

Response to DCMS consultation

“The Audiovisual Media Services Directive: Consultation on proposals for implementation in the United Kingdom”



October 2008

About the Broadband Stakeholder Group (BSG)

The BSG is the UK government's advisory group on broadband. It provides a neutral forum for organisations across the converging broadband value-chain to discuss and resolve key policy, regulatory and commercial issues, with the ultimate aim of helping to create a strong and competitive UK knowledge economy. Further information about the BSG can be found at: <http://www.broadbanduk.org/>

As part of this remit, the BSG took a key role in coordinating stakeholders' input to the development of the Audiovisual Media Services Directive (AVMS) and remains concerned that its implementation supports the growth and global competitiveness of the converging media sector in Europe and the UK.

The BSG also has a strong track record in working with industry stakeholders in the development of good practice. We helped facilitate and develop the “Good Practice Principles on Audiovisual Content Information” which were launched in February 2008. These principles demonstrate a commitment from signatories to promote media literacy by providing information on audiovisual content information that is easy for consumers to use and understand. The goal of this initiative is to empower consumers to make safe and informed choices about the content they and their families consume. In light of the requirement of the Directive to ensure that on-demand services whose content might be harmful to minors are made available only in ways that ensure that minors will not normally hear or see them, and the fact that the principal suppliers of VOD services in the UK signed up to these principles, they should be of background interest to this consultation process. The principles and the list of signatories can be accessed at: www.audiovisualcontent.org

Overview of our response

It is our view that regulation in this policy area should offer the flexibility to support investment in and the innovation of future services to the benefit of both industry and the consumer. As such, we welcome the stated intention within this consultation document to *“draw into the scope of UK regulation a narrow range of services falling within the scope of the AVMS Directive, rather than extending regulation to a wide range of audiovisual services.”*

Throughout the development of the Directive, the BSG has advocated the following policy priorities, which also form the basis of our consultation response:

- to frame an appropriate scope of services to be covered by the Directive that reflects the realities of the converged environment and allows flexibility for innovating new services
- to support existing and successful self-regulatory initiatives that have been developed in response to the challenges of convergence
- to allow for the fullest consideration of revenue streams that could support the development of new services, including liberalised advertising provisions and derogations to allow for product placement in some instances

Scope: On-demand audiovisual media services

The consultation proposes that the government will meet the terms of the Directive by amending the Communications Act 2003 to create and define the concept of an “on-demand programme service” with the following principal elements:

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

We believe that the outlined approach does capture the relevant elements of on-demand audiovisual media services, as per the definitions included in the Directive.

However, we do believe that the way in which the definition is proposed may have unintended consequences in terms of the scope of services captured, which would run against the stated intention of government to *“draw into the scope of UK regulation a narrow range of services falling within the scope of the AVMS Directive.”*

The proposed interpretation of “editorial responsibility” highlights some tensions that require resolution in order to be clear on the scope of services covered and who has responsibility for them. As currently phrased, we believe a consequence of the proposed approach risks regulating on an institutional basis rather than on the basis of the actual service that is provided.

The consultation document rightly identifies that in respect of an aggregated service, whether control over the elements of a VOD service lies with the original provider or the aggregated provider, will depend on the nature of the contractual agreement between the companies involved. It also correctly points to another important related issue of where responsibility should fall when the original provider is based outside the EU.

This document seems to suggest that aggregated service providers have a vested interest in taking full responsibility for all programmes it offers as an on-demand service, regardless of whether it has produced or commissioned the content directly or acquired it from elsewhere.

However, it is not reasonable, or required under the Directive for providers to take editorial responsibility for programmes of which the content is not under its direct control. We believe that a consequence of the proposed approach would unnecessarily duplicate this responsibility across various providers.

This would likely cause friction throughout the supply chain, hindering innovation and making commercial deals more difficult to negotiate. We are also concerned that this would put the UK content industry at a global disadvantage. There is a risk that this approach may result in the relocation of businesses outside the UK and the EU should the Directive be implemented in these terms.

We understand that there should be a clear and simple process for consumers to be able to lodge complaints but believe that this can effectively be achieved without attaching editorial responsibility to an aggregator. We believe that in practice, appropriate consumer safeguards can be achieved by an effective regulatory system for on-demand services that has the ability to handle complaints effectively and place responsibility on the appropriate content provider.

Regulation system for on-demand audiovisual media services

The consultation document expresses a preference for a co-regulatory system of on-demand audiovisual media services in the UK, with backstop powers assigned to Ofcom. In light of the following statement included at Recital 36 of the Directive:

“Without prejudice to Member States’ formal obligations regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This 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 would welcome clarification of why *“the Government is satisfied that a system of self-regulation for on-demand audiovisual media services is not sufficient to implement the Directive’s requirements in the UK.”*

Both ATVOD and the ICMB and other Mobile Content Codes are examples of good practice that are functioning effectively and we believe meet the requirements of the Directive for the regulation of on-demand services. As such it seems counter-intuitive that the Government has ruled out self-regulation as unsuitable for implementing any aspect of the Directive. The establishment of a new regulatory framework would undermine existing successful self-regulatory schemes and be an inefficient use of resources.

As such, should the government be able to clarify the legal thinking behind the requirement for a co-regulatory model we would strongly urge that the future regulation of on-demand services build on the best practice and operational experience established by both bodies. Given that on-demand audiovisual media services are a nascent industry, it would be imprudent to impose premature co-regulation that may have adverse effects on this industry when there are existing self-regulatory bodies in place that who are well placed to meet the terms of the Directive.

In terms of the structure of the regulatory system, we agree that the criteria set-out at paragraph 9 of part 3A are useful in thinking through how to establish the most effective structure. However, we believe that the third listed criteria *“reasonable consistency with existing content standards for broadcast content and for advertising”* is wholly inappropriate in this instance. The Directive itself does not require consistent standards between broadcast and other media, and recognises the qualitative differences.

However, ultimately, in setting up a co-regulatory structure, we think it important to bring together service providers to discuss what system will best deliver for their consumers’ needs, in terms of standards addressing complaints, rather than use a check-list of criteria as a starting point for this process. Again, the experience of both ATVOD and the IMCB should be very useful here and in the light of work already undertaken in this area, and we strongly believe that industry should take the leading role in developing a standards code and any additional guidance.

It is difficult to comment at this stage in great detail about the exact nature of the set-up of the future regulatory structure, when we believe fundamental issues surrounding the scope of services covered require further clarification. However, from our experience of developing good practice guidance with industry, we believe that it will be crucial for service providers to have a central role in developing

guidance, enforcement systems and promoting these to their consumers for this system to be effective.

Advertising in on-demand audiovisual media services and product placement

We believe that access to potential revenue streams is fundamental to the future health and expansion of audiovisual media services in the UK and Europe. It is clear from cross-governmental policy documents such as the DCMS strategy paper, *Creative Britain: New Talents for the New Economy* that there is a desire to provide a supportive environment for the evolution of these services. As such, we would urge that the options for advertising and product placement are viewed within this context.

In light of this, we would argue that the controls on advertising in on-demand services should cover advertisements which appear onscreen as a result of the user accessing a particular video-on-demand programme rather than all advertisements within the overall service. If the latter option was pursued, display advertisements that are not integral to the programme, such as banners, would be captured by the controls. We believe that this would undermine and disrupt the current effective self-regulatory regime in place for non-broadcast advertising, and would be confusing for advertisers and on-demand providers. Adverts associated with multiple services could be subject to multiple codes. Consumers are able to distinguish between advertisements that are a direct part of on-demand services, and those that merely accompany them. In light of this distinction, covering all types of advertisements within an overall on-demand service would not deliver any benefit to the consumer. It would also go against the stated intention of the Government to *“draw into the scope of UK regulation a narrow range of services falling within the scope of the AVMS Directive.”*

Furthermore, we disagree with the Government’s view that it is right not to take advantage of the permitted derogations in respect of product placement. We recognise the concerns to ensure editorial integrity but believe it would not be in the commercial interests of broadcasters or online service providers to use product placement in a way that consumers would find inappropriate. Furthermore, given that consumers are already accustomed to the use of product placement in feature films and programmes from overseas, we are unconvinced that the introduction of product placement would have a significant consumer impact.

The consultation document also suggests that the economic opportunities that may be available from product placement could be minimal, yet available research shows a mixed picture with potential advantages. As such, we think it is absolutely the wrong time to rule out the value of product placement, in particular given the increasingly competitive and ever-evolving advertising market across various types of media content and platforms.

Contact

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