



Procedures for the handling of
appeals of ATVOD decisions in
relation to what constitutes an On-
Demand Programme Services

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Ofcom procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an On-Demand Programme Services

Overview and general information

- 1.1 This document outlines the procedures that Ofcom will normally follow when considering appeals of decisions by the Authority for Television on Demand Limited (“ATVOD”)¹ as to whether a service constitutes an On-Demand Programme Service (“ODPS”); what constitutes a programme included in an ODPS; and/or whether a person is the provider of an ODPS (an “ODPS Provider”) for the purposes of Part 4A of the Communications Act 2003² (“the Act”). These procedures are effective from 1 October 2013.³ If Ofcom considers that it would be fairer and more appropriate to follow a different procedure in any particular case, or category of cases, we will explain our reasons for departing from these procedures.
- 1.2 An ODPS is defined in section 368A of the Act as a service that satisfies the following criteria:
- its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
 - access to it is on demand;
 - there is a person who has editorial responsibility for it;
 - it is made available by that person for use by members of the public; and
 - that person is under the jurisdiction of the UK for the purposes of the Audiovisual Media Service Directive (“the Directive”).⁴

A full copy of section 368A is contained in Schedule 1 to these procedures.

¹ ATVOD is an independent regulator designated by Ofcom to carry out certain functions in relation to the provision of ODPS (see below). ATVOD’s website is at: <http://www.atvod.co.uk>.

² As amended by The Audiovisual Media Services Regulations 2009 (SI 2009/2979) (“the 2009 Regulations”) and The Audiovisual Media Services Regulations 2010 (SI 2010/ 419) (“the 2010 Regulations”).

³ The procedures set out in this document and any related guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

⁴ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, implemented in the UK by the 2009 and 2010 Regulations, both of which insert new provisions comprising Part 4A of the Act.

Part 4A of the Act came into force on the 19 December 2009. It places a number of duties on those providing ODPS in the UK. These include notifying the appropriate regulatory authority of their provision of an ODPS or of their intention to provide such a service⁵.

Section 368C of the Act requires the appropriate regulatory authority to take steps to ensure that those providing an ODPS comply with their statutory duties under Part 4A.⁶ For the purposes of the legislation, the “appropriate regulatory authority” may be Ofcom, or another body who Ofcom designates to perform certain tasks, or both Ofcom and another designated body concurrently⁷.

- 1.3 Ofcom has general duties in relation to the regulation of those who provide an ODPS (“ODPS Providers”)⁸. Ofcom has designated ATVOD as an appropriate regulatory authority concurrently to carry out certain of its functions in relation to the regulation of ODPS.⁹ ATVOD has been given certain powers to carry out these functions, including to decide:
- what constitutes an “ODPS” (in accordance with section 368A of the Act);
 - whether or not a person is providing an ODPS;
 - what constitutes a ‘programme included in an ODPS’ (in accordance with section 368R(2) of the Act).
- 1.4 A determination made by ATVOD in respect of any of the matters set out in paragraph 1.3 above may be subject to appeal to Ofcom.
- 1.5 Ofcom will normally consider requests for appeals in accordance with the procedures set out in this document.
- 1.6 Appeal decisions¹⁰ will be made (and, where relevant, preliminary views taken) by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board. The Executive officers will normally be the Director of Content Standards, Licensing & Enforcement¹¹ and another member of the Ofcom Executive of at least equivalent seniority and with the appropriate delegated authority. Where Ofcom considers it necessary, decisions will be reached

⁵ Section 368BA of the 2003.

⁶ Section 368C (1) says, “It is the duty of the appropriate regulatory authority to take such steps as appear to them best calculated to secure that every provider of an on-demand programme service complies with the requirements of section 368D.” Section 368D (1) says, “The provider of an on-demand programme service must ensure that the service complies with the requirements of sections 368E to 368H.” Sections 368E to 368H set out requirements relating to harmful material, advertising, sponsorship and product placement.

⁷ Section 368B of the Communications Act 2003.

⁸ Although these are limited where the ODPS Provider is the BBC – see section 368P of the Act.

⁹ A copy of the Designation is at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

¹⁰ Including the decision as to whether or not to grant a request for an appeal.

¹¹ Or a Director of equivalent seniority should the Director of Content Standards, Licensing & Enforcement be unavailable for any reason.

by the Ofcom Executive Officers together with Non-Executive member(s) of Ofcom's Content Board.

Procedures

Requesting an appeal

1.7 An appeal can be requested in respect of an ATVOD decision:

- that a service is an ODPS;
- as to what constitutes 'a programme included in an ODPS';¹²
- that a person is an ODPS Provider; or
- in relation to any combination of these.

1.8 A request for an appeal must be submitted to Ofcom within 20 working days of the date of ATVOD's decision. A request for an appeal must:

- be in writing;
- clearly set out the grounds on which the appeal is being sought;
- provide a detailed explanation as to why, in respect of each of specific ground of the appeal, the decision is materially flawed (e.g. if it is believed that the ATVOD decision is obviously wrong in substance, or contains a significant mistake of fact or has been reached following a failure of process);
- include a copy of the ATVOD decision which is being appealed; and
- include all the evidence that the person requesting the appeal would like Ofcom to take into account when considering its case.

1.9 Ofcom may require that a request for an appeal be made in writing in less than 20 working days of the date of ATVOD's decision where it appears to Ofcom that the case requires urgent attention. This is likely to include cases where Ofcom or ATVOD considers that:

- there is an ODPS Provider providing a service that fails to comply with any requirement in sections 368E – 368H of the Act;
- that failure to comply is due to the inclusion in the service of material likely to encourage or to incite the commission of crime or lead to disorder; and
- the provider disputes that it is providing an ODPS.

A decision to shorten the length of time in which a person is able to submit their request for an appeal will be at Ofcom's sole discretion.

1.10 The decision as to whether or not to grant a request for an appeal will be at Ofcom's sole discretion. In particular, Ofcom may decide to grant a request for an appeal on the basis of the facts, or on a point of law, or both, as it sees appropriate.

Assessing and Determining

1.11 If Ofcom decides to proceed with a consideration of the appeal, it will inform ATVOD and provide ATVOD with a copy of the appeal. Where appropriate, Ofcom will request from ATVOD additional information relevant to the appeal.

¹² See section 368R(2) of the Act.

- 1.12 ATVOD will publish on its website details of the service in respect of which the appeal is being considered.
- 1.13 Where Ofcom receives a request for an appeal any enforcement action that has been, or may be, commenced against the appellant will usually be suspended until such time as Ofcom decides that the appeal has been resolved. Such resolution may include circumstances where an appeal is dismissed because the appellant has failed to comply with the steps set out in these procedures, or Ofcom reasonably believes that the appellant's request for appeal is an abuse of these procedures.
- 1.14 Notwithstanding paragraph 1.13, in cases where Ofcom considers that:
- the service that is the subject of the appeal fails to comply with any requirement in sections 368E – 368H of the Act; and
 - that failure to comply is due to the inclusion in the service of material likely to encourage or to incite the commission of crime, or lead to disorder,

Ofcom may decide that enforcement activity is appropriate in order to provide immediate protection to the public while the outcome of the appeal is being determined. Such cases are likely to be exceptional.

Representations from directly affected third parties

Individuals or bodies who are directly affected by a case may make representations to Ofcom during its consideration of an appeal. It is the responsibility of the third party to satisfy Ofcom that it has a sufficient interest in the appeal.

Directly affected third parties will be provided with a copy of the appeal. Anyone making representations will be expected to do so as early as possible.

- 1.15 Ofcom will then normally prepare its preliminary view. The preliminary view will contain a summary of the request for appeal and Ofcom's preliminary view on the appeal. Ofcom will prepare its preliminary view after assessing the relevant written and any other relevant material that has been submitted. In some cases, however, Ofcom may require further information from the appellant and/or ATVOD (and/or, if it considers it appropriate, other relevant parties) before it is able to prepare its preliminary view. In such circumstances, the relevant party (or parties) will normally be given 10 working days to provide the information requested.
- 1.16 When Ofcom has prepared its preliminary view, Ofcom will provide it (and representations from third parties in appropriate cases) to the appellant and ATVOD (and directly affected third parties where appropriate) and request a written response within 10 working days¹³.
- 1.17 Once Ofcom has received and considered the appellant's and ATVOD's written responses (or any relevant representations from a directly affected third party as appropriate) on its preliminary view, it will reach its decision and inform the appellant and ATVOD (and, in appropriate cases, third parties). That decision may:
- uphold ATVOD's decision; or
 - quash ATVOD's decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;

¹³ In some cases Ofcom may shorten the time period for providing representations as appropriate.

- substitute Ofcom's decision for that of ATVOD (including any revised time-tabling in relation to any enforcement action that has been commenced or is in contemplation).

1.18 Where Ofcom decides to uphold ATVOD's decision and enforcement action has been, or was to be, commenced by ATVOD against the relevant ODPS provider, time will again start to run immediately in relation to any enforcement action that has been, or may be, commenced against that party¹⁴. This is subject to any decision Ofcom makes in relation to the timetabling of such action.

1.19 Ofcom's decision is final. A copy of the decision will be sent to the appellant and ATVOD (and if necessary any other relevant party) 24 hours before publication on Ofcom and ATVOD's websites.

Publication of Decision

1.20 The decision will be published on Ofcom's website.

Non Disclosure

1.21 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly that all parties concerned abide by all Ofcom's published rules and procedures. These require, for example, that parties to an appeal should not disclose any correspondence, documents and other material concerning the appeal¹⁵ during the course of it being considered by Ofcom (see text box below). This requirement of non disclosure does not limit what Ofcom may disclose in the proper performance of its functions and/or can publish in its decision at the end of its consideration of the appeal.¹⁶

Non Disclosure

Parties (appellants, ODPS Providers, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that an appeal has been made or that Ofcom is considering an appeal. They may also use any information which is already in the public domain.

However, all parties are subject to the requirement of non disclosure in relation to all other material submitted and communications/correspondence entered into in relation to that appeal¹⁷. Moreover, once an appeal has been submitted or Ofcom

¹⁴ This is subject to paragraph 1.14, where time may have continued to run notwithstanding the appeal.

¹⁵ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of an appeal may need to be disclosed by Ofcom in order to meet such obligations and nothing in these Procedures can prevent Ofcom from doing so.

¹⁶ Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the ODPS Provider will be notified that relevant material has been withheld and the reasons why.

¹⁷ Subject to the caveat as to information Ofcom may disclose and publish, in paragraph 1.21 above.

has started considering an appeal, no party should take any steps which could – whether intentionally or not – compromise, or risk compromising, a fair decision on the matter by Ofcom or otherwise constitute, in Ofcom’s opinion, an abuse of process.

Failure to follow these requirements may result in Ofcom ceasing to consider a party’s representations.

Time limits

- 1.22 Appellants, ATVOD and, where appropriate, any affected third parties should keep to the time limits specified in these procedures. The time limits may, in appropriate cases, be shortened or extended, at Ofcom’s discretion. Any party seeking an extension to a time limit should explain in writing to Ofcom why it believes the relevant time limit should be extended.
- 1.23 Ofcom will aim to complete appeals within 60 working days from the date it receives a full request for an appeal (i.e. including all relevant supporting material). We note, however, that the circumstances of individual appeals can vary considerably and completion may in some cases take longer (for example, in those raising a number of, and/or novel, issues).

Failure to follow procedures

- 1.24 Any failure by an Appellant to follow these procedures may result in Ofcom taking additional regulatory action including discontinuing its consideration of the appeal.

Sanctions

- 1.25 ODPS providers should be aware of the importance of complying with decisions in accordance with these procedures. Failure to comply with the notification requirements for ODPS services may lead to an enforcement notification being served¹⁸ and/or a financial penalty being imposed on the ODPS provider¹⁹. Ofcom’s Procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services may be found at:
<http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/sanctions-procedures.pdf>

¹⁸ See section 368BB of the Act.

¹⁹ In accordance with section 368J of the Act.

Schedule 1

SECTION 368A COMMUNICATIONS ACT 2003

368A Meaning of “on-demand programme service”

(1) For the purposes of this Act, a service is an “on-demand programme service” if—

- (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
- (b) access to it is on-demand;
- (c) there is a person who has editorial responsibility for it;
- (d) it is made available by that person for use by members of the public; and
- (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.

(2) Access to a service is on-demand if—

- (a) the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service; and
- (b) the programmes viewed by the user are received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view).

(3) For the purposes of subsection (2)(a), the fact that a programme may be viewed only within a period specified by the provider of the service does not prevent the time at which it is viewed being one chosen by the user.

(4) A person has editorial responsibility for a service if that person has general control—

- (a) over what programmes are included in the range of programmes offered to users; and
- (b) over the manner in which the programmes are organised in that range;

and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the service (and see section 368R(6)).

(5) If an on-demand programme service (“the main service”) offers users access to a relevant ancillary service, the relevant ancillary service is to be treated for the purposes of this Part as a part of the main service.

(6) In subsection (5), “relevant ancillary service” means a service or facility that consists of or gives access to assistance for disabled people in relation to some or all of the programmes included in the main service.

(7) In this section “assistance for disabled people” has the same meaning as in Part 3.