



Review of the Ofcom Designation of the Authority for Television On Demand

Statement

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Contents

Section		Page
1	Executive Summary	1
2	Background	4
3	Notification, Scope and Appeals	12
4	Regulatory fees	19
5	ATVOD's other regulatory duties	24
6	Meeting the tests of co-regulation	38
Annex		Page
1	Ofcom's tests for co-regulation and the statutory criteria for co-regulation	51
2	Extracts from the original ATVOD Designation dated 18 March 2010	53
3	Index of Industry Respondents to the 22 March Letter	59
4	ATVOD Board and ATVOD/Industry Forum Working Parties membership	60
5	The Amended Designation dated 15 August 2012 ¹	63

¹ The Amended Designation was further amended on 14 September 2012
<http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

Section 1

Executive Summary

Introduction

- 1.1 The Audiovisual Media Services Directive (“the AVMS Directive”)² sought to create a more level playing field for emerging audiovisual media services in Europe and to protect consumer and citizen interests by ensuring that these services will be subject to minimum standards. These standards apply to “television-like” video-on-demand (“VOD”) services including those provided on the open internet. The AVMS Directive was implemented into UK law through Part 4A of the Communications Act 2003 (“the Act”).³ The Act defines services falling within the scope of regulation as “On-Demand Programme Services” (“ODPS”).
- 1.2 Following implementation of the AVMS Directive and after consultation with DCMS (Department of Culture Media and Sport) and publicly, Ofcom accepted a proposal from the Authority for Television On Demand (“ATVOD”)⁴ to be the new co-regulatory body with regard to ODPS. On 18 March 2010, ATVOD was designated by Ofcom as such a body pursuant to section 368B of the Act (“the Designation”⁵).
- 1.3 The Designation authorised ATVOD to carry out a range of functions:
- to administer procedures relating to notification of ODPS;
 - to determine whether ODPS providers have notified their services to the regulator;
 - to require ODPS providers to pay a regulatory fee;
 - to take steps to ensure ODPS providers comply with the various statutory content rules;
 - to encourage ODPS providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both (“the Access Services Duty”); and
 - to ensure ODPS providers promote, where practicable and by appropriate means, production of and access to European works (“the European Works Duty”).
- 1.4 The Designation gave ATVOD powers necessary to carry out these functions, such as to determine what constitutes an ODPS and/or who is the provider of the service (“scope determinations”). Similarly, it set out obligations to which ATVOD was subject, such as to produce guidance on matters relating to its functions and powers following consultation with, and/or obtaining the approval of, Ofcom. Together with section 368B (3) of the Act, the Designation provided for Ofcom to act as a concurrent regulator with ATVOD. Ofcom also retained a backstop regulatory role, including acting as an

² EC Directive 2007/65/EC

³ Part 4A of the Act was inserted and amended by The Audiovisual Media Services Regulations 2009 (SI 2009/2979) and The Audiovisual Media Services Regulations 2010 (SI 2010/419)

⁴ At the time of the Designation, ATVOD was known as The *Association* for Television On Demand, but subsequently changed its name to The *Authority* for Television On Demand on 21 March 2011.

⁵ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

appellate body in respect of ATVOD's scope determinations and exercising enforcement powers under sections 368J – 368L of the Act.

- 1.5 Paragraph 13 of the Designation also provided for a formal review ("the Review") to be carried out by Ofcom after two years. Accordingly, on 22 March 2012 we initiated the Review by publishing an open letter.
- 1.6 The letter set out the terms of reference for the Review, which included a consideration of how ATVOD had discharged the designated functions and met its obligations. It also made clear that Ofcom would take a broader look at the co-regulation of ODPS. In other words, that we would consider whether the co-regulatory model remained consistent with what we regard as the appropriate high-level principles for co-regulation.⁶ The letter invited stakeholders' responses.
- 1.7 Ofcom received 13 written responses to the Review, as well as views expressed to us at the ATVOD Industry Forum meeting on 23 May 2012. The responses came from ATVOD and a range of stakeholders, including broadcasters and ODPS providers, stakeholders' representative bodies and bodies representing the interests of people with disabilities affecting their sight and hearing.

Ofcom's decisions

- 1.8 Having considered the responses to the Review, and having made assessments of ATVOD's performance of its functions and obligations and of the application of the relevant principles and statutory requirements, Ofcom has decided to maintain the co-regulatory model, under the Designation. We have also decided to make some amendments to the Designation. This Statement sets out the decisions we have made and the reasons for them.
- 1.9 In particular, our assessment is that ATVOD has adequately performed its functions and carried out its duties. These include in respect of the following matters which were the main focus of stakeholders' responses to the Review:
 - the scope of regulation and the notification to ATVOD of ODPS;
 - the setting of regulatory fees; and
 - the enforcement of content standards.
- 1.10 Moreover, our current views are that, in the particular context of ODPS and Part 4A of the Act:
 - Industry's incentives and citizens and consumers' interests are sufficiently aligned as to support co-regulation (by ATVOD under the Designation) for the time being; and
 - with the amendments we have decided to make, the Designation, together with the concurrent and backstop powers it and the Act give to Ofcom, would provide for an effective and efficient co-regulatory model, involving co-regulatory bodies with an appropriate balance of powers, consistent with the appropriate principles and statutory requirements.

⁶ as well as the statutory tests in section 368B (9) of the Act.

- 1.11 Subject to the amendments we have decided to make to the Designation, ATVOD will, therefore, retain the functions, powers and obligations delegated to it. The amendments we have decided to make are:⁷
- to remove paragraph 6(iii), so that ATVOD no longer needs to refer to Ofcom any particular case to decide whether a service is an ODPS or whether a programme is included in an ODPS (and to amend paragraph 7(iii) in consequence);
 - to remove from paragraph 7(vii) ATVOD's obligation to obtain Ofcom's approval prior to publishing or amending ATVOD's guidance on the statutory rules and/or on the scope of regulation ("Scope Guidance");
 - to remove from paragraph 7(ix) ATVOD's obligation to consult specifically with Ofcom about the formulation of its complaints handling processes;
 - to remove ATVOD's obligation in paragraph 7(xii) to consult Ofcom before issuing Enforcement Notifications in accordance with sections 368BB and 368I of the Act;
 - to amend paragraphs 7(xx)(a) and (xxi)(a) to remove ATVOD's obligations to obtain Ofcom's approval for issuing guidance relating to the Access Services and European Works duties;
 - to replace the obsolete reporting obligations in paragraphs 2 to 4 of the Schedule to the Designation with an annual reporting obligation of the kind ATVOD proposed in its response to the Review (see below); and
 - to align the reporting obligations in paragraph 5(iii) of the Schedule to correspond with ATVOD's complaints handling procedure.

We have similarly decided to amend the Designation to make clear it may be reviewed at any time where regulatory developments, including changes to the statutory framework, make it appropriate for us to do so.

- 1.12 We also publish in parallel with this Statement Ofcom procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an On-Demand Programme Service⁸ and Ofcom procedures for the consideration of statutory sanctions arising in the context of On-Demand Programmes Service⁹ and a Statement on those procedures for handling appeals on scope and for imposing sanction in relation to On-Demand Programme Services.¹⁰ ("the appeals and sanctions procedures") These set out Ofcom's procedures for appeals of ATVOD's scope determinations. These include timeframes for the submission of and consideration of appeals.

⁷ We will also make minor amendments, such as changing references to the "Association for Television on Demand" to the "Authority for Television on Demand."

⁸ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

⁹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/sanctions-procedures.pdf>

¹⁰ <http://stakeholders.ofcom.org.uk/binaries/consultations/on-demand/statement/statement-procedures.pdf>

Section 2

Background

The purpose of the Ofcom Review

- 2.1 On 18 March 2010, the Authority¹¹ for Television On Demand (“ATVOD”) was designated by Ofcom pursuant to section 368B of the Communications Act 2003 (as amended) (“the Act”) as the co-regulator of editorial content included in on-demand programme services (“ODPS”) (“the Designation”¹²). The Designation provided for a formal review (“the Review”) to be carried out after two years.
- 2.2 In the Designation, Ofcom authorised ATVOD to carry out a range of functions (“the Designated Functions”):
- to administer procedures relating to notification of ODPS;
 - to determine whether ODPS providers have notified their services to the regulator;
 - to require ODPS providers to pay a regulatory fee;
 - to take steps to ensure ODPS providers comply with the various statutory content rules;
 - to encourage ODPS providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both (“the Access Services Duty”); and
 - to ensure ODPS providers promote, where practicable and by appropriate means, production of and access to European works (“the European Works Duty”).
- 2.3 The Designation gave ATVOD a range of powers necessary to carry out these functions, such as the power to determine whether a service is an ODPS. It also subjected ATVOD to a number of obligations, such as producing guidance for providers as to the exercise of its functions.
- 2.4 This statement sets out the legislative and regulatory background to the Designation and the terms of reference of the Review (Section 2). As discussed further below, we received a range of responses to our Review. Based on the issues raised in these responses, and Ofcom’s own experience as the backstop regulator for ODPS, we have structured the subsequent sections of this Statement on the basis of the importance attached by stakeholders to different issues (see paragraph 2.27 below).

¹¹ At the time of the Designation, ATVOD was known as The *Association* for Television On Demand, but subsequently changed its name to The *Authority* for Television On Demand on 21 March 2011.

¹² See <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf> and relevant extracts in Annex 2 of this statement.

The legislative and regulatory background

The AVMS Directive and Ofcom's 2009 Consultation

2.5 The Audiovisual Media Services Directive ("AVMS Directive")¹³, which was transposed in UK legislation on 19 December 2009 by the Audiovisual Media Services Regulations 2009 ("the 2009 Regulations")¹⁴, requires that on-demand services meeting certain criteria are regulated to secure compliance with minimum standards. The main features are that on-demand service providers must:

- enable users to identify the provider of the service and the relevant regulatory authority;
- exclude content which contains any incitement to hatred;
- exclude content which seriously impairs the physical, mental or moral development of under 18s;
- ensure that sponsored programmes fulfil certain requirements (e.g. users must be appropriately informed about sponsorship arrangements); and
- ensure programmes do not contain product placement, except where permitted in relation to certain types of programmes (e.g. light entertainment programmes) in accordance with the AVMS Directive.

2.6 The 2009 Regulations amended the Communications 2003 Act by inserting a new Part 4A (headed "On-Demand Programme Services"). The new provisions set out the requirements that ODPS providers must comply with in relation to video on-demand ("VOD") editorial content and VOD advertising. In particular they:

- give Ofcom functions in relation to the regulation of ODPS;
- give Ofcom power to delegate all or any of these functions to such other body or bodies it chooses to designate as a co-regulator and which meet the statutory criteria for designation (whilst retaining the power to act concurrently or in place of the co-regulator in relation to any of the functions Ofcom has designated to it);
- set the criteria that a body must fulfil before Ofcom can designate it to be an appropriate regulatory authority;
- set out the parameters for determining whether a VOD service is an "on-demand programme service" that falls within the scope of regulation;
- transpose the minimum requirements of the AVMS Directive which service providers must comply with; and
- set the regulatory framework for securing that ODPS providers comply with the new requirements, including enforcement powers for dealing with non-compliance.

¹³ EC Directive 2007/65/EC, amending the Television Without Frontiers Directive (Council Directive 89/552/EEC) For a fully codified version of the Directive see:

<http://register.consilium.europa.eu/pdf/en/09/st03/st03683.en09.pdf>

¹⁴ See SI 2009/2979 at http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

2.7 On 18 December 2009, Ofcom published its statement on the Regulation of VOD Services (“the 2009 Statement”)¹⁵, following its public consultation in September 2009 (“the 2009 Consultation”)¹⁶. In the 2009 Statement, amongst other things, we stated that we would work towards adopting a co-regulatory approach to the regulation of VOD editorial content, with a view to designating the existing industry self-regulatory body, ATVOD, as the co-regulator for VOD editorial content.

2.8 In the 2009 Statement, we said that the duties to be devolved were likely to include:

- determining the scope of regulation and the requirement on VOD service providers to notify their services (see below), as and when these become statutory obligations (including the power to issue enforcement notices against VOD service providers in relation to notification);
- enforcing VOD editorial content standards and issuing enforcement notices against VOD service providers in relation to contraventions of the standards;
- encouraging service providers to ensure they make their services gradually more available to people with sight and hearing disabilities; and
- ensure service providers promote production of and access to European works.

Developments since 19 December 2009

2.9 With the implementation of the 2009 Regulations, Ofcom was given the power to designate any corporate body to be, to the extent provided by the Designation, the appropriate regulatory authority for the purposes of exercising some or all of these new functions. In reaching any decision on whether to designate a co-regulator, Ofcom has to be satisfied that the body it proposes to designate fulfils the criteria set out in Figure 1.

Figure 1: criteria for designation set out in section 368B(9) of the Communications Act 2003

9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body:

- (a) is a fit and proper body to be designated;
- (b) has consented to being designated;
- (c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;
- (d) is sufficiently independent of providers of on-demand programme services; and
- (e) will, in performing any function to which the designation relates, have regard in all cases:

¹⁵ For a copy of Ofcom’s Statement (“the 2009 Statement”) see:

<http://www.ofcom.org.uk/consult/condocs/vod/statement/>

¹⁶ For a copy of Ofcom’s Consultation Paper (“the 2009 Consultation”) see:

<http://stakeholders.ofcom.org.uk/consultations/vod/>

(i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
(ii) to such of the matters mentioned in section 3(4)¹⁷ as appear to the body to be relevant in the circumstances.

- 2.10 Following a three month notification period to the European Commission that ended in February 2010, the Government amended the Act with effect from 18 March 2010 (by way of The Audiovisual Media Services Regulations 2010 ("the 2010 Regulations")). These amendments gave Ofcom further powers in relation to notifications and fees. This opened the way for Ofcom to designate ATVOD on the same day, which we did, on the basis (amongst other bases) of written undertakings and information provided by ATVOD.
- 2.11 We set out in the following paragraphs the legal and policy framework within which, and the essential rationale with which, we made the Designation of ATVOD.
- 2.12 Part 4A of the Act gives Ofcom the power to designate a co-regulator as the appropriate regulatory authority in relation to ODPS. Ofcom must exercise that power in line with both the specific statutory requirements in section 368B(9) and our general duties set out in the Act. In particular, our principal duty of furthering the interests of citizens and consumers as set out in section 3(1). Likewise, in line with the obligation in section 3(4)(c) of the Act, in performing that duty, to have regard to "... the desirability of promoting and facilitating the development and use of effective forms of self-regulation." We must also, in meeting that duty, have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, as well as any other principles appearing to us to represent the best regulatory practice.
- 2.13 Further, according to section 6(1) of the Act, Ofcom must, "... keep the carrying out of their functions under review, with a view to securing that regulation does not involve (a) the imposition of burdens which are unnecessary; or (b) the maintenance of burdens which have become unnecessary." Section 6(2) provides that, in so reviewing our functions, Ofcom must "... (a) have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured, by effective self-regulation; and (b) in the light of that, to consider to what extent it would be appropriate to remove or reduce the regulatory burdens imposed by Ofcom." Section 6(3) supplements these provisions by saying that, "In determining whether procedures for self-regulation are effective OFCOM must consider, in particular (a) whether those procedures are administered by

¹⁷ Section 3 of the Act states the general duties of Ofcom. In particular, Section 3(4) of the Act states: "OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances:

....

(b) the desirability of promoting competition in relevant markets;

(c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;

(d) the desirability of encouraging investment and innovation in relevant markets;

....

(h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;

(i) the needs of persons with disabilities, of the elderly and of those on low incomes;

(j) the desirability of preventing crime and disorder...."

a person who is sufficiently independent ; and (b) whether adequate arrangements are in force for funding the activities of that person”

- 2.14 Pursuant to these provisions, Ofcom published in 2008 the statement *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation* (“the Self- and Co-regulation Statement”).¹⁸ In this context, we regard co-regulation as schemes that involve elements of industry self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to secure desired objectives.
- 2.15 The Self- and Co-regulation Statement set out the high-level principles Ofcom intended to consider to help us determine whether self- or co-regulatory schemes were appropriate. It also set out good practice criteria we would take into account when considering the establishment of particular self- and co-regulatory schemes.
- 2.16 The principles were based on the idea that self- and co-regulatory approaches would work best where the incentives of industry are aligned with the interests of the public. The principles were designed to help assess the alignment of those incentives and interests by looking at these points:
- do the industry participants have a collective interest in solving the problem;
 - would the likely industry solution correspond to the best interests of citizens and consumers;
 - would individual companies have an incentive not to participate in any agreed scheme;
 - are individual companies likely to “free-ride” on an industry solution; and
 - can clear and straightforward objectives be established by industry?
- 2.17 The good practice criteria were: public awareness, transparency, significant industry participation, adequate resources, clarity of processes, ability to enforce codes, audits of performance, system of redress in place, involvement of independent members, regular review of objectives and non-collusive behaviour.
- 2.18 Ofcom decided to adopt the Designation for the reasons we set out in paragraph 4.22 and 4.23 of the 2009 Statement.¹⁹ We did so because, amongst other reasons set out there, we considered that an assessment of the high-level principles supported the adoption of a co-regulatory model (involving ATVOD) and our assessment against the good practice criteria supported the making of the Designation.
- 2.19 In particular, we considered that adoption of the proposed co-regulatory model, the Designation of ATVOD, would result in the beneficial involvement of industry, in regulation including that:
- ODPS providers would benefit from a regulatory framework developed with industry cooperation, through the industry-led steering group, under which those providers can fulfil the relevant statutory requirements;

¹⁸ <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

¹⁹ As described at 2.7 above.

- the creation of the co-regulatory structure would generate a sense of ownership and commitment amongst the VOD industry;
- the co-regulatory arrangements would be likely to foster a higher level of compliance, meaning consumers and citizens would benefit from the application of minimum standard requirements for television-like content on cross-platform VOD services; and
- co-regulation could harness the common interests of industry stakeholders to maintain their industry's reputation.

2.20 In designating ATVOD in March 2010, we considered that our assessment meant the adoption of the Designation would be consistent with our duties under the Act.

2.21 Ofcom's current thinking, as reflected in our submission to the Leveson Inquiry, over whether a regulatory body should be a statutory regulator or part of a co-regulatory model involving elements of statutory and self-regulation, remains similar to the position taken in 2009.²⁰ Our view, building on the principles set out above, is that an effective regulatory body must have independent governance and decision making, clear public accountability, clear regulatory objectives set out in a code and follow clear and transparent processes. It should also have workable membership incentives and/or obligations for or on those it regulates. Likewise, secure and sufficiently independent funding and budget control. It should also be accessible to those seeking redress, possess genuine powers of investigation and effective powers of enforcement and sanction.

2.22 In terms of whether regulatory bodies should be statutory, our view remains similar to that set out above, namely that models of co-regulation can be particularly effective when there is widespread industry support for the objectives of co-regulation. That is more likely the case where industry's incentives are aligned with those objectives. The less the alignment between the relevant interests, the more likely the need for a stronger element of backstop statutory regulation.

The terms of reference of the Ofcom Review

2.23 Paragraph 13 of the Designation states that: "The Designation shall be subject to a formal review by Ofcom at the expiry of two years from the date of this Designation taking effect [i.e., 18 March 2012]". In order to help inform Ofcom's Review of the Designation, on 22 March 2012 Ofcom initiated the Review by publishing an open letter ("the 22 March Letter")²¹, which set out the terms of reference for the Review.

2.24 In the 22 March Letter, we made clear that as well as taking the opportunity to undertake the formal Review of the Designation, we would also take a broader look at how the co-regulation of editorial content in ODPS had been working during the first two years of ATVOD's role as co-regulator. In other words, amongst the matters covered, our Review would consider both whether the high-level principles for co-regulation could be maintained and whether the sorts of tests provided for by Ofcom's good practice criteria were still met in respect of ATVOD's Designation.

2.25 The terms of the Review were stated as follows:

²⁰ See <http://media.ofcom.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf>

²¹ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/atvod-invite.pdf>

- a) to assess whether Ofcom's tests for co-regulation (as laid out again in Annex 1, paragraph A1.1 below), and as set out in paragraph 5.9 of the 2009 Consultation, and now as reflected in the principles Ofcom put to the Leveson Inquiry (again as summarised in Annex 1, paragraph A1.2 below) were still being met, and that ATVOD remained "an appropriate regulatory authority" within the terms of section 368B(9) of the Act (as set out in paragraph 2.9 above and Annex 1, paragraph A1.3 below);
- b) to consider how ATVOD had been discharging the designated functions and whether it was meeting the obligations and conditions set out in paragraphs 5 and 7 respectively of the Designation (see Annex 2 paragraph 2.1 and 2.3);
- c) to identify any issues arising from the co-regulation of ODPS that would merit further consideration; and
- d) to consider whether, in light of (a), (b) and (c) to continue the Designation, and if so whether there were any aspects of the Designation that may require amendment or opportunities for further enhancements to the current arrangements.

2.26 In the 22 March Letter, we invited any contributions to the Review from ODPS providers and other interested parties. In particular, a copy of the 22 March Letter was sent to all providers of ODPS regulated by ATVOD. In addition, Ofcom attended a meeting of the ATVOD Industry Forum 23 May 2012²² to listen to any further contributions to the Review from stakeholders.

2.27 The issues raised in the responses received are grouped together as follows:

- notification, scope and scope appeals (Section 3);
- regulatory fees (Section 4); and
- ATVOD's other regulatory duties (Section 5).

2.28 In each of the sections 3 to 5, we set out:

- a summary of ATVOD's designated duties in the particular area under discussion;
- experience to date in that area;
- ATVOD's representations on its performance of its duties in the area;
- a general summary of the responses we received to the Review relating to the issues raised in the area; and
- Ofcom's response to the issues raised.

We conclude each of these sections by setting out Ofcom's assessment on ATVOD's performance and, where appropriate, next steps.

2.29 In Section 6, we put forward a more general assessment of ATVOD's performance against the relevant principles and tests.

²² The ATVOD Industry Forum is a body set up by ATVOD to allow effective two-way communication between the industry and ATVOD. Membership is open to representatives of ODPS providers and Trade Associations are also invited to attend as 'associate members'.

General summary of responses

- 2.30 Ofcom received 13 written responses to the Review, one of which was from ATVOD. Three ODPS providers requested confidentiality and are not therefore identified when their responses are referred to in this Statement. Ofcom also attended the ATVOD Industry Forum, and took note of views expressed there.
- 2.31 The responses from those organisations who did not request anonymity were published on Ofcom's website on 22 June 2012. These were from the following organisations: Action for Hearing Loss ("AHL"); ATVOD²³; BT Plc ("BT"); Channel 4; Channel 5 Broadcasting Ltd ("Five"); the Commercial Broadcasters' Association ("CoBA"); the Country Channel; the Professional Publishers Association ("PPA"); the Royal National Institute of Blind People ("RNIB"). There was also one individual respondent who submitted out of the review period, but whose comments were considered in the Review²⁴.
- 2.32 In general, the responses demonstrated a broad, though not uniform, consensus that co-regulation, through the Designation of ATVOD, should continue. Respondents also made a number of specific points which we consider below.

Impact Assessment and Equality Impact Assessment

- 2.33 This document does not contain a separate impact assessment. Instead the document as a whole assesses the impact of Ofcom's Review, and the Designation, on stakeholders, and in particular VOD service providers who are subject to the regulatory regime for ODPS. This assessment has been informed by the information provided to us by a range of industry stakeholders.
- 2.34 Ofcom is required by statute to have due regard to any potential impacts our decisions may have on equality in relation to gender, disability or ethnicity. An Equality Impact Assessment ("EIA") is our way of fulfilling this obligation²⁵. An EIA is Ofcom's tool for analysing the potential impacts a proposed policy or project is likely to have on people, depending on their background or identity.
- 2.35 In relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability or ethnicity, we consider that the result of our Review would not have any particular implications for people to whom these considerations apply. With the exception of the Access Services Duty we believe the decisions Ofcom has made will affect all groups equally.
- 2.36 In terms of the Access Services Duty, Ofcom has taken the general view that we need no longer approve ATVOD's guidance, as noted elsewhere in this document. Given the way in which ATVOD has performed its duties to date, we have concluded that it should be able to set its own guidance in relation to Access Services and therefore this outcome of the Review was unlikely to have an overall adverse effect on persons with disabilities. ATVOD and ODPS providers continue to be bound by the relevant statutory provisions to the same extent.

²³ ATVOD requested some aspects of their response to be redacted for reasons of stakeholder business confidentiality.

²⁴ The text of respondents comments can be found at with the exception of those respondents that requested anonymity and the respondent who submitted out of time for publication.

²⁵ See the Equality Act 2010.

Section 3

Notification, Scope and Appeals

Introduction

3.1 This section sets out:

- a summary of ATVOD's designated duties relating to notification and scope, and Ofcom's backstop powers in relation to scope;
- experience to date in this area;
- ATVOD's representations on its performance of its duties in this area;
- a general summary of the responses we received to the Review relating to the issues of notification, scope and scope appeals; and
- Ofcom's response to the issues raised.

3.2 We conclude the section by setting out our assessment on ATVOD's performance on notification and scope and next steps in this area.

ATVOD's designated duties

3.3 Under the Designation, ATVOD is required to:

- a) "administer procedures for receiving, and to receive, advance notifications under section 368BA of the Act" from ODPS providers (paragraph 5(i) of the Designation); and
- b) "determine whether [ODPS providers] have complied with section 368BA as set out below and the relevant requirements of the Act" (paragraph 5(ii) of the Designation).

3.4 Under sections 368A(1) - (7) and 368BA(1) in of the Act, providers of ODPS that meet the following criteria are required to notify their service(s) to the regulator. The criteria are:

- a) the principal purpose of a service is to provide programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services (i.e. to provide "television-like" programmes;
- b) access to the service is on an on-demand basis;
- c) there is a person who has "editorial responsibility" for the service;
- d) it is made available to members of the public by the person in (c); and
- e) that person falls under UK jurisdiction for the purposes of the AVMS Directive.

3.5 In connection with these Designated Functions, ATVOD is given the power to determine whether a service is an ODPS (paragraph 6(ii) of the Designation). In other words, to make scope determinations. However, Ofcom retains the power to consider appeals from ODPS providers who dispute ATVOD's scope determinations. In addition, under

paragraph 7(xii) as set out in Annex 2, ATVOD is required to consult with Ofcom prior to issuing any Enforcement Notification in relation to notification.

Experience to date

- 3.6 The 2009 Statement included non-binding interpretative guidance on the scope of regulation (“Scope Guidance”). It was drawn up with the cooperation of the industry-led VOD Editorial Steering Group (“VESG”) and ATVOD, to set out the approach the regulatory authority would be likely to take in making scope determinations. It was designed to help the regulator and ODPS providers determine whether they were subject to regulation²⁶. The introduction to the current version of the Scope Guidance states that it, “...provides non-determinative, interpretative guidance as to how ATVOD is likely to apply the criteria set out in section 368A of the Act, drawing on the Articles and Recitals of the Audiovisual Media Services Directive (“the Directive”) where appropriate”.
- 3.7 The current position is that ATVOD may propose changes to the Scope Guidance, but the effect of the Designation is that ATVOD must consult with Ofcom, and obtain Ofcom’s prior written approval, before making any changes. As a result of experience, ATVOD has proposed a small number of amendments that have been approved by Ofcom. These changes introduced in October 2010 covered issues relating to editorial responsibility and the definition of multiple services.
- 3.8 During the first two years of the Designation, Ofcom has exercised its role as the scope appeals body on a number of occasions. To date, Ofcom has published seven scope appeals decisions. Ofcom has upheld two appeals against ATVOD’s scope determinations. There have been four cases where Ofcom has not upheld such appeals²⁷. In three of these four appeals not upheld, whilst Ofcom reached the same overall decision as ATVOD, Ofcom substituted its decision for ATVODs - addressing flaws in ATVOD’s initial decision. In one case Ofcom quashed ATVOD’s determination and remitted it back for a fresh determination to allow ATVOD to take account of the new precedent set in an appeal that was determined after the notification of this ODPS had taken place. These appeals have served both to clarify the scope of regulation, and to demonstrate the complexity of decisions in this area. There are several cases pending which are awaiting the conclusion of a research project intended to cast light on consumer behaviour and expectations of regulation for media in this area.

ATVOD’s representations on the performance of its duties

- 3.9 In its response to the Review, ATVOD pointed to the challenges it had faced arising from uncertainty over scope. In particular, it felt that the Scope Guidance published by Ofcom in its 2009 Statement “left many questions both unanswered and difficult to resolve quickly”. ATVOD suggested that the concerns of small-scale organisations about whether they were in scope had aggravated controversy about the flat-rate fee structure adopted in Year One of the co-regulatory regime (i.e. the period up to 31 March 2011). ATVOD said that “Although these particular issues were ultimately resolved, the impact on ATVOD’s new and developing relationship with the industry it was attempting to regulate in a partnership model of co-regulation was negative and significant”.

²⁶ This version of the Scope Guidance was subject to some minor amendments and can now be found at: http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf).

²⁷ For copies of Ofcom’s decisions on scope appeals see <http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/>

- 3.10 ATVOD added that it had set up an industry working party on multiple services to develop proposals for the definition of such services in future Scope Guidance so as to ensure “far less impact on the regulated industry, as administrative burdens which deliver no benefit to consumers are to be avoided wherever possible in any rational regulatory regime”. This group’s focus has now expanded to cover all Scope Guidance with a view to ATVOD’s future consultations on revised Scope Guidance.
- 3.11 ATVOD suggested that with the benefit of these experiences the Designation should be amended to remove the requirement for:
- Ofcom’s prior approval to any changes to the Scope Guidance; and
 - ATVOD to consult with Ofcom prior to issuing any Enforcement Notification in relation to notification.

Stakeholder views

- 3.12 Ofcom received six responses to the Review on notification, scope and appeals, in addition to ATVOD’s comments on these aspects in its submission. One of the respondents requested confidentiality and is identified only as “an ODPS provider” below.

Scope determinations

- 3.13 The PPA noted that Ofcom had upheld appeals from newspaper and magazine publishers who disputed ATVOD determinations that the publishers were providing ODPS. In this context, the PPA stated its belief that there has been a “lack of transparency in the selection process for on-demand TV services to be deemed in scope and the process.... was intent on testing the limits of the system when the [Act] and the [AVMS] Directive were clear that newspaper and magazine websites were not in scope”. One ODPS provider made a similar point.
- 3.14 BT noted the examples of scope determinations made by ATVOD which have subsequently been overturned by Ofcom on appeal. This respondent said that “ATVOD is not going to get it right every time but where rulings are made in new areas and on high profile cases where appeals are likely, it seems sensible for both Ofcom and ATVOD to share their views, even if it is informally, before action is taken by ATVOD”.
- 3.15 In other comments:
- The Country Channel said that ATVOD had “ignored” the statutory framework, and applied the scope criteria in an “arbitrary” and discriminatory manner;
 - An ODPS provider stated its view that scope determinations should reflect the distinction between ‘television-like’ programmes and ‘television-like’ services; and
 - An ODPS provider requested that notifications should be able to be submitted online to the regulator; and
 - Another said ATVOD’s heavy handed approach to regulation, described as “...ATVOD’s bureaucratic and self-appointed expansion intoweb video activities, “threatens to, “...strangle new entrants at birth and kill off innovation, “and that the definition of an ODPS and the scale of regulation applied to them, “...should be related to the scale of their commercial activities and the temporal nature of their content.”

Scope Guidance

- 3.16 Channel 4 stated that as ATVOD has gained more experience as a co-regulator “there is now some scope for Ofcom to step back slightly from more detailed aspects of ATVOD’s operation, while still retaining its important backstop function”. By way of example, Channel 4 echoed the point made by ATVOD, that ATVOD should no longer be required to seek prior approval from Ofcom for changes to the Scope Guidance, which “would provide more distance between the day to day running of ATVOD and Ofcom’s role as a backstop”.
- 3.17 This point was echoed by CoBA, who said that the process of Ofcom approval “...inevitably lengthens the process [of implementing changes to non-binding guidance] by adding another layer of oversight.” CoBA believed that this “...is unnecessary, particularly as this Guidance is interpretative and not binding at a statutory level”. CoBA added that, to foster greater engagement with industry, there should be a formal requirement on ATVOD to take account, where appropriate, of requests from the ATVOD Industry Forum for a review of guidance such as the Scope Guidance.
- 3.18 CoBA and an ODPS provider welcomed ATVOD’s creation of a working party to look at the issues of multiple services and whether different services are substantially the same for the purposes of notification. We note further on these ideas in the fees section at 4 below.
- 3.19 Discovery considered that at times, ATVOD had appeared to take positions only to be forced to change these positions following advice from Ofcom. This was echoed by an ODPS provider, who considered that ATVOD had been constrained in some aspects by Ofcom’s interpretation and guidance.

Scope appeals

- 3.20 Ofcom received four responses to the Review relating to scope appeals in addition to ATVOD’s.
- 3.21 Some respondents commented on the apparent complexity and opacity of the appeal process. An ODPS provider said that the issue of determining scope is “complex” and that Ofcom’s first decisions on scope appeals had set precedents and given “greater clarity” which is welcomed by the “VOD marketplace”. This respondent said that it was important for the UK industry to be able to operate with more certainty as to what does and does not fall within regulation”.
- 3.22 A number of respondents expressed concern about the time taken for Ofcom to consider appeals. PPA pointed out that “a 12 month process from notification to appeal judgement is too long for a dynamic market” and said that it was “a good example of regulation killing innovation and growth, with new business models prevented from growing due to improper execution of the Communications Act 2003”. CoBA, PPA and ATVOD all sought greater certainty about the maximum period that Ofcom would take to publish the outcome of appeals. CoBA asked for a maximum period be set, and ATVOD suggested that this be set out in the Designation.

Ofcom’s conclusions

Scope determinations

- 3.23 The issue of which on-demand services are within the scope of regulation has proved controversial, and has posed one of the biggest challenges to the new regulatory

regime. Given the novelty and complexity of regulation in this area, it was perhaps inevitable that different views would emerge. The process of resolving which bodies were within and outside scope has been, at times, difficult for all parties concerned ATVOD, Ofcom and on-demand and other service providers. That co-regulation remains the preferred approach to regulating on-demand services speaks to the determination of ATVOD and its industry partners to make the system work.

- 3.24 On a similar point, we note the view expressed by one stakeholder that ATVOD and Ofcom had at times given the impression of adopting differing positions with regard to scope. It is for ATVOD to set out its view in scope determinations. Service providers may appeal those determinations to Ofcom. In any such process, a first instance decision may be overturned.
- 3.25 We do not agree with one of the providers suggestions that ATVOD's determinations have been arbitrary and discriminatory. In Ofcom's view interpreting new and difficult legislation is challenging and open to the possibility that different constructions will be adopted.
- 3.26 We also do not agree that ATVOD was "intent on testing the limits of the system when the [Act] and the [AVMS] Directive were clear that newspaper and magazine websites were not in scope". Ofcom did uphold the appeal made in respect of The Sun website. This was a complex and precedent setting case and we noted that ATVOD withdrew its scope determinations in respect of other newspapers and magazines as soon as that decision was reached. ATVOD has also withdrawn notifications in respect of other appeals, notably "Coffee Shorts" showing an active engagement with precedents set by the appeals process. It is possible that in the future further appeals may be upheld but this does not cast doubt on the fundamental decision process ATVOD employs. That Ofcom has upheld appeals against ATVOD's scope determinations shows there is a properly functioning appeals process.
- 3.27 We note the comment made by a stakeholder at the ATVOD Industry Forum that scope determinations should reflect the distinction between 'television-like' programmes and 'television-like' services. We interpret this stakeholder to mean that a service might not be in scope if it only includes very few 'television-like' programmes. In response, we note that the statutory definition of an ODPS includes the criterion that a service is an ODPS if, amongst other things "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"²⁸. Whether a service fulfils this criterion will be a matter of the facts in each particular case.
- 3.28 In this connection, we note the comments that criticise ATVOD's allegedly heavy-handed approach, its effect on new entrants and innovation and the way the definition of ODPS should apply. A service is an ODPS if it meets the definition in section 368A (1), whatever its size or novelty. That is not a matter ATVOD or Ofcom can change. It is for ATVOD correctly to apply the statutory test. Service providers can appeal to Ofcom where they disagree with ATVOD's determinations. Ofcom's views as to the appropriate scope of regulation are set out in our appeal decisions.
- 3.29 We note the desire of BT that Ofcom and ATVOD should share their views on an informal basis before scope determinations are made, in order to reduce the number of cases that may lead to appeals. However, an essential feature of the co-regulatory relationship is the separation between ATVOD as the initial decision maker on scope notification and Ofcom as the appeals body, such that there is a fair appeals process. It

²⁸ Section 368A(1)(a) of the Act.

would be inappropriate for even informal discussions in regard to particular cases to take place between the regulatory bodies which might then become subject to appeal. This could be seen to compromise the ability of Ofcom to properly and fairly consider appeals against ATVOD's scope determinations.

- 3.30 We have discussed with ATVOD the issue of remaining open scope determinations noted in their documents, as this figure appeared quite high. On average in a given month ATVOD are managing to close around 10 to 12 scope determinations. The number of open determinations in July 2012 was 229. ATVOD raised questions of resource, but also explained it had a process of triage on all services with open scope determinations directed at identifying the potential harm of the service. All services identified as potentially within scope were given an initial review, and priority status. Services that appeared to be in breach of any of the content standard duties, or which have been subject to a complaint that appeared to be within ATVOD's remit (both further detailed in Section 5 below), and services whose provider was hidden behind a proxy were all given high priority²⁹. Services whose content appeared clearly within scope would also be given priority.
- 3.31 Considering ATVOD's scope determinations as a whole, bearing in mind that the vast majority of ODPS notified have not appealed against scope, it appears to Ofcom that ATVOD has been, and is seeking to, give consideration to the relevant factors before making its decisions in cases that were and are often complex. Furthermore, given that ATVOD has published these determinations on its website, we do not agree that it has lacked transparency in this area.
- 3.32 Finally, we understand that ATVOD is considering whether to include the procedures for online notifications in their plan for 2013 - 14.

Scope Guidance

- 3.33 We have noted ATVOD's, Channel 4's and CoBA's views that ATVOD should no longer need to get Ofcom's approval for changes to the Scope Guidance. In the current circumstances, we agree. We set out the reasons for that view in section 6 below.
- 3.34 It appears to Ofcom that, given the industry responses in paragraphs 3.13 to 3.22 above, the dynamic nature of the VOD industry, the complexity of the legislation concerned, and Ofcom's role as the appellate body in scope matters, it is appropriate for ATVOD to take forward the advisory work of its Industry Forum Scope Working Party. We welcome the expansion of this group's consideration from issues around the notification of multiple services to other issues to guide any future consultations on changes to Scope Guidance.

Scope appeals

- 3.35 We note the view of one respondent that Ofcom's decisions on scope appeals had set precedents and given "greater clarity" which is welcomed by the "VOD marketplace". As noted above, that Ofcom has upheld appeals against ATVOD's scope determinations shows there is a properly functioning appeals process.
- 3.36 However, we also recognise that some of Ofcom's first appeal decisions have required considerable time. This reflects the lack of existing precedent, their complexity and their importance in terms of the number of potential stakeholders whose position depended on them. Nonetheless, we recognise the desire of both ATVOD and other stakeholders

²⁹ ATVOD indicated all those in the final category were services with "adult" content.

for greater clarity in the process by which Ofcom undertakes its backstop function of considering appeals of ATVOD's scope determinations.

- 3.37 We consider that it is now appropriate to determine and publish procedures for determining scope appeals. We are therefore publishing in parallel with this Statement *Ofcom procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an On-Demand Programme Service*³⁰ and a *Statement on those procedures for handling appeals on scope and for imposing sanction in relation to On-Demand Programme Services*.³¹
- 3.38 These procedures lay out timeframes for the submission of and consideration of appeals. For example, Ofcom will aim to complete appeals within 60 working days from the date it receives a full request for an appeal (i.e. one including all relevant supporting material). This aim is likely to be circumscribed by the circumstances of individual appeals and some cases when setting fresh precedents may take longer.

Ofcom assessment and next steps on notification, scope and appeals

Ofcom assessment

Taking into account all the evidence available to us, we consider that ATVOD has adequately carried out its duties in relation to notification and scope.

Next steps

As a result of our Review and the reasons set out in Section 6 Ofcom has decided to amend the Designation:

1) to remove from paragraph 7(vii), the obligations for ATVOD to seek approval from Ofcom prior to publishing any changes to the Scope Guidance; and

2) to remove paragraph 7(xii), the requirement for ATVOD to consult with Ofcom prior to issuing any Enforcement Notification relating to notification;

Ofcom is also publishing its Procedures relating to appeals of scope determinations made by ATVOD; and is inviting ATVOD to consider taking forward the idea of enabling ODPS providers to notify services online to the regulator (as discussed in paragraph 3.32 above).

³⁰ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

³¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/on-demand/statement/statement-procedures.pdf>

Section 4

Regulatory fees

Introduction

4.1 This section sets out:

- a summary of ATVOD's designated duties relating to regulatory fees;
- experience to date in this area;
- ATVOD's representations on its performance of its duties in this area;
- a general summary of the responses we received to the Review relating to the issues of regulatory fees; and
- Ofcom's response to the issues raised.

4.2 We conclude the section by setting out our assessment on ATVOD's performance on regulatory fees.

ATVOD's designated duties

4.3 Under the Designation, ATVOD is mandated to "require [ODPS providers] to pay a fee in accordance with section 368NA of the Act" (paragraph 5(iii) of the Designation). The Designation also stipulates that such fees are subject to Ofcom's approval (also paragraph 5(iii)).

4.4 Section 368NA of the Act sets out the relevant legislative provisions concerning the setting of fees for VOD service providers for any given financial year commencing 1 April. In particular, it requires the appropriate regulatory authority, for each financial year, to consult in such manner as they consider appropriate the providers likely to be required to pay them a fee during that year (section 368NA(5)(c)); and publish the fee to be levied on VOD service providers (section 368NA(5)(d)).

4.5 Section 368NA (3) requires that ATVOD be satisfied that the fee levied on an ODPS provider represents the appropriate contribution of that provider towards ATVOD's likely costs and is justifiable and proportionate. Section 368NA (4) says that different fees may be required in relation to different cases or circumstances. And, sub-section (5) says ATVOD must, as well as consulting on and publishing fees, estimate their likely relevant costs each financial year and ensure the fees set will meet, but not exceed, those costs.

4.6 To reflect the requirement under section 368NA(5)(c), under paragraph 7(iv) of the Designation, ATVOD is required to, "... in each financial year to consult in such manner as Ofcom considers appropriate.... the service providers likely to be required to pay [the regulator] a fee," and to "publish in such manner as Ofcom considers appropriate the amount of the fee" payable by ODPS providers.

Experience to date

- 4.7 Since the Designation, there have been three consultations with regard to the setting of regulatory fees for the periods ending: 31 March 2011 (“Year One”); 31 March 2012 (“Year Two”); and 31 March 2013 (“Year Three”).
- 4.8 In relation to Year One, following a public consultation, ATVOD published a Statement jointly with Ofcom (“the Year One Statement”) on 17 June 2010, setting out the fees for the period ending 31 March 2011 (“the 2010/11 Fees”). In summary, this Statement stated that the 2010/11 Fees would be a flat-rate fee of £2,900 per ODPS³².
- 4.9 In relation to Year Two, following a public consultation, ATVOD published a Statement (“the Year Two Statement”)³³ on 28 June 2011, setting out the fees for the period 1 April 2011 to 31 March 2012 (“the 2011/12 Fees”). In summary, this Statement stated that the 2011/12 fees would be based on ODPS provider revenue, according to three revenue bands, with largest providers being those over £25.9million annual turnover. The Year Two Statement also stated that concessionary fees would be applicable to non-commercial ODPS providers and small-scale and micro-scale commercial ODPS providers with annual provider revenue not exceeding £100,000.
- 4.10 The Year Two Statement also stated that where two or more ODPS providers are wholly and directly owned by the same parent company, the service providers may opt to be assessed on the basis of group turnover with the result that the cap on total fees payable will also apply at the group level (“the Group Cap”).
- 4.11 In relation to Year Three, following a public consultation, ATVOD published a Statement (“the Year Three Statement”)³⁴ on 29 March 2012, setting out the fees for the period 1 April 2012 to 31 March 2013 (“the 2012/13 Fees”). In summary, this Statement stated that the 2012/13 Fees would continue to be based on the ODPS provider revenue model put in place for Year Two, but that the fees payable at each band for Year Three (including the concessionary bands) would be reduced by 3.58% from the tariffs set for Year Two. In addition, the Year Three Statement also stated a slight modification to the Group Cap, such that the Group Cap should apply if two or more ODPS providers are wholly owned by the same parent company, even if that ownership is not ‘direct’ (i.e. if it is through a wholly owned subsidiary).
- 4.12 Following the process of setting the fees for Year One, which was arrived at through a joint ATVOD and Ofcom consultation, the consultation processes for Year Two and Year Three have been undertaken by ATVOD alone. In relation to these two years, Ofcom reviewed the amount and structure of the fees and associated reasoning set out by ATVOD, by reference to the statutory requirements set out in Section 368NA of the Act. Taking into account: ATVOD’s proposed costs of carrying out the regulatory functions during each year; any surplus or deficits brought forward from previous years; and Ofcom’s own costs for carrying out the non-designated functions, Ofcom approved ATVOD’s decision in relation to fees, with regard to Year Two and Year Three, as to the amount and structure of the fees set for each year and the associated reasoning. In

³² http://www.atvod.co.uk/uploads/files/2010_fee_consultation_statement_0610.pdf. Following the publication of the Year One Statement, and after having invited small-scale service providers to provide information to the regulator concerning the issue of concessionary fees, ATVOD (jointly with Ofcom), on 12 November 2010, published a further short Statement which set out ATVOD’s power to set concessionary fees for small-scale ODPS providers in certain circumstances, and on a discretionary basis (see http://www.atvod.co.uk/uploads/files/VOD_mini-statement_concessionary_fees_-_Further_Final_Version_12112010.pdf).

³³ See http://www.atvod.co.uk/uploads/files/Year_Two_Fees_Statement2.pdf

³⁴ See http://www.atvod.co.uk/uploads/files/2012-13_Fees_Statement_FINAL.pdf

doing so, Ofcom had to be satisfied that the aggregate amount of the fees to be paid was sufficient to meet, but did not exceed the likely costs of carrying out the regulatory functions during the relevant financial year.

The Review: responses and conclusions on regulatory fees

ATVOD's representations on the performance of its duties

- 4.13 ATVOD in its response said that the flat rate fee of £2,900 set in Year One provoked "...a great deal of disquiet", especially among small-scale service providers and multiple service providers. ATVOD said it had always been in favour of concessionary rates for small-scale providers and noted that the subsequent setting of specific concessionary fees for such providers "...have satisfied all but a tiny minority of smaller scale stakeholders". ATVOD added that the introduction of a progressive fees system, with a cap on total payments has provided "reassurance" to multiple service providers. ATVOD also pointed to the creation of the ATVOD/Industry Forum Fees Working Party in which industry members participate as an example of ATVOD taking into account the concerns of industry.
- 4.14 In its response, ATVOD provided copies of the Year One Statement and Year Two Statement relating to the 2010/11 Fees and 2011/12 Fees respectively, and copies of its reports to Ofcom on the exercise of the Designated Functions for the first two years of the co-regulatory regime, which described its activities in relation to fees.

Stakeholder views

- 4.15 Ofcom received six further responses to the Review on regulatory fees. Two of these respondents requested confidentiality and are therefore identified only as ODPS providers when their responses are referred to below.

ATVOD's approach to fee setting

- 4.16 The Country Channel stated that ATVOD's objectives are "...financial rather than regulatory," and that ATVOD is "...financed by the big channels and would not function without their existence". The PPA said that, "...the overly prescriptive nature of ATVOD's fee structure and the lack of logic applied to the formulas used to calculate fees created an air of distrust for those parties who thought they were, at first, out of scope, then fell into scope".
- 4.17 CoBA said that ATVOD should be able to take a flexible approach to the annual setting of fees, noting that whilst "...an annual consultation about fees is a statutory requirement, and is desirable, it should not necessarily involve a root-and-branch review for the entire fee structure every year." CoBA indicated that the designation should reflect the "significant flexibility afforded in the legislation"³⁵ by "clarifying that certain elements of the scope of the annual review [of fees], including whether to review [the] fee structure, are at the discretion of the co-regulator".
- 4.18 In its response, and as mentioned in paragraph 3.18 above, CoBA asked for "further consideration of a framework that enables companies to develop and offer multiple services without necessarily requiring individual notifications for each service even if those services do not qualify as 'substantially the same'". CoBA added that "Given the often highly marginal and unpredictable nature of developing on-demand services, even

³⁵ Section 368NA(5)(c) of the Act states that the regulator must "...consult in a manner they consider appropriate the providers likely to be required to pay them a fee....during the year".

paying relatively small sums for an additional notification will weigh against investing time and resources in project development at the early stage". This respondent suggested an amendment to the fees framework "for providers to be able to apply for a capped number of notifications at a time". In this way, CoBA said that such a flexible system "...could reduce administration costs for both industry and ATVOD by allowing for multiple services under one payment". In conclusion, CoBA said that neither the Act or the AVMS Directive "...explicitly requires notification per service".

- 4.19 CoBA's response supported the Group Cap for calculating fees, introduced by ATVOD for Year Two and amended for Year Three. However, CoBA also said that it was concerned that the Cap "...excludes services that are not wholly owned by the same entity" which means that "such services are potentially subject to a disproportionate burden". CoBA said the effect of the Group Cap was that "companies cannot put forward on-demand services which are joint ventures with other entities for consideration at group level, and must apply for separate notifications". This respondent asked for Ofcom to consider whether the Group Cap rule should be amended or removed to address this concern.
- 4.20 An ODPS provider voiced their concern that concessionary fees only applied to small-scale commercial ODPS providers with provider revenue of not more than £100,000. This stakeholder said that for ODPS providers with provider revenue of just over £100,000 an annual fee of £771 in Year Three would represent a substantial burden.
- 4.21 Three other ODPS providers supported ATVOD setting up the ATVOD/Industry Forum Fees Working Party as a forum for industry participation on this issue.

Ofcom's conclusions

- 4.22 Ofcom agrees with ATVOD that, following the Designation, there was significant disquiet with regard to fees amongst certain stakeholders. However, we consider that much of the concern that existed has been addressed by the move from a flat-rate fee structure to a proportional banded structure based on ODPS provider revenue. The fees review by the ATVOD/Industry Forum Fees Working Party can continue to address such concerns, particularly with regard to the smaller providers and marginal services some respondents referred to.
- 4.23 We do not agree with The Country Channel that ATVOD's objectives are "financial rather than regulatory". A fundamental feature of the co-regulatory framework is that the co-regulatory body is funded by the industry it regulates rather than the taxpayer. By their nature, co-regulatory bodies will carry a range of costs, for example their own board, that are specific to the industry in question, rather than spread across a range of sectors in a body like Ofcom. Section 368NA of the Act lays out ATVOD's and Ofcom's powers in the area of fees. Although important, the setting of regulatory fees is only one of the regulatory duties undertaken by ATVOD and the fees may only meet, but not exceed, the costs of regulatory functions (with any surplus carried forward).
- 4.24 In addition, regarding the point made by The Country Channel in relation to the funding of ATVOD by the "big channels", we note that ATVOD is funded by ODPS providers of all sizes, under a fees system consistent with the statutory framework. In terms of the representation of smaller providers to ATVOD, we note that all parties are entitled to representation at the Industry Forum and can apply to participate in the working parties created under its auspices.
- 4.25 We note in relation to the annual fees consultations issues raised by CoBA that there is currently a degree of flexibility governing the consultation process. However, we

consider that CoBA's two related points about multiple services described at 4.17 and 4.18 above to be proposals that would merit further consideration by ATVOD. We further note the joint desire of ATVOD and industry to explore the possibility of a fees metric based on audience consumption.

- 4.26 We note the concerns expressed by one stakeholder at the ATVOD Industry Forum that concessionary fees only applied to small-scale commercial ODPS providers with provider revenue of not more than £100,000. This stakeholder said that for ODPS providers with provider revenue of just over £100,000 an annual fee of £771 in Year 3 would represent a substantial burden. We acknowledge that a fundamental feature of a fees framework involving tariff bands is that there will be jumps in regulatory fees being paid by service providers, when revenue thresholds of tariff bands (e.g. £100,000 ODPS provider revenue) are exceeded. However, we note that the concessionary fee framework in place for ODPS has received the overwhelming support of all stakeholders for two years running. We therefore consider that the framework for concessionary fees remains appropriate.
- 4.27 Taking into account all the information available to us, including what we say about the way ATVOD has consulted on and developed and continues to develop the fees' framework for ODPS, Ofcom considers that a framework exists which represents a settled and proportionate arrangement and which meets the applicable statutory requirements and the terms of the Designation. ATVOD has carried out consultations and addressed stakeholders' concerns in setting appropriate fees for different providers (as section 368NA envisages). The framework attracts the support of the large majority of stakeholders, and specifically accommodates the features of small-scale and micro-scale ODPS providers. We envisage that future consultations on fees will need to consider a range of such substantive issues and approaches and that the ATVOD/Industry Forum Fees Working Party could provide a focus for such considerations. With regards to the latter, we welcome the support given by different stakeholders to the existence of this working party.

Ofcom assessment on regulatory fees

Ofcom assessment

Taking into account all the evidence available to us, we consider that ATVOD has adequately carried out its duties in relation to the setting of regulatory fees. We believe that the ATVOD/Industry Forum Fees Working Party will be a useful forum for the future consideration of the differing fees concerns of the wider group of industry members, both large providers and small.

Section 5

ATVOD's other regulatory duties

Introduction

5.1 This section sets out:

- a summary of ATVOD's other designated duties relating to:
 - ensuring that ODPS providers comply with the content standards requirements of the Act;
 - handling complaints according to a published complaints-handling procedures;
 - the Access Services Duty; and
 - the European Works Duty;
- experience to date in each of these areas;
- ATVOD's representations on its performance of its duties in each of these areas;
- a general summary of the responses we received to the Review relating to the above duties; and
- Ofcom's response to the issues raised.

5.2 We conclude our discussion of each duty by setting out our assessment of ATVOD's performance and next steps in the relevant area.

Content standards

ATVOD's designated duties

5.3 Under paragraph 5(iv) of the Designation ATVOD is required to take such steps as appear to them best calculated to secure that every ODPS provider complies with the requirements of section 368D of the Audiovisual Media Services Regulations. Section 368D requires, amongst other obligations, that ODPS providers comply with the content standards in sections 368E - 368H which address harmful material, advertising, sponsorship and product placement.

5.4 Under paragraphs 6(iv) and (v) and 7(v) and (vii) of the Designation, ATVOD is required to set out the rules for the purpose of securing that ODPS providers comply with relevant requirements of the Act (referred to in the Designation as the "Rules"), and to provide non-binding guidance relating to them, in consultation with Ofcom. Ofcom is required to give prior written approval before publication of any such Rules and guidance or amendments to them.

5.5 Paragraph 7(vi) of the Designation stipulates that the Rules must be, "...expressed as the relevant requirements of the Act and "...expressed without further material additions or omissions." Paragraph 7(viii) says the guidance on them must reflect the following:

- “(a) that it is provided as non-binding guidance only in order to aid interpretation of the Rules;
- (b) that it will be the Rules themselves, rather than the guidance, which determine whether a contravention of the Rules has taken place;
- (c) that compliance with the guidance does not itself confer a presumption of conformity with the Rules; and
- (d) that non-compliance with the Rules will be taken to be non-compliance with the relevant requirements in the Act”

5.6 In addition, and as dealt with in more detail below, paragraph 7(x) of the Designation requires ATVOD to put in place, following consultation with Ofcom, processes for ensuring the compliance of ODPS with the content standards rules and handling complaints. Under paragraph 7(xii), ATVOD is required to consult with Ofcom prior to issuing any enforcement notification it proposes to issue in relation to any breach of the content standards following assessment under its complaints handling processes.

Experience to date

- 5.7 Since Designation, ATVOD has issued both Rules and guidance documents, in both cases following consultation both with Ofcom and more widely.
- 5.8 In contrast to the scope notification experience, content decisions have not resulted in significant representations to Ofcom by ODPS providers. Ofcom has noted two particular decisions below which demonstrate a reasonable approach to reaching a judgment and enforcing robust decision making. The two decisions are *Bootybox.TV* and Channel 4's on-demand programme service, *4OD (Mr Woodcock)* and are described below. Further decisions are published on ATVOD's website.
- 5.9 *Bootybox.TV* was a website providing adult on-demand programmes. A complaint was received on 26 June 2011 that the service had “...no parental control on...”, and that the content was “...far too strong to be allowed even under UK law...”. ATVOD conducted a full investigation of the service and established that the principal purpose of the service was to provide content that was R18 or stronger. In its view, the content met the statutory test of material which might seriously impair a minor and that accordingly an effective Content Access Control System was essential.
- 5.10 ATVOD assessed how the service was accessed and established that there was free content available on the service which any young person could access. Further, the paid service did not provide an adequate content access control system. Any young person with a debit card could easily access the material, without being challenged by any age verification process. ATVOD concluded that the above actions resulted in two breaches of Rule 11³⁶. On 16 November 2011 ATVOD issued its preliminary view that *Bootybox.tv* had committed two breaches of Rule 11. On 9 December 2011, ATVOD issued a final determination confirming the breach. The service then ceased operating in the UK.
- 5.11 Channel 4's on-demand programme service (*4OD*), featured the film *Mr Woodcock*. A complaint was received on 14 January 2012 that the content dealt inappropriately with

³⁶ Rule 11 states: “If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it. It reflects the requirements of section 368(E)(2) of the Act.

the issue of family abuse. ATVOD determined that its powers (unlike those co-defined under Ofcom's Broadcasting Code for Broadcasters) do not extend to enforcing standards on "content which might cause offence and distress *per se*". ATVOD further concluded that the tests under Rule 10³⁷ and Rule 11 are both very high. ATVOD noted that the BBFC notification of the film was a 12 and accordingly concluded that this material could not be seen as capable of causing harm under Rules 10 and 11. Therefore, no breach had occurred.

The Review: responses and conclusions on content standards

ATVOD's representations on the performance of its duties

- 5.12 In its Designation Review submission, ATVOD explored the concern over the ease with which children can access harmful material especially through "a small number of so-called 'Tube' sites operating from the USA, and therefore outside ATVOD's jurisdiction". ATVOD has said that it will take a precautionary approach to implementing the Rule about material harmful to under eighteens when it is within its jurisdiction. Hence, it has made clear that "...material which might seriously impair the physical, mental or moral development of minors" when provided as part of an on-demand programme service may include content that has been classified 'R18' by the British Board of Film Classification, or material equivalent to content classified in that category³⁸.
- 5.13 ATVOD also included a detailed analysis of the changing public expectations of regulatory protection across a range of devices, which will pose challenges to it ensuring that it will enforce these statutory rules.
- 5.14 In its response, ATVOD also suggested that the Designation should be amended to remove the requirement for:
- Ofcom's prior approval to any changes to its guidance on the Rules; and
 - ATVOD to consult with Ofcom prior to issuing any Enforcement Notification in relation to breaches of the statutory content standards rules.

Stakeholder views

- 5.15 One ODPS provider acknowledged the concerns over harmful material to under 18s and felt that co-regulation should minimise the risks of harm to children. Another stakeholder, an ODPS offering adult content, argued that the precautionary approach taken by ATVOD risked driving legitimate ODPS providers of 'adult' content offshore, depriving UK citizens of the protection of UK regulation.

Ofcom's conclusions

- 5.16 Ofcom is satisfied that ATVOD has Rules and relevant guidance documents and processes to secure compliance with the standards set out in section 368D of the Act. The decisions outlined above, and other actions it has taken to enforce and/or ensure compliance with those standards, demonstrate its ability, when called upon to do so, to take steps to analyse the issues concerned, recognise the limits of its statutory rules and secure compliance when those rules are breached.

³⁷ Rule 10 states: "An on-demand programme service must not contain any material likely to incite hatred based on race, sex, religion or nationality"

³⁸ See the Guidance to Rule 10 and 11 in ATVOD's Rules and Guidance (http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf).

- 5.17 We have considered (both here and more fully at 5.27 – 5.30 below) the make-up of ATVOD's Board in terms of its decision making procedures, as it contains both independent and non independent industry members. We have noted that the expertise industry Board members can bring to decision making can be of value and that ATVOD's Board members are subject to wide ranging obligations concerning the need to avoid conflict of interests set out in their Code of Conduct for Board members³⁹. These include, amongst other things the stricture that "Any conflict between Member's personal interests and the discharge of their public duties must be avoided. Board Members must not seek though the performance of their duties to gain material benefits for themselves, their families or their friends". Ofcom are in dialogue with ATVOD over the need to ensure there is no possibility or perception of bias or favour in any aspect of its decision making. We would also note at this point that Ofcom has and continues to reserve the powers of sanctions concerning content matters to itself upon application by ATVOD.
- 5.18 Ofcom notes the views expressed by ATVOD and other stakeholders about the growing concerns around the availability of content that might seriously impair the physical, mental or moral development of under-eighteens, and expects to explore these issues further. Ofcom addressed this issue in its report on report on Sexually Explicit Material and Video-On-Demand Services⁴⁰. In its response⁴¹ to the report, the Government stated that it intended to address this issue comprehensively in its review of the current regulatory framework for the communications sector. Ofcom will take account of any conclusions reached.
- 5.19 In light of our assessment that ATVOD has adequately taken the relevant procedural steps and other steps demonstrating its ability to ensure compliance with the content standards rules, Ofcom has also concluded that it is no longer necessary for Ofcom to approve changes to ATVOD's guidance on the Rules and we will amend paragraph 7(vii) of the Designation accordingly. Ofcom will also no longer require ATVOD to consult Ofcom prior to its issuing of an Enforcement Notification in relation to breaches of those Rules. We set out in more detail in section 6 below our reasons for this conclusion.
- 5.20 Ofcom has retained the backstop power to levy sanctions as a consequence of any Enforcement Notification determined by ATVOD. In the interests of clarity as between the application of the two regulatory bodies' respective powers, Ofcom will require prior notification should ATVOD consider that compliance with an Enforcement Notification needs to be secured by way of civil proceedings. ATVOD will need Ofcom's written approval for such proceedings. This should ensure, through appropriate consultation, that the correct process of either civil enforcement or Ofcom sanction is applied, avoiding the possibility of dual enforcement measures and ensuring that the appropriate balance between co-regulatory authorities, with Ofcom having backstop enforcement powers, is maintained. We will amend paragraphs 6 (x) and (xiii) of the Designation accordingly.

³⁹ <http://www.atvod.co.uk/about-ATVOD/atvod-Board>

⁴⁰ <http://stakeholders.ofcom.org.uk/internet/Sexually-Explicit-Material-VOD.pdf>

⁴¹ <http://www.culture.gov.uk/images/publications/EVletter-to-ed-richards-3aug2011pdf.pdf>

Ofcom assessment and next steps on content standards

Ofcom assessment

Taking into account all the evidence available to us, we consider that ATVOD has adequately carried out its duties in relation to the enforcement of content standards.

Next steps

As a result of our Review, Ofcom:

- will continue to explore, in liaison with ATVOD, the issues around ensuring the protection of under-eighteens from content that might seriously impair their physical, mental or moral development; and
- will amend the Designation to remove the obligations:
 - 1) in paragraph 7 (vii), for ATVOD to obtain Ofcom's prior approval to publishing its guidance on the statutory content rules and any changes to it; and
 - 2) in paragraph 7 (xii), for ATVOD to consult with Ofcom prior to issuing any Enforcement Notification relating to breaches of the statutory content rules (although where ATVOD considers that compliance with such Enforcement Notification needs to be secured by way of civil proceedings, Ofcom's prior written approval will be required for such proceedings).

Complaints handling

ATVOD's designated duties

5.21 Under paragraph 7(x) of the Designation, ATVOD is required to "handle complaints received by it in accordance with its obligations in this Designation". In addition, under paragraph 7(ix), ATVOD is required to consult with Ofcom in preparing any complaints handling processes.

Experience to date

5.22 In 15 September 2010, ATVOD published its complaints handling processes. These were republished on 25 June 2012 following consultation with Ofcom and publicly. The processes provide for users and ODPS providers to make complaints to ATVOD about services breaching relevant rules. ATVOD's Procedures for Complaints about Editorial Content on VOD Services were developed with input from the ATVOD Steering Group and were also internally reviewed by Ofcom.

5.23 In the period 1 January 2011 to December 2011, ATVOD received 493 complaints, 154 of which were referred to ATVOD for consideration under its complaints handling processes. Of these, one case was subject to a full investigation by ATVOD, resulting in a finding of a contravention of the statutory rules as referenced above in paragraphs 5.9 and 5.10.

The Review: responses and conclusions on complaints handling

ATVOD's representations on the performance of its duties

5.24 As part of its response, ATVOD provided copies of its reports to Ofcom on the exercise of the Designated Functions for the first two years of the co-regulatory regime⁴², which laid out details of all the complaints it had handled. In addition, ATVOD also suggested that the Designation should be amended to remove the requirement for ATVOD to consult with Ofcom prior to publishing any complaints handling procedures.

Stakeholder's views

5.25 Only one respondent commented on complaints handling. It felt ATVOD had dealt with this issue adequately.

Ofcom's conclusions

5.26 Ofcom is satisfied that ATVOD has published processes in line with the Designation. The bases on which we are satisfied are as follows.

5.27 First, Ofcom's current view is that, in light of the Code of Conduct for ATVOD Board members as outlined above and the following terms of ATVOD's complaints handling processes, there is an appropriate combination of industry expertise and sufficiently independent decision making on ATVOD's part in relation to complaints.

5.28 The terms of ATVOD complaints handling process are (with Ofcom's **emphasis**):

- "Complaints considered by ATVOD will be investigated by ATVOD's Executive, and complaints will be decided by a sub-committee of the ATVOD Board to whom the ATVOD Board has delegated the consideration and Determination of the complaint. **The sub-committee will have a majority of independent members and any director of ATVOD who is employed by the VOD service provider subject to the complaint or otherwise subject to any actual or potential conflict of interest is excluded from any consideration or Determination of that complaint....;**
- The complainant and the service provider each have the right to seek a review of ATVOD's Determination by the full ATVOD Board of Directors. **The full board shall for this purpose exclude** any directors who sat on the sub-committee that first considered and determined the complaint and **any director who is employed by the service provider subject to the complaint or subject to any actual or potential conflict of interest....;**
- The ATVOD Board may in its sole discretion refer the matter to an independent complaints reviewer for advice, but any recommendation of the independent reviewer shall not be binding on ATVOD. ATVOD will then take a final decision, having taken account of any recommendation of the independent complaints reviewer where a reference has occurred, either to uphold or to vary or reverse the original Determination".

5.29 Ofcom's view is that, in a dynamic industry like that for VOD services, a degree of expert involvement in regulation, in the form of industry participants (in the present context, non-independent Directors), may, in appropriate circumstances be beneficial. That

⁴² <http://stakeholders.ofcom.org.uk/broadcasting/tv/video-on-demand/responses/ATVOD/>

involvement must, however, be balanced with sufficient independence in the relevant decision making.

- 5.30 Ofcom considers that the provisions quoted maintain the possibility of sufficient independence, given the limited number of statutory content rules and that Ofcom has concurrent and backstop regulatory powers, especially in relation to content sanctions (see paragraph 7(xiv) of the Designation). This view, however, depends on:
- ATVOD's recognition of the potential for conflicts of interest in the relevant decision making process, even indirectly where one member of an industry determines complaints against another, and on its diligent application of its conflict of interest rules (construed widely); and
 - the VOD industry's incentives to regulate itself effectively remaining sufficiently aligned with the interests of consumers (see section 6 below).

Both of these provisos must continue to be met to ensure that the necessary independence and the proper application of the statutory content rules is maintained. These are matters Ofcom may need to keep under review.

- 5.31 We have detailed in paragraphs 5.8 to 5.11 and 5.16 to 5.19 above our view of the quality of the decisions reached under these procedures.
- 5.32 We also note the substantial increase in the number of complaints (from an average of three complaints a month in 2010 to nearly 50 a month in the 1st quarter of 2012). We noted a high proportion of complaints received were determined to be out of remit by ATVOD. ATVOD has provided further detail on the procedures it applies to determine if a complaint would be considered as falling within its remit. ATVOD explained that the majority of complaints did not concern content but related to commercial concerns such as unexplained bills, long contractual periods or dissatisfaction over the technical performance of the ODPS concerned. ATVOD passes all such complaints back to the relevant ODPS provider. ATVOD also passes back complaints concerning content matters to the ODPS provider in the first instance, but where there appears to be a possibility that the complaint might relate to a content function of ATVOD, ATVOD proactively follows up with the complainant to see if they are satisfied with the ODPS provider's response. If they are not, then ATVOD takes on consideration of the content complaint. If it transpires that a complaint about a potential ODPS which is not a notified service might involve a breach of the content rules applying to such a service, then ATVOD will prioritise a scope determination on that service to see if it can then follow through with a formal consideration of the complaint.
- 5.33 ATVOD will need to ensure that it is resourced adequately to deal with the likely increase in complaints stemming from the growing popularity of ODPS. No evidence has emerged to change our view, however, that the current complaints processes provide adequate procedural means to deal with those complaints.
- 5.34 ATVOD's publication of its complaints handling processes and its application of them, as described above, also enables Ofcom to conclude that, provided ATVOD continues to devote adequate resources to complaints handling, it is no longer necessary for ATVOD to consult with Ofcom prior to it publishing any changes to its complaint handling procedures. We will therefore make appropriate amendments to the Designation.

Ofcom assessment and next steps on complaints handling

Ofcom assessment

Taking into account all the evidence available to us, we consider that ATVOD has adequately carried out its duties in relation to complaints handling.

Next steps

As a result of our Review, Ofcom:

- in paragraph 7(ix), will amend the Designation to remove the obligation for ATVOD to consult with Ofcom prior to publishing any complaints handling procedures.

Access services

ATVOD's designated duties

5.35 Under paragraph 5(v) of the Designated Functions in the Designation, ATVOD is required to: "...encourage [ODPS providers] to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both". This reflects the Access Services Duty in section 368C(2) of the Act. In addition, under paragraph 7(xx)(a) of the Designation, ATVOD was required by 30 June 2010 to provide to Ofcom a plan relating to the Access Services Duty and proposed guidance to ODPS providers about how they should make their services more accessible. That paragraph says ATVOD must obtain Ofcom's approval before issuing that guidance.

Experience to date

- 5.36 ATVOD met this initial timetable with an outline plan followed up in February 2011 with a fuller explanation on how ATVOD would encourage ODPS providers to make their services more accessible to people with disabilities with their sight or hearing.
- 5.37 Following this, in March 2011, ATVOD launched an Access Services Consultation on a proposal for best practice guidelines for access services on Video-on-Demand services. The proposal was modelled on the best practice guidelines developed by Ofcom for programmes shown on television broadcast services. ATVOD also committed to an initial survey of industry members on the level and nature of access service provision. This survey, together with an interim report, was published in November 2011.

The survey and report indicated a number of key findings:

- Whilst there was broad support that the guidelines should be modelled on broadcast best practice, several respondents felt that the publication of guidelines would be premature given the industry's lack of agreed standards and limitations on technology.
 - Specific comments were raised on the technical compatibility of access services content and the platforms on which it is shown, with specific comments in relation to subtitles, audio description and signing.
- 5.38 As a result of the Access Services Consultation, an ATVOD/Industry Forum Access Services Working Party was established by ATVOD, comprising ODPS providers,

access service providers and organisations representing people with disabilities relating to hearing and sight. The ATVOD/Industry Forum Access Services Working Party is considering a range of issues, such as clarification of terminology used in the Best Practice Guidelines and, following discussions with relevant disability groups, is focussing its attentions on resolving the technical limits on the use of pre-existing subtitle and audio description information.

5.39 In July 2012 ATVOD issued a final set of Best Practice Guidelines for service providers for Video-on-Demand Access Services for Ofcom's approval. In these ATVOD encouraged service providers:

- to present clear signals when access services are available for a particular programme;
- to monitor the output quality of access services; and
- to consult periodically with groups representing service users and monitor feedback of these services.

5.40 ATVOD also provided detailed guidance for service providers in relation to subtitling, audio description and signing, setting out how the best practice on how each of these services should be delivered including:

- in relation to subtitling: ATVOD recommended that service providers give priority to the most popular programmes, that subtitles should be readable on the appropriate device and should also include non speech information.
- in relation to audio description: ATVOD stated that this should describe characters, locations, time and circumstances, any sounds that are not readily identifiable, on-screen action, and on-screen information.
- in relation to signing: ATVOD recommend British Sign Language as the default language and that interpreters should be registered with the National Registers of Communication Professionals working with Deaf and Deafblind people.

5.41 ATVOD now also maintain a schedule of annual surveys on the level of provision. The intention stated in the survey launched in July 2011 was to enable ATVOD to publicise on its website the providers who are currently making their services accessible to people with disabilities relating to hearing or sight or both.

The Review: responses and conclusions on access services

ATVOD's representations on the performance of its duties

5.42 In its response, ATVOD provided copies of the various documents mentioned in paragraph 5.24 above to demonstrate what it had done pursuant to this duty. In addition, ATVOD suggested that the Designation should be amended to remove the requirement for ATVOD to seek Ofcom's approval prior to publishing any guidance relating to the Access Services Duty.

5.43 ATVOD has also represented further that its ATVOD/Industry Forum Access Services Working Party will be focussing on the technological developments that should make it easier and cheaper to reversion subtitling and audio description files for on-demand programming previously broadcast on television with access services. We understand a seminar on such issues is proposed by ATVOD for September 2012.

- 5.44 ATVOD has also confirmed that the survey of level of provision of access services by all ODPS providers will continue annually, and its results will be published on its web site.

Stakeholder views

- 5.45 Ofcom received six other responses to the Review on access services. Three of these respondents requested confidentiality and are identified only as ODPS providers when their responses are referred to below.
- 5.46 Two respondents, AHL and RNIB representing people with sensory impairments expressed regret at the low level of access services provision by ODPS providers. AHL called it “disappointingly low”. RNIB noted that the only service providing audio description is BBC iPlayer “which falls outside ATVOD’s remit”. AHL suggested that few ODPS providers had engaged in the ATVOD/Industry Forum Access Services Working Party. Both AHL and RNIB called on ATVOD to be given powers to mandate provision of access services for people with sensory impairments. AHL said that “in the longer term, we believe that mandatory quotas for subtitling, signing and audio description are the only way to ensure that people with sensory loss are not left behind in terms of VOD content”.
- 5.47 One ODPS provider said that it was appropriate to allow ODPS providers to balance the cost of access service provisions against returns on such investment. This respondent, whilst expressing support for the Access Service Duty, urged caution against the mandating of access services in a nascent business sector. Two ODPS providers felt that, while on-demand services were becoming established, ATVOD was taking a practical approach, having regard to the technical, logistical and financial difficulties involved in providing access services on ODPS.
- 5.48 AHL and an ODPS provider said that ATVOD had engaged in a positive manner with stakeholders. The ODPS provider welcomed the creation of the ATVOD/Industry Forum Access Services Working Party as an example of ATVOD engaging with ODPS providers and showing “openness”. It said that ATVOD’s dialogue on access services demonstrated ATVOD “working with consumer groups, whilst engaging with providers in order to get a firmer understanding of the technological issues providers face”.
- 5.49 However, Channel 4 said that “ATVOD needs to take care that, in fulfilling [its duties], its interaction with ODPS providers is collaborative and the tone of its approach does not provide a cause for grievance”. By way of illustration, Channel 4 stated that “ATVOD’s approach to reporting on ODPS’ access service provision was one example where ATVOD could have adopted a more conciliatory tone in its dealings with industry”.
- 5.50 An ODPS provider suggested ATVOD could liaise with the Digital Television Group in the area of access services. Another ODPS provider suggested the use by ATVOD of ‘road maps’ to provide guidance to ODPS on how they should develop access services.

Ofcom’s conclusions

- 5.51 Ofcom notes that very little audio description was being provided at the time of the 2011 survey. Ofcom welcomes ATVOD’s and the ATVOD/Industry Forum Access Services Working Party’s current focus on technological developments to make it easier and cheaper to reversion subtitling and audio description files, originally created for broadcast, so they are suitable for use with on-demand versions of the same programming.

- 5.52 We have noted the concentration of access in relatively few of the larger scale ODPS providers shown in the annual survey results. We see merit in the proposal from one stakeholder for a road map for the roll-out of access services. A road map, that provided guidance on which ODPS might reasonably be expected to provide access services, when, and to what extent, might help ATVOD to assess whether ODPS providers were gradually making their services more accessible to people with a visual or hearing disability. Ofcom would expect to see ATVOD engage persuasively with all ODPS providers such that they take specific, positive and measurable steps to making their services more accessible. The rate of progress is a matter Ofcom will keep under review.
- 5.53 Ofcom notes that AHL and RNIB would like to see statutory regulation in this area. We also note, however, that the current provisions of section 368C(2) to which ATVOD and ODPS providers are subject are specific and limited. Legislative change would be required to mandate provision of access services in the way those stakeholders suggest. The issue of the costs of mandated provision, and their proportionality for smaller ODPS providers, would be a relevant consideration in any decision to change the law.
- 5.54 Taking the above into consideration Ofcom considers that the actions taken by ATVOD demonstrate that it is meeting its obligations in relation to the Access Services Duty. The work of the ATVOD/Industry Forum Access Services Working Party in revising the initial proposed guidance required by the Designation, to produce best practice guidelines for Ofcom's approval in July 2012, shows an on-going commitment to working towards encouraging the best practice. The annual access service provision survey is an important aspect of this encouragement, highlighting the developing best practice in some ODPS providers, and lack of movement by others. We look forward to seeing the results of the next survey, due later this year. It is important ATVOD continues to work with providers in the ODPS industry and other disability stakeholders via the ATVOD/Industry Forum Access Services Working Party.
- 5.55 Having taken this view, and noting the specific duties the Designation gave ATVOD (which are time limited in some respects), Ofcom has also concluded that it should no longer be necessary for ATVOD to seek Ofcom's approval prior to publishing further guidance relating to the Access Services Duty following approval of the most recent guidelines delivered. We note in this connection that ATVOD would continue to be bound by its statutory obligations and, again, we set out more fully our reasons for our decision in section 6 below.

Ofcom assessment and next steps on access services

Ofcom assessment

Taking into account all the evidence available to us, we consider that ATVOD is adequately carrying out its obligations relating to the Access Services Duty.

Next steps

As a result of our Review, Ofcom:

- **will amend the Designation to remove the obligation for ATVOD to seek Ofcom's approval prior to publishing any further guidance relating to the Access Services Duty; and**

- **is inviting ATVOD to consider taking forward the idea of a road map to provide guidance relating to the Access Services Duty (as discussed in paragraph 5.53 above) and to guide the development of pragmatic solutions to technical hurdles through the expertise of its ATVOD/Industry Forum Access Services Working Party.**

European works

ATVOD's designated duties

5.56 Under paragraph 5(vi) of the Designated Functions in the Designation, ATVOD is required to: "ensure that [ODPS providers] promote, where practicable and by appropriate means, production of and access to European works". This reflects the European works duty in section 368C(3) of the Act. In addition, under paragraph 7(xxi)(a), ATVOD was required by 30 June 2010 to provide to Ofcom a plan relating to the European works duty and proposed guidance to ODPS providers about that Duty, which guidance was not to be issued without Ofcom's approval.

Experience to date

5.57 ATVOD delivered and Ofcom approved ATVOD's European Works Duty plan and proposed guidance in June 2010.

5.58 The plan set out both a long and short term plan based on availability of resource.

5.59 In the "Long Term Plan" ATVOD said that, if it had adequate resources, it would:

- conduct a survey of service providers to ascertain how European works are promoted within ODPS;
- outline the barriers that services providers face and what they have done to reduce them;
- use the results of the survey to develop a coherent long term policy; and
- conduct a public consultation on any future strategies to ensure that service providers promote production of and access to European works.

5.60 ATVOD's "Short Term Plan" involved publishing a brief guidance note on the European works duty to Service Providers setting out the following information;

- ATVOD's duties with regards to promoting European works; and
- the definition of what constitutes a European work modelled on Ofcom's own guidance for linear services.

This guidance was originally published 15 Sept 2010 and was republished on 21 March 2011.

5.61 Thereafter, ATVOD collected data on European works from ODPS providers and collated a report of such data for the first year of ATVOD's existence as co-regulator (18

March 2010 to 17 March 2011) (“the European Report”)⁴³. The data showed, perhaps predictably, that the ODPS of UK based public service broadcasters such as ITV and Channel 4 had very high percentage levels of European works at over 90% total hours. Channel 5, the other UK public service broadcaster provider, came in slightly lower at 70%. The remaining Channels showed large fluctuations between the levels of European works sometimes reflecting the origin of the ODPS provider, such as Disney Channel at 2%. Scale was not a predictor of the percentage hours of European works. Small providers could have high percentages reflecting the local communities they were serving, such as the Country Channel and Leeds Trinity with 100% European works, whereas BskyB “Sky on Sky Anytime” was at 60%. This report formed the basis of a report made by the Department of Culture, Media and Sports to the European Commission in December 2011.

The Review: responses and conclusions on European works

ATVOD’s representations on the performance of its duties

5.62 In its response, ATVOD provided the European works data detailed above. In addition, ATVOD suggested that the Designation should be amended to remove the requirement for ATVOD to seek Ofcom’s approval prior to publishing any guidance relating to the European works duty.

Stakeholder views

5.63 Few respondents commented on this aspect of ATVOD’s duties. An ODPS provider said that ATVOD had adequately carried out the duty, but requested that ODPS providers should be able to submit European works data online to ATVOD. Discovery voiced concerns about the administrative burden involved in reporting European works data to ATVOD. Some ODPS providers would prefer not to have to provide data on European works included in their services and considered the amount of information that ATVOD required to be unduly onerous.

Ofcom’s conclusions

5.64 We do not consider the requirements on data collection to have been unduly onerous. Collection is necessary for the requirements of section 368C(3) of the Act to be met and for Government to fulfil its international obligations. Further, ATVOD’s request for information was, of necessity, issued before the European Commission finalised its own proforma. There will be an opportunity in preparing the next ATVOD survey to align this more closely with the Commission’s proforma. ATVOD will no doubt consider whether the benefits to ODPS of online submissions would justify the cost to ODPS of the necessary investment.

5.65 On the basis of the matters described in paragraphs 5.58 – 5.65 above, Ofcom is satisfied that ATVOD has so far discharged, and is discharging, the European works duty. In particular, ATVOD has followed through the short terms plans provided to Ofcom by 30 June 2010. In addition, given ATVOD’s successful meeting of the specific requirements relating to the European works duty (which, like those relating to the Access Services Duty, are time limited in some respects), we have concluded that it is no longer necessary for ATVOD to seek Ofcom’s approval prior to publishing any guidance relating to this duty. Once more, we note that ATVOD would continue to be bound by its statutory obligations and set out more fully our reasons for our decision in section 6 below.

⁴³ See <http://www.atvod.co.uk/regulated-services>

Ofcom assessment and next steps on European works

Ofcom assessment

Taking into account all the evidence available to us, we consider that ATVOD has adequately carried out the European Works Duty.

Next steps

As a result of our Review, Ofcom:

- will amend the Designation to remove the obligation in paragraph 7(xxi)(a) for ATVOD to seek Ofcom's approval prior to publishing any guidance relating to the European works duty; and
- is inviting ATVOD to consider taking forward the idea of enabling ODPS providers to submit European works data online to the regulator.

Section 6

Meeting the tests of co-regulation

Introduction

6.1 This section relates to Ofcom's overall assessment of whether the present co-regulatory model remains consistent with the relevant principles and tests for co-regulation. It also sets out amendments we have decided to make to the Designation and Ofcom's overall decision in the Review.

Background

6.2 As part of the Review, stakeholders were invited to identify any issues arising from the co-regulation of ODPS not already dealt with in the preceding sections of this Statement. Part of our assessment is to consider whether, taking account of all relevant considerations, to continue the present co-regulatory model under the Designation and, if so, whether there are any aspects of it requiring amendment (or opportunities for further enhancements). Ofcom has considered these matters by reference to the high-level principles set out in section 2 of this Statement. In particular, as follows.

6.3 We set out in the 2009 Statement our assessment that a co-regulatory model was appropriate for VOD services by reference to what we then considered the relevant high-level principles. As set out in section 2 above, at their heart these principles were concerned with whether the incentives of the relevant industry are sufficiently and appropriately aligned with the interests of citizens and consumers. We considered in 2009 that they were.

6.4 Again to re-iterate what we said in section 2, Ofcom's current thinking is that an effective regulatory body must have independent governance and decision making, clear public accountability, clear regulatory objectives set out in a code and follow clear and transparent processes. Such a body should also have workable membership incentives and/or obligations for or on those it regulates and secure and sufficiently independent funding and budget control. It should also be accessible to those seeking redress and possess genuine powers of investigation and effective powers of enforcement and sanction.

6.5 In terms of whether a regulatory body should be a statutory regulator or part of a co-regulatory model involving elements of statutory and self-regulation, Ofcom's view remains similar to that taken in 2009. General models of co-regulation, which typically provide more industry involvement than statutory regulation, can be particularly effective when there is widespread industry support for the objectives of co-regulation. That is more likely the case where industry's incentives are aligned with those objectives. Co-regulatory models can struggle where there are tensions between commercial interests and the wider public interest. Co-regulatory models require monitoring by a (usually statutory) backstop body to ensure effectiveness and can require the backstop body to carry out enforcement activity. The less the alignment between the relevant interests, the more likely the need for a stronger element of backstop statutory regulation.

6.6 Having considered the responses to the Review and having made an assessment against these principles, our decision is that we should maintain the co-regulatory model, under the Designation, but with the amendments set out below. Specifically, our current views are that, in the particular context of ODPS and Part 4A of the Act:

- industry's incentives and citizens and consumers' interests are sufficiently aligned as to support co-regulation (by ATVOD under the Designation) for the time being; and
- with the amendments we have decided to make, the Designation, together with the concurrent and backstop powers it and the Act give to Ofcom, would provide for an effective co-regulatory model, involving co-regulatory bodies with an appropriate balance of powers, consistent with the principles described above.

Our reasons are set out below, after a summary of relevant responses to the Review.

Issues arising from co-regulation

ATVOD's representations on the performance of its duties

- 6.7 In its response to the Review, ATVOD, stated its belief that the Designation should continue for the remainder of its ten-year term, and highlighted the various future challenges it would face:
- changing public expectations of regulatory protection may be likely as consumers become used to consuming services subject to different regulatory rules on converged services and devices. ATVOD said it would work with industry to ensure the statutory rules are enforced. However, "... whether that will be sufficient to satisfy public demand for regulatory protection is more difficult to predict";
 - the changing nature of services in the video on-demand and linear broadcast sectors, "... is likely to keep scope issues centre stage for ATVOD for some time to come";
 - concern over content that might be harmful to under 18s is likely to continue and ATVOD stated its belief that, "... its experience and expertise in relation to the regulation of 'hardcore' pornographic services is likely to be useful in the public policy debates that will continue to be thrown up by this issue"; and
 - the Government's Communications Review is likely to result in changes to the regulatory environment which have a direct impact on ATVOD's work. One possible outcome might be to, "... address in some manner the stark asymmetry between the regulation of television broadcast services and the regulation of on-demand services". If so, ATVOD said it looked forward "... to engaging with Ofcom and others on the implications of any such developments".

Stakeholder views

- 6.8 Ofcom received seven further responses on various other issues arising from co-regulation. Three respondents requested confidentiality and are therefore identified below only as ODPS providers.
- 6.9 Some respondents offered direct support for the co-regulatory model. Channel 4, for example, expressed its continuing support for co-regulation which can "... provide the flexible and appropriate regulatory regime which this rapidly changing and expanding sector requires". Channel 4 added that whilst the regulatory division between linear broadcast services and ODPS is currently clear, content regulation is an increasingly complex issue. It said ATVOD "... is well placed to play a part in any future regulatory structure for a converged environment".

- 6.10 CoBA also stated its support for the principle of co-regulation, but made submissions about the way it might operate in future. It stated that some ODPS providers are, “..... concerned they are liable for compliance issues that are outside their control and that are in reality under the control of a platform provider”. Whilst contractual arrangements can be amended to deal with such issues, CoBA requested that the continued Designation or guidance could make clear that ODPS providers “are compliant subject to ‘best endeavours’”.
- 6.11 Others offered indirect support, indicated by their suggestions of the way the co-regulatory relationship could be modified. BT, for example, said there should be greater cooperation and sharing of information, for example (as noted previously), with regard to appeals, between Ofcom and ATVOD.
- 6.12 Similarly, an ODPS provider said Ofcom should positively re-engage with ATVOD and industry. It said that, in this context, it was to be welcomed that Ofcom had recently appointed a senior member of staff with specific responsibilities for ATVOD and the ODPS sector.
- 6.13 Other respondents were more critical of the co-regulatory model. The Country Channel stated that “Ofcom had not demonstrated adequate consultation, consideration, or provided adequate communication with regard to and operation ofthe co-regulatory framework.”
- 6.14 One ODPS provider, meanwhile, pointed to the fact that a January 2012 ATVOD survey showed that 72% of ODPS’s are, or appear to be “.... directly connected to” linear broadcast services. This respondent said that, “It is highly probable therefore that content on broadcaster ODPS has already met the higher threshold of linear regulation, raising the real possibility that broadcasters are paying to be regulated twice”.
- 6.15 Another ODPS provider also considered that ODPS content provided by Ofcom-licensed linear broadcasters has already been regulated by Ofcom. It said there is, therefore, a duplication of regulation between ATVOD and Ofcom and ATVOD sometimes appears like a regulator looking for a remit. The respondent submitted that regulation of ODPS must not exceed the minimal levels set by the AVMS Directive⁴⁴ and, in light of the foregoing points, questioned both the cost-effectiveness of co-regulation and whether the purposes of ATVOD would be better served by Ofcom.
- 6.16 As to other issues arising out of co-regulation, one other ODPS provider raised concerns about the role of platform providers. It said they have proved unwilling to agree reasonable terms with ODPS providers. Further, whilst ODPS providers face potentially costly investment in their services, platform providers are unregulated and face no risk, whilst retaining a gatekeeper role for ODPS. This respondent said that in any future regulatory model platform providers should share the costs of regulating ODPS and ensure technological standards and quality are delivered.

Amending the Designation

ATVOD’s representations

- 6.17 As to possible amendment of the Designation, in its response ATVOD suggested a number of minor amendments:

⁴⁴ The same respondent also said that any request for information from ATVOD should be reasonable and only at the level required by the statutory framework.

- paragraph 6(iii)⁴⁵ should be removed, as agreed in 2010 by both ATVOD and Ofcom;
- paragraph 7(ii)⁴⁶ should be clarified to make clear that ATVOD is not required to comply with requests for information under the Freedom of Information Act 2000 (“the FoIA”) (ATVOD stated its view that it was not covered by the FoIA);
- paragraph 7(iii)⁴⁷ should be redrafted to reflect the deletion of paragraph 6(iii);
- paragraphs 2 to 4⁴⁸ of the Schedule (reporting obligations) should be deleted as they are obsolete, and should be replaced with an annual reporting obligation which is aligned with the regulatory year (1 April to 31 March). The deadline for such annual reports should be 31 July each year; and
- paragraph 5(iii)⁴⁹ of the Schedule (reporting obligations) should be revised to align more closely with the complaints procedure approved by Ofcom.

6.18 More fundamentally, ATVOD also said that, now the co-regulatory model is established, Ofcom’s backstop powers “... should be loosened to minimise regulatory costs and delays, and to demonstrate and encourage confidence in the co-regulatory regime.” On this basis, ATVOD proposed the following amendments to the Designation:

⁴⁵ Paragraph 6(iii) states: [In carrying out the Designated Functions ATVOD shall exercise the following Powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:]

“to refer any particular case to Ofcom to decide whether:

(a) a service is an on-demand programme service within the meaning of section 368A of the Act and/or who is the provider of that service; and

(b) a programme is a ‘programme included in an on-demand programme service’ in accordance with section 368R(2).

⁴⁶ Paragraph 7(ii) states that ATVOD is obliged: “to ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:

(a) to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;

(b) to consult and carry out impact assessments in relation to the carrying out of the Designated Functions in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and

(c) to comply and secure that its staff comply with section 393 of the Act (confidentiality)”.

⁴⁷ Paragraph 7(iii) states that ATVOD is obliged: “following referral or appeal to Ofcom in accordance, to accept any decision making making of Ofcom on scope or as to whether a programme is included in an on-demand programme service”.

⁴⁸ Paragraphs 2 to 4 of the Schedule state:

“2. ATVOD shall by no later than 31 October 2010 provide Ofcom with a written report summarising its exercise of the Designated Functions and its costs, income and expenditure during the period 18 March 2010 to 30 September 2010.

3. ATVOD shall by no later than 31 March 2011 provide Ofcom with a written report detailing its exercise of the Designated Functions and its costs, income and expenditure during the period 18 March 2010 to 31 December 2010.

4. ATVOD shall by no later than 31 March 2012 provide Ofcom with a written report detailing its exercise of the Designated Functions and its costs, income and expenditure during the period 1 January 2011 to 31 December 2011”.

⁴⁹ Paragraph 5(iii) of the Schedule states: “the number of complaints investigated by ATVOD and the status of those cases i.e. ‘informal investigation’, ‘not investigated after preliminary work’ and ‘full investigation’”.

- there should be greater clarity and certainty over the scope appeals process operated by Ofcom⁵⁰;
- the following paragraphs of the Designation should be amended to remove either the obligation to consult with Ofcom, or to seek Ofcom's prior approval, in various circumstances⁵¹:
 - paragraph 7(vii): Ofcom's prior approval for guidance on the statutory rules (including Scope Guidance). ATVOD said that this requirement in relation to the Scope Guidance "... sits uncomfortably with Ofcom's role as appeal body in relation to scope determinations made by ATVOD." Further, removing this requirement would be "... more appropriate in the next phase of the co-regulatory arrangements";
 - paragraph 7(ix): consultation with Ofcom when formulating complaints handling processes. ATVOD considered this to be an "... unnecessary administrative burden";
 - paragraph 7(xii): consultation with Ofcom before issuing an Enforcement Notification. ATVOD stated that following agreement with Ofcom in September 2010, ATVOD is required to notify Ofcom at least two working days ahead of issuing an Enforcement Notification. ATVOD stated that this requirement "... has become an unnecessary administrative burden which has no clear purpose and which delivers no clear benefit";
 - paragraph 7(xx)(a): Ofcom's prior approval of guidance relating to the Access Services Duty. ATVOD considered this requirement to be "... unnecessary and results in delays and administrative costs which are not justified by any potential public benefit"; and
 - paragraph 7(xxi)(a): Ofcom's prior approval of guidance relating to the European Works Duty. ATVOD considered this requirement to be "... unnecessary and results in delays and administrative costs which are not justified by any potential public benefit"; and
- the Designation should make clear that, were a further review necessary during the remainder of its term due to the Government's communications review, "... any new provision relating to a further review should make clear that it would be triggered only by significant external developments concerning the statutory framework".

Stakeholder views

- 6.19 Ofcom received five other responses to the Review specifically on whether the Designation should be continued, amended, and/or enhanced (in addition to those, like the responses described above questioning the duplication and cost-effectiveness of regulation by ATVOD, touching on related issues).
- 6.20 BT, Channel 4 and Five all said that the Designation should continue in its present form. CoBA agreed it should continue, but suggested amendments in relation to the following:

⁵⁰ The PPA also said that the timeframe for scope appeals needed to be formalised (see paragraph 3.22 above).

⁵¹ Channel 4 and CoBA also said that the Designation should no longer require ATVOD to seek Ofcom's prior approval for documents such as the Scope Guidance (see paragraph 3.16 – 3.17 above)

- timeframes on appeals;
- removing the requirement for Ofcom to approve any changes to ATVOD's guidance documents;
- annual reviews of fees;
- the issue of multiple services;
- the Group Cap on fees; and
- ODPS providers' contractual liabilities.

By contrast, an individual respondent specifically opposed continuation of the Designation. He said Ofcom should remove ATVOD as the appropriate regulatory authority and regulate ODPS directly itself.

Ofcom's conclusions

6.21 Having considered the responses and made our assessment against the relevant principles, Ofcom has decided to maintain the co-regulatory model, to continue the Designation and to make certain amendments to it.

6.22 The amendments we have decided to make are:⁵²

- to remove paragraph 6(iii), so that ATVOD no longer needs to refer to Ofcom any particular case to decide whether a service is an ODPS or whether a programme is included in an ODPS (and to amend paragraph 7(iii) in consequence);
- to remove from paragraph 7(vii) ATVOD's obligation to obtain Ofcom's approval prior to publishing or amending ATVOD's guidance on the statutory rules (the "Rules" as defined in the Designation) and/or Scope Guidance;
- to remove from paragraph 7(ix) ATVOD's obligation to consult specifically with Ofcom about the formulation of its complaints handling processes;
- to remove ATVOD's obligation in paragraph 7(xii) to consult Ofcom before issuing Enforcement Notifications in accordance with sections 368BB and 368I of the Act;
- to amend paragraphs 7(xx) and (xxi) to remove ATVOD's obligations to obtain Ofcom's approval for issuing guidance relating to the Access Services and European Works Duties;
- to replace the obsolete reporting obligations in paragraphs 2 to 4 of the Schedule with an annual reporting obligation of the kind ATVOD proposed in its response to the Review (see below); and
- to align the reporting obligations in paragraph 5(iii) of the Schedule to correspond with ATVOD's complaints handling procedure.

⁵² We will also make minor amendments, such as changing references to the "Association for Television on Demand" to the "Authority for Television on Demand."

We have similarly decided⁵³ to amend the Designation to make clear it may be reviewed at any time where regulatory developments, including changes to the statutory framework, make it appropriate for us to do so.

6.23 Ofcom considers that:

- there is sufficient alignment between industry's incentives and citizens' and consumers' interests; and
- the Designation, as we have decided to amend it, would provide for effective co-regulatory bodies consistent with the relevant principles,

for the following reasons.

6.24 As to the relevant incentives and interests, our analysis is that there is a degree of alignment around those for and in:

- the maintenance of standards and users' protection in respect of relevant on-demand content;
- a clear delineation between on-demand services to which those standards and appropriate regulatory protection⁵⁴ apply; and
- a degree of fair competition arising from the consistency in the standards to be attained across all relevant services.⁵⁵

These interests combine around the goal of ensuring that citizens and consumers can enjoy a wide range and diversity of audio-visual services (in respect of which appropriate content standards are maintained).

6.25 Our view is that there are plausible grounds for considering that industry's incentives are aligned with the above interests. For example, our view is that industry would act, of its own accord to maintain standards in relation to relevant on-demand content.

6.26 First, the recent history of the on-demand industry indicates a pre-existing inclination to accept and guide agreed levels of content standards.

6.27 For example, prior to ATVOD's Designation, the VOD Editorial Steering Group ("VESG") comprised of a wide range of VOD industry players. These went beyond ODPS providers, but also included several currently notified such providers. When Ofcom was considering the regulation of on-demand services, the VESG actively co-operated with us in discussions to define the standards a future co-regulator should seek to enforce.

6.28 In addition, ATVOD itself existed as a self regulatory and industry lead association prior to its Designation as co-regulator. Moreover, its members, all of whom are now notified ODPS providers, and many of whom are active participants on the various industry fora, all agreed a Code of Practice prior to the Designation.

6.29 This Code of Practice included, amongst other things, requirements to take reasonable steps to ensure that:

⁵³ having noted ATVOD's suggestion that the Designation make clear a further review may be triggered by significant developments in the statutory framework

⁵⁴ backed up by concurrent and backstop powers in the hands of an established statutory regulator

⁵⁵ both linear broadcast off shoots and free standing services without a linear broadcast owner

- children and young people were protected from unsuitable content;
 - all users were protected from advertising and other commercial communications which were not legal, decent, honest and truthful;
 - adequate information about the nature of content was available before it was viewed; and
 - service providers kept their promises to users.⁵⁶
- 6.30 Second, there is evidence of ongoing industry support for and in participation in ATVOD's work. Taken with the steps industry took before Designation, this might plausibly indicate an ongoing interest in maintaining appropriate content standards.
- 6.31 This is demonstrated, in one way, in the responses to the Review. Channel 4 specifically voiced its continuing support for both co-regulation and ATVOD. CoBA took a similar position. Indeed, all but two of the respondents who specifically responded on the point said the Designation should continue. In addition, all those respondents who submitted that ATVOD has adequately discharged its designated functions also indicated thereby support for the co-regulatory model and for ATVOD.
- 6.32 It is also demonstrated in another way by the degree of industry involvement in the ATVOD Board, the working parties on scope, access services and fees and at the Industry Forum level, all working towards ATVOD's objectives⁵⁷. Further, as noted at paragraph 3.31 above, the vast majority of ODPS providers have notified their services to ATVOD or have not appealed against ATVOD determinations that they are ODPS.
- 6.33 Third, in light of ATVOD's explanation of the data about complaints made to it (more fully described at paragraph 5.28 above), there appears to be little evidence of widespread contravention of regulatory requirements, especially content standards rules, amongst most ODPS providers. This indicates that the majority of providers are continuing to take steps to maintain standards⁵⁸.
- 6.34 Each of these factors supports the view that there is a measure of alignment between the relevant incentives and interests. Ofcom considers that alignment sufficient in the specific context of the current VOD industry in the UK and the current regulatory framework.
- 6.35 There are aspects of the statutory regulation and the accompanying Designation that support this view. Moreover, those aspects also provide bases for the view that Ofcom can amend the Designation in the ways described, whilst maintaining an appropriate balance between effective co- and statutory regulatory bodies (ATVOD and Ofcom) and consistency with the relevant principles of regulation. The relevant aspects are as follows:
- 6.36 First, the statutory content rules for VOD are in any event limited in scope. They cover only the four areas of harmful material, advertising, sponsorship and product placement in sections 368E – 368H of the Act. There is, therefore, no wholesale delegation of a

⁵⁶ ATVOD:CODE OF PRACTICE as Revised 15 October 2007

⁵⁷ See the list of ATVOD industry Board members and the three ATVOD/Industry forum working parties' members at Annex 4 as well as the industry chairmanship of the Industry Forum

⁵⁸ We are satisfied that in the limited number of clear contraventions, such as that of Bootybox.TV discussed at paragraph 5.9 – 5.10, ATVOD has taken appropriate action.

broad suite of powers to an industry-led regulator. We have already analysed those aspects of ATVOD's performance in this area in section 5.

- 6.37 Further, ATVOD remains bound at all times by its obligations under Part 4A of the Act. In particular, under section 368C(1) that, "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...."⁵⁹
- 6.38 Moreover, in as far as the Designation allows ATVOD to make its own regulatory 'code,' its powers are, and will continue to be, closely circumscribed. Paragraphs 6(iv) and 7(v) empower ATVOD to draw up "Rules" to secure that ODPS providers comply with their statutory obligations. Paragraph 7(vi), however, requires ATVOD, "..... to ensure that such Rules are expressed as the relevant requirements of the Act and are expressed without further material additions or omissions." Paragraph 7(v), meanwhile, requires (and will continue to require) that ATVOD consults with Ofcom, and obtains our approval, before issuing (and therefore also before amending) any such Rules.
- 6.39 As a counterpart to each of the preceding points, the Act and the Designation also provide for a comprehensive set of concurrent and backstop powers in Ofcom's hands.
- 6.40 Concurrent powers are preserved by section 368B(3) of the Act and by paragraph 21 of the Designation. Both make clear that, "Where a body (ATVOD) is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose concurrently with or in place of that body." Ofcom, like ATVOD, also remains bound at all times by the duty in section 368C(1) to ensure ODPS providers comply with regulatory requirements.
- 6.41 Backstop powers, meanwhile, are derived from sections 368I(1)(b) and 368I(9), 368J, 368K and 368L of the Act and relevant paragraphs of the Designation. These give Ofcom powers in relation to enforcement sanctions, which powers are not conferred on nor shared with ATVOD.
- 6.42 Further, paragraph 7(xiv) of the Designation requires ATVOD to inform Ofcom in all cases where an ODPS provider on whom ATVOD has served an Enforcement Notification does not comply with it, so that Ofcom can exercise its powers to impose enforcement sanctions under the relevant sections of the Act (or take other such steps that Ofcom considers appropriate to secure compliance). In addition, by way of further ensuring Ofcom retains the appropriate enforcement sanctions powers, we will also amend the Designation to make clear that ATVOD's powers in paragraphs 6(x) and 6(xiii) to take action in civil proceedings in respect of Enforcement Notifications are subject to Ofcom's approval.
- 6.43 Each of these points goes to, and is consistent with, the principle that effective regulators should have clear regulatory objectives set out in a code. They also support a sufficiently strong element of statutory regulation within the amended co-regulatory model. They ensure the regulatory code remains governed by the relevant statute and the statutory regulator retains a sufficient element of control over the co-regulator.
- 6.44 The powers and, in some circumstances, obligations Ofcom retains to vary or revoke the Designation also support the concerns in paragraph 6.43 above. Section 368B(7) of the Act, for example, says, "A designation has effect for such period as may be specified

⁵⁹ Section 368D imposes the obligation on ODPS providers to ensure their services comply with the content standards rules in sections 368E – 368H.

and may be revoked by Ofcom at any time.” Section 368B(9) says Ofcom may only designate a co-regulatory body where we are satisfied relevant tests, as to its fitness and independence, for example, are met. Paragraphs 9 and 15 – 17 of the Designation, meanwhile, reflect these statutory provisions.

- 6.45 Other aspects of the Act and the Designation, on which we base our decision to maintain the Designation with the amendments described, are as follows:
- 6.46 As to those amendments relating to matters of regulatory scope and ATVOD’s Scope Guidance, service providers would retain the right (under paragraphs 6(ii) and 7(xvii) of the Designation) to appeal to Ofcom against ATVOD’s scope determinations. In those circumstances, it is appropriate that ATVOD produces its own guidance as to the approach it, as the first line decision maker, is likely to take in making those determinations. Likewise, that providers are able to make, and Ofcom is able to consider properly as a separate appellate body, appeals against those determinations and ensure, where necessary, that appropriate scope decisions are made. Ofcom’s new appeals and sanctions procedures support this clear role as an appeals body distinct from the first line decision maker⁶⁰. Ofcom will also, in any event, retain a role in consultation over ATVOD’s Scope Guidance.
- 6.47 These points are consistent with principles of independence of governance and decision making and of (regulators having) clear and transparent processes. Likewise, with ensuring an appropriate balance of powers between ATVOD and Ofcom, as the statutory regulator, in matters of regulatory scope.
- 6.48 As far as amendments relating to ATVOD’s guidance on the statutory content rules, its complaints handling processes and its enforcement powers are concerned, a number of relevant checks and balances would continue to apply. These are consistent with, for example, the principles that effective regulators should have clear processes, independent decision making, and effective investigative and enforcement powers. They are also again consistent with the maintenance of sufficient elements of statutory regulation.
- 6.49 Principal amongst these is the statutory nature of the relevant content requirements and the circumscription of ATVOD’s powers in relation to “Rules” described above. In so far as ATVOD is (and will be) empowered to produce its own guidance on the application of the Rules, paragraphs 7(vii) and (viii) of the Designation also place (and will continue to place) appropriate parameters on ATVOD. The former will continue to require ATVOD to consult Ofcom about its guidance. The latter will continue, amongst other things, to require ATVOD to ensure the guidance reflects:
- that it is a non-binding aid to interpretation of the Rules; and
 - the Rules themselves, rather than the guidance, determine whether a contravention of the Rules has taken place.

We also note that the guidance ATVOD has so far produced demonstrates a good appreciation and application of the relevant rules within these parameters in most cases.

- 6.50 As to the enforcement of the Rules and the statutory content standards, we note again that, for the reasons set out in section 5 above, ATVOD’s complaint handling procedures and the enforcement decisions it has made, respectively:

⁶⁰ Described in more detail at paragraph 1.12 above

- make for the necessary enforcement of the Rules and standards, providing for sufficiently independent decision making in the context of the other factors set out here and as set out in section 5 above; and
- demonstrate an ability to make robust enforcement decisions.

Ofcom would also retain the (appropriate) powers in relation to enforcement described above.

- 6.51 As to the removal of the requirements in paragraphs 7(xx) and 7(xxi) of the Designation for ATVOD to obtain Ofcom's prior approval of ATVOD's proposed guidance in relation to the Access Services and European Works Duties, Ofcom relies on two points. First, that ATVOD continues to be bound by its duties in these respects under section 368C(2) and (3). Second, the requirements in the Designation were specific and time-limited. Ofcom is only removing the obligations the time for compliance with which has passed and where ATVOD has produced guidance documents. ATVOD's underlying obligations in the Designation remain the same and it must continue to take steps to comply with them.
- 6.52 All these factors, in Ofcom's assessment, mean that the rules on the scope of regulation, the content standards rules and the Access Services and European Works Duties would continue appropriately to be applied and, where necessary, enforced. More generally, they mean that maintaining the amended Designation is consistent with what Ofcom considers to be the relevant principles for effective regulation. That Designation would, in the present circumstances, maintain an appropriate co-regulatory model for VOD services with an appropriate balance between effective co- and statutory regulatory bodies. The balance between those bodies, in the context of ODPS, would not be tilted inappropriately away from the latter.
- 6.53 Similarly, for all the reasons set out in this statement, and this section in particular, Ofcom considers that the statutory requirements for designation of a co-regulator, in section 368B(9) of the Act, are met in relation to ATVOD. The steps ATVOD has taken, the procedures and guidance documents it has in place and the decisions it has taken, demonstrate its willingness and suitability to continue to be so designated. They demonstrate its regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and appropriately targeted. The position it has reached in respect of fees provides it with adequate financial resources to perform its functions effectively.
- 6.54 Turning to specific points made in responses to the Review, we do not agree with The Country Channel's view that "Ofcom had not demonstrated adequate consultation, consideration, or provided adequate communication with regard to and operation ofthe co-regulatory framework." Ofcom consulted on and published the high-level principles (and good practice criteria) used to help assess the appropriate self- and co-regulatory models, as described in this statement. We also consulted on the adoption of the co-regulatory model for VOD services and, specifically, the designation of ATVOD as part of that model. We set out in detail our reasons for that adoption and designation.
- 6.55 In that latter connection, as we made clear in the 2009 Statement⁶¹, it was the overwhelming view of stakeholders, in response to the consultation we had previously published, that regulation of VOD services: (1) should be achieved through a system of co-regulation; and (2) that it would be appropriate for Ofcom to designate ATVOD as the appropriate regulatory authority. Further, Ofcom and ATVOD undertook a joint

⁶¹ See paragraph 1.7 of the 2009 Statement.

consultation on fees for the period to 31 March 2011. That is, for Year 1 of the co-regulatory framework.

- 6.56 We note BT's suggestion that Ofcom and ATVOD should share information. Where it is appropriate to do so, for example in relation to fees and sanctions processes, the Designation provides for us to do so, and we do. However, for the reasons in section 3 above, it is not appropriate for us to do so in relation to ATVOD's scope determinations.
- 6.57 We also take account of the view of two ODPS providers that the current arrangements result in Ofcom regulating content shown on linear services, and ATVOD regulating the same content included in ODPS, and that this is not cost-effective. In this connection, we note two points.
- 6.58 First, Recital 27 of the AVMS Directive states:

“In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission.”

In other words, there are no additional requirements specifically relating to particular pieces of content that have already been regulated.

- 6.59 Second, we note again the Government's intention that ODPS should be subject to co-regulation, the AVMS Directive's references to the use of co-regulation and the prevailing view of stakeholders that co-regulation is the most appropriate means of regulating ODPS. We also note the operational savings ATVOD has made, organising its work in a manner that minimises costs as far as possible and avoids unnecessary duplication⁶². It does not appear to us that there is a strong desire in the relevant industry for ODPS to be directly regulated by Ofcom.
- 6.60 We have considered the points made about platform providers by CoBA and an ODPS provider. We acknowledge the CoBA's request that the Designation or guidance make clear that ODPS providers must be, “.... compliant subject to ‘best endeavours’” because compliance issues can be outside ODPS providers' control and, “.... in reality under the control of a platform provider”. In response, we note the following points.
- 6.61 First, we agree the issue of who has “editorial responsibility” for a service, as required by the Act, is not necessarily straightforward in some cases involving a content provider and a platform provider. However, as the Act and Ofcom's appeal decisions make clear, such responsibility cannot be held jointly by those providers. We expect in many cases any ambiguity as to the position would be dealt with by contractual wording and/or by other agreed conduct and practice between the relevant providers.
- 6.62 Second, and in any event, where a person or entity is an ODPS provider (because, amongst other things, it has editorial responsibility for a service), its obligations under the Act are mandatory. It must do what the Act requires. Without a change in the law, the Designation cannot require ODPS providers simply to use their “best endeavours” to meet their statutory obligations.

⁶² See Year 3 Statement paragraphs 4.21 and 4.22 http://www.atvod.co.uk/uploads/files/2012-13_Fees_Statement_FINAL.pdf

- 6.63 Third, on a similar point, it would not be appropriate, again absent a change in the law, for platform providers, who happen to carry ODPS, to be required to share the costs of regulating ODPS and ensuring technological standards and quality are delivered, as suggested by one respondent. The current statutory framework is clear that regulatory fees should only be levied on providers of ODPS.
- 6.64 We also note the view expressed by one confidential respondent that Ofcom should positively re-engage with ATVOD and industry. We agree it is incumbent on Ofcom to remain attuned to any concerns expressed by industry with regard to the working of the co-regulatory regime.
- 6.65 On a separate point raised by respondents, we agree there should be greater clarity and certainty over the scope appeals process. We have published in parallel with this Statement Ofcom's, Procedures for the handling of appeals on scope and for imposing sanction in relation to on-demand programme services.⁶³ These set out Ofcom's procedures for appeals of ATVOD's scope determinations. These include timeframes for the submission of and consideration of appeals.
- 6.66 As to those suggested amendments to the Designation that we have decided not to make, we have responded above to those put forward by CoBA. As to those of ATVOD's suggestions we have decided not to adopt, it does not appear to us appropriate to record in the Designation that ATVOD is not required to comply with requests for information under the FoIA. The Designation sets out the functions Ofcom has given ATVOD under Part 4A of the Act, for the purpose of (co-) regulating ODPS. It does not deal with obligations under the FoIA, which are determined by the provisions of that Act and not a matter in respect of which Ofcom has any power to designate or oblige ATVOD.

Ofcom assessment on other issues arising from co-regulation

Ofcom assessment

Taking into account all the evidence available to us, and noting that there remains a broad consensus in favour of the co-regulation of ODPS, we consider the maintenance of such co-regulation to be appropriate.

Ofcom assessment and next steps on the Designation

Ofcom assessment

For all the reasons set out in this statement, Ofcom confirms the continuation of the Designation.

Next steps

- **Ofcom will amend the Designation as set out above.**
- **The amendments will take effect 30 days from the date of this statement, after Ofcom has notified them to ATVOD in accordance with paragraph 9 of the Designation.**

⁶³ <http://stakeholders.ofcom.org.uk/binaries/consultations/on-demand/statement/statement-procedures.pdf>

Annex 1

Ofcom's tests for co-regulation and the statutory criteria for co-regulation

Ofcom's tests for co-regulation

A1.1 In 2004 Ofcom developed a set of criteria that we would apply when assessing whether to transfer any of our functions to a co-regulatory body. These were revised in 2008 in our statement *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation*⁶⁴. These criteria are listed below and are part of the mechanism by which Ofcom can adjudge the co-regulatory arrangements, including whether Ofcom retains certain functions:

Good practice criteria to guide the establishment of new schemes	
Public awareness	Audit of members and schemes
Transparency	System of redress in place
Significant participation by industry	Involvement of independent members
Adequate resource commitments	Regular review of objectives and aims
Enforcement measures	Non-collusive behaviour
Clarity of processes and structures	

A1.2 Ofcom's current thinking, meanwhile, which we put before the Leveson Inquiry,⁶⁵ remains similar. We consider that an effective regulatory body must have independent governance and decision making, clear public accountability, clear regulatory objectives set out in a code and follow clear and transparent processes. It should also have workable membership incentives and/or obligations for or on those it regulates. Likewise, secure and sufficiently independent funding and budget control. It should also be accessible to those seeking redress and possess genuine powers of investigation and effective powers of enforcement and sanction.

Statutory criteria for co-regulation

A1.3 Section 368B(9) of the Act states:

(9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—

⁶⁴ <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

⁶⁵ See <http://media.ofcom.org.uk/files/2012/04/Ofcom-Submission-to-the-Leveson-Inquiry-April-2012.pdf>

- (a) is a fit and proper body to be designated;
- (b) has consented to being designated;
- (c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;
- (d) is sufficiently independent of providers of on-demand programme services; and
- (e) will, in performing any function to which the designation relates, have regard in all cases—
 - (i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - (ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances.

Annex 2

Extracts from the original ATVOD Designation dated 18 March 2010

A2.1 The Designated Functions

5. Ofcom designates ATVOD to carry out the following functions:

- (i) to administer procedures for receiving, and to receive, advance notifications under section 368BA of the Act from every person who intends to provide an on-demand programme service (or, in the case of any person already providing an on-demand programme service on the date that the 2010 Regulations come into force, a notice stating that they are already providing the service);
- (ii) to determine whether Service Providers have complied with section 368BA and the relevant requirements of the Act in accordance with Paragraph 6(ii) of this Designation;
- (iii) to require Service Providers to pay a fee in accordance with section 368NA of the Act; such fees to be sufficient to enable ATVOD to meet, but not exceed, their costs estimated under section 368NA(5)(a) of the Act and to be subject to Ofcom's prior written approval;
- (iv) in accordance with section 368C(1) of the Act, to take such steps as appear to them best calculated to secure that the relevant requirements of the Act are complied with by Service Providers;
- (v) to encourage Service Providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both (section 368C(2) of the Act); and
- (vi) to ensure that Service Providers promote, where practicable and by appropriate means, production of and access to European works (within the meaning given in Article 1 (n) of the Audiovisual Media Services Directive ('the Directive') (section 368C(3) of the Act).

A2.2 Powers

6. In carrying out the Designated Functions ATVOD shall exercise the following Powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:

- (i) to prepare and to publish procedures for receiving advance notifications under section 368BA of the Act from every person who intends to provide an on-demand programme service (or, in the case of any person already providing an on-demand programme service on the date that the 2010 Regulations come into force, a notice stating that they are already providing the service);
- (ii) subject to Paragraph 6(iii) below, to decide:
 - (a) what constitutes an 'on-demand programme service' in accordance with section 368A of the Act and/or who the provider of that service is; and

- (b) what constitutes a 'programme included in an on-demand programme service' in accordance with section 368R(2) of the Act,
except that any such decision of ATVOD shall be subject to appeal to Ofcom in accordance with Ofcom's relevant procedures;
- (iii) to refer any particular case to Ofcom to decide whether:
 - (a) a service is an on-demand programme service within the meaning of section 368A of the Act and/or who is the provider of that service; and
 - (b) a programme is a 'programme included in an on-demand programme service' in accordance with section 368R(2);
- (iv) to prepare and to publish Rules for the purpose of securing that Service Providers comply with the relevant requirements of the Act, so as to ensure:
 - (a) that Service Providers pay such fee as may be required under section 368NA;
 - (b) that on-demand programme services do not contain any material likely to incite hatred based on race, sex, religion or nationality (section 368E(1) of the Act);
 - (c) that if an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it (section 368E(2) of the Act);
 - (d) that any sponsorship included in an on-demand programme service complies with the requirements of section 368G of the Act;
 - (e) that any product placement included in an on-demand programme service is only permitted if it meets the requirements of section 368H of the Act;
 - (f) that Service Providers retain a copy of every programme for at least forty-two days after the day on which the programme ceases to be available for viewing on their service; and
 - (g) that Service Providers comply with any requirement under section 368O (provision of information) and that they co-operate fully with the appropriate regulatory authority for any purpose within section 368O(2) or (3) of the Act;
- (v) to prepare and to publish accompanying guidance as a non-binding aid to interpretation of those Rules;
- (vi) to demand information (including copies of programmes) from any person who appears to ATVOD to be or have been a Service Provider and to have information that ATVOD requires for a purpose within section 368O(2)(a) and for the purposes of section 368O(3) of the Act, subject to the requirements of sections 368O(4) and (5) having been met;
- (vii) to determine, following a complaint or otherwise, that a Service Provider is contravening or has contravened any of the relevant requirements of the Act (including, for the avoidance of doubt, the power to determine that a Service Provider has contravened the requirement in section 368BA of the Act to notify provision of an on-demand programme service);
- (viii) where ATVOD has determined that a Service Provider has contravened the requirement in section 368BA of the Act, to issue an enforcement notification in

- accordance with section 368BB(1)(a) (except that ATVOD is given no powers under section 368BB(1)(b);
- (ix) to include in such an enforcement notification a requirement to take all such steps for remedying a contravention of the requirement to notify provision of an on-demand programme service in accordance with section 368BA as may be specified in the notification;
 - (x) (save in cases where Ofcom decides to take enforcement action itself in accordance with its powers under the Act) to enforce compliance with an enforcement notification under s368BB(6) of the Act in civil proceedings:
 - (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief;
 - (xi) where, other than in relation to a contravention of section 368BA, ATVOD has determined that a Service Provider is contravening or has contravened any of the relevant requirements of the Act, to issue an enforcement notification in accordance with section 368I of the Act (except that ATVOD is given no powers under sections 368I(1)(b), 368I(4)(b), 368I(4)(d) or 368I(9) of the Act);
 - (xii) to include in such enforcement notifications one or more of the following requirements:
 - (a) to cease providing or restrict access to a specified programme or programmes of a description specified in the enforcement notification;
 - (b) to provide additional information to users of the on-demand programme service prior to the selection of a specified programme by the user for viewing;
 - (c) to publish a correction in the form and place and at the time specified;
 - (d) to publish a statement of ATVOD's findings in the form and place and at the time specified;
 - (xiii) (save in cases where Ofcom decides to take enforcement action itself in accordance with its powers under the Act) to enforce compliance with an enforcement notification under s368I(8) of the Act in civil proceedings:
 - (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief.
 - (xiv) to carry out, commission or support (financially or otherwise) research (section 368B(11) of the Act); and
 - (xv) to use any recording, script or transcript provided to ATVOD under or by virtue of any relevant provision of the Act in connection with its performance of any of the Designated Functions as permitted under section 69(5) of the Copyright, Design and Patents Act 1988 (as inserted by Regulation 12(2)(c) of the Regulations).

A2.3 Obligations and Conditions

7. In carrying out the Designated Functions and in exercising the Powers set out in Paragraph 6 above ATVOD shall comply with the following Obligations and Conditions:
- (i) to act in accordance with s368B(9)(e) of the Act;
 - (ii) to ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:
 - (a) to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;
 - (b) to consult and carry out impact assessments in relation to the carrying out of the Designated Functions in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and
 - (c) to comply and secure that its staff comply with section 393 of the Act (confidentiality);
 - (iii) following referral or appeal to Ofcom in accordance, to accept any decision of Ofcom on scope or as to whether a programme is included in an on-demand programme service;
 - (iv) to ensure, that in carrying out its function under Paragraph 5(iii) of this Designation, it satisfies the requirements under section 368NA of the Act (Fees) and in particular:
 - (a) in each financial year to consult in such manner as Ofcom considers appropriate, whether alone or jointly with Ofcom, the Service Providers likely to be required to pay them a fee; and
 - (b) to publish, in such manner as Ofcom considers appropriate, the amount of the fee Service Providers will be required to pay;
 - (v) to consult with Ofcom in preparing any Rules it proposes to issue for the purpose of securing that Service Providers comply with the relevant requirements of the Act and to obtain Ofcom's prior written approval of the Rules before publishing them;
 - (vi) to ensure that such Rules are expressed as the relevant requirements of the Act and are expressed without further material additions or omissions;
 - (vii) to consult with Ofcom in preparing non-binding interpretative guidance to the Rules (and any subsequent material changes to that guidance), and to obtain Ofcom's prior written approval of such guidance before publishing it or any changes to it;
 - (viii) to ensure that in drawing up any guidance referred to in this Designation, such guidance reflects the following:
 - (a) that it is provided as non-binding guidance only in order to aid interpretation of the Rules;

- (b) that it will be the Rules themselves, rather than the guidance, which determine whether a contravention of the Rules has taken place;
 - (c) that compliance with the guidance does not itself confer a presumption of conformity with the Rules; and
 - (d) that non-compliance with the Rules will be taken to be non-compliance with the relevant requirements in the Act;
- (ix) to have in place and publish appropriate and robust complaints handling processes in order to carry out the Designated Functions, such processes to be formulated in consultation with Ofcom;
 - (x) to handle complaints received by it in accordance with its obligations in this Designation;
 - (xi) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
 - (xii) to consult Ofcom before issuing any enforcement notification it is empowered to issue under this Designation in accordance with sections 368BB and 368I of the Act;
 - (xiii) to comply with the reporting obligations set out in the Schedule to this Designation;
 - (xiv) to inform Ofcom forthwith of all cases where a Service Provider to whom ATVOD has given an enforcement notification does not comply with it within the period fixed by ATVOD in the enforcement notification and, if requested by Ofcom, provide copies of all relevant evidence and submissions, in order that Ofcom can decide whether to exercise its powers to impose a sanction on that Service Provider in accordance with sections 368J, 368K or 368L, or take other such steps that Ofcom considers appropriate to secure compliance;
 - (xv) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where ATVOD considers that a service provider may be in contravention of sections 368E to 368H of the Act due to the inclusion in the service of material likely to encourage or to incite the commission of crime, or to lead to disorder; and where the contravention may be such as to justify the need for Ofcom to take urgent action under section 368L of the Act (suspension or restriction of service for inciting crime or disorder);
 - (xvi) not to make a determination referred to in sections 368BB and 368I unless it has reasonable grounds for believing that a contravention of section 368D is occurring or has occurred and it has allowed the provider an opportunity to make representations about that apparent contravention;
 - (xvii) where ATVOD makes a determination:
 - (a) that a person is providing an on-demand programme service; or
 - (b) following complaint or otherwise concerning compliance with the relevant requirements of the Act, that a particular programme is or is not 'a

programme included in an on-demand programme service' in accordance with section 368R(2) of the Act,

ATVOD, when notifying the Service Provider or the parties to the complaint, as the case may be, of its determination, shall inform the Service Provider and, where appropriate, the parties, that they may request an appeal by Ofcom of that determination in accordance with Ofcom's relevant procedures;

- (xviii) not to enforce any requirements of section 368D of the Act other than those in respect of which it has Designated Functions;
- (xix) to cooperate fully with Ofcom at all times, including:
 - (a) to consult Ofcom, as appropriate, in cases where there is any doubt in connection with any of the Designated Functions and/or ATVOD's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and
 - (b) to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
- (xx) as part of fulfilling the duty to encourage Service Providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both, to:
 - (a) provide to Ofcom by no later than 30 June 2010 a detailed plan in writing setting out how ATVOD will fulfil this duty and including proposed guidance to Service Providers, such guidance not to be issued without Ofcom's prior approval; and
 - (b) comply with the reporting obligations in the Schedule to this Designation;
- (xxi) as part of fulfilling the duty to ensure that Service Providers promote, where practicable and by appropriate means, production of and access to European works (section 368C(3) of the Act) to:
 - (a) provide to Ofcom by no later than 30 June 2010 a detailed plan in writing setting out how ATVOD will fulfil this duty and including proposed guidance to providers of on-demand programme services, such guidance not to be issued without Ofcom's prior approval; and
 - (b) comply with the reporting obligations in the Schedule to this Designation;
- (xxii) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Functions for any reason and/or may no longer be able to satisfy the requirements of section 368B(9) to be the appropriate regulatory authority in relation to the Designated Functions and in each case to use its best endeavours to resolve any such issues promptly; and
- (xxiii) in the event that ATVOD no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Functions and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Functions, setting out its reasons.

Annex 3

Index of Industry Respondents to the 22 March Letter

Action on Hearing Loss

- Formerly the Royal National Institute for the Deaf. Action on Hearing Loss (AHL), provide support for people with hearing loss and tinnitus.

BT

- BT is a British multinational telecommunications services company. It supplies telecom services to corporate and government customers.

Channel 4

- Channel 4, is a public service broadcaster and was launched in 1982. 4OD is the channel's on-demand programme service and has been in operation since 2006.

Channel 5

- Channel 5, is a public service broadcaster and was launched in 1997. Demand 5 is the channel's on-demand programmes service and has been in operation since 2008.

The Commercial Broadcasters Association

- Formerly known as the Satellite and Cable Broadcasters' Group. The Commercial Broadcasters Association (CoBA) is the UK industry body for commercial broadcasters who are independent of public funding or incentives.

The Country Channel

- Launched in 2006. The Country Channel is an internet TV channel for viewers with an interest in country life.

Leon Hawthorne

- Mr Hawthorn was the founder CEO of the Baby Channel and also CEO of Simply Media's Channels and production output.

The Professional Publishers Association

- The Professional Publishers Association (PPA) represents consumer magazines, business to business data and information providers and smaller independents.

Royal National Institute of Blind People

- The Royal National Institute of Blind People (RNIB) is a charity offering information support and advice to people with sight loss.

Annex 4

ATVOD Board and ATVOD/Industry Forum Working Parties membership

ATVOD Board as at July 2012

Chief Executive Officer

Pete Johnson

- Pete Johnson was previously Head of Policy and Business Development at the British Board of Film Classification.

Independent Chair

Ruth Evans

- Ruth Evans is a non-executive director of the National Audit Office, the Independent Police Complaints Commission and Founding Director of the Alacrity Entrepreneurship Foundation.

Independent Deputy Chair

Nigel Walmsley

- Nigel Walmsley is a Council Member of the Advertising Standards Authority, Non Executive Director of Passenger Focus - the statutory consumer voice for rail and bus passengers, and Chairman of the Broadcasters Audience Research Board (BARB).

Independent Board Members

Sara Nathan OBE

- Sara Nathan is a journalist and is currently Chair of the Animal Procedures Committee and an editorial adviser to the BBC Trust.

Ian McBride

- Ian McBride is a journalist and programme maker with over 30 years experience, recognised by more than 20 national and international awards.

Julia Hörnle

- Julia Hörnle is a senior lecturer in Internet Law at Queen Mary School of Law, University of London, having previously practised commercial law in a major city law firm.

Non-Independent Board Members

Daniel Austin

- Daniel Austin is a Senior Legal Advisor in the Competition & Regulatory team at Sky, advising on all aspects of UK and EC competition law, as well as general broadcasting and communications regulation.

Gidon Freeman

- Gidon Freeman is Director of Regulatory and Government Affairs at NBCUniversal International.

Sophie Jones

- Sophie Jones has been Head of Corporate Relations at Channel 4 since 2011, having joined the broadcaster in 2008 as Head of Public Affairs.

Chris Ratcliff

- Chris Ratcliff is Programming Director for Portland TV. He rejoined the Northern & Shell subsidiary in 2007 to manage Portland's adult broadcasting output.

ATVOD Industry Forum

- The Chair and Deputy Chair of the Forum are elected by the members. All services notified to ATVOD are invited to regular meetings, currently scheduled at 4 meetings per year.
- **Chair:** Kerry Kent of Discovery Communications Europe Ltd.
- **Deputy Chair:** Martin Stott of Channel 5 Broadcasting Ltd.

ATVOD/ Industry Forum Fees Working Party (as at 16 May 2012)

ATVOD Members - Pete Johnson

Industry Members

- Janet Greco (Consultant, Broadcast Projects, representing Microsoft);
- Martin Stott (Channel 5);
- Steve Middleton (IP Vision);
- Gidon Freeman (NBC Universal);
- Hayden Punter (Filmflex RTY);

- Derek Nelson (Classical TV); and
- Tony Ghee (SBS Broadcasting).

**ATVOD/Industry Forum Scope Working Party
(previously the ATVOD/Industry Forum “Substantially the same”
Working Party) (as at 23 March 2012)**

ATVOD Members - Pete Johnson and Cathy Taylor

Industry Members

- Adrian Dicker (BBC Worldwide);
- Alex Kann (Community Channel);
- Jay Gillman-Wells (Fox);
- Aurea Garrido (Turner);
- David Coughtrie (Turner);
- Ray Blaney (UKTV);
- Guy Wheeler (Chellozone);and
- Tom Dennis (AITA/Television X)

**ATVOD/Industry Forum Access Services Working Party (as at 8 May
2012)**

ATVOD Members - Pete Johnson and Cathy Taylor

Organisations representing people with disabilities relating to hearing and sight

- Guido Gybels (RNIB);
- John Paton (RNIB);
- Kevin Taylor (Action on Hearing Loss);
- Joff McGill (Sense),
- Roy Staines (Sense);

Industry Members

- Adrian Byrne (ITFC);
- Adrian Dicker (BBC Worldwide);
- Claude Le Guyader (ITFC);
- David Bradshaw (DTG);
- Gareth Williams (BBC);
- Harry Owen (IMS);
- Jane Miller (Discovery)
- Liam Wall (IMS);
- Matthew Giles (BSkyB);
- Neil Golding (BSkyB);
- Paul Strickland (Turner);
- Rhys Jones (BSkyB);
- Steve Middleton (IP Vision) and;
- Wilf White (BBC)

Annex 5

The Amended Designation dated 15 August 2012

Designation pursuant to section 368B of the Communications Act 2003 of functions to the Authority for Television On Demand in relation to the regulation of on-demand programme services

WHEREAS:

- (1) Section 368B(2) and (3) of the Communications Act 2003 ('the Act') confers functions on the Office of Communications ('Ofcom') for the regulation of on-demand programme services following the coming into force of the Audiovisual Media Services Regulations 2009 ("the 2009 Regulations")⁶⁶ and the Audiovisual Media Services Regulations 2010 ("the 2010 Regulations")⁶⁷;
- (2) Section 368B(1) of the Act confers a power on Ofcom to designate any body corporate satisfying the criteria set out in section 368B(9) to be, to the extent provided by the designation, the appropriate regulatory authority for the purposes of any provision of Part 4A of the Act;
- (3) Ofcom has, by way of a consultation document entitled Proposals for the Regulation of Video-on-Demand Services published on 14 September 2009⁶⁸, proposed to designate certain of its functions in relation to the regulation of on-demand programme services to a body known as The Authority for Television On-Demand Limited (Registered number 05137314) ('ATVOD');
- (4) Ofcom, in making this Designation, has duly considered and taken into account all the responses to that consultation document, as set out in Ofcom's statement published on 18 December 2009⁶⁹;
- (5) Ofcom is satisfied on the basis of ATVOD's written undertakings to Ofcom, dated 17 March 2010 and annexed to this Designation, and on the basis of the relevant information provided to it, including ATVOD's proposal to be designated as the co-regulator for video on-demand editorial content (attached as Annex 7 to Ofcom's September consultation⁷⁰); ATVOD's acceptance of a loan (provisional on designation by Ofcom) from the Department of Culture, Media and Sport ("DCMS") to assist ATVOD in meeting the costs of regulating VOD editorial services; and the information contained in ATVOD's financial plan for the period up to March 2011, that:
 - (i) ATVOD is a fit and proper body to be so designated
 - (ii) ATVOD will ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and

⁶⁶ SI 2009/2979

⁶⁷ SI 2010/419

⁶⁸ <http://www.ofcom.org.uk/consult/condocs/vod/vod.pdf>

⁶⁹ <http://www.ofcom.org.uk/consult/condocs/vod/statement/vodstatement.pdf>

⁷⁰ Ibid

regulatory obligations that apply to Ofcom in performing its regulatory functions, including in particular:

- a. to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;
 - b. to consult and carry out impact assessments in relation to the carrying out of the Designated Functions in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and
 - c. to comply and secure that its staff comply with section 393 of the Act (confidentiality);
- (iii) ATVOD has access to financial resources that are adequate to ensure the effective performance of the designated functions;
 - (iv) ATVOD is sufficiently independent of providers of on-demand programme services; and
 - (v) ATVOD has consented to being so designated; and
- (6) Ofcom has reviewed this Designation in accordance with paragraph 13 below. In consequence, Ofcom remains satisfied as to the matters in Recital 5 above and has made amendments to paragraphs 6(iii), 7(ii), 7(vii), 7(ix), 7(xii), 7(xx)(a) 7(xxi)(a) and paragraphs 2 to 4 and 5(iii) of the Schedule of this Designation.
 - (7) Ofcom is satisfied that in making and amending this Designation it has acted in accordance with its duties under the Act.

NOW THEREFORE BY VIRTUE OF PART 4A OF THE COMMUNICATIONS ACT 2003, OFCOM HEREBY MAKES THE FOLLOWING DESIGNATION:

1. Ofcom in exercise of the powers conferred on it under section 368B of the Act hereby designates ATVOD to be the appropriate regulatory authority (as defined in section 368R of the Act) for the purpose of carrying out the functions set out in Paragraph 5 of this Designation in relation to on-demand programme services to the extent provided for, and subject to the Obligations, Conditions and such other circumstances as are described in this Designation (“the Designated Functions”);
2. This Designation incorporates the Schedule and Annex which form part of this Designation for all purposes and includes such variations as may from time to time be made by Ofcom in accordance with Paragraphs 9 and 10 of this Designation.
3. This Designation shall be legally binding and, as Ofcom’s designee, ATVOD shall be liable to Ofcom for any failure to carry out the Designated Functions in accordance with the terms of this Designation.

Interpretation of terms

4. The following terms referred to in this Designation shall have the following meanings:
- (i) 'Designated Functions' has the meaning given to it in Paragraph 1 of this Designation;
 - (ii) 'relevant requirements of the Act' means the requirements set out in section 368D of the Act and includes the requirements set out in section 368E (except insofar as those requirements relate to advertising), section 368G, section 368H and section 368O of the Act;
 - (iii) 'Service Provider' means a provider of an on-demand programme service;
 - (iv) for the purposes of this Designation, a 'programme' is included in an on-demand programme service if it is included in the range of programmes the service offers to users in accordance with section 368R(2) of the Act; and
 - (v) other terms and expressions used in this Designation shall have the meanings given to them in the Act.

The Designated Functions

5. Ofcom designates ATVOD to carry out the following functions:
- (i) to administer procedures for receiving, and to receive, advance notifications under section 368BA of the Act from every person who intends to provide an on-demand programme service (or, in the case of any person already providing an on-demand programme service on the date that the 2010 Regulations come into force, a notice stating that they are already providing the service);
 - (ii) to determine whether Service Providers have complied with section 368BA and the relevant requirements of the Act in accordance with Paragraph 6(ii) of this Designation;
 - (iii) to require Service Providers to pay a fee in accordance with section 368NA of the Act; such fees to be sufficient to enable ATVOD to meet, but not exceed, their costs estimated under section 368NA(5)(a) of the Act and to be subject to Ofcom's prior written approval;
 - (iv) in accordance with section 368C(1) of the Act, to take such steps as appear to them best calculated to secure that the relevant requirements of the Act are complied with by Service Providers;
 - (v) to encourage Service Providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both (section 368C(2) of the Act); and
 - (vi) to ensure that Service Providers promote, where practicable and by appropriate means, production of and access to European works (within the meaning given

in Article 1 (n) of the Audiovisual Media Services Directive ('the Directive') (section 368C(3) of the Act).

Powers

6. In carrying out the Designated Functions ATVOD shall exercise the following Powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:

- (i) to prepare and to publish procedures for receiving advance notifications under section 368BA of the Act from every person who intends to provide an on-demand programme service (or, in the case of any person already providing an on-demand programme service on the date that the 2010 Regulations come into force, a notice stating that they are already providing the service);
- (ii) to decide:
 - (a) what constitutes an 'on-demand programme service' in accordance with section 368A of the Act and/or who the provider of that service is; and
 - (b) what constitutes a 'programme included in an on-demand programme service' in accordance with section 368R(2) of the Act,

except that any such decision of ATVOD shall be subject to appeal to Ofcom in accordance with Ofcom's relevant procedures, and to prepare and publish guidance on ATVOD's approach to determine the matters referred to in sub paragraphs 6 (ii)(a) and (b) ("Scope Guidance");

- (iii) [removed pursuant to the 2012 review of the Designation by Ofcom];
- (iv) to prepare and to publish Rules for the purpose of securing that Service Providers comply with the relevant requirements of the Act, so as to ensure:
 - (a) that Service Providers pay such fee as may be required under section 368NA;
 - (b) that on-demand programme services do not contain any material likely to incite hatred based on race, sex, religion or nationality (section 368E(1) of the Act);
 - (c) that if an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it (section 368E(2) of the Act);
 - (d) that any sponsorship included in an on-demand programme service complies with the requirements of section 368G of the Act;

- (e) that any product placement included in an on-demand programme service is only permitted if it meets the requirements of section 368H of the Act;
- (f) that Service Providers retain a copy of every programme for at least forty-two days after the day on which the programme ceases to be available for viewing on their service; and
- (g) that Service Providers comply with any requirement under section 368O (provision of information) and that they co-operate fully with the appropriate regulatory authority for any purpose within section 368O(2) or (3) of the Act;
- (v) to prepare and to publish accompanying guidance as a non-binding aid to interpretation of those Rules;
- (vi) to demand information (including copies of programmes) from any person who appears to ATVOD to be or have been a Service Provider and to have information that ATVOD requires for a purpose within section 368O(2)(a) and for the purposes of section 368O(3) of the Act, subject to the requirements of sections 368O(4) and (5) having been met;
- (vii) to determine, following a complaint or otherwise, that a Service Provider is contravening or has contravened any of the relevant requirements of the Act (including, for the avoidance of doubt, the power to determine that a Service Provider has contravened the requirement in section 368BA of the Act to notify provision of an on-demand programme service);
- (viii) where ATVOD has determined that a Service Provider has contravened the requirement in section 368BA of the Act, to issue an enforcement notification in accordance with section 368BB(1)(a) (except that ATVOD is given no powers under section 368BB(1)(b));
- (ix) to include in such an enforcement notification a requirement to take all such steps for remedying a contravention of the requirement to notify provision of an on-demand programme service in accordance with section 368BA as may be specified in the notification;
- (x) (save in cases where Ofcom decides to take enforcement action itself in accordance with its powers under the Act and subject to first obtaining Ofcom's written approval for doing so) to enforce compliance with an enforcement notification under s368BB(6) of the Act in civil proceedings:
 - (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief;
- (xi) where, other than in relation to a contravention of section 368BA, ATVOD has determined that a Service Provider is contravening or has contravened any of

the relevant requirements of the Act, to issue an enforcement notification in accordance with section 368I of the Act (except that ATVOD is given no powers under sections 368I(1)(b), 368I(4)(b), 368I(4)(d) or 368I(9) of the Act);

- (xii) to include in such enforcement notifications one or more of the following requirements:
 - (a) to cease providing or restrict access to a specified programme or programmes of a description specified in the enforcement notification;
 - (b) to provide additional information to users of the on-demand programme service prior to the selection of a specified programme by the user for viewing;
 - (c) to publish a correction in the form and place and at the time specified;
 - (d) to publish a statement of ATVOD's findings in the form and place and at the time specified;
- (xiii) (save in cases where Ofcom decides to take enforcement action itself in accordance with its powers under the Act and subject to first obtaining Ofcom's written approval for doing so) to enforce compliance with an enforcement notification under s368I(8) of the Act in civil proceedings:
 - (a) for an injunction;
 - (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988; or
 - (c) for any other appropriate remedy or relief.
- (xiv) to carry out, commission or support (financially or otherwise) research (section 368B(11) of the Act); and
- (xv) to use any recording, script or transcript provided to ATVOD under or by virtue of any relevant provision of the Act in connection with its performance of any of the Designated Functions as permitted under section 69(5) of the Copyright, Design and Patents Act 1988 (as inserted by Regulation 12(2)(c) of the Regulations).

Obligations and Conditions

7. In carrying out the Designated Functions and in exercising the Powers set out in Paragraph 6 above ATVOD shall comply with the following Obligations and Conditions:
- (i) to act in accordance with s368B(9)(e) of the Act;
 - (ii) to ensure, in performing any function to which this Designation relates, that it takes all appropriate steps to comply with the statutory and regulatory duties and obligations that apply to Ofcom in performing its regulatory functions, including in particular:

- (a) to have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Act as appear to be relevant to it in the circumstances;
 - (b) to consult and carry out impact assessments in relation to the carrying out of the Designated Functions in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and
 - (c) to comply and secure that its staff comply with section 393 of the Act (confidentiality);
- (iii) following an appeal to Ofcom in accordance with the terms of this Designation and any relevant procedures followed by Ofcom from time to time, to accept any decision of Ofcom on scope or as to whether a programme is included in an on-demand programme service;
- (iv) to ensure, that in carrying out its function under Paragraph 5(iii) of this Designation, it satisfies the requirements under section 368NA of the Act (Fees) and in particular:
 - (a) in each financial year to consult in such manner as Ofcom considers appropriate, whether alone or jointly with Ofcom, the Service Providers likely to be required to pay them a fee; and
 - (b) to publish, in such manner as Ofcom considers appropriate, the amount of the fee Service Providers will be required to pay;
- (v) to consult with Ofcom in preparing any Rules it proposes to issue for the purpose of securing that Service Providers comply with the relevant requirements of the Act and to obtain Ofcom's prior written approval of the Rules before publishing them;
- (vi) to ensure that such Rules are expressed as the relevant requirements of the Act and are expressed without further material additions or omissions;
- (vii) to consult with Ofcom in preparing non-binding interpretative guidance to the Rules and Scope Guidance (and any subsequent material changes to either guidance);
- (viii) to ensure that in drawing up any guidance referred to in this Designation, such guidance reflects the following:
 - (a) that it is provided as non-binding guidance only in order to aid interpretation of the Rules and/or the legislative provisions on the scope of regulation in sections 368A and 368R (2) of the Act ("the Scope Provisions");
 - (b) that it will be the Rules and/or the Scope Provisions themselves, rather than the guidance, which determine whether a contravention of the Rules has taken place and determine the application of the Scope Provisions;

- (c) that compliance with the guidance does not itself confer a presumption of conformity with the Rules and/or the Scope Provisions; and
- (d) that non-compliance with the Rules will be taken to be non-compliance with the relevant requirements in the Act;
- (ix) to have in place and publish appropriate and robust complaints handling processes in order to carry out the Designated Functions;
- (x) to handle complaints received by it in accordance with its obligations in this Designation;
- (xi) to comply with the Key Performance Indicators ('KPIs') set out in the Schedule to this Designation for its complaints handling arrangements;
- (xii) [removed pursuant to the 2012 review of the Designation by Ofcom];
- (xiii) to comply with the reporting obligations set out in the Schedule to this Designation;
- (xiv) to inform Ofcom forthwith of all cases where a Service Provider to whom ATVOD has given an enforcement notification does not comply with it within the period fixed by ATVOD in the enforcement notification and, if requested by Ofcom, provide copies of all relevant evidence and submissions, in order that Ofcom can decide whether to exercise its powers to impose a sanction on that Service Provider in accordance with sections 368J, 368K or 368L, or take other such steps that Ofcom considers appropriate to secure compliance;
- (xv) to refer to Ofcom immediately (together with copies of all the relevant evidence and submissions) all cases where ATVOD considers that a service provider may be in contravention of sections 368E to 368H of the Act due to the inclusion in the service of material likely to encourage or to incite the commission of crime, or to lead to disorder; and where the contravention may be such as to justify the need for Ofcom to take urgent action under section 368L of the Act (suspension or restriction of service for inciting crime or disorder);
- (xvi) not to make a determination referred to in sections 368BB and 368I unless it has reasonable grounds for believing that a contravention of section 368D is occurring or has occurred and it has allowed the provider an opportunity to make representations about that apparent contravention;
- (xvii) where ATVOD makes a determination:
 - (a) that a person is providing an on-demand programme service; or
 - (b) following complaint or otherwise concerning compliance with the relevant requirements of the Act, that a particular programme is or is not 'a programme included in an on-demand programme service' in accordance with section 368R(2) of the Act,

ATVOD, when notifying the Service Provider or the parties to the complaint, as the case may be, of its determination, shall inform the Service Provider and, where appropriate, the parties, that they may request an appeal by Ofcom of that determination in accordance with Ofcom's relevant procedures;

- (xviii) not to enforce any requirements of section 368D of the Act other than those in respect of which it has Designated Functions;
- (xix) to cooperate fully with Ofcom at all times, including:
 - (a) to consult Ofcom, as appropriate, in cases where there is any doubt in connection with any of the Designated Functions and/or ATVOD's Powers, Obligations and Conditions under this Designation or any other provision of this Designation; and
 - (b) to supply Ofcom forthwith on request with any information it reasonably requires in connection with the carrying out of its functions;
- (xx) as part of fulfilling the duty to encourage Service Providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing or both, to:
 - (a) provide to Ofcom by no later than 30 June 2010 a detailed plan in writing setting out how ATVOD will fulfil this duty and to maintain appropriate guidance to Service Providers; and
 - (b) comply with the reporting obligations in the Schedule to this Designation;
- (xxi) as part of fulfilling the duty to ensure that Service Providers promote, where practicable and by appropriate means, production of and access to European works (section 368C(3) of the Act) to:
 - (a) provide to Ofcom by no later than 30 June 2010 a detailed plan in writing setting out how ATVOD will fulfil this duty and to maintain appropriate guidance to providers of on-demand programme services; and
 - (b) comply with the reporting obligations in the Schedule to this Designation;
- (xxii) to notify Ofcom immediately if it has reason to believe it may no longer be able to carry out the Designated Functions for any reason and/or may no longer be able to satisfy the requirements of section 368B(9) to be the appropriate regulatory authority in relation to the Designated Functions and in each case to use its best endeavours to resolve any such issues promptly; and
- (xxiii) in the event that ATVOD no longer wishes to be designated as the appropriate regulatory authority for the purpose of carrying out the Designated Functions and intends to withdraw its consent, it shall notify Ofcom in writing at least six months before ceasing to carry out the Designated Functions, setting out its reasons.

8. For the avoidance of doubt, this Designation shall not be revoked except in accordance with Paragraphs 15 and 16 below.

Variation of this Designation

9. Ofcom may vary this Designation at any time, subject to Ofcom notifying ATVOD in writing not less than thirty days prior to the date that the proposed variation is to come into force in order to give ATVOD a reasonable opportunity to comment or, exceptionally, in such lesser period as Ofcom considers appropriate.
10. ATVOD may also request a variation of this Designation at any time for Ofcom's consideration. Any variation will take effect only on Ofcom signing and issuing a notice of variation to that effect.

Duration of this Designation

11. This Designation is to have effect from 18 March 2010 and to continue for a period of ten years from the date it has effect ('the expiry date') or until such time as it is revoked in accordance with Paragraphs 15 and 16 below.
12. No less than twelve months before the expiry date, Ofcom and ATVOD shall discuss in good faith a renewal of this Designation for a further ten year period, or for such other period as they may agree; the decision whether or not to renew shall rest with Ofcom.

Review of this Designation

13. Ofcom may review this Designation at any time where, in Ofcom's reasonable opinion, regulatory developments, including any changes in relevant legislation, make it appropriate to do so.

Publication of this Designation

14. Ofcom shall publish this Designation in such manner as it considers appropriate for bringing it to the attention of persons who, in their opinion, are likely to be affected by it. ATVOD shall publish this Designation in the same manner as Ofcom and subsequent to Ofcom having first published it.

Revocation of this Designation

15. Ofcom may revoke this Designation at any time in accordance with section 368B(7) of the Act.
16. Ofcom must revoke this Designation if it is no longer satisfied that ATVOD is able to satisfy the requirements for being the appropriate regulatory authority set out in section 368B(9) of the Act or if ATVOD no longer consents to being designated, having first notified Ofcom in accordance the obligations in Paragraph 7(xxiii) above;
17. In exercising its powers to revoke under Paragraphs 15 and 16 above, Ofcom will give reasonable notice to ATVOD of its intention to revoke and will give ATVOD an opportunity to make representations and, where in the circumstances Ofcom considers it appropriate, an opportunity to take any remedial steps within such period as Ofcom requires; that period of notice being of such period as Ofcom shall determine to be appropriate in all the circumstances.

For the Avoidance of Doubt

18. ATVOD is only empowered to carry out the Designated Functions and exercise the powers specifically designated to them in this Designation. Accordingly, and for the avoidance of doubt, ATVOD is not the appropriate regulatory authority in relation to any function set out in the Act that does not form part of the Designated Functions (including, in particular, the power to impose financial penalties and to require suspensions or restrictions of on-demand programme services).
19. Any Notice given by ATVOD under Paragraph 7 (xxii) or (xxiii) above, would not have the effect of revoking this Designation unless or until Ofcom decided to revoke in accordance with Paragraphs 15 and 16 above.
20. ATVOD may not designate or otherwise appoint any body or person to act as the appropriate regulatory authority in its place.
21. Where ATVOD is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose concurrently with or in place of ATVOD (section 368B (3) of the Act).
22. To the extent that no body is designated for a purpose, Ofcom may act as the appropriate regulatory authority for that purpose (section 368B(2) of the Act).
23. Where there is any inconsistency or conflict between the provisions of this Designation and the provisions of the Act, the provisions of the Act shall prevail.

Ofcom's Commitments to ATVOD

24. In accordance with its powers under the Act, Ofcom shall take such steps as it considers appropriate by way of enforcement action against any Service Provider which has failed to comply with an enforcement notification issued by ATVOD.
25. Subject to any restriction in law, Ofcom shall provide ATVOD with such assistance and information as ATVOD may reasonably require from time to time under section 368B(4) and (10)(c) of the Act.
26. Ofcom shall consider in good faith any requests made by ATVOD from time to time under Paragraph 10 for a variation of this Designation.

Signed:

Date:



15th August 2012

.....
Christopher Woolard,
Group Director,
Content International and Regulatory Development Group, Ofcom

Person duly authorised in accordance with Paragraph 18 of the Schedule to the Office of Communications Act 2002

SCHEDULE

Reporting Obligations and Key Performance Indicators

Reporting Obligations

1. ATVOD shall report to Ofcom on the carrying out of the Designated Functions as set out below.
2. ATVOD shall by no later than 31 July each year provide Ofcom with a written report summarising its exercise of the Designated Functions and its costs, income and expenditure during the preceding period of 1 April to 31 March.
3. [removed pursuant to the 2012 review of the Designation by Ofcom]
4. [removed pursuant to the 2012 review of the Designation by Ofcom]
5. The reports referred to in paragraphs 2 - 4 of this Schedule shall include the following information:
 - (i) the number of complaints received and details of the programmes and the on-demand programme service providers to which they related;
 - (ii) the number of individuals and organisations who submit complaints;
 - (iii) the number of complaints investigated by ATVOD and the status of those cases under ATVOD's complaints handling processes;
 - (iv) the number of cases where contraventions of the Rules by providers of on-demand programme services have been (a) upheld and (b) upheld in part as contraventions of the Rules;
 - (v) any data and information collected or prepared in relation to the duties in sections 368C(2) and 368C(3) of the Act; and
 - (vi) ATVOD's plans, estimates and activities regarding the levying of fees on Service Providers under section 368NA of the Act.
6. The Chair and Chief Executive of ATVOD will report in person on the matters set out in this Designation to Ofcom's Content Board at meetings of the Content Board as reasonably requested by Ofcom.
7. ATVOD shall provide such information and assistance to Ofcom as Ofcom shall from time to time reasonably require for purposes connected with Ofcom's (or another designated body's) functions under Part 4A of the Act and generally as reasonably required to assist Ofcom to review how effectively ATVOD has exercised, or is exercising, the Designated Functions.

Key Performance Indicators

8. ATVOD shall comply with the Key Performance Indicators ('KPIs') agreed between Ofcom and ATVOD within three calendar months of this Designation

taking effect, and as may varied from time to time with the agreement of both parties, for its complaints handling arrangements.

ANNEX

Written undertakings provided by ATVOD to Ofcom



P O Box 561
Walton on Thames
Surrey KT12 9DA

Stewart Purvis
Partner, Content and Standards
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HAT

17 March 2010

By courier

Dear Stewart Purvis

Further to your letters of 2 and 4 February 2010, I am writing as Chair of ATVOD to provide ATVOD's written undertakings in relation to each of the criteria which need to be satisfied before it can be designated by Ofcom as the appropriate regulatory authority for VOD editorial content, including each of the statutory criteria set out in Section 368B of the Communications Act 2003 ('the Act'). We also confirm our consent to being designated below.

Accordingly, ATVOD now undertakes that:

(a) it is a fit and proper body to be designated;

- *ATVOD has taken all necessary steps in terms of its competency, resourcing and otherwise to ensure that it is a 'fit and proper' body in all respects to carry out any functions designated to it by Ofcom under section 368B of the Act for the purpose of regulating editorial content on on-demand programme services and has complied with all the requirements placed upon it. In addition, ATVOD has no reason to consider that it is not in any respect a fit and proper body to be designated;*

(b) it has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;

- *ATVOD, having estimated the likely costs of carrying out the delegated functions up to 31 March 2011, will exercise any powers given to it on designation to levy fees from the providers of on demand programme services under section 368NA of the Act, in a manner so as to ensure that the fees levied during the period up to 31 March 2011 will constitute an appropriate contribution to its costs in accordance with the statutory requirements of the Act; and*
- *In addition, as set out in the letter from Jon Zeff of DCMS dated 11 March 2010 and ATVOD's response of 12 March 2010, following designation ATVOD will also be in*

receipt of a grant of a total of £120,000 from DCMS in order to cover necessary expenditure in the period prior to the receipt of fees. This grant will be paid by DCMS no later than 24 March 2010 if we are designated by Ofcom before that date. £80,000 of this grant must be repaid, but repayments will be spread over eighteen months and are included in the forecast of costs provided. ATVOD has received, and requires, no financial support from Ofcom.

(d) it is sufficiently independent of providers of on-demand programme services;

- *Following an open recruitment process on Nolan principles, the ATVOD Board now comprises: an independent Chair (Ruth Evans), four independent members (Tim Lefroy, Sara Nathan, Nigel Walmsley, Ian McBride) and four industry members. It therefore has a majority of independent members. The draft complaints procedure that it has developed with Ofcom also provides that 'Any Director of ATVOD who represents a VOD service provider subject to the complaint is excluded from any consideration or determination of that complaint';*

and

(e) it will, in performing any function to which the designation relates, have regard in all cases -

(i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;

and

(ii) to such of the matters mentioned in section 3(4) of the Act as appear to the body to be relevant in the circumstances;

- *ATVOD will continue to adopt and apply the principles of better regulation and is committed to performing its designated functions in a manner which is transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.*
- *It will have regard, among other factors, to the desirability of preventing crime and disorder ;*
- *It will take all appropriate steps to comply with the statutory and regulatory obligations that apply to Ofcom in performing its regulatory functions, including in particular the obligation to consult and carry out impact assessments in relation in circumstances where Ofcom would be required to do so to comply with section 7 of the Act; and*
- *It will comply and secure that its staff comply with section 393 of the Act (confidentiality).:*

In addition, I confirm that ATVOD consents to being designated by Ofcom as the appropriate regulatory authority for the purpose of carrying out the functions which Ofcom delegates to it, such designation to be to the extent specified by, and on the terms and conditions set by, Ofcom.

I hope that as a result of these undertakings and the supporting material provided to Ofcom, Ofcom is now satisfied that ATVOD has 'fulfilled all its various commitments to make itself ready for designation' and that it can be designated as the appropriate regulatory authority.

May I take this opportunity to add my thanks to those of Elizabeth Filkin, the former Chair of ATVOD, to you and your team for all your support and encouragement and I look forward very much to working with you.

With all good wishes,

Yours ever,

Ruth Evans

Chair
The Association for Television On Demand