWF and AVMS Directives. In relation to on-demand services, however, a new regulatory structure will be required in the UK in order to implement the AVMS Directive and oversee the new content and advertising standards.
9. The UK Government will therefore need to legislate in order to empower one or more regulatory bodies to draw up and enforce codes of practice for providers of such services and providers of advertising in such services.
10. The rest of this Part of the consultation document considers:

Part 3A: the options for regulating the content of programmes in on-demand audiovisual media services; and

Part 3B: the options for defining and regulating advertising in on-demand audiovisual media services.

PART 3A – A REGULATORY SYSTEM FOR ON-DEMAND AUDIOVISUAL MEDIA SERVICES

What the AVMS Directive says

1. The AVMS Directive requires the UK and other EU Member States to ensure the existence of a regulatory system for on-demand audiovisual media services.
2. The Directive explicitly encourages the use of co- and self-regulation wherever possible. Recital 36 notes that:

“experience has shown that both co- and self-regulation instruments can play an important role in delivering a high level of consumer protection”.

This Recital also states that implementation of the Directive should not:

“disrupt or jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively”.

However, it also states that:

“while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator”.

3. Article 3.3 of the AVMS Directive encourages Member States to employ self- or co-regulatory solutions in this area. In view of the formal, legal obligations which the Directive creates, however, the Government is satisfied that a system of self-regulation for on-demand audiovisual media services is not sufficient to implement the Directive’s requirements in the UK.
4. In the Government’s view, the Directive requires Member States to ensure that video-on-demand services are regulated by either:
 - a formal system of regulation operated by State institutions and/or a legally established regulator such as Ofcom; or
 - a system of co-regulation.
5. The Government’s strong preference – supported by the Directive - is for a system of co-regulation. This would allow the UK video-on-demand industry itself to take the lead in setting and enforcing standards for the content of its services. There would need to be legislation which allowed either the Government or Ofcom, as the national regulator, to intervene – but only if strictly necessary, and as a last resort - in order to ensure that the content standards required by the Directive were met. However, for the most part, the scheme would be expected to operate independently, with little if any intervention by Government or Ofcom. If it could not do so, it would have failed and would have to be replaced.
6. Co-regulatory schemes of this sort operate successfully in a number of other areas notably in relation to broadcast advertising, for which the Advertising Standards Authority is the co-regulatory authority and where there are backstop powers for Ofcom and the Office of Fair Trading to intervene under particular circumstances.

Requirements of the regulatory system

7. The regulatory body or bodies for programme content in on-demand audiovisual media services will need to implement and enforce the mandatory requirements set out in Articles 3a, 3b, 3d, 3h and 3i of the Directive. It/they may also be required to implement and enforce the requirements relating to advertising (Article 3e), sponsorship (Article 3f) and product placement (Article 3g) – see Part 3B of this consultation document. In addition, it/they may also be asked by the Government to oversee measures in relation to Article 3c.
8. An important aspect of the regulatory models described below is the means through which it is decided whether any particular service should be subject to the regulatory regime. This issue will ultimately be determined by the legislation, and therefore, potentially, in Court. However, under some models there will also be a role for the regulatory authority, potentially giving advice and/or issuing guidance to help service providers determine the status of their services.
9. There are a number of criteria which need to be considered in setting up a new regulatory or co-regulatory system. These include:
 - need to implement the Directive effectively
 - transparency to the public and to industry
 - reasonable consistency with existing content standards for broadcast content and for advertising
 - incentives for video-on-demand providers to participate in the scheme
 - incentives for video-on-demand providers to comply with the rules
 - risk of creating new barriers to entry to the sector
 - public awareness and visibility of the scheme
 - consumer confidence
 - resources and workload
 - costs and funding mechanisms
 - existing relationships
 - flexibility and future proofing
 - complaints handling, appeals and enforcement
10. The design of the co-regulatory system needs to address all these criteria, but its operation, once established, could be reasonably straightforward.

The Structure of the Regulatory System

Membership

11. There is a basic choice about whether or not the regulatory system should operate on a membership basis. If it did, then every video-on-demand service provider might be required by law to be a member of an industry body which had been designated as a co-regulator for video-on-demand services, with membership effectively a prior condition for providing a video-on-demand service.

12. A system which was not based on membership might nevertheless require service providers to seek prior approval from the co-regulator – or simply to notify it – before providing a service. Alternatively, the co-regulator’s Code could act as a set of ‘general conditions’ by which all video-on-demand providers would have to abide in order to provide their service. Providers would then not need to join the industry body, notify it or seek prior approval from it.
13. The question of whether or not there should be membership has implications for the funding and legitimacy of the co-regulatory body and for the offences which might underpin its regulation of the industry.

Funding

14. A regulatory system which operated on a membership basis could proceed on the basis of a membership fee, possibly a graduated one, set by the industry body itself and aimed at covering its reasonable operating expenses.
15. If the system did not operate on a membership basis, that would imply that it could not support itself by fees and that some other basis of funding would then need to be found. There might also be issues about ‘free riders’ taking advantage of the existence of an industry-led regulatory system without contributing to it in any way.

Legitimacy

16. A membership-based regulatory system, in which the members were able to have a say in the running of the co-regulator and in the selection of those charged with its management and with drawing up and enforcing the Code, might be perceived as having a greater degree of legitimacy than a non-membership system. With the latter, the arrangements and procedures for selecting and appointing the co-regulator’s management and executive would need to be carefully considered. In particular, it would be important to avoid the impression that a small number of self-selecting operators were able to dictate to the wider industry.

Offences

17. A membership arrangement could be backed by a legal requirement for video-on-demand providers to be members of an approved industry co-regulatory body. The logical extension of that would be a new offence involving the provision of a video-on-demand service without being a member of a co-regulator.
18. If the regulatory system did not require membership of an industry body, then any offences would need to relate either to providing a video-on-demand service without having obtained prior approval or notified the co-regulator, or to breaching the industry Code, or particular parts of it.

Multiple co-regulators

19. It might also be possible to have more than one industry scheme, as is currently the case under the existing self-regulatory arrangements involving ATVOD and IMCB. But it would be more difficult to provide for that if the arrangements did not require membership of a scheme, since there could then be difficult questions about whose Code applied to any particular provider.

The Structure of the Regulatory System – basic legal provisions

20. Against this background, the Government has identified three possible overall models for the law which will be needed to set up the system for regulating video-on-demand services. The first two models imply a co-regulatory system. The third would involve direct regulation by Ofcom.
21. With either of the co-regulatory models (model 1 or model 2) there would also need to be answers to the practical questions about membership, funding, and offences which we have set out in paragraphs 10 to 18 above.
22. The sections that follow describe for each of the three options:
 - how the co-regulator⁷ would be given its powers;
 - how the scope of the scheme would be determined;
 - who would draw up its code and how; and
 - who would handle complaints and enforce the rules in the first instance.
23. They also consider who (Government or Ofcom) will be able to exercise 'backstop' powers in the event that the regulatory system fails to prevent breaches of the requirements of the AVMS Directive.

Model 1 – Co-regulation – direct assignment of powers to co-regulator

24. Under this model the Government⁸ would designate the co-regulator, so as to assign powers and duties to it. The co-regulator would then be responsible for drawing up and maintaining a standards code in conjunction with industry, and for monitoring compliance, complaints handling and enforcement (covering a range of sanctions). There would be provision for backstop powers to rest with Ofcom so that repeated breaches of the code could be addressed.
25. The Government would have an ultimate power to remove the designation of the co-regulatory institution.
26. The overall structure would allow day to day operation of the regulatory regime by the co-regulatory institution. This would provide maximum flexibility in the development and operation of the new regime.
27. In the event of systemic failure a new designated body would need to be appointed by the Secretary of State at speed. The regulations would therefore need to be drafted in such a way as to enable an interim regulator to be appointed pending public consultation on new arrangements.
28. Model 1 would have costs for video-on-demand providers, since they would need to set up and run the co-regulatory body. However, these costs might be offset to some degree, as ATVOD and IMCB have already carried out a lot of work in terms of developing codes and standards and setting up complaints procedures.

⁷ or co-regulators - throughout this section the singular includes the plural.

⁸ in practice, the Secretary of State for Culture, Media and Sport, with the agreement of Parliament.

29. Like models 2 and 3, it would benefit consumers by providing an assurance that UK video-on-demand providers will meet the minimum content standards set out in the AVMS Directive. Like model 2, but unlike model 3, there should also be a benefit to industry in that they will effectively own and operate the co-regulatory system.
30. Compared with model 2, model 1 would introduce a potential inflexibility if there were difficulties with the system. It could well be easier and more effective for Ofcom to address these than for the Government to do so.

Assignment of Powers	Scope	Code	Complaints Handling	Enforcement	Backstop
Regulations would enable the Government to assign powers to the co-regulator	Legislation	Co-regulator in conjunction with industry	Co-regulator	Co-regulator (censure and fines)	Ofcom (for code breaches) and Government (if there is systemic failure)

Model 2 – Co –regulation - Ofcom assigns powers to co-regulator

31. Under this model the Government would assign powers to Ofcom on the basis that Ofcom would devolve responsibility for the day to day operation of the regulatory regime to the co-regulatory institution. The final decision on the selection of this body would be a matter for Ofcom in conjunction with DCMS and would require public consultation.
32. The scope of the regulatory arrangements as defined in legislation would be supplemented with more detailed guidelines developed by the co-regulator. The co-regulator would be responsible for drawing up and maintaining a standards code, in consultation with the industry and agreed with Ofcom. It would also be responsible for complaints handling and have some enforcement powers (the ability to sanction service providers in the event of code breaches).
33. Ofcom would retain backstop powers, which would enable it to impose sanctions in the event of serious breaches, and to intervene if there was evidence that systemic failure had occurred in the operation of the co-regulatory body.
34. This model partly replicates the co-regulatory arrangements currently in place for broadcast advertising regulation.
35. As with model 1, there would be costs for the video-on-demand industry, which would need to set up and run the co-regulatory body. But again, these might be offset by work that the industry has already done in this area.
36. As with models 1 and 3, consumers would benefit from the assurance that UK video-on-demand providers will meet minimum EU content standards. There should also be a benefit to industry from their effective ownership and operation of the co-regulatory system.

Assignment of Powers	Scope	Code	Complaints Handling	Enforcement	Backstop
Legislation assigns powers to Ofcom	Legislation and co-regulator's guidance	Co-regulator in conjunction with industry and agreed with Ofcom	Co-regulator	Co-regulator (censure, fines, etc)	Ofcom (both for Code breaches and for systemic failure)

Model 3 – Statutory – Ofcom as the regulator

37. Under this model, the Government would assign powers to Ofcom to regulate video-on-demand services. The scope of the regulations would be defined in legislation, while the detailed standards code would be drawn up by Ofcom in consultation with industry and the Government. Responsibility for monitoring and enforcement would be assigned to Ofcom.
38. Service providers falling within the scope of the legislation might be required to obtain a licence from Ofcom (as with the current regime for television broadcasting); or they could be required to seek prior approval or to notify Ofcom before offering their services; or they might simply be required to comply with the Code and Ofcom's general conditions (a variation of Ofcom's general conditions regime which is in place for the telecommunications networks and services industry).
39. This model is not co-regulatory. But it would provide a system that is well understood and, having been tried and tested over some years, found to be effective. It could generate economies of scale in regulation.
40. Ofcom's work would be funded by means of a levy on service providers.
41. In the Government's view this model has an important disadvantage compared with models 1 and 2. Consumers would benefit from the assurance that UK video-on-demand providers will meet minimum EU content standards, but there would be a downside for the video-on-demand industry, which would have no part in the ownership or operation of the arrangements. The UK would have turned its back on the effective self-regulatory arrangements in this area that have been pioneered by ATVOD and the IMCB.

Assignment of Powers	Scope	Code	Complaints Handling	Enforcement	Backstop
Legislation assigns powers to Ofcom	Legislation	Ofcom in consultation with industry and Government	Ofcom	Ofcom	N/A

Preferred Option

42. Under model 1, the co-regulator would be nominated by the Government. That would in our view lead to a relatively inflexible arrangement that might not be able to respond in the most appropriate way if there were difficulties in the system that needed to be addressed.
43. Model 3, in which Ofcom would regulate video-on-demand providers directly, is not a co-regulatory system, and would, therefore, not have the advantages of independence and flexibility which are sought.
44. The Government's initial preference, therefore, is for model 2. That would give Ofcom an ultimate, overall responsibility for overseeing content regulation in both television and video-on-demand services. But we would welcome views on this.

QUESTIONS

10. Do you agree that the criteria at paragraph 9 are the right ones for determining the best regulatory option? Are there any other important criteria?
11. Are there any other possible co-regulatory or statutory models that you think we should consider? If so, please describe them and say why they meet the criteria.
12. Should service providers be subject to a membership, prior approval, notification or general conditions regime?
13. Who should be responsible for interpreting the legislative definitions and determining which services are subject to the regulatory framework - Government, Ofcom or an appointed industry co-regulator?
14. Who should be responsible for developing and maintaining a standards code and any additional guidance?
15. Who should be responsible for monitoring compliance, investigating complaints and reviewing any breaches of the code?
16. What sort of sanctions should apply and who should apply them?
17. If we opt for a co-regulatory structure we would need to introduce legislative 'backstop' powers. What should be the second tier level of enforcement to address cases of repeated breaches or system failure?
18. In the light of all these considerations, which option do you prefer and why?

The Government would also welcome information from respondents about the potential impact of the options for the co-regulatory system for video-on-demand services in response to the five impact and competition assessment related questions at the end of the list of questions in Part 6.

PART 3B - ADVERTISING IN ON-DEMAND AUDIOVISUAL MEDIA SERVICES

What the AVMS Directive says

1. Advertising ('audiovisual commercial communication') is defined in Article 1(h) of the AVMS Directive as:

"... images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement."

2. Article 3e of the Directive sets standards for the content of advertising in all audiovisual media services, both television broadcasting and on-demand services.
3. The Directive also sets out specific standards for sponsorship in Article 3f and for product placement in Article 3g. These also apply to both television broadcasting and on-demand audiovisual media services. Both sponsorship and product placement are identified in Article 1(h) as forms of audiovisual commercial communication (i.e. advertising).

Issues

4. This part of the consultation document discusses the options for ensuring that the UK meets the advertising requirements in the AVMS Directive in respect of video-on-demand services. It covers four issues:
 - how the advertising covered by the controls should be defined;
 - the arrangements for regulating advertising in video-on-demand services;
 - the arrangements for regulating product placement in programmes in video-on-demand services; and
 - the arrangements for regulating the sponsorship of programmes in video-on-demand services.

Scope - what advertising should the controls cover?

5. As described earlier, video-on-demand services are unlike scheduled television. In a traditional television service the viewer chooses to watch a particular channel, and it is the broadcaster who effectively decides which programmes the viewer, having selected that channel, is going to see.
6. With a video-on-demand service, the viewer makes a conscious choice not only to use the service but to access particular programmes which the service is offering, and it is the viewer's choice which determines when the programme is transmitted to him or her. While the viewer is using a video-on-demand service, advertisements may appear:
 - a) as part of a specific programme, either during breaks, or at the start or finish of the programme (bookending); or

- b) within features of the service which are not linked to a specific programme, such as the navigation menu.
7. In either case, the advertisements will appear as the result of a contract into which the video-on-demand service provider has entered with an advertiser, advertising agency or advertising network. Unlike the position over the choice of programme, the user has no choice as to the advertisements which he or she will see as a result of having decided to use a specific service or having selected a specific programme.

Which advertisements are covered?

8. The AVMS Directive requires Member States to ensure that the advertising standards which it sets in Article 3e are met by advertisements which '*accompany or are included in a programme*'.
9. There are two possible interpretations of which advertisements in video-on-demand services should be regulated under the AVMS Directive. One would give a wider meaning to "accompany" than the other.

Option A – based on programmes

10. Regulation could be confined to advertisements which appear within, or are adjacent to (i.e. bookending) programmes – that is, those which are covered by case a) above.

Option B – based on the service

11. Alternatively, regulation could apply to all advertising which appears as part of the service. In addition to the advertisements covered by Interpretation A, this would also cover any other advertisements which appear on the screen on which the viewer is accessing the video-on-demand service because he or she has elected to access that particular video-on-demand service. Such advertisements still "accompany" programmes, but in a wider sense.
12. This interpretation would include all the advertisements in case a) above, plus those in case b).

Assessment of Options

13. Option A has the narrower scope and would affect fewer advertisements. Option B has the wider scope and would affect more advertisements.
14. Option B would provide a single set of requirements for all advertisements which a viewer sees as a result of accessing a particular service. This would in the Government's view provide a more consistent scheme of regulation and is to be preferred. But we welcome views on this issue.

On-screen advertisements which are not covered by the Directive

15. Consumers often access video-on-demand at the same time as they are accessing other services. When they do that, the video-on-demand service may only occupy only a part of the computer, television or mobile screen which they are using.

16. The other parts of the screen may contain advertisements. These advertisements however will have no connection with the video-on-demand provider or the service he is offering, and the AVMS Directive does not cover them.
17. Advertisements of this sort are not covered by the terms of the AVMS Directive and would not be affected by either of the Options, A or B, set out above.

The regulatory system for advertising in on-demand services

18. The AVMS Directive encourages Member States to seek co-regulatory solutions for the controls on advertising in video-on-demand services. That is, it recommends that they should be the responsibility of industry, but with the possibility of intervention by the Government or the regulator (Ofcom) if there is a serious failure to meet the regulatory objectives.
19. Advertising in video-on-demand services, like all other non-broadcast advertising, is currently subject to the British Code of Advertising, Sales Promotion and Direct Marketing, drawn up by the Committee of Advertising Practice (CAP) under the aegis of the Advertising Standards Authority (ASA). The ASA is an industry-led body. As it is also responsible as Ofcom's regulatory partner for handling complaints about television advertising (under the separate BCAP code) it is able to act as a one-stop-shop for all public concerns and complaints about advertising and advertisements in the UK.
20. If the ASA finds that a video-on-demand advertisement has broken the requirements of the CAP Code it can require the advertiser to amend or withdraw the advertisement, a sanction which can have a significant cost to the advertiser. If the advertiser refuses to comply, further sanctions are available, as shown in the box below.

ASA SANCTIONS

Adverse publicity – ASA rulings receive a substantial amount of media coverage, which can be damaging to advertisers as well as helping to warn the public.

Ad Alerts – CAP may advise its members, including the media, to withhold their services from non-compliant advertisers or deny them access to advertising space.

Trading privileges and recognition – CAP trade associations and professional bodies may withdraw or temporarily withhold the recognition or trading privileges offered to their members and, in exceptional cases, expel advertisers from membership.

Pre-publication vetting – ASA and CAP may require persistent offenders to have some or all of their advertisements vetted in advance, until the ASA and CAP are satisfied that future advertising will comply with the Code.

Legal backstop – the ASA can refer some cases to the Office of Fair Trading (OFT), which has legal powers available to it, and can, in extreme cases, seek an injunction from the Courts.

Co-regulation – options

21. In Part 3A of this consultation we set out the options for the creation of a co-regulatory system led by industry to regulate the programme content of video-on-demand services. Part 3A discusses the legal arrangements which will be required to assign the responsibility for regulating video-on-demand services to one or more co-regulatory bodies.
22. There will also need to be legal arrangements for assigning the responsibility for regulating advertising on video-on-demand services to one or more co-regulatory bodies. As with video-on-demand as a whole, the law can provide for this responsibility to be assigned directly by the Government or it can provide for it to be assigned by Ofcom.
23. The law can also provide for the responsibility to be assigned to the same body or bodies as regulate video-on-demand as a whole, or it can provide for it to be assigned to a different body or bodies.
24. There are four basic options.

Option A

25. Regulation of advertising in video-on-demand services could be assigned to the Advertising Standards Authority.

Option B

26. Regulation of advertising in video-on-demand services could be assigned to the body or bodies responsible for regulating programme content in video-on-demand services.

Option C

27. Regulation of advertising in video-on-demand services could be assigned to another body or bodies.

Option D

28. Regulation of advertising in video-on-demand services could be assigned to the body or bodies responsible for regulating programme content in video-on-demand services, on the understanding that they will then assign it further to another body – either the Advertising Standards Authority, or someone else.

Assessment of Options

29. Option A would mean that the ASA could continue to act as a one stop shop for all public complaints and concerns about advertising in the UK. However, the ASA would need to draw up a new code specifically for video-on-demand services to add to its two existing codes for broadcast advertisements (BCAP) and advertisements in other media (CAP).

30. Option B would mean that all regulation of video-on-demand services would be the responsibility of the same body or bodies, in effect a one-stop-shop or shops for all aspects of video-on-demand services. On the other hand, it would mean that there was no longer a one-stop shop for all aspects of advertising – the ASA would have lost the role which it currently has in respect of advertising on video-on-demand services.
31. Option C would introduce one or more new bodies into the regulatory landscape for audiovisual media services. This would not seem to offer any particular benefit, especially as there is already a body in existence (the ASA) which has experience of regulating advertising in video-on-demand services.
32. Each of Options A, B and C would require a new advertising code specifically for video-on-demand to be drawn up and enforced by the body or bodies responsible (although these codes might nevertheless be based on the existing CAP and BCAP codes).
33. Option D is a potentially clumsy and lengthy process which seems to offer no particular benefit.
34. The Government's initial preference is for Option A. This seems to offer advantages for consumers, who will be able to continue to treat the ASA as a one-stop shop for all complaints and concerns about advertising, including advertising in video-on-demand services.
35. So far as the video-on-demand industry is concerned, Option A means that their advertising regulator (the ASA) would not be the same as their content regulator. But that is already the case with television and radio broadcasting (where the ASA regulates advertising, while Ofcom regulates programme content), where it does not seem to have caused any particular difficulty.
36. The Government would welcome views on these issues.

QUESTIONS

19. Should the controls on advertising in video-on-demand services cover
 - advertisements which appear onscreen as a result of the user accessing a particular video-on-demand programme?
 - advertisements which appear onscreen as a result of the user accessing a particular video-on-demand service?
20. Should there be only one co-regulatory body for advertising on video-on demand services?
21. Should such a body have its powers assigned to it by the Government, by Ofcom or by the body or bodies responsible for regulating programme and other content?
22. Should the Advertising Standards Authority be the body, or one of the bodies, which regulate advertising on video-on demand services?
23. Should regulation of advertising in video-on-demand services be handled by the body or bodies responsible for regulation of the programme and other content?

The Government would also welcome information from respondents about the potential impact of the options for regulating advertising in video-on-demand services in response to the five impact and competition assessment related questions at the end of the list of questions in Part 6.

Product placement

37. The AVMS Directive allows Member States to permit product placement in certain types of programming shown in television and video-on-demand services. Part 4 of this consultation sets out the details and poses some overall questions about product placement, and whether it should or should not be permitted in UK television and video-on-demand services. It also discusses the related issue of prop placement.
38. This part of the consultation focuses on just one issue: who should be responsible for regulating product and prop placement in video-on-demand services in the UK.
39. Product placement is identified in Article 1(h) as a form of audiovisual commercial communication (i.e. advertising). There would therefore be an argument for concluding that it should be regulated by the same body or bodies as regulate other advertising on video-on-demand services.
40. However, effective regulation of product placement will always concern the content of programmes. The rules which the AVMS Directive sets out about product placement in Article 3g specifically require Member States to ensure that:

".... (the) content (of programmes) shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider

.... (programmes) shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to (them)

.... (programmes) shall not give undue prominence to the product in question."
41. There is as a result also an argument for concluding that product placement in video-on-demand services, if permitted, should instead be regulated by the same body or bodies that regulate the programme content of these services, rather than by the body that regulates advertising on them. This is the way that product and prop placement are currently overseen for television broadcasting services.
42. The underlying principle is that a single institution should be responsible for all aspects of the regulation of programme content, and that clarity for programme-makers is best secured through the application of a single code of practice. If product or prop placement were regulated as part of advertising, there would be two regulators and two codes covering different aspects of content. One regulator and code would oversee product placement, the other regulator and code would oversee all other aspects of programme content.
43. For this reason, the Government's preferred option is for product placement to be regulated by the body responsible for regulating programme content in video-on-demand services.

Sponsorship

44. Similar issues arise in relation to sponsorship in video-on-demand services, in relation both to the sponsorship of programmes and to the sponsorship of the services themselves.

45. Like product placement, sponsorship is identified in Article 1(h) as a form of audiovisual commercial communication (i.e. advertising), and there is therefore an argument for concluding that it should be regulated by the same body or bodies as regulate other advertising in video-on-demand services.
46. But as the Directive makes clear, the regulation of sponsorship on video-on demand programmes and services also involves judgements about their content. Article 3f of the Directive requires Member States to ensure that:
- their content shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;*
- and that sponsored programmes and services
- shall not directly encourage the purchase or rental of goods and services, in particular by making special promotional references to those goods or services.*
47. As with product placement, there is therefore an argument for concluding that sponsorship should be regulated by the same body or bodies that regulate the programme content of these services, and not by the body that regulates advertising on them. Again, this is currently the case for broadcasting sponsorship.
48. The Government's preferred option is for sponsorship to be regulated by the body responsible for regulating programme content in video-on-demand services.

QUESTIONS

24. Should product placement in video-on-demand services, if allowed, be regulated by
- the body or bodies that regulate advertising on these services? or
 - the body or bodies that regulate programme content on these services?
25. Should sponsorship of video-on-demand programmes and services be regulated by
- the body or bodies that regulate advertising on these services? or
 - the body or bodies that regulate programme content on these services?

Summary: Intervention & Options

Department /Agency: DCMS	Title: Impact Assessment of legislative option for implementing the EU AVMS Directive - co-regulation of video-on-demand	
Stage: Consultation	Version: 1.0	Date: July 2008
Related Publications:		

Available to view or download at:

<http://www.culture.gov.uk>

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What is the problem under consideration? Why is government intervention necessary?

The EU Audiovisual Media Services Directive (AVMS) requires Member States to ensure that video-on-demand (v-o-d) services meet basic content standards. It encourages 'co-regulation'. This is an arrangement under which the v-o-d industry regulates itself, devising and introducing Codes or other mechanisms to ensure that the EU content standards are met, dealing fairly with complaints from viewers, and issuing sanctions if necessary, but with a power for the public authorities to intervene in the event of a serious and sustained failure to meet the content standards in the Directive.

What are the policy objectives and the intended effects?

The objective is to create a co-regulatory system for video-on-demand in the UK. The effect would be that the United Kingdom would have a light-touch, industry-led system to give consumers of video-on-demand services supplied from the UK a guarantee that these met the EU-mandated standards. These standards prohibit incitement to violence on certain grounds and restrict access by children to v-o-d material which could be damaging to them. They also relate to identification, advertising, film copyrights and the promotion of European works.

What policy options have been considered? Please justify any preferred option.

Government is considering three options. Option 1 would see the Government appointing the industry's co-regulatory body or bodies. Under option 2, they would be appointed by Ofcom. Under option 3, Ofcom would regulate v-o-d services directly, with no input from industry. The Government's preference is for Option 2. That would offer flexible, light-touch arrangements benefiting both industry and the consumer. Option 1 and option 2 both pose important practical questions about how the co-regulatory body(ies) might actually work, and the consultation seeks views on these

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

2011

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Andy BurnhamDate: July 2008

Summary: Analysis & Evidence

Policy Option: 2

Description: Establish a co-regulatory body (or bodies) for video-on-demand services, to be appointed by Ofcom

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Represents addition to existing assumed cost base of £200,000 per annum
	One-off (Transition)	Yrs	
	£ NA		
	Average Annual Cost (excluding one-off)		
£ 400.000		Total Cost (PV)	£ 1.72m
Other key non-monetised costs by 'main affected groups'			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Not quantified
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
£		Total Benefit (PV)	£
Other key non-monetised benefits by 'main affected groups' Assures that UK VoD providers will meet the minimum content standards which are set out in the AVMS Directive, and that this will be achieved by means of a flexible, light touch regime			

Key Assumptions/Sensitivities/Risks Without such a scheme 1) consumers of UK v-o-d services would have no guarantee that these will meet EU content standards, and 2) the UK would be liable to infraction proceedings under EU law.

Price Base Year 2008	Time Period Years 10	Net Benefit Range (NPV) £ Not Applicable	NET BENEFIT (NPV Best estimate) £ - 1.72m
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What is the geographic coverage of the policy/option?			United Kingdom		
On what date will the policy be implemented?			December 2009		
Which organisation(s) will enforce the policy?			Ofcom or industry		
What is the total annual cost of enforcement for these organisations?			£ 400,000		
Does enforcement comply with Hampton principles?			Yes		
Will implementation go beyond minimum EU requirements?			No		
What is the value of the proposed offsetting measure per year?			£ 200,000		
What is the value of changes in greenhouse gas emissions?			£ nil		
Will the proposal have a significant impact on competition?			No		
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)		
Increase of	£	Decrease of	£	Net Impact	£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

The Audiovisual Media Services Directive sets out minimum content standards for video-on-demand services in the EU and requires the Government to ensure the existence of a regulatory system to secure these standards for services operating from within the UK. Article 3.3 encourages the use of co-regulation and self-regulation, and Recital 36 recommends that implementing the Directive should not 'disrupt or jeopardise' existing self-regulatory initiatives in the video-on-demand industry which might already be in place and working.

A 'self-regulatory' scheme is one which is operated entirely voluntarily by the industry itself, without any legal backing. Industry members can enter it if they wish, but are not obliged to do so, and there is no law requiring them to abide by any industry Codes or judgements that may emerge from it. Self-regulation offers cost and flexibility advantages, provided that there are appropriate incentives in terms of market needs and /or the possibility of statutory intervention.

Self-regulation is more likely to be effective in a competitive market, with industry participants committing to it in order to increase or protect their market share by differentiating their products from others on grounds of superior protection of customers. This assumes that consumers value the protection afforded to a greater extent than other attributes, some of which may be the subject of regulation. Nevertheless, highly competitive markets are also likely to attract some who seek to supply market niches with non-compliant material.

A more mature industry may be able to operate self-regulation because participants are more likely to have the resources necessary to design and enforce regulations. In addition, participants in mature industries are more likely to be committed to long-term involvement in the market, and have much to lose if found to be in contravention of regulations or codes. On the other hand, maturity may also be accompanied by the development of vested interests – in which case, self-regulation may tend to serve the interests of established firms.

A co-regulatory scheme is similar to a self-regulatory one in that it the industry takes the lead in setting and enforcing standards for the content of its services. But in this case there is legal backing for its activities. This legal backing might, as discussed in the consultation document, take a number of different forms, but whatever its precise nature it will mean that an operator who consistently disregards the co-regulatory body's standards or judgements will be ultimately be subject to legal sanctions of some kind.

In the United Kingdom, there are already two industry self-regulatory bodies which cover parts of the video-on-demand industry. ATVOD (the Association for Television on Demand) and IMCB (the Independent Mobile Classification Board) have codes of practice agreed with the service providers whom they cover and procedures for handling complaints from customers.

These self-regulatory schemes are welcome and have so far proved effective, although they do not cover all UK service providers. The Government however takes the view that the legal requirements of the Directive are such that purely self-regulatory schemes are insufficient. In these circumstances the Government's strong preference is for a system of co-regulation.

The consultation document considers three options. Two of them are co-regulatory. In Option 1, the industry co-regulatory body (or bodies – there could be more than one) would be nominated directly by the Government. In option 2, they would be nominated by Ofcom. Option 3 is a system of direct regulation, in which Ofcom would regulate the video-on-demand industry directly without any input from industry bodies.

The video-on-demand industry in the UK and the EU

At the start of 2007, the European Audiovisual Observatory identified 142 separate video-on-demand services across 24 European countries. The Netherlands, France, Germany and the United Kingdom together accounted for some 65 of these services – that is, nearly half of them. The Observatory characterised these four countries as having a 'well-developed' supply of video-on-demand services, meaning that they each had more than 10.

But such is the dynamism of the sector that a revised estimate by the Observatory for the same 24 countries at the *end* of 2007 found 258 services – an increase of 116 (82%) in one year. Across Europe at the start of 2007 the majority of the services were delivered via Internet and IPTV with only a small percentage (10.7 %) distributed by cable, satellite and digital terrestrial television.

Scale and growth in the UK

Video-on-demand in the UK is characterised by diversity of players, distribution networks, and business models, with increasing competition between them. Business models range from advertising funded through subscription-based approaches to pay-per-view. At the start of 2007 the European Audiovisual Observatory identified 13 distinct video-on-demand services in the UK, delivered variously by means of the Internet, IPTV, cable, satellite and digital terrestrial television (DTT).

By the end of 2007 another 3 services had appeared in the UK. One of these was the BBC iPlayer – this had over a million download requests on 'official' launch day (Christmas Day 2007) and a total of over 20 million during April 2008. The iPlayer service became available on digital cable (rather than solely on the internet) in May 2008, and this might result in a still higher rate of download requests to the service.

Beyond the specific case of the BBC, market appraisal in the video-on-demand sector is, as the European Audiovisual Observatory has noted, extremely difficult. Many suppliers do not publish or communicate download figures. In 2006 the total UK video-on-demand market was estimated to be worth £66 million, with an annual growth rate of 50%.

There is however a consensus that the market took off in the first quarter of 2006 and continues to expand rapidly. Flexfilm have said that 80% percent of the 2.2 million homes in the UK which are eligible for its services (which are connected to the Virgin Media cable network) had already watched one film via video-on-demand by July of that year (some 1.8 million people). BSkyB has stated that its Sky Anytime service recorded more than a million downloads during 2006.

Substitution for 'linear' TV

Video-on-demand consumption is more likely to be a substitute for linear television viewing than an addition to it. The amount of time people spend on viewing is limited, and competition for this limited time is to a great extent a zero sum game in which one provider gains market share against another. This degree of economic substitution between the different forms of video consumption is clearly directly relevant at the individual level but it also indirectly affects the wholesale (upstream) channel provider market.

Thus in the initial Public Value Test for the iPlayer service the BBC Trust noted "*consumption was expected to be largely substitutonal – i.e. some consumption of BBC programmes on the television and radio will switch to on-demand. As such we expect the proposals to help maintain the total volume of consumption of BBC programmes*". Specifically, the Trust expected iPlayer to contribute to the maintenance of the combined BBC weekly reach (on all services) at over 90%.

Ofcom's projections for the impact of the BBC iPlayer covered the five years 2006-2011 and were driven by internet take-up. They included high, central and low scenarios, under which there were corresponding falls in linear television consumption of 33%, 20%, and 13%. The BBC Trust's own projections were broadly compatible with Ofcom's high impact scenario.

More generally, newly emerging systems allow consumers to use the internet or hybrid Freeview/IPTV services such as BT Vision to mix and match between free-to-air, paid-for and on-demand content. PVR- based content storage enables libraries of material to be stored and further intensifies competition for audiences. The standard model of consumer television demand indicates that these competition effects exist between pay and free to air services and that programming need not be necessarily be of the same character or indeed obviously a close substitute in order to exert competitive pressure⁹.

Video-on-demand in the mobile sector

The UK's total mobile entertainment market has generated revenues of around £600 million per annum since 2005, with mobile games generating approximately £200 million in revenue in 2007. Around 20% of the UK's 47 million mobile subscribers purchase mobile entertainment. Males and the 18-35 year old age group are the dominant users.

The widely predicted convergence of advertising and entertainment industries is continuing to evolve on the mobile platform. In April 2007 3 became the first operator to launch an advertising funded service and within six months of one million subscribers had signed up to it, although the number viewing content on a regular (daily) basis is lower.

In the UK almost 77% of mobile phone subscribers have video-enabled handsets and over 20% are owners of TV enabled mobile phones. The UK mobile entertainment market is widely predicted to grow rapidly, perhaps more than doubling to £1.4 billion by 2012.

However, the number of users who access video-on-demand services on mobile phones is relatively low, and is perhaps likely to remain so. Current figures are that mobile TV services are used by only 1% of all mobile telephone users, and video-on-demand services by 1.7%.

The options

The Government has ruled out the 'do nothing' option.

There is no indication that UK video-on-demand services breach any of the standards in the Directive. Indeed, the standards of the Directive are already exceeded for the most part. There are also self-regulatory systems in place to which many UK providers belong. But the Directive's requirements are clear and mean that the UK must have arrangements for securing the minimum EU standards for video-on-demand content in a way that applies to all relevant providers and has legal backing. This means that maintaining existing arrangements cannot be an option even if they are extended to the whole industry.

The three options for complying with the Directive's requirements in respect of video-on-demand which are outlined in the consultation document are:

1. a UK co-regulatory body (or bodies) for video-on demand, which the Government would appoint directly;
2. a UK co-regulatory body (or bodies) for video-on demand, which Ofcom would appoint;
3. no UK co-regulatory body for video-on-demand - the requirements of the Directive would be secured through direct regulation by Ofcom.

All of these options leave open the precise *mechanism* which the co-regulators (in options 1 or 2) or Ofcom (in option 3) would then use to achieve compliance with the Directive's standards. For instance, an industry co-regulator might operate on a membership basis or it might, alternatively, set general conditions which all providers had to abide by in order to provide their service.

⁹ See B Owen and R Wildman (1992) *Video Economics* Cambridge: Harvard University Press, especially pp.101-106

Similarly, if Ofcom were regulating the industry directly under option 3, it might operate a licensing regime similar to that which applies in broadcasting. Or it might be better for Ofcom to set general conditions to which, again, providers had to adhere in order to provide their service.

Although this consultation invites views on these more specific questions, they can only be determined once the overall framework of the new structure is clear and there are answers to the fundamental issues of whether or not there should be a co-regulatory body or bodies, and if so who should appoint it or them.

Costs of the three options

Under the current arrangements in the UK, some providers of video-on-demand services belong to one of the two industry self-regulatory bodies, ATVOD and IMCB, and others do not. In the case of IMCB, covering mobile content, the six signatories of the mobile code do not include all of the relevant content providers. However, IMCB's code covers all commercial content which is supplied via a mobile phone network because the signatories include all five of the networks.

ATVOD's membership currently consists of BT, Virgin, Tiscali, ITV, Channel 4, Five, FilmFlex, and OnDemand, with the BBC as associate members. Other UK video-on-demand providers (for example, Sky) do not currently belong either to ATVOD or to IMCB.

Options 1 and 2 will result in costs to the industry accruing from a) setting up the video-on-demand co-regulatory body/bodies and b) running it/them thereafter. There may however be some offsetting savings, in that ATVOD and IMCB have already pioneered much of the necessary work in terms of developing codes and standards and setting up complaints procedures.

It is not easy to estimate how much the overall cost of Options 1 or 2 would be, but costs seem likely to be relatively low especially in relation to the turnover of the industry as a whole. ATVOD's average membership fee is in the order of £20,000 per annum and its annual budget less than £200,000.

The number of complaints to ATVOD about the content of video-on-demand programming in the organisation's approximately four years of existence is nil (though it has had complaints about some technical issues). The position in respect of IMCB is similar.

We have assumed for illustrative purposes that the introduction of a co-regulatory system under option 1 or 2 will lead to a doubling of costs in comparison to the present arrangements. But we think this will prove a pessimistic assessment given that it will be in the interests of the industry – which will run any co-regulatory system – to keep its costs down.

Under Option 3, there would be costs to Ofcom as well as to the industry, with Ofcom in effect recouping its costs from the industry. But we see no reason to assume that overall costs (that is, costs to Ofcom plus costs to the industry) will be any higher than under options 1 or 2.

Benefits of the three options

There is a consumer benefit to any of Options 1, 2 or 3 in that each should provide assurance that UK video-on-demand providers will meet the minimum content standards set out in the AVMS Directive, and that providers who consistently flout these will no longer be able to operate from this country.

As against Option 3, Option 1 and Option 2 provide a benefit to video-on-demand suppliers, in that they will effectively own and operate the co-regulatory system(s). That should give them an assurance that the arrangements will remain light-touch and flexible while assuring the necessary standards for consumers.

Option 2 provides an additional benefit to Option 1, in that it will be easier for Ofcom than the Government to intervene to correct problems with the co-regulatory arrangements, should any arise. That would be to the advantage of both consumers and suppliers.

Competition assessment

Any of Options 1, 2 and 3 could have competition effects. In each case, the existence of the new EU standards for video-on-demand content, and their enforcement by Ofcom or an industry co-regulatory body, will require that video-on-demand suppliers ensure that their programming is in compliance with the new rules. That compliance cost could weigh more heavily upon a new, start-up supplier.

However, much video-on-demand content is material that has previously been shown either on television or in the cinema and is known already to comply with the relevant standards – which, certainly in the case of television, will be more demanding than the EU standards for video on demand.

Under Options 1 and 2, there would be a co-regulatory body or bodies, run by the video-on-demand industry itself. If video-on-demand providers were required to belong to such a body, then it would be important to ensure that application procedures and membership fees were not perceived as working to the disadvantage of new or start-up suppliers. It would also be important to ensure that the regulatory body reflected the interests of consumers as well as of providers.

The co-regulatory body (or bodies) would also determine the outcome of complaints against particular providers. It would again be important to ensure that these procedures operated fairly, and were perceived by all concerned as not working to the disadvantage of particular suppliers or groups of suppliers.

Should such difficulties arise, it would be important that Ofcom, as a neutral, non-political regulator, could step in quickly to ensure that they were properly and effectively resolved. Option 2, as opposed to Option 1, provides that possibility.

Small firms impact test

Under existing arrangements for television broadcasting, Ofcom has issued licences (television licensable service licences) to a large number of small firms which operate television stations. Their procedures do not appear to be perceived as an obstacle to smaller operators. Ofcom's fees are related to relevant turnover, but with minimum and maximum fees.

But it is not clear whether a co-regulatory body would be seen in the same light. The issues which we discuss in the competition assessment section (above) are also relevant in this context. In particular it is important that application procedures and membership fees are not perceived as working to the disadvantage of new or start-up suppliers.

Advertising in video-on-demand services

Total UK spend on advertising in 2006 across all media was £19 billion. Most of this (£13.5 billion) was display as opposed to classified advertising, and television advertising was the largest single category of display advertising, with a 28.9% share worth £3.9 billion. Internet advertising was worth just over £2 billion in 2006, with most (58%) being "paid for search" with the remainder being display advertising (23%) and classified.

Self-regulation of non-broadcast advertising dates from the founding of the Advertising Standards Authority (ASA) in 1962 with the aim of ensuring that advertisements were "legal, decent, honest and truthful". Since 1988 this has been backed up by statutory powers and possible referral to the Office of Fair Trading (OFT).

The relevant ASA codes of practice are divided between broadcasting (Broadcast Code of Advertising Practice - BCAP) and non-broadcast arms. In broadcasting, compliance with the ASA's Code is a condition of the relevant Ofcom licence.

The Broadcast Advertising Standards Board of Finance Limited (basbof) funds the ASA's regulation of broadcast advertising through a levy of 0.1% of the advertising cost to the client collected through the

agencies or media owners. In 2007 the income from this levy was £3.6 million, of which 94% was paid towards self regulatory costs, providing funds of almost £3.3 million to the ASA.

The consultation

The consultation document sets out a number of options for the regulation of advertising in video-on-demand services. It asks whether the advertising which is regulated should be:

- just those advertisements which are contained within programmes or which 'bookend' them; or
- all advertisements which appear as part of the service.

It discusses who should regulate advertising in video-on-demand services. The four options are

1. assigning the power to regulate advertising in video-on-demand services to the Advertising Standards Authority (ASA);
2. assigning it to the co-regulatory body (or bodies) which oversees programme content;
3. assigning it to the co-regulatory body (or bodies) on the understanding that they will then assign it to the ASA; or
4. assigning it to someone else altogether.

The consultation document asks similar questions about who should regulate the sponsorship of programmes on video-on-demand services and product placement in those programmes (if product placement is allowed).

The consultation document makes clear the Government's initial preferences. These are that regulation should cover all advertisements which appear in a video-on-demand service, and be carried out by the ASA, except for the regulation of sponsorship and product placement (if allowed) which should be a matter for the industry co-regulator(s).

There is however very little hard information on which to base conclusions in this area. In particular, we have no information readily available about the current size and development of the UK market in video-on-demand advertising and how it splits between adverts contained within programmes and adverts which accompany the service.

That being so, it is also difficult to estimate the costs to the regulators, whoever they may be, of dealing with complaints arising from video-on-demand advertising and the other regulatory functions which they will need to perform.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Annexes

Legal Aid

There might be an impact on the legal aid budget if a supplier of video-on-demand services were to seek legal aid in order to challenge a decision by the industry co-regulator in the Courts. The Government however considers that the likelihood of a provider qualifying to receive legal aid is very low.

Sustainable development

There will be no impact on sustainable development from the requirements of the Directive or the options set out for regulating video-on-demand services.

Carbon assessment

There will be no impact on carbon emissions from the requirements of the Directive or the options set out for regulating video-on-demand services.

Other environment; health; race, disability and gender equality; human rights

Implementation of the Directive in the UK, using any of Options 1, 2 or 3 would have marginal benefits in terms of each of these areas. In each case, that is because the Directive sets out standards applicable to the advertising and programme content of video-on-demand services.

In terms of advertisements on video-on-demand services, Article 3e of the AVMS Directive requires that they do not prejudice respect for human dignity, or include or promote discrimination based on sex, racial or ethnic origin, disability or sexual orientation. It also prohibits all advertising for tobacco products and advertisements which encourage behaviour which is prejudicial to health and safety or grossly prejudicial to the environment.

Article 3b requires that video-on-demand services do not contain any incitement to hatred based on race, sex, religion or nationality.

Implementation of the Directive in the UK will mean that video-on-demand services provided in this country will be required to abide by all these standards. That is not to say that these services currently contain content which infringes the AVMS standards – there is no such evidence. There is however no legal mechanism specifically applying to video-on-demand which requires these services to abide by the Directive's standards.

Rural proofing

There will be no impact on rural issues from the requirements of the Directive or the options set out for regulating video-on-demand services.

PART 4 - PRODUCT PLACEMENT

Current Position

1. Product placement – payment to a broadcaster or producer to feature products in a programme – is one of the more controversial practices in broadcasting. The TVWF Directive, which first came into force in 1989, had no specific ban on the practice. However, the Directive did require a clear separation of advertising from programmes and prohibited surreptitious advertising, advertising which uses subliminal techniques and any sponsorship which affects the editorial independence of the broadcaster in relation to programme content or scheduling.
2. Similarly, in the United Kingdom, there has, since the start of commercial broadcasting under the Television Act 1954, been a requirement for advertisements (i.e. paid-for commercial messages of any kind) to be clearly distinguishable as such and recognisably separate from the rest of the programme and inserted only at the beginning or end of programmes or in clearly signalled breaks in them.
3. The UK and most other Member States have regarded the requirements of the TVWF Directive as amounting to a *de facto* prohibition on product placement in television broadcasting, and have continued to prohibit product placement in television programmes produced or commissioned by broadcasters within their jurisdiction.
4. However, not all EU Member States have taken this approach. One or two have had national rules which permit some forms of product placement.
5. In a 2004 'interpretative communication' on advertising, the European Commission observed that Article 10(1) of the TVWF Directive
*"provides that advertising must be kept quite separate from other parts of the programme service" and that "programmes which fail to observe this so-called principle of separation between advertising and editorial content are prohibited"*¹⁰.
6. In the UK, it is Ofcom's Broadcasting Code which currently implements these EU provisions, by setting out rules governing the inclusion of products and services in television programmes. The Code requires that "broadcasters must maintain the independence of editorial control over programmes" (Rule 10.1), that "broadcasters must ensure that the advertising and programme elements of a service are kept separate" and that "no undue prominence may be given in any programme to a product or service" (Rule 10.4).
7. The latter is of particular practical value because it is easier to see from a programme whether a product is "unduly prominent" than to be able to demonstrate that money has changed hands to secure the inclusion of a product in a programme.
8. The Code states that "product placement is prohibited" (Rule 10.5). It goes on to define product placement as:

¹⁰ Commission interpretative communication on certain aspects of the provisions on televised advertising in the 'Television without frontiers' Directive (2004/C 102/02), paragraph 19

"the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of either)."

Rationale

9. The policy behind the prohibition of product placement is based on a number of principles which are sometimes seen as distinguishing the "European" approach to the regulation of broadcasting from a purely commercial approach:
 - that programmes and paid-for commercial messages should be separate and clearly distinguished, so that viewers know when they are being "sold to";
 - that those licensed to broadcast are permitted to advertise to the public principally in order to fund entertaining and informative programmes (especially when the public resource of terrestrial spectrum is used) rather than vice versa;
 - that audiences are better served if the principal incentive for broadcasters is the production of attractive programmes, in the breaks of which they can sell advertising slots, rather than making editorial decisions based principally on the advertiser's wishes to include their products.

Prop placement; product placement in films and in non-UK television programming

10. Ofcom's Code exempts from the definition of product placement

"references to products or services acquired at no, or less than full, cost, where their inclusion within the programme is justified editorially"; and

"the inclusion of products or services in a programme acquired from outside the UK and films made for cinema provided that no broadcaster regulated by Ofcom and involved in the broadcast of that programme or film directly benefits from the arrangement".

11. The first of these exemptions is known as 'prop placement'. Prop placement is the loan or provision of clothing, cars or other pieces of equipment to broadcasters at a reduced price or free of charge. It can also involve the offer of services, such as hairdressing.
12. The effect of Ofcom's Code is that prop placement is permitted in all television programming, provided that its inclusion is justified editorially and that it conforms to the rules on editorial independence and avoiding undue prominence.
13. Ofcom's Code also means that UK television broadcasters are able to show cinema films and non-UK television programmes which contain product placement. There are numerous examples of this. This is recognisably a compromise, but the rationale is not merely practical: broadcasters will have acquired the programme on the basis of audience appeal, rather than because they have been paid by an advertiser, and the commercial element must still avoid "undue prominence". In some cases therefore the product or brand reference concerned may be pixellated or otherwise edited.
14. Ofcom's Broadcasting Code is available at www.ofcom.org.uk/tv/ifi/codes/bcode.

Video-on-demand

15. Until the AVMS Directive is implemented, there are no restrictions in the EU or the UK on product placement in video-on-demand services. In the UK, this has been the case only since 2003, as prior to that video-on-demand was regulated as broadcasting.

What the Directive requires

16. The AVMS Directive defines product placement in Article 1(m) as a form of audiovisual commercial communication which consists of

“the inclusion of, or reference to, a product or service in a programme in return for payment or similar consideration”.

17. It does not separately define prop placement, but Recital 61 points to treating the provision of products and services free of charge or at less than full cost as product placement only when the product or service concerned is of *“significant value”*.
18. The specific provisions relating to product placement are set out in Article 3g of the Directive and would apply to all programmes produced after 19 December 2009. In summary:
 - i. Member States must implement a general prohibition on product placement;
 - ii. Member States may then decide to permit product placement in feature films, television films and series, sports and light entertainment programmes, but not in any programmes which are made for children;
 - iii. Member States may also decide to permit prop placement in all types of programme (including children’s programmes);
 - iv. programmes containing product placement must conform to the rules relating to editorial independence and undue prominence, and may not directly encourage purchase or rental of goods or services;
 - v. viewers must be informed of the presence of product placement in a programme at the start and end of the programme and after any advertising break during the programme;
 - vi. Member States may choose to waive this notification requirement for feature films and for programmes which have not been produced by the media service provider concerned or a company affiliated to it;
 - vii. product placement for cigarettes and other tobacco products, or from companies whose principal activity is the manufacture or sale of cigarettes and other tobacco products is prohibited; and
 - viii. product placement for medical products and treatments available only on prescription is prohibited.
19. The rules governing content standards for audiovisual commercial communications in Article 3e of the AVMS Directive also apply to product placement. In addition to the

restrictions in Article 3g, this imposes additional requirements in relation to human dignity and behaviour, discrimination, and protection of minors. In particular, it requires that any product placement of alcoholic drinks must not be aimed specifically at minors and must not encourage immoderate consumption.

The form of prohibition

20. Because of the way in which Article 3g of the Directive is structured, Member States must implement a prohibition on product placement, but can then, by way of derogation, allow product placement in certain genres of programme if they wish.
21. The Government's view is that the initial prohibition will require legislation. Full or partial prohibition in industry or regulators' codes, such as the current prohibition in Ofcom's Broadcasting Code, may not necessarily be sufficient to reflect the Directive's direct and express prohibition of product placement.
22. There are three basic options.

Option 1 – no legislation

23. For television broadcasting services, this would mean relying on the existing, or an amended, prohibition in Ofcom's Broadcasting Code. For on-demand services, it would mean relying on a similar prohibition in the relevant Code of the co-regulator for on-demand services. This might be an option if the UK decided to take advantage of the liberalisation allowed by the Directive, but, as indicated above, may not be sufficient properly to implement the Directive ban and would not secure any continued prohibition on product placement.

Option 2 - legislate to prohibit product placement except in some or all of the programme genres specifically permitted by the AVMS Directive

24. The legislation would place a specific prohibition in UK law on the inclusion of product placement in programming shown in television broadcasting or video-on-demand services, except for some or all of the programme types in which the Directive permits product placement (that is '*cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes*'). It would also specify that children's programmes must not contain product placement.
25. It would be for Ofcom and the co-regulator for video-on-demand services to establish more detailed rules, after consultation, and to determine whether or not to take full advantage of the derogations. For example, it would be consistent with Ofcom's advertising rules for it to continue to prohibit product placement of foods high in fat, salt or sugar in programmes of particular appeal to children, as well as programmes made specifically for children.

Option 3 - legislate to prohibit product placement in all types of programming

26. The legislation would prohibit product placement in all types of programming shown in television broadcasting and video-on-demand services.

The debate about product placement

27. Three main arguments have been put forward in support of allowing product placement. First, it is argued that viewers are used to product placement in programmes acquired especially from the United States, and are capable of recognising when they are being sold to.
28. As noted at paragraph 13 above, allowing such placement is recognised as a compromise, but crucially protects the editorial integrity of broadcasters (programmes are acquired on the basis of audience appeal) and products cannot be unduly prominent. Audiences may or may not be able to distinguish product placement and raise their guard: that will differ across the population.
29. Secondly, it has been argued that allowing product placement would add to the realism of television, since we are surrounded by branded products. However, the Ofcom Code already allows the inclusion of branded products if justified by the editorial context.
30. Thirdly, it is argued that income from product placement will help broadcasting, including commercial public service broadcasting, to compete more effectively with other forms of entertainment at a time of increasing competition for people's attention and for advertising revenues. This was the principal reason cited by the European Commission when bringing forward its proposals.
31. There have also been suggestions that international brands may seek to circumvent European restrictions by placing their products in US programmes, benefiting US rather than European programme-makers. Very significant levels of potential income have been quoted: in a consultation document on product placement issued in 2005, Ofcom noted that PQ Media estimated television product placement in the USA to be worth \$1.87 billion in 2004 and due to grow by 30% in 2005. On the other hand the US figure remained small compared with traditional television advertising spot revenues there (about 3.3% of spot revenues)¹¹.
32. Ofcom's analysis suggested that in the UK income of some £25-35 million a year after 5 years might be achievable; if US levels of 3.3% of spot advertising could be achieved, there would be potential to reach £120-125 million (at end 2005 prices). But these figures are likely to be overstated, given the limitations which were introduced into the Directive on the genres in which products could be placed, entirely excluding children's programmes, and the addition of conditions designed to protect editorial integrity and maintain the prohibition against undue prominence. Furthermore, UK audiences would be unlikely to find acceptable significant levels of product placement, certainly in the early years of any liberalisation.
33. It is also worth noting that there is increasing concern in the US about levels of product placement. There appears to be a significant increase. It has been reported that in last season's *American Idol* there were 4,349 product placement occurrences, and 3,291 in the first three months of 2008 alone. The Federal Communications Commission is examining the introduction of a requirement for better information for viewers about who has paid for their products to be featured.

¹¹ *Product Placement: A consultation on issues related to product placement*, Ofcom, December 2005

34. The key issue therefore is whether the comparatively modest additional income which is forecast, at least in the short term, would justify abandoning the long-held principles of European and UK broadcasting.
35. An important element of the success of broadcasting in the UK, and especially of public service broadcasting, has been the trust audiences have been able to have in broadcasters. This has been challenged by recent abuses of premium rate telephone charging and there must be a priority now for broadcasters to re-build audience trust in their integrity and maintain their distinctiveness from other media.
36. There is also more general concern about the impact of commercialisation on children and young people, who would be likely to see many programmes not specifically defined as "children's" (and thus subject to the Directive's prohibition on product placement).

Preferred Option

37. Subject to this consultation, **the Government's initial preference is for Option 3 – to legislate to prohibit product placement in all types of programming.**
38. The Government's central intention is to ensure continued viewer and consumer confidence in the integrity of television and video-on-demand programming and to maintain a reasonable distinction between editorial and commercial material. Option 3 seems best suited to deliver that.
39. Allowing product placement in the UK would risk damaging viewer and consumer confidence in the integrity of UK-produced programming. Following its 2005-6 consultation, Ofcom concluded that product placement was an issue on which there was no consensus. Commercial broadcasters and advertisers generally favoured a controlled introduction of product placement, but consumer and viewer groups were strongly opposed. Ofcom also noted that the 'predicted economic benefits' of product placement 'appear to remain modest'¹².
40. In the Government's view the same considerations also apply to video-on-demand programming. It is important that consumers and viewers can continue to rely on the integrity of video-on-demand programmes, especially since much of the programming which appears on UK video-on-demand services also appears on television. In practice, there is very little differentiation in content between the two types of service despite the fact that in the UK, since 2003, product placement has not been prohibited in video-on-demand services.
41. **The Government's initial view, therefore, is that it is right to continue so far as possible to prohibit product placement on television in the United Kingdom, not to take advantage of the permitted derogations, and that the UK's rules in this area should apply equally to television and video-on-demand.**
42. **The Government nevertheless remains open to other options if there are strong arguments that the concerns can be met. The questions about product placement at the end of this chapter seek information about specific aspects of the issue, and**

¹² *Product Placement: summary of responses to consultation on issues relating to product placement*, Ofcom, October 2006

this consultation as a whole provides an opportunity for you to express your views about the role which product placement should have in UK television and video-on-demand and about the advantages and disadvantages which might be associated with it.

43. The Government will give detailed consideration to all the points that are made in response to this consultation before reaching a decision.

Prop placement; product placement in films and in non-UK television programming

44. Under any of the three options above, the Government must also decide how to treat the ability which television broadcasters currently have under Ofcom's Code to show
- programmes (of any kind) containing prop placement;
 - cinema films containing product placement; and
 - television programmes made outside the UK which contain product placement.
45. The AVMS Directive imposes some restraints in this area. It requires the UK, like every other Member State, to set a 'significant value' for the goods or services involved in a prop placement. Above that 'significant value' the goods or services involved fall to be treated as product placement.
46. The Directive also requires an absolute prohibition on product placement in any programme which falls outside the permitted categories of '*cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes*' – even if the programme in question is one which has been made outside the UK.
47. This means that the Government must prohibit product placement in children's programmes and in news programmes, even if these have been bought from outside the UK.

The Government's view

48. The Government wishes to preserve the existing UK position, in as far as is possible, in relation both to prop placement and to product placement in cinema films and non-UK programming. That means that both prop and product placement would continue to be permitted for both television and video-on-demand programmes, subject to avoiding undue prominence.
49. The AVMS Directive however means that there must be a threshold of 'significant value' for the goods or services involved in prop placement, above which the UK will have to apply the rules set out in the Directive. The UK rules will be able to allow prop placements above the 'significant value', but must ensure that they are subject to the rules about permissible genres, notifying viewers, and so on which the Directive sets out (see paragraphs 18 and 19).

'Significant value'

50. The 'significant value' for prop placement purposes does not necessarily have to represent the retail or wholesale cost of a particular item which has been provided free of charge. The Government's view is that it should represent the value to the

broadcaster or programme-maker. For example, in the case of a car loaned for the production of a television programme it might represent the hire cost for the period.

51. In Austria, the authorities have a set benchmark of €1,000 (approximately £800) as the dividing line between prop placement and product placement. The Government would be interested in views as to whether a specific amount should similarly apply in the UK and, if so, at what level it should be set; and on whether alternative approaches might be better.
52. One alternative approach, for example, might be to apply a value which was related to the overall cost of the production and which therefore varied from one programme to another.
53. It would also be helpful to have views as to whether any relevant amount should be specified in legislation, or whether it would be preferable for it to be set in guidance by Ofcom and the video-on-demand co-regulator. The Government takes the view that the latter would provide a more flexible arrangement and would be preferable.

Signalling of product placement

54. The Directive sets out detailed rules about the signalling of product placement to viewers. Article 3g requires that
“programmes containing product placement shall be appropriately identified at the start and end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer”.
55. This requirement does not apply to programmes containing only prop placement which is below the ‘significant value’, or to ‘bought-in’ programmes which have not been produced or commissioned by the media service provider who is showing them or any of its affiliates. But it does apply to programmes containing prop placement which is *above* the ‘specified value’. It would also apply to genuine product placement if – under Option 2 above – it were to be permitted in the UK.
56. Although the requirements in the Directive are somewhat prescriptive, they leave Member States a significant amount of discretion to set their own rules. The UK will need to decide what an ‘appropriate’ identification would be. Should it for example be a generalised announcement, such as ‘this programme contains product placement’, or something more specific? Should it name products (which might in itself be promotional)? Should it appear on its own screen or be superimposed? The Government would welcome views on this issue.
57. The UK will also need to decide how to treat the concession in the Directive about the signalling of product placement in ‘bought-in’ programming. There may in particular need to be rules of some kind about who counts as an ‘affiliate’.
58. The Government proposes that power of decision on these matters should rest with Ofcom and the video-on-demand co-regulator. Issues of this kind are not in the Government’s view suitable for legislation. However, the Government would welcome views on this.

QUESTIONS

26. Should product placement be prohibited by law? Please explain the reasoning behind your preference.
27. Should any such legal prohibition allow for Ofcom and the co-regulator of video-on-demand services to permit product placement in some or all of the programme genres specified by the AVMS Directive (feature films, television films and series, sports and light entertainment programmes)?
28. What advantage would there be in permitting product placement in any or all of the specified genres? If so, which genre(s), when and why?
29. If product placement were permitted, how could audiences and regulators be assured that editorial integrity had been preserved, as required by the Directive?
30. How could "undue prominence" be avoided, given the commercial imperatives for audiences to recognise the products placed?
31. Should the same rules apply to both television broadcasting and on-demand audiovisual media services? If not, how should they differ and why?
32. Should prop placement continue to be permitted?
33. Should there be a specific set value above which prop placement is subject to the Directive's rules on product placement? If so, what should it be?
34. What other ways are there of ensuring that the UK meets the Directive's requirement that prop placement above a 'significant value' must be treated as product placement? Which test is best and why?
35. If there is to be a set value for this purpose, should it be set by the Government in legislation, or by Ofcom (for television broadcasting) and the video-on-demand co-regulator?
36. Should product placement continue to be permitted in programmes acquired from outside the UK and in films made for the cinema? If not, why not and how could such a ban be made effective in practice?
37. How should product placement be signalled to viewers?
38. Should the rules on signalling be set by the Government in legislation or by Ofcom (for television broadcasting) and the video-on-demand co-regulator?

The Government would also welcome information from respondents about the potential impact of the options for product and prop placement in response to the five impact and competition assessment related questions at the end of the list of questions in Part 6.

Summary: Intervention & Options

Department /Agency: DCMS	Title: Impact Assessment of legislative options for implementing the EU AVMS Directive - product placement	
Stage: Consultation	Version: 1.0	Date: July 2008
Related Publications:		

Available to view or download at:

<http://www.culture.gov.uk>

Contact for enquiries: Natasha Pavey

Telephone: 020 7211 6398

What is the problem under consideration? Why is government intervention necessary?

The EU Audiovisual Media Services Directive (AVMS) changes EU law on product placement in EU-made TV programming. Member States must prohibit it in general terms, but may permit it in certain types of programme, subject to safeguards. In the UK, Ofcom's Code already prohibits product placement, but the Government must legislate to ensure compliance with the Directive.

What are the policy objectives and the intended effects?

The aim is to retain the current UK position in which a) television companies and their affiliates cannot benefit from product placement deals with advertisers; but b) they may show films and non-UK programmes with product placement in; and c) they can show programmes which contain product placement. This will avoid damaging consumer and viewer confidence in the integrity of home-produced programmes, while allowing UK television and video-on-demand companies to continue to show the many non-UK programmes which contain product placement and to benefit from controlled provision of props.

What policy options have been considered? Please justify any preferred option.

The Government has considered three options. These are 1) continued prohibition without legislation; 2) legislate to prohibit product placement in all programme categories; 3) legislate to allow product placement in all the programme categories permitted by the Directive but prohibit it in all other cases. The Government has a preference for option 2, as it is the only one that can ensure continued viewer confidence in the integrity of UK television and video-on-demand programming.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

2011

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Andy BurnhamDate: July 2008

Summary: Analysis & Evidence

Policy Option: 3

Description: Prohibit product placement in all UK-made programming

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' If the prohibition on product placement is maintained, broadcasters and video-on-demand providers will be unable to develop and benefit from a new revenue stream. However, the amount of revenue which is likely to be foregone is unclear and seems likely to be relatively small.
	One-off (Transition)	Yrs	
	£		
	Average Annual Cost (excluding one-off)		
	£		Total Cost (PV) £
Other key non-monetised costs by 'main affected groups' If the prohibition on product placement in UK-made programming is maintained, the foregone revenue might over time make it more difficult for programme-makers to maintain the quality and diversity of programming which viewers expect.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' If the prohibition on product placement is maintained, broadcasters and video-on-demand providers who are more reliant on bought-in programming will not lose revenue from any diversion of revenues from spot advertising to product placement.
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£		Total Benefit (PV) £
Other key non-monetised benefits by 'main affected groups' If the prohibition on product placement in UK-made programming is maintained, there will be no risk of programme quality and the separation of advertising and editorial content being compromised by the inclusion of advertising in the form of product placement within programmes.			

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		UK	
On what date will the policy be implemented?		December 2009	
Which organisation(s) will enforce the policy?		Ofcom	
What is the total annual cost of enforcement for these organisations?		£	
Does enforcement comply with Hampton principles?		Yes	
Will implementation go beyond minimum EU requirements?		No	
What is the value of the proposed offsetting measure per year?		£	
What is the value of changes in greenhouse gas emissions?		£	
Will the proposal have a significant impact on competition?		No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium Large
Are any of these organisations exempt?	No	No	N/A N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase of £	Decrease of £	Net Impact	£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

The principle of separation of advertising and editorial content has been present since the advent of commercial television in the UK in 1955. It was most recently reiterated in Ofcom's Broadcasting Code of May 2005, which in turn reflected the requirements of the TVWF Directive in this respect. The Directive has, in the UK and most other EU Member States, been interpreted as imposing a de facto prohibition on product placement (but not on prop placement, when there is no payment to the programme-maker for including a product or service in a programme).

However, commercial television revenues no longer rely solely on "spot" advertising. Other sources of revenue include sponsorship and interactive services, and programme costs may also be mitigated through the controlled use of prop placement. In a competitive environment, with a large number of providers of commercial television broadcasting services, and increasing competition from on-demand services, these revenues are widely spread. Commercial broadcasters are engaged in a constant struggle to maintain their revenues and develop new sources of revenue.

Television broadcasting

Ofcom consulted on product placement in 2005-6. The consultation document¹³ noted that, in the USA where product placement is not prohibited but on-screen disclosure is required, television accounted for about 55% of all product placement revenues (across the film, television and other media sectors) in 2004. Moreover, product placement revenue was growing faster than other media spending (over 30% across the film, television and other media sectors), but product placement still only accounted for 1% of total US advertising spending (\$2 billion out of a total of \$161 billion).

The latest US industry marketing forecasts indicate product placement growth of over 33% to \$2.9 billion in 2007. The sector expanded at around an annual compound growth rate of 41% from 2002 to 2007 and was expected to reach \$3.5 billion (a growth rate of 25%) in 2009¹⁴.

The European Commission's own impact assessment for the AVMS Directive noted that product placement "could generate substantial additional resources for the audiovisual value chain, starting from linear providers", and that "such resources could amount to €500 million", although no geographical area or time period is given¹⁵.

Sponsorship was first allowed in the UK in 1988 but it took 10 years for sponsorship to generate revenues of £50 million per annum. Between 1998 and 2004 sponsorship revenues grew from £51 million to £114 million (in real terms at 2004 prices). By 2004 sponsorship represented about 3% of total commercial television advertising and sponsorship revenues. Spot advertising revenues were around £3.5 billion of which commercial terrestrial television was responsible for £2.8 billion.

So while not insignificant, sponsorship revenues are clearly relatively small. However, as Ofcom noted in its 2005 consultation document, sponsorship (and potentially product placement) does offer additional flexibility to advertisers in attempting to communicate with viewers and so helps to retain advertising funding within the commercial television sector.

¹³ *Product Placement: A consultation on issues related to product placement*, Ofcom, December 2005

¹⁴ *Branded Entertainment Marketing Forecasts 2008-2012*, PQ Media, Stamford, 2008

¹⁵ *Impact Assessment – Draft Audiovisual Media Services Directive*, COM(2005)646 final, European Commission, December 2005

On balance Ofcom concluded that if the US experience were replicated in the UK, product placement revenues might reach £100 million per annum (at 2005 prices). However, following the experience with the gradual build up of sponsorship revenues, and assuming some continued regulation of the market, most observers believed that revenues from product placement would only reach £25 to £35 million after around five years.

Video-on-demand

Ofcom assessed total video-on-demand revenues at £66 million in 2006, although growing rapidly (by 50%), with video-on-demand delivered over the internet estimated to be worth £41 million and growing at 34%¹⁶. On a pro-rata basis, therefore, potential product placement revenues for video-on-demand services might eventually be worth £2 million (at 3%) or perhaps one third of that sum after five years. However, the figure is likely to be significantly lower, given the limited amount of content which is made specifically for video-on-demand services, although it would clearly grow in line with the growth in such content, which in turn is likely to grow rapidly in line with the projected overall rapid growth in video-on-demand services.

Prop Placement

Prop placement is a small industry in the UK – around 12 companies providing television and film props which introduce realism into productions and reduce costs for producers¹⁷. These companies might be adversely affected if product placement replaces prop placement to any significant extent and if those seeking to place their products strike deals directly with broadcasters and programme- and film-makers. However, not all products will be suitable for 'paid for' product placement deals. Moreover, given their experience and knowledge of the market, prop placement companies may be well-placed to act as brokers for product placement deals between producers and programme-makers.

Competition Assessment

Maintaining the prohibition on product placement has some theoretical implications for competition in a "dual regime" world in which imported programmes from outside the UK can contain product placement. The revenues from product placement would be captured in producer countries and their costs reduced. However, this could lead to reduced costs for television broadcasters and video-on-demand providers using such imports and where a high proportion of programmes are in the genres where such placement is concentrated. In practice, this situation already exists in relation to the programming from the USA which is carried by UK broadcasters. If other EU Member States were to permit product placement, the effects would increase. However, given the relatively modest size of product placement revenues, even in the USA, Ofcom concluded¹⁸ that in practice such effects could reasonably be expected to be insignificant for at least the first few years.

Allowing product placement might also have implications for competition between broadcasters. Those using more UK productions would have greater access to a new source of revenue than those which are more reliant on imported programming. Ofcom noted that this would be likely to benefit the commercial PSB channels more, because they invest significantly more in UK-produced programming. However, even here, some would benefit more than others because they import less and produce more in-house. Broadcasters who are more reliant on bought-in programming might also suffer from any transfer of advertising revenues from traditional spot advertising to product placement. Again, in view of the relatively small amounts of revenue at stake, Ofcom took the view that the impact on competition was likely to be negligible.

¹⁶ BBC new on-demand proposals –Market Impact Assessment, Ofcom, January 2007

¹⁷ Product Placement consultation document, Ofcom, December 2005

¹⁸ Product Placement consultation document, Ofcom, December 2005

Small Firms Impact Assessment

Smaller broadcasters, video-on-demand service providers and programme- and film-makers might benefit from the opportunity to develop a new revenue stream if product placement is allowed. However, the benefits might be limited if most product placement deals are with the major broadcasters, and for those smaller companies that use largely bought-in programming. Overall, though, the relatively small amounts of revenue which product placement is expected to generate, at least in the first few years, suggests that any impact on small firms is itself likely to be very small.

As noted above, prop placement companies might be affected by a decision to permit product placement in UK-made programming. However, any loss of business as a result of a decline in the prop placement market might be offset by gains if they are able to use their experience and knowledge to move into the 'paid for' product placement market.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Annexes

Legal Aid

There might be an impact on the legal aid budget if any individuals were to seek legal aid in order to challenge in the Courts either the implementation arrangements for product placement in the UK or, in due course, a decision of Ofcom in relation to product placement. However, no challenges are anticipated, and the Government expects that all sides will work together to resolve any problems or disagreements without the need for legal action.

Sustainable Development

There will be no impact on sustainable development from the requirements of the Directive and the options set out in the consultation document.

Carbon Assessment

There will be no impact on carbon emissions from the requirements of the Directive and the options set out in the consultation document.

Other Environment

Product placement is defined in Article 1(m) of the AVMS Directive as a form of 'audiovisual commercial communication', i.e. advertising. As such it must comply with the content standards applicable to audiovisual commercial communications, which are set out in Article 3e. These include the requirement that such communications shall not encourage behaviour grossly prejudicial to the protection of the environment.

Health

Article 3g of the AVMS Directive explicitly prohibits product placement for

- tobacco products and cigarettes; and
- medicinal products and medical treatments which are available only on prescription.

In addition, as a form of audiovisual commercial communication, product placement must also comply with the requirement at Article 3e.1(f) that alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages.

It should also be noted that the AVMS Directive explicitly prohibits product placement in children's programmes, with the result that the requirement at Article 3e.2 for Member States to encourage media service providers to draw up codes of conduct regarding advertising of foods high in fat, salt and sugar during children's programmes becomes redundant in relation to product placement.

Race / Disability / Gender Equality

As a form of audiovisual commercial communication, product placement is required by Article 3e of the AVMS Directive not to:

- prejudice respect for human dignity; or
- include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation.

Product placement is also covered by the general requirement at Article 3b that audiovisual media services must not contain any incitement to hatred based on race, sex, religion or nationality.

In addition, continuing to allow UK broadcasters and video-on-demand service providers to show programmes made outside the UK which contain product placement, even if the prohibition on product placement in UK-made programming is maintained, will allow them to acquire and transmit programmes which appeal to particular ethnic and other minority communities and which contain product placement, e.g. programmes from Central and South America, Africa and South and East Asia.

Human Rights

There will be no impact on human rights from the requirements of the Directive and the options set out in the consultation document.

Rural Proofing

There will be no impact on rural issues from the requirements of the Directive and the options set out in the consultation document.

PART 5 – SATELLITE TELEVISION BROADCASTS FROM OUTSIDE THE EU

Current Position

1. The TVWF Directive set out rules which ensured that every television broadcaster whose broadcasts can be received in the EU¹⁹ was assigned to the jurisdiction of one, and only one, Member State.
2. Paragraph 3 of Article 2 set out the rules which determine the jurisdiction for broadcasters which are established in the EU.
3. Paragraph 4 of Article 2 set out rules which determine the jurisdiction for channels which can be received with standard consumer equipment within the EU but for which the broadcasters are established in countries outside the EU. These channels were assigned to the jurisdiction of:
 - the Member State whose satellite capacity was being used to broadcast the channel into the EU;

or, if the channel was not using any satellite capacity belonging to an EU Member State
 - the Member State, if any, from which the channel was being uplinked to the satellite.
4. The UK does not currently have any television broadcasting satellite capacity; and there are at present no channels which fall to the UK's regulatory control as a result of their use of uplink facilities in the UK.

What the AVMS Directive requires

5. The AVMS Directive makes no change to the rules in Article 2 paragraph 3 of the TVWF Directive. It therefore makes no difference to Member States' jurisdiction, for the purposes of EU law, over television channels which are transmitted by broadcasters established within the EU.
6. However, the Directive reverses the rules in Article 2 paragraph 4 of the TVWF Directive. As a result, it assigns jurisdiction over satellite television channels which can be received with standard consumer equipment within the EU but which are established in countries outside the EU, to the Member State, if any, from which the channel is being uplinked. Only if the channel is not being uplinked from any EU Member State does the AVMS Directive assign jurisdiction to the Member State whose satellite capacity is being used to broadcast it in the EU²⁰.

¹⁹ References to the EU in text and footnotes also include the non-EU members of the EEA - Iceland, Liechtenstein and Norway. See footnote 1 to the Introduction.

²⁰ Neither the TVWF Directive nor the AVMS Directive require Member States to exercise jurisdiction over non-EU channels received in the EU which are neither uplinked from within the EU nor use satellite capacity belonging to an EU Member State. No Member State could exercise any practicable jurisdiction over such channels, and EU law does not require them to do so.

7. The consequence of this change in the AVMS Directive is that the UK will, as from the transposition date of 19 December 2009, have formal jurisdiction under EU law for non-EU satellite television channels which are broadcast into EU Member States by means of UK-based uplinks. The UK Government and Ofcom are working with other Member States and the European Commission to determine which non-EU channels will fall into UK jurisdiction as a result of this change in the rules.
8. Several other EU Member States (for example, Germany) are in the same position as the UK. They have no satellite capacity which is used for television broadcasting. But they host uplinks which are used to transmit non-EU television channels. The AVMS Directive therefore assigns to them jurisdiction over, and responsibility for, the content of those channels.
9. The change will mean that some other Member States lose jurisdiction over particular non-EU satellite television channels which are broadcast in the EU by means of satellites which form part of their satellite capacity but are uplinked elsewhere in the EU. Those countries like France which presently regulate large numbers of channels under the current system are likely to lose jurisdiction over some of these channels to other Member States.
10. The Commission has determined that the transfers of jurisdiction which arise as a result of this aspect of the Directive will take place simultaneously at the end of the implementation period in December 2009.

The UK's duties under EU law

11. Article 3(6) of the AVMS Directive requires that:

"Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive."

12. The legal position therefore is that the Directive requires each Member State to apply the rules which are relevant to television broadcasting services to all such services, including those from outside the EU, over which the Directive gives it jurisdiction. The rules in question are those which are set out at Articles 3a to 3g, Articles 3j and 3k, and Articles 4 to 23 of the Directive (see Part 1 of this consultation document).

Implementing the AVMS Directive for Satellite Channels

13. The UK has implemented the requirements of the Television without Frontiers Directive for satellite and other television broadcasting services²¹ through:
 - the requirement in the Communications Act 2003 that channels under the UK's jurisdiction must be licensed by Ofcom; and
 - the requirement that licensed channels must comply with Ofcom codes such as the Broadcasting Code, and the Rules on the Amount and Distribution of Advertising.

²¹ Leaving aside for these purposes BBC and S4C services, where compliance is secured through arrangements other than licensing.

14. No substantive change is required or proposed to this approach in relation to the additional channels over which the UK will have jurisdiction following the implementation of the AVMS Directive. All channels which fall to the UK's regulatory responsibility under the AVMS Directive will be required to hold a licence from Ofcom and to comply with the Broadcasting and other codes.
15. The non-EU channels which will newly fall to the UK's jurisdiction are different from the channels which Ofcom currently regulate in an important respect: by definition, they will not have a business presence in the UK. This may mean that it is harder for Ofcom to secure their compliance with UK regulation – channel operators may be unwilling to comply with directions from the UK in the event that a breach of the regulations is identified. Equally, there is a risk that such channels may also ignore any sanctions which might be imposed by the UK authorities, whether these were warnings, fines, or the removal of a licence and consequent requirement that a channel cease transmission.
16. It is important to note in this context that the French Government took action in 2004 against two satellite television channels originating from the Middle East, which were relayed in Europe through the French Eutelsat satellite system, and which were carrying flagrantly anti-Semitic programming. Discussions between the French authorities and the broadcasters' European representatives did not prevent recurrences of the problem, which was ultimately solved by the removal of the channels from the satellite and its France-based uplink.
17. The UK Government welcomed the resolute action which the French authorities took to resolve these difficulties. The episode does however point to the need to consider whether the UK might itself have to take effective action against similar breaches of the AVMS rules by non-EU broadcasters which are uplinked from UK territory. However, ensuring that Ofcom can exercise a regulatory function in relation to these channels is likely to require an amendment to the Communications Act 2003.

Options for implementation in the UK

18. The Government considers that there might be a number of options for dealing with any specific (actual or alleged) infraction of the EU rules by a particular non-EU satellite TV channel which is being uplinked to satellite from the UK. In the first instance, Ofcom might wish to discuss the issue with the non-EU broadcaster, as they would with any other channel under UK jurisdiction.
19. It is unlikely that the broadcaster would be under any legal requirement within its own jurisdiction to adapt its output to comply with the UK regulations implementing the Directive or to comply with any Ofcom directions or sanctions decisions including licence revocation. Even so, it might be possible to seek to influence the behaviour of the channel through engagement between Ofcom and the relevant regulatory authority, or potentially at inter-government level.
20. However, we cannot rely upon the uncertain impact of such interventions to prevent continued breaches of UK or EU regulation. Ultimately, in order to ensure that the UK could prevent the continued broadcasting of a non-EU satellite channel which was in breach of the requirements of the Directive, the UK will require a power to intervene to prevent the channel from being uplinked from the UK. Such a power would ensure

that the power Ofcom has to stop a domestic channel from broadcasting (by revoking its licence), would also exist in relation to non-EU channels.

21. The nature and scope of the powers required and permitted under European and domestic law are still under consideration. However, the Government thinks that there are two possible ways of achieving the objective. These are:
 - empowering the Government or Ofcom to act against a channel by instructing providers to stop uplinking in specified circumstances – such as the channel's failure to comply with directions relating to the UK's regulation, or the absence or the removal of its broadcasting licence; or
 - subjecting uplink providers in the UK to ongoing regulation of some kind in relation to the non-EU satellite television channels which they uplink.
22. The Government takes the view that there are three underlying questions to answer before deciding what if any action the UK should take in respect of the non-EU satellite television channels for which the AVMS Directive gives it jurisdiction. These are:
 - should there be arrangements of some kind to regulate non-EU satellite television channels which are uplinked from the UK?
 - what legal powers should the Government or Ofcom have in order to ensure that there can be effective intervention if unacceptable content is broadcast? and
 - what responsibility, if any, should uplink providers have in relation to the channels they uplink?
23. Bearing these questions in mind the Government has identified three distinct options for consideration.

Option 1 - Do nothing

24. Under the AVMS Directive the UK Government must ensure that the non-EU broadcasters under its jurisdiction meet the minimum content requirements which the Directive sets out. However, if a non-EU satellite channel which was uplinked in the UK began to broadcast unacceptable content which breached EU laws, and the UK had no system of regulation in place to address the matter, then the UK Government would be unable to meet this commitment.
25. The European Commission is responsible for ensuring that Community law is correctly applied. Where a Member State fails to comply with Community law, the Commission has the power to bring the infringement to an end (Article 226, EC Treaty), and where necessary, may refer the case to the European Court of Justice. This could result in a substantial penalty payment and/or lump sum (Article 228, EC Treaty).
26. This is a costly and time-consuming procedure with potentially high costs for the UK. It would be quite unacceptable for the UK to fail to act in circumstances where it had a legal responsibility, under Community law, for material in breach of Community law which was being broadcast from here to other Member States.

Option 2 - Include non-EU channels within the current regulatory framework and ensure that the rules can be applied to non-EU broadcasters

27. Non-EU broadcasters could be licensed in the same way as media service providers who are established in the UK. They would be subject to the Ofcom Broadcasting Code and obliged to pay a licence fee. Normally, Ofcom would have a range of sanctions against a licence holder which, for example, persistently breached the Code.
28. However, a broadcaster with no connection to the UK apart from the fact that its broadcasts are uplinked from the UK may well be beyond the effective reach of Ofcom in practical terms. The UK may have little or no influence or control over non-EU broadcasters who are not under direct UK jurisdiction.
29. In order to ensure that Ofcom could effectively sanction such channels, it will therefore need a contingency power to take a channel off air by issuing an instruction to an uplink provider. In this circumstance, the uplink provider would be required to stop uplinking the channel to a satellite.

Option 3 - Include non-EU channels within the current regulatory framework and create a new regulatory responsibility for uplink providers

30. An alternative to option 2 would be to place responsibility for the broadcasting of non-EU channels which breach the requirements of the Directive on the providers of uplink services.
31. This need not require the uplink providers actually to make decisions about the content of the services which they uplink. As with option 2, non-EU channels would be required to hold a licence from Ofcom and therefore be subject to Ofcom's Codes. However, the uplink provider would be responsible for ensuring that the channels it was uplinking were appropriately licensed, either by Ofcom or elsewhere in the EU.
32. In the event that a channel was not licensed in the UK or the EU, the uplinker would be liable. Equally, if a channel had its licence removed as a sanction by Ofcom, the uplink provider would be liable unless it promptly stopped providing uplink services for that channel.

Analysis and assessment of the options

33. Option 1 poses a clear risk of infraction proceedings. Even more importantly, it would be highly undesirable for the UK to be unable to act if it had regulatory responsibility within the EU for a satellite television channel from outside Europe which, for example, was broadcasting hate speech. For these reasons, failure to seek some means of intervention in relation to non-EU channels uplinked from the UK is, in the Government's view, not an acceptable option.
34. Both options 2 and 3 will allow the UK to intervene in the event that there is a regulatory problem with a non-EU channel which uses a UK uplink facility. However, both options will also create risks for the providers of uplink services in the UK.
35. The first of these risks emerges from the technical structure of digital satellite broadcasting, and is common to both options. In the analogue environment, each television channel occupied an uplink frequency slot and used a specific satellite

transponder. In the digital environment, a single frequency slot and transponder will carry as many as eight or nine channels, multiplexed into a single data stream. In order to remove a single channel from this data stream it is necessary first to demultiplex the stream, to remove the channel, and then multiplex the remaining channels into a single stream which is uplinked to the satellite.

36. In the majority of cases, this is unproblematic, as the provider of the uplink service also provides multiplexing services and therefore will also be in a position to isolate and remove a specific channel. For example, EutelSat estimate that 90% of the channels carried on their satellites are multiplexed and uplinked by an integrated service provider. However, in some cases, the multiplexing operation is separate from the provision of uplink services.
37. If uplink provision and multiplexing are separate, the task of removing a single channel is more complex. The uplink provider would have to be in a position to de- and re-multiplex the data stream using their own technical equipment (effectively tying up the expensive plant, if they owned it, or requiring it be hired or purchased if they did not).
38. Alternatively, the uplink provider could ensure through the structure of its contract with the upstream multiplex operator that it could demand the removal of a channel from the multiplex on request. The second of these looks likely to have the smallest direct impact on uplink providers, and would be an acceptable means for uplink-only providers to address their new potential liability. However, it does nevertheless introduce a new business risk, for which uplink-only providers will need to allow in their contracts with channels or multiplex operators.
39. The difference between options 2 and 3 lies in the role and the potential liability assigned to uplink providers. Under option 3, the provider of uplink services takes on a regulatory responsibility: to ensure that the channels to which it provides service are legitimate AVMS services, because they are either:
 - licensed by Ofcom; or
 - established in, and regulated by, another EU Member State.
40. Under option 2, the uplink provider is not assigned a regulatory responsibility in relation to the channels it uplinks and has no additional duties. It will bear some business risk, as a result of the (remote) possibility that a channel which it uplinks is banned by Ofcom, leading to a requirement to terminate the provision of uplinking.
41. Under both options 2 and 3, UK uplink providers will have to allow for this possibility in the contracts they strike with channel operators. However, under option 2, the uplink provider has an ex post responsibility: they must act when informed that they are uplinking an unlicensed or banned channel. Under option 3, the provider has an ex ante responsibility: to determine, and keep track of the licensing status of the channels they uplink. For this reason, option 3 would appear to create a greater regulatory burden for the uplink industry.
42. Under both options 2 and 3, Ofcom would need to be able to identify the relevant uplink provider for a non-EU channel which was in breach of the Broadcasting Code or had failed to obtain a licence from Ofcom, in order to ask the uplink provider to terminate the uplink.

Preferred Option

43. The basic regulatory framework for media and telecommunications in the UK distinguishes content providers, with editorial responsibility and liability for the characteristics of content services, and communications services providers. In general, communications services providers do not have responsibility for the characteristics of the content services they may uplink. The clearest example of this is in relation to traditional telephony – telephone companies are responsible for connecting people or businesses, but not for the content of their customers' conversations.
44. However option 3 would create a link between the uplinking of a service and the characteristics of that service and thus introduce a new level of responsibility on uplink providers which they currently do not have.
45. Option 2 would not create such a link, and therefore results in a lesser regulatory burden on uplink providers.
46. Option 1 creates two undesirable risks – of infraction and of the continued uplinking by UK uplink providers of potentially illegal content services – each of which is in itself unacceptable.
47. The Government therefore prefers option 2.

QUESTIONS

39. **Should there be arrangements of some kind to regulate broadcasts from non-EU broadcasters which are uplinked from the UK?**
40. **What legal powers should the Government or Ofcom have in order to ensure that there can be effective intervention if unacceptable content is broadcast by a non-EU channel uplinked from the UK?**
41. **What responsibility, if any, should uplink providers have in relation to the channels they uplink?**
42. **Are there any other options, besides those described in this document, which would achieve the objective of ensuring that non-EU satellite channels uplinked from the UK comply with the requirements of the Directive and enabling the Government or Ofcom to take appropriate action against those that do not?**

The Government would also welcome information from respondents about the potential impact of the options for regulating satellite television broadcasts from outside the EU in response to the five impact and competition assessment related questions at the end of the list of questions in Part 6.

Summary: Intervention & Options

Department /Agency: DCMS	Title: Impact Assessment of legislative options for implementing the EU AVMS Directive - non-EU satellite television channels	
Stage: Consultation	Version: 1.0	Date: July 2008
Related Publications:		

Available to view or download at:

<http://www.culture.gov.uk>

Contact for enquiries: Natasha Pavey

Telephone: 020 7211 6398

What is the problem under consideration? Why is government intervention necessary?

The EU Audiovisual Media Services Directive (AVMS) gives the UK jurisdiction over non-EU television channels which are uplinked to satellites from locations within the UK for reception by viewers in the EU. This means that the UK is responsible under EU law for ensuring that these channels do not incite violence on grounds of race, sex, religion or nationality and that they meet other EU standards and requirements for television content. At present there is no legal mechanism in the UK which would allow the Government or Ofcom to intervene if such a channel was not meeting these standards.

What are the policy objectives and the intended effects?

The policy objective is to ensure that the UK can comply with the terms of the Directive. The effect will be to ensure Ofcom is able to intervene successfully if a non-EU television channel which is uplinked from the UK were to breach the EU standards.

What policy options have been considered? Please justify any preferred option.

The Government has considered three options. Option 1 is to do nothing. This has potentially high political and legal costs and is not acceptable. Under Options 2 and 3 Ofcom would have a new power to require the removal of a particular non-EU television channel from an uplink, and each channel would itself need to hold a UK broadcasting licence. Option 3 would additionally place a duty on uplinkers to ensure that each channel held a UK licence. The Government's preference is for option 2. This would ensure that the UK was not in breach of the Directive but would minimise costs for uplinkers.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? 2011.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Andy BurnhamDate: July 2008

Summary: Analysis & Evidence

Policy Option: 2

Description: Non-EU channels to hold a UK broadcasting licence and a power for Ofcom to require the removal of a channel from an uplink

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' The main costs will be on non-EU broadcasters which will now be required to hold a UK broadcasting licence. We estimate this will affect no more than 100 non-EU broadcasters.
	One-off (Transition)	Yrs	
	£ 250,000		
	Average Annual Cost (excluding one-off)		
	£ 105,000		Total Cost (PV) £ 1.153 million
Other key non-monetised costs by 'main affected groups' There will be some costs on satellite-uplink providers who uplink non-EU channels if Ofcom requests that they stop uplinking a channel. These costs may be greater for small uplink providers who do not have the technical equipment to separate out one particular channel from a multiplex of channels.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Not quantifiable at this stage.
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£		Total Benefit (PV) £
Other key non-monetised benefits by 'main affected groups' Existing non-EU channels uplinked from the UK will be required to meet minimum EU standards and additionally the requirements of Ofcom's Broadcasting Code. Ofcom will also be able to take action more quickly to deal with non-EU channels (uplinked from the UK & broadcasting illegal material) than they otherwise would.			

Key Assumptions/Sensitivities/Risks

Price Base Year 2008	Time Period Years 10	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £ -1.153million
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What is the geographic coverage of the policy/option?	UK-wide			
On what date will the policy be implemented?	19 December 2009			
Which organisation(s) will enforce the policy?	Ofcom			
What is the total annual cost of enforcement for these organisations?	£			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	No			
What is the value of the proposed offsetting measure per year?	£			
What is the value of changes in greenhouse gas emissions?	£			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)
Increase of	£	Decrease of	£
Net Impact			£

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

The AVMS Directive changes the criteria for determining which Member State has jurisdiction over non-EU television channels intended for reception in the EU.²² Under the Television without Frontiers Directive, such channels were assigned to the jurisdiction of the Member State responsible for the satellite capacity being used. Under the AVMS Directive, it is the Member State with responsibility for the satellite-uplink which has jurisdiction over these non-EU channels.

The UK did not have any responsibility to regulate non-EU channels under the TVWF Directive because we do not have any satellites being used for broadcasting. However, we do have satellite uplinks. The AVMS Directive requires us to ensure that non-EU channels uplinked from the UK meet minimum EU standards and to be able to take prompt action against services, if, for example, they broadcast race hatred material.

The three options

The three options for implementing this part of the Directive and which are outlined in the consultation document are:

1. do nothing;
2. include non-EU channels within the currently regulatory framework and ensure that the rules can be applied to non-EU broadcasters;
3. include non-EU channels within the currently regulatory framework and create a new regulatory responsibility for uplink providers.

Analysis and assessment of the options

The Government has ruled out the 'do nothing' option. The UK must be able to take action in the event that there is a regulatory problem with a non-EU channel which uses a UK uplink facility.

Both options 2 and 3 would allow the UK to intervene if a channel broadcast illegal content and to inform non-EU channels about the UK's regulatory standards. In both scenarios, Ofcom would be able to require the uplinker to stop uplinking the channel if it deemed necessary.

The difference between options 2 and 3 lies in the role and the potential liability assigned to uplink providers. Under option 2, the uplink provider has an ex post responsibility: they must act when informed that they are uplinking an unlicensed or banned channel. Under option 3, the provider has an ex ante responsibility: to determine, and keep track of the licensing status of the channels they uplink.

Option 3 would appear to create a greater regulatory burden for the uplink industry and to go beyond the requirements of the Directive, so the Government's preference is for option 2. This would allow the UK to ensure appropriate regulatory oversight of the non-EU channels.

²² The Directive does not apply to services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

Benefits and costs

This change in the criteria generates few additional direct benefits for the UK, since the protections afforded are already available under the existing TVWF regime. The real benefits accrue on a pan-European level. Member States will be able to deal more quickly with unacceptable services (for example, broadcasting race hate material) as they will now be able to take action at the point of the uplink before the signal reaches the satellite.

The Directive imposes some burdens on UK satellite-uplink providers. Uplinkers will need to ensure that they are in a position to stop uplinking a channel if they are required to do so by Ofcom, whether or not they have the technical equipment to do this themselves. They may also be required to notify Ofcom as to the non-EU channels they uplink.

Under either Option 2 or Option 3 the main costs of the proposal will fall on the non-EU television channels themselves. They will need to have a UK television broadcasting licence (a television licensable content service - 'TLCS' - licence) issued by Ofcom. Ofcom's fees and charges are related to relevant turnover with a minimum fee, progressive and cumulative percentage fees as turnover increases and a maximum cap beyond which no further fees are payable.

Assuming that in total less than 100 additional channels will be affected by the AVMS Directive's provisions, the total one off cost of new application fees will be under £250,000 (100 TLCS) licences at £2,500 each. Each subsequent year might see 10% of these licences requiring transfers/variations at £1,000 each. Shopping channels pay a flat annual fee of £2,000 and assuming five of these and 95 editorial TLCS licences at a minimum cost of £1000 each, then additional annual TLCS licenses would total £105,000 in 2008-2009 at 2008-2009 prices.²³

There will also be some administrative costs for Ofcom in dealing with applications for tlcs licences for these non-EU channels and in the event of complaints about a particular channel or other need to take measures against it.

Scale

At this stage it is difficult to determine how many satellite uplinkers will be affected by the new Directive and to what extent. It is also rather difficult to predict with much accuracy how many non-EU channels the UK will assume jurisdiction over. In order to establish these we would need to verify:

- how many UK satellite-uplink providers uplink non-EU television channels and how many channels they uplink; and
- whether they have the technical equipment to stop uplinking a channel if they are instructed to do so by Ofcom and where the channel is being uplinked as part of a multiplex of channels.

Ofcom currently provides around 200 Permanent Earth Station (PES) licences but uplinkers are not required to provide information on the type of service they are carrying. As well as carrying television channels, uplinkers could also be carrying a range of other services, including television contribution, Internet backbone, direct to home internet connectivity, trunk telephony and private networks. Ofcom does not have a detailed picture of the number of uplinkers uplinking non-EU television channels and whether they have the necessary technical equipment.

Ofcom's current estimate is that between 40 – 50 satellite-uplinkers might be affected by the new Directive and that the number of non-EU channels being uplinked is likely to be no more than 100.

We would not expect Ofcom to use the power to require the removal of a channel from an uplink in more than a handful of cases. These non-EU channels have already been subject to EU regulation in the

²³ Ofcom's Tariff Tables 2008-9, p.9 (<http://www.ofcom.org.uk/about/account/tariff/table0809/tariff0809.pdf>)

Member State which has responsibility for the satellite and therefore, the number of illegal services is likely to be few and far between.

Competition assessment

The impact of Option 2 or Option 3 on competition within the UK is likely to be negligible. All uplinkers based in this country will be affected equally, in that any non-EU television channels they carry will need to have an Ofcom licence. However, there may be an issue in relation to the possible requirement on uplinkers to cease carrying a particular channel, which might bear more heavily upon smaller-scale operators (see the small firms impact test below).

There may be an impact on competition between uplinkers in the UK and those elsewhere in the EU. The new AVMS rules will mean that all Member States will require some form of regulation of non-EU channels which are uplinked from their territory. However, not all other Member States have a licensing system. To the extent that this is so, the requirement for an Ofcom licence with its initial application fee of £2,500 (though a relatively small sum in comparison to the overall cost of uplinking a satellite channel, which is thought to be in the region of £50,000 pa) may impact upon decisions by non-EU channels as to the satellite which they use for transmission into the EU and/or the ground station from which their signal is uplinked to that satellite.

Small Firms Impact Assessment

The requirement to terminate an uplink provision for a non-EU channel may adversely affect small satellite-uplink providers and could present barriers to new entrants in the market. As mentioned, we do not know how many uplink providers would not have the necessary technical equipment to stop uplinking a channel which was part of a multiplex. We think that this is likely to be no more than 5-10 operators²⁴, and the number of occasions on which it might be necessary to terminate an uplink are likely to be few. However, we need more information in order to assess these impacts properly.

²⁴ Based on Ofcom's estimate that there are between 40-50 uplinkers who uplink TV channels and EutelSat's estimate that 90% of the channels carried on their satellites are multiplexed and uplinked by an integrated service provider.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Annexes

ULegal Aid

There might be an impact on the legal aid budget if any uplinker were to seek legal aid in order to challenge in the Courts either the implementation arrangements for the regulation of non-EU satellite-uplinked channels or, in due course, a decision by Ofcom to require an uplinker to stop uplinking a channel. However, no challenges are anticipated, and the Government expects that all sides will work together to resolve any problems or disagreements without the need for legal action.

Sustainable Development

There will be no impact on sustainable development from the requirements of the Directive and the options set out in the consultation document.

Carbon Assessment

There will be no impact on carbon emissions from the requirements of the Directive and the options set out in the consultation document.

Other Environment

There will be no impact on the environment in respect of implementing the requirement in the Directive to regulate non-EU satellite-uplinked channels and the options for doing this set out in the consultation document.

Health

There will be no impact on health in respect of implementing the requirement in the Directive to regulate non-EU satellite-uplinked channels and the options for doing this set out in the consultation document.

Race / Disability / Gender Equality

Article 3b of the AVMS Directive requires Member States to ensure that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality. The change in the technical criteria for determining jurisdiction over non-EU satellite-uplinked channels means that for the first time the UK will have a responsibility for non EU satellite-uplinked channels in this respect.

Human Rights

There will be no impact on human rights from the requirements of the Directive and the options set out in the consultation document.

Rural Proofing

There will be no impact on rural issues from the requirements of the Directive and the options set out in the consultation document.

PART 6 – FULL LIST OF QUESTIONS

The Government welcomes views on all the questions listed here and on any other issues raised by this consultation document.

Scope - Scheduled television broadcasting services

1. Does the Communications Act 2003 need to be amended in order to ensure that it covers all scheduled television services within UK jurisdiction regardless of the platform over which they are provided? If so, how?

Scope - On-demand audiovisual media services

2. Do the proposed definitions to be included in the Communications Act capture all the relevant elements of the definition of an on-demand audiovisual media service in the AVMS Directive?
3. Are there any services which you think should fall within the scope of regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might exclude?
4. Are there any services which you think should fall outside the scope of regulation according to the Directive, but which the proposed definitions to be included in the Communications Act might include?
5. Is the concept of "general control" appropriate for determining the person or organisation subject to regulation in respect of a particular video-on-demand service?
6. If the provider of an 'aggregated' video-on-demand service has control over some elements of another video-on-demand service to which it provides access, to what extent and in what circumstances should the regulatory responsibility for that other service remain with its original provider and to what extent and in what circumstances should it transfer to the provider of the 'aggregated' service?
7. If an 'aggregated' video-on-demand service provides access to a video-on-demand service from outside the EU, should the provider of the 'aggregated' service have regulatory responsibility for the non-EU service? If not, what other options are there for ensuring that the UK can meet its obligations under the Directive in respect of the non-EU service?
8. What other types of additional content might video-on-demand services offer or provide access to? Do you envisage any difficulties in determining whether a service provider has general control over such content?
9. Is it appropriate to treat scheduled and on-demand parts of the same overall service differently for regulatory purposes? Do you envisage any difficulties in identifying the boundaries between the scheduled and on-demand parts of the same overall service and/or in making different parts of the same overall service subject to different regulatory requirements and different regulatory bodies?

Regulatory System for on-demand audiovisual media services

10. Do you agree that the criteria at paragraph 9 (of Part 3A) are the right ones for determining the best regulatory option? Are there any other important criteria?
11. Are there any other possible co-regulatory or statutory models that you think we should consider? If so, please describe them and say why they meet the criteria.
12. Should service providers be subject to a membership, prior approval, notification or general conditions regime?
13. Who should be responsible for interpreting the legislative definitions and determining which services are subject to the regulatory framework - Government, Ofcom or an appointed industry co-regulator?
14. Who should be responsible for developing and maintaining a standards code and any additional guidance?
15. Who should be responsible for monitoring compliance, investigating complaints and reviewing any breaches of the code?
16. What sort of sanctions should apply and who should apply them?
17. If we opt for a co-regulatory structure we would need to introduce legislative 'backstop' powers. What should be the second tier level of enforcement to address cases of repeated breaches or system failure?
18. In the light of all these considerations, which option do you prefer and why?

Advertising in on-demand audiovisual media services

19. Should the controls on advertising in video-on-demand services cover
 - advertisements which appear onscreen as a result of the user accessing a particular video-on-demand programme?
 - advertisements which appear on-screen as a result of the user accessing a particular video-on-demand service?
20. Should there be only one co-regulatory body for advertising on video-on demand services?
21. Should such a body have its powers assigned to it by the Government, by Ofcom or by the body or bodies responsible for regulating programme and other content?
22. Should the Advertising Standards Authority be the body, or one of the bodies, which regulate advertising on video-on demand services?
23. Should regulation of advertising in video-on-demand services be handled by the body or bodies responsible for regulation of the programme and other content?

24. Should product placement in video-on-demand services, if allowed, be regulated by
- the body or bodies that regulate advertising on these services? or
 - the body or bodies that regulate programme content on these services?
25. Should sponsorship of video-on-demand programmes and services be regulated by
- the body or bodies that regulate advertising on these services? or
 - the body or bodies that regulate programme content on these services?

Product Placement

26. Should product placement be prohibited by law? Please explain the reasoning behind your preference.
27. Should any such legal prohibition allow for Ofcom and the co-regulator(s) of video-on-demand services to permit product placement in some or all of the programme genres specified by the AVMS Directive (feature films, television films and series, sports and light entertainment programmes)?
28. What advantage would there be in permitting product placement in any or all of the specified genres? If so, which genre(s), when and why?
29. If product placement were permitted, how could audiences and regulators be assured that editorial integrity had been preserved, as required by the Directive?
30. How could “undue prominence” be avoided, given the commercial imperatives for audiences to recognise the products placed?
31. Should the same rules apply to both television broadcasting and on-demand audiovisual media services? If not, how should they differ and why?
32. Should prop placement continue to be permitted?
33. Should there be a specific set value above which prop placement is subject to the Directive’s rules on product placement? If so, what should it be?
34. What other ways are there of ensuring that the UK meets the Directive’s requirement that prop placement above a ‘significant value’ must be treated as product placement? Which test is best and why?
35. If there is to be a set value for this purpose, should it be set by the Government in legislation, or by Ofcom (for television broadcasting) and the video-on-demand co-regulator(s)?
36. Should product placement continue to be permitted in programmes acquired from outside the UK and in films made for the cinema? If not, why not and how could such a ban be made effective in practice?

37. How should product placement be signalled to viewers?
38. Should the rules on signalling be set by the Government in legislation or by Ofcom (for television broadcasting) and the video-on-demand co-regulator(s)?

Non-EU satellite channels uplinked from the UK

39. Should there be arrangements of some kind to regulate broadcasts from non-EU broadcasters which are uplinked from the UK?
40. What legal powers should the Government or Ofcom have in order to ensure that there can be effective intervention if unacceptable content is broadcast by a non-EU channel uplinked from the UK?
41. What responsibility, if any, should uplink providers have in relation to the channels they uplink?
42. Are there any other options, besides those described in this document, which would achieve the objective of ensuring that non-EU satellite channels uplinked from the UK comply with the requirements of the Directive and enabling the Government or Ofcom to take appropriate action against those that do not?

Impact and Competition Assessment Related Questions

The Government would welcome responses to these questions in relation to each section of this consultation document: scope; regulation of programme content and advertising in on-demand audiovisual media services; product placement; and satellite television broadcasts from outside the EU.

43. What are the key technical and market developments and the likely future impact of these, including emerging strategic and business models?
44. What is your assessment of the degree of “footlooseness” of business activity in the sectors covered by the Directive, including the potential for operation from non-UK and non-EU locations and incremental costs for such operations?
45. How will the options proposed impact directly and indirectly on the number and range of service providers?
46. How will the options proposed limit the ability of service providers to compete and reduce the incentives for providers to compete vigorously?
47. How will the options proposed affect technological innovation within the relevant markets?