



Procedures for handling appeals on scope and for imposing sanctions in relation to On- Demand Programme Services

Consultation

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Section 1

Executive Summary

- 1.1 This consultation seeks stakeholders' views on the new procedures ("the Procedures") for the proposed handling of appeals on scope that relate to On-Demand Programme Services ("ODPS").

Background

- 1.2 The Audiovisual Media Services Directive ("the AVMS Directive")¹ requires that those who are providing an ODPS to consumers in the UK must comply with minimum standards in relation to content, advertising and sponsorship. The AVMS Directive has been implemented into UK law through Part 4A of the Communications Act 2003 ("the Act")².
- 1.3 On 18 March 2010 Ofcom formally designated the Association for Television on Demand Limited ("ATVOD") as a co-regulator to carry out a range of functions in relation to the regulation of ODPS. Further information about ATVOD can be obtained from its website: <http://atvod.co.uk/>³.

Proposed procedures for appeals on scope and for the imposition of sanctions

- 1.4 The new AVMS Directive and amended Act means that there are now a number of duties on those providing an ODPS. These include, amongst other things, notifying the appropriate regulatory authority of their intention to provide the service.
- 1.5 Under the terms of its designation, ATVOD was given powers to carry out certain functions regarding the regulation of ODPS. These include:
- what constitutes an "ODPS";
 - whether or not a person is providing an ODPS;
 - what constitutes a "programme included in an ODPS"; and
 - whether or not a person who is providing an ODPS has contravened the regulatory requirements.
- 1.6 A determination made by ATVOD in terms of scope in respect of any one case may be subject to appeal to Ofcom. We propose that the procedure set out in Section 3 should apply in these circumstances.

¹ EC Directive 2007/65/EC, amending the Television without Frontiers Directive (Council Directive 89/552/EEC). For a fully codified version of the Directive see: <http://register.consilium.europa.eu/pdf/en/09/st03/st03683.en09.pdf>

² As amended by the Audiovisual Media Services Regulations 2009 (SI 2009/2979 which came into force on 19 December, see: 2009 http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1) and the Audiovisual Media Services Regulations 2010 (SI 2010/419 which came into force on 18 March 2010, see: http://www.England-legislation.hms.gov.uk/si/si2010/uksi_20100419_en_1)

³ Ofcom has also designated the Advertising Standards Authority ("the ASA") as its co-regulator in relation to advertising that is included in an ODPS.

- 1.7 Where an ODPS Provider contravenes its regulatory requirements (including non-compliance with any enforcement notification that has been issued by either Ofcom or ATVOD) Ofcom has the power to impose statutory sanctions on that Provider. We propose that the procedures set out in Section 4 should apply in those circumstances.

Next Steps

- 1.8 We now seek stakeholders' views on these proposed procedures. The closing date for this consultation is 11 February 2011. The consultation responses will enable us to consider our proposals in light of stakeholder comments. We aim to publish a summary of responses as soon as possible in March 2011 and a statement setting out Ofcom's decision in March 2011. Ofcom intends to apply the new procedures from the date the statement is published.

Section 2

Consultation

What is the purpose of the consultation?

- 2.1 The Audiovisual Media Services Directive⁴ (“the AVMS Directive”) requires that those who are providing On Demand Programme Services (“ODPS”) to consumers in the UK must comply with minimum standards in relation to content, advertising and sponsorship. The AVMS Directive has been implemented into UK law through Part 4A of the Communications Act 2003 (“the Act”).
- 2.2 Under section 368A of the Act, a service will be an ODPS (and therefore subject to regulation) if it meets all of the following criteria:
- The service includes TV-like programmes: the service includes programmes whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services;
 - The service is “on demand”: the service enables users to select individual programmes from among the programmes included in the service, and to receive and view that programme when the user chooses;
 - Someone has editorial responsibility for the service: the programmes comprising the service are under a person’s editorial responsibility; and
 - The service is being made available to the public: the service is made available by that person for use by members of the public.
- 2.3 Ofcom has a duty to take steps to ensure that those providing an ODPS comply with their statutory duties under the Act⁵. Ofcom may choose to do this by itself, or designate other bodies to perform certain functions⁶ concurrently with it.
- 2.4 Ofcom has formally designated the Association for Television on Demand Limited (“ATVOD”) as a co-regulator. The designated functions include the power to make decisions as to:
- what constitutes an “ODPS”;
 - whether or not a person is providing an ODPS;
 - what constitutes a “programme included in an ODPS”; and
 - whether or not a person who is providing an ODPS has contravened the regulatory requirements.

⁴ EC Directive 2007/65/EC, amending the Television without Frontiers Directive (Council Directive 89/552/EEC). For a fully codified version of the Directive see: <http://register.consilium.europa.eu/pdf/en/09/st03/st03683.en09.pdf>

⁵ Section 368C of the Act.

⁶ Section 368B of the Act.

- 2.5 Ofcom has also designated the Advertising Standards Authority (“the ASA”) as its co-regulator in relation to advertising included in an ODPS.
- 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 ODPS⁷. 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.

What is the impact of our proposals?

- 2.7 Impact assessments provide a valuable way of assessing different options for regulation and showing why preferred options have been 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 our activities.
- 2.8 Ofcom recognises that the procedures for ‘the handling of appeals of ATVOD decisions in relation to what constitutes an “On-Demand Programme Service”’ are likely to have an impact on businesses. This is because the decisions made under these procedures will determine whether or not a business is an ODPS Provider and therefore whether they are subject to paying a regulatory fee. Such decisions will also determine whether or not a business is subject to all the other regulatory requirements set out in Part 4A of the Act.
- 2.9 As noted earlier, Part 4A of the Act implements into UK law the requirements of the AVMS Directive. Failure by a Member State to carry out such implementation carries the risk of infraction proceedings being commenced against it by the European Commission. The impact assessment that was undertaken by the UK Government as part of the implementation process may be found at: http://www.legislation.gov.uk/uksi/2009/2979/pdfs/uksiem_20092979_en.pdf and http://www.legislation.gov.uk/uksi/2010/419/pdfs/uksiem_20100419_en.pdf.
- 2.10 There is, in any event, an overall benefit to UK society as a whole in requiring the proper and appropriate regulation of ODPS. This is with respect to upholding UK values (for example, where material that is likely to incite hatred based on race, sex, religion or nationality is not acceptable) and protecting the more vulnerable members of our society, particularly children, from inappropriate advertising and product placement.
- 2.11 Finally, Ofcom refers to the impact assessment that has already been undertaken in relation to setting the regulatory fees which apply to ODPS Providers. This is reflected in the consultation document and published statement for ‘Regulatory fees for video on demand services for the period up to 31 March 2011’, which can be found on our website at:

⁷ The appeals procedures also relate to any appeal on what constitutes ‘a programme included in an ODPS’ under section 368R (2) of the Act.

http://stakeholders.ofcom.org.uk/binaries/consultations/vod_proposals/summary/vod_proposal.pdf and http://stakeholders.ofcom.org.uk/binaries/consultations/vod_proposals/statement/statement.pdf, respectively.

- 2.12 Ofcom also recognises that the procedures for ‘the consideration of statutory sanctions arising in the context of On-Demand Programme Services’ are likely to have an impact on ODPS Providers. This is because the application of these procedures will determine whether or not a statutory sanction should be imposed on the Provider. This could include a financial penalty or the suspension of the service altogether.
- 2.13 Accordingly, it is important to have published procedures which can create certainty and transparency for those involved in the ODPS industry.
- 2.14 We have also ensured that ODPS Providers will have a proper opportunity to make representations before any final decision is made as to whether or not a sanction should be imposed. As a public body, Ofcom must also comply with the principles of administrative law and natural justice in ensuring that its decisions are fair and reasonable.
- 2.15 Ofcom is required by statute to have due regard to any potential impacts our proposals in this consultation document may have on equality in relation to gender, disability or ethnicity – an Equality Impact Assessment (“EIA”) is our way of fulfilling this obligation⁸. An EIA is Ofcom’s tool for analysing the potential impacts a proposed policy or project is likely to have on people, depending on their background or identity. In relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability or ethnicity, we consider that our approach to regulation as a result of the Procedures would remain unchanged and therefore we do not consider that our proposals, as set out in Sections 3 and 4 would have any particular implications for people to whom these considerations apply. We base this conclusion on the experience gained by Ofcom in setting similar and broadly consistent procedures for handling standards and other broadcast licence-related cases and statutory sanctions.

Next Steps

- 2.16 Written views and comments on the proposed new Procedures are requested by 11 February 2011.
- 2.17 Following the end of the consultation period, Ofcom intends to publish finalised versions of the new Procedures. The Procedures will become effective as from the date of publication of Ofcom’s statement implementing them. Ofcom aims to publish this statement by March 2011. Ofcom intends to apply the new Procedures to all relevant cases as from that date.

⁸ See section 71(1) of the 1976 Race Relations Act (as amended), section 49A of the 1995 Disability Discrimination Act (as amended), and section 76A(1) of the 1976 Sex Discrimination Act (as amended).

Section 3

Ofcom procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an “On Demand Programme Service”

Overview and general information

- 3.1 This document outlines the procedures that Ofcom will normally follow when considering appeals from decisions by the Association for Television on Demand Limited (“ATVOD”)⁹ as to whether a service constitutes an On Demand Programme Service (“ODPS”); what constitutes a programme included in an ODPS and/or whether a person is the provider of an ODPS (an “ODPS Provider”) for the purposes of Part 4A of the Communications Act 2003¹⁰ (“the Act”). These procedures are effective from [date to be inserted]¹¹. If Ofcom considers that it would be fairer and more appropriate to follow a different procedure in any particular case, or category of cases, we will explain our reasons for departing from these procedures.
- 3.2 Ofcom has general duties in relation to the regulation of those who provide an ODPS (“ODPS Providers”)¹². ODPS Providers are required to comply with minimum standards that relate to matters such as content, advertising and sponsorship in the provision of an ODPS (the “relevant requirements”).
- 3.3 An “ODPS” is defined in section 368A of the Act as a service that satisfies the following criteria:
- the principal purpose of the service is the provision of programmes which are comparable in form and content to programmes that are normally included in television programme services;
 - access to the service is “on demand”;
 - there is a person who, in relation to the service:
 - has editorial responsibility for it;
 - makes it available to the public; and

⁹ ATVOD is an independent regulator designated by Ofcom to carry out functions in relation to the provision of ODPS (ATVOD’s website is at: <http://atvod.co.uk>).

¹⁰ As amended by The Audiovisual Media Services Regulations 2010 (2010/ 419).

¹¹ The procedures set out in this document and any related guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

¹² Although this is limited where the ODPS Provider is the BBC – see section 368P of the Act.

- is under the jurisdiction of the UK for the purposes of the Audiovisual Media Service Directive (“the Directive”).¹³

A full copy of section 368A is contained in Schedule 1 to these procedures¹⁴.

Part 4A of the Act came into force on the 19 December 2009. This means that there are now a number of duties on those providing ODPS in the UK. These include notifying the appropriate regulatory authority of their provision of an ODPS or of their intention to provide such a service¹⁵.

Section 368C of the Act requires the appropriate regulatory authority to take steps to ensure that those providing an ODPS comply with their statutory duties under Part 4A. For the purposes of the legislation, the “appropriate regulatory authority” may be Ofcom, or another body who Ofcom designates to perform certain tasks, or both Ofcom and another designated body concurrently¹⁶.

- 3.4 Ofcom has designated the Association for Television On Demand Limited (“ATVOD”) as an appropriate regulatory authority to carry out certain of its functions in relation to the provision of ODPS¹⁷ including to decide:
- what constitutes an “ODPS” (in accordance with section 368A of the Act);
 - whether or not a person is providing an ODPS;
 - what constitutes a ‘programme included in an ODPS’ (in accordance with section 368R (2) of the Act).
- 3.5 A determination made by ATVOD in respect of any of the matters set out in paragraph 3.4 above may be subject to appeal to Ofcom.
- 3.6 Ofcom will consider requests for appeals in accordance with the procedures set out in this document.

For the purposes of these procedures any reference to ‘Ofcom’ means any member of the Ofcom Executive, the Ofcom Board, any member of Ofcom’s Content Board or any other sub-committee of the Ofcom Board; and, any other person with appropriate delegation from the Ofcom Board to carry out functions described in these procedures.

¹³Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, amending the Television without Frontiers Directive (Council Directive 89/552/EEC) on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007). The AVMS Directive (2007/65/EC) is implemented in the UK by The Audiovisual Media Services Regulations 2009 (2009/2979) and by The Audiovisual Media Services Regulations 2010 (2010/419) both of which insert new provisions comprising Part 4A of the Act.

¹⁴ Guidance may be found at: http://atvod.co.uk/downloads/who_should_notify.pdf

¹⁵ Section 368BA of the Communications Act 2003.

¹⁶ Section 368B of the Communications Act 2003.

¹⁷ A copy of the Designation is at: http://www.ofcom.org.uk/tv/ifi/vod/designation_180310.pdf

Procedures

Requesting an appeal

3.7 Appeals can be requested of Ofcom where ATVOD has decided:

- that a service is an ODPS;
- and/or what constitutes 'a programme included in an ODPS'¹⁸;
- and/or that a person is an ODPS Provider;

and that person disputes any of those decisions.

3.8 Subject to paragraph 3.7, a request for an appeal must be made in writing to Ofcom within 10 working days of the date of ATVOD's decision. A request for an appeal must:

- be in writing;
- clearly set out the grounds on which the appeal is being sought;
- provide a detailed explanation as to why, in respect of each of specific ground of the appeal, the decision is materially flawed (e.g. if it is believed that the ATVOD decision is obviously wrong in substance, or contains a significant mistake of fact or has been reached following a failure of process);
- include a copy of the ATVOD decision which is being appealed; and
- include all the evidence that the person requesting the appeal would like Ofcom to take into account when considering its case.

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. A decision to shorten the length of time by which a person is able to submit their request for an appeal will be at Ofcom's sole discretion.

3.10 The decision as to whether or not to grant a request for an appeal will be at Ofcom's sole discretion. In particular, Ofcom may decide to grant a request for an appeal on the basis of the facts, or on a point of law, or both, as it sees appropriate.

Assessing and Determining

3.11 If Ofcom decides to proceed with a consideration of the appeal, ATVOD will publish on its website, details of the service in respect of which the appeal is being considered.

3.12 Where Ofcom receives a request for an appeal any enforcement action that has been, or may be, commenced against the ODPS Provider will usually be suspended until such time as Ofcom decides that the appeal has been resolved. Such resolution may include circumstances where an appeal is dismissed because the ODPS Provider has failed to comply with the steps set out in this procedure, or Ofcom reasonably believes that the ODPS Provider's request for appeal is an abuse of this procedure.

¹⁸ See section 368R (2) of the Act.

- 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. Such cases are likely to be exceptional.

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.

- 3.14 Ofcom will then normally prepare its preliminary view, The preliminary view will contain a summary of the request for appeal and Ofcom's preliminary view on the appeal. Ofcom will prepare its preliminary view after assessing the relevant written material that has been submitted. In some cases, however, Ofcom may require further information from the ODPS Provider (and/or if it considers it appropriate, other relevant parties) before it is able to prepare its preliminary view. In such circumstances, the ODPS Provider will normally be given 10 working days to provide the information requested.
- 3.15 When Ofcom has prepared its preliminary view, Ofcom will provide it to the ODPS Provider (and directly affected third parties where appropriate) and request a written response within 10 working days¹⁹.
- 3.16 Once Ofcom has received and considered the ODPS Provider's written response (or any relevant representations from a directly affected third party as appropriate) on its preliminary view, it will reach its decision and inform the ODPS Provider. That decision may:
- uphold ATVOD's decision; or
 - quash ATVOD's decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;
 - substitute Ofcom's decision for that of ATVOD (including any revised time-tabling in relation to any enforcement action that has been commenced or is in contemplation).
- 3.17 Where Ofcom decides to uphold ATVOD's decision and enforcement action has or was to be commenced by ATVOD against the relevant ODPS provider, time will again start to run immediately in relation to any enforcement action that has been, or may be, commenced against that party²⁰. This is subject to any decision Ofcom makes in relation to the timetabling of such action.
- 3.18 Ofcom's decision is final. A copy of the decision will be sent to the appellant (and if necessary any other relevant party) 24 hours before publication on Ofcom and ATVOD's websites.

¹⁹ In some cases Ofcom may shorten the time period for providing representations as appropriate.

²⁰ This is subject to paragraph 17, where time may have continued to run notwithstanding the appeal.

Publication of Decision

3.19 The decision will be published on Ofcom's website.

Non Disclosure

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.

Non Disclosure

Parties (ODPS Providers, Ofcom and any directly affected third parties) may, unless otherwise indicated, make public the fact that an appeal has been made or that Ofcom is considering an appeal. 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 appeal²². Moreover, once an appeal has been submitted or Ofcom has started considering an appeal, 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 a party's representations.

Time limits

3.21 ODPS Providers should keep to the time limits specified in these procedures. The time limits may, in appropriate cases, be shortened or extended, at Ofcom's discretion. Any party seeking an extension to a time limit should explain in writing to Ofcom why it believes the relevant time limit should be extended.

3.22 Ofcom will aim to complete appeals within 30 working days from the date it receives a full request for an appeal (i.e. including all relevant supporting material).

²¹ 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 2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of an appeal may need to be disclosed by Ofcom in order to meet such obligations and nothing in these Procedures can prevent Ofcom from doing so.

²² 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 ODPS Provider will be notified that relevant material has been withheld and the reasons why.

Failure to follow procedures

- 3.23 Any failure by an ODPS Provider to follow these procedures may result in Ofcom taking additional regulatory action including discontinuing its consideration of the appeal.

Sanctions

- 3.24 ODPS providers should be aware of the importance of complying with decisions in accordance with these procedures. Failure to comply with the notification requirements for ODPS services may lead to an enforcement notification being served²³ and/or a financial penalty being imposed on the ODPS provider²⁴. Ofcom's Procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services may be found at [*insert website*].

²³ See section 368BB of the Act.

²⁴ In accordance with section 368J of the Act.

Schedule 1

SECTION 368A COMMUNICATIONS ACT 2003

368A Meaning of “on-demand programme service”

- (1) For the purposes of this Act, a service is an “on-demand programme service” if—
- (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
 - (b) access to it is on-demand;
 - (c) there is a person who has editorial responsibility for it;
 - (d) it is made available by that person for use by members of the public; and
 - (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.
- (2) Access to a service is on-demand if—
- (a) the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service; and
 - (b) the programmes viewed by the user are received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view).
- (3) For the purposes of subsection (2)(a), the fact that a programme may be viewed only within a period specified by the provider of the service does not prevent the time at which it is viewed being one chosen by the user.
- (4) A person has editorial responsibility for a service if that person has general control—
- (a) over what programmes are included in the range of programmes offered to users; and
 - (b) over the manner in which the programmes are organised in that range;
- and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the service (and see section 368R(6)).
- (5) If an on-demand programme service (“the main service”) offers users access to a relevant ancillary service, the relevant ancillary service is to be treated for the purposes of this Part as a part of the main service.

- (6) In subsection (5), “relevant ancillary service” means a service or facility that consists of or gives access to assistance for disabled people in relation to some or all of the programmes included in the main service.
- (7) In this section “assistance for disabled people” has the same meaning as in Part 3.

Section 4

Ofcom procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services

Overview and general information

- 4.1 This document outlines the procedures that Ofcom will normally follow when considering the determination of a sanction against the provider of an On-Demand Programme Service (“an ODPS Provider”)²⁵ for contraventions of one (or more) of the requirements imposed on them under Part 4A of the Communications Act 2003²⁶ (“the Act”). In this document these requirements imposed under the Act are referred to as “relevant requirements”. These procedures are effective from *[date to be inserted]*²⁷. If Ofcom considers that it would be fairer and more appropriate to follow a different procedure in any particular case, we will explain our reasons for departing from these procedures.
- 4.2 Ofcom has general duties in relation to the regulation of ODPS Providers²⁸. ODPS Providers are required to comply with minimum standards that relate to matters such as content, advertising and sponsorship in the provision of an ODPS (the “relevant requirements”). These are summarised in the attached Schedule 1 to these procedures, but include for example:
- giving advance notification of the provision of their service or their intention to provide the service²⁹;
 - supplying specified information to users of the service³⁰;
 - paying the appropriate fees³¹;
 - keeping a copy of every programme contained in the service³²;

²⁵ An “On-Demand Programme Service” is defined in section 368A of the Act. It is a service that satisfies the following criteria: i) its principal purpose is the provision of programmes which are comparable in form and content to programmes that are normally included in television programme services; ii) access to the service is “on demand; and iii) there is a person who, in relation to the service: has editorial responsibility for it; makes it available to the public; and is under the jurisdiction of the UK for the purposes of the Audiovisual Media Service Directive 2007/65/EC (“the AVMS Directive”) An “ODPS Provider” has the associated meaning.

²⁶ As amended by regulation 2 of The Audiovisual Media Services Regulations 2009 (2009/2979).

²⁷ The procedures set out in this document, and any related guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

²⁸ Although this is limited where the ODPS Provider is the BBC – see section 368P of the Act.

²⁹ Section 368BA.

³⁰ Section 368D.

³¹ Section 368NA.

³² Section 368D(3)(zb).

- ensuring that the service does not contain material which is likely to incite hatred on the grounds of race, sex, religion or nationality³³;
 - protecting those under 18 years of age from being exposed to material that might seriously impair their physical, mental or moral development³⁴;
 - ensuring that restrictions on advertising, sponsorship and product placement are observed³⁵; and
 - providing the appropriate regulatory authority with such information as it may require for carrying out investigations³⁶.
- 4.3 Ofcom has designated the Association for Television on Demand Limited (“ATVOD”)³⁷ as an appropriate regulatory authority in relation to the regulation of editorial content included in an ODPS³⁸. ATVOD’s powers include the power to determine whether or not an ODPS Provider is contravening, or has contravened, any of the relevant requirements of the Act. ATVOD has also been designated the power to issue enforcement notifications³⁹, where it has reasonable grounds for believing that an ODPS Provider has contravened certain of its statutory obligations⁴⁰. ATVOD must, however, consult with Ofcom before it imposes such notifications. Both Ofcom and ATVOD may enforce compliance with an enforcement notice by issuing civil proceedings⁴¹.
- 4.4 In the event of a contravention of the Act by an ODPS Provider (including non-compliance with any enforcement notification that has been issued by either Ofcom or ATVOD) Ofcom has the power to impose statutory sanctions on that Provider as contained in sections 368I – 368L of Part 4A of the Act.

For the purposes of these procedures any reference to “Ofcom” means any member of the Ofcom Executive; the Ofcom Board; any member of Ofcom’s Content Board or any other sub-committee of the Ofcom Board; and any other person with appropriate delegation from the Ofcom Board to carry out functions described in these procedures.

- 4.5 The imposition of a sanction against an ODPS Provider is a serious matter. Ofcom may, following due process, impose a sanction if it considers that an ODPS Provider

³³ Section 368E(1).

³⁴ Section 368E(2).

³⁵ Sections 368F – 368H.

³⁶ Sections 368O.

³⁷ Under section 368B(1) of the Act. Ofcom has also designated the Advertising Standards Authority (“the ASA”) as its co-regulator in relation to advertising that is included in an ODPS.

³⁸ See: <http://www.ofcom.org.uk/tv/ifi/vod/designation180310.pdf>

³⁹ Under sections 368BB(1)(a) and 368I(1)(a)

⁴⁰ This includes the obligations under sections 368BA, 368D, 368E, 368G, 368H and 368O of the Act, subject to the constraints on ATVOD’s powers to issue enforcement notifications under section 368I(1)(a).

⁴¹ Under sections 368BB(6) and 368I(8) of the Act. ATVOD’s power in this respect is subject to any decision that Ofcom may make as to whether or not it wishes to issue such proceedings.

has seriously, deliberately, repeatedly⁴² or recklessly breached a relevant requirement.

4.6 The statutory sanctions available to Ofcom (set out in more detail in Schedule 2) include a decision to:

- impose a financial penalty; and
- issue a direction to suspend or restrict the entitlement to provide the ODPS.

Financial penalty

The maximum fine for a contravention of the Act is £250,000 or an amount up to 5% of the ODPS Provider's "applicable qualifying revenue"⁴³, whichever is the greater.

Procedures

Consideration of sanctions

4.7 The consideration of a sanction follows a decision by Ofcom or ATVOD that an ODPS Provider has contravened a relevant requirement. A case will normally be considered for the imposition of a statutory sanction when Ofcom considers that an ODPS Provider has seriously, deliberately, repeatedly, or recklessly contravened a relevant requirement.

4.8 If Ofcom considers that a sanction may be appropriate, it will write to the ODPS Provider with the following information as appropriate⁴⁴:

- details of the contravention(s);
- comments on any issue raised by the ODPS Provider that is material to the case;
- details of any relevant cases on which Ofcom has already adjudicated;
- details of the ODPS Provider's recent compliance history;
- details of Ofcom's preliminary view on the type and level of any sanction considered to be appropriate and proportionate and, where the sanction under

⁴² A repeated contravention of a relevant requirement would include, for example: a repeat of the contravention of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple contraventions of other requirements.

⁴³ For the purposes of imposing a sanction, "qualifying revenue" for an accounting period consists of the aggregate of all the amounts received, or to be received, by the provider (or any "connected person" as defined by the Broadcasting Act 1990) of the service to which the contravention relates for the inclusion in that service of advertisements, product placement and sponsorship and in respect of charges made in that period for the provision of that service (sections 368J(4)). The "applicable qualifying revenue" in relation to a provider means either the qualifying revenue for the provider's last complete accounting period falling within the period during which the provider has been providing the service to which the contravention relates **OR**, in relation to a person whose first complete accounting period has not ended when the penalty is imposed, the amount of that the appropriate regulatory authority estimates to be the qualifying revenue for that period (section 368J(3)).

⁴⁴ Where the sanction under consideration involves the suspension or restriction of the service, the information provided in accordance with this paragraph may constitute a "notice" under section 368K of the Act. Where the information does constitute a formal notice, Ofcom will make this clear.

consideration involves the suspension or restriction of the service, its reasons for taking this view;

- where the sanction under consideration involves the suspension or restriction of the service:
 - Ofcom's reasons for being satisfied that an attempt to secure compliance with the relevant requirements by issuing an enforcement notification, or imposing a financial penalty has failed; and
 - details of such steps that the ODPS Provider must take in order to remedy the contravention and any conditions that Ofcom might include in any potential direction to suspend or restrict the service;
- the relevant documentation that Ofcom has taken into account will also be provided;

4.9 Where, at this stage, Ofcom considers that the appropriate sanction should include a financial penalty, then it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

4.10 Ofcom will then invite the ODPS Provider to make representations on its preliminary view of the type and level of any sanction being proposed. Depending on the type and level of any sanction, this may be by written and/or oral representations as Ofcom may consider appropriate.

ODPS Provider representations

4.11 When invited to make written representations on a sanctions case, an ODPS Provider should do so within 15 working days, unless otherwise specified⁴⁵. In some circumstances, Ofcom may, at its discretion, invite an ODPS Provider to submit one or more sets of subsequent representations on a case, as he or she sees fit (he or she will also do so in cases where the statutory process requires so). Ofcom may also request any information he or she requires from the ODPS Provider, to assist its understanding of the case or if it is necessary to ensure that the process is fair.

Disposal

4.12 After consideration of written and/or oral representations from the ODPS Provider, Ofcom may decide that no sanction is appropriate in a particular case. Where this occurs, the ODPS Provider will receive a notification to this effect.

Sanctions Decision

4.13 If, after considering all the evidence and representations from the ODPS Provider, Ofcom believes that a sanction is appropriate, it shall consider which of the available sanctions is appropriate and will reach a decision to this effect.

Suspension or restriction of entitlement to provide an ODPS

4.14 If, at the end of the period specified by Ofcom in accordance with paragraph 4.11, having considered the representations (if any) made by the ODPS Provider, Ofcom is satisfied that the specified steps have not been taken and that it is necessary in the

⁴⁵ This time-frame may depend on the nature and circumstances of the case. For example, in urgent cases, it may be appropriate to allow an ODPS Provider no more than 24 hours to make representations.

public interest to give a direction, it will issue a direction either suspending or restricting the ODPS Provider's entitlement to provide an ODPS⁴⁶.

- 4.15 ODPS Providers should note that Ofcom will regard any failure by an ODPS Provider to comply with an enforcement notification requiring the payment of a fee under section 368NA of the Act as a serious breach of a relevant requirement. If a case of non-payment is referred by ATVOD to Ofcom, Ofcom will normally consider that the appropriate sanction would be issuing a direction suspending or restricting the ODPS Provider's entitlement to provide a service.

Publication of a Sanctions Decision

- 4.16 The Sanctions Decision will normally be sent to the ODPS Provider 24 hours before its publication. Where the sanction includes a financial penalty, the level of the penalty will be omitted. The ODPS Provider will be notified of the level of any financial penalty immediately before the publication of the decision.
- 4.17 Ofcom will then proceed to publish its decision on Ofcom's website. A summary of the Sanction Decision will also normally be published on Ofcom's website.
- 4.18 Ofcom's decision is final.

Non Disclosure

- 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.

Non Disclosure

Ofcom expects ODPS Providers to keep all information, correspondence and documents relating to sanctions cases strictly confidential, unless in the public domain. In particular, Ofcom expects ODPS Providers to keep strictly confidential any information provided to them by Ofcom as part of the sanctions process, including any provisional indication/decision on the type and level of any sanction to be imposed⁴⁸.

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)).

⁴⁷ 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 2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of an appeal may need to be disclosed by Ofcom in order to meet such obligations and nothing in these Procedures can prevent Ofcom from doing so.

⁴⁸ 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 ODPS Provider will be notified that relevant material has been withheld and the reasons why.

Moreover, once Ofcom has started a sanctions process, the ODPS Provider should not 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. This does not limit what Ofcom can publish in its decision at the end of the investigation.

Time limits

- 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. Any ODPS Provider seeking an extension to a time limit should explain in writing to Ofcom why it believes the relevant time limit should be extended.

Failure to follow procedures

- 4.21 Any failure by an ODPS Provider to follow these procedures may result in Ofcom taking additional regulatory action.

Failure to comply with a suspension, restriction

- 4.22 ODPS Providers should be aware of the importance of complying with a sanction that is imposed in accordance with these procedures. For instance, a person may be guilty of an offence and liable to a fine if an ODPS Provider continues to operate an ODPS in contravention of a suspension or restriction imposed under sections 368K, or 368L⁴⁹.

⁴⁹ See section 368N of the Act.

Schedule 2

Minimum standards required by ODPS Providers

Contravention		Potential Action ⁵⁰
Section	Requirement to	
368BA	Give prior notification of an intention to provide an ODPS service	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368BB(1)(a)) ➤ Financial penalty (ss 368I(1)(b) and 368J(1)(a))
368D(1)	Comply with sections 368E to 368H (below)	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368I(1)(a)) ➤ Financial penalty (ss368I(1)(b) and 368J) ➤ Suspension or restriction of service for contraventions (s.368K) ➤ Suspension or restriction of service for encouraging or inciting crime or disorder (s 368L)
368D(2)	Give certain information to users of the service	➤ As for section 368D(1)
368D(3)(za)	Pay fees in compliance with section 368NA (below)	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368I(1)(a)) ➤ Financial penalty (ss.368I(1)(b) and 368J) ➤ Suspension or restriction of service for contraventions (s.368K)
368D(3)(zb)	Keep a copy of every programme included in the service	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368I(1)(a)) ➤ Financial penalty (ss.368I(1)(b) and 368J) ➤ Suspension or restriction of service for contraventions (s.368K)
368D(3)(a)	Comply with a request by Ofcom or ATVOD for information under section 368(O)	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368I(1)(a)) ➤ Financial penalty (ss.368I(1)(b) and 368J) ➤ Suspension or restriction of service for contraventions (s.368K)
368D(3)(b)	Co-operate with Ofcom or ATVOD for the purposes of section 368O(2) and (3)	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368I(1)(a)) ➤ Financial penalty (ss.368I(1)(b) and 368J) ➤ Suspension or restriction of service for contraventions (s.368K)
368E(1)	Exclude material likely to incite hatred based on race, sex, religion or nationality	➤ As for section 368D(1)
368E(2)	Ensure those under 18 do not hear or see material which might seriously impair mental, physical or moral development	➤ As for section 368D(1)
368F	Exclude or restrict the advertising of certain products and messages	➤ As for section 368D(1)
368G(1) and (2)	Exclude or restrict sponsorship for the purpose of promoting tobacco or prescription only medicine	➤ As for section 368D(1)
368G(3)	Exclude news and current event programmes that are sponsored	➤ As for section 368D(1)
368G(5)	Ensure sponsorship does not	➤ As for section 368D(1)

⁵⁰ NB. Enforcement notifications are not “sanctions” for the purpose of this procedure, but have been included to provide a complete picture of the potential ramifications of a contravention under Part 4A of the Act.

	influence content or editorial independence	
368G(6)	Ensure sponsorship announcements do not encourage the purchase or rental of products	➤ As for section 368D(1)
368G(7)	Restrict sponsorship in relation to alcoholic drinks	➤ As for section 368D(1)
368G(8)	Ensure sponsored services clearly inform users of a sponsorship agreement	➤ As for section 368D(1)
368G(9)	Ensure name/logo of sponsor is displayed at the beginning or end of programme	➤ As for section 368D(1)
368G(10)	Ensure sponsorship does not include subliminal messages	➤ As for section 368D(1)
368G(11)	Ensure that sponsorship does not promote discrimination or prejudice health and safety	➤ As for section 368D(1)
368H(3)	Exclude children's programmes containing product placement	➤ As for section 368D(1)
368H(4)	Exclude product placement in relation to tobacco and prescription medicines	➤ As for section 368D(1)
368H(5)	Restrict product placement in relation to alcoholic drinks	➤ As for section 368D(1)
368H(6)-(16)	Abide by certain conditions in relation to product placement	➤ As for section 368D(1)
368NA	Pay fees to regulatory authority	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368I(1)(a)) ➤ Financial penalty (ss. 368(1)(b) and 368J) ➤ Suspension or restriction of service for contraventions (s.368K)
368O	Provide information on request	<ul style="list-style-type: none"> ➤ Enforcement notification (s.368I(1)(a)) ➤ Financial penalty (ss.368I(1)(b) and 368J) ➤ Suspension or restriction of service for contraventions (s.368K)

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 11 February 2011**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/on-demand-programme-services/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.
- Susan Naisbitt
Ofcom
Content and Standards
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3271
- 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 in your response 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 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/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in March 2011.
- 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/static/subscribe/select_list.htm

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 Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@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 www.ofcom.org.uk/consult/.
- 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	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	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)