

Virgin Media's response to Ofcom's proposals for procedures for handling appeals on scope and for imposing sanctions in relation to On-Demand Programme Services

Virgin Media's Response, 11 February 2011

Virgin Media welcomes the opportunity to comment on the consultation on the proposals for procedures for handling appeals on scope and for imposing sanctions in relation to On-Demand Programme Services ("**the Consultation**").

Virgin Media considers that this is an important consultation as Ofcom needs to set, at the outset of this new co-regulatory system for on-demand programming, a practical and fair regime for appeals and sanctions which follow rules of due process and allows industry a reasonable opportunity to make representations.

Virgin Media is a Board Member of the Association for Television On-Demand ("**ATVOD**"), the co-regulatory body for VOD editorial content. Virgin Media is also a founder member of the Internet Watch Foundation and it played a role in the setting up of the BCAP co-regulatory system for broadcast advertising. Therefore, based on its experience of inputting into co- and self-regulatory bodies, it is very keen that a consistent regime is implemented for appeals regarding scope and sanctions in relation to On-Demand Programme Services ("**ODPS**").

In relation to the specific proposals set out in the Consultation, Virgin Media sets out its response as follows:

Section A: procedures for appeals of ATVOD's decisions on scope

Paragraph 3.1

Proposal: If Ofcom departs from normal procedure it will explain its reasons

Comment: It is not clear from this whether Ofcom will provide its reasons before or after it departs from normal procedure. In our view, Ofcom should give advance notice of its intention to depart from normal procedure, and should explain its proposed alternative procedure and its reasons *before* it decides whether to follow the alternative procedure or the normal procedure. Ofcom should give the affected party a reasonable period to comment, and should take those comments into account when deciding whether to apply the normal procedure or the proposed alternative procedure.

Paragraph 3.1 footnote 11

Proposal: The appeal procedures may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

Comment: We assume (but it should be clarified) that any revisions to the procedure will not apply to appeals that are already underway at the time the revision is made.

Paragraph 3.8

Proposal: A request for an appeal must be made in writing to Ofcom within 10 working days of the date of ATVOD's decision.

Comment: Any time limit should run from the date that ATVOD's decision is published or notified to the appellant.

Comment: A party requires sufficient time to decide whether to appeal an ATVOD decision on scope, and if so, to prepare that appeal. Aggregators and distributors of third party ODPS, such as Virgin Media, are likely to be directly affected by many appeals from ODPS carried on their platform (who dispute that they are editorially responsible for their content). As such, we strongly believe that 10 working days is insufficient time. This is particularly so in light of the requirement to include detailed grounds of appeal, and all evidence, with the appeal.

To impose a short time limit of 10 working days may lead to appeals being requested on a protective basis (because there has not been sufficient time properly to consider the merits and desirability of requesting an appeal) whereas if a longer time were permitted to allow a considered decision, such appeals might be avoided. Further, the short time limit may mean that requests for appeal are incomplete or unclear, leading to additional costs and time later in the process.

The majority of appeals will not require urgent determination (as demonstrated by the fact that Ofcom proposes that it will have a significantly longer period of 30 working days to determine the appeal). In cases where urgent action is required for the protection of the public, Ofcom has separately made provision (at paragraph 3.13) for interim enforcement action to be taken while the appeal is determined. Given this, there is no good reason to impose a very short time limit for requests for appeal to be made, which would outweigh the good reasons to allow a longer period of time.

In our view, 20 working days would be a more appropriate time period.

Furthermore, this is in line with, for example, the time limit for appeals from Phonepay Plus (a body to whom Ofcom has delegated certain functions) to the Independent Appeals body. This period would give an ODPS provider sufficient time to take an informed view of whether to request an appeal, and (if so) prepare its request in a complete and clear manner.

Proposal: A request for an appeal must provide a detailed explanation as to why the decision is materially flawed (e.g. obviously wrong in substance, contains a significant mistake of fact, or failure of process).

Comment: This wording ("materially flawed") suggests that Ofcom intends to limit its standard of review of ATVOD's decisions to a judicial review standard rather than an appeal on the merits. ATVOD is not applying discretion when making these decisions - rather, it is interpreting the statute - so there is no basis to limit reviews of its decisions to a judicial review standard. In our view, Ofcom should review ATVOD's decisions on the merits, i.e. the decisions should be overturned if they are wrong, not only if they are "materially flawed".

Proposal: A request for an appeal must include all the evidence that the person requesting the appeal would like Ofcom to take into account.

Comment: There may be circumstances in which this is difficult or impossible, or alternatively where the need for certain evidence only becomes apparent later in the process. In our view, provision should be made for further evidence to be submitted at a later stage (in particular following receipt of Ofcom's preliminary view).

Comment: It is unclear what evidence will be required by Ofcom.

Paragraph 3.9

Proposal: Ofcom may require a request for an appeal to be made in less than 10 working days where it appears to Ofcom that the case requires urgent attention. This is likely to include cases where the service contains material that is likely to encourage a crime or lead to disorder. A decision to shorten the length of time will be at Ofcom's sole discretion.

Comment: The proposed power to shorten the time to request an appeal is a draconian power that should not be included without good reason. Paragraph 3.13 contains provision for immediate interim enforcement action pending the appeal being determined by Ofcom, in situations where the service contains material that is likely to encourage a crime or lead to disorder. This will address any immediate danger to the public from the material being shown. Given this, there is no need also to provide for the length of time for appeal requests to be shortened in the same circumstances. In our view, this power should not be included.

Comment: If, contrary to our view above, the power to shorten the time limit is retained, we presume (but it should be clarified) that Ofcom would provide reasons for its decision to shorten the time limit.

Paragraph 3.12

Proposal: Where Ofcom receives a request for an appeal any enforcement action will usually be suspended until such time as Ofcom decides that the appeal has been resolved.

Comment: The word "usually" is unclear. We presume (but it should be clarified) that enforcement action will always be suspended except in the circumstances set out in clause 3.13.

Comment: We would suggest that Ofcom gives the ODPS Provider at least 2 working days' notice after the appeal has been resolved before enforcement action will begin. This will allow time to implement any enforcement action (for example the technical requirements of suspending a particular programme or ODPS).

Representations from directly affected third parties

Comment: Given that appeals on scope may likely involve a third party (i.e. where the parties themselves are disputing which entity is the provider of the ODPS), any third party which may be directly affected by the decision should be provided with a copy of any such representations (subject to redaction of commercially confidential or legally privileged material).

Comment: We presume that Ofcom will also receive submissions on the appeal from ATVOD itself. Clearly all affected parties who have made representations should be provided with a copy of any submissions from ATVOD (subject to redaction of

commercially confidential or legally privileged material). This should be clarified in Ofcom's proposals.

Paragraph 3.15 footnote 19

Proposal: In some cases Ofcom may shorten the time period for making representations in response to the preliminary view.

Comment: Again, a power to shorten a time limit (which is already limited) is a draconian power. No indication has been given of when this power will be used or why it might be necessary. In our view there should be no such power. Alternatively, at the least, indication should be given of when this power would be used, and reasons should be given by Ofcom when it is used.

Paragraph 3.17

Proposal: Where Ofcom upholds ATVOD's decision, time will again start to run immediately in relation to any enforcement action that has been or may be commenced by ATVOD.

Comment: As noted in relation to 3.12 above, we would suggest that Ofcom gives the ODPS Provider 2 working days' notice before enforcement action is required in order to allow time for the enforcement action to be implemented (which may require technical adjustments to the ODPS).

Comment: We presume (but it should be clarified) that enforcement action would start or recommence from the time that Ofcom's decision is published on Ofcom's and ATVOD's websites rather than from 24 hours earlier (when the decision is sent to the appellant).

Paragraph 3.20

Proposal: Parties to an appeal should not disclose correspondence, documents and other material concerning the appeal during the course of it being considered by Ofcom.

Comment: We presume (but it should be clarified) that this only applies to material prepared for or received during the appeal, i.e. it does not apply to material which was already in the party's possession before the appeal started, for example, material which the party uses in its day to day commercial operations but has also submitted to Ofcom with the appeal.

Proposal: This requirement of non disclosure does not limit what Ofcom can publish in its final decision.

Comment: We presume (but it should be clarified) that Ofcom will not publish any material which a party or other person making representations has indicated is commercially confidential or legally privileged.

Paragraph 3.20 footnote 22

Proposal: Ofcom may withhold material it believes to be confidential, market sensitive or legally privileged.

Comment: This should be amended to state that Ofcom *will* withhold from disclosure all material that *a party has indicated* to be confidential, market sensitive or legally privileged. Further, Ofcom should allow parties an opportunity to indicate what material within their submissions is confidential, market sensitive or legally privileged before disclosing that material to third parties.

Section B: procedures for sanctions

Paragraph 4.1

See comments in relation to paragraph 3.1 above.

Paragraph 4.1 footnote 27

See comments in relation to paragraph 3.1 footnote 11 above.

Paragraph 4.7

Proposal: 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.

Comment: The word “normally” is unclear. Paragraph 4.5 suggests that these are the *only* situations in which a sanction will be imposed. Accordingly, our view is that the word “normally” should be removed.

Paragraph 4.8

Proposal: Where the sanction under consideration involves the suspension or restriction of the service, Ofcom’s notice will set out details of such steps that the ODPS Provider must take in order to remedy the contravention.

Comment: Ofcom’s notice should also set out the period for the ODPS Provider to take the proposed remedial steps, and should state that Ofcom will issue a direction for suspension or restriction of the service unless these steps are taken.

Paragraph 4.11

Proposal: When invited to make written representations on a sanctions case, an ODPS Provider should do so within 15 working days, unless otherwise specified.

Comment: A period of 15 working days may not be sufficient to allow full preparation of any representations, leading to the need for supplemental submissions and explanations later. In our view, 20 working days would be more appropriate given the gravity of a sanction imposition. 20 working days would also be more consistent with time limits applied elsewhere within Ofcom’s remit (as explained above).

4.11 footnote 45

Proposal: 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.

Comment: This is potentially draconian in effect, given the serious nature of imposing a sanction without allowing the addressee full opportunity to comment.

Ofcom's proposals do not set out examples of urgent cases, however we presume these are cases where there is a danger of harm to the public from some or all of the content being provided by the ODPS Provider. In our view, such danger could be remedied by the issue of an enforcement notification to take down the offending content. We can see no reason why there would ever be an urgent need to issue a financial penalty or to impose suspension or restriction of the entire service. In any event, any sanction imposed following a shortened time frame should be interim only, with the ODPS Provider being given the remainder of the usual time frame in which to provide further representations, following which a further decision will be taken as to whether to continue the interim sanction.

4.16

Proposal: The level of the financial penalty will be omitted.

Comment: We do not understand why this information should be omitted from the advance notification.

4.19 and footnote 48

See comments in relation to 3.20 and footnote 22 above.