



The regulation of video on demand services

Statement

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Section 1

Executive Summary

Summary of Ofcom Decisions

- 1.1 As a result of our consultation paper on *Proposal for the regulation of video on demand services* Ofcom has decided to:

Scope of Regulation

- Finalise guidance on the scope of regulation to provide clarity for the public and service providers as to who will be subject to regulation.

Regulation of Video on Demand Services

- Work towards adopting a co-regulatory approach to the regulation of video on demand editorial content. We are continuing to discuss with the Association for Television on Demand (“ATVOD”) the appropriate terms for designation. The duties that would be designated are:
 - determining the scope of regulation and notification requirements, as and when these become statutory obligations (including the power to issue enforcement notices against VOD service providers in relation to notification);
 - enforcing VOD editorial content standards and issuing enforcement notices against VOD service providers in relation to contraventions of the standards;
 - encouraging service providers to ensure they make their services gradually more available to people with sight and hearing disabilities; and
 - encouraging service providers to promote production of and access to European works.

Regulation of Video on Demand Advertising

- Work towards adopting a co-regulatory approach to the regulation of video on demand advertising and, noting respondents’ support for giving regulatory functions to the Advertising Standards Authority (“the ASA”), continue to discuss with the ASA the appropriate terms for designation.

Introduction

- 1.2 On 14 September 2009, we published our consultation paper (“the Consultation”) on the basis on which Ofcom proposes to fulfil its statutory duties relating to the regulation of video on demand (“VOD”) services which provide consumers and citizens with “television-like” content. Specifically, in the Consultation, we laid 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 included in

those services (“VOD advertising”). This document is Ofcom’s statement (“the Statement”) outlining responses we received to the questions we laid out in our Consultation, and, based on our analysis of these responses, our decisions relating to the regulation of VOD services.

1.3 The Audiovisual Media Services (“AVMS”) Directive (EC Directive 2007/65/EC) amends and renames the Television Without Frontiers (“TVWF”) Directive (EC Directive 89/552/EEC), providing less detailed and more flexible regulation. It seeks 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. Following implementation of the AVMS Directive into UK legislation:

- VOD services that meet the statutory criteria set will fall within the scope of statutory regulation;
- such services will be subject to a range of minimum content standards¹;
- Ofcom is given the power to designate particular functions relating to the regulation of VOD services to any corporate body that Ofcom is satisfied meets the statutory criteria for designation; and
- Ofcom is given primary responsibility, including back-stop powers, to ensure the effective operation of the co-regulatory framework.

1.4 As discussed in Section 2, the AVMS Directive came into force on 19 December 2007 and must be implemented into UK law by 19 December 2009. 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 content and VOD advertising. In 2008, the Government consulted on its proposals for implementation (“the Government Consultation”)², 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 implementation³.

1.5 In the Government Consultation and the Ministerial Statement, the Government made clear its intention 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; and only to those services that include programmes similar to those available on television broadcast services. The Government also made clear that Ofcom would be given powers to regulate UK VOD services under a regulatory framework that would enable Ofcom to designate functions to a co-regulatory body or bodies in order to secure compliance by providers of VOD services with the new requirements.

1.6 Our Consultation referred to the implementing regulations that the Government was in the process of drawing up to lay before Parliament. The final regulations (“the Regulations”)⁴ were made on 9 November 2009 (see paragraph 2.10 below) and laid

¹ See paragraphs 4.4 and 5.4 below for further details of the minimum standards.

² See http://www.culture.gov.uk/images/consultations/AVMS_Consultation_Document.pdf

³ See http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx

⁴ The Audiovisual Media Services Regulations (SI 2009/2979).

before Parliament on 10 November 2009⁵. The Regulations amend the Communications Act 2003 (“the Act”) with effect from 19 December 2009 (when they come into force) to insert a number of new provisions that will give effect to requirements from the AVMS Directive, including setting up a regulatory framework for the regulation of VOD services.

- 1.7 Following this date, editorial content and advertising included in VOD services that are television-like and come within the meaning of an “on-demand programme service” (“ODPS”), as defined in the Regulations, will be subject to statutory regulation.
- 1.8 It should be noted that a second set of regulations will implement some remaining aspects of the new proposed regulatory regime for VOD services. Ofcom understands that the Government expects to make this second set of regulations in early 2010 and bring them into force in March 2010 (“the 2010 Regulations”). The 2010 Regulations are expected to include:
- a requirement on VOD service providers to notify the regulator that they are providing a service;
 - a requirement for VOD service providers to pay a notification fee;
 - an enforcement regime to apply where these requirements have been contravened; and
 - a requirement for service providers to retain a copy of material, included in their service, for 42 days from the date it was last made available to users of the service.
- 1.9 Ofcom’s decisions set out in this Statement reflect our understanding that the above provisions will be included in the 2010 Regulations and that this set of regulations will be made and come into force in late February or March 2010. As and when this is the case, Ofcom has decided, in principle, to work towards delegating functions associated with these additional requirements to ATVOD.

Consultation

- 1.10 As we outline above, the Regulations enable Ofcom to designate functions to a co-regulatory body or bodies in order to secure compliance by providers of VOD services with the new legislative requirements. Accordingly, as we made clear in the Consultation, ATVOD and the ASA put forward to Ofcom proposals for designation as the new co-regulatory bodies with regard to VOD editorial content and VOD advertising respectively. In our Consultation, we evaluated and consulted on the suitability of the proposals we received with a view to determining whether it would be appropriate for Ofcom to designate co-regulatory functions to ATVOD and the ASA.
- 1.11 As we made clear in the Consultation, we evaluated both the proposal we received from ATVOD (“the ATVOD Proposal”) in relation to the regulation of VOD editorial content, and the proposal we received from the ASA (“the ASA Proposal”), in relation to the regulation of VOD advertising, against two sets of criteria: firstly, those criteria

⁵ See http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

laid out in the Regulations which will come into force on 19 December 2009; and second, those criteria laid out in Ofcom's own principles relating to co-regulation⁶.

- 1.12 As will be discussed in the rest of this Statement, it is the overwhelming view of stakeholders that regulation of VOD services should be achieved through a system of co-regulation and that it would be appropriate for Ofcom to designate ATVOD and the ASA as the appropriate regulatory authorities in relation to securing compliance by providers with the requirements relating to VOD editorial content and VOD advertising.

Overview of Ofcom's decisions

Services subject to regulation ("Scope Guidance") and functions relating to the notification process

- 1.13 In Section 4 of the Consultation, we stressed the fact that determining which services will be subject to regulation - i.e. are "in scope" - will be central to the working of the new regulatory framework. We set out and examined the criteria, contained in the Regulations, that determine which services will fall "in scope" of the new regulatory regime.

- 1.14 We then proposed:

- draft Scope Guidance, drawn up with the cooperation of 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 also laid out an indicative, non-exhaustive list of services which Ofcom believed, on a preliminary analysis, were likely to be considered to be in scope. This list was illustrative only, and in no way pre-judges the decisions of the proposed co-regulator and/or Ofcom in this area; and
- an allocation of functions relating to the notification process⁷, such that service providers subject to the requirements 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 proposed allocation of functions covered Ofcom's involvement in borderline decisions, when it is unclear whether a service should be in or out of scope of the new regulatory regime.

- 1.15 In Section 3 of this Statement, we lay out our decisions concerning scope and notification:

- we confirm as final the draft Scope Guidance we proposed in Section 4 and Annex 6 of the Consultation, subject to amendments reflecting, amongst other things, the responses we have received to the Consultation; and
- in anticipation of ATVOD being designated, we intend that ATVOD should have responsibility for the following broad functions relating to notification as and when notification becomes a statutory requirement:

⁶ See <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

⁷ Subsequent to the Consultation, as mentioned in paragraph 1.8 above, the Government has indicated that it intends to implement the requirement for on demand programme services ("ODPS") to notify the regulator in the 2010 Regulations.

- following the anticipated introduction of the 2010 Regulations, oversight of the timescale under which existing and prospective VOD service providers to notify the regulator;
- following the anticipated introduction of the 2010 Regulations, responsibility for receipt of notifications from VOD service providers;
- from 19 December 2009, management of the information, relating to VOD service providers, to be held by the regulator; and
- following the anticipated introduction if the 2010 Regulations, the power to issue enforcement notifications against VOD service providers determined to be within scope, for failure to notify provision of a regulated service.

As we proposed in the Consultation⁸, we have also decided we would not designate the following functions relating to notification as and when notification becomes a statutory requirement: decision-making on borderline scope decisions; and the power to impose statutory sanctions relating to notification, including financial penalties, and/or directions (including the power to direct the suspension of a VOD service).

The regulation of video on demand editorial content

- 1.16 In our Consultation⁹, we outlined the ATVOD Proposal for designation, as the co-regulator for VOD editorial content.
- 1.17 Since publication of the Consultation, ATVOD has, with the cooperation of industry stakeholders and Ofcom, undertaken a range of activities with a view to ensuring that ATVOD would be fit-for-purpose to be designated as a co-regulatory body. These activities include:
- recruitment of a new Chief Executive Officer and a new Chairman of the ATVOD Board;
 - recruitment of new independent members of the ATVOD Board;
 - recruitment of a part-time company secretary;
 - taking measures to help establish adequate funding for ATVOD to carry out its co-regulatory duties; and
 - the development of a suite of documents covering complaints handling, and editorial standards requirements and interpretative guidance.
- 1.18 In Section 4 of this Statement, we lay out our decisions concerning the functions we intend to designate to ATVOD in relation to VOD editorial content:
- in addition to the powers laid out in the ATVOD Proposal, we also intend to designate to ATVOD the power to issue enforcement notices against VOD service providers in relation to contraventions of the standards requirements covering VOD editorial content. We are continuing to discuss with ATVOD the appropriate terms for designation;

⁸ See paragraphs 4.87 to 4.91 of the Consultation.

⁹ See paragraphs 5.24 and 5.25, and Annex 7 of the Consultation.

- the duty to encourage VOD service providers to ensure that their services are gradually made more accessible to people with sight or hearing disabilities (“the Access Duty”); and
- the duty to ensure that VOD service providers promote production of and access to European works (“the European Works Duty”).

1.19 However, in designating both the Access Duty and the European Works Duty, we would explicitly require ATVOD to: prepare written plans to discharge these duties, which must be approved by Ofcom; and report regularly on these issues to Ofcom.

1.20 Ofcom’s approach, in principle, to co-regulation of VOD editorial content is, when powers and duties in this area are granted to Ofcom, to designate the widest possible range of powers and duties to the co-regulator. Under the relevant legislation, Ofcom retains such powers and duties in parallel and may act as the appropriate regulatory authority concurrently or in place of the co-regulator. We therefore anticipate designating the widest possible range of powers to ATVOD, subject to ATVOD not being permitted to exercise a certain restricted number of other powers. Powers that only Ofcom could exercise include: the anticipated power to determine decisions on scope referred to Ofcom; and certain powers to impose statutory sanctions (financial penalties, or suspension/restriction of service): firstly, relating to notification issues, once notification has become a statutory obligation; and second, relating to potential contraventions of the Act that might be recorded by ATVOD.

1.21 Public policy around the promotion of certain food and drink products – whether through sponsorship, product placement or advertising – is continuing to develop, and Ofcom has considerable experience in this area. Therefore Ofcom intends to retain the duty to encourage VOD service providers to develop codes of conduct regarding standards concerning the appropriate promotion of food or beverages by sponsorship of, or in advertising which accompanies or is included in, children’s programmes. However, in doing so, we would expect to consult ATVOD as appropriate.

The regulation of video on demand advertising

1.22 In our Consultation¹⁰, we outlined the ASA Proposal for designation as the co-regulator for VOD advertising. In Section 5 of this Statement, having undertaken our assessment according to both the statutory and the regulatory criteria; and noting respondents’ support for the ASA Proposal, Ofcom is of the view that the ASA satisfies the criteria required by the Regulations for a designated body. Accordingly, we are continuing to discuss with the ASA the appropriate terms for designation. In the meantime, Ofcom will deal with any issues relating to the relevant statutory VOD advertising standards, as listed in paragraph 5.4 below as they arise.

¹⁰ See paragraphs 6.6.19 to 6.21 and Annex 8 of the Consultation.

Section 2

Background

Introduction

2.1 On 14 September 2009, we published our consultation paper (“the Consultation”) on the basis on which Ofcom proposes to fulfil its statutory duties relating to the regulation of video on demand (“VOD”) services which provide consumers and citizens with “television-like” content. Specifically, in the Consultation, we laid 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 included in those services (“VOD advertising”). This document is Ofcom’s statement (“the Statement”) outlining responses we received to the questions we laid out in our Consultation, and, based on our analysis of these responses, our decisions relating to the regulation of VOD services.

2.2 The Audiovisual Media Services (“AVMS”) Directive (EC Directive 2007/65/EC) seeks 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. Following implementation of the AVMS Directive into UK legislation:

- VOD services that meet the statutory criteria will fall within the scope of statutory regulation;
- Such services will be subject to a range of minimum content standards;¹¹
- Ofcom is given the power to designate particular functions relating to the regulation of VOD services to any corporate body that Ofcom is satisfied meets the statutory criteria for designation; and
- Ofcom is given primary responsibility, including back-stop powers, to ensure the effective operation of the co-regulatory framework.

2.3 This section sets out:

- background information on the AVMS Directive and implementation into UK legislation of requirements for VOD;
- the current self-regulatory structure for VOD services;
- Ofcom’s approach to co-regulation; and
- a general summary of the responses that Ofcom received to the Consultation.

The AVMS Directive and implementation into UK legislation of requirements for video on demand

2.4 The AVMS Directive came into force on 19 December 2007 and must be implemented into UK law by 19 December 2009. It renames and amends the

¹¹ See paragraphs 4.4 and 5.4 below for further details of the minimum standards.

Television Without Frontiers (“TVWF”) Directive (EC Directive 89/552/EEC), to include television services delivered using the internet and on-demand programme services whilst also providing less detailed but more flexible regulation. The new requirements reflect technological developments and create a level playing field in Europe for emerging audiovisual media.

- 2.5 The Government consulted on its proposals for implementation in July 2008 (“the Government’s Consultation”)¹², 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 implementation¹³.
- 2.6 As we discussed in our Consultation, the Government has been in the process of drafting implementing regulations to lay before Parliament. 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 regulations was made available to stakeholders in mid-May 2009, following which a further, updated draft was circulated in July. The final version of the regulations (“the Regulations”)¹⁴ was made on 9 November 2009 (see paragraph 2.10 below) and laid before Parliament on 10 November 2009¹⁵. The Regulations will come into force on 19 December 2009.
- 2.7 Following this date, editorial content and advertising included in VOD services that are television-like regulation and come within the meaning of an “on-demand programme service”, as defined in the new section 368A which is inserted by the Regulations, will be subject to statutory regulation.
- 2.8 In the Government Consultation, the Government made clear its intention 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. In it, the Government set out its view 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. The Ministerial Statement made clear that only those services that include programmes similar to those available on television broadcast services would fall to be regulated under UK legislation.
- 2.9 The AVMS Directive sets a range of minimum standards covering the content of VOD services, so as to ensure adequate protection of consumers and citizens¹⁶. This must be achieved under a regulatory framework which can include a co-regulatory system to secure industry participation. Accordingly, the Ministerial Statement announced that Government intended to give Ofcom powers to regulate UK VOD services under a regulatory framework that would enable Ofcom to designate functions to a co-regulatory body or bodies in order to secure compliance by providers of VOD services with the new requirements.
- 2.10 The Regulations set the framework outlined above into UK legislation by introducing a new Part 4A (headed “On-Demand Programme Services”) into the Act. The new

¹² See http://www.culture.gov.uk/images/consultations/AVMS_Consultation_Document.pdf

¹³ See http://www.culture.gov.uk/reference_library/minister_speeches/5932.aspx

¹⁴ The Audiovisual Media Services Regulations (SI 2009/2979).

¹⁵ See http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

¹⁶ See paragraphs 4.3 and 5.3 below for further details of the minimum standards..

provisions set out the requirements that VOD providers must comply with in relation to VOD editorial content and VOD advertising. The Regulations amend the Act from 19 December 2009. In particular, the Regulations:

- give Ofcom powers to regulate VOD services;
- give Ofcom power to delegate all or any of these functions to such other body or bodies it chooses to designate as a co-regulator and which meet the statutory criteria for designation (whilst retaining in parallel responsibility for these functions);
- set the criteria that that body must fulfil for Ofcom to designate it;
- set out the parameters for determining whether a VOD service is an “on-demand programme service” that falls within the scope of regulation;
- transpose the minimum requirements of the AVMS Directive which service providers must comply with; and
- detail the regulatory structure for securing compliance with the requirements including enforcement powers for dealing with non-compliance (e.g. fines).

2.11 It should be noted that a second set of regulations will implement some remaining aspects of the new proposed regulatory regime for VOD services. Ofcom understands that the Government expects to make this second set of regulations in early 2010 and bring them into force in March 2010 (“the 2010 Regulations”). The 2010 Regulations are expected to include:

- a requirement on VOD service providers to notify the regulator that they are providing a service;
- a requirement for VOD service providers to pay a notification fee;
- an enforcement regime to apply where these requirements have been contravened; and
- a requirement for service providers to retain a copy of material, included in their service, for 42 days from the date it was last made available to users of the service.

2.12 The aspects of the co-regulatory regime outlined in paragraph 2.11 above have been delayed as they go beyond the minimum requirements laid down in the AVMS Directive, and under EC law are required to be notified to the European Commission.

2.13 Ofcom’s decisions set out in this Statement reflect our understanding that the above provisions will be included in the 2010 Regulations and that this set of regulations will be made and come into force in late February or March 2010. As and when this is the case, Ofcom has decided, in principle, that it would delegate functions associated with these additional requirements to the Association for Television on Demand (“ATVOD”), the co-regulatory body that Ofcom, as a result of the Consultation had decided to designate as the co-regulator for VOD editorial content.

Current self-regulatory structure for VOD services

- 2.14 As we explained in our Consultation there are currently two self-regulatory schemes in place in relation to VOD editorial content. These are operated by separate industry bodies: ATVOD; and the Independent Mobile Classification Body (“IMCB”). In Section 4 of this Statement, we outline our decisions following the responses we received to our Consultation in relation to the proposal we received from ATVOD (“the ATVOD Proposal”) for designation as the co-regulator for VOD editorial content.
- 2.15 In relation to VOD advertising, the Advertising Standards Authority (“ASA”) currently operates a self-regulatory code of practice (the British Code of Advertising, Sales Promotion and Direct Marketing – “the CAP Code”) to which UK advertisers are expected to adhere. In Section 5 of this Statement, we set out our decisions, following the responses we received to our Consultation in relation to the ASA’s proposal to Ofcom (“the ASA Proposal”) for designation as the co-regulator for VOD advertising.

Ofcom’s approach to co-regulation

- 2.16 As we made clear in the Consultation, 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 allows for a co-regulatory system in which the VOD industry may take responsibility for ensuring content standards underpinned by statutory powers.
- 2.17 For an explanation of the differences between co-regulation and other approaches to regulation, see figure 1 below:

Figure 1	
Approach	Description
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).
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.
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.

- 2.18 As we outlined above, the Regulations enable Ofcom to designate functions to a co-regulatory body or bodies in order to secure compliance by providers of VOD services with the new legislative requirements. Accordingly, ATVOD and the ASA put

forward proposals to Ofcom for designation as the new co-regulatory bodies. We have evaluated and consulted on the suitability of the proposals we received with a view to determining whether it is appropriate for Ofcom to designate co-regulatory functions to ATVOD and the ASA.

- 2.19 In our Consultation we evaluated both the ATVOD Proposal in relation to the regulation of VOD editorial content, and the ASA Proposal, in relation to the regulation of VOD advertising, against two sets of criteria: firstly, those criteria laid out in the Regulations which will come into force on 19 December 2009; and second, those criteria laid out in Ofcom's own principles relating to co-regulation.

Legislative principles relating to co-regulation

- 2.20 As the body ultimately responsible for VOD regulation in the UK, Ofcom is given a series of clear responsibilities and may not designate any body unless, as respects that designation, Ofcom is satisfied it meets a series of criteria. These are:
- that it is a fit and proper body to be designated;
 - it has consented to being designated;
 - that it has access to financial resources that are adequate to ensure the effective performance of functions as the appropriate regulatory authority;
 - 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.

Ofcom's principles relating to co-regulation

- 2.21 In addition to the new legislative duties laid out above, Ofcom must 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.
- 2.22 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. 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")¹⁷. This non-exhaustive list of criteria are set out in Figure 2 below and the

¹⁷ See <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/statement.pdf>

mechanism by which Ofcom can adjudge the co-regulatory arrangements, including whether Ofcom retains certain functions:

Figure 2: Good practice criteria to guide the establishment of new schemes	
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	

2.23 In Section 4, relating to VOD editorial content, and Section 5, relating to VOD advertising, we outline stakeholders' comments as to whether they agree with our assessment of the ATVOD Proposal and the ASA Proposal according to the two sets of criteria outlined above.

General summary of responses

2.24 Ofcom received 32 responses to the Consultation. Eight of those requested confidentiality and are not therefore identified when their responses are referred to in this Statement.

2.25 The responses from those organisations who did not request anonymity have been published on Ofcom's website¹⁸. These were from the following organisations: the Advertising Association; Arqiva; ATVOD; BBC Worldwide; British Sky Broadcasting Plc ("BSkyB"); BT Plc ("BT"); Channel 4; Discovery Communications Europe Ltd ("Discovery"); Channel 5 Broadcasting Ltd ("Five"); the Incorporated Society of British Advertisers ("ISBA"); Liverpool Football Club TV ("LFCTV"); the Mobile Broadband Group ("MBG"); the Newspaper Society and the Newspaper Publishers Association ("NS and NPA"); Portland Media Group/Strictly Broadband Ltd/Sport Media Group Plc/Playboy TV-Benelux Ltd/ Broadcasting (Gaia) Ltd ("Portland Media et al."); the Periodical Publishers Association ("PPA"); Royal National Institute for the Blind ("RNIB"); Royal National Institute for the Deaf ("RNID"); S4C; the Satellite and Cable Broadcasters' Group ("SCBG"); TAG; TalkTalk Group ("TalkTalk"); Viasat Broadcasting Ltd ("Viasat"); Virgin Media; and the Voice of the Listener and Viewer ("VLV").

¹⁸ See <http://www.ofcom.org.uk/consult/condocs/vod/responses1/>

Section 3

Services subject to regulation (“scope”)

Introduction

3.1 In Section 4 of the Consultation, we stressed the fact that determining which services will be subject to regulation - i.e. are “in scope” - will be central to the working of the new regulatory framework. We set out and examined the draft legislative criteria for determining which services will fall “in scope” of the new regulatory regime. The regulatory status of a service is defined in the new statutory provisions by a range of criteria, including: that the principal purpose of a service is to provide programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services (i.e. to provide “television-like” programmes; that there is a person who has “editorial responsibility”; access to the services is on an on-demand basis; it is made available to members of the public; and that the service falls under UK jurisdiction for the purposes of regulation.

3.2 We then proposed:

- draft Scope Guidance, 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 also laid out an indicative, non-exhaustive list of services which Ofcom believed, on a preliminary analysis, were likely to be considered to be in scope. We were clear that this list was illustrative only, and in no way pre-judged any decision on individual services that the proposed co-regulator and/or Ofcom might subsequently make in this area; and
- an allocation of functions relating to the anticipated notification process¹⁹, such that service providers subject to the requirements of the AVMS Directive must notify Ofcom (or the co-regulator, if following the Consultation Ofcom decided to make a designation) that they are providing a service subject to regulation. The proposed allocation of functions covered Ofcom’s involvement in borderline decisions, where it is unclear whether a service should be in or out of scope of the new regulatory regime.

3.3 This part of the Statement sets out:

- an overview of the issues surrounding the definition of on-demand programme services, including the key themes of the Scope Guidance that we proposed in the Consultation; and
- a general summary of the responses we received to the Consultation relating to the Scope Guidance and allocation of functions relating to notification including an analysis of the responses we received, and our decisions, concerning:

¹⁹ Subsequent to the Consultation, as mentioned in paragraph 2.11 above, the Government has indicated that it intends to implement the requirement for ODPS to notify the regulator in the 2010 Regulations. The notification process will not be implemented until these subsequent regulations are made and have come into force.

- the Scope Guidance; and
- the proposed allocation of functions on the basis that notification becomes a statutory requirement..

Definitions of VOD services

3.4 As we made clear in the Consultation, the definition of what constitutes a VOD service determines which services will fall under the new regulatory regime for VOD editorial content and VOD advertising. The definition relies on two sources: firstly, the AVMS Directive²⁰; and second, the Regulations transposing the requirements of the AVMS Directive into UK law.

The Government's approach

3.5 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) either Ofcom or any new co-regulator would be able to issue guidance on which services are likely to 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.

3.6 This last point was intended to clarify the status of "platform providers" and "service providers", and confirmed that compliance with the requirements of the AVMS Directive, as transposed into UK legislation, would rest with the providers of VOD services rather than with 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.

3.7 As mentioned in Section 2, the implementing Regulations were made on 9 November 2009 and laid before Parliament on the following day. They introduce a series of new provisions and amendments to the Act which will take effect from the 19 December 2009.

The Regulations

3.8 The Regulations restrict the scope of VOD services to be covered by the new regulatory regime, to the minimum required by the AVMS Directive. They 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. The definition of an ODPS will be included in section 368A of the Act. It is set out in the Regulations²¹ as follows:

²⁰ See paragraphs 4.11 to 4.14 of the Consultation.

²¹ See The Audiovisual Media Services Regulations 2009 (SI 2009/2979).

- (1) For the purposes of this Act, a service is an “on-demand programme service” if—
 - (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
 - (b) access to it is on-demand;
 - (c) there is a person who has editorial responsibility for it;
 - (d) it is made available by that person for use by members of the public; and
 - (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive.
- (2) Access to a service is on-demand if—
 - (a) the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service;
 - (b) the programmes viewed by the user are received by means of an electronic communications network (whether before or after the user has selected which programmes to view).
- (3) For the purposes of subsection (2)(a), the fact that a programme may be viewed only within a period specified by the provider of the service does not prevent the time at which it is viewed being one chosen by the user.
- (4) A person has editorial responsibility for a service if that person has general control—
 - (a) over what programmes are included in the range of programmes offered to users; and
 - (b) over the manner in which the programmes are organised in that range;

and the person need not have control of the content of the individual programmes or of the broadcasting or distribution of the service.

3.9 “Editorial responsibility” is a key concept. It plays two roles: firstly, there must be a person with general control over what programmes are included in the range of programmes offered to users; and second, that person must also have general control over the manner in which the programmes are organised in that range. The person with “editorial responsibility” will be the person with regulatory responsibility for ensuring compliance with the requirements of the legislation. However it should be noted that for a person to be exercising editorial responsibility, as defined, there is no requirement that the same person should also have control over the content of individual programmes or of the broadcasting or distribution of the service.

3.10 The new legislative provisions set out in the Regulations reflect and in most cases directly transpose, the criteria set out in the AVMS Directive. As mentioned in paragraph 4.14 of the Consultation, 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 and VOD advertising. It is clear from the Regulations that the legislation sets 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 (i.e. satellite, cable or digital terrestrial) or over the open internet.

- 3.11 As we explained in the Consultation, the Regulations have been made in exercise of the powers conferred under section 2(2) of the European Communities Act 1972 (“the ECA”). 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 requirements 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 its current interpretation of the scope criteria. Such guidance may be provided as an aid to interpretation, but cannot alter or extend the legal definition of services to be regulated and is intended to be indicative only, rather than determinative, of whether a particular service may meet the statutory criteria.
- 3.12 Against this legislative backdrop, we asked stakeholders for their responses on two issues relating to scope.
- 3.13 Scope Guidance: Ofcom has worked to ensure that the new framework for the regulation of VOD services will be clear and effective. To this end, Ofcom with the cooperation of industry stakeholders, including ATVOD, worked up potential guidance on the issue of definition of the ODPS (the “draft Scope Guidance”), structured according to the new statutory criteria as set out in the Regulations and listed in paragraph 3.8 above. Three broad policy principles have underpinned the development of the draft Scope Guidance:
- the criteria set out in the Regulations²² 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, the criteria should be strictly applied to ensure they are not drawn any more widely than they should be under the AVMS Directive and implementing legislation. Ofcom believes that this is the best way to secure a regulatory framework which will work for consumers and industry.
- 3.14 The draft Scope Guidance laid out in the Consultation, proposed the following approach to understanding whether any potential service might fall within the scope of the new regulatory regime for VOD editorial content and VOD advertising.
- whether it is a VOD service;
 - whether a person has editorial responsibility for the service;
 - whether the service is ‘TV-like’, to the extent it includes TV-like programmes; and
 - whether it is made available for use by members of the public.

The draft Scope Guidance then went on to discuss: the implications of the criteria; what types of service are in and out of scope of the legislation; who has “editorial responsibility” for a service; what happens in the case of “Multiple Services”; and

²² See paragraph 3.8 above.

whether the person providing the service falls within the jurisdiction of the UK for the purposes of regulation.

- 3.15 In our Consultation, we asked stakeholders for their views on the draft Scope Guidance and in particular on the extent to which it would be likely to assist VOD service providers, consumers and the regulator to interpret the statutory requirements and determine whether a service is likely to fall within scope.
- 3.16 Allocation of functions relating to notification: Linked to the issue of scope, is the process under which a new or existing service, defined as an “on-demand programme service” (referred to as “ODPS” in this Statement) under the implementing legislation, will need to notify the regulator²³, when such services intend to launch, or continue in existence, as appropriate.
- 3.17 We envisage that the process of notification to which service providers will be subject once the 2010 Regulations are made and come into force would be incorporated into documentation, to be published and owned by the co-regulator. This documentation would act as an aide memoire for 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 provision of a VOD service should be notified. In addition, the co-regulator would, at the appropriate time, 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 co-regulator would seek information from a potential service provider to enable it to reach a decision. As mentioned in paragraph 2.11 above, it is the Government’s intention to introduce further legislation in 2010 (“the 2010 Regulations”, referred to above), that will provide the regulator with the power to require a potential service provider to supply this information.
- 3.18 In light of our discussions with industry stakeholders, in the Consultation, we proposed that the following anticipated functions relating to notification should be designated for co-regulation²⁴:
- oversight of the timescale for notification: It is the Government’s intention to introduce as part of the 2010 Regulations a requirement that new and existing ODPS providers would need to notify their services to the regulator;
 - responsibility for the receipt of notifications from ODPS providers: It is the Government’s intention to introduce as part of the 2010 Regulations a requirement that relevant services would need to notify if:
 - they are existing service providers;
 - they are new service providers intending to start an ODPS from a designated date to be set out in the 2010 Regulations; and
 - 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;

²³ Subsequent to the Consultation, as mentioned in paragraph 2.11 above, the Government has indicated that it intends to implement the requirement for ODPS to notify the regulator in the 2010 Regulations. The notification process will not be implemented until these subsequent regulations are made and have come into force.

²⁴ Ibid.

and

- management of the information, relating to ODPS providers, to be held by the regulator: The AVMS Directive requires that the contact details of ODPS are readily available to users. It would be necessary for ATVOD to maintain records of service providers and, where necessary initiate requests for additional information on notification and in relation to preliminary investigations on any failure to notify.

3.19 Following discussions with industry stakeholders, in our Consultation²⁵, we proposed that, if a designation were to be made, the following notification functions²⁶ would be undertaken by Ofcom:

- decision-making on borderline scope decisions: There will inevitably be some circumstances where it is not straightforward to ascertain whether a particular service is or should be subject to regulation. Under the Regulations, Ofcom retains in parallel any functions that it designates. Notwithstanding this, we made clear in the Consultation that Ofcom would normally expect to exercise its decision-making powers in this area only in relation to borderline scope cases following a referral by the co-regulator. We envisaged that this situation might arise in either of the following two instances:
 - if ATVOD were to feel it is unable to reach a decision (because following an initial investigation it deems a case to be borderline) then ATVOD could refer the matter to Ofcom to determine; and/or
 - where a service provider is unhappy with a decision ATVOD might take in relation to scope, in which case the service provider could ask for the matter to be referred to Ofcom);

and

- the enforcement of decisions surrounding notification and scope: If a service provider fails to satisfy the anticipated requirements relating to notification²⁷, we proposed that Ofcom alone would determine whether or not to impose one or more of the available statutory sanctions that will be available. For example, if the provider of a service refused to notify ATVOD (or to pay the notification fee), and refused to cooperate with a formal request to comply, Ofcom would investigate the matter and, if the service was found to be in scope and the provider was contravening the requirement to notify the service, Ofcom would consider whether it was appropriate to take further action under the statutory provisions which we expect to be inserted by the 2010 Regulations. This would involve Ofcom issuing:
 - an enforcement notification; and/or
 - a financial penalty.

Where a provider fails to comply either with an enforcement notification or to pay a financial penalty for non-notification, the 2010 Regulations will allow the regulator to take further action if the regulator has served an enforcement

²⁵ See paragraphs 4.87 to 4.91 of the Consultation.

²⁶ See footnote 23.

²⁷ Ibid.

notification in order to secure compliance and the attempt to secure compliance has failed. This further action could result in a direction to suspend or restrict provision of the service. Failure to comply with such a direction would constitute a criminal offence.

- 3.20 It was envisaged that Ofcom would agree and publish procedures for handling borderline or contested scope decisions and modify its existing procedures for considering the imposition of statutory sanctions to include action taken in relation to VOD services.

General summary of responses

- 3.21 Ofcom received 23 responses on the draft Scope Guidance, 19 of which also responded concerning the allocation of functions relating to notification. Five of these respondents requested confidentiality and are therefore not identified when their responses are referred to below. The responses from those organisations who did not request anonymity have been published on Ofcom's website²⁸.

Scope Guidance

Consultation questions

- 3.22 In our Consultation, we asked the following questions relating to the draft Scope Guidance we proposed:

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 3

Do you wish to suggest alternative approaches to...: (a) the Scope Guidance?

Responses to the Consultation

Respondents who agreed with the Scope Guidance

- 3.23 Three respondents agreed with the draft Scope Guidance without amendment.
- 3.24 In its response, BSkyB agreed that where VOD content is integrated into a text-based news story, but is ancillary to the text-based story, that VOD content should not fall within scope.
- 3.25 Based on its reading of the draft Scope Guidance, BT considered that it would only need to make one notification for its BT Vision service, with there being no differentiation between different genres in that service. BT also welcomed the fact that services ancillary to ODPS (such as "online games") are not deemed to be in scope. BT did posit how changes to the Scope Guidance would be managed in

²⁸ See <http://www.ofcom.org.uk/consult/condocs/vod/responses1/>

future, and suggested that the Scope Guidance would become part of the ATVOD Code of practice and thereby subject to consultation.

Respondents who agreed with the Scope Guidance subject to amendments

3.26 Whilst welcoming the Scope Guidance as broadly acceptable, most respondents highlighted areas where, the Scope Guidance could be, in their view, improved. The suggested amendments fell into a number of areas.

Status of the Scope Guidance:

3.27 The PPA, whilst welcoming the draft Scope Guidance, put on record its concerns that it would be non-binding and therefore not provide certainty, because under the new co-regulatory regime the regulator would not have the legal power to draw up binding scope guidance.

3.28 One respondent made two general points about the draft Scope Guidance:

- firstly, this respondent expressed concerns that the draft Scope Guidance: had been drawn up with traditional VOD services in mind; and questioned whether it would be capable of delivering certainty for new services; and
- second, the same respondent considered the draft Scope Guidance to be underpinned by an underlying intention to interpret the provisions of the AVMS Directive in a “dynamic way”. This respondent made a number of points on this issue, and in particular, said there is a risk that by taking a “dynamic” view of the definition of “television-like” services, the regulatory framework would bring more services into scope over time, which will increase legal uncertainty; and discourage VOD services being established in the UK.

Principal purpose of a service:

3.29 The PPA suggested an amendment to paragraph 4.38 of the draft Scope Guidance²⁹ to make it clear that when an on-demand service is included as an ancillary element of the broader offering, that on-demand service is not the principal service and so it will fall outside of the scope of the Regulations.

Widely available:

3.30 One respondent considered the scope definitions to be appropriate and helpful but believed the definition of “widely available”³⁰ should be expanded upon.

“Television-like”:

3.31 Several respondents highlighted the issue of whether audio-visual clips are to be considered “television-like” or not. The PPA highlighted that many magazines offer short audio-visual clips to illustrate, for example, news stories on online services, and maintained such services are not “television-like” because: the audio-visual content was an ancillary feature of the service; the content is shorter in length than a typical

²⁹ Paragraph 4.38 of the draft Scope Guidance stated: “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”.

³⁰ See paragraph 4.33(d) of the draft Scope Guidance.

television programme; the content is aimed at niche interest groups and markets; and the subject matter of the magazines might not necessarily be featured regularly on linear television services. The PPA considered that paragraph 4.49 of the draft Scope Guidance could be clarified to more definitively exclude content where clips are not extracts from longer programmes. Text magazine reporting often includes audio-visual clips, but the PPA said it had been consistently led to believe that such short clips would not be within scope of the new Regulations. The PPA also considered the discussion in paragraph 4.81 of the Consultation unhelpful, because, according to the PPA, there was no mention of the “length” of programmes only their “form and content”.

- 3.32 Portland Media et al. also commented on the discussion in paragraph 4.81 of the Consultation, arguing that a service would not be “television-like” if it were a “promotional tool” rather than a “content destination”. Therefore, a service (“the Original Service”) would be out of scope if: the Original Service was just making available short clips of longer programmes, for the purposes of promoting those longer programmes; and those longer programmes were available on other services to the Original Service, or for sale on DVD.
- 3.33 The SCBG agreed that the draft Scope Guidance was appropriate but considered that the issue of what content is “television-like” would be tested vigorously during the first few months of the new regulatory regime. This respondent said that its members were providing new online services that share many characteristics and stylistic features akin to television, but which innovate in form and content. Therefore, the SCBG argued, citing Recital 17 of the AVMS Directive³¹ that the new regulatory body, (and Ofcom in its backstop position, should proceed with a bias against regulating nascent services offering content similar to – but not actually – that which would be found on a linear television channel.

Services out of scope:

- 3.34 Respondents highlighted three classes of service, which they separately considered to be out of scope of the new regulatory framework. These were: services providing feature films; mobile services; and services provided by newspapers and magazines.
- 3.35 Concerning feature film services, one respondent disagreed with paragraph 4.53(c) of the draft Scope Guidance³². This respondent argued that consumers of services making available feature film content would consider such a service to be closer to renting a DVD than watching television. Therefore, the Scope Guidance should make clear a feature film-based service as described above should not be considered in scope.
- 3.36 In relation to mobile services, the MBG maintained that Government officials had made clear to them that it was not intended, under the AVMS Directive to include within scope mobile services such as video clips and programme extracts, for the reason that, according to the MBG, they are not “television-like” or target the same

³¹ Recital 17 of the AVMS Directive states: “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”.

³² Paragraph 4.53(c) of the draft Scope Guidance stated that one of the types of service considered to be ‘in scope’ would be: “an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising ‘editorial responsibility’ over the content”.

audience as traditional television. The MBG suggested a series of amendments to the draft Scope Guidance in order to make it clear that mobile services would not fall within scope of the new regulatory regime.

- 3.37 Concerning newspapers and magazines, the NS and NPA noted that there appeared to be considerable difficulty in defining scope. This respondent stated that its understanding was that the Government had been intent on implementing just the terms of the AVMS Directive, but that there were indications that the new co-regulatory regime could be conferred with wider powers than the EU legislation requires. The NS and NPA stated that it was imperative that print publications' websites and online activities do not get "enmeshed by statutory and co-regulatory controls which were not supposed to govern their activities". Otherwise there was a risk that newspapers' press and commercial freedoms could be inhibited. In particular, the NS and NPA highlighted the importance of Recital 21 of the AVMS Directive³³, which the NS and NPA considered should be laid out in the Scope Guidance without qualification. The PPA agreed with this point and objected to the reference in paragraph 4.54(d) of the draft Scope Guidance, which stated that ODPS provided by newspapers and magazines would be in scope³⁴.
- 3.38 On a related point, one respondent expressed the view that there is a risk that the exclusion in the draft Scope Guidance relating to "electronic versions of newspapers and magazines"³⁵ might be determined in an arbitrary way because online newspapers and magazine sites bear little resemblance to their off line equivalents and bear more resemblance to aggregated content services.

Editorial responsibility:

- 3.39 Several respondents, including BBC Worldwide, Channel 4 and Five, raised concerns with, what they saw as, the stress put in the draft Scope Guidance: on "programme information" accompanying programme assets³⁶; and on an assumption that content providers would invariably have editorial responsibility. There was also a concern that the draft Scope Guidance put too little stress on the fact that platform operators will be organising and selecting the content to be put on their platforms.
- 3.40 These respondents argued that whilst content providers are generally responsible for providing programme information, content providers have little or no control over how platform operators organise programmes or, indeed, whether and how the programme information will be made available to the platform operator's consumers.
- 3.41 Channel 4 considered the stress, in adjudging editorial responsibility, placed by the draft Scope Guidance, on the entity providing programme information might have perverse implications, and raised the issue of "effective control" as it related to the provision of content information. This respondent suggested that the BBFC³⁷, as a body which classifies films and provides consumer information, could, under one interpretation of the draft Scope Guidance, be considered to have editorial responsibility for on-demand film content which is supplied to a service provider with those classifications and consumer information.

³³ Recital 21 of the AVMS Directive states: "The scope of this Directive should not cover electronic versions of newspapers and magazines.

³⁴ Paragraph 4.54(d) of the draft Scope Guidance stated that one of the types of content outside the scope of the Regulations are: "Electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines".

³⁵ Ibid.

³⁶ i.e. metadata.

³⁷ The British Board of Film Classification.

- 3.42 These respondents objected to the references to “programme information” in:
- paragraph 4.61 of the draft Scope Guidance³⁸, because whilst content providers may provide metadata with programmes to aggregators, the content providers would have no control as to whether or how the metadata was used or whether any protection mechanisms are employed on the service to which they were supplying content. Therefore, according to these respondents, there was no basis in the AVMS Directive for making the provision of programme information a criterion for “organisation” and editorial responsibility;
 - paragraph 4.67 of the draft Scope Guidance, because the reference to programme information in this paragraph was unhelpful and misleading, as there is no obligation to provide any such information to users; and
 - paragraph 4.68 of the draft Scope Guidance, which highlighted a scenario where an aggregator might have editorial responsibility. In such a case, under the draft Scope Guidance the aggregator would be selecting which programmes were included in the service and providing the necessary programme information. However, in this case, where an aggregator retains editorial responsibility, a content provider might still be supplying programme information to the aggregator. As a consequence, it was questioned whether it was appropriate for the draft Scope Guidance in general to equate the person who has effective control of the organisation of programmes with that who provides the programme information .
- 3.43 Given the above, respondents in general, suggested that the various references to “programme information” in paragraphs 4.61, 4.67 and 4.68 be deleted from the draft Scope Guidance. These respondents also suggested amendments to paragraphs 4.62 and 4.63 to make clear that as platform operators have control over the organisation and appearance of content on a platform, they were the person selecting and organising the content and therefore exercising editorial responsibility. In the respondents’ view, if platform operators: are responsible for the design or look and feel of a catalogue; or provide appropriate protection mechanisms allowing access to some content to be restricted; or specify how potentially harmful or offensive content should be indicated, this does tend to indicate that they control the organisation of content, and would be the person with editorial responsibility.
- 3.44 On a related point, several respondents highlighted the issue of contractual arrangements arguing that the criteria for who has editorial responsibility remains too heavily biased towards content providers and the traditional linear television broadcasting model rather than the different types of services and contractual agreements that exist in the on-demand world. These respondents argued that content providers would not always have control over the selection of programmes included in a VOD service, and how they are organised.
- 3.45 In contrast, Virgin Media considered that subject to contractual provisions to the contrary, the vast majority of content providers to the Virgin Media platform would be deemed to have editorial responsibility for their content as they had both: general control over the selection of individual programmes included in the range of programmes offered; and effective control over the organisation of those

³⁸ Paragraph 4.61 of the draft Scope Guidance stated: “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...”

programmes. However, Virgin Media considered that the draft Scope Guidance could state more clearly that contractual arrangements, rather than just being “useful evidence” of determining editorial responsibility, may be the only way of determining control.

- 3.46 Viasat suggested a clarification to paragraph 4.66 of the draft Scope Guidance by making clear that aggregators may comprise a combination of a collection of on demand programmes from third party suppliers and a service offered by the aggregator (for which of course the aggregator will be the ‘service provider’ and have the responsibility) while such aggregator will not have the responsibility for the third party services.
- 3.47 A further point concerning editorial responsibility was posed by Portland Media et al., who asked for clarification over what constitutes a “hosting” service in relation to paragraph 4.45 of the draft Scope Guidance³⁹.
- 3.48 The SCBG and Discovery questioned whether content providers would be adjudged to have editorial responsibility, if contraventions of the new VOD editorial content requirements occurred because of reasons beyond the control - e.g. the failure of a service platform’s PIN operation system. These respondents said that it would be unfair and cause reputational damage to a content provider to appear to consumers as negligent in its responsibilities if contraventions in its name are beyond its reasonable control. Therefore, the SCBG suggested that there should be some means of explaining the circumstances of a contravention when it is published.
- 3.49 One respondent said that the draft Scope Guidance confused the concepts of “general control” and “effective control”, which is the term used in the AVMS Directive. This respondent considered that the use of term “‘general control’ is likely to capture more than the AVMS Directive intended; and “‘effective control’ is a more objective test and is more capable of taking into account the contractual and technical relationship between different parties.

Multiple Services and types of notification:

- 3.50 In relation to the issue of whether multiple services should be notified, the SCBG queried: whether services would have to notify annually or just once in the service’s lifetime; and what would happen if a service occasionally moved into scope of the co-regulatory framework, and the move out shortly afterwards; would multiple variants of a core “umbrella” brand (such as MTV Base, Discovery Realtime or LIVING2) require multiple notifications.
- 3.51 One respondent asked for clarification as to whether a notification would be required per service provider or per service.
- 3.52 Also in relation to the issue of multiple services, Virgin Media considered that extra work may need to be undertaken by the co-regulatory body to determine: what “substantially the same”⁴⁰ means in practical terms; and whether a smaller subset of a larger service also needed to be notified on the basis that the smaller catalogue is

³⁹ Paragraph 4.45 of the draft Scope Guidance stated that: “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”.

⁴⁰ See paragraph 4.71 of the draft Scope Guidance.

not “substantially the same” as the larger catalogue, even though it contains identical programmes.

Jurisdiction

- 3.53 Discovery raised the issue of jurisdiction, stating that the draft Scope Guidance did not discuss the situation where VOD content provided by VOD service providers in the UK, is provided to service platforms in other Member States. This respondent was unclear if the “Country of Origin” requirements in the AVMS Directive, applied in such circumstances. Discovery had two concerns in this area. Firstly, it argued that there should not be separate notification fees charged per language version of a VOD service. Second, there is the possibility of a double jeopardy scenario, whereby a regulator in another Member State considers the content provider to be under its jurisdiction.

Respondents who disagreed with the Scope Guidance

- 3.54 Only the VLV voiced substantial criticism of the Scope Guidance, considering the draft Scope Guidance: to be limited by being interpretative, rather than prescriptive, reflecting the statutory limitations of the AVMS Directive; and left considerable interpretative power in the hands of the co-regulator in terms of ascertaining services in scope. In addition, this respondent suggested that Ofcom should assume licensing powers which avoid conflict with the statutory requirements of the AVMS Directive.

Comments on the illustrative list of services

- 3.55 In paragraphs 4.79-4.82 of the Consultation, we laid out an illustrative list of services and worked examples, which Ofcom had included in the Consultation to highlight a range of possible services which might be in the new regulatory regime’s scope. As we made clear, the list contained in Figure 1 of the Consultation was not to be interpreted as a comprehensive summary of all services likely to fall in scope of the new legislative framework; nor did it in any way pre-judge any decision on individual services that the regulator might subsequently make in this area.
- 3.56 Virgin Media agreed with Ofcom that it is impossible to determine the totality of services which would be in scope. However, this should not prevent a detailed analysis on scope being undertaken as soon as possible post implementation of the legislation. BSkyB noted that its Sky Anytime and Sky Player services had not been included in the illustrative list in Figure 1, and said that the omission of these two services chimed with BSkyB’s own belief that the Sky Anytime and Sky Player services would not be in scope. BSkyB also considered that the Sky News website and BSkyB’s other channel-branded websites should not be considered to be in scope because of their broader purpose e.g. provision of news or the provision of news and promotional clips about programmes on linear channels or VOD services.

Ofcom’s response and decision

- 3.57 The following areas of concern were raised by respondents in relation to the draft Scope Guidance:
- a) Status of the Scope Guidance
 - b) Definition of “principal purpose”;
 - c) Definition of “widely available”;

- d) Definition of “television-like”;
- e) Services out of scope;
- f) Definition of “editorial responsibility”;
- g) Definition of “multiple services” and types of notification;
- h) Jurisdictional issues; and
- i) Illustrative list of services.

3.58 As a preliminary point Ofcom wishes to make clear what we have said in paragraph 3.11 that the Scope Guidance can do no more than represent the regulator’s current interpretation of the scope criteria set under the legislation. We note that many responses appeared to suggest that stakeholders believed that the Guidance might of itself be determinative of whether or not a particular service would fall within the regulatory framework. This is not the case. We have therefore amended the Guidance to make it clear that its purpose is solely interpretive. It cannot alter or extend the legal definition of services to be regulated and is intended to be indicative only, rather than determinative, of whether a particular service may meet the statutory criteria.

3.59 Taking this into account, we lay out our response in the following paragraphs to the various issues listed above.

Status of the Scope Guidance

3.60 Several respondents commented on the status of the Scope Guidance, focusing on three issues:

- the ongoing viability of the definitions used in the draft Scope Guidance;
- the non-binding and subjective nature of the draft Scope Guidance; and
- the use of the term “dynamic” in the draft Scope Guidance.

3.61 We note the point made by one respondent that the definitions in the draft Scope Guidance may not remain viable over time. However, we also note that the definitions used in the draft Scope Guidance reflect, and are not intended to go beyond the definitions laid down in both the AVMS Directive and the Regulations. In addition, we would expect the Scope Guidance to be kept under review by the co-regulator for editorial content, in tandem with Ofcom, to ensure that the interpretation it sets out remains consistent with both the AVMS Directive and the Regulations.

3.62 As noted above, the Scope Guidance is interpretive only. It is not binding and therefore not determinative of whether or not a particular service may fall within scope. However, it is intended to assist stakeholders by clarifying the regulator’s understanding of how the legislative criteria may apply in practice. This approach reflects the manner in which the Government has implemented the AVMS Directive into UK law⁴¹.

⁴¹ See paragraph 3.11 above.

- 3.63 In addition, we do not agree that the Scope Guidance lacks objectivity. Rather, we consider that it provides a suitably flexible interpretation of the criteria which recognises the need to take account of the objective facts and circumstances regarding any particular service. The nascent and fast-changing nature of the VOD industry supports the introduction of Scope Guidance that is not overly rigid in its interpretation of the requirements, but yet can provide sufficient indication of the likely regulatory approach to applying the statutory criteria.
- 3.64 One respondent raised concerns about the use of the term “dynamic” in the draft Scope Guidance. It is worth noting that the use of the term “dynamic” is only used in relation to the definition of “television-like”⁴² and not throughout the draft Scope Guidance. It also reflects the wording of the AVMS Directive⁴³. Responding to the other points made by this respondent in this area:
- the role of the draft Scope Guidance is an aid to interpretation of the legislative criteria which, whilst not determinative, should assist stakeholders as an indication of the likely regulatory approach of the regulator. Although this is a dynamic approach, the draft Scope Guidance does not pre-suppose that the number of services that may fall within scope would necessarily decrease over time;
 - we do not agree that taking a “dynamic” view of the definition of “television-like” services will increase legal uncertainty and discourage VOD services being established in the UK. This is due to the fact that the intention of the AVMS Directive was to prevent “disparities as regards free movement and competition” between audiovisual media services between Member States. Hence the term “television-like”, according to Recital 17 of the AVMS Directive: “should be interpreted in a dynamic way taking into account developments in television broadcasting”; and
 - we agree that the interpretation of the definitional tests around scope should be objective, and we consider that the draft Scope Guidance would fulfil this aim in the context of the light-touch regulatory regime required by the AVMS Directive. We consider that the reference to “the way the service is marketed and presented to users”⁴⁴ within the draft Scope Guidance is an example of a material contextual factor that is likely to be relevant in determining what the “principal purpose” is of a particular service.

The definition of “principal purpose”

- 3.65 We note the PPA’s suggested rewording for paragraph 4.38 of the draft Scope Guidance. However, we consider that the wording of this particular paragraph as drafted in the draft Scope Guidance is sufficiently clear that the statutory criteria would exclude from scope on-demand programmes which are “an integral and

⁴² See paragraph 4.48 of the draft Scope Guidance. It should be noted, despite the contention by one respondent that the term “dynamic” was not used in the corresponding version of the draft Scope Guidance contained in Annex 6 of the Consultation, that version of the draft Scope Guidance did contain exactly the same wording (at paragraph 2.16 of Annex 6).

⁴³ See Recital 17 of the AVMS Directive: “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”.

⁴⁴ See paragraph 4.36 of the draft Scope Guidance.

ancillary element of a broader offering”. In addition, we consider that the use of the wording “even if integral” in the PPA’s proposed wording could be interpreted as meaning that on-demand programmes that were just ancillary to a broader offering were excluded from being in scope. This result would run counter to paragraph 4.37 of the draft Scope Guidance, which notes that: “Where relevant on-demand services 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”. Given the above we have left paragraph 4.38 of the draft Scope Guidance unamended.

- 3.66 In relation to “principle purpose”, we also note the MBG’s contention that mobile services should not be included in scope because they are not “television-like” or target the same audience as traditional television. As we make clear below, no service can be excluded from scope merely because of the platform on which the service is delivered. However, we consider that paragraphs 4.37 and 4.38 of the draft Scope Guidance can be clarified to help make clear that a service, which includes audiovisual material as part of a wider content offering, should not be included in scope. We therefore have decided to add wording at the beginning of paragraph 4.37, and at the end of paragraph 4.38 of the draft Scope Guidance, respectively as follows:

Paragraph 4.37: *“The second key issue under this criterion is whether the ‘principal purpose’ of the service is to provide ‘TV-like’ programming...”*

Paragraph 4.38: *“...or where video content forms part of a wider content offering, which also features a range of non-video content”.*

[For the full text of these amended paragraphs see paragraph 3.111 below].

Definition of “widely available”

- 3.67 Having taken account of the responses to the Consultation, Ofcom has concluded to replace all references to “widely available” with the phrase *“made available to the public”* which has been included in the published Regulations (see in particular paragraph 4.33(d) of the draft Scope Guidance, and the heading to paragraph 4.52..

[For the full text of this amended paragraph see paragraph 3.111 below].

Definition of “television-like”

- 3.68 Several respondents raised issues about “television-like”. Ofcom recognises the difficulty of providing guidance in this area. In this way, we acknowledge the point made by LFCTV that new forms of content may challenge regulatory interpretation. However, we would also point out the flexible nature of guidance and that it may therefore be amended and updated, as appropriate, over time. With this mind, we have split our response into two areas: firstly, we deal with a concern that was expressed about whether audio-visual clips would be deemed to be “television-like” or not; and second, we consider the concern expressed about nascent services.

- 3.69 In relation to clips:

- We note the PPA made a number of points relating to audio-visual clips provided by magazines on their online services:
 - the provision of short clips were an “ancillary feature of the service”:
We consider that the consideration of clips in these circumstances

would relate to what the “principal purpose” of the service was (see above), rather than whether such content may be “television-like”;

- audio-visual clips are shorter than typical television programmes: We consider that even if many audio-visual clips might be deemed not to be “television-like”, it would not necessarily follow that all clips are not “television-like”. In this regard we note the suggested amendment relating to clips to paragraph 4.49 of the draft Scope Guidance, from the MBG. We do not agree with this proposed amendment. In particular, in relation, to the wording that the MBG proposed to delete, we can envisage the possibility that an extract from a programme might represent such a significant part of the programme or contain such intrinsic material as to make it a separate and distinct programme in its own right (i.e. with its own editorial integrity). However, for the sake of clarity, we have decided to amend the second half of paragraph 4.49 of the draft Scope Guidance as follows:

[New wording shown *in italics*]

“...training videos available online. Short extracts from longer programmes may also not be TV-like, if the content that they comprise does not make them separate and distinct programmes in their own right (i.e. with their own editorial integrity). Long-form programming is more generally characteristic of TV broadcasting; however, the duration of the pieces of content in a service should not, on its own, determine whether that content is TV-like; some short video content – such as music videos – are likely to satisfy this test”.

[For the full text of this amended paragraph see paragraph 3.111 below].

- content aimed at niche interest groups and markets: The target audience for particular content could never be a definitive factor in ascertaining whether content is “television-like” or not – there are numerous examples of television channels which are focussed on niche interests; and
- magazine subject-matter not necessarily featured on linear television services: We consider it probable that any content included in a magazine-related online service might also reasonably be included in a linear television broadcast. Further, we believe the question of whether content is “television-like” will depend on a number of factors about the services as a whole, and not just the nature of the content. In relation to this point, we have decided to add the following wording to the end of paragraph 4.50 of the draft Scope Guidance:

“...and the nature of the on-demand programme service as a whole”.

[For the full text of this amended paragraph see paragraph 3.111 below].

- Further to the above, we note the PPA’s proposed amendment to paragraph 4.49 of the draft Scope Guidance aimed to make it clear that where there were clips which were not extracts from longer-form content, these programmes will fall outside of scope. We do not agree with this proposal, as we made clear in paragraph 4.81 of the Consultation: “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". In this regard, we do not agree with the PPA's contention that length of content alone can be determinative in relation to this particular criterion. Imposing a minimum length of programme extract deemed to be in scope would, we believe, be over mechanistic and not reflect the wide variety of forms of audio-visual content which might compete for television audiences. On a related point, we disagree with the MBG's view, as reflected in their proposed amendment to paragraph 4.54 of the draft Scope Guidance that "music videos" will fall outside of scope. This is because, whilst music videos are typically under four to five minutes in duration, they are standalone, short-form programmes, with an editorial integrity, which make-up the output of a number of linear broadcast channels.

- 3.70 In the discussion about clips, a key factor, as we made clear in paragraph 4.81 of the Consultation, and as mentioned by Portland Media et al., would be whether the clips on a service were being used as a promotional tool, and therefore would not be deemed to be "television-like", or were intended to be a content destination in their own right. It is worth noting that under these circumstances, it would seem to be the case that audiovisual clips were not "television-like" programmes because they were fundamentally intended to promote a linear channel.
- 3.71 In relation to nascent services: we note the separate point made by the SCBG, that there should be a bias against regulating such services on the basis that they offer content similar to, but not identical to, linear broadcast services. Ofcom is mindful of the need for a regulatory regime that does not stifle innovation. However, this needs to be balanced with the statutory duty of securing compliance with the statutory requirements in order to ensure adequate protection for citizen-consumers. We do not consider that the AVMS Directive (and therefore the implementing provisions) would permit a service to fall outside of scope merely because it is a new entrant to the marketplace.

Services out of scope

- 3.72 As mentioned above, respondents highlighted three classes of service, which they separately considered to be out of scope of the new co-regulatory regime. These were: feature-film-based services; mobile services; and services provided by newspapers and magazines.
- 3.73 Feature film-based services: We note the argument put forward that services making available feature film content would fall outside of scope under the statutory criteria. However, we note that as feature film content commonly appears on linear television channels (including whole channels devoted to feature films), it would not be appropriate or logical to deem such content as being not "television-like" for the purposes of decisions on scope. Therefore, whilst some services, featuring feature-film content may be deemed not in scope, this would be due to other criteria (e.g. principal purpose of the service) rather than just because feature films were being made available. The analogy drawn between DVD rental shops and services providing on-demand access to feature films cannot form part of the assessment of the regulatory status of such on-demand services. DVD rental shops also offer for rental recordings of programmes made for television, including one-off dramas, comedies, documentaries and complete series of programmes.
- 3.74 Mobile services: The MBG strongly argued that mobile-based services were outside the scope of the new regulatory framework. We disagree with this argument for two main related reasons: firstly, a key principle underpinning the AVMS Directive is that

it is technology-neutral; and second, the fact that a service may be accessed on a mobile device does not mean that content on such a service cannot ever be “television-like”. Given the above, we therefore do not agree with the MBG’s proposed amendments to paragraphs 4.33(c), 4.45, 4.47 and 4.54 of the draft Scope Guidance.

- 3.75 Services provided by newspapers and magazines: In their responses to the Consultation, several organisations, in particular those representing the print sector, emphasised Recital 21 of the AVMS Directive⁴⁵. However, we disagree with the suggestion that paragraph 4.54(d) should not contain a reference to on-demand programme services offered by newspapers and magazines. If a service, which fulfils the relevant scope criteria is made available on the website of a print publication (one of the key criteria in this regard being the “principal purpose” test in the new section 368(1) of the Act), then such a service is likely to be in scope. We do consider a service can fall outside of the criteria merely because of the industry sector from which the organization providing that service is drawn.
- 3.76 In addition, we disagree with the contention of one respondent that the exclusion in the draft Scope Guidance relating to “electronic versions of newspapers and magazines”⁴⁶ might be determined in an arbitrary way because online newspapers and magazine sites bear little resemblance to their off line equivalents and bear more resemblance to aggregated content services. We interpret this point to mean that this respondent was concerned that online versions of newspaper and can magazines could be portrayed as a form of content aggregator. As a consequence, this respondent seemed to suggest that all forms of content aggregator would fall outside of scope. It is worth noting that there is no excluded class of VOD services under the new regulatory regime. If a VOD service falls within the statutory criteria, as assessed in the draft Scope Guidance, even if that service is provided by a newspaper or magazine publisher, or a platform aggregator then that VOD service will be deemed to be in scope.

Definition of “editorial responsibility”

- 3.77 The definition of what constitutes “editorial responsibility” elicited arguably the strongest responses from stakeholders. In particular, a number of broadcasters and content providers expressed unhappiness with “editorial responsibility” being focused on the organisation which determines the relevant viewing information that is provided alongside an on-demand programme. The concern of these respondents was that there was a presumption that editorial responsibility would tend to lie more with a content provider rather than platform aggregators. In responding to the points made by stakeholders in relation to the issue of “editorial responsibility”, we consider it appropriate to rehearse the key principles underpinning the issue of editorial responsibility.
- 3.78 The legislative definition of what constitutes “editorial responsibility” in section 368A(4), as set out in the Regulations is:

*“A person has editorial responsibility for a service if that person has general control—
(a) over what programmes are included in the range of programmes offered to users;
and
(b) over the manner in which the programmes are organised in that range”.*

⁴⁵ Recital 21 of the AVMS Directive states: “The scope of this Directive should not cover electronic versions of newspapers and magazines”.

⁴⁶ Ibid.

- 3.79 In summary, we believe it is appropriate to give subsection (a) of the legislative text the label “the Selection Criterion” and subsection (b) the label “the Organisation Criterion”.
- 3.80 In addition paragraph 4.58 of the draft Scope Guidance makes clear that we do not believe that to exercise “editorial responsibility” means that a person has to control the elements comprised in a programme asset, or the actual distribution of the programme asset⁴⁷.
- 3.81 As is made clear in paragraph 4.59 of the draft Scope Guidance, in considering the Selection Criterion both the Regulations and the Directive focus on decision-making about individual programmes, and not on the choice of whole “channels” of content. Typically, it may well be the case that a content provider would be providing the individual programmes to be included in a service provided on a platform operator’s platform, and would therefore be undertaking “selection”. This mirrors the situation in the linear broadcasting environment where it is the linear channel operator who is selecting the programmes, even if that channel is reoffered to consumers as part of a package by a platform operator and even if there are wholesale contracts for the supply of such channels to a platform operator. In such cases, it is the linear channel that is subject to content regulation rather than the platform operator.
- 3.82 In considering the Organisation Criterion, at first sight it might seem that a platform aggregator would seem to be fulfilling the organisation criterion, through, for example: controlling the look and feel of how programmes are displayed on an on demand platform; or determining the programme-viewing choices available (e.g. age-rating warnings, or guidance about sources of potential concern such as sexual or violent content, or the provision of genre-based or alphabetic content indices).
- 3.83 However, we consider that the fact that a platform operator may be responsible for:
- the design or look and feel of the catalogue;
 - providing a PIN facility allowing access to some content to be restricted;
 - specifying whether potentially harmful or offensive content should be indicated with an age-rating, or a specific warning (“sexually explicit”); or
 - a logo,

does not, in and of itself, mean that they necessarily control the organisation of the content.

- 3.84 Rather, we consider the person fulfilling the Organisation Criterion is the person who categorises the content to ensure compliance with the relevant regulatory requirements (i.e. the person who determines for each individual content asset, whether or not it must be PIN protected; whether it should be signalled as containing product placement; and what other content information should be attached to it). We believe this will typically be the person who selects the individual content assets to be included within a service. (In other words, typically, organisation is controlled, and hence, in our view, the Organisation Criterion fulfilled, by a service provider through

⁴⁷ In this statement, the definition of “programme asset” should not to be taken to include any metadata attached to the programme asset.

the provision of relevant programme information alongside each content asset to a platform operator).

- 3.85 Given the above, if a content provider determines that a programme is only suitable for adults, and includes this fact in programme information attached to the programme asset, we consider that that content provider is fulfilling the Organisation Criterion. In practice, taking responsibility for categorising content in this way is determinative of the manner in which that content is made available so as to secure the relevant standards requirements, in as much as one option in the categorisation process must be to decide certain content is “not suitable to be provided on the service”. Therefore, in this scenario we believe the content provider is fulfilling both the Selection Criterion and Organisation Criterion, and on this basis would therefore be exercising editorial responsibility.
- 3.86 The role of programme information as discussed above is not intended to be determinative of the person with editorial responsibility, as some respondents seem to suggest – nor do we believe that the draft Scope Guidance suggests that it should. The focus on the provision of programme information is intended to clarify our understanding of the distinction between: (a) decisions in relation to the Organisation Criterion (i.e. decisions about programme information attached to individual programme assets); and (b) decisions about the presentational characteristics of a VOD service (i.e. a range of programme assets) – its look and feel – which may be defined by a platform operator without exercising editorial control.
- 3.87 There are two background factors to the issue of editorial responsibility: firstly, divided responsibility for selection and organisation; and second, contractual arrangements.

Divided responsibility

- in theory, it might be possible to avoid regulatory responsibility for a service, if one entity was responsible for selection of content (the Selection Criterion), whilst another entity was responsible for Organisation (the Organisation Criterion). A solution could be to hold both entities as jointly exercising editorial responsibility and be subject to regulation. However, the result of the Government Consultation in 2008 was that this solution would be an impractical and inappropriate interpretation of the AVMS Directive. The Government’s position on this was made clear in the Ministerial Statement on the implementation of the AVMS Directive on 11 March 2009, which said:

“Those whose role is only to provide access to other providers’ video on-demand services will not be responsible for the content of those services”.

Contractual arrangements

- as we made clear in paragraph 4.64 of the draft Scope Guidance, contractual arrangements between content suppliers and service platforms may be a useful guide to the regulator in assessing which body has “editorial responsibility” for a service⁴⁸. However, we have decided to amend paragraph

⁴⁸ Paragraph 4.64 of the draft Scope Guidance stated: “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”.

4.64 of the draft Scope Guidance to add clarity on this point. We have therefore decided to amend the second sentence of this paragraph with the following:

[New wording shown *in italics*]

“...Whilst not *necessarily being* determinative...”

- 3.88 We do not accept that the argument put by some respondents that the draft Scope Guidance makes a broad assumption that content providers would have editorial responsibility. Rather, we consider the implications of the above approach, outlined in paragraphs 3.77 to 3.87 are that, as well as preventing regulatory evasion, this interpretation preserves flexibility in terms of VOD business models similar to those offered in the linear broadcast market. These models could include where an operator can act as a: programme vendor, without editorial responsibility; as a regulated service provider, either of a stand-alone service, or of a service on another platform operator’s platform; or as a platform operator, aggregating third party services without assuming regulatory responsibility for them.
- 3.89 It is a necessary consequence of this analysis that, if it is a platform operator who selects what programmes are to be included in a service and determines which programme information should attach to individual content assets, and whether individual assets should be subject to access restrictions, then the platform operator must have assumed editorial responsibility.
- 3.90 In summary, in Ofcom’s view, the analysis above has four consequences in terms of editorial responsibility:
- it will not be appropriate to assess any service as being outside regulation as the result of any alleged split responsibility for *selection* and *organisation*;
 - in practice, it is unlikely that responsibility can be divided (subcontracting tasks would not be sufficient to avoid liability);
 - it would be incorrect to assume that editorial responsibility will fall to a platform operator by virtue of their control of the look and feel or other generic characteristics of the programme catalogue; and
 - the person who determines the programme information that is attached to a particular programme asset (so that the programme asset is made available in a manner that secures the relevant standards requirements) will through making such a determination typically be deemed to have effective control of the “organisation” of that programme asset. Typically, it is also the case that the same person “selects” the programmes to be included in a programme service.

Response to specific points raised by stakeholders on editorial responsibility

- 3.91 Firstly, we do not agree with the various proposals to remove references to “programme information” in paragraphs 4.61, 4.67 and 4.68 of the draft Scope Guidance. In particular, we note both BBC Worldwide’s and Channel 4’s proposed amendments to paragraph 4.68 of the draft Scope Guidance. This paragraph described the scenario where a platform aggregator had editorial responsibility for a VOD service because the platform aggregator was selecting programmes and also providing the relevant programme information associated with those programmes.

These arguments from respondents suggested that in practice in such a case, a content provider might well be providing the relevant programme information. However, we consider that this argument only focuses on the Selection Criterion. In practice, the test of which person has “effective control” of a VOD service and hence exercises “editorial responsibility” turns on both: (a) the Selection Criterion; and also (b) the Organisation Criterion being fulfilled. In addition, it should be recalled that: as mentioned in paragraph [3.85] above, only one person will be deemed to have editorial responsibility; and we expect the responsibility for the provision of programme information to be governed normally by contractual arrangements between a content supplier and a platform aggregator. Therefore, we do not accept the amendments suggested by BBC Worldwide and Channel 4 to paragraph 4.68 of the draft Scope Guidance. However, to add clarity, we have decided to add wording after references to “programme information” at the relevant points in paragraphs 4.61, 4.67 and 4.68 of the draft Scope Guidance. This wording would make clear that the purpose of “programme information” is to ensure that:

“...each individual programme is made available in a manner that secures the relevant standards requirements”.

[For the full text of these amended paragraphs see paragraph 3.111 below].

- 3.92 A content owner such as BBC Worldwide can provide content to a platform operator in two ways: as a wholesale service provider with editorial responsibility, or as a content wholesaler. Where a content owner acts as a content wholesaler, it is likely that the wholesale content package would include both programme assets and programme information. However, the platform operator would clearly have editorial control by virtue of its selection of the individual programme assets and related programme information for inclusion in the service. We have amended paragraph 4.68 of the draft Scope Guidance to clarify that content providers would be a content wholesaler or “vendor” in such a scenario.

[For the full text of this amended paragraph see paragraph 3.111 below].

- 3.93 Similarly we do not accept Five’s comments on paragraph 4.67 of the draft Scope Guidance that there is no obligation on service providers to provide programme information to users. We consider this overlooks the fact that in order to comply with the relevant content requirements, descriptive programme information will need to be created for each programme asset. Therefore, such programme information, at a minimum, would determine whether the programme assets are made available in a manner which ensures compliance with the Regulations.
- 3.94 An analogy may be drawn with a library catalogue. In dealing with a quantity of books, but no information about them, a librarian may decide to adopt for example, an alphabetical, or a Dewey Decimal cataloguing system. But following this choice the books would not actually be “organised in a range”. The books would only be organised when individual decisions about the characteristics of individual books had been made; for example, classifying a book by author surname.
- 3.95 On a related point we note Channel 4’s interpretation of the Selection Criterion that the BBFC might be responsible for the editorial responsibility for on-demand feature film content, because the BBFC classifies films and provides relevant programme information with those particular audio-visual assets. We note this point, but consider it ignores the fact that in so far as it provides relevant programme information, the BBFC is not taking subcontracted responsibility for the compliance function which would otherwise remain with a service provider. Rather, as is the case in relation to

linear services, subcontracting compliance to a third party would not free a service provider from editorial responsibility.

- 3.96 Second, some respondents also objected to paragraph 4.62 of the draft Scope Guidance, which referred to the techniques used by platform operators to “facilitate the location of content” as “solely presentational techniques”. However, as we make clear in paragraph 3.83 above, we do not agree that if a platform operator is responsible for the design or look and feel of a programme catalogue, this would cause the Organisation Criterion to be met. Rather, as we make clear these are optional presentational techniques that do not directly impinge on decisions relating to whether individual programme assets comply with the relevant content requirements. We therefore do not accept the proposed amendments to paragraph 4.62 of the draft Scope Guidance. However, we have decided that this paragraph could be clearer. Therefore, we have decided to amend the paragraph as follows:

[New wording shown *in italics*]

“...does not mean that they *necessarily* control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing) would not, *on their own*, constitute ‘selection and organisation’...”

[For the full text of this amended paragraph see paragraph 3.111 below].

- 3.97 Third, we note Five’s suggestion that paragraph 4.63 of the draft Scope Guidance should be amended to remove the reference to a single entity being considered to have editorial responsibility, to be replaced by a statement that it is the entity that fulfils the Selection Criterion that would be considered to have editorial responsibility. We do not accept this amendment because it takes no account of the Organisation Criterion, which the Regulations clearly specify as being relevant to the identification of the body with editorial control.

- 3.98 Fourth, the MBG suggested an amendment to paragraph 4.61 of the draft Scope Guidance suggesting the concept of the person making the “day to day decisions” will be typically the person who selects the programmes. We do not agree with this amendment as we feel that the effect of the amendment would be to increase rather than reduce ambiguity to decision making as to who fulfils the Selection Criterion. However, we recognise that paragraph 4.61 could be rephrased to reflect the fact that the guidance is interpretative only and is indicative of the regulator’s interpretation and operation of the statutory provisions. We have therefore decided to amend the beginning of paragraph 4.61 of the draft Scope Guidance as follows:

[New wording shown *in italics*]

“*In determining* the person with effective control of the organisation of those programmes *it is appropriate to consider* who determines...”

[For the full text of this amended paragraph see paragraph 3.111 below].

- 3.99 Fifth, two respondents suggested amendments to paragraph 4.66 of the draft Scope Guidance. Viasat suggested that it should be made clear that in some instances a platform aggregator will be providing its own VOD service alongside a collection of third party VOD services provided on the same platform, for which the aggregator would not have editorial responsibility. We acknowledge this point and consider it appropriate to insert amended wording to make it clear that aggregated services may

comprise both a collection of VOD services provided by different service *providers* and a VOD service provided by the programme aggregator itself. Second, the MBG asked for a reference to “effective control” to be put into paragraph 4.66 of the draft Scope Guidance. However, we do not agree with the MBG that this paragraph lays out a “circular” definition or that a reference to “effective control” or examples is necessary.

- 3.100 Sixth, we note the request from one respondent for clarity about what the term “hosting” means in paragraph 4.45 of the draft Scope Guidance. We agree that it would be helpful to explain the use of this term further. In this regard we are aware of the statutory definition of a “hosting” information society service in the E-Commerce Regulations⁴⁹. We therefore consider it is appropriate to expand the explanation of hosting in paragraph 4.45 of the draft Scope Guidance to reflect the statutory definition (see footnote 49 below). Paragraph 4.45 of the draft Scope Guidance would then be amended with the following footnote to “hosting” being inserted into the draft Scope Guidance:

“Consistent with the definition set out in Regulation 19 of the Electronic Communication (EC) Regulations 2002, “hosting” refers to the action of the provider of an information society service, which consists of information provided by a recipient or recipients of the service, of storing that information”.

- 3.101 Seventh, we note that some respondents highlighted the issue of where contraventions of the relevant content requirements under the regulatory framework may be due to reasons beyond the control of the entity holding editorial responsibility e.g. where a content provider holds editorial responsibility but the contravention of the requirements occurs, for example, due to the failure of the platform aggregator’s PIN operation system.
- 3.102 In considering this question, we referred to the treatment of linear services and platforms. It is currently the case that a platform operator, such as BSkyB provides PIN protection functionality to linear channels, and that the effective operation of these PIN services is essential to some channels’ complying with the Ofcom Broadcasting Code (“the Code”). This does not mean that, in relation to such linear channels, there are two bodies with editorial responsibility: the broadcaster remains responsible for any breach of the Code even if that breach is attributable to the actions – or failures – of third parties engaged by the broadcaster.

⁴⁹ See Electronic Communications (EC) Regulations 2002: Regulation 19 states:

Hosting

Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where –

(a) the service provider –

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

- 3.103 In considering such a breach, Ofcom would take account of all of the relevant circumstances and a similar position would hold in relation to a possible contravention by a VOD service provider. The body with editorial responsibility would be able to inform the regulator of all relevant factors concerning a possible contravention of the applicable content requirements.
- 3.104 We would envisage that in responding to any investigations into possible contraventions of the relevant VOD editorial content requirements, a VOD service provider could point to factors, such as the failure of a platform aggregator's systems for example. However, ultimately it is the VOD service provider who retains editorial responsibility and hence responsibility for compliance with the relevant requirements. It would be a matter for commercial contractual negotiation between the VOD service provider and the platform aggregator, as to whether the platform aggregator should provide an indemnity for the VOD service provider in such circumstances. Such indemnity might be to protect the VOD service provider against any enforcement actions of the regulator relating to a contravention of the relevant requirements arising from actions of the platform aggregator.
- 3.105 Eighth, we note the suggestion from one respondent that contractual arrangements rather than being just "useful evidence"⁵⁰, may be the only way of determining where editorial responsibility lies. We acknowledge this point but do not agree with the suggested amendment. However, as mentioned in paragraph 3.87 above we have amended paragraph 4.64 of the draft Scope Guidance to say that the contractual arrangements may not necessarily determine the issue. This is a reflection of the fact that there may be circumstances where contractual arrangements are likely to be a determinative factor, whereas paragraph 4.64 of the draft Scope Guidance, at present, suggests that contractual arrangements could never determine the issue of where editorial responsibility lies.

[For the full text of this amended paragraph see paragraph 3.111 below].

- 3.106 Finally, we disagree that the draft Scope Guidance, in general, confused the concepts of "general control", which is used in the Regulations, and "effective control", which is the term used in the AVMS Directive. It is Ofcom's view that these terms are consistent with each other and it is the Government's intention when drafting the Regulations. However, we have removed the word "general" from the phrase "general control" in paragraph 4.58 of the draft Scope Guidance, to avoid any possible confusion over the use of this term.

[For the full text of this amended paragraph see paragraph 3.111 below].

Definition of multiple services and types of notification

- 3.107 Various points were raised by respondents in relation to this issue. In summary, respondents asked for clarification on the following:
- whether VOD service providers would have to notify once or annually;
 - what would happen if a VOD service moved in and out of scope;
 - whether multiple variants of a core brand require multiple notifications;

⁵⁰ See paragraph 4.64 of the draft Scope Guidance.

- whether a notification would be required for each VOD service or for each VOD service provider; and
- the definition of “substantially the same” and whether a smaller sub-set of a larger service would need to notify separately to the larger service.

3.108 We envisage that the practical issues surrounding notification will be dealt with by ATVOD, in tandem with Ofcom and industry stakeholders as and when the anticipated statutory functions have become law and can be designated to ATVOD. As noted previously, we expect the 2010 Regulations to be made and in 2010, and brought into force in March 2010. However, it is worth noting that our view as to what constitutes “substantially the same”, as referred to in paragraph 4.71 of the draft Scope Guidance. In summary, it would be possible that there may be some differences in what is included in two services, but in substance the two services are the same i.e.; the two services cannot significantly differ to be considered as “substantially the same”. Therefore, on this basis, a smaller sub-set of a larger service would not be substantially the same service.

Jurisdictional issues

3.109 There were two points raised concerning jurisdiction: firstly, whether separate notification fees should be paid for different language versions of the same service. In such circumstances, we would envisage that a service provided in a different language would not be “substantially the same”, and, for example, would be likely to carry different advertising, and so would need to be notified separately. Second, one respondent was concerned about the possibility of a double jeopardy scenario whereby a regulator in another Member State considered a content provider to be under its jurisdiction, because, for example, the VOD service was included in a platform aggregator located in that Member State. As is made clear in paragraphs 4.72 to 4.74 of the draft Scope Guidance, the jurisdictional criteria for VOD services are identical to those that apply to linear broadcast services. Therefore, if a VOD service provider is deemed to be under the UK’s jurisdiction, this would apply to all of its services provided in different Member States. Just as in the linear broadcast environment, Ofcom liaises closely with its sister regulators in different Member States on issues of jurisdiction, we would envisage ATVOD and Ofcom liaising with other VOD service regulatory bodies in different Member States on the issue of jurisdiction.

Illustrative list of services

3.110 We welcome the fact that no respondent raised objections to the illustrative list of services included in paragraphs 4.79-4.82 of the Consultation. However, as we made clear in the Consultation, the list should not be seen as pre-judging the decisions of the regulator in this area. Therefore, the presence or absence of any service in the illustrative list of services included at paragraph 4.79 of the Consultation should not be seen as determinative as to whether a service is in or out of scope.

3.111 Given the above, Ofcom has decided to include the following amendments to the draft Scope Guidance (References are included to the corresponding paragraphs in the finalised version of the Scope Guidance contained in Annex 1 to this Statement):

[New wording shown *in italics*]

Paragraph 4.33(d) (see paragraph 2.1(d), Annex 1): “It is **made available to the public**:...

Paragraph 4.37 (see paragraph 2.10, Annex 1): “*The second key issue under this criterion is whether the ‘principal purpose’ of the service is to provide ‘TV-like’ programming. 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 Act*”.

Paragraph 4.38 (see paragraph 2.11, Annex 1): “*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; or where video content forms part of a wider content offering, which also features a range of non-video content*”.

Paragraph 4.45 (see paragraph 2.18, Annex 1): “*However, that is not to say that all content in such sites falls outside the definitions. For example, where ‘hosting’ services [Footnote: *Consistent with the definition set out in Regulation 19 of the Electronic Commerce (EC) Regulations 2002*], ‘hosting’ refers to the action of the provider of an information society service, which consists of information provided by a recipient or recipients of the service, of storing that information.] are used by commercial entities as a means of distributing relevant content, and meet the other criteria laid down in *section 468A(4) of the Act*, then such content might fall within the meaning of ‘on-demand programme service’ for these purposes*”.

Paragraph 4.49 (see paragraph 2.5, Annex 1): “*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. Short extracts from longer programmes may also not be TV-like, if the content that they comprise does not make them separate and distinct programmes in their own right (i.e. with their own editorial integrity). Long-form programming is more generally characteristic of TV broadcasting; however, the duration of the pieces of content in a service should not, on its own, determine whether that content is TV-like; some short video content – such as music videos – are likely to satisfy this test*”.

Paragraph 4.50 (see paragraph 2.6, Annex 1): “*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 and the nature of the on-demand programme service as a whole*”.

Title to paragraph 4.52 (see paragraph 2.20, Annex 1): “**(d) It is made available to the public?**”

Paragraph 4.58 (see paragraph 4.3, Annex 1): “*Under *section 368A(4) of the Act*, it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has control of the “content of individual programmes or of the broadcasting or 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 broadcasting or 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’*”.

Paragraph 4.61 (see paragraph 4.6, Annex 1): “*In determining the person with effective control of the organisation of those programmes it is appropriate to consider 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 and which ensures that each individual programme is made available in a manner that secures the relevant standards requirements: 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)*”.

Paragraph 4.62 (see paragraph 4.7, Annex 1): “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 *necessarily* control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not, *on their own*, constitute ‘selection and organisation’ of programmes, as these are solely presentational techniques”.

Paragraph 4.64 (see paragraph 4.9, Annex 1): “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. Whilst not *necessarily being* determinative, such contractual arrangements will provide useful evidence as to the division of responsibility between the parties”.

Paragraph 4.66 (see paragraph 4.11, Annex 1): “Accordingly aggregated services may comprise: a collection of on-demand programme services provided by different services providers (*one of which service providers may also be the aggregator*), or a single service incorporating content from a variety of sources. The outcome will depend on where ‘editorial responsibility’ lies”.

Paragraph 4.67 (see paragraph 4.12, Annex 1): “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 *which ensure that each individual programme is made available in a manner that secures the relevant standards requirements* (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 *statutory requirements*”.

Paragraph 4.68 (see paragraph 4.13, Annex 1): “In the latter case, the content vendors 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 *which ensures that each individual programme is made available in a manner that secures the relevant standards requirements*, and therefore, would have responsibility for ensuring compliance with the *statutory requirements*”.

3.112 In addition to the above, Ofcom has also introduced a number of other amendments (some of which apply to parts of the above amended paragraphs) to:

- make it clear that the purpose of the Scope Guidance is solely interpretive. It cannot alter or extend the legal definition of services to be regulated and is intended to be indicative only, rather than determinative, of whether a particular service may meet the statutory criteria;
- bring the wording of the Scope Guidance into line with the final wording in the Regulations, as published;
- reorder the definitional criteria within the Scope Guidance to reflect the order of the criteria within the Regulations, as published;
- the fact that, as mentioned in paragraph 2.11 above, the Government has indicated that it intends to implement the requirement for ODPS to notify the regulator in the 2010 Regulations. The notification process will not be implemented until these subsequent regulations are made and have come into force; and
- that in light of the use of the phrase ‘television-like’ in the AVMS Directive, Ofcom commissioned and carried out qualitative research in order to gain an understanding of what consumers consider to be ‘television-like’ material and what their expectations are in terms of the key characteristics of such material⁵¹. It should be noted that no part of the qualitative research that Ofcom has commissioned is intended, nor should it be interpreted as replacing in any way the powers properly exercisable by Ofcom and its co-regulator, in determining whether or not any particular service falls within the scope of regulation.

3.113 The final version of the Scope Guidance is contained in Annex 1 of this Statement.

Allocation of functions relating to notification

Consultation questions

3.114 In our Consultation, we asked the following relating to the allocation of functions relating to notification⁵² that we proposed:

Question 2

- a) Is the proposed allocation of functions relating to notification 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.

⁵¹ See footnote to paragraph 2.3, Annex 1.

⁵² Subsequent to the Consultation, as mentioned in paragraph 2.11 above, the Government has indicated that it intends to implement the requirement for ODPS to notify the regulator in the 2010 Regulations. The notification process will not be implemented until these subsequent regulations are made and have come into force.

Question 3

Do you wish to suggest alternative approaches to...: (b) the proposed allocation of functions relating to notification?

Responses to the Consultation

Respondents who agreed with the allocation of functions relating to notification

3.115 Seven respondents agreed with the allocation of functions relating to notification without amendment.

Respondents who agreed with the allocation of functions relating to notifications subject to amendments

3.116 Whilst welcoming the allocation of functions relating to notification as broadly acceptable, most respondents highlighted areas where the allocation of these functions could be, in their view, improved. The suggested amendments fell into a number of areas.

General comments

3.117 BT argued that: Ofcom would need to establish a transparent and coherent Memorandum of Understanding regarding the nature of the co-regulatory regime; the co-regulator would need appropriate funding arrangements in place from the outset of the new regime. In addition, BT said it would be necessary for any code of practice operated by ATVOD, as the putative co-regulator, to be established by ATVOD and Ofcom, with input from the industry's stakeholder group, and that any changes will require consultation.

3.118 LFCTV said that the functions relating to notification, whether exercised by Ofcom or the co-regulator, should be exercised in a reasonable and proportionate manner.

3.119 The MBG reaffirmed its view that regulation of VOD services should remain with Ofcom. However, this respondent said that in the event that ATVOD were to be designated as co-regulator for VOD editorial content, the MBG indicated that Ofcom's proposed allocation of functions relating to notification was appropriate.

Powers of the new co-regulator

3.120 Several respondents, including BT, Channel 4 and Five were concerned that ATVOD, as the proposed co-regulator relating to notification and scope, should be given sufficient powers: to be an effective co-regulatory body with real authority; to be able to make regulatory interventions; and to be able to seek to address less serious issues. Therefore, ATVOD should, if designated take the lead in dealing with scope notifications and be able to impose its own sanctions without recourse to Ofcom, such as namely enforcement notices and financial penalties. However, respondents acknowledged it would be appropriate for Ofcom to retain the power to retain the most serious sanction (suspension of a service) and service providers should have the right of appeal to Ofcom against an enforcement notice or financial penalty imposed by the co-regulator.

Co-regulator's procedures

- 3.121 Respondents variously called for: transparency regarding the sanctions process relating to notification; an appeals procedure in relation to scope; and clarification of what would happen in the event that the co-regulator does not notify a VOD service provider of its notification requirements and the VOD service provider does not notify the co-regulator, because such provider had accessed their service was not within 'scope'.
- 3.122 Virgin Media agreed that Ofcom should only exercise any decision making or enforcement powers if a case is referred to it either by the service provider or the co-regulator. However, Virgin Media highlighted a difference about which the Consultation had not given clarification. This was the scenario where the co-regulator believes a particular service or class of service is out of scope and this differs from Ofcom's view or a competing service provider.

Respondents who disagreed with the allocation of functions relating to notification

- 3.123 Only one respondent, the VLV, appeared to completely disagree with Ofcom's approach in terms of allocating functions relating to notification. The VLV considered that: the draft Scope Guidance would leave considerable interpretive power in the hands of the co-regulator at an early stage; the lack of prescription in the new regulatory regime did not sit comfortably with the enforcement provisions in paragraph 4.91 of the Consultation. The VLV therefore suggested that Ofcom assume licensing powers which avoid conflict with the statutory requirements of the AVMS Directive.

Ofcom's response and decision

- 3.124 The following areas of concern were raised by respondents in relation to the draft Scope Guidance:
- a) the powers to be exercised by the new co-regulator in relation to notification and scope; and
 - b) the co-regulator's procedures.

Anticipated powers of the co-regulator relating to notification and scope

- 3.125 As we make clear in paragraph 2.11 above, the powers of the co-regulator relating to notification and scope are not currently statutory functions and cannot be designated until they are introduced into the Act, as anticipated in Spring 2010. The notification process will not be implemented until these subsequent regulations ("the 2010 Regulations") are made and have come into force.
- 3.126 As we made clear in the Consultation, we discussed with stakeholders what would be an appropriate allocation of responsibilities relating to notification between Ofcom and the new co-regulator for VOD editorial content. We note the point made by several respondents that ATVOD, if designated, should be given the widest possible enforcement powers, in order that it may be an effective co-regulator. In this respect, we note that no respondents disagreed with our proposal that Ofcom should retain decision-making powers in relation to borderline scope decisions.
- 3.127 However, several respondents raised the possibility of Ofcom designating ATVOD with some, if not all, of the statutory sanction powers relating to the notification requirements that will be available under the new legislative framework. As

mentioned in paragraph 2.11 above, the Government expects to make the second set of regulations in early 2010 and bring them into force in March 2010 (“the 2010 Regulations”). These are expected to introduce the various requirements relating to notification. It is intended that these regulations will introduce a range of statutory sanctions relating to notification, namely: the power to give the provider an enforcement notification requiring it to notify the service; and/or the power to impose a financial penalty on a service for failure to notify; and the power to suspend or restrict a VOD service if an attempt to secure compliance by the imposition of a financial penalty or the giving of an enforcement notification has failed.

3.128 In the Consultation, we proposed that Ofcom would retain all the statutory sanction powers relating to cases arising from failure to notify. Several respondents expressed the view that to be perceived as a regulatory body with meaningful powers, ATVOD should be vested with some statutory sanction powers, with the most serious powers being retained by Ofcom. We note the strength of these arguments, but we also have regard to the fact that, in designating any functions to a co-regulatory body, Ofcom retains concurrent functions and may act with or in place of the designated body. As such, Ofcom remains responsible, as a public body for the delivery of those functions in a manner which is consistent with its general statutory duties and obligations. Given the above, we would envisage designating the power to issue enforcement notifications against VOD service providers in relation to notification. Ofcom will however retain the power to impose financial penalties on, or suspend or restrict, a VOD service⁵³.

3.129 We believe the above would be a proportionate balance: on the one hand we would be delegating sufficient and meaningful powers to a co-regulatory partner; whilst on the other hand we would be maintaining Ofcom’s position as backstop regulator in the most serious cases.

Co-regulator’s procedures

3.130 We agree with respondents that there should be transparency around the statutory sanctions process. Ofcom and ATVOD are working to produce procedures governing the range of functions to be exercised by ATVOD and Ofcom in anticipation of the proposed notification duties in the anticipated 2010 Regulations and subsequent designation by Ofcom of the associated functions. In particular, these will include:

- the procedures covering the imposition of statutory sanctions by ATVOD or Ofcom, relating to notification; and
- the procedures under which borderline decisions on scope will be referred to Ofcom, either by VOD service providers or ATVOD.

3.131 We note the request for clarification concerning the position where the co-regulator does not bring the co-regulator’s notification requirements to the attention of a VOD service provider, and the VOD service provider does not notify the co-regulator because it considers itself to be in scope. It is Ofcom’s view that it would be the responsibility of any VOD service provider to ensure compliance with the relevant requirements. Therefore it would be the responsibility of any service provider that might potentially fall within scope to consider notifying their service to the co-regulator once the notification requirements come into force. We would expect that in

⁵³ As we explain in Section 4, we are intending a similar division of statutory sanction powers between ATVOD and Ofcom in relation to potential contraventions of the VOD editorial content Rules.

practice, VOD service providers would contact the regulator at an early stage to discuss whether their service fulfils the scope criteria or not

- 3.132 A final issue relating to notification was the request for clarification concerning borderline scope decisions. One respondent asked what would happen in a situation where the co-regulator considered a VOD service provider to be out of scope, and this differed from the opinion of Ofcom or a third party service provider. As we made clear in paragraph 4.91 of the Consultation, Ofcom proposed only to exercise its anticipated decision-making powers in relation to borderline scope cases. In such circumstances, either the VOD service provider would be able to appeal a provisional scope decision taken by ATVOD, if designated, to Ofcom or ATVOD itself could refer a difficult case.
- 3.133 In practice, we envisage that the above notification process would operate on the basis that ATVOD, if designated, would take the lead in decisions on scope and would normally make provisional determinations as to whether a VOD service provider is in or out of scope. These provisional decisions could then be referred to Ofcom by the VOD service provider for a final decision, or by ATVOD itself. If no referral to Ofcom were made within a set time period, the provisional decision of ATVOD would become final. As mentioned above, Ofcom and ATVOD are in the process of drawing up draft procedures in anticipation of notification requirements being introduced into the legislation in order to deal with the process of decision-making in borderline decisions on scope. We envisage that ATVOD and Ofcom could take account of any informal representations made by third parties as to whether a VOD service should be in or out of scope. In all borderline decisions about scope, Ofcom's decision would be final.
- 3.134 Having undertaken our assessment of the responses to the Consultation in relation to the allocation of functions relating to notification, Ofcom therefore anticipates designating ATVOD with the powers as laid out in paragraph 3.18 above, as and when those powers are conferred to Ofcom, as expected, in the 2010 Regulations. In addition, subject to the same proviso, we also anticipate delegating to ATVOD the power to give VOD service providers enforcement notifications that require them to notify a service, against VOD service providers.

Section 4

The regulation of video on demand editorial content

Introduction

- 4.1 In Section 5 of the Consultation, we examined and evaluated a proposal from the Association for Television on Demand (“ATVOD”) to act as the co-regulator for VOD editorial content. We then invited stakeholders to give their views concerning our proposal to designate ATVOD as the co-regulator for VOD editorial (“the ATVOD Proposal”), and provided the opportunity for stakeholders to suggest alternatives to our proposals.
- 4.2 In light of: the further work that ATVOD has been carrying out; and on the basis of the available information; and having considered all the responses we received on this issue, we are working towards designating ATVOD in relation to carrying out the functions we proposed in our Consultation. We are continuing to discuss with ATVOD the appropriate terms for designation. We are continuing to discuss with ATVOD the appropriate terms for designation.
- 4.3 This part of the Statement sets out:
- a background to the issues determining which functions relating to the regulation of VOD editorial content that Ofcom would designate or not to a co-regulatory partner;
 - a general summary of the responses we received to the Consultation relating to the ATVOD Proposal, an analysis of these responses, and our decisions; and
 - a general summary of the responses to the Consultation, and our decisions, relating to the functions that we have determined should, in any event, be retained (i.e. not designated) by Ofcom in relation to VOD editorial content.

Designation and retention of functions by Ofcom - VOD editorial content

- 4.4 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 persons under the age of eighteen is only made available in such a way that ensures that minors will not normally hear or see such content;
 - c) should fulfil the requirements on sponsorship laid down in the AVMS Directive; and

- d) may contain product placement in permitted programme genres and subject to other conditions laid down in the AVMS Directive.

Functions to be designated by Ofcom

The ATVOD Proposal

- 4.5 In our Consultation, we outlined the terms of the ATVOD Proposal⁵⁴, under which, ATVOD proposed 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.
- 4.6 The ATVOD Proposal included a detailed timetable for implementation and noted the ongoing participation of the industry-led VOD Editorial Steering Group (“VESG”) in developing guidance notes and assessing its funding requirements. It also envisaged working closely with Ofcom over an appropriate delineation of responsibilities between the two organisations. We made clear in the Consultation that if, following the outcome of the Consultation, Ofcom should accept the ATVOD Proposal, ATVOD anticipated taking on the following functions and responsibilities in the event that it were to be designated by Ofcom:
 - a) ATVOD would adjudicate on complaints, 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;
 - 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 scope decision made by ATVOD, there would be a right of referral to Ofcom; 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.
- 4.7 Since publication of the Consultation, ATVOD has, with the cooperation of industry stakeholders and Ofcom, undertaken a range of activities with a view to ensuring that ATVOD meets the relevant criteria to be designated as a co-regulatory body – including the requirement that it will be sufficiently independent of service providers – should Ofcom decide to designate ATVOD following full consideration of all the issues in light of the responses to the Consultation.. These activities include:
 - recruitment of a new Chief Executive Officer and a new Chairman of the ATVOD Board;
 - recruitment of new independent members of the ATVOD Board;
 - recruitment of a part-time company secretary;

⁵⁴ See paragraphs 5.24 and 5.25, and Annex 7 of the Consultation.

- taking measures to help establish adequate funding for ATVOD to carry out its co-regulatory duties; and
- the development of a suite of documents covering complaints handling, and editorial standards requirements and interpretative guidance.

General summary of responses

Responses to the Consultation on the ATVOD Proposal

- 4.8 Ofcom received 22 responses on the ATVOD Proposal. Six of these requested confidentiality and are therefore not identified when their responses are referred to below. The responses from those organisations who did not request anonymity have been published on Ofcom's website⁵⁵.
- 4.9 The vast majority of respondents were in favour of the ATVOD Proposal.

Consultation questions

- 4.10 In our Consultation, we asked the following relating to the ATVOD Proposal:

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?

Responses to the Consultation

Respondents who agreed with the ATVOD Proposal

- 4.11 Eight respondents agreed with the ATVOD proposal without amendment.

Respondents who agreed with the ATVOD Proposal subject to amendments

- 4.12 BBC Worldwide argued that to be an effective regulatory body, ATVOD should be granted the power to sanction service providers, with only the most severe sanctions being reserved for Ofcom, namely the imposition of a financial penalty or the closure of a service.

⁵⁵ See <http://www.ofcom.org.uk/consult/condocs/vod/responses1/>

- 4.13 Virgin Media questioned why Ofcom needed to retain the right to: final approval of appointments to the ATVOD Board; final approval of the ATVOD Chief Executive; final approval of any rules and guidance issued by ATVOD and any changes to these documents and impose the most serious penalties (i.e. financial, suspension and restrictions of service). This respondent stated that: Ofcom needs to be minded that if the co-regulatory bodies are seen merely as arms of Ofcom, rather than as autonomous and successful co-regulatory authorities in their own right, this is likely to undermine the success of any future co-regulatory arrangements.
- 4.14 Whilst supporting the designation of ATVOD as the co-regulator for VOD editorial content in principle, BSkyB said its support was subject to: ATVOD successfully transforming itself into a state ready for designation; and the need for a clear delineation between ATVOD's and Ofcom's roles going forward, as little detail had been given to date on this issue. Ofcom would have to ensure an open and transparent procedure in respect of negotiations between ATVOD and Ofcom in respect of its revised constitution and the detailed statement of each body's respective duties. In particular, BSkyB recommended that ATVOD change its name upon designation, which, according to the respondent, would have several advantages, including: avoiding any "hangover" from the old solely self-regulatory incarnation of ATVOD; and recognising that the new body is different from the current incarnation of ATVOD, with a new role and new powers.
- 4.15 A number of respondents expressed concerns about the fee structure for notification suggested in paragraph 5.27 of the Consultation; and the uncertainty about the scale of notification fees after 31 March 2011. In particular, it was felt that the proposed flat fee (£2,000 to £2,500) represented a significant cost, and could negatively affect small niche VOD service providers. Viasat suggested a smaller flat-rate minimum fee of less than £1,000, and a percentage of annual turnover in the range of 0.07% to 0.1%, applied for 2009 for existing services, or good faith revenue projections for 2010 if data for 2009 did not exist. Another respondent suggested a tiered fee structure based on the volume of content available on a given service. In addition, the PPA objected to the principle of service providers carrying the costs of complainants, given the risk that competitors might make complaints without merit.
- 4.16 The PPA, whilst not having any experience of working with ATVOD, said it had no objection in principle to ATVOD being designated as the co-regulator for VOD editorial content, so long as it acts appropriately e.g. is transparent, acts proportionately etc. The PPA did voice several cautionary or critical points: firstly, it said it would not want any self-regulatory set of rules operated by ATVOD in parallel to the co-regulatory rules, to become "de facto mandatory"; second, the PPA expressed its hope that as the VOD market develops, ATVOD's work, and representation on the board would reflect the fact that VOD service providers were not just large-scale operators, or drawn just from the broadcasting community; and this respondent welcomed the continuing role by ATVOD of an Independent Complaints Adjudicator ("ICA"), although the PPA said the work of the ICA would need to be kept under review, and questioned whether it would be possible to appeal ICA decisions to Ofcom.
- 4.17 One respondent, whilst being supportive of the ATVOD Proposal suggested that, whilst it may be appropriate to have representatives of platform providers on the ATVOD Board, VOD service providers should be better represented on the future board, whilst ensuring a majority of the board remains independent of industry.

Respondents who disagreed with the ATVOD Proposal

- 4.18 Two respondents disagreed with the ATVOD Proposal.
- 4.19 The MBG said its preference was for Ofcom to retain regulatory powers for VOD editorial content, whilst ATVOD retained its self-regulatory role for its current membership. The MBG considered that, whilst the ATVOD Proposal is generally appropriate for a co-regulatory regime, the argument had not been made as to what added value will be derived from co-regulation as opposed to direct regulation by Ofcom. In its view, the respondent said that main standards relating to VOD editorial content were not complicated policy areas where industry input and expertise, the main benefit of co-regulation according to the MBG, would add significant value. The MBG said that this was in contrast to the regulation of advertising, where the input from practitioners is beneficial. The MBG also made several points in relation to the funding of ATVOD including: the funding of ATVOD's self-regulatory activities; and the need for ATVOD to keep its costs down.
- 4.20 The VLV also stated that it did not agree with the ATVOD Proposal, questioning why a system similar to that of the ASA's co-regulatory role in broadcast advertising was not being suggested with regard to VOD editorial content. The VLV queried the strength of the enforcement provisions under the co-regulatory framework, and stated its belief that ATVOD's proposed enforcement measures would mean a "light-touch" regulatory regime could easily become no regulation at all. On a separate point, the VLV considered ATVOD's proposed budget of £400,000 for the first 15 months to be very optimistic.

Ofcom's response and decision

- 4.21 The following areas of concern were raised by respondents in relation to the ATVOD Proposal:
- a) a case has not been made as to what added value would be derived from co-regulation, as opposed to regulation, regarding VOD editorial content;
 - b) the regulation of VOD editorial content could be achieved via: "a similar system to the ASA with Ofcom in overarching control", and the ATVOD Proposal would amount to no regulation in practice;
 - c) there should be a review of ATVOD after any designation by Ofcom, but it should not be assumed that expansion of ATVOD would be automatic;
 - d) ATVOD's self-regulatory activities must be kept separate from its co-regulatory activities;
 - e) ATVOD's proposed budget appears either too optimistic (and it is not clear where a short-fall would come from) or too high;
 - f) ATVOD must keep its costs under control;
 - g) the proposed model of flat-rate notification fees is inequitable and inappropriate;
 - h) ATVOD should be designated functions to sanction VOD service providers;

- i) ATVOD should have greater autonomy from Ofcom, and ATVOD and Ofcom should be open and transparent in negotiating the framework agreement between the two bodies;
- j) ATVOD should consider changing its name after it has been designated as co-regulator for editorial content; and
- k) VOD service providers should be better represented on any future ATVOD Board.

The case for co-regulation

4.22 We note the argument made by the MBG that the case has not been made for the regulation of VOD editorial content to be delivered through co-regulation rather than direct regulation. In favouring co-regulation, we have noted the following:

- the fact that the Government Consultation in 2008 found a clear consensus in favour of co-regulation;
- in our Consultation⁵⁶ we undertook an analysis of the ATVOD Proposal according to both: the statutory criteria laid out in the Regulations; and our own criteria for assessing the suitability of ATVOD as a co-regulator. Namely, Ofcom undertook a two-stage assessment: firstly, we undertook an assessment, and were satisfied, 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*:
 - i) **do industry participants have a collective interest in solving the problem?** – we considered that industry stakeholders have a collective will to facilitate the success of an industry-led solution to the regulation of VOD editorial content. This would 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?** – we considered 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 regulation⁵⁷;
 - iii) **would individual companies have an incentive not to participate in any agreed scheme?** – we considered that: given the wide engagement of industry stakeholders with the VESG; and the likelihood that service providers who have notified⁵⁸ the regulator would report on those who had not; and the powers to be conferred 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;

⁵⁶ See paragraph 5.33 of the Consultation.

⁵⁷ 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”.

⁵⁸ As mentioned in Section 3 the Government intends to implement the requirements on VOD service providers to notify the regulator in a separate set of regulations in 2010.

iv) **are individual companies likely to ‘free-ride’ on an industry solution?**

– we considered that, given the statutory obligation that all notifying services⁵⁹ will be required to pay a fee to the regulator, 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 industry cooperation through the VESG in drawing up the ATVOD Proposal and Scope Guidance, 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.

Second, in our Consultation, we undertook an assessment, and were satisfied of the appropriateness of the ATVOD Proposal against the set of best-practice criteria in our *Principles for analysing co- and self-regulation*. These were: awareness; transparency; significant participation by industry; adequate resources commitments; enforcement measures; clarity of processes and structures; audit of members and schemes; system of redress in place; involvement of independent members; regular review of objectives and aims; and non-collusive behaviour⁶⁰.

- the vast majority of respondents to our Consultation have endorsed the concept of co-regulation regarding VOD editorial content;
- the MBG, whilst disagreeing with ATVOD being designated in this context, still acknowledged that the ATVOD Proposal is generally appropriate for a co-regulatory regime; and
- in addition, we envisage that the range of tasks to be undertaken by ATVOD (including receipt and decision-making on notification issues; investigation and decision-making on complaints; and limited sanction-making powers (see below)), would represent a significant body of work and responsibility for a small regulatory body, as articulated under the ATVOD Proposal.

4.23 In summary, we consider that just as the MBG pointed to the benefits of practitioner involvement in the regulation of advertising, we have concluded that the participation of industry in the proposed co-regulation of VOD editorial content would also have evident benefits. As we made clear in the Consultation, these include that:

- VOD service providers would benefit from a regulatory framework developed with industry cooperation, through the industry-led steering group, the VESG, under which VOD service providers can fulfil the relevant statutory requirements;
- the creation of a co-regulatory structure for VOD editorial content would generate a sense of ownership and commitment amongst the VOD industry;
- it is envisaged the proposed co-regulatory arrangements would be likely to foster a higher level of compliance from industry stakeholders, with 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

⁵⁹ Ibid.

⁶⁰ See paragraph 5.34 of the Consultation.

- co-regulation could harness the common interests of industry stakeholders to maintain the reputation of VOD industry, through the participation of industry stakeholders in the co-regulatory regime.

The ASA model

- 4.24 The VLV, in its response, criticised the ATVOD Proposal. This respondent appeared to argue for a model based on the ASA's current co-regulatory relationship with Ofcom, with regard to the regulation of advertising on linear broadcast services. In particular, the VLV argued that, whilst the ASA reports directly to Ofcom, this would not be the case with ATVOD, under the ATVOD Proposal. In addition, the "light-touch" nature of the proposed co-regulatory framework, the VLV argued, would mean no regulation at all in practice. We note the points made by the VLV, but consider that this respondent has misinterpreted the nature of the ATVOD Proposal. We have interpreted the VLV's reference to the ASA as being in relation to the ASA's current role in co-regulating linear broadcast advertising. We envisage ATVOD's relationship with Ofcom would mirror that of the ASA's relationship with Ofcom, in relation to linear broadcast advertising e.g. ATVOD would be required to report regularly to Ofcom, and Ofcom would retain backstop regulatory powers including having the power to act concurrently with or in place of ATVOD if necessary and appropriate.
- 4.25 We disagree with the VLV's contention that the proposed co-regulatory framework would amount to no regulation at all. As we made clear in the Consultation, we consider the proposed co-regulatory framework justifies the lighter-touch regulation envisaged by European legislators through the AVMS Directive⁶¹. But given the range of enforcement and sanctions procedures within the Government's Regulations, and the future requirement on VOD service providers to notify the co-regulator, we do not believe amounts to no regulation as maintained by the VLV.

Review of ATVOD

- 4.26 Several respondents queried the review provisions under the ATVOD Proposal. We are satisfied that the proposal for a formal review to be undertaken after two years would be proportionate to ensure that ATVOD would have sufficient time to establish itself as the new co-regulator for editorial content, yet gives Ofcom a time sufficiently near in the future to assess formally the effectiveness of ATVOD in its proposed role. In addition, we note that the ATVOD Proposal envisages "periodic" reviews thereafter. Therefore, there would be scope for the period between reviews to be less than two years, if deemed appropriate. In addition, under any designation by Ofcom, ATVOD would be required to report periodically to Ofcom on its activities (e.g. complaints investigated etc); and would provide information to Ofcom on request.
- 4.27 On a related point, the view was expressed that ATVOD would not be required to report on its enforcement activities to Ofcom or to review the overall effectiveness of the co-regulator to Ofcom. This is not the case, as paragraph 3.8.3 of the ATVOD Proposal made clear⁶², following designation, ATVOD and Ofcom would draft sanction procedures, and based on the main principle that: "ATVOD should reach the decisions about compliance...and also to refer appropriate cases to Ofcom for

⁶¹ 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".

⁶² See Annex 7 of the Consultation.

consideration of the imposition of a statutory sanction". In addition, under the designation document, it is envisaged that ATVOD would inform Ofcom whenever ATVOD issues enforcement notifications against on-demand programme providers.

ATVOD's self-regulatory activities

- 4.28 Regarding ATVOD's self-regulatory activities, we consider that we have made clear to ATVOD and other stakeholders the need for the mandatory co-regulatory and voluntary self-regulatory regimes to be kept totally separate. As we acknowledged in the Consultation, ATVOD would be free to operate a voluntary self-regulatory code for those service providers who wished to abide by such a Code. We made clear that any self-regulatory code would be wholly separate from the legislative standards that all VOD service providers would be required to adhere to; and not be able to be funded by any part of the fees that service providers will be required to pay to ATVOD in respects of notification as and when ⁶³.

ATVOD's budget and costs

- 4.29 We note that, regarding ATVOD's proposed budget, whilst one respondent considered ATVOD's proposed budget of £400,000 for the first fifteen months of operation to be too low, another respondent considered the proposed budget was greater than would be necessary.
- 4.30 Ofcom remains satisfied that: with the projected estimates of numbers of likely notifiable services; the proposed level of notification fee, as set out in paragraph 5.27 of the Consultation; and ATVOD's proposed costs, the budget of £400,000 is appropriate. In this regard, we note the VLV's reference to how the ASA is currently funded, which we take as a reference to the ASA's role as co-regulator of linear broadcast advertising. We do not consider the comparison between the ATVOD and the ASA to be helpful, as the ASA is funded under a voluntary levy, paid by advertisers.
- 4.31 On a related point, we agree that ATVOD should ensure that it keeps its costs under control. In this regard we note ATVOD's commitment in its Proposal, to: "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"⁶⁴. In addition, we note, within the ATVOD Proposal, the proposed Audit and Risk Committee, which would be chaired by an independent appointee, whose remit is to ensure "appropriate and adequate audit processes and the governance of the internal audit...programme"⁶⁵. Part of this work will be to focus on "financial controls".

Notification fees

- 4.32 Several respondents expressed their concern about ATVOD's proposed model of flat-rate notification fees. We agree with the view expressed in the ATVOD Proposal⁶⁶ that notification fees need to be proportionate and fair. However, we recognise that given: that it is expected that the requirement to pay a notification fee

⁶³ As mentioned in paragraph 2.11 above, the functions relating to notification are not currently statutory functions and cannot be designated until they are introduced into the Act, as anticipated, in Spring 2010. The notification process will not be implemented until these subsequent regulations ("the 2010 Regulations") are made and have come into force.

⁶⁴ See paragraph 1.5, Annex 7 of the Consultation.

⁶⁵ See paragraph 4.2.3 (ii), Annex 7 of the Consultation.

⁶⁶ See paragraph 4.3.4, Annex 7 of the Consultation.

will be introduced, only once the 2010 Regulations are made and come into force⁶⁷; that there is uncertainty about the number of services likely to be in scope; and the difficulty of putting in place a variable system of notification fees, a flat-rate fee system is a proportionate and practicable funding solution in the short-term⁶⁸. However, we note that from 1 April 2011 onwards, it is envisaged that ATVOD would need to review its notification fee system. At such point, we would expect ATVOD to take account of the issues raised by stakeholders concerning the possible introduction of variable elements to any notification fee structure in future. In connection with this, it is worth noting that ATVOD would need to refer any notification fee proposal to Ofcom for approval.

Sanctions powers to be exercised by ATVOD

- 4.33 Under the new co-regulatory framework for VOD editorial content, and as mentioned in Section 3, there are a range of statutory sanctions, namely: the power to impose an enforcement notification on a VOD service; the power to impose a financial penalty on a VOD service; and the power to suspend or restrict a VOD service. In the Consultation, we proposed that Ofcom would retain all the above statutory sanction powers in relation to both potential contraventions of the VOD editorial content standards, and cases arising from notification. Several respondents expressed the view that to be perceived a regulatory body, with meaningful powers, ATVOD should be vested with some statutory sanction powers, with the most serious powers being retained by Ofcom. We note the strength of these arguments. However, the new statutory provisions vest ultimate responsibility for this area with Ofcom and are clear that that where a body is designated for any purpose, Ofcom retains such functions in parallel and may act as the appropriate regulatory authority either concurrently or in place of the designated body.
- 4.34 In order to enshrine Ofcom's position as backstop regulator in the most serious cases we remain of the view, therefore, that only Ofcom should have the ability to sanction providers through the imposition of a financial penalty or by restricting or suspending a provider's entitlement to provide a VOD service. However, we also consider that it would be necessary that ATVOD has sufficient and meaningful powers to be able to take preliminary action, where appropriate and where that body might determine that a provider is contravening one or more of the applicable requirements. We have decided, therefore, that, if we proceed to ATVOD, it should be designated the function of being able to give an enforcement notification. This would enable ATVOD to require remedial action is taken to remedy a contravention.

Delineation of roles between ATVOD and Ofcom

- 4.35 We note the concern expressed by one respondent that there should be greater autonomy for ATVOD in its relationship to Ofcom. We agree that ATVOD should have sufficient autonomy to operate as an arms-length co-regulatory partner from Ofcom. We believe that the range of duties we would delegate to ATVOD fulfils this aim, whilst recognising the fact that Ofcom retains ultimate responsibility for the new regulatory framework. It is worth noting in this context, that as well as deciding to designate the functions that we referred to in the proposals set out in our Consultation, in relation to designating ATVOD as co-regulator for VOD editorial content, we would additionally designate the function of being able to give enforcement notifications in relation to potential contraventions of the VOD editorial

⁶⁷ See paragraph 2.11 above.

⁶⁸ The requirement to pay a notification fee is not expected to be implemented until the 2010 Regulations are made and have come into force (see paragraph [2.11] above).

content standards⁶⁹. We would add to this, the function of giving enforcement notifications in relation to a failure to notify once, as expected, the 2010 Regulations have been made and have come into force⁷⁰. In addition we are proposing to delegate certain other duties to ATVOD – the Access Duty and the European Works Duty, as we discuss in paragraphs 4.61 to 4.66 below.

- 4.36 In addition, we note the view expressed by one respondent that, given a lack of detail about the delineation of roles between Ofcom and ATVOD going forward, that there should be an open and transparent procedure in respect of discussions between ATVOD and Ofcom in respect of its revised constitution and the detailed statement of each body's respective duties. We endorse this view which reflects the general duty on Ofcom under Section 3 of the Act to have regard to the principles under which regulatory activity should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. The designated co-regulator would be required to have regard to these principles under Section 3 and in the ATVOD Proposal. ATVOD undertook to: "have regard in all cases to the principles under which regulatory activity should be transparent"⁷¹. We would envisage, for example, that all ATVOD reports to Ofcom would be made available on the Ofcom and ATVOD websites. The designation document would also include a requirement on the ATVOD Chairman to report in person to the Ofcom Content Board, the minutes of which would be publicly available.

Name of the co-regulator

- 4.37 One respondent suggested that ATVOD should change its name, when designated. We note this suggestion and the rationale for it. However, this would be a matter for ATVOD.

Composition of the ATVOD Board

- 4.38 Finally, with regard to the future composition of the ATVOD Board, we consider that individual membership of the board would be a matter for ATVOD (subject of course to Ofcom being satisfied that ATVOD, as a designated body, is sufficiently independent of service providers). However, we would envisage that a portion of the industry membership of the Board would be drawn from the VOD service provider sector.
- 4.39 As we made clear in the Consultation, and in paragraphs 2.19 above, our basis for assessing the ATVOD Proposal was drawn from two sources: firstly, the proposed Regulations introduce a statutory requirement that Ofcom must be satisfied 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 and when it may be appropriate to operate a self- or co-regulatory system.
- 4.40 Having undertaken our assessment according to both the statutory and the relevant regulatory criteria⁷², Ofcom set out its view in the Consultation that ATVOD was on course to meet the relevant criteria by 19 December 2009. As we explained, ATVOD still needed to carry out further work to satisfy the statutory and regulatory

⁶⁹ See paragraph 4.41 above.

⁷⁰ See paragraph [3.130] above.

⁷¹ See paragraph 1.5, Annex 7 of the Consultation.

⁷² See paragraphs 5.26 to 5.35 of the Consultation.

requirements and to ensure that it would be ready to take on the relevant responsibilities by this date.

- 4.41 In light of: the further work that ATVOD has been carrying out; and on the basis of the available information; and having considered all the responses we received on this issue, we are working towards designating ATVOD in relation to carrying out the functions we proposed in our Consultation. We are continuing to discuss with ATVOD the appropriate terms for designation. For the reasons set out in paragraph 4.34 above, we anticipate designating the additional function of being able to give enforcement notices. We are continuing to discuss with ATVOD the appropriate terms for designation.

Range of other Functions to be designated to ATVOD

- 4.42 In our Consultation, we also discussed the issue of any powers to be retained by Ofcom. In particular, we proposed that Ofcom should retain the “Access Duty” (i.e. the duty to encourage VOD service providers to ensure that their services are gradually made accessible to people with sight or hearing disabilities).
- 4.43 Ofcom received 18 responses on the Access Duty. Four of these requested confidentiality and are therefore not identified when their responses are referred to below. The responses from those organisations who did not request anonymity have been published on Ofcom’s website⁷³.

Consultation question – Access Duty

- 4.44 In our consultation, we asked the following relating to the Access Duty:

Question 8

b) Do you agree with our proposal to retain the Access Duty in relation to VOD?

Responses to the Consultation

Access Duty

Respondents who agreed with Ofcom retaining the Access Duty

- 4.45 Twelve respondents agreed with Ofcom retaining the Access Duty.
- 4.46 LFCTV believed it was appropriate for Ofcom to retain the Access Duty, but requested that “a fair system be devised in how the duty should be applied to VOD services.
- 4.47 The RNIB whilst welcoming Ofcom’s proposal, was concerned that under the Access Duty, Ofcom would only be able to “encourage” VOD service providers to ensure their services are gradually made accessible to people with sight or hearing disabilities. The RNIB argued that unless provision of audio description, subtitling and signing was mandatory on VOD service providers equality of access for disabled people would not materialise. In addition, the RNIB made the following points:
- it would like the VOD regulator to set out timescales for the achievement of the provision of access services by VOD providers;

⁷³ See <http://www.ofcom.org.uk/consult/condocs/vod/responses1/>

- Ofcom should ensure that its regulatory approach includes specific mention of access technologies (such as magnification and screen reading software) on accessible websites, that meet recognised international web accessibility standards; and
 - in line with its statutory duties⁷⁴, Ofcom should become involved in encouraging others to secure equipment accessibility for blind and partially sighted people in relation to VOD services.
- 4.48 The RNID urged Ofcom to introduce regulations for the provision of access services on VOD services, which would bring the accessibility of VOD services in line with traditional linear broadcasting services.
- 4.49 TAG supported Ofcom retaining the Access Duty, but expressed disappointment over the extent of powers Ofcom would have in this area, by virtue of the AVMS Directive, stating that unless access services are provided in the same way as they are for broadcast programmes, deaf people will become increasingly disadvantaged because services are not accessible. TAG expressed its wish to ascertain how Ofcom would use its powers to encourage service providers to make their services more accessible to deaf people.
- 4.50 Viasat expressed its wish that, as non-UK facing linear broadcasters did not currently have to provide access services, the provisions of the Access Duty should equally not apply to non-UK facing VOD service providers.

Respondents who disagreed with Ofcom retaining the Access Duty

- 4.51 Six respondents disagreed with Ofcom retaining the Access Duty.
- 4.52 Several respondents queried Ofcom's reasoning for retaining the Access Duty. These respondents argued that ATVOD should be designated with the Access Duty because: ATVOD had specific understanding and experience of the VOD sector, whilst Ofcom's approach to this issue would be based on its mainstream broadcasting expertise. In particular, ATVOD would be: better placed to understand the opportunities and limitations of the provision of access services on VOD services; and would be more likely to encourage VOD service providers to look at providing access services in a voluntary non-prescriptive way. Given also that ATVOD does not have any experience of regulating the broadcasting sector it would be able to take a more even-handed approach to the VOD sector
- 4.53 Channel 4 considered that to have as much credibility as possible, ATVOD should have a broad range of responsibilities, and that the Access Duty would sit comfortably alongside ATVOD's other responsibilities.
- 4.54 Similarly, Five strongly opposed the proposal for Ofcom to retain the Access Duty, saying it could not understand why Ofcom was happy to designate functions in relation to which Ofcom had expertise and a proven track record (such as setting rules and adjudicating on editorial standards), and yet Ofcom was proposing to retain the Access Duty. Five recognised that Ofcom could have a useful dialogue with ATVOD over the Access Duty, but said they did not understand the logic behind Ofcom's argument that its experience of dealing with broadcasters over access services justified it overriding the co-regulatory principles on which the rest of the ATVOD Proposal is based. Five also considered that it would be: confusing and

⁷⁴ See section 10 of the Act.

unnecessarily bureaucratic for non-broadcaster VOD service providers to have a regulatory relationship with ATVOD over a range of issues, and also Ofcom over the Access Duty.

- 4.55 BT said that whilst it remains unclear how the Access Duty would be delivered in practice, BT considered that if ATVOD were to be designated with this duty, ATVOD could use this as leverage to gather further intelligence about the wider VOD market.
- 4.56 Channel 4 argued that ATVOD, as the co-regulator with representation and expertise from across the VOD sector ; and with a broad range of stakeholders,

The European Works Duty

- 4.57 Although we did not explicitly ask for responses on any other functions to be delegated or retained by Ofcom, we did receive three responses on the duty contained within the AVMS Directive for the regulator to ensure that VOD service providers promote production of and access to European works (“the European Works Duty”).
- 4.58 LFCTV rejected any proposal that would place reporting burdens on VOD service providers in areas such as European production quotas.
- 4.59 The SCBG said that different approaches to regulation would have different resource implications. This respondent said that his applies to the issue of promoting European Works, which although not referenced in the consultation paper, is an issue of real concern to its members.
- 4.60 Virgin Media noted that, whilst Ofcom retains the parallel right to exercise any power it might delegate, each duty which Ofcom allocates to itself needs to be justified and consistent with a light-touch regime. Therefore, this respondent questioned whether it would be necessary for Ofcom to retain the duty in relation to European works.

Ofcom’s response and decision

Access Duty

- 4.61 As we noted in the Consultation, there will be a statutory obligation on the regulator to undertake the Access Duty. In the Consultation, we proposed to designate ATVOD with a range of powers in relation to VOD editorial content, but that Ofcom should retain the Access Duty. This was 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)⁷⁵. In exercising its duty, Ofcom secures that broadcasters make available television access services (subtitling,

⁷⁵ 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.

signing and audio description) so as to help people with hearing and/or visual impairments to understand and enjoy television;

- b) many VOD services are provided by broadcasters, who understand the issues and are used to 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 built up established links with all interested parties, including broadcasters; providers of access technologies; and in particular advocacy groups representing the views of people with disabilities.
- 4.62 We have given further consideration to this proposal, in the light of the points made by respondents. On the one hand, we recognise the advantage to service providers of constituting ATVOD as a 'one-stop shop' for regulatory matters. We also recognise that, as ATVOD would have a relationship with service providers on a range of regulatory issues, it would be better placed to understand the particular circumstances of particular service providers. For its part, ATVOD is keen to have responsibility for as many matters relating to the editorial content of VOD services as possible.
- 4.63 On the other hand, Ofcom recognises that representatives of access service users would prefer Ofcom to retain responsibility for implementing the duty to encourage VOD service providers to ensure that their services are gradually made accessible to people with sight or hearing disabilities. We note that some service providers have suggested that a reason for ATVOD having the duty is that the access requirements in relation to VOD service providers are different from those imposed on linear broadcasters. While this is true, the overall objective of the duties in relation to access services on both linear and VOD services is the same – to allow people with sight or hearing disabilities to have access to content.
- 4.64 With this in mind, we consider that the most appropriate way forward would be to place responsibility for the Access Duty on ATVOD, if designated. But, in doing so, we would require ATVOD to: prepare a plan for discharging the duty and to secure Ofcom's approval for this and associated guidance to service providers; and report regularly on these issues to Ofcom.
- 4.65 As regards the hope expressed by Viasat that Ofcom would refrain from applying the duty to non-UK facing service providers, Ofcom notes that the duty applies in respect of all service providers falling under the jurisdiction of the United Kingdom.

European Works Duty

- 4.66 Whilst not referring to the European Works Duty in our Consultation, Ofcom had been of the provisional view that it should retain this Duty, given the experience we have in enforcing the European production quotas provisions of the TVWF Directive in the linear broadcast environment. However, as with Access Duty, we recognise that there is a key role for the co-regulator in this area. We therefore consider that it would be appropriate to delegate responsibility for the European Works Duty to ATVOD, if designated. But, in doing so, we would require ATVOD to: prepare a plan for discharging the duty, to secure Ofcom's approval for this and associated information which service providers will be required to provide to enable the UK to fulfil its duties in this area; and to report periodically to Ofcom.

Functions to be retained by Ofcom

- 4.67 Ofcom's approach to co-regulation of VOD editorial content is to designate the widest possible range of such powers and duties to the co-regulator. At the same time, however, Ofcom retains the statutory power to act concurrently or in place of any body it designates. Having considered all the responses we received to the Consultation, we anticipate designating the widest possible range of powers to ATVOD, subject to ATVOD not being permitted to exercise a certain restricted number of other powers. Therefore, Ofcom would not designate certain functions which we consider it necessary for Ofcom to retain exclusively for itself as the statutory regulator with ultimate responsibility for and oversight over the effective operation of the new regulatory framework for VOD services. Accordingly, Ofcom would not designate any enforcement functions relating to the imposition of statutory sanctions (financial penalties, or suspension/restriction of service). Further, once the notification regime has come into force, Ofcom would make determinations on scope in relation to any cases referred to it by ATVOD.
- 4.68 It should be noted that we envisage Ofcom being able to recoup its costs associated with any statutory sanctions process that might be referred to it by ATVOD in relation to the carrying out by Ofcom of powers relating to the enforcement functions referred to above.

Promotion of food and drink in children's programming

- 4.69 One further duty contained in the Regulations is the duty to encourage VOD service providers to develop codes of conduct regarding standards concerning the appropriate promotion of food or beverages by sponsorship of, or in advertising which accompanies or is included in, children's programmes. We did not explicitly ask for responses on this duty, and we received no responses to our Consultation on this issue.
- 4.70 We consider it appropriate that Ofcom should not designate the duty to encourage VOD service providers to develop codes of conduct regarding standards concerning the appropriate promotion of food or beverages by sponsorship of, or in advertising which accompanies or is included in, children's programmes.
- 4.71 It should be noted that in December 2003, amid growing concerns about child obesity, the Government asked Ofcom to consider proposals for strengthening the rules on television advertising of food and drink products to children. In April 2007, Ofcom began phasing in restrictions on the advertising of food and drink that is high in fat or salt or sugar ("HFSS"). Ofcom's principal aim was "to reduce the exposure of children to HFSS advertising, as a means of reducing opportunities to persuade children to demand and consume HFSS products". In December 2008, Ofcom published the results of a review of the effects of HFSS advertising on children, which showed that, in general, children were watching less HFSS advertising between 2005 and 2007/08. From 1 January 2009, it has been a requirement that no HFSS advertising should appear on children's channels. Ofcom is due to conduct a further review in this area to gauge the full effects of the restrictions on HFSS advertising.

Ofcom's decision

- 4.72 Ofcom does not propose to designate powers to impose statutory sanctions (financial penalties, or suspension/restriction of service) both in relation to notification issues⁷⁶, and serious contraventions of the statutory requirements for VOD services.
- 4.73 In addition, given that public policy around the promotion of certain food and drink products – whether through sponsorship, product placement or advertising - is continuing to develop, and that Ofcom has considerable experience in this area, we have decided that Ofcom should retain responsibility for exercising this duty. However, in doing so, we would expect to consult ATVOD as appropriate.

⁷⁶ When the statutory requirement for service providers to notify their services is, as expected, introduced, when the 2010 Regulations are made and come into force.

Section 5

The regulation of video on demand advertising

Introduction

- 5.1 In Section 6 of the Consultation, we examined and evaluated a proposal from the Advertising Standards Authority (“ASA”) to act as the co-regulator for VOD advertising. We then invited stakeholders to give their views concerning our proposal to designate the ASA as the co-regulator for VOD advertising (“the ASA Proposal”), and provided the opportunity for stakeholders to suggest alternatives to our proposals.
- 5.2 Having undertaken our assessment according to both the statutory and the regulatory criteria; and noting respondents’ support for the ASA Proposal, Ofcom is of the view that the ASA satisfies the criteria required by the Regulations for a designated body. Accordingly, we are continuing to discuss with the ASA the appropriate terms for designation. In the meantime, Ofcom will deal with any issues relating to the relevant statutory VOD advertising standards, as listed in paragraph 5.4 below as they arise.
- 5.3 This part of the Statement sets out:
- a background to the issues determining which functions relating to the regulation of VOD advertising that Ofcom would designate to a co-regulatory partner, or retain;
 - a general summary of the responses we received to the Consultation relating to the ASA Proposal, an analysis of these responses, and our decisions; and
 - a general summary of the responses to the Consultation, and our decisions, relating to the functions that we have determined, in any event, should be retained by Ofcom in relation to VOD advertising.

Designation and retention of functions by Ofcom – VOD advertising

- 5.4 In relation to VOD advertising, at present there is a self-regulatory model in place which is overseen by the ASA under the British Code of Advertising, Sales Promotion and Direct Marketing (“the CAP Code”). 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.

Functions to be designated by Ofcom

The ASA Proposal

- 5.5 In our Consultation⁷⁷, we outlined the terms of the ASA Proposal, under which the ASA would be designated as the new co-regulatory body for VOD advertising. The ASA would handle complaints relating to VOD advertising in a similar way to the way it currently handles complaints about advertising in other media. Ofcom would expect the ASA to be able to resolve most 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.
- 5.6 Under the ASA Proposal, an annex to the CAP Code would set out rules that mirror the new statutory requirements for VOD advertising. In accordance with the ASA's duty as an appropriate regulatory authority it would be responsible for enforcing these rules with a view to securing that every provider of an on-demand programme service complies with the new advertising requirements in the Act. In this way, day to day regulation would be in the hands of the ASA who would be responsible for investigating complaints about VOD advertising but, as we made clear in the Consultation, the designation would require the ASA to refrain from making a determination that a provider had contravened any of the statutory requirements. Rather, Ofcom would have the function of determining whether a contravention of the statutory requirements had occurred, and we would retain the ability to take immediate action in the event that we considered a serious contravention of the Regulations had taken place. We would also expect the ASA, if designated, 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.
- 5.7 We also stated in the Consultation 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.

General summary of responses

Responses to the Consultation on the ASA Proposal

- 5.8 Ofcom received 22 responses on the ASA Proposal. Five of these requested confidentiality and are therefore not identified when their responses are referred to

⁷⁷ See paragraphs to 6.19 to 6.21, and Annex 8 of the Consultation.

below. The responses from those organisations who did not request anonymity have been published on Ofcom's website⁷⁸.

5.9 There was universal support from respondents for the ASA Proposal.

Ofcom's approach to its response

5.10 In responding to the Consultation and preparing this Statement, we have taken into account each of the responses. Where appropriate we have added clarificatory comments to answer points raised by respondents in relation to the ASA Proposal.

Consultation questions

5.11 In our Consultation, we asked the following relating to the ASA Proposal:

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?

Responses to the Consultation

Respondents who agreed with the ASA Proposal

5.12 18 respondents agreed with the ASA proposal without amendment.

Respondents who agreed with the ASA Proposal subject to amendments

5.13 Four respondents raised issues relating to the ASA Proposal.

5.14 BT recommended that the ASA should report to Ofcom more frequently than the annual proposal, stating their belief that this would help facilitate proactive and timely regulation by highlighting any issues at the earliest possible juncture.

5.15 The VLV, whilst supporting the ASA Proposal, strongly recommended that the regulation of product placement on VOD services should be placed under the aegis of the ASA and not ATVOD.

5.16 S4C said that any fees charged by the ASA would need to be equitable. In particular, this respondent felt that if advertisements used on a linear television service were also used on a VOD service, it would be disproportionate to levy an additional fee on a VOD service provider.

5.17 Another respondent asked for clarification as to whether the fees to be paid by advertisers would be along the lines of the ASBOF and BASBOF model. This

⁷⁸ See <http://www.ofcom.org.uk/consult/condocs/vod/responses1/>

respondent said that as broadcasters currently pay Clearcast for its services, it questioned whether it was also appropriate for broadcasters and advertisers to pay additional fees via an equivalent to the BASBOF mechanism. This respondent also asked for clarification as to the resource implications for the ASA of the new co-regulatory regime. Although this respondent had no issue with the ASA being designated as co-regulator for VOD advertising, the respondent questioned whether ATVOD could undertake responsibility for the co-regulation of VOD advertising, with the clearance of content in advertisements being left with Clearcast.

Respondents who disagreed with the ASA Proposal

5.18 No respondents disagreed with the ASA Proposal.

Ofcom's response and decision

5.19 The following areas of concern were raised by respondents in relation to the ATVOD Proposal:

- a) the ASA should report to Ofcom more frequently than annually;
- b) the regulation of product placement should be put under the aegis of the ASA rather than ATVOD;
- c) it was not clear whom the ASA would be charging fees to fund the co-regulatory regime. In addition, any fees charged by the ASA should be equitable and that fees should not be levied on VOD service providers if linear broadcast advertisements were shown on VOD services; and
- d) whether ATVOD rather than the ASA should regulate VOD advertising, given the role of Clearcast.

ASA's reporting timetable

5.20 We consider the proposal set out in the ASA Proposal to report annually to Ofcom⁷⁹ over a range of issues such as complaints received, cases completed, and cases upheld, is a proportionate requirement that would ensure sufficient transparency for the operation of the co-regulatory regime without being administratively burdensome. In our view, any requirement to report more frequently would be disproportionate and unduly burdensome on the ASA.

Product placement

5.21 In the linear broadcast environment, product placement is considered part of the editorial content. Product placement is currently prohibited under Ofcom's Broadcasting Code, but will be permitted, subject to the restrictions laid out in the AVMS Directive, for VOD services. As any product placement would necessarily appear within programmes as part of the editorial content, we consider it would be appropriate for product placement in VOD services to be subject to co-regulation by the co-regulator for VOD editorial content.

⁷⁹ See p.109 of the Consultation

ASA fees

- 5.22 We note the comments made by respondents relating to any fees paid to the ASA in relation to the regulation of VOD advertising. However, Ofcom is aware of the following two points: the funding of a co-regulatory regime for VOD advertising would only extend to those activities carried out by the co-regulator i.e. the investigation and decision-making in cases involving the potential contravention of the co-regulator's proposed rules covering VOD advertising. Although, it is hard to be precise about the scale of co-regulatory activities, we envisage the costs involved are unlikely to be high, given the number of complaints that the ASA has dealt with under the existing self-regulatory arrangements⁸⁰. Further, we note that under the ASA Proposal, the voluntary levy which is currently paid by advertisers already pays for the existing self-regulatory arrangements. Therefore we consider that there would be no likely net increase in fees being paid by the advertising industry. Given the above, we consider that the ASA's fees would be equitable. In addition, we recognise that the ASA's fees would not be levied on VOD service providers themselves.
- 5.23 On a related point, it is worth noting that we envisage Ofcom being able to recoup its costs associated with any statutory sanction process arising from a contravention of the VOD advertising requirements. In summary, we would envisage that if a breach of the ASA's rules was serious or persistent, the matter would be referred to Ofcom by the ASA. Ofcom would be able to reclaim any costs it incurs in relation to its consideration of the matter from the funds received by ATVOD by way of the notification fees paid by VOD service providers⁸¹. Ofcom's role would involve determining whether a contravention of any of the corresponding statutory requirements had occurred and, if so could lead to Ofcom imposing one or more of the available statutory sanctions. .

Clearcast

- 5.24 Clearcast is a commercial company responsible for the pre-transmission examination and clearance of linear television broadcast advertisements. It is a voluntary decision for a broadcaster whether they engage the services of Clearcast to clear advertising content for transmission. This is fundamentally different from the proposed role of the ASA in relation to the co-regulation of VOD advertising, which would be a mandatory scheme, backed by statute. Unlike Clearcast, the ASA's role would be to consider complaints post-transmission. Funded by advertisers rather than broadcasters, this would in large part replicate the ASA's current self-regulatory activities in relation to VOD advertising. In addition, given the ASA's long track-record of specialist expertise in regulating VOD advertising, it would not, in our opinion, be sensible to designate ATVOD with the relevant duties of co-regulating VOD advertising, rather than the ASA, as suggested by one respondent.
- 5.25 As we made clear in the Consultation, and in paragraphs 2.19 above, our basis for assessment of the ASA Proposal took account of the requirements set out in the Regulations, and the tests set out in Ofcom's published principles for evaluating different types of regulation. The 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). Secondly, Ofcom's *Principles for Analysing Self-and Co-regulation* require us to

⁸⁰ See paragraph 6.24(b) of the Consultation.

⁸¹ Subsequent to the Consultation, as mentioned in paragraph 2.11 above, the Government has indicated that it intends to implement the requirement for ODPS to notify, and pay fees to, the regulator in the 2010 Regulations.

set a clear framework under which we can consider if and when it may be appropriate to operate a self- or co-regulatory system.

- 5.26 In relation to the latter it is worth recalling that, in our Consultation⁸² we undertook an analysis of the ASA Proposal according to both: the statutory criteria laid out in the Regulations; and the relevant regulatory criteria for assessing the suitability of ASA as a co-regulator. Namely, Ofcom undertook a two-stage assessment: firstly, we undertook an assessment, and were satisfied, of the appropriateness of the ASA Proposal, according to a number of high-order principles contained in our *Principles for analysing co- and self-regulation*:
- i) **do industry participants have a collective interest in solving the problem?** – we considered 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 support a scheme that has been designed in order to fulfil certain obligations, whilst minimising costs and administrative burdens;
 - ii) **would the likely industry solution correspond to the best interests of citizens and consumers?** – we considered 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 regulation⁸³;
 - iii) **would individual companies have an incentive not to participate in any agreed scheme?** – we considered 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 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 considered that, given that ASBOF has a well-established model for collecting a levy on advertising expenditure, there would be little scope for service providers to ‘free-ride’; and
 - v) **can clear and straightforward objectives be established by industry?** – we considered that, given the involvement of industry stakeholders⁸⁴ in drawing up the ASA Proposal, industry stakeholders had already produced the framework of a scheme that is: easy to understand; and can be readily signed up to by service providers.
- 5.27 Second, we undertook an assessment of the appropriateness of the ASA Proposal against the set of best-practice criteria in our *Principles for analysing co- and self-regulation*. These were: awareness; transparency; significant participation by industry; adequate resources commitments; enforcement measures; clarity of

⁸² See paragraph 6.29 of the Consultation.

⁸³ 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”.

⁸⁴ 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/)

processes and structures; audit of members and schemes; system of redress in place; involvement of independent members; regular review of objectives and aims; and non-collusive behaviour⁸⁵.

- 5.28 Having undertaken our assessment according to both the statutory and the regulatory criteria; and noting respondents' support for the ASA Proposal, Ofcom is of the view that the ASA satisfies the criteria required by the Regulations for a designated body. Accordingly, we are continuing to discuss with the ASA the appropriate terms for designation. In the meantime, Ofcom will deal with any issues relating to the relevant statutory VOD advertising standards, as listed in paragraph 5.4 above as they arise.

Functions to be retained by Ofcom

Promotion of food and drink in children's programming

- 5.29 One further duty contained in the Regulations is the duty to encourage VOD service providers to develop codes of conduct regarding standards concerning the appropriate promotion of food and drink by sponsorship of, or in advertising which accompanies or is included in, children's programmes. We did not explicitly ask for responses on this duty, and we received no responses to our Consultation on this issue.
- 5.30 We outlined above⁸⁶, that we intend to retain the duty to encourage VOD service providers to develop codes of conduct regarding standards concerning the appropriate promotion of food and drink in relation to sponsorship appearing in children's programmes. Similarly, we consider it would also be appropriate to retain the duty to encourage VOD service providers to develop codes of conduct regarding standards concerning the appropriate promotion of food and drink in advertising which accompanies or is included in, children's VOD programming.
- 5.31 Public policy around the promotion of certain food and drink products – whether through sponsorship, product placement or advertising – is continuing to develop, and Ofcom has developed considerable experience in this area in the course of developing rules in relation to advertising of food and drink that is high in fat or salt or sugar ("HFSS") in broadcast services. We shall be discussing with VOD service providers how best to achieve the underlying objectives in this area.

⁸⁵ See paragraph 6.30 of the Consultation.

⁸⁶ See paragraphs 4.69 to 4.71 above.

Section 6

Other issues

Introduction

6.1 This part of the Statement sets out:

- responses that we received to the Consultation on equality issues not covered elsewhere in this Statement⁸⁷; and
- responses that we received to the Consultation on miscellaneous issues.

Ofcom's duties with regard to equality

6.2 As we discussed in the Consultation, Ofcom is required by statute to have due regard to any potential impacts our proposals may have on equality in relation to gender, disability or ethnicity – an Equality Impact Assessment (“EIA”) is our way of fulfilling this obligation⁸⁸. 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 stated in the Consultation, that we considered that our approach to regulation as a result of the our proposals would remain unchanged and therefore we did not consider that our proposals, as outlined in Sections 4, 5 and 6 of the Consultation, would have any particular implications for people to whom these considerations relate. We based 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.

6.3 In the Consultation, we invited stakeholders to submit responses specifically on any potential impacts relating to equality resulting from the implementation of a co-regulatory regime. This was to ensure that we had not failed inadvertently to consider any possible equality impacts resulting from the proposed arrangements for co-regulation.

General summary of responses

Responses to the Consultation on equality issues

6.4 Other than the responses that Ofcom received regarding the Access Duty (see Section 4 above), Ofcom received 14 responses on equality issues. Four of these requested confidentiality and are therefore not identified when their responses are referred to below. The responses from those organisations who did not request anonymity have been published on Ofcom’s website⁸⁹.

⁸⁷ See Section 4 for the discussion on stakeholder responses and Ofcom’s decision on the Access Duty.

⁸⁸ 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).

⁸⁹ See <http://www.ofcom.org.uk/consult/condocs/vod/responses1/>

Consultation questions

6.5 In our Consultation, we asked the following relating to equality issues:

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?
- c) Are there any other possible equality impacts that we have not considered?

Responses to the Consultation

- 6.6 As noted above, we asked respondents to identify any likely impacts of our proposals (concerning draft Scope Guidance; delegation of functions relating to notification; and a new co-regulatory regime for VOD editorial content and VOD advertising) in relation to matters of equality, specifically to gender, disability or ethnicity.
- 6.7 None of the responses we received identified any likely equality impacts.
- 6.8 In responding to this area of the Consultation, BBC Worldwide welcomed the new requirements to ensure content cannot contain any incitement to hatred based on race, sex, religion and nationality.

Ofcom's response

- 6.9 We note that the responses we received to the Consultation chimed with our assessment that the proposals did not have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity.

Other issues raised by respondents

- 6.10 Several respondents raised issues not covered elsewhere in this Statement
- 6.11 BSkyB flagged its dissatisfaction with the consultation process, including: the length of the consultation period (six weeks), which it considered too short, given the issues involved; the fact that Ofcom was undertaking a consultation when the legislation implementing the new co-regulatory regime had not been finalised; and that Ofcom might need to consult on further issues relating to the co-regulatory framework, which were being discussed by the Government with the European Commission. BSkyB stated that the current Consultation examined discrete aspects of the proposed regime without giving the whole picture, which this respondent considered to be a material failing, which may not be Ofcom's fault, but must be recognised in terms of how Ofcom should conduct itself in future.
- 6.12 S4C stated its belief that under the co-regulatory framework, public service S4C services would only be subject to regulation by Ofcom or a designated regulatory body in relation to VOD advertising. Despite this, this respondent maintained that S4C is still under a duty to notify any of its public service VOD services; but it is unclear, given that S4C's public service VOD services can carry advertising, whether the notification (and associated notification fees) should be made to ATVOD or the ASA. S4C said it should not have a duty to notify ATVOD, as ATVOD will not be

regulating S4C public service VOD services. If nonetheless it is determined that S4C does have to notify ATVOD, the respondent stated its belief that S4C should not have to pay a fee to ATVOD, because ATVOD has no power to regulate the content of S4C's public service VOD services.

- 6.13 We note the comments made by S4C. It is worth noting that under the Regulations, any VOD editorial content on public service VOD services funded by public money (in the case of S4C, grant-in-aid; and in the case of the BBC, the licence fee), will be subject to coincident regulation between Ofcom and: in the case of S4C public service VOD services, the Welsh Authority; and in the case of the BBC public service VOD services, the BBC Trust. In addition, the Regulations make clear that any VOD advertising carried by S4C's public service VOD services, will be subject to regulation by Ofcom or any body that it might designate in relation to VOD advertising.
- 6.14 As we make clear earlier in this statement, it is the intention of the Government, in the 2010 Regulations, to implement the requirement on VOD service providers to both notify, and pay fees, to the relevant regulatory body. It is Ofcom's understanding the 2010 Regulations will make clear the issues of notification and notification fees as they relate to S4C's public service VOD services.
- 6.15 The VLV stated its particular concern with how product placement on VOD services would be regulated. In particular, the VLV argued that in order to implement Article 1(a) and 1(g) of the AVMS Directive and, given Ofcom's statutory duties⁹⁰ to further the interests of citizens and consumers, it is essential that the proposed Regulations ensure that users of VOD services are properly informed about: the genre of programme; and whether or not it contains product placement or other forms of audiovisual commercial communication. In this regard, the VLV questioned whether such information might be provided with an electronic programme guide to the programmes available in a VOD service.
- 6.16 We note these comments and acknowledge that they will require further consideration.

⁹⁰ See section 3 of the Act.

Annex 1

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

APPLICATION AND SCOPE OF THE REGULATORY FRAMEWORK TO VOD SERVICES

Introduction

- 1.1 This section of the guidance is provided as an aid to interpretation of the types of services that may fall within the definition of an ‘on-demand programme service’ under section 368A of the Communications Act 2003 (“the Act”) and therefore will be subject to the regulatory framework for VOD. It is also provided to help assess who is likely to be the provider of a relevant service for these purposes, and therefore the person who is responsible for compliance with the requirements, including the obligation to notify the service to the Regulator, as and when this becomes a statutory requirement. As with other guidance on the application of the statutory requirements, this section of the guidance is not binding nor legally enforceable, and only provides non-determinative, interpretative guidance as to how the Regulator is likely to apply the criteria set out in section 368A of the Act, drawing on the Articles and Recitals of the Audiovisual Media Services Directive (“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, as and when this becomes a statutory requirement, and need to comply with the requirements. It is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service is subject to the regulatory framework for VOD.
- 1.3 As explained below, there are a number of different cumulative criteria set out in section 368A of the Act that determine whether a service is within the scope of the regulatory framework. 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 statutory criteria, and act accordingly.
- 1.4 In deciding whether a particular service requires notification, as and when this becomes a statutory requirement, and by whom, the Act requires potential service providers, and ultimately the Regulator, to consider the following questions:
 - a) Is the service an ‘on-demand programme service’ within the meaning set out in section 368A of the Act? (Section 2 of this Guidance);

- b) Who has 'editorial responsibility' for that service within the meaning of section 368A(4) of the Act? (Section 4 of this Guidance); and
- 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 Act are to the Communications Act 2003, as amended by the Audiovisual Media Services Directive (Implementation) Regulations 2009.

2 Is the service an 'on-demand programme service' within the meaning set out in section 368A of the Act?

2.1 Under section 368A of the Act, a service will be an 'on-demand programme service', and therefore subject to notification, as and when this becomes a statutory requirement, and regulation, if it meets **all** of following criteria.

- a) **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;
- b) **It is a VOD service:** the service enables users the ability to select individual programmes from among the programmes included in the service, to receive the selected programme using an electronic communications network,⁹¹ and to view the selected programme when the user chooses;
- c) **There is editorial responsibility:** the programmes comprising the service are under a person's editorial responsibility; and
- d) **It is made available to the public:** the service is made available to the public: the service is made available by that person for use by members of the public.

2.2 The intention of the Directive and the Act 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).

The service is 'TV-like'

2.3 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 of the Directive). The Directive, and Part 4A of the Act, are therefore intended to cover on-demand and broadcast television audiovisual media services which compete for the same audiences (Recitals 16 and 17 of the Directive), sharing the same key characteristics, namely that they include comparable programmes. Accordingly, a defining characteristic of the definition of an 'on-demand programme service' in section 368A of the Act is that the principal purpose of the service is "the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television

⁹¹ Defined in section 32 of the Act 2003.

programme services". In other words, that the programmes are "television-like" (one of the phrases used in Recital 17 of the Directive).⁹²

TV-like programmes

- 2.4 An on-demand programme service will only be caught by the definition in section 368A of the Act 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.
- 2.5 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. Short extracts from longer programmes may also not be TV-like, if the content that they comprise does not to make them separate and distinct programmes in their own right (i.e. with their own editorial integrity). Long-form programming is more generally characteristic of TV broadcasting; however, the duration of the pieces of content in a service should not, on its own, determine whether that content is TV-like; some short video content – such as music videos – are likely to satisfy this test.
- 2.6 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 and the nature of the on-demand programme service as a whole.
- 2.7 Audio-only services, such as 'listen again' radio services are out of the scope of section 368A of the Act, and hence outside the scope of the regulatory framework for VOD. However, video only programmes, supplied on an on demand basis are potentially in scope (subject to the other criteria being met).

It is a VOD service?

- 2.8 The first key issue under this criterion is whether access to 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.
- 2.9 The assessment of whether access to the service is 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.

⁹² In light of the use of the phrase 'television-like' in the AVMS Directive, Ofcom commissioned and carried out qualitative research in order to gain an understanding of what consumers consider to be 'television-like' material and what their expectations are in terms of the key characteristics of such material. The research report is at <http://www.ofcom.org.uk/research/tv/reports/vodresearch/> It should be noted that no part of the qualitative research that Ofcom has commissioned is intended, nor should it be interpreted as replacing in any way the powers properly exercisable by Ofcom and its co-regulator, in determining whether or not any particular service falls within the scope of regulation.

- 2.10 The second key issue under this criterion is whether the ‘principal purpose’ of the service is to provide ‘TV-like’ programming. 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 Act.
- 2.11 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, or where video forms part of a content service predominantly featuring a range of non-video material.
- 2.12 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).
- 2.13 It is acknowledged that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case.
- 2.14 An “*electronic communications network*” is defined in section 32 of the Act 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.
- 2.15 A content service that is broadcast or streamed in a linear form is not covered by the on-demand programme service requirements, and may be subject to the relevant ‘broadcast’ regulation. It should be noted that the requirements for broadcast regulation are explicitly extended by the Directive and the Act to cover internet-based television channels.

There is editorial responsibility?

- 2.16 The exercise of ‘editorial responsibility’ is relevant to scope in two ways. Firstly, an ‘on-demand programme service’ is defined in the Act 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 in section 468A(4) of the Act) would fall outside the regulatory framework.
- 2.17 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.

- 2.18 However, that is not to say that all content in such sites falls outside the definitions. For example, where ‘hosting’⁹³ services are used by commercial entities as a means of distributing relevant content, and meet the other criteria laid down in section 468A of the Act, then such content might fall within the meaning of an ‘on-demand programme service’ for these purposes.
- 2.19 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).

It is made available to the public?

- 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 regulatory framework for VOD?

- 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 section 368A of the Act (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 Part 4A of the Act and, therefore, the regulatory framework for VOD:
- a) Services that are primarily non-economic, and which are therefore not in competition with television broadcasting (Recital 16 of the Directive). 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;

⁹³ Consistent with the definition set out in Regulation 19 of the Electronic Commerce (EC) Regulations 2002, “hosting” refers to the action of the provider of an information society service, which consists of information provided by a recipient or recipients of the service, of storing that information.

- b) services comprising on-demand content that are not “mass media in their function to inform, entertain and educate the general public” (Recital 18 of the Directive);
- 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 of the Directive); and
- d) electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines) (Recital 21 of the Directive).

3.3 The following types of content may well be outside the scope of the requirements 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 set out in section 368A(4) of the Act?

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 2.19 above). The body with editorial responsibility would be responsible for notification, as and when this becomes a statutory requirement, 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 section 368A(4) of the Act, it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has control of the “*content of individual programmes or of the broadcasting or*

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 broadcasting or 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 Act 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 In determining the person with effective control of the organisation of those programmes it is appropriate to consider 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 and which ensures that each individual programme is made available in a manner that secures the relevant standards requirements: 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 necessarily control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not, on their own, 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 section 468A of the Act 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 necessarily being determinative, such contractual arrangements will provide useful evidence as to the division of responsibility between the parties.
- 4.10 As noted in paragraph 2.12 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 (one of which service providers may also be the aggregator), or a single service, 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 which ensures that each individual programme is made available in a manner that secures the relevant standards requirements (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 statutory requirements.
- 4.13 In the latter case, the content vendors 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 which ensures that each individual programme is made available in a manner that secures the relevant standards requirements, and therefore, would have responsibility for ensuring compliance with the statutory requirements.
- 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'. In particular, the fact that an entity is operating as an aggregator in relation to some content services does not preclude the entity from being the content provider in relation to some other elements of the aggregated service. The onus is on the parties to provide the Regulator with all necessary information in support of any notification, as and when this becomes a statutory requirement, 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 Act, 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 in to 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, as and when this becomes a statutory requirement).

- 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, as and when this becomes a statutory requirement.

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

- 6.1 Services only fall within the scope of the Act 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

and

- 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 2

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.

BSkyB British Sky Broadcasting Plc.

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.

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.

Discovery Discovery Communications Europe Ltd.

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.

Five Channel 5 Broadcasting Ltd.

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.

ISBA the Incorporated Society of British Advertisers.

LFCTV Liverpool Football Club TV.

MBG the Mobile Broadband Group.

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 requirements of the AVMS Directive must notify Ofcom or, if a designation is made, the co-regulator of the service. It is anticipated that regulations to be introduced in early 2010 ("the 2010 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.

NS and NPA the Newspaper Society and Newspaper Publications Association.

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.

Portland Media et al. Portland Media Group; Strictly Broadband Ltd; Sport Media Group Plc; Playboy TV-Benelux Ltd; and Broadcasting (Gaia) Ltd.

PPA the Periodical Publishers' Association.

RNIB the Royal National Institute for the Blind.

RNID the Royal National Institute for the Deaf.

SCBG the Satellite and Cable Broadcasters' Group.

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.

TAG a consortium of the full range of national and regional organisations in the UK working on behalf of deaf people, promoting equality of access to electronic communications, including telecommunications and broadcasting, for deaf, deafened, hard-of-hearing, deafblind people and sign language users.

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.

Viasat Viasat Broadcasting Ltd.

VLV the Voice of the Listener and Viewer.

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.