

ATVOD response to the Ofcom Consultation: Procedures for handling appeals on scope and for imposing sanctions in relation to On-Demand Programme Services

Introduction

The Association for television On-Demand (“ATVOD”) is the independent co-regulator for the editorial content of UK video on demand services that fall within the new statutory definition of On Demand Programme Services (“ODPS”) .

Its duties and powers derive from the Communications Act 2003, as amended by the Audiovisual Media Services Regulations 2009 and the Audiovisual Media Services Regulations 2010 which came into force on 19 December 2009 and 18 March 2010 respectively. The Act confers functions on the Office of Communications (“Ofcom”) for the regulation of On Demand Programme Services, and gives Ofcom power to delegate certain functions to an appropriate regulatory authority. On 18 March 2010, Ofcom delegated certain of its functions and powers in relation to the regulation of On Demand Programme Services to ATVOD by means of a formal designation which can be found at:

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

The powers delegated to ATVOD include the power to decide:

- what constitutes an ODPS
- what constitutes a programme included in an ODPS
- whether or not a person is providing an ODPS
- whether or not a provider of an ODPS has contravened the regulatory requirements

ATVOD’s responsibilities do not include advertising contained in ODPS.

Comments on the proposed procedures for appeals on scope

ATVOD is concerned that the procedure for assessing and determining an appeal may leave Ofcom imperfectly informed both on the facts of a particular case and on the possible counter arguments against a particular ground for appeal. The danger arises because the draft procedures do not provide an automatic opportunity for ATVOD to respond to the notice of appeal and to any evidence that appeal may contain.



We note that paragraph 3.11 implies that ATVOD will be informed of the fact of an appeal, and that paragraph 3.13 provides that “individuals or bodies who are directly affected by a case may make representations to Ofcom during its consideration of a case”, but the draft procedures place no obligation on Ofcom to inform affected parties (including ATVOD) of the substance of any appeal.

While ATVOD makes every effort to set out clearly in its notice of determination on a matter of scope the grounds for that determination, it cannot anticipate every ground that might be advanced in an appeal, nor can it anticipate every piece of evidence that might be produced in support of that appeal. During our scope investigations to date we have seen evidence of services changing significantly over a short period of time and also, regrettably, of at least one service provider claiming that a particular and pertinent feature of a service had never existed despite documentary evidence to the contrary.

The need to ensure that Ofcom is in possession of all the facts is particularly important given that the version of the service that Ofcom is able to consider first hand following an appeal will not necessarily be identical to the version of service about which ATVOD made its determination. In order to consider the appeal properly Ofcom will need to ensure that it has all pertinent information relating to the service as it existed at the time the determination was made. Consequently, Ofcom should be required to seek any pertinent information from ATVOD before assessing and determining the appeal.

Similarly, an appeal may contain grounds which have not previously been raised with ATVOD. Ofcom’s consideration of those grounds should not be carried out in the absence of a response from the co-regulator.

We note that the independent appeals procedures in operation in relation to other media regulators typically include provisions requiring the entity hearing the appeal to make the regulator whose determination is being challenged fully aware of the substance of the appeal and to give the regulator an opportunity to make representations. This is the case in relation to appeals or reviews of determinations made by Phone Pay Plus¹, the Advertising Standards Authority² and the British Board of Film Classification³.

In our view, the appellant should then be given an opportunity to respond to the representations made by ATVOD.

ATVOD therefore proposes that the draft appeals procedure is amended as follows:

¹ See <http://www.phonepayplus.org.uk/output/8-Procedures-and-sanctions.aspx#8.10>

² See http://www.asa.org.uk/Complaints/Complaints-Procedure/~/_media/Files/ASA/Misc/Broadcast%20Complaint%20Handling%20Procedures.ashx

³ See <http://www.bbfc.co.uk/download/submitted-companies/Video%20Appeals%20Committee%20Terms.pdf>



THE ASSOCIATION FOR
TELEVISION
ON DEMAND

- On receipt of a request for an appeal, Ofcom should provide ATVOD with a copy and invite ATVOD to submit representations within 15 working days
- On receipt of representations from ATVOD, Ofcom should provide the appellant with a copy, and invite the appellant to submit a response within 15 working days
- Ofcom should aim to complete appeals within 30 working days from the date it receives the appellant's response to ATVOD's representations

We acknowledge that these amendments would lengthen the appeals process, however we believe that this is a small price to pay to ensure that appeals are determined on the basis of the fullest understanding of the issues and facts involved.

Comments on the proposed procedures for consideration of statutory sanctions

ATVOD has no comments on the proposed procedures for consideration of statutory sanctions.

11/02/11