

**EXPLANATORY MEMORANDUM TO
THE COMMUNICATIONS ACT 2003 (DISCLOSURE OF INFORMATION) ORDER
2010**

2010 No. 282

1. This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The instrument specifies that an appropriate regulatory authority within the meaning of section 368B of the Communications Act 2003 is a “relevant person” for the purposes of section 393(3) of that Act. This ensures that information obtained in exercise of a power conferred by the Communications Act 2003 may be disclosed for the purpose of facilitating the carrying out by an appropriate regulatory authority of any function conferred by or under that Act.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 This instrument follows the Audiovisual Media Services Regulations 2009 S.I. No. 2979, which implements the EU Audiovisual Media Services Directive (2007/65/EC) in the United Kingdom by way of amendments to the Communications Act 2003, the Wireless Telegraphy Act 2006 and the Copyright, Designs and Patents Act 1988.

4.2 This instrument is made using the power conferred by section 393(3) of the Communications Act 2003. The power has previously been used to make the Communications Act 2003 (Maximum Penalty and Disclosure of Information) Order 2005 (SI 2005/3469).

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

The Secretary of State for Culture, Media and Sport has made the following statement regarding Human Rights:

“In my view the provisions of the Communications Act 2003 (Disclosure of Information) Order 2010 are compatible with the Convention rights”.

7. Policy background

- *What is being done and why*

7.1 The Audiovisual Media Services Directive requires EU Member States to ensure that on-demand services which provide television-like content (in effect: video-on-demand services) are subject to regulation so as to ensure that their programme and advertising content meets certain minimum standards. On-demand services within the scope of the Directive will be subject to regulation in one Member State only. In the UK, such services are not currently subject to specific statutory regulation and a new regulatory system is required. Following public consultation, the Government decided to provide for a co-regulatory system, in which formal regulatory powers are conferred on OFCOM, which may then designate other bodies to carry out some of the regulatory functions. The Audiovisual Media Services Regulations 2009 insert new provisions into the Communications Act 2003 to provide for this. OFCOM has recently held a public consultation on proposals to designate a co-regulator for programme content and a co-regulator for advertising content, and is expected to make a statement about the outcome shortly.

7.2 In the event of designation, it will be necessary to ensure that information relevant to the regulation of on-demand programme services can be shared between OFCOM and the designated co-regulatory bodies. This instrument will permit that.

- ***Consolidation***

7.2 This instrument does not amend any other instrument.

8. Consultation outcome

8.1 The Government held a public consultation during 2008 on proposals for the implementation of the Directive. There were 59 responses to the consultation, mostly from the broadcasting, new media and advertising industries and from civil society organisations.

8.2 On the regulation of on-demand services, most industry respondents agreed with the Government's preferred option of a co-regulatory system in which an industry-led body would be the co-regulator for programme content and the Advertising Standards Authority would be the co-regulator for advertising, with OFCOM retaining 'backstop' powers to deal with serious cases or to intervene in the event of a failure of the co-regulatory system. Some civil society organisations preferred direct regulation by OFCOM or by a separate independent body. Industry respondents expressed some concerns about requiring the co-regulator to make decisions on whether or not particular services were within the scope of the regulatory system, about the type of sanctions which the co-regulator might be required to impose and about the circumstances in which OFCOM would intervene. In designing the co-regulatory system, the Government has sought to address these concerns by creating a flexible system in which OFCOM and the co-regulatory bodies can discuss and agree between themselves which functions and responsibilities will be carried out by the co-regulators and which will be retained by OFCOM. However, an efficient and effective regulatory system in which the functions and responsibilities are shared between OFCOM and the co-regulators will require some sharing of information between the bodies concerned.

8.3 The consultation document, the responses and a summary of the responses are available on the Department's website at:
www.culture.gov.uk/reference_library/consultations/5309.aspx

8.4 The main industry and civil society stakeholders were further consulted on a draft version of the Audiovisual Media Services Regulations in spring 2009. They

have not been consulted separately about this instrument, as it makes a change which is consequential to the main implementing regulations.

9. Guidance

9.1 OFCOM will ensure that the designated co-regulators for on-demand services are aware of their obligations in relation to information sharing and disclosure of information.

10. Impact

10.1 The impact on business is that businesses which provide on-demand services which are subject to regulation will need to provide information to the regulatory authorities only once. This is likely to represent a small saving to business in terms of compliance with the regulatory regime for on-demand programme services.

10.2 The impact on the public sector is that OFCOM will not need to ask businesses for consent to disclose information to the co-regulatory bodies, and the co-regulatory bodies will not need to seek consent to disclose information to each other. This is likely to represent a small saving to OFCOM and the co-regulatory bodies in terms of administration costs for the regulatory regime for on-demand programme services.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The instrument applies to small business to the extent that small businesses providing on-demand services which are subject to regulation will not have to provide information to OFCOM that they have already provided to a co-regulatory body.

12. Monitoring & review

12.1 The Government will review the implementation of the Directive in 2012.

13. Contact

Chris Bone at the Department for Culture, Media and Sport, Tel: 020 7211 6444 or email: chris.bone@culture.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency: Department for Culture, Media and Sport	Title: Impact Assessment of legislation to permit information sharing between regulatory bodies for video-on-demand services	
Stage: Implementation	Version: 1.0	Date: 4 December 2009
Related Publications: Impact Assessment of legislation to implement the EU Audiovisual Media Services Directive - co-regulation of video-on-demand services		

Available to view or download at:

<http://www.culture.gov.uk>

Contact for enquiries: Stewart Gandy

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What is the problem under consideration? Why is government intervention necessary?

An Order is required to bring bodies designated by OFCOM as co-regulatory bodies for on-demand programme services within the scope of section 393 of the Communications Act 2003. This will permit the disclosure of information between OFCOM and the co-regulatory bodies as well as between the co-regulatory bodies.

What are the policy objectives and the intended effects?

The objective is to ensure that the regulatory system for on-demand programme services operates efficiently and effectively and to minimise burdens on regulatory bodies and service providers, by ensuring that OFCOM and the co-regulatory bodies will only need to request, and service providers will only need to provide, information once. Information which has been provided to OFCOM or to a co-regulatory body can then, if necessary, be disclosed to a(nother) co-regulatory body without further reference to the service provider concerned.

What policy options have been considered? Please justify any preferred option.

If OFCOM and the co-regulatory bodies are not able to disclose information to each other, either they would need to seek specific consent from the service provider concerned to do so, or the information would need to be requested again by the regulatory body which required it. Either of these would place an additional regulatory burden on service providers and on OFCOM and the co-regulatory bodies. By bringing the co-regulatory bodies within the scope of section 393 of the Communications Act 2003, these burdens are avoided.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? 2012

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Siôn Simon

..... Date: 7 December 2009

Summary: Analysis & Evidence

Policy Option:

Description: Permit the co-regulatory bodies to disclose information to Ofcom and to each other

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' None identified.	
	One-off (Transition)	Yrs		
	£			
	Average Annual Cost (excluding one-off)			
	£		Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups' None identified.				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Businesses which provide on-demand programme services will only have to provide information to the regulatory authorities once. This is likely to represent a small saving on cost over base case to both businesses and regulatory authorities in terms of complying with and operating the regulatory system.	
	One-off	Yrs		
	£			
	Average Annual Benefit			
	£ 15,000		Total Benefit (PV)	£ 129,114
Other key non-monetised benefits by 'main affected groups' None identified.				

Key Assumptions/Sensitivities/Risks Some businesses - particularly those with little or no experience of regulation and regulatory authorities - may have concerns about information provided to a co-regulatory body being disclosed to third parties.

Price Base Year 2009	Time Period Years 10	Net Benefit Range (NPV) £ N/A	NET BENEFIT (NPV Best estimate) £ 129,114
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What is the geographic coverage of the policy/option?		UK		
On what date will the policy be implemented?		By end February 2010		
Which organisation(s) will enforce the policy?		Ofcom		
What is the total annual cost of enforcement for these		£		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ N/A		
What is the value of changes in greenhouse gas emissions?		£ N/A		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)				(Increase - Decrease)
Increase of	£ 0	Decrease of	£ 5,000	Net Impact £ 5,000 per annum

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Context

The Audiovisual Media Services Regulations 2009 established a regulatory regime for on-demand audiovisual media services (in effect: video-on-demand services), to implement the requirements of the EU Audiovisual Media Services Directive (2007/65/EC). The Regulations define the services to be regulated as on-demand programme services, set out the minimum standards to which such services must adhere, and allow OFCOM to designate one or more other bodies to act as co-regulators for these services. OFCOM has recently held a public consultation on proposals to designate a co-regulatory body for programme content and a co-regulatory body for advertising content, and is expected to make a statement about the outcome shortly.

Options

Do nothing

If co-regulatory bodies are designated by OFCOM, then, as things stand, OFCOM will not be able to disclose information received from service providers to the co-regulatory bodies and the co-regulatory bodies will not be able to disclose such information to each other. OFCOM and the co-regulatory bodies will either have to request relevant information from the service provider concerned, even if that information has already been provided to another co-regulatory body, or seek specific permission from the service provider to disclose the information. Either of these would be likely to delay the progress of the case. They would place additional burdens on both the regulatory authorities and service providers and would reduce the efficiency and effectiveness of the regulatory system.

General permission

It would be possible for OFCOM and the co-regulatory bodies to seek permission from service providers to disclose information to other regulatory bodies, either on a general basis relating to all information provided by a service provider or on a more specific basis relating to each set of information provided by the service provider, regardless of whether that information is likely to be disclosed to another regulatory body. However, the regulatory bodies would need to ensure that all relevant information was covered by the permission; and a service provider could fail to give permission, either as an oversight or as a deliberate tactic to try to delay investigations and potentially adverse decisions and sanctions, which would necessitate further action from a regulatory body to obtain information or permission to disclose information. This option would therefore still leave in place the risk of additional burdens for both the regulatory authorities and service providers and could adversely affect the efficiency and effectiveness of the regulatory system.

Permit disclosure of information through legislation

This option ensures that OFCOM and the designated co-regulatory bodies are able to disclose information relevant to the exercise of their functions and the regulation of on-demand programme services without reference to the service provider(s) concerned. It means that information will only need to be requested once by OFCOM and the co-regulatory bodies and

provided once by service providers, thereby reducing the burdens on both the regulatory authorities and service providers; and it reduces the scope for delays in the system while information or permission to disclose information is requested and provided, thereby improving the efficiency and effectiveness of the regulatory system. Ofcom will ensure that the designated co-regulatory bodies understand their obligations and responsibilities in relation to information sharing and disclosure of information.

Conclusions

The regulatory system has been established on the basis of close co-operation between Ofcom, the co-regulatory bodies and industry. Providers of on-demand programme services have been closely involved in discussions about the structure of the regulatory system and in designing and putting in place the practical arrangements. The Government believes that the efficiency and effectiveness of this co-operative, co-regulatory system is best supported by enabling the co-regulatory authorities to disclose information without having to seek specific permission to do so from service providers and that this is best achieved by legislating to bring them within the scope of section 393 of the Communications Act 2003.

Costs

This measure is not expected to impose any new costs on businesses or on the public sector.

Benefits

This measure will reduce burdens on businesses. Businesses which provide on-demand programme services will not have to respond to requests for the same information from more than one regulatory body, or deal with requests for permission to disclose information. This will reduce costs both to businesses in dealing with the regulatory system and to industry-funded co-regulatory bodies. The savings to business are not expected to be significant. Across the industry as a whole, they are likely to amount to no more than around £10,000 per annum.

This measure will also reduce burdens on the public sector. The regulatory bodies will not need to request the same information from a service provider more than once, or have to request permission from the service provider when they need to disclose information. The savings to the public sector are likely to be modest – no more than around £5,000 per annum.

Competition Assessment

This measure does not have any impact on competition between providers of on-demand programme services. It will benefit all providers of such services.

Small Firms Impact Test

This measure will reduce the regulatory burden on small firms which provide on-demand programme services by ensuring that information provided to one regulatory authority in connection with the regulation of an on-demand programme service will not have to be provided again to another regulatory authority for the same purpose.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	No	Yes
Sustainable Development	No	Yes
Carbon Assessment	No	Yes
Other Environment	No	Yes
Health Impact Assessment	No	Yes
Race Equality	No	Yes
Disability Equality	No	Yes
Gender Equality	No	Yes
Human Rights	No	Yes
Rural Proofing	No	Yes

Annexes

Legal Aid

There will be no new legal aid costs as a result of this measure. However, there might be legal aid or other legal costs in the absence of this measure, if, for example, a service provider sought to take legal action against a co-regulatory body over information which had been inadvertently disclosed without specific permission to do so, or if a regulatory body sought to take legal action against a service provider for failing to provide information for a second time or for failing or refusing to permit information to be disclosed.

Sustainable Development; Carbon Assessment; Other Environment

There will be no impact on sustainable development, carbon emissions or the environment from this measure.

Health Impact Assessment

There will be no impact on health from this measure.

Race, Disability, Gender Equality

There will be no impact on race, disability or gender equality from this measure.

Human Rights

There will be no impact on human rights from this measure.

Rural Proofing

There will be no impact on rural issues from this measure.