

RESPONSE OF CHANNEL 5 BROADCASTING LTD (FIVE) TO THE OFCOM/ATVOD CONSULTATION ON SETTING REGULATORY FEES FOR VIDEO ON DEMAND SERVICES UNTIL 31 MARCH 2011

Five welcomes this opportunity to submit a brief response to this consultation. We support the proposal for a flat-rate fee, which we believe is most appropriate for a young industry at an early stage of regulation. While there may be arguments for a different approach to ATVOD's fee structure from 2011/12 onwards, we believe the arguments for a flat fee for the current financial year are overwhelming.

Five has been a provider of on-demand versions of our television programmes since 2006, currently through our Demand Five service. We have been actively involved in the process that has led to the designation of ATVOD as the co-regulatory body responsible for the editorial side of notifiable video-on-demand services. Five's Head of Content Legal Advice, Chris Loweth, is one of the industry members of the ATVOD Board.

Consultation Questions

Question 1 *Do you have any comments on our analysis concerning the number of services that are likely to be subject to regulation?*

We believe the Ofcom analysis is adequate as far as it goes, but there may well be services that fall within the scope of the AVMS regulations of which Ofcom is currently unaware. Only now that the regulations have been passed by Parliament, and ATVOD has been designated as the co-regulator, will it become possible to come to grips fully with which services are actually in scope.

Question 2 *Do you have any comments on our estimates for regulating ODPS set out in paragraphs 3.23 to 3.29 above?*

No, we think the estimates are broadly correct (although we assume they are based on an estimate of the likely costs that ATVOD and Ofcom expect to incur until 31 March 2011, not 2010 as stated in the third bullet point of paragraph 3.29).

Question 3 *Do you agree or disagree with us taking account of the criteria and principles outlined in paragraphs 3.31 and 3.34 above in developing our approach for the 2010-2011 Fees?*

Although Five does not agree with all aspects of the Ofcom Charging Principles, we agree that they are a good starting point for consideration of the ATVOD fee structure.

Question 4 *Do you agree or disagree with our assessment of the alternative bases of charging VOD regulatory fees laid out in figure 2 above?*

We believe this is a fair assessment, especially as Ofcom and ATVOD are only considering the first 15 months of this new regime.

Question 5 *Do you agree or disagree with our assessment of the alternative attributes laid out in figure 3 above?*

We do not disagree with the assessment. However, we believe the analysis is over elaborate; ATVOD and Ofcom should have concentrated on basic principles rather than gradations of options.

Question 6 *a) Do you agree or disagree with our analysis above in relation to a minimum payment mechanism? b) Are there any other bases and attributes for a regulatory fees approach that we have not considered?*

Five strongly agrees that a flat rate minimum fee is the most appropriate approach at present. This is both the most straightforward to administer and, in the absence of detailed financial and performance information about all services, is the least inequitable.

Until more information has been gathered about the sector (which may be used to determine future charging mechanisms), a flat rate fee offers the fairest approach.

Question 7 *Do you agree or disagree with the approach we have adopted to drawing up options for the 2011-2012 Fees as outlined in Section 3?*

We agree.

Question 8 *a) Do you agree or disagree with our preferred approach – Option C – as a means of ensuring an appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011?*

We agree with Option C as the appropriate revenue model for the financial year to 31 March 2011, as it provides the most secure way of financing ATVOD in its first year. As the amount of revenue being generated in the sector is to a large extent unknown at present, the risks inherent in a revenue based model are either that fee levels are set too low, in which case ATVOD will not be properly financed and hence not able to fulfil its duties; or, in order to compensate for this risk, fees are set so high as to lead to some services paying disproportionately large amounts. A flat rate fee would be based on what is currently most known about a sector about which there is only limited information – the number of providers.

Question 8 b) *Do you agree or disagree with either Options (A) or (B) as a means of ensuring an appropriate aggregate contribution, to be recovered by way of fees payable by ODPs in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011?*

We disagree with both Options A and B for the reasons stated above. We have no objection in principle to a revenue based approach in the longer term; but we believe the lack of knowledge about how much revenue is being generated in the sector is a major barrier to devising a sensible tariff system for the current year.

Five has included our estimate of the revenue generated by our Demand Five service in 2009 in the Notification which we have submitted to ATVOD. This figure is confidential; but we have no objection to ATVOD and Ofcom using it to calculate the total revenue generated in the sector.

Question 9 *Are there any potential impacts arising from the options we have laid out in Section 4 that we have not considered?*

We do not believe so.

Question 10 a) *Do our proposals, as outlined in Section 4, concerning possible options for a regulatory fees approach for VOD services have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity? b) Are there any other possible equality impacts that we have not considered?*

We do not believe there is anything to add.

Channel 5 Broadcasting Ltd

May 2010