

Channel 4 response to the DCMS Consultation on the Audiovisual Media Services Directive: Proposals for Implementation in the United Kingdom

Executive summary

Channel 4 welcomes the opportunity to respond to the DCMS consultation on the implementation of the Audiovisual Media Services (AVMS) Directive.

In implementing the Directive, Channel 4 believes that it is important to achieve a balance between ensuring consumers are protected and ensuring that regulation responds to consumer and industry expectations. It is also important that the regulatory regime allows the digital content sector to flourish. Channel 4 therefore believes the priorities for the implementation of the AVMS Directive need to be:

- a system that applies regulation as effectively and narrowly as possible, and which ensures that legitimate consumer and citizen concerns are addressed;
- that regulation does not constrain creativity;
- that regulation is consistent in approach and achieves a level regulatory playing field; and
- that regulation is flexible enough to respond to the broad range of services and elements within services that exist and will develop in the on-demand space.

Scope of regulation

Channel 4 believes that the definition of what constitutes an on-demand or “TV-like” service—and therefore is captured within regulatory scope—is a fundamentally important issue. Many organisations offer a range of services, some of which may be on-demand or “TV-like”, others of which will not. Clarity is needed to ensure that regulations apply only to the elements of an organisation’s activities that meet the conditions set out in the Directive.

Channel 4 welcomes the Government’s intended policy to “draw into the scope of UK regulation a narrow range of services”. However, the question of which services should fall within scope is highly complex, as different organisations broaden the range of services they offer in a converged environment. In this context, Channel 4 believes that there must be a consistent approach in interpreting the Directive: decisions on whether or not a service is regulated should be made on the nature of the individual service, rather than on the basis of the institution that provides the service. In Channel 4’s case, while it is clear that on-demand service 4oD will be caught within scope, it is highly unlikely that new services on channel4.com, such as short clips or programme extracts, should be caught.

However, Channel 4 believes that greater clarity is needed in determining who has “general control”—and is therefore subject to regulation—of a video on-demand service. Care and attention should be taken to ensure absolute clarity about who takes responsibility at different stages of the value chain.

On-demand content regulation

Channel 4 favours a co-regulatory system for on-demand audiovisual media services, with powers assigned to the co-regulator by Ofcom. This would build on the existing self-regulatory regime and ensure that regulation is flexible and responsive in this rapidly changing sector. A co-regulatory system would also provide regulatory clarity

and would be consistent with the well-functioning co-regulatory regime for advertising.

Under this model, industry should take the lead in working with the co-regulator and Ofcom to agree a regulatory framework that is effective and workable. This would include the development of memoranda of understanding, regulatory codes and guidelines. Channel 4 believes that back-stop powers, granted to Ofcom, will give authority and create greater public confidence in the system. Channel 4 supports a membership regime for service providers, but believes that Ofcom back-stop powers will be essential to ensure that service providers join the co-regulator and enable it to be sufficiently resourced to provide robust regulation.

Advertising regulation

Channel 4 agrees with a large majority of the Government's proposals for the regulation of advertising on on-demand audiovisual media services. In particular, Channel 4 believes that the regulation of advertising should be assigned, by Ofcom, to the Advertising Standards Authority (ASA). The ASA has valuable experience in regulating advertising on video on-demand services, and this system would continue to provide consumers with a one-stop shop for all advertising concerns. It would also continue to provide industry with clarity and consistency in the regulatory regime.

On the proposed scope of video on-demand advertising regulation, Channel 4 believes that regulation should cover only advertisements which appear as a result of the user accessing a particular video on-demand programme, rather than service. An approach which regulated advertisements in the entire service, rather than only in the programme, would exceed the scope intended by the AVMS Directive, disrupt the current regulatory regime for display advertising set out in the CAP Code, and create a less, rather than more, consistent scheme of regulation.

Product placement

As a public service broadcaster, Channel 4's responsibility is to the audience, and maintaining editorial integrity is fundamental to all aspects of its programming. Channel 4 is highly sceptical as to whether the impact of product placement on both viewer engagement and the editorial integrity of programming is proportionate to the modest economic gain that it offers.

Channel 4 believes that the commercial benefit of product placement is likely to be very modest, especially considering that product placement could largely cannibalise existing sponsorship and spot advertising income. For example, sponsors may perceive a programme to have less value if it features product placement from other companies.

There is also a significant risk of clients seeking to intervene in the editorial process. If product placement were to be permitted, it would be imperative that the broadcaster maintains full editorial control over content and receives disclosure of any commercial negotiations in which the producer has been engaged. These issues are likely to be more problematic when dealing with independent producers than for broadcasters with their own in-house facilities.

Channel 4 believes that, if product placement were to be permitted, it must be signalled to viewers in a clear and transparent way. However, there are likely to be particular difficulties in maintaining this transparency while also ensuring that the

viewer does not feel intruded upon. Extensive statements at the beginning, middle and end of programmes containing product placement could have the unintended effect of disturbing viewers and further highlighting the brands involved. However, less explicit forms of signalling could lead to confusion for the viewer. The difficulty in maintaining this sensitive balance is one of the reasons that Channel 4 has serious concerns about any introduction of product placement.

Context

The implementation of a new legislative and regulatory framework for on-demand services comes at an important moment in the growth of digital media services. Across the industry, media service providers are providing content in new and innovative ways. Broadcasters are seeking to make their TV content available across a variety of platforms, and increasingly commissioning content specifically for an online audience. Likewise, organisations more traditionally associated with publishing and telecommunications are increasingly moving into content provision.

Channel 4 is a publicly-owned, commercially-funded public service broadcaster. Its core public service channel, Channel 4, is a free-to-air service funded predominantly by advertising. In recent years, Channel 4 has broadened its portfolio to offer a range of digital services, including the free-to-air, commercially-funded digital television channels Channel 4+1, E4, E4+1, Film4, More4 and 4Music.

In addition, Channel 4 provides a wide range of non-linear content services. Channel 4 was the first broadcaster in the UK to launch a full on-demand service, with 4oD launching in 2006. It enables viewers to catch up with a wide range of Channel 4 programmes in ways and at times that suit them on PCs and via cable. It has developed into a popular on-demand service, offering a wealth of TV content from Channel 4 and from third party content suppliers.

On channel4.com, Channel 4 provides a range of content including extensive programme support material, programme highlights and discussion forums. One recent example of how online can supplement and enhance the linear TV experience was *Embarrassing Bodies*, a series about medical conditions that people are often too embarrassed to talk about or seek medical advice about. To accompany the series, Channel 4 provided short video clips showing people how to self-health-check. The videos—available on the website or as mobile downloads—were accessed by over one million people and there was extensive discussion and feedback about the series from viewers. This example illustrates how Channel 4 is developing as a multi-platform public service network for the digital age.

The range of different types of services that digital media will enable makes the debate around the future regulatory framework for on-demand services all the more complex and important. While Channel 4 intends to bring the values associated with its brand and content in the linear world to the online world on a voluntary basis, there should be a consistent approach to the basic standards that should apply to all audiovisual content across media platforms.

Channel 4 has been involved in discussions about the AVMS Directive during its development at European level, and through various discussions in the UK. Channel 4 is a member of the Association of Television On-Demand (ATVOD), and believes that the existing ATVOD Code of Practice and Guidelines provides a helpful starting point for a future regulatory framework. We are also involved with the Broadband Stakeholders Group (BSG) and took an active part in devising the good practice principles produced by the group in relation to content labelling and consumer protection. This experience emphasises the need for the new regulatory framework to be robust, fair, flexible and able to adapt to the fast changing pace of the digital media environment.

The remainder of this response sets out Channel 4's views on each of the questions in the consultation document.

Responses to specific consultation 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?*

Channel 4 does not have any comment to make in response to this question.

On-demand audiovisual 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?*

The consultation document outlines seven conditions, all of which would need to be met for a service to qualify as an on-demand or “TV-like” service and therefore be captured within regulatory scope:

- it is operated by a “media service provider”;
- the media service provider exercises editorial responsibility;
- the principal purpose of the service is the provision of programmes;
- the programmes are intended to inform, entertain or educate the general public;
- the media service provider sends the programme to the user for viewing at a time chosen by the user;
- 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; and
- it is “television-like” in that;
 - it competes for the same audience as television broadcasting; and
 - the nature and means of access to the service mean that reasonable consumer expectation of it (in terms of regulatory protection) would be the same as for television broadcasting.

Channel 4 agrees that these conditions reflect the requirements of the AVMS Directive and Recitals. Further we agree that it is appropriate that *all* conditions need to be met for a service to be defined as an on-demand or “TV-like” service (although in some conditions a more clear definition of terms is required, as we discuss below). This fits with the Government’s intention to draw the regulatory line as narrowly as possible and to apply the lightest touch possible, whilst ensuring that the AVMS Directive is adhered to and consumer protection is offered where it is needed.

However, while identifying and setting out the conditions that would need to be met in accordance with the Directive is a relatively straightforward task, Channel 4 is more concerned about the complexity and uncertainty about the definition of what constitutes an “on-demand service”.

Most media service providers provide a range of services across their business activities, some but not necessarily all of which would meet all seven conditions. For Channel 4, activities range from the provision of traditional linear TV (Channel 4 and digital channels), through on-demand catch up of material originally broadcast on TV (4oD), to content made specifically and only for online consumption (e.g. additional video content on channel4.com). Similarly, a number of large online

providers offer social networking alongside (increasingly) content that displays “TV-like” characteristics, such as long-form drama. Companies traditionally associated with the provision of telecommunications, such as platform operators, are increasingly acting as aggregators, and in future may themselves move into content production.

As we will go on to argue in further detail in this submission, the definition of “service” is a fundamentally important issue. Many organisations offer a range of services, some of which may be on-demand or TV-like; others of which will not. Clarity is necessary to ensure that regulations apply only to the elements of an organisation’s activities that meet the seven conditions; equally the multiple offerings of any one organisation should not be singly captured by regulation that does not apply to some other aspects of its activity.

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?*

Channel 4 will answer questions 3 and 4 together. Channel 4 believes that decisions about which services should or should not fall within scope will be a matter to be determined through a transparent set of criteria that is able to clearly establish which services or elements within services should be subject to regulation. Channel 4’s priority is that there must be a consistent approach in interpreting the Directive, identifying those services within scope and applying regulation.

Channel 4 welcomes the Government’s intended policy to “draw into the scope of UK regulation a narrow range of services”. Channel 4 identifies three potential tiers where regulation might apply:

- by programme;
- by service; or
- by institution.

The question of which “services” should fall within scope is a highly complex one—and is becoming more complex as different organisations broaden the range of services they offer in an increasingly converged environment. As described above, it is increasingly difficult to define media organisations as single-service providers. It is also difficult to identify the “principal purpose” of the service: where activities include various elements the “principal purpose” may not be immediately obvious.

Channel 4 is concerned that such complexity may inadvertently lead to simplistic judgements about what is caught within the scope of regulation. In particular, Channel 4 is concerned that decisions on scope may be made on the basis of which institution provides the service, rather than on the nature of the service itself. This risks regulation being applied inconsistently, with the consequent potential for consumer confusion and competitive disadvantage. In particular, Channel 4 is concerned that everything it offers might automatically be considered to be within scope, by virtue of Channel 4 being traditionally associated with “broadcasting”, whereas content displaying near-identical characteristics but provided by a traditionally non-TV based organisation might not be considered within scope.

Channel 4 now offers a wide range of services. In traditional linear TV broadcasting Channel 4 offers a range of TV channels that clearly sit within the well-established regulatory framework applicable to traditional broadcasting. Channel 4 provides an on-demand catch up service, 4oD (which includes some third party content), as well as providing content to third party media service providers. In both cases, Channel 4 recognises that such content should be caught within the scope of the Directive as it meets the seven conditions identified in the Directive (in any case, pure catch-up content will have been editorially and legally complied to ensure it meets the Ofcom Broadcasting Code, and will also be subject to appropriate content access controls and guidance according to the nature of the content).

However, a more complicated and subjective situation arises in relation to content that is made specifically to be consumed online or on non-TV digital media platforms.

Channel 4 is seeking to broaden its public service activities across digital media. As part of this strategy, Channel 4's website channel4.com provides valuable content, including additional material to support TV programmes. This might include short clips, programme extracts or discussions forums. It is highly unlikely that such activities should be caught within scope.

Elsewhere in the digital sphere, organisations primarily based around social networking are commissioning content that displays the characteristics of TV, including "produced" dramas *Kate Modern* and *Sofia's Diary* on Bebo. These are both examples high quality commissioned content (which it is worth noting in the case of *Sofia's Diary* has been turned into a programme for linear broadcast by Five). Channel 4 would expect such examples of online content to fall within scope, just as we would expect similar online-only content provided by Channel 4 to be within scope, consistent with meeting the seven conditions and meeting audience expectations. However, the priority must be that there is a consistent approach.

There are a number of services that fall outside the scope of regulation, with examples listed in the Recitals to the Directive:

- services which are primarily non-economic and not in competition with television broadcasting;
- services allowing users to share user-generated content;
- private correspondence and emails;
- services where the audiovisual content is incidental to the main purpose of the service;
- gaming and gambling services;
- online games;
- search engines; and
- electronic versions of newspapers and magazines.

Channel 4 agrees that activities of this kind should fall outside the scope of regulation. However, for the reasons outlined above, the Directive is arguably slightly simplistic in its approach—increasingly content providers may blend traditional "produced" TV type content with a range of other elements. The question of the "principal purpose" of a service is open to subjective judgement. Services that include the activities outlined above may not necessarily automatically fall outside regulatory scope; their status will depend on the balance of the range of activities

included within the activity as a whole. Again, Channel 4 would stress the need for consistency and flexibility to assess individual services on a case-by-case basis.

Channel 4 does not make any particular judgement as to whether such examples of content online should or should not fall within scope—this should be subject to measurement against the seven conditions within the regulatory framework. However, it is essential that there is consistency in how services are assessed against the seven conditions and regulation is applied, and that regulatory decisions are made according to the nature of the content, rather than the organisation providing the content. This is important, both in terms of ensuring that there is a level-playing field and that consumers have confidence that—where appropriate—content meets the standards they would expect.

5. *Is the concept of “general control” appropriate for determining the person or organisations subject to regulation in respect of a particular video-on-demand service?*

General control applies to the body with responsibility for a service from a regulatory point of view. As the consultation rightly points out, this is a relatively simple issue in traditional broadcasting, but the situation is more complex in relation to video on-demand services, given that the editorial content and the way in which that content is presented to consumers may be the responsibility of different bodies.

Channel 4 believes that the concept of “general control” is the appropriate basis for determining who should bear regulatory responsibility for an on-demand service. However, care and attention should be taken to ensure absolute clarity about who takes responsibility at different stages of the value chain.

In the case of video on-demand, the concept of “general control” should be applied according to who bears responsibility for the various aspects of an on-demand service (e.g. variously to whoever is responsible for editorial content and whoever is responsible for the presentation of that content on the relevant platform). Given these complexities, the details of how regulatory responsibility is to be shared should also be subject to contractual agreement between the parties involved.

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?*

Regulatory responsibility will differ depending on the level of editorial control which the supplier has over the content. As both the provider of an aggregated video on-demand service (4oD) and a provider of content to other aggregated video on-demand services (eg. BT, Virgin, Tiscali), Channel 4 is well-placed to identify the difficulties involved in determining regulatory responsibility.

Channel 4 believes that editorial responsibility lies with the original content provider for content where the service provider acts solely as a distribution platform with no direct editorial responsibility for the content. The service provider does however take responsibility for the provision of content access controls and publication of synopsis and guidance information as supplied by the content provider.

These principles are evident in the operation of Channel 4's 4oD service. The bulk of content on 4oD is provided by Channel 4 as both the service provider and original content provider, however 4oD also features some content provided by third parties (National Geographic, FX and Discovery). In these circumstances, the third party content providers are obliged to ensure that their content complies with UK regulatory standards. It is also the responsibility of the original content provider to provide 4oD with information, labels and warnings about content that may be inappropriate for some audiences. As the service provider, Channel 4 makes occasional spot-checks and reserves the right (in consultation with the content provider) to request the removal of content and changes to guidance, synopsis information and ratings but ultimate responsibility for editorial compliance remains with the original content provider. It is Channel 4's responsibility, as the aggregated service provider, to publish the content as delivered to the consumer, along with the provided guidance and synopsis information.

Channel 4 also provides content to other aggregated service providers (e.g. BT, Virgin, Tiscali). Following the same principle outlined above, this content has been editorially complied by Channel 4. In these circumstances, Channel 4 also provides information to the aggregated service providers, in accordance with their individual requirements, about content that may be unsuitable for some viewers. These particular service providers operate age rating systems linking in to their content access controls. Channel 4 provides age ratings to these service providers as an interpretation of Channel 4's own preferred "G" for guidance system. Along with ratings, Channel 4 also identifies and provides information about the content of programmes (e.g. flagging sexual or violent material, strong language etc). However, in the event that the aggregated service provider fails to publish the supplied ratings and warnings to the consumer, Channel 4 believes that regulatory responsibility for such failure should lie with the aggregated service provider.

The new regulatory framework should set out the broad principles of where responsibility should fall; but the details will be most appropriately dealt with through contractual arrangement. Further, Channel 4 believes it is also important that all parts of the chain should be equipped to deal effectively with any viewer comments or complaints and to direct the complaint to the appropriate body.

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 no, what other options are there for ensuring that the UK can meet its obligations under the Directive in respect of the non-EU service?

As outlined in response to Question 6, the overriding principle in relation to regulatory responsibility for aggregated services is that editorial responsibility lies with the original content provider providing the content to the aggregated service provider, while the service provider is responsible for presenting the content as provided and providing robust content access controls.

However, in situations where the video on-demand service provider is based outside the EU (and is therefore not subject to AVMS regulation) it is simply not practicable to make the non-EU service provider responsible for complying with AVMS regulations. In these cases, it should be the responsibility of the aggregated service provider (as the UK body with control over the provision of content) to ensure that the content complies with UK regulatory content codes.

The current ATVOD Code contains guidance as to when ATVOD Members can rely on compliance procedures from third parties. Under the Code, if content is supplied by a content producer under foreign regulatory processes as specified by ATVOD, then ATVOD Members are entitled in the first instance to rely on the content producer's compliance processes. However, ultimate responsibility for compliance with UK regulatory content codes lies with the aggregated service provider in the UK.

If the non-EU service is provided via a third party UK service provider (e.g. a broadcaster) to an aggregated service provider as part of a bouquet of content services, then it should be the responsibility of the third party UK service provider to ensure that the content is compliant with UK standards.

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?*

Channel 4 is not aware of any additional content of this nature. However, Channel 4 believes that the seven conditions that will determine whether such content falls within regulatory scope are flexible enough to determine whether and how new or emerging services should be regulated.

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?*

As described above, it is to be expected that within the overall range of activities offered by any one organisation, different elements of its activity will be treated differently. The AVMS Directive anticipates that on-demand content will be subject to lighter touch regulation than linear, scheduled broadcasting. It is important that the right balance is struck between protecting consumers and responding to different levels of expectation. While Channel 4 intends to apply the same high standards it applies in linear broadcasting across all its activities, it is appropriate that the regulatory framework should distinguish between linear TV broadcasting and on-demand and online content services.

However, one potential area for confusion concerns complaints handling, and the potential risk of double jeopardy for service providers. It will be important for there to be clarity about where regulatory responsibility lies and for media providers to respond clearly to consumers. In the event of content-related complaints about the same or substantially similar content on both original linear broadcast and on an on-demand service, there should be a single complaints mechanism, with Ofcom taking precedence over the on-demand co-regulator.

Regulatory system for on-demand audiovisual media services

10. *Do you agree that the criteria at paragraph 9 (of Part 3A) are the right ones for the determining the best regulatory option? Are there any other important criteria?*

Channel 4 believes that the criteria are appropriate for determining the best regulatory option.

In particular, Channel 4 agrees that it is important that regulation is flexible and future proofed. While the regulatory framework needs to be sufficiently robust to ensure that all those activities that should fall within regulatory scope are captured, it is also essential that regulation can respond to such a fast-changing sector.

Channel 4 also believes that the regulatory system needs to be neutral and independent, to ensure that it acts in an even-handed and consistent way.

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.

The Government's consultation appears to rule out self-regulation, and expresses a preference for a co-regulatory model. Channel 4 agrees that Ofcom would not be the appropriate regulatory body for on-demand and that regulatory powers being granted to the statutory regulator would not meet the objective of a light-touch regulatory approach that differs from that applied to linear broadcasting. Channel 4 also recognises that self-regulation could raise problems in relation to the perceived robustness of the regulatory system.

Channel 4 therefore favours Model 2, with powers assigned by Ofcom to the co-regulator. This model should be based on applying a light touch, whilst ensuring regulatory clarity, together with essential back-stop powers through Ofcom. In Channel 4's view, Model 2 is:

- best positioned to deliver on the regulatory criteria;
- independent of government;
- consistent for Ofcom to have ultimate responsibility for content regulation;
- consistent with the well-functioning existing co-regulatory system for advertising; and
- able to develop codes and guidelines, agreed with industry and Ofcom, and applied flexibly in the light of the fast changing nature of the sector.

If Model 2 is introduced, industry, the co-regulator and Ofcom should work together to agree a regulatory framework that is effective and workable for industry. Ofcom and the co-regulator should also look to develop a Memorandum of Understanding setting out how the two bodies will work together.

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

Channel 4 believes that membership, with Ofcom back-stop powers, is the most appropriate regime. Membership will encourage a broad-ranging industry to support the regulatory system, giving it greater legitimacy and enabling it to work effectively. This will also ensure that the regulatory regime has stability and certainty of funding, which will be necessary to ensure the co-regulator is adequately resourced to provide effective regulation.

Channel 4 recognises that a membership regime poses problems in relation to organisations that may refuse to join or co-operate in helping to ensure that the membership organisation is fit for purpose. This underlines the importance of the co-regulator being sufficiently robust and clear about definitions and regulatory responsibility. It also underlines the importance of Ofcom having back-stop powers

to ensure that those bodies that should fall within regulatory scope join the regime and enable it to be sufficiently resourced to provide robust regulation.

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?*

Given the complexities outlined above, in the first instance this should be the responsibility of the co-regulator. Disputes should then be referred to Ofcom and ultimately—as a last resort—to the Courts.

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

The co-regulator should take the lead in developing and maintaining a standards code and additional guidance, in close consultation and co-operation with industry and Ofcom. The on-demand, digital media sector is likely to continue to adapt and change in the coming years, and the regulatory framework will need to keep pace. The co-regulator should be responsive to the requests of industry to change the codes in the light of market developments; equally it will need to respond as necessary to consumers.

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

As far as possible, responsibility for compliance and complaints should replicate the well-functioning systems that apply to content and advertising regulation.

In the first instance the content provider/aggregator (subject to who has responsibility as discussed above) should be responsible for compliance, and respond to complaints.

If the complaint cannot be resolved, or if a significant number of complaints is received, the co-regulator should investigate and respond to the complaint. If there is still no satisfactory outcome, the response may be referred to Ofcom (this reflects the ASA co-regulatory system for advertising).

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

The sanctions procedure should mirror as far as possible the sanctions system operated by Ofcom over TV content, which has a scaled approach that responds to the severity of the case (although of course Ofcom's licence revocation powers in broadcasting would not be applicable under a membership regime). In the case of on-demand content sanctions might range from publication of summaries of upheld complaints, public warnings through to financial penalties. In the first instance sanctions should be applied by the co-regulator.

17. *If we opt for a co-regulatory structure we would need to introduce legislative "backstop" powers. What should be the second tier of enforcement to address cases of repeated breaches or system failure?*

Channel 4 agrees that—whether a co- or self-regulatory regime is introduced—legislative "back-stop" powers will also be necessary. In reality Channel 4 sees little practical difference between the kind of "light touch" co-regulatory structure that the

Directive and the consultation envisage (with adequate scope for industry to take an active part) and self-regulation supported by “back-stop” powers.

Channel 4 believes that “back-stop” powers should be granted to Ofcom. This would reflect the relationship Ofcom has with the ASA as the co-regulator for advertising. A Memorandum of Understanding between Ofcom and the co-regulator would clarify the relationship between the two bodies, providing transparency for industry and consumers about when Ofcom’s back-stop powers might be invoked, for example in relation to repeated breaches. Ofcom’s back-stop powers would enable the enforcement of more serious sanctions (for example fines).

It is important to avoid the risk of double-jeopardy. If content is under separate investigation by Ofcom for a potential content-related breach of the Broadcasting Code, this investigation should take precedence and there should be one single sanctions procedure, which if appropriate would take account of complaints in relation to both linear TV and on-demand content.

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

For the reasons outlined above, Channel 4 believes that Option 2, co-regulation with powers assigned to the co-regulator by Ofcom, is the most appropriate model.

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 onscreen as a result of the user accessing a particular video on-demand service?*

Channel 4 believes that the regulation of advertising in video on-demand services should cover only advertisements which appear as a result of the user accessing a particular video on-demand programme (Option A).

The AVMS Directive (Article 1(h)) defines audiovisual commercial communications as “images with or without sound which are designed to promote, directly or indirectly, the goods, services or an image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme for payment or for similar consideration or for self-promotional purposes.”

Channel 4 notes the Government’s view that it should adopt a wide interpretation of “accompany” and extend the regulation of advertising in video on-demand services to cover advertisements which appear as a result of the user accessing a particular video on-demand service (Option B), on the basis that this would “provide a more consistent scheme of regulation”.

However, Channel 4 does not support the Government’s preferred position, as a wider interpretation would:

- exceed the scope intended by the AVMS Directive (and contradict the Government’s stated objective of restricting the scope of the AVMS Directive as narrowly as possible);

- disrupt and undermine the current regulatory regime for display advertising on websites;
- create confusion for media owners and advertisers; and
- create a less, rather than more, consistent scheme of regulation.

The AVMS Directive states clearly that audiovisual commercial communications that “accompany or are included in a programme” should be covered by regulation. It does not state that advertisements which are part of a video on-demand service should be covered. By describing scope in terms of programmes, rather than services, the AVMS Directive provides a clear signal that it is intended to cover only advertisements that are integral to the programme. Under a programme definition, advertisements that are included in programmes, such as mid-rolls, as well as advertisements that “accompany” programmes, such as pre-rolls or end-rolls, would be covered.

The existing regulatory regime already differentiates between broadcast and non-broadcast advertising. As such, there is already a comprehensive, effective regime for regulating display advertising on websites, regardless of whether or not they include video on-demand services. Display advertising within a video on-demand service (for example, on the navigation menu or the website) is already regulated by the CAP Code for non-broadcast advertising. Extending the AVMS regulatory regime to display advertising on video on-demand websites would subject these advertisements to two, potentially conflicting, regulatory regimes, thus undermining the existing well-functioning regulatory regime. In relation to the regulation of advertising within an on-demand programme, Channel 4 believes that care will have to be taken in considering the appropriate controls for advertisements that are subject to restrictions in linear broadcasting, such as food advertising.

The existence of two regulatory regimes for display advertising would also create confusion for media owners and advertisers, as there would be two sets of rules for the same item of display advertising, depending on where that advertising was displayed. This would also have the effect of creating a less consistent regulatory system, contrary to the Government’s stated intention of providing a more consistent scheme of regulation: identical display advertisements on websites would be treated differently, depending on whether the website was also involved in providing video on-demand services.

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

Channel 4 believes that the regulation of advertising on video on-demand services should be assigned to the Advertising Standards Authority (ASA) (Option A).

The ASA currently regulates advertising on video on-demand services through the CAP Code for non-broadcast advertising. It therefore has valuable experience in this area, which would be lost should regulatory responsibility be assigned to another body. In addition, assigning responsibility to the ASA would have the benefit of providing industry with consistency and clarity in the regulatory regime, and would remove the risk of potential double jeopardy.

Channel 4 notes that the Government’s initial preference is for regulation to be assigned to the ASA (Option A), on the grounds that it would offer advantages for consumers. Channel 4 shares this view: assigning regulatory powers to the ASA

would continue to provide consumers with a one-stop shop for all advertising concerns.

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?*

Channel 4 believes that the ASA should have its powers assigned to it by Ofcom.

This would have the benefit of ensuring that a robust, independent body assigns powers, while also retaining flexibility. It would also be consistent with the current arrangements for television broadcast advertising, where Ofcom assigns powers to the ASA. In addition, it would avoid a situation where the ASA would have to ratify codes through multiple bodies.

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

Channel 4 believes that the ASA should be the only body which regulates advertising on video on-demand services, for the reasons set out in 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?*

Channel 4 believes that the regulation of advertising in video on-demand services should not be handled by the content regulator.

Assigning regulatory responsibility to the ASA for advertising on video on-demand services would mean that the advertising regulator for video on-demand services would not be the same as the content regulator. The Government notes that this is already the case with television and radio broadcasting, where it does not seem to have caused any particular difficulty. Channel 4 agrees: the division of regulatory responsibilities for television broadcasting (where the ASA regulates advertising and Ofcom regulates content) is effective and workable, and there is no reason why it would not be workable for video on-demand services.

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?*

Channel 4 believes that product placement in video on-demand services should be regulated by the body that regulates programme content on these services. Decisions on product placement are a part of the editorial process for content, and should therefore be the responsibility of the on-demand content regulator.

Channel 4 believes that a single body should be responsible for all aspects of content regulation. This would provide clarity for programme-makers and would also avoid a situation where programme-makers might have to apply multiple codes for content. In addition, this arrangement would be similar to the regulation of product placement and, if allowed, product placement in television broadcasting, where the content regulator is responsible.

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?*

Channel 4 believes that sponsorship in video on-demand services should be regulated by the body that regulates programme content on these services, for the reasons outlined in response to Question 24. Sponsorship is more closely tied to the programme than spot advertising, so consumers associate the sponsor with the programme. For this reason, in linear television broadcasting, regulation of sponsorship is the responsibility of the content regulator. Channel 4 believes that similar arrangements should apply for video on-demand services.

Product placement

26. *Should product placement be prohibited by law? Please explain the reasoning behind your preference.*

The current prohibition of product placement is enforced through Ofcom's regulatory Broadcasting Code—not through primary legislation. Rule 10.5 of the current Ofcom Broadcasting Code explicitly states that "product placement is prohibited". This regulation has worked effectively for years across the industry, and we therefore do not agree with the position as stated in the consultation that "full prohibition in industry or regulators codes may not necessarily be sufficient to reflect the Directive's direct and express prohibition of product placement". Inclusion in a regulatory code, rather than legislation, also means that the prohibition is appropriately flexible to ensure that if any changes do need to be made, for any reason, it is not necessary to go back to primary legislation to do so.

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 (cinematographic works, films and series made for audiovisual media and services, sports programmes and light entertainment programmes)?*

Equally, we feel that the most appropriate place to outline the genres that permit product placement is within regulatory codes. It is important that the Government maintains some flexibility in this area as industry practice and programming genres develop, and therefore it is not appropriate to include this level of detail in primary legislation.

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

Channel 4 is highly sceptical as to whether the impact of product placement on both viewer engagement and the editorial integrity of our programming is proportionate to the modest economic gain that it offers.

The decision whether or not to allow product placement is complex, and needs to balance the limited potential financial benefit to the industry with the need to safeguard editorial integrity and viewer engagement. The Government cites Ofcom's 2005 figures that total UK income from product placement would be about £25-35 million a year after five years. However, it is very difficult to predict accurately the true value of product placement, and Channel 4 believes that its

commercial impact is likely to be modest when taken across the whole industry, particularly considering the following.

- Product placement is likely to be used only in a certain range of commercial programming. This is particularly relevant for Channel 4, as a substantial proportion of our programming is made up of public service genres such as current affairs and documentaries, which would not be appropriate for product placement.
- Product placement could cannibalise existing sponsorship and spot advertising deals. For example, sponsors may perceive a programme to have less value if it features product placement from other companies—particularly if competitors are involved.
- The extensive regulatory system that would be needed to ensure editorial integrity if product placement were to be permitted. For example, broadcasters would need dedicated resources to ensure that any instances of product placement were compliant with the regulatory codes. This challenge is particularly complex in cases where the value chain includes more than one party: for example, where a programme is commissioned by a broadcaster and produced externally by an independent producer (given Channel 4's unique publisher-broadcaster status, this obviously affects all commissioned output.). To ensure that any product placement deal is both compliant and editorially acceptable, it would be imperative that the broadcaster maintains full editorial control over content and receives disclosure of any commercial negotiations in which the producer has been engaged. These issues are likely to be more problematic when dealing with independent producers than for broadcasters with their own in-house facilities, but are crucial if there is to be sufficient transparency and editorial certainty within the system.

29. *If product placement were permitted, how could audiences and regulators be assured that editorial integrity had been preserved, as required by the Directive?*

As a public service broadcaster Channel 4's responsibility is to the audience, and retaining editorial integrity is therefore absolutely fundamental for all aspects of our programming. Whilst our regulatory experience and commitment to editorial integrity ensures that Channel 4 would adhere to any regulation surrounding product placement to our best efforts, we would also emphasise the significant costs and processes that this would entail—as well as the inevitable difficulties that the complex relationship between independent producers and broadcasters creates for issues of transparency and editorial control. Channel 4 would therefore not want to underestimate the regulatory challenges presented by the introduction of product placement.

If the Government did decide to allow product placement, it could only be permitted with a strong system of regulation—with clear regulatory codes and industry guidance, to ensure that the central principles of preventing undue prominence, ensuring transparency, editorial justification and a prohibition on promotion (as outlined in Article 3g of the Directive) are maintained. The regulator should clearly outline who has responsibility for all areas of the code.

All broadcasters have extensive experience in ensuring that programming does not breach regulatory codes. If product placement were to be permitted, broadcasters would be best placed to monitor content to assess editorial integrity and undue prominence. If any programmes were felt to breach the regulatory code on product

placement, this should be investigated by the regulator, with recourse to appropriate penalties—as is currently the case with any breaches of Ofcom’s Broadcasting Code.

Industry should also produce detailed guidelines on best practice implementation, in consultation with the appropriate regulator. This guidance would include measures to ensure that any product placement is editorially justified and editorial and commercial activity is structurally separated. It should also assert the overall editorial control of the broadcaster over any programming that may contain product placement. This point is crucial in enabling the broadcaster to maintain the editorial integrity of a programme, as well as ensuring that existing commercial relationships are not compromised.

30. *How could “undue prominence” be avoided, given the commercial imperatives for audiences to recognise the products placed?*

While Channel 4 acknowledges that many commercial operators will want to see brand value through product placement, it must be the broadcasters who retain overall editorial control over content—and their central concern should be that the audience does not find product placement obtrusive. Product placement and “undue prominence” are therefore not incompatible concepts—without this kind of regulatory yardstick, it would be extremely difficult to regulate excessive examples of product placement and protect viewers from overt and unnecessary product promotion. We therefore welcome the assertion within the AVMS Directive that *“programmes containing product placement must conform to the rules relating to editorial independence and undue prominence, and may not directly encourage purchase or rental of good or services”*.

The Independent Producers Handbook, provided by Channel 4 to all of its suppliers, includes clear systems of guidance on all aspects of sponsorship, product placement and prop placement—including definitions of and advice on how to spot “undue prominence” and ensure editorial justification. These guidelines define “undue prominence” as *“when there is insufficient editorial justification for the degree of prominence (verbal and/or visual) given to a commercial name, logo, product or service in a programme”*, and include consideration of the placing of a product on camera, the presence of branded clothing and the amount of time a product or brand is on screen (e.g. *“if branded items are brought into the studio, thought should be given as to how they are shown on camera. They should not be placed in such a way that they are unduly prominent e.g. placed directly in front of the camera and left there for an unduly long time”*.) The Handbook would be updated to reflect current law and regulation as appropriate.

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

As discussed in Questions 3 and 4, it is crucial that the Government further clarify the definitions of who is included under the scope of “on-demand audiovisual media services”, as it is important that all aspects of the industry receive absolute certainty as to whether their services will be regulated under the Directive, or if they fall outside scope. This is particularly important within the context of product placement, where there are clear distinctions in existing practice for on-demand content and made for online content.

For example, while the majority of content on Channel 4’s television catch-up service, 4oD, will be compliant with existing regulation for television broadcasting

(as most programming on the service will have already been shown on UK television, and any acquired content is exempt from rules on product placement), the Government should note that there are a number of emerging business models from non-traditional media companies which use product placement to fund online video content. For example, Bebo has recently had successes with innovative interactive dramas such as *Kate Modern* and *Sofia's Diary*—both of which featured product placement from a wide range of brands. This is not just an area for youth audiences either: the *Mail on Sunday* recently launched an online soap *Katie and Co*, aimed at 40-somethings, which features sponsorship and product placement from wine label Jacob's Creek.

In these cases product placement has allowed emerging entrants to develop new business models and invest in innovative, home-grown content. This role is likely to continue to develop, and therefore Channel 4 believes that it would be too soon to impose restrictions in this area. We would therefore recommend that if the scope of the Directive did include services that contain original content specifically made for online audiences, the Government should consider allowing product placement in online content (provided it was supported by sufficiently robust regulation)—even if it was not permitted for linear broadcasting.

It is also important that the Government is consistent when considering the range of content and services that should be brought under the scope of the Directive. For example, if made-for-online video content were to be included in scope, the Government should ensure there are no differences in regulation for made-for-online video content created by Channel 4 and made-for-online video content created by Bebo—or content commissioned and distributed by a platform belonging to a commercial brand (as is the case with the L Studio broadband channel in the US, created by car manufacturer Lexus). Consistency and clarity over what falls into this area is crucial so that broadcasters—who are most traditionally classified as “audiovisual service providers”, are not at a competitive disadvantage.

32. Should prop placement continue to be permitted?

Prop placement has been a long-standing and valuable practice for both programme-makers and brands, providing programming with a higher level of realism in a cost-effective manner. Channel 4 therefore sees no reason why there should be any changes made to the rules concerning prop placement.

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?

Channel 4 does not believe it is appropriate for there to be any regulatory consideration of specific price setting in this area—and nor could it be practically achieved. The price range of possible “props” for any programme is far too varied for there to be a clear and fair assessment of what a set value should be, and any arbitrary definitions of “appropriate” prices is likely to unnecessarily impact upon the creative production process.

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?

Channel 4 does not believe it would be appropriate or practical for regulation to impose a definition of what constitutes a “significant value” of prop placement. This

level of commercial detail should be assessed by the industry. However, the key principle of product placement is that use of products should not be “*conditional on any specific agreements as to the manner of their appearance in the programme*”. This principle should be maintained.

35. *If there is to be a set value for this purpose, should it be set by the Government in legislation, or by Ofcom (for television broadcasting) and the video-on-demand co-regulator(s)?*

As previously stated, assessing what constitutes a “significant value” should be a matter for industry to negotiate, rather than the regulator or Government.

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?*

Ofcom’s Broadcasting Code already permits product placement in acquired programmes and films, and therefore audiences will be familiar with product placement in this context. Consequently, Channel 4 recommends that this current regulation is continued, so long as the overriding principle of “undue prominence” is still maintained and observed.

37. *How should product placement be signalled to viewers?*

Channel 4 believes that, if product placement were to be permitted, it must be signalled to viewers in a clear and transparent way. However, there are likely to be particular difficulties in maintaining this transparency while also ensuring that the viewer does not feel intruded upon. Extensive statements at the beginning, middle and end of programmes containing product placement could have the unintended effect of disturbing viewers and further highlighting the brands involved. However, less explicit forms of signalling could lead to confusion for the viewer. The difficulty in maintaining this sensitive balance is one of the reasons that Channel 4 has significant reservations about the introduction of product placement.

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)?*

Channel 4 agrees with the Government that signalling issues should be designated to Ofcom and any co-regulator for inclusion in regulatory codes. If product placement were permitted, it is important that the regulator/co-regulator sufficiently consults with the industry as to the most appropriate forms of signalling—as the industry is most likely to have insight into the best ways to communicate to audiences and how to ensure messages are sensitive both to the content and to the viewer.

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