

Procedures for investigating breaches of rules for on demand programme services

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Introduction

- 1.1 This document outlines Ofcom's Procedures for the handling and resolution of complaints (or for the conduct of its own investigations) about potential breaches of rules applying to on-demand programme services ("ODPS") by ODPS providers¹. These Procedures are effective from 3 April 2017.
- 1.2 These Procedures do not apply to BBC UK Public On Demand Programme Services ("BBC ODPS")². Separate procedures apply to BBC ODPS (which also apply to BBC UK Public Broadcasting services):
https://www.ofcom.org.uk/data/assets/pdf_file/0030/99417/procedures-bbc.pdf
These Procedures do apply to notified on demand programme services operating under the BBC's commercial arm.
- 1.3 If Ofcom considers that it is necessary to depart from these Procedures in any material respect in a particular case for reasons of fairness and/or in order for Ofcom properly to consider a complaint(s) or carry out an investigation, it will make clear to the ODPS provider concerned (and any other relevant parties) the nature/extent of its departure and its reasons for doing so.
- 1.4 It is noted that the nature of ODPS (in comparison with linear broadcast) means that material will often remain available for viewing on demand, meaning a risk any harm from a breach may be ongoing. An example of where it may be appropriate to depart from these Procedures (and particularly to expedite the process) is where a potential breach involves incitement or the protection of minors, and the material remains available.

Statutory framework

- 1.5 Part 4A of the Communications Act 2003 (the "Act") makes provision for the regulation of ODPS. Section 368C of the Act imposes various duties on the "appropriate regulatory authority" which, in the absence of another body being designated under section 368B in relation to programme content, is Ofcom. These include a duty to take steps to secure that every provider of an ODPS complies with requirements in section 368D. These requirements include:
 - (a) complying with rules (in sections 368E to 368H of the Act) for harmful material, advertising, sponsorship, and product placement;
 - (b) supplying specified information about the ODPS provider to users;
 - (c) retaining copies of programmes for at least 42 days after they cease to be available for viewing;

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

² Such as the BBC iPlayer and iPlayer Kids (both audiovisual and sound programmes).

- (d) cooperating fully with the regulator, including by complying with information requests issued under section 368O; and
 - (e) paying any regulatory fees that may be imposed under section 368NA.
- 1.6 Under section 368BA of the Act, ODPS providers are also required to notify Ofcom in advance of providing an ODPS, making significant changes to an ODPS, or ceasing to provide an ODPS. The notification must include all such information as Ofcom may require.
- 1.7 Ofcom has published Rules and Guidance³ which set out the statutory requirements applying to ODPS (apart from those for advertising content) and provide non-binding guidance.
- 1.8 These Procedures cover potential breaches of any rules applying to ODPS providers except rules for advertising. The Advertising Standards Authority (“ASA”)⁴ has been designated by Ofcom under section 368B as the “appropriate regulatory authority” for the regulation of advertising content on ODPS. Any complaints about advertising content on an ODPS should be sent to the ASA⁵.
- 1.9 Ofcom may launch investigations on its own initiative as well as in response to complaints received. The Procedures in a complaint-led investigation and an Ofcom-initiated investigation are the same.

Procedures

Making a complaint

- 1.10 Complaints under these Procedures can be made to Ofcom by any person or body who considers that an ODPS provider has failed to comply with the relevant requirements as set out in the Rules. In particular, and as set out in Ofcom’s Rules and Guidance, these include:
- 1.11 Administrative Rules
- Notification of an intention to provide an ODPS (Rule 1).
 - Notification of an intention to make significant changes to a notified service (Rule 2).
 - Notification of intention to cease providing a notified service (Rule 3).
 - Payment of any required fee (Rule 4)
 - Retention of programmes for at least 42 days (Rule 5).
 - Provision of information (Rule 6).
 - Cooperation (Rule 7).
 - Compliance with enforcement notifications (Rule 8).

³ Available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules_and_Guidance.pdf

⁴ www.asa.org.uk

⁵ <https://www.asa.org.uk/Consumers/How-to-complain.aspx>

- Supply of information to service users (Rule 9).

1.12 Editorial Content Rules

- Harmful Material: Material Likely to Incite Hatred (Rule 10).
- Harmful Material: Protection of Under Eighteens (Rule 11).
- Sponsorship (Rule 12).
- Product Placement (Rule 13).
- Harmful Material: Prohibited Material (Rule 14).

1.13 Ofcom will not normally consider a complaint unless the complainant has sought to follow the ODPS provider's own complaints procedure first (see exception regarding ongoing harm at paragraph 1.14).

1.14 The contact details of all notified ODPS providers can be found on Ofcom's website at http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/List_of_Regulated_Video_On_Demand_Services.pdf. If a complainant is dissatisfied with the ODPS provider's response to their complaint, or the ODPS provider is not on the list of notified providers, the complaint can then be submitted to Ofcom.

1.15 In cases where a complaint is made under an ODPS provider's own complaints procedures, Ofcom will expect the ODPS provider to retain the relevant programme, and any related material, for the 42-day period required by statute (section 368D (3) (ab) of the Act), running from the date on which the ODPS provider may reasonably expect the complainant to have received the ODPS provider's final response.

1.16 Because ODPS content is continually available and there may be a risk of ongoing harm arising from some content, it may be appropriate for a complainant to contact Ofcom immediately if they believe harmful material is involved under Rules 10, 11 or 14. In cases raising a risk of ongoing harm, Ofcom may open an investigation before the conclusion of the ODPS provider's own process. Ofcom will take into account the potential harm alleged and any immediate steps taken by the ODPS provider, such as suspending access to particular material or preventing it from being accessed by under-18s, while the complaint is being considered. Ofcom may also depart from these Procedures to the extent necessary to expedite cases (whilst remaining fair to the ODPS provider) in these circumstances (see paragraph 1.3).

1.17 Separate, but similar, procedures apply to broadcast material. If a complaint is about a "catch-up" ODPS and the material has recently been shown on a television service, it may be more appropriate for Ofcom to consider the complaint under relevant broadcasting procedures as the substantive rules applying to broadcast television services are more extensive.

Form of complaint and information to be provided

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

available on Ofcom's website. Alternatively, you can contact us by post at the following address:

Ofcom
ODPS Complaints
5th Floor
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

1.19 All complaints should include sufficient detail about the matter complained of. Specifically, complaints should include:

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

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

1.21 Unless a complainant asks Ofcom not to do so, Ofcom may disclose the complainant's identity to the ODPS provider that is the subject of the complaint as well as sharing a non-confidential version of the complaint submission with it for comment. Ofcom will consider requests from complainants to remain anonymous.

Making a complaint promptly

1.22 ODPS providers are required, under Rule 5 which reflects section 368D(3) (ab) of the Act, to retain copies of programmes for 42 days after the programme ceases to be available. With that in mind, complainants should act promptly on becoming aware of material made available on an ODPS which they consider may breach the rules for ODPS. Generally, and particularly in circumstances where the relevant material is no longer available on an ODPS, Ofcom will not accept a complaint unless it has been pursued promptly.

1.23 Where a complaint is submitted regarding material which is no longer available on the ODPS, complainants should confirm when they became aware of the content and explain the reasons for any delay in progressing the complaint. Ofcom will then consider all relevant factors (including the complainant's explanation for the delay and the limited time period during which ODPS providers are required to keep recordings) in deciding whether or not Ofcom should investigate the complaint.

- 1.24 Where a complainant has previously complained directly to the ODPS provider, the complainant should wait to see if he/she is satisfied with the ODPS provider's response before referring it to Ofcom. If not, the complainant should refer his/her complaint to Ofcom (with the ODPS provider's response) as soon as possible, and in any event within 20 working days of the final response to the complainant from the relevant ODPS provider.
- 1.25 If the complainant has not received an acknowledgement of his/her complaint from the ODPS provider within 10 working days of submission and a substantive response within 20 working days, the complainant should promptly submit the complaint to Ofcom, providing copies of the correspondence with the ODPS provider.
- 1.26 Where a complainant submits a complaint at the same time to the ODPS provider and to Ofcom, Ofcom will not normally proceed to consider the complaint until the ODPS provider has first had an opportunity to resolve the complaint itself under its procedures. However, it may do so where it considers it appropriate taking into account whether the material remains available and the risk and seriousness of any potential ongoing harm. In such a case, the complainant should inform Ofcom when he/she has received the ODPS provider's final response, and confirm whether he/she wishes to proceed with his/her complaint.

Initial assessment of complaints

- 1.27 All complaints are important to Ofcom as they help it to understand whether an ODPS provider may be failing to comply with the rules for ODPS. Ofcom will log and acknowledge every complaint that it receives. However, it will not normally correspond any further with individual complainants. Ofcom will carry out a process of initial assessment and, where relevant following initial assessment, further investigation as set out below.
- 1.28 Ofcom will first consider whether, on its face, a complaint raises potentially substantive issues under the rules for ODPS which warrant investigation by Ofcom. It will take into account the gravity and/or extent of the matter complained of, including, for example, whether it involves ongoing harm and/or harm to minors.
- 1.29 If Ofcom considers that it should assess the matter further, it may ask the ODPS provider for a copy of the relevant programme or material at this stage, which we would generally require to be provided within five working days.⁶ We may also request any other background material we consider may be relevant to Ofcom's initial assessment of the complaint, however we will not normally request written representations from the ODPS provider at this stage.
- 1.30 Based on an initial assessment of the complaint and a review of the relevant material, Ofcom will consider whether there may have been a breach of the rules for ODPS which Ofcom considers requires a response from the ODPS provider. If not, Ofcom will decide not to investigate further and will normally publish its decision in a table in its Broadcast and On-demand Bulletin⁷ if the matter relates to compliance with a "public facing" rule. "Public facing" rules relate to editorial content or the

⁶ This would be pursuant to a request under section 368O of the Act, and the period allowed is in line with the position under Broadcasting Act Licences.

⁷ The Broadcast and On-demand Bulletin is published fortnightly on Ofcom's website: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

provider's dealings with the public. We will not normally publish the decision if the matter relates to compliance with a rule that is not "public facing", but there may be exceptional cases where we do publish (such as where there is a high level of public awareness of, and interest in, the matter complained of).

- 1.31 Ofcom aims to complete an initial assessment of complaints within 15 working days.

Investigating possible breaches

- 1.32 Other than in cases falling within paragraph 1.33 below, where Ofcom considers that an ODPS provider may have failed to comply with a relevant requirement, Ofcom will write to the ODPS provider. Ofcom will summarise the material parts of the complaint(s), set out the particular Rules which it considers are relevant, and invite the ODPS provider to make representations in response (and to provide any relevant material/evidence in support of its representations) within 10 working days. Ofcom will normally publish details of issues under investigation in a table in its Broadcast and On-demand Bulletin if the matter relates to compliance with a "public facing" rule (for more information on "public facing" rules see paragraph 1.30 above).
- 1.33 There may be cases in which Ofcom does not consider it necessary to seek representations from the ODPS provider at this stage. This will normally be where the question of whether there is a breach of a relevant rule is a matter of objective fact (for example where R18 is made available to under-18s without restriction). In these cases, Ofcom will not usually seek the ODPS provider's representations at this stage (as in paragraph 1.30 above). Instead, Ofcom will write to the ODPS provider with its Preliminary View on the substance of the complaint(s), as set out in paragraph 1.36 below. There may also be other cases where the matter(s) concerned, on the facts, mean this approach is appropriate.
- 1.34 Ofcom aims to complete those cases that it takes forward for investigation within 50 working days.

Representations from third parties

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

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

Preparation of Ofcom's Preliminary View

- 1.35 Ofcom will prepare its Preliminary View having taken account of the ODPS provider's representations, where provided. This preliminary view is only provisional and may be subject to change in the light of subsequent representations/material provided by the ODPS provider.

- 1.36 All draft Preliminary Views will be provided to a panel of Ofcom's Content Board members⁸ for their advisory opinion. The decision on Ofcom's Preliminary View will be taken by a senior member of Ofcom's Executive with appropriate Board-delegated authority. Typically, this would be the person who is responsible for overseeing the investigation. The Preliminary View will contain:
- a summary of the complaint(s);
 - a summary of the material parts of the programme/service to which the complaint(s) relates;
 - the relevant requirements as set out in the Rules; and
 - Ofcom's preliminary assessment of whether any breaches of those requirements have occurred and the reasons for that assessment.
- 1.37 If Ofcom considers that it is necessary to obtain further information to ensure that it can fairly and properly prepare its Preliminary View, Ofcom may seek such information before preparing that view.
- 1.38 When Ofcom has prepared its Preliminary View, Ofcom will provide it to the ODPS provider (and any relevant third party) and request representations within 10 working days.
- 1.39 Ofcom considers that it will normally be able to reach a decision fairly and properly following written representations and without oral representations from the ODPS provider. However, an ODPS provider may, in any particular case, make a written request to make its representations orally to Ofcom in addition to any written representations. Ofcom will agree to such a request if Ofcom considers that an oral hearing is appropriate in view of the nature of the breach under consideration and the complexity of the issues raised.

The final Decision

- 1.40 Once Ofcom has received and considered the ODPS provider's representations (and/or any representations from a relevant third party) on its Preliminary View, it will reach its final decision.
- 1.41 All draft decisions will be provided to a panel of Ofcom's Content Board members (who have not been involved in the investigation) for their advisory opinion before a final decision is taken. The final decision will be taken by a senior member of Ofcom's executive with appropriate Board-delegated authority, who will not have been involved in the investigation and/or the preparation of the Preliminary View.

Publication of Decision

- 1.42 Before publishing the Decision, Ofcom will provide the ODPS provider, for information only with an embargoed copy of the Decision one working day before publication.

⁸ The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive broadcasting experience. See <https://www.ofcom.org.uk/about-ofcom/how-ofcom-is-run/content-board>

- 1.43 The Decision will be published in Ofcom’s Broadcast and On-demand Bulletin on its website at <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>
- 1.44 Ofcom will also normally publish information in its Broadcast and On-demand Bulletin about Decisions in which it has found that the ODPS provider has **not** breached a “public facing” rule (for more information about “public facing” rules, see paragraph 1.30 above).

Non-Disclosure

- 1.45 It is an essential part of the integrity of Ofcom’s processes and its ability to regulate fairly that all parties concerned abide by Ofcom’s published rules and procedures, including those relating to non-disclosure below.

Non-Disclosure

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

However, parties should not disclose any correspondence, documents or other material concerning the complaint during the course of the investigation.⁹

Failure to follow this requirement may result in Ofcom ceasing to consider the party’s representations.

This does not limit what Ofcom can publish in its decision at the end of the investigation.¹⁰

Time limits

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

Sanctions

- 1.47 Where Ofcom records a breach or breaches of the Rules, it may consider that the breach justifies consideration of the imposition of a statutory sanction on the ODPS provider. If so, Ofcom will make that clear in its Decision (under paragraphs 1.40 and 1.41 above) and the “Procedures for the consideration of statutory sanctions arising

⁹ 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). Information provided to Ofcom as part of a complaint may need to be disclosed by Ofcom in order to meet such obligations.

¹⁰ Ofcom may (in investigating and publishing its decision) 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.

in the context of On-Demand Programme Services” will apply.¹¹ These are available on Ofcom’s website at http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised_sanctions_procedures.pdf

Complaints raising questions of scope

- 1.48 In cases involving services which have not been notified to Ofcom as ODPS, there will be a preliminary issue before considering the substance of the complaint of whether the service in fact constitutes an ODPS as defined in section 368A (1) of the Act (i.e. a question of whether the service falls into the “scope” of regulation). If it does not, the rules for ODPS do not apply to it and no breach of them can have occurred.
- 1.49 Where scope appears to be an issue Ofcom will, at the initial assessment stage, consider whether on its face the service appears it may meet the test in section 368A (1) and in particular whether it appears likely that the principal purpose is the provision of programmes comparable in form and content to programmes normally included in television programme services¹². If it does not, Ofcom would not generally assess the matter further.
- 1.50 If it does appear likely to meet the test, and there also appears to be a substantive issue if the service were to be found in scope, Ofcom would generally consider the scope and substantive issues in parallel, following the process set out above. This is in order to assist the prompt resolution of issues, especially where there is a risk of ongoing harm arising from the content in question. Given such investigations are likely to be more complex, the indicative investigation times indicated above may be longer in such cases. If no issue appears likely to arise from the content but there is a scope issue, Ofcom would consider the question of scope, and whether the requirement to notify an ODPS had been breached.
- 1.51 There may be circumstances in which it is appropriate to separate the scope and substantive issues, and consider them in sequence. In such circumstances, Ofcom will inform the ODPS provider of its proposal to do so.
- 1.52 In cases raising issues of scope, the service provider may consider it is not an ODPS provider. It is noted that the power to require provision of information under section 368O of the Act applies to all those who appear to Ofcom to be ODPS providers (whether or not a detailed assessment leads to that conclusion). Such service providers should also observe the rules applying to ODPS providers (including retention of recordings and cooperation) as if they were such a provider pending determination on scope.
- 1.53 If and to the extent that cases raise issues of scope, decisions reached under these procedures will be made by two (or more) members of the Ofcom Executive who have been given the appropriate delegated authority by the Ofcom Board.

¹¹ The ASA may, under the terms of its Memorandum of Understanding with Ofcom, request Ofcom to consider a statutory sanction in an advertising case. In such cases, the ASA will normally have published a breach of the advertising rules.

¹² This is the test under section 368A(1)(a) of the Act. A service would need to meet other criteria in section 368A (1), but those are more likely to require further information from the service provider to enable assessment.

Directions

- 1.54 Ofcom has the power under the Act¹³ to issue a direction suspending or restricting an ODPS. Ofcom may issue a direction in any case where it considers it to be appropriate, noting that the statute sets out tests and procedures that apply. In particular, Ofcom would only issue a direction where it is satisfied that an ODPS provider has contravened a relevant obligation and that either:
- attempts to secure compliance through imposition of a financial penalty and/or enforcement notification has failed, and a direction would be appropriate and proportionate in light of the seriousness of the contravention (section 368L); or
 - the contravention relates to the inclusion of material likely to encourage or incite crime, or lead to disorder (whether or not there had been a previous financial penalty or enforcement notification) and the contravention is such as to justify a direction.
- 1.55 A Notice of Direction will normally be published in Ofcom's Broadcast and On-demand Bulletin.
- 1.56 Failure by an ODPS provider to comply with a direction issued by Ofcom can lead to the consideration of the imposition of a statutory sanction on the ODPS provider (for example, the imposition of a financial penalty). In such cases, the Sanctions Procedures referred to in paragraph 1.47 would apply.

Expedited processes

- 1.57 As noted in paragraph 1.4 above, material on an ODPS will often remain available for viewing on demand for a long period, meaning there may be an ongoing risk of harm. Examples include cases where material remains available which potentially involves incitement to hatred based on sex, religion or nationality, or the protection of minors.
- 1.58 In such circumstances, Ofcom will make clear to the ODPS provider that it is expediting the process described above. This may include bypassing the ODPS provider's own complaints process, allowing substantially less time to provide material and other information, and allowing substantially less time to provide any representations. Ofcom will make clear to the ODPS provider the time limits for responses in such cases which will be fair in the circumstances of the case.

¹³ See sections 368K and 368L of the Act, which relate to contraventions and to inciting crime or disorder respectively.