



Satellite & Cable  
Broadcasters' Group

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**Submission to the UK Government Consultation**

**The Implementation of the AVMS Directive into UK Legislation**

**31<sup>st</sup> October 2008**

## **The Satellite and Cable Broadcasters' Group**

The SCBG is the trade association for digital programme providers who are independent of one of the main terrestrial broadcasters. Its members are responsible for over 100 channels in the UK. Many member companies are pan-European broadcasters, producing and commissioning content for different national markets.

According to recent Deloitte research, SCBG members made a total economic contribution to the UK economy in 2007 of over £2.2 billion and invested a total of £1.2 billion in programming, employing nearly 25 000 people in skilled jobs.

SCBG member channels provide citizens and consumers with programmes and services for a diverse range of audiences across a wide range of genres and audiences, including entertainment, factual, educational, history, music, nature, art and science. Our member companies make and show programmes for children and young people, and for ethnic minorities in their own languages. SCBG members' channels can be found on all of the UK's major digital pay and free-to-air platforms, which are now available in nearly 90% of UK homes.

For a full list of members and more details about the SCBG please go to

[www.scbg.org.uk](http://www.scbg.org.uk)

## **Executive Summary**

SCBG welcomes the opportunity to give its opinion on the Government's proposal for implementing the EU AVMS Directive into UK legislation. In this response SCBG has focused on areas which it believes are key to its members' interests. These are as follows:

### **Product Placement**

The advent of the PVR and the shift of ad-spend away from traditional spot advertising means that additional revenue streams will become increasingly important to broadcasters. SCBG argues that:

- Product placement should be permitted in the genres listed in the Directive
- Audiences have been shown to accept product placement if they are aware of its presence and it is not unduly prominent
- Even if the revenue derived from product placement initially is relatively low, it should still be an option which is open to broadcasters providing they follow the rules.

### **The Regime for Video-on-Demand**

SCBG members, like most other broadcasters are offering or in the process of offering on-demand services for viewers. As this market is not yet fully developed, it would be a mistake to regulate it in such a way that would stifle its evolution. SCBG wants to see as flexible a regime as possible for VoD and makes the following suggestions:

- VoD content should be co-regulated via a body such as ATVOD, with OFCOM as the regulatory backstop authority (Model 2 in the consultation paper)
- The model should be one of membership for anyone offering content considered to be within the scope of the Directive
- There should be a separate appeals mechanism in the event of dispute about whether a service is considered within scope
- The development of detailed content rules should be the responsibility of the co-regulatory body and its members.
- Monitoring and sanctions should be the responsibility of the co-regulatory body and its members
- Sanctions could include take down or 'naming and shaming' on the co-regulator's website, with more serious or persistent breaches referred to Ofcom
- The Advertising Standards Authority should have responsibility for advertising in VoD services.
- Advertising in VoD services should only be considered such if it is contained within the programme. This will avoid confusion with other advertising codes already in place.
- Sponsorship and product placement should be dealt with via the appointed content co-regulator as these are more closely linked to content than to advertising.

## **Scope**

### **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?**

SCBG considers the definitions laid out in the Directive to define an on-demand service to be sufficiently detailed to ensure non-VoD services are excluded from its scope. However we do have one or two concerns and would like to stipulate what SCBG members feel are the most important elements of defining whether a service will be considered VoD under the terms of the new rules.

In order to avoid confusion, the most important element of any definition the Government uses in the UK legislation will be the stipulation that all elements of that definition must be fulfilled, including particularly the principal purpose element, before a service can be considered video-on-demand and within the scope of the legislation. Furthermore a service should be considered in its entirety rather than focusing on elements of it and trying to ascertain whether any AV content is 'incidental' or not when establishing if it falls within scope. SCBG members believe that another important element of the decision-making process is whether a service competes for the same audience as television. How this would be done, e.g. by looking at the marketing of the service, is key to how what is in scope will be decided.

## **Video-On Demand Services**

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

SCBG believes that for a co-regulatory system to work successfully, those who are governed by it should have ownership of it and responsibility for ensuring that it works effectively. For this reason membership of a co-regulatory body governing VoD would seem to be the best way forward. A membership approach would also ensure funding of the system was in place, although membership fees would need to be set in a way which did not deter small and medium sized enterprises from entering the market.

### **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?**

It should be for the code owner to interpret the legislative definitions and to decide who is subject to the co-regulatory code. However, as a safeguard it might be sensible to have an independent appeals system in place to deal with disputes so that judicial review is not the only option open.

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

A co-regulatory code should be developed and owned by its members. One of the major benefits of having a code is that it is more flexible and can be modified to reflect changes in industry practice or to address issues as they arise. For this reason the eventual co-regulator(s) should be responsible for developing the standards code in conjunction with their members, as is the case with the ASA codes at the moment.

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

Again, following the successful ASA model, the co-regulator should take responsibility for monitoring, complaint investigation and breach reviews.

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

It should be for the co-regulator to apply sanctions in the case of any code breach. In the first case SCBG would favour a notice and take down approach for most breaches. For repeat offenders or for more serious breaches, naming and shaming on the website of the co-regulator might be appropriate. The co-regulator should not be in a position to impose fines or similar sanctions on VoD providers. However, as a last resort the co-regulator should have the right to refer persistent and serious code infringers to whichever 'backstop' enforcement body has been deemed appropriate.

**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 light of all these considerations, which option do you prefer and why?**

SCBG considers model 2 in the consultation to be the correct model. This would give the co-regulatory body the autonomy to develop and monitor its code but the possibility to refer any persistent or serious breaches to the regulator.

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

**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?**

The controls on advertising in video-on-demand services should only relate to that advertising which appears in the programme being watched. Any wider interpretation could potentially lead to advertising which should be subject to the self-regulatory code CAP (as it is paid-for space online) being pulled into the scope of the new on-demand code, thereby creating confusion for operators and consumers alike about which code applied to the advertising they were watching.

Furthermore it could be argued that to include the advertising that sits around a VoD service would be to 'gold plate' the Directive and could possibly compromise the existing self-regulatory system for online advertising - something which is expressly ruled out by recital 36 of the Directive.

Where VOD content consists solely of teleshopping, it is unclear if it falls outside of the definition of "programme" set out in the AVMS Directive. If this were the case, teleshopping channels would be in the difficult position of not knowing exactly which rules applied to teleshopping – would it be content or advertising? For the sake of clarity SCBG suggests that VoD teleshopping programmes should be considered as advertising and not content.

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

**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?**

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

**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?**

SCBG believes there should be one body which deals with advertising regulation in VoD. The ASA should remain as the sole co-regulatory body responsible for advertising standards, with its remit amended to include advertising in VOD services.

It makes sense for both the advertising industry and consumers to continue the “one stop shop” service for advertising regulation that currently exists under the auspices of the ASA.

The implementing regulations should be written in such a way as to allow Ofcom to assign powers directly to the advertising co-regulatory body. This would have the benefit of consistency with the current arrangements for broadcast advertising, and avoid a situation where the advertising regulator was required to ratify codes through two or more different bodies.

**Should product placement in video-on-demand services, if allowed be regulated by:**

- **the body or bodies that regulate advertising content on these services? or**
- **The body or bodies that regulate programme content on these services?**

As product placement is an integral part of the editorial and creative process it should be regulated by the body regulating programme content.

**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?**

As broadcast sponsorship at the moment is not overseen by the ASA, it would be more consistent to leave responsibility for this aspect of VoD with the content regulator.

### **Product Placement**

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

SCBG is of the opinion that product placement should not be prohibited by law as it considers the existing prohibition contained within the Ofcom code to be sufficient compliance with the revised Directive.

**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?**

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

SCBG believes strongly that there should be no restriction of practices already permitted under the current Ofcom rules.

Any ban on product placement in internationally-acquired programmes and films would mean that they would have to be edited in such a way that the viewer's enjoyment of them would be compromised or they would simply not be shown. Content of this nature would be likely to migrate to platforms not covered by the new Directive and broadcasters would be placed at a disadvantage in the market, as well as viewers missing out on high-quality programming.

Similarly, if prop placement were to be restricted, the realism of shows could be affected and the viewer's enjoyment and engagement with the programme could be damaged.

**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)?**

Product placement which is signalled properly and not unduly prominent should be allowed in the programme genres permitted by the AVMS Directive.

Research has consistently shown that viewers are not averse to product placement as defined above under certain circumstances:

- If they know that the use of product placement will result in fewer interruptions to their viewing;
- If product placement is done in a way which does not spoil their enjoyment by being excessively prominent;
- If they are aware that there is product placement within the programme and have that signalled to them clearly.

A number of researchers have looked at audience attitudes to product placement in both cinema and television in the past 10 years and come to the same conclusion. Viewers are in the main not averse to product placement.<sup>1</sup> Indeed some prefer product placement to traditional advertising spots if it meant their viewing time was not interrupted<sup>2</sup>. What they are concerned by is being marketed at without their knowledge<sup>3</sup> or their enjoyment being spoiled by examples of product placement which are so obvious that they get in the way of the plot<sup>4</sup>. If product placement is adequately signalled they are prepared to accept it as a quid pro quo which pays towards getting their favourite programmes made.<sup>5</sup>

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<sup>1</sup> Nebenzahl and Jaffe. Ethical Dimensions of Advertising Executions. 1998.

<sup>2</sup> Nebenzahl and Secunda. Consumer's Attitude Toward Placement in Movies. 1993

<sup>3</sup> Friestad and Wright. The Persuasion Knowledge Model – How People Cope With Persuasion Attempts. 1994

<sup>4</sup> From an essay by McCarty in the Book 'Psychology of Entertainment Media' by L.J. Shrum

<sup>5</sup> Recent research from Mediaedge:cia with UK consumers found that if shown an example of programming with product placement or spot advertising, 20% more of the audience said they enjoyed the programme if it contained product placement rather than traditional advertising. Mediaedge:cia. Realising Product Placement's True Value. 2006.

It should also be remembered that a whole generation of viewers is used to 'dipping in' to content online where there is less spot advertising. It is already becoming apparent to researchers that this group is less accepting of spot advertising<sup>6</sup>. Therefore in order for commercial broadcasters to keep advertising spots to a minimum, alternative revenue streams must be found and this will become increasingly imperative as the technology viewers use to watch programmes evolves, something which can already be seen with the increasing use of PVRs.

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

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

**How could undue prominence be avoided given the commercial imperatives for audiences to recognize the products placed?**

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

**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)?**

As previously mentioned, research has shown that the primary concern for audiences is being made aware of product placement in a programme and not having their viewing experience spoiled by it being unduly prominent.

SCBG believes that any rules put in place should reflect the 'different' nature of broadcast and video-on-demand but be based on three fundamental principles:

- **Transparency:** a visual indicator to signpost paid for product placement in UK originated programming should be displayed at the beginning, end and as programmes resume after a break.
- **Presence not promotion:** product placement should constitute brand presence in a programme where this is editorially justified.
- **Editorial independence:** there should be separation of commercial and creative processes to ensure that there is no programme distortion for commercial purposes.

To ensure these principles are respected, a process agreed by the industry as a whole and the regulator could be put in place for the UK production of programming containing product placement based on a framework for the system set by legislation.

Broadcasters want to put the needs of their viewers first. Having proper processes in place which would ensure that the production of quality programming should be the first consideration of the industry, will allow for the use of product placement without any deterioration of the viewer's experience.

**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?**

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<sup>6</sup> Ibid

**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?**

**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)?**

SCBG believes that there should be flexibility in the setting of any values above which prop placement is considered to be product placement. To set an arbitrary figure in the legislation would be unrealistic, especially since that figure would not change until the legislation was revised. Any discussion of the detail of this issue should be left to Ofcom and the co-regulator(s) in conjunction with the industry. Any test developed to identify 'significant values' should take into consideration the genre of prop (i.e. cars are more expensive than chocolate) and the nature of the programme (some cars are more expensive than other cars) rather than set strict values for each.

**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?**

SCBG believes that product placement should be permitted in all of the genres listed in the AVMS Directive as these tend to cover general entertainment programming.

The benefits of product placement were laid out quite clearly by the Commissioner for Information Society Viviane Reding when she said, "Having clear rules for product placement would secure new revenues for the audiovisual industry, contribute to our creative economy and thus reinforce cultural diversity."<sup>7</sup>

In a recent Government report<sup>8</sup>, the creative industries were highlighted as making a major contribution to the UK economy as a whole, with as much as 7% of GDP linked to their success, putting them on a par with the financial services industry. Given the recent turmoil in the financial markets, the creative industries are likely to be even more important to the future economic success of the United Kingdom. Allowing a new revenue stream to open up will ensure that world-class programmes will continue to be made which will keep the UK at the forefront of the global broadcast industry. Given that a number of member states of the EU will be permitting product placement, any move to ban it here would put UK broadcasters at a distinct disadvantage against their EU-based competitors and could have a detrimental effect on the UK creative economy.

Ofcom estimates in 2005 for potential revenue which could be derived from product placement give a figure of £25-35 million in the first few years, based on an extrapolation from US adspend figures which showed product placement was worth only 1% of the US market. However, it has been argued by some in the advertising industry that this figure is a very low estimate. Looking back over the five-year period between 2002 and 2007, it is clear that the US market for product placement has grown at a rate of between 30 and 40% per year. Even taking into account Ofcom's assumption that the UK market might not develop in exactly the same way, the value of product placement to the UK market could still be greater than originally anticipated at 6-7% of the advertising market<sup>9</sup>. Even if the market is relatively small initially, in times when advertising is

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<sup>7</sup> Viviane Reding. Speech to Liverpool Conference 'Between Culture and Commerce'. 2005.

<sup>8</sup> HMG. Creative Britain – New Talents for the New Economy. 2008.

<sup>9</sup> Calum Chase. Decision Time on Product Placement. IMedia Connection. 2008.

moving away from broadcast to other media, any additional revenue stream will help maintain programme standards to which UK viewers have become accustomed.

Last year SCBG members invested £1.2 billion in programme development, making a strong contribution to the UK public service remit. If product placement were permitted, more investment would be possible at a time when the UK Government is considering the best ways to ensure British television broadcasting remains of a high quality and receives the investment it needs to compete in a global market.

### **Satellite Uplinking**

**The Government would also welcome information from respondents about the potential impact of the options for regulating satellite television broadcasts from outside the EU in response to the five impact and competition assessment-related questions at the end of the list of questions in part 6.**

Some SCBG members receive programmes from outside the EU up-linked from other EU Member States. The current regime means that they are subject to UK broadcast regulations and from a regulatory point of view this has been satisfactory because it provides consistency and legal certainty to the broadcasters in question. It would be helpful to have some guidance on how the new regime will work in practice or what broadcasters can do to ensure their content comes under UK jurisdiction.

### **Conclusion**

SCBG favours the 'light-touch' approach to adopting the Directive put forward by the Government.

Relatively new markets such as VoD should be allowed to develop within the framework of a flexible set of rules which the industry as well as regulators has a part in setting and reviewing. The more mature broadcasting market also needs flexibility as it competes for viewers in an increasingly converged world. Allowing product placement, subject to sensible rules, will release money which can be used to develop more programming viewers will enjoy.

Above all, to remain at the forefront of the creative industries internationally, the UK needs to ensure that it creates market conditions that will encourage new entrants and allow the development of those already contributing to its success. This should be the main aim of any implementation of the Directive.

SCBG looks forward to taking part in further consultation and is happy to answer any further questions the Government may have on this paper.