



Future regulation of on-demand programme services

	Statement and consultation
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About this document

From 1 January 2016, Ofcom will be sole regulator (other than in relation to advertising) for on-demand programme services (“ODPS”) under Part 4A of the Communications Act 2003 (the “Act”).

This document summarises, for the convenience of providers and consumers of ODPS, arrangements which apply from that date. We have collated links to forms for notifying services to Ofcom (and related guidance), as well as Rules and Guidance applying to ODPS, Interim Breach Procedures for investigating breaches of rules for on-demand programme services (“Interim Breach Procedures”), and Sanctions Procedures.

This document also consults on two substantive proposals. One is to introduce new Procedures for investigating breaches of rules for on-demand programme services to replace the Interim Breach Procedures, and to align more closely with the position for linear television broadcasting. The other is not to charge fees under section 368NA of the Act.

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Section 1

Introduction

Legal framework for regulation of on-demand programme services

- 1.1 On-demand programme services (“ODPS”) are regulated in the UK under rules set out in Part 4A of the Communications Act 2003 (the “Act”). Under section 368B of the Act, Ofcom may, but is not required to, designate an “appropriate regulatory authority” to carry out functions under Part 4A. In the absence of a designation, Ofcom is the sole appropriate regulatory authority. Where there is a designation in place, Ofcom may act concurrently with or in place of that body, and may revoke the designation at any time.
- 1.2 The appropriate regulatory authority has a number of functions under Part 4A including:
- (a) To act as a body to whom a person can notify an intention to provide an ODPS as defined under section 368A(1), or to significantly change a notified ODPS, or to cease to provide an ODPS, as they are required to do under section 368BA. The appropriate regulatory authority also enforces the notification requirements under section 368BB.
 - (b) To take steps to secure that ODPS providers comply with (i) substantive rules in relation to harmful material (section 368E), advertising (section 368F), sponsorship (section 368G) and product placement (section 368H); and (ii) administrative rules in relation to provision of information to users, retention of programmes, and cooperation with the appropriate regulatory authority.
 - (c) To encourage ODPS providers to make ODPS progressively more accessible for individuals with visual or hearing impairments (section 368C(2)).
 - (d) To promote, where practicable and by appropriate means, production of and access to European works as defined by the Audiovisual Media Services Directive 2010 (the “AVMS Directive”) (section 368C(3)).
 - (e) To issue enforcement notifications for breaches of substantive or administrative rules under section 368I.
 - (f) In appropriate cases, to impose financial penalties for breaches of substantive or administrative rules, or for failure to notify provision of an ODPS, under section 368J.
 - (g) In appropriate cases, to suspend or restrict services for contraventions of rules or for incitement of crime or disorder (sections 368K and 368L).
- 1.3 The appropriate regulatory authority may also levy fees on ODPS providers pursuant to section 368NA of the Act, although it is not required to do so. If it does these must not exceed an estimate of likely costs for carrying out relevant functions. It may also require the provision of information from those appearing to it to be ODPS providers, under section 368O.

The Authority for Television on Demand

- 1.4 In 2010, Ofcom designated the Authority for Television on Demand (“ATVOD”) as the appropriate regulatory authority to carry out various functions relating to editorial content on ODPS. ATVOD and Ofcom worked within a co-regulatory model. In doing so, Ofcom remained able to act concurrently with or in place of ATVOD at any time (as is required under section 368B(2) of the Act). Ofcom also remained solely responsible for matters including financial penalties, suspensions and restrictions, and Ofcom had an appellate role in relation to ATVOD’s decisions that providers were ODPS providers as defined in the Act (known as scope appeals).
- 1.5 ATVOD played an important role in the first five years of a new regulatory regime. However, in light of convergence between linear television broadcasting and ODPS and the extensive overlap in the identity of ODPS providers and broadcast licensees, Ofcom decided to end the co-regulatory model, to bring ATVOD’s designation to an end, and to act as sole regulator for ODPS non-advertising content from 1 January 2016. The Advertising Standards Authority will remain co-regulator in relation to advertising content on ODPS, as it does for linear television broadcasting, and nothing in this statement and consultation has any bearing on that position.
- 1.6 It is important to note that Ofcom is not gaining any new functions as a result of the end of ATVOD’s designation. As noted above, it has been able to act concurrently with or in place of ATVOD in all respects and at all times since Part 4A came into force.

Next steps

- 1.7 Ofcom is adequately resourced to deal with all matters within its remit relating to ODPS from 1 January 2016. In addition to extensive experience in broadcasting regulation, Ofcom has substantial on-demand experience based on its co-regulatory role to date, including having handled appeals of ATVOD decisions as well as sanctions cases referred to it by ATVOD. We will be assisted by the expertise of a small number of staff joining us from ATVOD.
- 1.8 There will, however, need to be some consequential changes applying from 1 January 2016 to reflect the ending of the co-regulatory model (e.g. references in documents to two co-regulatory bodies are simply no longer accurate). Additionally, in light of the convergence between linear television and ODPS, it is appropriate to consult on how best to give effect to alignment with linear broadcasting, whilst recognising relevant differences in the substantive rules applying to each.
- 1.9 Consequently, Ofcom is today publishing the following materials, which are briefly explained in section 2 of this document for the convenience of providers and consumers of ODPS:
- (a) Forms and guidance on how to notify ODPS to Ofcom. These do not affect the substantive obligations on ODPS providers to notify as set out in section 368BA of the Act, but provide the material needed for providers to fulfil such obligations.
 - (b) Rules and Guidance which will apply from 1 January 2016. The rules applying to ODPS are statutory. The Guidance (which is non-binding) closely reflects that applied by ATVOD with minor updates which do not intend to change substantively the rules as they apply. Ofcom is likely to make revisions in the

first half of 2016 on amending the style and tone of this document and, if appropriate, addressing further practical points where stakeholders want to understand further how Ofcom is likely to interpret the Rules

- (c) Interim Breach Procedures (in relation to alleged breaches of the Rules) which will apply from 1 January 2016 but which will be replaced following consultation (below). The Interim Breach Procedures closely reflect those used by ATVOD, with which existing ODPS providers will be familiar, with some necessary changes because of the end of the co-regulatory model. These will provide continuity during the transition period but with the clear understanding that there will be changes following transition.
 - (d) Updated Procedures for the consideration of statutory sanctions arising in the context of on-demand programme services (“Sanctions Procedures”). Ofcom handled sanctions under the co-regulatory arrangements with ATVOD but the Sanctions Procedures require very minor changes to remove references to referrals from ATVOD, which are no longer relevant.
- 1.10 As well as providing information on updated materials, this document consults on two substantive matters:
- (a) Replacement of the Interim Breach Procedures with new Procedures for investigating breaches of rules for on-demand programme services aligning the process for ODPS with that already applying to linear television broadcast licensees (whilst recognising that the substantive rules differ). Section 3 summarises the new process and the draft Procedures for investigating breaches of rules for on-demand programme services are at Annex 5.
 - (b) A proposal not to charge fees under section 368NA of the Act at present. Section 4 summarises reasons for this proposal and invites comments.

Impact assessment

- 1.11 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom’s activities¹.
- 1.12 We have carried out impact assessments for some changes referred to in this document, where warranted. Section 2 of this document refers to minor textual changes including replacing outdated references, removing unnecessary text, clarifying points with no substantive underlying change in approach, and making necessary changes consequential on the end of ATVOD’s designation. We have not carried out an impact assessment on these. The analyses as presented in sections 3 and 4 represent an impact assessment of those proposals on which respondents to the consultation may wish to comment by the consultation closing date. We have also had due regard to our obligations under the Equality Act 2010, but do not expect that the outcome of this consultation is likely to have any

¹ For further information on our approach to impact assessments see our guidelines on Better Policy Making: <http://www.ofcom.org.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment/>

particular impact on race, disability or gender equality or those with any of the other characteristics protected by the Equality Act.

Section 2

Arrangements from 1 January 2016

- 2.1 This section summarises the arrangements that will apply from 1 January 2016 when Ofcom becomes sole regulator of ODPS (other than for advertising content, where the ASA remains co-regulator).
- 2.2 It is noted at the outset that the statutory framework for the regulation of ODPS has not changed, and Ofcom is not gaining any new functions as a result of the end of ATVOD's designation as it has been able to act concurrently with or in place of ATVOD in all respects since Part 4A came into effect. Additionally, Ofcom recognises the value of stability and predictability for ODPS providers in the transition from the co-regulatory model. Consequently, many of the arrangements for the period immediately following 31 December 2015 will be very familiar to existing ODPS providers.
- 2.3 However, there has been a need to update published materials to reflect the fact that the co-regulatory regime ends on 31 December 2015. We set these out below to assist ODPS providers and consumers.

Updated forms and guidance

- 2.4 Under section 368BA of the Act ODPS providers are required to notify intention to start providing an ODPS, to make significant changes, or to cease providing one (including where they close the service or where it ceases to fulfil the definition of an ODPS in section 368A). Consumers need to understand how to pursue complaints. Clearly, the end of the co-regulatory model necessitates practical changes in these areas.
- 2.5 We have created a new section of the Ofcom website containing relevant information which can be accessed via this link:
<http://stakeholders.ofcom.org.uk/broadcasting/on-demand/>.
- 2.6 We draw particular attention to the following:
- (a) There is a document providing guidance on who needs to notify (http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Guidance_on_who_needs_to_notify.pdf). This is closely based on ATVOD's guidance. We have removed references to various previously decided cases. These continue to provide important guidance for service providers but new cases are decided regularly so we have instead provided within the document a simple link to all the cases. We have updated references, and made some minor changes for reasons of clarity and precision; however, these changes do not reflect a change in Ofcom's interpretation of who needs to notify.
 - (b) There is a new form for notifying an ODPS (<http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/notification.rtf>). There are small changes to the form to align with standard Ofcom forms for broadcast licensees. ATVOD records are being transferred to Ofcom and there is no need to re-notify a service which was notified to ATVOD as at 31 December 2015.

- (c) There is new practical guidance on how to notify (http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/How_to_Notify.pdf). This does not affect the substantive obligation, but simply assists ODPS providers in the practical steps needed.
- (d) We have updated our website to provide advice to people wishing to complain about video on demand services. This can be found here: <http://consumers.ofcom.org.uk/complain/>.
- (e) ATVOD did not exercise functions in relation to sanctions for breaches of requirements by ODPS providers, so there was an existing Ofcom document on sanctions procedures for ODPS. However, the ending of the co-regulatory model necessitates non-material updates (http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised_sanctions_procedures.pdf).
- (f) We have made available, unamended, previous ATVOD publications including those relating to commercial references², European works, and to access services for people with disabilities affecting hearing or sight.³ In relation to the latter, we are aware of real concerns about the availability of access services (subtitling, audio-description and signing) on ODPS, sometimes including programmes which have previously been broadcast including those features. We will be consulting early in 2016 on what more we can do to encourage accessibility as required under section 368C(2) of the Act.

² Available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules_and_Guidance.pdf

³ Available at: <http://stakeholders.ofcom.org.uk/broadcasting/on-demand/access-services-european-works/>

Rules and Guidance

- 2.7 We have produced a Rules and Guidance document (http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/rules_and_guidance.pdf) closely reflecting the existing ATVOD Rules and Guidance, with minor updates to reflect the end of the co-regulatory model, and for reasons of clarity and precision.
- 2.8 The rules applying to ODPS are statutory rules, and will not change on 1 January 2016. The guidance assists in understanding Ofcom's interpretation of the substantive rules but are not exhaustive and do not either limit or supersede the statutory rules.
- 2.9 Ofcom intends to publish a revised set of Rules and Guidance in the first half of 2016, aligned more closely in format, tone and style to the Broadcasting Code and this may also include further guidance on points of practical importance to stakeholders.

Interim Breach Procedures

- 2.10 The Interim Breach Procedures apply where Ofcom receives a complaint from 1 January 2016. They will also apply to any ongoing investigations which ATVOD has been unable to complete by 31 December 2015. We are available to advise any ODPS providers involved in such investigations of next steps after 1 January 2016, but they should assume that the investigation will continue as all relevant files will be passed from ATVOD to Ofcom, and they should simply direct correspondence to Ofcom in future.
- 2.11 The Interim Breach Procedures are only intended to apply for a short period to provide continuity for ODPS providers in the transitional period. In section 3 of this document, we are consulting on a set of procedures more aligned with those applying to linear broadcasting.
- 2.12 However, the Interim Breach Procedures include a number of necessary changes reflecting the ending of the co-regulatory model and important differences in the scale and structure of Ofcom compared with ATVOD. We draw stakeholders' attention to the following:
- (a) The end of the co-regulatory regime automatically means that there is no appeal process from ATVOD to Ofcom. An internal review process is retained in the interim, and ODPS providers have an appeal route via judicial review in the High Court.
 - (b) We have been able to simplify the position on investigations into services which have not been notified as ODPS services (i.e. "scope" matters where there is an issue as to whether the definition of ODPS in section 368A(1) of the Act applies). Previously, given the appeal process over scope matters to Ofcom, the default position was to address issues of scope and of potential breaches of editorial rules sequentially. In future, the default is that they will be addressed in parallel, expediting the process for service providers and complainants. We also emphasise that "scope" cases are in themselves breach cases; failure to notify a notifiable service is a clear breach of Rule 1 of the Rules and Guidance (derived from section 368BA of the Act).

- (c) ATVOD was a much smaller organisation than Ofcom, with limited opportunity for internal governance and decision making involving individuals not directly involved in the original investigation. It is neither appropriate nor necessary to replicate ATVOD's Determinations Committee, nor to have Board-level involvement in typical cases. We note that these are not features of Ofcom's well established processes for linear broadcasting. However, an internal review process provided by appropriately qualified Ofcom staff not involved in the original decision will remain available in the transitional period, pending the outcome of consultation.

Section 3

Consultation on new Procedures for investigating breaches of rules for on-demand programme services

- 3.1 This section sets out the key reasons why Ofcom considers it is appropriate to align procedures covering alleged breaches by ODPS providers of the Rules and Guidance applying to ODPS with those covering alleged breaches by linear television broadcasters for breaches of Ofcom's Broadcasting Code. It also highlights some important features of the draft Procedures we propose (subject to consultation) to apply, and invites comments. The draft Procedures themselves appear at Annex 5.

Alignment with procedures applying to linear television broadcast

- 3.2 There are a number of reasons why Ofcom considers it is appropriate in principle for procedures for ODPS closely to reflect those for linear television, and these are set out below.
- 3.3 The AVMS Directive explicitly recognised growing convergence between what it referred to as, *“Traditional audiovisual media services — such as television — and emerging on-demand audiovisual media services”* and aimed to create *“a level playing field”* between them (Recital 10). Further, in relation to audiences' reasonable expectations of regulatory protection, it noted that, *“It is characteristic of on-demand audiovisual media services that they are ‘television-like’”*. In light of the concept of a level playing field for providers, and meeting audiences' reasonable expectations, Ofcom considers procedures should be as closely aligned as possible.
- 3.4 In practical terms, experience since the AVMS Directive was passed in 2010 demonstrates that there is a substantial overlap between ODPS and linear television. This takes the form both of overlapping content (many ODPS are catch-up services including previously broadcast material) and overlap between the largest ODPS providers and broadcast licensees.
- 3.5 For service providers and complainants alike, Ofcom considers it contributes to transparency, predictability and efficiency for procedures in relation to ODPS to closely reflect those for linear television. The procedures relevant to television have been in force for a considerable period, providing a clear process for viewers to raise concerns, and fair and appropriate opportunity for service providers to make representations.
- 3.6 We recognise, however, that there are differences between ODPS and linear television services. At the level of smaller ODPS providers, there is less overlap between ODPS providers and broadcast licensees. Additionally, the substantive rules are less extensive for ODPS than for linear television. However, we do not consider these factors justify fundamental differences in procedural approach between linear television and ODPS. The procedures for linear television provide fair and appropriate opportunity for complainants to bring issues to the attention of the regulator, and for service providers to make representations prior to a decision.

We consider this approach is as appropriate for ODPS providers which are not also broadcasting licensees as they are for those that are, and as appropriate given the less extensive rules applying to ODPS as they are for the more regulated landscape of linear broadcasting.

Key features of the draft Procedures for investigating breaches of rules for on-demand programme services

- 3.7 The draft Procedures for investigating breaches of rules for on-demand programme services appear at Annex 5. Subject to responses to this consultation, these are the Procedures which we propose would replace the Interim Breach Procedures early in 2016.
- 3.8 Respondents are invited to comment on any aspect of the draft Procedures they consider relevant. To assist that process, we highlight a number of key points below, particularly insofar as they depart from the Interim Breach Procedures and from Ofcom's *Procedures for investigating breaches of content standards for television and radio*⁴ on which they are based:
- (a) We have highlighted the fact that the on-demand nature of ODPS means that there may be a greater risk of ongoing harm in some cases than is the case for linear television broadcast. Examples include where a potential breach involves incitement to hatred, encouragement of crime and disorder, or protection of minors, where the material remains available on demand. We have made clear that this may justify departure from the Procedures, including allowing shorter periods for representations. We have stated that we would communicate deadlines to ODPS providers in such circumstances and that these would remain fair to the provider in the circumstances.
 - (b) Also related to this particular risk of ongoing harm and the need to expedite, we have made clear that there may be cases where it is appropriate to bypass ODPS providers' internal complaints processes and for Ofcom to investigate before such processes are concluded, although the presumption remains that complainants should go to the ODPS provider first where such concerns are not engaged.
 - (c) We have recognised that the requirements on ODPS providers differ from those on broadcasters, and have highlighted what the relevant requirements are.
 - (d) ODPS providers are required under section 368D(3)(zb) of the Act to retain copies of every programme on the service for at least 42 days after it ceases to be available for viewing. This differs from the position of broadcast licensees who are required to retain material for longer and have additional licence obligations in relation to adoption of procedures for the retention of material subject to a complaint. We have made clear we expect ODPS providers to retain material for at least 42 days after communicating its own decision on a consumer complaint. Equally, we have stated that complaints must be pursued promptly by complainants and that we will not generally accept essentially historic complaints where the matter has not been pursued promptly and the material is no longer available.

⁴ Available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/breaches-content-standards.pdf>

- (e) The definition of an “on-demand programme service” in section 368A of the Act is not always clear-cut and we have recognised complaints about non-notified services raise issues of whether the definition is met (known as “scope” issues). The approach to scope issues was complex under previous ATVOD processes, partly because of the appellant role of Ofcom. We have sought to clarify the matter. Failure to notify an ODPS (as defined) is a breach under section 368BA of the Act, and of Rule 1 of Ofcom’s published Rules and Guidance. We would therefore propose to progress any such matter under the Procedures and potentially further under the Sanctions Procedures. Normally, we would not separate consideration of this potential breach from any other potential breach (e.g. of an editorial rule).
 - (f) The proposed Procedures do not retain the internal review process embodied in the Interim Breach Procedures and in previous ATVOD procedures. ODPS providers retain the potential for appeal of Ofcom decisions via judicial review in the High Court. This aligns the approach with that for broadcast licensees, in the interests of prompt resolution for complainants and ODPS providers alike. While the additional stage may have been more appropriate for ATVOD as a small organisation with limited opportunity for review and validation by individuals not directly involved in an investigation as part of the decision making process, we do not consider this remains the case. The procedural measures in place have proved sufficient for broadcasters and it is our view that the nature of ODPS is not such that it makes it necessary to supplement these for them specifically.
 - (g) We have included specific reference to Ofcom’s powers to issue directions under the Act suspending or restricting an ODPS.
- 3.9 The proposed Procedures as set out at Annex 5 will have a number of impacts on citizens and consumers. Their intention is to align the procedural position with that applying to linear television, while appreciating differences in substantive requirements and in particular features of each medium. This should assist in understanding processes in the context of convergence, and add confidence that the reasonable expectations of audiences regarding protection will be met. The proposed Procedures clearly envisage expediting processes in cases of ongoing harm in the interests of citizens and consumers, and reducing the time to resolve cases more generally.
- 3.10 The proposed Procedures reduce the role for individual complainants following submission of an initial complaint. This is in line with the established approach for linear television broadcasting, and is likely to assist prompt resolution in the interests of citizens and consumers more widely.
- 3.11 For ODPS providers, again alignment with the position for linear television is intended to assist understanding of the process given many ODPS providers are also broadcast licensees. The changes reduce opportunities for internal review at the request of ODPS providers following a breach decision, but this contributes to prompt resolution while providing fair opportunity to make representations.

Question 1: Do you agree with Ofcom’s proposal substantively to align procedures for investigating breaches of rules for ODPS with established procedures for linear television broadcasting, and do you have any specific comments on any aspect of the draft Procedures at Annex 5?

Section 4

Consultation on fees

- 4.1 This section sets out Ofcom's proposal not to require ODPS providers to pay a fee under section 368NA of the Act. In particular, it considers three options:

OPTION A (preferred option): Not to charge a fee to ODPS providers under section 368NA of the Act for the financial year 2016-17, and to cover the very small incremental cost involved in becoming sole regulator (rather than co-regulator) of ODPS within the existing fees structure for television broadcasting licensees. This structure consists in particular of Ofcom's *Statement of Charging Principles*⁵ which we are required to publish under section 347 of the Act, and the associated tariff tables which are published annually⁶.

OPTION B: Not to charge a fee to ODPS providers under section 368NA of the Act (as per Option A) but to amend the Statement of Charging Principles such that ODPS revenues are specifically captured.

OPTION C: To charge a fee to larger ODPS providers under section 368NA.

- 4.2 If Ofcom adopts Option A following consultation, no further process would be required as a system is already in place for setting broadcasting licence fees, and we do not consider changes would be required to accommodate Option A.
- 4.3 If Ofcom adopts Option B, consideration would then be given to precisely how to capture the ODPS revenues of broadcast licensees and charge for them. This is likely to entail further consultation.
- 4.4 If Ofcom adopts Option C, Ofcom would make a costs estimate and propose a fee structure to replace ATVOD's, on which it would consult as required in section 368NA.

Current position

- 4.5 Section 368NA allows the "appropriate regulatory authority" to require providers of ODPS to pay a fee. Any fee must represent an appropriate contribution to the authority's likely costs over the financial year of carrying out its functions, must be sufficient to meet but not exceed those costs. The authority must consult ODPS providers which are likely to be required to pay a fee.
- 4.6 The "appropriate regulatory authority" refers to ATVOD until 31 December 2015 and to Ofcom after that date. Ofcom was also able, prior to 31 December 2015, to charge fees under section 368NA in its position as co-regulator. It chose not to do so but did receive a small "recouped costs" contribution from ATVOD, and this was reflected in ATVOD's fee calculation (the calculation amounted to £21,996 in 2015-16).

⁵ Available at:

http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging_principles.pdf

⁶ Available at: <http://www.ofcom.org.uk/about/annual-reports-and-plans/tariff-tables/>

- 4.7 ATVOD charged fees for the financial year 2015-16⁷. These varied from £96 per annum for “non-commercial” ODPS with a single outlet, up to £14,135 for “Super A” providers with a turnover over £25.9m. A “group cap” applied for ODPS providers in the same corporate group of £28,725.
- 4.8 ATVOD consulted on 2015-16 fees. In its resulting statement⁸, ATVOD set out costs estimates and how its fee structure was likely to meet but not exceed costs based on its estimate of the number and size of services it considered it would be regulating in the financial year. Its estimate of total costs was £487,162. The largest cost categories were (i) staff and ATVOD Board remuneration (£353,775); (ii) professional fees (£59,155); (iii) rent (£24,710), (iv) Ofcom recouped costs (referred to above - £21,996); and (v) IT hardware and support (£13,430).

Reasons for preferring Option A

- 4.9 Options A and B do not involve charging a fee under section 368NA. There are a number of reasons why Ofcom considers that is the appropriate course. In particular, the legislation does not require a fee; a fee would involve a parallel system to cover a very small incremental cost; separating costs would be complex and arguably artificial; and the overlap between broadcast licensees and ODPS providers is such that there would be minimal benefit in terms of recovering costs from organisations which would not otherwise pay a fee.
- 4.10 Firstly, the legislation sets out that it is open to the authority not to require a fee even if (as is inevitable) there are some costs arising from carrying out such functions. The legislation thus recognises that it may be disproportionate for Ofcom to separate out the costs of carrying out functions under Part 4A of the Act from other, closely related costs, and for both Ofcom and ODPS providers to go through an annual process of recalibrating fees. It envisages that it may be appropriate to cover costs in other ways.
- 4.11 Secondly, the incremental costs for Ofcom regulating ODPS in addition to broadcasting are very small. ATVOD’s cost estimate for the current financial year were £487,162. Ofcom considers that these significantly exceed the incremental costs of Ofcom carrying out the tasks previously carried out by ATVOD under its designation. In particular, the bulk of the remuneration costs (which was by far the largest of ATVOD’s cost categories) related to the ATVOD Board and CEO, who will not transfer to Ofcom on 1 January 2016. Three other members of staff will transfer to Ofcom, bringing valuable expertise. But this will not represent a substantial cost, and those staff will not exclusively work on ODPS matters over the longer term. Additionally, as Ofcom has existing internal facilities and resources, we do not expect to replicate other material cost categories (professional fees, rent, and IT). Consequently, charging a fee would involve allocating a very small incremental cost across a relatively large number of ODPS providers, with the cost of a parallel system beside the existing system for broadcast licences.
- 4.12 Separating costs of broadcast and ODPS regulation going forward would also be complex and arguably artificial. Ofcom will be closely aligning its work on ODPS with its work on broadcasting. As noted in section 3, this is consistent with the purposes of the AVMS Directive. Separating out costs would involve a range of assumptions being made in respect of cost allocation, including for individuals and

⁷ Available at: http://www.atvod.co.uk/uploads/files/2015-16_Fee_Tariff.pdf

⁸ Available at: http://www.atvod.co.uk/uploads/files/2015-16_Fees_Statement_FINAL.pdf

projects which cover both ODPS and broadcast. We do not consider this would be proportionate for costs of the magnitude described above.

- 4.13 Finally, it may still be appropriate to calculate a separate fee under section 368NA on grounds of fairness if the providers paying the bulk of such fees would differ substantially from existing television broadcast licensees. However, of the 27 services paying ATVOD's "Super A" fee rate in 2015-16 (for providers with turnover exceeding £25.9m), 25 either were broadcast licensees or were in the same corporate group as such a licensee. Nine of the 13 in the "A" fee rate (turnover between £6.5m and £25.9m) were also broadcast licensees. Such providers accounted for the large majority of overall fees collected by ATVOD, with smaller providers paying fees of as little as £96 each. Ofcom therefore does not consider there is a compelling argument on grounds of fairness between ODPS providers and broadcast licensees for charging a fee under section 368NA.

Alternative options

- 4.14 Option B is similar to Option A, but would involve making changes to the Statement of Charging Principles to capture ODPS revenues of broadcast licensees which, at the present time, are small compared with broadcast revenues. This would be a relatively complex process, including capturing ODPS revenues within the broader corporate groups of broadcast licensees. It would involve only very minor changes to the relative licence fees paid by different broadcast licensees.
- 4.15 Ofcom does not consider that preferring Option A over Option B involves an unfairness to television broadcast licensees who do not offer (or offer only very small) on-demand services.
- 4.16 Option C would involve requiring a fee under section 368NA. Were Ofcom to adopt this option, it considers that this structure would focus on the largest providers and would be very unlikely to involve any fee (or any material fee) for the "long tail" of small ODPS providers. This is because (i) the costs of collection would be disproportionate; (ii) many of these are emerging small businesses and while this does not mean fees are never appropriate we are conscious of the administrative and financial burden; and (iii) we are keen not to create a disincentive for notification under section 368BA of the Act for providers willing to comply with the very limited substantive rules that apply to ODPS.
- 4.17 Given all or the vast majority of fees would be paid by large ODPS providers (albeit these fees would be small because the costs are small as noted above) it is relevant to note that the overlap at this top end with existing broadcast licensees is extensive.
- 4.18 In conclusion, it is our view that Option A represents a fair, proportionate and pragmatic approach to apportioning the small incremental costs involved in Ofcom exercising sole regulatory responsibility for programme content on ODPS. We consider that it is an approach that takes into account the objectives of the AVMS Directive in relation to creating a "level playing field", and our intention to align the regulatory approach for ODPS with that applying to linear television broadcasting. We have considered whether section 347 of the Act allows for the recovery of costs of ODPS regulation (which is relevant to both Option A and Option B) and, in light of the close relationship between linear television broadcast and ODPS, we have taken the view that it does.

- 4.19 We note that the ODPS sector continues to develop and evolve. It would remain open to Ofcom to revisit its position at a later date were ODPS revenues to grow substantially and/or a substantial mismatch to develop between ODPS providers and television broadcast licensees. However, Ofcom does not consider that is an issue in the medium term, and consequently Option A is preferred for the time being.

Question 2: Do you agree with Ofcom's proposal not to charge fees under section 368NA of the Act, and specifically to cover the small incremental cost involved in becoming sole regulator (rather than co-regulator) of ODPS within the existing fees structure for television broadcasting licensees? If not, which alternative option do you consider would provide a proportionate, fair and pragmatic basis for apportioning these costs?

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 1 March 2016**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/vod-procedures/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data – please email VODconsultation@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Ofcom
'Consultation on ODPS procedures and fees'
5th Floor
Riverside House
2A Southwark Bridge Road
London
SE1 9HA
- Fax: 020 7981 3806
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Anna Lucas on 020 7981 3130.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all

responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/terms-of-use/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in March/April 2016.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: <http://www.ofcom.org.uk/email-updates/>

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email Graham.Howell@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at <http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation questions

We are consulting on two issues in this consultation document. Firstly, introducing new Procedures for investigating breaches of rules for ODPS which align with established procedures for linear television broadcasting and, secondly, not to charge fees under section 368NA of the Act. The consultation questions are as follows:

Question 1: Do you agree with Ofcom's proposal substantively to align procedures for investigating breaches of rules for ODPS with established procedures for linear television broadcasting, and do you have any specific comments on any aspect of the draft Procedures at Annex 5?

Question 2: Do you agree with Ofcom's proposal not to charge fees under section 368NA of the Act, and specifically to cover the small incremental cost involved in becoming sole regulator (rather than co-regulator) of ODPS within the existing fees structure for television broadcasting licensees? If not, which alternative option do you consider would provide a proportionate, fair and pragmatic basis for apportioning these costs?

Annex 5

Draft Procedures for investigating breaches of rules for on-demand programme services

Introduction

- 1.1 This document outlines Ofcom's Procedures for the handling and resolution of complaints (or for the conduct of its own investigations) about potential breaches of rules applying to on-demand programme services ("ODPS") by ODPS providers¹.
- 1.2 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint(s) or carry out an investigation, it will make clear to the ODPS provider concerned (and any other relevant parties) the nature/extent of its departure and its reasons for doing so. It is noted that the nature of ODPS (in comparison with linear broadcast) means that material will often remain available for viewing on demand, meaning a risk any harm from a breach may be ongoing. An example of where it may be appropriate to depart from these Procedures (and particularly to expedite the process) is where a potential breach involves incitement or the protection of minors, and the material remains available.

Statutory framework

- 1.3 Part 4A of the Communications Act 2003 (the "Act") makes provision for the regulation of ODPS. Section 368C of the Act imposes various duties on the "appropriate regulatory authority" which, in the absence of another body being designated under section 368B in relation to programme content, is Ofcom. These include a duty to take steps to secure that every provider of an ODPS complies with requirements in section 368D. These requirements include:
 - (a) complying with rules (in sections 368E to 368H of the Act) for harmful material, advertising, sponsorship, and product placement;
 - (b) supplying specified information about the ODPS provider to users;
 - (c) retaining copies of programmes for at least 42 days after they cease to be available for viewing;
 - (d) cooperating fully with the regulator, including by complying with information requests issued under section 368O; and
 - (e) paying any regulatory fees that may be imposed under section 368NA.
- 1.4 Under section 368BA of the Act, ODPS providers are also required to notify Ofcom in advance of providing an ODPS, making significant changes to an ODPS, or ceasing to provide an ODPS. The notification must include all such information as Ofcom may require.

¹ References to "ODPS providers" in these Procedures are to providers of any on-demand programme service meeting the criteria in section 368A(1) of the 2003 Act.

- 1.5 Ofcom has published Rules and Guidance² which set out the statutory requirements applying to ODPS (apart from those for advertising content) and provide non-binding guidance.
- 1.6 These Procedures cover potential breaches of any rules applying to ODPS providers except rules for advertising. The Advertising Standards Authority (“ASA”)³ has been designated by Ofcom under section 368B as the “appropriate regulatory authority” for the regulation of advertising content on ODPS. Any complaints about advertising content on an ODPS should be sent to the ASA⁴.
- 1.7 Ofcom may launch investigations on its own initiative as well as in response to complaints received. The Procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same.

Procedures

Making a complaint

- 1.8 Complaints under these Procedures can be made to Ofcom by any person or body who considers that an ODPS provider has failed to comply with the relevant requirements as set out in the Rules. In particular, and as set out in Ofcom’s Rules and Guidance, these include:

Administrative Rules

- Notification of an intention to provide an ODPS (Rule 1).
- Notification of an intention to make significant changes to a notified service (Rule 2).
- Notification of intention to cease providing a notified service (Rule 3).
- Payment of any required fee (Rule 4)
- Retention of programmes for at least 42 days (Rule 5).
- Provision of information (Rule 6).
- Cooperation (Rule 7).
- Compliance with enforcement notifications (Rule 8).
- Supply of information to service users (Rule 9).

Editorial Content Rules

- Harmful Material: Material Likely to Incite Hatred (Rule 10).
- Harmful Material: Protection of Under Eighteens (Rule 11).
- Sponsorship (Rule 12).

² Available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules_and_Guidance.pdf

³ www.asa.org.uk

⁴ <https://www.asa.org.uk/Consumers/How-to-complain.aspx>

- Product Placement (Rule 13).
 - Harmful Material: Prohibited Material (Rule 14).
- 1.9 Ofcom will not normally consider a complaint unless the complainant has sought to follow the ODPS provider's own complaints procedure first (see exception regarding ongoing harm at paragraph 1.12).
- 1.10 The contact details of all notified ODPS providers can be found on Ofcom's website at http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/List_of_Regulated_Video_On_Demand_Services.pdf. If a complainant is dissatisfied with the ODPS provider's response to their complaint, or the ODPS provider is not on the list of notified providers, the complaint can then be submitted to Ofcom.
- 1.11 In cases where a complaint is made under an ODPS provider's own complaints procedures, Ofcom will expect the ODPS provider to retain the relevant programme, and any related material, for the 42 day period required by statute (section 368D(3)(ab) of the Act), running from the date on which the ODPS provider may reasonably expect the complainant to have received the ODPS provider's final response.
- 1.12 Because ODPS content is continually available and there may be a risk of ongoing harm arising from some content, it may be appropriate for a complainant to contact Ofcom immediately if they believe harmful material is involved under Rules 10, 11 or 14. In cases raising a risk of ongoing harm, Ofcom may open an investigation before the conclusion of the ODPS provider's own process. Ofcom will take into account the potential harm alleged and any immediate steps taken by the ODPS provider, such as suspending access to particular material or preventing it from being accessed by under-18s, while the complaint is being considered. Ofcom may also depart from these Procedures to the extent necessary to expedite cases (whilst remaining fair to the ODPS provider) in these circumstances (see paragraph 1.2).
- 1.13 Separate, but similar, procedures apply to broadcast material. If a complaint is about a "catch-up" ODPS and the material has recently been shown on a television service, it may be more appropriate for Ofcom to consider the complaint under relevant broadcasting procedures as the substantive rules applying to broadcast television services are more extensive.

Form of complaint and information to be provided

- 1.14 Ofcom requests that complaints are submitted on its complaint form.⁵ To access a complaint form, go to Ofcom's website at <http://stakeholders.ofcom.org.uk/broadcasting/on-demand/complain>. Alternatively, for any complaint you can contact us by telephone on: 0300 123 3333 or 020 7981 3040. If you have a text phone you can call 020 7981 3043 – please note that this number only works with special equipment used by people who are deaf or hard of hearing. Alternatively, you can contact us by post at the following address:

Ofcom
VOD Complaints
5th Floor
Riverside House

⁵ Ofcom is currently consulting on proposals not to require ODPS to pay fees.

2a Southwark Bridge Road
London
SE1 9HA

- 1.15 All complaints should include sufficient detail about the matter complained of. Specifically, complaints should include:
- the name / title of the content complained about;
 - the date when it was accessed;
 - the ODPS on which it appeared;
 - a link to where on the ODPS service it appeared;
 - the nature of the complaint and (where possible and relevant) the particular parts of any programme complained about;
 - the complainant's full contact details (including any e-mail address); and
 - whether (and, if so, when) the complainant has submitted a complaint to the ODPS provider.

Provision of these details (or as many of them as possible) is very important. A failure to provide them may mean that Ofcom is not able to investigate the complaint.

- 1.16 Unless a complainant specifically requests at the time a complaint is made that his/her name and contact details should remain confidential, Ofcom reserves the right to disclose these to the ODPS provider.⁶

Making a complaint promptly

- 1.17 ODPS providers are required, under Rule 5 which reflects section 368D(3)(ab) of the Act, to retain copies of programmes for 42 days after the programme ceases to be available. With that in mind, complainants should act promptly on becoming aware of material made available on an ODPS which they consider may breach the rules for ODPS. Generally, and particularly in circumstances where the relevant material is no longer available on an ODPS, Ofcom will not accept a complaint unless it has been pursued promptly.
- 1.18 Where a complaint is submitted regarding material which is no longer available on the ODPS, complainants should confirm when they became aware of the content and explain the reasons for any delay in progressing the complaint. Ofcom will then consider all relevant factors (including the complainant's explanation for the delay and the limited time period during which ODPS providers are required to keep recordings) in deciding whether or not Ofcom should investigate the complaint.
- 1.19 Where a complainant has previously complained directly to the ODPS provider, the complainant should wait to see if he/she is satisfied with the ODPS provider's response before referring it to Ofcom. If not, the complainant should refer his/her

⁶ Ofcom is a 'prescribed person' under the Public Interest Disclosure Act 1998 and has published guidance at: <http://www.ofcom.org.uk/about/policies-and-guidelines/procedure-for-making-a-disclosure-to-ofcom-under-the-public-interest-disclosure-act-pida/> on how to make a disclosure to Ofcom under the provisions of this Act.

complaint to Ofcom (with the ODPS provider's response) as soon as possible, and in any event within 20 working days of the final response to the complainant from the relevant ODPS provider.

- 1.20 If the complainant has not received an acknowledgement of his/her complaint from the ODPS provider within 10 working days of submission and a substantive response within 20 working days, the complainant should promptly submit the complaint to Ofcom, providing copies of the correspondence with the ODPS provider.
- 1.21 Where a complainant submits a complaint at the same time to the ODPS provider and to Ofcom, Ofcom will not normally proceed to consider the complaint until the ODPS provider has first had an opportunity to resolve the complaint itself under its procedures. However, it may do so where it considers it appropriate taking into account whether the material remains available and the risk and seriousness of any potential ongoing harm. In such a case, the complainant should inform Ofcom when he/she has received the ODPS provider's final response, and confirm whether he/she wishes to proceed with his/her complaint.

Initial assessment of complaints

- 1.22 All complaints are important to Ofcom as they help it to understand whether an ODPS provider may be failing to comply with the rules for ODPS. Ofcom will log and acknowledge every complaint that it receives. However, it will not normally correspond any further with individual complainants. Ofcom will carry out a process of initial assessment and, where relevant following initial assessment, further investigation as set out below.
- 1.23 Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the rules for ODPS which warrant investigation by Ofcom. It will take into account the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm and/or harm to minors.
- 1.24 If Ofcom considers that it should assess the matter further, it may ask the ODPS provider for a copy of the relevant programme or material at this stage, which we would generally require to be provided within five working days.⁷ At this stage it is not appropriate for the ODPS provider to provide written representations.
- 1.25 Based on an initial assessment of the complaint and a review of the relevant material, Ofcom will consider whether there may have been a breach of the rules for ODPS which Ofcom considers requires a response from the ODPS provider. If not, Ofcom will decide not to investigate further and will normally publish its decision in a table in its Broadcast and On Demand Bulletin⁸ if the matter relates to compliance with a "public facing" rule. "Public facing" rules relate to editorial content or the provider's dealings with the public. We will not normally publish the decision if the matter relates to compliance with a rule that is not "public facing", but there may be exceptional cases where we do publish (such as where there is a high level of public awareness of, and interest in, the matter complained of).
- 1.26 Ofcom aims to complete an initial assessment of complaints within 15 working days.

⁷ This would be pursuant to a request under section 368O of the Act, and the period allowed is in line with the position under Broadcasting Act Licences.

⁸ The Broadcast and On Demand Bulletin is published fortnightly on Ofcom's website: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

Investigating possible breaches and preparation of Ofcom's Preliminary View

- 1.27 Other than in cases falling within paragraph 1.28 below, where Ofcom considers that an ODPS provider may have failed to comply with a relevant requirement, Ofcom will write to the ODPS provider. Ofcom will summarise the material parts of the complaint(s), set out the particular Rules which it considers are relevant, and invite the ODPS provider to make representations in response (and to provide any relevant material/evidence in support of its representations) within 10 working days. Ofcom will normally publish details of issues under investigation in a table in its Broadcast and On Demand Bulletin if the matter relates to compliance with a "public facing" rule (for more information on "public facing" rules see paragraph 1.25 above).
- 1.28 There may be cases in which Ofcom does not consider it necessary to seek representations from the ODPS provider at this stage. This will normally be where the question of whether there is a breach of a relevant rule is a matter of objective fact (for example where R18 is made available to under 18s without restriction). In these cases, Ofcom will not usually seek the ODPS provider's representations at this stage (as in paragraph 1.27 above). Instead, Ofcom will write to the ODPS provider with its preliminary view on the substance of the complaint(s), as set out in paragraph 1.30 below. There may also be other cases where the matter(s) concerned, on the facts, mean this approach is appropriate.
- 1.29 Ofcom aims to complete those cases that it takes forward for investigation within 50 working days.

Representations from third parties

Ofcom recognises that there may be persons/bodies who may be directly affected by the outcome of Ofcom's investigation and decision on a complaint(s) and who may have interests independent of the relevant ODPS provider (e.g. presenters, producers and/or independent programme-makers). Wherever possible, ODPS providers should seek to take account of and include the representations of such persons/bodies in their submissions in response to a complaint and confirm to Ofcom that they have done so.

However, such persons/bodies may make representations on their own behalf direct to Ofcom in cases it is investigating. In such a case, persons/bodies should seek to make representations to Ofcom as early in an investigation as possible, setting out if/to what extent their representations differ from those of the ODPS provider. Ofcom will as appropriate take those representations into account and include those persons/bodies in its decision-making process under these Procedures.

Preparation of Ofcom's preliminary view

- 1.30 On receipt of the ODPS provider's representations,⁹ Ofcom will then prepare its preliminary view on the substance of the complaint(s). This preliminary view is only provisional and may be subject to change in the light of subsequent representations/material provided by the ODPS provider (and any relevant third party), see paragraphs 1.32 and 1.33 below. Members of Ofcom's Content Board will be

⁹ In cases where paragraph 1.27, not 1.28, above applies.

provided with all preliminary views before they are provided to the ODPS provider.¹⁰ The preliminary view will contain:

- a summary of the complaint(s);
- a summary of the material parts of the programme/service to which the complaint(s) relates;
- the relevant requirements as set out in the Rules; and
- Ofcom's preliminary assessment of whether any breaches of those requirements have occurred and the reasons for that assessment.

1.31 If Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its preliminary view, Ofcom may seek such information before preparing that view.

1.32 When Ofcom has prepared its preliminary view, Ofcom will provide it to the ODPS provider (and any relevant third party) and request representations within 10 working days.

1.33 Once Ofcom has received and considered the ODPS provider's representations (and/or any representations from a relevant third party) on its preliminary view, it will reach its final decision and inform the ODPS provider.¹¹

Publication of Decision

1.34 Before publishing the Decision, Ofcom will provide the ODPS provider with a strictly embargoed copy for the purposes of correcting factual inaccuracies only. The ODPS provider will be given 48 hours in which to respond with such corrections, following which Ofcom will publish the Decision.

1.35 The Decision will be published in Ofcom's Broadcast and On Demand Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

1.36 Ofcom will also normally publish information in its Broadcast and On Demand Bulletin about Decisions in which it has found that the ODPS provider has **not** breached a "public facing" rule (for more information about "public facing" rules, see paragraph 1.25 above).

Non-Disclosure

1.37 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes that all parties concerned abide by all Ofcom's published rules and procedures. These require, for example, that parties to a complaint should not disclose any correspondence, documents and other material concerning the complaint¹² during

¹⁰ The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive content standards experience. See <http://www.ofcom.org.uk/about/how-ofcom-is-run/content-board/functions-and-role/>

¹¹ Members of Ofcom's Content Board will be provided with all Decisions before they are provided to the ODPS provider.

¹² Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations

the course of the investigation (see grey box below). This requirement of non disclosure does not limit what Ofcom can publish in its decision at the end of the investigation.

Non-Disclosure

Parties (complainants, ODPS providers, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that a complaint has been made or that Ofcom is investigating a case. They may also use any information which is already in the public domain.

However, all parties are subject to the requirement of non disclosure in relation to all other material submitted and communications/correspondence entered into in relation to that complaint or case.¹³ Moreover, once a complaint has been made or Ofcom has started investigating a case, no party should take any steps which could – whether intentionally or not – compromise, or risk compromising, a fair decision on the matter by Ofcom or otherwise constitute, in Ofcom’s opinion, an abuse of process.

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

Time limits

1.38 Complainants and ODPS providers should keep to the time limits specified in these Procedures. However, Ofcom may consider it appropriate (in the interests of fairness and/or properly to carry out an investigation) to amend or adapt the time limits set out in the Procedures in a particular case. Any complainant or ODPS provider seeking an extension to a time limit should explain in writing to Ofcom why it believes it is appropriate.

Sanctions

1.39 Where Ofcom records a breach or breaches of the Rules, it may consider that the breach justifies consideration of the imposition of a statutory sanction on the ODPS provider. If so, Ofcom will make that clear in its Decision (under paragraphs 1.34 and 1.35 above) and the “Procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services” will apply.¹⁴ These are available on Ofcom’s website at http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised_sanctions_procedures.pdf

2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations and nothing in these Procedures can prevent Ofcom from doing so.

¹³ Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged or that it is under some other legal obligation to protect from disclosure. In such cases, the broadcaster will be notified that relevant material has been withheld and the reasons why.

¹⁴ The ASA may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In such cases, the ASA will normally have published a breach of the advertising rules.

Complaints raising questions of scope

- 1.40 In cases involving services which have not been notified to Ofcom as ODPS, there will be a preliminary issue before considering the substance of the complaint of whether the service in fact constitutes an ODPS as defined in section 368A(1) of the Act (i.e. a question of whether the service falls into the “scope” of regulation). If it does not, the rules for ODPS do not apply to it and no breach of them can have occurred.
- 1.41 Where scope appears to be an issue Ofcom will, at the initial assessment stage, consider whether on its face the service appears it may meet the test in section 368A(1) and in particular whether it appears likely that the principal purpose is the provision of programmes comparable in form and content to programmes normally included in television programme services¹⁵. If it does not, Ofcom would not generally assess the matter further.
- 1.42 If it does appear likely to meet the test, and there also appears to be a substantive issue if the service were to be found in scope, Ofcom would generally consider the scope and substantive issues in parallel, following the process set out above. This is in order to assist the prompt resolution of issues, especially where there is a risk of ongoing harm arising from the content in question. Given such investigations are likely to be more complex, the indicative investigation times indicated above may be longer in such cases. If no issue appears likely to arise from the content but there is a scope issue, Ofcom would consider the question of scope, and whether the requirement to notify an ODPS had been breached.
- 1.43 There may be circumstances in which it is appropriate to separate the scope and substantive issues, and consider them in sequence. In such circumstances, Ofcom will inform the ODPS provider of its proposal to do so.
- 1.44 In cases raising issues of scope, the service provider may consider it is not an ODPS provider. It is noted that the power to require provision of information under section 368O of the Act applies to all those who appear to Ofcom to be ODPS providers (whether or not a detailed assessment leads to that conclusion). Such service providers should also observe the rules applying to ODPS providers (including retention of recordings and cooperation) as if they were such a provider pending determination on scope.

Directions

- 1.45 Ofcom has the power under the Act¹⁶ to issue a direction suspending or restricting an ODPS. Ofcom may issue a direction in any case where it considers it to be appropriate, noting that the statute sets out tests and procedures that apply. In particular, Ofcom would only issue a direction where it is satisfied that an ODPS provider has contravened a relevant obligation and that either:
- attempts to secure compliance through imposition of a financial penalty and/or enforcement notification has failed, and a direction would be appropriate and proportionate in light of the seriousness of the contravention (section 368L); or

¹⁵ This is the test under section 368A(1)(a) of the Act. A service would need to meet other criteria in section 368A(1), but those are more likely to require further information from the service provider to enable assessment.

¹⁶ See sections 368K and 368L of the Act, which relate to contraventions and to inciting crime or disorder respectively.

- the contravention relates to the inclusion of material likely to encourage or incite crime, or lead to disorder (whether or not there had been a previous financial penalty or enforcement notification) and the contravention is such as to justify a direction.

1.46 A Notice of Direction will normally be published in Ofcom's Broadcast and On Demand Bulletin.

1.47 Failure by an ODPS provider to comply with a direction issued by Ofcom can lead to the consideration of the imposition of a statutory sanction on the ODPS provider (for example, the imposition of a financial penalty). In such cases, the Sanctions Procedures referred to in paragraph 1.39 would apply.

Expedited processes

1.48 As noted in paragraph 1.2 above, material on an ODPS will often remain available for viewing on demand for a long period, meaning there may be an ongoing risk of harm. Examples include cases where material remains available which potentially involves incitement to hatred based on sex, religion or nationality, encouragement of crime or disorder, or the protection of minors.

1.49 In such circumstances, Ofcom will make clear to the ODPS provider that it is expediting the process described above. This may include bypassing the ODPS provider's own complaints process, allowing substantially less time to provide material and other information, and allowing substantially less time to provide any representations. Ofcom will make clear to the ODPS provider the time limits for responses in such cases which will be fair in the circumstances of the case.