



***Audiovisual media services Directive: Consultation on proposals for implementation  
in the United Kingdom***

***Response from Yahoo! UK & Ireland***

***31 October 2008***

**Introduction**

Yahoo! UK & Ireland offers a range of content, navigation and information services to internet users in the UK. Yahoo! also develops global technology platforms which are open to third party developers to distribute non-Yahoo! services. Our response to this consultation focuses on how the principles of the Directive could be objectively applied in a way that is clear and predictable for all media service providers in an increasingly complex policy environment. Our comments also cover some of the issues raised in the impact assessment.

**Scope and definition**

The Government has chosen to consult on the general framework it proposes to implement the Directive rather than inviting comments on a draft SI. Our preference would be for the latter and we encourage the Government to consult separately on the draft regulations so that stakeholders have an opportunity to comment on the actual legal drafting as well as the Government's policy intentions.

It is proposed to define the concept of an "on-demand programme service" in the Communications Act 2003 with three principal elements:

- Its principal facility is a "video on demand" service;
- It is mediated by a service provider exercising "editorial responsibility"; and
- It is available to members of the public to use.

We have the following comments on this approach:

***"Video on demand" service***

We agree with the proposal to qualify the definition of a service with a "principal purpose" test. This makes clear that the Directive is only intended to cover services which predominantly comprise programmes of the kind available in traditional broadcasting and not to inadvertently capture services of which on-demand audiovisual services only form a small part.

We agree with the requirement that the definition also be limited to programmes of a kind similar to those available on television broadcasting services. This remains faithful to the intention of the Directive i.e.: to focus on services which are equivalent to television but not bleed in to new services which do not share the characteristics of traditional broadcasting.

The definition of “video on demand” suggested in para 26 is, in our view, incomplete. In order to fully implement the Directive, the definition in the Act must include all the cumulative tests as stated in recital 25 (and restated in para 21). The definition must also be specific about the exclusions set out in para 19. Once established in law, these principles will guide the assessment of individual services. This is the intention of the Directive.

### ***“Editorial responsibility”***

The distribution of audiovisual content online involves a longer and more complex value chain than in broadcasting. The analysis in paras 29-43 reflects some of the complexity. We believe that the tests set out in the Directive regarding responsibility for audiovisual media services should be faithfully reflected in the UK implementation and that interpretation should rely on these tests only. In other words, we do not believe that there needs to be an additional layer of regulatory responsibility placed on “aggregators” of content simply because they are aggregators. Rather, our view is that it should be a matter of fact whether a party aggregating content has “editorial responsibility” for its services based on the tests in the Directive. The analysis also confuses the provision of services and the provision of the underlying platforms used to distribute services. The concept of ‘general control’ does not sit comfortably with these models.

In our view, the regulatory framework needs to give clarity to three distinct business models:

#### *Provision of own on-demand service*

In principle, we agree that the provider of a service primarily made up of acquired or self-produced “programmes”, available at a time chosen by the end-user, could be deemed an on-demand audiovisual media services provider under the Directive.

It is important to note that there are models in the market at present whereby the provider manages the overall service but the content is supplied by a partner under contract and it is the partner which selects the individual programmes and delivers them automatically in to the service without prior editorial control by the service provider. In this scenario, the provider of the service could be held responsible for regulatory breaches committed by the content partner given the provider’s level of control over the form and content of the services made available to the end-users. In practice, some of these issues can be managed via contractual arrangements between the parties but, as a general principle, we believe that ‘regulatory responsibility’ should not be assigned to a party for an element of a service which it does not control, contractually or otherwise.

We agree that the legal framework should allow the regulatory body to assess and deal with such issues in a flexible and practical way, in line with the tests provided for in the Directive (as above). Business models will change quickly and the dynamism of this cannot be easily captured in a legal instrument designed to last 10 years or more.

#### *On-demand service distributed by a third party*

There will be aggregated on-demand services distributed by a third party but the service provider does not control the way in which the service is presented by the third party distributor. This is important as this presentation could be capable of triggering one of the Directive’s more subjective tests outlined in para 18 – e.g.: “*competing for the same audience as television*” or “*reasonable consumer expectations of it would be the same as for television broadcasting*”. We would not consider the provider of a service to have ‘editorial

responsibility' for the presentation of service by a third party in another medium which it has not agreed to or for the expectations of that party's customers. There is a more than theoretical risk that services which are out of scope in one medium could fall in scope in another. This is not the intention of the Directive.

This risk could be overcome by being clear that (1) services outlined in para 19 fall outside scope of the Directive regardless of the medium they are presented in and how they are presented and (2) the objective tests in the Directive carry greater weight than the subjective tests.

### *Operation of a platform*

We would not envisage a provider of a platform being deemed a provider of an on-demand audiovisual media service. In this scenario, the platform owner performs no editorial role and has no contractual responsibility for (or control over) the content contained in the service. This remains under the control of the service provider using the platform as a distribution channel for its service(s). For example, a third party may use an open Yahoo! platform to develop a widget to distribute its services. Yahoo! only makes available the underlying code and provides the end user interface in the form of a widget gallery. Any on-demand services distributed on this platform would be developed and managed by the third party, not Yahoo!, and the third party should have full regulatory responsibility for the service.

The consultation document suggests in paras 38-39 that this should be treated as a form of "aggregation" and that there may be a case for fixing responsibility for some elements of the service on the platform provider in this scenario. We disagree. The platform owner may be able to provide additional services under contract to assist the service provider meet their regulatory obligations (e.g.: PIN controls, age verification or similar<sup>1</sup>) but the formal 'regulatory responsibility' would rest with the provider of the video-on-demand service, not the platform provider.

If the platform provider is also providing an on-demand audiovisual media service(s) on that platform, they should have regulatory responsibility for those service(s) (as above) to the extent that they fall within scope.

### **Regulatory system for on-demand audiovisual media services**

The intention is to faithfully transpose the Directive in UK law but maintain the UK's commitment to a 'light touch approach' to the regulation of on-demand services relative to broadcasting. However, we note some tension between this and the options presented in the consultation document:

- Recital 36 of the Directive states that it "*should neither oblige Member States to set up co- and/or self-regulatory regimes nor disrupt or jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively*". We are concerned that the consultation document does not explore this point in detail and that the Government's favoured option 2 could in practice undermine existing self-regulatory schemes.

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<sup>1</sup> It is worth noting that in an online environment, these additional services are readily available from other third parties (independently of the platform) so an on-demand AVMS provider is able to take regulatory responsibility for all aspects of its service(s).

- The criteria for the regulatory framework set out in para 9 of the consultation document include “*reasonable consistency with existing content standards for broadcast content and for advertising*”. This, in our view, goes beyond what it required by the Directive. The Directive specifically recognises that on-demand services are different from traditional broadcasting and does not require that content standards are uniform. Research also shows that consumer expectations of new, on-demand services are different from traditional, linear broadcasting. This is also reflected in the existing regulation of broadcast and non-broadcast advertising. The Directive sets only minimum standards and deliberately leaves scope for approaches to content regulation which reflect evolving consumer expectations. We believe that this should be a guiding principle for the regulatory framework.
- We are not convinced that co-regulation is the *only* approach for implementing *all* aspects of the Directive and are disappointed that Government has not been persuaded to consider existing self-regulatory models as a suitable way to implement the Directive with respect to the regulation of content. We are minded to recommend that Government take time after this consultation to explore other options more fully with industry stakeholders. We also feel, however, it is important that the regulatory framework for the implementation of the Directive remains separate from other self-regulatory initiatives which may exist or come to exist for services outside the scope of the Directive. We must remember that it is not the intention of the Directive that the regulatory framework bleeds in to services which are outside scope. These services are the subject of other ongoing policy discussions and industry initiatives in other fora and it will be important to give those service providers as much clarity and predictability as possible and to minimise confusion.

To reflect the aspirations of the Directive and the intended light touch approach, we would envisage the regulatory framework operating along the following lines:

- The regulatory powers and day to day management of the framework would be delegated to the self-/co-regulatory body;
- It would be a membership-based organisation made up of providers offering services which fall within the scope of the Directive;
- It would be responsible for drawing up, interpreting and enforcing the code, as well as keeping it under review;
- The code would include guidance on content standards, to the extent that it is required by the Directive. The self-/co-regulator would be responsible for making this determination;
- The self-/co-regulatory body would be responsible for identifying and bringing in to membership providers of on-demand audiovisual media services<sup>2</sup>;
- Sanctions should set out in the code by industry and applied by the self-/co-regulatory body;
- If Government is minded to opt for a co-regulatory approach, serious breaches of the code could be referred to Ofcom by the co-regulator if the co-regulator’s own enforcement procedures have been exhausted<sup>3</sup>;
- Ofcom’s reserve powers would be limited to handling serious breaches of the code referred by the co-regulatory body (but not by Ofcom intervening on its own initiative)

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<sup>2</sup> If co-regulatory, this should include a process to determine when a service is no longer in scope and can ‘graduate’ out of the framework, possibly in to a self-regulatory scheme.

<sup>3</sup> This is similar to the ASA’s ability to refer an advertiser to the OFT on matters relating to misleadingness in the event that an advertiser persistently breaches the code or does not respond to available sanctions.

and intervening only where there is evidence that the co-regulatory system has failed<sup>4</sup>;

- Any disputes between a service provider and the self-/co-regulator about whether or not a service is in scope should be resolved by the two parties in the first instance. The self-/co-regulatory body may refer the matter to Government or a delegated authority (e.g.: Ofcom) if it cannot be agreed.

We also have some additional observations:

- It is important to acknowledge that the talent and expertise to inform the development of the new regulatory framework for on-demand services are to be found almost exclusively within the industry. We are not seeing a flow of this talent to regulators or Government. This is a matter of fact and is unlikely to change in the medium term. It will be important to ensure that aspects of the framework which will rely on this expertise are delegated to the regulatory body (see above).
- We agree in principle that it could be possible to have more than one industry scheme<sup>5</sup>. There would though need to be MoUs between the schemes setting out a process to refer complaints. As business models become more and more 'open', we can envisage a scenario where a complaint is received by one self-/ co-regulatory body about a service but the provider is not a member of that body. For example, if provider A's service were available on a channel/platform provided by provider B (who is also a provider of an on-demand AVMS service), a complaint from provider B's viewer about provider A's content would be heard by the regulatory body which provider A is a member of not provider B's.
- In co-regulation, the separation of day-to-day management of the scheme from Ofcom is an important one. However, it does mean that Ofcom staff will not necessarily gain experience of how this system operates when it comes to consider matters referred to it by the co-regulator. It is important to acknowledge the risk that case handlers apply the more familiar regulatory standard. The ASA, for example, has had to overcome this with its adjudication of the CAP and BCAP codes.

If Government is minded to opt for a co-regulatory approach, option 2 would be the most appropriate.

## **Advertising in on-demand audiovisual media services**

### *Advertisements to be covered*

The consultation document favours extending the advertising regulation required by the Directive to all inventory – i.e.: placements adjacent to programmes and placements which appear on the screen when accessing a regulated service. The Government suggests that this would provide a more “*consistent scheme of regulation*” and proposes this as the preferred option. This approach may appear consistent on paper, but in practice it would be difficult to separate the inventory described in para 11 from the inventory the Government would like to exclude, discussed in para 15. The user of a service is unlikely to see a distinction between them either. It is also the case that features identified in para 6b) also form part of services other than the on-demand audiovisual media service, particularly in on-

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<sup>4</sup> This is similar to the arrangement between Ofcom and BCAP with respect to the broadcast advertising code.

<sup>5</sup> This has worked successfully with Otelo and CISAS.

line media. It is preferable, in our view, to limit the scope of the regulatory system to advertisements embedded in programmes. This minimises the risk of regulatory creep, which is not intended by the Directive.

### *Regulatory system*

The implementation of this Directive presents a high risk of regulatory duplication and confusion in the area of advertising. Minimising this risk should be a guiding objective of this process, as should minimising the impact on existing self-regulatory schemes (in this case, the CAP code enforced by the ASA).

The existing self-regulatory code (CAP code) enjoys strong support from within the industry and among external stakeholders, and its scope extends beyond on-demand services in to the full range of non-broadcast media. It is important to all stakeholders that the implementation of the Directive does not compromise the future of this scheme. We therefore favour co-regulatory option A – i.e.: that the regulation of advertising in video-on-demand services be assigned to the ASA (under a new code, separate from both CAP and BCAP) so that it can remain the one-stop-shop for all consumer complaints about advertising. This is similar to the co-regulatory BCAP framework. We would envisage the industry remaining responsible for adequately funding the management of the new code as they are now.

The way advertising inventory is bought and sold is becoming increasingly complex and there is a trend towards selling campaigns across platforms and media. Separate codes for separate inventory pose real practical challenges for media owners and advertisers alike. In practice, they are unlikely to apply different codes to the same adverts and we would expect one standard to prevail, making the other redundant. This is not the intention of the Directive. These challenges would need to be reflected in the new code.

We believe that the co-regulatory body for advertising, rather than Government or Ofcom, would be best placed to address these and other complexities arising from fast-changing advertising business models (as noted above).

### ***Product placement***

Product placement is likely to become an important source of funding for content creation in the future. This is already the case for some productions specifically made for online audiences and for many TV productions from outside the UK. It will be important that the UK retains as much flexibility as possible in its implementation of the Directive to allow content producers to explore this revenue stream as traditional sources of funding decline. In response to the specific questions raised on this issue, we feel:

- Ofcom and the self-/co-regulator for on demand services should be able to permit product placement in all the programme genres specified in the Directive. These are genres where production funding is becoming increasingly difficult to secure, particularly for UK originating content. Ofcom's PSB review shows that this trend is expected to continue.
- Different rules should apply to on-demand services. Article 3(g) focuses on scheduling, advertising breaks and other features which are unique to television broadcasting and are not relevant to on-demand services. The co-regulator of on-demand advertising should determine an appropriate framework to give notice to

users about product placement in programmes in the various media. It will also be able to address issues arising from the interaction between product placement and other commercial communications in digital media.

- Product placement should continue to be permitted in programmes acquired from outside the UK. Imposing the UK rules on content originating other countries would have the effect of denying UK audiences access to high quality imported content via UK service providers and/or impose onerous editorial obligations on service providers. Users would probably seek to access this content from illegitimate channels and this is in no-one's interest.

For the avoidance of doubt, Government should make clear that the provisions on product placement will not be retrospective and that content produced before the new provisions enter in to force (including archive content) can continue to be distributed via UK services.

### **About Yahoo! UK & Ireland**

Yahoo! UK & Ireland is a subsidiary of Yahoo! Inc., a leading global Internet brand and one of the most trafficked Internet destinations worldwide. Yahoo! is focused on powering its communities of users, advertisers, publishers, and developers by creating indispensable experiences built on trust. Yahoo! is headquartered in Sunnyvale, California.

### **Contact**

Please address any questions regarding this response to:

Emma Ascroft  
Head of Public & Social Policy  
Yahoo! UK & Ireland  
125 Shaftesbury Avenue  
London WC2H 8AD  
Tel: 020 7131 1088  
Email: [eascroft@yahoo-inc.com](mailto:eascroft@yahoo-inc.com)