**Ofcom Further Consultation: making on demand services accessible**
**ITV plc Response**

ITV is fully committed to ensuring its content can be enjoyed by all audiences, and accessibility is key to this, both on live TV and on demand.

ITV consistently over-delivers against its targets for subtitling, audio description and visual signing on broadcast TV: Close to 100% of programmes on ITV's broadcast channels are subtitled; over 20% of programmes on the main ITV channel are audio described; over 55% on ITV2 and ITV3. We have a minimum of 6% visually signed content across all channels except ITVBe.

ITV is also committed to making its on demand services assessable. ITV Hub, our digital catch-up service, offers subtitles on 23 of the 35 platforms we are on. On the most popular (web, iOS, Android, Amazon Fire) 95% of content is subtitled and on mobile apps over 30% of content carries audio description. ITV also partners with BBC to provide standalone SVOD service, BritBox which provides subtitles on 90% of all content – we are aiming to increase this to 99% by the end of 2020 and are looking to introduce audio description to BritBox by the end of 2021.

Our development work has always focussed on where we can deliver the most audience benefit, targeting those platforms with the biggest audiences. Launching access services on YouView is our current focus and we are in active discussions to bring subtitles to audiences on Sky and Virgin's catch up services.

This year, ITV embarked on a major new programme of work to redesign and modernise the ITV Hub which will relaunch in 2021 with a new technical backbone, paving the way for visual signed content to be added across all platforms. Visually signed content should also begin to appear on BritBox in 2021.

As you can see, ITV strongly support Ofcom's ambition to make on demand services more accessible and has done so even in the absence of regulatory targets for ODPS. ITV therefore supports the approach to regulation in this area articulated in Ofcom's 2019 Statement: Making on-demand services accessible:[1]

> "*Regulations which effectively increase the accessibility of on-demand content while being flexible enough to apply now and in future to the developing and diverse on-demand industry*"

One of the key recommendations made at that time, and which is reflected in the current consultation is that the requirements are proportionate, by reference to the scale of audience

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[1] https://www.ofcom.org.uk/__data/assets/pdf_file/0014/131063/Statement-Making-on-demand-services-accessible.pdf

benefit, the cost of providing the required assistance relative to a provider's ability to pay, and technical or operational difficulty.

Proportionality is crucial. Resources (both people and financial) to engage in product development are limited and operators must juggle competing demands to expand, evolve and improve digital services for all audiences, particularly seeking to prioritise improvements for the largest overall audiences (including those with access service needs). The obvious risk of getting intervention wrong in this area is that operators may simply decide not to provide a particular service on a particular platform at all if the intervention is disproportionate, to everyone's disbenefit.

For this reason, it is important that in formulating new regulations – both legislation and guidance/Codes - Ofcom takes due regard of the realities of on demand provision and of digital product development. As we set out in this submission, providing access services[2] for ODPS is far more complex than for linear broadcast TV.

In particular, Ofcom should have due regard to the difference in on demand (and access services) provision between the following two types of platform:

(i) **'App based' platforms**: the ODPS provider controls the means of delivery and the technical standards of the programme files (e.g. where the service is accessed through an app controlled by the ODPS provider). In this case, the provision of access services tends to be more standardised, based on technical standards that are widely adopted; and

(ii) **'Bespoke solution' platforms**: the ODPS provider's content is disaggregated into a separate 'service' where delivery and the technical standard of the programme files are controlled by a third party. In this case, access services are often based on bespoke technical standards that require significant additional investment from ODPS content providers.

In this introduction, we explain how access services are facilitated in each of these types of platform and, as a result, why this important distinction is key to effective regulation.

In addition, this introduction also discusses issues arising from version/model 'updates' – i.e. where a platform operator or device manufacturer updates the software on which its platform/device is based, thereby requiring additional development work by ODPS providers. Ofcom does not address this issue in its consultation which, in ITV's view, is important to enable effective and proportionate regulation.

[2] For complete clarity, we note that except where specifically stated, this introduction and our responses to the consultation questions, use the term 'access services' to mean the functionality that enables the supply of subtitles and audio description. We address the provision of visual signing in response to consultation questions 16 to 20 only.

**Access services from ODPS provider-controlled apps provided on app-based platforms**

Most ODPSs (including the ITV Hub) provide access services via ancillary files that sit alongside the programmes they support. This is by-and-large considered a more 'standard' approach for providing access services.

Like all functionality within an app, the delivery mechanism and file format must be consistent with the technical specification of the particular platform through which the user accesses the ODPS. As a result, each platform still requires a unique technical build by the ODPS provider, for example through a platform-specific version of its app. This is clearly complicated and involved given the number of platforms ITV is on.

In the current context, whilst it is helpful that providers have control over their own app, this control should not be overestimated given that the app still has to sit on someone else's platform that the app provider will usually not control. For this reason, ITV would urge Ofcom to ensure that in relation to platforms where the ODPS provider controls the playout and technical specification of programme files (which will generally be the case where programmes are viewed through the ODPS provider's app) any audience size exemption should be applied on a platform-by-platform basis **where 'platform' is defined as the service/operating system through which the user accesses the ODPS**. As we set out in response to question 11 below, these are the real platforms that ought to be the basis of regulation in this area.

**Access services on 'bespoke solution' platforms**

By contrast to the 'app based' approach to access services described above, certain platforms deliver on demand services through a unique/bespoke interface, for example bringing together on demand content from a range of different ODPSs into a single service. Because these services and their technical backbone are under the control of a third party platform operator (as opposed to the ODPS provider), it is not possible to generalise about the process for enabling access services or the associated costs.

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If these 'bespoke solution' platforms are covered by ODPS access services regulation, ODPSs providers will be at a significant competitive disadvantage in any negotiations. Theoretically, faced with unlimited exposure for development costs, ODPS providers may simply decide not to provide ODPS services on that platform at all which would be a bad outcome for all audiences. In ITV's view, it is not reasonable to expect ODPS providers to pay for the decision of a platform to require a bespoke solution beyond the cost that that provider would normally bear for the more standard app based approach.

The more satisfactory and proportionate outcome would be for ODPS providers' responsibility for providing access services under regulation to extend only to that which is required to enable access services using the more standard app based technology. Where a platform operator requires an ODPS provider to go above and beyond, to accommodate a bespoke technical standard/build, any extra cost should be a matter for free and fair negotiation between the platform operator and ODPS provider unencumbered by regulation.

Recognising this distinction would result in a more proportionate and practical approach to access services. For example, on the Virgin Media platform, ITV VOD content is available through both the ITV Hub app (i.e. akin to the 'standard' platform solution above) and within Virgin's own catch up service (the 'bespoke solution' platform). Accordingly, if access services through the ITV Hub were regulated, it should not be necessary to regulate access services on programmes provided through Virgin's catch up service.

The discussion above about the two types of platform solution is highly relevant to the discussion about "reasonable endeavours" in the context of technical difficulty. We strongly support Ofcom's proposal to apply an exemption based on 'technical difficulty'. We recommend that in this context: 'reasonable endeavours' should be assessed by reference to the level of investment required to accommodate more 'standard' app based VOD delivery (i.e. via an ODPS-controlled app). Platforms where programme delivery and technical standards are outside the control of the ODPS provider should not require incremental spend beyond that base level – to do so would be unreasonable.

**Platform and device updates**

Platform operators regularly update their platform and OEMs regularly release new equipment models, for example to increase functionality, fix bugs and update the technical backbone with newer technology. This generally happens on an annual basis with autumn being the traditional time for new device models/platform variants to be released. Over time, older models/variants become obsolete and are replaced by newer models/variants.

Each time a platform is updated, changes will need to be made to any apps on that platform. Sometimes these changes can be small, other times this can require substantial development work, without which the app will not work and functionality may not operate.

For example, many TV manufacturers are based in Asia. There have been instances where updates to TV firmware have not taken European or UK technical standards into consideration resulting in access services failing to work following upgrade to the new version. Sometimes ODPS providers can fix such problems with development work. Other times, this requires negotiation with the manufacturer and a fix may not be provided until the next firmware update. In this situation, access services may not be operational on that specific platform for a period of time.

The length of time it takes to fix such a problem and the development work required by ODPS operators will depend in large part on whether the platform utilises widely accepted technical standard: there will be greater pressure to fix a problem where the impact is felt across the industry; and less individual development work is required where solutions can be shared across an industry.

Over time, an app may be functional over an increasing number of variants/models. An app developer must decide which of these to maintain and which to 'sunset'. This decision depends on a range of factors including the number of users on that variant/model, the cost of maintenance and the ability for increasingly obsolete technology to support increasingly sophisticated functionality. It is inevitable that an app operator will choose to sunset models/variants where the cost exceeds the benefit or where it is technically impossible to do so.

Furthermore, when an app launches on a platform for the first time, the platform may have already evolved over multiple previous models/variants, each of which potentially represents a separate technical build. An app developer must decide whether and how to service each model/variant based on the basis of the same cost/benefit analysis.

What is clear is that this is a complex area where technology and product development is evolving at speed. It is therefore crucial that regulation does not lock ODPS providers into a mode of access service delivery that fails to keep pace with the reality of product development.

The description above illustrates that the cost of providing access services is a function of the technical development required to accommodate not only each unique platform, but also each previous variant/model of that platform. If Ofcom is to ensure that the burden of providing access services is not disproportionate to the value and cost of being on a platform, it is important that Ofcom recognises these realities of digital product development and ensures that ODPS providers have sufficient flexibility to employ resources in a way that best serves audiences overall.

In that context, whilst it is helpful that providers have control over their own app, this control should not be overestimated given that the app still has to sit on someone else's platform that the app provider will usually not control. For this reason, ITV is keen to work with Ofcom to develop an approach that ensures regulation is effective and proportionate. For example:

- When launching access services on a particular platform for the first time, regulation should only apply to the provision of access services on the most recent model/variant of that platform.
- ODPS providers should be given a grace period to launch access services on any new device model/platform variant.
- ODPS providers should not be required to maintain access services on any and all device models/ platform variants indefinitely.

We are not suggesting that ODPS providers should not provide access services in these situations, but ODPS providers should not be exposed to unlimited liability. ITV therefore submits that regulation should provide sufficient flexibility to ensure that, in these circumstances, ODPS providers should be free to negotiate the provision of access services (including the costs and timescales involved) with platform operators, unencumbered by regulation.

RESPONSE TO CONSULTATION QUESTIONS

AFFORDABILITY

**Question 1: Do you agree with our suggested approach to assessing exemptions for affordability, i.e. using overall turnover?**

In 2018, we welcomed Ofcom's recommendation that exemptions would be granted on the basis of affordability. However, (as explained above) it is important that exemptions do not operate to inhibit innovation which could be the case if the costs of providing access services are disproportionate to overall audience benefit and even imperil overall service economics. We therefore support an exemption based on ability to pay, with VOD audience size being the best proxy for this (see our response to question 10 below).

ITV does not have a view on whether a separate low-turnover threshold is necessary or whether this should be assessed by reference to overall or relevant turnover. However, if such a threshold is based on *relevant* turnover, Ofcom must consult on any methodology for calculating relevant turnover to ensure consistency across the industry.

Regardless of how the threshold is applied, large ODPS providers should not be able to escape these requirements by recording their turnover outside the UK, as is the case for many of the global ODPS providers – in 2019, Netflix (one of the most popular VOD services in the UK) generated over £1bn in revenue from UK consumers, but avoided paying tax in the UK by registering its activities in the Netherlands.[3]

**Question 2: Do you agree with our suggestion that 'small companies' should be exempted from the requirements?**

We agree with the proposal that any ODPS provider that meets the definition of a "*small company*" should be exempt from the requirement. However, ODPS providers should not be able to avoid the requirements simply by restructuring their group company.

The definition of "*small companies*" in section 382 Companies Act 2006 covers subsidiaries of large publicly traded companies. But does not cover subsidiaries of large *private* companies. For this reason, we propose that ODPS providers meeting the definition of "*small companies*" (as per the definition in section 382 Companies Act 2006) should be exempt so long as they do not form part of a wider corporate group, in which case they can be exempt if the whole group meets the definition of a "*small group*" in section 383 Companies Act 2006.

[3] https://www.independent.co.uk/news/business/comment/netflix-corporation-tax-uk-avoidance-analysis-a9315456.html

**Question 3: Do you agree that a threshold level of 1% for the remaining ODPS providers is proportionate?**

We agree with Ofcom's proposal that ODPS providers for whom the cost of providing access services is disproportionate relative to their turnover should be exempt. We cannot, however, comment on whether 1% of overall turnover represents a proportionate threshold as much of the information used by Ofcom to reach this conclusion is redacted from the Annex to the consultation due to confidentiality.

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We therefore welcome the fact that Ofcom has chosen to adopt an *exemption* based on low turnover, rather than a spending cap as previously suggested. As ITV noted in its letter to Ofcom in November 2019, a spending cap could inadvertently set expectations as to the level of investment made by mainstream services that would be disproportionate compared to the potential benefits delivered. To this end, we welcome Ofcom's statement that "*we expect the costs of provision to be significantly lower*",[4] and trust that this is reflected in any future guidance.

**Question 4: Can you provide any information on the costs of providing access services, including in relation to the various platforms by which services are delivered?**

As explained above, it is important to make a distinction between the provision of access services on (i) platforms where the ODPS provider is in control of programme delivery and the technical specification of access services assets – e.g. where ODPSs are provided through a proprietary app; and (ii) platforms where the ODPS provider's content is disaggregated into a separate 'service' where delivery and the technical standard of the programme files are controlled by a third party – i.e. 'bespoke solution' platforms.

**Access services on app-based platforms**

ITV has already provided Ofcom with substantial information about the costs of providing subtitles via the ITV Hub app, including in response to ITV's response to Ofcom's 2017 consultation,[5] and in the letter to Ofcom in November 2019. Subtitles and audio description are provided in a similar manner, via a separate file/asset that accompanies the programme in the delivery stream. As a result, the information already provided by ITV remains an accurate description of the process and associated costs of providing access services.

***Initial Set Up Costs***

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[4] Para 3.16

[5] https://www.ofcom.org.uk/__data/assets/pdf_file/0030/108669/consultation-odps-accessibility.pdf

The ITV Hub app is now available on 35 platforms, each operating with different technical standards, involving a unique user interface and, therefore, requiring a similar level of upfront investment.

Our best estimate is that enabling access services on new platforms in the future will require a similar level of initial investment each time. However, we note that the more platforms adopt uniform standards the more ODPS providers will face lower costs associated with the launch of VOD services, upgrade to new version/variants and the enabling of access services. It is, therefore, in Ofcom's interest to encourage the uptake of standard technology. This is a strong argument in favour of a limit to ODPS providers' obligation to support 'bespoke standard' platforms. This would give ODPS providers more scope to encourage the take up of standard platform technology by platform operators.

***Ongoing Operational Costs***

In 2017, we explained that ITV's running costs for VOD access services are difficult to isolate because many services are provided under third party contracts covering not only access services but also the delivery of other services related to VOD. However, we were able to provide the following observations about the provision of access services on 'app-based' platforms:

- Running costs for access services relate mainly to the preparation of access services 'assets'. As ITV Hub is a catch up service, this mainly involves the repurposing of linear broadcast access services files and converting them to on demand source file formats. Costs are generally calculated by reference to the number of hours of content converted. [**CONFIDENTIAL**]
- Further running costs (which it is not possible to separate from broader contracts of work) relate to processing (converting the on demand source file into different formats); and delivery (sending an access services file to the end-user via a Content Delivery Network).

Like set-up costs, operational costs are not scalable. As ITV Hub launches on additional platforms and must, therefore, accommodate additional technical standards, operational costs will increase in proportion to the volume of access services-supported content that is made available on each new platform.

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Because these costs are not scalable, it is essential that affordability is tested on a platform-by-platform basis rather than on the basis of the VOD service across all platforms. We discuss this in more detail in response to question 10 below.

***New platform variants/models***

As explained in the introduction, each time a platform or OEM introduces a new model, version or variant, additional development work is required to update the ITV Hub app to meet the new technical requirements. This includes any changes to technology that supports access services. It is difficult to generalise about the costs involved as sometimes new models/variants replicate existing technology. In other cases, this may require technical development akin to what is required for launch on a new platform. It is important that these additional costs are factored into any assessment of the affordability of providing access services.

**Access Services on 'bespoke solution' platforms**

As is explained above, a number of platforms have bespoke operating systems where the platform operator controls the user interface, programme delivery, and, as a result, the technical backbone for facilitating access services. For these platforms, the technical development work necessary to enable access services and to maintain delivery on an on-going basis will vary platform-by-platform. As a result, we cannot generalise about the cost of delivering access services over 'bespoke solution' platforms as these are (by definition) unique to the platform.

In addition, we would caution against taking to strict an assessment of costs in this case because it is very difficult to predict changes in platform technology including how accesses services may be delivered in the future. However, the cost of providing access services will generally be a function of the technical complexity of the platform (i.e. extent to which it is built on bespoke or widely accepted standards) and the willingness of the platform operator to accommodate ODPS providers' needs.

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It is crucial that ODPS providers have sufficient ability to negotiate the level of any investment needed to accommodate access services. Otherwise, the cost of a bespoke build may exceed the commercial benefit and an ODPS provider may choose not to launch on that platform.

We are not suggesting that ODPS providers should not provide access services on these platforms, but that ODPS providers should not be exposed to unlimited liability. ITV therefore submits that regulation should provide sufficient flexibility to ensure that, in these circumstances, ODPS providers should be free to negotiate the provision of access services (including the costs and timescales involved) with platform operators, unencumbered by regulation. The yardstick of reasonableness here should be the costs in relation to an ODPS controlled app in a more standard app-based platform.

**BritBox**

In 2019, ITV (in partnership with BBC) launched BritBox, a standalone SVOD service. Currently, BritBox is available on 12 platforms, each representing a similar level of up-front investment as is required for the inclusion of access services in a platform-variant of ITV Hub.

In addition, BritBox incurs ongoing operational costs, relating to the preparation, processing and delivery of access services files. However, because BritBox is a standalone VOD services, access services assets must either be acquired from the content provider or made from scratch. Even where programmes on BritBox were previously broadcast on an ITV channel or made available on ITV Hub, this content is usually repurposed (e.g. clipped to remove ITV-specific content such as bugs, bumpers and idents) and new access service assets created that work with the BritBox technical standards.

In general, the costs associated with preparing content for BritBox are generally higher than those incurred when re-purposing access services assets created for linear broadcast.

For these reasons, we strongly dispute any implication that operators of more than one ODPS service benefit from efficiencies.

**Question 5: Can you provide any information on the proportion of your ODPS catalogue which is replaced over a given month/ year (rather than archived)?**

The vast majority of content on ITV Hub currently is catch-up content from ITV's linear television channels. As a result, close to 100% of content is replaced over a given month. However, this should be expected to change over time, as catch-up windows can lengthen or shorten, and we can expect to see more online-only content as viewing habits of our audiences evolve.

BritBox is a collection of the best of British television and film over the decades and, as such, has a much lower refresh rate. It is too early in BritBox's life to establish a stable refresh rate but any impact from refresh rates on Ofcom's thinking needs to take into account the vastly varied natures of the different types of ODPS.

**Question 6: If you have a broadcast television service, can you provide any information on the proportion of your ODPS catalogue which is repurposed from broadcast television over a given month/ year?**

ITV notes that non-broadcaster operated VOD services routinely include content that has been previously broadcast. Indeed, the BBC licenses substantial content to providers such as Netflix and Amazon Prime including through co-production arrangements. If there are any efficiencies to be gained from repurposing access service assets/file from those created for broadcast, then these efficiencies would accrue to any and all ODPS providers that provide previously broadcast content. ITV is, therefore, not clear why this question has been addressed only to ODPS operators that have a broadcast television service. It is crucial that Ofcom establishes a level playing field for all providers rather than one that disadvantages often UK owned and controlled players with linear TV operations such as ITV.

From ITV's perspective, ITV operates BritBox as a standalone VOD service, negotiating commercial arrangements for the acquisition of content entirely separately from ITV. As a result, BritBox gains no particular efficiencies from being (jointly) owned by television broadcasters. As Ofcom has not asked non-broadcaster VOD services to provide information about the proportion of their ODPS catalogues which have been repurposed from broadcast television, we have limited our response to this question to information related to ITV Hub.

Currently, on ITV Hub, almost 100% of content is repurposed from broadcast television. However, this should be expected to change over time as we can expect to see more online-only or online-first content as viewing habits of our audiences evolve.

**Question 7: If you have more than one ODPS, can you provide any information on the hours of unique content provided across all your ODPS over a given year?**

We do not understand the relevance of this question. As explained in response to question 4 above, BritBox is a standalone VOD service and gains no particular efficiencies from being (jointly) owned by television broadcasters. A lot of the content on BritBox comes from sources other than ITV - from the BBC, Channel 4 and many other content providers. The programmes on BritBox that do come from ITV are, with very few exceptions, different versions from the ITV Hub programmes and so require additional work to be done to create new, re-synchronised subtitle and audio description files.

**Question 8: Can you provide any information on how much advertising/ subscription revenue you would expect to gain from providing access services on your content?**

It is not possible for ITV to estimate how much additional revenue ITV would gain from providing access services. In relation to advertising, we believe any increment would be too small to show up in any commercial model. In relation to subscription or viewing, there are myriad different factors impacting consumers' propensity to choose one VOD service over another meaning it would be close to impossible to isolate the impact of accessibility in any decision.

**Question 9: If you have provided answers for any of Qs 4-8 above, would you be happy for Ofcom to share this information with Government on a confidential basis, for the purpose of their impact assessment to inform the drafting of regulations?**

Yes

AUDIENCE SIZE

**Question 10: Do you agree with our suggested approach to making exemptions on the basis of audience size?**

ITV very much supports an exemption based on audience size as this represents the fairest proxy for audience benefit and, therefore, ensures costs borne by ODPS providers are proportionate to benefit delivered to audiences. However, this support is subject to the following important clarifications.

## Measuring Audience Size

Ofcom proposes to measure audience size by reference to "*monthly average unique visitors*".[6] If this is to be a proxy for audience benefit, it is important that it reflects actual viewing. There may be many visitors to ODPS providers' app or website that do so for purposes unconnected with the provision of ODPS. We estimate that [**CONFIDENTIAL**] visitors to the ITV Hub each month consume no AV content – they come to read the news, check TV schedules, access their ITV Hub account information (for example). These 'visitors' do not generate revenue for ITV and it is, therefore, not clear they should be factored in to any calculation of 'audience size'. For this reason, ITV proposes that audience size be measured by reference to monthly active unique *viewers*.

## User data on 'bespoke solution' platforms

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Historically, these platforms tended to publish data on the number of set-top-boxes which could be used as a proxy for audience size. However, audiences are increasingly consuming audio video content on multiple devices, tailoring their viewing habit by platform. For example, watching ITV Hub on the main TV, BBC iPlayer on another, with Netflix registered only to a mobile device. As a result, set-top-box ownership is less and less an accurate measure of audience size.

It is likely that in the future, ODPS viewing will become increasingly fragmented as audiences have more choice as to the platforms they are able to use. As a result, it will become increasingly important that ODPS providers have accurate data on where users are actually actively consuming content. Without this information, it will be difficult for ODPS providers to target resources where they are most needed.

For this reason, we would propose that platforms which do not provide ODPS providers with sufficient data to measure audience size should be excluded from these requirements.

## Non-Domestic Services

Ofcom has stated that, following the end of the Brexit transition period, it will only regulate an ODPS if both its head office and editorial decision-making capacity are based in the UK.[7] This raises two important questions that Ofcom has not addressed in its consultation.

### *Ex-UK operated ODPSs*

Some of the most popular VOD services with UK audiences are not based in the UK: Netflix is based in the Netherlands; Apple TV+ in Ireland; Amazon Prime in Luxembourg. Ofcom has itself acknowledged that these global services are increasingly seen as substitutes for

[6] Para 3.29

[7] https://www.ofcom.org.uk/__data/assets/pdf_file/0019/190342/faq-television-on-demand-services-after-brexit.pdf

broadcast TV and VOD services provided by UK operators. Ofcom's latest Media Nations report found that, in 2020 the greatest growth in viewing by UK adults came from subscription on demand services such as Netflix, Amazon Prime Video and Disney+.[8] Although some of that growth can be attributed to changing viewing habits during the Covid-19 pandemic lockdown, it is generally accepted that the take up of global subscription on demand services has merely been accelerated by Covid.[9]

Failure to include these services in any access services regulation would not only put UK operators at a significant competitive disadvantage, it would also significantly undermine Ofcom's stated goal to increase the accessibility of ODPS services that UK audiences use.

***UK-operated ODPSs that serve audiences outside the UK***

Ofcom states at paragraph 3.30 that there should be recognition in legislation "*that 'equivalent' thresholds may need to apply in relation to non-domestic services*" (i.e. ODPSs based in the UK but serving audiences in other EU Member States).

ITV questions whether the Digital Economy Act intended to create obligations for operators serving non-UK audiences. Indeed, following the end of the Brexit transition period, any requirement to exert jurisdiction over non-domestic services serving audiences in other EU member states would fall away. For these reasons, it should be clear in any legislation and/or guidance that these requirements do not apply to ODPSs (such as BritBox USA) that are operated by UK providers but serving audiences outside the UK.

**Question 11: Do you agree with our suggested threshold for assessing audience size?**

ITV does not have an opinion on whether 200,000 unique monthly users represents an appropriate threshold for assessing audience size, in particular due to the fact that much of the data used by Ofcom for its calculation is redacted due to confidentiality.

However, in the introduction to this submission, we set out in considerable detail how technical standards, and therefore the development work required to support access service, varies by platform, with the platform operator governing which technical standards to adopt and how often to update the hardware and software involved. For this reason, ODPS development work (and the costs involved) tends to accrue on a platform-by-platform, which should be reflected in any regulation. ITV, therefore, strongly supports Ofcom's view that the Audience Size exemption should be applied on a platform-by-platform basis.

In this context, our firm view is that "platform" should be defined by reference to the interface through which a user accesses the ODPS, rather some more abstract cross cutting notion of a "platform" which does not accord with the divisions and differences between platforms in

[8] Ofcom Media Nations 2020, page 4,

[9] Ofcom Media Nations 2020, page 24; see also Enders Analysis "Broadcast Television: troubling trends in lockdown", 10 June 2020.

reality. On this basis, in ITV's view the following would constitute distinct "platforms" (the following list is illustrative not exhaustive):

- Individual browsers would constitute separate platforms: e.g. Safari, Chrome;
- Individual mobile operating systems would constitute separate platforms: e.g. iOS, Android;
- Each connected TV brand would constitute a separate platform: e.g. Samsung, LG;
- Where a connected TV uses a third party operating system, the operating system would constitute a separate platform: e.g. Amazon Fire TV, Android TV;
- Other devices/sticks would constitute separate platforms: Roku, Chromecast, Apple TV (TVOS);
- Versions/variants of platforms that involve significant technical upgrades or wholly separate operating systems should each be considered a separate platform: e.g Sky+ vs SkyQ.

Importantly, and contrary to statements made in paragraph 3.33 of Ofcom's consultation, there are compelling reasons the following can't *properly* be considered "platforms" for the purposes of this regulation:

- Connected TV platforms as a whole: in general, different connected TV brands have unique operating systems and technical specifications. Each brand/make should, therefore, constitute a separate 'platform' for the purpose of assessing the audience size threshold. However, where multiple connected TV brands utilise the same third party operating system (e.g. Android TV, Amazon Fire TV) we would consider the "platform" to be the operating system as this is what governs the technical standards on which access services are provided.
- Individual ODPS apps: one individual app (e.g. ITV Hub) may comprise myriad different versions, each created to conform to the particular technical specifications of an individual platform.

**Question 12: If you are an ODPS provider, do you have information on unique visitors to your service, including by the platforms through which your service is delivered? Would you be prepared to share estimated audience metrics with Ofcom on a confidential basis, for use in our impact analysis? (Please provide if so)**

We have provided recent audience figures for ITV Hub and Britbox as an Annex to this submission. This annex contains business secrets and is confidential in its entirety.

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TECHNICAL DIFFICULTY

**Question 13: Do you agree with our suggested approach to assessing exemptions on the grounds of technical difficulty?**

ITV agrees with Ofcom's proposal that providers should be exempt from the requirements where there are significant technical or operational barriers to providing access services on particular platforms.

We believe this exemption should apply in three scenarios:

- Where the ODPS provider does not control programme delivery or file standards (this is generally the case on what we refer to as 'bespoke solution' platforms)
- New models/variants
- Older or obsolete models/variants

In these cases, we agree with Ofcom's suggestion that the regulations should have the effect of requiring ODPS providers to use 'reasonable endeavours' to provide access services. We expect Ofcom will consult further on the definition of 'reasonable endeavours' in due course as it develops guidelines/Codes around the new regulations. However, we thought it would be helpful to share our thoughts on what we believe should be covered by 'reasonable endeavours' in each of these scenarios.

**Technical difficulty on 'bespoke solution' platforms**

Ofcom states that it "*does not expect to make exemptions on those platforms which are largely under the ODPS provider's control*".[10] For the reasons explained in the introduction, the notion that a platform is/not controlled by an ODPS provider, is something of a misconception. The "platform" (as defined in the introduction and in response to question 11 above) is never in the control of the ODPS provider. The key is whether the *delivery of and technical standards for the provision of programme services* is under the control of the ODPS provider (e.g. through a proprietary app) or the platform operator (as is the case for Sky and Virgin Media's catch-up VOD services).

ITV submits that the 'Technical Difficulty' exemption should apply where programme delivery and technical standards are not controlled by the ODPS provider. In these cases, we agree with Ofcom's suggestion that the regulations should have the effect of requiring ODPS providers to use 'reasonable endeavours' to provide access services.

In the introduction, we explained the difference between 'app-based' platforms that utilise more standard technology and 'bespoke solution' platforms where the platform operator controls programme delivery and, therefore, dictates the technical standards and process for providing access services. On these 'bespoke solution' platforms, ODPS providers face potentially unlimited exposure to the cost of providing access services if regulation is not

[10] Para 3.41

limited or capped in some way. For this reason, ITV believes that ODPS providers' liability for providing access services on these platforms should be assessed by reference to the level of investment required to accommodate the more 'standard' app based VOD delivery (i.e. via an ODPS-controlled app) and use of common/widely accepted technical standards.

As a result, and subject to the discussion about the two cost categories below, the level of cost incurred in providing access services via an owned and operated app would be 'reasonable' (see response to question 4 above). Investment required beyond this level should generally be considered to exceed 'reasonable endeavours' and should be the subject of free and fair negotiation between the ODPS provider and platform operator unencumbered by regulation.

**Technical difficulty on new models/variants**

As explained in detail in the introduction, when a platform introduces a new model/variant (outside of the control of the ODPS provider), each app operator must update its app to accommodate the new technical standards. Sometimes this can involve substantial work where a new model/variant cannot accommodate existing technology. In these circumstances, ODPS providers must work with the platform operator to resolve the problem, this may take time and access services may not be available until a fix is found.

It is important that regulation is sufficiently flexible to accommodate this issue. This could, for example, be reflected in guidance around what constitutes 'reasonable endeavours' or (as discussed in response to question 22 below) through some form of 'grace period' on roll out access services to new models/versions. We are keen to engage with Ofcom and discuss the best approach that ensures regulation is effective and proportionate.

**Technical difficulty on older models/variants**

As explained in the introduction, over time, older device models/ platform variants become increasingly obsolete. As audiences migrate to newer models/variants, the benefit of updating older versions may be increasingly outweighed by the cost. At the extreme, certain older platforms are incapable of accepting updates when the technology fails to support them.

For this reason, ITV supports Ofcom's proposal that ODPS providers would be exempt from providing access services on any platforms which technically does not support access services.[11]

In addition, ODPS providers should have sufficient flexibility to apply its resources where they are able to create the most benefit for users. It is, therefore, important that regulation is sufficiently flexible to accommodate this issue. This could, for example, be reflected in guidance around what constitutes 'reasonable endeavours' or through some form of regulatory flexibility for legacy models/versions. In addition, where an ODPS provider

[11] Para 3.40

launches access services on a platform for the first time, these requirements should only apply to the current (at that time) model/variant. That is not to say that ODPS providers would not provide access services on older models/variants, simply that these should be the subject of free and fair negotiation between the ODPS provider and platform operator unencumbered by regulation

We would like to engage with Ofcom and discuss the best approach that ensures regulation is effective and proportionate.

PARTICULAR GENRES/TYPES OF PROGRAMMING

**Question 14: If Ofcom is given discretion in this area, do you agree with our suggested approach to making exemptions for particular genres/ types of programmes?**

**Question 15: If Government wants to specify which types of programming should be exempt in the regulations, do you agree with our provisional view that the exemptions should only be for audio description on news and music programmes?**

ITV agrees that Ofcom should have discretion to exclude certain genres of content where the provision of access services would provide little additional benefit to audiences.

ITV agrees that exemptions should, therefore, apply to audio description on news and music programmes. But it should also apply to coverage of live sporting events, where commentary is provided as there is little space within existing dialogue to provide any additional audio description.

In terms of how this exemption would apply, ITV suggests that the total hours of programming that fall into one or more of the exempt genres be subtracted from an ODPS provider's total catalogue hours used to calculate the % of content that must be provided with audio description.

SIGNING

**Question 16: Do you have any views on our preferred approach to determining applicable signing requirements?**

Ofcom has set out a number of suggestions for how visual signing could be regulated on ODPSs. These suggestions are based on certain assumptions about broadcaster-operated ODPSs and larger services being better placed to offer visual signing. In fact, ODPSs serve a different audience need to that of broadcast services and each ODPS (large or small) is unique, presenting different content and serving different audience needs.

For example, broadcast services have a strict schedule providing appointments to view and live moments when the nation can come together. By contrast, ITV Hub is primarily a catch up service offering audiences the chance to watch their favourite shows at a time that suits them; and BritBox is a standalone VOD service providing a catalogue of British content from the archives and content specifically created for the service. The audiences for these services are different and ITV is best placed to determine what content and functionality best suits the individual needs of each audience.

In addition, audience needs are continually changing. For example, the BBC recently announced that it may drop its regular TV broadcast news bulletins.[12] ODPS providers need to be able respond nimbly to changing needs – including how best to meet the needs of audiences that rely on visual signing.

For this reason, different ODPS providers will need to serve different audience needs in terms of visual signing. For example, a catch up service may prefer to provide sign-interpreted versions of popular programmes and up-to-the-minute news. By contrast, news is rarely a feature of VOD services that focus on entertainment content.

Ofcom should, therefore, be wary to draw too close an analogy to broadcast services which, as explained above, serve a different audience need in terms of the content provided and access services to support that content.

**Question 17: Do you prefer Option A or Option B for determining the levels of sign presentation / funding for alternative arrangements and why?**

As explained in response to question 16, each VOD service meets unique audience needs. It is, therefore, important that ODPS provides have sufficient flexibility to meet the needs of their audience through sign-presented, sign-interpreted or through a contribution to BSLBT (or equivalent provider of sign-supported content). There is also no reason why the levels of any requirements should reflect broadcast services which serve different audience needs.

[12] https://www.bbc.co.uk/news/entertainment-arts-53846414

For this reason, ITV favours Option B which would enable ODPS providers to choose how they meet visual signing requirements in a way that best suits the needs of their particular audiences.

**Question 18: What alternative signing arrangements do you think should be in place for ODPS? Should this be an extension of the current arrangement with BSLBT?**

Ofcom states that its preferred approach is that all providers have a choice to provide presented/interpreted/BSLBT contribution.[13] ITV agrees with this as it provides the greatest discretion for Ofcom to determine a practical approach to regulation and provides the ODPS providers with greatest flexibility to serve audience needs.

However, any requirements need to be set at a level that is affordable and does not disincentivise the provision of access services. The way in which different visual signing options are compared will be very important. For example, we estimate (based on the experience of SignPost) that the cost of producing sign-presented content is [**CONFIDENTIAL**]x the cost of producing sign-interpreted content.

We look forward to seeing the outcome of Ofcom's further research with users and stand ready to work with Ofcom to determine an appropriate cost equivalent.

**Question 19: Do you believe there should be an exemption for signing in cases where it allows ODPS providers to offer subtitling and AD?**

We agree in principle that lower-turnover services should have certain flexibility. However, for the reasons stated above, there is no reason why the requirement should necessarily reflect the system for broadcast content. A reasonable compromise would be for lower-turnover ODPS providers to have flexibility to provide subtitling/AD in place of signing. But, the level at which these should be considered equivalent should be a matter for consultation.

We look forward to seeing the outcome of Ofcom's further research with users and stand ready to work with Ofcom to determine an appropriate cost equivalent.

**Question 20: Do you have any information on the relative costs of providing signinterpreted or sign-presented programming? If so, please indicate whether you would be happy for Ofcom to share this information with Government on a confidential basis, for the purpose of their impact assessment to inform the drafting of regulations.**

There is clearly a very significant difference between the costs of producing an entire programme from scratch with all of the pre-production, production and post-production entailed and the simple filming of a signer against a green screen and then embedding that within a pre-existing programme. It is difficult to give a precise answer as the cost of production depends entirely on the nature of the programme commissioned but a rule-of-thumb estimate (based on the experience of SignPost) would be that the cost of producing

[13] Para 4.20

sign-presented content is [**CONFIDENTIAL**]x the cost of producing sign-interpreted content. We are happy for this information to be shared with Government on a confidential basis.

TARGETS AND IMPLEMENTATION

**Question 21: Do you agree with our suggested approach on how targets should be met across ODPS services and platforms?**

We agree with Ofcom's suggested approach to meeting targets subject to the following important clarifications:

**Interim Targets**

We understood that the legislation would include an interim target for visual signing, in line with interim targets for subtitles and audio description. This is important because it reflects the needs for ODPS operators to change their processes to accommodate the new requirements. In particular, it is likely that the new requirements will necessitate changes to resourcing priorities at our access service suppliers. There is no mention of an interim target for visual signing in Ofcom's consultation. Notwithstanding the need to establish the alternatives for meeting visual signing targets, we would be grateful for confirmation that this interim target will be included in the legislation.

**Repeats**

Ofcom proposes that legislation requires ODPS providers to refresh their provision of access services at the same rate as they refresh content on their service more generally.[14] This approach would prejudice services that provide content with short licence periods such as broadcaster catch-up services. This is particularly unfair given that those short licence periods are themselves a function of the Ofcom regulated terms of trade for PSBs in ITV's case. We have already noted in response to question 10 that catch up services like ITV Hub increasingly compete head-to-head with VOD services including those from large global providers. As a result, these services should face the same regulatory burden. Ofcom's suggested approach risks placing UK-native operators at a significant competitive disadvantage.

ODPS providers should have flexibility to serve their audiences the best way they see fit. We would, therefore, dispute the need for a regulation over the refresh rate of content.

In any event, Ofcom has the ability to revisit and clarify its guidance in the future if there are concerns that operators are 'gaming' the regulation.

[14] Para 5.5

**Multiple Platforms**

Ofcom has suggested an approach for ODPS providers that provide services across multiple platforms. Ofcom states that its preference for the 'prescriptive option' (i.e. that access services should be distributed equally among all non-excluded platforms) is because it wants to establish an expectation that on-demand services should be made available across all platforms, as far as possible.

This conclusion ignores the realities of platform development that we have outlined in this submission and is particularly serious in relation to Ofcom's proposed cross cutting and generic definition of platforms. It takes no account of platform scale (for instance, many users might consider over-delivery on a very big platform to be better overall than lower delivery across the board) or cost considerations or the issue we have outlined about past technologies and new updates which introduces perpetual change which causes uneven delivery over time.

Furthermore, it ignores genuine user preference and usage issues – for instance, subtitles may be more useful for viewing in noisy environments or where it is not possible to use audio. Subtitle functionality may, therefore, be more important on mobile OS platforms than on others. By contrast, the size of a mobile screens may be less conducive to accommodating sign-interpretation compared to TV screens.

For these reasons, it is important that ODPS providers have sufficient flexibility to alter the level of access services provision between different platforms. ITV, therefore, strongly supports option 1 – the flexible approach.

**Question 22: Do you agree with our suggested approach to implementing the requirements?**

We agree with Ofcom's suggested approach to meeting targets subject to the following important clarifications:

**Measurement**

Ofcom does not comment in its consultation on the method by which the size of ODPS operators' catalogues will be calculated. Due to the lack of independent data on the sector, it is important that the method used is consistent across the industry and we trust this will be included in future guidance issued by Ofcom.

We propose that catalogue size should be calculated on the basis of the number of assets/hours made available during the measurement period (i.e. calendar year) subtracting any content that falls into one or more of the exempted genre categories. We propose that compliance with subtitle and audio description should be assessed by reference to the number of programmes/hours that have a corresponding subtitle and/or audio description file/asset.

Compliance with visual signing requirements will depend on the extent to which sign-presented content sign-interpreted content and contributions towards the BSLBT (or equivalent provider) are considered equivalent. We trust that Ofcom will consult on any methodology for this in due course.

**Grace Period for Audience Size Exemption**

Ofcom has suggested that compliance is measured on a calendar year basis (i.e. the number of programmes/hours of content made available with access services over a calendar year). Potentially, this means that where an ODPS provider reaches the audience size threshold on a particular platform, it must assess compliance over the previous calendar year. This would mean ODPS providers being assessed in relation to period within which for much of the year the provider might reasonably assume the obligation did not apply. It would mean ODPS providers would need to plan access service provision on the basis of a forward looking forecast of what audience levels they were likely to reach at the end of a given year – clearly not something over which they have control. ITV hopes that this was not Ofcom's intention. Clearly any obligation should apply prospectively based on actual delivery in the previous calendar year.

ITV proposes that ODPS providers are afforded a grace period during which to implement access services on new platforms and that they will not be assessed against target until the end of a full calendar year following the date on which that platform reaches the audience size threshold.

**Flexibility for New Models/Variants**

As explained in the introduction, ODPS providers can face significant development costs associated with updates to existing platforms where access services are provided. It has even been the case that access services have been interrupted by changes to technology that cannot be remedied by ODPS providers themselves.

It is important that Ofcom's approach to implementing the requirements allows certain flexibility in this regard. This could (as discussed above) be accommodated in any 'Technical Difficulty' exemption or by providing ODPSs a grace period following the implementation of a new model/variant.

We would like to engage with Ofcom on this issues and discuss the best approach that ensures regulation is effective and proportionate.

**Question 23: If you are an ODPS provider, would you be able to provide Ofcom with the information outlined in 5.18 to 5.21 on a regular basis (e.g. every 2 years)?**

- **Calculations on catalogue size:** Yes, ITV can provide this information
- **Number of platforms on which the service is present:** Yes, ITV can provide this information

- **Average costs of establishing access service functionality relative to turnover:** for the reasons set out in the introduction it is difficult to generalise about the costs associated with providing access services on ODPSs that utilise bespoke or technical standards that are not widely accepted. ITV cannot predict how platform technology will develop in the future; whether platforms will tend toward more or less standard approaches. It is therefore not possible to commit with any certainty that this information will be available.
- **Proportion of ODPS content that is likely to be replaced each year (rather than archive); proportion of content which is likely to be repurposed from broadcast channels :** Yes, ITV can provide this information
- **Hours of unique content provided across differently branded on demand services:** for the reasons expressed in response to questions 6 and 7 above, we do not believe requirements should be different for companies that operate more than one ODPS and that each ODPS should be assessed on its own merits. On this basis, Ofcom should not require this information.

**Question 24: Do you have any comments on the cost assumptions included in this Annex?**

No

**Question 25: Do you agree with our assessment of the impact of our proposals on the relevant equality groups? If not, please explain why you do not agree.**

Yes