



**DCMS Consultation on
Proposals for Implementation of the Audiovisual Media
Services Directive in the UK**

BT's response

Executive Summary

1. BT welcomes this opportunity to comment on the Government's current views on interpretation of the AVMS Directive and its approach to implementation.
2. The Government's approach to this Directive has been commendably consistent in seeking to establish the full implications of including services outside traditional broadcasting within the Directive's scope. BT supports the overall position taken to date and re-affirmed in the consultation; namely to draw only a narrow range of services into the scope.
3. Implementation of the Directive must provide clarity and certainty for those affected by it and must ensure that it does not lead to regulation of the internet by the backdoor. It must be clear which current and potential future services would be subject to regulation and the obligations that flow from this.
4. BT's considerable commercial investments in this area, most notably in BT Vision, are greatly assisted by regulatory clarity and certainty. Such certainty is needed so that BT Vision can plan the inclusion and, or introduction of further on-demand services – which we envisage will increasingly be content originating on the internet rather than as broadcast TV programming.
5. We believe an approach involving the least disturbance to existing self-regulatory (ATVoD) and co-regulatory (ASA) models would be best, since they are working effectively and offer a pragmatic model for future evolution.
6. We have some concerns that the Government's overall intent to maintain a narrow scope is not consistently carried through in each stage of the consultation's proposals, some of which could lead to a much wider or arbitrary application. In order to help avoid this, we encourage the Government to review its proposals in further dialogue with stakeholders over the coming months.
7. Implementation of the AVMS Directive is of comparable significance to the that of the E-Commerce Directive. Government should ensure that implementation does not hamper, intentionally or through unintended consequences, the development of internet-based services which are outside this Directive's scope but within the scope of the E-Commerce Directive.
8. We appreciate the Government's intention to achieve full implementation by 19 December 2009, but it is important to get the principles and practical application right. This will have longer term benefits for all concerned. Rushed implementation, seeking to encompass all providers and technical eventualities, could result in detrimental consequences for innovation, investment and cultural diversity. The Government should, therefore, adopt a similar approach to that taken with implementation of the E-Commerce Directive, which although a little behind the set timetable, was achieved in a consensual and fully-informed fashion.
9. The Government's Digital Britain Review also provides an opportunity to set AVMS implementation within a wider policy framework regarding investment in infrastructure and content, innovation, transparency for consumers and a responsive regulatory environment.

BT's interest in responding to this consultation

10. The development of broadband services is at the heart of BT's UK business. Through Openreach, BT Wholesale, BT Global Services and BT Retail we provide a range of broadband products and services for communications providers, content companies, consumers and citizens. BT thereby underpins most of the UK's broadband capability.
11. As part of its strategy, BT is committed to offering UK consumers a wider range of services so that they can get the most out of their broadband connection. BT broadband customers are no doubt typical of other users in wanting to access a huge range of services and material via the internet, including audio-visual content streamed or downloaded for later use. BT's provision of broadband access to over 4.6m households is one reason for our interest in the Government's plans regarding AVMS implementation. In short, we want to ensure that previous assurances that the Directive will not result in obligations on ISPs for vetting content are followed through in practice.
12. Like other communications companies, we have made substantial investments in new platforms and services which augment traditional TV viewing with full interactivity and truly on-demand content, through BT Vision, launched in December 2006. The consultation's proposals are of obvious interest to us in relation to this investment.
13. Using a single set-top box, BT Vision delivers to the TV a broad range of video content, available on a pay per view (PPV) and subscription video on demand basis (SVOD). The BT Vision set-top box also provides access to digital terrestrial channels, both the Freeview channels and Setanta Sports 1 on subscription.
14. The service covers the range of 'traditional' programming such as first run movies, older/classic library movies, high profile UK and US episodic television programming, children's programming, sports and music. Customers have the opportunity to watch programming with complete flexibility, not only in terms of when and what they watch, but also how they pay for it. The interactive nature of the service includes games and the platform will allow a range of interactive and communications services. We anticipate that it will offer a range of diverse, speciality and niche programming for groups hitherto unserved or under-served by broadcast television. We also expect new forms of user-generated content, community-based programming and low-cost independent programmes to be stimulated.
15. The primary business model for video content is based on subscription and pay-per-view, although as volumes of customers grow, advertiser-funded programming may be an alternative way of making content available.
16. BT's intention is to continue to innovate and evolve the technology, applications and the range of services which are available through BT Vision. In particular, to bring together through BT Vision a broad "jumping-off" point from which users can enjoy a range of:
 - communications services (such as video telephony and instant messaging)
 - interactive services to meet the needs of interest groups and communities who wish to create content/information for others to view and interact with
 - digital content from a wide variety of sources.

17. We believe that offering consumers simple-to-use access to internet content on their television sets through the BT Vision platform will be an attractive proposition. It particularly utilises the capabilities of the broadband-based platform. Our concern is that imposing regulation under the Directive on such services will make them unattractive to develop and deliver, in comparison with other ways of providing access to internet content. As such, this benefit of broadband access for consumers and industry could be lost.
18. BT's development of BT Vision and its ISP business have been informed by an understanding of the prospective regulatory framework for on-demand and internet-based services based on Government statements about the AVMS Directive's implementation in the UK. BT has been an active supporter of the self-regulatory arrangements for TV VOD content, in the expectation that this model would likely be the mainstay of the AVMS framework.

BT's main concerns

19. The initial proposals from the Commission were very-broad ranging in terms of their potential to capture a vast range of services that would be accessible to people through their internet service connections. Subsequent debate has resulted in the AVMS Directive being extended to bring within its scope "TV-like" Video-on-Demand (VoD) services but it does not apply to audiovisual content outside of this category.
20. The Government's stated position in discussions with industry, in evidence to Parliamentary Committees and in the Consultation is that despite inclusion of TV-like VoD services within scope "*the UK Government policy is 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
21. However, we have some concerns about these, since the consultation sets out an expansive reading of the Directive. To this end, BT echoes the concerns expressed in the House of Lords EU Committee Report in February 2007 about the potential problems of the Directive if interpreted in this way (extracts are included at Annex A)². Not only will this risk introducing internet regulation by the backdoor, but it could also result in market distortion. Those in scope will face high regulatory costs and market entry may be restricted in this and related markets for fear of being brought into scope.
22. BT's observations on the specific consultation questions later in this response provide detail on particular proposals. Our concerns are summarised below. We anticipate that these concerns should be resolvable with more detailed dialogue leading to mutual understanding between industry and Government.

¹ Consultation, page 9, paragraph 7

² HL 27 "Television without Frontiers?" Report with Evidence: published 5 February 2007 at <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldecom/27/27.pdf>

Identifying services in scope

23. To provide adequate clarity and legal certainty, the definitions employed by Government will need to be more explicit such that only a limited class of “video-on-demand” services which simultaneously fulfil all the characteristics drawn out in the relevant Articles and associated Recitals are subject to regulation. So that, while TV programmes in the traditionally understood sense may be the subject of regulation, games, user-generated content and content accessed from the internet, for example, would not be.
24. There needs to be greater emphasis on the core feature of “on-demand” and support for the benefits it can deliver for consumers and industry:
- people choose for themselves what they wish to see without reference to any actual or notional schedule
 - meeting consumer and citizen expectations that compared with linear TV, a broader range of content (and other services) will be made accessible including less mainstream and potentially more controversial material
 - stimulate diversity in creative endeavour and public opinion, and provide an avenue for freedom of expression.
25. One of the risks in the Government’s approach is that it will reset user expectations such that they come to expect broadcast standards to apply to all “on-demand” content, since this will also place unreasonable, impractical demands on any envisaged regulatory system.
26. Implementation requires that the tests must be applied in relation to individual services, and not at the level of an overall “service package” on offer from an on-demand provider which may include content which is far removed from traditional TV programming, i.e. not at the level of the “aggregated” service as described in the consultation³.

Self-regulation

27. We suggest that the Government should re-examine or set out more clearly the reasons why it has adopted the view expressed that “*a system of self-regulation for on-demand audiovisual media services is not sufficient to implement the Directive’s requirements in the UK*”⁴. We are unsure how this fits with these other views in the consultation:
- that the existing self-regulatory schemes operated by self-regulatory bodies which cover parts of the video-on-demand industry (ATVoD and IMCB) “*...are welcome and have so far proved effective...*”⁵; and
 - “*There is no indication that UK video-on-demand services breach any of the standards in the Directive. Indeed, the standards of the Directive are already exceeded for the most part...*”⁶

³ [Council Note dated 6.11.06 on general approach proposed changes to the text finally adopted as Article 3 (2)(a) on jurisdiction “*to have the effect of applying the co-operation procedure between Member States to cases where a **particular service** targets another Member State, **rather than the activities of a broadcaster taken as a whole.***” (our emphasis added) is another example of the adoption of the approach we indicate.

⁴ Consultation, page 21, paragraph 3

⁵ Consultation, page 39, “Evidence Base”

⁶ Consultation, page 41, “Evidence Base”

28. The Government also indicates that implementation of the Directive requires that the UK must adopt arrangements that apply to all relevant providers (all relevant providers including those who do not belong to the existing schemes) and have legal backing and that *“maintaining existing arrangements cannot be an option even if they are extended to the whole industry.”*⁷ We would like to understand the basis for this view, since we suggest a more graduated response would be appropriate.
29. If following re-examination, the Government confirms that self-regulation of on-demand services is not an option, then the approach to implementation of a new regulatory mechanism should strive to give the fullest effect possible to securing the intentions set out in the Directive, including that it does not *“jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively”*. By doing so the UK will also meet the objective that *“this Directive encourages the use of co- and/or self-regulation”*: Failure to do so will discourage current self-regulatory schemes and remove incentives for future development of these and other schemes.
30. In this context, we suggest that the most appropriate approach is one which involves State intervention as a “back-stop” and not the “hand on the tiller” of an industry regulator, to ensure genuine distinction between linear, regulated broadcasting and the non-linear sector.

Cultural diversity and freedom of expression

31. The proposed approach to implementation gives insufficient emphasis to supporting the cultural diversity and freedom of expression objectives of the Directive.
32. During the passage of the Directive, emphasis was given (by the European Parliament (EP), in particular, in its role in framing the Directive) to the potential for on-demand services to support and enhance cultural diversity and freedom of expression. These services provide an inherent ability for users to choose what to view, even though that content may be unpalatable on a linear broadcasting channel. The Directive explicitly recognises that a different tier of content standards for “non-linear” services drawn within its scope are required to support that diversity⁸.
33. The compromise text adopted means that in respect of new platforms and new products, the primary method for delivering adequate protection around some content would be through measures such as PIN codes, labelling and filtering. These measures are the best way to balance the need for protection against the need to guarantee freedom of expression by providing users with tools and information to enable them to make informed choices.
34. We believe a similar approach, which would be in line with users’ expectations and the requirements of the Directive, should be adopted here.

⁷ Consultation, page 41, “Evidence Base”

⁸ Report of Committee on Culture and Education dated 22.11.06, Rapporteur Ruth Hieronymi; *Recital 45*

Editorial responsibility

35. The EP was also concerned to ensure that the dividing line between services subject to the E-Commerce Directive (and other EU legislation) and those within scope of AVMS would be clear. This is an important feature of implementation.
36. In particular, we consider that attaching content clearance responsibility to on-demand platform providers of the same kind as would attach to those creating or commissioning content created for linear consumption, may cut across the country of origin principle present in the E-Commerce Directive. It may also remove some of the “one-stop” country-of-origin certainty that a creator or commissioner of content would otherwise have expected to enjoy by relying on clearance obtained in one member state to legitimise distribution in a different member state. The approach to implementation should not damage the single market objective.
37. Because the UK is a particularly multi-cultural society with significant representation of cultures from outside the EU, in comparison to many Member States, it may experience greater demand for content originating outside of the EU. The approach to content originating from outside the EU should be especially mindful of the need to address such demands and should strike an appropriate balance between freedom of expression and applicable content “control” standards.

Parliamentary oversight

38. We suggest that the legislative instrument for implementation should be through an affirmative resolution procedure so that all stakeholders can benefit from the informed debates of both Houses, which are already familiar with the issues (including risks) that the Directive raises for the UK. An affirmative resolution procedure would also be consistent with the process set out in section 234 of the Communications Act 2003 which was created to deal with the need for new services to be brought within the scope of regulation in a sound, evidence-based way.
39. Explanatory guidelines developed with industry, as was done for implementation of the E-Commerce Directive, may also be useful to raise awareness, for SMEs in particular, of the potential for their services to come within the scope of new regulation.

Responses to Consultation Questions

Q1: *Scheduled television broadcasting services*

40. We do not have a definitive view as to whether the Communications Act 2003 requires amendment to ensure it covers all scheduled TV services with UK jurisdiction, since this would have no impact on BT's current business models for channel distribution. However, we are concerned that any amendment considered does not have unintended consequences for BT's future commercial opportunities, for example by creating new obligations on platform providers.
41. Currently BT provides BT Vision consumers with access to linear scheduled television services only via the DTT features of its set-top box. No additional linear scheduled television services are provided via the broadband line to the set-top box, but such channels may be an element of the future proposition. Furthermore, there is considerable interest in the opportunities for linear channel transmission, including HD, to domestic devices via super-fast broadband.
42. The Government's approach to interpretation of this aspect of the Directive should avoid creating any uncertainty about whether BT is a "media service provider" for such linear television services. We would wish it to remain clear that BT is not. Any regulatory obligations for the content of such services should continue to apply to the channel operator rather than to BT.

Q2-9: *Defining on-demand audiovisual services in UK law*

43. Some elements of the consultation section setting out the Government's approach to defining what services are in the scope of the Directive and which are not, raise concerns, which are set out below. This includes BT's view on individual questions raised in the consultation (e.g. on how non-EU content is treated). We anticipate that these concerns should be resolvable with more detailed dialogue leading to mutual understanding between industry and Government.

On-demand services within scope

44. Only a limited class of "video-on-demand" services, which simultaneously fulfil all the characteristics drawn out in the relevant Articles and associated Recitals, should be subject to regulation. Whilst TV programmes in the traditionally understood sense may be the subject of regulation, games, user-generated content and content accessed from the internet, for example, should not be.
45. There needs to be greater emphasis on the core feature of "on-demand" and support for the benefits it can deliver for consumers and industry, e.g.-
- people choose for themselves what they wish to see without reference to any actual or notional schedule;
 - meeting consumer and citizen expectations that compared with linear TV, a broader range of content (and other services) will be made accessible;
 - stimulation of diversity in creative endeavour and public opinion, and the provision of an avenue for freedom of expression.
46. There are risks in aiming to reset user expectations such that they come to expect broadcast standards to apply to all "on-demand" content, since this will also place unreasonable, impractical demands on any envisaged regulatory system.

Control

47. Aiming to pin down a definitive application of whether and how on-demand service providers exercise editorial control over content as a foundation stone of the new regulatory environment is ambitious at best and market restricting at worst.
48. The business models for acquiring content for “video-on-demand” services are relatively new and constantly evolving. This includes varying approaches to how content is controlled, particularly compared with the strong, central control exercised by traditional linear broadcasters.
49. Linear broadcasters aim to exercise strong control to determine what content they choose to acquire, specify and commission - and have acquired significant influence in determining the commercial and contractual terms relating to that. In addition, they have established extensive resources to clear content, pre-transmission to a granular level. All these elements have developed over several years and together provide a coherent basis for their current regulation based on Ofcom’s programme codes.
50. A good fit between the broadcasters’ editorial control regimes and Ofcom’s regulation of content took much longer than the 18 months envisaged by Government in the much more embryonic market of on-demand services. A more graduated approach would be sensible.
51. The discussion in the consultation of notions of “general control”, the determination of the meaning of “effective control” and “editorial control” in relation to on-demand content, to underpin a finding of “regulatory responsibility”, must reflect differences between linear and non-linear content to be appropriate and sustainable. It is not clear that the concept of “general control” described in paragraphs 30 and 31 for traditional linear TV is an appropriate basis for determining who to subject to regulation for a particular video-on-demand service.
52. Implementation requires that the tests must be applied in relation to individual services, and not at the level of an overall “service package” on offer from an on-demand provider which may include content which is far removed from traditional TV programming, i.e. not at the level of the “aggregated” service as described in the consultation⁹.
53. Equally, the extension of the pre-existing Directive to include certain on-demand services is predicated on there being a difference between the tier of regulation required for linear services and the lighter tier required for non-linear services within scope. Implementation must ensure that the difference is respected and achievable in practice. Automatic read-across to on-demand services from custom, practice and what is technically and commercially feasible in linear, broadcasting should be avoided.

⁹ [Council Note dated 6.11.06 on general approach proposed changes to the text finally adopted as Article 3 (2)(a) on jurisdiction “to have the effect of applying the co-operation procedure between Member States to cases where a **particular service targets another Member State, rather than the activities of a broadcaster taken as a whole.**” (our emphasis added) is another example of the adoption of the approach we indicate.

Foundation for regulatory obligations

54. Discussions to date between industry and Government and Ofcom suggest a belief that contractual arrangements between companies can produce the regulatory outcomes sought and that imposing regulatory requirements in this way will not be burdensome.

55. We disagree with this approach :

- On-demand providers are forced to run commercial and contractual risks to explore the services they can bring to market to meet evolving users' demands.
- If potential commercial, contractual terms (which are not capable of providing "one-size-fits-all" norms for different kinds of on-demand service) are converted to regulatory requirements, the consequence will be that on-demand providers will be unable to experiment and develop services in the way they have been expecting, based on the assurances given to industry and Parliament about how the UK would implement the Directive.
- This is especially the case, given the Government's firm view that implementation must entail formal involvement of the Government and, or a Regulator, the right for them to step-in in any event and the importance placed on sanctions and offences.
- Such a chilling effect would diminish the cultural diversity and support for freedom of expression that the Directive envisages that on-demand services can and should bring. It would also harm the economic contribution that development of this new sector would make to the UK economy.

Internet-originating content

56. It is important that implementation of the Directive does not:

- remove either the ability or incentives for those entities who have invested in infrastructure and platforms in the UK which are capable of supporting linear and internet capabilities and services (both "non-linear" within the meaning of the Directive and more broadly) from providing the widest possible range of services through which to recoup their investments;
- create market distortions by fixing such entities with regulatory obligations because they are within UK jurisdiction and likely to remain so compared with other entities in the "value chain";
- set a precedent for regulating internet (including non-EU) content through regulation of physical infrastructure/platforms.

57. We would appreciate specific clarification of the Government's intended approach to regulation for on-demand services providing access to user-generated audiovisual content which has already been aggregated on a website (e.g. by Google, Yahoo!, Bebo, Facebook). For example, we anticipate that if BT made use of a customer's broadband connection, BT Vision set-top box and the graphical user interface to provide access to pre-aggregated UGC content, this would not be within the scope of the Directive, since:

- the recitals of the Directive state that user generated content is outside the scope of the Directive;

- within the EU and UK the website aggregator would be subject to regulation under the E-Commerce Directive in relation to notice and take-down of content which might be the subject of complaints; and
- BT would not be in a position to exercise “editorial control” of such content, even to the extent that the website aggregator is, or could be characterised as doing so.

58. We raise this because comments made at the AVMS stakeholder meeting on 26 September 2008 indicated that Government may hold a different view.

59. If a regulatory requirement were to be placed on the on-demand provider to control the content, would it be framed under the AVMS or E-Commerce Directive? If it were to be framed under the AVMS Directive then is it envisaged that the on-demand provider would be subject to the same or different rules that would apply to the website aggregator? The website aggregator will have a direct contractual nexus with users whose content is accessible from its site, whereas the on-demand provider will have no relationship with the original content provider. It is difficult, therefore, to envisage the mechanism through which the on-demand provider could exert control on the content or attempt to do so.

60. Such a service would broaden access to internet content by appealing to people without a PC or those more comfortable using a remote control and TV screen rather than a mouse and PC. If the application of the Directive to such services is not clear enough or compliance cannot be achieved in practical terms, it would not make commercial sense to offer it and other internet-originating content. This would be an unfortunate consequence of implementation and Government should engage in further dialogue with industry to consider how the Directive can be truly narrow in scope.

Previously broadcast content

61. If content has already been subjected to pre-transmission clearance for broadcasting in the UK, we do not understand what purpose would be achieved by creating an obligation on a provider to clear the content, separately, if it wishes to provide on-demand access to it.

62. Such content will be likely to retain branding that maintains its association with the original broadcaster in the UK. It will only serve to confuse users to suggest that they need to direct issues about the content itself (and not just issues about the information or PIN protection which an on-demand provider would provide) to the on-demand provider.

63. It would also impose new costs on an on-demand provider if it is required to duplicate pre-broadcast transmission clearance procedures. No additional costs would be borne by the original broadcaster (it can rely on the pre-broadcast clearances it has already carried out) whilst also obtaining the benefits of greater reach of its originally broadcast content through its availability on on-demand platforms with which it is not affiliated.

64. We are not aware that there any problems which need to be addressed through such a change.

“TV-like” ,“programme”

65. We remain unclear on the guiding principles being used to characterise content as “TV-like” and as a “programme”.
66. For example, we understand paragraph 28 of the Consultation to indicate that if a DVD of a film is rented or bought, then that activity would be excluded from scope.
67. If the same content is consumed through streaming or downloading it would be characterised as provision of a TV-like programme and the service through which that is done would be subject to regulation under AVMS. We can see why provision of a “made-for-TV” film should be characterised in this way, but not other film content.
68. However, it seems to be arguable that provision (and consumption) of cinematographic works (e.g. a film rental or “download-to-own” service) should not be characterised as an activity that is the provision of “programmes” or as competing with television broadcasting. It is equally aptly characterised as an activity that substitutes for buying or renting a film, or for viewing a film in a cinema, neither of which activities have been subject to regulation under the current TVwF Directive.

Non-EU content

69. On-demand services are still at an early stage of their development. To date, in relation to content which has a linear, broadcast origin, on-demand providers such as BT Vision are still largely focused on bringing material which has already been aired in the UK by linear channel broadcasters. Non-EU content within this category is predominantly English language programming such as popular US or Australian series and serials. As far as we are aware, no problems have manifested themselves in relation to such non-EU content and the providers of such content are major businesses who have offices based in the UK to whom issues which might arise can be directed.
70. In relation to content originating on the internet, the first issue to be established is whether the content is “TV-like” and falls within the definition of a non-linear service to which the Directive applies. As indicated above, we are still unclear on the application of the definition to many services. If the service is a non-linear one which is outside the scope of the Directive, then care is needed not to drag it into scope, wherever it may have originated from.
71. Especially while the issue remains speculative to a large degree, we urge against premature or excessive focus on the creation of full-blown regulatory requirements to deal with it. Transposition should be in a form that enables the UK (industry and the regulatory body or bodies) to develop appropriate solutions closer to the time when it is clear whether there are practical problems which need to be addressed.

Application to BT Vision

72. There have been indications in stakeholder forums that the underlying approach might mean that every service which is offered or made accessible through BT Vision would be characterised a TV-like VoD service within the scope of AVMS regulation. In those circumstances, services such as games/gambling, user-

generated content and potentially even PVRs and communications services would be covered. This would be inappropriate and discourage development of the business.

73. We would like to have certainty that these types of services, and facilities such as storage or retrieval of content that a user has stored on a PVR like that in the BT Vision set-top box, are definitely not within scope. We are also not clear that dedicated film service offerings are necessarily within the scope of "TV-like" programming. We would also like to have a better understanding of what "effective control" for the purpose of being characterised as having "editorial responsibility" is or will mean.
74. Such certainty is needed so that BTV can plan the inclusion and, or introduction of newer on-demand services – which we envisage will increasingly be content originating on the internet rather than as broadcast TV programming.

Ancillary and other services

75. We have the same general concern that the scope of the regulation should be kept as narrow as possible, within the terms of the Directive. It would, therefore, be helpful to have clarification behind the intent of the final sentence of paragraph 46 of the consultation:

“However, even if the service provider does not have general control over additional content that is available from its service, it might be required to take down the link to that service if a complaint about it is upheld.”

and to know on what basis such an obligation would arise, through regulation or otherwise, which specifies a requirement to take down such a link?

Q10 – 18 : Regulatory System for on- demand audiovisual media services

Regulatory regime for on-demand services within scope

76. The current self-regulatory mechanisms within the UK for VOD services (ATVOD and IMCB) are acknowledged to be working well and effectively by Government and Ofcom. Any changes will necessarily entail uncertainty, disruption and extra costs. If step-changes are required over 12 months in what these mechanisms do and who they apply to, there is a real prospect of undermining their viability and losing what is in place already.
77. The Government seems convinced that a system of self-regulation for on-demand services within scope is not sufficient to implement the UK. Given the far-reaching negative impacts for all UK stakeholders arising from any step-change, we urge the Government to re-examine whether the Directive does indeed close-off the possibility of self-regulation being maintained for on-demand services within its scope. For example, in relation to Recital 36 does the excision of the reference to the Interinstitutional Agreement on Better Law-making from the adopted text of the Directive assist? Our understanding was that its excision provided increased flexibility for each Member State to implement co- and self-regulation according to each Member State's traditions and legal system.
78. We recognise that the Directive did not intend to remove "legislative and judicial and/or administrative mechanisms in place". Is that confined to mechanisms in place to deal with the services which were already within scope of TVwF

Directive and carried forward in the Directive as “linear” services, i.e. does not touch on the extended, new scope of AVMS for non-linear services? Can the last line of the second paragraph of this Recital be read as permitting self-regulation to be used as the means to implement the new, non-linear issues brought within scope (“method of implementing certain provisions of this Directive”) as a complement to other provisions which relate to broadcast (“non-linear”) issues which are already subject to “obligations of the national legislator”?

79. If following re-examination, the Government confirms that self-regulation of on-demand services is not an option, then the approach to implementation of a new regulatory mechanism should strive to give the fullest effect possible to the Directive’s aim of securing that it does not *“jeopardise current co-or self-regulatory initiatives which are already in place within Member States and which are working effectively”*. By doing so the UK will also meet the objective that *“this Directive encourages the use of co- and/or self-regulation”*: Failure to do so will discourage current self-regulatory schemes and remove incentives for future development of these and other schemes.

80. In this context, therefore, we suggest that the most appropriate approach is one which wholly consists of State intervention as a “back-stop” and not as a “hand on the tiller” of the industry body.

- The degree of intervention and participation of the formal back-stop should be consistent with that approach.
- It will also facilitate achievement of the Directive’s objectives of different tiers of regulation for on-demand and linear services, which will be difficult to achieve and sustain if the approach and experience of the designated state intervenor is dominated by engagement in linear broadcasting content regulation.
- All participants in the system must share equal clarity on which issues are subject to formal regulation under the Directive and which are not. If not there is a real risk of commercial issues being brought in the scope of regulation through “creep” and that will chill innovation and experimentation that is intrinsic to timely evolution of on-demand services to respond to consumer and citizen demands.

Class and number of on-demand service providers to be regulated

81. If the approach to scope remains as indicated in the consultation, there is potentially a very large number of on-demand service providers who would become subject to regulation under the Directive. If so, the current regulatory mechanisms will become strained and over-stretched and might not cope.

82. Addressing the following would help to mitigate this risk:

- Clarity on whether implementation does require every potential on-demand provider to be covered. Recital 16 includes various factors which limit the potential class, e.g. to services which are *“mass media”* and *“which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public”*. How does the Government intend to apply such factors?
- Even if the class and number of service providers remains very large, implementation could be phased to enable them to be brought within the

regulatory system in a well-managed and coherent way. If Government instead chooses to pursue a “big-bang” approach, such that every potential service provider has to be brought within a system of regulation from the outset, then devising and establishing a system that would be expected to roll-out all the features of a regulatory system indicated in the Consultation at page 22, paragraph 9 would involve extensive resources and significant costs for regulators and regulatees.

83. The UK on-demand industry is nascent (it is largely at a building and investment stage), so the level of burdens created on the industry as a whole, and for companies individually, is significant. It could result in some exiting the market and create barriers to new entrants.

Authorisation, Prior Approval and Membership

84. The Consultation refers to options for the regulatory regime for on-demand providers to be based on membership, prior approval, notification or general conditions. Recital 15 provides that “*No provision of the Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.*” We are not clear how the adoption of any of these potential options as part of a co-regulatory system would be consistent with this provision.

85. There would be tensions with the even clearer principle of “*no prior authorisation or any other requirement having equivalent effect*” in Article 1 of the E-Commerce Directive if there is not absolute clarity about which on-demand services are subject to regulation under the AVMS Directive and which are “information society services” subject to regulation under the E-Commerce Directive.

Criteria and structure of the regulatory system

86. BT commented on the criteria set out in paragraph 9 when responding to Ofcom’s consultation earlier this year on “Initial Assessments for when to adopt self- or co-regulation”. Our view, essentially, is that the criteria are a good summary of the characteristics of a perfect system.

87. All these features are recognisable in mature and well-established markets, but it must be recognised that in the start-up phase of new service markets, self- and co-regulation arrangements must have the flexibility to develop and evolve. Resources of regulators and regulatees are finite, so it should be permissible to prioritise some features of the regulatory regime compared with others.

88. The immediate priority is to implement the Directive. If the shared intention of industry, Government and Ofcom remains to do so in a way that avoids gold-plating, is confined to the minimum needed to meet EU legal requirements for transposition, and is supportive of growth of on-demand services in the UK, then mechanistic application of every criteria from the outset is not appropriate. It would risk creating an unrealistic straitjacket for the industry.

Sanction and Enforcement

89. Content regulation has to be context-based and, therefore, involves a large degree of subjectivity in evaluation. If scope is interpreted broadly in practice

then, as indicated earlier, on-demand providers are likely to face practical difficulties in enforcing standards in relation to certain content.

90. In this context, it is important that sanctions and enforcement against a service provider are proportionate and there is full recognition of these factors if and when they are applied.

Future Proofing

91. On the issue of “future proofing”:

- The combination of industry-led expertise within the regulatory system, the provisions of section 234 of the Communications Act and the in-built review process for the Directive mean that “future proofing” is more than adequately covered.
- We would be concerned if “future proofing” were to be elevated as a goal in itself. This would lead to requiring the system to anticipate developments, adding yet further uncertainty, potentially looking at issues prematurely, creating market distortions and unintended consequences.
- Implementation of the Directive should not build into the regulatory system anything that would pre-empt or become inconsistent with the debate and outcomes of the Digital Britain review.

Advertising, Product Placement, Sponsorship in video-on-demand services

92. Advertising is acknowledged to be an exceptionally important engine for funding and growth of the internet and new media services. It is essential to avoid simply carrying across TV broadcast standards for advertising to internet-originating services - the history and users' expectations are different and need to be respected rather than eliminated.

93. We agree that the ASA is the appropriate regulatory body for advertising in respect of services in scope, on a similar basis to its position in regulating advertising in other media. Such regulation should be appropriately light touch, given the nature of an on-demand service, and also to be as restricted in scope as possible, while ensuring certainty as to what is regulated under which regime.

94. Product placement, is likely to be a useful revenue source, so we are in favour of this being possible for services in scope. We have similar views on the issue of sponsorship. In our view, since product placement and sponsorship tend to be integral to programmes, especially in comparison with traditional advertising, we can see a case for this being overseen by the body that also oversees programme content for linear services. The position, though, is less clear for non-linear services whilst current uncertainties on scope and definitions are still to be resolved.

Annex A

The following extracts express the concerns raised by a number of industry voices that the Directive provides a tool for “internet regulation by the back-door”.

In terms of the potential for expansive reading of scope to result in chilling market entry and growth, the issues are captured by the following extract from the House of Lords Report:

“81. In our view, it is neither the role of regulation nor the role of any regulator to protect those with established market positions from threats by new market entrants operating under different business models.

82. We are concerned that the identification of some of media services as “television-like”, may lead some to conclude that eventually “like services” should be regulated in a “like-manner”, i.e. a perfectly “level playing field.”

83. The Council text seeks to identify and propose the regulation of “television like” services but proposes to regulate them differently. As we note above, if they are to be included at all we agree that they must be regulated differently, but the wording and definitions in the latest versions of the text may encourage the idea that they can and should be regulated in the same way as television. We would consider such a move now or in the future to be a grave error.

84. There may also be a second problem with extending the draft Directive into non-television services, such as the internet and other new media services. It might be taken as an encouragement that it is desirable to extend regulation into these services more widely and eventually to go beyond “television-like” services into other parts of the internet and new media.

85. Given the practical difficulties in defining, regulating and enforcing a Directive based on “television-like” services, we believe that any further incursion into the internet and other new media services will be fraught with even greater difficulties and, as we have indicated above, is unnecessary in order to secure a single internal market.”

In terms of the potential for the nature of regulation which will apply to services falling within the scope of the Directive to raise costs and create barriers to entry, the issues are captured by the following extract:

“166. Mr Paulger from the Commission told us that they were “very much in favour of co- and self-regulation as a regulatory technique ... This was our position at the outset”. He explained that there was no mention of self-regulation in the body of the initial draft Directive only because of legal concerns that it might not be compatible with the section on current self-regulation in the existing inter-institutional agreement on better law-making.(Q 350)

167. He cautioned us however that “self-regulation is more developed in some Member States than in others as a regulatory technique,” and thus cannot be simply prescribed to all. (Q 350)

168. We strongly welcome the inclusion of co- and self-regulation in the body of the revised text, and hope that it will allow such regimes to continue to flourish in the United Kingdom and other Member States where they already operate.

169. We are persuaded that self-regulation is the best means of operation in principle, especially for rapidly developing technological markets such as broadcasting.”

Source: HL 27 “Television without Frontiers?” Report with Evidence: published 5 February 2007 at

<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldecom/27/27.pdf>