

# RESPONSE BY OFCOM TO THE EUROPEAN COMMISSION ISSUES PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE

## COMMERCIAL COMMUNICATIONS

### I RULES COMMON TO ALL AUDIOVISUAL COMMERCIAL COMMUNICATIONS

1. Ofcom's response to this issues paper is based on an assumption that any Directive provisions in this area will only apply to content covered by the scope of the existing Television Without Frontiers Directive. Where the Issues Papers consider issues beyond this, any comments made by Ofcom must be considered in a context of Ofcom's reservations about proposals to extend scope.

#### **Issue 1: The Concept of Audiovisual Commercial Communications**

2. Ofcom welcomes the Commission's proposals concerning a new definition of audiovisual commercial communications. We believe this would enable, in addition to the examples cited in the issues paper, channels solely devoted to advertising but without necessarily including teleshopping.

#### **Issue 2: Rules on Human Dignity and the Protection of Minors**

#### **Issue 3: Rules relating to Public Health Considerations (Tobacco, Alcohol and Medicines)**

3. Ofcom recognises the Commission's public policy concerns in these areas. However, the reservations Ofcom has detailed about the extension of scope *per se* need to be considered carefully with respect to these issues.

#### **Issue 4: Identification of Commercial Communications in general, including sponsored spots**

4. Ofcom welcomes the Commission's proposals on product placement. It further welcomes the Commission's general approach that the principle of separation of commercial content from editorial should be replaced by one based on transparency.

#### **Issue 5: Identification of Sponsored Content in particular**

#### **Issue 6: Application of the Rules**

5. Ofcom would ask the Commission to note that its own decision to transfer responsibility for the regulation of broadcast advertising from Ofcom to the self regulatory body for non-broadcast advertising (the Advertising Standards Authority) has been successful and led to no obvious reduction in the standards of television advertising.

## **II QUANTITATIVE RULES ON TELEVISION ADVERTISING**

### **Issue 1: Hourly and Daily Advertising Limits**

6. Ofcom notes the Commission's proposals to abolish the daily limit on advertising and teleshopping spots and to retain only the hourly limit. (Ofcom's understanding of this proposal is that the effect of this would be to permit 12 minutes per hour of advertising or teleshopping spots. Currently, Ofcom licensees are permitted 9 minutes per hour of advertising spots with the option to include an additional 3 minutes per hour of teleshopping).

7. Whilst broadly welcoming the simplification of this proposal, Ofcom would question whether any limits on the amount of spot advertising remain appropriate. We note that in the UK radio market, where no limits are imposed, broadcasters tend to self regulate to balance the needs of listeners and advertisers (usually at between six and nine minutes per hour). We receive few, if any, complaints about the amount of advertising broadcast on commercial radio.

### **Issue 2: Hourly and Daily Limits Applied to Teleshopping**

8. Ofcom supports the Commission's view that there is no longer a need to apply special rules regarding duration to teleshopping. We agree that teleshopping is best seen as one form of audiovisual commercial communication.

### **Issue 3: Insertion of Advertising**

9. Ofcom agrees that the rules on insertion of advertising have been counterproductive in seeking to protect the legitimate needs of broadcasters, producers and viewers. We would further question whether the categories identified by the Commission (religious services, cinematographic works, news programmes and programmes for children) need the restrictions proposed. Such measures may well have a negative effect in discouraging broadcasters from showing these genres of programmes at all.

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## **RULES APPLICABLE TO AUDIOVISUAL CONTENT SERVICES**

### **Issue 1: Material competence**

1. Ofcom's response to this is dealt with in the covering letter.

### **Issue 2: Territorial competence**

2. Ofcom's response to this section of this issues paper is based on an assumption that any Directive provisions in this area will only apply to content covered by the scope of the existing Television without Frontiers Directive. Where the Issues Papers consider issues beyond this, any comments made by Ofcom must be considered in a context of Ofcom's reservations about proposals to extend scope.

### **Provisions with Respect to Linear Audiovisual Services**

3. Ofcom welcomes proposals to prevent circumvention of Article 2 of the Directive without undermining the 'country of origin' rule and the principle of encouraging 'Television Without Frontiers'.
4. Ofcom believes measures such as clarifying what is meant by 'head office' would be a helpful measure to achieve this aim. 'Head office' is the primary criterion for establishing country of jurisdiction. These could include a requirement that a majority of (rather than 'significant part of') the workforce be employed in the member state.
5. The proposal to codify the case law of the European Court of Justice is not without merit. However, given that this case law is already included in the recitals to Directive 97/36/EC, this would not change the current situation. Member States already have the option to pursue legal action on this basis but have not sought to do so. Ofcom would argue that a proposal that will require individual legal actions to secure enforcement is unlikely to be a helpful amendment to the Directive.
6. Ofcom shares the view that the criterion of language is not a suitable criterion to assess whether a broadcast is directed at a member state. Many broadcasters legitimately target member states with broadcasts not in the principal language of a member state for perfectly legitimate reasons.
7. Ofcom does not have strong views on the proposal to place the use of uplink before satellite capacity with respect to the criteria in Article 2(4).

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### **CULTURAL DIVERSITY AND THE PROMOTION OF EUROPEAN AND INDEPENDENT PRODUCTION**

1. Ofcom's response to this issues paper is based on an assumption that any Directive provisions in this area will only apply to content covered by the scope of the existing Television Without Frontiers Directive. Where the Issues Papers consider issues beyond this, any comments made by Ofcom must be considered in a context of Ofcom's reservations about proposals to extend scope.

#### **Issue 1: Non-Linear Services**

3. We share the view of the broadcasters, transmission companies and internet providers cited in the issues paper that any measures would be premature at this stage and believe strongly that this would risk hindering the development of new services. This is particularly important in the context of the Commission's own i2010 initiative which is looking to the communications sector to deliver significant efficiencies and growth. Any attempts to impose inappropriate and disproportionate regulation on this sector will seriously impair the ability of this sector to meet the Commission's own aspirations.

#### **Issue 2: Monitoring of the application of Articles 4 and 5 in the Member States**

4. Ofcom sees no reason to amend the guidelines concerning the monitoring of the application of Articles 4 and 5 in the Member States.

5. It is clear from the study undertaken by David Graham Associates that the enforcement of the articles varies according to the resources and determination devoted to this by individual member states. Amending the guidelines will have no effect on the individual performance of individual member states. The Commission should therefore concentrate on measures to improve the reporting performance of those member states where this is necessary.

6. Ofcom does not believe that the Commission should replace the bi-annual reporting obligation with ex-post controls on a sample basis at Community level.

7. The Directive specifically requires broadcasters to comply with Articles 4 and 5 'where practicable'. Ofcom believes that judgements as to whether it is practicable for a broadcaster to comply with Articles 4 and 5 are best made at member state level. It would be difficult for such judgements to be made by independent consultants acting on behalf of the Commission.

8. Ofcom notes the rapid proliferation of broadcasting channels across Europe (Screen Digest estimate there were 100 in 1990 and were over 1000 in 2003). The fact that many of these individual channels may not yet have reached the quotas in Articles 4 and 5 should not obscure the fact that this explosion of channels has provided many more opportunities for independent and European production than existed before. Ofcom would argue strongly that a strong and competitive market for broadcasting channels is most likely to serve both the interests of European and independent production as well as the growth ambitions for the content and communications sectors envisaged by i2010. It is therefore of vital importance to the

health and growth of the broadcasting sector that the 'where practicable' provision remains for Articles 4 and 5.

### **Issue 3: Encourage the production and distribution of European co-productions**

Ofcom note the Commission's concerns but do not believe that Directive measures are appropriate to address these. The exchange and circulation of European programmes within Europe will always be difficult given linguistic diversity, but Ofcom believes that a large and competitive market of European broadcasters will be the best mechanism to achieve this rather than regulatory intervention.

### **Issue 4: Concept of independent producer**

Ofcom has already considered this issue and worked with broadcasters and the UK independent production sector to develop Terms of Trade. Whilst this has been a valuable initiative, Ofcom would question whether such initiatives need to be mandated at European level.

## **RESPONSE BY OFCOM TO THE EUROPEAN COMMISSION ISSUES PAPER FOR THE LIVERPOOL AUDIOVISUAL CONFERENCE**

### **PROTECTION OF MINORS AND HUMAN DIGNITY RIGHT OF REPLY**

1. Ofcom's response to this issues paper is based on an assumption that any Directive provisions in this area will only apply to content covered by the scope of the existing Television Without Frontiers Directive. Where the Issues Papers consider issues beyond this, any comments made by Ofcom must be considered in a context of Ofcom's reservations about proposals to extend scope.

#### **Issue 1: Protection of Minors**

2. Ofcom agrees that the wording of Article 22 does not need changing.
3. Ofcom accepts that the principles of protection of minors should be extended to all audiovisual content wherever practicable. Ofcom also agrees that wherever possible these should be achieved by systems of co-regulation or self-regulation.

#### **Issue 2: Incitement to Hatred**

4. Ofcom agrees that the wording of Article 22a does not need changing.
5. Ofcom accepts the desirability of extending these provisions to all audiovisual content wherever practicable. However, given the nature of internet delivered audiovisual content, Ofcom has real concerns about the effective policing of these rules. Wherever possible, these should be achieved by systems of co-regulation or self regulation.

#### **Issue 3: Right of Reply**

6. Ofcom agrees that the wording of Article 23 does not need changing.
7. Ofcom does not agree that it is either practicable or necessary to extend this provision to non linear services. In particular the nature of internet delivered content enables all shades of opinion to reply to or challenge assertions against them. No formal right of reply exists in print media (where the damage to reputation can be at least as great as audiovisual) and we believe the Commission's proposals are neither proportionate nor evidence based.

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**RIGHT TO INFORMATION AND RIGHT TO SHORT REPORTING**

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**Question 1: Events of Major Importance**

2. Ofcom is broadly content with the status quo?

**Question 2: The Right to Information**

3. Ofcom supports the view that this matter is best handled at national level through voluntary codes and does not believe that there is a need to harmonise a right to access at European level. As such, it does not offer an opinion on the two options proposed by the Commission.