

**Response to Department for Culture, Media and Sport
Consultation on implementing the Audiovisual Media
Services Directive in the UK.**

31 October 2008

UK Film Council

Executive Summary

1. The UK Film Council is the Government-backed lead agency for film in the UK ensuring that the economic, cultural and educational aspects of film are effectively represented at home and abroad.
2. The UK Film Council welcomes the opportunity to respond to the Department for Media, Culture and Sport's (DCMS) consultation on the implementation of the Audiovisual Media Services Directive (AVMS).
3. The UK Film Council's overall role is encapsulated in its goal, "to help make the UK a global hub for film in the digital age, with the world's most imaginative, diverse and vibrant film culture, underpinned by a flourishing, competitive film industry."
4. In relation to film and broadcasting and digital platforms our goal is "to work with broadcasters and other platform operators and to improve public access to British and specialised films." We would attach considerable importance to the obligation, set out in Recital 48, for audiovisual media services to "promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity" thereby contributing to the achievement of the goals of European and UK audiovisual policy. This is crucial for the future of feature film.
5. In our response to this consultation we wish to draw attention to the following issues in particular:
 - (i) That issues arising in relation to Ofcom's duty to further citizen interests – as opposed to its duties in relation to consumer interests - are not addressed.
 - (ii) We support a co-regulatory model for video-on-demand.
 - (iii) We support the Government's position that product placement should continue to be permitted in films made for the cinema which are shown on television and also on video-on-demand services.
6. We also wish to draw attention to one issue relating to the AVMS that is outside the scope of the current consultation, namely media literacy. We welcome Article 26 of the Directive whereby the Commission is asked to submit a Report on the levels of media literacy in all Member States. We urge the DCMS to ensure that the survey of the UK is as inclusive and wide-ranging as is possible, covering both the current levels of media literacy and provision in both the formal curriculum and informal education to increase and develop these levels.

In particular, we suggest that the survey takes account not merely of the skills of users and audiences in using available technologies but also the understanding of citizens in relation to issues such as the range of content available, the rights and

responsibilities incumbent upon producers and users in relation to content, and the opportunities that the creative use of media afford in a digital environment.

Responses to Questions

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?*

We believe that this is a matter for the Government to determine, taking into account the advice of Ofcom. However, we would note in regard both to this question and the following one, and the present consultation as a whole, that Clause 3 of the Communications Act 2003 refers to Ofcom's primary duty as being to further the interests of citizens and as well as the interests of consumers.¹

However, the present consultation document refers only to consumers and makes no reference to the separate interests of citizens. Therefore, due consideration needs to be given to those citizen issues which may arise in relation to any amendments to the Communications Act, as well as consumer issues.

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?*

We believe that they do.

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?*

We are not aware of any.

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?*

We are not aware of any.

¹ http://www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_2#pt1-pb2-l1g3

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?*

Yes.

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?*

We do not have a view on this question.

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?*

We believe that the aggregator should have such regulatory responsibility.

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?*

We do not have a view on this question.

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?*

We think that it is appropriate to adopt a different approach with regard to scheduled, as opposed to on-demand, parts of the same service. For example, the idea of time-based watershed which has existed in relation to scheduled television makes no sense in relation to an on-demand service.

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?*

As noted in our answer to Question 1., the issue of the citizen interest needs to be included to ensure consistency with the Communications Act 2003.

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.*

We are not aware of any.

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

We do not have a view on this question.

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?*

We believe that co-regulatory arrangements, such as those already in place for advertising, would appear to be appropriate.

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

We do not have a view on this question.

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

We do not have a view on this question.

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

We do not have a view on this question.

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?*

We do not have a view on this question.

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

We support "Model 2 – Co-Regulation – Ofcom assigns powers to a co-regulator." We support this option because we believe that it is sensible that Ofcom, as the statutory regulator, is the body which devolves responsibility to the co-regulatory institution.

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?*

We do not have a view on this question.

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

We do not have a view on this question.

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 do not have a view on this question.

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

We do not have a view on this question.

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?*

We do not have a view on this question.

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?*

We do not have a view on this question.

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?*

We do not have a view on this question.

Product Placement

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

Product placement with respect to films made for the cinema should not be prohibited by law. On this subject our view remains as set out in our submission to DCMS on the proposal to revise the Television Without Frontiers Directive.² As noted in that submission, the prohibition in the UK of product placement does not extend to feature films acquired by broadcasters. The UK Film Council believes that this exception should be maintained. It does not believe that stringent controls to “signpost” product placement within feature films are either necessary or desirable. Such signposting would be counter-productive by giving greater prominence to the very thing that it seeks, in some sense, to neutralize.

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)?*

We believe that the existing regime for feature film – which allows product placement in films as noted in our answer to Question 26 – should be extended to video-on-demand services.

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?*

See answers to Questions 26 and 27.

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

We believe that it is in the self-interest of producers and distributors of feature films to ensure that such editorial integrity is maintained, as otherwise the commercial attractiveness of a film would be harmed. We believe that the development of media literacy is also a useful tool in helping viewers to be able to identify where editorial integrity may have been breached in this way.

² www.culture.gov.uk/images/publications/UKFilmCouncil.doc

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

See answer to question 26 [or 37 - certainly not 30].

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

The same rules should apply in respect of film.

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

Yes.

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?*

We do not believe such a set value is necessary.

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?*

We do not have a view on this question.

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)?*

We do not have a view on this question.

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?*

As stated in our answer to Question 26, product placement should continue to be permitted in films made for the cinema.

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

It should not. This will simply draw further attention to it.

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)?*

We do not have a view on this question.

Non-EU satellite channels uplinked from the UK

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

We do not have a view on this question.

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?*

We do not have a view on this question.

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

We do not have a view on this question.

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?*

We do not have a view on this question.

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?*

At a general level we would refer the Government to our responses to the first two Convergence Think-Tank seminars which set out some of our views on these matters.³

³ <http://www.culture.gov.uk/Convergence/submissions/submissions.html#1>

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?*

We have not carried out a detailed assessment of this issue for film and are therefore unable to comment at this stage.

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

We have not carried out a detailed assessment of this issue for film and are therefore unable to comment at this stage.

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

We have not carried out a detailed assessment of this issue for film and are therefore unable to comment at this stage.

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

We have not carried out a detailed assessment of this issue for film and are therefore unable to comment at this stage.