

6 November 2006

Mr Shaun Woodward MP  
Parliamentary Under-Secretary of State  
Creative Industries and Tourism  
Department of Culture, Media and Sport  
2-4 Cockspur Street  
London  
SW1Y 5DH

Dear Minister,

Audiovisual Media Services Directive

I am writing, in advance of the Council of Ministers' meeting you are attending on 13 November, to bring to your attention some outstanding issues the advertising industry has with the latest Presidency text, dated 20 October. While in some respects, such as co- and self-regulation, it introduces improvements to the Commission proposals, in other respects, the text is worse.

Members of the Advertising Association - a federation of 31 trade bodies and organisations representing the advertising and promotional marketing industries including advertisers, agencies, media and support services – are particularly concerned about the Presidency's proposals on 'country of origin', and with the very limited extent of liberalisation of the advertising rules.

The Directive currently fails, in our view, to fulfil the de-regulatory Lisbon agenda, and to allow commercial communication to fulfil its important role in the development of the true "Single Market" we all wish to see. It also fails to take into account the seismic changes taking place in the sector, for example, the announcement this week that Google's ad spend set to overtake Channel 4's and ITV's in the next 18 months. This demonstrates the need for the Directive to take account of the fact that TV companies must remain competitive in the fact of global competition for advertising revenues.

*Country of origin*

By introducing the concept that receiving Member States can raise objections to an incoming broadcast on the very broad grounds of "general public interest" (Article 3(1a)a), as well as adopting stricter rules than the Directive, the new text threatens to undermine the country of origin basis of the

legislation. The new criteria could jeopardise free movement of linear broadcasting services carrying advertising, regardless of the technical means of distribution, and would potentially extend to non-linear (on demand) audiovisual services as well.

We acknowledge that the Member State raising objections would need to go through certain investigative procedures involving the European Commission before an incoming service could be blocked, and that it would be the Commission who decides whether it would be legitimate to block the service. However, we are concerned that this widening of derogations to the country of origin principle could create unacceptable legal uncertainties for media services (both linear and non-linear), with repercussions for the advertising they carry.

To date, the UK has benefited from a stable regulatory regime that has encouraged broadcasters and new media providers to establish themselves in this country, with benefits for advertising as part of a thriving UK creative industries sector. Compromises to the principle of free circulation will mean that advertisers wanting to run pan-European advertising campaigns on TV or any campaigns on new media platforms that are not boundary-specific would have to familiarise themselves with the nuances of advertising regulations in 27 Member States. This could then become a threat to the production of efficient pan-European advertising campaigns with knock-on effects for competition and innovation of products and services.

We are particularly concerned that the Finnish Presidency text has become the basis on which the European Parliament is now developing even more interventionist amendments, and that if the current text becomes part of the Common Position, the wording will only worsen in subsequent negotiations with the European Parliament.

We would therefore ask you to object, on behalf of the UK, to the widening of derogations from the country of origin principle in the Finnish Presidency text.

#### *Advertising breaks for TV*

We note that there is a helpful change from 35 minutes to 30 minutes in Article 11(2), and we are grateful to interventions that you have already made to bring this about.

However, the Council should be under no illusion that this rule represents the liberalisation of advertising rules promised by the European Commission. It would allow only a modest improvement as regards breaks in films and cinematographic works, but it represents a further restriction on ad breaks in children's and news programmes that has been in place for 17 years. Although in the UK, it has been standard practice to schedule only one centre break in such programmes, technically, the existing rule permits up to two, scheduled 20 minutes apart. It is also absurd that the new wording for the rule would disallow the existing practice of two centre breaks in Channel 4 News – a 55 minute programme.

Like the Government, our preferred position is complete deletion of Article 11(2) which we consider to be inappropriate in today's media environment, or at least the removal of films and cinematographic works from the scope of Article 11(2). In practice we appreciate that neither may be feasible at this stage.

However, it is essential not only to maintain "30 minutes", but for the Government to ensure the insertion of the word "scheduled" before duration, as with the existing Directive. This is crucial to provide continuity of practice and legal certainty. Any interpretation that the rule is based on the "running time" of programmes would be impractical and unfeasible.

#### *Sponsorship rules*

The AA is concerned that the sponsorship rules in Article 3(e) have been drafted from the perspective of the TV regulatory environment but will extend to mass media scheduled and on-demand services. It needs to be clear that they do not encompass on-demand services that are not part of a licensed regime. If there is no legal clarity, it will be impossible to enforce the Directive. There could also be a risk of inadvertently capturing other types of content on "mixed media" services that may, for example, have a VOD-like element, and where it may not always be practicable to separate the audiovisual element from others that make up the service.

#### *Product placement*

The above concern also relates to Article 3f on product placement. However, the Council text is an improvement on the compromise amendments proposed in the European Parliament. It takes the right approach by proscribing the programme genres in which product placement would not be permitted, and leaving it to Member States to decide at the national level whether to prohibit or permit it for other types of programme, rather than trying to specify (like the European Parliament) the types of programme in which product placement should be allowed.

Nevertheless, there are still significant issues for existing practice that need to be addressed, as follows:

1. "prop placement", as currently exists, where no exchange of money takes place, is excluded from the definition of "product placement" in this Directive, so that the genre restrictions and identification obligations do not apply, as is the case under the Ofcom code at present.
2. the Directive's provisions apply only to originally-commissioned programmes, where payment is received by the service provider itself (as proposed by the Government). Whilst the new sunset clause in Article 3(f)(3) of the 20 October text is helpful, it does not solve the problem since:
  - it assumes that the whole market will adapt,
  - that information on placement in existing programmes will be in line with the Directive, even where programmes are being acquired at a number of removes from the producers,

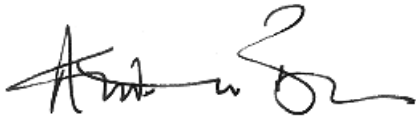
- and that a broadly liberal position on genres is maintained.

If, as the European Parliament would like, the Directive only permits product placement in fiction and sport, a number of programmes today, such as *American Idol* and *US Apprentice*, will in effect be banned. This is surely an unacceptable approach for such programmes which have been so successful with viewers.

It would also be unacceptable (as well as unfeasible) for the Directive to specify, as proposed by one delegation and by some European Parliament amendments, that permanent on-screen logos be displayed during any programme containing product placement.

I hope these thoughts are helpful to you as you prepare your position for the Council, and we are of course available for any further discussion on the above points.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Andrew Brown', with a stylized flourish at the end.

Andrew Brown  
Director General

cc. Chris Bone  
Chris Dawes