

Microsoft Response to the DCMS Consultation on Implementation of the Audiovisual Media Services Directive in the United Kingdom

31 October 2008

Executive Summary

Microsoft welcomes this opportunity to comment on the Government's proposals for the implementation of the Audiovisual Media Services Directive in the UK. Our key messages, which are described in more detail in the remainder of this submission, are as follows:

- The on-demand audiovisual sector continues to experience an extraordinary period of growth in consumer interest, dynamic technological change and market convergence. Successful business models for digital content distribution remain uncertain, but advertising, sponsorships and creative ways for engaging with consumers will continue to be important.
- It is vital that any new regulation in the sector does not stifle innovation or create uncertainties for online content distributors, aggregators and platform providers in relation to obligations they may have regarding on-demand and linear services.
- The proposed definition of "on-demand programme service" seems unnecessarily broad given the scope of the Directive. More precision is needed to clarify that regulation only applies to providers of truly 'television-like' on-demand services.
- We are concerned that it will be difficult to determine who is subject to regulation as the provider of an on-demand programme service. In particular, aggregated service providers should not be subject to regulation, except in respect of their own content.
- Self-regulation is the preferred option for ensuring compliance with the new regulatory obligations to be imposed on on-demand services. Self-regulatory schemes have worked well in the UK and provide the flexibility necessary to respond to rapid changes and promote innovation.
- If a co-regulatory system is adopted, it would be preferable if the regulation of on-demand content and advertising were dealt with by the pre-existing industry regulators in these areas based on a sharing of each body's particular expertise with input from industry representatives from a broad range of on-demand services. This arrangement of regulatory responsibilities draws on the strengths of compliance mechanisms already in place while promoting consistency in regulatory approach given the special characteristics of the on-demand sector.
- Only truly 'television-like' advertising in on-demand services should be subject to regulation.
- In line with the intention of the Directive, appropriate product placement should be permissible in the UK, particularly for on-demand services. The government's proposed ban seems inconsistent with the intention of the Directive and will disadvantage UK-

based providers vis-à-vis those established in places where product placement is permitted. The proposed ban will also result in limiting the volume and variety of content available to UK audiences.

Introduction

We appreciate the opportunity to help the UK Government reflect on the various options available under the Directive for the implementation of audiovisual content services regulation.

Our Consultation submission is divided into two parts. This introduction provides an overview of our views on several important aspects of the implementation. We then provide responses to the specific Consultation questions related to these implementation issues.

Growth of On-demand Content Services

With extensive UK investments in content creation and distribution across multiple platforms, Microsoft has a significant interest in the growth of the UK on-demand audiovisual services market. The way in which the public accesses audiovisual content is rapidly changing. On-demand audiovisual services are increasingly the service of choice for consumers who want to enjoy the benefits of choosing what they want to watch when they want to watch it.

While the on-demand audiovisual sector is experiencing extraordinary growth in consumer interest, dynamic technological change and market convergence, on-demand services are still at a relatively early stage of development with providers offering a variety of services with different features and enabled by different technologies. At this early stage, successful business models for digital content distribution remain uncertain, but advertising, sponsorships and creative ways for engaging with consumers will continue to be important.

Need for a Narrow Scope of Regulation

Some on-demand services, such as the popular catch-up services recently launched by the UK broadcasters, are so closely tied to broadcast television programming that consumers might reasonably expect television-type regulation to apply to these services. However, many of the services allowing access to on-demand content are quite dissimilar from television in both their “look and feel” and the way that they bring together content from a wide range of sources. Consumers are not likely to expect that the rules applicable to television broadcasting would also apply to these services, which also offer significantly different methods for user control. Consequently, imposing television-like regulation on these services would be inappropriate as it would hinder the launch of innovative services without satisfying a clear need for regulation.

For these reasons it is vital that the regulations introduced through transposition of the Directive apply only to on-demand services which are so similar to traditional television that they are properly viewed as substitute services rather than mere complements to broadcasting. The UK has been a leader within Europe in advocating a light-touch approach to regulation, particularly in circumstances where regulation is extended to new sectors due

to converging technologies and platforms. Consistent with this approach, the Government should ensure that the definitions establishing the scope of regulation for on-demand services are focused as narrowly as possible on a subset of video services that are sufficiently comparable to traditional television as to compete for the same audience, such as on-demand services providing time-shifted access to broadcast television content.

Identifying the Service Provider

An important issue in extending traditional television regulation to on-demand services is clearly identifying the service provider that is responsible for regulating the content and advertising that is accessible through the service. This is particularly difficult for providers of “aggregated services” that combine content from other commercial providers with their own content and in some cases content provided by their users. This is a common model for services within the emerging on-demand content sector.

The Government’s proposals provide little clarity about how regulation should apply to the different layers of service providers likely to be found in an “aggregated service”. We urge the Government to take a practical approach to the treatment of aggregated services by excluding from regulation the aggregator of content that provides access to services controlled by third parties. Regulation should only apply to an aggregated service provider with respect to the programming that it directly controls and edits.

Benefits of Self-Regulation

The Government led the effort to include explicit reference to self-regulation in the Directive. This was in recognition of the significant success that self-regulatory schemes have had in the UK and the need to ensure that such efforts are not blocked by the implementation of the Directive.

We believe that self-regulation is the best option for ensuring compliance with the new regulatory obligations to be imposed on on-demand services. Self-regulatory schemes have worked well in the UK and provide the flexibility necessary to respond to rapid changes in the sector, allow for innovation and facilitate the introduction of new technologies.

If a co-regulatory system is instead adopted, it would be preferable if the regulation of both on-demand content and advertising were dealt with by the pre-existing industry regulators in these areas based on a sharing of each body’s particular expertise with input from industry representatives from a broad range of on-demand services. This arrangement of regulatory responsibilities draws on the strengths of compliance mechanisms already in place while promoting consistency in regulatory approach given the special characteristics of the on-demand sector.

Updating Advertising and Product Placement Rules

We welcome the changes introduced by the Directive that liberalise restrictions on the quantity of advertising and permit new advertising formats, such as interactive ads, split screen ads and virtual ads. A key intent of the Directive’s revision of advertising restrictions was to create additional flexibility for advertisers on all types of linear and nonlinear video offerings. By extending the rules on advertising to nonlinear content, however, some

flexibility is necessarily lost. The Government should work to ensure that service providers have flexibility in the delivery of advertising to video-on-demand service consumers. Product placement should also be permitted in order to allow new business models to emerge in the video-on-demand sector.

Responses to the Consultation Questions

Our responses to the Consultation questions are set out below:

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?**

Microsoft does not have any comments on this question.

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?**

Microsoft concurs with the Government's conclusions that the regulation of on-demand services should apply only to a "narrow range of services"¹ in order to preserve flexibility and innovation in this nascent area. However, we are concerned that the proposed definitions as outlined in the Consultation will unnecessarily broaden the scope of UK regulation to include many services otherwise outside the scope of the Directive.

Additional precision in the definitions will be necessary to ensure that UK regulation is in line with the wording of the Directive and to promote clarity and certainty for providers as to when and how regulation applies. The Government should work to ensure clear, consistent application of the Directive's definition of "on-demand audiovisual media service" by further clarifying the existing elements of the proposed definition or adding additional requirements that must be met before regulation can be imposed.

Specifically, the Government must look to regulate only those services that truly compete with broadcast services and of which a reasonable consumer would expect the same level of regulatory protection as applies to broadcast services. Both of these requirements must be met prior to the application of regulation so as to mirror the wording of the Directive as set out in Recital 17.

¹ Part II, paragraph 7 of the Consultation.

Microsoft's view appears to be shared by Ofcom, which has advocated that regulation should only apply to those on-demand services that are in a form characteristic of television broadcasting, e.g. video-on-demand services which provide time-shifted or archive television programmes for viewers.² In evidence to the House of Lords, Ofcom said that the Directive will only apply to services "where consumers might reasonably expect television-type regulation because it is a television-type service."³

At present, the only "television-like" element of the definition is that "programmes of a kind similar to those available on scheduled television broadcasting services" must be included in the on-demand programme service. While a service should not be subject to regulation unless it offers content in a form that is similar to broadcast television, this element of the definition does not ensure that regulation will apply only to the subset of video-on-demand services that compete directly with linear television. The definition of either "on-demand programme service" or "video-on-demand" must be narrowed by adding additional requirements to focus the scope of regulation on the subset of video-on-demand services where consumers would reasonably expect the same regulatory protections as in television broadcasting. It should be clear that these will only include services that compete with traditional broadcast television in terms of audience, commercial advertising and other key characteristics.⁴

It should also be made clear that content "of a kind similar to those available on scheduled television broadcasting services" covers professionally produced programmes and not user-generated content. The definitions in their current form do not adequately distinguish between traditional television programmes and content created by users and amateur producers.

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?

No, the proposed definitions are over-inclusive as explained in our responses to Questions 2 and 4.

² Paragraph 35 of the Ofcom Memorandum on page 42 of the House of Lords Inquiry into the Audiovisual Media Services Directive: Evidence (25th October 2006)

³ Mr Alex Blowers, Head of Policy Development Mr Blowers' answer to Q121 of the House of Lords Inquiry into the Audiovisual Media Services Directive: Evidence.

⁴ Presumably a service that provides access to only a few broadcast television-like programmes will not be subject to regulation because its *principal facility* is not a "video-on-demand" service. Neither should the definition apply to a service which provides a few professionally produced, broadcast-quality programmes alongside other kinds of video content that is not in a format similar to television programmes (e.g. specialised short factual or instructional videos, user-generated content, or interactive experiences). However, this should be clarified.

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?

Yes, the Directive expressly excludes from regulation several types of services that may be caught by the proposed definitions.

To ensure that these services do not come within the scope of UK regulation, the proposed definitions will need to do the following:

- Exclude non-commercial services and private websites that provide some access to on-demand content by referring to “primarily non-economic services” as outside the definition’s scope. It should be clear that such services can include some advertising and still come within the definition of “primarily non-economic”.
- Explicitly avoid the application of regulation to “online games” using a broad definition of this term. The boundaries between gaming and non-interactive video continue to blur, and games are becoming more interactive with other content on converged platforms. A broadly defined exclusion avoids the inadvertent extension of regulation to online games, which should be placed squarely outside the scope of television-like services subject to regulation.
- Ensure that services with user-generated content are not covered. The Directive’s exclusion of “services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”⁵ should be implemented into UK law with a broad interpretation to ensure that the vibrant dialogue amongst users through the sharing of user generated content is maintained.

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?

No. The concept of “general control” may be appropriate to identify the licence-holder for the purposes of television broadcasting but services carrying on-demand content are typically delivered in different ways than television. Consequently, the concept of general control does not provide enough guidance to determine which organisation will be regulated in the context of on-demand programme services.

The consumer experience in on-demand services may be enabled by the interaction of a variety of parties from both within and outside the UK, including individual users and entities established outside the EU. In this environment, the application of the principle of general control is problematic.

For example, a service may provide a website that creates an “audiovisual community” allowing viewers to see on-demand streaming video messages, commentary, short

⁵ See Recital 16, AVMS Directive.

films, etc. that are created by individuals or third parties, posted either by the webmaster or other users who create profiles or lists, which may be organised by type of content or under a personal profile. The website host in this example would exercise little or no control over the choice of content or the content of the third party services, at least not proactively, but the service would organise the content and provide the navigation menus.

We have particular concerns about the application of regulation to what the Consultation refers to as “aggregated services”. In the on-demand world and particularly for those services enabled by the Internet, aggregators and portals are commonly the access point for on-demand content. These aggregators allow users to select content from a variety of sources, much of which may be provided by third parties rather than the aggregator.

The Government’s proposals are unclear about when such “aggregated services” are subject to regulation. Microsoft believes that such services should not be subject to regulation except in a few clearly defined circumstances.

Under the proposed wording in the Consultation, regulation will fall on the original provider of content where it remains responsible for both the selection of the programmes and the organisation of the catalogue through which the programmes are selected. Where the aggregator has control over both of these elements, however, there is a possibility that compliance responsibilities will fall on the aggregator. It is Microsoft’s view that only the entity that directly controls and edits the content should be regulated. Where the aggregator acts merely as an interface through which users can gain access to content produced or controlled by a third party, the aggregator should not be subject to any obligations relating to the content of the services.

Microsoft provides or is developing a number of products that could be considered “aggregated services”. For example, Microsoft offers access to a variety of on-demand third party video content through its XBOX Live! Video Marketplace service via downloads and streams. It recently announced a partnership in the US with Netflix to allow US Netflix and US XBOX Live! subscribers to use their XBOX 360 console to access films and television programmes from Netflix’s on-demand streaming video service.⁶ In addition, using Microsoft’s Windows Media Center Online Media service, PC users can use their broadband connection to download films and television programmes. In the US, Microsoft has also launched a beta version of Windows Media Center Internet TV, which allows access to free on-demand streams of television programmes and films from Microsoft’s MSN Video portal (which itself provides access to third party video content like television programmes, music videos and sports highlights).⁷

Critically, in each of these examples, Microsoft merely acts as a front-end “shop window” for the services of third parties, creating the overall user experience for the navigation and access to these services. Microsoft does not control the content of these third party services. It would therefore be inappropriate for Microsoft to be

⁶ <http://www.xbox.com/en-US/community/events/e32008/articles/0714-netflixteamup.htm>.

⁷ <http://www.microsoft.com/windows/products/winfamily/mediacenter/features/onlineservices.mspix>.

considered the provider of a regulated on-demand programme service in these examples as it does not exercise sufficient control over the content being provided.

Further, on-demand service providers have strong incentives to differentiate between content they have chosen and paid for and content from sources over which they have little control (such as user generated content). While service providers are likely to promote the former as a means of marketing their business, they are likely to be more guarded with the latter. The way in which the content is used is therefore also likely to help shape user expectations.

- 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?**

Provision of access tools should not make the tool provider responsible for content regulation if it does not directly control and edit the content. In particular, the provision of PIN access controls for video-on-demand content provided by a third party should not trigger regulatory responsibility for the provider of the access controls.

Further, aggregators which filter or moderate third party content should not be subject to regulation. This follows the US model which allows online service providers to continue to be treated as “conduits”, not editorially responsible, even where they take measures to moderate offensive or inappropriate content or offer to end users tools to do so for themselves.⁸ It would be a perverse outcome if providers of the aggregated service are discouraged from moderating third party content for fear of triggering regulatory responsibility for such content.

Please also see our responses to questions 2 and 5.

- 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?**

No, providers of aggregated video-on-demand services should not have regulatory responsibility for non-EU services accessed through the aggregated service. Such providers do not directly control and edit the content. To impose such responsibilities on the aggregation provider would place undue regulatory burdens on providers. New and innovative on-demand services would be most affected, with smaller providers being disproportionately affected as they will have fewer resources available to comply with the requirements.

⁸ Section 230 of the US Communications Act (47 USC § 230).

- 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?**

See our response to question 5.

- 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?**

Yes, it is appropriate to treat the scheduled and on-demand parts differently. Where two different classifications of video services are combined or co-exist through a common platform, they should be subject to different regulatory requirements. Specifically, more stringent regulation should not be applied to non-linear services that are offered in conjunction with linear services. It should be possible to identify the boundaries between such services in practice – particularly if the Government defines the subset of on-demand services that are subject to regulation with enough specificity, as we recommend.

Regulatory System for on-demand audiovisual media services

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

We would agree with the application of most of the criteria listed, e.g.

- the need to implement the Directive effectively,
- transparency to the public and to industry,
- incentives for video-on-demand providers to participate in the scheme, and
- incentives for video-on-demand providers to comply with the rules.

Along with considering the “risk of creating new barriers to entry to the sector,” the Government should ensure that regulation does not limit innovation and the introduction of new technologies.

Consideration of “flexibility and future proofing” should also include flexibility in the means for compliance available to service providers.

We question the appropriateness of “reasonable consistency with existing content standards for broadcast content and advertising” as a criterion given the important differences between traditional broadcast television and on-demand video services.

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.

Microsoft disagrees that self-regulation is precluded by the language of the Directive and would encourage the Government to consider self-regulation along with co-regulation to implement certain aspects of the Directive. Microsoft's view is supported by the European Commission which has stated its support for self-regulatory options as long as there is a link between the establishment of the self-regulatory scheme and the results to be achieved.⁹

The Directive requires that Member States encourage the use of self-regulatory and co-regulatory regimes, including voluntary industry codes of conduct. With such regimes, companies can police their activities with less government involvement. Specifically, the following areas should be subject to a self-regulatory model: ratings, advertising in children's programming, and appropriate measures to protect children and minors from inappropriate content for on-demand services. Existing self-regulatory schemes have been successful in many of these areas through the work of bodies such as ATVOD, IMCB, ASA and the Internet Watch Foundation.

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

The reliance of self-regulatory schemes on voluntary codes of conduct avoids the need for membership, approval or notification requirements. If the Government does not permit the use of voluntary codes, then only a general conditions regime gives providers the requisite flexibility for innovation and avoids creating barriers to entry in the sector. Other mechanisms come close to a licensing regime that imposes barriers to entry, which the Government has said it does not want.

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?

An industry-led self-regulatory body should have the authority and can be guided by the legislation, its experience in developing codes of practice and its experience in handling complaints.

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

The industry self-regulatory body should have this responsibility. In this rapidly evolving environment, industry participants are best-placed to develop flexible practices.

⁹ See response of Gregory Paulger, Director of the Commission DG Information Society of the European Commission, to Q350 in the House of Lords Inquiry into the Audiovisual Media Services Directive: Evidence.

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

The industry self-regulatory body should monitor compliance, investigate complaints and determine sanctions. ASA, ATVOD and IMCB are all successful examples of such a model.

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

Public censure followed by rejection from membership as applicable. Name-and-shame sanctions can be very effective in practice.

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?

It will depend on the nature of the failure but we would agree that backstop powers should include sanctions for serious breaches.

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

The Government should support self-regulatory efforts currently underway. Improvements to self-regulatory efforts continue to be forthcoming. These issues were outlined in Microsoft's September 2006 submission in the Government's prior consultation on the AVMS Directive.¹⁰

However, of the co-regulatory models proposed in the Consultation, Microsoft believes that Model 1, whereby the Government delegates day-to-day operations to a co-regulatory body, preserves the most opportunity and flexibility for industry to establish the appropriate regulatory regimes to govern on-demand services.

It is important that an industry-led group with members drawn from the video-on-demand sector is in charge. The group ought to span the full range of stakeholders, from broadcasters such as the BBC (given the success of the iPlayer), through to traditional video-on-demand players such as On Demand Group (who serve the pay-TV industry) to players such as Microsoft. A group focused on broadcast regulatory responsibilities may not fully understand the differences with video-on-demand and why broadcast regulation should not be extended reflexively.

¹⁰ Microsoft Submission to the Modernisation of Audiovisual Content Services Regulation Consultation (2006)

Advertising in on-demand audiovisual media services

19. Should the controls on advertising in video-on-demand services cover

- **advertisements which appear on-screen 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?**

Given the significant differences between on-demand services and traditional broadcasting for advertisements that “accompany or are included in that programme”, Microsoft believes that a narrower definition is more appropriate, i.e. to cover only advertisements which appear on screen as a result of the user accessing a particular video-on-demand programme. Furthermore, this definition would be more consistent with the language of the Directive by focusing on television-like advertising, such as adverts at the beginning and end of programmes or during programme breaks where consumers would reasonably expect regulation to apply in a similar way to linear television. Under the Government’s proposals, the advertising restrictions will be extended to a much broader range of on-demand video services, which currently are not subject to the existing regulations. As a result, any services that provide access to “programmes” will need to meet the ad restrictions.

As previously noted, interfaces for online video-on-demand catalogues are more likely to resemble Internet portals or search engines in their arrangement, with links to virtual channels and other groupings of on-demand content and in some cases links to electronic programme guides for linear or on-demand services. Consequently, advertisements which appear on-screen as a result of the user accessing a particular video-on-demand service are likely to be different from broadcast television adverts, which are based on traditional television spot advertising. By contrast, adverts on services for accessing on-demand programmes are likely to look more like Internet display advertising, which will frame navigation menus and content.

The Government has proposed a broad definition of advertisements that would impose television-like advertising regulations on navigation menus and other features not linked to specific programmes. This proposal is not consistent with the Government’s stated objective of light-touch regulation through implementation of the Directive as it will extend regulation to new categories of advertising and risks imposing television-style advertising restrictions on services that have neither the look, feel nor function of broadcast television. We are concerned that the Government seeks to impose a “consistent scheme of regulation” across two very different categories of services.

Given the significant differences in the nature and types of on-demand services being developed and the nascent nature of the video-on-demand industry, Microsoft believes that the narrower definition is less likely to lead to overly restrictive regimes that will encroach on innovation in the sector.

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

Microsoft supports a system under which ASA (or a new self-regulatory body evolved from the collaboration of ASA and on-demand industry stakeholders) regulates advertising on on-demand services while product placement is regulated by an industry-led self-regulatory body with responsibility for on-demand content.

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?

We see no advantage to having Ofcom, rather than the Government, assign advertising regulatory powers to an industry-led body.

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

Yes. ASA should form at least part of the new self regulatory body or in some way contribute their expertise in the establishment of a new self-regulatory regime. We have confidence in ASA and believe that it has done a good job in regulating both the print and broadcasting sectors. We believe that ASA could be a successful self-regulatory body for the on-demand sector so long as it adapts regulation typically applied to traditional broadcasting content where necessary to deal with on-demand content appropriately. See also our response to Question 23.

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?

Microsoft's preference would be for ASA to deal with advertising in video-on-demand services and a separate self-regulatory body (in line with existing successful models such as ATVOD and IMCB) to deal with the programme and other content regulation including product placement, prop placement and sponsorship issues.

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?**

As set out in our response to Question 23 above, Microsoft's preference would be for the content regulator to administer any rules on product placement.

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?**

It should be the body that regulates the programme content. See our response to Question 23.

In relation to sponsorship of video-on-demand programmes and services, it should also be noted that the Directive significantly relaxes the requirements for sponsorship, while retaining some limits and rules for sponsors. It is important that the Government does not impose more stringent requirements in this area making it difficult to deploy services without changing the nature of the actual sponsorship accompanying a video-on-demand service. Ambiguities about what constitutes an encouragement to purchase goods should be clarified based on the wording of the Directive with the goal of consistent treatment of on-demand programmes and services.

Product Placement - General

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

Microsoft is not convinced of the value of a complete ban on product placement as preferred by the Government. Specifically, we disagree with the introduction of a ban on product placement in on-demand content. Today on-demand content is not currently subject to such a ban. As on-demand business models continue to evolve the revenues from product placement could provide crucial financial support to new and innovative ventures as well as encourage more UK production. Given that much of the content produced in the US and elsewhere abroad includes product placement, the impact of such a ban is not likely to be uniform for the viewing public.

The Government believes that the extension of a product placement ban to video-on-demand services will have little impact since “much of the programming which appears on UK video-on-demand services also appears on television”. This ignores the fact that video-on-demand services are still in an early stage of development. It is wrong to assume that on-demand content will consist of the same films and programmes that appear in cinemas and on television. Professionally produced programmes are being made available exclusively on the Internet, such as the UK web drama KateModern that recently appeared on Bebo. The extension of a product placement ban to such programmes will foreclose possible funding options and hurt UK production companies.

Generally speaking, EU national governments should work together to harmonise the rules for product placement across the EU. Ad hoc restrictions will complicate the roll-out of EU wide services for all providers.

- 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)?**

Microsoft urges the Government to proceed to liberalise the rules on product placement for video services in the UK to the extent permitted by the Directive. This would allow product placement in “cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes.” This derogation does not apply to children’s programming.

For programmes produced after 19 December 2009, the Directive has provided the Government with the discretion to relax the restrictions on product placements. It is therefore unclear, how the product placement restrictions will apply for previously produced programming provided by service providers that were previously unregulated.

- 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?**

Permitting product placement in “cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes” would encourage innovation and give effect to the intention of the Directive. Each of these genres will benefit from greater exploitation on digital platforms, particularly the “long tail” of on-demand content distribution. Successful business models for on-demand services remain uncertain, but a greater reliance on advertising, sponsorship and product placement seems likely. Extending the ban on product placement to on-demand services will limit access to new, innovative services for all these genres. It will also cut off a potential source of funding for UK productions at a time when funding is becoming less available.

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

The UK broadcasters appear to be able to preserve editorial integrity in respect of product placement in the cinema films and non-UK television programmes that they are currently able to show.

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

A practical and flexible approach to “undue prominence” should be taken based on the UK’s experience with product placement in films and non-UK television and drawing on experience from other jurisdictions where product placement is permitted.

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

In general, we would support an overall liberalisation of product placement rules across all audiovisual media services. For the reasons given above, it is particularly important to allow product placement in on-demand content services. Viewers of on-demand content are, generally speaking, sophisticated consumers with a high degree of media literacy. These viewers are accustomed to the current on-demand environment in which product placement is permitted in services based in the US or not closely tied to television.¹¹

Prop Placement

32. Should prop placement continue to be permitted?

Yes. Content producers need to have the editorial freedom to include products and services in their programmes to promote the realism of programmes.

Microsoft does not have any comments on Questions 33 to 35.

Product Placement - Signalling

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?

Yes. See our response to Question 27.

37. How should product placement be signalled to viewers?

The regulatory body for on-demand content should be allowed to develop a flexible approach to signalling of product placement. The IMCB's signalling scheme is an example of effective self regulatory practice in this area.

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)?

See our response to Question 37.

Non-EU satellite channels uplinked from the UK

Microsoft does not have any comments on Questions 39 to 42.

¹¹ Paragraph 15, page 54 of the Consultation

Impact and Competition Assessment Related Questions

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

43. What are the key technical and market developments and the likely future impact of these, including emerging strategic and business models?

There are several observable trends that may affect competition in the provision of video-on-demand in the next two to three years. These include:

1. **Convergence and multiple screens:** Consumers are no longer consuming video solely on televisions. The advent of new portable devices including mobile telephone handsets, Internet television set tops such as Apple TV, and game consoles like the Xbox 360 that are video capable are changing consumers' expectations of video services. Consumers increasingly want to see the content they want on any or all of the screens they have.
2. **Increased broadband penetration and bandwidth:** Increasingly, consumers have access to a reasonably priced broadband connection that is capable of delivering high quality video although not yet with the quality and reliability of existing television distribution systems. This has created the beginnings of a new distribution system for video content that is more flexible, extensible, and capable than fixed broadcast, cable, and satellite systems. This capacity will continue to expand, creating new opportunities for service providers and distributors to deliver more content, to more devices, in more ways, than ever before.
3. **Transition to digital broadcasting and increased fidelity of web-based video:** The UK is well-served by digital satellite, cable, terrestrial broadcast and IPTV delivery systems. Digital broadcast has demonstrated higher picture and audio quality attracts consumers. Similarly, technology advances in the encoding and processing of web-based video, such as Microsoft Silverlight, Adobe Flash, and Apple QuickTime, are delivering increasingly higher quality video. As the quality of the experience improves, particularly with HD content, it has the effect of drawing more users toward online viewing and acquisition via download for offline viewing.
4. **Business model erosion:** The advent of the digital video recorder has put pressure on the traditional broadcast ad-supported, schedule-based business model as viewers increasingly skip commercials. As the traditional model erodes, distributors are experimenting with additional business models, including delivery to the multiple screens noted above, in an effort to seek new ways to monetize their product, including with alternative, less disruptive, and more trackable ad-based revenue models.

As noted above, this is a period of rapid experimentation and change in the video distribution marketplace. We note that there have been several attempts to develop and market Internet-television set tops and services around the world. Recently, new television sets have begun shipping with integrated Internet connectivity. To date, none have acquired significant scale, and none have demonstrated a significant business model. It is too soon to predict the future with any certainty. However, the technology direction is clear – a general migration from legacy analogue production, distribution, and broadcast technologies to digital, IP-based technologies throughout the value chain from the camera lens to the user’s display screen. This transformation will undoubtedly include the development of both new quality-of-service managed networks, as well as continued expansion of the best-efforts Internet networks that are supplying consumer broadband today.

These trends will initially result in a flurry of competitive activity – with providers launching new Internet-based video services, mobile operators introducing new services, and legacy providers broadening their offerings – attempting to reach all of the consumers’ screens. While there will initially be a host of new services, the uncertainty over new business models, coupled with the pressure on legacy business models will inevitably influence not only the cost and variety of offers to consumers, but also licensing negotiations for all parties involved in the acquisition and provisioning of content.

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?

In the on-demand sector in particular, providers will have a high degree of flexibility to establish themselves outside the UK and even beyond the EU for purposes of the Directive. Although there are several ambiguities in the application of the Country of Origin principle, providers should have some ability to avoid a country’s jurisdiction by ensuring that editorial decisions and other activities (e.g. marketing decisions) are not taken or managed within the jurisdiction. The availability of reliable, high-speed IP access networks for delivery of services removes many technological barriers to providing these services from outside the UK. Because of this it is important for the UK Government to follow through on its stated goal of implementing the Directive in a manner that will result in a flexible, light-touch regime for media service providers. Otherwise the UK risks losing innovative content service providers to other jurisdictions where the regulatory regime is more flexible, less costly and more open to innovative business models.

45. How will the options proposed impact directly and indirectly on the number and range of service providers?

See our response to Questions 43 and 44.

46. How will the options proposed limit the ability of service providers to compete and reduce the incentives for providers to compete vigorously?

See our response to Questions 43 and 44.

47. How will the options proposed affect technological innovation within the relevant markets?

See our response to Questions 43 and 44.

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Microsoft welcomes the opportunity to discuss our views in greater detail. Please contact Paul Morris, Head of Government Affairs, Microsoft Limited on 0203 139 6279 or at paulmor@microsoft.com or Jim Beveridge, Senior Director of International Policy & Standards on 0796 899 6079 or at jimbev@microsoft.com.