



**Mobile Broadband Group**  
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**Response of the Mobile Broadband Group to Government's consultation on the revision of the Television without Frontiers Directive**

The Mobile Broadband Group ("MBG" whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to the Government's consultation on the revision of the TV without Frontiers Directive.

**SECTION 1: MAIN POINTS**

General

The MBG recognises that the Directive needs review and we support the Commission's objective of keeping the Directive relevant to changing market circumstances. Nevertheless, we share many of the concerns about the Commission's proposed AVMS Directive that have been expressed by many other stakeholders. We do not believe that the Commission's proposals in their current form are fit for purpose – indeed we fear that they risk being counter productive and likely to damage the very economies the Commission believes it is helping.

We believe that the Commission's Option 3 (make changes to the Directive but with only linear services in scope) is the most appropriate approach to take – although more work is required to improve the definition of linear TV broadcasting (regardless of platform).

Linear

- There is more work to be done to clarify the extent of Linear services to ensure that those services captured by the term are truly those that are based on the model of traditional broadcasting regardless of platform<sup>1</sup> – i.e. transmitting scheduled programmes (at a time and in a linear schedule determined by the broadcaster) for simultaneous viewing by the public. Services such as interactive on-line games, continuous loops of repeated material and other non-TV programme like services, which are delivered in the manner of 'on demand' rather than broadcast, should be specifically excluded, as should services that are downloaded to a subscriber's device at a time of the provider's choosing (say during the night) but watched by the customer at a time of his or her choosing.

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<sup>1</sup> It has to be said that the existing definition in the TVWF is platform neutral in any event since it makes clear it applies to the broadcast of programmes whether by wire or the air.

- In addition, we believe that the Directive could be more deregulatory in relaxing the rules on linear services. As the market develops and becomes increasingly competitive, market pressure on providers is surely sufficient to make quantitative advertising rules unnecessary. Furthermore, the proposed rules need to be appropriate for viewing patterns. Trials of mobile TV to date indicate that viewing patterns will be very different to those of the traditional TV viewer in the home. Recent research published in the UK by Strategy Analytics indicates that the average mobile TV viewer watches three times per day for an average of five minutes at a time. Advertising may be very important for building the business model for Mobile TV and it is not right that rules primarily devised for domestic television are copied across to other platforms. The Directive, while being platform neutral in this respect, should allow for more flexibility on the quantity of advertising delivered.

#### Non- Linear

- The MBG is supportive of the Government's publicly stated preference for excluding non-linear services from the scope of the Directive, on the grounds that it serves no purpose for promoting a single market.
- In addition, traditional 'command and control' regulation will not be effective for non-linear services. Regulators are being set up to fail. Furthermore, there is also a high risk of diverting economic activity outside the EU, if compliance and regulatory costs are unnecessarily inflated by the Directive.
- If, the sound reasons for excluding non-linear services are ignored, the fall back position is that non-linear services should only be defined as "on demand" TV programme content that is truly substitutional to traditional television and is intended for a mass media commercial market.
- Only then will regulators have a chance of identifying the relevant media services providers and establishing sensible regulation (discussed more fully under question 7).

#### Costs and Benefits

- In general, we share the analysis of the +/- set out in the Consultation Document – save that we believe the assessment of the 'increased diversity' resulting from Option 3 is overly pessimistic.
- With respect to the questions on economic effects, UK consumers spend over £13 billion per annum on basic mobile telephony and there are 66.2 million subscriptions, with an increasing proportion of people owning more than one mobile. The market for mobile content, having grown from nothing to £1 billion (not all audio visual) in about five years, clearly has huge potential for further growth. Nevertheless there are still significant challenges in getting services such as mobile TV off the ground and the market needs careful nurturing.

- It is clear that regulation that entails high compliance costs for small content providers in the mobile space will undoubtedly have a dampening effect on this market.
- At present mobile [non TV] audio-visual content is self-regulated. This is practical and cost efficient. Mobile operators will continue to make sure that audio visual content made available on their platforms will be done so responsibly.
- The MBG believes that even greater benefits could be accrued from further relaxation of the rules on quantitative advertising

### Self or Co-Regulation

We feel strongly that any outcome from the Directive, even if there has to be a minimum legal link to back stop powers under co-regulation, should allow the mobile industry to continue with its approach, because it has been well received by customers and has proved very effective. No complaints against service providers have been upheld since the Mobile Code was launched in 2004.

## **SECTION 2: LINEAR AND NON-LINEAR**

### Non-linear services

Before answering the Government's consultation questions, the MBG would like to set out a key practical argument against the inclusion of non-linear services.

The Directive, while not explicitly so, is based on the assumption that traditional command and control regulation will be effective for non-linear services (*"audio visual media service provider, do this or the state will punish you"*). This is possible for traditional broadcast TV, as the service providers are extensively licensed within national or regional boundaries, where the MS or EC can exercise control.

But where services are delivered from anywhere in the world via the Internet, command and control is not effective. Even China, with its 'great firewall' is struggling to keep on top of it and the EU certainly does not want to attempt anything that is remotely close to what is being done there.

We fear that the language of the Directive is **setting member states up to fail**. For example (*"Article 3d - member states shall take appropriate measures to ensure that audio visual media service under their jurisdiction are not made available in such a way that might seriously impair the physical, mental or moral development of minors"*).

The definition of avms is drawn very wide, covering many, many new services. Furthermore, as so many consumers are now also potential producers of commercial audio visual media service, it is a potentially enormous task for the national regulator to comply with Article 3d. This could be very costly for regulators to implement and it is not at all clear how they could be expected to recover the cost from all the various avms providers.

**To address services supplied from all over the world over the Internet, we must move away from a command and control mentality and develop new models for dealing with public policy issues.**

There are, after all several tools at our disposal – the general law, technical tools, self-regulation, community regulation (e.g. e-bay), customer education and even, where appropriate, co-regulation. In any given situation all can be deployed individually or in combination. In the long term, this will be a much more effective way of dealing with the global phenomenon of content delivered over the Internet. It is not realistic to try to ring fence the European market or meaningful to just to attempt to control what goes on inside its boundaries. This is why we would like to see non-linear services removed from scope.

The mobile operators have imposed on themselves, voluntarily, some of the most draconian and effective self-regulation in the AVMS market (customers cannot get access to adult rated commercial content until they have produced independent evidence that they are at least 18) and are supportive of regulation where it is proportionate and effective.

In reality, state imposed approaches will not provide comprehensive solutions. We fear that the Directive, with respect to non-linear services, sets the EU down completely the wrong path. This is the basis of our objection.

Therefore, to the extent that the Directive covers non-linear services at all, it should be tightly defined only to those on demand services that are designed to be a substitute for traditional television.

## Linear Services

With respect to linear services, we believe the Directive still needs improvement in two main respects.

First, the scope of linear services is still unclear. Services such as interactive on-line games, continuous loops of repeated material and other non-TV programme like services, which are delivered in the manner of 'on demand' rather than broadcast, should be specifically excluded; also, services that are downloaded to a subscriber's device at a time of the provider's choosing (say during the night) but watched by the customer at a time of his or her choosing.

Secondly, the obligations on linear services should be relaxed even further. It is questionable whether the quotas on advertising and European works are necessary. Customers will punish channels (of which there is now a much greater choice than when the Directive was last reviewed) that overfill schedules with ad breaks or they will use PVRs to get rid of them altogether. As for European works, there is still significant demand for European content and content that is geographically relevant (as evidenced by the still strong demand for numerous local radio stations, even in such small nations as Scotland or Wales). With some 60M UK mobile customers we believe the mobile phone sector offers some of the most exciting prospects to the creative industries for new sources of revenue. Those creative industries that make a success of developing compelling new content for the UK mobile market will be very well placed to take advantage of similar opportunities arising in overseas markets and thus reinforce the UK's position as a leader in the field. But the market for

broadcast mobile TV is very much in its infancy and it is difficult at this stage to judge whether it will be successful. Even though indications from early adopter customers are positive, it will take some time to work through the issues on standards, spectrum and digital rights. Unnecessary rules on advertising and quotas must not be a barrier to the development of mobile TV. This is a new market and it needs nurturing.

With respect to regulation of new content and the protection of intellectual property much has already been done in the mobile industry to take account of the changing circumstances. Nevertheless, industry, regulators, the Government and Parliament still have work to do to ensure that there is an appropriate regulatory regime across all the new media platforms that meets consumer needs and at the same time promotes creativity and innovation in the UK.

### **SECTION 3: RESPONSE TO QUESTIONS**

#### *General - the effect of widening the scope of the Directive*

#### **1. To what extent would Option 2, 3, or 4 ease market entry for new providers of audio-visual media services, or prevent it or make it more difficult?**

This series of questions touches on the economic impact of the revised TVWF/AVMS Directive. The Government will appreciate that it is extremely difficult to give accurate forecasts when dealing with these technologies. Therefore, by way of background, we are setting out here some of the broad metrics (actual and forecast) for aspects of the mobile market, by way of context for the discussion.

There are 66.2 million mobile subscriptions in the UK (with an increasing proportion of people owning more than one device.) Annual revenues from basic voice and data carriage are in excess of £13billion<sup>2</sup>. The mobile content market is about £1billion (not all of which is audio visual). Today, the bulk of content would be classed under this directive as non-linear and is largely paid for through premium rate services, which have grown very strongly in the mobile market in the last five years.

With respect to linear services, TV over mobile is in its infancy (with many issues around rights, standards and spectrum) and so it is very difficult to assess the likely demand with meaningful accuracy.

Trials around the EU have produced a range of results:

Nearly 60 per cent of Finnish respondents thought the service would be very popular. 83 per cent of English respondents were happy with the service, compared to 75 per cent in Spain. 73 per cent of the respondents in France said they would recommend the service to others. Although only 40 per cent of Finnish respondents were prepared to pay for the service, a clear majority of respondents from England, France and Spain were prepared to pay....The most popular pricing model to emerge from the study is a monthly subscription for a package of channels. In the Helsinki pilot, half of those that took part thought €10 per month was a reasonable price to pay,

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<sup>2</sup> Ofcom: The Communications Market 2006

while in France, 68 per cent were willing to pay €7 per month for mobile TV services.... The most popular types of content were news, sports, music, soaps and documentaries.<sup>3</sup>

Furthermore, contrary to the presumptions underpinning the Directive, the signs are that broadcast mobile TV is complementary to traditional broadcast TV – not a substitute.

Of the Options presented by the Commission, the impacts are likely to be as follows:

#### Option 2

The upside to Option 2 (no change) is that the Directive would remain only applicable to broadcast television programmes and thus not applicable to other types of linear audio visual media services and all non-linear content. The problem with this is that the rules on advertising, product placement etc. do need changing to reflect the realities of today's market. We would expect that 'no change' to TV regulation would make it more difficult for new TV content providers and platforms to enter the market.

#### Option 3

Option 3 would be much the best approach for promoting new economic activity in content services, while still ensuring that regulation remains appropriate and meets public expectations. It updates the rules relating to broadcast TV (although more work would still need to be done to clarify the scope of linear services and relax rules on advertising - e.g. 20% rule and 35 minute rule). Option 3 avoids a heavy handed extension of regulation to non-linear (which we fear is setting regulators up to fail).

#### Option 4

As stated elsewhere in this response, the MBG do not favour Option 4. We are concerned that Ofcom and other NRAs will be forced by the Directive to establish a compliance function that will be expensive and ineffective. We feel that this will be unnecessary for the mobile operators; we have already established self-regulation in this area. For smaller organisations, compliance costs may deter market entry or displace economic activity outside the EU, which will be self-defeating. It is very hard to quantify this effect. However, the mobile operators are very keen to see small content providers (who today account for a significant proportion of the £1billion mobile content) flourish in the value added market.

## **2. To what extent would Option 2, 3 or 4 limit the freedom of firms active in the markets which are affected to determine their own prices, product characteristics and/or quality and standards, means of advertising the product and distribution channels?**

We do not offer a detailed analysis of the various components of this question for each option but make some observations.

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<sup>3</sup> The Register, 13<sup>th</sup> March 2006

In the mobile sector, the mobile operators, through their code of practice, already ensure that 18 rated audio visual content (linear and non-linear) is not offered to children. We therefore do not anticipate that the Directive will significantly affect product characteristics in this respect. We have concern that the arrival of the Directive in a few years time will force NRAs to replace our self-regulation (which has been very effective) with formal or co-regulation. This would almost certainly be more inflexible and expensive without delivering any significant benefits.

Under Option 4, there is a risk that some of our new services will fall under the definition of 'linear', when they are really very dissimilar to broadcast television programmes. If such services were to be caught up in the quota system for European works and other 'linear' obligations, it might be impractical or more difficult to offer them. An example of a service under threat of being defined as linear, is a subscription service where the content that are downloaded to a subscriber's device at a time of the provider's choosing (say during the night) but watched by the customer at a time of his or her choosing – i.e. viewing is on demand rather than simultaneous to the broadcast. Looped content should not be deemed to be a linear service even though the content is identical to downloads and in no way substitutes for traditional television.

**3. What would be the costs and benefits, both direct and indirect, to the UK generally and across the various audio-visual services?**

In Table 4 of the Regulatory Impact Assessment, the Government has made an assessment of the likely costs and benefits that could arise under Option 3 and Option 4. In the main the MBG would agree with the Government's assessment of the pluses, minuses and no changes. We have just a few comments.

First, in the table 'Increased diversity' is assessed as no change under Option 3. This may be overly pessimistic. Initial trials indicate that mobile TV will be popular if the existing hurdles of ownership of new media rights and spectrum are overcome. At present these problems mean that the volume of content suitable for viewing on mobiles is very limited. Because viewer attention span is generally shorter than for domestic TV, we expect that it will be much easier for smaller content providers to break into the market with shorter, less expensive content. Relaxation of the TVWF rules (such as the 20% rule) could allow for all sorts of new business models to emerge and finance a whole new breed of content providers —just as we have seen happen for non-linear mobile content.

**4. What impact would the Options have in terms of compliance costs, especially for smaller firms?**

As stated in response to Q2, the UK mobile sector has established a robust and responsive self-regulatory regime for content and is already delivering against the proposed requirements for non-linear services. However, if self-regulation was to be replaced with co-regulation or direct regulation, there are many small players in the content value added chain that would experience additional compliance costs. At the margin, this would make some of the businesses uneconomic and therefore depress the overall level of economic activity.

**5. Would any of the Options give rise to a potential for displacement of economic activity as between different parts of the audio-visual services sector? Would it give rise to decisions in this sector to relocate to or invest in non-EU locations?**

The answer is undoubtedly yes with respect to the inclusion of non-linear services. Very hard to quantify but we can cite all sorts of examples in other industries where this happens. On-line gambling services is a prominent example.

It is all a matter of degree and how expensive and onerous the regulation turns out to be but some of the language used ('must ensure that') is potentially very onerous. This type of industry is very mobile and the Commission has to be very careful not to encourage the establishment of creative centres of excellence outside the EU. This can have a very dramatic cumulative adverse affect over the long term.

**6. Would Option 4 have any indirect impacts on firms' competitiveness in audio-visual services, or more generally?**

We believe that even if one takes an extremely optimistic view and the basic tier of regulation extended to non-linear is little more than a "harmonisation" of the rules that already exist under the e-commerce directive, the cooling and displacement effect arising from the uncertainty which is inherent in changing a regulatory regime would be material to UK's creative industries.

**7. If the TVWF Directive were extended to add only mass-media video-on demand services of the kind currently available - so excluding all other forms of 'non-linear' on demand services, what would the costs and benefits be?**

It would certainly be an improvement on the current text. For one thing, because of the investment required to build a service, it is likely that the number of market players is going to be a reasonably identifiable and quantifiable. It will therefore be practical for regulators to be able to reach them and have some influence over their behaviour. It will also be much more practical to introduce self and co-regulation where there is a recognisable service. We note the current self-regulation in this sector, which we understand to have been successful and capable of extension. The problem with the current text is the very open ended definition of audio-visual media service. The MBG recognises that it may not be the Commission's intention to capture commercialised personal video blogs and similar. However, this is not clear as the text stands.

Market information

**8. What are the market structures in the various sub-sectors covered by the draft AVMS Directive, and what are the overlaps between them?**

The value chain for the delivery of content to the mobile is diverse and, in many ways, far from fully developed.

The approximate market value for mobile content in the UK is currently £1 billion per annum, a figure that has grown from a negligible base in the last five years. Not all of these services will fall within the scope of the AVMS Directive but it is likely that many of the higher value services and those with the greatest growth prospects will. At present, the bulk of content would also be defined as non-linear.

Examples of such services would be: music video downloads, football highlights, news reports, comedy clips, magazine items and games.

The content can generally be accessed in one of three ways: on the mobile operators' own portals on the mobile web (using the browser capability on the mobile phone) or through 3<sup>rd</sup> party sites, where a commercial arrangement subsists between the content provider and the mobile operator. The arrangement is often facilitated by the mobile operator providing the content provider with a 'short code' access number.

This latter category is probably providing the majority of value added mobile content and is perhaps the most dynamic segment of the market, with many small entrepreneurial companies seeking to provide an array of new services to consumers. If the AVMS Directive brings significant compliance costs to service providers, it is likely that this sector will be the hardest hit.

With respect to linear services, the mobile market is yet to be developed. Orange, 3 and Vodafone offer TV packages on their 3G network and Virgin Mobile are the first to announce a commercial Mobile TV service (using BT Movio's DAB facility). There is also a number of independent suppliers of TV over 3G, such as Rok TV. With linear services there are greater capacity considerations than with non-linear services. It may be that the early forms of mobile TV will involve the more established market participants. However, this will by no means be a sure-fire indicator of how the market develops. It is absolutely essential that small companies are not saddled with excessive compliance costs and are able to enter the market and compete with larger organisations.

#### Country of origin

- 9. Are there any instances in which the current lack of harmonisation of controls on *non-linear* audio-visual services among Member States is limiting competition in this sector?**

The MBG cannot think of any examples.

- 10. Specifically, have businesses felt that the current derogations under Article 3 of the Electronic Commerce Directive harmed their business and thus whether the inclusion of their services under this proposed new Directive would be beneficial?**

No.

#### Place of establishment, jurisdiction, and derogation

**11. Would the rules proposed in Article 2.3, for establishing which Member State has jurisdiction over any particular non-linear service, provide clear and effective jurisdiction in this sector?**

The problem will not be so much over definition of establishment but whether any jurisdiction can be established at all.

It will be very interesting to see whether it will be possible for a member state or the European Commission to exercise an effective jurisdiction over audio-visual service providers in the non-linear world. As everyone knows, the Internet operates on a global basis and those providers that want to avoid regulatory costs or operate outside the control of regulators will establish themselves in a jurisdiction that is amenable to their business.

For example, in Germany there is evidence that service providers are relocating to Denmark to evade the Commission for the Protection of Minors. The MBG believes that it will be very difficult to apply regulation to audio-visual services providers that want to operate beyond regulatory control.

Leaving practicality aside the MBG supports the current provisions on country of origin. They have led to the development of a vibrant broadcasting industry in the UK which we would not want to see jeopardised.

*Protection of minors*

**12. Article 3d of the Directive would require Member States to ensure that audiovisual services within their jurisdiction do not carry material which might seriously impair the mental, physical, or moral development of minors. However, this Directive will not give the EU or Member States any greater powers than they have now in respect of undesirable Internet services from outside the EU, and would remove their ability, under the e-Commerce Directive, to enforce their own standards on non-linear services from other Member States. In view of this, would Article 3d give consumers adequate protection from services which might be harmful to minors?**

The MBG is unconvinced that the Directive brings any benefits with regard to the protection of minors from non-linear services that are not already demonstrably being delivered by existing industry and stakeholder initiatives.

Those companies that want to protect their customers and their reputations will behave responsibly in any event. In the UK, the mobile industry has imposed some of the most comprehensive and effective regulation on itself, whereby no customers can obtain adult commercial content until, through a process of robust age verification, they have proved that they are at least 18 years old. The AVMS will simply impose formal regulation on the mobile operators seven or eight years after they have imposed it on themselves voluntarily. This is superfluous and, if it is associated with inflexibility and regulatory compliance cost, unwelcome. The mobile industry's own actions have clearly demonstrated that self regulation is faster and more effective than formal regulation. No complaints have been upheld since the code was launched in 2004.

Those audio-visual media service providers that do not want to operate responsibly will serve their EU customers from outside its jurisdiction. (The mobile operators' strategy for tackling this is, in their capacity as mobile ISPs, to offer customers filters so that they can block out content that is not suitable for minors. Many operators set this filter as a default).

#### Incitement to hatred

- 13. Would Article 3e give consumers adequate protection from services which might contain incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation? These prohibitions go much wider than current UK law. What consequences would this have for freedom of speech?**

All the members of the MBG are subscribers to the Internet Watch Foundation, the UK's hotline for the reporting of illegal incitement to race hatred. We operate a notice and take down process for any instance notified to us by the IWF of race hate material appearing on our servers. It is extremely rare for the IWF to issue such a notice, as perpetrators virtually always operate outside the UK. If EU law was extended to cover these additional offences, providing the law is clear and that the test is incitement to hatred as opposed to just challenging, the MBG would expect the same thing to happen.

#### Advertising – qualitative controls

- 14. Articles 3g(c)(iii), 3(d), and 3(e) contain controls on advertising via any audio-visual service which bear on health and safety. They are supplemented, for linear services only, by Articles 14 and 15. Would these controls between them be effective in achieving the right balance between commercial freedom and public health?**

The controls on advertising including those which bear on health and safety are already contained in the ASA Broadcast Advertising Code so there would be no change to the current position. Articles 3g(c)(iii), 3(d) and 3(e) are already incorporated into the ASA Broadcast Advertising Code sections 6.7, 3.1, 11.8.1(d) and 11.8.2(a). Article 14 is already incorporated into the ASA Broadcast Advertising Code sections 8.2.1(a). Article 15 is in the current TVWF.

The MBG has no issue with controls on the advertising of cigarettes and alcohol within the EU, whether on non-linear or linear services, always recognising, though, that consumers will be exposed to adverts for alcohol and tobacco on sites that are based in geographic regions that allow such advertising.

#### Advertising - quantitative controls

- 15. What will be the impact of allowing for isolated advertising and teleshopping spots in sports programmes (Article 10.2)?**

The MBG supports measures that liberalise the rules on the quantity of advertising.

- 16. What will be the impact of removing the prohibitions in Articles 18 and 18a that put a limit on the amount of teleshopping allowed on a channel that was not ‘exclusively devoted’ to teleshopping?**

The MBG supports measures that liberalise the rules on the quantity of advertising.

- 17. What will be the impact of the rule (Article 11.2) that films made for television, cinematographic works, children’s programmes and news programmes may be interrupted by advertising or teleshopping once for every period of 35 minutes?**

The MBG’s overall view on the rules on quantitative advertising is that they are anachronistic. We have sympathy with policy maker’s desire not to ‘Americanise’ television with over frequent interruptions for advertising. However, the present rules were invented at a time before multi-channel TV and personal video recorders. Today, the consumer has so much choice that the market will punish providers that overfill schedules with advertising – either channels will not be watched or PVRs will be used to filter out advertising.

In addition, new models, such as mobile TV, are emerging. Trials to date suggest that mobile TV is not a substitute for but is complementary to domestic TV. Customers watch mobile TV in much shorter sessions, while they are out and about, filling in downtime. The quantitative rules invented for domestic TV do not make sense for mobile TV, particularly the 35 minute rule, which we would like to see removed. Research recently published in the UK by Strategy Analytics indicates that the average mobile TV user watches three times per day for an average of five minutes at a time.

The MBG welcomes the changes so far proposed by the commission but suggests that it could go further and abolish quantitative rules (such as the 20% rule and the 35 minute rule) altogether. The TV market is now so diverse that such tinkering is unwarranted. Regulators should exercise a preference for non-intervention on the workings of the TV advertising market.

### Sponsorship

- 18. Are the rules on sponsorship of audio-visual media services set out at Article 3h necessary and sufficient to safeguard the integrity of the services that are sponsored?**

MBG believe further clarification is required regarding Article 3(h)(1)(c) as it relates to sponsorship and product placement. It is uncertain how the requirement to identify programmes containing product placement will be implemented and how clear any signposting must be. For example, the form such signposting could take: could this be visual with an indent as currently used for sponsorship be acceptable? Or would an on screen textual advisory be required and would such wording be dictated?

Moreover, MBG believes that the requirement to identify programmes containing product placement should allow this to occur at either the beginning or the end of the programme rather than limit it to the beginning. The proposed requirement is unnecessarily restrictive and could affect the impact of any sponsorship, exaggerate the importance of any product placement and reduce the attractiveness of the programme to a potential viewer. For these reasons the MBG believes it may, in some cases, be more appropriate to identify any product placement in the end credits.

### Product placement

- 19. OFCOM have consulted on the possibility of allowing product placement on TV services within the UK if the EU – as a result of this draft Directive – removes the current implicit EU-wide prohibition of it. But the UK will retain its discretion not to allow product placement in programming made by and for UK broadcasters whatever the outcome of the EU discussion. If the UK were to continue not to allow product placement, but the EU allowed it, what practical impact would that have for UK broadcasters, UK programme makers, and the UK advertising industry?**

MBG believes the current rules are outdated and disproportionate and should be removed across the EU, including the UK. Consumers are already familiar with product placement as it is frequently used in films and imported US programmes.

MBG is surprised at the suggestion that the UK may continue to ban product placement in programming made by and for UK broadcasters if the EU permitted it (and when viewers will continue to watch programmes containing it over which broadcasters under Community jurisdiction have no production responsibility).

Ofcom's consultation concluded that its high level impact assessment appeared to favour relaxation of product placement for three main reasons: such a move would be deregulatory and would remove rules preventing broadcasters from maximising revenue; it would reflect some viewer's preference to see the realism of programme's enhanced; and it adds to the variety of media products broadcasters are able to offer advertisers.

Given this, maintaining the current ban would be perverse and UK production would then be subject to a damaging competitive disadvantage. As long as any placement is transparent then consumers can make informed decisions about the content they consume.

### Surreptitious and subliminal advertising

- 20. Is the definition of surreptitious advertising at Article 1(h) sufficient to catch all possible forms of abuse?**

There is a need for further clarity on this provision. For example, what if a company which has complied with the product placement rules has a range of services and more than one of those is featured? How specific must the product placement notification be to avoid the risk that more than one reference is then surreptitious?

21. **Should there also be a definition of the ‘subliminal techniques’ which are to be banned (Article 3g(b))?**

No comments.

Right of reply

22. **The right of reply at Article 23 of the existing TVWF Directive will remain, but with its scope extended to cover ‘linear’ (but not ‘non-linear’ services). Is this right? What is the case for or against extending this right of reply to all ‘audio-visual media services’?**

Given the investment in customer care within the mobile industry along with the proliferation of discussion forum etc and existing defamation law, we don't believe there is a case to extend the right of reply to non linear services

Film rights

23. **Article 3f2 of the Directive would require Member States to ensure that audio-visual media services do not transmit cinematographic works outside the periods agreed with their licence holders. This re-enacts Section 7 of the existing TVWF Directive, but applied to audiovisual services as a whole rather than simply to television broadcasters. Would this provision achieve anything, given the existence of copyright law?**

This provision does not seem to have much purpose as content owners will be protected by being able to bring breach of contract/licence claims.

Short reports

24. **Article 3b offers a limited transfrontier right of access to footage of major events, including (and especially) sports events for television news purposes. Does this strike a fair balance between the respective rights of the rights holders, broadcasters, news agencies, sports organisations and other event organisers, and**

**Should this right be available to broadcasters in all Member States, or should it be available only in Member States that already allow such access to footage of major events to their own domestic broadcasters?**

The mobile industry is a strong supporter of copyright rights and would not like to see new exemptions being introduced. For this reason it would support the right only being available if it were under domestic law.

Promotion of European work

**25. Article 3f requires Member States to ensure that media service providers under their jurisdiction promote production of and access to European work. No specific quota is set. What would be the most effective ways for the Government to meet this obligation?**

The MBG supports the EU's objective that the European Union is and will remain an attractive location in which to invest in and create new audio visual media services. We also believe that there is a strong demand from consumers for content that is culturally familiar and attuned to its citizens. One of the great benefits of making content available on-line and on-demand is that it is easier to promote cultural diversity and to cater for fringe minorities (e.g. Gaelic speakers in Scotland) whose size may not justify a large amount of broadcast airtime (the "long tail" effect). However, on demand content is different to broadcast content, in that, self-evidently, it is only accessed if it appeals to its audience. Quantity of material available is not a very interesting or meaningful thing to measure if no-one is watching it.

On balance, the MBG does not support the inclusion of article 3f in the Directive. We strongly support there being no quota requirement, on the grounds that it would create uncertainty, reduce programming flexibility, discourage investment in development of new services and be extremely difficult for the regulator to make any meaningful measurement. In our view the measure is inappropriate and it is very difficult to envisage what a national regulator would be expected to do in order to comply with the requirement of the Directive.

Mobile operators will act as new media providers to enable distribution of a diverse range of content and European works in a way that is unprecedented for traditional media. These new services would stimulate innovation and foster creativity across Europe that encourages culture, education and knowledge.

We feel that the best way to promote the production of non-linear content within the EU, is to establish a regulatory regime that is reasonable and encourages such innovation and creativity by not imposing unnecessary regulatory obligations.