

**EXPLANATORY MEMORANDUM TO
THE AUDIOVISUAL MEDIA SERVICES REGULATIONS 2009**

2009 No. 2979

1. This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument implements certain provisions of the Audiovisual Media Services (AVMS) Directive which are not already implemented in UK law or Ofcom's statutory codes. It:-

- defines the on-demand services to which it applies as on-demand programme services, establishes a regulatory framework for such services and sets out minimum content standards to which they must adhere;

- modifies the definition of a television licensable content service to remove the exclusion for broadcast services provided over the internet so as to ensure that all television broadcasting services are within the scope of regulation and therefore require a broadcasting licence from Ofcom;

- places on Ofcom a duty to ask a broadcaster to comply with the broadcasting rules of another EU Member State when a substantiated request is received from that Member State for the broadcaster to do so (but there is no obligation for Ofcom to impose or enforce them);

- brings within the scope of regulation non-EU satellite television services which are uplinked to satellite from within the UK.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The AVMS Directive was formally adopted by the Council of Ministers and the European Parliament in December 2007. It must be implemented in all EU Member States by 19 December 2009. The Directive amends the existing Television Without Frontiers (TVWF) Directive, which has regulated television broadcasting in the EU since 1989, and also in the three EFTA members of the EEA (Iceland, Liechtenstein and Norway) since 1994, and which was previously amended in 1997. The AVMS Directive has not yet been extended to the EEA.

4.2 The final text of the AVMS Directive was cleared from scrutiny by the House of Commons European Scrutiny Committee on 9 May 2007 and by the House of Lords Select Committee on the European Union on 22 May 2007 following the conclusion of its inquiry into the Directive.

4.3 In respect of the matters dealt with in this instrument, the Government's approach to transposition is to include in the instrument only such measures as are necessary to ensure effective implementation of the Directive and, in setting definitions and standards, not to go beyond what the Directive permits or requires. This approach will avoid imposing undue or excessive new regulatory burdens on broadcasting and on-demand services while securing the level of public protection which the Directive seeks to achieve.

4.4 The Government will bring forward further Regulations early next year to require providers of on-demand programme services to notify the regulatory authorities that they are providing, or intend to provide, such a service, and to allow the regulatory authorities to levy fees on service providers in order to cover the cost of regulation. These measures are currently the subject of a notification to the European Commission under the Technical Standards Directive. The Government will present the necessary legislation when this process has been completed.

4.5 The TVWF and AVMS Directives are currently undergoing a codification procedure in the European Parliament and the Council. The codified Directive, which will repeal the existing Directives, is expected to come into force by the end of 2009. The Government expects to include in its further Regulations, mentioned in paragraph 4.4 above, provisions to ensure that the implementing legislation refers to the codified Directive.

4.6 The Government will also bring forward shortly an Order under section 393 of the Communications Act 2003 to permit the designated co-regulators to share information with Ofcom.

4.7 A Transposition Note is attached to this memorandum.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Secretary of State for Culture, Media and Sport has made the following statement regarding Human Rights:

“In my view the provisions of the Audiovisual Media Services Regulations 2009 are compatible with the Convention rights”.

7. Policy background

- *What is being done and why*

7.1 The TVWF Directive created a single market in television broadcasting by ensuring that each television broadcaster in the EU is regulated only by the Member State in which the broadcaster is established (the “country of origin” principle) and setting minimum content standards and rules on the amount and frequency of advertising in television broadcasting. Member States may impose stricter rules on broadcasters within their jurisdiction but cannot impose these rules on television broadcasts received from other Member States. The AVMS Directive extends these principles to the on-demand sector to create a single market in television-like on-demand services (in effect, video-on-demand services) in which each service is regulated only by the Member State in which it is established and is required to adhere to a minimum set of standards set out in the Directive. In the UK, the on-demand services which are expected to be subject to regulation under the Directive include those provided on the BBC iPlayer, ITVPlayer, 4oD and SkyPlayer, and by some online film providers.

7.2 The AVMS Directive requires Member States to establish a regulatory system for on-demand services that provide programmes and ensure that they adhere to the standards set out in the Directive. The Directive does not allow for self-regulation by the on-demand industry – a regulatory system with the backing of the law is required to achieve effective implementation of the Directive – but it does permit and encourage co-regulation. As the services to which the Directive relates are not currently regulated by law as a separate category of services in the UK

(although there is a self-regulatory scheme to which most, though not all, of the major industry players currently subscribe), legislation is required to establish a regulatory system. The Government is therefore amending the Communications Act 2003 to include a definition of on-demand programme services and establish a legal framework within which such services will be regulated. The minimum standards for programmes and advertising in on-demand programme services are transposed directly from the Directive into UK law. Ofcom will be given powers to regulate on-demand programme services and ensure that they comply with the minimum standards and may designate one or more bodies to act as co-regulator(s). The Government expects that a body established by the on-demand industry will be designated as the co-regulator for programme content and that the Advertising Standards Authority will be designated as the co-regulator for advertising.

7.3 Programme content in on-demand public services provided free of charge by the BBC and S4C will not be subject to regulation by the industry co-regulator. BBC services such as the iPlayer will be regulated by the BBC Trust. The BBC Agreement will be amended to reflect the requirements of the Directive and the obligations of the Trust. However, as with the BBC's public service television broadcasting services, Ofcom will also be able to consider complaints about the BBC's on-demand public services. Programme content in S4C's on-demand public services will be regulated by the Welsh Authority. S4C's advertising content will be regulated through the co-regulatory arrangements established for other commercial providers of on-demand services. The instrument makes provision for these arrangements.

7.4 The AVMS Directive allows Member States to decide for themselves whether or not to permit product placement in television and on-demand programmes. Currently, product placement is prohibited in television broadcasting, except in programmes acquired from outside the UK and films originally made for the cinema, but it is permitted in on-demand services. The Government has decided to continue to permit product placement in on-demand services, subject to the restrictions imposed by the Directive. This instrument creates the legal framework for that. The Government is consulting further on whether or not to permit product placement in television broadcasting and will bring forward legislation on this at a later date.

7.5 The AVMS Directive is technology-neutral in its application, i.e. it applies to all television broadcasting and on-demand services regardless of the mode of transmission. In the case of television broadcasting services, this means that such services must be subject to the minimum requirements of the Directive regardless of whether they are delivered to users via traditional television broadcasting means or using new technology such as the internet. This instrument amends the definition of a television licensable content service in section 233 of the Communications Act 2003 to ensure that relevant services provided over the internet will fall within the scope of regulation.

7.6 Some EU and EEA Member States have been concerned about the impact of the "country of origin" principle, under which television broadcasters are regulated in the Member State from which they broadcast, rather than the Member State(s) in which their broadcasts are received. They argue that this allows broadcasters to avoid their stricter rules, for example concerning advertising to children or advertising of alcohol or gambling services, by establishing themselves in a Member State which does not have such strict rules. Many broadcasters established in the UK broadcast to other EU and EEA Member States which have stricter broadcasting rules than the UK with which they do not have to comply, although they may choose to do so. The AVMS Directive maintains the "country of origin" principle, but introduces a new procedure, intended to facilitate co-operation, whereby a Member State receiving television broadcasts from another Member State may contact the Member State with jurisdiction to request that the broadcaster concerned comply with their broadcasting rules. The Member State receiving the request must ask the broadcaster to comply with those rules and must inform the first Member State of the broadcaster's response. However, there is no obligation on the Member State with jurisdiction to enforce another Member State's rules or on the broadcaster to comply with those rules. The

instrument introduces a requirement for Ofcom to ask a broadcaster to comply with another Member State's broadcasting rules, if a substantiated request for it to do so is received from that Member State. The UK would similarly be able to take advantage of this procedure in respect of services received in the UK from other Member States.

7.7 The AVMS Directive modifies the criteria used to determine which Member State is responsible for non-EU satellite television channels which are not established in the EU but which are either uplinked from a Member State or use satellite capacity controlled by a body within the jurisdiction of a Member State. Previously the Member State responsible for the satellite capacity had jurisdiction over any non-EU channels transmitted via that satellite. However, such channels now fall within the jurisdiction of the Member State from which they are uplinked to the satellite, and only if they are not uplinked from within the EU do they fall within the jurisdiction of the Member State responsible for the satellite capacity. The UK does not have any satellite capacity which is used for television broadcasting, but does have a satellite uplink industry. The European Commission is managing a process to identify the channels which will switch jurisdiction as a result of the change. The indications are that around 10 channels will transfer to UK jurisdiction. The Government has decided that these channels should be brought within the existing UK regulatory scheme. They will therefore be required to obtain a broadcasting licence from Ofcom and to comply with Ofcom's Broadcasting Code. In the event of a failure to obtain a licence or a serious infringement of the Code, Ofcom will be able to require the uplink provider to stop uplinking the channel concerned. Ofcom will also be able to require an uplinker to stop uplinking an on-demand programme service if that service is provided in contravention of the new requirements imposed on on-demand programme services under Part 4A of the Communications Act 2003, which is inserted by this instrument.

- ***Consolidation***

7.8 This instrument does not amend any other instrument.

8. Consultation outcome

8.1 The Government held a public consultation during 2008 on proposals for the implementation of the Directive. There were 59 responses to the consultation, mostly from the broadcasting, new media and advertising industries and from civil society organisations.

8.2 On the regulation of on-demand programme services, the main concern of industry respondents was to clarify the interpretation of the definition of such services, with the aim of limiting the number of services which would fall within the scope of the regulatory system. In particular, respondents were concerned that those who merely provide platforms for other service providers but do not control the content of those services should not fall within the regulatory system. Most industry respondents agreed with the Government's preferred option of a co-regulatory system in which an industry-led body would be the co-regulator for programme content and the Advertising Standards Authority would be the co-regulator for advertising, with Ofcom retaining 'backstop' powers to deal with serious cases or to intervene in the event of a failure of the co-regulatory system. Some civil society organisations preferred direct regulation by Ofcom or by a separate independent body. Industry respondents expressed some concerns about requiring the co-regulator to make decisions on whether or not particular services were within the scope of the regulatory system, about the type of sanctions which the co-regulator might be required to impose and about the circumstances in which Ofcom would intervene. In designing the co-regulatory system and preparing this instrument, the Government has sought to address these concerns by creating a flexible system in which Ofcom and the co-regulators can discuss and agree between themselves which functions and responsibilities will be carried out by the co-regulators and which will be retained by Ofcom.

8.3 In relation to product placement, most commercial broadcasters and programme makers, together with the advertising industry, were in favour of allowing product placement in television broadcasting as well as on-demand services. However, civil society organisations were firmly opposed to product placement. The Government has decided to continue to permit product placement in on-demand services, subject to the restrictions required by the Directive, but is consulting further on whether or not to permit product placement in television broadcasting.

8.4 Few respondents commented on the Government's proposals for regulating non-EU satellite channels uplinked from the UK. Those who did mostly agreed with the Government's preferred option to include these channels within the current regulatory framework and to require uplinkers to stop uplinking a channel if instructed to do so by Ofcom.

8.5 The consultation document, the responses and a summary of the responses are available on the Department's website at: www.culture.gov.uk/reference_library/consultations/5309.aspx

8.6 The main industry and civil society stakeholders were further consulted on a draft version of this instrument in spring 2009. Following that informal consultation, a number of changes were made, in particular to the definition of an on-demand programme service.

9. Guidance

9.1 No formal or statutory guidance is being issued. Ofcom and the co-regulator(s) for on-demand programme services are likely to issue informal and non-binding guidance to assist stakeholders and users.

10. Impact

10.1 The impact on business is that businesses providing on-demand programme services must ensure that they comply with the standards and requirements set out in the Directive as transposed into UK law by this instrument. When the further Regulations mentioned in paragraph 4.4 above come into force next year, these businesses will also be required to notify and pay fees to the regulatory authorities. Non-EU satellite channels which are uplinked to satellite from the UK and are not otherwise subject to regulation within the EU must obtain a broadcasting licence from Ofcom and comply with the requirements and standards set out in Ofcom's Broadcasting Code. Businesses which provide uplink services must be able to stop uplinking such a channel if Ofcom direct them to do so. They may also be required to stop uplinking an on-demand programme service if it is provided in contravention of the requirements of new Part 4A of the Communications Act 2003. Ofcom may also require providers of uplink services to provide them with information about the channels they uplink.

10.2 The impact on the public sector is that Ofcom will be required to carry out some of the functions involved in regulating on-demand programme services and will be responsible for the overall supervision of the regulatory arrangements for these services. The costs of this will be met from the fees which providers of on-demand programme services will be required to pay to the regulatory authorities. Ofcom will also be responsible for regulating non-EU satellite channels which are uplinked from the UK and which are not already regulated elsewhere in the EU. The costs of this will be met by the fees which such channels will be required to pay to Ofcom for their broadcasting licences.

10.3 Impact Assessments are attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business. However, it is anticipated that few small businesses which employ fewer than 20 people will be providing services which satisfy the definition of an on-demand programme service and fall within the scope of the regulatory system. It is also expected that the fees payable to the regulator by businesses providing on-demand programme services will be set in such a way as to minimise any potential adverse impacts on small businesses.

11.2 Some uplink services may also be provided by small businesses employing fewer than 20 people. The only new burden on such businesses will be to stop providing an uplink-to-satellite service for a non-EU satellite channel if instructed to do so by Ofcom because the channel has failed to obtain a licence from Ofcom or because it is transmitting unacceptable content in breach of the Broadcasting Code, or to stop uplinking an on-demand programme service if required to do so by Ofcom because the service is in breach of the new requirements imposed by new Part 4A of the Communications Act 2003. The Government expects that Ofcom will rarely need to issue such instructions.

12. Monitoring & review

12.1 The Government will review the implementation of the Directive in 2012.

13. Contact

Chris Bone at the Department for Culture, Media and Sport, Tel: 020 7211 6444 or email: chris.bone@culture.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency: DCMS	Title: Impact Assessment of legislation to implement the EU Audiovisual Media Services Directive – co-regulation of video-on-demand services	
Stage: Implementation	Version: 2.0	Date: 9th November 2009

Available to view or download at:

<http://www.culture.gov.uk>

Contact for enquiries: Stewart Gandy

Telephone: 020 7211 6203

What is the problem under consideration? Why is government intervention necessary?

The EU Audiovisual Media Services (AVMS) Directive requires Member States to ensure that video-on-demand services within their jurisdiction meet certain minimum content standards. These standards include a prohibition on incitement to hatred on grounds of race, sex, religion or nationality, and a requirement to ensure that children are not able to access material which could be harmful to them. Such content can have negative consequences and costs for individuals and society. Other standards and requirements relate to the identification of services, access for disabled people, advertising content and presentation, including product placement and sponsorship, and promotion of European works.

The Directive encourages 'co-regulation', whereby the video-on-demand industry takes the lead in regulating itself to ensure that the EU standards and requirements are met, dealing fairly with complaints from the public, and imposing sanctions if necessary, but with a power for the public authorities to intervene in the event of a serious and sustained failure to meet the requirements of the Directive.

What are the policy objectives and the intended effects?

The objective is to create the legal framework for a co-regulatory system for video-on-demand services in the UK. This would allow Ofcom and the video-on-demand industry to establish a light-touch, industry-led system to give consumers of UK video-on-demand services confidence that these services met the minimum content standards, without placing undue burdens on the industry.

What policy options have been considered? Please justify any preferred option.

The Government considered three options: (1) the Government would designate one or more industry bodies to act as co-regulator(s); (2) Ofcom would designate the co-regulator(s); (3) Ofcom would regulate video-on-demand services directly with no input from industry. Following consultation, the Government selected option (2). This offers a flexible, light-touch arrangement, benefiting both industry and the consumer, while retaining overall oversight and 'backstop' powers with an experienced media regulator.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

2012

Ministerial Sign-off For implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister: Siôn Simon

Summary: Analysis & Evidence

Policy Option: 2

Description: Establish a co-regulatory body (or bodies) for video-on-demand services, to be appointed by Ofcom

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' The additional annual cost to industry is £120,000. This is based on Ofcom's estimate it will cost £320,000 to regulate the industry (made up of notification fees), less the current assumed cost base of £200,000. The additional cost of £120,000 produces a PV of £1.04m over ten years.
	One-off (Transition)	Yrs	
	£ 95,500	1	
	Average Annual Cost (excluding one-off)		
	£ 120,000		Total Cost (PV) £ 1.04m
Other key non-monetised costs by 'main affected groups' All UK video-on-demand providers will need to ensure that they have procedures in place to ensure compliance with the requirements of the Directive and to engage effectively with the new co-regulatory system.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Not quantified
	One-off	Yrs	
	Average Annual Benefit (excluding one-off)		
	Total Benefit (PV)		
Other key non-monetised benefits by 'main affected groups' Assures that UK video-on-demand providers will meet the minimum content standards set out in the AVMS Directive, and that this will be achieved by means of a flexible, light touch regime. In particular, protects children from potentially harmful material and society against incitement to hatred in video-on-demand services.			

Key Assumptions/Sensitivities/Risks Without such a scheme 1) consumers of UK video-on-demand services would have no guarantee that these will meet minimum EU content standards, and 2) the UK would be liable to infraction proceedings under EU law.

Price Base Year 2009	Time Period Years 10	Net Benefit Range (NPV) £ Not Applicable	NET BENEFIT (NPV Best estimate) £ 1.04m	
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What is the geographic coverage of the policy/option?				United Kingdom	
On what date will the policy be implemented?				19 December 2009	
Which organisation(s) will enforce the policy?				Ofcom	
What is the total annual cost of enforcement for these organisations?				£ 320,000	
Does enforcement comply with Hampton principles?				Yes	
Will implementation go beyond minimum EU requirements?				No	
What is the value of the proposed offsetting measure per year?				£ 200,000	
What is the value of changes in greenhouse gas emissions?				£ nil	
Will the proposal have a significant impact on competition?				No	
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)

(Increase - Decrease)

Increase of

Decrease of

Net Impact

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

The Audiovisual Media Services (AVMS) Directive sets out minimum content standards for video-on-demand services in the EU and requires the Government to ensure the existence of a regulatory system to secure these standards for services operating from within the UK. Article 3.3 encourages the use of co-regulation and self-regulation, and Recital 36 recommends that implementing the Directive should not ‘disrupt or jeopardise’ existing self-regulatory initiatives in the video-on-demand industry which might already be in place and working.

A ‘self-regulatory’ scheme is one which is operated entirely voluntarily by the industry itself, without any legal backing. Industry members can enter it if they wish, but are not obliged to do so, and there is no law requiring them to abide by any industry Codes or judgements that may emerge from it. Self-regulation offers cost and flexibility advantages, provided that there are appropriate incentives in terms of market needs and /or the possibility of statutory intervention.

Self-regulation is more likely to be effective in a competitive market, with industry participants committing to it in order to increase or protect their market share by differentiating their products from others on grounds of superior protection of customers. This assumes that consumers value the protection afforded to a greater extent than other attributes, some of which may be the subject of regulation. Nevertheless, highly competitive markets are also likely to attract some who seek to supply market niches with non-compliant material.

A more mature industry may be able to operate self-regulation because participants are more likely to have the resources necessary to design and enforce regulations. In addition, participants in mature industries are more likely to be committed to long-term involvement in the market, and have much to lose if found to be in contravention of regulations or codes. On the other hand, maturity may also be accompanied by the development of vested interests – in which case, self-regulation may tend to serve the interests of established firms.

A co-regulatory scheme is similar to a self-regulatory one in that it the industry takes the lead in setting and enforcing standards for the content of its services. But in this case there is legal backing for its activities. This legal backing might take a number of different forms, but whatever its precise nature it will mean that an operator who consistently disregards the co-regulatory body’s standards or judgements will be ultimately be subject to legal sanctions of some kind.

In the United Kingdom, there are two industry self-regulatory bodies which cover parts of the video-on-demand industry. ATVOD (the Association for Television On Demand) and IMCB (the Independent Mobile Classification Board) have codes of practice agreed with the service providers whom they cover and procedures for handling complaints from customers.

These self-regulatory schemes are welcome and have so far proved effective, although they do not cover all UK service providers. However, the Government takes the view that the legal requirements of the Directive are such that purely self-regulatory schemes are insufficient. In these circumstances the Government has opted for a system of co-regulation.

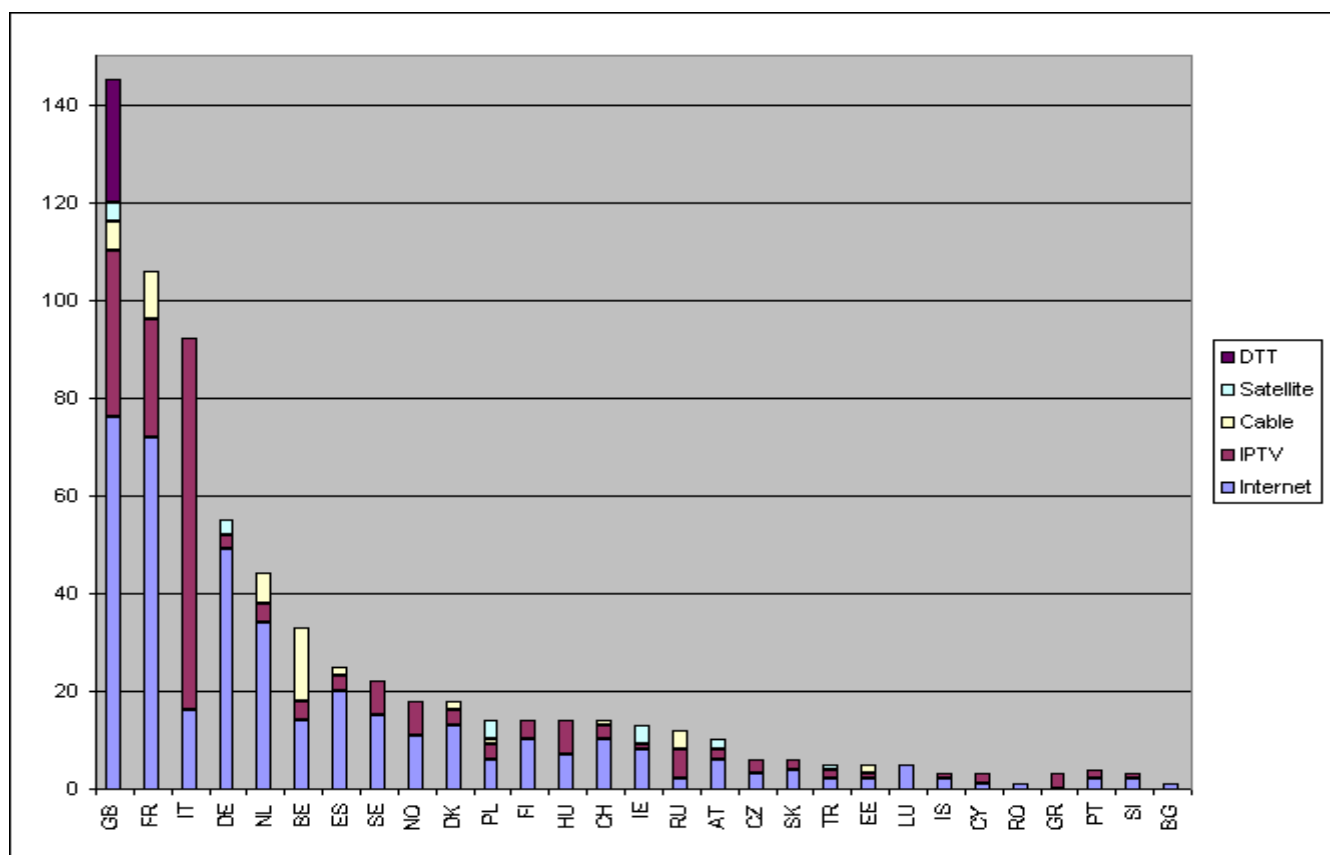
The Government’s 2008 consultation document considered three options. Two of them were co-regulatory. In Option 1, the industry co-regulatory body (or bodies – there could be more than one) would be nominated directly by the Government. In option 2, they would be nominated by Ofcom.

Option 3 was a system of direct regulation, in which Ofcom would regulate the video-on-demand industry directly without any input from industry bodies.

The video-on-demand industry in the UK and the EU

The European Audiovisual Observatory has identified 696 services from 366 different providers that were operational at the end of December 2008. They found that the United Kingdom had the most services (145), followed by France (106) and Italy (93). More than half these services were delivered via the internet, 30% on a DSL network (in the IPTV mode), 7% on cable and less than 3% by satellite. At the moment, the only on-demand services delivered by digital terrestrial television are available on the Top Up TV platform in the United Kingdom

Number of on-demand audiovisual media services in Europe by country of reception and type of network (December 2008)¹



Source: European Audiovisual Observatory

The European Audiovisual Observatory also shows that there is a great diversity of players in on-demand audiovisual services. The newest players in the market are the telecommunications network operators and the manufacturers (of games consoles, mobile telephones and other multimedia devices).

Scale and growth in the UK

Video-on-demand in the UK is characterised by diversity of players, distribution networks, and business models, with increasing competition between them. Business models range from advertising funded through subscription-based approaches to pay-per-view. At the start of 2007 the European Audiovisual Observatory identified 13 distinct video-on-demand services in the UK, delivered variously by means of

¹ Not included: services on mobile telephones, adult services, video sharing services and company chains within video sharing services, and services that only offer information videos, trailers and highlights.

the Internet, IPTV, cable, satellite and digital terrestrial television (DTT). Many new services have been added since, the most successful of which has been the BBC iPlayer – this had over a million download requests on ‘official’ launch day (Christmas Day 2007) and a total of over 20 million during April 2008. The iPlayer service became available on digital cable (rather than solely on the internet) in May 2008. While download requests via the cable platform are not as high as those online, they are still sizeable, growing from 4 million download requests in May 2008 to 17 million download requests in December 2008. Some iPlayer content is available on the BT Vision and Tiscali TV IPTV platforms as well.

Factors such as the availability and take-up of high-speed broadband connections and the introduction of easier to use content delivery systems have facilitated the increase in video-on-demand services. For example, ITV revamped its own catch-up video-on-demand service in early 2008 and received an average 21% month-on-month growth in video views between January and June of that year.

Channel 4’s catch up and archive content service, 4OD, launched in late 2006 and has also enjoyed significant usage. Like the iPlayer, 4OD can be accessed via television (on digital cable and some IPTV providers) and by PC. However, unlike the iPlayer, 4OD tends to receive a higher number of download requests via its television platforms than it does by PC. In 2008, there were approximately 6-6.5 million requests to view programmes on 4OD’s TV services per month, peaking at 7.4 million in June 2008. Requests through PCs varied between 3.3 and 5.9 million per month. Over the course of 2008 there was a total of approximately 132 million programme requests on all platforms.

Beyond the specific case of the BBC, market appraisal in the video-on-demand sector is, as the European Audiovisual Observatory has noted, extremely difficult. Many suppliers do not publish or communicate download figures. In 2006 the total UK video-on-demand market was estimated to be worth £66 million, with an annual growth rate of 50%.

There is however a consensus that the market took off in the first quarter of 2006 and continues to expand rapidly. For example, of approximately 3.5 million Virgin Media subscribers, 52% (approximately 1.8 million) used video-on-demand in the last quarter of 2008, an increase of five percentage points from Q4 2007. The average total video-on-demand views per month on the platform rose considerably from 33 million in the last quarter of 2007 to 53 million a year later. BSkyB has stated that its Sky Anytime service recorded more than a million downloads during 2006. With the exception of 4OD² most of the broadcasters’ video-on-demand services are currently weighted towards catch-up content.

Video-on-demand providers can expect to see further increased take-up of their services as they continue bringing them into the living room, making video-on-demand access more akin to viewers’ consumption of traditional television broadcast services. A number of different means are being employed to do this. Cable and IPTV set-top boxes is one avenue, but games consoles are a newer one – the iPlayer is available on Nintendo’s Wii and Sony’s Playstation 3 consoles and BSkyB has struck a deal with Microsoft to deliver content on the Xbox. A number of smartphone and other handheld media devices now have the ability to access them as well. All this indicates that technological advances are expanding the boundaries of the video-on-demand market.

Ofcom’s analysis suggests that in the UK there are currently around 90 broadcaster-related video-on-demand services, and approximately 150 video-on-demand services overall.

Substitution for ‘linear’ television

Video-on-demand consumption is more likely to be a substitute for linear television viewing than an addition to it. The amount of time people spend on viewing is limited, and competition for this limited time is to a great extent a zero sum game in which one provider gains market share against another. This degree of economic substitution between the different forms of video consumption is clearly directly

² 4OD has an approximately 50:50 split between catch-up and archive content.

relevant at the individual level but it also indirectly affects the wholesale (upstream) channel provider market.

Thus in the initial Public Value Test for the iPlayer service the BBC Trust noted “*consumption was expected to be largely substitutational – i.e. some consumption of BBC programmes on the television and radio will switch to on-demand. As such we expect the proposals to help maintain the total volume of consumption of BBC programmes*”. Specifically, the Trust expected iPlayer to contribute to the maintenance of the combined BBC weekly reach (on all services) at over 90%.

Ofcom’s projections for the impact of the BBC iPlayer covered the five years 2006-2011 and were driven by internet take-up. They included high, central and low scenarios, under which there were corresponding falls in linear television consumption of 33%, 20%, and 13%. The BBC Trust’s own projections were broadly compatible with Ofcom’s high impact scenario.

More generally, newly emerging systems allow consumers to use the internet or hybrid Freeview/IPTV services such as BT Vision to mix and match between free-to-air, paid-for and on-demand content. PVR-based content storage enables libraries of material to be stored and further intensifies competition for audiences. The standard model of consumer television demand indicates that these competition effects exist between pay and free to air services and that programming need not necessarily be of the same character or indeed obviously a close substitute in order to exert competitive pressure³.

Video-on-demand in the mobile sector

The UK’s total mobile entertainment market has generated revenues of around £600 million per annum since 2005, with mobile games generating approximately £200 million in revenue in 2007. Around 20% of the UK’s 47 million mobile subscribers purchase mobile entertainment. Males and the 18-35 year old age group are the dominant users.

The widely predicted convergence of advertising and entertainment industries is continuing to evolve on the mobile platform. In April 2007 3 became the first operator to launch an advertising funded service and within six months of one million subscribers had signed up to it, although the number viewing content on a regular (daily) basis is lower.

In the UK almost 77% of mobile phone subscribers have video-enabled handsets and over 20% are owners of television-enabled mobile phones. The UK mobile entertainment market is widely predicted to grow rapidly, perhaps more than doubling to £1.4 billion by 2012.

However, the number of users who access video-on-demand services on mobile phones is relatively low, and is perhaps likely to remain so. Current figures are that mobile television services are used by only 1% of all mobile telephone users, and video-on-demand services by 1.7%.

The current regulatory system for video-on-demand services

There is currently no statutory regulatory system for video-on-demand services in the UK.

Some providers of video-on-demand services belong to one of the two industry self-regulatory bodies, the Association for Television On Demand (ATVOD) and the Independent Mobile Classification Board (IMCB), and others do not. ATVOD’s membership currently consists of BT, Virgin, Tiscali, ITV, Channel 4, Five, FilmFlex, and OnDemand, with the BBC as associate members. In the case of IMCB, covering mobile content, the six signatories of the mobile code do not include all of the relevant content providers. However, IMCB’s code covers all commercial content which is supplied via a mobile phone network because the signatories include all five of the networks. Other UK video-on-demand providers (for example, BSkyB) do not currently belong either to ATVOD or to IMCB.

³ See B Owen and R Wildman (1992) *Video Economics* Cambridge: Harvard University Press, especially pp.101-106

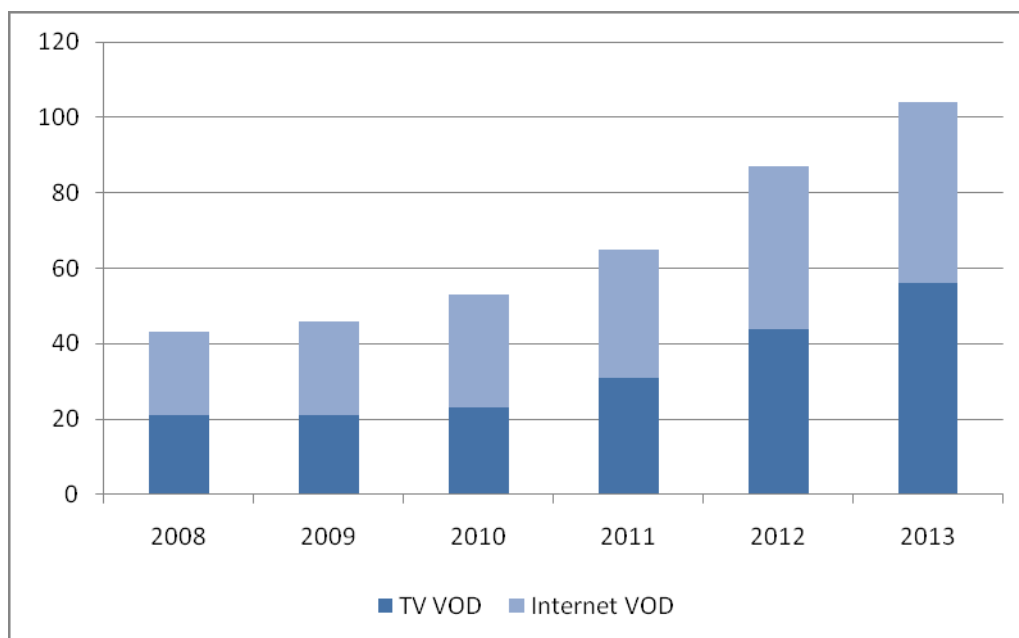
The number of complaints to ATVOD about the content of video-on-demand programming in the organisation’s approximately four years of existence is nil (though it has had complaints about some technical issues). The position in respect of IMCB is similar.

Advertising on video-on-demand services

Total UK spend on advertising in 2006 across all media was £19 billion. Most of this (£13.5 billion) was display as opposed to classified advertising, and television advertising was the largest single category of display advertising, with a 28.9% share worth £3.9 billion. Internet advertising was worth just over £2 billion in 2006, with most (58%) being “paid for search” with the remainder being display advertising (23%) and classified.

Advertising spend in video-on-demand services is forecast to grow significantly over the next five years.

Advertising Spend (£m)⁴



Source: Enders Analysis

The current regulatory system for advertising in video-on-demand services

Self-regulation of non-broadcast advertising dates from the founding of the Advertising Standards Authority (ASA) in 1962 with the aim of ensuring that advertisements were “legal, decent, honest and truthful”. Since 1988 this has been backed up by statutory powers and possible referral to the Office of Fair Trading (OFT). Advertising in video-on-demand services is currently treated as non-broadcast advertising.

The relevant ASA codes of practice are divided between broadcasting (Broadcast Code of Advertising Practice - BCAP) and non-broadcast (Code of Advertising Practice – CAP) arms. In broadcasting, compliance with the ASA’s Code is a condition of the relevant Ofcom licence.

⁴ TV VOD advertising represents spot advertising on television video-on-demand services only. Internet VOD advertising represents spending on in-stream video formats only (pre, mid and post roll-out).

The Broadcast Advertising Standards Board of Finance Limited (basbof) funds the ASA's regulation of broadcast advertising through a levy of 0.1% of the advertising cost to the client collected through the agencies or media owners. In 2007 the income from this levy was £3.6 million, of which 94% was paid towards self regulatory costs, providing funds of almost £3.3 million to the ASA.

The options for regulation

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. But the Directive's requirements are clear and mean that the UK must have arrangements for securing the minimum EU standards for video-on-demand content in a way that applies to all relevant providers and has legal backing. This means that maintaining existing arrangements cannot be an option even if they are extended to the whole industry.

The Government's 2008 consultation outlined three options for complying with the Directive's requirements in respect of the programme content in video-on-demand services:

1. a UK co-regulatory body (or bodies) for video-on demand, which the Government would appoint directly;
2. a UK co-regulatory body (or bodies) for video-on demand, which Ofcom would appoint;
3. no UK co-regulatory body for video-on-demand - the requirements of the Directive would be secured through direct regulation by Ofcom.

For advertising content, the consultation document set out options in which regulatory responsibility would be assigned to

1. the Advertising Standards Authority (ASA);
2. the programme content co-regulatory body;
3. another body altogether.

The Government expressed a preference for a new co-regulatory body for programme content and for the ASA to regulate advertising content, with regulatory powers being assigned to both bodies by Ofcom. In the light of the responses to the consultation, the Government confirmed this decision in March 2009. The Regulations, which this Impact Assessment accompanies, will establish a legal framework within which Ofcom will be able to designate one or more bodies to act as co-regulators for the video-on-demand sector. Ofcom is currently consulting on a proposal to designate a restructured ATVOD as the co-regulatory body for programme content and the ASA as the co-regulatory body for advertising content.

The Government's implementation proposals also envisage that video-on-demand service providers will be required to notify the regulatory authorities that they intend to provide a video-on-demand service (or are already providing such a service at 19 December 2009) and to pay a fee to the authorities. The fees paid by video-on-demand services will be used to cover the costs of the co-regulatory system. These requirements have been notified to the European Commission under the Technical Services Directive. The Government will bring forward further Regulations to implement them once this process has been completed.

Costs of co-regulation

ATVOD's average membership fee is in the order of £20,000 per annum and its annual budget less than £200,000. This is covered entirely by the fees paid by its members. £200,000 is therefore the current cost of regulation.

A co-regulatory system will result in costs to the video-on-demand industry accruing from a) setting up the video-on-demand co-regulatory body and b) running the co-regulatory system thereafter. There may however be some offsetting savings, in that ATVOD and IMCB have already pioneered much of the necessary work in terms of setting up complaints procedures.

Ofcom has estimated that there are around 150-200 video-on-demand services which will fall within the scope of the co-regulatory system⁵. Based on an estimate of at least 150 notifiable services, and an initial estimate from ATVOD that the budget for the regulation of video-on-demand services will be around £400,000 for the first 15 months (19 December 2009 to 31 March 2011), Ofcom estimates that an initial notification fee for video-on-demand service providers, to cover the costs of the co-regulatory system, would be likely to be between £2,000 and £2,500 for each service (up to £500 for the period 19 December 2009 to 31 March 2010 and up to an additional £2,000 to cover the period 1 April 2010 to 31 March 2011). Ofcom considers that it would be appropriate to review the fee structure for the financial years after 2010-11, and Ofcom would expect the co-regulatory body to consult stakeholders before taking any decisions in this area. The overall costs to industry are therefore likely to be marginal. However, the additional costs of the co-regulatory system will fall largely on those mostly smaller and medium-sized service providers who are not already members of, and therefore do not pay a membership fee to, ATVOD or IMCB.

The additional annual cost to industry is £120,000. This based on Ofcom's estimate that it will cost £320,000 to regulate the industry (made up of notification fees), less the current assumed cost base of £200,000. The additional cost of £120,000 produces a PV of £1.04m over ten years.

The costs of the two options which the Government did not select (co-regulatory bodies appointed directly by the Government, and direct regulation by Ofcom) would be broadly similar, since the same functions would need to be carried out and costs would have to be recovered through fees payable by industry.

Benefits

Consumers will benefit from a co-regulatory system which provides assurance that UK video-on-demand providers are meeting the minimum content standards set out in the AVMS Directive, and that appropriate action will be taken when providers breach these standards. These standards include a prohibition on incitement to hatred on grounds of race, sex, religion or nationality, and a requirement to ensure that children are not able to access material that might seriously impair their physical, mental or moral development. Such content can have negative consequences and costs for individuals and society.

Co-regulation provides a benefit to video-on-demand suppliers, in that they will effectively own and operate the co-regulatory system(s). That should give them an assurance that the arrangements will remain light-touch and flexible while assuring the necessary standards for consumers. In addition, it will be easier for Ofcom than the Government to intervene to correct problems with the co-regulatory arrangements, should any arise. That would be to the advantage of both consumers and suppliers.

Competition assessment

Any of the options considered by the Government could have competition effects. The existence of new EU standards for video-on-demand content, and their enforcement either by Ofcom or by an industry co-regulatory body, requires that providers of video-on-demand services ensure that their programming is in

⁵ Ofcom, Proposals for the regulation of video on demand services – Consultation, September 2009. See paragraph [4.86].

compliance with the new rules. The cost of ensuring compliance could weigh more heavily upon a new, start-up supplier and smaller providers.

However, much video-on-demand content is material that has previously been shown either on television or in the cinema and is known already to comply with the relevant standards – which, certainly in the case of television, will be more demanding than the EU standards for video-on-demand.

Similarly, the fees charged in order to cover the costs of regulation could weigh more heavily upon new and smaller providers. It will be important to ensure that the fees are kept to a minimum and are perceived to be fair and not set in such a way as to work to the disadvantage of some providers. However, the fees charged by Ofcom for television broadcasting licences do not appear to have deterred a large number of companies from applying for and obtaining broadcasting licences, and there is no reason to assume that fees charged at the rates indicated above would be perceived any differently.

The co-regulatory body will also determine the outcome of complaints against particular providers. It will again be important to ensure that these procedures operated fairly, and are perceived by all concerned as not working to the disadvantage of particular providers or groups of providers.

Should such difficulties arise, it will be important that Ofcom, as a neutral, non-political regulator, could step in quickly to ensure that they were properly and effectively resolved. The option selected provides that possibility.

Small firms impact test

Under existing arrangements for television broadcasting, Ofcom has issued licences (television licensable service licences) to a large number of small firms which operate television stations. Their procedures and fees do not appear to be perceived as an obstacle to smaller operators. Ofcom's fees are related to relevant turnover, but with minimum and maximum fees.

It is not clear whether a co-regulatory body would be seen in the same light. The issues which we discuss in the competition assessment section (above) are relevant in this context. In particular it is important that application procedures and membership fees are not perceived as working to the disadvantage of new, start-up and smaller providers.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Legal Aid

There might be an impact on the legal aid budget if a supplier of video-on-demand services were to seek legal aid in order to challenge a decision by Ofcom or the industry co-regulator in the Courts. However, the Government considers that the likelihood of a provider qualifying to receive legal aid is very low.

Sustainable development

There will be no impact on sustainable development from the requirements of the Directive or the plans for regulating video-on-demand services.

Carbon assessment

There will be no impact on carbon emissions from the requirements of the Directive or the plans for regulating video-on-demand services.

Other environment

There will be no other environmental impacts from the requirements of the Directive or the plans for regulating video-on-demand services.

Health; race, disability and gender equality; human rights

Implementation of the Directive in the UK will have marginal benefits in each of these areas. In each case, that is because the Directive sets out minimum standards applicable to the advertising and programme content of video-on-demand services.

In terms of advertisements on video-on-demand services, Article 3e of the AVMS Directive requires that they do not prejudice respect for human dignity, or include or promote discrimination based on sex, racial or ethnic origin, disability or sexual orientation. It also prohibits all advertising for tobacco products and advertisements which encourage behaviour which is prejudicial to health and safety or grossly prejudicial to the environment.

Article 3b requires that video-on-demand services do not contain any incitement to hatred based on race, sex, religion or nationality.

Implementation of the Directive in the UK will mean that video-on-demand services provided in this country will be required to abide by all these standards. There is no evidence that such services currently contain content which infringes the Directive's standards, but in the absence of a regulatory system, there is currently no legal mechanism specifically applying to video-on-demand services which requires them to abide by the Directive's standards and provides for sanctions to be applied against those who breach the standards. The implementation of the Directive will create such a mechanism.

Rural proofing

There will be no impact on rural issues from the requirements of the Directive or the plans for regulating video-on-demand services.

Summary: Intervention & Options

Department /Agency: DCMS	Title: Impact Assessment of legislation to implement the EU Audiovisual Media Services Directive - non-EU satellite television channels	
Stage: Implementation	Version: 2.0	Date: 9th November 2009

Available to view or download at:

Contact for enquiries: Stewart Gandy

Telephone: 020 7211 6203

What is the problem under consideration? Why is government intervention necessary?

The EU Audiovisual Media Services Directive (AVMS) gives the UK jurisdiction over non-EU television channels which are uplinked to satellites from locations within the UK for reception by viewers in the EU. This means that the UK is responsible under EU law for ensuring that these channels do not incite violence on grounds of race, sex, religion or nationality and that they meet other EU standards and requirements for television content. Such content can have negative consequences and costs for individuals and society. At present there is no legal mechanism in the UK which would allow the Government or Ofcom to intervene if a non-EU channel uplinked from the UK was not meeting these standards.

What are the policy objectives and the intended effects?

The policy objective is to ensure that the UK can comply with the terms of the Directive. The effect will be to ensure Ofcom is able to intervene successfully if a non-EU television channel which is uplinked from the UK were to breach the EU standards.

What policy options have been considered? Please justify any preferred option.

The Government considered three options. Option 1 was to do nothing. This would have potentially high political and legal costs and would not be acceptable. Under Options 2 and 3 Ofcom would have a new power to require the removal of a particular non-EU television channel from an uplink, and each channel would itself need to hold a UK broadcasting licence. Option 3 would additionally place a duty on uplinkers to ensure that each channel held a UK licence. Following consultation, the Government selected option 2. This will ensure that the UK is not in breach of the Directive, while minimising the costs for uplinkers.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

2012

Ministerial Sign-off For implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister: Siôn Simon

Summary: Analysis & Evidence

Policy Option: 2

Description: Non-EU channels to hold a UK broadcasting licence and a power for Ofcom to require the removal of a channel from an uplink

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' The main costs will be on non-EU broadcasters which will now be required to hold a UK broadcasting licence. We estimate this will affect no more than 10 non-EU broadcasters. The licence fee will cover the cost to Ofcom of processing licence applications and carrying out regulatory functions.
	One-off (Transition)	Yrs	
	£ 25,000		
	Average Annual Cost (excluding one-off)		
	£ 10,000		Total Cost (PV) £ 0.11 million
Other key non-monetised costs by 'main affected groups' There will be some costs on satellite-uplink providers who uplink non-EU channels if Ofcom requests that they stop uplinking a channel. These costs may be greater for small uplink providers who may not have the technical equipment to separate out one particular channel from a multiplex of channels.			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Not quantified.
	One-off	Yrs	
	Average Annual Benefit (excluding one-off)		
			Total Benefit (PV)
Other key non-monetised benefits by 'main affected groups' Non-EU channels uplinked from the UK will be required to meet minimum EU standards and additionally the requirements of Ofcom's Broadcasting Code. Ofcom will be able to take action to deal with non-EU channels which breach the requirements of the Directive and broadcast illegal or unacceptable material.			

Key Assumptions/Sensitivities/Risks

Price Base Year 2009	Time Period Years 10	Net Benefit Range (NPV)	NET BENEFIT (NPV Best estimate) £ -0.11million
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What is the geographic coverage of the policy/option?		UK-wide	
On what date will the policy be implemented?		19 December 2009	
Which organisation(s) will enforce the policy?		Ofcom	
What is the total annual cost of enforcement for these organisations?			
Does enforcement comply with Hampton principles?		Yes	
Will implementation go beyond minimum EU requirements?		No	
What is the value of the proposed offsetting measure per year?			
What is the value of changes in greenhouse gas emissions?			
Will the proposal have a significant impact on competition?		No	
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium Large
Are any of these organisations exempt?	No	No	N/A N/A

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of	Decrease of	Net Impact

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

The AVMS Directive changes the criteria for determining which Member State has jurisdiction over non-EU television channels intended for reception in the EU.⁶ Under the Television without Frontiers Directive, such channels were assigned to the jurisdiction of the Member State responsible for the satellite capacity being used. Under the AVMS Directive, it is the Member State with responsibility for the satellite-uplink which has jurisdiction over these non-EU channels.

The UK did not have any responsibility to regulate non-EU channels under the TVWF Directive because we do not have any satellites being used for broadcasting. However, we do have satellite uplinks. The AVMS Directive requires us to ensure that non-EU channels uplinked from the UK meet minimum EU standards and to be able to take prompt action against services, if, for example, they broadcast race hatred material.

The options for regulation

The Government's 2008 consultation document set out three options for implementing this part of the Directive. They were:

1. do nothing;
2. include non-EU channels within the currently regulatory framework and ensure that the rules can be applied to non-EU broadcasters;
3. include non-EU channels within the currently regulatory framework and create a new regulatory responsibility for uplink providers.

The Government ruled out the 'do nothing' option – the Directive requires the UK to be able to take action in the event that there is a regulatory problem with a non-EU channel which uses a UK uplink facility.

Both options 2 and 3 would allow the UK to intervene if a channel broadcast illegal content and to inform non-EU channels about the UK's regulatory standards. In both scenarios, Ofcom would be able to require the uplinker to stop uplinking the channel if it deemed it necessary.

The difference between the two options lies in the role and the potential liability assigned to uplink providers. Under option 2, the uplink provider has an ex post responsibility: they must act when informed that they are uplinking an unlicensed or banned channel. Under option 3, the provider has an ex ante responsibility: to determine, and keep track of the licensing status of the channels they uplink.

Option 3 would appear to create a greater regulatory burden for the uplink industry and to go beyond the requirements of the Directive. The Government therefore preferred option 2. This would allow the UK to ensure appropriate regulatory oversight of the non-EU channels. In the light of the responses to the consultation, the Government confirmed this approach in March 2009.

⁶ The Directive does not apply to services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

Benefits and costs

This change in the criteria generates few additional direct benefits for the UK, since the protections afforded are already available under the existing TVWF regime. The real benefits accrue on a pan-European level. Member States will be able to deal more quickly with unacceptable services (for example, broadcasting race hate material) as they will now be able to take action at the point of the uplink before the signal reaches the satellite. The rationale for having content standards in the first place is to protect viewers from harmful content such as content that incites violence on grounds of race, sex, religion or nationality. Such content is associated with negative consequences and costs for individuals and society. There is also an indirect reputational benefit to the UK in demonstrating a commitment to these values and not providing a base to broadcast harmful content.

The Directive imposes some burdens on UK satellite-uplink providers. Uplinkers will need to ensure that they are in a position to stop uplinking a channel if they are required to do so by Ofcom, whether or not they have the technical equipment to do this themselves. They may also be required to notify Ofcom as to the non-EU channels they uplink.

The main costs will fall on the non-EU television channels themselves. They will need to have a UK television broadcasting licence (a television licensable content service - 'TLCS' - licence) issued by Ofcom. Ofcom's fees and charges are related to relevant turnover with a minimum fee, progressive and cumulative percentage fees as turnover increases and a maximum cap beyond which no further fees are payable.

Current indications are that fewer than 10 non-EU channels will transfer to UK jurisdiction as a result of the AVMS Directive. The total one-off cost of new application fees for these channels will be £25,000 (10 TLCS licences at £2,500 each). Each subsequent year licences require renewal at a cost of £1,000 each. Shopping channels pay a flat annual fee of £2,000, but it is not clear that any of the channels affected fall into this category.

There will also be some administrative costs for Ofcom in dealing with applications for tics licences for these non-EU channels and in the event of complaints about a particular channel or other need to take measures against it. However, such costs should be covered by the fees charged to licensees.

We would not expect Ofcom to use the power to require the removal of a channel from an uplink in more than a handful of cases. These non-EU channels have already been subject to EU regulation in the Member State which has responsibility for the satellite and therefore, the number of services in breach of EU standards is likely to be few and far between.

Competition assessment

The impact on competition within the UK is likely to be negligible. All uplinkers based in this country will be affected equally, in that any non-EU television channels they carry will need to have an Ofcom licence. However, there may be an issue in relation to the possible requirement on uplinkers to cease carrying a particular channel, which might bear more heavily upon smaller-scale operators (see the small firms impact assessment below).

There may be an impact on competition between uplinkers in the UK and those elsewhere in the EU. The new AVMS rules will mean that all Member States will require some form of regulation of non-EU channels which are uplinked from their territory. However, not all other Member States have a licensing system. To the extent that this is so, the requirement for an Ofcom licence with its initial application fee of £2,500 (though a relatively small sum in comparison to the overall cost of uplinking a satellite channel, which is thought to be in the region of £50,000 pa) may impact upon decisions by non-EU channels as to

the satellite which they use for transmission into the EU and/or the ground station from which their signal is uplinked to that satellite.

Small Firms Impact Assessment

The requirement to terminate an uplink provision for a non-EU channel may adversely affect small satellite-uplink providers and could present barriers to new entrants in the market. We do not know how many uplink providers would not have the necessary technical equipment to stop uplinking a channel which was part of a multiplex. We think that this is likely to be no more than 5-10 operators⁷, and the number of occasions on which it might be necessary to terminate an uplink are likely to be few. Uplink providers did not express any concerns about this in response to the 2008 consultation.

⁷ Based on Ofcom's estimate that there are between 40-50 uplinkers who uplink TV channels and EutelSat's estimate that 90% of the channels carried on their satellites are multiplexed and uplinked by an integrated service provider.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Legal Aid

There might be an impact on the legal aid budget if any uplinker were to seek legal aid in order to challenge in the Courts either the implementation arrangements for the regulation of non-EU satellite-uplinked channels or, in due course, a decision by Ofcom to require an uplinker to stop uplinking a channel. However, no challenges are anticipated, and the Government expects that all sides will work together to resolve any problems or disagreements without the need for legal action.

Sustainable Development

There will be no impact on sustainable development from the requirements of the Directive and the plans for regulating non-EU satellite channels uplinked to satellite from the UK.

Carbon Assessment

There will be no impact on carbon emissions from the requirements of the Directive and the plans for regulating non-EU satellite channels uplinked to satellite from the UK.

Other Environment

There will be no impact on the environment from the requirements of the Directive and the plans for regulating non-EU satellite channels uplinked to satellite from the UK.

Health

There will be no impact on health from the requirements of the Directive and the plans for regulating non-EU satellite channels uplinked to satellite from the UK.

Race / Disability / Gender Equality

Article 3b of the AVMS Directive requires Member States to ensure that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality. The change in the technical criteria for determining jurisdiction over non-EU satellite-uplinked channels means that for the first time the UK will have a responsibility for non EU satellite-uplinked channels in this respect.

Human Rights

There will be no impact on human rights from the requirements of the Directive and the plans for regulating non-EU satellite channels uplinked to satellite from the UK.

Rural Proofing

There will be no impact on rural issues from the requirements of the Directive and the plans for regulating non-EU satellite channels uplinked to satellite from the UK.

Transposition Note: Council Directive 2007/65/EC of the European Parliament and Council

Transposition Note setting out how the Audiovisual Media Services Regulations 2009 (S.I. 2979) (the “Regulations”) and other existing legislation implements Directive 2007/65 EC.

The Directive

Council Directive 2007/65/EC of 11 December 2007 (the “Directive”) is concerned with all EC audiovisual media services (including on-demand services). It amends and renames the Television without Frontiers Directive (89/552/EC) (“TVWF”), as previously amended by Directive 97/36/EC.

The Directive, entitled the Audiovisual Media Services Directive (“AVMSD”), must be transposed in national law by 19 December 2009.

The new rules respond to technological developments and create a level playing field in Europe for emerging audiovisual media.

Introduction

These regulations do not go beyond what is necessary to implement the Directive including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply. All references in the transposition table are to sections of the Communications Act 2003 as amended by these regulations unless otherwise stipulated. The references to the articles are to the articles of Directive 2007/65/EC not TVWF as amended. It is expected that the Commission will produce a consolidated version of Directive 89/552/EEC in the next few months.

Articles of AVMSD	Objective	Implementation	Responsibility
Article 1(1)	Replaces the title of TVWF with the new title, AVMSD.	Regulations 8, 10 and 11 of the Regulations and consequential amendments at sections 211(2)(b), 211(3)(b), 329(7)(b)(i), 362(1) and 405(1) of the Communications Act 2003 (the “2003 Act”).	
Article 1(2) – inserts article 1 TVWF as detailed below	Replaces Article 1 of TVWF, giving new definitions to key terms.		
1(a)	Defines “audiovisual media service”.	“on-demand programme service” in section 368A(1) and the existing definition of “television programme service” at section 362(1) of the 2003 Act.	

1(b)	Defines “programme”.	Existing definition at section 405(1) of the 2003 Act.	
1(c)	Defines “editorial responsibility”.	Section 368A(4) of the 2003 Act.	
1(d)	Defines “media service provider”.	Existing definition of “television programme service” at section 362(1) and section 368A of the 2003 Act .	
1(e)	Defines “television broadcasting” or “television broadcast”.	Existing definition of “television programme service” at section 362(1) of the 2003 Act.	
1(f)	Defines “broadcaster”.	Existing definition of general control at section 362(2) of the 2003 Act.	
1(g)	Defines “on-demand audiovisual media service”.	Section 368A(1) of the 2003 Act.	
1(h)	Defines “audiovisual commercial communication”.	Sections 368F, 368G, 368H and 368R(1) of the 2003 Act.	
1(i)	Defines “television advertising”.	Not defined – concept at sections 319 – 322 of the 2003 Act.	
1(j)	Defines “surreptitious audiovisual commercial communication”.	Not defined – concept at section 368F(3)(b) of the 2003 Act.	
1(k)	Defines “sponsorship”.	Mentioned at section 319(2)(j) and defined at section 368G(12) to (16) of the 2003 Act.	
1(l)	Defines “teleshopping”.	Not defined.	
1(m)	Defines “product placement”.	Section 368H(1) of the 2003 Act.	
1(n)	Defines “European works”.	Section 368C(3) of the 2003 Act and Ofcom guidance on European Works quota in licences.	
Article 1(3) – inserts article 2 TVWF as detailed below	Replaces Article 2 of TVWF, placing a requirement on Member States to ensure that all audiovisual media services transmitted by media service providers under that Member State’s jurisdiction comply with the domestic laws applicable to audiovisual media services in that Member State.		

2(1)	Places an obligation on each Member State to ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.	Cumulative effect of various provisions of the Broadcasting Acts 1990 and 1996 and the 2003 Act; Regulation 13 (sections 9A, 39 and 115 of the Wireless Telegraphy Act 2006).	Ofcom and Secretary of State, the BBC Trust, the Welsh Authority
2(2) to (6)	<ul style="list-style-type: none"> Defines what is meant by a “media service provider which is under the jurisdiction of a Member State” and in what circumstances a media provider can be deemed to be under a Member State’s jurisdiction. Jurisdiction of satellite uplinkers. 	<ul style="list-style-type: none"> Section 368A(1)(e) of the 2003 Act. Section 9A of the Wireless Telegraphy Act 2006 as inserted by Regulation 13. 	Ofcom
Article 1(5) – inserts article 3 TVWF	Replaces Article 3 of TVWF, giving Member States the option to impose stricter or more detailed rules than those required under the Directive. Creates new co-operation procedure.	Section 335A of the 2003 Act, inserted by Regulation 7.	Ofcom
Article 1(7) – inserts articles 3a to 3g TVWF as detailed below	Inserts a new Chapter IIA into TVWF, encompassing new Articles 3a – 3g as detailed below.		
3a	Member States must ensure that audiovisual media service providers within their jurisdiction make certain information available to the recipients of the service.	Section 368D(2) of the 2003 Act in respect of on-demand programme services; in respect of linear services, under Ofcom’s licence conditions.	Ofcom/designated appropriate regulatory authority
3b	Member States must ensure that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on	Code made under section 319 and section 368E(1) of the 2003 Act.	Ofcom/designated appropriate regulatory authority

	race, sex, religion or nationality.		
3c	Member States must encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.	Code made under section 303 and requirement under section 368C(2) of the 2003 Act.	Ofcom/designated appropriate regulatory authority
3d	Member States must ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.	Various provisions of the Copyright, Designs and Patents Act 1988.	
3e(1)	Member States must ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with a number of prohibitions, relating to: <ul style="list-style-type: none"> • recognisability of audiovisual commercial communications; • use of subliminal techniques; • non-discrimination; • respect for human dignity; • health and safety; • environmentally prejudicial behaviour; • tobacco, alcohol and medication; • communications aimed at minors. 	Code under section 319 and requirement under sections 368F, 368G and 368H of the 2003 Act. No advertising permitted by the BBC by virtue of clause 75(2)(b) of the BBC Agreement.	Ofcom/designated appropriate regulatory authority/BBC Trust
3e(2)	Member States, together with the Commission, must encourage media service providers to develop a variety of codes of conduct.	Section 368C(4) of the 2003 Act.	Ofcom/designated appropriate regulatory authority
3f	Sponsored audiovisual media services must meet a number of requirements, relating to: <ul style="list-style-type: none"> • influence on the responsibility and 	Sections 319, 321 and 368G of the 2003 Act. No sponsorship at the BBC by virtue of clause 75(2)(b) of the BBC Agreement.	Ofcom/designated appropriate regulatory authority/BBC Trust

	<p>editorial independence of the media service provider;</p> <ul style="list-style-type: none"> • encouraging the purchase or rental of goods or services; and • informing viewers of the existence of a sponsorship agreement. <p>In addition, there are prohibitions and restrictions:–</p> <ul style="list-style-type: none"> • on sponsorship by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products; • on sponsorship by undertakings whose activities include the manufacture or sale of medicinal products; • on news and current affairs programmes. 		
3g(1) and (2)	<p>Places a general prohibition on product placement, but permits Member States to derogate from that prohibition: –</p> <ol style="list-style-type: none"> 1. in respect of cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes (subject to programmes 	<p>Sections 319 and 368H of the 2003 Act. Clause 75(2)(b) of the BBC Agreement which prohibits funding of activities funded by “any alternative means of finance”.</p>	<p>Ofcom/designated appropriate regulatory authority/BBC Trust</p>

	<p>containing such product placement satisfying a number of conditions);</p> <p>2. in situations where there is no payment but only the provision of certain goods or services free of charge, with a view to their inclusion in a programme.</p>		
3g(3)	Places a prohibition on product placement of tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of the same, and a prohibition on product placement of medicines available only on prescription in the Member State.	Sections 319 and 368H(4) of the 2003 Act.	Ofcom/designated appropriate regulatory authority/BBC Trust
Article 1(8) – inserts articles 3h and 3i TVWF as detailed below	Inserts a new Chapter IIB into TVWF, encompassing new Articles 3h and 3i, applicable only to on-demand services, as detailed below.	Regulation 2 of the Regulations inserts a new Part 4A into the 2003 Act. This implements article 1(8) by creating the concept of the “appropriate regulatory authority” to whom Ofcom may designate functions, imposing a set of obligations on service providers, and introducing a set of sanctions for failure of service providers or regulatory authorities to comply with the duties.	
3h	Places an obligation on Member States in relation to on-demand audiovisual media services which might seriously impair the physical, mental or moral development of minors. Providers of such services in the Member State’s jurisdiction must take	Code under section 319 and requirements under section 368E(2) of the 2003 Act.	Ofcom/designated appropriate regulatory authority/BBC Trust

	appropriate measures to ensure that these services are only made available in a way that ensures minors will not normally hear or see them.		
3i	Places an obligation on Member States to ensure that on-demand audiovisual media services provided by providers under their jurisdiction promote European works, where practicable and by appropriate means.	For television, section 335 of the 2003 Act and Ofcom licence requirement. For on-demand, sections 368C(3) and 368Q(3) of the 2003 Act, and clause 63 of the BBC Agreement.	Ofcom/designated appropriate regulatory authority/BBC Trust/Welsh Authority
Article 1(9) – inserts articles 3j and 3k TVWF as detailed below	Inserts a new Chapter IIC into TVWF, encompassing new Articles 3j and 3k as detailed below.		
3j	Permits Member States to take such measures as are compatible with Community law to ensure that the public in a Member State are not deprived of the opportunity to follow events which are regarded by a Member State as being of major importance for society.	Part IV of the Broadcasting Act 1996 sets out the UK’s “listed events” regime for ensuring compliance with this provision of the Directive.	Secretary of State
3k	In relation to short news reports, Member States must ensure that any broadcaster established in the Community has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.	Implemented by existing domestic legislation and case-law : Sections 30(2) and 30(3) of the Copyright, Designs and Patents Act 1988 Section 137 of the Broadcasting Act 1996 Domestic case law on fair dealing	Secretary of State
Article 1(13) – inserts article 10 TVWF	Replaces Article 10 of TVWF with a new Article 10. This places an obligation on Member States to ensure that television advertising and teleshopping are readily recognisable and distinguishable from editorial content, with the exception of isolated advertising and teleshopping spots.	Sections 319 – 322 of the 2003 Act.	Ofcom

Article 1(14) – inserts new article 11 TVWF as detailed below	Replaces Article 11 of TVWF with a new Article 11 making further provision in relation to television advertising and teleshopping.		
11(1)	Places an obligation on Member States to ensure that, where television advertising or teleshopping is inserted during programmes, the integrity of the programmes and the rights of the right holders are not prejudiced.	Sections 319 – 322 of the 2003 Act.	Ofcom
11(2)	Permits television advertising and/or teleshopping to interrupt certain transmissions in certain circumstances, including certain films made for television, cinematographic works, news programmes and children’s programmes. Prohibits television advertising and/or teleshopping from interrupting religious services.	Sections 319 – 322 of the 2003 Act.	Ofcom
Article 1(18) inserts new article 18 TVWF	Replaces Article 18 of TVWF with a new Article 18 which places an obligation on Member States to ensure that the proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20% (and stipulates that a broadcaster’s announcements in relation to its own programmes and related products shall not be subject to this restriction).	Sections 319 – 322 of the 2003 Act.	Ofcom
Article 1(19) inserts new article 18a TVWF	Replaces Article 18a of TVWF with a new Article 18a which requires Member States to ensure that teleshopping slots take a particular form and duration.	Sections 319 – 322 of the 2003 Act.	Ofcom
Article 1(20) inserts new article 19 TVWF	Replaces Article 19 of TVWF with a new Article 19 which stipulates that (with certain exceptions) the Directive’s provisions shall apply to advertising and teleshopping	Sections 319 – 322 of the 2003 Act.	Ofcom

	as well as to television channels exclusively devoted to self-promotion.		
Article 1(27) – inserts article 23b TVWF	Inserts a new Chapter VIB, “Cooperation between Member States’ Regulatory Bodies”, into TVWF. The new Chapter encompasses new Article 23b, which places an obligation on Member States to share information with the Commission and with other Member States, in particular through their respective independent regulatory bodies.	Sections 335 and 368O(3) of the 2003 Act.	Ofcom/appropriate regulatory authority

AMENDING LEGISLATION

No relevant amendments to the existing legislation