

**The Audiovisual Media Services Directive:  
Consultation on Proposals for Implementation in the United Kingdom**

**Response from the Internet Advertising Bureau (IAB)**

**1. Introduction**

- 1.1 The Internet Advertising Bureau (IAB) is the UK trade body for the online advertising industry. We represent over 470 companies engaged in interactive digital advertising, including major online publishers and those directly involved in brokering the placing of online advertising.
- 1.2 The internet is the UK's fastest growing advertising medium. Spending on internet advertising grew by 20.8% in H1 2008 (compared with H1 2007) and is now a UK industry worth over £2.8bn. The UK online advertising market is the second largest in the world.
- 1.3 The market for on-demand audiovisual media services in the UK is nascent. Like many business models on the internet, it is highly competitive, fast-moving and dynamic. The IAB believes that the Government needs to take this into consideration in its implementation of the Directive into UK law. In particular, we welcome the Government's commitment 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."*
- 1.4 The IAB's response specifically relates to the following areas of the consultation document:
  - The definition of an on-demand audiovisual media service.
  - The regulation and regulatory framework for on-demand audiovisual media services.
  - The regulation of advertising and product placement on/within an on-demand audiovisual media service.

## 2. Key Points

- The IAB welcomes the Government's intention to draw into scope a narrow range of services. We believe this is vital in order to minimise the potential impact upon many existing and future online programme services not thought or intended to be captured by the regulations.
- In particular, we believe that the 'principal purpose' test is crucial in determining the scope of the Directive. Some on-demand programmes will be embedded into a wider service which may include other services which would not in themselves constitute an on-demand audiovisual media service.
- The IAB is disappointed that the Government has dismissed self-regulation as an appropriate means of implementing any aspects of the Directive. However, of the co-regulatory options presented in the consultation document, Model 2 (whereby Ofcom assigns powers to the co-regulator(s)) would be the least intrusive.
- The IAB supports the establishment of a new co-regulatory Code or sub-Code specifically for advertising on an on-demand audiovisual media service under the auspices of the Advertising Standards Authority (ASA). However, we believe that the industry – via CAP/BCAP – is best placed to determine how the requirements of the Directive can be met within this framework.
- The IAB believes the regulation of advertising in an on-demand audiovisual media service should only be confined to advertisements which appear, or are adjacent to programmes. These are advertisements which appear as a result of the user *accessing* a particular on-demand programme.
- Regulating all the advertising which appears as part of a service (including a website which may include a service) goes further than the Directive intended and would introduce unnecessary additional regulation to display advertising.
- The IAB supports the Government's preference that there should be one co-regulatory body for advertising on on-demand audiovisual media services and that should be assigned to the ASA.
- The IAB believes the Government needs to take a more flexible approach to product placement, which plays an increasingly important role in funding content creation online.
- We support an approach whereby Ofcom or the content co-regulator can permit product placement in certain cases, as well as make distinctions between product placement within a television programme and on-demand audiovisual media service.

### **3. The Definition of an Audiovisual Media Service**

- 3.1 The Audiovisual Media Service (AVMS) Directive specifically brings on-demand audiovisual services within the scope of EU broadcasting regulation. The transposition of the definition of an on-demand audiovisual service into UK law – via an amendment to the Communications Act 2003 - is therefore fundamental.
- 3.2 It is vital – in achieving the Government’s stated aim to provide clarity for business and consumers in relation to which services will be regulated (Part 2 (23)) – that the definition is defined in terms of the seven tests that the UK negotiated during drafting in order to minimise the potential impact upon many existing and future online programme services not thought or intended to be captured by the new regulations. A failure to do this may be confusing to consumers and have a detrimental impact upon industry and advertisers. The services specifically excluded in the Directive should also be excluded in the UK legislation.
- 3.3 The IAB welcomes the Government’s aim to draw into the scope of the new regulations only a narrow range of services (Part 2 (7)). We believe that many online services – such as short form audiovisual content designed and produced exclusively for mobile devices or those on social networking websites – would not be captured by the regulation. These services do not have as their ‘principal purpose’ the provision of ‘programmes’ and the content is not comparable to television broadcast content in format, quality and presentation. Some online audiovisual content is specifically excluded, for example versions of newspapers or sites sharing user-generated content mentioned in Recitals 19 and 21 of the Directive.
- 3.4 The IAB therefore believes that the ‘principal purpose’ test is crucial to determining the scope of application of the Directive. Some on-demand programmes will be embedded within a wider service which may include, for example, video clips and possibly editorial content. These elements would not in themselves constitute an on-demand audiovisual media service.
- 3.5 This also has implications for display advertising on a provider’s website (we cover this point in more detail in section 5 of our response) which, more often than not, will not be related to the on-demand audiovisual media service.
- 3.6 We therefore believe that the definition in the legislation needs to provide this clarification. It should specifically include the exclusions set out in Recital 19 and the cumulative tests set out in paragraph 18 of the consultation document.

### **4. The Regulation of On-Demand Audiovisual Media Services**

- 4.1 The AVMS Directive requires a new regulatory structure to be implemented into the UK for content and advertising standards on on-demand audiovisual media services. The Government’s consultation paper sets out options for regulating the content of programmes and advertising in these services.
- 4.2 The IAB is disappointed that the Government has dismissed self regulation as an appropriate means of implementing any aspects of the Directive. There are many successful self-regulatory schemes that have a proven track record

in regulating aspects of on demand services covered by the Directive. Moving to a wholly co-regulatory approach potentially undermines these schemes and would not be consistent with the objectives set out in Recital 36. In our view, the consultation document does not present a convincing case for a co-regulatory rather than a self regulatory approach. It would be helpful to understand the legal analysis which supported this conclusion.

- 4.3 Of the co-regulatory options presented in the consultation, the type of co-regulatory model whereby Ofcom assigns powers to the co-regulator(s) (Model 2) would be the least intrusive. This would provide Ofcom with the ultimate and overall responsibility for over-seeing content regulation in both television and on-demand audiovisual media services.
- 4.4 We would support the establishment of a new co-regulatory code or sub-Code specifically for advertising on an on-demand audiovisual service under the auspices of the Advertising Standards Authority (ASA) – see 5.4-5.5. We do not believe that audiovisual media services have the same characteristics – or indeed service providers - as broadcast services and therefore we believe they warrant their own co-regulatory Code or sub-Code. This is consistent with the objectives set out in recital 36 as it would preserve the self regulatory (and successful) CAP code for non broadcast advertising and only cover the narrow requirements of the Directive with respect of advertising associated with on demand content.
- 4.5 However, we believe industry – via BCAP/CAP – is best placed to determine how the requirements of the Directive can be met within this framework.

## 5. Advertising in On-Demand Audiovisual Media Services

### *What aspects of advertising should be included?*

- 5.1 The Directive states in Article 1(h) that an audiovisual commercial communication is defined as:

*“...images with or without sound which are designed to promote, directly or indirectly, the goods, services, or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes.”*

- 5.2 The IAB does not agree with the Government that the regulation of on-demand audiovisual commercial communication should apply to advertising that may appear as part of the services (Option B). The Government’s preferred option goes further than the spirit and the letter of the Directive. We believe the regulation of advertising in an on-demand audiovisual media service should only be confined to advertisements which appear, or are adjacent to programmes (Option A). In other words: advertisements which appear as a result of the user *accessing* a particular on-demand programme.

5.3 The IAB strongly supports Option A for the following reasons:

**A. Regulating all the advertising which appears as part of the service goes further than the Directive intended.**

The Directive does not say that advertisements on the on-demand audiovisual service (or indeed a website or portal which may feature the on-demand audiovisual service) should be included. Article 1(h) states very clearly that:

*“Such images accompany or are included in a **programme** in return for payment or for similar consideration or for self-promotional purposes.”*

The IAB therefore recommends that only advertisements embedded in the actual programme should be subject to the regulations. Some advertisements may accompany a programme, for example, where it is compulsory for a user to watch advertisements before the programme (ie ‘pre-rolls’). Some advertising may be included in a programme, for example, when there are advertisements in the middle of the programme in a similar way to commercial breaks in a broadcast programme. Therefore, pre-rolls or advertisements during an on-demand audiovisual programme should be covered by the regulations. Display advertising on a provider’s website (which may include an on-demand audiovisual service) should not be covered.

**B. Regulating the advertising which appears on an on-demand audiovisual service would “disrupt or jeopardise current self-regulatory initiatives that are working effectively” (Recital 36). The Government’s preferred option would therefore introduce double-regulation to display advertising.**

Recital 36 of the Directive states:

*“...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.**”*

Display advertising on a website/portal (that may include an on-demand audiovisual service) is already subject to strict rules under the CAP Code for non-broadcast advertising. In many places the CAP Code contains standards that exceed those in the Directive.

There is no need to extend this to display advertising where a self-regulatory framework is already in place and working effectively. Extending the new regulations in this way would subject providers to double-regulation: display advertising would be subject to the existing CAP Code and its sanctions as well as a (potentially conflicting) different code and set of sanctions established under the AVMS Directive. We believe this would disrupt and jeopardise the existing initiative already in place.

The IAB also believes this would be burdensome and confusing for both advertisers and media owners as there would be two sets of rules for the same advertising.

**C. Display advertising on an on-demand audiovisual media service is not always linked to the advertising embedded in an on-demand audiovisual programme.**

The advertising inventory for embedded advertisements appearing within an on-demand programme/service will not always be linked to that of display advertisements on a website or portal. It is more often than not that this type of advertising will be sold separately. The inventory can also be associated with a wider service or more than one service and this would extend the scope of the Directive unintentionally.

**D. Users tend to watch on-demand audiovisual programme as a single viewing experience (ie in full screen mode).**

In expressing its preference for Option B, the Government states that it would “provide a single set of requirements for all advertisements which a viewer sees as a result of accessing a particular service” (Part 3B (14)). We disagree. More often than not, users tend to watch on-demand audiovisual media programmes in full screen mode and therefore as a single ‘TV like’ viewing experience. When doing this, the display advertising is not visible to users and they do not associate it with the programme. The video advertising in or before the programme on the other hand will be.

***The Regulatory System for Advertising in On-Demand Audiovisual Media Services***

5.4 The IAB supports the Government’s preference (Option A) that there should be one co-regulatory body for advertising on on-demand audiovisual services and that should be assigned to the Advertising Standards Authority (ASA). We do not support giving the responsibility of advertising to the content co-regulator(s).

5.5 This would maintain the ASA as the ‘one stop shop’ in respect of all UK advertising. The ASA has already been regulating advertising on-demand audiovisual services through the CAP Code since 2001. Giving another co-regulatory body the remit for advertising on on-demand audiovisual services would risk confusing consumers and the industry.

***Product Placement***

5.6 The IAB believes the Government needs to take a more flexible approach to product placement in the UK. Product placement already plays an important role in funding content creation online and its importance is likely to increase in the future. Its role is very much nascent.

- 5.7 We do not believe that product placement in on-demand audiovisual media services should be prohibited by law. Rather we support a more flexible approach whereby Ofcom or the (content) co-regulator can make the decision as to whether product placement is permitted in the certain cases listed (Article 3g). We therefore support Option 1 whereby product placement should be regulated by the (content) co-regulatory body.
- 5.8 The IAB also supports the (content) co-regulator being able to make distinctions between product placement within a television programme and an on-demand audiovisual media programme. Article 3g states that programmes that contain product placement shall meet requirements, such as “clearly inform viewers...at the start and the end of the programme...and when a programme resumes after an advertising break.” Clearly these factors are more akin to broadcast than on-demand audiovisual services.
- 5.9 Flexibility is also required where the Directive allows for Member States to take a waiver on the notification and signalling requirements for third party produced content (Article 3g). We believe the (content) co-regulator can take advantage of this to ensure that consumers are not subjected to interruptive notification requirements for this type of product placement on programmes.

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