



DCMS CONSULTATION ON PROPOSALS FOR IMPLEMENTATION OF THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE IN THE UK

RESPONSE FROM THE BRITISH SCREEN ADVISORY COUNCIL

November 2008

Introduction

The British Screen Advisory Council (BSAC) is an independent, industry-funded advisory body which focuses on audiovisual policy issues. It brings together many of the most influential players from the TV, film and new media sectors¹.

We are pleased to have the opportunity to outline our views on the DCMS consultation on the implementation of the EU Audiovisual Media Services (AVMS) Directive in the UK. Our response does not replace the evidence that individual BSAC Members may have separately provided on this consultation.

BSAC believes that the DCMS proposals are a helpful first step in the development of an effective regulatory system for video-on-demand services. We welcome in particular the government's preference for a co-regulatory approach, based on the existing structures created by industry. An industry-led body is likely to be the most effective and least disruptive approach. We also agree that the Advertising Standards Authority (ASA) is well-placed to take responsibility for advertising regulation.

However, we have a number of concerns relating to the proposals surrounding the scope of regulation, advertising relating to VOD programming, and product placement.

Scope

The consultation document omits some of the elements of definitions that appear in the Directive, and in some cases changes the terminology in its descriptions. Failing to incorporate and reflect accurately all the relevant elements of the Directive could result in more services being caught by the regulation than is appropriate or necessary.

¹ See <http://www.bsac.uk.com/members.html> for a list of current BSAC Members.

Overly wide or restrictive regulation is likely to lead to many online service providers relocating or establishing themselves outside the EU, which could have a negative impact on economic activity as well as compromise consumer protection objectives.

Another observation is that the current focus on the “principle purpose” of a service (as a means of testing which ones should fall within the scope of the regulation) cannot work - services are constantly evolving and changing their offerings, therefore making it increasingly difficult to make distinctions between them for regulatory scope purposes.

We are concerned that in certain places in the consultation document, it appears that the Government’s motivation is to try to capture a company (or a person) within the scope of the regulation, rather than to foster fair and effective competition within the audiovisual sector. We would urge that where no obvious entity or person meets all relevant criteria, the most appropriate approach should be to refrain from imposing unnecessary restrictions.

The Principles of Better Regulation must be followed in the implementation of the Directive, therefore ensuring that legislation is only introduced/amended if absolutely necessary.

Advertising relating to VOD programming

The consultation document implies that all advertising associated with VOD programming would be subject to regulation. We would argue that only advertising which is embedded into an on-demand programme and not other forms of display advertising (such as banner ads) should be subject to the proposed regulation.

Product placement

Permitting product placement in some genres of TV programmes would result in the creation of a much needed and potentially significant new revenue stream, without adversely affecting editorial integrity. If the UK prohibits all product placement, while other territories permit it, our creative industries are likely to suffer competitive disadvantage. BSAC also cannot understand the logic of allowing product placement in imported TV programmes, whilst prohibiting it in UK produced programmes.

Other general observations

The consultation document does not seem to take into account the fact that consumer expectations for “old” and “new” media content/services are very different. Developing a “one size fits all” type of regulation runs the risk of hampering the development of new forms of content and services, and possibly wrongly predicting how certain business models and consumer behaviours may evolve. Therefore an important feature of any new regulatory regime should be flexibility, and an ability to move in step with a rapidly changing set of circumstances/business practices.

We also hope that in the event that the legislation takes the form of an Order (i.e. enabling the Government to change primary legislation, in this case the Communications Act 2003), an affirmative resolution procedure will be employed, so that the proposed regulatory changes are debated and approved in both Houses. A set of explanatory guidelines to accompany the new regulation would be welcomed by the industry.

Scope: The Definition of Audiovisual Media 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?

BSAC recognises the importance of equality of treatment between all comparable scheduled services, and therefore we support any necessary clarification of the current regime. Any changes/amendments to legislation must be undertaken in accordance with the Better Regulation Principles. Accordingly, any regulatory intervention deemed necessary should therefore be: transparent; accountable; proportionate; consistent; and targeted only at cases where action is needed.

Government has recently indicated that legislation is likely to take the form of an Order ² (which will enable Government to change primary legislation i.e. the Communications Act 2003). If this is the case, BSAC believes that the affirmative resolution procedure should be employed in order to guarantee a parliamentary debate. Debate in this manner will support the aims of Better Regulation to improve transparency and accountability, guarantee the scrutiny of policy proposals, and communicate regulatory changes efficiently. Having said this, BSAC believes that there is a potentially substantial drawback in implementing the Directive via an Order rather than primary legislation as Parliament cannot amend the statutory instrument. A flexible approach to legislation is essential for this rapidly changing sector. BSAC hopes that, if deemed necessary during its consideration, the Order can be withdrawn and modified to ensure Better Regulation principles can be satisfied.

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?

BSAC supports the Government's aim of drawing into UK regulation only a narrow range of services falling within the scope of the AVMS Directive (i.e. scheduled broadcasting services and video on-demand services only).

However, we observe that the consultation document does not explore all the relevant elements of the definitions as set out in the Directive. This is problematic, because excluding relevant elements and/or inaccurately reflecting the provisions of the Directive could result in a wider range of audiovisual services than is necessary being captured by regulation.

For example, the Directive describes an on-demand audiovisual media service as being "a catalogue of programmes selected by the media service provider". This is not touched on in the DCMS consultation. The potential issue here is that some on-demand services may not have a "catalogue" of programmes – also, it may be the case that the programmes are not "selected" by the media service provider. So, according to the Directive, these services should not fall within the scope of regulation - but this is not explicitly stated in the consultation paper.

² At the AVMS Stakeholders' Meeting on 26 September 2008

Other oversights include the Directive's reference to on demand services that should be deemed to be "television-like" in cases where "the nature and means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive". Without any research having been conducted into viewers' attitudes thus far as to what types of programming they would expect to be regulated, we acknowledge that this is going to be difficult to assess. However, inclusion of this element of the definition within the consultation document would have been preferable. Our own observation on this point is that audiences have grown used to consuming a variety of online forms of entertainment that have hitherto been subject to little or no regulatory oversight – particularly services that are established outside EU jurisdiction. Therefore, we do not believe that viewers will be expectant of regulatory protection with regard to many forms of on-demand entertainment.

The topic of "editorial responsibility" is also not covered accurately in the consultation document. The Directive describes it as 'the exercise of effective control both over the selection of the programmes and over their organisation in a chronological catalogue, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.' We understand this to mean that the service provider must have both "effective control" over both the "selection" and the "organisation" in a catalogue. Therefore, there are likely to be on-demand services that do not fulfil both these criteria, and thus will fall outside the scope of the Directive's regulation.

Other areas of concern: the term "mediated" appears in the consultation document³ but is not employed in the Directive, and there is a lack of clarity as to what it means; and the omission of various provisions as to what is considered to be "television-like"⁴.

Omitting provisions in the Directive, or changing the language is unhelpful and potentially catches more services than are necessary. We hope that the Government will ensure that the definition of an on-demand audiovisual media service includes the requirement of Recital 25 of the Directive, i.e. that "all of the characteristics of an audiovisual media service set out in its definition and explained in Recitals 16 to 23 should be present at the same time."

³ in Paragraph 24 (with reference to the idea that an on demand programme service is one that is "mediated" by a service provider exercising "editorial responsibility")

⁴ in Paragraph 26 (e.g. the Directive's provision that services must fall within the scope of the Directive if they "compete for the same audience of television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive").

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?

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BSAC seeks more clarity on the precise scope of the proposed application of the Directive.

The consultation document seems to imply that only on demand services offered by television providers will be subject to regulatory oversight.

We observe that the “principle purpose” test set out in Article 1 (a) of the Directive is likely to be problematic with regard to which VOD providers are caught, because the business models of media service providers are changing so quickly. It is unclear at this stage whether services such as Bebo Television or YouTube channels would be caught. For example, looking at Bebo, which is a social networking site in its principle purpose, are we to infer that its drama series, Kate Modern, would not be caught by the proposed new regulation, even though this programme is “television-like” in many respects? It is also worth noting that YouTube (currently primarily a provider of user generated content, or UGC) features a range of broadcasters’ own branded content, and are currently planning to distribute long form programming, including full length television programmes and feature films.

We also question the implication in the consultation document⁵ that new media services which are based around user-generated content are automatically excluded from the scope of the Directive. We note that the Directive (Recital 16) indicates that services will fall outside the scope if they are “primarily non-economic” and if they are “not in competition with television, such as private websites” - services will also not fall within scope if they consist of “the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”. In other words, the Directive does not specifically state that UGC content should be subject to automatic exclusion. Many sites which provide UGC content are reaching mass audiences. As discussed above, many also carry professionally produced content as well as UGC content. Many of the larger players are generating substantial revenues from advertising (therefore cannot be considered to be “non-economic”. The larger players have also played a large part in the steady decline in TV audiences in recent years (therefore it could be argued that they are in competition with television). [Another issue is that although much of the content on these services may be short clips (as opposed to longer form programming), this should not automatically justify exclusion from scope. Further exploration of the nature of various forms of short form content, and how they are consumed by audiences would be welcomed.] We would like to stress at this point that we are not arguing that all UGC providers that are “economic”, or which provide other forms of entertainment alongside UGC content should fall within the scope of regulation. DCMS has corroborated the Recital 25 requirement that a service must meet all of the relevant criteria to fall under scope. So, many of these services may not fall within scope as they may not fulfil other criteria.

⁵ Paragraphs 19 and 22

In BSAC's view, the test as to what services are to fall within the scope of the Directive needs to be applied at a more detailed or granular level (i.e. different programmes and offerings available) rather than the stated overall purpose of an audiovisual service.

Serious thought needs to be given as to how online offerings which provide access to a variety of different services, only some of which might satisfy the definition of an on demand audio visual media service, might be appropriately regulated. The Act should specify clearly that only video on demand programming is covered by the legislation, and not other support services (e.g. information pages) that sit alongside them.

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?

BSAC is concerned that the term “general control” that is employed by the consultation document (for identifying a company or person that holds the licence for a scheduled television broadcasting service), runs the risk of catching more services within the scope of the Directive than is appropriate. We note that the Directive employs the term “effective control” rather than “general control” in relation to the definition of “editorial responsibility”⁶.

The consultation document implies that the aim of this shift in terminology is “to capture the right level of responsibility within the hierarchy of the broadcasting industry”. In our view, in some cases there may be no organisation or person that exercises effective control both over the selection (of the programmes) and a catalogue. We are concerned that the Government's motivation appears to be to try and capture a company/person within the scope of the regulation, rather than to foster fair and effective competition within the audiovisual sector. We would argue that where no obvious entity/person meets all relevant criteria, the correct approach should be to refrain from imposing unnecessary restrictions.

If intervention is applied to a level beyond that which is absolutely necessary, this could result in many service providers re-locating to outside the EU. This will result in not only a loss of economic activity within the UK, it will also mean that the Government's objective of protecting UK viewers is compromised.

⁶ in Article 1 (c)

6. If the provider of an ‘aggregated’ video-on-demand service has control over some elements of another video-on-demand service to which it provides access, to what extent and in what circumstances should the regulatory responsibility for that other service remain with its original provider and to what extent and in what circumstances should it transfer to the provider of the ‘aggregated’ service?

Regulatory responsibilities should only be placed on an aggregated on-demand service provider if it has effective control over both the selection and organisation of the programmes in a catalogue, and fulfils the other criteria governing scope.

But, in the unlikely event of there still being a lack of clarity as to regulatory responsibility, the correct starting point in assessing where responsibility for a service lies should be the contractual arrangements that are in place between original provider and aggregator. Where it is not clear as to which party has control over different elements of a service, the best solution would be for both the original provider and the aggregator to be responsible for compliance in each particular area (to the extent that they have or perhaps share general control of those elements). Such an approach would incentivise each party to ensure that they discharge their respective responsibilities.

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?

As discussed above, aggregators that are deemed to hold regulatory responsibility will have an incentive to work with the VOD providers to ensure compliance. If an aggregator experienced problems with a VOD provider, the aggregator would have the ability to remove access to the offending foreign VOD service.

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?

BSAC has some concerns that other non-TV forms of content might be caught by the provisions of the regulatory regime because it is provided via a site which provides access to regulated, TV-like programmes. Video-on-demand services are likely to be provided alongside other on-line services that are audiovisual in nature but do not fall within the scope of the Directive.

As discussed previously, we believe it is more appropriate to use the term “effective control” in attempting to determine whether a service provider has control over content. In cases where it is not clear that a service provider has effective control we believe the best approach would be to refrain from imposing unnecessary restrictions.

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?

Arrangements should be put in place to avoid any difficulties that may arise regarding the regulatory treatment of the scheduled and on-demand parts of the same overall service e.g. a pay TV operator may provide both linear television channels (regulated by Ofcom) and on-demand services (overseen by the new co-regulator). The two regulatory bodies would need to establish an agreement to avoid both organisations considering the same complaint from a consumer about a programme that has been broadcast and then also made available on demand. A Memorandum of Understanding between regulatory bodies outlining responsibilities would seem to be the most effective approach.

Regulatory System for on-demand audio-visual 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?

BSAC agrees that these are appropriate criteria – however, accountability could also be included (i.e. accountability of the new co-regulator to Government for implementation of the relevant provisions of the Directive, and also accountability to all relevant stakeholders). The new on demand regulatory regime should be light touch, simple and cost effective

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.

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

BSAC agrees that a system requiring each VOD provider to be a member of an industry body designated as a co-regulator probably offers an effective method of regulating on-demand services.

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?

BSAC believes that Ofcom should be responsible for deciding which services are within the scope of the new legislation, and therefore which service providers would need to be members of the co-regulatory body.

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

The new co-regulatory body should be responsible for developing and maintaining a standards code, with formal sign off from Ofcom.

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

Responsibilities for monitoring compliance, investigating complaints and reviewing breaches of the code should lie with the co-regulator. However, Ofcom should have appropriate powers in relation to the most serious sanctions. A Memorandum of Understanding (MoU) between Ofcom and the co-regulator should set out the latter's responsibilities. To ensure confidence in the system, Ofcom should ratify the standards code and compliance procedures drawn up by the co-regulator.

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

The consultation document does not go far enough in exploring the issue of what types of sanctions should be applied. Further clarity is required.

In the event that providers do not comply with industry co-regulator rules, we believe that there is a case for graduated sanctions. Sanctions could range from formal warnings to financial penalties and suspension of membership. The imposition of most sanctions should be the responsibility of the industry co-regulatory body. However, the more serious sanctions, such as imposition of fines, membership suspensions and prohibitions should be the responsibility of Ofcom on the recommendation of the industry co-regulator.

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

In the event of a systemic failure (i.e. if a service provider continuously breached the co-regulator's Code, or if the industry lost confidence in the co-regulatory body), we believe that Ofcom should have reserve powers to step in to oversee the regulatory system for a temporary period while an alternative regulatory approach was being designed/re-worked.

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

BSAC is in favour of Model 2, as this solution provides a level of flexibility combined with the assurance of backstop legal powers from Ofcom.

Advertising in on-demand audiovisual media services

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

- ***advertisements which appear onscreen as a result of the user accessing a particular video-on-demand programme?***
- ***advertisements which appear on-screen as a result of the user accessing a particular video-on-demand service?***

BSAC believes that only advertisements which appear as a result of a viewer choosing to access a particular video-on-demand programme should be subject to AVMS directive regulations. (i.e. adverts during / at the end of the programme, or adverts embedded within the beginning of a VOD programme). Banner ads and other similar types of ad that appear on VOD websites should be excluded.

The government should familiarise itself with the practicalities of how advertising is sold and provided on or near a video on demand service. Two types of advertisement are being considered. 1) Pre-rolls, mid-rolls and end-rolls are similar in style and content to advertisements seen on TV or in the cinema. These adverts are normally required to be viewed in order to access the video programme. 2) Display advertisements such as banner ads, ‘skyscrapers’ and pop-ups are to be found on most mainstream websites that accept advertising.

Display advertising already falls under the remit of the Advertising Standards Authority (ASA), and is obliged to abide by the Code of its Committee on Advertising Practice (CAP). Making display advertisements on VOD sites subject to both a new video on demand code and to the existing CAP code (i.e. when they appear on other websites) would make the same adverts subject to two different regulatory regimes. This regulatory overlap could result in advertisers choosing not to place display ads on VOD provider websites, and a subsequent loss of revenue for those VOD providers.

The interpretation of the word “accompany” in Article 1 (h) of the Directive is key. “Audiovisual commercial communications” or adverts are defined as images that “accompany or are included in a programme”. “Accompany” is a very loose term – it could be interpreted to mean a) all the advertisements on a website that includes a video on demand service. Or b) only advertisements that form an integral part of the experience of viewing an on-demand programme. The latter interpretation would be more in keeping with the overall purpose of the Directive and the UK’s view of it (i.e. that the new regime should cover TV-like programmes specifically and not the Internet more generally).

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

BSAC favours Option A (i.e. the regulation of VOD advertising being overseen by a single body, the ASA) as the most appropriate solution. We believe this system would be of considerable benefit to advertisers, media owners and consumers.

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?

Ofcom should agree a Memorandum of Understanding (MoU) with the ASA, in the same way that a MoU exists in relation to the co-regulation of broadcast advertising.

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

Yes, the ASA should be the sole body with responsibility for regulating VOD advertising.

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?

No. The ASA should remain as the “one stop shop” for advertising regulation.

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 we will explain in more detail later in this response, BSAC believes that product placement should be liberalised in the UK. The implications of introducing product placement are editorial in nature, therefore an editorial regulator /content regulator should oversee it. Furthermore, the ASA has no expertise in regulating programme content - major changes would need to be made to its constitution for it to take on such a responsibility. BSAC supports the government’s proposal that the body that regulates programme content in on demand services should also regulate product and prop 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?***

Similarly, sponsorship in on-demand services should be regulated by the body responsible for regulating programme content in video-on-demand services.

Product Placement

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

BSAC believes that carefully regulated product placement should be permitted in linear and non-linear content services in the UK in all the genres permitted in EC law as the Directive now explicitly allows. Producers of audiovisual content are experiencing declines in revenues as a result of audience fragmentation – this of course impacts on their ability to continue to produce quality content for UK audiences. Any possibility of raising additional revenues from product placement in order to supplement revenues would be welcomed. If the UK prohibits all product placement, while other territories permit it, our creative industries are likely to suffer competitive disadvantage.

The consultation document argues that only “modest” additional revenue streams (about £25 million - £35 million within five years) could be achieved by permitting product placement – and that therefore there would be little positive economic impact for the industry if product placement was liberalised in this country. BSAC believes that the 2005 Ofcom research that DCMS bases this belief on significantly underestimates the potential revenues that could be achieved. The advertising sector estimates that product placement revenues could reach up to 5-10% of the total advertising market. While this figure is unlikely to alarm viewers about risks of over-exposure to product placement, it could at the same time provide substantial support to the creative industries. This is essential for investment in new content, particularly at a time when advertising revenues are in decline.

Currently there are no restrictions on product placement in UK video-on-demand services. We believe it would be against the Government’s commitments to Better Regulation to introduce restrictions on these services in the absence of any demonstrable consumer harm, and also in light of the potential damage this could do to UK competitiveness. Introducing restrictions on product placement, particularly in VOD services, runs the risk of forcing some new services overseas. Already, a number of major linear TV channels are moving to other jurisdictions for various reasons (particularly tax), and while there are some broadcasters who are likely to always remain onshore, we believe there is likely to be a greater issue for on-demand services. If there are both tax and regulatory advantages of being in other territories outside EU jurisdiction, e.g. Luxembourg, it is difficult to see why certain on demand services would remain in the UK.

Another reason why BSAC does not agree with the proposal to prohibit product placement is that viewers might seek out uncut programming from illegal sites and thus encourage further growth of TV piracy.

We do agree however, that certain genres of programming, particularly news and children’s programmes, should be subject by way of exception to an absolute prohibition – but we believe that producers of other genres (i.e. features films, TV films and series, sports and light entertainment programmes) should be left to determine for themselves whether to use product placement or not. Programmes which are clumsily and excessively filled with product placement will not be taken seriously by discerning UK audiences that are accustomed to high quality output. This self-regulatory approach has long been successfully applied in the film industry.

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)?

Yes, as discussed above, BSAC is in favour of product placement being allowed in as many of the permitted genres as possible.

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?

As inferred above, BSAC believes that it would be possible to allow some product placement without compromising programmes editorially, by adopting a regime along the lines outlined in the Directive (in particular the prohibition on undue prominence and insistence on transparency). In time, product placement could provide modest additional benefits to advertiser-funded television as traditional revenues come under increasing threat (and thus could help the ability of commercial PSBs to fulfil their public service broadcasting obligations). Moreover, product placement revenues could be a significant source of revenue in the future for “new” media content creators (where the main sources of revenue are currently and will continue to be sponsorship deals and product placement.)

UK viewers are already aware of product placement in many films and American series, therefore we feel that some element of product placement could be introduced in the UK without harming viewers.

We would question the logic of a regime that enables viewers to continue to be exposed to high levels of product placement in movies and imported shows, yet which prohibits modest product placement in UK produced TV programmes.

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

BSAC believes that a rigorously enforced undue prominence regime would be essential for the success of product placement, as it would ensure products and commercial references only appeared in programmes when they could be justified and not compromise the editorial integrity of the programme. We believe that transparency would also be crucial – this could be achieved in part through a signalling regime, as required by the Directive. Viewers should also be able to find out easily what products have been placed in a programme (for example, this could be achieved by providing information in the credits or on an accompanying website).

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

An overly blatant or prominent approach is likely to only alienate viewers and therefore undermine the value of the programmes. Advertisers know that product placement can only be successful if products are integrated sensitively into programmes in ways that do not compromise them editorially, or make the products look out of place.

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

As we have already discussed, we believe that product placement should be allowed in the permitted genres in broadcasting and on-demand services. We are not in favour of different regimes for linear and on-demand, and would anticipate the co-regulator for on-demand services applying similar rules to those in Ofcom’s Broadcast Code.

32. *Should prop placement continue to be permitted?*

Prop placement is a well-established element of programme making in the UK already, with no apparent harm to viewers. BSAC sees no justification for it to be banned.

33. *Should there be a specific set value above which prop placement is subject to the Directive's rules on product placement? If so, what should it be?*

BSAC notes that there is no requirement in the Directive to set a specific value. We see no benefit of introducing such a concept into UK legislation or regulation, and believe that such a rule would be very difficult to enforce.

34. *What other ways are there of ensuring that the UK meets the Directive's requirement that prop placement above a 'significant value' must be treated as product placement? Which test is best and why?*

In our view, "significant value" is a relative concept. The most obviously relevant element against which it might be measured as significant is as a proportion of the total production budget. For example, a "significant" value could be deemed as perhaps over 10% of the total production budget for a programme for any one supplier or manufacturer. However, this matter needs further exploration and discussion.

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

Setting a value would not be helpful. However, if such an approach was adopted it would be a more appropriate and flexible arrangement if the new co-regulator (and Ofcom) could review and re-set the value from time to time according to market circumstances - rather than putting a set value in the legislation and it becoming out of date.

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, BSAC supports the proposal to preserve product placement in programmes acquired from outside the UK and films. UK audiences have become very accustomed to imported TV shows from the US, many of which contain high levels of product placement (e.g. Desperate Housewives, Six Feet Under, Lost, 24, West Wing, The Wire etc). These are very popular programmes with audiences, and there is no evidence that audiences are in any way misled or harmed by this placement activity. However, as stated above, we would question the logic of a regime which exposed UK audiences to product placement in shows from overseas – yet prevented any product placement in UK produced programming.

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

We note that according to Article 3 (g) of the Directive, Member States have the flexibility not to require that viewers be informed of product placement in programmes that have been produced by the media service provider (or an affiliate company). We would hope that the UK will exercise this flexibility in its implementation of the Directive in this area.

For cases where TV shows are shown that have not been produced by the media service provider or an affiliate, a balance needs to be struck between the requirement to provide transparency and the need to avoid intrusion to the viewing experience.

We do not think it would be appropriate for a single method of signalling to be prescribed, rather the decision should be left to the broadcasters to decide how to identify product placement. A good starting point might be to ask audiences as to how they would wish product placement signalling to appear in TV programmes. Another idea is that a single industry approach (e.g. in the form of a logo) might be developed to alert viewers to the presence of product placement in programming.

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)?

BSAC does not believe that the rules on signalling should be set by government in legislation. We support the proposal that the relevant regulators who are closest to the issue should determine the regulatory framework and any appropriate rules.

Satellite television broadcasts from outside the EU

39. Should there be arrangements of some kind to regulate broadcasts from non-EU broadcasters which are uplinked from the UK?

40. What legal powers should the Government or Ofcom have in order to ensure that there can be effective intervention if unacceptable content is broadcast by a non-EU channel uplinked from the UK?

41. What responsibility, if any, should uplink providers have in relation to the channels they uplink?

42. Are there any other options, besides those described in this document, which would achieve the objective of ensuring that non-EU satellite channels uplinked from the UK comply with the requirements of the Directive and enabling the Government or Ofcom to take appropriate action against those that do not?

BSAC favours Option 2 as recommended by DCMS.

Impact and Competition Assessment

BSAC would like to observe that the impact and competition assessment work is not comprehensive enough. The VOD market is in an embryonic state, and there is a risk that the proposed regulatory regime may discourage/put obstacles in the way of new companies from forming or force new entrants overseas.

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

Digital technologies are transforming the production, distribution and consumption of audiovisual content, bringing significant benefits to producers and consumers. For consumers, this means access to more and better audiovisual content than ever before, available for them to use wherever and whenever they want.

New technologies should enable producers to get their creative output more directly to consumers; and to address large (potentially worldwide) audiences with little or no repackaging of content for different platforms. VOD will enable a vastly expanded range of pre-existing content to be made available, opening up historic and global archives. New mainstream high-end content will continue to be offered across all platforms, and may be promoted even more heavily. New technologies should empower niche interest communities, who can be targeted more effectively, enabling the production of a potentially significant volume of niche content.

Some audiovisual companies will continue to aim their content primarily at national audiences (e.g. public service broadcasters), while others (e.g. the US studios) will rollout their content on a global level online. The industry is still experimenting with many different forms of business models and DRMs to find out what works.

The audience's appetite for on demand content on a range of different platforms (PCs, mobiles and cable) will continue to grow. The audiovisual industry will need to address the proliferation of increasing number of communication devices by delivering content over a number of networks and devices. These trends will continue as equipment manufacturers produce the next generation of laptop computers and mobile phones which permit accessing the Internet or broadcast content on the move: the mobility, greater personalisation of content and participation that these devices permit is likely to increase the significance of these platforms as a means of consuming and producing content over time. Audience fragmentation will lead to increased pressure on audiovisual entities to find new ways of supplementing their incomes – and new business models will emerge. The ability of the UK broadcasting sector to address the opportunities and challenges of convergence will depend among other things upon the vitality of its public service broadcasters (BBC, ITV, Channel 4 and 5). As for VOD services, as discussed previously if regulatory intervention goes above a level that is absolutely necessary, many services will find it difficult to compete with other players. As a result many businesses are likely to relocate outside the jurisdiction of the EU.

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?

Many “traditional” TV providers are based in the countries where they operate – and would have little incentive to relocate. However, the majority of online audiovisual businesses could operate just as effectively from outside of the UK or the EU.

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

As we have discussed previously, if regulatory intervention goes above a level that is absolutely necessary, many service providers are likely to relocate to non-EU locations.

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

We believe that some of the proposals could force smaller, independent services to relocate or establish themselves overseas – leading in turn to a less competitive domestic market.

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

Unfortunately, some of the proposals in the consultation document are in quite stark contrast to the “light touch” regulatory aspirations in recent years and principles of Better Regulation. As stated already, there is a danger that overly restrictive regulations could curb innovation, and could result in many online services moving or establishing themselves outside the EU.