



SKY'S RESPONSE TO OFCOM'S CONSULTATION ON FUTURE REGULATION OF ON-DEMAND PROGRAMME SERVICES

SECTION 1: INTRODUCTION

- 1.1 We refer to the Ofcom consultation on future regulation of On-Demand Programme Services (“ODPS”) dated 17 December 2015 (“**Consultation Document**”).
- 1.2 In the Consultation Document, Ofcom invites responses on two questions:
- (a) *“Question 1: Do you agree with Ofcom’s proposal substantively to align procedures for investigating breaches of rules for ODPS with established procedures for linear television broadcasting, and do you have any specific comments on any aspect of the draft Procedures at Annex 5?”*
 - (b) *“Question 2: Do you agree with Ofcom’s proposal not to charge fees under section 368NA of the Act, and specifically to cover the small incremental cost involved in becoming sole regulator (rather than co-regulator) of ODPS within the existing fees structure for television broadcasting licensees? If not, which alternative option do you consider would provide a proportionate, fair and pragmatic basis for apportioning these costs?”*
- 1.3 Sky UK Limited (“**Sky**”) has set out its responses to Question 1 and Question 2 of the Consultation Document below.
- 1.4 As a preliminary point, Sky notes that under section 3(3) of the Communications Act 2003 (as amended) (“**Act**”), in performing its duties Ofcom must have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted.

SECTION 2: RESPONSE TO QUESTION 1

- 2.1 Sky broadly supports Ofcom’s proposals to substantively align procedures for investigating breaches of rules for ODPS with those applying to linear television broadcast licensees. However, as set out below, Sky has concerns over the removal of scope appeals to Ofcom and Sky has some specific comments on aspects of the draft procedures for investigating breaches of rules for ODPS (“**Draft Procedures**”).

Removal of scope appeals to Ofcom

- 2.2 Sky submits that an internal review process should be available at the request of any party to a decision on scope. This would provide a more manageable second stage review process for parties than the current proposals for judicial review (which would in any event remain as a third stage review process).
- 2.3 Prior to 1 January 2016, a service which had been determined by the Authority for Television On Demand (“**ATVOD**”) to fall within the scope of an ODPS could appeal to Ofcom (i.e. a scope appeal).
- 2.4 Appeals on scope are important. As stated at paragraph 3.8(e) of the Consultation Document, the definition of an ODPS in section 368A of the Act is not always clear-cut and complaints about non-notified services raise issues of whether the definition is met. If the definition is met then this imposes a burden on the ODPS provider, which must comply with the rules for ODPS (such as compliance with Editorial Rules for ODPS content and compliance with information requests). Furthermore, the initial

failure to notify an ODPS service would be a breach of section 368BA of the Act, resulting in potential sanctions. By contrast, if the definition is not met, then the rules for ODPS do not apply and no breach can have occurred.

- 2.5 From 2011-15, Ofcom issued nineteen decisions on appeals from ATVOD determinations, and upheld the appeals in twelve of these decisions.¹ As acknowledged by Ofcom at paragraph 2.6(a) of the Consultation Document, these decisions “*continue to provide important guidance for service providers.*”
- 2.6 As of 1 January 2016, there is no longer an appeal process from ATVOD to Ofcom in relation to determinations on scope. Instead, ODPS providers now have an appeal route via judicial review in the High Court (alongside an internal review process in the interim).
- 2.7 Sky disagrees with Ofcom’s statement at Section 3.8(f) of the Consultation Document that “*[t]he procedural measures in place have proved sufficient for broadcasters and it is our view that the nature of ODPS is not such that it makes it necessary to supplement these for them specifically.*” The definition of a linear provider is relatively straightforward. By contrast, the definition of an ODPS under section 368A of the Act is not always clear-cut and has resulted in appeals, many of which have been successful. Therefore, it is necessary to supplement the procedural measures to factor in the issues surrounding determinations on scope.
- 2.8 Sky submits that judicial review is too high a hurdle for a first stage appeal on scope, and both expensive and time consuming (for both parties). Judicial review is widely considered to be a remedy of last resort, with claimants encouraged to explore all possible alternatives before applying for judicial review given that a court may refuse permission to bring a claim if an alternative remedy has not been exhausted. This proposal may therefore discourage appeals. This would increase the chances of false-positives remaining unchallenged, which impacts all potential ODPS providers given that the decision will set a precedent for future decisions and act as guidance.
- 2.9 There should be a step before judicial review, one that is comparable to the previous option of an appeal to Ofcom and presenting potential appellants with a lower hurdle. Under the Interim Breach Procedures, service providers may request an internal review of the decision by Ofcom under certain circumstances. This internal review procedure will be provided by appropriately qualified Ofcom staff not involved in the original decision.
- 2.10 Given the importance of scope appeals and the fact that Ofcom has identified an appropriate and manageable substitute to the previous appeal process, Ofcom should implement the internal review process on a permanent basis.

Comments on specific provisions of the Draft Procedures

- 2.11 As a general point, Sky believes that Ofcom should continue to take proactive steps to make clear to potential complainants that the rules that apply to linear services do not fully apply to ODPS (i.e. clarification on the Ofcom website, Ofcom guidance, complaint forms, etc.). This will help minimise complaints where the complainant has misapplied linear rules to ODPS content.

Sections 1.12 and 1.21

- 2.12 Sky submits that when Ofcom opens an investigation into a complaint, Ofcom should inform the broadcaster as soon as possible even if Ofcom believes the broadcaster is already investigating a complaint. This will ensure that the broadcaster is able to investigate the complaint promptly and take any necessary steps as soon as possible.

¹ Ofcom, Scope Appeals. (<http://stakeholders.ofcom.org.uk/broadcasting/on-demand/atvod-archives/scope-appeals/>)

Section 1.13

- 2.13 A 'catch up' service is an ODPS and should be regulated under ODPS rules. Sky queries why Ofcom considers it may be more appropriate to consider a complaint in respect of catch-up content under broadcasting procedures. Sky cannot envisage any circumstances in which such an approach would be appropriate.
- 2.14 As a more general point, Sky notes that this would appear to place a greater burden on ODPS providers who also provide a linear service, by comparison to ODPS-only providers.

Sections 1.15 and 1.24

- 2.15 Ofcom should ensure that the ODPS provider has 'sufficiently detailed' information about the complaint to carry out a timely investigation. In particular, when making a request for a copy of the relevant programme or material, Ofcom should provide details of how the viewer accessed the content (in particular because viewers sometimes incorrectly identify on what service they viewed the content). This will allow Sky (and other ODPS providers) to confirm which programme is the subject of the complaint and whether the viewer accessed the content on their ODPS, or whether in fact the viewer accessed the content on a linear service. This will avoid any delays resulting from the ODPS provider having to request further specific detail about the complaint in order to identify the content in question. Sky notes that under the linear complaints procedure it has experienced issues in correctly identifying the content subject to the complaint, and that this can add considerable confusion and delays to the complaints process.

SECTION 3: RESPONSE TO QUESTION 2

- 3.1 As set out below, Sky submits that neither Option A, Option B nor Option C is appropriate for recovery of the costs of ODPS regulation. On the basis that Option A is stated to be Ofcom's "*preferred option*", Sky has focused its response on Option A, albeit Sky does briefly address Option B and Option C.

Recovery of costs of ODPS regulation under section 347 of the Act

- 3.2 At paragraph 4.18 of the Consultation Document, Ofcom states that in light of the close relationship between linear television broadcast and ODPS, it is of the view that section 347 of the Act allows for the recovery of costs of ODPS regulation. Ofcom has provided limited arguments in support of its view that there is a close relationship between linear television broadcast and ODPS (at paragraphs 3.3 and 3.4 of the Consultation Document), and why such a close relationship would allow Ofcom to recover costs relating to the regulation of ODPS under section 347 of the Act.
- 3.3 The fact that the Audiovisual Media Services Regulations 2010/419 ("**AMSR**") added section 368NA to the Act specifically for the recovery of fees relating to ODPS suggests that section 368NA of the Act, and not section 347 of the Act, is the most appropriate (and potentially only) authority for recovery of costs of ODPS regulation by Ofcom.

If Ofcom decides to recover its costs under section 347 of the Act, the principles of section 368NA(3) of the Act should still apply

- 3.4 Sky submits that the principles of section 368NA(3) of the Act (i.e. the fee must be an **appropriate contribution**, justifiable and proportionate) should apply equally whether Ofcom charges a separate fee for ODPS regulation (under section 368NA of the Act) or whether Ofcom includes the fee for ODPS regulation within its Broadcasting Act licence fees (under section 347 of the Act).
- 3.5 Furthermore, Sky notes that:

- (a) section 3(3) of the Act requires that in performing its duties Ofcom must have regard in all cases to the principles under which regulatory activities should be proportionate, consistent and targeted; or
 - (b) section 347(2)(b) of the Act requires that any Broadcasting Act licence fees should be **justifiable and proportionate** to the matters in respect of which they are imposed.
- 3.6 Option A would not represent an appropriate contribution by each provider towards meeting the likely costs of ODPS regulation. Furthermore, Option A would not be justifiable and proportionate. This is because under Option A:
- (a) some ODPS providers would be overpaying (i.e. those who are broadcast licensees);
 - (b) other ODPS providers would be underpaying (i.e. those who are not broadcast licensees, who would pay no contribution); and
 - (c) any broadcast licensees that provide no ODPS services would be contributing towards the cost of ODPS regulation despite providing no ODPS services.

All ODPS providers should contribute towards the costs of ODPS regulation

- 3.7 Sky submits that in order to promote “compliance discipline”, all ODPS providers should contribute towards the costs of ODPS regulation.
- 3.8 Under Option A, only those ODPS providers that are also broadcast licensees will contribute towards the cost of ODPS regulation. Those ODPS providers that do not contribute towards to the costs of ODPS regulation may be less inclined to comply with regulation.

There is a lack of transparency on fees under Option A

- 3.9 Sky notes that section 3(3) of the Act requires that in performing its duties Ofcom must have regard in all cases to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted. Furthermore, section 347 of the Act requires that fees imposed under section 347 of the Act should be justifiable, proportionate and transparent.
- 3.10 Sky submits that there is a lack of transparency on fees under Option A.
- 3.11 Transparency on fees is necessary for broadcast licensees and ODPS providers for financial planning purposes. At the very least, Ofcom should identify the categories of costs that will be allocated to broadcast regulation, ODPS regulation or shared between broadcast and ODPS regulation. At paragraph 4.6 of the Consultation Document Ofcom acknowledges that it has in the past identified and separated out its costs of ODPS regulation (as a concurrent regulator). These costs were £21,996 in 2015-16.
- 3.12 Under Option A, it appears that there will be no transparency on how much of the Broadcasting Act licence fee will relate to ODPS regulation. By contrast, under the old regime ATVOD published a fee tariff (i.e. for 2015-16 the fee ranged from £96 per annum for “non-commercial” ODPS with a single outlet, up to £11,135 for “Super A” providers with turnover over £25.95 million). From Sky’s perspective, it is preferable to have some visibility over how much it and other ODPS providers are contributing towards the cost of ODPS regulation.

Ofcom should introduce a solution that is fit for the future and fair

- 3.13 Ofcom acknowledges at paragraph 4.19 of the Consultation Document that the ODPS sector continues to develop and evolve, and that it would remain open to Ofcom to revisit its position at a later date were

ODPS revenues to grow substantially and/or a substantial mismatch to develop between ODPS providers and broadcast licensees.

3.14 This suggests that Option A is only an interim solution, under which:

- (a) Broadcast licenses are treated unfairly, as Ofcom would need to recover a larger proportion of the incremental costs from those ODPS providers paying Broadcasting Act licence fees in order to cover the shortfall arising from those ODPS providers not paying Broadcasting Act licence fees.
- (b) There is uncertainty for ODPS providers as Ofcom may change its position in the future.

3.15 Sky submits that Ofcom should instead implement a solution that is fit for the future and fair.

Option B is not appropriate

3.16 For many of the same reasons as noted above in relation to Option A, Sky submits that Option B is not appropriate. In particular, Option B is not proportionate on the basis that only broadcast licensees will be contributing towards the costs of ODPS regulation.

Option C is not appropriate

3.17 Although Sky supports Ofcom's proposals under Option C to charge a fee under section 368NA of the Act (as opposed to under section 347 of the Act), Sky submits that Option C is not appropriate. All ODPS providers, regardless of their size, should contribute towards the costs of ODPS regulation, in particular in order to promote "compliance discipline".

Sky

March 2016