

2009 No. 2979

ELECTRONIC COMMUNICATIONS

BROADCASTING

The Audiovisual Media Services Regulations 2009

Made - - - - *9th November 2009*

Laid before Parliament *10th November 2009*

Coming into force - - *19th December 2009*

These Regulations are made by the Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to information society services(b) and measures relating to television broadcasting(c), in exercise of the powers conferred by section 2(2) of that Act.

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Audiovisual Media Services Regulations 2009 and come into force on 19th December 2009.

(2) In these Regulations “the 2003 Act” means the Communications Act 2003(d).

On-demand programme services

2. In the 2003 Act, after section 368 insert—

“PART 4A

ON-DEMAND PROGRAMME SERVICES

Preliminary

368A Meaning of “on-demand programme service”

(1) For the purposes of this Act, a service is an “on-demand programme service” if—

- (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;

(a) 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1)(a)
(b) European Communities (Designation)(No.2) Order 2001 S.I. 2001/2555
(c) European Communities (Designation) Order 1997 S.I. 1997/1174
(d) 2003 c.21

- (b) access to it is on-demand;
- (c) there is a person who has editorial responsibility for it;
- (d) it is made available by that person for use by members of the public; and
- (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.

(2) Access to a service is on-demand if—

- (a) the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service; and
- (b) the programmes viewed by the user are received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view).

(3) For the purposes of subsection (2)(a), the fact that a programme may be viewed only within a period specified by the provider of the service does not prevent the time at which it is viewed being one chosen by the user.

(4) A person has editorial responsibility for a service if that person has general control—

- (a) over what programmes are included in the range of programmes offered to users; and
- (b) over the manner in which the programmes are organised in that range;

and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the service (and see section 368R(6)).

(5) If an on-demand programme service (“the main service”) offers users access to a relevant ancillary service, the relevant ancillary service is to be treated for the purposes of this Part as a part of the main service.

(6) In subsection (5), “relevant ancillary service” means a service or facility that consists of or gives access to assistance for disabled people in relation to some or all of the programmes included in the main service.

(7) In this section “assistance for disabled people” has the same meaning as in Part 3.

368B The appropriate regulatory authority

(1) OFCOM may designate any body corporate to be, to the extent provided by the designation, the appropriate regulatory authority for the purposes of any provision of this Part, subject to subsection (8).

(2) To the extent that no body is designated for a purpose, OFCOM is the appropriate regulatory authority for that purpose.

(3) Where a body is designated for a purpose, OFCOM may act as the appropriate regulatory authority for that purpose concurrently with or in place of that body.

(4) OFCOM may provide a designated body with assistance in connection with any of the functions of the body under this Part.

(5) A designation may in particular—

- (a) provide for a body to be the appropriate regulatory authority in relation to on-demand programme services of a specified description;
- (b) provide that a function of the appropriate regulatory authority is exercisable by the designated body—
 - (i) to such extent as may be specified;
 - (ii) either generally or in such circumstances as may be specified; and
 - (iii) either unconditionally or subject to such conditions as may be specified.

(6) The conditions that may be specified pursuant to subsection (4)(b)(iii) include a condition to the effect that a function may, generally or in specified circumstances, be exercised by the body only with the agreement of OFCOM.

(7) A designation has effect for such period as may be specified and may be revoked by OFCOM at any time.

(8) OFCOM must publish any designation in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to be affected by it.

(9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—

- (a) is a fit and proper body to be designated;
- (b) has consented to being designated;
- (c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;
- (d) is sufficiently independent of providers of on-demand programme services; and
- (e) will, in performing any function to which the designation relates, have regard in all cases—
 - (i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - (ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances.

(10) Subject to any enactment or rule of law restricting the disclosure or use of information by OFCOM or by a designated body—

- (a) a designated body may supply information to another designated body for use by that other body in connection with any of its functions as the appropriate regulatory authority;
- (b) a designated body may supply information to OFCOM for use by OFCOM in connection with any of their functions under this Part;
- (c) OFCOM may supply information to a designated body for use by that body in connection with any of its functions as the appropriate regulatory authority.

(11) In carrying out their functions as the appropriate regulatory authority, a designated body may carry out, commission or support (financially or otherwise) research.

(12) In this section—

“designation” means a designation under this section and cognate expressions are to be construed accordingly;

“specified” means specified in a designation.

Duties of the appropriate regulatory authority

368C Duties of the appropriate regulatory authority

(1) It is the duty of the appropriate regulatory authority to take such steps as appear to them best calculated to secure that every provider of an on-demand programme service complies with the requirements of section 368D.

(2) The appropriate regulatory authority must encourage providers of on-demand programme services to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both.

(3) The appropriate regulatory authority must ensure that providers of on-demand programme services promote, where practicable and by appropriate means, production of and access to European works (within the meaning given in Article 1(n) of the Audiovisual Media Services Directive).

(4) The appropriate regulatory authority must encourage providers of on-demand programme services to develop codes of conduct regarding standards concerning the

appropriate promotion of food or beverages by sponsorship of, or in advertising which accompanies or is included in, children's programmes.

Duties of service providers

368D Duties of service providers

(1) The provider of an on-demand programme service must ensure that the service complies with the requirements of sections 368E to 368H.

(2) The provider of an on-demand programme service ("P") must supply the following information to users of the service—

- (a) P's name;
- (b) P's address;
- (c) P's electronic address;
- (d) the name, address and electronic address of any body which is the appropriate regulatory authority for any purpose in relation to P or the service that P provides.

(3) The provider of an on-demand programme service must—

- (a) comply with any requirement under section 368O (provision of information);
- (b) co-operate fully with the appropriate authority for any purpose within section 368O(2) or (3).

(4) In this section "electronic address" means an electronic address to which users may send electronic communications, and includes any number or address used for the purposes of receiving such communications.

368E Harmful material

(1) An on-demand programme service must not contain any material likely to incite hatred based on race, sex, religion or nationality.

(2) If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.

368F Advertising

(1) Advertising of the following products is prohibited in on-demand programme services—

- (a) cigarettes or other tobacco products;
- (b) any prescription-only medicine.

(2) Advertising of alcoholic drinks is prohibited in on-demand programme services unless—

- (a) it is not aimed at persons under the age of eighteen, and
- (b) it does not encourage excessive consumption of such drinks.

(3) Advertising included in an on-demand programme service—

- (a) must be readily recognisable as such, and
- (b) must not use techniques which exploit the possibility of conveying a message subliminally or surreptitiously.

(4) Advertising included in an on-demand programme service must not—

- (a) prejudice respect for human dignity;
- (b) include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;

- (c) encourage behaviour prejudicial to health or safety;
- (d) encourage behaviour grossly prejudicial to the protection of the environment;
- (e) cause physical or moral detriment to persons under the age of eighteen;
- (f) directly exhort such persons to purchase or rent goods or services in a manner which exploits their inexperience or credulity;
- (g) directly encourage such persons to persuade their parents or others to purchase or rent goods or services;
- (h) exploit the trust of such persons in parents, teachers or others; or
- (i) unreasonably show such persons in dangerous situations.

368G Sponsorship

(1) An on-demand programme service or a programme included in an on-demand programme service must not be sponsored—

- (a) for the purpose of promoting cigarettes or other tobacco products, or
- (b) by an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products.

(2) An on-demand programme service or a programme included in an on-demand programme service must not be sponsored for the purpose of promoting a prescription, only medicine.

(3) An on-demand programme service may not include a news programme or current affairs programme that is sponsored.

(4) Subsections (5) to (11) apply to an on-demand programme service that is sponsored or that includes any programme that is sponsored.

(5) The sponsoring of a service or programme must not influence the content of that service or programme in a way that affects the editorial independence of the provider of the service.

(6) Where a service or programme is sponsored for the purpose of promoting goods or services, the sponsored service or programme and sponsorship announcements relating to it must not directly encourage the purchase or rental of the goods or services, whether by making promotional reference to them or otherwise.

(7) Where a service or programme is sponsored for the purpose of promoting an alcoholic drink, the service or programme and sponsorship announcements relating to it must not—

- (a) be aimed specifically at persons under the age of eighteen; or
- (b) encourage the immoderate consumption of such drinks.

(8) A sponsored service must clearly inform users of the existence of a sponsorship agreement.

(9) The name of the sponsor and the logo or other symbol (if any) of the sponsor must be displayed at the beginning or end of a sponsored programme.

(10) Techniques which exploit the possibility of conveying a message subliminally or surreptitiously must not be used in a sponsorship announcement.

(11) A sponsorship announcement must not—

- (a) prejudice respect for human dignity;
- (b) include or promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
- (c) encourage behaviour prejudicial to health or safety;
- (d) encourage behaviour grossly prejudicial to the protection of the environment;
- (e) cause physical or moral detriment to persons under the age of eighteen;

- (f) directly encourage such persons to persuade their parents or others to purchase or rent goods or services;
- (g) exploit the trust of such persons in parents, teachers or others; or
- (h) unreasonably show such persons in dangerous situations.

(12) For the purposes of this Part a programme included in an on-demand programme service is “sponsored” if a person (“the sponsor”) other than—

- (a) the provider of that service, or
- (b) the producer of that programme,

has met some or all of the costs of the programme for the purpose of promoting the name, trademark, image, activities, services or products of the sponsor or of another person.

(13) But a programme is not sponsored if it falls within this section only by virtue of the inclusion of product placement (see section 368H(1)) or prop placement (see section 368H(2)).

(14) For the purposes of subsection (12) a person meets some or all of the costs of a programme included in a service only if that person makes a payment or provides other resources for the purpose of meeting or saving some or all of the costs of—

- (a) producing that programme;
- (b) transmitting that programme; or
- (c) making that programme available as part of the service.

(15) For the purposes of this Part an on-demand programme service is “sponsored” if a person (“the sponsor”) other than the provider of the service has met some or all of the costs of providing the service for the purpose of promoting the name, trademark, image, activities, services or products of the sponsor or another person.

(16) For the purposes of subsection (15) a person is not to be taken to have met some or all of the costs of providing a service only because a programme included in the service is sponsored by that person.

(17) In this section a “sponsorship announcement” means—

- (a) anything included for the purpose of complying with subsection (8) or (9), and
- (b) anything included at the same time as or otherwise in conjunction with anything within paragraph (a).

368H Prohibition of product placement and exceptions

(1) “Product placement”, in relation to a programme included in an on-demand programme service, means the inclusion in the programme of, or of a reference to, a product, service or trade mark, where the inclusion—

- (a) is for a commercial purpose,
- (b) is in return for the making of any payment, or the giving of other valuable consideration, to any relevant provider or any connected person, and
- (c) is not prop placement.

(2) “Prop placement”, in relation to a programme included in an on-demand programme service, means the inclusion in the programme of, or of a reference to, a product, service or trade mark where—

- (a) the provision of the product, service or trade mark has no significant value; and
- (b) no relevant provider, or person connected with a relevant provider, has received any payment or other valuable consideration in relation to its inclusion in, or the reference to it in, the programme, disregarding the costs saved by including the product, service or trademark, or a reference to it, in the programme.

(3) Product placement is prohibited in children’s programmes included in on-demand programme services.

- (4) Product placement is prohibited in on-demand programme services if—
- (a) it is of cigarettes or other tobacco products,
 - (b) it is by or on behalf of an undertaking whose principal activity is the manufacture or sale of cigarettes or other tobacco products, or
 - (c) it is of prescription-only medicines.
- (5) Product placement of alcoholic drinks must not —
- (a) be aimed specifically at persons under the age of eighteen;
 - (b) encourage immoderate consumption of such drinks.
- (6) Product placement is otherwise permitted in programmes included in on-demand programme services provided that—
- (a) conditions A to F are met, and
 - (b) if subsection (14) applies, condition G is also met.
- (7) Condition A is that the programme in which the product, service or trademark, or the reference to it, is included is—
- (a) a film made for cinema;
 - (b) a film or series made for a television programme service or for an on-demand programme service;
 - (c) a sports programme; or
 - (d) a light entertainment programme.
- (8) Condition B is that the product placement has not influenced the content of the programme in a way that affects the editorial independence of the provider of the service.
- (9) Condition C is that the product placement does not directly encourage the purchase or rental of goods or services, whether by making promotional reference to those goods or services or otherwise.
- (10) Condition D is that the programme does not give undue prominence to the products, services or trade marks concerned.
- (11) Condition E is that the product placement does not use techniques which exploit the possibility of conveying a message subliminally or surreptitiously.
- (12) Condition F is that the way in which the product, service or trade mark, or the reference to it, is included in the programme by way of product placement does not—
- (a) prejudice respect for human dignity;
 - (b) promote discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
 - (c) encourage behaviour prejudicial to health or safety;
 - (d) encourage behaviour grossly prejudicial to the protection of the environment;
 - (e) cause physical or moral detriment to persons under the age of eighteen;
 - (f) directly encourage such persons to persuade their parents or others to purchase or rent goods or services;
 - (g) exploit the trust of such persons in parents, teachers or others; or
 - (h) unreasonably show such persons in dangerous situations.
- (13) Condition G is that the on-demand programme service in question signals appropriately the fact that product placement is contained in a programme, no less frequently than—
- (a) at the start and end of such a programme, and
 - (b) in the case of an on-demand programme service which includes advertising breaks within it, at the recommencement of the programme after each such advertising break.

(14) This subsection applies where the programme featuring the product placement has been produced or commissioned by the provider of the service or any connected person.

(15) This section applies only in relation to programmes the production of which begins after 19th December 2009.

(16) In this section—

“connected” has the same meaning as it has in the Broadcasting Act 1990 by virtue of section 202 of that Act;

“film made for cinema” means a film made with a view to its being shown to the general public first in a cinema;

“producer”, in relation to a programme, means the person by whom the arrangements necessary for the making of the programme are undertaken;

“relevant provider”, in relation to a programme, means—

(a) the provider of the on-demand programme service in which the programme is included; and

(b) the producer of the programme;

“residual value” means any monetary or other economic value in the hands of the relevant provider other than the cost saving of including the product, service or trademark, or a reference to it, in a programme;

“significant value” means a residual value that is more than trivial; and

“trade mark”, in relation to a business, includes any image (such as a logo) or sound commonly associated with that business or its products or services.

368I Enforcement of section 368D

(1) Where the appropriate regulatory authority determine that a provider of an on-demand programme service is contravening or has contravened section 368D they may do one or both of the following—

(a) give the provider an enforcement notification under this section;

(b) impose a financial penalty on the provider in accordance with section 368J.

(2) The appropriate regulatory authority must not make a determination as mentioned in subsection (1) unless there are reasonable grounds for believing that a contravention of section 368D is occurring or has occurred and they have allowed the provider an opportunity to make representations about that apparent contravention.

(3) An enforcement notification under this section is a notification which specifies the determination made as mentioned in subsection (1) and imposes requirements on the provider to take such steps for complying with section 368D and for remedying the consequences of the contravention of that section as may be specified in the notification.

(4) The requirements specified in an enforcement notification may in particular include requirements to do one or more of the following—

(a) cease providing or restrict access to—

(i) a specified programme, or

(ii) programmes of a specified description;

(b) cease showing or restrict access to—

(i) a specified advertisement, or

(ii) advertisements of a specified description;

(c) provide additional information to users of the service prior to the selection of a specified programme by the user for viewing;

(d) show an advertisement only with specified modifications;

(e) publish a correction in the form and place and at the time specified; or

- (f) publish a statement of the findings of the appropriate regulatory authority in the form and place and at the time specified.
- (5) An enforcement notification must—
- (a) include reasons for the appropriate regulatory authority’s decision to give the enforcement notification, and
 - (b) fix a reasonable period for the taking of the steps required by the notification.
- (6) Where a provider is required by an enforcement notification to publish a correction or a statement of findings, the provider may publish with the correction or statement of findings a statement that it is published in pursuance of the enforcement notification.
- (7) It is the duty of a provider to whom an enforcement notification has been given to comply with it.
- (8) That duty is enforceable in civil proceedings by the appropriate regulatory authority—
- (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief.
- (9) If a provider to whom an enforcement notification has been given does not comply with it within the period fixed by the appropriate regulatory authority in that enforcement notification the appropriate regulatory authority may impose a financial penalty on that provider in accordance with section 368J.

Financial penalties

368J Financial penalties

- (1) The amount of a penalty imposed on a provider under section 368I is to be such amount not exceeding 5 per cent. of the provider’s applicable qualifying revenue or £250,000 whichever is the greater amount, as the appropriate regulatory authority determine to be—
- (a) appropriate; and
 - (b) proportionate to the contravention in respect of which it is imposed.
- (2) In determining the amount of a penalty under subsection (1) the appropriate regulatory authority must have regard to any statement published by OFCOM under section 392 (guidelines to be followed in determining amount of penalties).
- (3) The “applicable qualifying revenue”, in relation to a provider, means—
- (a) the qualifying revenue for the provider’s last complete accounting period falling within the period during which the provider has been providing the service to which the contravention relates; or
 - (b) in relation to a person whose first complete accounting period falling within that period has not ended when the penalty is imposed, the amount that the appropriate regulatory authority estimate to be the qualifying revenue for that period.
- (4) For the purposes of subsection (3) the “qualifying revenue” for an accounting period consists of the aggregate of all the amounts received or to be received by the provider of the service to which the contravention relates or by any connected person in the accounting period —
- (a) for the inclusion in that service of advertisements, product placement and sponsorship; and
 - (b) in respect of charges made in that period for the provision of programmes included in that service.
- (5) For the purposes of subsection (4), “connected” has the same meaning as it has in the Broadcasting Act 1990 by virtue of section 202 of that Act.

- (6) A financial penalty imposed under this section—
 - (a) must be paid into the appropriate Consolidated Fund; and
 - (b) if not paid within the period fixed by the appropriate regulatory authority, is to be recoverable by the appropriate regulatory authority as a debt due to them from the person obliged to pay it.
- (7) For the purposes of subsections (3) and (6)—
 - (a) the amount of a person’s qualifying revenue for an accounting period, or
 - (b) the amount of any payment to be made into the appropriate Consolidated Fund by any person in respect of any such revenue,

is, in the event of a disagreement between the appropriate regulatory authority and that person, the amount determined by the appropriate regulatory authority.

- (8) The references in this section to the payment of an amount into the appropriate Consolidated Fund—
 - (a) in the case of an amount received in respect of matters appearing to OFCOM to have no connection with Northern Ireland, is a reference to the payment of the amount into the Consolidated Fund of the United Kingdom;
 - (b) in the case of an amount received in respect of matters appearing to OFCOM to have a connection with Northern Ireland but no connection with the rest of the United Kingdom, is a reference to the payment of the amount into the Consolidated Fund of Northern Ireland; and
 - (c) in any other case, is a reference to the payment of the amount, in such proportions as OFCOM consider appropriate, into each of those Funds.

Suspension or restriction of service

368K Suspension or restriction of service for contraventions

- (1) The appropriate regulatory authority must serve a notice under subsection (2) on a provider of an on-demand programme service if they are satisfied—
 - (a) that the provider is in contravention of section 368D;
 - (b) that an attempt to secure compliance with section 368D by the imposition of one or more financial penalties or enforcement notifications under section 368I has failed; and
 - (c) that the giving of a direction under this section would be appropriate and proportionate to the seriousness of the contravention.
- (2) A notice under this subsection must—
 - (a) state that the appropriate regulatory authority are satisfied as mentioned in subsection (1);
 - (b) state the reasons why they are satisfied as mentioned in subsection (1);
 - (c) state that the appropriate regulatory authority will give a direction under this section unless the provider takes, within a period specified in the notice, such steps to remedy the contravention within subsection (1)(a) as are so specified;
 - (d) specify any conditions that the appropriate regulatory authority propose to impose in the direction under section 368M(5)(b); and
 - (e) inform the provider that the provider has the right to make representations to the appropriate regulatory authority about the matters appearing to the authority to provide grounds for giving the proposed direction within the period specified for the purposes of paragraph (c).
- (3) If, after considering any representations made to them by the provider within that period, the appropriate regulatory authority are satisfied that the provider has failed to take the steps specified in the notice for remedying the contravention and that it is necessary in

the public interest to give a direction under this section, the appropriate regulatory authority must give such of the following as appears to them appropriate and proportionate as mentioned in subsection (1)(c)—

- (a) a direction that the entitlement of the provider to provide an on-demand programme service is suspended (either generally or in relation to a particular service);
- (b) a direction that that entitlement is restricted in the respects set out in the direction.

368L Suspension or restriction of service for inciting crime or disorder

(1) The appropriate regulatory authority must serve a notice under subsection (2) on a provider of an on-demand programme service if they are satisfied—

- (a) that the service has failed to comply with any requirement of section 368E to 368H and that accordingly the provider has contravened section 368D(1);
- (b) that the failure is due to the inclusion in the service of material likely to encourage or to incite the commission of crime, or to lead to disorder; and
- (c) that the contravention is such as to justify the giving of a direction under this section.

(2) A notice under this subsection must—

- (a) state that the appropriate regulatory authority are satisfied as mentioned in subsection (1);
- (b) specify the respects in which, in their opinion, the provider has contravened section 368D;
- (c) specify the effect of the notice in accordance with subsection (3);
- (d) state that the appropriate regulatory authority may give a direction under this section after the end of the period of twenty-one days beginning with the day on which the notice is served on the provider; and
- (e) inform the provider of the provider's right to make representations to the appropriate regulatory authority within that period about the matters appearing to the appropriate regulatory authority to provide grounds for giving a direction under this section.

(3) A notice under subsection (2) has the effect specified under subsection (2)(c), which may be either—

- (a) that the entitlement of the provider to provide an on-demand programme service is suspended (either generally or in relation to a particular service), or
- (b) that that entitlement is restricted in the respects set out in the notice.

(4) The suspension or restriction has effect as from the time when the notice is served on the provider until either—

- (a) a direction given under this section takes effect; or
- (b) the appropriate regulatory authority decide not to give such a direction.

(5) If, after considering any representations made to them by the provider within the period mentioned in subsection (2)(d), the appropriate regulatory authority are satisfied that it is necessary in the public interest to give a direction under this section, they must give such of the following as appears to them justified as mentioned in subsection (1)(c)—

- (a) a direction that the entitlement of the provider to provide an on-demand programme service is suspended (either generally or in relation to a particular service);
- (b) a direction that that entitlement is restricted in the respects set out in the direction.

368M Supplementary provision about directions

- (1) This section applies to a direction given to a provider under section 368K or 368L.
- (2) A direction must specify the service to which it relates or specify that it relates to any on-demand programme service provided or to be provided by the provider.
- (3) A direction, except so far as it otherwise provides, takes effect for an indefinite period beginning with the time at which it is notified to the provider.
- (4) A direction under section 368L must specify a time for it to take effect, and that time must not fall before the end of twenty-eight days beginning with the day on which the direction is notified to the provider.
- (5) A direction—
 - (a) may provide for the effect of a suspension or restriction to be postponed by specifying that it takes effect only at a time determined by or in accordance with the terms of the direction; and
 - (b) in connection with the suspension or restriction contained in the direction or with the postponement of its effect, may impose such conditions on the provider as appear to the appropriate regulatory authority to be appropriate for the purpose of protecting that provider's customers.
- (6) If the appropriate regulatory authority consider it appropriate to do so (whether or not in consequence of representations or proposals made to them), they may revoke a direction or modify its conditions—
 - (a) with effect from such time as they may direct;
 - (b) subject to compliance with such requirements as they may specify; and
 - (c) to such extent and in relation to such services as they may determine.

368N Enforcement of directions under section 368K or 368L

- (1) A person ("P") is guilty of an offence if P provides an on-demand programme service—
 - (a) while P's entitlement to do so is suspended by a direction under section 368K or 368L, or
 - (b) in contravention of a restriction contained in such a direction.
- (2) A person guilty of an offence under this section is liable—
 - (a) on summary conviction, to a fine not exceeding the statutory maximum;
 - (b) on conviction on indictment, to a fine.

Information

368O Power to demand information

- (1) The appropriate regulatory authority may require a person who appears to them to be or to have been a provider of an on-demand programme service and to have information that they require for a purpose within subsection (2) to provide them with all such information as they consider necessary for that purpose.
- (2) The following are within this subsection—
 - (a) the purposes of an investigation which the appropriate regulatory authority are carrying out in order for it to be determined whether a contravention of section 368D has occurred or is occurring, where—
 - (i) the investigation relates to a matter about which they have received a complaint, or

(ii) they otherwise have reason to suspect that there has been a contravention of either of those sections;

(b) the purpose of ascertaining or calculating applicable qualifying revenue under section 368J.

(3) The appropriate regulatory authority may require a person who appears to them to be or to have been a provider of an on-demand programme service and to have information that they require for the purpose of securing compliance with the obligations of the United Kingdom under the Audiovisual Media Services Directive to provide them with all such information as they consider necessary for that purpose.

(4) The appropriate regulatory authority may not require the provision of information under this section unless they have given the person from whom it is required an opportunity of making representations to them about the matters appearing to them to provide grounds for making the request.

(5) The appropriate regulatory authority must not require the provision of information under this section except by a demand for the information contained in a notice served on the person from whom the information is required that describes the required information and sets out the appropriate regulatory authority's reasons for requiring it.

(6) A person who is required to provide information under this section must provide it in such manner and within such reasonable period as may be specified by the appropriate regulatory authority in the demand for information.

(7) Sections 368I and 368K apply in relation to a failure to comply with a demand for information imposed under this section as if that failure were a contravention of a requirement of section 368D.

(8) In this section "information" includes copies of programmes.

Application and interpretation of Part 4A

368P Application of Part 4A in relation to the BBC

(1) Section 368D(3) (duties of providers of on-demand programme services) does not apply to the BBC.

(2) In the following provisions references to a provider of an on-demand programme service do not include references to the BBC—

- (a) section 368C (duties of appropriate regulatory authority);
- (b) section 368F (advertising);
- (c) section 368G (sponsorship);
- (d) section 368I (enforcement by appropriate regulatory authority);
- (e) section 368K (suspension or restriction of service for contraventions);
- (f) section 368L (suspension or restriction of service for inciting crime or disorder);
- (g) section 368O (power to demand information).

(3) Paragraph 2(2)(b) of Schedule 12 includes provision imposing obligations on the BBC in relation to on-demand programme services.

368Q Application of Part 4A in relation to the Welsh Authority

(1) In section 368C (duties of appropriate regulatory authority) references to a provider of an on-demand programme service do not include references to the Welsh Authority.

(2) It is the duty of the appropriate regulatory authority—

- (a) to take such steps as appear to them best calculated to secure that the requirements of sections 368E and 368F are complied with by the Welsh Authority in relation to advertising, and

(b) to encourage the Welsh Authority to develop the codes of conduct referred to in section 368C(4) so far as it relates to advertising.

(3) It is the duty of the Welsh Authority in the provision of any on-demand programme service to promote, where practicable and by appropriate means, production of and access to European works (within the meaning given in Article 1(n) of the Audiovisual Media Services Directive).

(4) Section 368D(3)(duties of providers of on-demand programme services) does not apply to the Welsh Authority except in relation to advertising or in relation to the inclusion of advertising in on-demand programme services provided by the Welsh Authority.

(5) Section 368I (enforcement by appropriate regulatory authority), section 368K (suspension or restriction of service for contraventions) and section 368L (suspension or restriction of service for inciting crime or disorder) do not apply in relation to the contravention of section 368D by the Welsh Authority except in the case of a contravention of section 368E or 368F that relates to advertising.

(6) Section 368O does not apply in relation to information held by the Welsh Authority except where that information is required by the appropriate regulatory authority for the purposes of—

- (a) an investigation which the appropriate regulatory authority are carrying out (whether or not following receipt by them of a complaint) into a matter relating to compliance by the Welsh Authority with section 368E or 368F in relation to advertising; or
- (b) securing compliance with the international obligations of the United Kingdom under the Audiovisual Media Services Directive in relation to advertising.

(7) Part 2 of Schedule 12 includes provision imposing obligations on the Welsh Authority in relation to on-demand programme services.

368R Interpretation of Part 4A

(1) In this Part—

“appropriate regulatory authority” is to be construed in accordance with 368B;

“children’s programme” means a programme which is intended for viewing primarily by persons under the age of sixteen;

“prescription-only medicine” means a medicinal product of a description or falling within a class specified in an order made under section 58 of the Medicines Act 1968;

“product placement” has the meaning given by section 368H(1);

“sponsorship” is to be construed in accordance with section 368G;

“tobacco product” has the meaning given in section 1 of the Tobacco Advertising and Promotion Act 2002.

(2) For the purposes of this Part, a programme is included in an on-demand programme service if it is included in the range of programmes the service offers to users.

(3) For the purposes of this Part, advertising is included in an on-demand programme service if it can be viewed by a user of the service as a result of the user selecting a programme to view.

(4) The services that are to be taken for the purposes of this Part to be available for use by members of the public include any service which—

- (a) is made available for use only to persons who subscribe to the service (whether for a period or in relation to a particular occasion) or who otherwise request its provision; but
- (b) is a service the facility of subscribing to which, or of otherwise requesting its provision, is offered or made available to members of the public.

(5) The person, and the only person, who is to be treated for the purposes of this Part as providing an on-demand programme service is the person who has editorial responsibility for the service (see section 368A(4)).

(6) For the purposes of this Part—

- (a) the provision of a service by the BBC does not include its provision by a BBC company;
- (b) the provision of a service by the Welsh Authority does not include its provision by an S4C company;

and, accordingly, control that is or is capable of being exercised by the BBC or the Welsh Authority over decisions by a BBC company or an S4C company about what is to be comprised in a service is to be disregarded for the purposes of determining who has editorial responsibility for the service.”

The BBC

3.—(1) In section 198 of the 2003 Act (functions of OFCOM in relation to the BBC)—

(a) in subsection (3), after paragraph (a) (before “or”) insert—

“(aa) Part 4A,” and

(b) in subsection (9), after “245” insert “or by the appropriate regulatory authority by virtue of section 368C”.

(2) In paragraph 2(2)(b) of Schedule 12 to the 2003 Act (duty to publicise complaints procedures), after the words “under section 319”, insert—

“or about compliance by the BBC with the requirements imposed by section 368D”.

The Welsh Authority

4.—(1) Part 2 of Schedule 12 to the 2003 Act (corresponding obligations of the Welsh Authority) is amended as follows.

(2) In paragraph 15 (directions by OFCOM following breach of duty by Welsh Authority)—

(a) in sub-paragraphs (1)(a) and (6), after “14”, insert “or 23A, or under section 368D”;

(b) in sub-paragraphs (1)(b), (2) and (5), after “public television services”, insert “or on-demand programme services”.

(3) In paragraph 19(2)(b) (duty to publicise complaints procedures), after the words “under section 319”, insert—

“or about compliance by the Authority with the requirements imposed by section 368D and section 368Q(3), except the requirement imposed by section 368D(1) so far as it relates to advertising”.

(4) After paragraph 23, insert—

“On-demand programme services

23A.—(1) It is the duty of the Welsh Authority to comply with a direction given to them by OFCOM in relation to the establishment of procedures for the handling and resolution of complaints about compliance by the Authority with the requirements imposed by section 368D or section 368Q(3).

(2) But OFCOM must not give any such direction in relation to the handling and resolution of complaints about compliance with the requirement imposed by section 368D(1) so far as it relates to advertising.”

5. In section 341 of the 2003 Act (imposition of penalties on the Welsh Authority), after subsection (1)(j) insert—

- “(ja)the requirement imposed by paragraph 23A of that Schedule (complaints procedures for on-demand programme services) to comply with a direction under that paragraph;
- (jb) the requirements imposed by section 368D and section 368Q(3) (on-demand programme services), except the requirement imposed by section 368D(1) so far as it relates to advertising.”

Television licensable content services

6.—(1) In section 232(2)(b) of the 2003 Act (television licensable content services), after “consists of” insert “or has as its principal purpose the provision of”.

(2) In section 233 of the 2003 Act (services that are not television licensable content services), omit subsection (3).

Co-operation with other Member States

7. In the 2003 Act, after section 335 insert—

“Co-operation with other Member States

335A Co-operation with other Member States

- (1) Where OFCOM—
 - (a) receive under Article 3 of the Audiovisual Media Services Directive a request from another member State relating to a relevant broadcaster, and
 - (b) consider that the request is substantiated, they must ask the broadcaster to comply with the rule identified in that request.
- (2) In this section “relevant broadcaster” means—
 - (a) the BBC;
 - (b) C4C;
 - (c) the Welsh Authority; or
 - (d) the holder of—
 - (i) a Channel 3 licence;
 - (ii) a Channel 5 licence; or
 - (iii) a licence to provide any relevant regulated television service within the meaning of section 13(1) of the Broadcasting Act 1990.”

Minor amendments of the 2003 Act

8. In the following provisions of the 2003 Act, for “Television without Frontiers Directive” substitute “Audiovisual Media Services Directive”—

- (a) section 211(2)(b) and (3)(b) (regulation of independent television services);
- (b) section 329(7)(b)(i) (proscription orders).

9. In section 361 of the 2003 Act (meaning of “available for reception by members of the public”)—

- (a) for subsections (2) to (5) substitute—
 - “(2) A service is not to be treated as available for reception by members of the public if it is an on-demand programme service.”;
- (b) omit subsection (9).

10. In section 362(1) of the 2003 Act (expressions used in Part 3 of that Act) omit the definition of “the Television without Frontiers Directive”.

11. In section 405(1) of the 2003 Act (general interpretation)—

(a) after the definition of “associated facility”, insert—

““the Audiovisual Media Services Directive” means Directive 89/552/EEC of the European Parliament and of the Council on the Coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audiovisual media services, together with the modifications of that Directive by—

(a) Directive 97/36/EC of the European Parliament and of the Council; and

(b) Directive 2007/65 EC of the European Parliament and of the Council;”;

(b) after the definition of “OFCOM” insert—

““on-demand programme service” has the meaning given by section 368A(1);”.

On-demand programme services: consequential amendments of the Copyright, Designs and Patents Act 1988

12.—(1) The Copyright, Designs and Patents Act 1988(a) is amended as follows.

(2) In section 69 (copyright: recording for purposes of supervision and control of broadcasts and other services)—

(a) in subsection (1), after “them” insert “or included in any on-demand programme service provided by them”,

(b) in subsection (2)(d), after “334(3)” insert “, 368O(1) or (3)”, and

(c) after subsection (4) insert—

“(5) Copyright is not infringed by the use by an appropriate regulatory authority designated under section 368B of the Communications Act 2003, in connection with the performance of any of their functions under that Act, of any recording, script or transcript which is provided to them under or by virtue of any provision of that Act.

(6) In this section “on-demand programme service” has the same meaning as in the Communications Act 2003 (see section 368A of that Act).”

(3) In paragraph 17 of Schedule 2 (rights in performances: recordings for purposes of supervision and control of broadcasts and other services)—

(a) in sub-paragraph (1), after “them” insert “or included in any on-demand programme service provided by them”,

(b) in sub-paragraph (2)(d), after “334(3)” insert “, 368O(1) or (3)”, and

(c) after sub-paragraph (4) insert—

“(5) The rights conferred by this Chapter are not infringed by the use by the appropriate regulatory authority designated under section 368B of the Communications Act 2003, in connection with the performance of any of their functions under that Act, of any recording, script or transcript which is provided to them under or by virtue of any provision of that Act.

(6) In this paragraph “on-demand programme service” has the same meaning as in the Communications Act 2003 (see section 368A of that Act).”

Amendments of the Wireless Telegraphy Act 2006

13.—(1) The Wireless Telegraphy Act 2006(b) is amended as follows.

(a) 1988 c.48

(b) 2006 c.36

(2) In section 9(4) (terms, provision and limitations in wireless telegraphy licences), after paragraph (c) insert—

- “(d) terms, provisions or limitations requiring a satellite uplinker to suspend or cease uplinking, by means of satellite uplink apparatus, a service named by OFCOM in a notice given to the satellite uplinker under section 9A;
- (e) terms or provisions requiring a satellite uplinker to provide OFCOM with such information necessary for the purpose of determining whether section 9A applies in relation to a service uplinked by the satellite uplinker or for any purpose connected with the giving of a notice under section 9A as OFCOM may request by a notice in writing.”

(3) After section 9 insert—

“Notice to satellite uplinkers

9A.—(1) This section applies where a relevant regulated television service or an on-demand programme service is provided by a person who is deemed to be under the jurisdiction of the United Kingdom for the purpose of the Audiovisual Media Services Directive by reason only of the person providing such a service by means of satellite uplink apparatus situated within the United Kingdom.

(2) OFCOM may give a notice in writing under this section to a satellite uplinker in relation to a relevant regulated television service if OFCOM are satisfied that the service is provided—

- (a) in contravention of a licence under Part 1 of the Broadcasting Act 1990 or Part 1 of the Broadcasting Act 1996; or
- (b) otherwise than pursuant to such a licence.

(3) OFCOM may give a notice in writing under this section to a satellite uplinker in relation to an on-demand programme service if OFCOM are satisfied that the service is provided in contravention of a requirement of Part 4A of the Communications Act 2003.

(4) Where a notice is given to a satellite uplinker under subsection (2)(a) or (3) the notice must—

- (a) name the service;
- (b) specify the reasons why OFCOM consider that subsection (2)(a) or (3) is satisfied; and
- (c) specify—
 - (i) the date by which the satellite uplinker must cease the uplinking of the service; or
 - (ii) a period during which the satellite uplinker must suspend the uplinking of the service.

(5) Where a notice is given to a satellite uplinker under subsection (2)(b) the notice must—

- (a) name the service; and
- (b) specify—
 - (i) the date by which the satellite uplinker must cease the uplinking of the service; or
 - (ii) a period during which the satellite uplinker must suspend the uplinking of the service.

(6) In this section—

“relevant regulated television service” has the same meaning as in section 13 of the Broadcasting Act 1990;

“on-demand programme service” has the same meaning as in the Communications Act 2003 (see section 368A of that Act).”

(4) In section 39 (contravention of terms, etc)—

- (a) in subsection (4) for “(7)” substitute “(8)”, and
- (b) after subsection (7) insert—

“(8) The person notified also has a shorter period if—

- (a) OFCOM have reasonable grounds for believing that that person is contravening, or has contravened, a notice given under section 9A or a term or provision as mentioned in section 9(4)(e);
- (b) OFCOM have determined, taking into account all relevant circumstances, that a shorter period would be appropriate; and
- (c) the shorter period has been specified in the notification.”

(5) Section 115 (general interpretation) is amended as follows.

(6) After the definition of “associated facility” insert—

““the Audiovisual Media Services Directive” means Directive 89/552/EEC of the European Parliament and of the Council on the Coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audiovisual media services, together with the modifications of that Directive by —

- (a) Directive 97/36/EC of the European Parliament and of the Council; and
- (b) Directive 2007/65 EC of the European Parliament and of the Council;”.

(7) After the definition of “receiving apparatus” insert—

““satellite uplink apparatus” means wireless telegraphy apparatus, the purpose of which is to emit, to one or more satellites, energy to which section 116(2) applies;

“satellite uplinker” means a person who operates satellite uplink apparatus, but where a person is employed or engaged to operate satellite uplink apparatus under the direction or control of another person, references to a satellite uplinker are references only to that other person;”.

9th November 2009

Si on Simon
Parliamentary Under Secretary of State
Department for Culture, Media and Sport

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations implement Directive 2007/65 EC of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities^(a) (“the Directive”). These Regulations insert new provisions into the Communications Act 2003 (“the Act”).

Regulation 2 inserts a new Part 4A into the Act in order to regulate on-demand programme services. Section 368A sets out the meaning of an on-demand programme service and section 368B provides for OFCOM to designate a body as an appropriate regulatory authority. OFCOM is also an appropriate regulatory authority under this Part of the Act. Section 368C imposes duties on the appropriate regulatory authority and sections 368D to 368H impose requirements on the provider of an on-demand programme service.

Section 368I sets out an enforcement mechanism for the appropriate regulatory authority in relation to the requirements in sections 368D to 368H. Section 368J regulates the amount of a financial penalty which may be imposed under section 368I and sets out how such a penalty is to be calculated and paid. Sections 368K and 368L confer powers on the appropriate regulatory authority to direct that the entitlement of a provider of an on-demand service to provide that service is suspended or restricted in specified circumstances. A criminal offence to enforce directions made under section 368K or 368L is set out in section 368N.

Section 368O provides a power for the appropriate regulatory authority to require the provision of information from the provider of an on-demand programme service for specified purposes. Section 368P sets out which provisions of the regulations apply to the BBC and Regulation 3 describes the functions of OFCOM in relation to the BBC and its on-demand programme services. Section 368Q sets out which provisions apply to the Welsh Authority. Section 368R defines some of the terms used in Part 4A including in subsection (6) the interpretation of the meaning of “BBC” and “Welsh Authority”.

Regulation 4 inserts amendments into Schedule 12 of the Act to create an obligation on the Welsh Authority to regulate on-demand programme services provided by Sianel Pedwar Cymru, except in respect of advertising which will be regulated by the appropriate regulatory authority.

Regulation 6 amends the definition of television licensable content services, making two changes. Firstly, a principal purpose test is inserted into section 232(2)(b) of the Act and secondly section 233 is amended so that the exclusion of services provided over the internet from the definition of a television licensable content service is removed.

Regulation 7 inserts a new section 335A into the Act. This creates a new co-operation procedure which applies to specified broadcasters and holders of broadcast licences.

Minor amendments are made to the Act by regulations 8 to 11. Regulation 12 amends the Copyright, Designs and Patents Act 1988 so that copyright would not be infringed by the provision of information, making of recordings or the use of material where it provided or used pursuant to specified sections of the Act.

Regulation 13 amends the Wireless Telegraphy Act 2006 to enable OFCOM to require a satellite uplinker to cease or suspend uplinking a relevant regulated television service or an on-demand programme service in certain circumstances. The amendments made by Regulation 13 apply where the service is provided by a person who is deemed to be under the jurisdiction of the United Kingdom for the purpose of the Directive only because that person provides such service by means of a satellite uplink apparatus situated within the United Kingdom.

(a) Directive 2007/65 EC OJ No L 332, 18.12.2007, p.27 amending Directive 89/552/EEC OJ No L 298, 17.10.1989, p.23 as amended by Directive 97/36/EC OJ No L 202, 30.7.1997, p.60

A transposition note and an impact assessment of the effect that this instrument will have on the costs to business and the voluntary sector are available from the website of the Department for Culture, Media and Sport (www.culture.gov.uk). They are also annexed to the Explanatory Memorandum which is available alongside the instrument on the OPSI website.

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STATUTORY INSTRUMENTS

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BROADCASTING

The Audiovisual Media Services Regulations 2009

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