



Proposals for the regulation of  
video on demand services  
Consultation

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## Section 1

# Executive Summary

## Introduction

- 1.1 In today's media landscape, as well as traditional linear broadcasting services, there are now a number of video on demand ("VOD") services which provide consumers and citizens with "television-like" content. Legislation has been passed at the European level (the EC Directive 2007/65/EC – Audio Visual Media Service ("AVMS") Directive) seeking to create a level playing field for emerging audiovisual media services in Europe; and to protect consumer and citizen interests by ensuring that these services will be subject to some basic content standards. These standards will apply to "television-like" VOD services – including those provided on the open internet – for the first time. The UK Government's approach to implementing this legislation means that:
- VOD services will be regulated for the first time;
  - this regulation will consist of a range of minimum content standards;
  - it is proposed that the new rules relating to VOD services should, subject to consultation, be delivered through a co-regulatory framework; and
  - Ofcom will be given primary responsibility, including back-stop powers, to ensure the effective operation of the co-regulatory framework.
- 1.2 Ofcom will be required to give effect to a number of requirements relating to the AVMS Directive by 19 December 2009. These relate not just to VOD services but cover all audiovisual media services in the digital age. The AVMS Directive amends and renames the Television Without Frontiers ("TVWF") Directive, providing less detailed and more flexible regulation.
- 1.3 This consultation paper sets out the basis on which Ofcom proposes to fulfil its statutory duties relating to the regulation of VOD editorial services ("VOD editorial content") and VOD advertising content included in those services ("VOD advertising"). Specifically, we are seeking stakeholders' views on the following:
- a) the issue of how to decide which VOD services come within the ambit of the new VOD regulations, or are deemed to be "in scope"; and how the regulator is notified about these services; and,
  - b) the issue of the practical implementation of the regulations and whether the proposals from industry for a co-regulatory framework, in relation to both VOD editorial services and VOD advertising, provide an appropriate basis for Ofcom to designate co-regulatory functions.

## Background

- 1.4 As discussed in Section 2 of the consultation document, the AVMS Directive requires that the UK regulates VOD editorial content and VOD advertising either directly or, at a minimum, through a co-regulatory system for VOD editorial and VOD advertising. In 2008, the Government consulted ("the Consultation") on alternative approaches to securing the regulation of VOD services including direct and co-regulatory models.

- 1.5 The Government's conclusion from the Consultation was that a co-regulatory approach was its preferred approach to fulfilling the VOD requirements of the AVMS Directive. Following the Consultation, in March 2009, the Secretary of State for Culture, Media and Sport published a written statement ("the Ministerial Statement") on the implementation of the AVMS Directive. The Ministerial Statement emphasised it was the view of Government that industry should be allowed and encouraged to set up and manage its own regulatory arrangements as far as possible, with Ofcom retaining back-stop powers. A first draft of the regulations to be used to implement the AVMS Directive was made available to stakeholders in mid-May 2009, following which a further updated draft was circulated in July 2009. These regulations ("the proposed Regulations") set out Ofcom's: duty to regulate VOD services; and designate all or any of these functions to a co-regulatory body or bodies in accordance to the specific criteria that the proposed Regulations lay out.

### **VOD services subject to regulation**

- 1.6 Central to the working of the new regulatory framework is the need to determine which services will be subject to regulation i.e. are in "scope". In Section 4 of this consultation document, we set out and examine the criteria, contained in the proposed Regulations, that determine which services will fall "in scope" of the new regulatory regime. Whether a service is "in scope" is defined by a range of criteria, including: whether the principal purpose of a service is to provide "television-like" programmes, on an on-demand basis, to members of the public; whether such a service falls under UK jurisdiction for the purposes of regulation; and whether the service is under a person's "editorial responsibility".
- 1.7 We then propose:
- a) Scope Guidance (see attached at Annex 6), drawn up in conjunction with the industry-led VOD Editorial Steering Group ("VESG"), to help service providers determine whether they will be subject to regulation. This part of the consultation document also lays out an indicative, non-exhaustive list of services which Ofcom believes, on a preliminary analysis, are likely to be considered to be in scope. This list is illustrative only, and must not be seen as pre-judging the decisions of the proposed co-regulator and/or Ofcom in this area; and
  - b) an allocation of functions relating to the notification process, such that service providers subject to the rules of the AVMS Directive must notify Ofcom (or, if a designation is made, the co-regulator) that they are providing a service subject to regulation. The allocation of functions covers Ofcom's involvement in borderline decisions, when it is not clear whether a service should be in or out of scope of the new co-regulatory regime.

Stakeholders are invited for their views on these two proposals, and suggest alternative approaches, if they think appropriate.

### **The regulation of VOD editorial content**

- 1.8 In Section 5 of the consultation document, we examine and evaluate a proposal from the Association for Television on Demand ("ATVOD") to act as the co-regulator for VOD editorial content. We then invite stakeholders to give their views concerning our proposal to designate ATVOD as the co-regulator for VOD editorial, and provide the opportunity for stakeholders to suggest alternatives to our proposals.

- 1.9 While VOD editorial content is not currently subject to formal regulation, there are two self-regulatory schemes in place administered by ATVOD and the Independent Mobile Classification Body (“IMCB”). ATVOD, whose membership includes many of the larger VOD service providers in the UK, regulates many (but not all) VOD services under its Code. The AVMS Directive requires that VOD editorial content complies with minimum standards. In brief, these require that VOD editorial content:
- a) should not contain any incitement to hatred based on race, sex, religion or nationality;
  - b) which might seriously impair the physical, mental, or moral development of minors is only made available in such a way that ensures that minors will not normally hear or see such content;
  - c) should fulfil the rules on sponsorship laid down in the AVMS Directive; and
  - d) may contain product placement, but only subject to conditions laid down in the AVMS Directive.
- 1.10 Under ATVOD’s proposal (see attached at Annex 7) , ATVOD would remodel itself from a self-regulatory membership-based organisation into an industry wide co-regulator for the purpose of ensuring compliance with the regulations, which duties Ofcom would then delegate to it. By 19 December 2009, ATVOD proposes to undertake a range of tasks (e.g. recruit a new Chair and Chief Executive; publish revised complaints procedures; and complete the development of a new funding structure based on the income it will receive from notifying VOD services).
- 1.11 Our basis for assessing ATVOD’s proposal is drawn from two sources: firstly, the proposed Regulations require us to satisfy ourselves that any body to which we propose to designate regulatory functions, meets a series of criteria (e.g. that it is fit and proper; sufficiently independent of providers of VOD services etc); and second, Ofcom’s *Principles for Analysing Self-and Co-regulation* require us to set a clear framework under which we can consider if an when it may be appropriate to operate a self- or co-regulatory system.
- 1.12 Having undertaken our assessment according to both the statutory and our own criteria, Ofcom is of the view that ATVOD satisfies the criteria required by the regulations for a designated body, and therefore would be fit-for-purpose to be designated on 19 December 2009. Ofcom is therefore proposing to designate ATVOD as the relevant co-regulator for VOD editorial content. However, as we also explain, ATVOD is carrying out further work to ensure that it would be ready to take on the relevant responsibilities by this date.

### **The regulation of VOD advertising**

- 1.13 In Section 6, we examine and evaluate the proposal from the Advertising Standards Authority (“ASA”) to act as the co-regulator for VOD advertising. Stakeholders are invited for their views concerning our proposal to designate the ASA as the co-regulator for VOD advertising, and suggest alternatives to our proposals, if they think appropriate.
- 1.14 In relation to VOD advertising, at present there is a self-regulatory model in place which is overseen by the ASA under the Code on Advertising Practice. The AVMS Directive requires that VOD advertising complies with minimum standards. In brief, these require that VOD advertising:

- a) should be readily recognisable as such. In particular surreptitious advertising is prohibited, as are subliminal techniques;
  - b) should not prejudice respect for human dignity, or include or promote discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
  - c) should not encourage behaviour that is prejudicial to health or safety, or grossly prejudicial to the protection of the environment;
  - d) is not permitted for cigarettes and other tobacco products, or for prescription-only medicinal products or medical treatment; advertisements for alcohol products may not be aimed at minors, and shall not encourage immoderate consumption of alcohol; and
  - e) may not cause physical or moral detriment to minors; exploit their inexperience or credulity or the special trust they repose in parent, teachers and others by encouraging them to persuade their parents or others to buy advertised products or services; or unreasonably show minors in dangerous situations.
- 1.15 In the Ministerial Statement, the Government said that its strong preference would be for Ofcom to designate the ASA to be the new co-regulatory body for VOD advertising, thus maintaining the ASA's role as a one-stop shop for all complaints about advertising.
- 1.16 Ofcom, and the ASA, have discussed the basis on which the ASA could be designated as the new co-regulatory body for VOD advertising (see attached at Annex 8). If the ASA were to be designated as the new co-regulatory body for VOD advertising, it is proposed that the ASA would handle complaints relating to VOD advertising in a similar way to complaints about advertising in other media. Ofcom would expect the ASA to be able to resolve almost all issues without the need for a reference to Ofcom. However, Ofcom would reserve to itself the power to impose sanctions, thereby replicating the arrangements that apply to broadcast advertising.
- 1.17 Our basis for assessing the ASA's proposal is drawn from the same two sources outlined in paragraph 1.11 above. Having undertaken our assessment according to both the statutory and our own criteria, Ofcom is of the view that the ASA satisfies the criteria required by the regulations for a designated body, and therefore would be fit-for-purpose to be designated on 19 December 2009. Ofcom is therefore proposing to designate the ASA as the relevant co-regulator for VOD advertising. This seems to Ofcom the most appropriate course of action because the ASA is a well-established organisation with a proven and fit-for-purpose co-regulatory relationship with Ofcom.

### **Approach to impact assessment**

- 1.18 This consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including citizens and consumers; and VOD service providers). This assessment has been informed by our pre-consultation discussions with stakeholders and by the Government's Consultation.
- 1.19 In Section 7 of the consultation document, we invite stakeholders' views as to whether our proposals have any impacts in relation to matters of equality.

## Next Steps

- 1.20 We now seek stakeholders' views on these proposals. The consultation responses will enable us to consider our proposals in light of stakeholder comments. We will publish a summary of responses and statement prior to 19 December 2009 (the implementation date for the AVMS Directive).

## Section 2

# Background

## Introduction

2.1 In today's media landscape, as well as traditional linear broadcasting services, there are now a number of video on demand ("VOD") services which provide consumers and citizens with "television-like" content. Legislation has been passed at the European level (the EC Directive 2007/65/EC – Audio Visual Media Service ("AVMS") Directive) seeking to create a level playing field for emerging audiovisual media services in Europe; and to protect consumer and citizen interests by ensuring that these services will be subject to some basic content standards. These standards will apply to "television-like" VOD services – including those provided on the open internet – for the first time. The UK Government's approach to implementing this legislation means that:

- VOD services will be regulated for the first time;
- this regulation will consist of a range of minimum content standards;<sup>1</sup>
- the new rules relating to VOD services should, subject to consultation, be delivered through a co-regulatory framework; and
- Ofcom will be given primary responsibility, including back-stop powers, to ensure the effective operation of the co-regulatory framework.

2.2 This section sets out:

- a) background information on the AVMS Directive and VOD;
- b) the Government's stated approach to the regulation of VOD;
- c) an overview of the VOD industry; and
- d) how VOD services are currently regulated.

## The AVMS Directive and Video on Demand

2.3 The AVMS Directive came into force on 19 December 2007 and must be implemented into UK law by 19 December 2009 ("the Implementation Date")<sup>2</sup>. The Government consulted ("the Consultation") on its proposals for implementation in July 2008<sup>3</sup>, and on 11 March 2009 the Secretary of State for Culture Media and Sport published a written statement ("the Ministerial Statement") on the implementation of the AVMS Directive setting out how the Government intended to proceed with implementation<sup>4</sup>. Implementing regulations are expected to be laid before Parliament in the autumn. These will amend the Communications Act 2003 ("the Act") to give effect to a number of requirements in the AVMS Directive, including setting up a regulatory framework for the regulation of VOD services. A first draft of the

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<sup>1</sup> See paragraphs 5.3 to 5.4 and 6.3 for further details of the minimum standards.

<sup>2</sup> Relevant excerpts from the AVMS Directive are attached at Annex 5.

<sup>3</sup> See [http://www.culture.gov.uk/images/consultations/AVMS\\_Consultation\\_Document.pdf](http://www.culture.gov.uk/images/consultations/AVMS_Consultation_Document.pdf)

<sup>4</sup> See [http://www.culture.gov.uk/reference\\_library/minister\\_speeches/5932.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx)

regulations was made available to stakeholders in mid-May 2009, following which a further, updated draft was circulated in July. References in this consultation are to this later version of the proposed regulations (“the proposed Regulations”). It should be noted that Ofcom does not have ownership of these and is not consulting on their content. The Government has already consulted on its proposals as well as seeking the views of stakeholders on the proposed Regulations.

- 2.4 The AVMS Directive covers all audiovisual media services - including on-demand services - in the digital age. It amends and renames the Television Without Frontiers (“TVWF”) Directive (EC Directive 89/552/EEC), providing less detailed but more flexible regulation. The new rules reflect technological developments and create a level playing field in Europe for emerging audiovisual media.
- 2.5 One of the results of the AVMS Directive will be that certain types of VOD service will be subject to television-like regulation for the first time. Both VOD editorial services (“VOD editorial content”) across all platforms, including the internet, and VOD advertising content included in those services (“VOD advertising”), fall within the terms of the AVMS Directive.

### **The Ministerial Statement and Government approach**

- 2.6 In its Consultation on proposals for implementing the AVMS Directive, the Government made clear that its policy was to limit the scope of UK regulation to the narrow range of VOD services falling within the scope of the AVMS Directive, rather than extending regulation more broadly than the AVMS Directive requires. This position: was reaffirmed in the subsequent Ministerial Statement published in March 2009; and highlighted that the AVMS Directive’s definition of the on-demand services to be regulated is narrow and covers only mass media services whose principal purpose is to provide television-like programming to users. Therefore, only those services that include programmes similar to those available on television broadcast services should be regulated.
- 2.7 The AVMS Directive requires that the UK imposes, as a minimum, a co-regulatory system for VOD services that fall within the scope of the AVMS Directive. In particular, the AVMS Directive requires Member States to put in place a range of minimum standards covering the content of VOD services, so as to ensure adequate protection of consumers and citizens<sup>5</sup> and the Government has made clear that its strong preference, supported by the AVMS Directive, is for a system of co-regulation to secure the new requirements in relation to VOD editorial content and VOD advertising included in such services. The Ministerial Statement announced that Ofcom would be given powers to regulate UK VOD services so that it could then designate, and delegate powers to, an industry-led co-regulatory body to regulate programme content in these services. It was felt that this would allow the UK VOD industry to take the lead in setting and enforcing standards for the content of its services. At the same time, there would need to be legislation that gave either the Government or Ofcom backstop powers to deal with serious or repeated breaches of the standards and to intervene in the event of systemic failure.
- 2.8 The Government also announced its strong preference for Ofcom to designate, and delegate powers to, the Advertising Standards Authority (ASA) to regulate VOD advertising. This would maintain the ASA’s role as a ‘one-stop shop’ for all complaints about advertising.

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<sup>5</sup> See paragraphs 5.3 to 5.4 and 6.4.

- 2.9 The proposed Regulations made available by the DCMS to stakeholders, in July 2009, make clear that Ofcom will be given functions to regulate VOD services, and that it can designate another regulatory body to carry out all or any of these functions. Certain criteria that that body must fulfil in order for Ofcom to designate it are also set out.
- 2.10 In addition, the proposed Regulations include:
- a number of criteria referred to in paragraph 4.20 that will determine which services are in scope and which are not;
  - the obligation on service providers to notify the regulator of their intention to provide a VOD service; and
  - various rules about content which service providers must comply with, reflecting the requirements of the AVMS Directive and a regulatory structure for securing compliance which gives the regulator various enforcement powers (e.g. fines).

## Overview of the VOD Industry

- 2.11 At the start of 2007, the European Audiovisual Observatory (“the Observatory”) identified 142<sup>6</sup> separate VOD services or platforms across 24 European countries. The Netherlands, France, Germany and the UK together accounted for 65 of these services. The Observatory characterised these four countries as having a “well-developed” supply of VOD services or platforms, meaning that they each had more than 10. But such is the dynamism of the sector that a revised estimate by the Observatory for the same 24 countries at the end of 2007 found 258 services – an increase of 116 (82%) in one year. Across Europe at the start of 2007 the majority of the services were delivered via the internet and internet protocol television (IPTV) with only a small percentage (10.7 %) distributed by cable, satellite and digital terrestrial television.
- 2.12 VOD in the UK is characterised by a diversity of players, distribution networks, and business models, with increasing competition between them. Business models range from advertising-funded through subscription-based approaches to pay-per-view. At the start of 2007, the Observatory identified 13 distinct VOD services or platforms in the UK, delivered variously by means of the internet, IPTV, cable, satellite and digital terrestrial television (DTT). By the end of 2007 another three services had appeared. A number of major broadcasters, PSB and commercial, each now have their own VOD presence, with smaller broadcasters increasingly entering the VOD arena as well. In addition, a number of new, VOD-only providers have emerged.
- 2.13 One of the biggest and most significant events for the UK VOD market was the launch of the BBC *iPlayer* in December 2007. The *BBC iPlayer* is a “catch-up” service for the main BBC broadcast channels, generally available over a seven day window after transmission. It had over a million download requests on “official” launch day (Christmas Day 2007) and a total of over 20 million download requests during April 2008. By December 2008, monthly download requests were up to 41 million, with a total of 374 million download requests over the year. The *iPlayer* service became available on digital cable (rather than solely on the internet) in May

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<sup>6</sup> See [http://www.obs.coe.int/oea\\_publ/market/vod.html](http://www.obs.coe.int/oea_publ/market/vod.html) It should be noted that the Observatory analysis (as is the case with Ofcom’s own analysis in paragraphs 4.75 to 4.86) should not be seen as exhaustive overviews of the VOD sector. Both the Observatory and Ofcom analyses are broadcaster-focused and do not represent audits of all VOD services available on the open internet.

2008. While download requests via the cable platform are not as high as those online, they are still sizeable, growing from 4 million download requests in May 2008 to 17 million download requests in December 2008. Some *iPlayer* content is available on the BT Vision and Tiscali TV IPTV platforms as well.

- 2.14 Factors such as the availability and take-up of high-speed broadband connections and the introduction of easier to use content delivery systems have facilitated the increase in VOD services. For example, ITV revamped its own catch-up VOD service in early 2008 and received an average 21% month-on-month growth in video views between January and June of that year.
- 2.15 Channel 4's catch up and archive content service, *4OD*, launched in late 2006 and has also enjoyed significant usage. Like the *iPlayer*, *4OD* can be accessed via television (on digital cable and some IPTV providers) and by PC. However, unlike the *iPlayer*, *4OD* tends to receive a higher number of download requests via its television platforms than it does by PC. In 2008, there were approximately 6-6.5 million requests to view programmes on *4OD*'s TV services per month, peaking at 7.4 million in June 2008. Requests through PCs varied between 3.3 and 5.9 million per month. Over the course of 2008 there were a total of approximately 132 million programme requests on all platforms.
- 2.16 Beyond the specific cases of the BBC and Channel 4, market appraisal in the VOD sector is, as the Observatory has noted, extremely difficult. Many suppliers do not publish or communicate download figures. In 2006 the total UK VOD market was estimated to be worth £66 million, with an annual growth rate of 50%. There is however a consensus that the market took off in the first quarter of 2006 and continues to expand rapidly. For example, of approximately 3.5 million Virgin Media subscribers, 52% (approximately 1.8 million) used VOD in the last quarter of 2008, an increase of five percentage points from Q4 2007. The average total VOD views per month on the platform rose considerably from 33 million in the last quarter of 2007 to 53 million a year later. BSkyB has stated that its *Sky Anytime* service recorded more than a million downloads during 2006. With the exception of *4OD*<sup>7</sup> most of the broadcasters' VOD services are currently weighted towards catch-up content.
- 2.17 VOD providers can expect to see further increased take-up of their services as they continue bringing them into the living room, making VOD access more akin to viewers' consumption of traditional television broadcast services. A number of different means are being employed to do this. Cable and IPTV set-top boxes are one avenue, but games consoles are a newer one – the *iPlayer* is available on Nintendo's *Wii* and Sony's *Playstation 3* consoles, and BSkyB has struck a deal with Microsoft to deliver content on the *Xbox*. Television manufacturers have also developed television sets that can access VOD, once they are connected to the internet. However, the size of screen is no longer a limit on the availability of VOD services: a number of smartphone and other handheld media devices now have the ability to access them as well. All this indicates that technological advances are expanding the boundaries of the VOD market.
- 2.18 Ofcom's own analysis suggests that in the UK there are currently around 90 broadcaster-related VOD services, and approximately 150 VOD services overall.

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<sup>7</sup> *4OD* has an approximately 50:50 split between catch-up and archive content.

## **Current regulation of VOD services**

- 2.19 In relation to VOD editorial content, while VOD services are not currently subject to formal regulation there are two self-regulatory schemes in place which are administered by separate industry bodies: the Association for Television on Demand (“ATVOD”); and the Independent Mobile Classification Body (“IMCB”). As will be discussed in Section 5, Ofcom has received a proposal from ATVOD that it should be designated as the co-regulator for VOD editorial content.
- 2.20 ATVOD regulates many (but not all) VOD programmes under its Code, requiring members to comply with rules on ‘Protection of Young People’, ‘Harm and Offence’ and on ‘Advertising’.
- 2.21 The ATVOD membership includes many of the larger VOD service providers in the UK, including BT, Five, Channel 4 and Virgin Media. The BBC is an affiliate member. All members have agreed to the adoption of an independent complaints process on issues of content, and complaints about technical and operational matters as well as billing errors.
- 2.22 In relation to VOD advertising, the Advertising Standards Authority (“ASA”) currently operates a self-regulatory code of practice (the Code on Advertising Practice) to which advertising industry members are expected to adhere. The ASA has investigated and adjudicated on complaints about non-broadcast advertising for over forty years, including more recently, complaints concerning paid-for advertising in VOD services. There is a well-established model for collecting a levy on advertising expenditure, which is collected from the advertising industry by the Advertising Standards Board of Finance, and assesses complaints against a code drafted by the Committee of Advertising Practice, an industry body comprised of trade associations representing advertisers, agencies and the media.
- 2.23 As will be discussed in Section 6, Ofcom has received a proposal from the ASA for it to be designated, by Ofcom, as the co-regulator for VOD advertising.

## **Moving towards a new system of regulating VOD**

- 2.24 In light of the above, it is the clear preference of Government for Ofcom to work with industry towards putting in place a new co-regulatory framework in relation to VOD editorial content and VOD advertising. In Section 3, we give an overview of how it is proposed that this should be achieved, which have emerged from our discussions with industry.

## Section 3

# Overview of our proposals

## The purpose of this consultation

- 3.1 This consultation examines:
- the issue of how to decide which VOD services come within the ambit of the new regulations, or are deemed to be “in scope”; and
  - the issue of the practical implementation of the regulations and asks whether the proposals from industry for a co-regulatory framework are appropriate.
- 3.2 In Section 4 of the consultation document, we set out and examine the criteria from the proposed Regulations that will form the basis of the statutory framework for determining which services fall under the new regulatory regime. We then: invite views on our proposed guidance to help service providers determine whether they will be subject to regulation; and explain, and invite views on, our proposed allocation of functions, between Ofcom and the proposed co-regulator for editorial content, relating to the notification process (i.e. the process by which service providers will be required to notify the service they are providing).
- 3.3 Section 5 of this consultation examines, assesses, and invites views on, the proposal Ofcom has received from ATVOD to be considered for designation as the new co-regulatory body for VOD editorial content.
- 3.4 Finally, in Section 6 this consultation examines, assesses, and invite views on, the proposal Ofcom has received from the ASA to be considered for designation as the new co-regulatory body for VOD advertising.

## Overview of proposals

### Services subject to regulation (“Scope”)

- 3.5 Central to the working of the new regulatory framework is the need to ascertain which services will fall under the framework i.e. are in “scope”. Ofcom, in liaison with stakeholders, has discussed two areas of responsibility relating to scope, which we propose to designate to a new co-regulator for VOD editorial content, from the Implementation Date. These are:
- a) extensive non-binding guidance<sup>8</sup> on scope, which has been drawn up by Ofcom and industry stakeholders, and it is envisaged would be owned and administered by the proposed new co-regulator for VOD editorial content, so as to provide as much certainty as possible concerning which services are likely to fall within scope; and
  - b) a clear notification process<sup>9</sup>, under which VOD service providers would be required to notify the co-regulator for VOD editorial content of their intention to provide a VOD service.

<sup>8</sup> See paragraphs 4.28 to 4.74.

<sup>9</sup> We are proposing an allocation of functions, in relation to the notification process, between Ofcom and the new co-regulator for editorial content - see paragraphs 4.87 to 4.91.

These two undertakings will provide clarity to stakeholders in the early stages of the new regulatory environment.

### **VOD editorial content**

- 3.6 In relation to co-regulation of VOD editorial content, this consultation seeks views on ATVOD's proposal to be designated as co-regulator for VOD editorial content. Section 5 lays out our reasons for considering that the proposal demonstrates that ATVOD would be fit-for-purpose to be designated on the Implementation Date. However, as we also explain, ATVOD is carrying out further work to ensure that it would be ready to take on the relevant responsibilities by this date.

### **VOD advertising**

- 3.7 In relation to VOD advertising, this consultation seeks views on the basis of Ofcom's proposal to designate the ASA as the relevant co-regulator. This seems to Ofcom the most appropriate course of action because the ASA is a well established organisation with a proven and fit-for-purpose co-regulatory relationship with Ofcom.

### **Approach to impact assessment**

- 3.8 The consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders (including citizens and consumers; and VOD service providers). This assessment has been informed by our discussions with industry stakeholders and the conclusions from the Government's Consultation into implementation of the AVMS Directive. We note that in its Consultation, the Government has already dealt with the impact of co-regulation in principle on stakeholders<sup>10</sup>.
- 3.9 In Section 7, we invite stakeholders' views as to whether our proposals have any impacts in relation to matters of equality. Ofcom is required by statute to have due regard to any potential impacts our proposals in this consultation may have on equality in relation to gender, disability or ethnicity – an Equality Impact Assessment is our way of fulfilling this obligation<sup>11</sup>. In relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability or ethnicity, we believe our approach to regulation as a result of the current proposals would remain unchanged and therefore we do not consider that our proposals would have any particular implications for people to whom these considerations relate. We base this conclusion on: the experience gained by Ofcom in regulating standards in editorial content in linear broadcast services; and also our involvement in the regulation of broadcast advertising.
- 3.10 In Section 7, we also set out why we propose not to designate one duty to the new co-regulator for VOD editorial content, namely, the statutory obligation to encourage VOD service providers to ensure that their services are gradually made more accessible to people with sight or hearing disabilities.

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<sup>10</sup> In particular, in its Consultation, the Government carried out a cost/benefit analysis, which referred to the possible costs of co-regulation: "We have assumed for illustrative purposes that the introduction of a co-regulatory system...will lead to a doubling of costs in comparison to the present arrangements. But we think this will prove a pessimistic assessment given that that it will be in the interests of the industry – which will run any co-regulatory system – to keep its costs down".

<sup>11</sup> See section 71(1) of the 1976 Race Relations Act (as amended), section 49A of the 1995 Disability Discrimination Act (as amended), and section 76A(1) of the 1976 Sex Discrimination Act (as amended).

- 3.11 The proposed Regulations are clear that, in designating any functions to a co-regulatory body, Ofcom retains such functions in parallel. As such, Ofcom remains responsible, as a public body for the delivery of those functions according to Ofcom's general statutory duties and obligations. Co-regulation means that Ofcom must identify co-regulatory bodies capable of carrying out their delegated functions in a rigorous and appropriate manner, taking into account the statutory framework within which Ofcom is empowered to designate its functions and Ofcom's statutory duties.

### **Next Steps**

- 3.12 The following parts of this document set out our proposals and invite stakeholders' views on them by 26 October 2009<sup>12</sup>. The consultation responses will enable us to consider our proposals in light of stakeholder comments. We will publish a summary of responses and decision statement, following our consideration of those responses, in December 2009.

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<sup>12</sup> See Annex 1 concerning how to respond to this consultation paper.

## Section 4

# Services subject to regulation (“scope”)

## Introduction

- 4.1 In this section, we discuss which services will be subject to the new VOD regulatory arrangements i.e. which services will be “in scope”. In particular, we propose guidance that is intended to help service providers assess whether they are VOD services (and therefore: come under statutory regulation: and need to abide by the relevant legislative requirements). This section sets out relevant background information relating to the AVMS Directive and VOD.
- 4.2 It then goes on to:
- a) explain the criteria set out in the proposed Regulations that will determine which VOD services fall under the new regulatory regime laid out in the AVMS Directive;
  - b) propose and invite views on draft guidance on scope (“Scope Guidance”), which has been developed in tandem with industry, to help service providers determine whether their service will be subject to regulation and, if so, be required to be notified to Ofcom or to a designated co-regulator;
  - c) set out and invite views on the proposed allocation of functions relating to the notification process, through which service providers subject to the rules of the AVMS Directive must notify Ofcom or, if a designation is made, the co-regulator of the service; and
  - d) invite stakeholders to propose any alternative approaches to the issues of scope and notification.

## Background

### The AVMS Directive and Video on Demand

- 4.3 The TVWF Directive, introduced in 1989, and subsequently revised in 1997, set minimum standards for linear television services across Europe. One of the most significant changes introduced by the AVMS Directive is to extend the scope of television regulation to include VOD services.
- 4.4 There was an extended debate during the passage of the AVMS Directive through the European legislative process as to the appropriate scope for the AVMS Directive and which services should be subject to the new regulatory regime. The conclusion of this debate was that that the special regulatory status accorded to television services was not appropriate for all services which include “...moving pictures with or without sound...” However, it was concluded, that the type of regulation that had hitherto only applied to television services should be extended to cover those services which have similar characteristics to television and therefore justify such special status. Accordingly, the AVMS Directive extends some minimum requirements<sup>13</sup> to VOD services across Europe. Both the AVMS Directive and the regulations, through which it will be implemented in the UK, seek to define which

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<sup>13</sup> For details of the minimum standards regarding: VOD editorial content see paragraphs 5.3 and 5.4; and VOD advertising see paragraph 6.3.

VOD services are “television-like”, and should therefore be subject to the relevant television regulations.

- 4.5 As mentioned in paragraph 2.10 for the effective transposition of the AVMS Directive into UK law, the Government intends that the implementing regulations will provide the framework for determining which services fall under the scope of regulation.
- 4.6 Paragraphs 4.11 to 4.14 and 4.20 to 4.25 respectively set out: the key elements of the AVMS Directive and the proposed Regulations that determine which services are subject to regulation; and therefore must be notified to the regulator and comply with the regulations covering VOD editorial content and VOD advertising. The legislation will allow scope for some interpretative flexibility. Ofcom and industry stakeholders have therefore been working on designing potential guidance in this area (“the draft Scope Guidance”), which we put forward for consultation. The draft Scope Guidance is laid out in paragraphs 4.28 to 4.74 (and is also attached at Annex 6). It is proposed that this guidance would be published in order to help stakeholders and the regulator determine which services are in scope. It is envisaged that, if it were to be designated by Ofcom as the co-regulator for editorial content, ATVOD would have ownership of the Scope Guidance. It should be noted that, if the ASA were to be designated as the co-regulator for VOD advertising, it would have no role in overseeing the Scope Guidance. Rather its key role would be to investigate complaints relating to the standards covering VOD advertising.
- 4.7 In this section, Ofcom is consulting on two issues: firstly, the non-binding draft Scope Guidance, as to which services are subject to regulation; and second, we describe, in outline, how we propose to allocate (between Ofcom and, subject to the outcome of the consultation, the designated authority) the functions relating to the notification process. The latter is the process under which VOD service providers would be required to notify the regulator of their intention to provide a VOD service.
- 4.8 Scope Guidance: The statutory definition of the applicable VOD service will be laid down in the Act, as amended by the implementing regulations. However, Ofcom, in tandem with industry stakeholders, has drafted indicative guidance on scope (see attached at Annex 6). This is designed to assist stakeholders and viewers in determining which services are regulated and are therefore subject to the consumer protection requirements set by the AVMS Directive. As drafted, the guidance seeks to interpret the statutory definition of what constitutes a VOD service for the purposes of regulation. The Government has indicated that its strong preference is that, ultimately, the regulation of VOD services should be undertaken through co-regulation. Therefore if, following the outcome of this consultation Ofcom should decide to designate ATVOD as an industry co-regulator, it is envisaged that ownership of the Scope Guidance would rest with that body, with appropriate oversight from Ofcom.
- 4.9 Notification functions: The implementing regulations will require service providers to notify the regulator if they are operating a VOD service that falls within scope or if they intend to operate such a service. Ofcom, in tandem with industry stakeholders, has discussed the potential allocation of notification functions between it and the proposed co-regulator.
- 4.10 In Section 7, we separately invite stakeholders’ views as to whether our proposals concerning scope and notification would be likely to have any impacts in relation to matters of equality.

## The criteria determining whether a VOD service should be regulated

### The AVMS Directive definitions

- 4.11 The AVMS Directive sets the scope of television regulation in two stages: firstly defining an “audiovisual media service” as follows:

“a service...which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by means of electronic communications networks...Such an audiovisual media service is either a television broadcast...or an on-demand audiovisual media service”. (Article 1(a))

- 4.12 For VOD regulation, we are concerned with “on-demand audiovisual media services”, which are defined as follows:

“an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider”. (Article 1(g))

- 4.13 These core definitions are supplemented within the AVMS Directive’s Articles and Recitals with further clarifications intended to capture the idea that regulation should only attach to “television-like” services:

- The definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. (Recital 16)
- It is characteristic of on-demand audiovisual media services that they are ‘television-like’, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. (Recital 17)

- 4.14 The AVMS Directive also provides a non-exhaustive list of those services which would, in general, be excluded from the scope of any new regulatory regime. These include: services which are primarily non-economic and not in competition with television broadcasting; services allowing users to share user-generated content; private correspondence and e-mails; services where the audiovisual content is incidental to the main purpose of the service; gaming and gambling services; online games; search engines; and electronic versions of newspapers and magazines.

### The Government’s approach

- 4.15 In the Ministerial Statement which followed the Government’s Consultation last year on its proposals for implementing the AVMS Directive, the Government stated as follows in relation to the definition of VOD services:

- a) the definition in the AVMS Directive is narrow, covering only mass media services whose principal purpose is to provide television-like programming to users;
- b) any new co-regulator would be able to issue guidance on which services will fall into the scope of the new co-regulatory regime; and

- c) those whose role is only to provide access to other providers' VOD services ("access providers") will not bear the regulatory burden for those services. (This was intended to clarify the status of "platform providers" and "service providers", and confirmed that compliance with the requirements of the Directive, as transposed into UK legislation, rests with the providers of VOD services rather than the providers of platforms, on which those services may appear, such as those operated by, for example, Sky or Virgin Media. This replicates the model in place for linear television, where individual channels and not platforms are regulated).
- 4.16 As mentioned in Section 2, the Government has drawn up proposed Regulations, which it has shared with stakeholders, and which will transpose the AVMS Directive into UK law. Although currently in draft form and subject to the applicable Parliamentary process, once made these proposed Regulations will introduce a series of new provisions and amendments to the Act which will take effect from the 19 December 2009.
- 4.17 Whilst we refer to the proposed Regulations in this document, Ofcom does not have ownership of these and is not consulting on their content. The Government has already consulted on its proposals as well as seeking the views of stakeholders on the proposed Regulations.
- 4.18 It is important to note that the Government is implementing the terms of the AVMS Directive under section 2(2) of the European Communities Act 1972 ("the ECA"). The effect of this is that there are some limits on what the proposed Regulations can do.
- 4.19 As discussed in Section 2, the Government's intention is for an obligation to be placed on Ofcom to secure that VOD editorial content and VOD advertising are regulated in accordance with the principles enshrined in the AVMS Directive. Furthermore, the new provisions will enable Ofcom to designate corporate bodies to be regulatory authorities for the purposes of any of the new functions created under the implementing regulations. Ofcom has been working closely with Government on the proposed Regulations and the Government has consulted a wide range of stakeholders on the content of their provisions. The wording of the proposed Regulations is not yet finalised.

## The proposed Regulations

- 4.20 The Government's intention is to restrict the scope of VOD services to be covered by the new regulatory regime, to the minimum required by the AVMS Directive. The proposed Regulations transpose the language of the AVMS Directive to create a specific definition of "on-demand programme service" (ODPS), which mirrors the definition of "on-demand audiovisual media service" provided for in the AVMS Directive. An ODPS is defined in the regulations<sup>14</sup> as follows:

a service is an "on-demand programme service" if, and in so far as—

- (a) its principal purpose is the provision of programmes of a kind falling within subsection (3);
- (b) it is provided for video on-demand access;

<sup>14</sup> These criteria are still subject to discussion within Government and may not remain as drafted within the final version of the regulations.

- (c) it is under a person's editorial responsibility;
  - (d) it is made available by that person for use by members of the public; and
  - (e) its provider is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive
- (2) "Video on-demand access" is access where the user is able—
- (a) to make individual selections of programmes of a kind falling within subsection (3) from a range of such programmes (or of such programmes along with other kinds of programmes) offered to users;
  - (b) to receive such programmes by means of an electronic communications network (whether the programmes are so received before or after the user has selected which programmes to view); and
  - (c) to view the programmes selected at a point in time of the user's choosing.
- (3) The programmes referred to in subsections (1) and (2) are those whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services.

- 4.21 "Editorial control" is a key concept that will be enshrined in the new legislative provisions. It plays two roles: firstly, there must be a person with editorial control for a service to be an ODPS; and second, the person who has such control will be the person with regulatory responsibility for ensuring compliance with the requirements of the legislation.
- 4.22 The proposed Regulations reflect and in most cases directly transpose, the criteria set out in the AVMS Directive. As mentioned in paragraph 4.14 above, the AVMS Directive provides a list of types of services which will usually be excluded from the scope of regulation. It should be noted that if a service fulfils the above criteria, it must comply with the applicable requirements for standards relating to VOD editorial content<sup>15</sup> and VOD advertising<sup>16</sup>. It is clear from the proposed Regulations that the legislation will set out a definition of VOD that is "technology-neutral" – critically, this means that services which satisfy the criteria will be subject to regulation irrespective of whether they are distributed on a traditional television platform like Virgin Media (cable) or over the open internet.
- 4.23 As explained above, the effect of implementing the terms of the AVMS Directive under section 2(2) of the ECA is that, in relation to scope, the regulations cannot confer a power to legislate. This means that the regulator cannot create its own set of binding rules as to which services fall within scope; the enforceable requirements with which service providers must comply, are those set out in the implementing legislation. However, the regulator can provide guidance on the interpretation of the scope criteria. Such guidance may aid interpretation, but cannot alter or extend the legal definition of services to be regulated. As such, it can only be seen as interpretive and indicative of the approach the regulator is likely to take in its interpretation and operation of the applicable statutory provisions.
- 4.24 Ofcom has worked to ensure that the new framework for the regulation of VOD services will be clear and effective. To this end, Ofcom and industry stakeholders, including ATVOD, have worked up potential guidance on the issue of definition of the ODPS (the "Scope Guidance"), structured according to the criteria in the proposed Regulations and listed in paragraph 4.20 above. Ofcom now seeks views

<sup>15</sup> These standards are listed in paragraphs 5.3 and 5.4.

<sup>16</sup> These standards are listed in paragraph 6.3.

on this draft Scope Guidance<sup>17</sup> and in particular on the extent to which it would be likely to assist VOD service providers, consumers and the regulator to determine whether a service falls within scope under the legislation.

- 4.25 Three broad policy principles have underpinned the development of the draft Scope Guidance:
- the criteria set out in the proposed Regulations<sup>18</sup> are cumulative - all must be satisfied by a VOD service for it to fall within the scope of regulation;
  - VOD services, rather than the underlying platforms which give access to the services, should bear the regulatory burden of the new co-regulatory regime; and
  - most importantly, there should be a policy of minimal scope. Ofcom believes that it is the best way to secure a regulatory framework which works for consumers and industry.

## Draft Scope Guidance – the definition of VOD services

### Introduction

- 4.26 Paragraphs 4.28 to 4.74 set out the draft Scope Guidance proposed by Ofcom and on which we are seeking stakeholders' views (The Scope Guidance is also contained at Annex 6)<sup>19</sup>. As mentioned in paragraph 4.8, It is envisaged that, if it were to be designated by Ofcom as the co-regulator for editorial content, ATVOD would have ownership of the Scope Guidance on an on-going basis.
- 4.27 The introduction to the Scope Guidance explains the types of services that may be required to comply with the rules. It also explains who the provider of a relevant service is for these purposes, and therefore who is responsible for compliance with the rules. As with other guidance on the application of the new statutory requirements, the Scope Guidance would not be legally enforceable, and would be intended only to assist in interpreting the scope criteria set out in the legislation.

### Draft Scope Guidance

- 4.28 This guidance is intended to help providers of on-demand programme services assess whether they are VOD services (and therefore: come under statutory regulation: and need to abide by the relevant legislative requirements) and need to notify the Regulator that they provide a relevant on-demand programme service and need to comply with the rules. It is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service is subject to the VOD regulations.
- 4.29 As explained below, there are a number of different cumulative criteria that determine whether a service is within the scope of the Regulations. At the present time, video on demand services represent an increasingly important part of the audiovisual market. However, the wide variety of content, services and business models

<sup>17</sup> See paragraphs 4.28 to 4.76.

<sup>18</sup> See paragraph 4.20.

<sup>19</sup> The draft Scope Guidance is based on the criteria as laid out in the proposed Regulations. As mentioned in footnote 14, these criteria are still subject to discussion within Government and may not remain as drafted within the final version of the regulations.

available make it difficult to list with any degree of certainty the services that will be within scope, and those that will fall outside scope. Each service provider must make their own assessment of whether they meet the criteria laid down by the Regulations and act accordingly.

- 4.30 In deciding whether a particular service requires notification, and by whom, the Regulations require potential service providers, and ultimately the Regulator, to consider the following questions:
- a) Is the service an ‘on-demand programme service’ within the meaning of the Regulations (see Section (A) of this Guidance)?
  - b) Who has ‘editorial responsibility’ for that service within the meaning of the Regulations (see Section (B) of this Guidance)?
  - c) Does that person fall within the jurisdiction of the UK for these purposes (see Section (D) of this Guidance)?
- 4.31 Each of these questions is explored in more detail below.
- 4.32 References in this guidance to the Directive are to the Audiovisual Media Services Directive. References to Recitals and Articles are to the recitals and articles of the Directive. References to the Regulations are to the Audiovisual Media Services Directive (Implementation) Regulations 2009.

#### **A) SCOPE CRITERIA**

##### **Is the service an on-demand programme service?**

- 4.33 Under the Regulations, a service will be an ‘on-demand programme service’, and therefore subject to notification and regulation, if it meets **all** of following criteria.
- a) **It is a VOD service:** its principal purpose is to offer users the ability to select individual programmes from a range of programmes, to receive the selected programme using an electronic communications network,<sup>20</sup> and to view the selected programme when the user chooses.
  - b) **There is editorial responsibility:** the programmes comprising the service are under a person’s editorial responsibility.
  - c) **It is ‘TV-like’,** to the extent that:
    - i) **it includes TV-like programmes:** the service includes programmes whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services; and
  - d) **It is widely available:** the service is made available by that person for use by members of the public.
- 4.34 The intention of the Directive and Regulations is to regulate on-demand programme services. This means that a service which falls outside the definition of an ‘on-demand programme service’, but is handled with or accompanies an on-demand programme service, would not typically be considered to form part of that on-demand programme service (subject to the provisions dealing with VOD advertising).

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<sup>20</sup> See paragraph 4.41.

**a) Is it a VOD service?**

- 4.35 The key issue under this criterion is whether the principal purpose of the service is the provision of programmes on an on-demand basis. There may be services where the availability of audiovisual content on an on-demand basis is incidental to another service, for example, short video advertising spots accompanying a non-video service, and video elements of online games and gambling services.
- 4.36 The assessment of whether the principal purpose of the service is the provision of relevant programmes on an on-demand basis will take into consideration all relevant materials available to the Regulator, including, for example, the way the service is marketed and presented to users.
- 4.37 Where relevant on-demand programmes form part of a broader consumer offering, it may be the case that those programmes comprise an on-demand programme service in their own right. For example, where a service provider offers a movie and television programme download service as part of its broader, non-audiovisual online retailing activities, then such a service may be considered to be a distinct on-demand programme service which falls within the scope of the Regulations.
- 4.38 This will not be the case if the relevant on-demand programmes are included as an integral and ancillary element of the broader offering, for example, where video is used to provide additional material relevant to a text-based news story.
- 4.39 Similarly, the extent of a particular on-demand programme service may be determined by other criteria, such as the identity of the service provider. Thus an aggregated retail video on-demand service may be comprised of a number of on-demand programme services from different providers, depending on which undertaking exercises editorial responsibility in respect of the programmes offered to users (see section (C) below).
- 4.40 It is acknowledged that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case.
- 4.41 An “*electronic communications network*” is defined in section 32 of the Communications Act 2003 and encompasses the communications infrastructure by means of which voice, content and other data are delivered to consumers. Accordingly, delivery of content through other means, for example, a DVD sent through the post having been ordered online, would not meet this criterion. The selection, downloading and viewing of a movie via the internet, paid for using a voucher bought over the counter in a shop, would be caught, if all other criteria were met. The means of delivery is the deciding factor for this criterion, not the means of payment or selection.
- 4.42 A content service that is broadcast or streamed in a linear form is not covered by the on-demand programme service rules, and may be subject to the relevant ‘broadcast’ regulation. It should be noted that the rules for broadcast regulation are explicitly extended by the Directive and Regulations to cover internet-based television channels.

**b) Is there editorial control?**

- 4.43 The exercise of ‘editorial responsibility’ is relevant to scope in two ways. Firstly, an ‘on-demand programme service’ is defined in the Regulations as a service falling under a person’s ‘editorial responsibility’. Therefore, a service which by its nature has

no person exercising 'editorial responsibility' (as defined) would fall outside the Regulations.

4.44 An example of such a service, with no-one exercising editorial responsibility might be a catalogue of programmes consisting of user generated content posted to a public website for sharing and exchange, without prior moderation or restriction as to what can be posted.

4.45 However, that is not to say that all content in such sites falls outside the definitions. For example, where 'hosting' services are used by commercial entities as a means of distributing relevant content, and meet the other criteria laid down by the Regulations, then such content might fall within the meaning of an 'on-demand programme service' for these purposes.

4.46 Second, the extent of a person's editorial responsibility will be relevant in determining who is to be treated as providing an on-demand programme service. For example, an aggregated VOD content service may comprise a number of different on-demand programme services, each provided by a different entity exercising 'editorial responsibility' over its own on-demand content. How to determine the identity of the person exercising 'editorial responsibility' is discussed in more detail below (See Section (D) below).

### **c) Is the service "television-like"?**

4.47 One of the principal aims of the Directive is to create a level-playing field as between traditional linear broadcast television services and emerging on-demand audiovisual media services (Recital 6). The Directive, and the Regulations, are therefore intended to cover on-demand and broadcast television audiovisual media services which compete for the same audiences (Recitals 16 and 17), sharing the same key characteristics, namely that:

- they include comparable programmes.

### **i) Are the programmes "television-like"?**

4.48 An on-demand programme service will only be caught by the Regulations to the extent that it provides access to programmes that compete for the same audience as television broadcasts, and therefore, are comparable to the form and content of programmes included in broadcast television services. It is, however, necessary to interpret the meaning of '*programme*' in this context in a dynamic way, taking into consideration developments in television broadcasting.

4.49 Examples of 'programmes' that are not 'TV-like' might include informational videos directed at a particular group of people, such as an undertaking's employee training videos available online, and short extracts from longer programmes, to the extent that such extracts are not such a significant part of the programme as to be considered to be a programme in their own right.

4.50 Clearly the decision as to whether programmes are 'TV-like' will involve consideration of all relevant information, including the availability of comparable programmes in linear broadcast services.

4.51 Audio-only services, such as 'listen again' radio services are out of the scope of the Regulations. However, video only programmes, supplied on an on demand basis are potentially in scope (subject to the other criteria being met).

**d) It is widely available?**

- 4.52 This criterion is satisfied if the service is made available to the general public, and includes subscription services, provided that the subscription is open to members of the public, as well as services that are made available only to the general public located in a particular geographic area.

**B) IMPLICATIONS OF THE CRITERIA****What types of service are in and out of scope of the legislation?**

- 4.53 A non-exhaustive list of types of content which are likely to be considered to be ‘on-demand programme services’ for the purposes of the Regulations (provided those services are established in the UK as explained in section (D)) is as follows:
- a) a ‘catch-up service’ for a broadcast television channel whether programmes are made available from the broadcaster’s own branded website, an online aggregated media player service, or through a ‘television platform’ to a set top box linked to a television (whether using broadcast ‘push’ technology, or ‘pull’ VOD);
  - b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising ‘editorial responsibility’ over all the programmes (see section 4 below), whether via a dedicated website, online aggregated media player service, or through a television platform; and
  - c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising ‘editorial responsibility’ over the content.
- 4.54 The following types of content are outside the scope of the Regulations:
- a) services that are primarily non-economic, and which are therefore not in competition with television broadcasting (Recital 16). In this context, ‘economic’ is interpreted in the widest sense to encompass all forms of economic activity, however funded, and may include public service material, free to view content, as well as advertising-funded, subscription, pay per view and other transactional business models;
  - b) services comprising on-demand content that are not “mass media in their function to inform, entertain and educate the general public” (Recital 18);
  - c) “*games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services*”, “*on-line games*” and “*search engines*” are all stated to be excluded on grounds that their principle purpose is not the provision of ‘TV-like’ programmes (Recital 18); and
  - d) Electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines) (Recital 21).
- 4.55 The following types of content may well be outside the scope of the rules as they may not meet all of the required criteria:
- a) video content posted by private individuals onto video sharing sites such as YouTube (where the content has been self-generated and is not posted as part of an ‘economic’ purpose on the part of the individual);

- b) video content produced by professional bodies, trade unions, political parties, or religious organisations, where the content is very narrowly focused and is primarily about the dissemination of information about the organisation to members, rather than for consumption by the general public;
- c) video content embedded within a text-based editorial article, such as a written news story on a web site that contains an illustrative video clip; and
- d) video content on corporate websites, where the purpose is to disseminate information about the company's own operations, products or financial performance (e.g. a video of an AGM, but excluding a standalone service providing access to videos of many companies' AGMs on a commercial basis, which could fall within scope).

### **C) EDITORIAL RESPONSIBILITY**

#### **Who has “editorial responsibility” for that service?**

- 4.56 Once it has been determined that there is a relevant on-demand programme service, it is then necessary to determine which single entity should be treated as providing the service, having ‘editorial responsibility’ for the programmes comprising the relevant on-demand programme service, and therefore the exact scope of that service (see paragraph 4.46 above). The body with editorial responsibility would be responsible for notification and compliance with the relevant standards laid down in the legislation.
- 4.57 ‘Editorial responsibility’, in this context, means the exercise of general control over both:
- a) the selection of the individual programmes included in the range of programmes comprising the relevant on-demand programme service; and
  - b) the manner in which those programmes are organised within that range.
- 4.58 Under the Regulations, it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has ‘general control’ of the “*content of individual programmes or of the distribution of the service*”. This is intended to clarify the degree of ‘control’ required for ‘editorial responsibility’, namely that it is not necessary to control the elements comprising a particular programme (for example, as a television director might), and similarly that it is not necessary to control the actual distribution of the on-demand programme service (i.e. physical transmission, or the retailing of a service to consumers), as these matters are irrelevant to the issue of ‘editorial responsibility’.
- 4.59 In considering who has general control over the selection of programmes, both the Regulations and the Directive focus on decision-making about individual programmes, and not on the choice of whole ‘channels’ of content. The concept of *selection* in the Directive’s definition of ‘editorial responsibility’ is common to both linear and VOD services (in relation to linear services, the reference is to control over the selection of programmes and “...*organisation in a chronological schedule...*”). It is certain that, in relation to such linear services, it is the channel operator (i.e. broadcaster) who is selecting the programmes, even if those channels are distributed to consumers as part of a package of channels by a platform operator or retailer. In the context of on-demand programme services, ‘editorial responsibility’ is exercised by the person selecting the programmes to be included in the on-demand

- programme service in a role comparable to that of the broadcaster in relation to linear channels.
- 4.60 It is, however, recognised that the mere fact that a broadcaster provides content from its linear channel to another undertaking for inclusion in an on-demand programme service does not remove the need to assess which entity has ‘editorial responsibility’ considering all relevant circumstances. It would be possible for an aggregator or platform operator to be responsible for the selection of individual programmes, and thereby acquire ‘editorial responsibility’. Selection of individual programmes may, in this context include, for example, acquiring, commissioning or producing programmes for inclusion in the service. None of these factors is definitive, and each assessment will require consideration of all relevant factors.
- 4.61 The person with effective control of the organisation of those programmes is the person who determines the relevant viewing information provided alongside the on-demand programme, that may then be used in listing the programme in an on-demand programme service: such information might include, for example, whether or not access to a particular programme must be restricted; and what content information should be attached to it (e.g. the programme synopsis, rating information and other content warnings). This will typically be the person who selects the individual programmes to be included within a service. (In other words, organisation may be controlled by a service provider through the supply of relevant programme information accompanying each content asset to a platform operator or distributor).
- 4.62 The fact that a platform operator may be responsible for the design or look and feel of the catalogue; or that a platform operator or technical services provider may provide appropriate protection mechanisms allowing access to some content to be restricted; or specify how potentially harmful or offensive content should be indicated, for example, with an age-rating and/or a specific text warning (“sexually explicit”) and/or a logo, does not mean that they control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not constitute ‘selection and organisation’ of programmes, as these are solely presentational techniques.
- 4.63 These criteria will be applied in a way which provides for a single entity to have ‘editorial responsibility’. It will not be open for content and/or service providers to argue that content that they make available or a service that they provide is outside of the scope of the Regulations as a result of responsibility for selection and organisation of programmes being divided between two or more persons.
- 4.64 The parties to commercial agreements in the value chain for the supply and distribution of on-demand programmes may decide to identify the entity with ‘editorial responsibility’ in respect of the relevant programmes. Whilst not determinative, such contractual arrangements will provide useful evidence as to the division of responsibility between the parties.
- 4.65 As noted in paragraph 4.39, the identity of the entity with ‘editorial responsibility’ will also be relevant to the determination of the extent of the on-demand programme service. Someone who makes relevant content available on an on-demand basis can only be the provider of a service comprising programming over which they exercise ‘editorial responsibility’.
- 4.66 Accordingly, aggregated services may comprise a collection of on-demand programme services provided by different service providers, or a single service

offered by the aggregator, incorporating content from a variety of different sources. The outcome will depend on where “editorial responsibility” lies.

- 4.67 In the former case, an on-demand content aggregator might provide access to content provided by a number of different providers, who each retain ‘editorial responsibility’ for their content, who select which programmes will be made available via the aggregated service and provide the programme information, rating and/or categorisation of those programmes (for example, as being appropriate for adults only). In this case, each content provider, as the relevant service provider for their own content, would be responsible for ensuring that their own content complies with the Regulations.
- 4.68 In the latter case, the content providers would not have ‘editorial responsibility’, as the aggregator would have responsibility for selecting which programmes were included within the service, and for providing the necessary programme information, and therefore, would have responsibility for ensuring compliance with the Regulations.
- 4.69 Clearly, it is conceivable that content providers, aggregators and service providers may arrive at alternative arrangements that require a more complex analysis as to which party has ‘editorial responsibility’. The onus is on the parties to provide the Regulator with all necessary information in support of any notification to allow the Regulator to assess whether the correct entity has been identified as the provider of the service.

#### **What happens with “Multiple Services”?**

- 4.70 Under the Regulations, an on-demand programme service comprises all on-demand programmes offered by a service provider. No distinction is made between different channel brands or content genres or other means of sub-dividing services in the same way as linear services. However, it is also possible for a service provider to nominally sub-divide its on-demand programme service into separate services, perhaps based upon linear channel identities for administrative ease (although it is noted that such a strategy would also require each such service to be notified to the Regulator separately).
- 4.71 Similarly, a service provider may provide its on-demand programme content to a number of aggregation or retail platforms for distribution (e.g. on cable and over the internet). If the range of content is substantially the same across all distribution outlets then it would seem reasonable to view the distribution across each service or platform as comprising instances of a single on-demand programme service. In contrast, where the range of programmes offered to different services and platforms is not substantially the same, then each individual catalogue would form a separate on-demand programme service requiring notification.

#### **D) JURISDICTION**

##### **Does that person fall within the jurisdiction of the UK for these purposes?**

- 4.72 Services only fall within the scope of the Regulations if they are provided by an entity that falls under UK jurisdiction in accordance with Article 2 of the Directive. The service provider of an on-demand programme service will fall under the UK’s jurisdiction if it is established in the UK.
- 4.73 A service provider will be deemed to be established in the UK if:

- a) the service provider has its head office in the UK and the editorial decisions for the relevant on-demand programme service are also taken here;
- b) alternatively, if only one of the head office or the place where editorial decisions for the relevant service are taken is in the UK, with the other function carried out in a different EU Member State, then the question of where the service provider is established will be determined according to the following principles:
- establishment will be deemed to be Member State where a significant part of the workforce involved in the pursuit of the on-demand programme service activity operates; or
  - if a significant part of the relevant workforce operates in each of those Member States, then establishment deemed to be where it has its head office; or
  - if a significant part of the relevant workforce operates in a third Member State, then establishment deemed to be in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State.
- c) the head office is in the UK but editorial decisions on the on-demand programme service are taken in a third (non-EU) country, or vice-versa, the service provider shall be deemed to be established in the UK, provided that a significant part of the workforce involved in the pursuit of the on-demand programme service operates in the UK.
- 4.74 In accordance with the Directive, these jurisdictional criteria are identical to those applicable to linear services.

### **The definition of VOD services – the role of Scope Guidance**

- 4.75 It is envisaged that the Scope Guidance, supplemented by developing precedent in the form of up-to-date lists of the services determined to be inside and outside scope, will assist service providers, consumers and, if it is designated by Ofcom following this consultation, the co-regulator in making judgements about the regulatory status of new services. As noted in paragraph 4.23 above, the proposed Scope Guidance would be non-binding, as the Government is implementing the AVMS Directive by means of statutory instrument, under the ECA. This limits the powers which can be conferred on the regulator – and in particular, prevents the regulator from being assigned the power to create any new binding rules. The Scope Guidance reflects this and, therefore, can only be seen as interpretative rather than prescriptive. However, it is indicative of the approach the regulator is likely to take in its interpretation and operation of the applicable statutory provisions.
- 4.76 The breadth and diversity of services on the internet which include some video makes it impossible to determine the totality of services which will fall under the statutory definition of an ODPS and will fall under the new regulatory regime. Ofcom is conscious of the need for service providers to have early awareness of the new co-regulatory arrangements for illustrative purposes, and to plan accordingly. Therefore, where possible, Ofcom considers it appropriate to provide as much certainty as possible concerning which services are likely to be within scope. To this end, Ofcom proposes an indicative, non-exhaustive list of VOD services which Ofcom considers are very likely to be in scope.
- 4.77 This list was developed from a limited review, under which Ofcom:

- created a shortlist of the larger licensed TV channels, examined the online offerings from these channel providers and made a preliminary and indicative assessment of their likely regulatory status under the AVMS Directive; and
- examined the services provided on a set of major VOD platforms: those operated by Sky, Virgin Media, BT, Tiscali (now owned by Talk Talk), and Top-Up TV.

4.78 As should be clear, this analysis focused on VOD providers who are also present in the broadcast market, and not on the potentially broad range of new service providers operating exclusively on the internet. This is not intended to suggest that service providers from outside the existing broadcast sector are less likely to be subject to regulation. The objective was to provide a sense of the scale of the regulated VOD industry without requiring a wholesale audit of services provided on the internet.

4.79 Given the above, it should be noted that the following list:

- is illustrative only and should not be interpreted as a comprehensive summary of all services likely to fall in scope of the new legislative framework;
- should not be seen as pre-judging the decisions of the regulator in this area, in any way.

**Figure 1: Services likely to be in scope**

Baby First	HBO on demand	Sky Real Lives
Baby TV	HIT	Sky Sports
BBC iPlayer	Honda TV	Sky Travel
Bikini Destinations	Horse & Country	Sumo TV
BOD Movies	ITV Player	Teachers TV
BOD Music	Jetix	The Adult Channel
Bravo	Karaoke Channel	The Biography Channel
Butterfly	LA Muscle TV	The History Channel
C1 (Tiscali)	Lifetime	The Lovers' Guide
Cartoon Network	LiverpoolFCTV	The Pit
Channel 4 (4OD)	Living TV	Theatreland TV
Chelsea TV	Movies4men	Time for Bed
Comedy Central	MTV	TV Favourites
Community Channel	MUTV	V:MX
Content Film	Nat Geo	Virgin Books
Crime & Investigation Network	New Frontier Media	Virgin Media Shorts
CSC Media	New You	Virgin1
Demand Five	Nickelodeon	Vision Kids
Discovery	Picturebox Film	Vision Music
Discovery Kids	Playboy	Vision Sport
Disney Channel	RUSH	VisionTV
DMA Media	Saavan	Warner TV
Elle UK	Scamp	Wedding TV
Entertainment Rights	Sci Fi Channel	WhatCar
Eros	Screen Gems	Zone Horror
Exercise TV	Screenies	Zone Reality
Filmflex	Sky Arts	Zonevision
Fitness TV	Sky Entertainment	
FX	Sky Movies	

4.80 It is important to note that the outcome of this survey should be treated as indicative only of the likely status of these services. Whether a particular service is definitely within scope will depend on a full assessment of the relevant criteria. Importantly,

potential VOD service providers who are not on the list should not conclude anything about the likely status of services they may be providing. In order to understand the thinking behind each of the above lists, a number of worked examples from the analysis above are explored further below.

<b>Figure 2</b>	
<b>Worked Example 1 – service likely to be in scope: Bravo on Demand service on the Virgin Media Platform</b>	
<p>a) Is it an On Demand Programme Service?</p> <p>i) Comprised of TV programmes?</p> <p>ii) Whose principal purpose is providing those programmes?</p> <p>iii) A person with editorial control?</p>	<p>Bravo provides a programme service on Virgin Media’s on-demand platform – typically comprised of programmes which are also carried on the linear channel. The service therefore includes programmes whose form and content are comparable to the form and content of programmes normally included in broadcast television services)</p> <p>On the Virgin Media platform Bravo’s service is wholly comprised of programmes. Provision of the programmes is therefore its principal purpose</p> <p>Bravo selects and provides the programmes and the relevant programme data for the EPG. There is therefore a person with editorial control</p>
b) Who has “editorial responsibility” for that service?	Bravo has editorial control (as above)
c) does that person fall within the jurisdiction of the UK?	Bravo is provided by Virgin Media, established in the UK

<b>Figure 3</b>	
<b>Worked Example 2 – service likely to be in scope: 4OD service on the internet</b>	
<p>a) Is it an On Demand Programme Service?</p> <p>i) Comprised of TV programmes?</p> <p>ii) Whose principal purpose is providing those programmes?</p> <p>iii) A person with editorial control?</p>	<p>Channel 4 provides on-demand access to programmes as part of its internet offering at <a href="http://www.channel4.com">www.channel4.com</a></p> <p>The content is substantially TV programmes previously broadcast by Channel 4</p> <p>4OD is accessed as part of Channel 4’s broader internet proposition. However, the on-demand service is clearly distinguished, and users are directed to it as a discrete on-demand proposition, whose purpose is to provide the on-demand access to the programmes</p> <p>Channel 4 controls all aspects of the service</p>
b) Who has “editorial responsibility” for that service?	Channel 4 (as above)
c) does that person fall within the jurisdiction of the UK	Channel 4 is established in the UK

<b>Figure 4</b>	
<b>Worked Example 3 – service likely to be in scope: HighTV service on the internet</b>	
<p>d) Is it an On Demand Programme Service?</p> <p>iv) Comprised of TV programmes?</p>	<p>High TV provides on-demand access to (extreme sports) programmes as its offering at <a href="http://www.high.tv">www.high.tv</a>, as well as access to some music videos</p> <p>The programmes are sports reports and documentaries of a kind which could be seen on TV. High TV is substantially comprised of such TV-like programmes</p>

<p>v) Whose principal purpose is providing those programmes?</p> <p>vi) A person with editorial control?</p>	<p>High TV would appear to control all aspects of the service</p>
<p>e) Who has “editorial responsibility” for that service?</p>	<p>High TV appears to do so</p>
<p>f) does that person fall within the jurisdiction of the UK</p>	<p>High TV appears to be established in the UK</p>

- 4.81 Ofcom’s survey, and the information provided by industry, was also important in providing some insight into the other types of services which are likely to be outside scope. The services provided online by broadcasters fell broadly into two groups, in relation to the audiovisual media provided, and the question of scope. These were: those who provided access to programmes; and secondly, those who provided clips and/or programme excerpts. In the majority of cases, our assessment was that the online services featuring clips were not ODPS, because the clips were typically part of a proposition which we assessed as fundamentally intended to promote the linear channel, rather than as a content destination in its own right. However, we also concluded that a service featuring clips could not be ruled out of scope solely by virtue of the fact that the service provided access to such short form content.
- 4.82 The Draft Guidance also refers to “...*video content produced by professional bodies, trade unions, political parties, or religious organisations, where the content is very narrowly focused and is primarily about the dissemination of information about the organisation to members, rather than for consumption by the general public...*” (see paragraph 4.56(b) above) as likely to be outside scope. A good example of such a service might be the video service provided by the RMT (National Union of Rail, Maritime and Transport Workers)<sup>21</sup>. Ofcom would be likely to assess this service as outside the scope of regulation.

### The number of notifiable services

- 4.83 The survey of broadcasters provisionally identified **90** notifiable services. This figure is consolidated to reflect the fact that multiple genres provided by a single operator on a platform (e.g. BSkyB’s Sport and Movies propositions on the SkyPlayer) will require a single notification, as discussed in the draft guidance above.

<sup>21</sup> See <http://www.rmtv.org.uk/>

- 4.84 We also counted a brand with a proposition on multiple platforms (ITV, on ITV Player, Virgin, BT Vision) as a single service. In some circumstances, for example if the range of programmes offered and the accompanying advertising are substantially different across the different platforms, a single brand might require multiple notifications for the different ranges of programmes provided on the different platforms.
- 4.85 We did not review the provision of VOD services by broadcasters from the adult sector: more significantly, we did not seek to identify new, stand-alone VOD services which are distributed exclusively on the internet, although an informal review suggests that there may be a substantial number of such services which fall within the scope of regulation<sup>22</sup>.
- 4.86 The various sources that Ofcom has considered suggest that there will be in the region of 150-200 notifiable VOD services in the UK.

#### **Question 1**

- a) Is the draft Scope Guidance set out above appropriate?
- b) If you do not agree that the draft Scope Guidance is appropriate, please explain why and suggest alternative wording where appropriate.

### **Notification of VOD services – proposed allocation of functions**

- 4.87 Linked to the issue of scope, is the process under which new or existing services, defined as an ODPS under the implementing legislation, will need to notify the regulator, when such services intend to launch, or continue in existence, as appropriate.
- 4.88 We envisage that the process of notification would be incorporated into documentation, to be published and owned by the co-regulator for VOD editorial content, if Ofcom designates such a body following this consultation. This documentation would act as an aide memoire for the co-regulator and VOD service providers concerning: when new or existing VOD services should be notified; when variations in a VOD service should be notified; and when the intention to cease a VOD service should be notified. In addition, the co-regulator would set out a process for investigating whether any particular VOD service, which it has reason to believe may be in scope but which has not provided a notification, should in fact do so. We envisage that the regulator would seek information from a potential service provider to enable it to reach a decision. The proposed Regulations provide the regulator with the power to require a potential service provider to supply this information.
- 4.89 In discussing notification, Ofcom, in tandem with industry stakeholders, has considered the following five key functions:
- the timescale for notification;
  - receipt of notifications from ODPS providers;

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<sup>22</sup> Ofcom has noted that the French regulatory authority, the CSA, has identified 175 VOD services which will be subject to their regulatory oversight across traditional broadcaster and new internet service providers.

- the extent and management of ODPS information;
- decision-making on borderline scope decisions; and
- the enforcement of decisions surrounding notification and scope.

4.90 We propose that the following functions relating to notification should be designated for co-regulation:

- timescale for notification: New ODPS providers would need to notify their services to the co-regulator. For ODPS already in existence on 19 December 2009, the proposed Regulations set out that these would need to be notified to the co-regulator by 31 January 2009;
- receipt of notifications from ODPS providers: Relevant services would need to notify if:
  - they are existing service providers (between 19 December 2009 and 31 January 2010);
  - they are new service providers intending to start an ODPS from 19 December 2009 onwards;
  - there is a significant difference to an ODPS in respect of matters required to be notified; and there is to be a cessation of an ODPS;

and

- extent and management of ODPS information: The AVMS Directive requires that the contact details of ODPS are readily available to users. It will be necessary for the regulator to maintain records of service providers and initiate requests for additional information on notification and preliminary investigations on failures to notify.

4.91 Following discussions with industry stakeholders, Ofcom proposes that, if a designation were to be made, the following notification functions would be undertaken by Ofcom:

- decision-making on borderline scope decisions: Given that the Scope Guidance would not be able to give total certainty regarding decisions over scope, there will clearly be cases which will not be straightforward in terms of scope, and whether a particular provider is obliged to notify. Under the proposed Regulations, Ofcom retains any functions in parallel, that it designates. However, Ofcom would only exercise the decision-making powers in relation to borderline scope cases if a case was referred to it in two instances: either a service provider, unhappy with the decision of the co-regulator in relation to scope could refer the matter to Ofcom; or the co-regulator itself, following an initial investigation, if it deemed a case to be borderline in terms of scope, could refer the case to Ofcom. In both cases, the referral to Ofcom would be for formal consideration and decision as to whether a particular service is in scope or not. If appropriate, Ofcom could then exercise the relevant enforcement powers relating to notification (see below); and
- the enforcement of decisions surrounding notification and scope: Where the relevant regulatory body notified of an intention to provide a service by an ODPS

is: (a) dissatisfied with the information provided by a service provider; or (b) a service provider believed to be “in scope” has failed to notify the body, there are the following statutory sanction powers: (i) an enforcement notification; (ii) the imposition of a financial penalty; and (iii) a direction, including the power to direct the suspension of the service (failure to comply can be a criminal offence). It is envisaged that the designated co-regulator would have ownership of all cases relating to notification under (a) and (b) above. If, following thorough investigation by the co-regulator (including an adequate opportunity for the ODPS to make representations), the co-regulator considers that a statutory sanction ((i)-(iii) above) is appropriate, the case would be passed to Ofcom. Ofcom would then have ownership for cases for: investigation, and where appropriate, the imposition of a statutory sanction; and if a service provider fails to fulfil the requirements of a statutory sanction ((i)-(iii) above), the carrying out of enforcement proceedings (including the possibility of taking civil or instituting criminal proceedings)<sup>23</sup>.

### **Question 2**

- a) Is the proposed allocation of functions relating to set out in paragraphs 4.87 to 4.91 appropriate?
- b) If you do not agree that the proposed allocation of functions relating to notification is appropriate, please explain why and suggest an alternative, where appropriate.

## **Alternative approaches**

- 4.92 We invite stakeholders to offer any alternative approaches to the proposed Scope Guidance and allocation of functions relating to notification.
- 4.93 Stakeholders should be aware that any alternative approaches must secure Ofcom’s statutory duties, as required under the AVMS Directive, and as set out in the proposed Regulations.

### **Question 3**

Do you wish to suggest alternative approaches to either of both:

- a) the Scope Guidance; and/or
- b) the proposed allocation of functions relating to notification?

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<sup>23</sup> The practical arrangements for how enforcement will work in relation to notification is discussed further at paragraph 5.25(b).

## Section 5

# The regulation of video on demand editorial content

## Introduction

- 5.1 In earlier sections we examined the development of the AVMS Directive as well as the types of service which are likely to be defined as VOD services within the scope of the requirements as implemented into UK legislation. Our focus for the remainder of this document is more specific and practical. In this section on VOD editorial content, and the following section on VOD advertising, we consider how to implement the regulatory framework for VOD services.
- 5.2 This section:
- a) explains the basis on which Ofcom may designate any body corporate to be a co-regulator for the purposes of regulating the provision of VOD services. We set out the draft legislative framework and the criteria against which Ofcom must assess any proposal it receives from such a body;
  - b) lays out the co-regulatory proposals put forward by industry stakeholders under which ATVOD could be designated as co-regulator for VOD editorial content;
  - c) sets out our view as to whether these proposals meet the criteria for designation specified both in the proposed Regulations and in Ofcom's own principles for assessing the suitability of co-regulatory models;
  - d) invites views on Ofcom's proposal that ATVOD should be designated as the co-regulator of VOD editorial content; and
  - e) invites stakeholders to propose any alternative approaches to Ofcom's proposal to designate ATVOD as the co-regulatory body for VOD editorial content.

## Background

- 5.3 The AVMS Directive requires that VOD editorial content complies with minimum standards set out in the AVMS Directive (and reproduced at Annex 5). In brief, these require that VOD editorial content:
- a) should not contain any incitement to hatred based on race, sex, religion or nationality;
  - b) which might seriously impair the physical, mental, or moral development of minors are only available in such a way that ensures that minors will not normally hear or see such content;
  - c) should fulfil the rules on sponsorship laid down in the AVMS Directive; and
  - d) may contain product placement subject to conditions laid down in the AVMS Directive.

- 5.4 In addition, the AVMS Directive also requires that Members States put in place arrangements for ensuring that VOD service providers: promote the production of, and access to, European works; make their services accessible to certain people with disabilities; and adhere to standards concerning the promotion of food or beverages.
- 5.5 As we mentioned in Section 4, it is important to note that the Government is implementing the terms of the AVMS Directive under section 2(2) of the ECA. The effect of this is that there are limits on what the proposed Regulations can do.
- 5.6 The effect of this is that, in relation to the minimum standards laid out in paragraphs 5.3 and 5.4, the regulator cannot set binding rules; the enforceable requirements are those set out in the implementing legislation. However, the regulator can provide guidance on the interpretation of the legislative standards. Such guidance may aid interpretation, and as such, it can only be seen as interpretive and indicative of the approach the regulator is likely to take in its interpretation and operation of the applicable statutory provisions.
- 5.7 The AVMS Directive explicitly recognises that self-regulatory schemes “can play an important role in delivering a high level of consumer protection”<sup>24</sup> as they encourage the direct involvement of businesses in the maintenance of standards. Nevertheless, the AVMS Directive is also clear that the voluntary nature of such schemes means they can play only a limited and supporting role in the enforcement of legislative obligations, explaining that “while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator.”<sup>25</sup>
- 5.8 The AVMS Directive requires the UK to regulate the content of UK VOD services to ensure that those services maintain, as a minimum, the standards and requirements set out in the AVMS Directive. At a minimum, the AVMS Directive provides for a co-regulatory system in which the VOD industry takes responsibility for ensuring content standards underpinned by statutory powers. In its Consultation on proposals for implementing the AVMS Directive, the Government (see paragraph 2.7 above) made clear its strong preference for a system of co-regulation to secure the new requirements of the AVMS Directive in relation to VOD services.
- 5.9 For an explanation of the differences between co-regulation and other approaches to regulation, see figure 5 below:

<b>Figure 5</b>	
<b>Approach</b>	<b>Description</b>
<b>No regulation</b>	Markets are able to deliver citizen and consumer outcomes. Citizens and consumers are empowered to take full advantage of the products and services in question and to avoid harm.
<b>Self-regulation</b>	Industry collectively administers a solution to address citizen or consumer issues, or other regulatory objectives, without formal oversight from government or regulator. There are no explicit ex ante legal backstops in relation to rules agreed by the scheme (although general obligations may still apply to providers in this

<sup>24</sup> AVMS Directive, recital 36.

<sup>25</sup> Ibid.

	area).
<b>Co-regulation</b>	Schemes that involve elements of self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to secure desired objectives.
<b>Statutory regulation</b>	Objectives and rules of engagement are defined by legislation, government or regulator, including the processes and specific requirements on companies, with enforcement carried out by public authorities.

- 5.10 The responses the Government received to its Consultation<sup>26</sup> generally split into two camps. Some respondents agreed with the Government's preferred option, in which an industry-led co-regulator would take on day-to-day regulatory responsibilities while Ofcom retained 'back-stop' powers to deal with the most serious cases. Others preferred direct regulation, either by Ofcom or through a separate independent body.
- 5.11 In his Ministerial Statement<sup>27</sup>, the Secretary of State for Culture, Media and Sport called on industry and Ofcom to develop co-regulatory arrangements for VOD editorial content and VOD advertising in order to allow the UK VOD industry to take the lead in setting and enforcing standards for the content of its services. Having taken into account the responses to the Consultation, he announced the Government's intention to introduce amendments to the Act to give Ofcom powers to regulate UK-based VOD services, so that Ofcom could then designate, and delegate powers to an industry-led co-regulatory body. These amendments, in the form of the proposed Regulations are due to be laid before Parliament in the autumn.
- 5.12 The proposed Regulations are clear that, in designating any functions to a co-regulatory body, Ofcom retains such functions in parallel. As such, Ofcom remains responsible, as a public body for the delivery of those functions according to Ofcom's general statutory duties and obligations. Co-regulation therefore means that Ofcom must identify co-regulatory bodies capable of carrying out their delegated functions in a rigorous manner, and needs to work, in an appropriate way, with these bodies to ensure this happens in practice.
- 5.13 In light of the Government's consultation and subsequent statement from the Secretary of State, we do not see it as our role in the current document to revisit the benefits of different regulatory models assessed in the Government's Consultation. The implications of the Ministerial Statement are clear: it is only in the absence of an appropriate co-regulatory alternative that responsibility for VOD regulation should remain solely with Ofcom. Instead, we consider that our role is to evaluate the suitability of any co-regulatory models proposed to us by stakeholders. In the remainder of this section we assess the proposal we have received from ATVOD against the criteria set out in the proposed Regulations and Ofcom's own guidelines. (We deal separately with the proposals for VOD advertising in Section 6). In carrying out our evaluation, we are mindful of ATVOD's current role as a self-regulatory body for VOD editorial content; the current state of the VOD industry (see paragraphs 2.11

<sup>26</sup> A copy of the Government's Consultation document, the responses received and a summary of those responses can be found at [http://www.culture.gov.uk/reference\\_library/consultations/5309.aspx](http://www.culture.gov.uk/reference_library/consultations/5309.aspx)

<sup>27</sup> See paragraph 2.7.

to 2.18 above; and the indicative financial costs to stakeholders arising from ATVOD's proposals (see paragraph 5.27 above).

- 5.14 It should be noted that the BBC's licence fee funded VOD services will be subject to co-incident regulation by the BBC Trust and Ofcom. The BBC Agreement will be amended accordingly. S4C's public service VOD services will be subject to coincident regulation by the Welsh Authority and Ofcom.
- 5.15 In Section 7, we separately invite stakeholders' views as to whether our proposals concerning the designation of ATVOD as co-regulator for editorial content, would be likely to have any impacts in relation to matters of equality.

### **Our basis for assessing co-regulatory models for VOD services**

- 5.16 As the body ultimately responsible for VOD regulation in the UK, the regulations will place a series of clear responsibilities on Ofcom. The scope of the proposed Regulations is discussed in Section 4 above. However, in relation to Ofcom's power to designate a co-regulator, the regulations will require that Ofcom may not designate any body unless, as respects that designation, we are satisfied it meets a series of criteria. These are:
- that it is a fit and proper body to be designated;
  - it consents to being designated;
  - that it has access to financial resources which are adequate to ensure the effective performance of its delegated functions;
  - that it is sufficiently independent of providers of VOD services; and
  - that it will, in performing any function to which the designation relates, have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and that it will have regard to such of the matters mentioned in section 3(4) of the Act as appear to it to be relevant in the circumstances.
- 5.17 In addition to these new duties, Ofcom must also have regard under section 3 of the Act to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed as well as to any other principles appearing to Ofcom to represent the best regulatory practice. Further, under section 6 of the Act, Ofcom is required to keep the carrying out of its functions under review with a view to securing that regulation by Ofcom does not involve the imposition of burdens which are unnecessary or the maintenance of burdens which have become unnecessary.
- 5.18 We are also required to promote effective self- and co-regulation and to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by Ofcom. In the context of VOD editorial content, we are mindful that any powers that we can designate are strictly defined by the proposed Regulations. Consumers and citizens can therefore be reassured that any body designated by Ofcom has only prescribed set of powers, as defined by legislation. To ensure we take a consistent approach when considering these issues, in 2004 we developed a set of criteria that we would apply when assessing whether to transfer any of our functions to a co-regulatory body. These were revised in 2008 in our statement *Identifying Appropriate*

*Regulatory Solutions: Principles for Analysing Self- and Co-regulation* (“*Principles for analysing co- and self-regulation*”)<sup>28</sup>. These criteria are listed in Figure 6 below and the mechanism by which Ofcom can adjudge the co-regulatory arrangements, including whether Ofcom retains certain functions:

<b>Figure 6: Good practice criteria to guide the establishment of new schemes</b>	
Public awareness	Audit of members and schemes
Transparency	System of redress in place
Significant participation by industry	Involvement of independent members
Adequate resource commitments	Regular review of objectives and aims
Enforcement measures	Non-collusive behaviour
Clarity of processes and structures	

## **Proposal for co-regulation by ATVOD - The co-regulatory framework proposed by industry stakeholders**

### **How ATVOD operates**

- 5.19 As discussed above, and prior to the planned implementation of the AVMS Directive on 19 December 2009, VOD services have not been subject to specific statutory regulation in the UK. Since 2003, however, a number of the UK’s largest VOD service providers, including BT, Channel 4 and Virgin Media, have operated a self-regulatory scheme under the auspices of ATVOD. Each ATVOD member is entitled to a seat on the Board alongside the two independent Board members, including the Chair.
- 5.20 As part of their conditions of membership, ATVOD members are required to ensure their VOD services comply with a Code of Practice, which contains a set of rules about the protection of children and young people, offensiveness and compliance with the self-regulatory scheme for non-broadcast advertising operated by the ASA. It should be noted that were ATVOD to be designated as the co-regulator for VOD editorial content, ATVOD would be free to operate a voluntary self-regulatory code for those VOD service providers who wished to abide by such a code. Such a code would be: wholly separate from the legislative standards that all VOD service providers would be required to adhere to, and as contained in the proposed Regulations; able to include rules that fall beyond the standards rules laid out in the proposed Regulations; and not be able to be funded by any part of the fees that service providers would pay to ATVOD in respects of notification.
- 5.21 Consumers whose complaints have not been satisfactorily resolved by the service provider concerned may bring their complaints to ATVOD for consideration by a sub-committee of its Board. In the event that a complaint is upheld, and subject to consideration by its Independent Complaints Adjudicator, ATVOD retains a

<sup>28</sup> See <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

progressive range of sanctions (from requiring the service provider to remedy the cause of the complaint to fining the service provider and suspending its ATVOD membership), although in its history no such sanction has been imposed.

### **The VOD Editorial Steering Group**

- 5.22 Following the Ministerial Statement, an industry stakeholder group, the VOD Editorial Steering Group (“VESG”) was set up, with the assistance of Ofcom and the DCMS, to work towards developing a proposal to Ofcom, for consultation, for a new co-regulatory body to regulate VOD. The VESG is chaired by Antony Walker, Chief Executive of the Broadband Stakeholder Group, and represents a range of industry stakeholders, including all of the UK’s major platform owners and major providers of VOD content<sup>29</sup>.
- 5.23 In the following paragraphs, we describe the proposal that has been received from ATVOD (“the ATVOD Proposal”) and which has been approved and commended to Ofcom by the VESG. The full ATVOD Proposal is included at Annex 7.

### **The proposed scheme**

- 5.24 Under the terms of the ATVOD Proposal submitted to us (attached at Annex 7), ATVOD proposes to remodel itself from a self-regulatory membership-based organisation into an independent industry wide co-regulator for the purpose of carrying out functions that would be delegated to it by Ofcom for it to secure compliance by VOD providers with the new statutory requirements. By 19 December, ATVOD proposes to (see paragraph 3.11, Annex 7):
- a) amend its Articles of Association and Board structure, so that a majority of Board members, including the Chair, are independent of industry;
  - b) recruit a new Chair and Chief Executive in a recruitment process compatible with the Nolan Principles<sup>30</sup>;
  - c) revise its code to reflect the new statutory requirements that will apply to VOD editorial content, including sponsorship and product placement;
  - d) develop and keep under review guidance notes to assist VOD providers in interpreting and applying those requirements including the process whereby providers would notify the regulator of their services;
  - e) publish new complaints procedures delineating the role of its complaints committee and Independent Adjudicator;
  - f) complete the development of a revised funding structure based on the income it would receive from notifying VOD services. ATVOD proposes that, under the model already established by Ofcom with the Broadcast Training and Skills Regulator, notification fees are collected and processed by Ofcom on its behalf. It

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<sup>29</sup> The membership of the VESG is drawn from the following organisations: ATVOD; BBC Worldwide; the British Board of Film Classification; the Broadband Stakeholder Group; BT; BSkyB; Channel 4; Five; ITV; Filmflex Movies; Microsoft; Mobile Broadband Group; Motion Pictures’ Association; Playboy TV; Satellite and Cable Broadcasters’ Group; Virgin Media; and Warner Brothers.

<sup>30</sup> In its proposal, ATVOD recognises that it is unlikely to be able to complete the recruitment process that would be required for a new Chair and Chief Executive by 19 December 2009. If it is unable to do so, the current independent Chair, Elizabeth Filkin, and the existing ATVOD independent Secretariat, Andrea Millwood Hargrave, would temporarily exercise those respective roles.

is proposed that in the first 15 months of operation these would be based on a flat fee which would be subject to revision in following years;

- g) develop an awareness campaign to inform industry and the public about the new regulatory arrangements that would apply; and
- h) agree reporting, referral and sanctions procedures with Ofcom.

5.25 The ATVOD Proposal includes a detailed timetable for implementation and notes the ongoing participation of the VESG in developing guidance notes and assessing its funding requirements. It also envisages working closely with Ofcom over an appropriate delineation of responsibilities between the two organisations. If, following the outcome of this consultation, Ofcom should accept the ATVOD Proposal, ATVOD anticipates taking on the following functions and responsibilities in the event that it is designated by Ofcom:

- a) ATVOD would adjudicate on complaints (see paragraph 3.7.3, Annex 7), while referring cases in which statutory sanctions may be appropriate to Ofcom. Ofcom would therefore not designate functions relating to the issuing of enforcement notifications, the imposition of financial penalties and suspension of services (see paragraph 3.8.3 (Annex 7));
- b) ATVOD would act as the regulator with responsibility for informing service providers about notification requirements and would conduct an initial assessment as to whether or not a service fell within the scope of the statutory criteria. Ofcom would continue to have the power to review any decisions made on scope by ATVOD. In the event that any provider were to dispute a notification decision made by ATVOD, there would be a right of referral to Ofcom (see paragraph 3.5.7, Annex 7); and
- c) Prior to 19 December 2009, ATVOD would discuss and agree procedures for review by Ofcom and reporting to Ofcom. These would include, for example, reviewing and approving any guidance notes produced by ATVOD, as well as corporate structures and operational procedures. Key Performance Indicators would also be agreed with Ofcom (see paragraph 3.10.1, Annex 7).

## Ofcom's assessment of the industry stakeholder proposals

### The impact of the proposed co-regulatory framework

5.26 We set out below, in paragraphs 5.27 to 5.35 our assessment of the potential impacts of co-regulation on affected parties, including consumer and citizens, and VOD service providers. Our published guidelines<sup>31</sup> on impact assessments explain that "an Impact Assessment should be proportionate to the likely impact of our decision. This means that the more substantial and/or wide ranging the impact on stakeholders, the more comprehensive the Impact Assessment should be".

5.27 Due to the nascent nature of the VOD industry, Ofcom does not have comprehensive quantitative data on which to base a full cost/benefit analysis. Based on an estimate of at least 150 notifiable services<sup>32</sup>, and taking into account the estimated budget for the regulation of VOD services of £400,000 (see also paragraph 4.3.4, Annex 7) for

<sup>31</sup> *Better policy making – Ofcom's approach to impact assessments*, Ofcom, April 2005 (see [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)).

<sup>32</sup> See paragraph 4.87.

the first 15 months (19 December 2009 to 31 March 2011), the initial notification fee would be likely to be between £2,000 and £2,500 for each service (up to £500 for the period 19 December 2009 to 31 March 2010 and up to an additional £2,000 to cover the period 1 April 2010 to 31 March 2011). It is suggested that it would be appropriate to review the fee structure for the financial years after 2010-11, and Ofcom would expect the co-regulatory body to consult stakeholders before taking any decisions in this area. In addition, the Government undertook its own cost-benefit analysis of co-regulation (see footnote 10). In view of the information available, Ofcom considers that the costs to industry would be marginal. Accordingly, we consider that a qualitative assessment of the impacts on stakeholders is appropriate in this case.

5.28 Large portions of the VOD sector are already regulated, on a self-regulatory basis, by ATVOD and the IMCB<sup>33</sup>. Therefore, we do not believe that co-regulation would have any significant negative effects on consumers, citizens, or VOD service providers, and that the overall costs to industry are likely to be marginal. Further, we consider that co-regulation offers real benefits to citizens and consumers, and therefore would help secure the public policy objectives contained in the AVMS Directive. These include:

- a) VOD service providers would benefit from a clear regulatory framework under which they can fulfil the relevant statutory requirements;
- b) the creation of a co-regulatory structure for VOD editorial content would generate a sense of ownership and commitment amongst the VOD industry;
- c) it is envisaged the proposed co-regulatory arrangements would be likely to foster a higher level of compliance from industry stakeholders, to the new regulatory regime. This means consumers and citizens would benefit from the application of minimum standard requirements for television-like content on cross-platform VOD services, being introduced on a statutory footing for the first time; and
- d) co-regulation could harness the common interests of industry stakeholders to maintain the reputation of VOD industry, through the direct involvement of industry stakeholders in the co-regulatory regime.

5.29 In Section 7, we separately invite stakeholders' views as to whether our proposals have any impacts in relation to matters of equality. In particular, we discuss Ofcom's proposal that it should retain the power within the proposed Regulations, that the regulator must encourage VOD service providers to ensure that their services are gradually made accessible to people with sight or hearing disabilities.

### **Are ATVOD's proposals likely to satisfy Ofcom that it would meet the statutory criteria for designation?**

5.30 As discussed above, we have assessed the ATVOD Proposal for designation as the co-regulator for VOD editorial content ("the ATVOD Proposal") against the criteria that will be set out in the new statutory provisions as currently set out in the proposed Regulations. We have also assessed the ATVOD Proposal against Ofcom's own principles for the establishment of co-regulatory schemes.

5.31 In relation to the statutory tests, we are satisfied that, by 19 December 2009, ATVOD:

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<sup>33</sup> See paragraph 2.19.

- a) would be able to amend its governing structure in order to ensure it is suitable for designation. In particular, the ATVOD Proposal states that ATVOD is undertaking to: restructure its board to ensure that independent members are in the majority, and recruit a new independent Chairman and Chief Executive Officer (see paragraph 3.3.3, Annex 7); and change its company structure to ensure its corporate structure is fit-for-purpose for the needs of operating as a viable stand-alone regulatory body (see paragraph 3.3.10, Annex 7).
- b) has already confirmed to us that it is willing to be designated;
- c) would have access to adequate financial resources in order to carry out the regulatory work assigned to it. Following discussion within the VESG, it is envisaged that ATVOD would require a flat fee for notification from service providers. Whilst, if it were to be designated, ATVOD would be administering more services than it does currently, it would be doing so for a much narrower set of rules i.e. only the requirements laid down in the AVMS Directive (see paragraph 5.3 above). Therefore, we consider that ATVOD's budget proposal (see section 4.3, Annex 7) appears to be suitable and chimes with the Government's own indicative estimate of the costs of co-regulation (see footnote 10). It is our understanding that, given the number of services which ATVOD and Ofcom consider are likely to fall within the scope of the proposed Regulations (see paragraph 4.88 above), this fee would be broadly similar to that paid to Ofcom by applicants for Ofcom Television Licensable Content Service (TLCS) licences<sup>34</sup>. We also agree that, given that Ofcom already has in place processes for the collection and administration of fees from its licensees, the task of collecting and processing fees should be carried out by Ofcom. This approach is likely to be more cost-efficient than if ATVOD were to develop its own finance function;
- d) would be sufficiently independent from providers of VOD services. We note that, according to its plan, by 19 December 2009 the majority of ATVOD Board members would be independent (see paragraph 3.3.3, Annex 7). In addition, independent board members would have a range of responsibilities (see paragraph 4.2.2, Annex 7) concerning issues such as evaluating the performance of the Chairman and oversee their appointment. We note also that the key sub-committee of the main board, Audit and Risk, would be chaired by and have a majority of independent members (see paragraph 4.2.3, Annex 7). We believe the proposed involvement of the independent board members would ensure that the non-industry viewpoint would be adequately represented in the work of ATVOD going forward. This will help ensure that there would be adequate protection in place for citizens and consumers in the design and operation of the various structures and procedures that will make up the new co-regulatory regime (in particular, decision-making and enforcement procedures);
- e) would have agreed both a set of Key Performance Indicators and a structured review programme with Ofcom. The timetable supplied by ATVOD includes a critical path for agreement on these issues. It is our view that these matters can be properly dealt within a designation agreement that will be required if the ATVOD Proposal is adopted.

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<sup>34</sup> Put simply, TLCS licences are for services made available using either satellite, an electronic communications network (such as cable), or a radio multiplex.

5.32 The ATVOD Proposal makes clear that ATVOD would have much to do in order to be in a position for Ofcom to designate it as co-regulator for VOD editorial content on 19 December 2009. This is perhaps unsurprising, given the changes that would be required to its existing structure and the fact that its proposals are contingent on the final outcome of this consultation. We note, however, that ATVOD has the continued support of the VESG in developing a suitable structure as well as sufficient interim funding to cover the cost of doing so. We consider, therefore, that the ATVOD Proposal does provide a clear road-map for the steps it would have to take by 19 December 2009 in order to pass the requirements laid out in the proposed Regulations.

5.33 As indicated in paragraph 5.31 above, we believe co-regulation is the preferred route for fulfilling appropriate regulation of VOD editorial content. In relation to our own criteria for assessing the suitability of ATVOD as a co-regulator, Ofcom has undertaken a two-stage assessment: firstly, we have undertaken an assessment of the appropriateness of the ATVOD Proposal, according to a number of high-order principles contained in our *Principles for analysing co- and self-regulation* (see footnote 28):

- i) **do industry participants have a collective interest in solving the problem?** – we consider that industry stakeholders have a collective will to facilitate the success of an industry-led solution to the regulation of VOD editorial content. This will enable industry stakeholders to have ownership over a scheme they have designed in order to fulfil statutory obligations, whilst minimising costs and administrative burdens;
- ii) **would the likely industry solution correspond to the best interests of citizens and consumers?** – as mentioned in paragraph 5.28(c) above, we consider that the ATVOD Proposal would ensure adequate protection of citizens and consumers, whilst reflecting the position of European legislators that VOD editorial content merits lighter-touch regulation<sup>35</sup>;
- iii) **would individual companies have an incentive not to participate in any agreed scheme?** – we consider that: given the wide engagement of industry stakeholders with the VESG; the likelihood that service providers who have notified the regulator would report on those who had not; and the powers conferred, in the proposed Regulations, upon the co-regulator to pursue service providers who opt not to notify their services, there would not be wide-spread attempts to evade co-regulation;
- iv) **are individual companies likely to ‘free-ride’ on an industry solution?** – we consider that, given the statutory obligation that all notifying services will be required to pay a fee to the regulator, as required under the proposed Regulations, there would be little scope for service providers to ‘free-ride’; and
- v) **can clear and straightforward objectives be established by industry?** – we consider that, given the heavy involvement of the VESG in drawing up the ATVOD Proposal, Scope Guidance and Notification Process, industry

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<sup>35</sup> Recital 42 of the AVMS Directive states: “On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive”.

stakeholders have already produced the framework of a scheme that is easy to understand and can be readily signed up to by service providers.

5.34 Second, we have undertaken an assessment of the ATVOD Proposal against the set of best-practice criteria in our *Principles for analysing co- and self-regulation*, and outlined in paragraph 5.18 above:

- a) **awareness** – we note that ATVOD: already promotes its own activities, as an assurer of good practices, to its members’ users; is aware of the need to ensure that service providers comply with the requirements of the AVMS Directive (see paragraph 3.9.1, Annex 7); and “believes a robust complaints system relies on good publicity” and commits to measures to ensure industry and consumers are aware of the co-regulatory system (see paragraph 3.9.2, Annex 7). Further, we note it would inform all service providers who are likely to fall within the scope of the new requirements of their obligation to notify by 31 January 2010 (see paragraph 3.9.3, Annex 7);
- b) **transparency** – under the ATVOD Proposal, ATVOD would publish details of its structure, complaints handling processes, the findings of its investigations and details of notifying services.<sup>36</sup> It notes the need for any designation agreement to include objectives and regular assessments of its performance by Ofcom;
- c) **significant participation by industry** – we note that all VOD service providers will be required to abide by the new statutory requirements and hence would have to abide by the co-regulatory regime. In addition, we note that:
  - a large number of UK-based service providers are members of the VESG, which has pledged its backing for ATVOD’s proposal;
  - there would still be significant involvement of industry on the ATVOD board (see paragraph 3.3.10, Annex 7); and
  - ATVOD recognises the need for there “to be appropriate publicity so that those in the industry who are either in scope or probably in scope so that they can notify between 19 December 2009 and 31 January 2010” (see paragraph 3.9.3, Annex 7);
- d) **adequate resources commitments** – as we discuss in paragraph 5.27, we consider ATVOD is correct in its view that funding from the notification fees of providers, to be collected by Ofcom, would be in excess of its current budget and that this should provide sufficient income for the new regulatory body to discharge its duties. We note, and consider viable, ATVOD’s work, already undertaken, relating to budgeting (see paragraph 3.4.2 and section 4.3, Annex 7). Further, we consider that the staffing structure outlined in the ATVOD Proposal (see paragraph 3.3.10, Annex 7) should be sufficient, if designated, during ATVOD’s first year of operation and welcome the fact that it is already developing a plan to ensure adequate staffing in future years;
- e) **enforcement measures** – we consider ATVOD’s outline proposals relating to processes for enforcement and for referral to Ofcom are sufficient at this point. In particular, we welcome ATVOD’s commitment, in liaison with Ofcom and the

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<sup>36</sup> For example in relation to complaints handling, ATVOD undertakes to produce a draft set of complaints handling procedures as soon as practicable, if designated by Ofcom (see paragraph 3.7.3, Annex 7).

VESG, to draft and publish as soon as practicable after designation a set of enforcement and sanctions procedures (see paragraph 3.8.3, Annex 7). ATVOD would adjudicate on complaints (see paragraph 3.7.3, Annex 7), while referring cases in which statutory sanctions may be appropriate to Ofcom. Ofcom would therefore not designate functions relating to the issuing of enforcement notifications, the imposition of financial penalties and suspension of services (see paragraph 3.8.3 Annex 7); The main principle behind these procedures is that ATVOD should reach the decisions about compliance with the regulations as regards both VOD editorial content and notification (subject in this latter case to a review process by Ofcom) and then refer the case to Ofcom for consideration of the imposition of a statutory sanction such as a fine or issuing a direction ordering a service to cease;

- f) **clarity of processes and structures** – we note that the ATVOD Proposal sets out the institutional structures and decision making arrangements it intends to adopt in the event that it is designated as a co-regulator (see paragraph 3.11 and section 4.2, Annex 7);
- g) **audit of members and schemes** – we note that ATVOD has committed to agreeing and publicising robust Key Performance Indicators (see paragraph 3.7.3(vii), Annex 7). In addition, we note that ATVOD is intending to set up an Audit and Risk Committee (see paragraph 4.2.3, Annex 7) for “ensuring the maintenance of appropriate and adequate audit processes and the governance of the internal audit and external audit programme”;
- h) **system of redress in place** – we consider the complaints handling procedures outlined by ATVOD in the event of designation are appropriate (see paragraph 3.7.3, Annex 7). We note also that ATVOD intends to retain an independent adjudicator as an appeals mechanism (see paragraph 3.7.3(iii), Annex 7);
- i) **involvement of independent members** – we note that ATVOD intends to remodel its board so that lay members will be in the majority (see paragraph 3.3.3, Annex 7). We also note that industry members will be appointed to represent the views of VOD service providers as a whole rather than their own companies (see paragraph 3.3.3(iv), Annex 7). In particular, we note that the majority of members on ATVOD’s Audit and Risk Committee will be drawn from the independent board members of the ATVOD board;
- j) **regular review of objectives and aims** – ATVOD proposes that, in light of the likely development of the VOD sector, the system operated by the co-regulator should be reviewed after the first two years of operation and periodically thereafter (see paragraph 3.10.5, Annex 7). In particular, we note the proposed role of ATVOD’s Audit and Risk Committee will review a range of issues, including: ATVOD’s independence; risk, control and governance; and accounting policies (see annex A, section 7, Annex 7). We consider that this proposal is appropriate; and
- k) **non-collusive behaviour** – we consider that a majority of independent board members should be sufficient to militate against collusive behaviour. We also consider it is important that the industry members have a clear role as industry representatives rather than as spokesmen for their own companies (see paragraph 3.3.3(iv), Annex 7).

5.35 We understand that a plan to stimulate public awareness of the proposed regulatory framework, and details of the organisation’s governance structures and complaints

procedures are to be finalised over the coming months. We anticipate the continued involvement of the VESG in this necessary process. With these provisos, we consider ATVOD's proposal provides a clear road-map for the steps it would have to take by 19 December 2009 in order to meet the criteria laid out above.

## Conclusion

- 5.36 We consider that ATVOD's proposal demonstrates that substantial progress has been made by it and the VESG towards putting forward a credible proposal for ATVOD as a fit-for-purpose body to be considered as a candidate for designation on 19 December 2009 as VOD editorial content co-regulator. We believe the various proposals it has outlined, together with the further work it has undertaken to carry out would put it on course to meet Ofcom requirements and the statutory criteria that would need to be met for it to be designated by Ofcom on 19 December. Ofcom is mindful of the possibility that ATVOD might not have completed all the necessary work, outlined in the ATVOD Proposal, by 19 December 2009, to be deemed fit-for-purpose to be designated as co-regulator of VOD editorial content. However, if Ofcom considers that ATVOD has undertaken enough work before the 19 December 2009 so as to be close to being ready to be designated thereafter, Ofcom would, subject to the responses it receives to this consultation, still propose to designate ATVOD as the co-regulator of VOD editorial content after the Implementation Date.
- 5.37 It is our view that, subject to the development of the co-regulatory framework put forward by ATVOD, and proposed by Ofcom along the lines indicated above:
- a) consumers would benefit from the existence on 19 December 2009 of a focused and specialised co-regulator, with the knowledge of, and support from this new and important sector, assessing VOD issues alongside Ofcom. They would be able to have confidence in the independence of this new scheme, given that Ofcom would retain: back-stop powers<sup>37</sup>; and the ability to impose statutory sanctions and intervene in the event of systemic failure<sup>38</sup>;
  - b) industry would, as envisaged by the Government, have effective ownership of a specialised co-regulatory body, created to ensure appropriate regulation for this new and growing sector. Therefore, industry would be able to manage its own regulatory arrangements in this new area of regulation from the start. We consider, for the reasons laid out in paragraph 5.28 above, that industry would benefit from co-regulation; and
  - c) the costs to industry as a whole of the proposed co-regulatory framework are marginal given ATVOD's budget proposal (see paragraph 5.27 above) which would be spread across all notifying service providers.
- 5.38 In the event that, following this consultation, Ofcom does not consider it appropriate to designate ATVOD as the co-regulator for VOD editorial content, all the relevant powers pertaining to VOD editorial content, contained in the proposed Regulations, would remain exclusively with Ofcom. In such circumstances, Ofcom would then have sole responsibility for the regulation of VOD editorial content, through direct regulation.

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<sup>37</sup> See paragraph 5.12.

<sup>38</sup> See paragraph 5.34(e).

**Question 4**

- a) Do stakeholders agree with Ofcom's proposal that, subject to the necessary progress being made over the consultation period, it would be appropriate for Ofcom to designate co-regulatory functions to ATVOD on 19 December 2009, or thereafter, when all relevant aspects of the ATVOD Proposal have been agreed, in relation to the regulation of VOD editorial content?
- b) If you do not agree that it would be appropriate for Ofcom to designate ATVOD as the co-regulator for VOD editorial content, please explain why?

**Alternative approaches**

- 5.39 We invite stakeholders to offer any alternative approaches to the proposed designation of ATVOD as the co-regulator of VOD editorial content.
- 5.40 Stakeholders should be aware that any alternative approaches must secure Ofcom's statutory duties, as required under the AVMS Directive, and as enshrined in the proposed Regulations.

**Question 5**

Do you wish to suggest alternative approaches to Ofcom's proposal to designate ATVOD as the co-regulatory body for VOD editorial content, and if so what are these?

## Section 6

# The regulation of video on demand advertising

## Introduction

- 6.1 In the previous section we set out our proposed approach to implementing the Regulations in relation to VOD editorial content. In this section we lay out our proposed approach to VOD advertising.
- 6.2 This section:
- a) explains the background to the new regulatory framework for VOD services, including the basis on which we have assessed proposals from the ASA for it to be designated by Ofcom as the co-regulator for VOD advertising;
  - b) describes the co-regulatory model for VOD advertising proposed by the ASA;
  - c) sets out our view as to whether the ASA's proposed scheme would be likely to meet both the statutory criteria set out in the proposed Regulations and our own stated principles for assessing co-regulatory models;
  - d) invites views on Ofcom's proposal that the ASA should be designated as the co-regulator of VOD advertising; and
  - e) invites stakeholders to propose any alternative approaches to Ofcom's proposal to designate the ASA as the co-regulatory body for VOD advertising.

## Background to the New Regulatory Framework for VOD Services

- 6.3 The AVMS Directive requires that VOD advertising complies with minimum standards set out in the AVMS Directive, and reproduced at Annex 5. In brief, these require that:
- a) advertisements should be readily recognisable. Surreptitious forms of advertising, such as the use of subliminal messaging, are prohibited;
  - b) advertisements should not prejudice respect for human dignity, or include or promote discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
  - c) advertisements should not encourage behaviour that is prejudicial to the health or safety of people, or grossly prejudicial to the protection of the environment;
  - d) advertisements for tobacco products, prescription-only medicines or medical treatment are proscribed;
  - e) advertisements for alcohol products may not be aimed at minors or encourage immoderate consumption; and
  - f) advertisements must not cause physical or moral detriment to minors or exploit their inexperience.

- 6.4 As we mentioned in Sections 4 and 5, it is important to note that the Government is implementing the terms of the AVMS Directive under section 2(2) of the ECA.
- 6.5 The effect of this is that, in relation to the minimum standards laid out in paragraphs 6.3, the regulations cannot confer a power to legislate. This means that the regulator cannot set binding rules; the enforceable requirements are those set out in the implementing legislation. However, the regulator can provide guidance on the interpretation of the legislative standards. Such guidance may aid interpretation, and as such, it can only be seen as interpretive and indicative of the approach the regulator is likely to take in its interpretation and operation of the applicable statutory provisions.
- 6.6 As discussed in Section 5, the AVMS Directive explicitly recognises that self-regulatory schemes “can play an important role in delivering a high level of consumer protection”<sup>39</sup> as they encourage the direct involvement of businesses in the maintenance of standards. Nevertheless, the AVMS Directive is also clear that the voluntary nature of such schemes means they can play only a limited and supporting role in the enforcement of legislative obligations, explaining that “while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator.”<sup>40</sup>
- 6.7 The AVMS Directive requires the UK to regulate advertising associated with UK VOD services to ensure that such advertising maintains, as a minimum, the standards and requirements set out in the AVMS Directive. At a minimum, the AVMS Directive provides for a co-regulatory system. In its Consultation<sup>41</sup> on proposals for implementing the AVMS Directive the Government (see paragraph 2.7 above) made clear its strong preference for a system of co-regulation to secure the new requirements of the AVMS Directive in relation to VOD advertising. For an explanation of the differences between co-regulation and other approaches to regulation, see figure 5 at paragraph 5.9.
- 6.8 The proposal that the regulatory responsibility for the co-regulation of VOD advertising should be given to the ASA, with Ofcom taking a ‘back-stop’ role similar to the situation in broadcast advertising, was overwhelmingly favoured by respondents.
- 6.9 In his Ministerial Statement<sup>42</sup>, the Secretary of State for Culture, Media and Sport called on industry and Ofcom to develop co-regulatory arrangements for VOD editorial and VOD advertising. Having taken into account the responses to the Consultation, he announced the Government’s intention to introduce amendments to the Act to give Ofcom powers to regulate VOD editorial content and VOD advertising, so that Ofcom could then designate powers to: an industry-led co-regulatory body, in relation to VOD editorial content (see Section 5); and, the Government hoped, the ASA, in relation to VOD advertising, in order to maintain the latter’s role as the ‘one-stop shop’ for complaints about advertising<sup>43</sup>. These amendments, which are set out

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<sup>39</sup> AVMS Directive, recital 36.

<sup>40</sup> Ibid.

<sup>41</sup> A copy of the Government’s consultation document, the responses received and a summary of those responses can be found at [http://www.culture.gov.uk/reference\\_library/consultations/5309.aspx](http://www.culture.gov.uk/reference_library/consultations/5309.aspx)

<sup>42</sup> See paragraph 2.7.

<sup>43</sup> The proposed legislation will apply regulation only to those advertisements that can be viewed by a user as a result of his selecting a particular programme to watch. Advertising that falls outside the scope of the new legislative requirements will continue to be covered by the more comprehensive rules in the British Code of Advertising, Sales Promotion and Direct Marketing (the “CAP Code”), the

in the form of the proposed Regulations are due to be laid before Parliament in the autumn.

- 6.10 The proposed Regulations are clear that, in designating any functions to a co-regulatory body, Ofcom retains such functions in parallel. As such, Ofcom remains responsible, as a public body for the delivery of those functions according to Ofcom's general statutory duties and obligations. Co-regulation therefore means that Ofcom must identify co-regulatory bodies capable of carrying out their delegated functions in a rigorous manner, and needs to work, in an appropriate way, with these bodies to ensure this happens in practice.
- 6.11 In light of the Government's Consultation and the Ministerial Statement from the Secretary of State, we do not see it as our role in the current document to revisit the benefits of different regulatory models assessed in the Government's Consultation. The implications of the Ministerial Statement are clear: it is only in the absence of an appropriate co-regulatory alternative that responsibility for VOD regulation should remain solely with Ofcom. Therefore, given the clear evidence from the Government's Consultation that such a move has industry support, and the absence of credible co-regulatory alternatives, we have worked with the DCMS, ASA and Advertising Association to develop a proposal for co-regulation. We understand that the Advertising Association has also consulted its members, and others within the advertising industry. Our aim in the current document is to evaluate the suitability of the ASA as the VOD advertising co-regulator before subjecting that critique to public consultation in order to assess whether it is robust.
- 6.12 In Section 7, we separately invite stakeholders' views as to whether our proposals concerning the designation of the ASA as co-regulator for advertising, would be likely to have any impacts in relation to matters of equality.

### **Our basis for assessing co-regulatory models for VOD Advertising**

- 6.13 As the body ultimately responsible for VOD regulation in the UK, the Regulations place a series of clear responsibilities on Ofcom. The scope of the proposed Regulations discussed in section 4 above. However, in relation to Ofcom's power to designate a co-regulator, the regulations will require that Ofcom may not designate any body unless, as respects that designation, we are satisfied it meets a series of criteria. These are:
- that it is a fit and proper body to be designated;
  - it consents to being designated;
  - that it has access to financial resources which are adequate to ensure the effective performance of its delegated functions;
  - that it is sufficiently independent of providers of VOD services; and
  - that it will, in performing any function to which the designation relates, have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases

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self regulatory code which is drafted and revised by the industry body, the Committee of Advertising Practice. It is under the CAP Code that the ASA adjudicates on the self-regulatory aspects of non-broadcast advertising. See paragraphs 6.15 to 6.18 below for further information about the ASA's role.

in which action is needed; and that it will have regard to such of the matters mentioned in section 3(4) of the Act as appear to it to be relevant in the circumstances.

- 6.14 In addition to these new duties Ofcom must also have regard under section 3 of the Act to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed as well as to any other principles appearing to Ofcom to represent the best regulatory practice. Further, under section 6 of the Act, Ofcom is required to keep the carrying out of its functions under review with a view to securing that regulation by Ofcom does not involve the imposition of burdens which are unnecessary or the maintenance of burdens which have become unnecessary. We are also required to promote effective self-regulation and to consider what extent it would be appropriate to remove or reduce regulatory burdens imposed by Ofcom. To ensure we take a consistent approach when considering these issues, in 2004 we developed a set of criteria that we would apply when assessing whether to transfer any of our functions to a co-regulatory body. These were revised in 2008 in our statement *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation*.<sup>44</sup> These criteria are listed in Figure 7 below:

<b>Figure 7: Good practice criteria to guide the establishment of new schemes</b>	
Public awareness	Audit of members and schemes
Transparency	System of redress in place
Significant participation by industry	Involvement of independent members
Adequate resource commitments	Regular review of objectives and aims
Enforcement measures	Non-collusive behaviour
Clarity of processes and structures	

## The co-regulatory framework proposed by the ASA

### How the ASA operates

- 6.15 The ASA has investigated and adjudicated on complaints about non-broadcast advertising for over forty years, including more recently complaints concerning paid-for advertising in VOD services. It is funded by a levy on non-broadcast advertising, which is collected from the advertising industry by the Advertising Standards Board of Finance (“ASBOF”), and assesses complaints against a code drafted by the Committee of Advertising Practice (“CAP”), an industry body comprised of trade associations representing advertisers, agencies and the media.
- 6.16 Since 2004, a legally separate but operationally aligned body, ASA (Broadcast) (“ASA (B)”) has performed the same role in relation to broadcast advertising. It is funded by a levy on broadcast advertising, which is collected from industry by the

<sup>44</sup> See <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

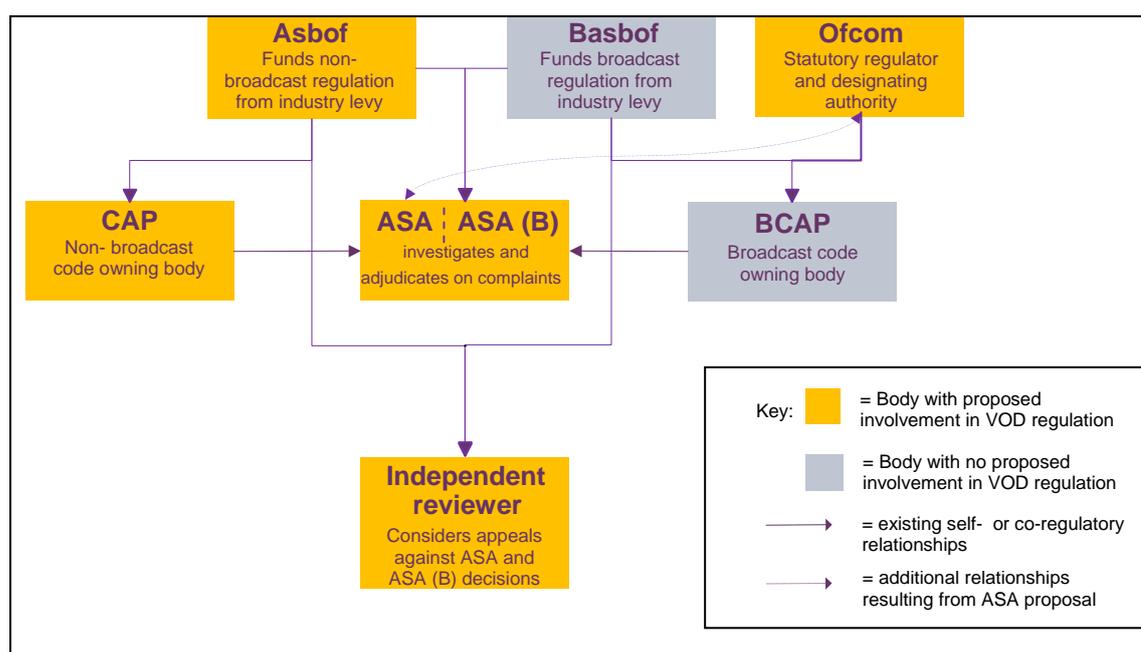
Broadcast Advertising Standards Board of Finance (“BASBOF”) and assesses complaints against a code drafted by the Broadcast Committee of Advertising Practice (“BCAP”), an industry body comprising advertisers, agencies and representatives of the broadcast media.

- 6.17 The broadcast side of the system is run as a co-regulatory scheme. Although Ofcom has delegated various responsibilities to BCAP and the ASA, we retain a role in supervising the effectiveness of the system, for instance, overseeing how the ASA meets its key indicator targets, which the co-regulatory body is expected to meet. Additionally, under the terms of an authorisation agreement with BCAP, the industry body is unable to make changes to its Code without approval from Ofcom.
- 6.18 Although the broadcast and non-broadcast sides of the advertising system have a different legal status, the ASA and ASA (B) operate parallel structures. Three points are of particular relevance to the current consultation:
- 6.18.1 The ASA and ASA (B) share an independent Chairman appointed in line with Nolan principles by ASBOF and BASBOF following consultation with the Advertising Association, Government and Ofcom.
  - 6.18.2 The complaint adjudicating bodies of both organisations, known as their Councils, comprises eight lay members and four industry members.
  - 6.18.3 Adjudications by the ASA and ASA (B) are subject to an independent review process which is funded by ASBOF and BASBOF.

### **The proposed scheme**

- 6.19 Under the plans that have been developed, we would be proposing to designate the ASA as the regulatory authority for VOD advertising. CAP has undertaken to broaden its membership to include representation from the VOD industry, and proposes to introduce an annex to the CAP Code with the relevant provisions from the Regulations for the ASA to enforce. The designation would require that the ASA refrain from making a determination that a breach of the requirements set out in the legislation has occurred. Day to day regulation would be in the hands of the ASA who would be responsible for investigating complaints about VOD advertising. Ofcom would retain the ability to take immediate action in the event that we considered a serious breach of the regulations had taken place and would have the function of determining whether a contravention of the statutory requirements had occurred. We would also expect the ASA to refer repeated or serious matters to us to consider whether to take action under the Regulations, thereby replicating the arrangements that apply to broadcast advertising.
- 6.20 We are proposing that to ensure accountability, the ASA would, if designated, report each year on matters such as: the number of complaints received; how many cases of advertising these involved; and the breakdown of complaints that were upheld, partially upheld, or not upheld. The ASA produces similar reports in respect of broadcast advertising.
- 6.21 Figure 8 gives a structural overview as to the proposed involvement of the ASA and CAP in the co-regulation of VOD advertising:

**Figure 8**



## Ofcom's assessment of the ASA's proposals

### The impact of our proposal

6.22 We set out below in paragraphs 6.26. to 6.31 our assessment of the potential impacts of co-regulation on affected parties, including consumer and citizens, VOD service providers and advertisers. Within this assessment is our full consideration of the impact of our proposals on stakeholders. Our published guidelines<sup>45</sup> on impact assessments explain that “an Impact Assessment should be proportionate to the likely impact of our decision. This means that the more substantial and/or wide ranging the impact on stakeholders, the more comprehensive the Impact Assessment should be”.

6.23 As mentioned in Section 5, due to the nascent nature of the VOD industry, Ofcom does not have adequate comprehensive quantitative data on which to base a full cost/benefit analysis. Accordingly, we consider that a qualitative assessment of the impacts on stakeholders is appropriate in this case.

6.24 In particular, we do not believe that either direct or co-regulation would have a significant effect on consumers, citizens, VOD service providers or advertisers. Further, we consider that co-regulation would help secure the public policy objectives contained in the AVMS Directive. There are several reasons for this:

- a) consumers already benefit from the fact that VOD advertising is currently subject to the CAP Code, which embodies (and indeed goes beyond) many of the principles set out in the draft legislation, and which is currently enforced by the ASA;

<sup>45</sup> *Better policy making – Ofcom's approach to impact assessments*, Ofcom, April 2005 (see [http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)).

- b) the cost of regulating VOD advertising is unlikely to be very high, given that in either case, as most of the ASA's work would be to respond to and assess complaints, of which there have been very few under the existing self-regulatory arrangements. This is despite the fact that the ASA is, according to one survey, the best recognised UK media regulator (see section 7.2, Annex 8); and
- c) the costs to advertisers and VOD service providers of complying with VOD advertising rules would be unlikely to be significantly higher than the costs of complying with the self-regulatory Code already in place due to the manner in which the co-regulatory regime would be funded. In addition, many advertisements shown in VOD services will already have met the stricter requirements applying to broadcast advertisements.

6.25 In Section 7, we separately invite stakeholders' views as to whether our proposals have any impacts in relation to matters of equality.

**Is the ASA's proposal for designation likely to satisfy Ofcom that it would be meet the statutory criteria for designation?**

6.26 As discussed above, we have assessed the ASA's Proposal for designation as the co-regulator for VOD advertising ("the ASA Proposal" – see attached at Annex 8) against the criteria that will be set out in the new statutory provisions as currently set out in the proposed Regulations. We have also assessed the ASA Proposal against Ofcom's own principles for the establishment of co-regulatory schemes.

6.27 In relation to the statutory tests, we are satisfied that:

- a) the ASA's experience of co-regulating broadcast advertising demonstrates that it is a fit and proper body (see section 11, Annex 8);
- b) the ASA has confirmed to Ofcom that it would consent to being designated as a co-regulator for VOD advertising and that CAP has confirmed its willingness to amend its code accordingly (see Annex 8);
- c) as illustrated in figure 8 above, ASBOF has also confirmed that it will make the necessary arrangements to fund the ASA's VOD-related activities, in the same way as it already funds other aspects of the ASA's work (see Annex 8);
- d) the ASA's governance structure, in which a clear majority of its complaints adjudicating body are lay members, and which mirrors the arrangements in relation to the ASA's current co-regulatory arrangements in relation to broadcast advertising, demonstrates that it is sufficiently independent of VOD service providers; and
- e) in the event of designation, we would agree with the ASA a set of key indicators (including complaints received, completed and upheld) as well as a structured review programme with the ASA (see Annex 8).

6.28 Accordingly we consider that the ASA would meet the requirements set out in the Regulations if, following this consultation, it was decided to proceed with designation.

6.29 As indicated in paragraph 6.24 above, we believe co-regulation is appropriate for the regulation of VOD advertising. In relation to our own criteria for assessing the suitability of a co-regulator, Ofcom has undertaken a two-stage assessment: firstly, we have undertaken an assessment of the appropriateness of the ASA Proposal,

according to a number of steps contained in our *Principles for analysing co- and self-regulation* (see footnote 28):

- i) **do industry participants have a collective interest in solving the problem?** – we consider that industry stakeholders have a collective will to facilitate the success of an industry-led solution to the regulation of VOD advertising, given the track-record of the ASA in regulating to date: VOD advertising on a self-regulatory basis; and broadcast advertising on a co-regulatory basis. Under the ASA Proposal, industry stakeholders would have ownership over a scheme they have designed in order to fulfil statutory obligations, whilst minimising costs and administrative burdens;
- ii) **would the likely industry solution correspond to the best interests of citizens and consumers?** – as mentioned in paragraph 6.24(a) above we consider that the ASA Proposal would ensure adequate protection of citizens and consumers, whilst reflecting the position of European legislators that VOD advertising merits lighter-touch regulation<sup>46</sup>;
- iii) **would individual companies have an incentive not to participate in any agreed scheme?** – we consider that: given the wide engagement of industry stakeholders with the existing self-regulatory scheme in relation to VOD advertising; and the powers conferred, in the proposed Regulations, upon the co-regulator to enforce the legislative powers relating to VOD advertising, there would not be wide-spread attempts to evade co-regulation;
- iv) **are individual companies likely to ‘free-ride’ on an industry solution?** – we consider that, given that ASBOF has a well-established model for collecting a levy on advertising expenditure (see figure 8), there would be little scope for service providers to ‘free-ride’; and
- v) **can clear and straightforward objectives be established by industry?** – we consider that, given the involvement of industry stakeholders<sup>47</sup> in drawing up the ASA Proposal, industry stakeholders have already produced the framework of a scheme that: is easy to understand; and can be readily signed up to by service providers.

6.30 Second, we have undertaken an assessment of the ASA Proposal against the criteria in our *Principles for analysing co- and self-regulation*, and outlined in paragraph 6.14 above:

- a) **awareness** – the ASA’s role as the UK’s advertising regulator is well established – it’s role is recognised by nearly 80% of the public according to research<sup>48</sup>. It is likely that regulation of VOD advertising by another body would lead to considerable public confusion;
- b) **transparency** – the ASA intends to publish the findings of its investigations, as it does in the case of broadcasting-related complaints, as well as a detailed

<sup>46</sup> Recital 42 of the AVMS Directive states: “On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive”.

<sup>47</sup> We understand that CAP has approved ASA proposal. For a full list of CAP’s membership (see [http://www.asa.org.uk/cap/codes/cap\\_code/](http://www.asa.org.uk/cap/codes/cap_code/))

<sup>48</sup> See [http://www.pcc.org.uk/assets/111/PCC\\_public\\_opinion\\_survey\\_final\\_topline\\_results.pdf](http://www.pcc.org.uk/assets/111/PCC_public_opinion_survey_final_topline_results.pdf)

- evaluation of its performance against key indicators in its annual statement (see paragraph 8.1.5, Annex 8);
- c) **significant participation by industry** – the ASA is funded by industry, which is also represented on its Council. We note that the Advertising Association and CAP have pledged their support for the ASA’s proposal;
  - d) **adequate resource commitments** – we note that ASBOF has agreed to fund the ASA’s proposed role in VOD advertising regulation via the levy on advertising which it already collects to pay for the self- and co-regulatory systems already in place for broadcast and non-broadcast advertising (see Annex 8);
  - e) **enforcement measures** – we consider the ASA’s proposals for day to day enforcement of the standards for VOD advertising and the non-statutory sanctions it proposes are sufficient. These include: prohibiting advertising and advertising techniques; and encouraging service providers to seek advice before running future advertisements. We note also that the ASA proposes to refer the most serious cases to us for consideration of statutory sanctions (see Annex 8) ;
  - f) **clarity of processes and structures** – the ASA’s processes for investigating and adjudicating on complaints are described in the CAP Code. From 19 December 2009, new procedures will be made available publicly. For example, information for consumers is available on the company’s website, including information on how to complain;
  - g) **audit of members and schemes** – we have agreed with the ASA that, in the event of designation, it would report to us each year on a range of measures including complaints received, completed and upheld. We also anticipate that these would be published by the ASA (in the same manner as its performance in regulating broadcast advertising) in its annual report and on its website (see Annex 8);
  - h) **system of redress in place** – we consider the complaints handling procedures for VOD advertising outlined by the ASA in the event of designation are appropriate, given that they replicate the existing complaints handling procedures in place for broadcast advertising. We note also that the ASA retains an Independent Reviewer, who has a proven track-record of giving complainants a second opportunity to consider complaints, to consider appeals about the conduct of ASA investigations.
  - i) **involvement of independent members** – we note that two-thirds of the ASA Council, its adjudicating body, are independent of industry. This means that decisions of the ASA Council will be greatly influenced by stakeholders who are free from the vested interests of industry;
  - j) **regular review of objectives and aims** – we are in agreement with the ASA that any designation should be reviewed after the first two years of operation and periodically thereafter, as has been the case in broadcast advertising (see Annex 8); and
  - k) **non-collusive behaviour** – we consider that the make-up of the ASA Council and the transparency of its procedures should be sufficient to protect against collusive behaviour. We base this assessment on the proven track-record of the ASA as the co-regulator for broadcast advertising.

- 6.31 In our view, the proposed co-regulatory scheme compares well with the good practice criteria set out above.

## Conclusion

- 6.32 It is our view that:

- a) in light of the ASA's high recognition amongst consumers; its current role as the converged regulator of advertising in the UK; and high levels of satisfaction among consumers at the ASA's complaints handling processes<sup>49</sup>, the proposed designation would be in the interests of consumers;
- b) industry has already shown its support for ASA designation via CAP and in response to the Government's Consultation; and
- c) the costs of co-regulation would be readily incorporated within the existing ASA structure as the regulator already oversees VOD advertising in a self-regulatory capacity.

- 6.33 We consider that designation of the ASA would meet both the statutory criteria in the proposed Regulations and our own principles for co-regulatory systems. We also consider that the alternative, in which we look for an alternative co-regulatory model or seek to make significant changes to the ASA's proposal are likely to lead to significant public confusion. Equally, given the strong investment of industry in the proposed regulatory structure as well as the clearly stated preference of Government for an ASA-led co-regulatory model, we do not consider that an alternative form of co-regulation is likely to be practical, and particularly not by 19 December 2009.

- 6.34 In the event that, following this consultation, Ofcom does not consider it appropriate to designate the ASA as the co-regulator for VOD advertising, all the relevant powers to VOD advertising, contained in the proposed Regulations, would remain exclusively with Ofcom. In such circumstances, Ofcom would then have sole responsibility for the regulation of VOD advertising, through direct regulation.

### **Question 6**

- a) Do stakeholders agree with Ofcom's proposal that it would be appropriate for Ofcom to designate co-regulatory functions to the ASA on 19 December 2009, in relation to the regulation of VOD advertising?
- b) If you do not agree that it would be appropriate for Ofcom to designate the ASA as the co-regulator for VOD advertising, please explain why?

## Alternative approaches

- 6.35 We invite stakeholders to offer any alternative approaches to the proposed designation of the ASA as the co-regulator of VOD advertising.
- 6.36 Stakeholders should be aware that any alternative approaches must secure Ofcom's statutory duties, as required under AVMS, and as enshrined in the Regulations.

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<sup>49</sup> According to the ASA's own customer satisfaction research, and bearing in mind that the ASA's work will inevitably involve disappointing one party to a complaint, 74% are satisfied with the service they receive and 85% think that the ASA has consumers' interests at heart (See paragraph 7.4, Annex 8).

**Question 7**

Do you wish to suggest alternative approaches to Ofcom's proposal to designate the ASA as the co-regulatory body for VOD advertising, and if so what are these?

## Section 7

# Equality issues

- 7.1 As mentioned in paragraph 3.9, Ofcom is required by statute to have due regard to any potential impacts our proposals in this consultation may have on equality in relation to gender, disability or ethnicity – an Equality Impact Assessment (“EIA”) is our way of fulfilling this obligation<sup>50</sup>. An EIA is Ofcom’s tool for analysing the potential impacts a proposed policy or project is likely to have on people, depending on their background or identity. In relation to equality (whether in Northern Ireland or the rest of the UK) including gender, disability or ethnicity, we consider that our approach to regulation as a result of the current proposals would remain unchanged and therefore we do not consider that our proposals, as outlined in Sections 4, 5 and 6 would have any particular implications for people to whom these considerations relate. We base this conclusion on the experience gained by Ofcom in regulating standards in editorial content in linear broadcast services as well as our involvement in the regulation of broadcast advertising.
- 7.2 On the basis of our initial EIA screening and the information currently available to us, Ofcom considers that it is not necessary for a full EIA to be undertaken as part of this consultation. However, in this document, we are inviting stakeholders to submit responses specifically on any potential impacts relating to equality resulting from the implementation of a co-regulatory regime. This is to ensure that we have not failed inadvertently to consider any possible equality impacts resulting from the proposed arrangements for co-regulation.
- 7.3 However, whilst we consider there are no equality implications from our proposals in Sections 4, 5 and 6, we note that there will be a statutory obligation on the regulator to encourage VOD service providers to ensure that their services are gradually made accessible to people with sight or hearing disabilities (“the Access Duty”). As we mention in Section 5, whilst we are proposing to designate ATVOD with a range of powers in relation to VOD editorial content, we are proposing to retain the Access Duty. This is for three main reasons.
- a) Ofcom has expertise and a proven track record in this area, as it already has a duty under the Act to publish and from time to time review and revise a Code setting out how applicable television services should promote the understanding and enjoyment of television by people who have hearing or visual impairments, or who have a dual sensory impairment (deafblind)<sup>51</sup>. In exercising its duty, Ofcom facilitates television access services (subtitling, signing and audio description) so as to help people with hearing and/or visual impairments to understand and enjoy television;

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<sup>50</sup> See section 71(1) of the 1976 Race Relations Act (as amended), section 49A of the 1995 Disability Discrimination Act (as amended), and section 76A(1) of the 1976 Sex Discrimination Act (as amended).

<sup>51</sup> The Act prescribes quotas for broadcasters (as defined by Ofcom) to subtitle 80%, sign 5% and audio describe 10% of all programmes by the tenth anniversary of the relevant date for each channel, as well as a subtitling quota to be reached by the fifth anniversary (60%). To reflect these requirements, Ofcom published the Code on Television Access Services (the “Television Access Code”) in July 2004, and conducted the first review of the Code in 2006.

- b) many VOD services are provided by broadcasters, who have track record of dealing with Ofcom, in relation to the Television Access Code relating to linear broadcast services; and
- c) in fulfilling its duties in the linear arena, Ofcom has established links with: broadcasters; providers of access technologies; and in particular advocacy groups representing the views of people with disabilities.

**Question 8**

- a) Do our proposals, as outlined in Sections 4, 5 and 6 concerning: draft Scope Guidance; delegation of functions relating to notification; and the implementation of a new co-regulatory regime for VOD editorial content and VOD advertising have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity?
- b) Do you agree with our proposal to retain the Access Duty in relation to VOD?
- c) Are there any other possible equality impacts that we have not considered?

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on Monday 26 October 2006**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/vod/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [VODConsultation@ofcom.org.uk](mailto:VODConsultation@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Sara Winter  
Ofcom  
Content and Standards  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Adam Baxter on 020 7981 3236.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

### Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in December 2009.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

### Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom  
Sutherland House  
149 St.Vincent Street  
Glasgow G2 5NW

Tel: 0141 229 7401  
Fax: 0141 229 7433

Email [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

**Cover sheet for response to an Ofcom consultation: BASIC DETAILS**

Consultation title: Regulation of Video On Demand Services

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

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Part of the response	<input type="checkbox"/>		

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Name

Signed (if hard copy)

## Annex 4

# Consultation questions

### **Question 1**

- a) Is the draft Scope Guidance set out above appropriate?
- b) If you do not agree that the draft Scope Guidance is appropriate, please explain why and suggest alternative wording where appropriate.

### **Question 2**

- a) Is the proposed allocation of functions relating to set out in paragraphs 4.87 to 4.91 appropriate?
- b) If you do not agree that the proposed allocation of functions relating to notification is appropriate, please explain why and suggest an alternative, where appropriate.

### **Question 3**

Do you wish to suggest alternative approaches to either of both:

- a) the Scope Guidance; and/or
- b) the proposed allocation of functions relating to notification?

### **Question 4**

- a) Do stakeholders agree with Ofcom's proposal that, subject to the necessary progress being made over the consultation period, it would be appropriate for Ofcom to designate co-regulatory functions to ATVOD on 19 December 2009, or thereafter, when all relevant aspects of the ATVOD Proposal have been agreed, in relation to the regulation of VOD editorial content?
- b) If you do not agree that it would be appropriate for Ofcom to designate ATVOD as the co-regulator for VOD editorial content, please explain why?

### **Question 5**

Do you wish to suggest alternative approaches to Ofcom's proposal to designate ATVOD as the co-regulatory body for VOD editorial content, and if so what are these?

### **Question 6**

- a) Do stakeholders agree with Ofcom's proposal that it would be appropriate for Ofcom to designate co-regulatory functions to the ASA on 19 December 2009, in relation to the regulation of VOD advertising?
- b) If you do not agree that it would be appropriate for Ofcom to designate the ASA as the co-regulator for VOD advertising, please explain why?

**Question 7**

Do you wish to suggest alternative approaches to Ofcom's proposal to designate the ASA as the co-regulatory body for VOD advertising, and if so what are these?

**Question 8**

- a) Do our proposals, as outlined in Sections 4, 5 and 6 concerning: draft Scope Guidance; delegation of functions relating to notification; and the implementation of a new co-regulatory regime for VOD editorial content and VOD advertising have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity?
- b) Do you agree with our proposal to retain the Access Duty in relation to VOD?
- c) Are there any other possible equality impacts that we have not considered?

## Annex 5

# Audiovisual Media Services Directive

## Extracts relevant to the regulation of VOD services

A5.1 The following text sets out those recitals and articles of the Audiovisual Media Services (AVMS) Directive that are particularly relevant to the regulation of VOD editorial content and VOD advertising<sup>52</sup>

### Recitals

(7) Legal uncertainty and a non-level playing-field exist for European companies delivering audiovisual media services as regards the legal regime governing emerging on-demand audiovisual media services. It is therefore necessary, in order to avoid distortions of competition, to improve legal certainty, to help complete the internal market and to facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services). The basic principles of Directive 89/552/EEC, namely the country of origin principle and common minimum standards, have proved their worth and should therefore be retained.

(15) No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.

(16) For the purpose of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.

(17) It is characteristic of on-demand audiovisual media services that they are "television-like", i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the notion of "programme" should be interpreted in a dynamic way taking into account developments in television broadcasting.

(18) For the purpose of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and

<sup>52</sup> At the time of publication, an official consolidated version of the AVMS Directive was not available. However, an unofficial version published by the European Commission can be found at [http://ec.europa.eu/avpolicy/docs/reg/avmsd/avmsd\\_cons\\_en.pdf](http://ec.europa.eu/avpolicy/docs/reg/avmsd/avmsd_cons_en.pdf)

should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

(20) Television broadcasting, currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video on demand, whereas video on demand, for example, is an on demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

(21) The scope of this Directive should not cover electronic versions of newspapers and magazines.

(22) For the purpose of this Directive, the term "audiovisual" should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect Member States' freedom to regulate such services at national level in accordance with the Treaty.

(23) The notion of editorial responsibility is essential for defining the role of the media service provider and thereby for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the notion of "effective control", when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

(25) All the characteristics of an audiovisual media service set out in its definition and explained in Recitals 16 to 23 should be present at the same time.

(26) In addition to television advertising and teleshopping, a wider definition of audiovisual commercial communication should be introduced in this Directive, which however should not include public service announcements and charity appeals broadcast free of charge.

(35) With respect to on-demand audiovisual media services, restrictions upon their free provision should only be possible in accordance with conditions and procedures replicating those already established by Articles 3(4), (5) and (6) of Directive 2000/31/EC.

(36) In its Communication to the European Parliament and the Council on Better Regulation for Growth and Jobs in the European Union, the Commission stressed that a careful analysis

of the appropriate regulatory approach is necessary, in particular, in order to establish, whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co- and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves.

Thus self-regulation constitutes a type of voluntary initiative, which enables the economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves. Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator.

Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States.

Co-regulation should allow for the possibility for State intervention in the event of its objectives not being met. Without prejudice to Member States' formal obligations regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co- and/or self-regulatory regimes nor disrupt or jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively.

(42) On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.

(44) The availability of harmful content in audiovisual media services continues to be a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. It is therefore necessary to introduce rules to protect the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications.

(45) Measures taken to protect the physical, mental and moral development of minors and human dignity should be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. The aim of those measures, such as the use of personal identification numbers (PIN codes), filtering systems or labelling, should thus be to ensure an adequate level of protection of the physical, mental and moral development of minors and human dignity, especially with regard to on-demand audiovisual media services.

The Recommendation on the protection of minors and human dignity and on the right of reply already recognised the importance of filtering systems and labelling and included a number of possible measures for the benefit of minors, such as systematically supplying users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or equipping the access to services specifically intended for children with automatic filtering systems.

(47) None of the provisions introduced by this Directive that concern the protection of physical, mental and moral development of minors and human dignity necessarily requires that the measures taken to protect those interests should be implemented through prior verification of audiovisual media services by public bodies.

(48) On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video on demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports set out under this Directive Member States should also take into account notably the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and in the actual consumption of European works offered by such services.

(52) The availability of on-demand audiovisual media services increases the choice of the consumer. Detailed rules governing audiovisual commercial communication for on-demand audiovisual media services thus appear neither to be justified nor to make sense from a technical point of view. Nevertheless, all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives.

(60) Surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement. This can be done by signalling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.

## Articles

### Article 1

For the purpose of this Directive:

(a) 'audiovisual media service' means:

- a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this Article or an on-demand audiovisual media service as defined in point (g) of this Article, and/or

- audiovisual commercial communication;

(b) 'programme' means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and

whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

(c) 'editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

(d) 'media service provider' means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;

(g) 'on-demand audiovisual media service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

(h) 'audiovisual commercial communication' means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement;

(j) 'surreptitious audiovisual commercial communication' means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration;

(k) 'sponsorship' means any contribution made by a public or private undertaking or natural person not engaged in providing audiovisual media services or in the production of audiovisual works, to the financing of audiovisual media services or programmes with a view to promoting its name, its trade mark, its image, its activities or its products;

(m) 'product placement' means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration;

(n) (i) 'European works' means the following:

- works originating in Member States,

- works originating in European third States party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of point (ii),

- works co-produced within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements,

- application of the provisions of the second and third indents shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned;

(ii) The works referred to in the first and second indents of point (i) are works mainly made with authors and workers residing in one or more of the States referred to in the first and second indents of point (i) provided that they comply with one of the following three conditions:

- they are made by one or more producers established in one or more of those States, or

- production of the works is supervised and actually controlled by one or more producers established in one or more of those States, or

- the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States;

(iii) Works that are not European works within the meaning of point (i) but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Community supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the Member States.

## **Provisions applicable to all audiovisual media services**

### **Article 3a**

Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

(a) the name of the media service provider;

(b) the geographical address at which the media service provider is established;

(c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;

(d) where applicable, the competent regulatory or supervisory bodies.

### **Article 3b**

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

### **Article 3c**

Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

### **Article 3e**

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

- (a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;
- (b) audiovisual commercial communications shall not use subliminal techniques;
- (c) audiovisual commercial communications shall not:
  - (i) prejudice respect for human dignity;
  - (ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
  - (iii) encourage behaviour prejudicial to health or safety;
  - (iv) encourage behaviour grossly prejudicial to the protection of the environment;
- (d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited.
- (e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;
- (f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;
- (g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

2. Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

### **Article 3f**

1. Audiovisual media services or programmes that are sponsored shall meet the following requirements:

- (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
- (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
- (c) viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes shall be clearly identified as such by the name, logo and/or any

other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in a appropriate way for programmes at the beginning, during and/or the end of the programmes.

2. Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.

3. The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking, but shall not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.

4. News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.

### **Article 3g**

1. Product placement shall be prohibited.

2. By way of derogation from paragraph 1, product placement shall be admissible unless a Member State decides otherwise:

- in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes, or

- where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.

The derogation provided for in the first indent shall not apply to children's programmes. Programmes that contain product placement shall meet at least all of the following requirements:

(a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;

(b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

(c) they shall not give undue prominence to the product in question;

(d) viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

3. In any event programmes shall not contain product placement of:

- tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, or

- specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.

4. The provisions of paragraphs 1, 2 and 3 shall apply only to programmes produced after 19 December 2009.

## **Provisions applicable only to on-demand audiovisual media services**

### **Article 3h**

Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand audiovisual media services.

### **Article 3i**

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works. Such promotion could relate, *inter alia*, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.

2. Member States shall report to the Commission no later than 19 December 2011 and every four years thereafter on the implementation of paragraph 1.

3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.

## Annex 6

# Proposed guidance on scope of VOD programme services to be subject to regulation (“Scope Guidance”)

## **APPLICATION AND SCOPE OF THE REGULATIONS**

### **Introduction**

- 1.1 This section of the guidance explains the types of services that may have to comply with the rules. It also provides guidance on who the provider of a relevant service is for these purposes, and therefore who is responsible for compliance with the rules, including the obligation to notify the service to the Regulator. As with other guidance on the application of the Regulations, this section of the guidance is not binding nor legally enforceable, and only provides interpretative guidance as to how the Regulator is likely to apply the rules, drawing on the Articles and Recitals of the Directive where appropriate. This guidance is subject to review from time to time.
- 1.2 This guidance is intended to help providers of on-demand programme services assess whether they are VOD services (and therefore come under statutory regulation and need to abide by the relevant legislative requirements) and need to notify the Regulator that they provide a relevant on-demand programme service and need to comply with the rules. It is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service is subject to the VOD regulations.
- 1.3 As explained below, there are a number of different cumulative criteria that determine whether a service is within the scope of the Regulations. At the present time, video on demand services represent an increasingly important part of the audiovisual market. However, the wide variety of content, services and business models available make it difficult to list with any degree of certainty the services that will be within scope, and those that will fall outside scope. Each service provider must make their own assessment of whether they meet the criteria laid down by the Regulations and act accordingly.
- 1.4 In deciding whether a particular service requires notification, and by whom, the Regulations require potential service providers, and ultimately the Regulator, to consider the following questions:
  - a) Is the service an ‘on-demand programme service’ within the meaning of the Regulations? (Section 2 of this Guidance)
  - b) Who has ‘editorial responsibility’ for that service within the meaning of the Regulations? (Section 4 of this Guidance)
  - c) Does that person fall within the jurisdiction of the UK for these purposes? (Section 6 of this Guidance)

1.5 Each of these questions is explored in more detail below.

1.6 References in this guidance to the Directive are to the Audiovisual Media Services Directive. References to Recitals and Articles are to the recitals and articles of the Directive. References to the Regulations are to the Audiovisual Media Services Directive (Implementation) Regulations 2009. .

## 2 **Is the service an ‘on-demand programme service’ within the meaning of the Regulations?**

2.1 Under the Regulations, a service will be an ‘on-demand programme service’, and therefore subject to notification and regulation, if it meets **all** of following criteria.

- a) **It is a VOD service:** its principal purpose is to offer users the ability to select individual programmes from a range of programmes, to receive the selected programme using an electronic communications network,<sup>53</sup> and to view the selected programme when the user chooses.
- b) **There is editorial responsibility:** the programmes comprising the service are under a person’s editorial responsibility.
- c) **It is ‘TV-like’,** to the extent that:
  - **it includes TV-like programmes:** the service includes programmes whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services ; and
- d) **It is widely available:** the service is made available by that person for use by members of the public.

2.2 The intention of the Directive and Regulations is to regulate on-demand programme services. This means that a service which falls outside the definition of an ‘on-demand programme service’, but is bundled with or accompanies an ODPS, would not typically be considered to form part of that ODPS (subject to the provisions dealing with VOD advertising).

### ***It is a VOD service?***

2.3 The key issue under this criterion is whether the principal purpose of the service is the provision of programmes on an on-demand basis. There may be services where the availability of audiovisual content on an on-demand basis is incidental to another service, for example, short video advertising spots accompanying a non-video service, and video elements of online games and gambling services.

2.4 The assessment of whether the principal purpose of the service is the provision of relevant programmes on an on-demand basis will take into consideration all relevant materials available to the Regulator, including, for example, the way the service is marketed and presented to users.

2.5 Where relevant on-demand programmes form part of a broader consumer offering, it may be the case that those programmes comprise an on-demand programme service in their own right. For example, where a service provider offers a movie and

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<sup>53</sup> Defined in section 32 of the Communications Act 2003.

television programme download service as part of its broader, non-audiovisual online retailing activities, then such a service may be considered to be a distinct on-demand programme service which falls within the scope of the Regulations.

- 2.6 This will not be the case if the relevant on-demand programmes are included as an integral and ancillary element of the broader offering, for example, where video is used to provide additional material relevant to a text-based news story.
- 2.7 Similarly, the extent of a particular on-demand programme service may be determined by other criteria, such as the identity of the service provider. Thus an aggregated retail video on-demand service may be comprised of a number of on-demand programme services from different providers, depending on which undertaking exercises editorial responsibility in respect of the programmes offered to users (see section 4 below).
- 2.8 It is acknowledged that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case.
- 2.9 An “*electronic communications network*” is defined in section 32 of the Communications Act 2003 and encompasses the communications infrastructure by means of which voice, content and other data are delivered to consumers. Accordingly, delivery of content through other means, for example, a DVD sent through the post having been ordered online, would not meet this criterion. The selection, downloading and viewing of a movie via the internet, paid for using a voucher bought over the counter in a shop, would be caught, if all other criteria were met. The means of delivery is the deciding factor for this criterion, not the means of payment or selection.
- 2.10 A content service that is broadcast or streamed in a linear form is not covered by the on-demand programme service rules, and may be subject to the relevant ‘broadcast’ regulation. It should be noted that the rules for broadcast regulation are explicitly extended by the Directive and Regulations to cover internet-based television channels.

### ***There is editorial responsibility?***

- 2.11 The exercise of ‘editorial responsibility’ is relevant to scope in two ways. Firstly, an ‘on-demand programme service’ is defined in the Regulations as a service falling under a person’s ‘editorial responsibility’. Therefore, a service which by its nature has no person exercising “editorial responsibility” (as defined) would fall outside the Regulations.
- 2.12 An example of such a service, with no-one exercising editorial responsibility might be a catalogue of programmes consisting of user generated content posted to a public website for sharing and exchange, without prior moderation or restriction as to what can be posted..
- 2.13 However, that is not to say that all content in such sites falls outside the definitions. For example, where ‘hosting’ services are used by commercial entities as a means of distributing relevant content, and meet the other criteria laid down by the Regulations, then such content might fall within the meaning of an ‘on-demand programme service’ for these purposes.
- 2.14 Second, the extent of a person’s editorial responsibility will be relevant in determining who is to be treated as providing an on-demand programme service..

For example, an aggregated VOD content service may comprise a number of different on-demand programme services, each provided by a different entity exercising 'editorial responsibility' over its own on-demand content. How to determine the identity of the person exercising 'editorial responsibility' is discussed in more detail below (See section 4 below).

### ***The service is 'TV-like'***

- 2.15 One of the principal aims of the Directive is to create a level-playing field as between traditional linear broadcast television services and emerging on-demand audiovisual media services (Recital 6). The Directive, and the Regulations, are therefore intended to cover on-demand and broadcast television audiovisual media services which compete for the same audiences (Recitals 16 and 17), sharing the same key characteristics, namely that:
- a) they include comparable programmes.

### **TV-like programmes**

- 2.16 An on-demand programme service will only be caught by the Regulations to the extent that it provides access to programmes that compete for the same audience as television broadcasts, and therefore, are comparable to the form and content of programmes included in broadcast television services. It is, however, necessary to interpret the meaning of '*programme*' in this context in a dynamic way, taking into consideration developments in television broadcasting.
- 2.17 Examples of 'programmes' that are not 'TV-like' might include informational videos directed at a particular group of people, such as an undertaking's employee training videos available online, and short extracts from longer programmes, to the extent that such extracts are not such a significant part of the programme as to be considered to be a programme in their own right.
- 2.18 Clearly the decision as to whether programmes are 'TV-like' will involve consideration of all relevant information, including the availability of comparable programmes in linear broadcast services.
- 2.19 Audio-only services, such as 'listen again' radio services are out of the scope of the Regulations. However, video only programmes, supplied on an on demand basis are potentially in scope (subject to the other criteria being met).

### ***It is widely available?***

- 2.20 This criterion is satisfied if the service is made available to the general public, and includes subscription services, provided that the subscription is open to members of the public, as well as services that are made available only to the general public located in a particular geographic area.

## **3 What types of service are in and out of scope of the Regulations?**

- 3.1 A non-exhaustive list of types of content which are likely to be considered to be 'on-demand programme services' for the purposes of the Regulations (provided those services are established in the UK as explained in section 5), is as follows:
- a) a 'catch-up service' for a broadcast television channel whether programmes are made available from the broadcaster's own branded website, an online aggregated

media player service, or through a 'television platform' to a set top box linked to a television (whether using broadcast 'push' technology, or 'pull' VOD);

- b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising 'editorial responsibility' over all the programmes (see section 4 below), whether via a dedicated website, online aggregated media player service, or through a television platform; and
- c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising 'editorial responsibility' over the content.

### 3.2 The following types of content are outside the scope of the Regulations:

- a) Services that are primarily non-economic, and which are therefore not in competition with television broadcasting (Recital 16). In this context, 'economic' is interpreted in the widest sense to encompass all forms of economic activity, however funded, and may include public service material, free to view content, as well as advertising-funded, subscription, pay per view and other transactional business models;
- b) services comprising on-demand content that are not "mass media in their function to inform, entertain and educate the general public" (Recital 18);
- c) "*games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services*", "*on-line games*" and "*search engines*" are all stated to be excluded on grounds that their principle purpose is not the provision of 'TV-like' programmes (Recital 18); and
- d) electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines) (Recital 21).

### 3.3 The following types of content may well be outside the scope of the rules as they may not meet all of the required criteria:

- a) video content posted by private individuals onto video sharing sites such as Youtube (where the content has been self-generated and is not posted as part of an 'economic' purpose on the part of the individual);
- b) video content produced by professional bodies, trade unions, political parties, or religious organisation, where the content is very narrowly focused and is primarily about the dissemination of information about the organisation to members, rather than for consumption by the general public;
- c) video content embedded within a text-based editorial article, such as a written news story on a web site that contains an illustrative video clip; and
- d) video content on corporate websites, where the purpose is to disseminate information about the company's own operations, products or financial performance (e.g. a video of an AGM, but excluding a standalone service providing access to videos of many companies' AGMs on a commercial basis, which could fall within scope).

## **4 Who has 'editorial responsibility' for that service within the meaning of the Regulations?**

- 4.1 Once it has been determined that there is a relevant on-demand programme service, it is then necessary to determine which single entity should be treated as providing the service, having ‘editorial responsibility’ for the programmes comprising the relevant on-demand programme service, and therefore the exact scope of that service (see paragraph 2.15 above). The body with editorial responsibility would be responsible for notification and compliance with the relevant standards laid down in the legislation.
- 4.2 ‘Editorial responsibility’, in this context, means the exercise of general control over both:
- a) the selection of the individual programmes included in the range of programmes comprising the relevant on-demand programme service; and
  - b) the manner in which those programmes are organised within that range.
- 4.3 Under the Regulations, it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has ‘general control’ of the “*content of individual programmes or of the distribution of the service*”. This is intended to clarify the degree of ‘control’ required for ‘editorial responsibility’, namely that it is not necessary to control the elements comprising a particular programme (for example, as a television director might), and similarly that it is not necessary to control the actual distribution of the on-demand programme service (i.e. physical transmission, or the retailing of a service to consumers), as these matters are irrelevant to the issue of ‘editorial responsibility’.
- 4.4 In considering who has general control over the selection of programmes, both the Regulations and the Directive focus on decision-making about individual programmes, and not on the choice of whole ‘channels’ of content. The concept of *selection* in the Directive’s definition of ‘editorial responsibility’ is common to both linear and VOD services (in relation to linear services, the reference is to control over the selection of programmes and “...*their organisation in a chronological schedule...*”). It is certain that, in relation to such linear services, it is the channel operator (i.e. broadcaster) who is selecting the programmes, even if those channels are distributed to consumers as part of a package of channels by a platform operator or retailer. In the context of on-demand programme services, ‘editorial responsibility’ is exercised by the person selecting the programmes to be included in the on-demand programme service in a role comparable to that of the broadcaster in relation to linear channels.
- 4.5 It is, however, recognised that the mere fact that a broadcaster provides content from its linear channel to another undertaking for inclusion in an on-demand programme service does not remove the need to assess which entity has ‘editorial responsibility’ considering all relevant circumstances. It would be possible for an aggregator or platform operator to be responsible for the selection of individual programmes, and thereby acquire ‘editorial responsibility’. Selection of individual programmes may, in this context include, for example, acquiring, commissioning or producing programmes for inclusion in the service.. None of these factors is definitive, and each assessment will require consideration of all relevant factors.
- 4.6 The person with effective control of the organisation of those programmes is the person who determines the relevant viewing information provided alongside the on-demand programme that may then be used in listing the programme in an on-demand programme service: such information might include, for example, whether or not access to a particular programme must be restricted; and what content information should be attached to it (e.g. the programme synopsis, rating information and other content warnings). This will typically be the person who selects the individual

programmes to be included within a service. (In other words, organisation may be controlled by a service provider through the supply of relevant programme information accompanying each content asset to a platform operator or distributor).

- 4.7 The fact that a platform operator may be responsible for the design or look and feel of the catalogue; or that a platform operator or technical services provider may provide appropriate protection mechanisms allowing access to some content to be restricted; or specify how potentially harmful or offensive content should be indicated, for example, with an age-rating and/or a specific text warning (“sexually explicit”) and/or a logo, does not mean that they control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not constitute ‘selection and organisation’ of programmes, as these are solely presentational techniques.
- 4.8 These criteria will be applied in a way which provides for a single entity to have ‘editorial responsibility’. It will not be open for content and/or service providers to argue that content that they make available or a service that they provide is outside of the scope of the Regulations as a result of responsibility for selection and organisation of programmes being divided between two or more persons.
- 4.9 The parties to commercial agreements in the value chain for the supply and distribution of on-demand programmes may decide to identify the entity with ‘editorial responsibility’ in respect of the relevant programmes. Whilst not determinative, such contractual arrangements will provide useful evidence as to the division of responsibility between the parties.
- 4.10 As noted in paragraph 2.7, the identity of the entity with ‘editorial responsibility’ will also be relevant to the determination of the extent of the on-demand programme service. Someone who makes relevant content available on an on-demand basis can only be the provider of a service comprising programming over which they exercise ‘editorial responsibility’.
- 4.11 Accordingly, aggregated services may comprise a collection of on-demand programme services provided by different service providers, or a single service offered by the aggregator, incorporating content from a variety of different sources. The outcome will depend on where “editorial responsibility” lies.
- 4.12 In the former case, an on-demand content aggregator might provide access to content provided by a number of different providers, who each retain ‘editorial responsibility’ for their content, who select which programmes will be made available via the aggregated service and provide the programme information, rating and/or categorisation of those programmes (for example, as being appropriate for adults only). In this case, each content provider, as the relevant service provider for their own content, would be responsible for ensuring that their own content complies with the Regulation.
- 4.13 In the latter case, the content providers would not have ‘editorial responsibility’, as the aggregator would have responsibility for selecting which programmes were included within the service, and for providing the necessary programme information, and therefore, would have responsibility for ensuring compliance with the Regulations.
- 4.14 Clearly, it is conceivable that content providers, aggregators and service providers may arrive at alternative arrangements that require a more complex analysis as to which party has ‘editorial responsibility’. The onus is on the parties to provide the Regulator with all necessary information in support of any notification to allow the Regulator to assess whether the correct entity has been identified as the provider of the service

## 5 'Multiple services'

- 5.1 Under the Regulations, an on-demand programme service comprises all on-demand programmes offered by a service provider. No distinction is made between different channel brands or content genres or other means of sub-dividing services in the same way as linear services. However, it is also possible for a service provider to nominally sub-divide its on-demand programme service into separate services, perhaps based upon linear channel identities for administrative ease (although it is noted that such a strategy would also require each such service to be notified to the Regulator separately).
- 5.2 Similarly, a service provider may provide its on-demand programme content to a number of aggregation or retail platforms for distribution (e.g. on cable and over the internet). If the range of content is substantially the same across all distribution outlets then it would seem reasonable to view the distribution across each service or platform as comprising instances of a single on-demand programme service. In contrast, where the range of programmes offered to different services and platforms is not substantially the same, then each individual catalogue would form a separate on-demand programme service requiring notification.

## 6 Does that person fall within the jurisdiction of the UK for these purposes

- 6.1 Services only fall within the scope of the Regulations if they are provided by an entity that falls under UK jurisdiction in accordance with Article 2 of the Directive. The service provider of an on-demand programme service will fall under the UK's jurisdiction if it is established in the UK.
- 6.2 A service provider will be deemed to be established in the UK if:
- a) the service provider has its head office in the UK and the editorial decisions for the relevant on-demand programme service are also taken here;
  - b) alternatively, if only one of the head office or the place where editorial decisions for the relevant service are taken is in the UK, with the other function carried out in a different EU Member State, then the question of where the service provider is established will be determined according to the following principles:
    - establishment will be deemed to be Member State where a significant part of the workforce involved in the pursuit of the on-demand programme service activity operates; or
    - if a significant part of the relevant workforce operates in each of those Member States, then establishment deemed to be where it has its head office; or
    - if a significant part of the relevant workforce operates in a third Member State, then establishment deemed to be in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State.
  - c) the head office is in the UK but editorial decisions on the on-demand programme service are taken in a third (non-EU) country, or vice-versa, the service provider shall be deemed to be established in the UK, provided that a significant part of the

workforce involved in the pursuit of the on-demand programme service operates in the UK.

- 6.3 In accordance with the Directive, these jurisdictional criteria are identical to those applicable to linear services.

## Annex 7

# Proposal from the Association for Television On Demand to be designated as the co-regulator for video on demand editorial content



## Proposal to Ofcom from ATVOD for designation as the New Regulatory Authority for On-Demand Programme Service Providers

### 1. Introduction

- 1.1 On-demand provision of audiovisual programmes offers users high levels of choice and control. Access to on-demand programmes is therefore largely a matter of individual responsibility and justifies lighter regulation. The on-demand programme industry is currently self-regulating; members of the Association for Television On Demand (ATVOD) abide by a Code of Practice and guidance notes developed by ATVOD.
- 1.2 The implementation of the Audiovisual Media Services Directive<sup>54</sup> (“the Directive”) by means of Regulations (“the Regulations”) allows for a co-regulatory structure and the Regulations provide for Ofcom to designate a co-regulator if Ofcom so decides. The earliest date on which designation can occur is 19 December 2009.
- 1.3 As part of its public consultation on proposals for the regulation of on-demand programme services, Ofcom is consulting on its proposal to designate ATVOD as the co-regulator under new provisions which the Regulations will insert into the Communications Act 2003. If Ofcom decides to designate ATVOD as a co-regulator, it may do so from 19 December 2009.
- 1.4 ATVOD commits to establish mechanisms and processes intended to satisfy Ofcom that ATVOD is a ‘fit and proper body’ to be designated as the co-regulator with Ofcom for editorial content for the on-demand programme service industry by the designation date, subject to the outcome of Ofcom’s consultation.
- 1.5 This paper is designed to demonstrate that ATVOD will, in performing any function in respect of which it may be so designated, have regard, in all cases, to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. It will have regard to

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<sup>54</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007

such matters set out in section 3(4) of the Communications Act 2003 which are relevant.

- 1.6 ATVOD's remit as the co-regulator would include all on-demand audiovisual content that falls within the scope of the Regulations<sup>55</sup> (with the exception of advertising included in on-demand programme services), as delegated to it by Ofcom.
- 1.7 The number of on-demand programme service providers is uncertain as of the date of this proposal. Ofcom together with the industry forum, the Video on Demand Steering Group ("VESG"), has developed various draft documents, including guidance on the scope of the implementing Regulations and a provisional list of some service providers which might potentially be required to notify themselves. ATVOD is an active participant in the VESG and its discussions are informing ATVOD's forecasts as to the resources it will require to ensure the effective performance of the functions delegated to it by Ofcom.

## **2. The Proposal**

- 2.1 This proposal to Ofcom for ATVOD to be designated as the new regulatory authority for on-demand programme service providers will demonstrate that:
  - a) ATVOD will be sufficiently independent of providers of on-demand programme services;
  - b) ATVOD will have access to financial resources that are adequate to ensure the effective performance of the delegated function; and
  - c) ATVOD will have regard in all cases to the principles under which regulatory activity should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.
- 2.2 This proposal sets out the tasks that ATVOD proposes to undertake, and the commitments it proposes to make, to enable Ofcom to designate ATVOD, if this is what Ofcom decides following its consultation, as the new regulatory authority for on-demand programme service providers on 19 December 2009. It provides a timeline in this document for these activities (described here as Phase 1).<sup>56</sup>
- 2.3 The proposal also sets out the next and further stage of activities expected should ATVOD be designated and take on the co-regulatory role (described here as Phase 2).
- 2.4 ATVOD makes this proposal with the support of the VESG, the Group representing industry players.
- 2.5 The name of the new regulatory body is kept as ATVOD throughout this paper as the Association has brand recognition within the on-demand industry and with users (in part because of the public awareness campaign launched by ATVOD in 2009). This is a matter that can be discussed at a later stage however and the new board will have the powers to change the name of ATVOD as the co-regulator if it wishes.

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<sup>55</sup> Draft Statutory Instrument "The Audiovisual Media Services Directive (Implementation) Regulations 2009".

<sup>56</sup> It should be noted that this paper is written with uncertainty still surrounding the final Regulations (these have not been laid before Parliament at this stage) and, therefore, the size of the eventual market and notification base is uncertain, although estimates have been made.

**3. Phase 1: Tasks necessary to set up the co-regulatory arrangements (now - 19 December 2009)**

3.1 Bearing in mind the uncertainties over scope and the size of the eventual market and notification base, ATVOD is undertaking certain tasks to ensure that it is a 'fit and proper body' for Ofcom (subject to the forthcoming consultation) to be in a position to designate it as the co-regulator for on-demand programme service providers.

3.2 The following section outlines the modifications and changes that will be made to the current ATVOD structure to achieve this.

**3.3 Independence/Governance**

3.3.1 ATVOD's structure currently is:

- Company limited by guarantee
- No limit set in Articles of Association on number of members
- Budget set as cash budget by Members: January –December
- Audit and Risk Committee
- Independent Non Executive Chairman
- 1 x Independent Non Executive Member
- 7 x industry Board members (representing the Association's Full Members), plus representatives from the Association's Associate and Affiliate members
- Independent Complaints Adjudicator
- Company Secretary duties performed by a Member organisation
- Secretariat outsourced
- Accounting outsourced
- Audit outsourced
- The ATVOD office is run by the Secretariat function

3.3.2 ATVOD proposes to modify its structure to meet the requirements of the draft Regulations and Directive so as to enable Ofcom to designate it as the co-regulator.

**3.3.3 Proposed Modifications**

**The Board**

- (i) Re-structure the industry board representation to ensure a majority of independent members.
- (ii) Recruit three more non-executive independent Board members by 19 December 2009 to increase the independent Board members to five (Chair plus four members).
- (iii) To achieve a board membership where independent members are in the majority. Industry members may be no more than four. This number of industry members is thought appropriate to ensure suitable representation of the range of on-demand programme service providers that will fall within scope of the Regulations.
- (iv) Industry members who are currently on the Board of ATVOD will step down and Board members from industry will be appointed from across the industry through the selection process. They may be individuals who have served as ATVOD Board members or who have not previously been ATVOD members. It will of course be made clear to all the industry members of the board that they must have regard to the interests of the industry in general and not the organisations which employ them.

- (v) If these appointments cannot be completed by the time Ofcom (subject to the Ofcom consultation) would need to decide to designate ATVOD as the co-regulator, ATVOD commits to making arrangements to ensure that the independent board members who are in place at that time have a majority of votes on the board (e.g. by introducing weighted voting.)

### **Recruitment**

Before 19 December 2009 ATVOD will begin:

- (i) Recruitment of the new independent Chair (ATVOD currently has an independent Chair).
- (ii) Recruitment of the Chief Executive Officer; the person who currently runs the Secretariat function is willing to stay on for a period post-designation, if required, to handle the transition.
- (iii) All Board members will be recruited against the procedures and principles set out in paragraph 3.3.5 below.
- (iv) Temporary staff will also be recruited to develop and manage the database function to handle notifications required under the Regulations when enacted, or this function may be outsourced.
- (v) No appointments can be confirmed before Ofcom takes a formal policy decision to designate ATVOD as a co-regulator.

3.3.4 In accordance with the FRC's Combined Code on Corporate Governance<sup>57</sup> ATVOD will use the Nominations Committee framework (see section 4.2.4 below) for the selection and appointment of the new independent Chair, the CEO and Board members. The existing independent Chair and/or independent member (who acts as Deputy Chair) will act as the Chair of the Nomination Committee and liaise with headhunters / recruitment agencies to identify potential candidates for each of the vacant positions.

3.3.5 ATVOD will comply with the Nolan Principles with regard to the key roles within the organisation. The Nolan principles are:

- **Selflessness**  
Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
- **Integrity**  
Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.
- **Objectivity**  
In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
- **Accountability**

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<sup>57</sup> <http://www.frc.org.uk/CORPORATE/COMBINEDCODE.CFM>

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

- **Openness**  
Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty**  
Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
- **Leadership**  
Holders of public office should promote and support these principles by leadership and example.

### 3.3.6 **Roles and Responsibilities**

ATVOD will define the roles and responsibilities of the Chairman, the Board and CEO.

#### **The Chairman**

- (i) The Combined Code requires that the Chair should be an independent person. ATVOD's Nominations Committee will appoint appropriate recruitment services or head-hunters. Ideally the Chair will be a person of standing in the market sector, whilst ensuring there is no conflict of interest.
- (ii) There will be a clearly defined division of responsibilities between the Chair and the CEO so as to ensure the balance of power and authority is such that, as required by the Combined Code, no one individual has unfettered powers of decision-making.

#### **The Chief Executive Officer (CEO)**

- (i) It is anticipated that ATVOD will need a full-time CEO. The CEO's functions will include creating good working relationships between ATVOD as the co-regulator and other stakeholders including Ofcom, meeting with on-demand programme service providers, dealing with issues around notification, and servicing the Board.
- (ii) The CEO will report to the Chairman and will be a member of the Board.

#### **The Board**

- (i) The Board will consist of a mix of independent and industry members, with independent members in the majority. The size of the Board needs to be appropriate to the decision making process and to reflect the interests of members and the industry.
- (ii) Formal procedures are and will continue to be followed when a meeting of the Board is held, with a distinction being made between a meeting of the Board or a formally constituted committee of the Board and other meetings involving directors.
- (iii) There is and will continue to be a clear and comprehensive schedule of matters reserved for the decision of the Board which helps to provide clarity of what may and may not be decided outside Board meetings.
- (iv) Directors must be conscious of ATVOD's Articles and the powers in the constitution.

- (v) Directors are encouraged to seek the advice and guidance of the company secretary and may employ external advisers.

3.3.7 ATVOD recognises the need for there to be an appropriate system of redress for viewers who complain about inappropriate content supplied by on-demand programme service providers. It therefore proposes for there to be a continuing role for an Independent Complaints Adjudicator (where requested) to review decisions made by ATVOD on appeal about whether content complies with the Regulations.

3.3.8 ATVOD has recruited an external adviser who is working with the Board to prepare a risk management framework which will focus on the key risks and the controls in place to mitigate those risks. A risk register has been prepared which details the risks, the mitigating controls and the owners of the risks and is being discussed by the Board. A Board member has assumed ownership of the risk register.

3.3.9 Should ATVOD be proposed by Ofcom as the designated body to co-regulate on-demand programme service providers, the process of recruitment needs to begin ahead of the close of the consultation period, although it would not be appropriate to confirm any appointments until after Ofcom's policy decision on designation is published.

#### 3.3.10 **Company Structure**

(i) At 19 December 2009 ATVOD's structure will be:

- Company limited by guarantee
- Independent Non Executive Chairman
- 4 x Independent Non Executive Board Members
- 4 x Industry Board Members
- Company Secretary
- Database provision (could be outsourced)
- Secretariat outsourced
- Audit and Risk Committee
- Accounting outsourced
- Audit outsourced

(ii) The ATVOD office will continue to be run by the current Secretariat function until the CEO is in place and an assessment is made by the CEO of the necessary staffing structure and numbers.

(iii) Premises will not be acquired until the Chairman and /or CEO is appointed.

(iv) A suitable database will be commissioned to capture details of notifying on-demand programme service providers from 19 December 2009 (can be outsourced).

#### 3.4 **Funding of Phase 1: Budget and fees**

3.4.1 In order for Ofcom to be able to designate ATVOD as the co-regulator for the on-demand industry, ATVOD must demonstrate it has 'access to financial resources that are adequate to ensure the effective performance of the delegated function'.

3.4.2 ATVOD currently operates on a budget of approximately £200,000 per annum. ATVOD has therefore undertaken substantial work to prepare a provisional budget

("the Budget") for the period 19 December 2009 to 31 March 2011. Details are set out below in section 4.3.

- 3.4.3 ATVOD would be funded by fees paid by service providers and the level of those fees will be calculated so as provide ATVOD with adequate resources to carry out all its designated functions. See section 4.3 for further details of proposed fees.
- 3.4.4 The DCMS has made available a sum of money to fund the tasks ATVOD needs to undertake by 19 December 2009 in order to be in a position for Ofcom to designate it, if that should be its decision (e.g. recruitment costs). This will be supplemented by the industry.
- 3.4.5 Existing ATVOD members have agreed to fund certain costs until 31 March 2010. ATVOD may also request Ofcom for a loan if necessary.

### **3.5 Notification Framework**

- 3.5.1 ATVOD understands that Ofcom intends to attach to its consultation a preliminary list of potential service providers based on a limited analysis of certain sectors of the market, that Ofcom intends to distribute this list as widely as practicable within the industry, and that the consultation document will raise awareness of the possible need to notify amongst providers of on-demand programme services. The draft Regulations set out an obligation on existing service providers to notify by 31 January 2010.
- 3.5.2 The VESG is working on the scope and notification documents (which are based on the draft Regulations). Ofcom plans to consult on various notification functions and the allocation of those functions between Ofcom and any co-regulator. The notification documents will include a notification form for on-demand programme service providers.
- 3.5.3 The on-demand programme service provider will obtain the notification form from ATVOD's website. The form will require the on-demand programme service provider to supply certain information about the provider.
- 3.5.4 Once an on-demand programme service provider has notified, details of the service, the provider and the jurisdiction will be published on ATVOD's website so as to provide a source of information to users and other providers. Confidential information will not be published.
- 3.5.5 Where it is thought that an on-demand programme service provider may fall within scope but has not notified, ATVOD will contact that potential service provider and request information (which must be provided in accordance with the Regulations) to enable ATVOD to reach a decision on whether the provider must notify.
- 3.5.6 Failure to notify will be investigated as a potential breach of the Regulations and may result in sanctions proceedings as provided for by the Regulations. There will need to be procedures in place which allow, particularly in the early days, for those on-demand programme service providers who consider that their service falls out with scope to make representations about the apparent failure to comply.
- 3.5.7 Should ATVOD's decision on whether an on-demand programme service provider falls within or outside scope be challenged, or ATVOD considers the determination especially complex, then the issue will be referred to Ofcom for a final decision on the matter. Ofcom's decision will be binding on the provider and on ATVOD.

### **3.6 The editorial content Code**

- 3.6.1 Should ATVOD be designated, its Code regarding editorial content will be a transposition of the enforceable requirements from the Regulations.
- 3.6.2 ATVOD will prepare non-binding Guidance Notes to assist on-demand programme service providers interpret and apply these requirements. It is working with Ofcom and other stakeholders on the form and content of these draft Guidance Notes (through the VESG).
- 3.6.3 Any breach of the Code would be a contravention of the statutory requirements and any consequent action taken by ATVOD would be with a view to securing compliance with the Regulations.
- 3.6.4 It is possible that at some stage in the future, after possible designation, the new ATVOD board may consider whether service providers should have the option to comply with some additional rules or guidelines regarding editorial content or consumer protection on a purely voluntary, self-regulatory basis. This would be a matter for the ATVOD board to consider if it wishes. Service providers would be at liberty to either agree or not to adhere to any possible extra rules or guidelines; and any costs of publicising or enforcing any such rules or guidelines would be additional and separate from the costs of ATVOD as regards enforcing the Regulations.

### **3.7 Complaints handling about editorial content**

- 3.7.1 ATVOD will run a robust complaints system with the public interest paramount and appropriate systems of redress for consumers.
- 3.7.2 In the current ATVOD model the following complaints procedure is relevant, swift, effective and transparent:
  - (i) The complaint is passed first to the service provider.
  - (ii) If not resolved satisfactorily within a set period of time (in the ATVOD system, 20 working days after the complaint is made) or if the service provider indicates, the complaint can be taken to ATVOD for consideration.
  - (iii) The complainant must fill in a form, or be assisted to fill in a form, giving details about the complaint together with a copy of all correspondence and any notes between the complainant and the service provider.
  - (iv) Currently, complaints are considered by a sub-committee of the Board. Any director who represents a member subject to the complaint is excluded from any such consideration.
  - (v) In the current ATVOD system, a right to appeal against the co-regulator's decision by either side goes to an independent complaints adjudicator.
  - (vi) The independent complaints adjudicator must reach a decision on the appeal within a fixed period of time (six weeks in ATVOD's current arrangements), and may uphold, vary or rescind the decision reached.
  - (vii) The decision of the independent complaints adjudicator is final.

### 3.7.3 Proposed complaints procedure

ATVOD considers that this complaints procedure is also appropriate for reaching decisions on whether editorial content from on-demand programme service providers complies with the Regulations. Although some adjustments may be needed, ATVOD proposes to use this system if designated by Ofcom. It considers that all such procedures must be the responsibility of the co-regulator. With input from the VSEG and Ofcom, ATVOD will prepare a draft set of complaints handling procedures to be published as soon as practicable if designated by Ofcom. ATVOD outlines below how it proposes the new procedures would work.

- (i) The complaints resolution process will continue to encourage complainants to go first to the service provider and complain to ATVOD if they are dissatisfied with how their supplier has acted.
- (ii) Where complainants choose to complain first to the relevant provider, ATVOD will expect the provider to retain the relevant recordings and any related material for 42 days from the date at which the provider may reasonably expect the complainant to have received the provider's final communication. It is expected that a complainant who then wants to take the matter to ATVOD will submit their complaint as soon as possible following the final communication from the provider.
- (iii) Providers and/or complainants who are dissatisfied with ATVOD's decision will be able to refer the matter to the Independent Complaints Adjudicator who will be required to reach a final decision on the matter within a set period.
- (iv) ATVOD will communicate its decisions clearly and promptly to all parties in response to a complaint.
- (v) All upheld complaints (and where appropriate in ATVOD's view some not upheld complaints so as to provide guidance to industry for example) will be published on ATVOD's website.
- (vi) The cost for the consideration of the complaint falls upon the service provider, in the current ATVOD structure. By 19 December 2009, ATVOD will review with the VSEG and Ofcom whether this principle should continue if it is designated as a co-regulator. Any financial penalties imposed will be payable to HM Treasury.
- (vii) ATVOD commits to agreeing robust Key Performance Indicators (perhaps as appropriate based on those of Ofcom or the ASA) for the handling of viewers' complaints. These KPIs will be published as soon as practicable if ATVOD is designated by Ofcom.

## 3.8 Sanctions

3.8.1 ATVOD currently has a range of graduated sanctions. It may:

- require the service provider to remedy the cause of the complaint; and/or
- require an assurance from the service provider regarding its future behaviour; and/or
- require the service provider to reimburse service charges paid in connection with the matter giving rise to the complaint;
- warn the service provider about the consequence of any further infringement; and/or
- fine the service provider; and/or
- publicise its decision and the identity of the service provider concerned; and/or
- suspend the service provider from the co-regulatory system.

- 3.8.2 By 19 December 2009, it will have been necessary to review this range of sanctions against the Regulations. The VESG is discussing with Ofcom what the precise route of escalation or referral of cases to Ofcom should be. The Regulations provide for the following range of measures for enforcement:
- issuing an enforcement notification;
  - imposing a financial penalty; and/or
  - issuing legally enforceable Directions to suspend or restrict a service or part of a service.
- 3.8.3 If ATVOD is designated as the co-regulator authority following Ofcom's consultation, ATVOD commits to cooperating fully with Ofcom to ensure comprehensive enforcement of the Regulations. In liaison with Ofcom and the VESG it will draft and publish as soon as practicable after designation a set of sanctions procedures which will set out which sanctions are applicable and the principles governing their use. The main principle behind these procedures is that ATVOD should reach the decisions about compliance with the Regulations as regards both editorial content and notification (subject in this latter case to referrals to Ofcom), and also to refer appropriate cases to Ofcom for consideration of the imposition of a statutory sanction such as a fine or issuing a direction ordering a service to cease.
- 3.8.4 Any proposal to review or amend the range of sanctions available under the Regulations would require further legislation.

### **3.9 ATVOD and Ofcom's roles as co-regulators**

- 3.9.1 Under discussion in the VESG is the extent of any public awareness campaign that needs to be conducted – aimed either at both industry and/or users. ATVOD members already promote the existence of ATVOD (as an assurer of good practice) to Members' users and ATVOD takes full regard of the recitals to the Directive which state that the introduction of rules is necessary to protect the physical, mental and moral development of minors as well as human dignity in all audio visual media services in ensuring that citizens and consumers are aware of the obligations placed on service providers by the Regulations which are designed to protect them.
- 3.9.2 ATVOD believes a robust complaints system relies on good publicity. It therefore commits to developing and introducing as appropriate and practicable measures to ensure consumers and industry are aware of the co-regulatory system and ATVOD's new role should it be designated.
- 3.9.3 At a minimum there will need to be appropriate publicity so that those in the industry who are either in scope or probably in scope can notify ATVOD (if designated) between 19 December 2009 and 31 January 2010.

### **3.10 Relationship of Ofcom and ATVOD**

- 3.10.1 Ofcom is to consult on the proposal to designate ATVOD as the co-regulatory authority for on-demand programme service providers. Subject to the outcome of this consultation, ATVOD proposes to agree with Ofcom principles of reporting regularly to Ofcom, so that Ofcom can monitor effectively how well any designation of functions to ATVOD is working. ATVOD envisages that these reports would be at least annual and contain an overview of the number of complaints, their outcome and compliance with KPIs. Details of the respective roles and functions of Ofcom and ATVOD (if designated) would be set out in a formal Designation Agreement and/or a Memorandum of Understanding between Ofcom and ATVOD.

- 3.10.2 Any such Designation Agreement should include clearly stated objectives, refer to the Regulations that are to be implemented, and the legal requirements that pertain to them.
- 3.10.3 It is assumed that if these agreed processes and targets are met, and that Ofcom and ATVOD conduct their association in an open and pre-agreed manner, then Ofcom will leave the day to day running of those functions that can be so-designated to ATVOD.
- 3.10.4 Areas requiring liaison with Ofcom (in addition to those referred to above) will include matters regarding:
- Reporting and information procedures with a person assigned the primary responsibility to Ofcom for the delivery of an effective co-regulatory system.
  - Scope .
  - Review of the editorial content Guidance Notes, complaints handling and sanctions procedures, and other arrangements.
  - ATVOD's funding requirements will need to reviewed periodically, with consideration given to actions in the event of any shortfall.
  - Monitoring and performance audits, including a framework for setting KPIs or assessing the performance of ATVOD, will need to be agreed and may include data on complaints handling, risk assessment criteria etc.
  - Publication of Annual Reports on the effectiveness and progress of the co-regulatory system.
  - The definition of 'systemic failure' so that, if Ofcom felt that ATVOD was not performing to the pre-agreed and required standards, there would be an agreed procedure and set of circumstances under which Ofcom could take action.
- 3.10.5 In light of the likely development of the on-demand programme service industry and the increasing importance of ATVOD, it is suggested that the operation of the designation should be reviewed after the first two years of operation and periodically thereafter.

### **3.11 Critical Path Milestones to Phase 1 (19 December 2009)**

ATVOD sets out below various actions and activities which it will carry out before 19 December 2009 in order to ensure that any designation of ATVOD can proceed smoothly on 19 December 2009 or as soon as possible thereafter, if Ofcom decides that such a designation is appropriate. Some actions (e.g. recruitment) will only be able to be completed if and when Ofcom decides to designate Ofcom. Nonetheless ATVOD has provided to the VSEG and Ofcom a detailed timetable of its plans to reach the following critical milestones by 19 December and ATVOD commits to doing its utmost to achieving these milestones.

#### **3.11.1 Governance**

- (i) Recruit three further independent Board members
- (ii) Revise number of industry Board members
- (iii) Begin recruitment of new independent Chair
- (iv) Begin recruitment of full time CEO
- (v) Recruit Company Secretary (part-time)

#### **3.11.2 Funding**

- (i) Agree with Ofcom the budgetary requirements to 19 December 2009
- (ii) Agree with Ofcom the budgetary requirements for first 15 months of operation
- (iii) Agree with Ofcom the fee structure at designation

### **3.11.3 Scope and Notification**

- (i) Agree with Ofcom parameters for on-demand programme service providers in scope.
- (ii) Agree with Ofcom notification documents
- (iii) Make notification documents available on the website
- (iv) Contact all on-demand service providers likely to be in scope
- (v) Set up database and reporting structures
- (vi) Set up fee invoicing and collection process

### **3.11.4 Editorial content Code**

- (i) Complete transposition of enforceable requirements of Regulations
- (ii) Agree the Guidance Notes with Ofcom

### **3.11.5 Complaints and sanctions**

- (i) Agree with Ofcom the sanctions procedures
- (ii) Agree with Ofcom the complaints handling procedures

### **3.11.6 Designation Agreement/Memorandum of Understanding**

- (i) ATVOD promises to work with Ofcom to agree details of the parameters for the functioning of the co-regulatory system with clearly established and agreed principles, coordination activities and reporting structures.

## **4. Phase 2: The Proposal post 20 December 2009**

4.1.1 Depending on the outcome of Ofcom's consultation and subject to ATVOD being designated as the co-regulatory authority for on-demand programme service providers, ATVOD will begin what is referred to here as Phase 2 of the co-regulatory system which will develop as the size of the notifying market is established.

4.1.2 This will lead to a better understanding of the required size of the Board. Should it be decided that the size of the Board should be changed to adapt to the requirements of the regulated industry, then it will be for the new independent Chair and the Chief Executive to oversee such alterations.

4.1.3 Other budgetary requirements, apart from the initial set-up costs described above, will be confirmed post-Phase 1.

## **4.2 Establish the following governance structure**

### **4.2.1 The Board**

As discussed above, the Board will be a mix of independent and industry members. The size of the Board needs to be appropriate to the decision making process and also to reflect the interests of members and the industry.

- (i) Initial consideration has led to a view that a Board of 10 members would be appropriate. This would provide for 5 independent members (including the Chair) and 4 industry members. The CEO would be a Board member.
- (ii) This size of Board has been arrived at to ensure that the expertise of the industry is well-represented. Should it be agreed that fewer industry members than four are required (see above) then fewer independent members will need to be recruited.
- (iii) As discussed, ATVOD will comply with the Combined Code requirements and ensure that there is a formal, rigorous and transparent procedure for the appointment of new directors to the Board. The Nomination Committee will lead the process for board appointments and make recommendations to the board of industry members.
- (iv) In order to ensure the appropriate balance and effectiveness of the board, ATVOD will seek to identify the skills needed and those individuals who might best provide them. As with most aspects of corporate governance, ATVOD must be seen to be doing all these things in a fair and thorough manner. The Combined Code also requires the terms of reference of the nomination committee, explaining its role and the authority delegated to it by the Board, to be made publicly available, this will be done by publishing the terms of reference on ATVOD's website.

#### **4.2.2 Board Responsibilities**

- (i) The key elements of the provisions under the Companies Act 2006 detail the responsibilities of Directors. It is important for directors to appreciate that the liability for not complying with the company's constitution is strict.
- (ii) Responsibilities will be assigned to Board members to oversee key functions of the new regulatory framework such as Notification, Fees and the Sanctions framework. One member will also be asked to provide ownership for the support services e.g. Finance, Legal, Administrative functions at Board level.
- (iii) The responsibility of the independent members has the following specific key elements –
  - Evaluation and appraisal  
Independent directors should meet with the other members of the Board without the chairman present on at least an annual basis in order to evaluate and appraise the performance of the chairman.
  - Succession  
An independent director should chair the nomination committee when the succession to the role of the chairman of the Board is being considered.
  - Stakeholder contact  
Independent directors could act as a point of contact for stakeholders with concerns which either have not been resolved or which it would not be appropriate to raise through the normal channels of the chairman, and chief executive.
  - Knowledge  
Independent directors should attend sufficient Audit and Risk Committee meetings to develop an understanding of the issues and concerns facing the organisation and the industry sector.
- (iv) It would be helpful to recruit at least one independent member who has experience of government and/or experience of a regulatory environment. The intention is that one of the independent members will chair the Audit Committee so experience of chairing or serving on an Audit Committee would be desirable.

- (v) The ATVOD Board meets once a month and it is suggested that this continues although, in the early stages, additional meetings may be required by sub-committees looking at particular issues.
- (vi) Effective arrangements for public consultation will be put in place and the ATVOD Board will convene stakeholder meetings to consult on significant issues or developments in the industry.

#### **4.2.3 Audit and Risk Committee**

- (i) Risk oversight is a basic function of the board of any organisation. Directors have an ongoing duty to ensure that an effective reporting system is in place. They are expected to be diligent, careful, and well-informed in the identification and management of material business risks. However, in this environment, the Board should also consider the need to initiate special risk reviews. If unforeseen risks emerge – and exert a detrimental impact on the organisation’s prospects - there is the danger that directors will be subsequently accused of failing to exercise appropriate care or oversight. Beyond legal and regulatory requirements, a feature of today’s business environment is that perceived failure of oversight results in media, shareholder and regulatory scrutiny. Timely contingency planning for anticipated risks is the best way to avoid such an undesirable spotlight.
- (ii) As described above, ATVOD has an audit and risk Committee in place which is responsible for ensuring the maintenance of appropriate and adequate audit processes and the governance of the internal audit and external audit programme. It is a sub-committee of the Board.
- (iii) In Phase 2 it is recommended that this Committee is chaired by an independent non-executive director and meets at least three times a year. Board members as a whole should appoint two of their number (at least of whom must be an independent member) to be members of the Audit and Risk Committee. They will serve as members of the Committee in rotation, in order to provide for objectivity in the longer term. At least one of the members shall have recent and relevant financial experience. The Chairman of the Board shall not be a member of the Committee.
- (iv) To further ensure independence the Board may appoint a suitably qualified person as the third member of the audit committee who shall be an independent non-executive director who has no connection with ATVOD and who will act as the chairman. This will be a matter for the new independent Chairman and CEO.
- (v) The intention in the early days of ATVOD with regard to the internal control framework is to focus on financial controls; the damage to the ATVOD’s reputation if there was a fraud / irregularity in the early days would be catastrophic.
- (vi) There is also a need to ensure compliance with other regulations e.g. Data Protection particular in relation to staff and members and also with regard to complainants and the privacy statements on ATVOD’s website.
- (vii) It is assumed that ATVOD would also be covered by the Freedom of Information legislation and therefore there will need to be a framework in place to deal with FOI requests, especially in the early days.
- (viii) The Regulations state that material which ‘might seriously impair the physical, mental and moral development of persons under the age of 18 years’ should be available

‘only in a way that ensures such persons will not normally see or hear that content’. As part of the notification framework there will be a right of audit clause particularly with regard to how providers comply, in accordance with the duty to ensure that services and providers comply with this obligation.

- (ix) The Regulations also contain certain provisions regarding incitement to hatred, sponsorship, and product placement. ATVOD will wish to be satisfied that providers are aware of these obligations and ensure compliance with them.
- (x) A copy of the draft terms of reference for the Audit and Risk Committee are attached at Annex A.

#### 4.2.4 Nominations Committee

- (i) As in Phase 1, in Phase 2 ATVOD will ensure that there is a formal, rigorous and transparent procedure for the appointment of new directors to the Board. The nomination committee will lead the process for Board appointments.
- (ii) Previous guidance has permitted smaller listed companies to allow the Board to act as a nomination committee. This is no longer the case and, although the Higgs Review recognised that it may take time for smaller companies to comply, it states ‘there should be no differentiation in the Code’s provision for larger and smaller companies.’ ATVOD will ensure compliance with this requirement. For new appointments in Phase 2, this will be a matter for the new independent Chairman and CEO.
- (iii) In order to ensure the appropriate balance and effectiveness of the board, ATVOD will seek to identify the skills needed and those individuals who might best provide them. The nomination committee will also assess the time commitments of the board posts and ensure that the individuals have sufficient available time to undertake them.
- (iv) As with most aspects of corporate governance, ATVOD must be seen to be doing all these things in a fair and thorough manner. The Combined Code also requires the terms of reference of the nomination committee, explaining its role and the authority delegated to it by the board, to be made publicly available, this will be done by publishing the terms of reference on ATVOD’s website.

#### 4.2.5 Remunerations Committee

- (i) Immediately post-designation, it is likely that only the CEO and administrative support of ATVOD will receive salaries. The independent members and the Chair will receive an honorarium rather than a salary. Nevertheless as part of the Combined Code there is merit in setting up a Remunerations Committee.
- (ii) Only members of the committee have the right to attend committee meetings. However, other individuals such as the chief executive and external advisers may be invited to attend for all or part of any meeting as and when appropriate. Appointments to the committee shall be for a period of up to three years, which may be extended for two further three-year periods, provided the director still meets the criteria for membership of the committee. The Board shall appoint the committee chairman who shall be an independent non-executive director. In the absence of the committee chairman and/or an appointed deputy, the remaining members present shall elect one of themselves to chair the meeting. The chairman of the Board shall

not be chairman of the committee. The company secretary or their nominee shall act as the secretary of the committee.

- 4.2.6 The incoming CEO, with the new independent Chair, will want to make decisions at Phase 2 about levels of administrative and other support required. Many of these functions are currently outsourced.

#### **4.3 Funding and Revenue Collection (further work is required in this area)**

- 4.3.1 The fees to be charged to the industry must be proportionate and fair while sufficient to ensure that ATVOD (if designated) can carry out its regulatory activity efficiently and effectively.
- 4.3.2 ATVOD has undertaken quite extensive work on a provisional budget to cover its costs for the first fifteen months after 19 December 2009 should it be designated by Ofcom. As of the date of this paper this budget ("the Budget") is just under £400,000 to cover the estimated costs of ATVOD carrying out its new functions as a co-regulator during this period. Following discussions with the VSEG and Ofcom, ATVOD proposes that for the fifteen months following 19 December 2009 each service provider covered by the Regulations will be required to pay a flat fee to ATVOD cover its costs. This fee will be calculated by dividing the total budgeted operating costs for these fifteen months by the estimated number of service providers required to notify as at 19 December 2009. ATVOD has discussed the Budget with Ofcom and VSEG and believes that it would provide adequate resources for it to carry out the necessary functions as co-regulator.
- 4.3.3 The Budget takes into account the regulatory activity that Ofcom may undertake on ATVOD's behalf that would have to be charged back, such as the costs of collecting fees or of appeals against notification. The details of these costs are to be discussed further.
- 4.3.4 The fees to be charged to the industry need to be proportionate and fair while sufficient to ensure that ATVOD would be able to carry out its regulatory activity efficiently and effectively. The current uncertainty about the number of service providers means that it is not possible for ATVOD in this document to set out details of the proposed flat fee. By way of illustration however if there were estimated (as is expected) to be approximately 150 service providers, and based on the Budget of £400,000, the initial annual fee would be between £2,000 and £2,500 for each service (up to £2,000 for the period 19 December 2009 to 31 December 2010 plus up to an additional £500 to cover the period 1 January to 31 March 2010). ATVOD would plan to review the fee structure for the financial years after 2010-11 and would consult stakeholders before taking any decisions.
- 4.3.5 Whatever funding model is adopted, ATVOD would be the body to set the fees, subject to Ofcom's approval.
- 4.3.6 In the interests of efficiency, ATVOD plans to use the model already established for the Broadcast Skills and Training Regulator, whereby Ofcom collects and processes fees from service providers on ATVOD's behalf. This model helps ensure collection costs are proportionate.

#### **4.4 The editorial content Code**

- 4.4.1 The non-binding Guidance Notes will need to be kept under review at intervals to be discussed with Ofcom.

## **4.5 Relationship with Ofcom**

- 4.5.1 While if designated the relationship between ATVOD and Ofcom will have been agreed in the Designation Agreement and/or the Memorandum of Understanding at designation, this relationship should be kept under periodic review to ensure that the requirements of the Regulations are met fully.

## **Annex A**

### **ATVOD - Audit and Risk Committee Terms of Reference**

The audit committee is responsible for ensuring the maintenance of appropriate and adequate audit processes and the governance of the internal audit and external audit programme.

It is a sub-committee of the ATVOD Board and is chaired by an independent appointee.

#### **1. Membership**

- 1.1 Members of the audit committee shall be appointed by the board, in consultation with the chairman of the audit committee. The committee shall be made up of at least [3] members.
- 1.2 The Board members as a whole will appoint two of their number to be members of the Audit Committee. Members of the Board will serve as members of the Audit Committee in rotation, in order to provide for objectivity in the longer term. At least one of members shall have recent and relevant financial experience. The Chairman of the Board shall not be a member of the committee.
- 1.3 The Board shall appoint, a suitably qualified person, as the third member of the audit committee who shall be an independent non-executive director who has no connection with ATVOD and who will act as the chairman.
- 1.4 Only members of the committee have the right to attend committee meetings. However, other individuals such as the chairman of the board, chief executive, finance director, other board members and internal audit may be invited to attend all or part of any meeting as and when appropriate.
- 1.5 The external auditors (NAO) will be invited to attend meetings of the committee on a regular basis.
- 1.6 Members of the audit committee will serve for three years, unless a member ceases to be a Board member or asks to stand down. Appointments may be extended for a further three year period. The appointment of the independent member may also be extended provided the member remains independent.
- 1.7 In the absence of the committee chairman and/or an appointed deputy, the remaining members present shall elect one of themselves to chair the meeting.

## **2. Secretary**

2.1 The company secretary or their nominee shall act as the secretary of the committee.

## **3. Quorum**

3.1 The quorum necessary for the transaction of business shall be 2 members one of whom shall be an independent member. A duly convened meeting of the committee at which a quorum is present shall be competent to exercise all or any of the authorities, powers and discretions vested in or exercisable by the committee.

## **4. Frequency of meetings**

4.1 The Audit Committee will meet regularly and at least three times a year. The Chair of the committee may convene additional meetings as necessary, including at the request of the CEO, Board members and the internal or external auditor.

## **5. Notice of meetings**

5.1 Meetings of the committee shall be called by the secretary of the committee at the request of any of its members or at the request of external or internal auditors if they consider it necessary.

5.2 Unless otherwise agreed, notice of each meeting confirming the venue, time and date together with an agenda of items to be discussed, shall be forwarded to each member of the committee, any other person required to attend and all other non-executive directors, no later than, five working days before the date of the meeting. Supporting papers shall be sent to committee members and to other attendees as appropriate, at the same time.

## **6. Minutes of meetings**

6.1 The secretary shall minute the proceedings and resolutions of all meetings of the committee, including recording the names of those present and in attendance.

6.2 The secretary shall ascertain, at the beginning of each meeting, the existence of any conflicts of interest and minute them accordingly.

6.3 Minutes of committee meetings shall be circulated promptly to all members of the committee and, once agreed, to all members of the board, unless a conflict of interest exists.

## **7. Duties**

7.1 The committee supports the CEO and Board members in discharging their formal accountability responsibilities by offering objective advice and ensuring that the most efficient, effective and economic risk, control and governance processes are in place, and that the associated assurance processes are optimal.

7.2 In doing this the committee tests and challenges the assurances which are available to the CEO and Board members, the way in which these assurances are developed, and the management priorities and approaches on which the assurances are premised.

- 7.3. In addition, from the work it does, the committee will develop good knowledge of areas of weakness in the organisation and of their significance. This can assist the CEO and Board member in identifying priorities for action.
- 7.4. The Audit Committee will review in particular:
  - 7.4.1 ATVOD's independence to ensure it is and continues to be sufficiently independent of providers of on-demand programme services;
  - 7.4.2 The strategic processes for risk, control and governance;
  - 7.4.3 The accounting policies, the accounts and the annual report of ATVOD, including the process for review of the accounts prior to submission for audit; levels of error identified; and management's letter of representation to the external auditor;
  - 7.4.4 The planned activity and results of the external auditor and internal auditor;
  - 7.4.5 The adequacy of management response to issues identified by audit activity;
  - 7.4.6 Assurances relating to the corporate governance requirements for ATVOD; and
  - 7.4.7 Proposals for tendering for either external or internal Audit services, or for the purchase of non-audit services from contractors who provide audit services
  - 7.4.8 Copies of the Audit Committee's written review reports will be submitted to Ofcom.
- 7.5 Whistleblowing and fraud
  - 7.5.1 The committee shall
    - 7.5.1.1 Review the company's arrangements for its employees to raise concerns, in confidence, about possible wrongdoing in financial reporting or other matters. The committee shall ensure that these arrangements allow proportionate and independent investigation of such matters and appropriate follow up action; and
    - 7.5.1.2 Review the company's procedures for detecting fraud
- 7.6 External Audit
  - 7.6.1 The committee shall:
    - 7.6.1.1 Seek to ensure co-ordination between the activities of the internal and external audit functions
    - 7.6.1.2 Meet regularly with the external auditor, including once at the planning stage before the audit and once after the audit at the reporting stage.
    - 7.6.1.3 The committee shall meet the external auditor at least once a year, without management being present; to discuss their remit and any issues arising from the audit
    - 7.6.1.4 Develop and implement a policy on the supply of non-audit services by the external auditor, taking into account any relevant ethical guidance on the matter.
- 8. Reports to the Audit Committee**
  - 8.1 For each meeting the audit committee will be provided with:
    - 8.1.1. A report summarising any significant changes to the corporate risk register
    - 8.1.2 A progress report from the internal auditor summarising:

- (a) Work performed (and a comparison with work planned)
- (b) Key issues emerging from internal audit work
- (c) Management response to audit recommendations
- (d) Changes to the internal audit plan

8.1.3 A progress report from external audit summarising work done (and a comparison with work planned) and emerging findings.

## Annex 8

# Proposal from the Advertising Standards Authority to be designated as the co-regulator for video on demand advertising

A8.1 The ASA Proposal consists of: firstly, an exchange of letters between Ofcom and the ASA, dated 7 August 2009; and second, a subsequent letter from the ASA to Ofcom dated 7 September 2009. The first letter featured (Ofcom's letter to the ASA dated 7 August 2009) sets out the basis on which it is proposed that, subject to consultation, Ofcom will designate the ASA as a co-regulator of advertising associated with VOD services. The letter makes reference to numbered clauses in a draft of the proposed regulations which has subsequently been superseded, and is therefore not appended. The letter has been amended with footnotes which provide a gloss on the relevant clauses as they stood then.



7 August 2009

Guy Parker  
Chief Executive  
Advertising Standards Authority  
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Dear Guy,

### **Co-regulation of advertising associated with VOD services – proposal for consultation**

Following the discussions between Ofcom and the Advertising Standards Authority ("ASA"), I am writing to you to set out the basis on which Ofcom might designate the ASA as a co-regulator of advertising associated with Video on Demand ("VOD") services for the purposes of the draft legislative provisions, and to invite the ASA's confirmation that it is content for Ofcom to consult on this basis. References to the draft legislative provisions are to the version sent to the ASA by Peter Bourton with his e-mail of 12 May 2009; as the draft is with the Parliamentary Law Draftsman, it is subject to amendment, though we are assured by DCMS that there will be no change of substance.

### Designation

As we have explained previously, Ofcom will carry out a consultation later this year on its proposals to designate co-regulatory bodies for the regulation of VOD editorial and advertising. Subject to the outcome of Ofcom's consultation and to the enactment of draft legislative provisions along the lines produced by DCMS, Ofcom propose to designate the ASA as a regulatory authority under section 240B(2)<sup>58</sup>, on the basis that the ASA:

- can satisfy Ofcom that it is a fit and proper body to be so designated;
- would consent to being so designated;
- has access to financial resources that are adequate for the functions that would be delegated to it;
- is sufficiently independent of providers of on-demand programmes services; and
- would, in performing any designated function, have regard in all cases to the principles under which regulatory activity should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and to such of the matters in section 3(4) of the Communications Act as appear relevant to it in the circumstances.

### Functions and duties

By virtue of the designation, the ASA would be subject to the duties set out in sections 240E<sup>59</sup>, including the requirement to act in a manner that appears to them best calculated to secure that VOD service providers comply with relevant requirements of section 240F. The relevant requirements are those set out in sub-sections (3), (4), (5), (7), (9) of section 240F<sup>60</sup>, and in section 240G<sup>61</sup>. In the light of the points raised by Catherine Thomas in her e-mail to Peter Bourton of 5 August 2009, we agree that it makes sense to give further thought with DCMS as to how the powers in section 240(L)<sup>62</sup> are expressed, before discussing with the ASA whether it is appropriate for the ASA to have these powers.

In order to provide VOD service providers and other interested parties with clarity as to the obligations in respect of advertising included in a VOD service with which they must comply, Ofcom would expect the ASA to administer rules that codify the rules as they appear in the legislation ('the Code'). Ofcom would also expect the ASA to take the steps best calculated to ensure that VOD service providers are aware of, and comply with, the Code.

Section 240B(3) provides that a designation may provide that a function to which it relates may be exercised by the body in question:

- (a) to such extent as may be specified in the designation;
- (b) either generally or in such circumstances as may be so specified; and
- (c) either unconditionally or subject to such conditions as may be so specified.

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<sup>58</sup> This section grants Ofcom the power to designate a body as a regulatory authority.

<sup>59</sup> This section defines the duties of a regulatory authority in relation to VOD services.

<sup>60</sup> These sections, and the following section G, define the responsibilities of VOD service providers in relation to advertising, for example covering bans on incitement to hatred and on the advertising of tobacco products.

<sup>61</sup> See footnote 60.

<sup>62</sup> This section defines the power of a regulatory authority to demand information for the purposes of exercising its duty.

In the light of this, and having regard to the fact that it has been agreed that Ofcom will consider what sanctions are appropriate, Ofcom proposes to provide in the designation that, while the ASA should seek to secure compliance with the requirements set out in section 240F, it should refrain from making a determination under section 240K<sup>63</sup>. In the event that the ASA determine that a service provider has failed to comply with the relevant rules set out in the Code, it will be open to the ASA to refer the matter to Ofcom, which would decide whether or not a breach of the legislative requirements had occurred.

### Funding

Ofcom understands that the Advertising Standards Board of Finance has agreed to ensure that, in exercising any functions that may be designated to the ASA if it were to be designated as a co-regulator of VOD advertising, the ASA would be funded to secure the effective discharge of its functions and duties in respect of which it would have been designated.

### Scope

Ofcom intends to make clear in the consultation document to be published in the autumn that, consistent with the interpretation favoured by DCMS in its letter to Sue Eustace dated 5 June 2009, we see no objection in principle to interpreting sub-section (7) of section 240F<sup>64</sup> to mean that the requirements apply only to those advertisements included in a VOD service that are triggered by the viewer selecting a programme to watch.

### Revocation procedures

Ofcom will consult on the basis that it proposes to designate the ASA as a relevant authority for the maximum period allowed for in section 240B(3)(c) of the draft Regulations. Section 240B(3)(d) of the draft legislative provisions provide for Ofcom to revoke a designation at any time. Notwithstanding this, it is Ofcom's intention that any designation would continue for a minimum of two years from 18 December 2009, and thereafter, subject to mutual agreement, would continue for a further period of 8 years. Consistent with the approach adopted in relation to the co-regulation of broadcast advertising, Ofcom proposes that, after the initial two-year period, either Ofcom or the ASA would have the option to give a minimum of six months' notice to terminate the designation.

### Reporting

To ensure public accountability, we propose that the ASA, if designated, would be required to report to Ofcom each year on the following:

- complaints received (i.e. number of individuals / organisations who submit complaints);
- cases received (i.e. number of advertisements about which complaints are received);
- cases completed, broken down by the status of investigation (e.g. 'informal investigation', 'not investigated after preliminary work', using the same categories as for completed broadcast advertising cases);
- cases upheld / upheld in part; and
- percentage upheld / upheld in part as a proportion of total VOD cases.

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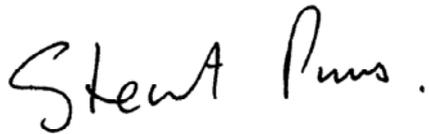
<sup>63</sup> This section covers the enforcement of the regulations in the sections above.

<sup>64</sup> This section defines when an advertisement will be considered to be included within a VOD service.

By the same token, our initial view is that, in principle, it would make sense for the ASA to apply the same performance indicators as for broadcast advertising, although we should be happy to discuss in due course whether less detailed arrangements would be appropriate.

In order that we can proceed with preparations for the consultation document and the preparation of a draft agreement, we would be grateful to know whether the ASA is content to be proposed as a body for prospective designation on the basis set out in this letter.

Yours sincerely

A handwritten signature in black ink that reads "Stewart Purvis." The signature is written in a cursive, slightly slanted style.

Stewart Purvis

*cc. Kate Stross, Peter Bourton*



Stewart Purvis  
Partner, Content and Standards  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

7 August 2009

Dear Stewart,

**Co-regulation of video-on-demand advertisements: proposal for consultation.**

Thank you for writing to me earlier today.

I confirm that the Advertising Standards Authority is happy to be proposed for prospective designation as co-regulator under the draft AVMS Directive (Implementation) Regulations 2009, on the basis set out in your letter of 7 August, and for Ofcom to consult on those proposals.

The advertising industry, through the Committee of Advertising Practice, has of course proposed that the Advertising Standards Authority Ltd, (i.e. the non-broadcast variant) should be the designated body.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Guy Parker', is written over a light grey rectangular background.

**Guy Parker**  
Chief Executive



*Tony Close  
Senior Standards Manager  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA*

7 September 2009

***By email***

Dear Mr Close,

I am writing to provide you with documentation to support the Advertising Standards Authority's (ASA) proposal for a co-regulatory system to regulate advertisements accompanying Video-on-Demand (VOD) services under the Audio Visual Media Services (AVMS) Directive.

In our response (October 2008, attached) to the UK Government's consultation on its proposals to implement the AVMS Directive, we clearly set out why maintaining the 'one stop-shop' approach to advertising regulation was the best and most logical approach for regulating ads accompanying VOD services.

The ASA is already widely recognised as being responsible for controlling marketing communications in all media in the UK. The system operates in line with Government's better regulation principles and offers the simplest solution for regulating ads accompanying VOD services.

The current ASA system is based on four fundamental principles, which would be followed when establishing a new VOD advertising regulatory system. It is our view that these principles meet Ofcom's own objectives for establishing an effective regulatory mechanism. These principles are:

- Code ownership and enforcement by the industry;
- Adjudication on complaints by a separate body that is independent of industry;
- Adequate funding of the system by industry and;
- Effective sanctions

These principles are fully explained in the consultation response, along with an in-depth description of the benefits that the ASA one-stop shop brings to consumers, industry and Government.

Please accept this letter and the accompanying consultation response in support of our proposal to regulate VOD advertisements under the AVMS Directive. The ASA is happy for

this letter and the consultation response to be published. If you require anything further please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Lynsay Taffe', written in a cursive style.

**Lynsay Taffe**  
**Communications and Policy Manager**

Tel: 020 7492 2246

[lynsayt@asa.org.uk](mailto:lynsayt@asa.org.uk)



Natasha Pavey  
AVMS Implementation  
Department for Culture, Media and Sport  
2-4 Cockspur Street  
London SW1Y 5DH

31 October 2008

## **RESPONSE TO THE AUDIOVISUAL MEDIA SERVICES DIRECTIVE CONSULTATION ON PROPOSALS FOR IMPLEMENTATION IN THE UNITED KINGDOM**

### **Introduction**

#### **1. Overview of Advertising Standards Authority**

- 1.1 The Advertising Standards Authority (ASA) is the UK self-regulatory body for ensuring that all ads, wherever they appear, are legal, decent, honest and truthful.
- 1.2 The ASA is widely recognised as being responsible for controlling marketing communications in all media in the UK and we work closely with statutory regulatory partners, such as the Office of Communications (Ofcom) and the Office of Fair Trading (OFT).
- 1.3 Two industry bodies, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are responsible for writing and maintaining the Advertising Codes. CAP is responsible for the non-broadcast Code and BCAP is responsible for the TV and radio Codes.<sup>65</sup>
- 1.4 More information about the ASA one-stop-shop and the benefits it brings to consumers and industry is detailed at **Annex A**.
- 1.5 The ASA welcomes the opportunity to respond to the Government's plans for implementing the Audiovisual Media Services Directive (AVMS; 'the Directive') in the UK.

#### **2 Response summary**

- 2.1 This ASA response will not address each consultation question in turn and will offer no views on some matters. This is because it is important that any decisions about the structure and breadth of advertising co-regulation are made by the industry itself. That said, the advertising regulatory system is ready, willing and able to adapt to develop an appropriate system for the regulation of Video-On-Demand (VOD) advertising under AVMS.
- 2.2 The ASA naturally supports a simple regulatory structure that is in line with better regulation principles and for that reason this response will make the case for:

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<sup>65</sup> The Advertising Codes can be found at: <http://www.cap.org.uk/cap/codes/>

- Responsibility for regulation of VOD advertising remaining with the ASA as part of the ‘one-stop shop’ self-regulatory and co-regulatory model.
- Ofcom being responsible for assigning powers for VOD advertising, rather than those powers being assigned by central government or a third party such as the VOD content regulator(s).
- A simple form of co-regulation to be established for VOD services, something more akin to self-regulation, with the necessary legal underpinning, rather than an onerous co-regulatory structure.

## Regulation of VOD advertising

### 3. VOD advertising regulation under AVMS

- 3.1 Currently, advertisements accompanying VOD programmes are subject to advertising self-regulation. Advertising must comply with the CAP Code<sup>66</sup> and complaints can be made to the ASA. The ASA has not encountered any particular problems with such advertising.
- 3.2 However, the ASA acknowledges that the purely self-regulatory status quo cannot be maintained under the AVMS Directive.
- 3.3 As a self-regulatory and co-regulatory body, the ASA is encouraged that the UK Government has taken the opportunity provided by the Directive to permit co-regulation to play a full role in regulating audio visual media services.
- 3.4 However, the ASA is aware that there are many different degrees of co-regulation, which sit between pure self-regulation and statutory regulation, as indicated below in **Figure 1**.

**Figure 1**



- 3.5 Given that there is already an effective self-regulatory system in place to control VOD advertisements, it seems unnecessary to devise an onerous (or very formal) system of co-regulation to control VOD advertising under AVMS. Since the Directive is supportive of both self-regulation and co-regulation it seems sensible to provide the most flexible regulatory structure permissible under the Directive. The ASA self-regulatory model has proven that such an approach is workable and effective; the ASA comprises many forms of self-regulation within a co-regulatory framework and the formality of these various arrangements does not have a particular bearing on compliance levels.

<sup>66</sup> The CAP Code is the non-broadcast advertising code. All the Advertising Codes can be accessed at [www.cap.org.uk](http://www.cap.org.uk)

- 3.6 The ASA has established effective partnerships with various statutory regulators, which are regarded as self-regulation within a co-regulatory framework. Some of these are outlined in section 10 of this response.
- 3.7 The ASA firmly believes that maintaining a single advertising regulator is the best approach, rather than establishing a new regulatory body(-ies). The whole point of creating the one-stop shop in 2004 was to simplify advertising regulation, because consumers and industry found it confusing dealing with a number of separate bodies. For this reason, the ASA is encouraged that the Government's initial preference, as outlined in part 3B of the consultation document (paragraph 34), is that "*regulation of advertising in video-on-demand services could be assigned to the Advertising Standards Authority*".
- 3.8 The approach outlined above would be in line with the Better Regulation Commission's five principles of better regulation.

#### **4. Ofcom as the backstop to the system**

- 4.1 The ASA strongly supports powers for VOD advertising regulation being assigned directly by Ofcom to the ASA rather than those powers being assigned by central government or a third party such as the VOD content regulator.
- 4.2 The ASA regards this as a much simpler route and in line with better regulation principles because Ofcom already acts as the statutory backstop for broadcast advertising regulation, so there is a constructive pre-existing relationship. This would keep any reporting and accountability as streamlined as possible.

#### **Why the ASA?**

5. The ASA one stop-shop has a proven track record of regulating advertising and of adapting to include new areas of advertising. In particular, the system is able to meet the requirements of the regulatory system as detailed on page 22 of the consultation document.

#### **6 International partner**

- 6.1 The ASA is a founding member of the European Advertising Standards Alliance (EASA)<sup>67</sup>. As part of this alliance, the ASA works in cooperation with partner organisations from across Europe to address international issues of concern and to resolve cross-border complaints.
- 6.2 The ASA one-stop shop system fulfils EASA's stated mission for advertising self-regulation:

*"To maintain consumer confidence in advertising by offering a rapid and effective response to consumer concerns. It facilitates consumer protection by providing a route for the individual consumer to express a view directly to the advertising business and the advertiser. It enables brands to compete on a level playing field to the benefit of the consumer. In all this, the advertising business will also be seen to be actively, continuously, and responsibly engaged with the consumer."*

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<sup>67</sup> EASA brings together national advertising self-regulatory organisations and organisations representing the advertising industry. It is the single authoritative voice on advertising self-regulation issues and promotes high ethical standards in commercial communications by means of effective self-regulation [www.easa-alliance.org](http://www.easa-alliance.org)

6.3 The ASA is committed to upholding the key common principles of good effective self-regulation, which have been agreed at a European level by EASA:

- Independence and impartiality
- Transparency and accessibility
- Effectiveness
- Efficient complaint-handling and enforcement
- Compliance with the law
- Cross border co-operation
- Sufficiently resourced to meet objectives

6.4 The ASA one-stop shop model meets all these principles. It has:

- vast experience of regulating advertising content;
- a comprehensive regulatory approach;
- strong governance and funding structures;
- experience of working in a co-regulatory partnership and;
- a proven track record of being able to adapt the system to work for different media.

This makes the ASA model the logical choice for maintaining advertising standards under the AVMS Directive.

## **7 An Experienced and Recognised System**

7.1 The non-broadcast advertising self-regulation has been operating for more than 45 years and the broadcast model has been operating for four years. The system is widely recognised by the Government, the industry, consumers, the Courts and partner regulators, for example the OFT and Ofcom, as the established means of consumer protection against misleading, offensive or harmful advertising.

7.2 According to recent MORI research for the Press Complaints Commission (PCC), the ASA is the best recognised UK media regulator, scoring more highly than Ofcom, PhonepayPlus and the PCC. Section 328 of the Communications Act 2003 requires broadcast licensees to publicise the regulatory system and section 60.8 of the CAP Code describes the system's commitment to publicising the ASA's policies and decisions.

7.3 The industry's commitment to maintaining high awareness of the system can be evidenced by our advertising campaign that has been running since 2005. The campaign is aimed at informing the public about the ASA's work and is run entirely in advertising space donated by the media. The space donated is not inconsiderable, for example during 2005 and 2006 the ad ran more than 8,500 times in radio and appeared more than 1,500 times in national and regional press.

7.4 The ASA strives to deliver excellent service to its customers and undertakes regular customer satisfaction surveys to monitor our levels of service. Given that the ASA's work will inevitably involve disappointing one party to the complaint, it is encouraging that our most recent survey revealed that 61% of our complainants are satisfied with their overall experience of the ASA (85% for upheld complainants and 55% for not upheld). 74% overall are satisfied with the service they receive and 85% think that the ASA has consumers' interests at heart.

## **8 A comprehensive system**

- 8.1 The ASA/ CAP/ BCAP approach is a comprehensive regulatory model, with nearly all aspects of advertising regulation under one roof. The system offers:
  - 8.1.1 A large and experienced complaints & investigations department which deals with issues relating to advertising in all media. The ASA is an organisation of over 100 people and deals with around 25,000 complaints each year.
  - 8.1.2 A free Copy Advice service for advertisers, agencies and media who want to check prospective non-broadcast ads or creative ideas against the CAP Code. The team deals with around 6000 enquiries each year.
  - 8.1.3 A compliance and monitoring team that proactively monitors ads in all media on a daily basis to check for compliance with the Codes. The team also undertakes surveys in high profile areas (e.g. sensitive areas such as gambling or alcohol) or amongst sectors with lower compliance records.
  - 8.1.4 Guidance and training for the industry, including regular seminars, presentations and visits by our Code experts to companies and agencies.
  - 8.1.5 Open and transparent performance evaluation, through key performance indicators, which are published every year in the ASA annual statement. These show, for example, the number of complaints received and resolved and the average time taken to deal with different classes of complaints.
  - 8.1.6 Consumer information through the ASA website, including published adjudications, information on how to complain and information about how the system works.
  - 8.1.7 Established sanctions, including prohibiting ads or advertising techniques, and requiring advertisers to seek advice before publishing future ads. In extreme cases the ASA can refer advertisers to the OFT for unfair or misleading ads and broadcasters to Ofcom for persistently airing ads that break the rules.

## **9 Strong governance structures: an open, transparent system**

- 9.1 The ASA is independent of both Government and industry. The system has consistently proven that it is prepared to take action against those advertisers that breach the Codes. In 2007, 2,458 ads were changed or withdrawn following ASA action.
- 9.2 Arms-length funding via a levy on advertising space costs ensures that the system is adequately funded. The levy is the only part of the system that is voluntary (all advertisers must comply with the Codes and ASA decisions, but they do not have to pay the levy). The voluntary nature of the levy and the fact that it is collected by arms-length funding bodies ensures that the ASA's decision-making remains independent of the industry.
- 9.3 CAP and BCAP are responsible for writing the Advertising Codes and co-ordinating sanctions with the ASA. CAP and BCAP have no involvement with the ASA decision-making process.
- 9.4 The Chairman of the ASA is appointed in line with Nolan principles by ASBOF and BASBOF following consultation with the Advertising Association, DBERR, DCMS and Ofcom. The Chairman is required to be someone who has never been engaged in

the advertising business. The current Chair of the ASA is the Rt Hon Lord Smith of Finsbury.

- 9.5 The independent ASA Council, which is responsible for deciding whether an ad has breached the Codes, is appointed by the ASA Chairman in accordance with Nolan principles and following public advertisement. Two thirds of Council members are lay.

## 10 Experience of co-regulation/ self-regulation with a legal backstop

- 10.1 The ASA already has four years' experience of working in a formal co-regulatory partnership and has even longer-standing, strong ties with other partner statutory regulators. These examples demonstrate that co-regulation can come in many different forms, but can be equally effective in achieving high standards in advertising and consumer protection. For example:

- 10.1.1 **Ofcom** – Since 2004, the ASA has been operating a formal co-regulatory partnership with Ofcom for broadcast advertising. This partnership is agreed through a formal Memorandum of Understanding (MOU), with the Deregulation and Contracting Out Act 1994 (DCOA) as the legal function that enables this partnership

Although the day-to-day operation of the system is contracted-out, under the MOU, Ofcom retains all its legal powers stemming from the Communications Act 2003. However, Ofcom will not normally intervene in specific ASA or BCAP decisions and actions in respect of matters that have been contracted-out to them.

Also under the MOU, on a quarterly basis ASA(B) and BCAP are required to provide Ofcom with performance data against agreed key performance indicators.

- 10.1.2 **Office of Fair Trading (OFT)** – The ASA/ CAP/ BCAP system is recognised as an 'established means' for enforcing the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and the Business Protection from Misleading Marketing Regulations 2008 (BPRs). The CPRs and BPRs provide protection against unfair and misleading advertisements and unacceptable comparative advertisements.

This recognition means that the ASA can refer an advertiser to the OFT if, for example, the trader is of doubtful repute, or if the advertiser repeatedly fails to comply with the CAP Code. This is rarely necessary because most advertisers comply with the self-regulatory system; since 2000 just 30 advertisers have been referred to the OFT. The ASA views this part of the system as self-regulation with a legal backstop. Although, the ASA has a close working relationship with the OFT, it is not formally accountable to the regulator. The OFT does satisfy itself that the Codes reflect the requirements in law.

- 10.1.3 **Gambling Commission** – Under the Gambling Act 2005 the Gambling Commission can issue code of practice provisions on non-broadcast advertising, but the Commission asked CAP to perform that function and for the ASA to administer the new rules<sup>68</sup>. The Commission has made compliance with the Advertising Codes a provision of its own Code of Practice. Furthermore, the Gambling Act also contains reserve powers for the Secretary of State to issue regulations on advertising. The ASA views this system as being self-regulation with legal underpinning. The ASA has a close working relationship with the Gambling Commission and DCMS, but does not formally report to either body.

<sup>68</sup> Under the Gambling Act and the Contracting-out Order with Ofcom, BCAP was automatically responsible for developing broadcast advertising rules and ASA(B) for enforcing them.

## **11 Proven Track Record of expanding the system**

- 11.1 The ASA already regulates all advertising accompanying VOD programmes and services through the existing self-regulatory CAP Code as part of our wider responsibility for regulating all advertising in the UK. Under the current system all ads must abide by the CAP Code, regardless of the media in which they appear.
- 11.2 This experience of regulating VOD ads would make a transition to a co-regulatory system for VOD advertising regulation relatively simple.
- 11.3 The ASA already has the necessary experience, personnel and structures in place to regulate ads accompanying VOD programmes. Although there will be some resource implications involved with establishing a co-regulatory system for VOD advertising, these are likely to be much smaller than those associated with establishing an entirely new or separate regulator.
- 11.4 It is important for the ASA to make clear that we cannot state categorically what the system might look like as this is a matter for the industry. However, the regulatory system has a good track record of designing and establishing effective self-regulatory and co-regulatory structures that are fit for purpose and aligned with gold-standard principles for advertising regulation.
- 11.5 The current system is based on four fundamental principles. The ASA expects that these would be followed when establishing the new VOD advertising regulatory system. These principles are:
- 11.5.1 Code ownership and enforcement by the industry**  
The ASA believes that a new structure for regulating VOD advertising could be adopted without any noticeable change for its customers, both consumers and industry.
- 11.5.2 Adjudication of complaints by a separate body, independent of industry**  
Under a new regulatory structure for VOD advertising, the independent ASA Council could continue independent adjudication on VOD ads.
- 11.5.3 Adequate funding for the system by the industry**  
The funding mechanism was appropriately adapted to cover broadcast advertising in 2004. It seems likely that a similar arms-length funding system could be devised for VOD advertising under AVMS.
- 11.5.4 Effective sanctions**  
Under the one-stop shop model, advertisers, agencies and the media all commit to upholding the highest standards in advertising. However, the ASA has a number of compliance mechanisms available, should advertisers fail to comply with the Codes. The ASA is confident that the industry will be able to devise equally effective sanctioning for advertisements accompanying VOD programmes. It should be noted that the ASA currently has no power to fine and does not want to have that power. The aim of the self-regulatory system is to gain compliance rather than to punish.
- 11.6 The ASA fully endorses the ability of the current advertising regulatory system to formulate an appropriate and responsible regulatory mechanism for regulating VOD advertising under AVMS.

## **Conclusion**

- 12.1 The ASA would like to thank Government for the opportunity to respond to its plans for implementing AVMS in the UK.
- 12.2 The ASA hopes that it has put forward a sufficiently strong case in support of maintaining responsibility for regulation of VOD advertising as part of the 'one-stop shop' self-regulatory and co-regulatory structure, and for VOD advertising regulatory powers being assigned directly by Ofcom.
- 12.3 The current advertising regulatory system is ready, willing and able to adapt its structure to regulate VOD advertising under the Directive, to the benefit of consumers, the industry and Government.
- 12.4 The ASA is happy to discuss further its position on any of the above issues and to assist Government and other stakeholders with the AVMS implementation process. If there are any questions arising from this response, please contact me on 020 7492 2121, or at [michaelt@asa.org.uk](mailto:michaelt@asa.org.uk).

Yours sincerely,



**Michael Todd**  
**Policy and Public Affairs Officer**

## ANNEX A – About the ASA one-stop shop

1. The ASA has been responsible for policing non-broadcast advertising standards since 1962, when the industry established the ASA as an independent complaints body to administer the new CAP Code for non-broadcast advertising.
2. The self-regulatory system is based on a concordat between advertisers, agencies and the media that each will act in support of the highest standards in advertising. It is not a voluntary system.
3. The success of the self-regulatory system led to the contracting-out of broadcast regulation (TV and radio) by Ofcom in 2004. This move was approved by Parliament and created a 'one-stop shop' for all advertising complaints<sup>69</sup>.
4. Two industry bodies, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) are responsible for writing and maintaining the Advertising Codes. CAP is responsible for the non-broadcast Code and BCAP is responsible for the TV and radio Codes.<sup>70</sup>
5. The industry worked hard to create a robust regulatory structure for broadcast advertising, which would ensure consistent cross-platform regulation for the benefit of both consumers and advertisers. This included ensuring appropriate funding was put in place for the new regulatory system and creating a fully representative industry code-owning committee (BCAP).
6. Generally speaking, the ASA now regulates all advertisements in 'paid for space', anywhere in the UK, including in VOD services. Although primarily a complaints based regulator, the ASA also conducts daily pro-active monitoring of ads in all media and regularly undertakes compliance surveys of advertisements published by sectors about which there is particular societal concern or in sectors where compliance may be poor.
7. The system is entirely funded by industry, through a levy of 0.1% on display advertising space and airtime and 0.2% on Royal Mail Mailsort contracts. The levies are collected by two arm-length funding bodies, the Advertising Standards Board of Finance (Asbof) and the Broadcast Advertising Standards Board of Finance (Basbof)<sup>71</sup>. Last year the ASA was awarded £8m to run the system.
8. The ASA 'one-stop shop' advertising regulatory system brings great benefits for consumers and for business:
  - **Easier for consumers** – The establishment of a single complaints body has made it easier for consumers to negotiate the complaints system. This is illustrated by the fact that in the ten months prior to November 2004, the ASA received 5,814 complaints about TV advertising from consumers, which it was at that time unable to act upon.
  - **Free to the taxpayer** – The system is funded by the industry, not the tax payer, via the 0.1% levy on the cost of advertising space.

<sup>69</sup> Agreed through a formal Memorandum of Understanding (MOU), with the Deregulation and Contracting Out Act 1994 (DCOA) as the legal function that enables the partnership

<sup>70</sup> The Advertising Codes can be found at: <http://www.cap.org.uk/cap/codes/>

<sup>71</sup> [www.asbof.co.uk](http://www.asbof.co.uk)

- **Simpler for Advertisers** – Advertisers are now well-used to working with the ASA model. Not only do advertisers have to deal with just one body during the complaints process; nearly all aspects of advertising regulation are under one roof (CAP and BCAP code development; Copy Advice<sup>72</sup>; complaints and investigations; and compliance and monitoring). Currently, all the advertising Codes are being reviewed by CAP and BCAP to ensure they remain relevant and robust, yet simple to use.
  - **Technology neutral and high standards for all approach** – The ASA deals with advertisements in all media, meaning it is technology neutral. The ASA believes that all ads should be subject to the same high standards regardless of the media in which they appear (while taking into account the context and audience of the marketing communication).
  - **Harmonious decision making** – Cross media adjudications are made by a single organisation.
  - **Corporate Social Responsibility** – Effective self-regulation works because it is powered and driven by a sense of corporate social responsibility amongst advertising stakeholders. The advertising industry has a strong interest in maintaining the system and a level playing field, not least to maintain high levels of consumer trust in advertising,
  - **Cost Effective** – Advertising self-regulation is a cost-effective way to resolve grievances, without the requirement for expensive legal action.
9. Further information about the ASA and the work we do can be found at [www.asa.org.uk](http://www.asa.org.uk). The website also contains a searchable database of all our adjudications from the past five years.

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<sup>72</sup>Copy Advice is a non-broadcast service: pre-clearance for television and radio advertisements is not conducted by the one-stop shop system, but by Clearcast (TV [www.clearcast.co.uk](http://www.clearcast.co.uk)) and the RACC (radio [www.racc.co.uk](http://www.racc.co.uk))

## Annex 9

# Glossary

**Act, the** the Communications Act 2003.

**ASA** Advertising Standards Authority - an independent body set up by the advertising industry to police the rules laid down in the non-broadcast advertising codes. Subsequently, Ofcom delegated it responsibility for broadcast advertising, as a co-regulatory body.

**ASBOF** Advertising Standards Board of Finance - body that raises money to fund the regulation of non-broadcast advertising.

**ATVOD** Association for Television On Demand - currently the independent, self-regulatory body responsible for regulating the VOD services of its members.

**AVMS Directive** Audiovisual Media Services Directive - the European Union's regulatory framework for television broadcasting. One of the most significant changes introduced by the AVMS Directive is to extend the scope of television regulation to include VOD services.

**BASBOF** Broadcast Advertising Standards Board of Finance - body that raises money to fund the regulation of broadcast advertising

**BCAP** Broadcast Committee of Advertising Practice - a part of the ASA responsible for drawing up codes of practice for television and radio advertising. BCAP is contracted by Ofcom to write and enforce the codes of practice that govern television and radio advertising. The Committee comprises representatives of broadcasters licensed by Ofcom, advertisers, agencies, direct marketers and interactive marketers. It is a co-regulatory body.

**CAP** Committee of Advertising Practice - an advertising industry body comprised of trade associations representing advertisers, agencies and the media responsible for drawing up a code of practice for non-broadcast advertising. The ASA is responsible for enforcing this code.

**Catch-up service:** a VOD service that allows users to watch programmes that have recently been broadcast on a linear television service, usually for a set period of time following the broadcast e.g. the BBC *iPlayer*.

**Co-regulation** Schemes that involve elements of self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. The split of responsibilities may vary, but typically government or regulators have legal backstop powers to secure desired objectives.

**DCMS** Department for Culture Media and Sport - Government Department responsible for Government policy on the arts, sport, the National Lottery, tourism, libraries, museums and galleries, broadcasting, creative industries, press freedom and regulation, licensing, gambling and the historic environment.

**DTT** digital terrestrial television - currently most commonly delivered in the UK through the *Freeview* platform.

**Editorial control** the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.

Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.

**EIA** Equality Impact Assessment - an analysis of the potential impacts a proposed policy or project is likely to have on people, depending on their background or identity.

**ECA** the European Communities Act (1972) - the Act which provides for the incorporation of European Community law into the domestic legal order of the United Kingdom.

**Internet** a global network of networks, using a common set of standards (e.g. internet protocol), accessed by users with a computer via a service provider.

**IMCB** Independent Mobile Classification Body - body that sets a framework for classifying commercial content available on mobile phones.

**IPTV** internet protocol television - The term used for television and/or video signals that are delivered to subscribers or viewers using Internet Protocol (IP), the technology that is also used to access the Internet. Typically used in the context of streamed linear and on demand content, but also sometimes for downloaded video clips.

**Member State** one of the 27 European countries that are members of the European Union.

**Notification Process** the process, through which service providers subject to the rules of the AVMS Directive must notify Ofcom or, if a designation is made, the co-regulator of the service. The implementing regulations will require service providers to notify the regulator if they are operating a VOD service that falls within scope or if they intend to operate such a service.

**ODPS** on-demand programme service: (i.e. a non-linear audiovisual media service) - an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.

**PSB** public service broadcasting, or public service broadcasters - the Act defines the PSB services to include the BBC, ITV 1 (and GMTV 1), Channel 4, Five and S4C.

**Scope Guidance** information to aid VOD service providers and the regulator for VOD editorial content in determining which services are subject to regulation.

**Self-regulation** Industry collectively administers a solution to address citizen or consumer issues, or other regulatory objectives, without formal oversight from government or regulator. There are no explicit ex ante legal backstops in relation to rules agreed by the scheme (although general obligations may still apply to providers in this area).

**Statutory Regulation** Objectives and rules of engagement are defined by legislation, government or regulator, including the processes and specific requirements on companies, with enforcement carried out by public authorities.

**TLCS Licence** Television Licensable Content Service licences - Ofcom-issued licences for services made available using either satellite, an electronic communications network (such as cable), or a radio multiplex.

**TVWF Directive** Television Without Frontiers Directive - the legislative precursor to the AVMS Directive. It was introduced in 1989 (and revised in 1997) and set minimum standards for linear television services across Europe.

**VESG** VOD Editorial Steering Group - an industry-led group set up, with the assistance of Ofcom and the DCMS, to work towards developing a proposal to Ofcom, for consultation, for a new co-regulatory body to regulate VOD editorial content. It represents a range of industry stakeholders, including all of the UK's major platform owners and major providers of VOD services.

**VOD** Video On Demand - a service or technology that enables television viewers to watch programmes or films, etc whenever they choose, rather than being restricted to a linear schedule.