

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.