



# Future regulation of on-demand programme services

Statement

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## About this document

Since 1 January 2016, Ofcom has been sole regulator (other than in relation to advertising) for on-demand programme services (“ODPS”) under Part 4A of the Communications Act 2003 (the “Act”).

On 18 December 2015, Ofcom published details of arrangements that would apply from 1 January 2016, and consulted on two substantive proposals. One was to introduce new Procedures for investigating breaches of rules for on-demand programme services to replace the Interim Breach Procedures, and to align more closely with the position for linear television broadcasting. The other was not to charge fees under section 368NA of the Act and instead to cover the small incremental cost involved in becoming sole regulator of ODPS within the existing fees structure for television broadcasting licensees.

This document sets out Ofcom’s conclusions having carefully considered consultation responses. Firstly we will implement the new Procedures, with minor amendments in response to points raised in consultation, with effect from 1 April 2016. Secondly, further financial planning work indicates that the incremental costs of becoming sole regulator of ODPS are in fact so small that they are likely substantially to be covered by the surplus which will pass from ATVOD to Ofcom in respect of fees collected but not spent in the 2015-16 financial year. This means, in the 2016-17 financial year, we will neither charge fees under section 368NA nor require television broadcasting licensees to contribute. We will re-consult in due course in relation to future financial years.

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## Section 1

# Summary

## Background

- 1.1 On-demand programme services (“ODPS”) are regulated in the UK under rules set out in Part 4A of the Communications Act 2003 (the “Act”). Under section 368B of the Act, Ofcom may, but is not required to, designate an “appropriate regulatory authority” to carry out functions under Part 4A. In the absence of a designation, Ofcom is the sole appropriate regulatory authority. Where there is a designation in place, Ofcom may act concurrently with or in place of that body, and may revoke the designation at any time.
- 1.2 The appropriate regulatory authority has a number of functions under Part 4A. These include enforcing both administrative and substantive rules, encouraging access services for those with visual or hearing impairments, promoting access to European works, issuing enforcement notifications for breaches of rules, imposing financial penalties where appropriate, and suspending or restricting services in certain cases.
- 1.3 The appropriate regulatory authority may also levy fees on ODPS providers pursuant to section 368NA of the Act, although it is not required to do so. If it does these must not exceed an estimate of likely costs for carrying out relevant functions. It may also require the provision of information from those appearing to it to be ODPS providers, under section 368O.
- 1.4 In 2010, Ofcom designated the Authority for Television on Demand (“ATVOD”) as the appropriate regulatory authority to carry out various functions relating to editorial content on ODPS. ATVOD and Ofcom worked within a co-regulatory model. In doing so, Ofcom remained able to act concurrently with or in place of ATVOD at any time (as is required under section 368B(2) of the Act). Ofcom also remained solely responsible for matters including financial penalties, suspensions and restrictions, and Ofcom had an appellate role in relation to ATVOD’s decisions that providers were ODPS providers as defined in the Act (known as scope appeals).
- 1.5 ATVOD played an important role in the first five years of a new regulatory regime. However, in light of convergence between linear television broadcasting and ODPS and the extensive overlap in the identity of ODPS providers and broadcast licensees, Ofcom decided to end the co-regulatory model, to bring ATVOD’s designation to an end, and to act as sole regulator for ODPS non-advertising content from 1 January 2016. The Advertising Standards Authority remains co-regulator in relation to advertising content on ODPS, as it does for linear television broadcasting, and nothing in this statement has any bearing on that position.
- 1.6 Ofcom did not gain any new functions as a result of the end of ATVOD’s designation. It has been able to act concurrently with or in place of ATVOD in all respects and at all times since Part 4A came into force.

## Statement and consultation

- 1.7 On 18 December 2015, Ofcom published a statement and consultation entitled “*Future regulation of on-demand programme services*”.<sup>1</sup> This set out arrangements from 1 January 2016, including forms and guidance on how to notify ODPS to Ofcom, Rules and Guidance applying from that date, Interim Breach Procedures, and updated procedures for the consideration of statutory sanctions.
- 1.8 The statement and consultation also consulted on two substantive matters:
- (a) Replacement of the Interim Breach Procedures with new Procedures for investigating breaches of rules for on-demand programme services aligning the process for ODPS with that already applying to linear television broadcast licensees (whilst recognising that the substantive rules differ).
  - (b) A proposal not to charge fees under section 368NA of the Act at present and instead to cover the small incremental cost involved in becoming sole regulator of ODPS within the existing fees structure for television broadcasting licensees.
- 1.9 The consultation closed on 1 March 2016 and consultation responses were received from the following:
- Action on Hearing Loss
  - A+E Networks UK (“A+E”)
  - Channel 5 Broadcasting Limited (“Channel Five”)
  - The Commercial Broadcasters Association (“COBA”)
  - ITV plc, STV Central Limited and UTV Limited (as a joint response; we refer to “ITV” below for brevity)
  - Pact
  - Reverend Kendall Down
  - Sky UK Limited (“Sky”)
  - Six responses for which the respondent requested anonymity<sup>2</sup>; four from stakeholders who are both broadcasters and ODPS providers, one from a stakeholder who is an ODPS-only provider, and one from a programme maker.
- 1.10 Sections 2 and 3 of this document respectively reprise reasons for making the two proposals set out in paragraph 1.8, summarise consultation responses, and set out Ofcom’s conclusions having carefully considered these.

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<sup>1</sup> [http://stakeholders.ofcom.org.uk/consultations/vod\\_procedures/](http://stakeholders.ofcom.org.uk/consultations/vod_procedures/)

<sup>2</sup> Channel 4 has, since the publication of this statement, confirmed that its response is not confidential. We have therefore published Channel 4’s response in full, along with the other responses, on our website here:  
[http://stakeholders.ofcom.org.uk/consultations/vod\\_procedures/?showResponses=true](http://stakeholders.ofcom.org.uk/consultations/vod_procedures/?showResponses=true)

## Impact assessment

- 1.11 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities<sup>3</sup>.
- 1.12 We have carried out impact assessments for some changes referred to in this document, where warranted. The analyses presented in sections 2 and 3 represent our impact assessment of those proposals having carefully considered consultation responses. We have also had due regard to our obligations under the Equality Act 2010, but do not expect that the outcome of this consultation is likely to have any particular impact on race, disability or gender equality or those with any of the other characteristics protected by the Equality Act.

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<sup>3</sup> For further information on our approach to impact assessments see our guidelines on Better Policy Making: <http://www.ofcom.org.uk/about/policies-and-guidelines/better-policy-making-ofcoms-approach-to-impact-assessment/>

## Section 2

# Procedures for investigating breaches of rules for on-demand programme services

2.1 This section reprises the key reasons for Ofcom's proposal to adopt new procedures for investigating breaches of rules for ODPS (the "Procedures") as set out in its 18 December 2015 consultation (which appended the draft Procedures we proposed to adopt). It summarises consultation responses received, Ofcom's responses to the points raised, and our conclusion that we should adopt the new Procedures with effect from 1 April 2016, which reflect the draft Procedures with the amendments as set out below. The new Procedures themselves appear at Annex 1.

## Ofcom's reasons for its original proposal

- 2.2 As set out in our consultation, a key aim of the draft Procedures was to align the procedures with those for linear television. There were a number of reasons why Ofcom considered it is appropriate in principle for the procedures for ODPS closely to reflect those for linear television. In particular:
- (a) The AVMS Directive recognised growing convergence between, "*Traditional audiovisual media services — such as television — and emerging on-demand audiovisual media services*". It aimed to create "*a level playing field*" between them (Recital 10). Further, in relation to audiences' reasonable expectations of regulatory protection, it noted that, "*It is characteristic of on-demand audiovisual media services that they are 'television-like'*". In light of the concept of a level playing field for providers, and meeting audiences' reasonable expectations, Ofcom considered procedures should be as closely aligned as possible.
  - (b) In practical terms, experience since the AVMS Directive was adopted in 2010 demonstrated that there was substantial overlap between ODPS and linear television. This took the form both of overlapping content (many ODPS are catch-up services including previously broadcast material) and overlap largest ODPS providers broadcast television licensees.
  - (c) It contributes to transparency, predictability and efficiency for procedures in relation to ODPS to closely reflect those for linear television. The procedures relevant to television have been in force for a considerable period, providing a clear process for viewers to raise concerns, and fair and appropriate opportunity for service providers to make representations.
- 2.3 Ofcom recognised that there are differences between ODPS and linear television services. At the level of smaller ODPS providers, there is less overlap between ODPS providers and broadcast licensees. Additionally, the substantive rules are less extensive for ODPS than for linear television. However, in our consultation, we did not consider these factors justified fundamental differences in procedural approach between linear television and ODPS. We noted that the procedures for linear television provide fair and appropriate opportunity for complainants to bring issues to the attention of the regulator, and for service providers to make representations prior to a decision. We considered this approach to be as appropriate for ODPS providers which are not also broadcasting licensees as they are for those that are. It is also as

appropriate given the less extensive rules applying to ODPS as for the more regulated landscape of linear broadcasting.

- 2.4 To assist the consultation process, we highlighted a number of key aspects of the draft Procedures, particularly insofar as they departed from the Interim Breach Procedures (which were applied from 1 January 2016) and from Ofcom's *Procedures for investigating breaches of content standards for television and radio*<sup>4</sup> (the "Broadcasting Procedures") on which the draft Procedures were based. In particular:
- (a) ODPS potentially gave rise to a greater risk of ongoing harm in some cases than did linear television broadcast. Examples included where a potential breach involves incitement to hatred, encouragement of crime and disorder, or protection of minors, where the material remains available on demand. We noted this may justify departure from the Procedures, including allowing shorter periods for representations. We stated that we would communicate deadlines to ODPS providers in such circumstances and that these would remain fair to the provider in the circumstances.
  - (b) Also related to the risk of ongoing harm and the need to expedite, the draft Procedures made clear that there may be cases where it is appropriate to bypass ODPS providers' internal complaints processes and for Ofcom to investigate before such processes are concluded, although the presumption remained that complainants should go to the ODPS provider first where such concerns are not engaged.
  - (c) The requirements on ODPS providers differ from those on broadcasters, and the draft Procedures highlighted what the relevant requirements are.
  - (d) The position on retaining recordings differs between broadcast licensees and ODPS providers. We made clear we expected ODPS providers to retain material for at least 42 days after communicating their own decisions on consumer complaints. Equally, we stated that complaints must be pursued promptly by complainants.
  - (e) The definition of an "on-demand programme service" in section 368A of the Act is not always clear-cut and we recognised complaints about non-notified services raise issues of whether the definition is met (known as "scope" issues). The approach to scope issues was complex under previous ATVOD processes, partly because of the appellant role of Ofcom. We sought to clarify the matter by confirming that failure to notify an ODPS (as defined) is a breach under section 368BA of the Act, and of Rule 1 of Ofcom's published Rules and Guidance. We said we would propose to progress any such matter under the Procedures and potentially further under the Sanctions Procedures. We said that, normally, we would not separate consideration of this potential breach from any other potential breach (e.g. of an editorial rule).
  - (f) We noted that the draft Procedures do not retain the internal review process embodied in the Interim Breach Procedures and in previous ATVOD procedures. We said that ODPS providers retain the potential for appeal of Ofcom decisions via judicial review in the High Court, and that this aligns with our existing approach for broadcast licensees. We said that, while the additional stage may have been more appropriate for ATVOD as a small organisation with limited

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<sup>4</sup> Available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/june2011/breaches-content-standards.pdf>

opportunity for review and validation by individuals not directly involved in an investigation as part of the decision making process, we did not consider this remained the case. The procedural measures in place have proved sufficient for broadcasters and it is our view that the nature of ODPS is not such that it makes it necessary to supplement these for them specifically.

- (g) We made specific reference in the draft Procedures to Ofcom's powers to issue directions under the Act suspending or restricting an ODPS.
- 2.5 We said that the draft Procedures, if adopted, would have a number of impacts on citizens and consumers. Their intention was to align the procedural position with that applying to linear television, while appreciating differences in substantive requirements and in particular features of each medium. We said this should assist in understanding processes in the context of convergence, and add confidence that the reasonable expectations of audiences regarding protection would be met. The draft Procedures envisaged expediting processes in cases of ongoing harm in the interests of citizens and consumers, and reducing the time taken to resolve cases.
- 2.6 We noted that the draft Procedures reduced the role for individual complainants following submission of an initial complaint. This is in line with the established approach for linear television broadcasting, and is likely to assist prompt resolution in the interests of citizens and consumers more widely.
- 2.7 For ODPS providers, we noted that alignment with the position for linear television is intended to assist understanding of the process given many ODPS providers are also broadcast licensees. We accepted that the changes reduce opportunities for review at the request of ODPS providers following a breach decision, but noted that this contributes to prompt resolution while providing fair opportunity to make representations.

## **Ofcom's consideration of consultation responses**

- 2.8 Respondents to the consultation were broadly supportive of Ofcom's proposal to adopt the draft Procedures, and in particular with the principle that these should align closely with the Broadcasting Procedures in the interests of both providers and viewers. However, a number of specific comments were raised as follows.

### Rights of appeal/review

- 2.9 As noted in Ofcom's consultation, the move from a co-regulatory model to a sole regulator by definition meant the removal of an appeal route from ATVOD to Ofcom. The Interim Procedures applicable from 1 January 2016 included an additional internal Ofcom review process, but the draft Procedures (aligning with the Broadcasting Procedures) did not, and further appeal was instead to be by way of judicial review.
- 2.10 Some respondents expressed concern about changes to appeal procedures. A+E argued that the change would potentially place smaller businesses lacking the resources for judicial review at a disadvantage. An ODPS provider argued the change went against the fair administration of justice and queried consistency with Article 6 of the European Convention on Human Rights.
- 2.11 Sky's response on this matter related specifically to the issue of scope decisions (i.e. decisions as to whether or not a particular service meets the definition of an ODPS in section 368A(1) of the Act). It argued that this is an area which differs from broadcasting because the definition of a linear provider is relatively straightforward

compared with that of an ODPS, as evidenced by a high proportion of appeals from ATVOD to Ofcom on scope having been upheld. Sky submitted that scope decisions are particularly important in providing guidance for other service providers, and judicial review is too high a hurdle (including in terms of expense) in this context. Sky argued an internal review process involving appropriately qualified Ofcom staff, reflecting the Interim Procedures, should be retained for scope appeals.

- 2.12 Having reviewed the responses received, Ofcom remains of the view that the draft Procedures are compliant with Article 6 of the European Convention of Human Rights. They follow the same approach with the same rights of appeal as the longstanding Broadcasting Procedures and offer a fair and impartial process. In relation to judicial review costs, clearly the risk of losing a case and being liable for costs will be a factor for potential appellants considering their legal options. However, the draft Procedures set out a fair process giving providers every opportunity to be heard by Ofcom and receive a reasoned decision to enable them to decide whether or not to bring a judicial review.
- 2.13 In relation to Sky's specific points on scope appeals, Ofcom agrees that this is an area where the issues tend to be more complex than for linear broadcast, albeit that area can itself raise a number of jurisdictional issues. This is particularly the case as the on-demand sector remains innovative and evolving and, although a number of important questions have been addressed by ATVOD and Ofcom decisions over the past five years, some new issues continue to arise. As Sky says, scope appeals can also raise issues of general importance (e.g. Ofcom's scope appeal decision in relation to *Sun Video* clearly had relevance for other newspaper and magazine websites). However, many other scope decisions are highly dependent on the specific facts, requiring a balancing exercise based on the layout, styling and content of a particular service with limited read-across to others.
- 2.14 Ofcom agrees that scope decisions require particularly careful consideration, including challenge by appropriately qualified decision makers within Ofcom of assessments and assumptions made by case teams. As we pointed out in our consultation, the scale of Ofcom as an organisation compared with ATVOD allows for a more robust review process before arriving at a decision.
- 2.15 We are not persuaded that the additional step of building a formal "internal appeal" into the Procedures is necessary. It has disadvantages for Ofcom and the industry alike by extending the process and increasing costs, and knowledge that a second stage is available may discourage full stakeholder engagement in the process at the initial stage.
- 2.16 However, we appreciate the wider importance of scope decisions, particularly in a fast developing sector. We can therefore confirm that, at least while the current pace of change in the sector persists, we will ensure that scope decisions are not made by an individual decision maker but will instead involve two or more appropriately qualified Ofcom members of staff with delegated authority from the Ofcom Board as joint decision makers. This will provide challenge not only to the team working on the case, but at the final decision making level within Ofcom.
- 2.17 We have therefore added paragraph 1.45 to the Procedures appended to this statement which reads, *"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."* This provision mirrors the wording of paragraph 1.8 of our *Procedures for the*

*consideration of statutory sanctions arising in the context of on-demand programme services*<sup>5</sup> which we published on 18 December 2015.

Paragraph 1.13: application of broadcasting rules and procedures to “catch-up” ODPS

2.18 Several respondents (Channel Five, ITV, Sky, and another broadcaster/ODPS provider) were opposed to Ofcom considering complaints which had been submitted by viewers in respect of “catch-up” ODPS under broadcasting rules and procedures where the material had recently been shown on a broadcast television service. This proposed approach was set out in paragraph 1.13 of the draft Procedures which stated:

*“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.”*

2.19 Channel Five argued that a complaint about an ODPS should be dealt with under the ODPS Rules and Guidance, and should not be simultaneously investigated under the Broadcasting Code. ITV similarly argued that Ofcom should not assess complaints about an ODPS except where these raised issues under the Rules and Guidance, and should not “convert” a complaint about an ODPS into one about a linear service. Sky submitted it could not envisage circumstances where considering a complaint about catch-up content under the Broadcasting Procedures would be appropriate, and that it would place a greater burden on ODPS providers who also provide a linear service by comparison to ODPS-only providers. Another broadcaster/ODPS provider argued the approach in paragraph 1.13 of the draft Procedures could be unfair to “catch-up” ODPS, and expressed concerns about the process being used as a “backdoor” for complaints about broadcasting standards a significant time after the event. This respondent asked for greater clarity on the meaning of “recently” in this context.

2.20 Ofcom has carefully considered these concerns but does not agree that a change to paragraph 1.13 or to the principle it embodies would be appropriate. While complaints are a valuable way of alerting Ofcom to potential content issues, Ofcom can launch an investigation on its own initiative without any complaint. Therefore, once an issue has come to Ofcom’s attention, any regulatory action taken in response to that will be to protect the wider public through the application of appropriate standards. This is in accordance with Ofcom’s statutory duties under section 3(2)(e) and (f) of the Act to secure, in carrying out its functions, the application of standards to protect members of the public.

2.21 Where material has caused concern to a particular complainant on a “catch-up” ODPS, the complainant may not be aware that it has also recently been broadcast on linear television. But where it has recently been broadcast on a licensed service and raises substantive issues under the Broadcasting Code meriting investigation, Ofcom considers it would generally be appropriate to investigate the broadcast under the Broadcasting Code and Broadcasting Procedures.

2.22 The alternative would be to ignore the broadcast material which raises substantive issues, or to delay an investigation pending assessment under the Rules and Guidance applying only to ODPS. Neither approach would be supportive of Ofcom’s

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<sup>5</sup> [http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised\\_sanctions\\_procedures.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised_sanctions_procedures.pdf)

statutory obligation to secure the application of standards to protect members of the public, as it would result in either a delay to the application of such standards or they would not be applied at all.

- 2.23 Ofcom does not consider this creates unfairness to ODPS providers who also provide a linear service by comparison to ODPS-only providers. Ofcom would simply be enforcing standards applicable to broadcast material to content which has already been broadcast, irrespective of how it came to Ofcom's attention. Clearly, ODPS-only providers or broadcasters who use their ODPS to show content other than "catch-up" will only need to comply with the Rules and Guidance for ODPS and not with the Broadcasting Code. However, the application of different sets of standards is a feature of the statutory scheme as enacted, which is unrelated to the draft Procedures.
- 2.24 In relation to the concern expressed by a broadcaster/ODPS provider over the potential for complaints made too late to be investigated under the applicable broadcasting procedures to fall to be considered under broadcasting standards via the "backdoor", we note that the Broadcasting Procedures state (also at paragraph 1.13) that, "*Complainants should submit their complaint to Ofcom within 20 working days of the broadcast of the relevant programme or of the occurrence of the matter complained of. Ordinarily, Ofcom will not accept a complaint which is made after this deadline.*" The Broadcasting Procedures are thus clear that promptness is important, and that it is not ordinarily appropriate to investigate fundamentally historic matters.
- 2.25 Ofcom can confirm that it will read "recently" in paragraph 1.13 of the new Procedures in the light of paragraph 1.13 of the Broadcasting Procedures. The policy objective is that complaints are brought promptly in the interests of both broadcasters and viewers, and to ensure copies of material remain available. However, we are also mindful of the fact that the Broadcasting Procedures use the word "ordinarily", so making it clear there may be circumstances in which a complaint would be accepted later. As use of "catch up" ODPS has grown, there is a tendency for issues to come to the attention of some potential complainants a little later than may have been the case in the past, and it is possible to envisage circumstances where material is broadcast in a relatively obscure time slot but publicised more heavily a little later on an ODPS. On balance, therefore, we consider the wording of the draft Procedures appropriately captures the need for complaints to be made promptly, and do not consider a change would be appropriate.

#### Paragraph 1.48: encouragement of crime and disorder

- 2.26 ITV noted that paragraph 1.48 listed "encouragement of crime and disorder" as a type of harm covered by the Rules and Guidance, when this is only the case where there is a breach of another Rule (most importantly Rule 10 on incitement of hatred). ITV recognised that encouragement of crime and disorder was an important concern, but said that a drafting change was appropriate to avoid the suggestion of extending the Rules and Guidance beyond the statutory scheme.
- 2.27 Ofcom agrees paragraph 1.48 was not sufficiently clearly expressed and we have deleted the words "encouragement of crime or disorder," from that paragraph in the new Procedures. Of course, encouragement of crime and disorder may well constitute a serious criminal offence quite apart from any breach of content standards, so this is merely a drafting clarification rather than a relaxation of rules in this area.

#### Other matters

- 2.28 Sky said that Ofcom should inform providers promptly of a complaint even if Ofcom believes it is already under investigation to ensure the provider can take necessary steps. Ofcom does not consider this is a matter that should be built into the procedures. The draft Procedures set out that, with exceptions such as for ongoing serious harm, Ofcom would expect complainants to follow the provider's own complaints process first, and it is for providers to progress such complaints thoroughly and promptly whether or not Ofcom has also been alerted.
- 2.29 In relation to expediting the most serious cases, Pact agreed with the principle, but noted it is essential that adequate opportunity is given for representations, and that ODPS providers understand the types of complaint that may give rise to expedition, potentially through Rules and Guidance. Ofcom recognises the need for an adequate opportunity for representations (whilst this may be a very short period in the most serious cases) and this is embodied in the existing legislation. Although it is not possible to give exhaustive examples with a timescale for each as circumstances vary on a case-by-case basis, we will consider in due course whether changes to the Rules and Guidance may further assist ODPS providers in understanding what would be considered particularly urgent.
- 2.30 A programme maker and Reverend Kendall Down both made the broad point that the Procedures should not impose disproportionate burdens on small organisations or individuals. Ofcom agrees, while recognising that the editorial rules applying to ODPS are intended to protect viewers of smaller as well as larger ODPS. Ofcom considers the Procedures are proportionate, and indeed reflect procedures applicable to a variety of smaller and larger broadcasting licensees.
- 2.31 Finally, Action on Hearing Loss expressed frustration about the relative lack of availability of access services. This is a matter Ofcom referred to in our consultation, where we stated that we will be consulting on what more we can do to encourage accessibility as required under section 368C(2) of the Act.
- 2.32 In light of the above, having carefully considered consultation responses, Ofcom has decided to adopt the Procedures (with the addition of paragraph 1.45 and a minor amendment to paragraph 1.48 as noted above) with effect from 1 April 2016.

## Section 3

# Approach to fees

3.1 This section reprises the key reasons for Ofcom's proposal, as set out in its 18 December 2015 consultation, not to charge a fee to ODPS providers under section 368NA of the Act for the financial year 2016-17 and instead to cover the small incremental cost involved in becoming sole regulator of ODPS within the existing fees structure for television broadcasting licensees. It summarises consultation responses received. It sets out that further financial planning work indicates that incremental costs are so small that they are likely substantially to be covered by the surplus which will pass from ATVOD to Ofcom in respect of fees collected but not spent in the 2015-16 financial year. Consequently, it concludes we will neither charge fees under section 368NA nor require television broadcasting licensees to contribute in the 2016-17 financial year. We will re-consult in due course in relation to future financial years.

## Ofcom's reasons for its original proposal

3.2 Ofcom set out three options in our 18 December 2015 consultation. These were:

**OPTION A (preferred option):** Not to charge a fee to ODPS providers under section 368NA of the Act for the financial year 2016-17, and to cover the very small incremental cost involved in becoming sole regulator (rather than co-regulator) of ODPS within the existing fees structure for television broadcasting licensees. This structure consists in particular of Ofcom's *Statement of Charging Principles*<sup>6</sup> which we are required to publish under section 347 of the Act, and the associated tariff tables which are published annually<sup>7</sup>.

**OPTION B:** Not to charge a fee to ODPS providers under section 368NA of the Act (as per Option A) but to amend the Statement of Charging Principles such that ODPS revenues are specifically captured.

**OPTION C:** To charge a fee to larger ODPS providers under section 368NA.

3.3 We noted that, were Ofcom to adopt Option A following consultation, no further process would be required as a system is already in place for setting broadcasting licence fees, and we did not consider changes would be required to accommodate Option A. We noted that if instead we adopted Option B, further consultation would be likely to be required on how to capture the ODPS revenues of broadcast licensees and charge for them. We also said that, were we to adopt Option C, Ofcom would make a costs estimate and propose a fee structure to replace ATVOD's, on which we would consult as required in section 368NA.

3.4 By way of background, we noted that:

- (a) Section 368NA allows the "appropriate regulatory authority" to require providers of ODPS to pay a fee. Any fee must represent an appropriate contribution to the authority's likely costs over the financial year of carrying out its functions, must be sufficient to meet but not exceed those costs. The

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<sup>6</sup> Available at:

[http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging\\_principles.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging_principles.pdf)

<sup>7</sup> Available at: <http://www.ofcom.org.uk/about/annual-reports-and-plans/tariff-tables/>

authority must consult ODPS providers which are likely to be required to pay a fee.

- (b) The “appropriate regulatory authority” referred to ATVOD until 31 December 2015 and to Ofcom after that date. Ofcom was also able, prior to 31 December 2015, to charge fees under section 368NA in its position as co-regulator. We chose not to do so but did receive a small “recouped costs” contribution from ATVOD, and this was reflected in ATVOD’s fee calculation (the calculation amounted to £21,996 in 2015-16).
- (c) ATVOD charged fees for the financial year 2015-16<sup>8</sup>. These varied from £96 per annum for “non-commercial” ODPS with a single outlet, up to £14,135 for “Super A” providers with a turnover over £25.9m. A “group cap” applied for ODPS providers in the same corporate group of £28,725.
- (d) ATVOD consulted on 2015-16 fees. In its resulting statement<sup>9</sup>, ATVOD set out costs estimates and how its fee structure was likely to meet but not exceed costs based on its estimate of the number and size of services it considered it would be regulating in the financial year. Its estimate of total costs was £487,162. The largest cost categories were (i) staff and ATVOD Board remuneration (£353,775); (ii) professional fees (£59,155); (iii) rent (£24,710), (iv) Ofcom recouped costs (referred to above - £21,996); and (v) IT hardware and support (£13,430).

3.5 We said that there were a number of reasons why Ofcom considered Option A to be the appropriate course. In particular:

- (a) We noted that the legislation sets out that it is open to the authority not to require a fee even if (as is inevitable) there are some costs arising from carrying out such functions. The legislation thus recognises that it may be disproportionate to separate out the costs of carrying out functions under Part 4A of the Act from other, closely related costs, and to go through an annual process of recalibrating fees. It envisages that it may be appropriate to cover costs in other ways.
- (b) We set out that the incremental costs for Ofcom regulating ODPS in addition to broadcasting are very small. ATVOD’s cost estimate for the current financial year were £487,162. Ofcom considered that these significantly exceed the incremental costs of Ofcom carrying out the tasks previously carried out by ATVOD under its designation.<sup>10</sup> Consequently, charging a fee would involve allocating a very small incremental cost across a large number of ODPS providers, with the cost of a parallel system beside the system for broadcast licences.
- (c) We said that separating costs of broadcast and ODPS regulation going forward would be complex and artificial given Ofcom will be closely aligning its work on ODPS with its work on broadcasting. Separating out costs would involve a range of assumptions being made in respect of cost allocation, including for individuals and projects which cover both ODPS and broadcast.

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<sup>8</sup> Available at: [http://www.atvod.co.uk/uploads/files/2015-16\\_Fee\\_Tariff.pdf](http://www.atvod.co.uk/uploads/files/2015-16_Fee_Tariff.pdf)

<sup>9</sup> Available at: [http://www.atvod.co.uk/uploads/files/2015-16\\_Fees\\_Statement\\_FINAL.pdf](http://www.atvod.co.uk/uploads/files/2015-16_Fees_Statement_FINAL.pdf)

<sup>10</sup> The bulk of remuneration costs (the largest cost category) related to the ATVOD Board and CEO, who will not transfer to Ofcom on 1 January 2016. Additionally, as Ofcom has existing internal facilities and resources, we did not expect to replicate other important cost categories.

We did not consider this would be proportionate for costs of the magnitude involved.

- (d) We accepted it may still be appropriate to calculate a separate fee under section 368NA on grounds of fairness if the providers paying the bulk of such fees would differ substantially from existing television broadcast licensees. However, we noted that, of the 27 services paying ATVOD's "Super A" fee rate in 2015-16, 25 either were broadcast licensees or were in the same corporate group as such a licensee. Nine of the 13 in the "A" fee rate were also broadcast licensees. Such providers accounted for the large majority of overall fees collected by ATVOD. Ofcom did not therefore consider there was a compelling argument on grounds of fairness between ODPS providers and broadcast licensees for charging a fee under section 368NA.
- 3.6 In relation to alternative options, our consultation noted that Option B is similar to Option A, but would involve making changes to the Statement of Charging Principles to capture ODPS revenues of broadcast licensees which, at the present time, are small compared with broadcast revenues. We said this would be a complex process, including capturing ODPS revenues within the broader corporate groups of broadcast licensees. It would involve only very minor changes to the relative licence fees paid by different broadcast licensees.
- 3.7 Ofcom did not consider that preferring Option A over Option B would involve an unfairness to television broadcast licensees who do not offer (or offer only very small) on-demand services.
- 3.8 We said that, were Ofcom to adopt Option C, this structure would focus on the largest providers and would be very unlikely to involve any fee (or any material fee) for the "long tail" of small ODPS providers. This was because (i) the costs of collection would be disproportionate; (ii) many of these are emerging small businesses and while this does not mean fees are never appropriate we were conscious of the administrative and financial burden; and (iii) we were keen not to create a disincentive for notification under section 368BA of the Act for providers willing to comply with the very limited substantive rules that apply to ODPS. In light of this, we considered it relevant to note that the overlap at this top end with existing broadcast licensees is extensive.
- 3.9 In conclusion, we expressed our view that Option A represented a fair, proportionate and pragmatic approach to apportioning the small incremental costs involved in Ofcom exercising sole regulatory responsibility for programme content on ODPS. We considered that it is an approach that takes into account the objectives of the AVMS Directive in relation to creating a "level playing field", and our intention to align the regulatory approach for ODPS with that applying to linear television broadcasting. We said that we had considered whether section 347 of the Act allows for the recovery of costs of ODPS regulation (which is relevant to both Option A and Option B) and, in light of the close relationship between linear television broadcast and ODPS, we had taken the view that it does.
- 3.10 We noted that the ODPS sector continues to develop and evolve. It would remain open to Ofcom to revisit its position at a later date were ODPS revenues to grow substantially and/or a substantial mismatch to develop between ODPS providers and television broadcast licensees.

## Consultation responses

- 3.11 Respondents had mixed views on the appropriateness of Option A, and the alternative options presented.
- 3.12 One ODPS provider, one broadcaster/ODPS provider, and one programme maker expressed particular support for not charging fees to small ODPS providers. Pact expressed support for Option A, viewing it as proportionate in the current market, whilst saying this may need to be reviewed in future if ODPS providers with no linear television service were to grow significantly in future. A broadcaster/ODPS provider expressed support for costs being met from existing broadcast licence fees.
- 3.13 Other respondents had concerns regarding Option A. In particular, several respondents (A+E, Channel Five, COBA, ITV, Sky and two other broadcasters/ODPS providers) considered it unfair to require linear broadcasters to bear the full cost of regulating ODPS while ODPS-only providers (i.e. ODPS providers not also holding a broadcasting licence) would pay no fee.
- 3.14 Within this overarching fairness issue some respondents noted particular examples of relatively large ODPS-only providers who they said are not current broadcast licensees, in particular Amazon Instant Video, TalkTalk Group, Sainsbury's Supermarkets, Liverpool FC and Chelsea FC were mentioned. Additionally, COBA and ITV argued that actual costs of regulation of ODPS were driven primarily by ODPS-only providers (such as adult services) rather than existing broadcasting licensees, in their view exacerbating the unfairness.
- 3.15 A number of respondents accepted that, notwithstanding what they saw as some unfairness, there was a significant overlap between ODPS providers and broadcast licensees and incremental costs were modest. As such, A+E, COBA and ITV indicated Option A could be practical as an interim or short term solution. However, each emphasised that the growth of the industry meant the unfairness may grow and there was a need to keep the matter under review and revisit it promptly.
- 3.16 Some respondents believed Ofcom may have underestimated the incremental costs of ODPS regulation in our consultation. Channel Five and another broadcaster/ODPS provider argued the costs estimate may be conservative given, respectively, industry growth and Ofcom becoming the sole regulator for editorial video on demand would itself raise the profile of regulation of ODPS. Both considered other costs such as office space and management time should properly be allocated to ODPS.
- 3.17 Sky and a broadcaster/ODPS provider also had particular concerns over the transparency of incremental costs (particularly in future years). Sky noted that section 347 of the Act explicitly required transparency in any fees.
- 3.18 Sky also queried whether there was a close enough relationship between linear television broadcasting and ODPS to allow Ofcom to recover costs under section 347 of the Act, and said that section 368NA of the Act was "the most appropriate (and potentially only) authority for recovery of costs of ODPS regulation by Ofcom". Sky further noted that section 347 requires that any fees be "justifiable and proportionate", and argued this would not be the case if some providers overpaid (due to being broadcast licensees, either with or without an ODPS offering), and some underpaid (ODPS-only providers).
- 3.19 For those respondents arguing that it was unfair not to charge ODPS-only providers, Option B was not a solution as it would not place a charge on such providers. COBA

and Channel Five also considered Option B would involve difficulties in terms of isolating ODPS revenues.

- 3.20 There was some support for a variant of Option C, at least in the medium term. Sky argued all ODPS providers should make an “appropriate contribution”. Channel Five also favoured all contributing, albeit noting this may be a very small amount for smaller providers. Reverend Kendall Down expressed the view that all providers except not-for-profits should make some contribution to costs. A broadcaster/ODPS provider said all should contribute in principle but accepted it may be appropriate to have a clear exemption level at the very low end to avoid disincentives to notify. Another broadcaster/ODPS provider said all “major” ODPS providers should pay a fee. COBA said fees should take into account practice elsewhere in the EU to ensure the UK did not stand out as an expensive place to provide services, and that this may mean charging a fee only to those providers who are not also broadcasting licensees.

## Ofcom response

- 3.21 Ofcom has carefully considered the arguments made by respondents on fees. We understand the arguments of fairness to the effect that it is appropriate that providers of ODPS, particularly those which are relatively large in scale, make some contribution to regulatory costs. Although only a small number are not currently broadcast licensees<sup>11</sup>, we appreciate that this is a developing market and that there is potential for that to change over time. We also note the potential unfairness to those broadcast licensees who do not also operate an ODPS. Consequently, we will re-consult in the 2016-17 financial year with a view to ODPS providers making an appropriate contribution. This means it is not necessary to respond in detail to the responses summarised above.
- 3.22 However, we do wish to set out the impact both for broadcast licensees and ODPS providers in the 2016-17 financial year.
- 3.23 Ofcom will, of course, undertake work on ODPS regulation in the 2016-17 financial year. As noted in our consultation, ATVOD’s £487,162 of costs for the financial year 2015-16 included a number of cost categories such as ATVOD board remuneration and premises, which do not transfer directly to Ofcom. Consequently, we said we expected incremental costs to be “very small”.
- 3.24 Indeed, the financial planning work we were undertaking at the time our consultation was published for the financial year 2016-17, and which has continued since then, indicates that the incremental costs are anticipated to be approximately £96,000. This very small sum is likely to be substantially covered by the surplus which will pass from ATVOD to Ofcom in respect of fees collected but not spent in the 2015-16 financial year. To the extent they are not, it is noted that there is provision under section 368NA(7) of the Act for surpluses and deficits to be carried forward from one financial year to the next and reflected in lower or higher fees in the following year. However, we would emphasise any surplus or deficit would be likely to be minimal in this case.
- 3.25 Consequently, for the financial year 2016-17, we neither need to charge a fee to ODPS providers under section 368NA of the Act, nor has our becoming sole regulator for programme content on ODPS resulted in fees for broadcast licensees under

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<sup>11</sup> As noted in our consultation, this accounts for 25 of the 27 providers who paid ATVOD’s “Super A” rate for 2015-16. In addition to Amazon Instant Video and Sainsbury’s, consultation responses referred to TalkTalk, Chelsea FC and Liverpool FC. These three are in fact also broadcast licensees, albeit their current broadcast licence fees are low compared with the “Super A” rate.

section 347 being higher than would otherwise have been the case. We can confirm that the tariff tables published on 30 March 2016 for the financial year 2016-17 do not seek to recover the small cost category referred to above from broadcast licensees. As noted, we will consult in due course on the approach for future financial years.

## Annex 1

# Procedures for investigating breaches of rules for on-demand programme services

## 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 providers<sup>12</sup>.
- 1.2 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. 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

- 1.3 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;
  - (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.
- 1.4 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.

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<sup>12</sup> 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.

- 1.5 Ofcom has published Rules and Guidance<sup>13</sup> which set out the statutory requirements applying to ODPS (apart from those for advertising content) and provide non-binding guidance.
- 1.6 These Procedures cover potential breaches of any rules applying to ODPS providers except rules for advertising. The Advertising Standards Authority (“ASA”)<sup>14</sup> 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 ASA<sup>15</sup>.
- 1.7 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

- 1.8 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:

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

#### Editorial Content Rules

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

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<sup>13</sup> Available at: [http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules and Guidance.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules_and_Guidance.pdf)

<sup>14</sup> [www.asa.org.uk](http://www.asa.org.uk)

<sup>15</sup> <https://www.asa.org.uk/Consumers/How-to-complain.aspx>

- Product Placement (Rule 13).
  - Harmful Material: Prohibited Material (Rule 14).
- 1.9 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 1.12).
- 1.10 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](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.
- 1.11 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.
- 1.12 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 1.2).
- 1.13 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**

- 1.14 Ofcom requests that complaints are submitted on its complaint form.<sup>16</sup> 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. Alternatively, you can contact us by post at the following address:

Ofcom  
 VOD Complaints  
 5<sup>th</sup> Floor  
 Riverside House

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<sup>16</sup> Ofcom is currently consulting on proposals not to require ODPS to pay fees.

2a Southwark Bridge Road  
London  
SE1 9HA

- 1.15 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.

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.

- 1.16 Unless a complainant specifically requests at the time a complaint is made that his/her name and contact details should remain confidential, Ofcom reserves the right to disclose these to the ODPS provider.<sup>17</sup>

### **Making a complaint promptly**

- 1.17 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.
- 1.18 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.
- 1.19 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

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<sup>17</sup> Ofcom is a 'prescribed person' under the Public Interest Disclosure Act 1998 and has published guidance at: <http://www.ofcom.org.uk/about/policies-and-guidelines/procedure-for-making-a-disclosure-to-ofcom-under-the-public-interest-disclosure-act-pida/> on how to make a disclosure to Ofcom under the provisions of this Act.

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.

- 1.20 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.
- 1.21 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**

- 1.22 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.
- 1.23 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.
- 1.24 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.<sup>18</sup> At this stage it is not appropriate for the ODPS provider to provide written representations.
- 1.25 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 Bulletin<sup>19</sup> if the matter relates to compliance with a "public facing" rule. "Public facing" rules relate to editorial content or the 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).
- 1.26 Ofcom aims to complete an initial assessment of complaints within 15 working days.

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<sup>18</sup> 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.

<sup>19</sup> The Broadcast and On Demand Bulletin is published fortnightly on Ofcom's website: <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/>

## **Investigating possible breaches and preparation of Ofcom's Preliminary View**

- 1.27 Other than in cases falling within paragraph 1.28 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 1.25 above).
- 1.28 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 1.27 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 1.30 below. There may also be other cases where the matter(s) concerned, on the facts, mean this approach is appropriate.
- 1.29 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**

- 1.30 On receipt of the ODPS provider's representations,<sup>20</sup> Ofcom will then prepare its preliminary view on the substance of the complaint(s). This preliminary view is only provisional and may be subject to change in the light of subsequent representations/material provided by the ODPS provider (and any relevant third party), see paragraphs 1.32 and 1.33 below. Members of Ofcom's Content Board will be

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<sup>20</sup> In cases where paragraph 1.27, not 1.28, above applies.

provided with all preliminary views before they are provided to the ODPS provider.<sup>21</sup> 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.

1.31 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.

1.32 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.

1.33 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 and inform the ODPS provider.<sup>22</sup>

## Publication of Decision

1.34 Before publishing the Decision, Ofcom will provide the ODPS provider with a strictly embargoed copy for the purposes of correcting factual inaccuracies only. The ODPS provider will be given 48 hours in which to respond with such corrections, following which Ofcom will publish the Decision.

1.35 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/>

1.36 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 1.25 above).

## Non-Disclosure

1.37 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes that all parties concerned abide by all Ofcom's published rules and procedures. These require, for example, that parties to a complaint should not disclose any correspondence, documents and other material concerning the complaint<sup>23</sup> during

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<sup>21</sup> The Content Board is a committee of the main Ofcom Board established by the Communications Act 2003. It includes members with extensive content standards experience. See <http://www.ofcom.org.uk/about/how-ofcom-is-run/content-board/functions-and-role/>

<sup>22</sup> Members of Ofcom's Content Board will be provided with all Decisions before they are provided to the ODPS provider.

<sup>23</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

the course of the investigation (see grey box below). This requirement of non-disclosure does not limit what Ofcom can publish in its decision at the end of the investigation.

### **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, 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 complaint or case.<sup>24</sup> Moreover, once a complaint has been made or Ofcom has started investigating a case, no party should take any steps which could – whether intentionally or not – compromise, or risk compromising, a fair decision on the matter by Ofcom or otherwise constitute, in Ofcom’s opinion, an abuse of process.

Failure to follow these requirements may result in Ofcom ceasing to consider the party’s representations.

### **Time limits**

1.38 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**

1.39 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 1.34 and 1.35 above) and the “Procedures for the consideration of statutory sanctions arising in the context of On-Demand Programme Services” will apply.<sup>25</sup> These are available on Ofcom’s website at [http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised\\_sanctions\\_procedures.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Revised_sanctions_procedures.pdf)

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2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of a complaint 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>24</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 broadcaster will be notified that relevant material has been withheld and the reasons why.

<sup>25</sup> 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.

## Complaints raising questions of scope

- 1.40 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.
- 1.41 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 services<sup>26</sup>. If it does not, Ofcom would not generally assess the matter further.
- 1.42 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.
- 1.43 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.
- 1.44 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.
- 1.45 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.

## Directions

- 1.46 Ofcom has the power under the Act<sup>27</sup> 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:

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<sup>26</sup> 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.

<sup>27</sup> See sections 368K and 368L of the Act, which relate to contraventions and to inciting crime or disorder respectively.

- 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.

1.47 A Notice of Direction will normally be published in Ofcom's Broadcast and On Demand Bulletin.

1.48 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 1.39 would apply.

### **Expedited processes**

1.49 As noted in paragraph 1.2 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.

1.50 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.