

SKY'S RESPONSE TO OFCOM'S CONSULTATION ON REGULATORY FEES FOR ON DEMAND PROGRAMME SERVICES

SECTION 1: INTRODUCTION

- 1.1 We refer to the Ofcom consultation on Regulatory fees for on demand programme services (“ODPS”) dated 31 January 2017 (the “Consultation”).
- 1.2 In the Consultation, Ofcom invites responses on its new regulatory fees regime under section 368NA of the Communications Act 2003 (the ‘Act’), to apply from the 2017/18 financial year onwards. Ofcom’s preferred proposal is to adopt a fee structure that shares the costs of regulating ODPS only between the largest providers (Option 4 in the Consultation).¹
- 1.3 Sky UK Limited (“Sky”) has set out its comments on the Consultation below.
- 1.4 As a preliminary point, Sky notes that section 3(3) of the Act requires that in performing its duties Ofcom must have regard in all cases to the principles under which regulatory activities should be proportionate, consistent and targeted. Furthermore, under section 368NA of the Act, Ofcom must be satisfied that the amount of any ODPS related fee must represent an “*appropriate contribution*” of the provider towards meeting the likely costs of regulation, and be justifiable and proportionate.
- 1.5 In relation to Option 4, Sky objects to the principle that only the largest ODPS operators should pay regulatory fees. Sky nevertheless concedes that Ofcom’s preferred option may be appropriate in the particular circumstances of the current regulatory transitional period (from ATVOD to Ofcom), and given the relatively low level of fees proposed. However, Ofcom should reassess its approach to ODPS fees should the level of costs (and therefore fees) rise materially in the future.

SECTION 2: RESPONSE TO CONSULTATION

All ODPS providers should contribute towards the costs of ODPS regulation

- 2.1 As noted above, Sky objects to the principle that only the largest ODPS operators should pay regulatory fees. Such an approach does not result in an “*appropriate contribution*” by each provider towards meeting the costs of ODPS regulation as only some providers would be targeted.
- 2.2 Sky notes that Ofcom’s costs of ODPS regulation are unlikely to relate solely or predominantly to content made available by the largest operators; indeed, such costs are more likely to be in relation to smaller operators not linked to linear broadcast services who may not have the financial means or incentives to put in place an effective compliance program or a dedicated compliance team.
- 2.3 Furthermore, if only the largest providers are required to contribute then those that do not contribute may be less inclined to comply with regulation. In order to promote “compliance discipline”, all ODPS providers, regardless of their size, should contribute towards the costs of ODPS regulation.
- 2.4 Whilst a ‘polluter pays’ principle has an appeal, spreading the cost of regulation over all regulated services is often most appropriate, being a proportionate and fair solution for all.

¹ Under Option 4 ODPS providers with a total turnover of less than £10m would pay no fees; providers with a total turnover of more than £10m but less than £50m would pay £2,073 per year; provider with a total turnover of more than £50m would pay £4,146 per year.

Ofcom should keep its approach to ODPS fees under review

- 2.5 The ODPS sector continues to develop and evolve. Sky is therefore concerned that Ofcom's costs (and therefore ODPS fees) may well increase as regulation in this area increases. For example, under the proposed Digital Economy Bill Ofcom will have statutory oversight of access services for ODPS.
- 2.6 While Sky accepts that Option 4 is justifiable and proportionate in the short term, Ofcom should commit to keeping its approach to ODPS fees under review in order to ensure that ODPS fees remain justifiable and proportionate and that *all* ODPS providers are making an "*appropriate contribution*".
- 2.7 Option 4 should therefore remain an interim solution. In particular, Sky submits that Ofcom should not materially increase fee levels without revisiting the size and type of services that are required to pay such fees.

Sky

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