



Procedures for the
consideration of statutory
sanctions arising in the context of
on-demand programme services

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Ofcom procedures for the consideration of statutory sanctions arising in the context of on-demand programme services

Overview and general information

- 1.1 This document outlines the procedures that Ofcom will normally follow when considering the determination of a sanction against the provider of an on demand programme service (“ODPS”)¹ for contravention of one (or more) of the requirements imposed on them under Part 4A of the Communications Act 2003² (the “Act”). In this document these requirements are referred to as “relevant requirements”.
- 1.2 These procedures were introduced on 18 February 2015.³ Minor amendments were introduced which have effect from 1 January 2016 to reflect the ending of the co-regulatory regime under which the Authority for Television on Demand (“ATVOD”) was designated to carry out certain functions in relation to regulation of ODPS content (except advertising which is a co-regulatory responsibility of the Advertising Standards Authority (“ASA”)). The designation did not include the function of considering statutory sanctions, but clearly its ending has an impact on how sanctions cases come to Ofcom for consideration.
- 1.3 If Ofcom considers that it would be fairer and more appropriate to follow a different procedure in any particular case, we will explain our reasons for departing from these procedures. It is noted that the statutory rules applying to ODPS include, for example, rules prohibiting material likely to incite hatred, and material which might seriously impair the physical, mental or moral development of under eighteens. The urgency of addressing potential ongoing harm where material remains available on-demand on an ODPS is one example of a reason why it might be appropriate to depart from these procedures.
- 1.4 Ofcom’s powers include the power to determine whether or not an ODPS provider is contravening, or has contravened, any of the relevant requirements of the Act and to issue enforcement notifications⁴ where it has reasonable grounds for believing that an ODPS provider has contravened certain of its statutory obligations.⁵ Ofcom may enforce compliance with an enforcement notice by issuing civil proceedings.⁶
- 1.5 The Act places a statutory duty on ODPS providers to comply with the relevant requirements. These requirements include that ODPS providers must:
 - give advance notification (to Ofcom) of the provision of their service or their intention to provide the service;⁷
 - supply specified information to users of the service;⁸
 - pay any required fees (to Ofcom);⁹

¹ An “on-demand programme service” is defined in section 368A of the Act, and an ODPS provider has the associated meaning.

² As amended by The Audiovisual Media Services Regulations 2009 (SI 2009/2979) and the Audiovisual Media Services Regulations 2010 (SI 2010/ 419).

³ The procedures set out in this document, and any related guidance, may be reviewed and amended at any time. Any major revision will be the subject of prior consultation.

⁴ Under sections 368BB(1)(a) and 368I(1)(a).

⁵ This includes the obligations under section 368BA, 368D, 368G, 368H and 368O of the Act.

⁶ Under sections 368BB(6) and 368I(8) of the Act.

⁷ Section 368BA (n.b. re-notification is not required for services notified with ATVOD as at 31 December 2015).

⁸ Section 368D.

⁹ Section 368NA.

- keep a copy of every programme contained in the service;¹⁰
- ensure that the service does not contain material which is likely to incite hatred on the grounds of race, sex, religion or nationality;¹¹
- ensure that the service does not contain any “prohibited material”;¹²
- protect those under 18 years of age from being exposed to “specially restricted material”;¹³
- ensure that restrictions on advertising, sponsorship and product placement are observed;¹⁴ and
- provide Ofcom (or the ASA for advertising content) with such information as it may require for carrying out investigations.¹⁵

1.6 In the event of a contravention of the Act by an ODPS provider (including non-compliance with any enforcement notification issued by Ofcom), Ofcom has the power to impose on that provider statutory sanctions as contained in sections 368I – 368L of Part 4A of the Act. The imposition of a sanction against an ODPS provider is a serious matter. Ofcom may, following due process, impose a sanction if it considers that an ODPS provider has seriously, deliberately, repeatedly¹⁶ or recklessly breached a relevant requirement.

1.7 The statutory sanctions available to Ofcom include:

- the imposition of a financial penalty; and
- the issuing of a direction to suspend or restrict the entitlement to provide the ODPS.

Financial penalty

The maximum fine for a contravention of the Act is £250,000 or an amount up to 5% of the ODPS provider’s “applicable qualifying revenue”,¹⁷ whichever is the greater.

1.8 Sanctions decisions reached under these procedures will be made (and, where relevant, preliminary views taken) by two senior members of the Ofcom Executive who have been given the appropriate delegated authority by the Ofcom Board. The Executive officers will normally be the Director of Content Standards, Licensing & Enforcement¹⁸ and another member of the Ofcom Executive of at least equivalent seniority and with the appropriate delegated authority. Where Ofcom considers it necessary, decisions will be reached by the Ofcom Executive Officers together with Non-Executive member(s) of Ofcom’s Content Board.

¹⁰ Section 368D(3)(zb).

¹¹ Section 368E(1).

¹² Section 368E(2) and Section 368E(3).

¹³ Section 368E(4) and Section 368(5).

¹⁴ Sections 368F – 368H.

¹⁵ Sections 368O.

¹⁶ A repeated contravention of a relevant requirement would include, for example; a repeat of the contravention of the same requirement as has already been recorded; repetition of the same or similar conduct as that which earlier contravened a requirement; or multiple contraventions of other requirements.

¹⁷ For the purposes of imposing a sanction, “qualifying revenue” for an accounting period consists of the aggregate of all the amounts received, or to be received, by the provider (or any “connected person” as defined by the Broadcasting Act 1990) of the service to which the contravention relates for the inclusion in that service of advertisements, product placement and sponsorship and in respect of charges made in that period for the provision of that service (section 368J(4)). The “applicable qualifying revenue” in relation to a provider means either the qualifying revenue for the provider’s last complete accounting period falling within the period during which the provider has been providing the service to which the contravention relates **OR**, in relation to a person whose first complete accounting period has not ended when the penalty is imposed, the amount of that the appropriate regulatory authority estimates to be the qualifying revenue for that period (section 368J(3)).

¹⁸ Or a Director of equivalent seniority should the Director of Content Standards, Licensing & Enforcement be unavailable for any reason.

Procedures

Consideration of sanctions

- 1.9 The consideration of a sanction follows a decision by Ofcom that an ODPS provider has contravened a relevant requirement. As indicated above, a case will normally be considered for the imposition of a statutory sanction when Ofcom considers that an ODPS provider has seriously, deliberately, repeatedly, or recklessly contravened a relevant requirement.
- 1.10 If Ofcom considers that a sanction may be appropriate, it will write to the ODPS provider with the following information as appropriate:
- details of the contravention(s);
 - comments on any issue raised by the ODPS provider that is material to the case;
 - details of any relevant cases on which Ofcom has already adjudicated;
 - details of the ODPS provider's recent compliance history;
 - details of Ofcom's preliminary view on the type and level of any sanction considered to be appropriate and proportionate; and
 - a summary of the material on which Ofcom has relied in reaching its preliminary view.

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

- 1.11 Where, at this stage, Ofcom considers that the appropriate sanction should include a financial penalty then it will, as appropriate, consider the penalty in accordance with the Penalty Guidelines published by Ofcom at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.
- 1.12 Where the sanction under consideration involves the suspension or restriction of the service, Ofcom will set out:¹⁹²⁰
- its reasons for taking this view;
 - (in appropriate cases) its reasons for being satisfied that an attempt to secure compliance with the relevant requirements by issuing an enforcement notification or imposing a financial penalty has failed;
 - (in appropriate cases) details of steps that the ODPS provider must take in order to remedy the relevant contravention and any conditions that Ofcom might include in any potential direction to suspend or restrict the service;
 - the period the ODPS provider has for taking any specified steps and making representations; and
 - the effects of the relevant sanction(s).
- 1.13 Ofcom will then invite the ODPS provider to make representations on its preliminary view of the type and level of any sanction being proposed. Depending on the type and level of any sanction, this may be by written and/or oral representations as Ofcom may consider appropriate.

¹⁹ Where the sanction under consideration involves the suspension or restriction of the service, the information provided to the ODPS Provider at this stage may constitute a "notice" under section 368K of the Act. Where the information does constitute such a formal notice, Ofcom will make this clear and the information provided will be in line with any applicable statutory requirements.

²⁰ Where the sanction proposed is a suspension or restriction of a service under section 368L (suspension or restriction of service for inciting crime or disorder) of the Act, Ofcom will normally put to the ODPS Provider a preliminary view that we are minded to serve a notice under that section. The provider may make representations on this preliminary view as set out in paragraphs 1.13 - 1.15 before Ofcom decides whether to serve the notice. However, it is noted that section 368L covers matters which are inherently serious (incitement to crime or disorder) and provides for the possibility of suspension prior to any representations. Ofcom may, in appropriate cases, not issue a preliminary view and move directly to issuing a notice, or may substantially reduce the period for representations on such a view.

ODPS provider representations

- 1.14 When invited to make written representations on a sanctions case, an ODPS provider should do so within 15 working days, unless otherwise specified.²¹ In some circumstances, Ofcom may, at its discretion, invite an ODPS provider to submit one or more sets of subsequent representations on a case, as Ofcom sees fit (it will also do so in cases where the statutory process requires so).²² Ofcom may also request any information it requires from the ODPS provider, to assist its understanding of the case or if it is necessary to ensure that the process is fair.

Oral representations

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

Disposal

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

Sanctions Decision

- 1.18 If, after considering all the evidence and representations from the ODPS provider, Ofcom believes that a sanction is appropriate, it shall consider which of the available sanctions is appropriate and will reach a decision to this effect.²³

Suspension or restriction of entitlement to provide an ODPS

- 1.19 Where, having considered the ODPS provider's representations on Ofcom's preliminary view, Ofcom decides to serve on the provider a notice under section 368L of the Act,²⁴ the suspension or restriction of the service under that notice will take effect immediately from the date the notice is served.²⁵ The ODPS provider will then have 21 days to make (further) representations to Ofcom about whether Ofcom should issue a direction confirming the suspension or restriction of the service.²⁶

²¹ This time-frame may depend on the nature and circumstances of the case. For example, in urgent cases, it may be appropriate to allow an ODPS provider no more than 24 hours to make representations.

²² For example, where Ofcom decides to serve on an ODPS provider a notice under section 368L of the Act, the provider will have the opportunity to make (further) representations within 21 days in accordance with section 368L(2)(e) (see paragraph 1.18).

²³ Again, where Ofcom decides that the appropriate sanction should include a financial penalty, then it will, as appropriate, have regard to the Ofcom Penalty Guidelines published at <http://www.ofcom.org.uk/about/policies-and-guidelines/penalty-guidelines/>.

²⁴ In relation to a failure to comply with any requirement of sections 368E – 368H that is due to the inclusion in the service of material likely to encourage or to incite the commission of crime or lead to disorder.

²⁵ Section 368L(4)

²⁶ In accordance with sections 368L(2)(e) and (5) of the Act.

1.20 If, at the end of the period specified by Ofcom for making representations,²⁷ and having considered any such representations made by the ODPS provider, Ofcom is satisfied that:

- (in appropriate cases) the specified steps set out in any notice under section 368K have not been taken; and
- (in all cases) it is necessary in the public interest to give a direction, Ofcom will issue a direction either suspending or restricting the ODPS provider's entitlement to provide an ODPS.

1.21 ODPS providers should note that Ofcom will regard any failure by an ODPS provider to comply with an enforcement notification requiring the payment of any fee imposed under section 368NA of the Act as a serious breach of a relevant requirement²⁸. Ofcom is likely, subject to an ODPS provider's representations, to consider that the appropriate sanction would be issuing a direction suspending or restricting the ODPS provider's entitlement to provide a service.

Publication of a Sanctions Decision

1.22 The Sanctions Decision will normally be sent to the ODPS provider 24 hours before its publication. Where the sanction includes a financial penalty, the level of the penalty will be omitted. The ODPS provider will be notified of the level of any financial penalty immediately before the publication of the decision.

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

1.24 Ofcom's decision is final.

Non-Disclosure

1.25 Subject to any relevant obligations, it is an essential part of the integrity of Ofcom's processes and its ability to regulate fairly that all parties concerned abide by all Ofcom's published rules and procedures. These require, for example, that parties to a consideration of a sanction should not disclose any correspondence, documents and other material concerning that case²⁹ during the course of it being considered by Ofcom (see text box below). This requirement of non-disclosure does not limit what Ofcom may disclose in the proper performance of its functions and/or can publish in its decision at the end of its consideration of the sanction.³⁰

Non-Disclosure

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

²⁷ Either under paragraphs 1.13 – 1.15 above, in cases where Ofcom is considering a suspension or restriction of a service under section 368K of the Act, or under paragraph 1.18 where Ofcom has served a notice under section 368L.

²⁸ Note that section 368NA allows but does not require fees to be imposed.

²⁹ Ofcom is obliged to meet various statutory obligations relating to the disclosure of information (for example, under the Freedom of Information Act 2000 and the Environmental Information Regulations 2004). Such obligations do not allow the use of exemptions by Ofcom in an arbitrary fashion. Information provided to Ofcom as part of an appeal may need to be disclosed by Ofcom in order to meet such obligations and nothing in these procedures can prevent Ofcom from doing so.

³⁰ Ofcom may withhold material it believes to be confidential, market 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 reason why.

Moreover, once Ofcom has started a sanctions process, the ODPS provider should not take any steps which could – whether intentionally or not – compromise, or risk compromising, a fair decision on the matter by Ofcom or otherwise constitute, in Ofcom’s opinion, an abuse of process.

Time limits

- 1.26 ODPS providers should keep to the time limits specified in these procedures. The time limits may be extended or shortened, in appropriate circumstances, at Ofcom’s discretion. Any ODPS provider seeking an extension to a time limit should explain in writing to Ofcom why it believes the relevant time limit should be extended.

Failure to follow procedures

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

Failure to comply with a suspension, restriction

- 1.28 ODPS providers should be aware of the importance of complying with a sanction that is imposed in accordance with these procedures. For instance, a person may be guilty of an offence and liable to a fine if an ODPS Provider continues to operate an ODPS in contravention of a suspension or restriction imposed under sections 368K, or 368L.³¹

³¹ See section 368N of the Act.