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STATUTORY INSTRUMENTS

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**2020 No. 1062**

**The Audiovisual Media Services Regulations 2020**

**PART 3**

**On-demand programme services**

**20.** The Communications Act 2003 is amended in accordance with this Part.

**21.** In section 341 (imposition of penalties on the Welsh Authority)(1), for subsection (1)(jb) substitute—

- “(jb) the requirements imposed by section 368CB, section 368D and section 368E(4) (on-demand programme services), except—
- (i) the requirements imposed by section 368D(1) and section 368E(4) so far as they relate to advertising, and
  - (ii) the requirement imposed by section 368D(3)(za);”.

**22.** Before section 368A insert—

**“368ZA Audiovisual programmes**

This Part applies in relation to the provision of programmes with or without sounds which consist of moving or still images, or of legible text, or of a combination of those things.”.

**23.** In section 368A (meaning of “on-demand programme service”)(2)—

- (a) in subsection (1)—
  - (i) after “a service” insert “(or a dissociable section of a service)”;
  - (ii) in paragraph (a), for the words “the form and content of which” to the end, substitute “(as described in section 368ZA)”;
- (b) in subsection (2)—
  - (i) after “Access to a service” insert “(or dissociable section of a service)”;
  - (ii) in paragraph (a), after “the service”, in both places, insert “(or dissociable section of the service)”;
- (c) in subsection (3), after “the service” insert “(or dissociable section of the service)”;
- (d) in subsection (4)—
  - (i) after “a service” insert “(or dissociable section of a service)”;
  - (ii) after “the service” insert “(or dissociable section of the service)”.

**24.** In section 368B (the appropriate regulatory authority)(3)—

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(1) Section 341 was amended by [S.I. 2009/2979](#) and [2010/419](#).  
(2) Section 368A was inserted by [S.I. 2009/2979](#).  
(3) Section 368B was inserted by [S.I. 2009/2979](#), amended by [S.I. 2010/419](#); there is another amending instrument but it is not relevant.

(a) before subsection (1), insert—

“(A1) OFCOM is the appropriate regulatory authority for all purposes of this Part in relation to the BBC (and, in relation to the BBC, OFCOM may not designate any other body to be the appropriate regulatory authority for any of those purposes).”;

(b) in subsection (1), for “subsection (9)” substitute “subsections (A1) and (9)”.

**25.** After section 368B insert—

*“List of providers*

**368BZA Maintenance of list of providers**

(1) OFCOM must establish and maintain an up to date list of persons providing an on-demand programme service.

(2) The list must indicate in respect of each person which of the criteria set out in paragraphs 2 to 5 of Article 2 of the Audiovisual Media Services Directive is the basis for the decision that they are under the jurisdiction of the United Kingdom (see section 368A(1)(e)).

(3) OFCOM must notify the European Commission of the contents of the list and of any updates to it.”.

**26.** In section 368BA (advance notification to appropriate regulatory authority)(4), after subsection (3) insert—

“(4) In this section, “significant differences” includes any change that may affect the determination of jurisdiction in accordance with paragraphs 2, 3 and 4 of Article 2 of the Audiovisual Media Services Directive.”.

**27.** In section 368BC (accessibility for people with disabilities)(5)—

(a) in subsection (1)—

(i) for “their services” substitute “such services”;

(ii) for “affecting their sight or hearing or both” substitute “, including, in particular, people with disabilities affecting their sight or hearing, or both”;

(b) in subsection (2), after paragraph (c) insert—

“(d) requirements for providers of on-demand programme services to report annually to the appropriate regulatory authority about the accessibility of such services.”;

(c) in subsection (4)(b) omit “affecting their sight or hearing or both”.

**28.** In section 368C (duties of the appropriate regulatory authority)(6)—

(a) in subsection (1), for “section 368D” substitute “sections 368CB and 368D”;

(b) for subsection (2)(7) substitute—

“(2) The appropriate regulatory authority must encourage providers of on-demand programme services to develop accessibility action plans with a view to continuously and progressively making such services more accessible to people with disabilities.

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(4) Section 368BA was inserted by [S.I. 2010/419](#).

(5) Section 368BC was inserted by section 93 of the Digital Economy Act 2017 ([c. 30](#)).

(6) Section 368C was inserted by [S.I. 2009/2979](#).

(7) Subsection (2) of section 368C was repealed by section 93(3) of the Digital Economy Act 2017, but that repeal is not yet in force. See regulation 52 of these Regulations, which repeal section 93(3) of that Act.

(2A) The appropriate regulatory authority must provide a single, easily accessible (including by people with disabilities), online point of contact for providing information and receiving complaints regarding accessibility of on-demand programme services to people with disabilities.”;

(c) omit subsection (3);

(d) after subsection (4) insert—

“(5) The appropriate regulatory authority must draw up, and from time to time review and revise, guidance for providers of on-demand programme services concerning measures that may be appropriate for the purposes of section 368E(4) (ensuring specially restricted material is not available to under-18s).”.

**29.** In section 368CA (code on accessibility for people with disabilities)(8)—

(a) in subsection (1)(b)—

(i) for “their services” substitute “on-demand programme services”;

(ii) omit “affecting their sight or hearing or both”;

(b) in subsection (2), after “revision accessible to” insert “people with disabilities, in particular”.

**30.** Before section 368D insert—

**“368CB Quota for European works**

(1) A person providing an on-demand programme service must secure that, in each year, on average at least 30% of the programmes included in the service are European works.

(2) A person providing an on-demand programme service must ensure the prominence of European works in the service.

(3) Subsections (1) and (2) do not apply to a person providing an on-demand programme service in relation to any period throughout which—

(a) the service has a low turnover or a low audience, or

(b) it is impracticable or unjustified for those subsections to apply because of the nature or theme of the service.

(4) An exemption under subsection (3)(b) is at the discretion of the appropriate regulatory authority.

(5) Where a person does not provide an on-demand programme service for a whole year, compliance with subsection (1) is to be assessed in relation to the period in that year during which the person does provide the service.

(6) In assessing a provider’s compliance with subsection (1), any period for which an exemption under subsection (3)(a) or (b) applies to the provider is to be discounted.

(7) In this section—

“European works” has the same meaning as in the Audiovisual Media Services Directive (see Article 1(1)(n), (2) and (3) of that Directive) and includes works deemed to be European works by Article 1(4) of that Directive;

“programmes” does not include advertisements, news programmes, sports events, games, teletext services or teleshopping.

(8) This section is to be interpreted in accordance with the Communication from the European Commission (2020/C223/03) “Guidelines pursuant to Article 13(7) of the

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(8) Section 368CA was inserted by section 93 of the Digital Economy Act 2017.

Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover” published in Volume 63 of the Official Journal of the European Union on 7 July 2020(9).”.

**31.** In section 368D (duties of service providers)(10)—

- (a) in subsection (1), for “368E to 368H” substitute “368E(1) and (2) and 368F to 368H”;
- (b) in subsection (2)—
  - (i) after paragraph (c) insert—
    - “(ca) a statement that P is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive;”;
    - (ii) in paragraph (d), for “the service” substitute “the on-demand programme service”;
- (c) in subsection (3), before paragraph (za) insert—
  - “(zza) provide the appropriate regulatory authority with a copy of any accessibility action plan drawn up by the provider as mentioned in section 368C(2);”.

**32.** In section 368E (harmful material)(11)—

- (a) in subsection (1), for “hatred” to the end substitute “violence or hatred against a group of persons or a member of a group of persons based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg on 12 December 2007(12).”;
- (b) in subsection (3), before paragraph (a) insert—
  - “(za) material the inclusion of which in an on-demand programme service would be conduct required by any of the following to be punishable as a criminal offence—
    - (i) Article 5 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism(13),
    - (ii) Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography(14), or
    - (iii) Article 1 of Council Framework Decision (2008/913/JHA) of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law(15).”;
- (c) for subsection (4) substitute—
  - “(4) A person providing an on-demand programme service must take appropriate measures to ensure that any specially restricted material is made available by the service in a manner which secures that persons under the age of 18 will not normally see or hear it.
  - (4A) The measures are to be proportionate to the potential of the material to harm the physical, mental or moral development of such persons.”;
- (d) in subsection (5)(c), omit “seriously”.

**33.** In section 368F (advertising)(16)—

- (a) for subsection (2) substitute—

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(9) OJ No. C 223, 7.7.2020, p. 10.

(10) Section 368D was inserted by S.I. 2009/2979 and amended by S.I. 2010/419.

(11) Section 368E was inserted by S.I. 2009/2979, and amended by S.I. 2014/2916.

(12) OJ No. C 303, 14.12.2007, p.1.

(13) OJ No. L 88, 31.3.2017, p. 6.

(14) OJ No. L 335, 17.12.2011, p. 1.

(15) OJ No. L 328, 6.12.2008, p. 55.

(16) Section 368F was inserted by S.I. 2009/2979; there is an amending instrument but it is not relevant.

“(2) Advertising of alcoholic drinks is only permitted in on-demand programme services if—

- (a) it is not aimed specifically at persons under the age of eighteen, nor does it, in particular, depict such persons consuming alcoholic drinks;
- (b) it does not link the consumption of alcohol to enhanced physical performance or to driving;
- (c) it does not create the impression that the consumption of alcohol contributes towards social or sexual success;
- (d) it does not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- (e) it does not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light; and
- (f) it does not place emphasis on high alcoholic content as being a positive quality of alcoholic drinks.”;

(b) in subsection (4)(e), after “physical” insert “, mental”.

**34.** In section 368G (sponsorship)(17)—

(a) for subsection (1A) substitute—

“(1A) 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 electronic cigarettes or electronic cigarette refill containers, or
- (b) by an undertaking whose principal activity is the manufacture or sale of electronic cigarettes or electronic cigarette refill containers.”;

(b) in subsection (11)—

- (i) in paragraph (e), after “physical” insert “, mental”;
- (ii) after paragraph (e) insert—

“(ea) directly exhort such persons to purchase or rent goods or services in a manner which exploits their inexperience or credulity;”.

**35.** In section 368H (prohibition of product placement and exceptions)(18)—

(a) for subsection (3) substitute—

“(3) Product placement is prohibited in any of the following included in on-demand programme services—

- (a) children’s programmes;
- (b) news and current affairs programmes;
- (c) consumer affairs programmes;
- (d) religious programmes.”;

(b) in subsection (4)—

- (i) at the end of paragraph (ba), omit “or”;
- (ii) after paragraph (ba) insert—

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(17) Section 368G was inserted by [S.I. 2009/2979](#) and amended by [S.I. 2016/507](#); there is another amending instrument but it is not relevant.

(18) Section 368H was inserted by [S.I. 2009/2979](#), and amended by [S.I. 2016/507](#) and [2010/831](#).

- “(bb) it is by or on behalf of an undertaking whose principal activity is the manufacture or sale of electronic cigarettes or electronic cigarette refill containers, or”;
  - (c) in subsection (6)(a), for “A” substitute “B”;
  - (d) omit subsection (7);
  - (e) in subsection (12)(e), after “physical” insert “, mental”;
  - (f) after subsection 12(e) insert—
    - “(ea) directly exhort such persons to purchase or rent goods or services in a manner which exploits their inexperience or credulity;”;
  - (g) in subsection (15), for “subsection (15A)” substitute “subsections (15A), (15B) and (15C)”;
  - (h) after subsection (15A) insert—
    - “(15B) Subsection (4)(bb) applies only in relation to programmes the production of which begins after 31 October 2020.
    - (15C) This section applies in relation to a programme the production of which began before 1 November 2020 as if—
      - (a) subsection (3)(b) to (d) were omitted, and
      - (b) subsection (6)(a) included a reference to a condition that the programme in which the product, service or trademark, or the reference to it, is included is—
        - (i) a film made for cinema,
        - (ii) a film or series made for a television programme service or for an on-demand programme service,
        - (iii) a sports programme, or
        - (iv) a light entertainment programme.”.
- 36.** In section 368I (enforcement)(**19**)—
- (a) in the heading, for “section 368D” substitute “sections 368CB and 368D”;
  - (b) in subsection (1), after “has contravened” insert “section 368CB or”;
  - (c) in subsection (2), after “contravention of” insert “section 368CB or”;
  - (d) in subsection (3)—
    - (i) after “complying with” insert “section 368CB or”;
    - (ii) omit “of that section”;
  - (e) after subsection (9) insert—
    - “(10) A financial penalty may not be imposed on a provider of an on-demand programme service under subsection (1) or (9) in respect of an act or omission if the provider has been convicted of a criminal offence in respect of that act or omission.”.
- 37.** After section 368I insert—

**“368IA Enforcement of section 368E(4)**

- (1) Where the appropriate regulatory authority determine that a provider of an on-demand programme service has failed to take a measure which the authority consider to be appropriate in relation to that service for the purpose mentioned in section 368E(4), or

has failed to implement such a measure effectively, the authority 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 failure as mentioned in that subsection is occurring or has occurred and they have allowed the provider an opportunity to make representations about that apparent failure.

(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 368E(4) and for remedying the failure 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) take a specified measure that the appropriate regulatory authority consider to be appropriate for the purpose mentioned in section 368E(4);
- (e) make specified changes to the way in which a provider implements a measure it has taken for that purpose;
- (f) show an advertisement only with specified modifications;
- (g) publish a correction in the form and place and at the time specified; or
- (h) publish a statement of the findings of the appropriate regulatory authority in the form and place and for the time period 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 person is required by an enforcement notification to publish a correction or a statement of findings, the person 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 person 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<sup>(20)</sup>; or

(c) for any other appropriate remedy or relief.

(9) If a person 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 person in accordance with section 368J.”.

**38.** In section 368J (financial penalties)<sup>(21)</sup>—

(a) in subsection (1)—

(i) for “368BD or 368I” substitute “368BD, 368I or 368IA”;

(ii) after “contravention” insert “or failure”;

(b) after subsection (1) insert—

“(1A) Where the provider in question is the BBC, the amount of the penalty is to be such amount not exceeding the amount for the time being specified in an order under section 198(6) or, if no such order is in force, £250,000, as OFCOM determine to be—

(a) appropriate; and

(b) proportionate to the contravention or failure in respect of which it is imposed.”;

(c) in subsection (2), after “subsection (1)” insert “or (1A)”;

(d) in subsection (3)(a), after “contravention” insert “or failure”;

(e) in subsection (4), after “contravention” insert “or failure”.

**39.** In section 368K (suspension or restriction of service)<sup>(22)</sup>—

(a) in the heading, after “contraventions” insert “or failures”;

(b) in subsection (1)(a)—

(i) after “368BA” insert “, 368CB”;

(ii) after “368BC” insert “, or has failed to take a measure which the authority consider to be appropriate in relation to that service for the purpose mentioned in section 368E(4), or has failed to implement such a measure effectively”;

(c) for subsection (1)(b) substitute—

“(b) that the imposition of one or more financial penalties or enforcement notifications under section 368BB, 368BD, 368I or 368IA has not resulted in the remedying of the contravention or failure in question; and”;

(d) in each of subsections (1)(c), (2)(c) and (3), after “contravention” insert “or failure”.

**40.** In section 368L (suspension or restriction of service for inciting crime or disorder)<sup>(23)</sup>—

(a) in subsection (1), for paragraph (a) substitute—

“(a) that—

(i) the service has failed to comply with any requirement of section 368E(1) or (2) or sections 368F to 368H and that accordingly the provider has contravened section 368D(1), or

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<sup>(20)</sup> 1998 c. 36.

<sup>(21)</sup> Section 368J was inserted by [S.I. 2009/2979](#) and amended by [S.I. 2010/419](#) and section 93 of the Digital Economy Act 2017 (c. 30).

<sup>(22)</sup> Section 368K was inserted by [S.I. 2009/2979](#); subsection (1) was amended by [S.I. 2010/419](#) and section 93 of the Digital Economy Act 2017.

<sup>(23)</sup> Section 368L was inserted by [S.I. 2009/2979](#).



- (ii) the provider has failed to take a measure which the authority consider to be appropriate in relation to that service for the purpose mentioned in section 368E(4), or has failed to implement such a measure effectively;”;
  - (b) in subsection (1)(b), after “due to” insert “, or has resulted in,”;
  - (c) in subsection (1)(c), after “contravention” insert “or failure”;
  - (d) in subsection (2), for paragraph (b) substitute—
    - “(b) give details about the matters which, in their opinion, constitute the contravention or failure in question;”.
- 41.** In section 368O(2) (power to demand information)(**24**)—
- (a) in paragraph (a)—
    - (i) for “or section 368D” substitute “, 368CB or 368D”,
    - (ii) for “368CA” substitute “368BC”, and
    - (iii) in sub-paragraph (ii), for “a contravention of either of those sections” substitute “such a contravention”;
  - (b) after paragraph (a) insert—
    - “(aa) the purposes of an investigation which the appropriate regulatory authority are carrying out in order to determine whether a person who appears to them to be or to have been a provider of an on-demand programme service has failed to take an appropriate measure in relation to that service for the purpose mentioned in section 368E(4), or has failed to implement such a measure effectively, 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 such a failure;”.
- 42.** After section 368O insert—

**“368OA Co-operation with member States and the European Commission**

- (1) OFCOM must take all necessary steps to provide such information and assistance to member States and to the European Commission as is required in order to comply with the Audiovisual Media Services Directive as it applies in relation to providers of on-demand programme services, in particular Articles 2, 3, 4 and 30a of the Directive.
  - (2) Where OFCOM—
    - (a) receive a request from a member State under Article 4 of the Audiovisual Media Services Directive relating to a provider of an on-demand programme service, and
    - (b) consider that the request is substantiated under that Article,they must ask the provider to comply with the rule identified in that request.”.
- 43.** In section 368P (application of Part 4A in relation to the BBC)(**25**)—
- (a) for subsection (1)(a) substitute—
    - “(a) section 368D(3)(za) and (zb) (duties of providers of on-demand programme services);”;
  - (b) in subsection (2)—

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(24) Section 368O was inserted by [S.I. 2009/2979](#); subsection (2) was amended by [S.I. 2010/419](#) and section 93 of the Digital Economy Act 2017.

(25) Section 368P was inserted by [S.I. 2009/2979](#) and amended by [S.I. 2010/419](#).

- (i) in paragraph (a), for “368C (duties of appropriate regulatory authority)” substitute “368C(4) (codes of conduct: food and beverage promotion and children’s programmes)”;
- (ii) omit paragraphs (d) and (g).

**44.** In section 368Q (application of Part 4A in relation to the Welsh Authority)(**26**)—

- (a) for subsection (1) substitute—

“(1) In section 368C (duties of appropriate regulatory authority), references to a provider of an on-demand programme service only include references to the Welsh Authority in the following subsections —

- (a) subsection (1), so far as it relates to section 368CB,
- (b) subsection (2), and
- (c) subsection (5).”;

- (b) omit subsection (3);

- (c) for subsection (5) substitute—

“(5) Section 368I (enforcement of sections 368CB and 368D) applies in relation to the Welsh Authority only in the following cases—

- (a) a contravention of section 368D(1) consisting of a contravention of section 368E or 368F that relates to advertising;
- (b) a contravention of section 368D(3)(za).

(5A) Section 368IA (enforcement of section 368E(4)) applies in relation to the Welsh Authority only in relation to a failure to take or implement a measure as mentioned in section 368IA(1) that relates to advertising.

(5B) Sections 368K (suspension or restriction of service for contraventions) and 368L (suspension or restriction of service for inciting crime or disorder) apply in relation to the Welsh Authority only in a case mentioned in subsection (5)(a) or (b) or subsection (5A).”.

**45.** In Schedule 12 (corresponding obligations of the BBC and Welsh Authority)(**27**)—

- (a) in paragraph 2(2)(b), after “section 368D” insert “and section 368E(4)”;

- (b) in paragraph 15, for sub-paragraph (1)(a) substitute—

“(a) that the Welsh Authority have failed in any respect to perform any of their duties under—

- (i) paragraphs 12 to 14,
- (ii) paragraph 23A,
- (iii) section 368D(1) except so far as it relates to advertising,
- (iv) section 368D(2),
- (v) section 368D(3)(zza), (zb), (a) or (b), or
- (vi) section 368E(4) except so far as it relates to advertising; and”;

- (c) in paragraph 19—

- (i) in sub-paragraph (2)(b), for “and section 368Q(3)” substitute “and section 368E(4)”;
- (ii) for sub-paragraph (3) substitute—

“(3) The requirements mentioned in this sub-paragraph are—

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(26) Section 368Q was inserted by [S.I. 2009/2979](#) and amended by [S.I. 2010/419](#).

(27) Schedule 12 was amended by [S.I. 2009/2979](#) and [2010/419](#); there are other amending instruments but none is relevant.

- (a) the requirements imposed by sections 368D(1) and 368E(4) so far as they relate to advertising, and
  - (b) the requirement imposed by section 368D(3)(za).”.
- (d) in paragraph 23A—
  - (i) in sub-paragraph (1), for “section 368Q(3)” substitute “section 368E(4)”;
  - (ii) for sub-paragraph (2) substitute—
    - “(2) But OFCOM must not give any such direction in relation to the handling and resolution of complaints about compliance with—
    - (a) the requirements imposed by section 368D(1) or 368E(4) so far as they relate to advertising, or
    - (b) the requirement imposed by section 368D(3)(za).”.