



Information for providers of
video on demand ('VOD') services
Regulation of VOD Services

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Section 1

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Regulation of VOD services

Introduction

- 1.1 On 19 December 2009 new statutory Regulations¹ affecting video on demand ('VOD') services came into force. These Regulations amended the Communications Act 2003. The result is that all programming and advertising which appears on certain kinds of VOD service are now subject to a range of minimum content standards. Ofcom has been given new regulatory powers to enforce these requirements.
- 1.2 Ofcom has already written to all Ofcom-licensed television providers, who provide, or may be thinking of providing, a VOD service to complement their existing television channels. We have alerted such organisations to the new regulatory regime which is being introduced to cover VOD services.
- 1.3 In similar terms, we lay out below the same information for the benefit of other individuals, companies or organisations who currently provide, or may be thinking of providing, a VOD service within the UK. Accordingly, this note provides a brief overview of the following:
 - the new framework;
 - information information to help assess whether a VOD service is likely to be subject to regulation², and the requirements that will apply if this is the case; and
 - the further proposed and important changes to the law which will affect all VOD service providers subject to regulation in the near future.

What services do the new requirements apply to?

- 1.4 The Regulations transpose the VOD requirements of the European Audiovisual Media Services Directive ('AVMS Directive') into UK law. It is important to note that the new statutory provisions introduced by the Regulations only apply to those VOD services that meet **all** the criteria set out in those provisions. In brief, a service will be subject to regulation only if:
 - a) its principal principal purpose is the provision of programmes which are "TV-like" (i.e. the form and content is comparable to the form and content of television programmes;

¹ The Audiovisual Media Services Regulations (2009) – 'the Regulations.' See: http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

² A VOD service subject to regulation is called an "on-demand programme service" in the Regulations and defined in section 368A of the Communications Act 2003 (as amended). See paragraph 2 of the Regulations. The statutory provisions affecting on-demand programme services are set out in new sections 368A-368R inclusive of the Communications Act 2003.

- b) it can be accessed on-demand, i.e. if the service enables the user to view, at a time of the user's choosing (whether inside a specified period or not), programmes from a range included in the service;
 - c) a person has editorial responsibility for it (i.e. they have general control over what programmes are included and how those programmes are organised within the service, but they do not necessarily have control over the content of individual programmes);
 - d) it is made available by that person for use by member sof the public; **and**
 - e) that person falls under UK jurisdiction for the purposes of the AVMS Directive.
- 1.5 Further information about each of these criteria can be found in the Scope Guidance contained in Annex 1.
- 1.6 In the first instance, it is up to service providers themselves to determine whether they are providing a VOD service which meets the relevant statutory criteria and which is therefore subject to regulation. In the event of uncertainty or dispute, however, the final decision as to whether or not a service falls within the scope of regulation rests with Ofcom.

What should I do next?

- 1.7 Guidance on the scope of the new provisions is available in the Annex below and is provided as an aid to interpretation of the types of services that may fall within scope. It contains information about the factors that determine whether or not a VOD service is likely to be subject to regulation. If you, your company or organisation provides any VOD or VOD-like services, you are strongly advised to familiarise yourself with the new legislative provisions set out in the Regulations and to read the Guidance carefully so that you can assess whether or not the new requirements apply to you. You should also consider seeking legal advice if you are unclear about the application of the scope criteria in relation to any services that you provide.
- 1.8 If you do offer a VOD service which is subject to regulation, it is your responsibility to ensure it does not infringe the new statutory requirements summarised below. Conducting a review to ensure all editorial and advertising content is compliant with these requirements is a first and necessary step that we urge all VOD service providers to undertake.

What are the new statutory requirements?

- 1.9 VOD service providers who are subject to regulation must ensure that content provided on their services:
- a) does not contain any incitement to hatred based on race, sex, religion or nationality;
 - b) which might seriously impair the physical, mental, or moral development of minors is only made available in such a way that ensures that they will not normally hear or see it;
 - c) complies with the relevant sponsorship requirements laid out in the legislation; and

- d) contains product placement only in certain programme genres specified in the legislation and only in accordance with the restrictions and other conditions that it sets out.
- 1.10 The new statutory provisions also oblige in-scope VOD service providers to ensure that advertising on their services complies with a set of minimum standards. In brief, these state that advertising:
- a) is readily recognisable as such (surreptitious advertising and subliminal techniques are prohibited);
 - b) may not prejudice respect for human dignity, or include or promote discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
 - c) may not encourage behaviour that is prejudicial to health or safety, or that is grossly prejudicial to the protection of the environment;
 - d) of cigarettes and other tobacco products, and advertising of prescription-only medicines is strictly prohibited;
 - e) of alcoholic drinks must neither be aimed at minors nor encourage excessive consumption of such drinks;
 - f) may not cause physical or moral detriment to minors or unreasonably show minors in dangerous situations; and
 - g) may not exploit the inexperience or credulity of minors, or exploit their trust in parents, teachers and others, or encourage them to persuade their parents to buy goods.

What happens if someone complains that a VOD service is contravening the requirements?

- 1.11 Ofcom is responsible for handling any complaints about compliance by services that are within scope of the new statutory requirements. Our objective is to ensure a high standard of compliance by providers of such services for the protection of citizens and consumers in the UK. We will take appropriate action to ensure that this objective is met.
- 1.12 Providers who are found to have contravened any of the new requirements may be liable for a range of sanctions including fines and, in very serious cases, a requirement to cease providing the service.
- 1.13 Ofcom has the power to designate functions in relation to the regulation of on-demand services to a co-regulator or co-regulators. Ofcom has not made any designation to date. However, we have consulted on proposals to designate the Association for Television On Demand ('ATVOD') and the Advertising Standards Authority (the 'ASA') as the co-regulators for editorial content and advertising on VOD services respectively. We are continuing to work with both organisations towards adopting a co-regulatory approach. Although Ofcom has not yet designated any of its functions regarding VOD services to ATVOD or the ASA, it hopes to be in a position to do so as soon as possible.

What further obligations will be placed on VOD service providers?

- 1.14 The Government has chosen to implement the AVMS Directive using a two-stage process. The Government intends to bring a second set of regulations into force around mid- or late March 2010 ('the 2010 Regulations'). The 2010 Regulations are expected to include some additional obligations on VOD service providers who are subject to regulation. These include:
- a) a requirement on on all providers to **notify the regulator** within a specified period if they are providing a VOD service;
 - b) a requirement for those providers to **pay a notification fee** (the level has not yet been announced); and
 - c) a requirement for those providers to **retain a recording** of content for 42 days from the date it was last made available to users of the service.
- 1.15 Again, failure to comply with these duties may lead to enforcement action, including fines and, ultimately, a criminal prosecution for providing an illegal service.
- 1.16 We will make available further information on our website:
- about the notification process, and the fee payable, in due course; and
 - about whether Ofcom, or ATVOD and/or the ASA, will be responsible for enforcing the new requirements affecting on-demand programme service providers.
- 1.17 Please email us at vod@ofcom.org.uk if you have any questions.

Annex 1

Application and scope of the regulatory framework on VOD services ('Scope Guidance')

- A1.1 A second version of the Scope Guidance (entitled 'Guidance on who needs to notify') has been produced and is available at:
<http://www.ofcom.org.uk/tv/ifi/vod/obligation/Guidance.pdf>
- A1.2 This updated guidance has been produced to reflect the fact that on 18 March 2010, Ofcom designated the Association for Television on Demand ('ATVOD') as the co-regulator for VOD editorial content.