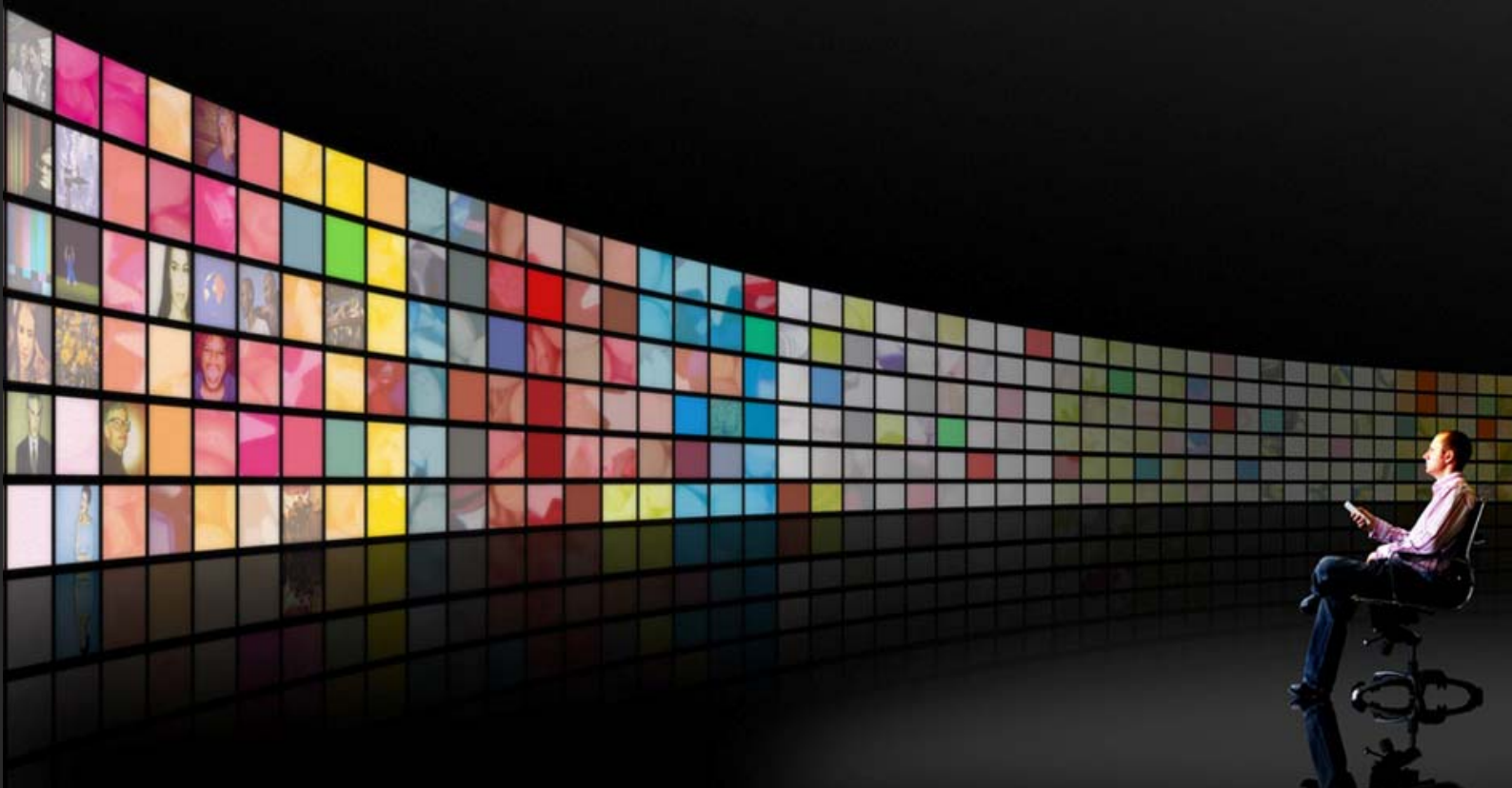


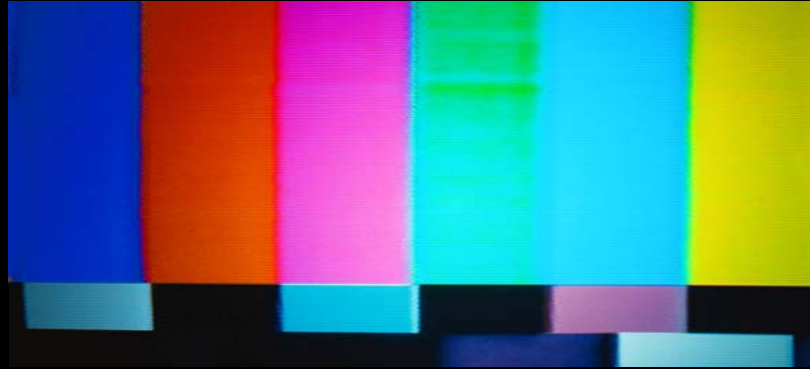
# Audiovisual Media Services Regulations

What do they mean for you?

OLSWANG



# Audiovisual Media Services Regulations



It seems like we have been talking about the EU Audiovisual Media Services Directive (the "**AVMS Directive**") for years and the process of agreeing and implementing this Directive has certainly been a long one. The Audiovisual Media Services Regulations 2009 (the "**AVMS Regulations**") came into force at the end of last year (on 19 December 2009). Although not all of the operational aspects of the new Regulations have been fully implemented, the new regime is now up and running.

As many people will know, one of the principal aims of the AVMS Directive was to ensure that both linear services (i.e. scheduled, one-to-many services like traditional TV channels) and non-linear services (i.e. video-on-demand ("VOD")) are subject to a comparable degree of regulation. The predecessor to this EU legislation, the Television without Frontiers Directive, imposed rules only on broadcast television channels and with the growth in on demand services it was widely felt that the playing field needed to be levelled. Whether or not the final version of the AVMS Directive and the implementing AVMS Regulations achieve that is a different matter.

This note deals primarily with the regulation of VOD services under the AVMS Regulations but other issues that we touch upon are:

- Non-EU satellite TV
- Internet and mobile TV
- Product placement on television

# Regulation of VOD Services



## *Are you caught by the AVMS Regulations?*

The majority of the provisions in the AVMS Regulations deal with the content standards that will now apply to “on-demand services” and the new regulatory structure for these services. Before getting into the detail of these rules, there are two important questions that need to be answered:

1. is your service an “on-demand service” as defined in the AVMS Regulations? If so, then the AVMS Regulations will apply; and
2. if the AVMS Regulations do apply, who is responsible for ensuring compliance?

The answer to the first question lies in the definition of an “on-demand service”. Only a service that meets all of the following criteria is within the scope of the AVMS Regulations:

- its principal purpose is the provision of programmes whose form and content are comparable to those of programmes normally shown on television, i.e. they are "**television-like**" and compete for the same audience as traditional TV shows;
- it is an **on-demand** service, i.e. viewers are able to watch programmes at a time chosen by them and such programmes are received by the user over an electronic communications network;
- there is a person who has **editorial** responsibility for the service;
- it is available to members of the **public**; and
- its provider falls within the **UK jurisdiction**.

The above definition, whilst remaining fairly true to the wording of the AVMS Directive, is far from clear cut; “television-like” is a concept clearly open to interpretation. OFCOM has come to the rescue (at least to some degree) with some guidance as to what is and what is not likely to be within the scope of the AVMS Regulations. For example, whilst long form programmes are likely to be considered to be “television-like” short extracts from shows, which cannot be said to constitute programmes in their own right, may not be. The OFCOM guidance also confirms that online catch up and archive services are included (whether available online or on a television platform) and that on demand includes both “push” and “pull” VOD delivery.

The answer to the second question lies in another definition in the AVMS Regulations. The “audiovisual media service provider” is the person who will be responsible for ensuring that an on-demand service complies with the new rules. This is the person who

has editorial responsibility for the service, meaning that they have “general control” over the programmes offered to users and over the manner in which those programmes are organised. The OFCOM scope guidance focuses on the person who selects the individual programmes that make up a service and refers to the difficulties that will no doubt be faced in distinguishing between service providers, content aggregators and platform operators. The guidance also suggests that the parties to a commercial agreement might try to clarify in that agreement who has editorial responsibility for the service (although this will not be definitive of course).

### *Regulatory structure for VOD*

Whilst OFCOM is the regulator with ultimate responsibility for on-demand services in the UK, the AVMS Regulations allow for OFCOM to designate another regulator to carry out all or some of its functions. In the context of advertising the relevant regulator will be the Advertising Standards Authority, who by way of amendment to the CAP Non-Broadcast Code will impose a mirror of the rules set out in the AVMS Regulations on advertisements on on-demand services. OFCOM is expected to retain responsibility as against media service providers, however the first port of call in the event of any problems is likely to be the advertiser.

The relevant regulator for editorial standards is expected to be the Association for Television On-Demand (“**ATVOD**”). ATVOD has for some time been regulating the VOD industry on a self-regulatory basis. However its appointment by OFCOM will require the organisation to become independent. ATVOD is also expected to issue guidance to service providers to help them to interpret and implement the new rules, although this will of course be non-binding.

The provider of an on-demand service that falls within the scope of the AVMS Regulations will not require a licence from OFCOM (as is the case for broadcast television channels) but will need to notify the relevant regulator in advance of launching, significantly changing or closing down an on-demand service. As part of this notification process the service provider will need to pay a fee. It is also worth noting that operators of on-demand services will also need to retain copies of the content they make available for at least 42 days after that content ceases to be available. This mirrors the requirement on broadcast television channels and enables complaints about content to be dealt with even after the offending programming has been taken down.

Although the AVMS Regulations came into force last year, for reasons not directly related to the AVMS Directive, this notification process and the requirement for payment of a fee have been included in a second set of regulations (the AVMS Regulations 2010), which come into force on 18 March 2010. For those operators already providing an on-demand service as of 18 March 2010 the deadline for notification will be **30 April 2010**.

### *So what are the rules applicable to VOD services?*

For the first time, on-demand services will be required by legislation to comply with content standards beyond those prevailing under the general law (such as obscenity), although these standards are generally not as strict as those which apply in a broadcast environment.

For example, the AVMS Regulations state that if an on-demand programme contains material that might seriously impair the physical, mental or moral development of under 18s then that material can only be made available in such a way that under 18s would not normally be able to see or hear it. By contrast, for a linear service, material that might seriously impair the physical, mental or moral development of under 18s must not be broadcast at all. In addition, on-demand service providers must ensure that their services do not contain any incitement to hatred on grounds of race, sex, religion or nationality.

Other key requirements relate to sponsorship of on-demand programmes and product placement. On-demand advertising is also covered. And aside from editorial and advertising content compliance, on-demand service providers will be subject to duties to promote the production of and access to European works and to ensure that their on-demand programme services are made progressively more accessible to people with sight or hearing disabilities.

#### *Sponsorship*

The AVMS Regulations also include extensive rules on sponsorship which aim to impose similar standards on sponsored programmes on on-demand services as apply to linear television channels. For example, an on-demand programme must not be sponsored for the purposes of promoting cigarettes or tobacco products or by an undertaking whose principal business is the manufacture or sale of cigarettes or tobacco products. The same restriction applies to the promotion of prescription medicines. Also, news and current affairs programmes may not be sponsored and programmes or services that are sponsored must adhere to a number of restrictions, for example:

- the sponsor must not interfere with the editorial independence of the service provider;
- where a service or programme is sponsored for the purpose of promoting goods or services, the programme must not directly encourage the purchase of the goods or services;
- programmes sponsored by alcoholic products must not be aimed at under 18s or encourage immoderate consumption;
- the viewer must be made aware that the programme is sponsored by placing the sponsor's logo and name at the beginning and/or end of the programme; and

- no techniques that may promote a product or service in a subliminal or surreptitious manner may be used.

### *Product Placement*

As well as sponsorship, the AVMS Regulations also include provisions on product placement for on-demand programmes, which are separate to the ongoing process of liberalisation of product placement for television (which is not expected to take effect until later in the summer of 2010). Product placement on on-demand services will not, however, be a free for all. The AVMS Directive contains certain restrictions that apply to all services and so the following rules are new to the on-demand world and apply to programmes that went into production after 19 December 2009.

There can be no product placement in children's programmes and it is completely prohibited in relation to tobacco products and prescription medicines. Product placement is otherwise permitted in films and series, sports programmes and light entertainment programmes provided that various conditions are met including:

- the product placement does not influence the editorial independence of the service provider;
- the programme does not directly encourage the purchase or rental of goods or services;
- the programme does not give undue prominence to the product in question;
- the product or service is not promoted using subliminal or surreptitious techniques;
- the manner of promotion must meet minimum standards in respect of avoiding prejudicial and dangerous behaviour, discrimination, exploitation, etc; and
- if the programme has been produced or commissioned by the service provider or a connected person, viewers must be clearly informed of the existence of the product placement by a signal at the beginning and end of a programme, and when a programme resumes after an advertising break.

### *Advertising*

Under the AVMS Regulations a similar approach is taken with advertising content on on-demand services as is taken with product placement and sponsorship: advertising of tobacco products and prescription medicines is prohibited; alcohol advertising can not be aimed at under 18s and cannot encourage excessive consumption; advertising must be easily recognised as such and may not use any subliminal or surreptitious techniques; and certain minimum standards must be met as described above.

# Satellite services and internet TV



## *Non-EU satellite services*

The underlying principle of the AVMS Directive is that on-demand services (as well as linear channels) need only comply with one set of content standards, regardless of the number of Member States in which they are received. Previously where linear TV channels were made available in Europe by broadcasters who did not have any physical presence here, the Member State with jurisdiction over that broadcaster's service was typically the one to whom the satellite capacity used by that broadcaster pertained. The rules have now changed, however, with the effect that it is the location of the uplink that takes precedence.

Therefore, certain channels using an uplink located in the UK may now fall under the jurisdiction of the UK and fall to be regulated by and require a licence from OFCOM where previously they were regulated in, for example, Luxembourg. The AVMS Regulations also include a process for dealing with so-called forum shopping where services are deliberately established in a particular Member State in order to circumvent stricter rules in the territory which they actually want to target.

## *Internet TV*

The intention of the AVMS Directive was to create a platform neutral system of regulation. In the past, OFCOM has taken no responsibility for regulating linear video services provided via the internet. This is no longer going to be possible – the distinction in terms of regulation will only be between linear services on the one hand and on-demand services on the other, regardless of the method of delivery.

As a result, linear internet services will now require a licence from OFCOM, provided of course that they fall under the UK's jurisdiction, in the same way that satellite, cable and terrestrial channels have done to date. Whilst this is unlikely to be an issue for online simulcasts of OFCOM licensed channels, broadcasters providing ancillary linear services could find themselves requiring further licences from OFCOM (or from another regulator, depending on which jurisdiction the service comes under).

Technically any linear scheduled service should fall to be regulated in this way post implementation of the AVMS Regulations. However not all services which would fall into this category can easily be shoe-horned into the existing system. Mobile loops are a good example. Arguably these are linear services but quite how the existing regulatory regime could be applied to them is not clear.

# Product placement on broadcast television



The issue that has received the most press attention in relation to the AVMS Directive is undoubtedly the relaxation of the rules on product placement on television. Whilst not explicitly addressed in the Television without Frontiers Directive, the AVMS Directive sets out an express prohibition but then allows Member States to derogate from this for certain types of content. Under the AVMS Directive, as with on-demand services, there can be no product placement in children's programmes and it is completely prohibited in relation to tobacco products and prescription medicines. Product placement can be permitted in films, series, sports programmes and light entertainment programmes provided that:

- the product placement does not influence the editorial independence of the service provider in terms of both content and scheduling;
- the programme does not directly encourage the purchase or rental of goods or services;
- the programme does not give undue prominence to the product in question; and
- viewers must be clearly informed of the existence of the product placement by a signal at the beginning and end of a programme and when a programme resumes after an advertising break unless a specific derogation to this is implemented (as has been done for on-demand services).

Having originally said that it would not be implementing the relaxation of the previous rules, DCMS consulted on the issue and in February 2010 the Government announced its decision, stating that it would permit television broadcasters to reach product placement deals with advertisers but that the placement of certain types of products would be prohibited. In particular, the Government's legislation will prohibit the product placement of alcohol, foods high in fat, salt, sugar (HFSS), gambling services, smoking accessories, infant and follow-on formula and over-the-counter medicines. Whilst the Government's decision provoked cries of "nanny state" from various camps, any relaxation of the rules for television has got to be good news for broadcasters and production companies in the current climate. However the fact that more stringent rules are being put in place for television than apply to on-demand services obviously impacts upon the anticipated "level playing field".

These new rules will only be implemented after a further set of regulations are laid before Parliament and following an OFCOM consultation on the necessary changes to the Broadcasting Code. The relaxation will not therefore be implemented until late Summer 2010 at the earliest.

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The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action.

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