



# **On-demand programme services: who needs to notify to Ofcom?**

**Virgin Media's response**

**26<sup>th</sup> May 2021**

**Non-Confidential response**

## EXECUTIVE SUMMARY

Virgin Media welcomes the opportunity to respond to Ofcom’s consultation on who needs to notify in regard to on-demand programme services (the “Consultation”).

Following changes to the regulatory framework, it is appropriate and reasonable for Ofcom to update the available guidance, allowing providers to fully understand its position and how any interpretation of the statutory criteria could be made.

As has previously been expressed, for the most part Virgin Media acts as a platform via which on-demand programme services (“ODPS”) can be accessed and as an *aggregated content service*. As such, we do not have control over the organisation and selection of the majority of on-demand content available on the platform and we are therefore not providing an ODPS in such scenarios. However, we do make available a small amount of on-demand content to our customers for which we consider that we are operating an ODPS – and we have notified Ofcom accordingly.

### 1. ON DEMAND PROGRAMME SERVICE CRITERIA

As laid out under section 368A of the Communications Act 2003 (the “Act”), the identification of an on-demand service falls into five constituent elements. It is therefore sensible that Ofcom’s guidance mirrors these elements in order to support providers’ interpretation.

The key element to identifying an ODPS, without which a service could not be classified as such, is that the principal purpose is to provide programmes. In regard to the definition of “programmes”, Virgin Media acknowledges that the updated definition of programmes significantly broadens the scope of what may constitute an ODPS and therefore welcomes Ofcom’s attempt to provide further clarification via a list, albeit non-exhaustive, of the type of media not covered by the updated definition. When looking at what a service’s principal purpose is, we believe that the guidance given by Ofcom within the consultation is suitable and the factors laid out that Ofcom would take into consideration, such as availability and audience size, are appropriate measures to look at.

As is mentioned throughout the consultation, the content made available via an ODPS may have similarities to that found on video-sharing platforms (VSPs). However, we believe that it is vital that a clear distinction is made between the two.

(X) Whilst acting as an aggregation platform for a number of ODPS providers, we are not responsible for, nor do we have control over, the selection and organisation of programmes included in such services and therefore the obligation with regard to notification does not rest with us. Obviously, this does not include the small number of ODPS services that we provide, as mentioned previously.

(X)

### 2. NOTIFICATION

The guidance provided within this consultation, alongside the further document referenced within the consultation, covers the key areas regarding notification. Within the guidance, Virgin Media welcomes further definition regarding what constitutes a “significant difference” to the service which would lead to a provider having to inform Ofcom before making such a change.

Virgin Media notes the proposed requirement on providers to complete an annual return in relation to the information held by Ofcom and would like further clarity on how this would take place and when this annual return would come into effect. As many providers already have services that Ofcom has been notified of, and which will not have changed since, we question whether there is a need for this additional administrative step. If this additional step were to be introduced, are we to expect an update from Ofcom when such an annual return is required alongside the nature of such a notification?

### **3. CONCLUSION**

Overall, Virgin Media welcomes the updated guidance provided by Ofcom in relation to ODPS providers and who is required to notify Ofcom. Following the coming into effect of the updated regulatory framework, it is appropriate that Ofcom, as the regulator, responds with updated guidance and we would always support such developments that allow providers to be clear about their regulatory obligations.

Having reviewed the guidance, we consider that it aligns in general with our interpretation of the regulatory requirements the position that we have taken in regard to both ODPS and VSP services.

However, we would also like to understand in more detail the need for and the way in which Ofcom expects ODPS providers to complete an annual return in regard to the services they provide. Further detail on this point from the consultation will allow providers to ensure that such an update is adequately diarised and ensure that Ofcom is consistently provided with the accurate detail required.

### **4. CONSULTATION QUESTION RESPONSES**

Please see below for our response to the specific questions in the Consultation.

**Question 1: Do you have any comments on proposed guidance around subsection 1(a) of section 368A of the Act – whether the provision of programmes is the principal purpose of a service or a dissociable section of a service?**

Virgin Media does not have any further comment on the proposed guidance concerning these points at this current time. .

**Question 2: Do you have any comments on proposed guidance around subsection 1(b)-(d) of section 368A of the Act**

- **whether the service or dissociable section is accessed on-demand;**
- **whether the programmes comprising the service or dissociable section are under a person’s editorial responsibility; and**
- **Whether the service or dissociable section is made available to the public by that person?**

Virgin Media does not have any further comments on the proposed guidance outside what has been highlighted within the main body of this consultation.

**Question 3: Do you have any comments on proposed guidance around assessing whether an ODPS provider is within jurisdiction of the UK?**

Virgin Media does not have any further comment on this section of the guidance.

**Question 4: Do you have any comments on proposed guidance around notification of a service?**

As mentioned in the main body of this response, Virgin Media would like to further understand the need for and process that Ofcom is proposing in regard to the annual return that providers will be expected to complete.

**Question 5: Do you have any comments on any other part of the proposed guidance which is not explicitly set out in questions 1-4?**

Other than what has been highlighted in the main body of this consultation, Virgin Media has no further comments to make at this time.