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Dear Natasha

Consultation on AVMS Directive

I am writing with my views on certain of the Government's proposals in relation to the issues addressed in the consultation document of July 2008. These are my views and do not necessarily reflect the views of my firm.

The extension of the scope of regulation to VOD services

1. I have a number of concerns about the proposals on scope which I will develop below but in summary are as follows:
 - (a) Whilst it is well known that content regulation is to extend to certain on-demand services on implementation of the Directive, there appears to be widespread uncertainty in the industry as to its precise extent. It is not surprising because of the way the Directive is drafted. I am concerned that the transposition exercise should not increase that uncertainty.
 - (b) Further, paragraph 7 of Part 2 of the consultation document indicates that, as a matter of policy, the aim is to draw into the scope of UK regulation only that narrow range of services that falls within the scope of the AVMS Directive rather than extending it more widely. I am concerned that the transposition exercise should not inadvertently bring a wider range of services into scope.
2. With respect to uncertainty:
 - (a) If the draftsman of the implementing legislation were to take a view on any point of uncertainty in the Directive and drafted the legislation accordingly, the citizen could be left in the invidious position of having to construe two legislative instruments instead of one. The courts, however, would look to the underlying Directive and not the UK legislation and, if they took a different view of the matter, their view would prevail. In those circumstances, there would be little merit in any attempt to resolve any uncertainty through the

legislation since it would in effect merely record the draftsman's view and would be no guide as to the true position. Any attempt to do so would risk misleading the public.

- (b) The risk of interpretation rather than transposition is high in this case because of the way the Directive is drafted. An "on-demand audiovisual media service" is defined in Article 1 of the Directive as part of a set of interlocking definitions which have no immediate counterpart in UK law. We have, for example, no generic concept of an "audiovisual media service". Further, the definitions are "explained" in Recitals 16 to 23 and Recitals also have no counterpart in UK law.
- (c) To fit an on-demand audiovisual media service, however defined, into the structure of UK law no doubt means finding a place for it in the existing statutory framework. That framework is broadly speaking based on various categories of programme service to which different regulatory regimes apply. Calling an on-demand audiovisual media service an "on-demand programme service" (ODPS), as is proposed, would conveniently fit into that framework especially if that expression were defined as an on-demand audiovisual media service within the meaning of the Directive. But it is not proposed to do so. Instead it appears that it is to be defined in terms of three principal elements, none of which are quite congruent with the Directive, and one of which appears to be quite different in that it is a facility rather than a programme service.
- (d) Of the three proposed elements of an ODPS, the first is that its principal "facility" should be a VOD service. This is something of a surprise. In general, other programme services in the UK statutory framework are defined in terms of the provision of programmes, not in terms of a facility. The Directive, although using different terms, adopts the same approach. An on-demand audiovisual media service is a subset of the generic "audiovisual media service" whose principal purpose is the provision of programmes. The service may have an associated facility for access to the programmes but the service itself is a programme service and not a facility.
- (e) Focusing on a facility is no doubt designed to build on section 361(3) to (5) which defines an exception from the expression "available for reception by members of the public". This expression, perhaps a little counter-intuitively, is used to capture the sense of "broadcasting" as used in the Directive. If a service passes through the gateway in subsections (3) to (5) it is not a programme service within the meaning of the 2003 Act (although it may be such a service under section 201 of the 1990 Act) or for that matter a television broadcast within the meaning of the Directive and is not regulated under the 2003 Act. But defining the gateway and defining a new category of programme service are different things. I question whether it is appropriate to depart from the underlying and long standing principle that content regulation is to do with the provision of programmes (or services consisting of programmes) as distinct from telecommunications services.

- (f) An electronic communications service (ECS) is defined in section 32(2) of the 2003 Act as :

“... a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals except insofar as it is a content service”.

If the principal facility offered by an on-demand programme service is a VOD service consisting of a facility enabling selection and reception of programmes (which may also be an associated facility within the meaning of section 33(3)), it is at least arguable that the service is an ECS. That would place it in the wrong place in the statutory framework. It might be said that it was to some extent a content service but this is not clear. A content service is defined in section 32 (7) in terms of either the provision of materials or the exercise of editorial control or both. It is less than clear that an on-demand programme service would fall within that definition because:-

- (i) the service consists principally of a facility for selection and reception, not of programme provision; and
 - (ii) editorial responsibility for the service within the meaning of the directive may not cover the same ground as editorial control within the meaning of the 2003 Act.
- (g) Quite where this would lead us is not clear but it would not be an accurate transposition of the Directive and could lead to great uncertainty.

3. With respect to the policy as explained in paragraph 7 of Part 2:

- (a) Article 3(1) of the Directive leaves member states free to apply “more detailed or stricter rules” than those set out in the Directive. It would also leave them free, if they wished, to extend regulation to other on-demand services which do not fall within the scope of the Directive. So whilst on the one hand the courts will tend to ignore the implementing legislation in seeking to give effect to the underlying Directive, the same would not be true under this Directive to the extent that the implementing legislation goes further than the Directive.
- (b) There is, therefore, a danger that transposing the definition of an on-demand audiovisual media service into new and different terms may inadvertently bring within scope a number of services that might not be caught by the Directive. I suggest that, to avoid this hazard, the implementing legislation should make it clear that it is not intended to bring into scope any services that would not be within scope under the Directive itself. I also suggest that it would be consistent with policy to negative by express words the application to ODPs of any more detailed or stricter rules than those which are required by the Directive. This would be consistent with the underlying policy as stated in paragraph 7 of the consultation document.

Natasha Pavey

Product placement

4. I have a short point to make about product placement. With all due respect to those concerned, the debates about product placement have tended to envisage that allowing product placement would enlarge the prominence of placed products. The Government therefore sees it as a threat to confidence in the integrity of regulated programming and to the distinction between editorial and commercial material. But this is misconceived. The rule against undue prominence will continue because it is required under Article 3g(2) of the Directive. What would change would be the commercial basis on which products would be placed in the production. Instead of products being placed on terms that they are made available free or at less than full cost, which is called prop placement, they would be placed on terms that the producer would charge a fee, when it would be called product placement. So far as undue prominence was concerned, there would be no change.
5. By allowing product placement in the permitted categories of programming, the Government would not be undermining confidence in the integrity of programming or the distinction between editorial and commercial material since the rules designed to protect those things would not change. What would change would be the ability of a producer to obtain more generous terms for doing what he already does in placing props in his programming, and not the appearance of those products on screen.

Satellite television broadcasts

6. I have an equally short point about the proposals for control over the content of satellite television broadcasts. Contrary to paragraph 12 of Part 5 of the consultation document, the Directive requires member states to apply the rules relevant not only to television broadcasting services but also to other audiovisual media services including on-demand audiovisual media services. The risks discussed at paragraph 34 and following of Part 5 are more serious even than those that have already been identified. An operator is unlikely to be able to isolate and remove messages comprised in an on-demand service that might be uplinked. The operator is unlikely to be able to identify them at all. This requirement of the Directive may therefore be unworkable, at least without considerable investment by the operator in monitoring equipment.
7. I therefore suggest that the Government should, in transposing this requirement, take care to ensure that any obligation placed on operators is capable of being performed and that it does not impose any undue burden on them.

Yours sincerely

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