



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

Statement

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## Section 1

# Introduction

## Legislation and Regulatory Framework

- 1.1 The Audiovisual Media Services Directive<sup>1</sup> (“the AVMS Directive”) sets minimum standards in relation to the provision of On-Demand Programme Services (“ODPS”). The AVMS Directive has been implemented into UK law through Part 4A of the Communications Act 2003 (“the Act”).<sup>2</sup>
- 1.2 Under section 368A of the Act, a service is an ODPS (and therefore subject to regulation) if it meets all of the following criteria:
- It is a service providing TV-like programmes: the principal purpose of the service is the provision of programmes whose form and content are comparable to the form and content of programmes 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; selected programmes are viewed at the time of the user’s choosing; and programmes are received by means of an electronic communications network;
  - A person has editorial responsibility for the service: a person controls what programmes are offered and the manner in which the programmes are organised;
  - The service is being made available to the public: the person with editorial responsibility for the service makes it available for use by members of the public; and
  - The person is under UK jurisdiction: the person with editorial responsibility who makes the service available for use by members of the public is under UK jurisdiction for the purposes of the AVMS Directive.
- 1.3 The Act places a number of duties on ODPS providers. These include, amongst other things, a requirement:
- to notify “the appropriate regulatory authority” of their intention to provide the service (under section 368BA of the Act);
  - to pay such fee to “the appropriate regulatory authority” as it may require (section 368D(3)(za)); and
  - to comply with certain content standards (section 368D and sections 368E – 368H).

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<sup>1</sup> 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>

<sup>2</sup> Part 4A of the Act was inserted and amended by The Audiovisual Media Services Regulations 2009 (SI 2009/2979) and The Audiovisual Media Services Regulations 2010 (SI 2010/419)

- 1.4 Ofcom has a duty, under section 368C of the Act, to take steps to ensure that those providing an ODPS comply with their statutory duties under that Act.<sup>3</sup> Ofcom may choose to do this by itself, or designate other bodies to perform certain functions<sup>4</sup> concurrently with it.
- 1.5 Ofcom must exercise that power to designate other bodies, and its duties in respect of ODPS providers, in line with both the specific statutory requirements in section 368B(9) and our general duties set out in the Act. In particular, our principal duty of furthering the interests of citizens and consumers as set out in section 3(1). Likewise, in line with the obligation in section 3(4)(c) of the Act, in performing that duty, to have regard to "... the desirability of promoting and facilitating the development and use of effective forms of self-regulation." We must also have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, as well as any other principles appearing to us to represent the best regulatory practice.
- 1.6 Pursuant to these powers and in line with these duties, as part of a co-regulatory regime Ofcom has, by way of a designation dated 18 March 2010 ("the Designation")<sup>5</sup>, formally designated the Authority for Television on Demand Limited ("ATVOD") as the "appropriate regulatory authority" to carry out certain functions under Part 4A of the Act<sup>6</sup>. The designated functions<sup>7</sup> include:
- receiving notifications of ODPS from service providers; and
  - determining whether a person who is providing an ODPS has contravened the regulatory requirements.
- 1.7 The Designation gives ATVOD powers in connection with the designated functions. These include powers to decide:
- what constitutes an ODPS;
  - whether or not a person is providing an ODPS; and
  - what constitutes a "programme included in an ODPS."
- 1.8 A determination made by ATVOD in respect of any of the matters set out in paragraph 1.7 above may be subject to appeal to Ofcom.
- 1.9 In addition, where an ODPS provider contravenes a regulatory requirement Ofcom has the power to impose statutory sanctions on that provider<sup>8</sup>.
- 1.10 On 17 December 2010 Ofcom published a consultation proposing to create two new sets of procedures ("the Procedures") in relation to ODPS matters:

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<sup>3</sup> Although this is limited where the ODPS Provider is the BBC – see section 368P of the Act

<sup>4</sup> Section 368B of the Act.

<sup>5</sup> The Designation was amended on 15 August 2012. The amended Designation can be found at <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

<sup>6</sup> Ofcom has designated the Advertising Standards Authority as its co-regulator in relation to advertising included in an ODPS.

<sup>7</sup> Full details of ATVOD's designated functions and powers can be found at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

<sup>8</sup> Sections 368I – 368L of the Act.

Procedures for handling appeals on scope and sanctions in relation to ODPS

- 1.10.1 Procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an ODPS<sup>9</sup> (“scope appeals procedures”); and
  - 1.10.2 Procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services (“sanctions procedures”).
- 1.11 The consultation sought stakeholders’ views on both sets of procedures.

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<sup>9</sup> The appeals procedures also relate to any appeal on what constitutes “a programme included in an ODPS” under section 368R(2) of the Act and of any decision by ATVOD that a person is an ODPS provider.

## Section 2

# Responses to the Consultation

2.1 Ofcom received responses to its consultation from nine organisations, including:

- ATVOD
- BBC Worldwide
- BT
- Channel 4
- Information TV
- News International
- Universal Networks
- Virgin Media

The responses were broadly supportive of the proposed Procedures, but also included a number of suggested amendments.

2.2 Ofcom's aim in adopting the Procedures is to ensure that we have processes which are clear, sufficiently certain and fair to those involved, which maintain efficient and effective, high quality decision-making and which meet our statutory duties. In particular, which fairly, effectively and efficiently ensure that those who should properly fall within the scope of regulation do so and that they comply with their obligations arising out of that regulation (including by way of proper enforcement of those obligations and sanctions of their breach). In pursuing this aim, we have taken into account the range of views, some conflicting, and the suggested amendments to the proposed Procedures, in the consultation responses. We set out below how we have considered the responses, and the decisions we have made, against this backdrop.

## Issues raised by respondents

### Time limits - appeals

2.3 The proposed scope appeals procedures required appellants to submit appeals to Ofcom within 10 working days from the date of an ATVOD scope determination. Six respondents stated that this timeframe was too short. They argued that a party requires time to consider the case and decide whether to appeal an ATVOD decision. The party will then need time to prepare its appeal, including possibly obtaining legal advice. In addition, Virgin Media and News International suggested that the time limit for submitting an appeal should begin from the date ATVOD's decision has been notified to the appellant, rather than the date of the decision, as these may be very different.

2.4 Ofcom has considered the responses. We have also taken into account knowledge gained as a result of considering the appeals received to date. It is clear that appellants need sufficient time to prepare reasoned scope appeals, as well as preparing supporting evidence where necessary. We agree that 10 working days following a decision by ATVOD may be insufficient for appellants to prepare and submit an appeal. Therefore we have extended this timeframe to 20 working days from the date of ATVOD's decision. We consider this extended timeframe:

- accommodates the period between ATVOD reaching its decision and notifying the service provider; and
  - reflects an appropriate balance between a period which enables a provider fairly to protect its rights and one which is consistent with a prompt and efficient process which provides regulatory certainty.
- 2.5 The proposed scope appeal procedures noted also that, before Ofcom is able to prepare its preliminary view on an appeal, we may require further information from the appellant (and/or if we consider it appropriate, other relevant parties). The procedures stated that in such circumstances, the appellant will normally be given 10 working days to provide the information requested. One respondent stated that 10 working days was insufficient time.
- 2.6 The proposed scope appeal procedures made clear that the 10 working days timescale will “normally” apply. Given that the procedures also require the appellant to include with its appeal all the evidence it wants Ofcom to take into account, this 10 working days period should normally suffice. That point notwithstanding, however, Ofcom has a statutory duty to act proportionately. So, if exceptional circumstances made doing so appropriate, the procedures would enable Ofcom to allow more time for information to be provided.
- 2.7 We have not, therefore, changed the scope appeal procedures in this respect. The draft provisions, which we now adopt, maintain the efficiency of the process without compromising its fairness.
- 2.8 In addition to the responses to the consultation, Ofcom has also reviewed the proposed timescale for completing scope appeals. The proposed scope appeal procedures stated that Ofcom will aim to complete appeals within 30 working days from the date it receives a full request for an appeal.
- 2.9 Based on our experience of considering the appeals received to date, and in particular, their length and the novelty, complexity and importance of the issues they have raised, the timescale proposed was not realistic. We have therefore extended the target time for completing appeals to 60 working days from the date Ofcom receives an appeal, noting that the circumstances of individual appeals can vary considerably and completion may in some cases take longer (for example, appeals raising large numbers of novel issues). This will ensure appropriate time is given to the full and fair consideration and disposal of the issues raised, without unduly compromising the efficiency of the process.

### **Time limits (and representations) - sanctions**

- 2.10 Paragraph 4.11 of the proposed sanctions procedures gave ODPS providers 15 working days to make representations on Ofcom’s preliminary view of the type and level of any sanction that should be imposed. BT and Virgin Media commented that this timescale is too short and does not allow time for full preparation of any representations the provider may wish to make.
- 2.11 The timescale of 15 days for submitting representations is consistent with that given to broadcasters when Ofcom is considering statutory sanctions in relation to breaches of broadcast licences, in respect of which the relevant regulatory requirements and range of possible sanctions are no more extensive. This time period has operated fairly in respect of broadcast licensees. We see no reason why it should not reflect a fair balance between providers’ defences of their rights and the

efficiency of the sanctions process in the context of ODPS. We also note again, however, our duty to act proportionately and that the procedures would allow us to give a provider more time in an exceptional case.

- 2.12 We therefore remain of the view that the timescale proposed is sufficient for ODPS providers to submit relevant representations, especially so in light of the following additional point.
- 2.13 The proposed sanctions procedures set out an opportunity for ODPS providers to submit written representations. No provision for oral representations was included. While no respondents to the consultation raised this as an issue, we have revised the procedures to include a stage in which Ofcom may, where appropriate, invite the ODPS Provider to make oral representations. This, again, is consistent with Ofcom's Procedures for the consideration of statutory sanctions in broadcasting or other licence-related cases.
- 2.14 An ODPS provider will be invited to make oral representations where Ofcom considers it is appropriate to do so in order to ensure that Ofcom can fairly and properly determine whether to impose a sanction, and the appropriate and proportionate level of any sanction. In such cases, Ofcom will normally give the ODPS Provider at least 15 working days' notice of the date for making those representations. The hearing of such representations will be in private and may take place in England, Northern Ireland, Scotland, or Wales, as appropriate.

### **Submitting an appeal**

- 2.15 Paragraph 3.8 of the proposed scope appeal procedures set out a number of steps an appellant must take when submitting an appeal. These included a requirement that:
  - the appeal be in writing;
  - the appellant provides 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); and
  - the appellant includes all the evidence that it would like Ofcom to take into account when considering its case.
- 2.16 Virgin Media stated that the wording "materially flawed" suggests that Ofcom intends to limit its standard of review of ATVOD's decision to a judicial review standard rather than an appeal on the merits. Virgin Media believes that Ofcom should review ATVOD's decisions on their merits, i.e. the decisions should be overturned if they are wrong, not only if they are "materially flawed".
- 2.17 As set out at paragraph 1.7 of the proposed procedures, Ofcom (as the regulatory authority with concurrent powers) can 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; or can substitute Ofcom's decision for that of ATVOD.
- 2.18 The requirements set out for a request for appeal at paragraph 1.8 of the proposed scope appeal procedures indicate that Ofcom would expect the flaws alleged in the decision under appeal, whether in its merits or otherwise, to be sufficiently material to



warrant an appeal. We would not, for example, expect to receive an appeal in which the alleged flaws in ATVOD's decision were *de minimis* and would not affect the substance of that decision or the way in which it was reached.

- 2.19 With regard to submitting evidence with an appeal, News International Limited commented that the requirement to submit an appeal in writing appears to preclude appellants submitting evidence in video form. This means that a written description of any relevant video material would need to be prepared (impacting on the time taken to prepare an appeal).
- 2.20 The procedures require that the request for an appeal be in writing. They do not require all evidence to be in written form. Ofcom is prepared to consider, where relevant, evidence in video form (though appellants must provide supporting written documentation clearly setting out the relevance of the video content to the appeal).
- 2.21 Virgin Media commented that there may be circumstances where the need for certain evidence only becomes apparent at a later stage in the process. Therefore there should be provision in the scope appeal procedures for further evidence to be submitted at such a stage.
- 2.22 Ofcom will expect appellants to provide all information they wish to be taken into consideration at the time of submitting an appeal. However, we accept that there may be exceptional circumstances in which additional relevant information comes to light after an appeal has been submitted and whose relevance means an appeal can only fairly be disposed of taking the information into account.
- 2.23 The timing of the receipt of such evidence and whether it can be taken into account will depend on the individual circumstances of each case. In particular, weighing the fair disposal of the appeal against the need for an efficient and certain process. Given that admission of the evidence would be possible, but dependent on the circumstances, in relevant cases, we do not consider it necessary or appropriate to set out in the procedures a specific process for late submission of evidence.

### **Third parties**

- 2.24 In its response, ATVOD stated that the proposed scope appeal procedures do not provide an automatic opportunity for ATVOD to respond to a notice of appeal. It maintained that independent appeals procedures in operation in relation to other media regulators typically include provisions requiring the appellate body to give the regulator whose determination is being challenged notice of the appeal and the opportunity to make representations.
- 2.25 We have decided to amend the scope appeal procedures to include a stage in which Ofcom will notify and send ATVOD a copy of any appeal we receive. However, we do not agree ATVOD should be given the right to make representations at this stage. Ofcom expects ATVOD's scope determinations to set out fully ATVOD's reasoning, and the evidence it considered, having taken account of any representations the relevant service provider made to it. It does not, therefore, appear to Ofcom necessary to dispose fairly of an appeal to give ATVOD the chance to make such representations, given the need for efficiency in the process.
- 2.26 These points notwithstanding, we have also decided the procedures will be revised to require ATVOD to provide Ofcom with additional information, in cases where Ofcom considers it is appropriate to do so. The procedures will also be amended to provide ATVOD with an opportunity to make representations on Ofcom's preliminary view

(once we have considered the appeal and reached a provisional decision). In other words, to make representations on matters (Ofcom's preliminary view) that ATVOD has not previously seen. Ofcom agrees that amendment would be consistent with a fair procedure, without undue effect on its speed.

- 2.27 As to other parties' representations, Virgin Media stated that where an appeal directly affects a third party, that third party should be provided with a copy of any representations, subject to the normal redaction of confidential information. Channel 4, meanwhile, stated that where third party individuals or bodies who are directly affected by a case make representations to Ofcom, the appellant should be given the opportunity to respond to these representations.
- 2.28 Ofcom agrees that a third party directly affected by an appeal should, where possible, have sight of relevant information. It was implicit in the proposed scope appeals procedure that this was the case, but we have amended it to make the position expressly clear. Ofcom similarly agrees, in the interests of fairness, that, where third parties make representations about an appeal, then, in normal circumstances, both ATVOD and the appellant are entitled to see and respond to these at an appropriate stage. We have amended the scope appeals procedures to reflect this.

### **Cases requiring urgent attention**

- 2.29 The proposed Procedures stated that Ofcom may impose shorter timescales in some cases. These may include cases requiring urgent attention. The proposed sanctions procedures said these timescales may be as little as 24 hours (for making representations at relevant stages).<sup>10</sup>
- 2.30 BT and Virgin Media commented that the proposed sanctions procedures' provision that a provider may have no more than 24 hours to make representations about Ofcom's preliminary view on an appropriate sanction is unreasonable and impractical. In addition, Channel 4 said it is not aware of any statutory provision giving Ofcom or ATVOD the power to ensure a service does not contain "material that is likely to encourage or to incite the commission of crime, or lead to disorder." It submitted that any purported power to shorten timescales in cases involving services containing such material is therefore ultra vires.
- 2.31 However, the proposed Procedures made clear that any decision to shorten the length of timeframes will depend on the nature and circumstances of a case. As stated above, Ofcom has a statutory duty to act proportionately. Timeframes will be shortened only in cases in which Ofcom considers it is necessary and appropriate to do so in order to fulfil its statutory duties and where doing so is in line with any applicable statutory requirements. We have made amendments to the Procedures that reflect Ofcom/ATVOD's statutory powers in particular.

### **Non-disclosure**

- 2.32 Virgin Media commented that the proposed Procedures stated that the requirement for non-disclosure does not limit what Ofcom can publish in its final decision. Virgin Media believes that Ofcom should not publish any material which a party or other person making representations has indicated is commercially confidential or legally

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<sup>10</sup> The footnote to paragraph 4.11 in the proposed sanctions procedures stated, "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."

privileged. Ofcom should also allow parties an opportunity to indicate what material within their submissions is confidential.

- 2.33 Ofcom agrees that, in the information they submit to Ofcom in connection with the Procedures, parties may indicate material they consider should not be published. Ofcom is bound by the rules on confidentiality, non-disclosure and publication of information in sections 26 and 393 of the Act. Ofcom will hold, use and disclose information in accordance with those provisions, as well as its obligations under the Freedom of Information Act 2000. The Procedures acknowledge these points.

## **Decision-making**

- 2.34 Channel 4 also stated that the proposed Procedures do not indicate who at Ofcom will decide whether or not to grant a request for appeal or who will take the decisions on appeals and sanctions. It believes this omission is contrary to Ofcom's transparency requirements.
- 2.35 We have decided to amend the Procedures to show that these decisions will be made (and, where relevant, preliminary views taken) by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board. The Executive officers will normally be the Director of Standards and the Group Director of Ofcom's Content, International and Regulatory Development Group (or Directors of equivalent seniority and delegated authority should either of these be unavailable for any reason). Where, exceptionally, Ofcom considers it necessary for reasons of fairness and/or in order for Ofcom properly to determine a matter, decisions will be reached by the Ofcom Executive Officers together with Non-Executive member(s) of Ofcom's Content Board.
- 2.36 Ofcom considers that, in the context of scope appeals and sanctions, fair and effective procedures –that provide parties with a proper opportunity to put their “case” to a suitably qualified decision maker before the decision is made and which contribute to the appropriate application of, and compliance with, regulatory rules – require that decision makers:
- are identifiable and known in advance to relevant parties;
  - have relevant expertise and seniority; and
  - are consistent (in the sense, in this context, that there is consistency in their identity across cases).

This is important in relation to the Procedures. Scope appeals determine whether a service is subject to regulation and required to comply with a range of regulatory rules. Sanctions procedures determine whether an ODPS Provider should face punitive action. These are serious matters, but which will come before Ofcom relatively rarely. Expressly indicating in the Procedures a small number of decision makers, as set out above, therefore meets the requirements of identifiability, expertise and seniority and consistency, but without undue adverse effect on the Procedures' efficiency.

## **Enforcement**

- 2.37 Virgin Media suggested that, in scope appeals, Ofcom should give an ODPS provider two working days' notice before any enforcement action dependent on the outcome

of the appeal is taken. It said this is required in order to allow time for the enforcement action to be implemented.

- 2.38 Ofcom does not agree that it is necessary to stipulate this in the scope appeals procedures. The procedures state that where Ofcom decides to uphold ATVOD's decision and where enforcement action was to have, or has been, commenced, but stopped during the appeal process, then "time will again start to run immediately" in relation to that action. The action will depend on the circumstances of the infringement and is likely to include time for implementation. We are, therefore, satisfied the procedures appropriately covers this point.

## **Publication**

- 2.39 Paragraph 4.16 of the proposed sanctions procedures stated that Ofcom will only send the final sanctions decision to the ODPS provider 24 hours before its publication. This paragraph also stated that if the sanction includes a financial penalty, the level of the penalty will be omitted but the ODPS provider will be notified of the level immediately before publication of the decision. Channel 4 submitted that this is an insufficient period of advance notice which could cause ODPS providers serious difficulties. It said any publication of substantial financial penalties would necessitate the ODPS provider reporting this to senior executives and potentially its board. Channel 4 suggested a compromise position would be to provide a full embargoed copy of the decision, including the financial penalty, to the legal team of the ODPS provider on a confidential solicitor to solicitor basis. The embargo could then be lifted shortly before publication.
- 2.40 Ofcom does not consider it necessary to change the sanctions procedures in respect of publication timescales. It provides for a preliminary view to be given to the ODPS provider which, in appropriate cases, will include details of the type and level of any sanction considered to appropriate and proportionate. At this stage, the ODPS provider will be aware of, can consider and may make representations on those matters. Ofcom will only reach a decision on a financial penalty following full consideration of the provider's representations. Ofcom considers that this means the provider will have fair and appropriate notice of the possible penalty and its implications. We also note that giving ODPS providers final decisions 24 hours before their publication is consistent with Ofcom's current procedures for the consideration of statutory sanctions in breaches of broadcast licences<sup>11</sup>.

## **Review of Ofcom decisions**

- 2.41 Two respondents raised the issue that there was no process for appeal or review from decisions made by Ofcom. Channel 4 believed there should be a right of appeal to a separately constituted panel.
- 2.42 Ofcom does not agree that there is a requirement for a separately constituted internal appeal or review panel and we have decided not to amend the Procedures to make provision for one. We consider that the Procedures give relevant service providers opportunities to make representations at appropriate stages throughout the Procedures.

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<sup>11</sup> See <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/procedures-statutory-sanctions/>

- 2.43 In particular, under the scope appeals procedures providers will be able to put their case both in their initial appeal and in response to Ofcom's preliminary view (having already made representations in connection with its decision). In connection with sanctions, providers will often be able to make representations in response to both an enforcement notification (whether issued by ATVOD or Ofcom) and to Ofcom's preliminary view. It would also be open to providers to challenge Ofcom's decisions by application for a judicial review.
- 2.44 In other words, the Procedures, viewed as a whole, provide relevant parties with fair opportunities to defend their positions. Ofcom considers that this should help secure the appropriate application of regulation, taking into account service providers' and consumers' and citizens' interests, and meeting our duties (including securing, by way of effective enforcement and sanctions, service providers' compliance with their duties). Achieving this without the additional steps that internal reviews would require goes to Ofcom's aim of having an efficient process.

### **Amendments to the proposed procedures**

- 2.45 Ofcom has carefully considered the consultation responses as set out above. Where we consider it appropriate to do so in the light of these responses, in order to meet our duties and legitimate objectives, and/or to aid clarity, we have made the changes to the Procedures described.
- 2.46 The decisions we have decided to make are consistent with Ofcom's duties. In particular, those under sections 3, 6 and 368C of the Act.
- 2.47 Most particularly, it is in the interests of citizens and consumers that, where there is a co-regulatory scheme, like that for ODPS involving Ofcom and ATVOD, there is an appropriate balance between statutory regulation and (industry) self-regulatory elements. Similarly, it is in their interests, and those of service providers, that regulation is properly applied to those who fall within it, including ensuring that they comply with their obligations (by way, where appropriate, of effective sanctioning of breaches). The Procedures, which give providers fair opportunities to represent their positions and enable Ofcom effectively and efficiently to make appropriate decisions as to the scope of regulation and sanctions, go to meeting those interests.
- 2.48 The final scope appeals procedures are in Annex 1. The final sanctions appeal procedures are in Annex 2.

### **Section 3**

## **Publication of the Procedures and coming into force**

### **Publication**

- 3.1 The finalised Procedures for the handling of appeals of ATVOD decisions and the consideration of statutory sanctions are given in Annex 1 and Annex 2 of this Statement.
- 3.2 Both sets of Procedures will be published on Ofcom's website on 15 August 2012.

### **Coming into force**

- 3.3 Both sets of Procedures as given in Annex 1 and 2 will come into force on 15 August 2012.

## Annex 1

# Ofcom procedures for the handling of appeals of ATVOD decisions in relation to what constitutes an On-Demand Programme Services

## Overview and general information

- 1.1 This document outlines the procedures that Ofcom will normally follow when considering appeals of decisions by the Authority for Television on Demand Limited (“ATVOD”)<sup>12</sup> 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 2003<sup>13</sup> (“the Act”). These procedures are effective from 15 August 2012.<sup>14</sup> 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.
- 1.2 An ODPS is defined in section 368A of the Act as a service that satisfies the following criteria:
- 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;
  - access to it is on demand;
  - there is a person who has editorial responsibility for it;
  - it is made available by that person for use by members of the public; and
  - that person is under the jurisdiction of the UK for the purposes of the Audiovisual Media Service Directive (“the Directive”).<sup>15</sup>

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

Part 4A of the Act came into force on the 19 December 2009. It places a number of duties on those providing ODPS in the UK. These include notifying the appropriate

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<sup>12</sup> ATVOD is an independent regulator designated by Ofcom to carry out certain functions in relation to the provision of ODPS (see below). ATVOD’s website is at: <http://www.atvod.co.uk>.

<sup>13</sup> As amended by The Audiovisual Media Services Regulations 2009 (SI 2009/2979) (“the 2009 Regulations”) and The Audiovisual Media Services Regulations 2010 (SI 2010/ 419) (“the 2010 Regulations”).

<sup>14</sup> 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.

<sup>15</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007, implemented in the UK by the 2009 and 2010 Regulations, both of which insert new provisions comprising Part 4A of the Act.

regulatory authority of their provision of an ODPS or of their intention to provide such a service<sup>16</sup>.

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.<sup>17</sup> 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 concurrently<sup>18</sup>.

- 1.3 Ofcom has general duties in relation to the regulation of those who provide an ODPS (“ODPS Providers”)<sup>19</sup>. Ofcom has designated ATVOD as an appropriate regulatory authority concurrently to carry out certain of its functions in relation to the regulation of ODPS.<sup>20</sup> ATVOD has been given certain powers to carry out these functions, 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).
- 1.4 A determination made by ATVOD in respect of any of the matters set out in paragraph 1.3 above may be subject to appeal to Ofcom.
- 1.5 Ofcom will normally consider requests for appeals in accordance with the procedures set out in this document.
- 1.6 Appeal decisions<sup>21</sup> will be made (and, where relevant, preliminary views taken) by two senior members of the Ofcom Executive who have been given appropriate delegated authority by the Ofcom Board. The Executive Officers will normally be the Director of Standards and the Group Director of Content, International and Regulatory Development Group.<sup>22</sup> Where Ofcom considers it necessary, decisions will be reached by the Ofcom Executive Officers together with Non-Executive member(s) of Ofcom’s Content Board.

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<sup>16</sup> Section 368BA of the 2003.

<sup>17</sup> Section 368C (1) says, “It is the duty of the appropriate regulatory authority to take such steps as appear to them best calculated to secure that every provider of an on-demand programme service complies with the requirements of section 368D.” Section 368D (1) says, “The provider of an on-demand programme service must ensure that the service complies with the requirements of sections 368E to 368H.” Sections 368E to 368H set out requirements relating to harmful material, advertising, sponsorship and product placement.

<sup>18</sup> Section 368B of the Communications Act 2003.

<sup>19</sup> Although these are limited where the ODPS Provider is the BBC – see section 368P of the Act.

<sup>20</sup> A copy of the Designation is at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

<sup>21</sup> Including the decision as to whether or not to grant a request for an appeal.

<sup>22</sup> Or Directors of equivalent seniority and delegated authority should either of these be unavailable for any reason.



## Procedures

### Requesting an appeal

- 1.7 An appeal can be requested in respect of an ATVOD decision:
- that a service is an ODPS;
  - as to what constitutes ‘a programme included in an ODPS’;<sup>23</sup>
  - that a person is an ODPS Provider; or
  - in relation to any combination of these.
- 1.8 A request for an appeal must be submitted to Ofcom within 20 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.
- 1.9 Ofcom may require that a request for an appeal be made in writing in less than 20 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:
- there is an ODPS Provider providing a service that fails to comply with any requirement in sections 368E – 368H of the Act;
  - that failure to comply is due to the inclusion in the service of material likely to encourage or to incite the commission of crime or lead to disorder; and
  - the provider disputes that it is providing an ODPS.

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

- 1.10 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

- 1.11 If Ofcom decides to proceed with a consideration of the appeal, it will inform ATVOD and provide ATVOD with a copy of the appeal. Where appropriate, Ofcom will request from ATVOD additional information relevant to the appeal.
- 1.12 ATVOD will publish on its website details of the service in respect of which the appeal is being considered.

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<sup>23</sup> See section 368R(2) of the Act.

1.13 Where Ofcom receives a request for an appeal any enforcement action that has been, or may be, commenced against the appellant 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 appellant has failed to comply with the steps set out in these procedures, or Ofcom reasonably believes that the appellant's request for appeal is an abuse of these procedures.

1.14 Notwithstanding paragraph 1.13, in cases where Ofcom considers that:

- the service that is the subject of the appeal fails to comply with any requirement in sections 368E – 368H of the Act; and
- that failure to comply is due to the inclusion in the service of material likely to encourage or to incite the commission of crime, or lead to disorder,

Ofcom 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 an appeal. It is the responsibility of the third party to satisfy Ofcom that it has a sufficient interest in the appeal.

Directly affected third parties will be provided with a copy of the appeal. Anyone making representations will be expected to do so as early as possible.

1.15 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 and any other relevant material that has been submitted. In some cases, however, Ofcom may require further information from the appellant and/or ATVOD (and/or, if it considers it appropriate, other relevant parties) before it is able to prepare its preliminary view. In such circumstances, the relevant party (or parties) will normally be given 10 working days to provide the information requested.

1.16 When Ofcom has prepared its preliminary view, Ofcom will provide it (and representations from third parties in appropriate cases) to the appellant and ATVOD (and directly affected third parties where appropriate) and request a written response within 10 working days<sup>24</sup>.

1.17 Once Ofcom has received and considered the appellant's and ATVOD's written responses (or any relevant representations from a directly affected third party as appropriate) on its preliminary view, it will reach its decision and inform the appellant and ATVOD (and, in appropriate cases, third parties). 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).

<sup>24</sup> In some cases Ofcom may shorten the time period for providing representations as appropriate.

- 1.18 Where Ofcom decides to uphold ATVOD's decision and enforcement action has been, 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 party<sup>25</sup>. This is subject to any decision Ofcom makes in relation to the timetabling of such action.
- 1.19 Ofcom's decision is final. A copy of the decision will be sent to the appellant and ATVOD (and if necessary any other relevant party) 24 hours before publication on Ofcom and ATVOD's websites.

### **Publication of Decision**

- 1.20 The decision will be published on Ofcom's website.

### **Non Disclosure**

- 1.21 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly 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 appeal<sup>26</sup> during the course of it being considered by Ofcom (see text box below). This requirement of non disclosure does not limit what Ofcom may disclose in the proper performance of its functions and/or can publish in its decision at the end of its consideration of the appeal.<sup>27</sup>

#### **Non Disclosure**

Parties (appellants, 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 appeal<sup>28</sup>. 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

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<sup>25</sup> This is subject to paragraph 1.14, where time may have continued to run notwithstanding the appeal.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> Subject to the caveat as to information Ofcom may disclose and publish, in paragraph 1.21 above.

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**

- 1.22 Appellants, ATVOD and, where appropriate, any affected third parties 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.
- 1.23 Ofcom will aim to complete appeals within 60 working days from the date it receives a full request for an appeal (i.e. including all relevant supporting material). We note, however, that the circumstances of individual appeals can vary considerably and completion may in some cases take longer (for example, in those raising a number of, and/or novel, issues).

### **Failure to follow procedures**

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

### **Sanctions**

- 1.25 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 served<sup>29</sup> and/or a financial penalty being imposed on the ODPS provider<sup>30</sup>. Ofcom's Procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services may be found at:  
<http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/sanctions-procedures.pdf>

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<sup>29</sup> See section 368BB of the Act.

<sup>30</sup> 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.

## Annex 2

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

## Overview and general information

- 1.1 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”)<sup>31</sup> for contravention of one (or more) of the requirements imposed on them under Part 4A of the Communications Act 2003<sup>32</sup> (“the Act”). In this document these requirements are referred to as “relevant requirements”. These procedures are effective from 15 August 2012.<sup>33</sup> 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.
- 1.2 Ofcom may designate another body to perform certain of its duties, or both Ofcom and another designated body may carry out the duties concurrently<sup>34</sup>. Ofcom has designated the Authority for Television on Demand Limited (“ATVOD”) as an appropriate regulatory authority in relation to carrying out certain functions in relation to the regulation of ODPS Providers.<sup>35</sup>
- 1.3 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 notifications,<sup>36</sup> where it has reasonable grounds for believing that an ODPS Provider has

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<sup>31</sup> 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.

<sup>32</sup> As amended by The Audiovisual Media Services Regulations 2009 (SI 2009/2979) and the Audiovisual Media Services Regulations 2010 (SI 2010/ 419).

<sup>33</sup> 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.

<sup>34</sup> Section 368B of the Act

<sup>35</sup> See: <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

<sup>36</sup> Under sections 368BB(1)(a) and 368I(1)(a)

contravened certain of its statutory obligations.<sup>37</sup> Both Ofcom and ATVOD may enforce compliance with an enforcement notice by issuing civil proceedings.<sup>38</sup>

1.4 The Act places a statutory duty on ODPS Providers to comply with the relevant requirements. These requirements include that ODPS Providers must:

- give advance notification (to ATVOD) of the provision of their service or their intention to provide the service;<sup>39</sup>
- supply specified information to users of the service;<sup>40</sup>
- pay the appropriate fees (to ATVOD);<sup>41</sup>
- keep a copy of every programme contained in the service;<sup>42</sup>
- ensure that the service does not contain material which is likely to incite hatred on the grounds of race, sex, religion or nationality;<sup>43</sup>
- protect those under 18 years of age from being exposed to material that might seriously impair their physical, mental or moral development;<sup>44</sup>
- ensure that restrictions on advertising, sponsorship and product placement are observed;<sup>45</sup> and
- provide the appropriate regulatory authority with such information as it may require for carrying out investigations.<sup>46</sup>

1.5 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 on that Provider statutory sanctions as contained in sections 368I – 368L of Part 4A of the Act. 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 has seriously, deliberately, repeatedly<sup>47</sup> or recklessly breached a relevant requirement.

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<sup>37</sup> 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).

<sup>38</sup> 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 and, in relation to the power under section 368I(8), to Ofcom's approval of any action by ATVOD.

<sup>39</sup> Section 368BA.

<sup>40</sup> Section 368D.

<sup>41</sup> Section 368NA.

<sup>42</sup> Section 368D(3)(zb).

<sup>43</sup> Section 368E(1).

<sup>44</sup> Section 368E(2).

<sup>45</sup> Sections 368F – 368H.

<sup>46</sup> Sections 368O.

<sup>47</sup> 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.



1.6 The statutory sanctions available to Ofcom include:

- the imposition of a financial penalty; and
- the issuing of 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",<sup>48</sup> whichever is the greater.

1.7 Sanctions decisions reached under these procedures will be made (and, where relevant, preliminary views taken) by two senior members of the Ofcom Executive who have been given the appropriate delegated authority by the Ofcom Board. The Executive officers will normally be the Director of Standards and the Group Director of the Content, International and Regulatory Development Group.<sup>49</sup> Where Ofcom considers it necessary, decisions will be reached by the Ofcom Executive Officers together with Non-Executive member(s) of Ofcom's Content Board.

## **Procedures**

### **Consideration of sanctions**

1.8 The consideration of a sanction follows a decision by Ofcom or ATVOD that an ODPS Provider has contravened a relevant requirement. As indicated above, 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.

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

- 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

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<sup>48</sup> 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 (section 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)).

<sup>49</sup> Or Directors of equivalent seniority and delegated authority should either of these be unavailable for any reason.

- a summary of the material on which Ofcom has relied in reaching its preliminary view.

The relevant documentation that Ofcom has taken into account will also be provided.

- 1.10 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/>.
- 1.11 Where the sanction under consideration involves the suspension or restriction of the service, Ofcom will set out:<sup>50 51</sup>
- its reasons for taking this view;
  - (in appropriate cases) its 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;
  - (in appropriate cases) details of steps that the ODPS Provider must take in order to remedy the relevant contravention and any conditions that Ofcom might include in any potential direction to suspend or restrict the service;
  - the period the ODPS Provider has for taking any specified steps and making representations; and
  - the effects of the relevant sanction(s).
- 1.12 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**

- 1.13 When invited to make written representations on a sanctions case, an ODPS Provider should do so within 15 working days, unless otherwise specified.<sup>52</sup> 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 Ofcom sees fit (it will also do so in cases where the statutory process requires so).<sup>53</sup> Ofcom may also request

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<sup>50</sup> Where the sanction under consideration involves the suspension or restriction of the service, the information provided to the ODPS Provider at this stage may constitute a “notice” under section 368K of the Act. Where the information does constitute such a formal notice, Ofcom will make this clear and the information provided will be in line with any applicable statutory requirements.

<sup>51</sup> Where the sanction proposed is a suspension or restriction of a service under section 368L (suspension or restriction of service for inciting crime or disorder) of the Act, Ofcom will put to the ODPS Provider a preliminary view that we are minded to serve a notice under that section. The provider may make representations on this preliminary view as set out in paragraphs 1.13 - 1.15 before Ofcom decides whether to serve the notice.

<sup>52</sup> 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.

<sup>53</sup> For example, where Ofcom decides to serve on an ODPS Provider a notice under section 368L of the Act, the provider will have the opportunity to make (further) representations within 21 days in accordance with section 368L(2)(e) (see paragraph 1.18).

any information it requires from the ODPS Provider, to assist its understanding of the case or if it is necessary to ensure that the process is fair.

### **Oral representations**

- 1.14 If Ofcom considers that, in addition to or instead of making written representations, it is necessary to invite the ODPS Provider to make oral representations in order to ensure that Ofcom can fairly and properly determine whether to impose a sanction, and the appropriate and proportionate level of any sanction, it will invite the ODPS Provider to make such representations. Ofcom will normally give the ODPS Provider at least 15 working days' notice of the date for making those representations. The hearing of such representations will be in private and may take place in England, Northern Ireland, Scotland, or Wales, as appropriate.
- 1.15 The procedure for making oral representations will be at the discretion of Ofcom. Ofcom will write to the ODPS Provider in advance of the date for hearing the representations, to set out what the procedure will be.

### **Disposal**

- 1.16 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 (and, where appropriate, ATVOD) will receive a notification to this effect.

### **Sanctions Decision**

- 1.17 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.<sup>54</sup>

### **Suspension or restriction of entitlement to provide an ODPS**

- 1.18 Where, having considered the ODPS Provider's representations on Ofcom's preliminary view, Ofcom decides to serve on the Provider a notice under section 368L of the Act,<sup>55</sup> the suspension or restriction of the service under that notice will take effect immediately from the date the notice is served.<sup>56</sup> The ODPS Provider will then have 21 days to make (further) representations to Ofcom about whether Ofcom should issue a direction confirming the suspension or restriction of the service.<sup>57</sup>

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<sup>54</sup> Again, where Ofcom decides that the appropriate sanction should include a financial penalty, then it will, as appropriate, have regard to the Ofcom Penalty Guidelines published at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

<sup>55</sup> In relation to a failure to comply with any requirement of sections 368E – 368H that is due to the inclusion in the service of material likely to encourage or to incite the commission of crime or lead to disorder.

<sup>56</sup> Section 368L(4)

<sup>57</sup> In accordance with sections 368L(2)(e) and (5) of the Act.

1.19 If, at the end of the period specified by Ofcom for making representations,<sup>58</sup> and having considered any such representations made by the ODPS Provider, Ofcom is satisfied that:

- (in appropriate cases) the specified steps set out in any notice under section 368K have not been taken; and
- (in all cases) it is necessary in the public interest to give a direction,

Ofcom will issue a direction either suspending or restricting the ODPS Provider's entitlement to provide an ODPS.

1.20 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 is likely, subject to an ODPS Provider's representations, to 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**

1.21 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.

1.22 Ofcom will then proceed to publish its decision on its website.

1.23 Ofcom's decision is final.

### **Non Disclosure**

1.24 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly that all parties concerned abide by all Ofcom's published rules and procedures. These require, for example, that parties to a consideration of a sanction should not disclose any correspondence, documents and other material concerning that case<sup>59</sup> during the course of it being considered by Ofcom (see text box below). This requirement of non disclosure does not limit what Ofcom may disclose in the proper performance of its functions and/or can publish in its decision at the end of its consideration of the sanction.<sup>60</sup>

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<sup>58</sup> Either under paragraphs 1.13 – 1.15 above, in cases where Ofcom is considering a suspension or restriction of a service under section 368K of the Act, or under paragraph 1.18 where Ofcom has served a notice under section 368L.

<sup>59</sup> 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.

<sup>60</sup> 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.

### **Non Disclosure**

Ofcom expects ODPS Providers to keep all information, correspondence and documents relating to sanctions cases strictly confidential, unless already 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 imposed.

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.

### **Time limits**

- 1.25 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**

- 1.26 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**

- 1.27 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 368L<sup>61</sup>.

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<sup>61</sup> See section 368N of the Act.