



CHANNEL 4 RESPONSE TO THE OFCOM/ATVOD CONSULTATION ON PROCEDURES FOR HANDLING APPEALS ON SCOPE AND FOR IMPOSING SANCTIONS IN RELATION TO ON-DEMAND PROGRAMME SERVICES

Introduction

Channel 4 welcomes the opportunity to respond to the consultation on procedures for handling appeals on scope and for imposing sanctions in relation to on-demand programme services.

For some years Channel 4 has been developing a range of on-demand services, both through our own on-demand service 4oD, available at channel4.com and in partnership with a range of third party on-demand providers/platforms, including Sky, Virgin Media, BT, YouTube, See Saw and Talk Talk.

4oD enables consumers to access a comprehensive catch-up on-demand service, making available the majority of Channel 4 programmes from across our digital channel portfolio, typically for 30 days after original linear transmission. In almost all cases the on-demand programmes are identical to those originally shown in linear TV form. The 4oD service also offers access to Channel 4 archive.

Under paragraph 2.6 of Section 2 of the consultation, Ofcom states that:

"2.6 We are proposing to create two new sets of procedures ("the Procedures") in relation to ODPS matters. These are set out in sections 3 and 4 of this consultation. The first set of procedures apply when a person wishes to appeal a decision made by ATVOD that a service is an ODPS and/or that he or she is providing an ODPS. The second set of procedures set out Ofcom's policy for imposing sanctions where a person providing an ODPS contravenes the regulatory requirements. In the interests of consistency and simplicity, the ODPS procedures mirror closely the proposed broadcasting procedures which are also currently the subject of consultation."

Channel 4 has responded in detail to the consultation on the proposed broadcasting procedures. Rather than repeat its comments on those procedures and to the extent that the proposed procedures "mirror closely" the procedures in this consultation, Channel 4 should be grateful if Ofcom consider that its comments on the proposed broadcasting procedures are considered adopted and incorporated in this response mutatis mutandis.

Turning to Channel 4's additional responses to the procedures proposed by Section 3 and Section 4 of this consultation:

Section 3

Procedures

Requesting an appeal

Paragraph 3.9 states that:

“3.9 Ofcom may require that a request for an appeal be made in writing in less than 10 working days of the date of ATVOD’s decision where it appears to Ofcom that the case requires urgent attention. This is likely to include cases where Ofcom or ATVOD considers that the ODPS Provider is providing a service that includes material that is likely to encourage or to incite the commission of crime or lead to disorder.”

However, Channel 4 is not aware of any statutory authority giving Ofcom or ATVOD such a power. Under the Communications Act 2003 as amended by The Audio Visual Media Services Regulations 2009, providers of an ODPS are required to ensure that the service complies with sections 368E to 368H. There is no requirement under those sections to ensure that the service does not contain *“material that is likely to encourage or to incite the commission of crime or lead to disorder”*. This power reserved to Ofcom and ATVOD is, accordingly, ultra vires.

Paragraph 3.10

Under paragraph 3.10 there is no indication (save for the broad definition under paragraph 3.6) as to how or who at Ofcom will decide whether or not to grant a request for an appeal which Channel 4 considers necessary in order that Ofcom can fulfil its obligations to exercise its regulatory activities transparently, accountably, proportionately and consistently.

Paragraph 3.13 provides that:

“3.13 Notwithstanding paragraph 3.12, in cases where Ofcom considers that the ODPS Provider is providing a service that contains material that is likely to encourage or to incite the commission of crime, or lead to disorder, it may decide that enforcement activity is appropriate in order to provide immediate protection to the public while the outcome of the appeal is being determined.”

As indicated above under paragraph 3.9, there are no statutory grounds upon which Ofcom has the power to decide enforcement activity is appropriate on this basis i.e. that *“a service that contains material that is likely to encourage or to incite the commission of crime, or lead to disorder”*. Accordingly, the power which Ofcom provides for itself under this paragraph is also ultra vires.

Paragraph 3.13 also provides that:

“Representations from directly affected third parties

Individuals or bodies who are directly affected by a case may make representations to Ofcom during its consideration of a case. Anyone making a representation of this kind will be expected to do so as early as possible.”

In the interests of fairness, the ODPS Provider should be given the opportunity to respond to any such representations in a similar way to that provided for under paragraph 3.14 of Ofcom’s consultation relating to a Review of procedures for handling broadcasting

complaints, investigations and sanctions: *“Ofcom will give the broadcaster an opportunity to comment on any relevant representations made by the third party”*.

Paragraphs 3.14 – 3.16 provide for Ofcom preparing a “preliminary view” on the appeal and reaching a decision. As indicated under paragraph 3.10 above, there is no indication as to how or who at Ofcom will decide whether or not to grant a request for an appeal which Channel 4 considers necessary in order for Ofcom to fulfil its obligations to exercise its regulatory activities transparently, accountably, proportionately and consistently. In addition, whilst recognising that Ofcom is attempting to provide that these procedures “mirror closely” the broadcasting procedures under which Ofcom forms a “preliminary view” before receiving representations from the broadcaster, under these procedures, under paragraph 3.8 Ofcom will have already received the request for appeal setting out the grounds for the appeal. Accordingly, the “preliminary view” is more in the nature of a “preliminary decision” rather than a “preliminary view”.

Under paragraph 3.20 Ofcom states that:

“3.20 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 an appeal should not disclose any correspondence, documents and other material concerning the appeal²¹ during the course of it being considered by Ofcom (see text box below). This requirement of non disclosure does not limit what Ofcom can publish in its decision at the end of its consideration of the appeal.”

Whilst there is a reference to the limitations of Ofcom’s duty of confidentiality under this paragraph (by way of *Footnote 21*) to its perceived obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, the limited nature of Ofcom’s duty of confidentiality compared to that of ODPS Providers and directly affected third parties should be made clearer in the procedures themselves. Furthermore, it is not accepted that the Environmental Information Regulations 2004 would limit Ofcom’s duty of confidentiality in these circumstances. Those Regulations do not apply where Ofcom acts in a quasi-judicial capacity. In addition, for both the Environmental Regulations 2004 and for the Freedom of Information Act 2000, relevant exemptions under that legislation and obligations under the Communications Act 2003 e.g. section 393, might oblige the regulator to consult with the ODPS Provider and apply relevant exemptions where appropriate before any disclosure.

Section 4

Procedures

Consideration of sanctions

Under this section there is no indication (save for the broad definition under paragraph 4.4) as to who at Ofcom will take the decision that the appropriate sanction should include a financial penalty (4.9); who forms the “preliminary view” of the type and level of any sanction (4.10) and who reaches the decision as to which of the sanctions is appropriate (4.13). Channel 4 considers it necessary for this to be stated in the procedures in order that Ofcom can fulfil its obligation to exercise its regulatory activities transparently, accountably, proportionately and consistently.

As a footnote to paragraph 4.14 the procedures state:

"⁴⁶ ODPS Providers should note that where a notice is served in relation to a contravention due to the inclusion in the service of material likely to encourage or to incite the commission of crime or lead to disorder, a notice suspending or restricting the service will take effect immediately from the date that the notice is served (section 368L(4))."

However, as indicated above, Channel 4 is not aware of any statutory authority giving Ofcom or ATVOD such a power to give a notice suspending or restricting a service on these grounds. Under the Communications Act 2003 as amended by The Audio Visual Media Services Regulations 2009, providers of an ODPS are required to ensure that the service complies with sections 368E to 368H. There is no requirement under those sections to ensure that the service does not contain *"material that is likely to encourage or to incite the commission of crime or lead to disorder"*. This power reserved to Ofcom and ATVOD is, therefore, ultra vires.

Publication of a Sanctions Decision

Under paragraph 4.16 the proposal is that the Ofcom's decision will *"normally"* be sent to a broadcaster 24 hours before publication with the level of any financial penalty omitted. Notification of the financial penalty will then take place *"immediately before publication of the decision."*

Channel 4 notes the use of the word *"normally"*. When does Ofcom envisage that such prior notification would not take place?

Channel 4 appreciates Ofcom's desire to prevent information leaking prior to publication. However, the publication of substantial financial penalties necessitates a reporting procedure to senior executives and potentially the board of an ODPS Provider and the preparation of a reasoned response to press inquiries which may be hostile. The lack of a sufficient period of advance notice therefore could cause ODPS Providers serious difficulties.

As a compromise position Channel 4 proposes that a full embargoed copy of the decision including financial penalty is provided to the in house legal team or the external solicitors of an ODPS Provider on a confidential solicitor to solicitor basis. That way the legal function of an ODPS Provider can prepare their advice to be tendered to the ODPS Provider when the embargo is lifted shortly prior to full publication.

Non Disclosure

Under paragraph 4.19 it is stated that:

"4.19 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 sanctions case should not disclose any correspondence, documents and other material concerning that case⁴⁷ during the course of it being considered by Ofcom (see text box below). This requirement of non disclosure does not limit what Ofcom can publish in its decision at the end of its consideration of the sanctions case."

Whilst there is a reference to the limitations of Ofcom's duty of confidentiality under this paragraph (by way of *Footnote 47*) to its perceived obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004, the limited nature of Ofcom's duty of confidentiality compared to that of ODPS Providers and directly

affected third parties should be made clearer in the procedures themselves. Furthermore, it is not accepted that the Environmental Information Regulations 2004 would limit Ofcom's duty of confidentiality in these circumstances. Those Regulations do not apply where Ofcom acts in a quasi-judicial capacity. In addition, for both the Environmental Regulations 2004 and for the Freedom of Information Act 2000, relevant exemptions under that legislation and obligations under the Communications Act 2003 e.g. section 393, might oblige the regulator to consult with the ODPS Provider and apply relevant exemptions where appropriate before any disclosure.

Time Limits

Under paragraph 4.20 it is stated that:

"4.20 ODPS Providers should keep to the time limits specified in these procedures. The time limits may be extended or shortened, in appropriate circumstances, at Ofcom's discretion."

It is unreasonable for a regulator to tailor procedure for particular cases or categories of cases in an ad hoc manner. Both ODPS Providers and directly affected third parties are entitled to know in advance how potential sanctions will be handled and decided upon. They are entitled to know in advance the time limits for their dealings with the regulator. It is neither fair nor reasonable for the regulator to retain the ability to shorten periods for response without defining in advance the criteria for such limitation.

Absence of Review

There is no appeal or review from the sanctions decisions of Ofcom proposed in these draft Procedures. Therefore, an ODPS Provider would only have recourse to judicial review if they had a concern regarding the imposition of or the level of the sanction.

Ofcom's proposal not to have any appellate procedures within these procedures is contrary to natural justice and a remarkable proposal for a regulator to make. For example, other regulators such as the Advertising Standards Authority, PhonePayPlus, the Information Commissioner, Financial Services Authority, and the Press Complaints Commission all have such procedures. A system without such appellate procedures would be an unreasonable system for Ofcom adopt when judged against comparable regulators and accepted standards of regulatory practice.

This is unsatisfactory and unjust. Channel 4 would therefore propose an alternative approach:

The sanction decision is taken by Ofcom with a right of appeal to a separately constituted panel consisting of members of Ofcom who have not had any involvement in the previous procedure.

Taking this approach provides a separate appellate step in process and would likely prevent litigation.

Channel 4 Television Corporation
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