



Public consultation on Implementing the EU Audiovisual Media Services Directive

Response of British Sky Broadcasting Limited ('Sky')

[NON-CONFIDENTIAL VERSION]

Introduction

1. Sky welcomes the opportunity to respond to Government's consultation on the implementation of changes required by the Audiovisual Media Services Directive ('the Directive'). Sky's response focuses on the proposals relating to the extension of the basic tier of content regulation to video on demand ('VOD') content. Sky is, however, also materially affected by the proposals relating to product placement, and the changes to the rules regarding jurisdiction, and has provided responses to the questions posed by the Consultation Document where appropriate.

Background

Sky's broadcast services

2. Sky broadcasts a number of television channels¹ which it distributes, together with a large range of channels provided by third parties, in subscription packages to direct to home ('DTH') satellite subscribers, and to a limited number of digital subscriber line subscribers, in the UK and Ireland. Sky also supplies certain of its channels to cable operators, which those operators distribute to their subscribers in the UK and Ireland. In addition, Sky currently makes three of its channels (Sky News, Sky Sports News and Sky3) available free to air via the digital terrestrial television platform in the UK.
3. Sky provides linear scheduled content to end-users through Sky Mobile TV, which allows customers with 3G mobile phones on the certain networks to choose from three mobile TV packages of themed Sky and third party channels for a monthly subscription charge.
4. Sky also simulcasts its Sky News channel and its suite of Sky Sports channels on the internet. Sky News is available via the internet free of charge. The Sky Sports suite of channels is available to Sky Sports subscribers with a Sky multiroom subscription free of charge (otherwise the cost of accessing this service is £10 per month to Sky Sports subscribers).

Sky's on-demand activities

5. The on-demand services currently offered by Sky, and those likely to be offered in the near future, are described below.

Sky Player

6. Sky Player (previously known as "Sky Anytime on PC") is a PC-based software application that allows Sky subscribers and non-subscribers to download and view a variety of programmes, including movies, sport and entertainment. The service was launched in January 2006. The programming available from Sky Player includes programming from the channels broadcast by Sky (including Sky1, Sky Movies, Sky Sports, Sky Arts and Sky Real Lives) and programming from third party channels that are included in Sky's retail subscription services (including The Biography Channel, National Geographic, The History

¹ Including Sky1, Sky2, Sky3, Sky News, Sky Arts, Sky Real Lives, Sky Travel, the Sky Movies suite of channels, the Sky Box Office screens, Sky Sports 1, Sky Sports 2, Sky Sports 3, Sky Sports Xtra and Sky Sports News.

Channel and Crime & Investigation Network).²

7. Annex 1 to this response provides screen shots of the Sky Player front page, an example genre listing (Documentaries) and a programme listing, showing the information provided to customers when accessing a programme.³
8. Access to programming within Sky Player is provided at no additional cost to subscribers to the relevant Sky retail subscription package, allowing on-demand viewing of the same content that is available on a linear basis. For example, subscribers to Sky's Movies Mix (Sky Movies pack 1 and Sky Movies pack 2) are able to access the Sky Movies content for no additional charge.
9. Although content was previously available only to subscribers to Sky's DTH services, some content is now available to subscribers and non-subscribers on a pay-per-view basis, with episodes of television programmes typically costing between £1 and £2. Movie titles available on Sky Player during their pay-per-view window are currently charged at £3.99 per movie.
10. [X]

Sky Anytime on TV

11. In March 2007, Sky launched Sky Anytime on TV, a service that provides access to approximately 40 hours of content which is transmitted to and stored on the hard-drives of customers' set top boxes. Customers have up to seven days to watch programmes or store them on their Sky+ planner. As newer programmes are added, older programmes are deleted automatically. Sky Anytime on TV is available via all Sky HD set top boxes and via newer models of Sky+ set top boxes (those acquired after November 2005). Viewers are able to access the content on Sky Anytime on TV at no extra charge in accordance with their DTH subscriptions (for example, customers who subscribe to the Sky Movies channels will have access to certain Sky Movies programming on Sky Anytime on TV at no extra charge).
12. Sky Anytime on TV currently provides access to programming from Sky's wholly-owned channels and an increasing number of third party channels from Sky's subscription services, and is used by broadcasters to highlight new and unusual programming that audiences might not otherwise be aware of, in addition to being used as a 'catch-up' service.
13. Annex 2 includes screen shots of the current Sky Anytime menu, [X].
14. [X]
15. As with Sky Player, advertising may be included "pre-roll" and "post-roll", but there are no advertisement breaks during the content available on Sky Player. There is no advertising around Sky Anytime on TV programme listings, which is based on Sky's existing electronic programme guide.

² Sky recently entered into an agreement with the BBC to provide links to BBC on-demand content. Whilst such content is listed in the same way as other third party content, under BBC channel brands, in order to view the BBC content, users are taken to the iPlayer.

³ Sky Player can be accessed directly from <https://skyplayer.sky.com/vod/page/homePage.do?l=1>

PlayStation Portable ('PSP') - 'Go!View' portal

16. Sky and Sony recently launched the 'Go!View' on-demand service for the PSP.⁴ Sky retails programmes from Sky and third party content providers to owners of PSPs for download to these portable devices. PSP users are able to access content on a subscription or pay-per-view basis.

17. Annex 3 provides screen shots of the homepage for this service.

[X]

18. [X]

⁴ Available at <http://www.goview.tv/vod/page/promoPage.do>

PART A

1. The future regulation of on-demand content

- 1.1 As Government will be aware, Sky is concerned that the regulatory framework proposed for VOD content regulation may impose some or all of the regulatory obligations relevant to VOD content from the Directive (the 'AVMS Obligations') on those undertakings which, like Sky, aggregate VOD content from third party content providers to offer a 'service' to consumers, and with whom consumers contract (e.g. Virgin Media, BT Vision, Tiscali TV and 4oD).⁵
- 1.2 Such an approach was considered during the pre-consultation phase, however, it appears from the Consultation Document that this issue has moved forward, and that Government now recognises that, in respect of VOD services, the aggregator or retailer of the services should not necessarily be responsible for all aspects of the content offering.⁶ Sky broadly welcomes the approach taken in the Consultation Document.
- 1.1 Sky remains firmly of the view that mere aggregators of VOD content should not be held responsible under the Directive for the content they make available to consumers where another party is more appropriately connected to that content, and is better able to fulfil the AVMS Obligations. In the linear environment, those obligations fall on broadcasters, as the appropriate undertakings with 'editorial responsibility' for the content scheduled on their services. In the on-demand environment, where broadcasters make the same content available through aggregated services, and retain the same editorial rights and responsibilities in respect of that content, they should retain regulatory responsibility for the AVMS Obligations, notwithstanding the fact that their content may be provided to the end user through an intermediary service.
- 1.3 As explored in more detail below, such a view is
- (a) consistent with the regulatory framework for broadcast services and proposed by the Directive;
 - (b) results in regulatory responsibility for the AVMS Obligations lying with the most appropriate party able to fulfil the objectives of the Directive;
 - (c) reflects relationships and arrangements currently in place to provide VOD content to end users;
 - (d) does not undermine existing business models based around linear channel brands; and
 - (e) avoids the difficulties that would undoubtedly arise from multiple parties having responsibility for the same content (where a content provider chose to make its content available via more than one aggregated services).

There should be consistent regulation between linear and non-linear content

- 1.4 Under the TVWF Directive broadcasters of scheduled services are responsible for the regulatory obligations it imposes as the party with the requisite degree of control over the content comprising the service. Retailers and aggregators of such scheduled services, such as Sky, have no responsibility for the editorial content of the services they supply to customers.
- 1.5 That regime is retained under the Directive, however, it is clear that the intention of the Directive is that this framework should be extended to on-demand services which compete with scheduled services. The recitals to the Directive indicate that the Commission envisages the "***adaptation of the regulatory framework to take account of the impact of structural change, the spread of information and communication technologies ("ICT") and technological developments on business models, especially the financing of commercial broadcasting***" with the aim of ensuring the "***optimal conditions***

⁵ 4oD was incorrectly identified in the Consultation Document as a 'standalone' service, however, it also includes VOD content from third party broadcast channels including FX, Discovery Channel and National Geographic.

⁶ See the discussion on 'editorial responsibility' in respect of VOD services at paragraphs 32 to 42 of the Consultation Document.

*of competitiveness and legal certainty for Europe's information technologies and its media industries and services*⁷ (emphasis added).

1.6 Such conditions can only exist if a consistent regulatory framework is applied to both scheduled and on-demand services which “*compete for the same audience*”.⁸

1.7 The practical consequence of this approach is explicitly acknowledged by the Directive, which states that “[i]n general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast i.e. linear transmission”.⁹

Broadcasters and content providers are the most appropriate parties to fulfil the AVMS Obligations

1.8 The Directive imposes the same basic tier of regulatory obligations on providers of both linear and on-demand programming. The nature of these obligations is such that, under the existing chain of editorial control and responsibility in relation to television broadcast and on-demand content, responsibility most appropriately rests with broadcasters and content providers. A number of the obligations are considered below to illustrate this point.

(a) For example, the obligation not to make material available which contains incitement to hatred on grounds of race, sex, religion or nationality (Article 3b) can only be fulfilled by the party with in-depth knowledge of the editorial content of a programme. In the linear environment, responsibility lies with the broadcaster who will have produced, commissioned or acquired the relevant programme for inclusion in its scheduled service. The position is the same for on-demand content, irrespective of whether that content is then distributed by an aggregator.

The effect of imposing such an obligation on an aggregator would be to transfer editorial responsibility to the aggregator, thereby requiring the aggregator to view and comply the material, and identify itself to viewers as the provider of such content (Article 3a).

An alternative approach (proposed during the pre-consultation phase) whereby the aggregator is made ‘legally’ responsible for the content, but is not required to review the content before making it available to its customers (instead relying on contractual warranties and indemnities, for example), could increase the risk of potentially infringing content being made available.

(b) The requirement that service providers be encouraged to ensure that services are gradually made available to people with impaired sight or hearing (Article 3c) is similarly only of relevance to the content provider who will have access to transcripts for the preparation of subtitles and audio-description, as is the case now in relation to broadcast material.

(c) The obligation to ensure that service providers comply with rules on product placement and on signalling prop placement of ‘significant value’ (Article 3g) again is most appropriately fulfilled by the undertaking responsible for commissioning or producing the content, rather than the aggregator.¹⁰

1.9 Sky’s responses to the relevant consultation questions address the issue of responsibility for PIN protection mechanisms.

Broadcasters and content providers currently retain editorial control of their VOD content

1.10 Sky’s VOD services (described above) seek to replicate the range and choice of programming

⁷ Recital 1 of the Directive.

⁸ Recital 17 of the Directive.

⁹ Recital 20 of the Directive.

¹⁰ The same is true in relation to the rules on sponsorship (Article 3f).

available in the linear world on an on-demand basis. Sky provides content from its own linear services under the appropriate channel brands, and does the same for third party content, for example, listing content in the Sky Player service under the appropriate channel brands (see Annex 1).

1.11 [X]

1.12 Any change to the existing model would involve a fundamental change in the operational practices currently followed by Sky and third party content providers. Were Sky to have regulatory responsibility for the third party content provided as part of its VOD retail services (in addition to its own content), Sky would have to undertake all of the tasks described above in complying material for inclusion in the service, including the clearance of rights with underlying rights holders. The relationship between Sky as aggregator and the broadcasters and content providers would effectively become identical to that currently undertaken by Sky's broadcast operations when it acquires pre-produced programming from third party production companies for inclusion as part of its wholly owned channels, for which Sky is "editorially responsible".

1.13 Furthermore, if the content has been complied for broadcast in a linear service, the aggregator will simply be repeating tasks already carried out by the broadcaster. Such duplication is inefficient, increases costs and could reduce the competitiveness of both the VODMS and the aggregated service. The compliance function should only be carried out once, and by the appropriate party.

Aggregator responsibility would undermine existing business models

1.14 Sky retails packages comprising its own and third party channels to customers in return for payment. Sky's arrangements with channel providers are governed by distribution agreements that provide for the supply of the channel on the one hand in return for Sky making the channel available to its customers and paying consideration to the broadcaster. Sky's principal task under these arrangements is the marketing of the channels and packages containing those channels to customers, and associated customer management functions. This model is largely replicated in the on-demand environment.

1.15 There is a significant risk that the operational changes that would follow a change in regulatory responsibility (see paragraph 1.12 above) could result in the disappearance of broadcast channel brands in aggregated VOD services.

1.16 [X]

1.17 The effect of aggregators becoming responsible for the AVMS Obligations would be to increase significantly the costs involved in providing aggregated VOD services. An increase in such costs would leave fewer resources available to acquire third party content, and so such services would be likely to reduce the overall amount of third party content being made available. Not only would this make aggregated services less attractive to end users, but it might also reduce, or even remove, the incentive for aggregators to market third party channel brands as the source of programming. Aggregators could decide to acquire the underlying rights to programming and bypass broadcasters in order to reduce costs.

1.18 Whilst this might also result in a proliferation of 'stand-alone' VOD services provided by channel brands seeking to continue their existence in the on-demand environment, such a fundamental change would be to the detriment of consumers and industry alike and should not result solely from regulatory intervention.

Duplication of regulatory responsibility must be avoided

1.19 Aggregator responsibility would result in different undertakings having regulatory responsibility for identical content made available on different platforms. Not only is this inefficient as programming will have to be complied by each aggregator (in addition to having been complied by the relevant broadcaster), but it replicates those inefficiencies throughout the regulatory process – for example, the need to enforce a decision against multiple aggregators even though a complaint had been received in respect of the content in one such service.

1.20 A good example would be the BBC's on-demand content. The BBC is required to syndicate its

content to multiple platforms and services. It is currently available direct from the BBC, from Virgin Media, from BT Vision, and now (to a degree) in Sky Player, in addition to access being made available via mobile phones and games consoles. An aggregator-responsibility model would result in all of these service providers being responsible for the fulfilment of the AVMS Obligations for the BBC's content. This would be extremely unsatisfactory from an operational and commercial perspective, as well as from a regulatory perspective, for the reasons described above.

PART B

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?

1.1 Sky has no view on this issue.

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?

2.1 DCMS suggests that an on-demand audiovisual media service (VODMS) should comprise the following elements:

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

2.2 Sky considers the last of these criteria to be uncontroversial. Sky’s comments on the first two elements of the proposed definition are set out below.

“video-on-demand” service

2.3 According to the Consultation Document, the definition of a VODMS will encapsulate the following “key ideas”:

- (a) the user can make individual selections of programmes;
- (b) the programmes must include programmes of a kind similar to those available on scheduled television broadcasting services;
- (c) 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
- (d) the programmes must be received by means of an electronic communications network.¹¹

2.4 These criteria raise a number of issues which are discussed below, however, Sky notes at the outset that the meaning of “facility” in this context is unclear and may be misleading. The most obvious meaning of “facility” would be the “means or equipment facilitating the performance of an action”. This context immediately focuses attention on the nature of the service (i.e. the technical equipment) rather than on the nature of the content comprising the service. It would seem sufficient to state that a VODMS is “principally a “video-on-demand” service”, in order to exclude services whose principal purpose is not “*the provision of programmes*”.¹²

2.5 The second “key idea” is described in the Consultation Document as “*particularly important*” as “[i]t excludes many audiovisual services where the content is not in a format similar to television programmes”.¹³ DCMS states that this filter is intended to allow the development of new services which will not be subject to the new regulatory framework.

2.6 It is doubtful whether this requirement can have this limiting effect as it is not at all clear what DCMS means either by “*programmes of a kind similar to those on scheduled television broadcasting services*” or by content that is “*not in a format similar to television programmes*”. Given the wide

¹¹ Paragraph 26 of the Consultation Document.

¹² See Recital 18 and paragraph 2.12 below.

¹³ Paragraph 27 of the Consultation Document.

- range of programme formats available to television broadcasters now,¹⁴ it is by no means certain that this requirement would have the desired effect, and it is likely to increase uncertainty as to whether a particular video service falls within the definition or not.
- 2.7 The boundaries for the scope of VODMS regulation must be clearly delineated if they are to provide the certainty intended by the Directive. Despite stating its importance and certain exclusionary effect, DCMS has failed to provide a single example of an existing service that will not be caught by the proposed regulation due to the fact that its content is “*not in a format similar to television programmes*”. Furthermore, if the requirement is aspirational, looking forward to future as yet undeveloped services then it cannot be stated, as it is in the Consultation Document, that the requirement “*excludes many audiovisual services*” from scope.
- 2.8 DCMS must clarify which services it considers should be caught by its proposed definition and which are not. Both are equally important.
- 2.9 The third criterion states that “*the user can watch the programmes at a time of his or her own choosing*”. This is a characteristic of content recorded from a linear source at the pre-request of the viewer, for example, using a personal video recorder such as Sky+. There has been no suggestion that such content or facility would be caught by the Directive, and nor should it. It might be more appropriate to reframe this criterion so that it references the transmission or delivery of the programme in response to the user’s request (instead of or in addition to the user watching the programme at a time of their choice).
- 2.10 Although paragraphs 18 and 19 of the Consultation Document set out the criteria that Government has extrapolated from the recitals and articles of the Directive that dictate whether a VODMS is covered by the Directive or not, not all of these criteria are reflected in the proposed definition of a “video-on-demand” service.
- 2.11 Accordingly, in addition to the “key ideas” reflected in the Consultation Document definition, a VODMS must be:
- (a) an economic activity, as defined by the EC Treaty (Recital 16);
 - (b) in competition with television broadcasting generally (Recital 16);
 - (c) “television-like” by competing for the same audience as television broadcasts (Recital 17); and
 - (d) “television-like” to the extent that the nature and the means of access to the service would lead the user reasonably to expect regulatory protection (Recital 17).
- 2.12 Recital 18 indicates that the definition of a VODMS under the Directive “*should exclude all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service.*”
- 2.13 Government has sought to reflect this requirement in the consultation through the idea that the “principal facility” of the service is a video on demand service. However, as noted above, the Consultation Document does not explore what is meant by “principal facility” and “facility” itself risks confusion. It is submitted that without further guidance, this element of the DCMS’s definition could lead to inaccurate implementation of the Directive and uncertainty for industry. The examples provided in the recital appear to indicate that “principal purpose” should be broadly construed and should not be limited solely to services that only provide VOD programmes and may, for example, include video content accompanying text based content on news websites, or programming provided as part of a social networking site.

¹⁴ See paragraph 4.5 and 4.6 of Sky’s response to DCMS’s pre-consultation consultation on draft scope Regulations in which Sky drew DCMS’s attention to examples such as Current TV, and (the now sadly defunct) Bedroom TV.

- 2.14 Similarly, although services excluded from the scope of the Directive are listed in the Consultation Document, these are not reflected in the definition. It would have been helpful if Government had developed these exclusions further as part of the consultation as they are amongst the only examples provided, and therefore act as useful guidance on scope.

The meaning of “editorial responsibility”

- 2.15 “*Editorial responsibility*” is the key concept in assigning responsibility for the obligations imposed by the Directive, both in respect of scheduled services and VODMS.¹⁵
- 2.16 The Directive defines “*editorial responsibility*” in respect of scheduled services as “*the exercise of effective control both over the selection of programmes and over their organisation ... in a chronological schedule*” and in respect of a VODMS as “*the exercise of effective control both over the selection of programmes and over their organisation ... in a catalogue.*”
- 2.17 Accordingly, there are two parts to each definition, with the first relating in both cases to the selection of programmes for inclusion in the ‘service’ and the second, relating to the organisation of those programmes.

‘Effective’ not ‘general’ control

- 2.18 DCMS appears to suggest, at paragraph 30 *et seq.*, that the concept of “general control” (as used in the Communications Act 2003 to identify the licence holder of a broadcast television service)¹⁶ can be used as a proxy for “effective control”. Although Recital 23 of the Directive encourages Member States to “*further specify aspects of the definition of editorial responsibility, notably by the notion of “effective control”*” when implementing the Directive, Sky contends that using an existing concept as a synonym for a new concept is likely to cause confusion for industry, particularly when the current legislation makes no reference to the organisational element of the Directive’s definition. There would appear to be no reason why “effective control” could not be used and further defined, without reference to existing concepts.

Editorial responsibility in ‘stand-alone’ VODMS

- 2.19 Notwithstanding this issue, Sky submits that identifying who has “*editorial responsibility*” and therefore “*regulatory responsibility*” over a VODMS (whether provided on a stand-alone basis or as part of an aggregated service) should not be “*more complex*” than for a scheduled service. In essence, the primary question remains ‘who has (effective) control over which programmes are comprised in the service?’ Once this has been established, there is a secondary question as to whether that person also has control over the organisation of those same programmes, whether in a schedule (for a linear service) or ‘catalogue’ (for a VODMS).
- 2.20 DCMS states that VOD content provided as part of a ‘stand-alone service’ by a single operator and branded as such leaves “*no ambiguity*” as to editorial responsibility.¹⁷ It must be assumed that DCMS considers this to be the case for both questions raised by the concept, as there is no discussion in relation to such services as to who has effective control over the organisation of the relevant programmes in any catalogue.
- 2.21 Sky agrees that, generally, where a content provider makes its branded content available on a VOD basis directly to consumers, for example, via a website (e.g. ITV.com or TeachersTV.com), there can

¹⁵ Sky notes that ‘mediate’ in this context risks adding confusion as this can itself mean a form of ‘editorial responsibility’. It would be sufficient in this context to refer simple to a VODMS being “supplied by a service provider exercising “editorial responsibility””.

¹⁶ Section 362(2) CA03 defines the provider of such services being the sole person with “general control over which programmes ... are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service)”.

¹⁷ Paragraph 32 of the Consultation. Sky notes that Channel 4’s 4oD service contains third party content and is therefore an aggregation service.

be little doubt that the content provider is also the VODMS provider.

Editorial responsibility in aggregated services

- 2.22 Sky submits that the insertion of an additional party between the content provider and consumer, acting as retailer (whether or not as part of an aggregated service), will not and should not change this analysis, provided the content provider retains ‘editorial responsibility’ over its content.
- 2.23 Sky welcomes the approach set out in the Consultation Document which appears to endorse Sky’s view that aggregated VOD services, such as those provided by Sky, can be understood to be a collection of separate VODMS, each provided by a different content provider who identifies the content in their own ‘catalogue’ as belonging to them through the use of branding, and who each retain “editorial responsibility” over that content.¹⁸
- 2.24 There is, however, a need for guidance from Government on what is required to satisfy the relevant parts of the definition in order to provide greater certainty for content providers and aggregators.
- 2.25 As noted above, in an aggregated service a VODMS will sit alongside other VODMS (some provided by other third parties and others perhaps provided by the aggregated service provider in a dual capacity). Generally (and particularly in relation to Sky’s arrangements with third party content providers), responsibility for the two parts of “editorial responsibility” in respect of each VODMS lies with the content provider as the party responsible for (i) selecting the content to be made available on a VOD basis (usually from current broadcast content or library content), and, (ii) how that content is listed or organised. Each of these aspects is explored further below.
- 2.26 Taking Sky’s relationship with the third party content providers whose content is available through the internet-based Sky Player application as an example of a typical content provider/retail service provider relationship, it is clear that there are two possible undertakings that could have “editorial responsibility” for the VOD content available:
- (a) Sky is acting as an aggregator of its own and third party content, providing a user friendly interface and navigational tool to customers, as well as a marketing platform for content providers to reach viewers and exploit their content beyond the traditional linear broadcast environment; and
 - (b) the content providers make their content available for viewing through the Sky Player application. All content is associated with the relevant content provider’s chosen brand (usually, if not always, that of a linear broadcast service), creating channel pages and areas for viewers to browse, and at the same time allowing user generated searches across all content available through Sky Player.
- 2.27 The Consultation Document acknowledges that in relation to the ‘seat’ of “editorial responsibility”, *“the exact position will depend on the contractual arrangements between the companies involved”*. Sky Player, however, (in common with the other major aggregated VOD services from Virgin Media, BT Vision and Tiscali) is organised in a way that seeks to complement scheduled television channels, and therefore reflect the predominance of linear television channel brands. As explored further below, in such services, it is the third party content providers that select the programmes to be made available, and, to an adequate degree, how they are ‘organised’.

(i) programme selection

- 2.28 The selection of programmes for inclusion in a particular VODMS is relatively straightforward as only the content provider has the right to make its content available on an on-demand basis and has the requisite knowledge of the content in order to ensure that it complies with the obligations imposed by the Directive.

(ii) ‘organisation in a catalogue’

- 2.29 This requirement is satisfied by the content provider designating the appropriate genre in which

¹⁸ See paragraphs 34 and 35 of the Consultation Document.

the content will be listed (whether in a catalogue comprising only the VODMS of that provider, or in the overall aggregated VOD service), providing the programme name and synopses as they will appear in the aggregated service, appropriate content warnings as well as rating information that may be used to trigger PIN protection mechanisms. Further data may be provided by the content provider to assist in user searches to ensure that the most appropriate content is provided in response to user enquiries (e.g. cast and production details).

- 2.30 Content providers have an interest in ensuring that their content is appropriately presented in an aggregated service, and have control over these important elements of each listing. The presentation of this information to the end user and its accuracy and appropriateness are equivalent to the decisions taken by a broadcaster as to when a programme should be scheduled in a linear service. Accordingly, it is entirely appropriate for control over these aspects of a VODMS to satisfy the requirement for effective control over the ‘organisation of programmes in a catalogue’.
- 2.31 Furthermore, Sky submits that it is in the interests of all parties that a flexible and purposive approach be taken to applying this part of the definition in order to fulfil the objectives of the Directive.
- 2.32 There must be a presumption that the undertaking with “effective control” over the selection of the programmes also has control over their organisation in a catalogue. This presumption arises from the need for there to be a single entity with ‘editorial responsibility’ for a particular programme. Nothing in the Directive contemplates shared responsibility. Similarly, the Directive cannot have intended programmes that would otherwise be caught by its provisions to escape due to the fact that no one person had effective control over **both** the selection **and** organisation of the content.
- 2.33 This presumption is also justified when one considers that the intention of the second element in respect of VOD content is to provide an equivalent function to the scheduling of content in a linear service (as noted above).
- 2.34 Were the regulatory scheme to go beyond such matters, for example to consider ‘organisation in a catalogue’ to include navigational issues such as the order in which content is listed, the extent to which it is made available with content provided by other media service providers, etc., then there is a material risk that regulatory responsibility will be arbitrarily determined by the specific terms of each individual contract, without any regulatory certainty for the parties or regulators (in addition to the risks of divided responsibility).

PIN protection mechanisms

- 2.35 The “*provision of tools to enable audiences to manage access to potentially harmful content*”¹⁹ is irrelevant to the question of who has “editorial responsibility” for a particular item of content, and has no basis in the Directive. Furthermore, there is also no basis for limiting this question to aggregated services, as issues of PIN control will arise in relation to ‘stand-alone’ services as well. Does DCMS suggest that, were a content provider to use an ‘off the shelf’ software solution to provide PIN control functionality for a ‘stand-alone’ service, the provider of that software would be responsible for compliance under the regulatory framework if it failed? This seems unlikely and impracticable.
- 2.36 The existing broadcast regime provides a more than adequate solution to DCMS’s concerns regarding PIN failure. Under Ofcom’s Broadcasting Code, broadcasters can only broadcast certain content if protected by PIN or equivalent protection system. Sky, as a provider of EPG services, facilitates the application of PIN controls to programmes. Sky is not accountable to Ofcom for these services (it is the responsibility of the broadcaster to ensure its content is protected appropriately). Sky’s obligations are to the broadcasters that use this functionality under their service agreements. Were Sky’s services to fail on a regular basis, it would soon find that broadcasters would cease to make relevant content available over the platform as it would not be fit for purpose.

¹⁹ See paragraph 35 of the Consultation Document.

- 2.37 It is also of note that such protection mechanisms can fail for a variety of reasons which are not always the responsibility of the technical service provider (for example, content must be properly signposted as requiring PIN protection, a task assigned to the content provider as the party with awareness of the exact nature of the programme). It would appear disproportionate in the extreme to carve out an element of responsibility under the Directive for ‘aggregators’/platform providers when the risk of failure rests, at least in part, with the content provider.
- 2.38 Furthermore, in order to implement the suggestion in the Consultation Document that responsibility for protection mechanisms should rest with the provider of such functionality, it would be necessary to designate that person as having “editorial responsibility” over the content comprising the VODMS without reference to the definition outlined in the Directive (as the provider of technical services could not be considered to have effective control over the selection and organisation of programmes). This is clearly undesirable and impracticable.
- 2.39 Whilst there is an obvious desirability in ensuring that adequate technical mechanisms are applied to protect children from potentially harmful VOD content in the absence of a temporal watershed, it cannot be proportionate to achieve regulatory jurisdiction over such technical services by distorting the concept of “editorial responsibility”. Such matters could, however, be considered by the appointed co-regulator, for example, through the drawing up of voluntary arrangements for aggregators and providers of technical services to ‘stand-alone’ services. Such matters should not be dealt with in the primary legislation.
- 2.40 In conclusion, in the majority of circumstances, it is content providers that will be editorially responsible for their own content, whether provided directly to consumers or through third party retailers and aggregators. Such an approach requires an understanding that, as with scheduled television channels, the relevant ‘service’ comprises a collection of programmes, and not the ‘platform’ or user interface through which the content is accessed.
- 2.41 Such an approach is consistent with the intentions and objectives of the Directive for the following reasons:
- (a) The obligations imposed on the provider of a VODMS relate to the editorial content of the programmes comprising the VODMS. Retailers and aggregators have no control or awareness of the editorial composition of the content made available through their retail services beyond the information supplied to them by content providers, and are therefore not in a position to ensure that material complies with the requirements of the regulation in advance, and therefore prevent the harms the Directive seeks to avoid or achieve its objectives, without intervention; and
 - (b) near identical obligations are imposed on broadcasters of scheduled television services. Where content from scheduled services is made available on an on-demand basis, by the same undertaking and under the same channel brand, it is entirely appropriate that the same undertaking should be responsible for regulatory compliance in respect of both means of distribution. To suggest otherwise would be equivalent to making Sky responsible for all the editorial content on every channel contained in each of its subscription packages.

Content providers outside the EU

- 2.42 Sky acknowledges that the availability in aggregated services of VODMS provided by content providers from outside the EU (and therefore not directly caught by the Directive) poses a particular and difficult issue for Government in the context of the implementation of the Directive. Sky is concerned, however, that this issue has been wrongly characterised as a legal issue, rather than a matter of policy. Sky contends that it is a matter of policy only, and as such, there is much greater flexibility available to Government as to how to deal with the issue.
- 2.43 Sky wishes to emphasise at this point that it is not in Sky’s interests as a responsible provider of aggregated VOD services to provide its customers with content that infringes the AVMS Obligations. Sky will continue to act in a responsible manner, and develop and market its services in the

interests of its customers, on whom it depends.

2.44 At paragraph 40 of the Consultation Document DCMS states that:

*“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.**”* (emphasis added)

2.45 Sky does not understand the legal basis for the above statement which appears to state Government’s view that the Directive requires VODMS provided by undertakings that do not fall under the jurisdiction of any EU Member State to be subject to the obligations it contains. This would appear to be inherently contradictory as, by definition, such VODMS fall outside the jurisdiction of the legislation.

2.46 Article 2(1) of the Directive states that:

*“Each Member State shall ensure that all audiovisual media services transmitted **by media service providers under its jurisdiction** comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.”* (emphasis added)

2.47 Furthermore, the position is clear from the recitals to the Directive which emphasise the role of the Directive in supporting the European **internal** market for audiovisual media services:

*“It is therefore necessary, in order to avoid distortions of competition, to improve legal certainty, **to help complete the internal market and to facilitate the emergence of a single information area**, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).”²⁰* (emphasis added)

2.48 The Directive is not designed or intended to regulate trade with services established in non-Member States.

2.49 If “editorial responsibility” (as defined) sits with an undertaking that is outside the Directive’s jurisdiction, the fact that such services may be accessed in the UK via an aggregated service is irrelevant to the question of whether a non-EU VODMS is subject to the Directive. Accordingly, it would seem inappropriate for Government to state that regulation of non-EU services on aggregated services is a legal requirement of the Directive.

2.50 Notwithstanding the absence of any legal requirement in the Directive that might require non-EU services to be subject to the basic tier of regulation, to the extent that there may be concerns regarding the availability of content which is not subject to the same regulation as content provided by operators located in the EU, such concerns should not be dealt with by the imposition of disproportionate and discriminatory regulation.

2.51 Furthermore, the Consultation appears to view this problem as one generated solely by aggregated services, and singularly fails to acknowledge that this issue can also arise with ‘stand-alone’ services as a result of the lack of geographic boundaries on the Internet. A VODMS provided by a content provider in the US (with no EU presence) making ‘television-like’ content available online to UK customers would clearly fall outside of the scope of the Directive due to the location of the provider. It appears to be Government’s view that where that same content appears in an aggregated service (with the US based content provider retaining editorial responsibility), the provider of the aggregated service should be subject to the regulatory obligations imposed by the Directive in respect of that content. Such an approach would be arbitrary, inconsistent and discriminatory.

2.52 Any solution to this issue must be applied equally to stand alone and aggregated services in order to be effective in meeting the policy concerns referred to above. Sky agrees with Government’s suggestion in paragraph 43 that this particular issue is best dealt with by the co-regulatory body

²⁰ Recital 7 of the Directive.

and industry. However, this can only be on a self-regulatory basis given the absence of any legal basis for regulatory interference. If, as might be expected, the co-regulatory regime operates a 'kite-mark' system, participation in the industry scheme will provide non-EU content providers with instant credibility with consumers. Aggregators, such as Sky, might also participate in such a scheme on a voluntary basis to encourage non-EU content providers to submit to the co-regulatory body's jurisdiction if they wish to make their content available in the UK under their own name (rather than wholesaling content to established UK content providers to be provided under that content provider's brand).

- 2.53 The Government notes at paragraph 42 that respondents to the consultation might wish to consider the nature of the obligations comprising 'regulatory responsibility' under the Directive. As noted above, Sky considers the nature of the obligations to be a key factor in determining that 'regulatory responsibility' should lie with content provider, rather than retailers/aggregators.

Impact assessment

- 2.54 Whilst Sky appreciates that it is necessary for Government to attempt to assess the impact of its proposals, Sky is concerned that the impact assessment carried out in relation to this consultation is flawed, having been based on an inaccurate evidence base (as it appears to prejudge the question of what is a 'VODMS' under the Directive), which is not reflected in its conclusions.
- 2.55 Sky notes in this regard that on page 40 of the Consultation Document, the 'impact assessment' states that in 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)*", and that another three had appeared by the end of 2007, including the BBC iPlayer. Reference is made to ATVOD's members and a relatively restricted view of the scope of the services covered by the Directive. The impact assessment therefore clearly envisages aggregated services being the focus of the regulation and does not contemplate any other services being in scope.
- 2.56 It is self evident that any impact assessment that is based upon inaccurate bases, or a pre-determined assessment of the outcome of the consultation is flawed. This is a significant failing and invalidates the impact assessment which must be undertaken again once a decision has been taken as to the appropriate regulatory framework.

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 might 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?

4.1 The key criterion to which Government should have regard in framing the question of scope is to ensure that all "*television-like*" (*i.e. they compete for the same audience as television broadcasts*)²¹ services are caught. If this is achieved, then the potential risks associated with the introduction of additional regulation will be minimised.

4.2 Clearly, Sky would be concerned were any undertaking found to be a provider of an VODMS under the proposed definitions merely as a result of its decision to make that VODMS available to its customers. The decision to retail a service cannot be the basis for 'editorial responsibility', and falls outside the scope of the Directive.

4.3 Furthermore, Government will need to develop the concept of a service's "principal purpose" being a VOD service. It is likely that many services which otherwise might fall within the scope of the definition will seek to argue that the supply of that content is not the "principal facility" they offer. In order to provide certainty to industry, the boundaries of the definition must be clear and

²¹ Recital 17 of the Directive.

appropriately defined.

- 4.4 As detailed above, in this regard, it is not clear why Government has departed from the wording of the Directive, which refers to the exclusion of services “*whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal service. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service.*” Such a description provides a great deal more detail and understanding than Government’s novel concept of a service having a “principal facility”.

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?

- 5.1 See paragraph 2.18 above.

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?

- 6.1 In accordance with the Directive, the only undertaking with ‘regulatory responsibility’ for a particular VODMS should be the undertaking with ‘editorially responsibility’ for that service. Where the ‘aggregator’ merely performs retail functions (which would include selecting the content provider VODMS it wishes to make available to its customers, the means of supply of that content to those customers and the overall ‘look and feel’ of the retail service, as well as pricing and customer management), and does not have ‘editorial responsibility’, there is no reason for the aggregator to have regulatory responsibility for any of the content available through its service.
- 6.2 Government appears to envisage the possibility of scenarios where either the aggregator **and** VODMS provider are simultaneously responsible for a particular programme (in respect of some or all of the relevant obligations), or each is responsible for certain mutually exclusive obligations. As demonstrated above (see paragraph 2.29 *et seq.*), neither proposition is practicable or logical, since at any one time, only one party can have editorial responsibility for a particular VODMS.
- 6.3 Sky has dealt with Government’s particular concern regarding PIN protection and similar systems above (see paragraph 2.35 *et seq.*).

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?

- 7.1 See paragraph 2.42 *et seq.* above.

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?

- 8.1 Sky does not consider that separate rules are required in respect of ancillary and other additional services. The question as to whether such services ought properly to fall within the scope of the Directive and therefore the UK regulations should be the same as for all relevant content. The mere fact that such content is provided alongside a VODMS that is caught by the regulations should not be determinative of its status. For example, were a VODMS that focussed on feature films to be caught by the rules, an ancillary facility that enabled users to post audiovisual reviews of the films

for viewing by other users should not be caught as such content would be user-generated and “non-economic”.²²

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?

9.1 It is not clear what this question means by “same overall service”. In responding, Sky makes reference to paragraph 47 of the Consultation Document which refers to “Mixed” offers, consisting of both scheduled television broadcasts and VODMS.

9.2 In principle, Sky considers that implementation of the Directive requires regulatory differentiation given the additional regulation imposed on television broadcasts as compared to VODMS.

9.3 As set out in greater detail above, however, Sky does not consider that it is appropriate to have “editorial responsibility” in respect of a scheduled service sit with the broadcaster, and in respect of a VODMS of the same programmes sit with the retailer (whether or not an aggregator) rather than the undertaking with true ‘editorial responsibility’ (the broadcaster).

Regulatory System for on-demand audiovisual media services

Sky considers that Option 2 provides the appropriate balance between certainty of structure and flexibility of implementation, being based upon that employed for the regulation of broadcast advertising standards. The responses to the questions in this section reflect this view.

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?

10.1 Sky considers that the following criteria are appropriate for determining the best regulatory options regarding the appropriate regulatory system:

- (a) need to implement the Directive effectively;
- (b) transparency to the public and to industry;
- (c) risk of creating new barriers to entry to the sector; and
- (d) incentives for video-on-demand providers to participate in the scheme;
- (e) incentives for video-on-demand providers to comply with the rules;
- (f) flexibility and future proofing.

10.2 Sky considers that the following criteria are appropriate to assessing whether a particular regulatory system functions adequately in fulfilling the objectives set for it, and are not therefore relevant to the question of which regulatory model is appropriate:

- (a) public awareness and visibility of the scheme;
- (b) consumer confidence;
- (c) resources and workload;
- (d) costs and funding mechanisms;
- (e) existing relationships; and
- (f) complaints handling, appeals and enforcement.

10.3 These criteria cannot be used in the abstract to decide, for example, whether it is more

²² Recital 16 of the Directive.

appropriate or preferable for Ofcom to exercise the regulatory functions required by the Directive or a newly created co-regulatory body. Once that decision has been made, however, these criteria can inform the implementation of the framework, for example by requiring the co-regulatory body to undertake an advertising campaign to raise public awareness and visibility of its existence.

10.4 The criterion “reasonable consistency with existing content standards for broadcast content and for advertising” would seem inappropriate when considering the question of what the most appropriate regulatory system should be as it relates to the application of relevant standards and not to the assessment of a particular regulatory model.

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.

11.1 Sky does not have a view on this issue.

12. Should service providers be subject to a membership, prior approval, notification or general conditions regime?

12.1 Sky does not have strong views on the appropriate mechanism for co-regulation, noting that there are advantages and disadvantages to each suggested basis for the operation of the regulatory system. However, taking into consideration the difficulties of funding the regime and achieving industry accountability, it would seem that a system requiring membership would be more likely to achieve these goals than the other bases, and is therefore to be preferred from launch of the scheme. Consideration should also be given to allowing the regime to be sufficiently flexible that it is able to adapt to the needs of industry over time, for example, enabling a move from a membership scheme to one of prior notification following a transitional period when greater certainty might be required.

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?

13.1 It is for Government to determine the legislative definitions in the most appropriate manner. It cannot and should not draft in a vacuum without reference to reality, and therefore should have a clear view as to which services fall within its definitions and without. It should not, however, be involved in the day to day interpretation of its own statute.

13.2 Whether operational determinations of scope fall to Ofcom or an industry co-regulator cannot be decided now without a greater understanding of the basis for regulation and the framework to be adopted. Logic and practicability suggest, however, that such determinations should fall first to the co-regulator, and in the absence of agreement to Ofcom as back-stop. Any party taking issue with such a determination would then be able to take the matter to the courts under judicial review.

14. Who should be responsible for developing and maintaining a standards code and any additional guidance?

14.1 In order for Option 2 to function properly, industry, through the co-regulatory body, must ‘own’ the applicable standards code and guidance in order to ensure industry buy-in and responsibility.

14.2 There is a limited role for Ofcom which will be required to approve any code once drafted and any subsequent material amendments (as Ofcom cannot be expected to apply its back-stop powers in relation to a code that it has no endorsed). Ofcom may be consulted on guidance, but should not have a right of approval over such materials (to the extent that they are required).

15. Who should be responsible for monitoring compliance, investigating complaints and reviewing any breaches of the code?

15.1 As with current similar regulatory schemes, such activities would be carried out by the co-regulatory body, with support from Ofcom where appropriate (e.g. in relation to cross-platform research, etc.).

16. What sort of sanctions should apply and who should apply them?

16.1 It is difficult to respond in any detail to such a generalised question. One would expect a range of sanctions to be available to both Ofcom and the co-regulator to be applied in respect of a range of possible offences. The co-regulator should be the first port of call for any complaint or dispute and would be required to deal with each matter on a case by case basis as appropriate. More serious cases or serial offenders might be referred back to Ofcom under pre-determined criteria for the imposition of stronger sanctions.

16.2 As a matter of principle, it would seem inappropriate to subject VODMS providers to sanctions that are harsher than those available under the broadcast licensing regime. VODMS regulation is intended to be lighter, as is made clear at Recital 42:

“On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.”

16.3 The range of sanctions available might therefore include written warnings, publication of findings against an undertaking and directions to remove particular programmes from a service.

16.4 Sky does not consider that it would be appropriate to grant a co-regulatory body the power to fine any member or authorised party. Such powers could discourage membership and leave the co-regulator at risk of legal challenges.

16.5 Notwithstanding the above, the ultimate sanction should be withdrawal of membership or permission to operate the relevant VODMS. This should only be implemented by Ofcom, consistent with its ability to revoke broadcast licences. However, such a sanction will only be effective if there are also appropriate sanctions written into the primary legislation regarding non-compliance with the requirement to participate in a designated scheme.

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?

17.1 See preceding response.

18. In the light of all these considerations, which option do you prefer and why?

18.1 As noted above, Sky considers that Option 2 presents the only feasible co-regulatory structure.

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?

19.1 Sky considers that Option A, dictating that only those advertisements which are viewed as a result of accessing a particular on-demand programme, is not only the most appropriate option, but is also the option most clearly intended by the Directive. The reasons why Option A should be adopted may be summarised as follows:

- (a) Article 3e of the Directive defines advertisements covered by the regulatory regime as being those which “*accompany ... a programme ... in return for payment or for similar consideration*”. This definition creates a clear link between the programme and the advertising that can only be interpreted in the manner set out as Option A. The Directive does not state that its obligations apply to those advertisements that accompany **a service**, which would be the case were the Directive intended to be interpreted as Option B;
- (b) Option A is analogous to the position in relation to broadcast advertising, where advertisements are inserted between programmes and parts of programmes. In order to properly implement the Directive, Government must ensure that regulation between broadcast and on-demand services is consistent where appropriate;
- (c) Banner and other advertising of a sort that might be considered to “accompany” services (i.e. Option B) is currently regulated by the ASA under a purely self-regulatory scheme. Were Option B implemented, it would undermine the self-regulatory nature of non-broadcast advertising regulation to the detriment of all parties given the successful functioning of that system to date, and leave advertisers and service providers at risk of double-regulation; and
- (d) Option A is the most practical option as the link between a programme and the advertising that accompanies it ensures that responsibility for each relevant advertisement is clear and unambiguous. Under Option A, complex issues raised by the Consultation Document regarding advertisements in “*other parts of the screen*” with “*no connection with the video-on demand provider*” do not arise.
- (e) Furthermore, in relation to aggregated VOD services, comprising a number of different VODMS provided by different content providers (each with editorial responsibility for their own service) it is unclear how responsibility for display advertising caught under Option B would be assigned to the aggregated service provider. The retailer (who is likely to have benefited from the display advertising arrangement) is not caught by the regulations.

20. Should there be only one co-regulatory body for advertising on video-on-demand services?

20.1 Sky supports the assignment of the regulation of advertising accompanying VOD programmes to the ASA, and only the ASA (acting as an umbrella co-regulatory organisation in the same way as it acts for broadcast advertising through the interaction of the ASA, BCAP and basbof).

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?

21.1 Ofcom should have overall responsibility to regulate VOD advertising consistent with the co-regulatory framework. It is therefore appropriate for it to be the assignor of those powers to the ASA. The assignment of those powers to the co-regulatory body responsible for editorial VOD content first introduces an unnecessary complication into the structure and will lead to

considerable delays should Ofcom need to intervene in order to exercise its statutory powers, reducing the flexibility that the framework is designed to introduce.

22. Should the Advertising Standards Authority be the body, or one of the bodies, which regulate advertising on video-on demand services?

22.1 See Sky's response to question 20.

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?

23.1 See Sky's responses to questions 20 and 21.

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?**

24.1 Given the inseparable link between product placement and editorial content, product placement in VOD programmes should be regulated by the content regulator.

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?**

25.1 Given the inseparable link between the sponsorship rules set out in the Directive and the editorial content of the sponsored programme, sponsorship of VOD programmes should be regulated by the content regulator.

Product Placement

Although Sky supports the removal of unnecessary regulation in general, it is far from clear what the effect of the introduction of product placement would be in practice.

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)?

27.1 [~~✗~~]

28. What advantage would there be in permitting product placement in any or all specified genres? If so, which genre(s), when and why?

28.1 [~~✗~~]

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?

30.1 [~~✗~~]

31. Should the same rules apply to both television broadcasting and on-demand audiovisual media services? If not, how should they differ and why?

31.1 [~~✗~~]

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-regulators?

35.1 [~~✗~~]

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?

36.1 [~~✗~~]

37. How should product placement be signalled to viewers?

37.1 [~~✗~~]

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)?

38.1 [~~]~~

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?**
- 42.1 Sky provides uplink services to a number of third party broadcasters in the UK. [§]. Notwithstanding this fact, the adoption of legislation giving Government and/or Ofcom the power to interfere with bilateral agreements between commercial undertakings is a significant matter and should not be undertaken lightly. As Government notes in its consultation, this power would be unprecedented in relation to communications services.
- 42.2 In the event that Government requires additional legislation in order to take action against non-EU broadcasters uplinked from the UK, Sky agrees with Government that Option 2 is the most proportionate means of achieving the removal of a particular service. Government must, however, ensure that any new powers requiring action to be taken by UK providers of uplink services are only exercised as a last resort and do not become the default option for dealing with difficult non-EU broadcasters. Accordingly, Sky considers that any primary legislation should require Ofcom to develop detailed procedures for dealing with such cases before taking action through uplink providers and should consult with stakeholders before adopting such procedures.

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 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?**

Sky is unable to provide meaningful responses to these questions in relation to the proposals set out in the Consultation Document as they are not sufficiently developed to enable a clear understanding of their impact. To the extent that Sky is able to predict the impact of certain options available to Government, Sky has commented in the text of its responses to the questions posed, and in its introductory section.