

Voice of the Listener & Viewer Response to The Draft AVMS Directive (Implementation) Regulations 2009

Voice of the Listener & Viewer (VLV) is an independent, non-profit-making association, free from political, commercial and sectarian affiliations, working for quality and diversity in British broadcasting. VLV represents the interests of listeners and viewers as citizens and consumers across the full range of broadcasting issues. VLV is concerned with the structures, regulation, funding and institutions that underpin the British Broadcasting system.

Regulation 1

This regulation is fairly straightforward, but VLV would prefer it if the Regulations were cited as *The Audiovisual Media Services Directive Regulations*, rather than the *AVMS Directive Regulations*. This would then make the regulations more accessible to those listeners and viewers who were not *au fait* with the relevant acronym.

Regulation 2

VLV has two essential difficulties with this regulation. First, in many places it uses different terminology to the AVMS Directive. This is a complicated issue, and VLV understands that there are substantial disagreements between regulators in different EU Member States as to how a video-on-demand service is to be defined; and that as a result, the European Audiovisual Observatory is preparing a discussion paper on this issue which should be published at the end of June. Secondly, the UK's draft regulations cut some corners when transposing the requirements of the AVMS Directive into British law. In so doing, they often weaken the consumer interest.

- (a) S. 240A (1) Although the purpose of regulation 2 is to regulate video-on-demand services, the proposed s. 240A (1) uses the term "on-demand programme services".
- *Why is this?*
 - *Is it because the AVMS Directive does not regulate all video-on-demand services, and that other services are regulated under the provisions of the EU's e-Commerce Directive?*
 - *Is the purpose of s. 240A to be to define those video-on-demand services that are caught by the AVMS Directive, and to exclude those that are not?*
 - *VLV is also concerned about the introduction of some weasel words, which may, however, be necessary to deal with putative future video-on-demand services which have a mixed nature, since parts of them would fall within the provisions of these new regulations and parts would not.*
- (b) S. 240A (1) (a) says that "a service is an on-demand programme service if, and in so far as, (a) the principal facility that it offers to users is a video-on-demand facility." This wording seems circumlocutory and almost tautological. Why not simply say "Any service that offers users a video-on-demand facility is a video-on-demand service."? *Can the DCMS clarify and simplify the differences between an on-demand programme service and a video-on-demand service?*
- (c) S. 240A (1) (b) says that the service must be under a person's editorial responsibility. According to the AVMS Directive, the term "editorial responsibility" only extends to the selection and organisation of the programmes in a video-on-demand catalogue, which clearly excludes a lot of what users of video-on-demand services would normally consider to be the editorial responsibility – namely the responsibility for the programme content. Regulation 2 follows the Directive's narrow definition of "editorial responsibility" in s. 240A (1) (4), but then goes on to say "but a service may be regarded as being under a person's editorial

responsibility whether or not that person has control of the content of individual programmes or of the distribution of the service.” This renders the whole definition unclear.

- *What, precisely is meant by the words “but a service may be regarded”?*
 - *Who may so regard that service? Ofcom? The law courts? The ordinary user?*
 - *Is the purpose of the additional words simply to say that in no way does the person who has editorial responsibility have to be concerned about the content of individual programmes, or the manner in which they are distributed?*
 - *Or does it mean the opposite, namely that Ofcom (or the law courts) may regard the person as having editorial control in the traditional legal sense, even though they have no control over either programme content or the mode of distribution?*
 - *Can the DCMS clarify these issues?*
- (d) S. 240A (1) (c) says that the VOD service must be made available for use by members of the public, but s.240A (9) makes it clear that this also includes subscription services, which are open to members of the public.
- *Does this mean that all subscription services will be caught by the AVMS Regulations?*
 - *Or is it designed to encourage providers of VOD subscription services VOD services, not to make their VOD programmes available on an individual basis via a catalogue (which is what the Directive appears to envisage), but instead to require subscribers to pay for the whole package.*
 - *Is it intended that a TV subscription service, which includes one or two programmes which are only available to subscribers on an “on-demand basis” – e.g. by requiring them to pay a premium charge for those programmes – would be classified as an “on-demand programme service”?*
- (e) S. 240A (2) requires a “video-on-demand facility” to fulfil three requirements. First, the user must be able “to make individual selections of programmes of a kind falling within subsection (3) from a range of such programmes (or of such programmes along with other kinds of programmes). Second, the user must be able to receive such programmes by means of an electronic communications network (whether the programmes are so received before or after the user has selected which programme to view). And third, to view the programmes selected at a point in time of the user’s choosing.
- (f) Consider the third condition first. S. 240A (5) specifies that the third condition can be met “even if the point in time at which the programme can be viewed must fall within a period specified by the provider of the service.” This will mean that it is the provider of the service who can ultimately prescribe the time when the user can watch the programme. Is this intended to cover the period of availability for a catch-up TV service (which VLV understands that some EU Member States do not consider will fall within the provisions of the AVMS Directive)? Or is it intended to allow the provider of a subscription service to allow its subscribers only a very narrow time window in which to watch a programme – for example a recording of a premier league football match. Either way, the current formulation could lead to a *video-when-supplied* service, rather than a *video-on-demand* service. *If this were to be the case, VLV would consider that the UK had not properly implemented the provisions of the Directive.*
- (g) The second condition in s. 240A (2) would also allow the provider to charge a subscription to access the VOD service, but not necessarily also to charge the user to access an individual programme. This would allow a subscription television service to morph into an “on-demand programme service”, and thus to enjoy a lower level of regulatory obligations than if it were to continue to be a subscription television service. *. If this were to be the case, VLV submits that the UK has not properly implemented the provisions of the Directive.*
- (h) Finally, the first condition in s. 240A (2) would allow the provider to offer a mixed service of some programmes, and some other material, such as, let us say, a social networking facility. *VLV is concerned about this possibility, but is happy to reserve its judgement until the European Audiovisual Observatory has published its discussion paper.*
- (i) Finally, there is a danger that, by reclassifying some television services as ‘video-on-demand services’, the new definition of “at a point of time of the user’s choosing” the draft regulations could remove the current right of viewers to make off-air recordings from television broadcasts

for time-shifting purposes, VLV therefore requests that the UK regulations maintain the clear-cut distinction between a television broadcast and an on-demand audiovisual media service which is set down in the AVMS Directive. Article 1(g) of the Directive defines “an audiovisual media service provided by a media service provider for the viewing of programmes at a moment chosen for the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.” In VLV’s view, the draft UK regulations do not fulfil this requirement.

- (j) Furthermore, VLV would like the words of s. 240A (2) (b) to be amended to read: “to receive such programmes by means of an electronic communications network.” This would then align the proposed Statutory Instrument more closely with the Copyright and Related Rights Regulations (SI: 2003: 2498) which implements the EU’s Copyright Directive (2001/29/EC). The latter draws a clear distinction between those works which are made available for the consumer to watch by electronic means at a time and a place of his/her own choosing (from which off-air recordings for time-shifting purposes may not be made), and other means of distributing protected works, such as television broadcasting and near video-on-demand services, from which copies of the works may generally be made for fair use purposes, such as time-shifting, criticism or review, and reporting news and current affairs.
- (k) S. 240A (3) of the Draft AVMS Regulations defines the programmes referred to in s. 240A (2) as “those (*and only those*) whose form and content are comparable to the form and content of programmes of a kind *normally* included in television programme services.” [VLV’s emphases] VLV finds this a very confusing definition. There seems to be an implicit contradiction between “and only those” and “normally”. In article 1(b), the AVMS Directive simply uses the phrase “whose form and content is comparable to the form and content of television broadcasting”. VLV submits that the UK should retain the original words in the Directive.
- (l) Finally, article 3(8) of the Directive, provides that, “in the event of a conflict between a provision of Directive 2000/31/EC [the e-Commerce Directive] and a provision of this Directive, the provisions of this Directive shall prevail unless otherwise provided for in this Directive.” VLV therefore proposes that a new sub-section be added to the proposed s. 240A, which reads “In the event of a conflict between a provision of this section and The Electronic Commerce (EC Directive) Regulations (Statutory Instrument 2002: 2013), the provisions of these regulations shall prevail.”
- (m) Section 240B – The regulatory authority. This section presents VLV with further problems. First, section 240B (1) says that “Any reference in this Part to a regulatory authority is a reference to - ...” We assume the word “Part” to refer to Part 3 of the 2003 Communications Act, within which s. 240 et seq. falls. On the other hand, the phrase ‘regulatory authority’ occurs throughout the whole of the draft regulations, so presumably it means this part of the regulations. VLV therefore proposes that the words “this Part” should be changed to “these Regulations”
- (n) The definition in s. 240B (1) defines “a regulatory authority” as “(a) OFCOM, and (b) any body designated as such under subsection (2) to the extent provided for by the terms of the designation”. The use of the word “and”, and not the word “or” between OFCOM and the designated body, implies that the term “regulatory authority” means *both* OFCOM and any designated body This is fine, except that ss.240C (1), 240C (3), and 240C (4) (a) use the phrase “the appropriate regulatory authority”, followed by a further complicated definition in s. 240C (7) of the phrase “the appropriate regulatory authority”, which also applies to ss. 240D and 240F. However, s.240D (1) uses the phrase “a regulatory authority ... in relation to which that authority is the appropriate regulatory authority”, but then goes on in subsequent subsections of that section simply to refer to “the regulatory authority”. Moreover, s. 240E, which is not covered by the definition of “the appropriate regulatory authority” in s. 240C (7), uses the phrase “a regulatory authority”. Does this mean “OFCOM and ...any body designated as such” as specified in s. 240B (1)?
- (o) S. 240B (7) also says that “A regulatory authority may supply another regulatory authority with information.
- (p) VLV proposes that the regulations be rewritten to specify whether the words “regulatory authority” mean (a) OFCOM; (b) any body designated by OFCOM under subsection (2); or (c) OFCOM and any body designated by OFCOM under subsection (2).

- (q) S. 240B (2) will allow OFCOM to designate any body corporate to be a regulatory authority over a substantial number of areas, which are specified in ss. 240C to 240 E, and ss. 240I to 240O of the Regulations. However, there is no oversight by Parliament over the devolution of these regulatory powers. The only duties imposed on OFCOM are the five set down in s. 240B (6), the first three of which are virtually tautological. S. 240B (6) (e), for example, refers to “such of the matters mentioned in section 3(4) as appear to them [i.e. OFCOM] appear to them to be relevant.” VLV takes this to mean s. 3(4) of the 2003 Communications Act, which allows OFCOM wide discretionary powers to do, or not to do, whatever it feels like. Therefore the proposed s. 240B (6) (e) virtually negates article 3(7) of the Directive which specifically requires that co- and/or self-regulatory regimes shall be “broadly accepted by the main stakeholders in the Member States concerned, and provide for effective enforcement”. VLV therefore requests the following provisions to be added, in line with the requirements in article 3(7) of the AVMS Directive. *“OFCOM shall be satisfied (i) that the body is broadly accepted by the main stakeholders concerned, including UK citizens and potential consumers of the service, and (ii) that it will provide for effective enforcement.*
- (r) S. 240B (3) (c) would allow OFCOM to designate a co- and/or self-regulatory body for a period “not exceeding 10 years, as is specified in the designation”. VLV considers that this is far too long, and we propose that the maximum period should be reduced to 5 years, subject of course, to renewal.
- (s) S. 240B (4) proposes that OFCOM must publish any designation of a self- and/or co-regulatory body “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.” VLV welcomes this, but the provision also needs to be strengthened in order to bring it into line with current administrative practice. VLV therefore submits that *“OFCOM must publish any designation, and proposals for designation, under subsection (1) in such manner as they consider appropriate for bringing them to the attention of persons, including UK citizens and consumers, and potential users of the service who, in their opinion, are likely to be affected by it.”*
- (t) S. 240B (9) appears to exempt both the BBC and the Welsh Authority from the regulatory oversight by OFCOM of any of their on-demand services. VLV would welcome guidance from the DCMS as to how the UK intends to implement the provisions of the AVMS Directive in relation to VOD services offered by the BBC or the Welsh Authority.
- (u) S. 240C lists the requirements for providers of on-demand programme services to notify regulatory authority. VLV therefore returns to the problems, which we raised earlier about the precise meaning of the words “regulatory authority”. VLV submits that the regulations should make it clear that providers of on-demand services will be expected to provide OFCOM, as well as any self- and/or co-regulatory bodies, with copies of all notifications that they are required to send to those bodies.
- (v) S.240E (2) uses the phrase “Every provider of a United Kingdom on-demand programme service”. The phrase is ambiguous, and could either mean “every provider of an on-demand programme service that is licensed in the United Kingdom”, or “every provider of an on-demand programme service that can be received in the United Kingdom”. VLV assumes that it means the former, which means that the phrase also includes on-demand programme services which are licensed in the UK, but which are directed at non-UK users. VLV asks the DCMS to clarify this and to amend the draft regulation accordingly
- (w) S.240E (3) requires a regulatory authority to “take such steps as they consider appropriate for encouraging providers of on-demand programme services progressively to make their services accessible to people with sight or hearing disabilities.” The words used in article 3c of the Directive are stronger and less convoluted, namely to: “encourage providers of on-demand programme services to ensure that their services are gradually made accessible to people with a visual or hearing disability.” VLV submits that the regulations should use the same words as those in the Directive. This would clearly put the responsibility for encouragement on the regulatory authority. Moreover, it would require the (relevant) regulatory authority to report on the measures which it has taken to encourage providers of service to make their services accessible to disabled people.
- (x) S. 240E (4) is a very weak implementation of the EU’s ambition, in article 3i of the Directive, to provide users with a quota of European programmes in their catalogue. VLV recognises that the UK Government has traditionally used the phrase “where practicable and by appropriate means” in the TWF Directive, virtually to negate the EU’s intention for a European quota

- (including UK programmes). *Nevertheless, VLV submits that in the regulations, the plural should be replaced by the singular. Namely, instead of “securing that on-demand programming services promote”, it should read “securing that each on-demand programming service promotes”.*
- (y) Moreover, article 3i of the Directive suggests a series of measures by which this could be achieved, and if regulation in this field is to be devolved *VLV therefore submits that the full text of article 3i should be included in the regulations by adding the words “Such promotion could relate to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the provider of the on-demand service.” Furthermore, the UK regulations should also require the (relevant) regulatory authority to report on the measures which it has taken to encourage providers of service to include an adequate proportion of European works in their catalogue.*
- (z) S. 240E (5) concerns the development of codes of conduct for audiovisual commercial communications [i.e. advertisements] which accompany or are included in children’s programmes. *VLV submits that the words “must take such steps as they consider appropriate for encouraging providers of on-demand programme services” should be amended to use the words in art. 3e (2) of the Directive, which are stronger, namely: “shall encourage providers of on-demand programme services”.*
- (aa) S. 240E (6) defines the types of food involved in s. 240E (5), but the proposed definition is far weaker and full of weasel words. *VLV submits that the regulations should use all the words contained in the Directive. This means that the words “the promotion of foods or beverages which contain nutrients and substances, excessive intake of which in the overall diet may be detrimental” are replaced by “the promotion of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.”*
- (bb) S. 240F sets out the requirements demanded of on-demand programme services. S. 240F (2) purports to fulfil the requirements in article 3a of the Directive, for each VOD service to provide the user with information about its name, location, and the relevant regulatory authority. Nevertheless some editing has gone on, which would allow a VOD service to make it difficult for the user of a VOD service to track down the information required. *VLV therefore submits that in order to implement properly the wording of the Directive, the words “easily, directly and permanently” should be inserted in line 2, between the words “information” and “accessible”.*
- (cc) S. 240F (2) (b). As required by article 3a, paragraph 1 of the Directive, *VLV submits that the words “at which the on-demand programme service provider is established” should be added.* This will be especially important for non-UK users of on-demand programme services.
- (dd) S. 240F (2) (c) In line with the stipulation in article 3a (c) of the Directive, *VLV submits that the words “rapidly in a direct and effective manner” should be inserted between the words “provider” and “including”.*
- (ee) S. 240F (2) (d) *VLV submits that the words “and contact details” should be added between the words “identity” and “of the bodies which”.* It is no good the user of a service being told who the regulatory bodies are, but knowing how to contact them.
- (ff) S. 240F (2) (3) *VLV is puzzled by this subsection, which implements article 3b of the Directive. However, article 3e (c) (ii) of the Directive contains a more extensive set of prohibitions against discrimination in audiovisual commercial communications, a term which includes advertisements, sponsored programmes and programmes containing product placement. Draft regulation 240G (5) implements these prohibitions in relation to advertisements, but the regulations do not include any such prohibitions in relation to programmes which are sponsored or which contain product placement. VLV submits that either this section, or both sections 240H and 240I, must be amended in order to ensure that the provisions of article 3e (c) of the Directive are properly implemented.*
- (gg) S. 240F (7) *VLV again queries the use of the word “Part”, see our comments in paragraph (n) above.*

- (hh) S. 240F (9) (b) *VLV welcomes the provision that the on-line provider will be asked to keep a copy of every programme and advertisement for a period of 60 days, from the day on which it is no longer available. But VLV submits that this should be increased to 90 days, as 60 days would be too short a period for non-UK users of a trans-frontier service to register a complaint via their domestic regulatory body, in line with the provisions of articles 2, 3 and 23b of the Directive. (Co-operations between Member States)*
- (ii) S. 240F (10) *VLV submits that unless the duties and responsibilities of the BBC Trust and the Welsh Authority are specifically amended (which does not appear to be the case), paragraph (b) of subsection (9) (which requires the provider of a VOD service to retain copies of their programmes) should also apply to the BBC and the Welsh Authority .*
- (jj) S. 240G relates to advertisements included in on-demand programme services. This regulation is basically acceptable, in that it transposes the words of article 3e (1) of the Directive, which applies to all audiovisual commercial communications, except that it omits paragraph (f) of article 3e (1) which prohibits advertisements for “medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls (i.e. the UK). *VLV submits that this prohibition must be added to section 240G, presumably as subsection (8) with subsequent renumbering.*
- (kk) S. 240G also includes, as required by the AVMS Directive, a ban on surreptitious advertising. But the location of this provision within the section on advertising raises another issue about how this ban is to be regulated, to which we shall return below.
- (ll) S. 240H refers to Sponsorship. The draft regulation implements article 3f of the Directive is acceptable as far as it goes, except that it fails to implement article 3f (3) of the Directive, which concerns the sponsorship by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment. Moreover, as article 1 (h) of the Directive makes clear, sponsorship is a form of audiovisual commercial communication. *VLV therefore submits that the inclusion of the relevant prohibitions on sponsorship of medicinal products and medical treatments, and for the prohibitions on advertisements included in regulation S. 240G (including VLV’s proposed addition) should be added to s. 240H.*
- (mm) Furthermore, article 3f (4) of the Directive prohibits the sponsorship of news and current affairs programmes, and indicates that Member States may choose to prohibit the showing of a sponsorship logo during children’s programmes, documentaries and religious programmes. *VLV therefore submits that s. 240H should include a specific prohibition of the sponsorship of news and current affairs programmes, and a prohibition of the showing of a sponsorship logo during children’s programmes, documentaries and religious programmes.*
- (nn) S. 240I refers to product placement in on-demand programme services. The wording follows the wording of the Directive fairly closely, but deploys the most liberal interpretation possible. While it does not contradict Secretary of State Andy Burnham’s statement to the House of Commons, it undermines the spirit of what he led Parliament to believe about the future of product placement.
- (oo) S. 240I (2) uses the phrase “any connected person” in relation to making of any payment, or other valuable consideration, in return for product placement. *VLV welcomes the recognition in the regulations that there are many oblique methods by which payment for product placement may be made.* There is no definition of the phrase “any connected person”, however. Article 3g (2) of the Directive uses the phrase “a company affiliated to the media service provider. *VLV submits that the regulations should include a definition of “any connected person, such as “affiliated by means of common ownership or company directorship, or significant investments, shareholdings, or employment status.”*
- (pp) Article 3g (2) of the Directive allows derogation from the overall ban on product placement “in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes, or – when there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes with a view to their inclusion in a programme.” [VLV’s underlining] Note the word, ‘or’. This is different from the word ‘and’. Ss. 240I (4) and 240I (5) of the draft regulations, if taken together, would allow both product placement and prop placement in the same programme. *VLV submits that the regulations should make it clear that it will be impossible to have both prop placement and product placement in the same programme.*

- (qq) S. 240I (4) (a) (ii) states that product placement is permitted in a film or series made for a television programme service or for an on-demand programme service. This is permitted by article 3g (2) of the Directive. But it could lead to the production by UK television services of programmes containing product placement which are initially released via an on-demand programme service, and are stockpiled for television release later. The phrase “a television programme service” could also be argued to include a foreign television programme service, such as an American TV network. In order to avoid any ambiguity and to ensure the implementation of Secretary of State Andy Burnham’s undertakings to Parliament, *VLV submits that the words “but not a UK television programme service”, be inserted into s. 240I (4) (a) (ii) after the words “a television programme service”.*
- (rr) Article 3g (2) of the Directive also states that the derogation from the overall ban on product placement shall not apply to children’s programmes. S. 240I (4) (a), however, uses the words “except to the extent that the programme concerned is a children’s programme.” Once again, weasel words seem to be creeping in, by somehow envisaging that a programme can be partly a family programme (which could include product placement) and partly a children’s programme (which would not). *VLV submits that the words “to the extent that the programme concerned is” are removed from the draft regulation.*
- (ss) S. 240I (9) defines a “children’s programme” as “a programme which is targeted at and intended for viewing primarily by persons under the age of sixteen. Given (i) the double requirement of both being targeted at *and* intended for viewing by children, and the fact that the UN Convention for the Protection of Children refers to “children aged seventeen and under”, *VLV submits that the definition should be amended to read: “A children’s programme is a programme which is targeted at, or intended for viewing, primarily by persons under the age of seventeen.”*
- (tt) S. 240I (7) transposes the requirement in the Directive for the user to be notified about the presence of product placement (but not prop placement) in a programme, but allows the regulatory authority, which may mean a self- and/or co-regulatory authority, to be the judge of whether or not the provider of the on-line programme service has properly notified the user. This fulfils the requirement of the Directive, but may make it difficult for a unsatisfied user to know to whom to complain.
- (uu) There is a further problem, which is not tackled in either the Directive or the regulations, which relates to the point in time at which the user is notified that s/he is watching a programme which contains product placement. At the moment, the regulations only require the user to be notified at the start of the programme, by which time s/he may have paid to watch it. *VLV considers this to be unsatisfactory, and submits that users must be informed that they will be watching a programme containing product placement before they actually have to pay for it.* At the moment, there are a number of scenarios. If the user has to pay to watch the online programme as part of a subscription to an online service, then s/he should be informed before they take out a subscription. If it is a mixed service, which contains some programmes which are financed by product placement, and some which are not, then there should be separate subscriptions for each category of programme. If, on the other hand, which is what the Directive appears to envisage, there is a catalogue of programmes from which users can choose to pay to watch individual programmes, then they should be *informed in the catalogue*, that the programme for which are about to pay will be one which has been financed by product placement. *VLV submits that s. 240I (7) should be expanded to take account of these problems.*
- (vv) Articles 3g (2) (a) (b) and (c) of the Directive require programmes containing product placement to meet all of the following requirements: (i) their content ... shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider; (ii) they shall not encourage the purchase or rental of goods or services , in particular by making special promotional references to those goods or services; and (iii) they shall not give undue prominence to the product in question. *VLV submits that all three requirements to be added to s. 240I.*
- (ww) Article 3f (4) of the Directive states that News and Current Affairs Programmes shall not be sponsored. In private correspondence with a member of VLV, Christophe Forax, a member of Commissioner Reding’s Cabinet, has advised him that this implies that that news and current affairs programmes should not contain product placement. *VLV therefore submits that product placement should be prohibited in news and current affairs programmes.*

- (xx) As noted above, article 1h of the Directive states that product placement (but not prop placement) is a form of audiovisual commercial communication. *VLV therefore submits that programmes containing product placement must also meet all the requirements of article 3e of the Directive.*
- (yy) S. 240I (9) includes a series of definitions relating to product placement. *VLV submits that the following definitions should be modified:* (i) a “children’s programme” should be a programme which is targeted at or intended primarily for viewing by persons under the age of seventeen” (the UN Convention on the Protection of Children refers); (ii) “film made for cinema” means a film made with a view to it being shown first in a cinema, and has been shown, in a UK cinema” (the definition of a film in s. 1181 of the CTA 2009 is very wide, and includes a film which can have up to 26 parts).
- (zz) S. 240 (I) (10) The Directive enters into force on 19 December 2009, *VLV therefore submits that this section should be amended to read “This section shall apply to all programmes made available to users in a VOD service after 19 December 2009.”*
- (aaa) S. 240K relates to the enforcement of s. 240F. In general, the provider of the on-line service is presumed to be innocent, until judged to be guilty by the regulatory authority, which may, of course, be a self- or a co-regulatory authority. The difficulty with this procedure is that the provider may continue to make the putatively irregular service available to users, while the regulatory authority is deciding whether or not it is, indeed, breaching the regulations. However, s. 240K (3) allows (but does not mandate) the regulatory authority to require the provider to withdraw the contravening programme or advertisement, if it has grounds for believing that a contravention has taken place, and that the contravention is serious. While the powers of the regulatory authority may inhibit irregular behaviour by the on-line service provider, none of them will recompense a user of the service who may have been misled into unwise economic behaviour by the misleading programmes or advertisements of the provider of an on-line programme service. Moreover, providers of an online programme service will also have access to the electronic addresses of people who use their services.
- (bbb) This brings into question the question of the relationship between the provisions of the AVMS Directive, and those of the Unfair Commercial Practices Directive (Directive 2005/29/EC of 11 May 2005) and the Data Protection Directive (Directive 95/46/EC). Although the AVMS Directive does not co-ordinate any commercial practices in the areas of unfair competition or misleading advertising, it does break down the traditional separation, which was in the Television without Frontiers Directive, between advertisements and programmes. The UCP Directive definitely applies to the provision of an online programme service however, since it is clearly a commercial practice. Article 2(d) of the Directive defines a commercial practice as “any act, omission, course of conduct or representation, commercial communication including advertising and marketing by a trader, directly connected with the promotion, sale or supply of a product to consumers.” Thus it applies to audiovisual commercial communications, such as self-promotion by online programme service providers, programme sponsorship, product placement and (the ban on) surreptitious advertising. On the other hand, the UCP Directive only comes into force when users enter into an economic transaction as a result of the activities of the provider of an on-line media service provider. *VLV requests the DCMS to advise where the proposed regulations will deal with this problem.*
- (ccc) There is a further problem about the regulation of the ban on surreptitious advertising. At the moment, the ban is located in s. 240G which deals with advertising. Advertisements are currently regulated by the Broadcasting Code of Advertising Practice of the ASA. Generally, this has worked well, as advertisements have been quite separate from programmes. However, the introduction of product placement, and the associated ban on surreptitious advertising, raises the issue of which will be the appropriate regulatory authority to determine whether on-line programmes, not on-line advertisements, are observing the rules on product placement and the ban on surreptitious advertising. If it were to be the ASA, this would require quite a different enforcement mechanism to that for advertisements. If it were to be OFCOM, this would also require OFCOM to change its current regulatory practices. The provisions of ss. 240L, 240M, 240N, 240O and 240P give no guidance on this issue. *VLV therefore requests the DCMS to provide more detail on how the ban on surreptitious advertising and the observance of the regulations on product placement are to be regulated, bearing in mind the provisions of the Unfair Commercial Practices Directive.*

(ddd) *A similar problem relates to the use by providers of VOD services on the use of personal data arising from the selection of programmes from an online catalogue. Once again, VLV requests the DCMS to provide more detail on how the personal data of users of VOD services will be protected from misuse by the providers of those services.*

Regulation 3

(eee) The amendment to s. 232(b) of the [Communications] Act seems acceptable, except that *VLV submits that 'principle' should be respelled as 'principal'.*

(fff) The removal of s. 233 (3) is more significant as it will permit the advent of two-way licensable content services. This puts the provider of the service and the users of the service in direct electronic contact, permitting the introduction of direct selling operations. This raises the relevance of the Unfair Commercial Practices Directive (see notes above) but also the Data Protection Directive. *VLV therefore requests advice from the DCMS as to why there is nothing in the Draft regulations about the protection of the personal data of users of the online programme services.*

Regulation 4

(ggg) The addendum to s. 319 (2) (f) says nothing about surreptitious advertising. *VLV submits that it should be amended to read "that product placement and surreptitious advertising is prohibited, save to the extent that it is permitted by section 320A."*

Regulation 5

(fff) The amendments to s.320A of the Communications Act appear to contradict Secretary of State Andy Burnham's statement to the House of Commons. They

- (i) Define product placement in television programming services (subsections (1) and (2)) and
- (ii) Permit product placement in films made for cinema, or in acquired programmes or series, which have been made for a television programme service or an on-demand programme service. (subsections (3) and (4)).

In general, the Regulation complies with the requirements of the AVMS Directive, although they remain subject to VLV's earlier caveats on product placement in online programme services.

But more seriously, the draft regulations appear to open up a situation where holders of television licences will be able to show programmes containing product placement provided that the acquired programmes have been produced or commissioned by a company connected to the BBC or the Welsh Authority [e.g. an independent producer], or the holder of a relevant Broadcasting Act licence [VLV takes this to be a licence under either the 1990 or the 1996 Broadcasting Acts]. This amendment therefore appears to open up the possibility of inter-company trading between companies holding (UK) television licences (including ITV's separate regional licences), and any independent producers commissioned by them, of programmes containing product placement. This would allow a programme containing product placement, which has been produced or commissioned by a UK television company, to be purchased by another UK television company and to be shown on television. This appears to undermine the intent of Secretary of State Andy Burnham's statement to Parliament on product placement in television programmes. *VLV submits that this section should be reworded to make it clear that inter-company trading by these companies cannot be used to facilitate the showing on television of programmes containing product placement.*

Moreover, from an EU perspective, it could be argued that this is contrary to free trade in the European Union, since it appears to restrict these freedoms to acquire programmes containing product placement to essentially UK companies. *VLV therefore submits that this section should be reworded in order to rectify this situation.*

Regulation 6

This arises from the provisions of article 3 of the AVMS Directive. S. 335A seems reasonable, except that it ignores the requirement in art. 3(2) of the Directive that the other EEA state should receive a reply within two months. *VLV therefore proposes that the words "in less than two months" should be added to s. 335A (1).*

Regulations 7 to 10

VLV has no comment.

10 June 2009