



Regulatory fees for video on demand services for the period up to 31 March 2011

Joint statement by Ofcom and the Association for Television on Demand ("ATVOD")

Statement

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Section 1

Executive Summary

Summary of Decisions

- 1.1 This Statement is a joint Statement between Ofcom and the Association for Television on Demand (“ATVOD”), the body that Ofcom designated on 18 March 2010 as the co-regulator for video on demand (“VOD”) editorial content before our consultation on proposals for the setting of regulatory fees for providers of video on-demand services (defined as ‘on-demand programme services’ - “ODPS”¹) for the period up to 31 March 2011 (“the VOD Fees Consultation”)².
- 1.2 Having duly considered and taken account of the responses we received to the VOD Fees Consultation and in light of all the information currently available and the relevant legislative provisions, Ofcom and ATVOD have decided:
- that, having considered the alternative approaches to setting fees set out in the VOD Fees Consultation for the reasons more fully explained in Sections 3 and 4 of this Statement, a flat-rate fee approach to the setting of fees is the most appropriate basis to adopt in this first year of regulation in order to ensure that ATVOD is adequately funded to carry out its regulatory activities for the period 1 April 2010 to 31 March 2011;
 - that having reviewed the estimated number of notifiable services, for the reasons more fully set out in Section 3 of this Statement, and taking account of the statutory requirement to ensure that the aggregate amount of fees levied are an appropriate contribution to the estimated likely costs of regulation for 2010/2011, the previous working assumption that fees should be calculated on the basis of an estimated 150 notifiable services should be changed to **129** as a more reasonable basis on which to calculate fees for the relevant period;
 - that accordingly, a fee per service of **£2,900** now represents the appropriate contribution to be paid by providers towards the likely costs of carrying out the relevant regulatory functions during the period 1 April 2010 to 31 March 2011 (“the 2010-2011 Fees”); and
 - that having taken account of concerns raised by a few respondents to the VOD Fees Consultation that there may be some (as yet unidentified) small scale providers of actual or prospective ODPS services who might find a fee of £2,900 prohibitive, and that such a fee would therefore not be justifiable or proportionate in relation to them, we should seek further information from the providers themselves. To date, we have not received any representations on such concerns from any small-scale providers themselves, nor have any small-scale providers been specifically identified to us. We are therefore inviting any small-scale (local, community) providers of ‘on demand programme services’ (“ODPS”) (or those who intend to provide such services) who believe they may have genuine difficulties in being able to pay the £2,900 fee - either because they would be inhibited from being able to provide a new ODPS or they would be prevented from continuing to provide an existing one) - to contact Adam

¹ See paragraph 2.1 below.

² See http://www.ofcom.org.uk/consult/condocs/vod_proposals/vod_proposal.pdf

Baxter of Ofcom³ in writing by **5 pm on 15 July 2010** in writing with full details of their particular circumstances. These circumstances would include, in particular, details of their actual or estimated revenue and turnover and information about themselves (e.g. who they are, and what their status is) and the service they are providing or intend to provide. If the evidence suggests that a separate limited category of provider exists for whom a compelling case can be made for considering setting a lower tariff, then we will consider what different approach may be appropriate. This would be in order to ensure that the fees imposed on them are justifiable and proportionate whilst still ensuring that the aggregate amount of fees levied represents an appropriate contribution to the estimated likely costs of regulation for 2010/2011 in accordance with our statutory duties. If such a case is made, it may necessitate a further short consultation to determine the relevant eligibility criteria and what level of fee is appropriate for providers in their situation.

Background

1.3 On 26 March 2010, we published our consultation (“the VOD Fees Consultation”), which sought stakeholders’ views on questions relating to the setting of the 2010-2011 Fees. In Section 2 of this Statement, we set out the legislative and regulatory background to the consultation including an assessment of the suitability of Ofcom’s current principles⁴ for fee-setting which apply to the other sectors Ofcom regulates. In short:

- the new European Audiovisual Media Services (“AVMS”) Directive, which was implemented into UK legislation on 19 December 2009 by the Audiovisual Media Services Regulations 2009 (“the 2009 Regulations”)⁵, requires that statutory, television-like regulation is extended to certain types of VOD editorial services. The main editorial content requirements are that VOD service providers must:
 - enable users to identify the provider of the service and the relevant regulatory authority;
 - not include content which contains any incitement to hatred;
 - not include content which seriously impairs the physical, mental or moral development of under 18s;
 - ensure that sponsored programmes fulfil certain requirements (e.g. users must be appropriately informed about sponsorship arrangements); and

³ Please see paragraphs 4.86 and 4.87 below for the relevant contact details.

⁴ See Ofcom’s consultation *Principles for setting Licence Fees and Administrative Charges*, published on 30 September 2004. In particular “the Fees Criteria” laid out in paragraph 3.2, http://www.ofcom.org.uk/consult/condocs/licence_admin_fee/licence_admin.pdf; and Ofcom’s *Statement of Charging Principles* (“the Charging Principles”) published on 8 February 2005, http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf

⁵ See the Audiovisual Media Services Regulations 2009 (SI 2009/2979) (“the 2009 Regulations”), http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

- ensure programmes do not contain product placement, except, where permitted by the Member State in relation to certain types of programmes (e.g. light entertainment programmes) in accordance with the AVMS Directive.

A range of rules also apply to advertising included in VOD services subject to regulation;

- the 2009 Regulations amend the Communications Act 2003 (“the Act”) to give Ofcom functions in relation to the regulation of ODPS, and the 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. In making any designation, Ofcom has to be satisfied that the body it proposes to designate has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority (“the Financial Resources Criterion”)⁶;
- on 18 March 2010, a further set of regulations (“the 2010 Regulations”)⁷ came into force, amending the Act, and giving Ofcom further powers, including fee raising powers; and
- on 18 March 2010, on the basis of written undertakings and information provided by ATVOD, Ofcom formally designated ATVOD as a co-regulator to carry out a range of functions in relation to the regulation of VOD services. Included in the designated functions was the power to set the appropriate regulatory fees for ODPS, subject to Ofcom’s prior written approval⁸.

The approach to developing the 2010-2011 Fees for video on-demand services

1.4 In Section 3 of this Statement, we consider in turn the various responses we received to the questions we asked in Section 3 of the VOD Fees Consultation. These questions were in relation to the various factors we considered in developing an approach to the 2010-2011 Fees:

- the estimate of the number of ODPS subject to regulation. With a view to providing a reasonable estimate of the total number of notifiable services, and for the purposes of setting the regulatory fee, we proposed a working assumption of a total of 150 notifiable services. Respondents were broadly supportive or made no comment about our analysis, although concern was expressed about whether we had taken account of, for example, the number of small-scale VOD services;
- the statutory criteria relating to regulatory fees, as contained in the 2010 Regulations. In particular, in consulting on any proposed 2010-2011 Fees, ATVOD and Ofcom must prepare such estimate as it is practicable for them to make of the likely costs for carrying out its relevant functions during each financial year. Respondents broadly agreed or made no comment on the estimates that we put forward;

⁶ See section 368B(9)(c) of the Act reproduced in Annex 5, VOD Fees Consultation.

⁷ See the Audiovisual Media Services Regulations 2010 (SI 2010/419) (“the 2010 Regulations”), http://www.England-legislation.hmso.gov.uk/si/si2010/uksi_20100419_en_1

⁸ In accordance with section 368NA of the Act reproduced in Annex 6, VOD Fees Consultation.

- Ofcom's approach to fee setting. We asked stakeholders whether they agreed with Ofcom and ATVOD's approach in working up the proposals for the 2010-2011 fees to take account of the principles set out in Ofcom's *Statement of Charging Principles* ("the Charging Principles")⁹ published on 8 February 2005, which lays out charging principles that Ofcom applies in other sectors it regulates, such as broadcasting. Respondents broadly agreed or made no comment with our taking account of the Fees Criteria and Charging Principles in developing our approach to the 2010-2011 Fees;
- the advantages and disadvantages of various bases that might be applicable for the 2010-2011 Fees. In the VOD Fees Consultation, we stated our initial analysis that revenue and a flat-rate fee could provide suitably robust bases for the 2010-2011 Fees. All respondents that responded on this issue agreed with our analysis; and
- the advantages and disadvantages of various attributes that could be used in a variable approach to the 2010-2011 Fees, based on revenue, to enable such an approach to be more progressive (i.e. regulatory fees could be proportionally more from larger regulated services). We stated our initial analysis that, due to the lack of financial data and the nascent state of the VOD sector, we could not with any certainty or reliability propose a progressive fee system but that a minimum fee could potentially provide a suitable feature of a revenue-based approach to the 2010-2011 Fees. All respondents that responded on this issue agreed wholly or mainly with our analysis.

The 2010-2011 Fees for video on demand services

- 1.5 In Section 4, we summarise the stakeholder comments we received, and our response, in relation to the three options we put forward in Section 4 of the Fees Consultation for the amount and structure of fees to be paid to the regulator by ODPS providers. The options were: **Option A (Revenue model); Option B (Revenue model with a minimum payment); and Option C (Flat-rate fees model)**. In the VOD Fees Consultation, we acknowledged that all of the three options outlined above have disadvantages to varying degrees. Respondents predominantly considered Option C as the most practical and appropriate for determining the 2010-2011 Fees.
- 1.6 We go on to explain our decision and the reasons for reaching it, having taken account of the responses we have received on the level of fees payable by ODPS providers for the first financial year of the new regime.

Our decision

- 1.7 Having considered the responses we have received to the VOD Fees Consultation, we have concluded the following:
- there is no regulatory fee structure that would satisfy all VOD service providers, although the majority of respondents favour the proposal for a flat-rate fee;

⁹ See footnote 4.

- it is not practical or feasible to adopt any approach to the 2010-2011 Fees that is based on revenues (or any of the other potential bases suggested in the responses we received) given the current lack of available data;
- that, on balance, the flat-rate fee represents the most practical option for setting a justifiable and proportionate fee for the financial year 2010-2011; and
- alternative approaches based on other bases (such as revenue and audience share) may merit further consideration when the regulator comes to set regulatory fees in future years.

1.8 Given the above we have decided that the applicable regulatory fee to be paid immediately by providers of ODPS for the period 1 April 2010 to 31 March 2011 will be **£2,900** per ODPS.

Next Steps

- 1.9 Given that at the time of writing, we can only estimate the minimum likely number of notifiable services that will be required to pay a regulatory fee, we will continue to review regularly the number of ODPS that are notified to ATVOD.
- 1.10 Notwithstanding our decision, we remain alert to the concerns, expressed by some respondents, that a flat-rate fee, as determined, would be likely to have a serious impact on small-scale and local community-based ODPS although no such providers were identified to us by these respondents nor did any identify themselves to us in order to raise this issue.
- 1.11 In order for us to consider whether there is a case for a different fee to be payable by small-scale ODPS we will need evidence from the providers themselves to support the broad assertions that have been made. We are therefore asking for evidence from relevant ODPS providers, as outlined in the final bullet-point of paragraph 1.2 above.

Section 2

Background

The purpose of this consultation

- 2.1 On 26 March 2010, we published our consultation (“the VOD Fees Consultation”)¹⁰, which sought stakeholders’ views on questions relating to the setting of regulatory fees to be paid by providers of video on demand (“VOD”) services that come within the definition of an “on-demand programme service” (“ODPS”)¹¹ under section 368A of the Communications Act 2003 (“the Act”) and are subject to regulation¹² by Ofcom and the Association for Television on Demand (“ATVOD”).
- 2.2 In this document we set out:
- the legislative and regulatory background to the issue of regulatory fees and assess the suitability of applying Ofcom’s current principles¹³ in the area of fee-setting for other sectors Ofcom regulates (Section 2);
 - the stakeholder comments we received, and our response, in relation to the background factors associated with setting up a regulatory fees structure for ODPS (Section 3); and
 - the stakeholder comments we received, and our response, in relation to the options we put forward for the amount and structure of fees to be paid to the regulator by ODPS providers (Section 4). In particular, we lay out our decision, having taken account of the responses we have received, as to what represents the appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011 (“the 2010-2011 Fees”), towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011.
- 2.3 This document is a joint Statement between Ofcom and ATVOD, the body that Ofcom designated on 18 March 2010 as the co-regulator for VOD editorial content. The Statement only relates to the setting of fees to be paid by providers of notifiable VOD services (i.e. ODPS) during the first financial year of the new regime: 1 April 2010 to 31 March 2011. Under section 368NA of the Act¹⁴, such fees must be

¹⁰ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/vod_proposal.pdf

¹¹ The concept of an “on-demand programme service” was introduced into the legislation by the Audiovisual Media Services Regulations (“2009 Regulations”) – see paragraph 2.5 below. For guidance as to which services might fall into the definition of ODPS, see *Application and scope of the regulatory framework on VOD services* (‘Scope Guidance’), contained in Annex 7, VOD Fees Consultation.

¹² See the Audiovisual Media Services Regulations 2009 (SI 2009/2979)(“the 2009 Regulations”), http://www.opsi.gov.uk/si/si2009/ukSI_20092979_en_1

¹³ See Ofcom’s consultation *Principles for setting Licence Fees and Administrative Charges*, published on 30 September 2004. In particular “the Fees Criteria” laid out in paragraph 3.2, http://www.ofcom.org.uk/consult/condocs/licence_admin_fee/licence_admin.pdf; and Ofcom’s *Statement of Charging Principles* (“the Charging Principles”) published on 8 February 2005, http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf

¹⁴ See the Audiovisual Media Services Regulations 2010 (SI 2010/419)(“the 2010 Regulations”), http://www.England-legislation.hmso.gov.uk/si/si2010/ukSI_20100419_en_1

sufficient to enable ATVOD and Ofcom to meet, but not exceed, the likely costs of carrying out the relevant functions during that year and must, in the regulator's opinion, represent the 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. It should be noted that the costs incurred by ATVOD and Ofcom for carrying out the relevant functions (and in the case of ATVOD preparing for designation) in the period 19 December 2009 to 31 March 2010, can be recouped from the regulatory fees set for the period 1 April 2010 to 31 March 2011. However, the regulatory fees are liable to be paid only by service providers who were providing an ODPS on 18 March 2010, or who commence provision after this date.

- 2.4 Although this is a joint Statement, the ultimate responsibility for deciding the 2010-2011 Fees remains with Ofcom under the Designation¹⁵. This Statement does not deal with what would be an appropriate amount and structure of regulatory fees beyond 31 March 2011. The relevant regulatory authorities are required annually to publish costs incurred and estimated for the next financial year and to set the appropriate fees to be paid for that period. In accordance with Section 368NA of the Act, the level of fees to be paid after 31 March 2011 will be assessed annually, following the procedure set out in the Act.

The legislative and regulatory background

- 2.5 The new European Audiovisual Media Services ("AVMS") Directive¹⁶, which was implemented into UK legislation on 19 December 2009 by the Audiovisual Media Services Regulations 2009 ("the 2009 Regulations")¹⁷, requires that statutory, television-like regulation is extended to certain types of VOD editorial services. The main editorial content requirements are that VOD service providers must:

- enable users to identify the provider of the service and the relevant regulatory authority;
- not include content which contains any incitement to hatred;
- not include content which seriously impairs the physical, mental or moral development of under 18s;
- ensure that sponsored programmes fulfil certain requirements (e.g. users must be appropriately informed about sponsorship arrangements); and
- ensure programmes do not contain product placement, except, where permitted by the Member State in relation to certain types of programmes (e.g. light entertainment programmes) in accordance with the AVMS Directive.

A range of rules also apply to advertising included in VOD services subject to regulation.

- 2.6 With the implementation of the 2009 Regulations, Ofcom was given new functions in relation to the regulation of VOD services. In particular, Ofcom was given the power

¹⁵ See paragraph 5(iii), <http://www.ofcom.org.uk/tv/ifi/vod/designation180310.pdf>

¹⁶ EC Directive 2007/65/EC. For a fully codified version of the Directive see:

<http://register.consilium.europa.eu/pdf/en/09/st03/st03683.en09.pdf>

¹⁷ SI 2009/2979, http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

to designate any corporate body to be, to the extent provided by the designation, the appropriate regulatory authority for the purposes of exercising some or all of these new functions. In reaching any decision on whether to designate a co-regulator, Ofcom has to be satisfied that the body it proposes to designate fulfils certain criteria, including whether the designated body has access to financial resources that are adequate to ensure the effective performance of its functions

- 2.7 However, at the time of its 2009 Statement, Ofcom was not in a position to designate ATVOD as the co-regulatory body for VOD editorial content since it had to ensure prior to designation, that ATVOD would have the necessary powers to levy fees to provide it with the necessary funding of its activities. As explained in paragraph 2.12 of the 2009 Statement, the additional obligations on ODPS providers to notify their ODPS to the regulator and pay a regulatory fee could not be introduced until they had been notified to the European Commission in accordance with the requirements of the European Technical Standards Directive which requires a three month notification period.
- 2.8 On expiry of the three month notification period to the European Commission in February 2010, the Government was able to proceed with making further statutory provision for the levying and payment of fees under the 2010 Regulations. The 2010 Regulations amended the Act with effect from 18 March 2010. From this date, Ofcom was given further powers including powers to levy regulatory fees. The statutory criteria relating to such fees are referred to in paragraph 3.30 below.
- 2.9 Having consulted in late 2009 on the proposal to designate ATVOD, and having been given the power to levy fees, on 18 March 2010, and on the basis of written undertakings and information provided by ATVOD, and with the support of stakeholders, Ofcom formally designated ATVOD as a co-regulator to carry out a range of functions in relation to the regulation of VOD services. Included in the designated functions was the power to require ODPS providers to pay a regulatory fee in accordance with Section 368NA of the Act, the level of regulatory fee being subject to Ofcom's prior written approval.
- 2.10 In accordance with the requirements of the Act, Ofcom and ATVOD have consulted ODPS providers on what the regulatory fees should be¹⁸. Having consulted on this in March 2010, the rest of this Statement sets out:
- the stakeholder comments we received, and our response, in relation to the factors relating to the approach we suggested in determining the 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 (Section 3); and
 - the stakeholder comments we received, and our response, in relation to the options we put forward in Section 4 of the Consultation for the amount and structure of fees to be paid to the regulator by ODPS providers. In particular, we lay out what we have determined, having taken account of the responses we have received, to be the regulatory fees to be paid by providers of notifiable VOD services (i.e. ODPS) in respect of each ODPS service, during

¹⁸ See section 368NA(5)(c) of the Act. The VOD Fees Consultation was issued on 26 March 2010, see http://www.ofcom.org.uk/consult/condocs/vod_proposals/vod_proposal.pdf

the first financial year of the new regulatory regime (1 April 2010 to 31 March 2011).

Summary of respondents

- 2.11 Ofcom received 18 responses to the VOD Fees Consultation which were from a wide range of stakeholders. Five of those requested confidentiality and are therefore not identified when their responses are referred to in this Statement. A further respondent (S4C) asked that its response not be published on Ofcom's website.
- 2.12 The responses from those organisations who did not request full or partial anonymity have been published on Ofcom's website¹⁹. These were from the following organisations: the Association for Interactive Media and Entertainment ("AIME"); British Sky Broadcasting Plc ("BSkyB"); BT Plc ("BT"); Channel 4; Channel 5 Broadcasting Ltd ("Five"); the Mobile Broadband Group ("MBG"); the Periodical Publishers' Association ("PPA"); SeeSaw IPTV Ltd ("SeeSaw"); United for Local Television ("ULTV")²⁰; Viasat Broadcasting Ltd ("Viasat"); Virgin Media; and Walt Disney Company Limited ("Disney").

¹⁹ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

²⁰ ULTV represents a number of community and local TV operators and campaigners, and whose aim is the recognition of "local TV as a public service".

Section 3

Developing an approach to the 2010-2011 Fees for video on demand services

Introduction

3.1 In Section 3 of the VOD Fees Consultation, we set out:

- the background to the application of a regulatory fee on ODPS service providers;
- what we said in the 2009 Consultation and the 2009 Statement with regard to regulatory fees, including our estimates of the number of VOD services likely to be subject to regulation; and
- the relevant statutory criteria we need to take account of in determining the 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, including the different bases and attributes of fee-setting that could be relevant in setting the 2010-2011 Fees.

Background to regulatory fees

3.2 As we said in the VOD Fees Consultation, the legislative rationale for requiring ODPS providers to pay fees is in order to meet the costs to the regulator of carrying out relevant functions relating to the regulation of VOD services. Ofcom takes the same approach in the principles it applies in setting fees in other sectors that it regulates, such as broadcasting. In relation to these sectors, Ofcom's 2004 Consultation *Principles for setting Licence Fees and Administrative Charges* state as follows:

"Ofcom's prime objective is the effective collection of its funding requirements with the minimum administrative burden on stakeholders in a fair and equitable manner. It is also important that the tariff structure does not create incentives for regulated businesses that conflict with broad objectives of regulatory policy. Ofcom recognises that, as a zero-sum game, any choice of tariff structure is bound to be unpopular with some. This suggests that it is particularly important for tariffs to be practical and workable"²¹.

In the VOD Fees Consultation, we stated our belief that we should have regard to the same principles in developing an approach to the 2010-2011 Fees.

²¹ See paragraph 3.1, *Principles for setting Licence Fees and Administrative Charges*, http://www.ofcom.org.uk/consult/condocs/licence_admin_fee/licence_admin.pdf

The 2009 Consultation

3.3 In our 2009 Consultation, published on 14 September 2009, with regard to the regulation of VOD editorial services, we were consulting on the ATVOD Proposal to be designated as co-regulator of VOD editorial services, and in particular, whether we could be satisfied that ATVOD would be able to fulfil the relevant designation criteria within section 368B(9) of the Act. In particular, to designate ATVOD under the Act, Ofcom has to be satisfied that ATVOD: “has access to financial resources that are adequate to ensure the effective performance of its functions” (“the Financial Resources Criterion”)²². The ATVOD Proposal suggested a flat-rate fee of £2,500 as an illustration of the potential level of regulatory fee to fund ATVOD’s activities “for the first fifteen months”²³, based on an initial estimate of 150 notifiable ODPS. This suggested approach was endorsed by the industry VOD Editorial Steering Group (VESG)²⁴. The rationale for a potential flat-rate fee, which was explained in the ATVOD Proposal²⁵, was noted by Ofcom in the 2009 Consultation²⁶. Accordingly, the 2009 Consultation stated that:

- any fees set need to be proportionate and fair whilst being sufficient to ensure that ATVOD can carry out its regulatory activity efficiently and effectively;
- there was uncertainty about the actual number of services that would be subject to regulation;
- due to the nascent nature of the VOD industry, Ofcom did not have comprehensive quantitative data on which to base a full analysis in this area;
- Ofcom estimated that there was likely to be at least 150 notifiable services; and
- ATVOD’s estimated likely costs for its activities were £400,000 for the period 19 December 2009 to 31 March 2011.

3.4 Given the above factors, we accepted that, for the purpose of deciding whether we could be satisfied that ATVOD was likely to be able to fulfil the Financial Resources Criterion, the flat-rate fee structure put forward by ATVOD represented a possible approach to the setting of a regulatory fee for the first fifteen months, subject to further consultation. We also accepted that the flat-rate fee structure represented a workable model for the purposes of Ofcom’s assessment of the Financial Resources Criterion with a view to deciding whether to designate ATVOD as the co-regulator for VOD editorial content. We also noted that.:

²² See section 368B(9)(c) of the Act, as introduced by the 2009 Regulations, as reproduced in Annex 6, VOD Fees Consultation.

²³ See paragraph 5.27, and paragraph 4.3.4, Annex 7, 2009 Consultation.

²⁴ The VESG was the industry-led group set up, with the assistance of Ofcom and the DCMS, with the primary purpose of working 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 the major providers of VOD services.

²⁵ See paragraph 4.3.4, Annex 7, 2009 Consultation.

²⁶ See paragraph 5.27, 2009 Consultation.

- if designated, ATVOD would be required to review the fee structure for the financial years after 2010-11 and to consult stakeholders before taking any decisions²⁷; and
- ATVOD would set regulatory fees but only subject to Ofcom's approval²⁸.

3.5 It was also stated in the 2009 Consultation, that any fee to be paid by ODPS providers "must be proportionate and fair while sufficient to ensure that ATVOD...can carry out its regulatory activity efficiently and effectively"²⁹. In addition, it was stated that the regulatory fees would include "the regulatory activity that Ofcom may undertake on ATVOD's behalf that would have to be charged back, such as the costs of collecting fees or of appeals against notification"³⁰.

The 2009 Statement

3.6 As we pointed out in the VOD Fees Consultation, although we did not ask specifically in the 2009 Consultation for responses on the issue of regulatory fees, the possibility for a flat-rate fee was included as part of the ATVOD Proposal for designation, as described in paragraph 3.3 above. The majority of respondents to the 2009 Consultation voiced their support for the ATVOD Proposal without amendment. However, a few respondents raised concerns about ATVOD's suggested proposal for a flat-rate fee including that:

- the flat-rate fee would be disproportionate and unfair to smaller VOD service providers and conversely a fee of £2,500 would be a relatively modest cost for larger businesses; and
- the flat-rate fee would represent a significant cost on small niche service providers and could make some ODPS unviable (although it should be noted that no such providers were identified to us during or subsequent to the 2009 Consultation, nor have any come forward to make these arguments to us directly).

3.7 Some respondents suggested alternative fee structures³¹. Viasat, for example, suggested a smaller flat-rate fee of less than £1,000 and a percentage of annual turnover in the range 0.07% to 0.1%, applied for 2009 for existing services, or good faith revenue projections for 2010 if 2009 data did not exist. Another respondent suggested a tiered fee structure based on the volume of content available on a given service; whilst the Mobile Broadband Group suggested that fees should be proportionate to a service's viewing audience "possible with an uplift for repeat offenders...the offender pays principle".

3.8 Having taken into account all the responses to our 2009 Consultation, we reaffirmed, in the 2009 Statement that any fee structure had to be proportionate and fair³². With a view to considering whether ATVOD would fulfil the Financial Resources Criterion we suggested that the ATVOD Proposal of a flat-rate fee system appeared to us to

²⁷ See paragraph 4.3.4, Annex 7, 2009 Consultation.

²⁸ See paragraph 4.3.5, Annex 7, 2009 Consultation.

²⁹ See paragraph 4.3.1, Annex 7, 2009 Consultation.

³⁰ See paragraph 4.3.3, Annex 7, 2009 Consultation.

³¹ Ibid.

³² See paragraph 4.32, 2009 Statement.

be a “proportionate and practicable funding solution in the short-term” on account of the uncertainty about the number of services likely to be in scope. We also acknowledged the practical difficulties in the short term with putting in place a variable fee structure for ODPS.

- 3.9 However, Ofcom was not at that time in a position to carry out a consultation on fees or make any final decision because the specific legislative provisions relating to the levying of fees were not then in place (see further Section 2 above).

The number of ODPS subject to regulation

Background

- 3.10 Question 1 of the VOD Fees Consultation, as reproduced in paragraph 3.14 below, dealt with our estimates on the number of services that are likely to be subject to regulation. Once the legislative provisions in relation to the levying of fees came into force, we issued the 2010 VOD Fees consultation. In paragraphs 3.13 to 3.19 of that consultation, we noted that in order to set the appropriate level of regulatory fees we needed to obtain a good understanding of the likely number of services which will be subject to regulation. It is clearly essential that fees are set on the basis of an estimate which provides reasonable certainty. Further, it is also essential that the statutory provisions relating to the costs of regulation will be satisfied, whilst avoiding, as far as possible, the risk of overcharging and over-recovery of costs³³.
- 3.11 To this end we outlined the updated research that Ofcom had undertaken to provide a reasonable estimate of the number of notifying services. We recognised that our analysis would not necessarily have identified all of the providers or services to be provided. So with a view to providing a reasonable estimate of the total number of notifiable services, and for the purposes of setting the regulatory fee, we proposed a working assumption of a total of 150 notifiable services. We explained that the figure of 150 services was only a working assumption as it was not feasible to provide a strictly accurate number in advance of all relevant services being required to notify. Paragraph 3.16 provided some examples of the practical hurdles we faced in carrying out our analysis.
- 3.12 In order to ensure that ODPS are aware of the legal requirement to notify their services and pay a regulatory fee, we wrote twice to all Ofcom broadcast television licensees:
- firstly, in February 2010 to inform them that it was likely that, subject to the Government successfully notifying the requirements to notify a service and pay a regulatory fee, to the European Commission³⁴, VOD services subject to regulation would be required to fulfil these additional requirements, when they passed into UK law; and

³³ Under section 368NA(5) of the Act, the authority must “for each financial year — (a) prepare such estimate as it is practicable for them to make of the likely costs of carrying out the relevant functions during that year; [and] (b) ensure that the aggregate amount of the fees that are required to be paid to them...during that year is sufficient to enable them to meet, but not exceed, the costs estimated under paragraph (a)”. In addition, under section 368NA(7) of the Act, any deficit or surplus in terms of the cost of regulation and regulatory fees received by the regulator is to be (a) carried forward; [and] (b) and taken into account” to ensure that the aggregate amount of regulatory fees to be paid by ODPS is sufficient for the regulator to meet, but not exceed, the estimated costs of the regulator for the next financial year.

³⁴ See paragraph 2.7 above.

- second, in April 2010 to inform them to make it clear that the legal requirements to notify a service subject to regulation, and to pay a regulatory fee, have now been introduced into UK law by virtue of the 2010 Regulations.

3.13 We also published notes setting out the same information as contained in the two letters discussed in paragraph 3.12 above, on Ofcom's website for the benefit of other stakeholders, including providers of VOD services not from the broadcast television sector³⁵.

Consultation question

3.14 In the VOD Fees Consultation, we asked the following question:

Question 1

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

- 3.15 We received five responses to this question. Three 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 website³⁶.
- 3.16 Three responses broadly agreed with our analysis. However, Five suggested that there might be ODPS of which the regulator is unaware. Another respondent said that given the work ATVOD has to do in relation to which services might be subject to regulation, it is imperative that ATVOD has a very simple and easily explainable method of charging.
- 3.17 Two respondents raised issues with our analysis. ULTV maintained that the analysis overlooked small VOD services, and that we had not given a reasonable explanation as to how we had arrived at our estimate of the likely number of services. ULTV agreed that it would be an inefficient use of resources to try and survey the whole internet. However, ULTV argued that we had demonstrated little concern in identifying small-scale VOD service providers and that "Ofcom has simply focused on producing a list of groups it believes are likely to comply with the requirement to notify". In addition, ULTV maintained that Ofcom had said in the VOD Fees Statement that it had only sought to "identify larger UK providers". In ULTV's view, in not taking account of small-scale VOD providers, we had failed to realise the implications of our proposals on such services.
- 3.18 Another respondent said that our analysis had not taken account of the number of UK-based channel providers who also provide VOD services to cable and satellite platforms outside the UK.

Our response and decision

3.19 The following areas of concern were raised by respondents:

³⁵ See <http://www.ofcom.org.uk/tv/ifi/vodservices.pdf>

³⁶ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

- a) the need for the regulator to identify ODPS and have an easily explainable method of charging regulatory fees;
- b) the degree to which our analysis accounted for small-scale ODPS; and
- c) whether our analysis took account of UK-based VOD services provided to third party platforms in the EU.

The need for the regulator to identify ODPS and have an easily explainable method of charging regulatory fees

3.20 We note the point made by Five that there are likely to be additional services that might fall into scope as an ODPS, of which Ofcom and ATVOD are currently unaware. In response to this point, one task that ATVOD is urgently attending to is approaching those services that it believes might reasonably fall into scope of the regulatory regime but which have not yet made any notification. However, we are conscious that some of the services we thought might be notifiable do not fall within scope for the various reasons given in paragraph 3.27 below. On a related point, given the work that ATVOD has to do to ascertain which VOD services might need to notify the regulator, we note the comment from one respondent that any approach to regulatory fees should be simple and easily explainable. In this regard we note that two of the Fees Criteria are “simplicity” and “be easily verified”³⁷.

Small-scale ODPS

3.21 As we said in the VOD Fees Consultation, it was not feasible for us to predict exactly the number of notifiable services for the financial year 2010 - 2011. Our analysis was necessarily limited for the practical reasons we listed in paragraph 3.16 of the VOD Fees Consultation. Our aim was to provide a “reasonable estimate” of the likely number of notifiable services for the purposes of setting the regulatory fee. However, we did not, as claimed by ULTV, produce an estimate of only those services likely to comply with the requirement to notify.

3.22 In producing our estimate of the likely number of notifiable services for the purposes of the VOD Fees Consultation, Ofcom did consider whether there were any small-scale, including local and community services, that might fall into scope. However, because of the unreliability of the platforms that might be delivering such services, it was not possible to identify with any certainty whether there were any such providers providing services falling within scope so none were included in our estimate of 150 notifiable services. Our analysis and ongoing research in tandem with ATVOD, has not yet identified any such services operating which are definitely within the scope of the VOD regulatory regime. There may currently be no such services operating that are likely to fall in scope for the purpose of the new requirements. This confirms the findings Ofcom reported in its recent Discussion Document *Local and Regional Media in the UK*³⁸. It is only if they fall within scope that they would be subject to paying a regulatory fee. Of the small number of small-scale online services, including local and community services referred to in the above Discussion Document, it was noted that in relation to those ‘local TV’ services that have launched exclusively as internet offerings that they do not have the appearance of traditional linear television

³⁷ See paragraph 3.45 below.

³⁸ See <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf>, published 22 September 2009.

and given that they tended to include a mix of text and 'on-demand' elements were "much more akin to pure websites"³⁹.

- 3.23 However, we recognise that the VOD sector, including at the small-scale and local level, is developing and we would like to hear from any small scale providers who think that the service(s) they are providing or intend to provide this financial year, may be notifiable in order that the position may be ascertained with greater clarity. We discuss this in more detail in paragraphs 4.83 to 4.88 below.

UK-based ODPS provided across the EU

- 3.24 Whilst, as mentioned above, our estimate of the likely number of services was necessarily limited, it was informed by the number of companies providing broadcast linear channels licensed by Ofcom and did include a number of services provided by UK-based operators, offered outside the UK. However, numbers of these services remain unclear due to the fact that not all such services are accessible from within the UK.
- 3.25 As we refer to above, in section 3 of the VOD Fees consultation we put forward an updated estimate of the number of services which were likely to be subject to regulation, and asked stakeholders to provide their views on this estimate. We explained that the figure of 150 services was only a working assumption as it was not possible to know in advance the precise number of relevant notifiable services for the year. Paragraph 3.16 of the VOD Fees Consultation provided some examples of the practical hurdles we faced in carrying out our analysis. However, as we explained in our consultation, it was on this basis that we considered that a working assumption of 150 services was reasonable for the purpose of calculating regulatory fees. Taking this assumption into account together with the estimated likely costs of regulation for this financial year, we proposed a flat fee of £2,500 for this financial year in relation to each notifiable ODPS service.
- 3.26 The deadline set for receiving notifications of ODPS services already being provided on the day that the statutory requirement to notify came into force was 30 April 2010. To date, however, ATVOD has only received just over half the original estimated number of 150 notifiable services (there have been 83 notifications at the time of publication) and it remains unclear whether all those services which have been notified definitely fall within scope and are therefore subject to the requirement to pay a regulatory fee.
- 3.27 We have therefore had to review our analysis in light of the notifications that have been received so far. Whilst we anticipate that there are a number of services that have yet to notify, we no longer consider it reasonable to calculate fees on the basis of our previous working assumption of 150 services. This is because a number of services which we anticipated being in scope have indicated they do not fall in scope for various reasons including that: some service providers have informed ATVOD that their VOD services do not fall under UK jurisdiction for the purposes of regulation; some services previously included in our estimates are no longer operating; ATVOD has been informed of new facts concerning the editorial responsibility of some services; and ATVOD's recent analysis has suggested that some providers, who had previously been thought to be providing multiple services may in fact be providing a single service on multiple platforms. In light of all these

³⁹ Ibid, paragraph 8.40.

factors, and on the basis of ATVOD's latest figures in particular, we now consider a more reasonable working assumption as the basis for calculating fees is at least **129** notifiable services. We have set out in figure 1 below ATVOD's current estimate of the minimum number of notifiable services, by different categories of VOD service. For each category, we have included in brackets the comparable figure from Ofcom's previous analysis, on which our original working assumption of 150 notifiable services was based.

Figure 1	
ATVOD current estimate of minimum number of VOD services subject to regulation	
Category of VOD Service	Estimated number of ODPS (The comparable figure from Ofcom's previous analysis is shown in brackets)
Broadcaster VOD services	77 (98-140+)
IPTV platform services	13 (14)
Online only	18 (18-48)
Notifications from services not previously identified by Ofcom	21 (0)
TOTAL	129 (130-200+)

- 3.28 Given the factors outlined above, we have decided that our original working assumption about the minimum likely number of notifiable services should be revised to 129 as a reasonable estimate of the likely number of services for the purposes of setting the regulatory fee for this year. We consider it necessary to do this in light of the statutory requirement to ensure, in accordance with the provisions of the Act, that the aggregate amount of fees levied are an appropriate contribution to the estimated likely costs of regulation for the purpose of ATVOD being properly funded to carry out its activities up to March 2011.
- 3.29 As explained further in this document, if the actual number of notified services for the year proves to be higher or lower than our revised estimate, any surplus (or deficit) in the aggregate amount of fees collected for this year, will be taken into account in setting next year's fees in accordance with the requirements of the Act.

The statutory criteria relating to regulatory fees and the estimates for regulating ODPS

Background

- 3.30 Question 2 of the VOD Fees Consultation, as reproduced in paragraph 3.37 below, dealt with our estimates for regulating ODPS. As we discussed in Section 2 of the VOD Fees Consultation, the 2010 Regulations introduced a provision for Ofcom

and/or any co-regulator that Ofcom might designate, to require providers of ODPS to pay them a fee⁴⁰. The 2010 Regulations came into force on 18 March 2010. Section 368NA of the Act, as introduced by the 2010 Regulations, sets out the relevant legislative provisions concerning the setting of fees for VOD service providers for any given financial year commencing 1 April:

- in setting any fee, the appropriate regulatory authority must be satisfied that that fee “represents the appropriate contribution of the [ODPS] provider towards the likely costs of the appropriate regulatory authority (section 368NA(3)(a)); and “is justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is imposed” (section 368NA(3)(b) of the Act);
- a different fee may be required in relation to different cases or circumstances (section 368NA(4) of the Act);
- the regulatory authority must prepare such estimate as it is practicable for them to make of the likely costs of carrying out its relevant functions during each financial year (section 368NA(5)(a) of the Act); and must ensure that the total amount of fees levied on service providers meets but does not exceed the estimated costs of regulation for the given financial year (section 368NA(5)(b) of the Act); and
- any deficit or surplus relating to a certain financial year must be carried forward and taken into account in determining what is required to ensure that the aggregate amount of the fees payable during the following financial year is sufficient to enable them to meet, but not exceed, the likely costs of carrying the relevant functions during that year (section 368NA(7) of the Act).

3.31 Section 368NA of the Act also requires the regulator, for each financial year, to consult in such manner as they consider appropriate the providers likely to be required to pay them a fee during that year (section 368NA(5)(c) of the Act); and publish the fee to be levied on VOD service providers (section 368NA(5)(d) of the Act).

3.32 In addition to the above, the 2010 Regulations provide transitional arrangements in relation to the period 19 December 2009 to 31 March 2010⁴¹, which is to be considered as if that period were a financial year, but with the modifications specified under Regulation 13 of the 2010 Regulations. In summary, these transitional arrangements require that in producing estimates of costs, for the purposes of determining a regulatory fee for that period, Ofcom is required to prepare, or approve, an estimate of the likely costs of regulation for the period 19 December 2009 to 31 March 2010, including the costs of the co-regulator as well as its own costs.

⁴⁰ The 2010 Regulations came into effect on 18 March 2010. They introduced three additional obligations on VOD service providers: to notify the regulator; to pay the regulator a regulatory fee; and, to retain recordings of their content for 42 days. These Regulations were delayed because the Government had to notify them first to the European Commission under the Technical Standards Directive.

⁴¹ See Regulation 13 of the 2010 Regulations.

- 3.33 In the VOD Fees Consultation, we stated that the appropriate regulatory authority is required to prepare such estimate as it is practicable for them to make of the likely costs of carrying out the relevant functions for the financial year to which the regulatory fees apply. As a result, Ofcom and ATVOD are subject to the following obligations:
- a) Ofcom is required to prepare (in the case of its own estimate), or approve (in the case of an estimate produced by ATVOD), an estimate of the likely costs of regulation for ATVOD and Ofcom for the period 19 December 2009 to 31 March 2010; and
 - b) ATVOD and Ofcom are required to produce an estimate of the likely costs of regulation for the period 1 April 2010 to 31 March 2011.
- 3.34 Ofcom reviewed ATVOD's estimate of £315,276 in relation to paragraph 3.33(b) above for the purposes of designating ATVOD as co-regulator. Given that there will also be some regulatory costs for Ofcom even after ATVOD has taken on its regulatory responsibilities, an element of ATVOD's estimate under paragraph 3.33(b) above incorporated the amount of £25,000 that Ofcom would expect to be reimbursed for in relation to the activities that Ofcom envisages it will carry out (either in terms of generally assisting ATVOD, or in terms of carrying out the non-designated functions (e.g. imposing statutory sanctions). According to the terms and conditions of the Designation, Ofcom will retain the power of giving prior written approval for ATVOD's proposed regulatory fees.
- 3.35 As part of the process of designating ATVOD as co-regulator for VOD editorial services, Ofcom analysed and reviewed the ATVOD estimates produced in relation to paragraph 3.33(a) and (b) above. We set these out in figure 1 (on page 21) in the VOD Fees Consultation, together with Ofcom's estimates of the likely costs of regulating ODPS providers for the period 19 December to 31 March 2010, and the amount which Ofcom envisages it will need to recover from fees, for any residual regulatory activities it has to undertake in relation to VOD services. The total estimate of the likely costs of regulating ODPS providers for the period 19 December 2009 to 31 March 2011 was, as contained in figure 1 of the VOD Fees Consultation, £426,388.
- 3.36 As we mentioned in paragraph 3.27 of the VOD Fees Consultation, no fee was levied during the period 19 December 2009 to 31 March 2010. However, we stated that: we expected that the costs incurred during the same period would constitute a deficit to be carried forward, and considered it appropriate to take such costs into account in determining the fee payable during the financial year 1 April 2010-31 March 2011. As required under section 368NA(6) of the Act we are publishing in Annex 1 of this Statement a statement setting out the costs to ATVOD and Ofcom of carrying out the relevant functions during the period 19 December 2009 to 31 March 2010.

Consultation question

- 3.37 In the VOD Fees Consultation, we asked the following question:

Question 2

Do you have any comments on our estimates for regulating ODPS set out in paragraphs 3.23 to 3.29 [in the VOD Fees Consultation]?

- 3.38 We received five responses to this question. Three 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 website⁴².
- 3.39 Whilst two responses either agreed with the estimates or had no specific comments, three respondents raised issues with the estimates. Five considered that the estimates were broadly accurate, but queried whether the reference to estimates of the likely costs expected to be incurred until 31 March 2010 (in the third bullet-point of paragraph 3.29 of the VOD Fees Consultation) should actually be a reference to estimates of the likely costs expected to be incurred until 31 March 2011. ULTV reserved judgement on ATVOD's estimates of the likely costs of regulation in the absence of a full budgetary breakdown and explanation. However, ULTV welcomed the principle of regulating a substantial sized sector on a very low cost base, and ULTV praised Ofcom and ATVOD's initiative in this regard. Another confidential response noted that the statutory requirement that the estimates of the likely costs of regulation must be set to cover costs would mean that the level of regulatory fees would be unpredictable, because they are a function of the number of ODPS.

Our response and decision

- 3.40 The following areas of concern were raised by respondents:
- a) How we explained the estimates of the likely costs of regulation; and
 - b) the predictability of regulatory costs.

The estimates of the likely costs of regulation

- 3.41 We note Five's comments and can confirm that there was a typographical error in the third bullet-point of paragraph 3.29 of the VOD Fees Consultation. The sentence should have ended "...31 March 2011" rather than "...31 March 2010". However, we consider that this error would not have materially impacted on respondents' ability to answer question 2 of the VOD Fees Consultation. We note the fact that most respondents who answered this question did not raise any issues with the estimates for regulating ODPS. We also note that ULTV welcomed the approach of ATVOD seeking to regulate the VOD sector on a very low cost base.

The predictability of regulatory costs

- 3.42 We acknowledge the point made by one respondent that the 2010-2011 Fees are a function of the number of ODPS notifying ATVOD. However, we consider that given the uncertainty over the number of services that might be subject to regulation in the initial period of regulation, the uncertainty is unavoidable to some degree. However, as made clear in the VOD Fees Consultation, our approach to setting regulatory fees only relates to the 2010-2011 Fees. Therefore, we envisage that when we consult on options for the regulatory fees to be paid by ODPS for the period 1 April 2011 to 31 March 2012 ("the 2011-2012 Fees"), there will be a higher level of certainty as to the number of services. In addition, we note that section 368NA(7) of the Act, as introduced by the 2010 Regulations, requires that any deficit or surplus in the 2010-2011 Fees is to be carried forward and taken into account when determining the

⁴² See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

2011-2012 Fees. This would mean that the impact of any inaccuracy in our estimates of the likely number of services subject to regulation can be reconciled, as appropriate, when drawing up the 2011-2012 Fees. In relation to this point, we are conscious, as we state in paragraph 3.27 above, that we have revised downwards our estimate of the likely number of services subject to regulation. However, we remain confident that the total likely costs of regulation are unlikely to be lower for the period up to 31 March 2011 than previously estimated (£426,388). This is because of the start-up costs that ATVOD is incurring as co-regulator, which are to a degree, independent of the number of services that are subject to regulation.

- 3.43 Given all of the above we do not consider it necessary to amend our estimates of the likely costs of regulating ODPS for the period up to 31 March 2011, having regard to the responses we received to the VOD Fees Consultation.

Ofcom's approach to fee setting

Background

- 3.44 Question 3 of the VOD Fees Consultation, as reproduced in paragraph 3.48 below, dealt with criteria and principles in developing our approach for the 2010-2011 Fees. In the VOD Fees consultation we set out Ofcom's prior experience in setting and administering the regulatory fees that apply to different sectors. In particular, we explained how, in developing an approach towards the 2010-2011 Fees, Ofcom and ATVOD had been mindful of Ofcom's work in relation to setting sectoral fees in other areas. In this regard, our proposals took account of the principles set out in *Ofcom's Statement of Charging Principles*⁴³ ("the Charging Principles") published on 8 February 2005. This document was drawn up following consultation with stakeholders in the relevant industries and lays out charging principles that Ofcom applies in determining the amount to be recovered from providers in those sectors in relation to administrative fees for networks, services and electronic communication code services; and licence fees for broadcasting licences. In summary, these fees cover, on the basis of estimated costs, the cost of Ofcom's functions relating to the regulation of those sectors.
- 3.45 When it drew up the Charging Principles, Ofcom applied a number of criteria ("the Fees Criteria") for framing options for setting fees. These were laid out in Ofcom's original consultation *Principles for setting Licence Fees and Administrative Charges*⁴⁴:
- **fairness.** The tariff structure should raise Ofcom's required funding across the regulated sectors in a manner that is equitable;
 - **cost-reflectiveness.** Charges should broadly reflect the underlying cost of regulating each category of stakeholder;
 - **reliability.** The tariff base needs to be stable over time, and not prone to erratic movements. Charges should not move substantially in any one year;
 - **simplicity.** The calculation of charges should be as simple as possible, wherever practicable using data that stakeholders would anyway gather for

⁴³ See http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf

⁴⁴ See paragraph 3.2,

http://www.ofcom.org.uk/consult/condocs/licence_admin_fee/licence_admin.pdf

their own management purposes; and be relatively simple to administer for Ofcom;

- **be easily verified.** Information required for the setting of charges should be easily verifiable to ensure industry-wide compliance;
- **adaptable.** Tariff principles and structures should be able to adapt to a changing market environment and be consistent with wider policy; and
- **relevance.** Charges should cover in full an operator's activities that flow from the licence or authorisation, but only those activities.

3.46 The Charging Principles set out a number of common principles to setting tariffs for the sectors to which they apply. These are: use of Relevant Turnover⁴⁵ as a common tariff basis across all sectors or the setting of fixed tariffs where applicable; collection of turnover data for the last but one calendar year (rather than using licensees' and network and services providers' accounting periods); and that administrative charges and licence fees are calculated for each Regulatory Sector and for each Regulatory Category within the Regulatory Sector.

3.47 As we made clear in paragraphs 3.33 and 3.34 of the VOD Fees Consultation Ofcom's Statement of Charging Principles derive from Ofcom's statutory obligations under the Act⁴⁶. Any charges and/or tariffs Ofcom sets for the relevant sectors must be drawn up according to that Statement of Principles. However, the statutory requirement to produce a Statement of Principles applying to the fixing of charges in, for example, the broadcasting sector has not been extended to the regulatory regime for VOD. Ofcom's Statement of Charging Principles is therefore not binding on Ofcom, when setting the level of fees to cover Ofcom's (or ATVOD's) costs of carrying out the relevant VOD-related functions. However, we considered that for reasons of consistency and best practice it was appropriate to have regard to the Statement of Charging Principles when setting fees to be paid by ODPS providers, particularly in terms of the criteria we have referred to in paragraphs 3.45 and 3.46 above. Accordingly, we proposed to have regard to the broad principles set out in Ofcom's Statement of Charging Principles in relation to setting fees for the VOD sector.

Consultation question

3.48 In the VOD Fees Consultation, we asked the following question:

Question 3

Do you agree or disagree with us taking account of the criteria and principles outlined in paragraphs 3.31 and 3.34 [in the VOD Fees Consultation] in developing our approach for the 2010-2011 Fees?

⁴⁵ For definitions of "Relevant Turnover" in television and radio, see the Charging Principles, Annexes B and C respectively - see

http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf

⁴⁶ See section 38(3) of the Act concerning networks and services and section 347(1) of the Act in relation to broadcasting.

- 3.49 We received five responses to this question. Three 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 website⁴⁷.
- 3.50 Two respondents agreed with our taking account of the Fees Criteria and the Charging Principles in developing our approach to the 2010-2011 Fees. For example, Five said these criteria and principles were a "good starting point" for developing the 2010-2011 Fees.
- 3.51 In its response, ULTV noted that it had asked Ofcom whether there would be a concessionary rate for small-scale VOD providers. ULTV said that Ofcom had confirmed to it in written correspondence that under the Charging Principles, there could be no individual discounts from any applicable tariff. Given this, ULTV said it could not understand why Ofcom would seek to apply the Charging Principles, which had been designed for different circumstances in the case of regulatory fees for VOD, when there was no statutory requirement to do so
- 3.52 One confidential response, whilst agreeing with the Fees Criteria, stated that it did not agree the Charging Principles were appropriate given their stress on turnover. This respondent stated its belief that the use of turnover in determining an approach to regulatory fees would cause uncertainty for ATVOD; delay in the effective launch of the new regulatory regime; and create significant difficulty for service providers who would not have relevant revenue data in easily accessible and auditable form.
- 3.53 Another confidential response expressed the view that if multi- language reversioned VOD services were considered to be separate ODPS, then a flat-rate fee would not meet the Fee Criterion of "cost reflectiveness".

Our response and decision

- 3.54 The following areas of concern were raised by respondents:
- a) whether individual discounts are permitted under the Charging Principles;
 - b) that the Charging Principles are not appropriate, given their stress on turnover; and
 - c) whether a flat-rate fee meets the criterion of cost-reflectiveness if multiple language versions of a VOD service were to be considered separate ODPS.

The Charging Principles and discounts

- 3.55 Concerning the point made by ULTV about a possible discount under the Charging Principles, we confirmed to this respondent in pre-consultation correspondence that it would not be consistent with the Charging Principles to grant a discount from a particular tariff for a particular VOD service provider, as this risks the regulator acting arbitrarily. Whilst we are conscious that the Charging Principles are non-binding in the context of setting regulatory fees for VOD services, as we explained in paragraph 3.34 of the VOD Fees Consultation, we considered that for a number of reasons, including "consistency and best practice" that it was appropriate to have regard to the Charging Principles when setting the 2010-2011 Fees.

⁴⁷ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

- 3.56 However, we consider that, after any relevant consultation, a separate stand-alone concessionary tariff would not be inconsistent with the Charging Principles, if we considered a concessionary tariff was justified on the basis of evidence. In addition, such an approach would chime with the provisions set out in section 368NA(4) of the Act, which allow for regulatory fees to be levied “in relation to different cases or circumstances”. We discuss this further in paragraphs 4.83 to 4.88 below.

The Charging Principles and turnover

- 3.57 We note the point made by one respondent that the Charging Principles would not be appropriate for developing an approach to the 2010-2011 Fees, due to the “the use of Relevant Turnover as a common tariff basis across all sectors or setting of fixed tariffs where applicable”⁴⁸. However, as we mention in paragraph 3.47 above, we proposed to have regard to the broad principles set out in the Charging Principles. We did consider, in drawing up the options in the VOD Fees Consultation, that turnover/revenue merited consideration as a possible option for an approach to regulatory fees. However, we note the disadvantages concerning turnover stated by this respondent, and will discuss these at greater length in paragraphs 4.50 to 4.55 below.

Flat-rate fees and cost-reflectiveness

- 3.58 We consider that a flat-rate fee broadly meets the criterion of cost-reflectiveness (i.e. Charges should broadly reflect the underlying cost of regulating each category of stakeholder). However, we note that a key concern for the respondent who raised this point was the regulator’s interpretation of scope as it applies to a service provider making available multiple language versions of an English-language VOD service, on third party platforms across the EU. This issue will have to be resolved taking into account all the particular facts and circumstances of each case. Clearly one factor in determining how the criteria will be interpreted, will be the benefit of having a consistent approach for both linear and VOD services. However, we note that differences in the nature of these two types of service will also have to be taken into account.

Different approaches to fee setting

Alternative bases of charging

- 3.59 Question 4 of the VOD Fees Consultation, as reproduced in paragraph 3.62 below, dealt with the alternative bases of charging VOD regulatory fees. As part of our VOD Fees Consultation, in considering a possible approach to the 2010-2011 Fees, figure 2 on pages 24 and 25, set out an assessment of the alternative bases of charging VOD regulatory fees. This listed the advantages and disadvantages of five bases: revenue; profit; audience; amount of regulated content; and a flat-rate fee.
- 3.60 Figure 2 indicated that each of the bases has distinct advantages and disadvantages. However, our initial analysis of the alternative bases of charging regulatory fees, taking into account the Fees Criteria outlined in paragraph 3.45 above, suggested the following:

⁴⁸ See paragraph 3.1 of the Charging Principles, http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf

- profit was not an appropriate basis due to the immature state of the VOD sector and the anecdotal evidence that suggests that many VOD services are ‘loss-leaders’ (i.e. such services operate at a loss) would mean uncertainty and an inability to forward-plan for both the regulator and service providers;
- audience has some strengths as a basis for calculating regulatory fees. However, we considered it inappropriate for the purposes of setting a possible approach to the 2010-2011 Fees because service providers may use different systems for measuring audience consumption and, unlike in the television and radio sectors, there is no single easily verifiable and impartial audience statistics body for the VOD sector at present; and
- the amount of regulated content on a service has superficial attractions as a basis for calculating regulatory fees but we considered it to be inappropriate for this purpose due to the significant problems of defining and verifying which content should be included in the calculation of what constitutes relevant content. In addition, it was not necessarily fair, as some regulated services would be penalised for making available large amounts of regulated content.

3.61 On the basis of the analysis outlined in the VOD Fees Consultation, we suggested that revenue and flat-rate fees could provide suitably robust bases for the 2010-2011 Fees.

Consultation question

3.62 In the VOD Fees Consultation, we asked the following question:

Question 4

Do you agree or disagree with our assessment of the alternative bases of charging VOD regulatory fees laid out in figure 2 [in the VOD Fees Consultation]?

- 3.63 We received five responses to this question. Three 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 website⁴⁹.
- 3.64 All of the respondents agreed with our assessment. Five said that our assessment was fair especially as Ofcom and ATVOD are only considering the setting of regulatory fees for the period up to 31 March 2011. SeeSaw agreed that, in principle, linking regulatory fees to revenue would be more equitable than a flat-rate fee. However, it continued that in a market as nascent as the VOD sector, there is insufficient certainty for a revenue-based approach to be administered simply and efficiently “and considerable risk of it generating either a significant shortfall or significant excess in revenue” taking account of the Fees Criteria and the Charging Principles
- 3.65 One confidential response expressed its agreement with the disadvantages that we had listed with regard to revenue, profit, audience, and amount of regulated content, given the need to establish a credible regulatory regime as quickly as possible. In addition, this respondent said that it did not consider a flat-rate fee to be

⁴⁹ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

disproportionate because it is far from clear that larger VOD services will be driving most regulatory activity.

Our response and decision

3.66 We note the agreement from stakeholders about our analysis in this area.

Alternative attributes of a revenue charging approach

3.67 Questions 5 and 6 of the VOD Fees Consultation, as reproduced in paragraph 3.70 below, dealt with: the alternative attributes of bases of charging VOD regulatory fees; a minimum payment mechanism; and alternatives bases and attributes for a regulatory fees approach. In the VOD Fees Consultation, we noted that if revenue was used as a basis for the 2010-2011 Fees, one approach could be to impose a purely proportional system whereby a set share of revenue tariff would be applied to all regulated services. This would ensure that the regulatory fee would rise in proportion to a regulated service's revenues.

3.68 However, to aid our analysis further, we also considered different attributes which could be used in an approach for the 2010-2011 Fees to make it more progressive i.e. regulatory fees would be proportionally more from larger regulated services. We laid out our analysis in figure 3 on pages 26 to 29 of the VOD Fees Consultation. The attributes we assessed were:

- a minimum revenue threshold (i.e. services below a minimum threshold of revenue would not pay a regulatory fee);
- 0% Allowance (i.e. regulated services with revenues just above zero would be charged in a special band);
- Number of bands (i.e. introducing separate revenue bands and applying different share of revenue tariffs to each band);
- Rounding to lowest point within band (i.e. setting all regulatory fees in one band at the same level);
- Degree of progression (i.e. a progressive regulatory fees approach raises fees proportionally more for larger regulated services – This is analogous to how higher rate income tax is levied in the UK);
- Progressive Addition (i.e. higher regulatory fees are only charged upon incremental revenues above banding thresholds);
- Maximum revenue threshold; (i.e. set a maximum regulatory fee);
- Minimum payment (i.e. all services pay at least a minimum fee, irrespective of their level of revenues);and
- 'Polluter Pays' (i.e. services would pay an uplifted regulatory fee for engendering regulatory activity).

3.69 Our initial analysis of the alternative attributes that could be applied to a revenue basis of charging regulatory fees, taking into account the Fees Criteria outlined in paragraph 3.45 above, led us to reaching the following initial view:

- due to: the nascent nature of the VOD sector; the lack of financial data (which we consequently invited stakeholders to provide in order to help us consider the viability of the revenue based options); and the fact that we are designing a ‘start-up’ regulatory fees approach where revenue data may genuinely not be available across the sector, we were unable with any certainty or reliability to propose a complex revenue-based approach based on tiers or revenue bands (i.e. a progressive system); and
- in order to ensure that all services contribute to the costs of the regulatory system, we suggested that it might be appropriate to implement a minimum fee on all regulated services.

Consultation questions

3.70 In the VOD Fees Consultation, we asked the following questions:

Question 5

Do you agree or disagree with our assessment of the alternative attributes laid out in figure 3 [in the VOD Fees Consultation]?

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?

3.71 We received five responses in relation to question five. Three of these respondents requested confidentiality and are therefore not identified when their responses are referred to below. We received four responses in relation to question six. Three of these respondents requested confidentiality and are therefore not identified when their responses are referred to below. The responses from the organisations who did not request anonymity have been published on Ofcom’s website⁵⁰.

3.72 In relation to our assessment of the alternative charging attributes that could be applied to a revenue-based fees approach (question 5), all of the respondents agreed wholly or mainly with our assessment. Five in its response, whilst not disagreeing with our assessment, believed our analysis to be over elaborate, and that we should have concentrated on basic principles rather than gradation of options. SeeSaw said that whilst the ‘polluter pays’ principle has an appeal, the number of likely complaints in the current year are not likely to require more regulatory attention than was the case when VOD editorial was subject to self-regulation. Therefore, a flat-rate fee would be the simplest and cheapest means of collecting regulatory fees. One confidential response said that a missing element in the analysis was the difficulty, uncertainty, cost and complexity that would be caused

⁵⁰ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

for ATVOD and ODPS if dealing with a revenue-based approach in the early years of regulation. This respondent added that a flat-rate fee appeared better suited to the particular circumstances both in terms of ease of implementation, certainty and minimisation of incremental effort from stakeholders.

- 3.73 All four respondents agreed with our analysis in relation to a minimum payment mechanism - question 6(a). One confidential response said that a minimum payment mechanism was appropriate if applied to VOD services that generate revenues, but added that a “minimum fee” is understandable for the first year of regulatory fees.
- 3.74 No respondents suggested other bases and attributes for a regulatory fees approach (question 6(b)).

Our response and decision

- 3.75 The following areas of concern were raised by respondents:
- a) the relationship between likely levels of regulatory activity and the approach to regulatory fees;
 - b) further comments on a flat-rate fee approach; and
 - c) the applicability of a minimum fee to ODPS not generating revenues.

Likely levels of regulatory activity and regulatory fees

- 3.76 We note the comments made by See Saw about the likely level of regulatory activity in the initial months of regulation and the implications for the regulatory fee. In this regard, we note that since the implementation of the new regulatory regime for VOD editorial content, few complaints have been received by the regulator. We noted also the view expressed by SeeSaw that a ‘polluter pays’ approach would not be appropriate for setting the 2010-2011 Fees.

Further comments on a flat-rate fees approach

- 3.77 We note the comments made by a confidential respondent that a revenue-based approach would have the disadvantage of being uncertain, costly and complex both for the regulator and ODPS providers. We discuss this further in paragraphs 4.50 to 4.55 below.

Minimum fee and revenue

- 3.78 We note that one confidential respondent agreed with a minimum fee, but only in the case of ODPS that generate revenue. However, this respondent also stated that the use of a minimum fee would be understandable for the first year of the regulatory regime. In relation to this point, the legal framework does not allow for providers to be exempted altogether from the requirement to pay a regulatory fee. Therefore, just because an ODPS does not generate any revenues, does not mean it can pay no regulatory fees.

Our general approach to establishing the 2011-2012 Fees

3.79 Question 7 of the VOD Fees Consultation, as reproduced in paragraph 3.80 below, dealt with the overall approach we had adopted to drawing up options for the 2010-2011 Fees. In the VOD Fees Consultation, we stated our objective of using an approach to establishing the 2010-2011 Fees that fulfils as far as possible the criteria and principles laid out in paragraphs 3.31 and 3.32 of the VOD Fees Consultation, whilst at the same time adhering to the legislative criteria laid out in the 2010 Regulations and discussed above.

Consultation question

3.80 In the VOD Fees Consultation, we asked the following question:

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 [in the VOD Fees Consultation]?

3.81 We received four responses in relation to this question. Three of these respondents requested confidentiality and are therefore not identified when their responses are referred to below. The response from the organisation who did not request anonymity has been published on Ofcom's website⁵¹.

3.82 All the respondents agreed with the approach we had suggested. One confidential response stated its belief that given the nascent nature of the VOD marketplace and the low revenues in the sector, there is a need for a minimum administrative burden on service providers. Accordingly, this respondent said there would need to be compelling evidence in the early years of the co-regulatory regime to prompt the regulator from deviating from an approach to regulatory fees based on a flat-rate fee.

3.83 One confidential response agreed with our suggested approach, but stated that, in order for the 2011-12 Fees to be fair, reasonable and non-discriminatory, ATVOD should not, in this respondent's view, adopt a particular approach to re-versioned VOD services that would constitute a barrier to market entry for small-scale providers providing multiple language versions of a VOD services to overseas platforms. In particular, this respondent argued that a VOD service that is merely a foreign language version of the same editorial content as the English-language version of the service is "substantially the same" and therefore should not be considered a separate ODPS by ATVOD.

Our response and decision

3.84 The following areas of concern were raised by respondents:

- a) the administrative burden of an approach to regulatory fees; and
- b) whether the approach to regulatory fees deals appropriately with multiple language versions of a VOD service.

⁵¹ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

The administrative burden of regulatory fees

- 3.85 Administrative burden of regulatory fees is a key consideration and in this regard we note that the Fees Criteria include the criteria of: “simplicity” (i.e. the calculation of charges should be as simple as possible, wherever practicable using data that stakeholders would anyway gather for their own management purposes; and be relatively simple to administer for [the regulator]”; and “be easily verified” (i.e. information required for setting of charges should be easily verifiable to ensure industry-wide compliance). We note the arguments made by respondents about the need for any approach to regulatory fees to take account of the fact that the VOD sector is a newly emerging sector, and that they claim there are many small-scale players. However, at present, we do not have sufficient evidence as to whether there are such providers providing notifiable services for this financial year, and if so, whether they are likely to have difficulty paying the level of flat-rate fee, and are asking for further details to be provided to us as a matter of urgency. We discuss this further in paragraphs 4.83 to 4.88 below.

Regulatory fees and multiple language versions of a VOD service

- 3.86 We note the argument made by a confidential respondent, who provides multiple language versions of an English-language VOD service to third party platforms in the EU. Please see paragraph 3.58 above for our response on this point.

Section 4

Possible options for the 2010-2011 Fees for video on demand services

Introduction

- 4.1 In Section 4 of the VOD Fees Consultation we set out three possible options for the 2010-2011 Fees including a discussion of the advantages and disadvantages of each.
- 4.2 The options took account of the legislative criteria for the setting of fees as well as the following:
- the information provided from a range of actual and potential stakeholders on the issue of fees including the stakeholder responses to Ofcom's 2009 Consultation;
 - the number of services that are likely to be subject to regulation;
 - the estimates that have been produced concerning the likely costs of regulation;
 - the broad principles and associated criteria set out in Ofcom's Statement of Charging Principles in relation to the setting of fees across different industry sectors; and
 - the advantages and disadvantages of the different bases and attributes that might be applied to an approach to the 2010-2011 Fees.

Option A – Revenue model

- 4.3 In paragraphs 4.5 to 4.8 of the VOD Fees Consultation, we suggested that an option based on revenue (Option A) could be a viable basis for calculating a regulatory fee for several reasons. It fulfilled the statutory tests, and in drawing up this option, we had regard to a number of the Fees Criteria laid down in paragraph 3.45 above. In addition, we had regard to the fact that revenue is the key basis for fee-charging contained in Ofcom's Charging Principles, as outlined in paragraph 3.46 above, and revenue was suggested by a few respondents to the 2009 Consultation as a fairer basis for regulatory fees than a flat-rate fee.
- 4.4 Despite the difficulties we identified in paragraphs 4.9 and 4.10 of the VOD Fees Consultation in using a revenue-base, we recognised that the principle attraction of a revenue-based approach was that it could match a service's ability to pay. This led us to a provisional view that such an approach might be considered further, subject in particular, to setting an appropriate tariff, and considering respondents' views in this area.
- 4.5 However, we noted that the lack of market intelligence makes it difficult to draw up an appropriate differentiated tariff structure that would ensure that regulated services would make 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. The lack of market intelligence arises from the fact that the VOD sector is a nascent and evolving sector, with a lack of financial data available in connection with the range of services being provided in the marketplace.

4.6 Despite these practical difficulties, figure 4 (on page 34 of the VOD Fees Consultation) put forward five possible tariffs that could be applied to the VOD sector. We invited providers to submit information on levels of actual and estimated revenues in order to ascertain whether revenues would be at a sufficient level, and sufficiently robust to form a proper basis for charging. In picking these possible tariffs, we used three approaches:

- firstly, Tariff 1 and Tariff 2 are the two main tariffs which are applied to Ofcom's television broadcast licensees, as laid out in Ofcom's Tariff Tables 2009/10⁵² (in respect of channels reporting in the range £0-£10million relevant revenue);
- second, Tariff 3 and Tariff 4 were the two possible tariffs suggested by Viasat in their response to the 2009 Consultation⁵³; and
- third, Tariff 5 extrapolated a revenue tariff ("Average Revenue Tariff") using estimated total revenue figures for the VOD sector.

4.7 In figure 4 we applied each of these possible Tariffs to four hypothetical ODPS to calculate what regulatory fees might be produced in each scenario. A striking feature of figure 4 was that under a purely proportional revenue base, the figures indicated that there was a risk that the regulator would not receive 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. This was because of the anecdotal evidence that we have concerning low revenues being generated in the VOD sector. An alternative would be to set the tariff at a much higher rate. We expressed our initial view that this would be inappropriate until the regulator has obtained more meaningful data of the likely numbers of services that are subject to regulation, and undertaken more thorough analyses on the revenues being created across the VOD sector.

4.8 As mentioned above, in asking for responses on Option A, we asked respondents who favoured Option A to:

- provide us, in confidence, with details of actual revenues related to any ODPS they may have been currently operating, and estimates of revenues in the case of new or proposed ODPS. We stated that in the absence of such revenue data, it would be hard for us to take the development of Option A any further;
- indicate whether they favoured any of Tariffs 1-5; and

⁵² See <http://www.ofcom.org.uk/about/accoun/tariffable0910/tariff0910.pdf>

⁵³ Viasat were the only the only respondent to the 2009 Consultation, who provided concrete proposals for tariffs in this area.

- if applicable, suggest different tariffs to Tariffs 1-5 that we laid out in figure 4 , giving reasons why they believed such alternative tariffs would be appropriate.

Option B – Revenue model with a minimum payment

- 4.9 In the VOD Fees Consultation, we stated that given the potential of an approach to fees-setting being applied to a sector where there are likely to be many services generating small revenues, a possible alternative to Option A would be a revenue model, but with the addition of a minimum payment of a fixed amount. We therefore proposed a revenue model, but with the addition of a minimum payment (Option B). In paragraphs 4.17 and 4.18 of the VOD Fees Consultation, we laid out how Option B could fulfil the statutory tests. In addition, in drawing up this option we had regard to a number of the Fees Criteria outlined in paragraph 3.45 above. Further, we had regard to the fact that revenue is the key basis for fee-charging, mirroring the approach taken in Ofcom's Charging Principles, as outlined in paragraph 3.46 above. Finally, revenue with the use of a minimum payment was suggested by a few respondents to the 2009 Consultation as a fairer basis for a regulatory fee than a flat-rate fee. We laid out the advantages and disadvantages of Option B in paragraphs 4.20 and 4.21 of the VOD Fees Consultation.
- 4.10 Figure 5 (on pages 36 and 37 of the VOD Fees Consultation) laid out how the regulatory fee payments from the purely hypothetical examples used in figure 4 under Option A might change with the introduction of a £1,000 minimum fee. In this process, we aimed to draw up a possible minimum fee within reasonable parameters. This figure was suggested by Viasat in its response to the 2009 Consultation; and is the minimum fee which is currently paid by Ofcom Television Licensable Content Service Licensees.
- 4.11 As with Option A, there is a lack of market intelligence, which makes it difficult to draw up an appropriate tariff. Therefore, in asking for responses on Option B, we asked respondents who favoured Option B to:
- provide us, in confidence, with details of either actual revenues related to any ODPS that they may have been currently operating and estimates of revenues in the case of new or proposed ODPS. We stated that in the absence of such revenue data, it would be hard for us to take the development of Option B any further;
 - indicate whether they favoured any of Tariffs 1-5;
 - if applicable suggest different tariffs to those suggested in figure 5; and
 - if applicable, suggest different levels of minimum fee to that we laid out in this option.

Option C – Flat-rate fees model

- 4.12 In the VOD Fees Consultation, we noted the potential problems under Options A and B of formulating a tariff that would reliably provide adequate income for the regulator to meet the estimated costs of regulation for 2010/2011. We therefore proposed a third option (Option C) whereby each ODPS would pay a flat-rate fee of £2,500. We reached this figure as a result of taking the following considerations into account:

- the estimated cost of regulation (£375,000)⁵⁴ that comprises the 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, as outlined in paragraph 3.28 of the VOD Fees Consultation;
- our, at that time, current estimate as to the likely number of services (150) which would be required to notify the regulator; and
- the Fees Criteria laid out in paragraph 3.45 above.

4.13 In paragraphs 4.27 and 4.28 of the VOD Fees Consultation we outlined how this option would meet the statutory tests, and explained how it matched several of the Fees Criteria, outlined in paragraph 3.45 above. In addition, in paragraphs 4.29 to 4.32 we outlined a number of advantages and disadvantages of the flat-rate fee approach.

Ofcom and ATVOD's preferred option for the 2010-2011 Fees

4.14 Questions 8 and 9 of the VOD Fees Consultation, as reproduced in paragraphs 4.17 and 4.45 below respectively, dealt with the three options for VOD regulatory fees that we had laid out in the VOD Fees Consultation, and any potential impacts arising from the options we have laid out. In the VOD Fees Consultation, we acknowledged that all of the three options outlined above have varying limitations. Whilst, we recognised that an option based on an ability to pay would, in principle, be a more equitable funding solution than a flat-rate fee, we also recognised that in the absence of VOD-related revenue data, it would be hard for us to take the development of either Option A or Option B any further (see paragraphs 4.15 and 4.23 of the VOD Fees Consultation). In addition, we were mindful that our purpose in consulting was to determine an appropriate means of ensuring the aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011 would be sufficient to enable ATVOD to meet the costs of carrying out relevant functions during this year.

4.15 Despite the practical hurdles outlined, we said we would welcome responses from stakeholders, which included details of either actual revenues, or estimated revenues for new or proposed ODPS. We explained that such data would enable us to take the development of Options A and B further.

4.16 We stated that, after careful consideration of the above three options and on the basis of the evidence before us at the time of going out to consultation, we were minded, on balance, to put forward Option C (a flat-rate model) as the most appropriate approach for the 2010-2011 Fees.

Consultation questions – our proposed options for regulatory fees

4.17 In the VOD Fees Consultation, we asked the following question:

⁵⁴ It should be noted that the difference between the figure of £375,000 and the figure of £400,000 quoted in paragraph 3.3, is due to the fact that the latter figure was an earlier budget figure included in the 2009 Consultation, and was subsequently revised by ATVOD for the purposes of designation.

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?. In your response please give as much detail as possible giving reasons how a flat-rate fees approach would be 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.
- 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? In your response, please give as much detail as possible. In particular please provide the following:
 - i) details of either actual revenues attributable to any ODPS that you may operate, or estimates of revenues in the case of a new or proposed ODPS that you intend to launch [any revenue information provided will be treated in confidence];
 - ii) reasons how a revenue-based approach would ensure that ODPS would make 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; and
 - iii) if appropriate alternative tariffs and/or levels of minimum payment, giving reasons as to how these would ensure that ODPS would make 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.
- c) Are there any other options for a regulatory fees approach, that we have not considered, that you feel would be appropriate? If so, please state why, giving as much detail as possible, and stating how an alternative option would ensure that ODPS would make 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.

4.18 We received 15 responses in relation to this question. Five of these respondents requested confidentiality and are therefore not identified when their responses are referred to below. The responses from the organisations who did not request anonymity have been published on Ofcom's website⁵⁵.

⁵⁵ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

Respondents who agreed with Option A – Revenue model

- 4.19 Two respondents broadly agreed with this option. The PPA considered this option to be a possible approach, adding that as the VOD market is nascent, any approach to regulatory fees should not inhibit growth of this market.
- 4.20 One confidential response agreed with the advantages of a revenue-based approach, as laid out in paragraphs 4.5, 4.6 and 4.9 of the VOD Fees Consultation. This respondent said that its particular business model of providing multiple language versions of VOD services accrued no revenues. This was because it was a contractual requirement of its linear channel supply agreements to third party platforms in the EU, that this respondent should also supply complimentary VOD services associated with the linear channel at no extra cost. The respondent noted what it felt to be the advantages of Option A, but accepted that Option B was probably the fairest option (see below).

Respondents who disagreed with Option A – Revenue model

- 4.21 Eight respondents expressed their disagreement with Option A
- 4.22 Five said that the amount of revenue being generated in the VOD sector is to a large extent unknown at present. This meant that there is an inherent risk that a revenue-based approach to fees would mean that fee levels would either be set too low, which would mean that ATVOD would not be able to carry out its functions, or too high, which would mean some VOD services would be charged disproportionately high regulatory fees. However, Five said that it had no objection in principle to revenue being considered in the longer term, but said that the lack of knowledge about how much revenue is being generated in the sector is a major barrier to devising a sensible revenue tariff for the period up to 31 March 2011.
- 4.23 Virgin Media said it understood why Ofcom and ATVOD were consulting on the revenue approach but thought it unlikely that within the period up to 31 March 2011 and potentially further, VOD revenue models would be sufficiently developed to enable a viable revenue-based approach to fees. Virgin Media said that development of a revenue-based approach required discussion with industry first. In addition, this respondent said that any attempt to devise a revenue-based approach at present is likely to result in a delay in ATVOD collecting fees, due to various difficulties, for example, ODPS trying to apportion revenue, if any, to their services.
- 4.24 BSkyB also pointed to the problems of attributing revenues to VOD services, especially as the majority of VOD content provided by BSkyB is made available to subscribers of linear services at no additional cost. In addition, BSkyB said it would be difficult to allocate revenue to multiple VOD services operated by the same provider, which each allow access to the same VOD content. In this respect, BSkyB said that its internal accounting systems do not allocate revenues on a 'per-ODPS' basis. In summary, BSkyB said that using a revenue-based approach to regulatory fees would not be meaningful because it would not necessarily reflect the value of the VOD content in an ODPS or its use. Further, this respondent considered that it would be time-consuming and difficult: for the regulator to determine the principles that should apply under a revenue-based approach; and for the VOD service providers to interpret and apply such principles.

- 4.25 Channel 4 agreed with the disadvantages of a revenue-based approach, set out in the VOD Fees Consultation, and said these disadvantages reflected the complexity of the different business and delivery models that exist in the VOD sector. In Channel 4's view, the disadvantages of a revenue-based approach could be compounded where editorial responsibility for a VOD service lies with a third party platform, which would cause problems for a regulatory fees approach based on revenue.
- 4.26 One confidential response said that it would not be possible to report VOD revenues because: online advertising deals do not separately attribute value to VOD editorial content that ATVOD regulates; VOD advertising is not a standalone business from television advertising sales; there are not robust and auditable systems in place attributable to VOD advertising revenues. As a result this respondent said the business models and operational processes for delivering VOD revenues are emerging and do not currently allow for reliable attribution of revenues to VOD content subject to regulation.
- 4.27 One other confidential response said that a fees approach should not be based on revenue because there is no widely accepted definition of revenue or accepted method of collecting and assessing revenue data. In this respondent's view, it would be unlikely that many ODPS providers would be in a position to report revenue data, and therefore using a revenue-based approach would leave ATVOD not receiving any income for a number of months. In addition, this respondent cited the example of reporting revenues to Ofcom in relation to linear channels, as demonstrating that revenue reporting creates a large administrative burden on both VOD services and the regulator.
- 4.28 ULTV agreed with the VOD Fees Consultation that it is likely to be impractical to agree a commonly-accepted definition of VOD revenue in the near future. ULTV also questioned why the VOD Fees Consultation had held out the possibility of some service providers paying no regulatory fees under Option A, whilst in correspondence with ULTV, Ofcom had said the 2010 Regulations would not permit an ODPS paying no regulatory fees.
- 4.29 Disney agreed that developing a revenue-based approach to the 2010-2011 Fees was problematical due to: the difficulties of attributing revenue to VOD services; the early stage of development of the VOD industry; and the fact that many VOD services generate little or no revenues. This respondent also stated that revenue is not necessarily a measure of the regulatory activity that a service will generate.

Respondents who agreed with Option B – Revenue model with a minimum payment

- 4.30 Two respondents agreed with Option B. The PPA considered this option to be a possible approach, and that as the VOD market is nascent, any approach to regulatory fees should not inhibit growth of this market.
- 4.31 As mentioned above, one confidential response accepted that Option B was probably the fairest option. This respondent stated that the minimum fee would reflect the fact that all regulated services would engender some form of regulatory activity. However, this respondent also argued that large VOD service providers (such as the public service broadcasters), VOD services with high turnover, or VOD services available on a subscription or transactional basis, should cover the majority of regulatory costs.

Respondents who disagreed with Option B – Revenue model with a minimum payment

- 4.32 Eight respondents expressed their disagreement with Option B. Those who had also disagreed with Option A tended to have the same reasons for rejecting Option B. ULTV said that Ofcom and ATVOD were mistaken to suggest a minimum fee of £1,000, on the basis that this is also the minimum fee paid by Ofcom Television Licensable Content (TLCS) Licensees. This is because this fee would only be likely to cover a small proportion of the overall costs of a provider who provides the linear channel, whereas £1,000 would represent a large amount of a small-scale VOD service provider's costs. In addition, ULTV noted that the regulatory costs of broadcasting are associated with the costs that Ofcom has passed on associated with licensing, spectrum planning and coordination. However, in ULTV's view, this contrasted with the costs associated with the costs of regulation of VOD services, and contrasted with one of the purposes of Ofcom designating ATVOD, namely to be a minimal and light-touch form of regulation.

Respondents who agreed with Option C – Flat-rate fees model

- 4.33 12 respondents agreed with Option C. Five stated that a flat-rate fee would provide the most secure way of financing ATVOD in its first year, given the limited information known about the sector. SeeSaw agreed, stating its belief that a flat-rate fee would be the simplest and cheapest means of collecting revenue "at least for the period up to 31 March 2011. BT considered a flat-rate fee was the most appropriate in a dynamic and growing market and before a full list of ODPS has been produced and reviewed. This respondent also believed this approach to be understandable and would apply a reasonable level of fees to all notified VOD services for the period up to 31 March 2011.
- 4.34 Virgin Media, in supporting Option C, also stated its belief that a flat-rate fee approach would be the only practicable approach for the foreseeable future. BSkyB also agreed with the flat-rate fee as long as a proportionate and targeted approach is taken to determining which services are deemed to fall into scope, and in particular so-called 'multiple' services. This respondent argued that a flat-rate fee may be reasonable where a service provider is deemed to be providing a single service across multiple platforms. However, a flat-rate fee would become a barrier to entry where a separate flat-rate fee is required to be paid in respect of the same content that is made available across separate platforms. In this respect, BSkyB pointed to the example of content that is being made available on different platforms at no incremental costs to the user's linear subscription, and that in such circumstances no additional revenue is being received by the content provider in respect of VOD viewing.
- 4.35 One confidential response argued that Option C would be easy to apply, collect and budget for, and would not involve any complex audit or verification exercises. Further, this option would give ATVOD financial certainty, and would give all service providers an equal stake in the new regulatory regime. In addition, this respondent said that the proposed flat-rate fee of £2,500 would be unlikely to be a material sum to those services firmly in scope of the new regulatory regime.
- 4.36 Virgin Media, in supporting a flat-rate fee as being proportionate, considered that a flat-rate would be "justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is imposed" in line with section 368NA(3)(b) of the Act on the basis that in the start-up phase of regulation, it

is likely that all ODPS would incur a similar amount of regulatory activity. In addition, this respondent considered that this assumption would apply to the regulatory environment on an on-going basis.

- 4.37 Disney, whilst agreeing with a flat-rate fee as the most appropriate option for the 2010-2011 Fees, said that how fair and proportionate the flat-rate fee of £2,500 would be, would depend on scope decisions by ATVOD. In particular, this respondent said that where a service provider offers VOD services to several platforms, which may slightly differ in terms of: the precise programming or ‘bonus’ material on offer in each service; and the language version that each service is provided in, then these services should not be treated as multiple ODPS by the regulator, requiring separate notifications.

Respondents who disagreed with Option C – Flat-rate fees model

- 4.38 Four respondents disagreed with Option C. The PPA said that many publishers considering setting up an ODPS are start-up businesses, and therefore a flat-rate fee of £2,500 is uneconomic. In addition, this approach could lead to consumer detriment as such services would not launch and consumers would not be able to access content in a manner that they desire. The MBG stated its belief that the mobile VOD sector is made up of more small and new companies than other sectors. According to the MBG, many mobile VOD service providers would have turnover of less than £1M, and profits of £50,000. In this respondent’s view, a flat-rate fee of £2,500 would be considered nothing more than a “5% regulatory tax” which delivered no value to such services, or little value, if any, to their customers. Therefore, the proposed flat-rate fee would represent a disproportionate administrative burden and a barrier to market entry.
- 4.39 ULTV, although accepting that there is no perfect fee structure that would satisfy all service providers, made a number of points against a flat-rate fee, including the following. Firstly, it noted that the VOD Fees Consultation had itself said that a flat-rate fee would be disproportionate⁵⁶. Second, a flat-rate fee would be difficult to enforce amongst small-scale VOD providers, who would find it hard to pay such a fee, and would encourage services to evade notifying the regulator. In this regard ULTV noted that many community organisations find it hard to afford the £60 annual subscription fee payable to the Community Media Association. Third, the proposed flat-rate fee would be a disincentive for small-scale services to either remain in, or enter the regulated VOD sector. Fourth, although radio restricted service licences (RSLs) are “relatively expensive”, these fees can be justified by the work that Ofcom undertakes in relation to spectrum planning and licensing. Fifth, Ofcom, according to ULTV, seemed to be confused in thinking a flat-rate fee would be legally sustainable i.e. that it would have “regard to the provider who will be required to pay the fee”⁵⁷. Sixth, ULTV rejected the argument made in paragraph 4.27 of the VOD Fees Consultation, whereby “in the start-up phase of regulation, it is likely that all ODPS would incur a similar amount of regulatory activity”. This was because for example, in ULTV’s view small-scale services would have less “web traffic” and so group turnover would be a broadly accurate proxy for regulatory activity. Finally, ULTV argued that the proposed flat-rate fee did not comply with Ofcom’s Charging Principles or Ofcom’s statutory duties.

⁵⁶ In paragraph 4.32 of the VOD Fees Consultation, we said: “It can be argued that depending on at what level it is set, a flat-rate fee can be seen to be inequitable and disproportionate and taking account of VOD service providers’ business models or ability to pay, and imposes higher relative costs on smaller VOD service providers”.

⁵⁷ As required under section 368NA(3)(b) of the Act.

- 4.40 One confidential response disagreed with Option C because it took no account of a service provider's business model where ODPS are provided for free to third party service platforms across the EU as a compliment to associated linear channels. In particular, this respondent considered a flat-rate fee to be unfair if multiple language versions of an original English-language VOD service were to be considered by the regulator as separate ODPS. In such a scenario, this respondent argued that a flat-rate fee would not be 'cost-reflective', in accordance with the Fees Criteria, because the regulator would only check the English-language version of the VOD service. This respondent also noted that the Charging Principles stress turnover as being relevant, and it stated that it accrued no revenues in relation to any VOD service it provides. In addition, the respondent acknowledged that although all VOD services would engender some regulatory activity, it would be unfair and not be "justified and proportionate having regard to the provider"⁵⁸ if it had to pay many flat-rate fees for small multiple language versions of a VOD service, when large UK-based VOD providers might only have to pay one flat-rate fee.

Respondents who suggested alternative models

- 4.41 The MBG suggested a variation to Option C, whereby a minimum fee of £200 would be applied to all ODPS, who would be banded into 'small', 'medium' and 'large' categories according to their audience share. 'Small' VOD services would pay just the minimum fee, whilst 'medium' and 'large' VOD services would pay a medium or higher additional fee, in addition to the minimum fee, according to their audience share. The MBG said banding service providers would be less administratively burdensome than measuring exact revenue or audience consumption. This respondent acknowledged that it might be slightly more difficult to set regulatory fees on this basis, and there would be more of a risk of the regulator falling into deficit in the first year of regulation. In such circumstances, "initial reserve funding" of ATVOD should be made available for longer so that a more equitable and proportionate funding structure can be put in place.
- 4.42 Viasat stated its preference that no regulatory fee should be charged on ODPS, as according to Viasat, many overseas regulators do not charge for the notification of a VOD service.
- 4.43 One confidential response argued that the current co-regulatory framework was not light touch and that the functions that had been designated to ATVOD by Ofcom could be carried out by Ofcom itself with minimal costs. This would mean that small-scale VOD service providers, who already provide Ofcom-compliant linear services at some expense, would not have to face an extra cost in relation to related VOD services.
- 4.44 ULTV suggested an approach ("the ULTV proposal") whereby ODPS would pay the flat-rate fee of £2,500 unless they qualified for a concession. An ODPS would qualify for the concession if they could demonstrate that the group of companies of which it were a part had a consolidated gross turnover (from all business activities) of under £1M. This respondent made a number of points, including the following:
- under the ULTV Proposal, the VOD service provider would self-certify the group turnover of the group of companies of which it was a part. New VOD services would automatically apply for the concessionary rate, as long as they

⁵⁸ Ibid.

are not part of a pre-existing group of companies. The regulator could easily ascertain whether a VOD service qualified for the concession, by verifying the signed accounts of the company or the group of companies of which the VOD service was a part;

- additional concession tests that could be applied, including that to qualify for the concessionary rate the VOD service provider, or the group of companies of which the VOD service provider were a part: has profits of less than £100,000, or that no individual company director has been paid fees or a salary package of more than £100,000;
- ULTV argued that for company groups with less than £1M turnover, and less than £100,000 profits, VOD service provision is unlikely to be a core business and therefore an onerous flat-rate fee could discourage such entities from providing an ODPS. In this regard, ULTV noted that Ofcom had previously described radio groups generating less than £100,000 to be generating only limited returns;
- there were precedents for using group turnover. For instance, it is used when measuring eligibility for government grants and contracts, and by HM Revenue and Customs when assessing liability for corporation tax. In addition, according to ULTV, Ofcom has often requested copies of group accounts when assessing radio broadcasting licence applications. Further, Ofcom has previously applied exemptions to reporting requests in relation to equal opportunities, on the basis of group staff numbers;
- ODPS that qualified for the concessionary rate would still need to pay a concessionary regulatory fee of £20 to £25 (to cover basic regulatory administration costs, such as stationary), rising to £40-£50 if the fee was not paid promptly. In this regard, ULTV noted one of the levels of regulatory fees mentioned in the VOD Fees Consultation was £46;
- the 2010 Regulations does not state that the regulatory fee should be based on the revenues directly associated with the VOD service, and this legislation refers to the VOD “provider” rather than the VOD “service”;
- the incremental costs of regulating small-scale VOD providers would be close to zero. Therefore, given the costs of enforcement, and that the regulator would need the help of VOD services to ascertain who has editorial responsibility, a concessionary rate would lead to lower evasion;
- it would be broadly reasonable to assume that small scale VOD providers would generate less web traffic than larger VOD providers, and that group turnover would therefore be a broadly accurate proxy for regulatory activity. In addition, ULTV argued that group turnover would be a more accurate reflection of a service provider’s financial circumstances;
- the proposed concessionary rate would aim to minimise potential damage to the nascent VOD sector;
- ULTV maintained that it would be impossible to consider a VOD service’s “circumstances” as required by the 2010 Regulations⁵⁹, unless consideration

⁵⁹ See http://www.england-legislation.hms.gov.uk/si/si2010/uksi_20100419_en_1

was given to the group turnover of the group of companies of which an ODPS was part. ULTV argued that many larger VOD providers would be cross-subsidised by the larger corporate groups of which they are a part;

- ULTV maintained that there was no 'double jeopardy' whereby a larger broadcaster providing an ODPS would be paying regulatory fees for both their linear broadcast licences and their ODPS by reference to their level of broadcast revenues. Rather, ULTV maintained that an ODPS was benefiting from being part of a broadcaster's extended group offering;
- ULTV believed its proposal complied with the Fees Criteria;
- ULTV suggested that there are examples of other Ofcom licences where account is taken of how affordable a licence fee would be and relates to a company's expected financial position. ULTV cited the example of local DAB multiplex licensees, who rent out digital multiplex capacity to third parties, who pay an annual licence fee of £500; and
- ULTV outlined other approaches which it had considered but rejected, including applying automatic exemptions: for charities or services staffed wholly or mainly by volunteers, or for VOD services who limited the amount of content that was made available in that service

Consultation question – potential impacts of our proposals

4.45 In the VOD Fees Consultation, we asked the following question:

Question 9

Are there any potential impacts arising from the options we have laid out in Section 4 [in the VOD Fees Consultation] that we have not considered?

4.46 We received six responses in relation to this question. Three of these respondents requested confidentiality and are therefore not identified when their responses are referred to below. The responses from the organisations who did not request anonymity have been published on Ofcom's website⁶⁰.

Respondents who identified other potential impacts

4.47 Three respondents said there were no other potential impacts arising from the options we had laid out in Section 4 of the VOD Fees Consultation. The MBG said that in the absence of a lower regulatory fee for smaller companies, this respondent suspected that there would be a high level of avoidance, which would drive up ATVOD's administrative costs.

4.48 ULTV said that nothing in the VOD Fees Consultation could, in its opinion, reasonably constitute a regulatory impact assessment. In this regard, ULTV expressed its surprise that Ofcom and ATVOD appeared to have failed to undertake a cost/benefit analysis of the impacts of our proposals on small-scale VOD service

⁶⁰ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

providers, including prospective small-scale VOD services. This respondent stated that the proposed flat-rate option would force small-scale services to cease operating, and therefore there would be an impact on innovative and experimental services with wide societal benefits. In addition, ULTV believed that the flat-rate fee proposal would increase the likelihood of services trying to evade regulation. Further, whereas large VOD service providers could afford the proposed flat-rate fee, small-scale VOD services, with a comparatively small turnover, could not afford the flat-rate fee. ULTV also argued that Ofcom and ATVOD gave the impression that they were trying to produce any proposal which raises fees for ATVOD, irrespective of the impacts on the VOD industry or society. ULTV noted that many small-scale VOD services are highly marginal and are volunteer-based. This respondent also added that it was aware of prospective local and community television operators who have indicated to ULTV their intention to cancel launching a VOD service if required to pay the proposed flat-rate fee. This would, according to this respondent, mean that the communities that such VOD services were aiming to serve (e.g. ethnic groups, disabled groups, youth and senior groups, rural groups, and groups with educational or cultural purposes) would be disadvantaged.

Our response

- 4.49 The following areas of concern were raised by respondents in response to questions eight and nine:
- a) the level and definitions of revenues being generated by VOD services and the implications for fee setting;
 - b) whether ODPS could be totally exempted from paying the regulatory fee;
 - c) whether a minimum fee was appropriate as a feature of an approach to regulatory fees;
 - d) the advantages of a flat-rate fee approach;
 - e) the disadvantages of a flat-rate fee approach;
 - f) the use of audience share as a feature of an approach to regulatory fees;
 - g) whether any regulatory fee should be paid by ODPS and whether the regulation of VOD editorial content should be carried out by Ofcom through direct regulation;
 - h) whether group turnover should be used as a means of ascertaining whether ODPS might qualify for a concessionary rate, rather than pay a flat-rate fee (“the ULTV Proposal”);
 - i) whether a flat-rate fee would cause some ODPS to avoid notifying ATVOD and paying the regulatory fee; and
 - j) the impact of a flat-rate fee on small-scale VOD services.

Revenues and the setting of regulatory fees

- 4.50 We note that the clear majority of respondents who expressed a view on either of the options for regulatory fees that included revenue, disagreed with both these options. The reasons included the following: the lack of data about revenues being generated

in a nascent sector; the complexity of the different business and delivery models would complicate the devising of a revenue-based approach; the lack of any widely accepted definition of what constitutes VOD-related revenue; the material risk that a revenue-based approach could result in unpredictability of regulatory fees income; any attempt to devise a regulatory scheme would mean a delay on ATVOD receiving income; and even if a system of defining and measuring VOD-related revenue could be devised, it would be time-consuming and difficult to implement.

- 4.51 We note that the responses we received confirmed our initial view and analysis of the revenue-based options. In particular, that there are real practical difficulties in devising a revenue-based approach for the 2010-2011 Fees. Further, although any approach to setting regulatory fees will have a certain level of predictability, due to the current uncertainty over the number of ODPS, the responses we have received chime with our initial view that a revenue-based approach would have the added uncertainty of lack of clarity and information about VOD revenues being generated across the industry at present.
- 4.52 But we also noted the views of those respondents in favour of Option B, which would underline the merits of considering this option further in future years. In the immediate term, our concerns about the practical difficulties associated with trying to use existing VOD revenues as a mechanism for determining the 2010-2011 Fees have been confirmed in the responses we received. For example, BSkyB pointed to the fact that much of its VOD content is made available at no additional cost to its linear subscribers. It would be difficult therefore to allocate revenues to ODPS, especially provided across multiple platforms. Similarly, one confidential response stated that online advertising deals do not separately attribute value to VOD editorial content
- 4.53 We note that some respondents, such as Five, did not rule out revenue as a possible basis for regulatory fees beyond 31 March 2011. In addition, Virgin Media requested that the development of any revenue-based approach to regulatory fees in future years would require discussion with industry stakeholders first. In this regard, it is important to make clear that it is a legal requirement for the regulator to consult⁶¹ “in such manner as they consider appropriate the providers likely to be required to pay them a fee”.
- 4.54 Only two respondents (the PPA and one confidential response) agreed with the 2010-2011 Fees being based wholly or partly on revenue. However, we note that the PPA did not give any detail of revenues being generated by VOD services. As we made clear in paragraphs 4.15 and 4.23 of the VOD Fees Consultation, in the absence of such revenue data, we considered it would be hard for us to take the development of either Option A or Option B any further. In addition, neither did the PPA nor the confidential respondent set out any suggestions as to how to overcome the practical difficulties, referred to above, with using revenue as a basis for calculating the 2010-2011 Fees.
- 4.55 The confidential respondent who favoured a revenue-based approach confirmed that it received no revenues from its VOD services, which it supplies for free as a compliment to the linear channels it supplies to third party platforms in the EU. We note that this respondent acknowledged that Option B was probably the fairest option, reflecting the fact that all regulated services engender some form of

⁶¹ See section 368NA(4) of the Act.

regulatory activity. We agree that regulatory fees should reflect the fact that all ODPS should engender some form of regulatory activity. Further, as we state in paragraph 4.27 of the VOD Fees Consultation above, we consider that in the period up to 31 March 2011, it is likely that all ODPS would incur a similar amount of regulatory activity.

Exemptions from the regulatory fees

- 4.56 Under Option A, we included a table⁶² which showed that a hypothetical VOD service generating no revenues might pay no regulatory fees under this option. ULTV queried whether this was consistent with subsequent correspondence between Ofcom and ULTV where Ofcom had said that the legal framework does not allow for VOD service providers to be exempted altogether from the requirement to pay a fee.
- 4.57 This was however a hypothetical scenario and we should clarify as noted already above, that where it is decided to levy a fee, the legal framework for the regulation of ODPS services does not provide for individual providers to be exempted altogether.

Minimum fees and the setting of the regulatory fee

- 4.58 The majority of the respondents who expressed a view about Option B, disagreed with this option, mainly for the same reasons that they disagreed with Option A. However, ULTV also objected to a minimum fee of £1,000 for a number of reasons. In particular, ULTV objected to the use of the same minimum as an Ofcom Television Licensable Content (TLCS) Licence (£1,000), because, amongst other reasons this figure would represent a small amount of linear broadcaster's costs but a large amount of a small-scale VOD service provider's costs.
- 4.59 In addition, ULTV argued that there is more value in an Ofcom broadcasting licence (through Ofcom's costs in areas such as spectrum planning) than a regulatory fee payable to ATVOD. We note these points, however, as we discuss below concerning the advantages of a flat-rate fee, there are real practical issues at the present time preventing us from developing an approach to regulatory fees based on a variable metric. We return in paragraphs 4.83 to 4.88 to the issue of the impact of a flat-rate fee on small-scale VOD services.

Advantages of a flat-fee approach

- 4.60 We note that the majority of respondents to the VOD Fees Consultation agreed with Option C as the most appropriate approach for the 2010-2011 Fees. This was for a number of reasons, including that a flat-rate fee would be: the most secure way of financing the regulation of the VOD sector, given the limited data that is available at present; simple and inexpensive to budget for, collect and administer; and would give all ODPS an equal stake in the regulatory regime.
- 4.61 BSKyB qualified its support for a flat-rate fee by stating that a flat-rate fee might become a barrier to entry if a separate regulatory fee is required to be paid for the same content made available across multiple platforms. It is not possible for us to give a definitive decision within this Statement about whether any particular provider's VOD services constitute ODPS or not.
- 4.62 We note the point made by Virgin Media that it will be likely in the early months of regulation that all ODPS are incurring a similar amount of regulatory activity thus

⁶² See figure 4 on page 34 of the VOD Fees Consultation.

making a flat rate fee justifiable and proportionate having regard to the functions in respect of which it is imposed. However, we do not agree it is possible to say, as Virgin Media contends, that the level of regulatory activity would remain relatively constant in future years. This is a factor that would need to be considered afresh when we consult on the appropriate approach to the 2011-2012 Fees in due course.

Disadvantages of a flat-rate fee approach

- 4.63 The respondents who disagreed with Option C were concerned that a flat-rate fee might prove disproportionately expensive for small VOD services or new entrants to the VOD sector. ULTV, in particular, made the following points about the proposed flat-rate fee. Firstly, the flat-rate fee would be difficult for small-scale VOD service providers to pay, and would cause such providers to evade notifying and paying the regulatory fee. In addition, the proposed flat-rate fee cannot be justified compared with the fees paid by radio RSL licensees to Ofcom. This is because the level of the radio RSL fees can be justified because they cover the costs of Ofcom undertaking spectrum planning and licensing. This is not the case with small-scale VOD services, who do not use spectrum. Second, the flat-rate fee would be many times more than the membership fee of £60 payable to the Community Media Association, which many small-scale service providers, according to ULTV, cannot afford to pay. Third, the flat-rate fee does not comply with the Charging Principles or Ofcom's statutory duties. Finally, ULTV noted that VOD Fees Consultation itself had noted that a flat-rate fee would be disproportionate⁶³.
- 4.64 In response, we would make the following points. Firstly, we note that ULTV has argued that a flat-rate fee would be disproportionate, cause evasion amongst small-scale service providers, and discourage new market entrants. It is difficult for us to gauge the weight of this argument given the lack of evidence provided by ULTV specifically, or from small-scale VOD service providers directly, concerning any particular small-scale services that are already being provided or that are likely to be provided. In this respect, as we make clear in paragraph 3.22 above, that we believe that there are only very few web-based services currently available of a local or community nature, and further, it is not clear that these. Or future similar services, would necessarily fall into the scope of the new regulatory regime. However, we consider these issues, as well as the comparison with the licence fees paid by other community and small-scale broadcast licensees, when we discuss the issue of small-scale services in more detail in paragraphs 4.83 to 4.88 below.
- 4.65 Second, although service providers might not be able to pay a £60 membership fee to the Community Media Association (CMA), we would point out that this is a purely voluntary fee, which small-scale VOD service providers are not obliged to pay. In addition, the fact that a service provider is eligible to join the CMA does not mean it is an ODPS. In contrast, if, for example, a small-scale, community-based VOD service was determined to be an ODPS, then it would be required to pay a compulsory regulatory fee. However, we note that the regulatory fee would not be a unique compulsory cost for such providers. Rather, we assume that such providers would pay a range of compulsory costs, such as utility and technical costs, and where relevant content costs, such as music copyright fees.
- 4.66 Third, we have had regard to the fact that the Charging Principles state that "Tariffs for some categories where turnover is inappropriate... may be set as fixed cash

⁶³ See footnote 56 above.

sums” (paragraph 3.3). In addition, we consider that a flat-rate fee is, as we state in paragraph 4.27 of the VOD Fees Consultation, is consistent with the statutory criterion that requires the regulatory fees be “justifiable and proportionate having regard to the provider who will be required to pay it and the functions in which it is imposed”⁶⁴. This is because, as we explained in paragraph 4.27 of the VOD Fees Consultation, “in the start-up phase of regulation, it is likely that all ODPS would generate a similar amount of regulatory activity”. Finally, we acknowledge ULTV’s point that we did note in the VOD Fees Consultation that a flat-rate fee could be seen as disproportionate⁶⁵ but this was in the context of noting the possible arguments for and against the various options for regulatory fees. We were not suggesting that we considered this to be the case.

- 4.67 We note that the MBG said that a flat-rate fee would be a disproportionate administrative burden. We do not agree. Rather, we consider that as a general principle a flat-rate regulatory fee would in most cases be a more straight-forward method of calculating and paying regulatory fees when compared to variable-based approaches such as revenue or audience share, which would require a larger degree of administration on the part of ODPS, let alone the regulator. Further, in the context of agreeing the 2010-2011 Fees, we consider that there would be more administrative burdens involved in the regulator devising, and ODPS setting up, systems to report revenue or audience share, under possible revenue-based approaches.
- 4.68 We also note the points made by one confidential response that a flat-rate fee did not take into account its business model whereby multiple language versions of an English-language VOD service are provided to third party platforms across the EU. This point repeats this respondent’s concern about scope decisions by the regulator about such reversioned services. We deal with this point in paragraph 3.58 above.
- 4.69 On a related point, we note the argument made by Disney about multiple VOD services offered to third party platforms that may vary according to the range of programming or additional content on offer, as well as being provided in different languages. This respondent considered that such services with only “minor differences” between them, due to the range of programmes on offer, and their language version, should not be considered separate ODPS. We note this point, but the judgement as to whether particular VOD services are substantially the same will depend on the facts of each case.

Audience share and the setting of the regulatory fee

- 4.70 The MBG suggested a variation of Option B but with the use of audience-share rather than revenue as the variable for setting the level of regulatory fees. We consider that this would not be a feasible approach for setting the 2010-2011 Fees, given the lack of reliable audience data for VOD services; the absence of a widely accepted measure of audience share in the VOD sector; and the urgent need to implement a workable approach for such fees for the period up to 31 March 2011.

Whether any regulatory fee should be paid by ODPS and whether Ofcom should regulate ODPS

- 4.71 Viasat argued against the imposition of any regulatory fees, given that, according to this respondent, many overseas regulators do not charge for the regulation of a VOD

⁶⁴ See section 368NA(3)(b) of the Act.

⁶⁵ See paragraph 4.32 of the VOD Fees Consultation.

service. At present, we are aware that different EU member States take different approaches to the regulation of VOD services. We further note that the AVMS Directive lays out the option for the regulation of VOD services to be achieved through co-regulation. It was the overwhelming view of respondents to the 2009 Consultation that Ofcom should, if all the relevant statutory tests had been fulfilled, designate ATVOD as co-regulator for VOD editorial content. The VOD Fees Consultation and this Statement are a recognition that the costs of running the co-regulator are to be met through regulatory fees to be paid by ODPS.

- 4.72 On a related point, as we made clear in the 2009 Statement, the overwhelming view of respondents was that the regulation of VOD editorial services should be achieved through a co-regulatory framework, rather than direct regulation by Ofcom. In addition, as the 2010 Regulations make clear⁶⁶, if Ofcom directly regulated VOD editorial services, ODPS would still have to meet the costs of regulation.

The ULTV Proposal

- 4.73 We note ULTV's argument that it is likely to be impractical to agree a commonly-accepted definition of VOD revenues in the near future, and we also note ULTV's implicit support for a flat-rate fee for at least the majority of ODPS. We also note that although ULTV strongly argued against Option C for small-scale VOD services, it did not object to flat-rate fee at the level we laid out in the VOD Fees Consultation being paid by an ODPS, who in ULTV's opinion, were not small-scale community-based ODPS. But, ULTV argued that small-scale VOD service providers should only pay a concessionary rate. Under the ULTV Proposal, in order to delimit which services should pay the concessionary rate, ULTV suggested a methodology based on the group turnover of the group of companies of which a VOD provider is a part.
- 4.74 We acknowledge the effort that ULTV has taken to develop the ULTV Proposal. However, having given it due consideration, we have reached the view that it is not feasible for the following reasons:
- we do not consider it is fair and proportionate to ascertain the appropriate regulatory fee an ODPS provider should pay by reference to group turnover. We consider that such an approach would not fulfil the statutory test of being "justifiable and proportionate having regard to the provider who will be required to pay [the regulatory fee]⁶⁷. For example, we do not consider it justifiable and proportionate to judge whether an ODPS provider should qualify or not for a concessionary fee just because it comes from a larger corporate group;
 - although ULTV points to other precedents for using group turnover, we consider that these are not of relevance, as we have to be bound by the statutory criteria in the Act, as well as Ofcom's general duties. In particular, we note that a closer comparable example is the approach to levying licence fees from Ofcom's linear broadcast licensees. In such circumstances, the calculation only relates to revenue received in relation to the relevant licensed service, and not the group of companies of which the licensed service might be part;

⁶⁶ See http://www.England-legislation HMSO.gov.uk/si/si2010/ukSI_20100419_en_1

⁶⁷ See section 368NA(3)(b) of the Act.

- we note ULTV’s suggested level of concessionary fee (£20-£25). However, if such a level of regulatory fee were chosen, we consider that this would be an unreasonably low contribution by any ODPS to the costs of the regulatory system. We consider that there are minimum administrative costs associated with any service subject to regulation, which exceed the level of concessionary fee suggested by ULTV. In this context, we note the range of other flat-rate fees paid by Ofcom’s licensees⁶⁸;
- ULTV argues that the 2010 Regulations do not expressly state that regulatory fees should be based on the revenues directly associated with a VOD service. However, we would also point out that the 2010 Regulations do not state any particular basis on which the regulatory fees should be based. Rather, the 2010 Regulations lay out the statutory criteria against which any of our proposals should be judged. In addition, we note that the 2010 Regulations refer to the “provider” of an ODPS rather than a ‘service in terms of the payment of the regulatory fee. In this context, we note ULTV’s related point that a number of ODPS may currently be ‘cross-subsidised’ by their larger parent companies. As in the case of Ofcom broadcasting licensees, where it is the company directly in possession of the relevant broadcasting licence that pays the relevant statutory fees, rather than its wider group of companies, we believe it would be wholly consistent to take the same approach with regard to ODPS i.e. that the person or body which is responsible for the ODPS pays any relevant regulatory fee and the person or body against which the proportionality of the regulatory fee should be judged, rather than an associated group of companies; and
- we note ULTV’s desire that any approach to regulatory fees does not damage the nascent VOD regulatory sector. We share this desire, but we note that ULTV has only asserted potential damage and not provided evidence of any actual or potential VOD services that might be affected by a flat-rate fee. We discuss the possibility of a concessionary fee further below.

Whether a flat-rate fee would cause ODPS to evade regulation

4.75 We note the point made by the MBG and ULTV that in the absence of a lower rate for smaller VOD service providers, there might be high level of avoidance from such providers. However, these respondents did not provide any examples of such services and we did not hear directly from any such providers, or potential providers, themselves. This makes it very hard for us to assess the strength of this argument. In this respect, we note that only one service has notified ATVOD which might be considered to be a small-scale. We discuss the issue of small-scale services in more detail in paragraphs 4.83 to 4.88 below.

The impact of a flat-rate fee on small-scale VOD services

4.76 In its response, ULTV argued that, in presenting our proposals, we had not accounted for the potential impacts on small-scale VOD services. This point was also implicitly made by both the MBG and PPA. As we have said in paragraph 3.22, our research has indicated to us that there are currently few small-scale or community based services of the type that these respondents seemed to suggest, and further, of those that we were aware of, it was not clear that such services would fall into scope of the regulatory regime. We strongly refute the suggestion from ULTV that in setting our approach to the 2010-2011 Fees, we have been trying to produce any proposal

⁶⁸ See Annex 2.

which raises regulatory fees for ATVOD, irrespective of the impacts on the VOD industry or society. In developing our proposals, we have been clearly bound by the statutory criteria, including Ofcom's general duties, under the Act. However, we have only been able to base and assess our proposals on what evidence is available before us. In this context, we note that ULTV has not provided any specific evidence of which services might be affected by our proposals, and in what way. Neither have we received any responses from any providers or potential providers of such services. However, we are conscious that ULTV has strongly argued the case that a flat-rate fee, as proposed, would have a detrimental effect on small-scale VOD service providers, aimed at particular community and equality groups, and would, according to ULTV, cause some such groups not to launch a VOD service. Taking this into account, we address the issues raised in relation to small-scale services in more detail in paragraphs 4.83 to 4.88 below.

Our decision

4.77 Having considered the responses we have received to the VOD Fees Consultation, we have concluded the following:

- there is no regulatory fee structure that would satisfy all VOD service providers, although the majority of respondents favour the proposal for a flat-rate fee;
- it is not practical or feasible to adopt any approach to the 2010-2011 Fees that is based on revenues (or any of the other potential bases suggested in the responses we received) given the current lack of available data;
- that, on balance, the flat-rate fee represents the most practical option for setting a justifiable and proportionate fee for the financial year 2010-2011; and
- alternative approaches based on other bases (such as revenue and audience share) may merit further consideration when the regulator comes to set regulatory fees in future years.

4.78 In addition, as we state in paragraphs 3.25 to 3.29 above, for the purposes of setting a fee for this financial year, we have determined that an estimate of **129** notifiable services would be appropriate.

4.79 Accordingly, on the basis of the estimate set out in paragraph 3.28 of the VOD Fees Consultation of the likely costs of carrying out the relevant functions during the period 1 April 2010 to 31 March 2011⁶⁹, and taking into account our revised estimate of 129

⁶⁹ It should be noted that Government has provided a loan of £80,000 to ATVOD to be repayable over the period up to 31 March 2012. Taking into account the fact that £51,388 of the Government loan to ATVOD was attributable towards the likely costs of regulation for the period up to 31 March 2011, paragraph 3.28 of the VOD Fees Consultation explained that the 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, was £375,000 of the total costs of regulation (£426,388). As was noted in the VOD Fees Consultation, Regulation 13 of the 2010 Regulations and section 368NA of the Act provide that any costs incurred after 19 December 2009 but before 1 April 2010 in relation to preparing to carry out the relevant functions during the period 1 April 2010 to 31 March 2011 are to be carried forward as a

notifiable services, we have decided that the applicable regulatory fee to be paid immediately by providers of ODPS for the period 1 April 2010 to 31 March 2011 will be **£2,900** per ODPS.

- 4.80 We are conscious that the regulatory fee we have outlined is greater than the level of fee we originally indicated in the VOD Fees Consultation. However, as we note in paragraph 3.25 above, the figure of 150 services, on which Option C was based, was only a working assumption as it was not feasible to provide a strictly accurate number in advance of all relevant services being required to notify. Paragraph 3.16 of the VOD Fees Consultation provided some examples of the practical hurdles we faced in carrying out our analysis. As we explained in our consultation, it was on that basis, and taking into account the estimated likely costs of regulation for this financial year, that a flat fee of £2,500 for this financial year was proposed in relation to each notifiable ODPS service.
- 4.81 The higher fee outlined in paragraph 3.79 above is a function of the revised estimate of 129 notifiable services. We are confident that this figure represents as robust an estimate as possible in light of the most up to date information for the number of notifiable services. However, if ATVOD receives notifications from more than 129 ODPS, and receives more than the actual costs of regulation then any surplus is to be “(a) carried forward; and (b) taken into account in determining” the fees that are required to be paid by providers for the subsequent financial year, 1 April 2011 to 31 March 2012. As we explained in paragraph 3.28 of the VOD Fees Statement, the estimate of the likely costs of regulation for the period up to 31 March 2011 is £426,388, £375,000 of which is the amount we proposed to be the appropriate contribution, to be recovered by way of fees payable by ODPS, toward the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011. In addition, the balance (£51,338) of the estimate of the likely costs of regulation of £426,388, is attributable to the loan provided by Government towards meeting the total likely costs of regulation.

Next Steps

Invoicing of ODPS providers

- 4.82 Given our decision, invoices will be sent out urgently to those ODPS providers who have notified their ODPS to ATVOD, so that ATVOD can receive its regulatory funding as soon as possible. ATVOD will continue its investigatory work to establish which other services, which are currently operating, should be notified as ODPS. All providers of existing VOD services based in the UK are reminded of the urgent need to check whether they are subject to regulation, and whether they should notify ATVOD, as appropriate.

Small-scale services and a possible concessionary regulatory fee

- 4.83 We consider that there may be a case for a different fee to be payable by small-scale ODPS if sufficient evidence can be provided to support the concerns raised by a few respondents to the VOD Fees Consultation that there may be some (as yet unidentified) small scale providers of actual or prospective ODPS services who might find a fee of £2,900 prohibitive, and that such a fee would therefore not be justifiable or proportionate in relation to them.

deficit and taken into account in determining the appropriate fee for the financial year 1 April 2010 to 31 March 2011.

- 4.84 To date, we have not received any representations on such concerns from any small-scale providers themselves, nor have any small-scale providers been specifically identified to us. We are therefore inviting in paragraph 4.85 below, any relevant small-scale (e.g. local, community etc) providers of ODPS (or those who intend to provide such services) to contact us with evidence to help us in this area. If the evidence suggests that a separate limited category of provider exists for whom a compelling case can be made for considering setting a lower tariff, then we will consider what different approach may be appropriate. This would be in order to ensure that the fees imposed on them are justifiable and proportionate whilst still ensuring that the aggregate amount of fees levied represents an appropriate contribution to the estimated likely costs of regulation for 2010/2011 in accordance with our statutory duties. If such a case is made, it may necessitate a further short consultation to determine the relevant eligibility criteria and what level of fee is appropriate for providers in their situation.

Request for Information

- 4.85 We are inviting any providers of ODPS (or those who intend to provide such services), given what we say in paragraphs 4.83 and 4.84 above, who believe they may have genuine difficulties in being able to pay the £2,900 fee - either because they would be inhibited from being able to provide a new ODPS or they would be prevented from continuing to provide an existing one) - to contact us (the relevant contact details are provided in paragraph 4.87 below), with full details of their particular circumstances. These circumstances would include, in particular, details of their actual or estimated revenue and turnover and information about themselves (e.g. who they are, and what their status is) and the service they are providing or intend to provide.
- 4.86 If stakeholders wish to submit a response in answer to our request for information outlined in paragraphs 4.85, they should ensure their response arrives no later than **5 pm on 15 July 2010**. Responses should be sent, preferably by email, to adam.baxter@ofcom.org.uk
- 4.87 Alternatively responses may be posted or faxed to the address below.
- Adam Baxter
Ofcom
Content and Standards
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3271
- 4.88 It should be noted that all VOD service providers, who provide services in scope which have been notified to ATVOD, will be sent an invoice for £2,900 in respect of each ODPS they provide. Service providers must pay the amounts invoiced immediately to ATVOD.

Section 5

Other issues

Equality matters

- 5.1 Question 10 of the VOD Fees Consultation, as reproduced in paragraph 5.3 below, dealt with any equality matters arising from our proposals. As we discussed in the VOD Fees Consultation, Ofcom is required by statute to have due regard to any potential impacts our proposals in this consultation document may have on equality in relation to gender, disability or ethnicity – an Equality Impact Assessment (“EIA”) is our way of fulfilling this obligation. 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 VOD Fees Consultation, that we considered that our approach to regulation as a result of the current proposals would remain unchanged and therefore we did not consider that our proposals, as outlined in Section 4 would have any particular implications for people to whom these considerations relate. We based this conclusion on the experience gained by Ofcom in setting fees and tariffs across the sectors that Ofcom regulates.
- 5.2 In the VOD Fees Consultation, we invited stakeholders to submit responses specifically on any potential impacts relating to equality resulting from any of the options we outlined in relation to the 2010-2012 Fees. This was to ensure that we had not failed inadvertently to consider any possible equality impacts resulting from the proposed options.

Consultation question

- 5.3 In the VOD Fees Consultation, we asked the following question:

Question 10

- a) Do our proposals, as outlined in Section 4 [in the VOD Fees Consultation] 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?

- 5.4 We received five responses in relation to this question. Three of these respondents requested confidentiality and are therefore not identified when their responses are referred to below. The responses from the organisations who did not request anonymity have been published on Ofcom’s website⁷⁰.
- 5.5 Three respondents raised no issues under this question. One confidential response stated that the UK should not implement an approach to regulation of VOD services

⁷⁰ See http://www.ofcom.org.uk/consult/condocs/vod_proposals/responses/

which does not constitute a barrier to the provision of small-scale multi-language VOD services provided across the EU.

- 5.6 ULTV expressed its disappointment that Ofcom had not undertaken a full EIA. In this regard it noted a previous EIA Ofcom had produced in its Discussion Document on *Local and Regional Media in the UK*⁷¹. ULTV noted that this document had noted that “community media in particular is used by a greater proportion of the BME community than of the population overall...Internet take-up among BME groups is also higher than in the population as a whole, and therefore, initiatives in this area may have a disproportionate impact on this diversity group”. In addition ULTV noted that this document said “We note that community media...may have an important role to play in promoting equality for disability groups”. ULTV hoped that ATVOD and Ofcom would recognise that community and small-scale media groups are able to provide valuable services for ethnic minorities, women, and the disabled. Further, this respondent hoped that ATVOD and Ofcom would recognise that it would be unacceptable to place VOD services that serve these minorities through the proposed regulatory fees.

Our response and decision

- 5.7 The following areas of concern were raised by respondents:
- a) the impact of our proposals on multi-language VOD services; and
 - b) the impact of our proposals on BME and disabled groups.

The impact of our proposals on multi-language VOD services

- 5.8 We note the contentions by one confidential respondent that our proposals might have adverse impacts on equality, as they pertain to different language groups. In this regard, we note that this respondent provides multiple language versions of an English-language VOD service on third party platforms in the EU. However, as we explain in paragraph 3.58 above, the interpretation of scope as it applies to a service provider making available multiple language versions of an English-language VOD service, on third party platforms across the EU, will have to be resolved taking into account all the particular facts and circumstances of each case. However, ATVOD is aware that any decisions it takes in this area should not have any adverse impacts on equality matters, as they pertain to different language groups.

The impact of our proposals on BME and disabled groups

- 5.9 In its response, ULTV quotes Ofcom’s Discussion Document on *Local and Regional Media in the UK*. We interpret ULTV’s response to be implying that our proposals would have an adverse impact on local and small-scale VOD services provided to serve the BME and disabled communities. However, in its response ULTV did not give examples of services that might be ODPS. Further, in our research we are not aware of such services. However, we are conscious of the Discussion Document’s statement that any initiatives in the area of the internet may have a disproportionate impact on BME groups, and refer stakeholders to our earlier request for information

⁷¹ *Local and Regional Media in the UK*, Discussion Document published 22 September 2009, See <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf>

about their particular circumstances⁷². We envisage that this constituency might include VOD services there might be that are targeted at the BME and disabled communities.

- 5.10 With regard to promoting equality for disabled groups, it should be noted that ATVOD has been designated by Ofcom with the statutory duty⁷³ to encourage ODPS providers to ensure that their services are progressively made more accessible to people with disabilities affecting their sight or hearing of both. Any guidance produced by ATVOD on this matter cannot be issued without Ofcom's prior written approval.

Other issues raised by respondents

- 5.11 Several respondents raised issues not covered elsewhere in the Statement.
- 5.12 One confidential response argued that a flat-rate fee should remain in place beyond 31 March 2011 until there is more certainty over which service providers are driving the costs of the regulatory regime. According to this respondent, if it transpires that smaller VOD services are driving most of the regulatory costs, then there would be no justification for the larger VOD services to subsidise the smaller services. Channel 4 said it was looking forward to working with ATVOD concerning the possible adoption of a variable element to regulatory fees in the period after 31 March 2011, reflecting the different sizes and business models of ODPS.
- 5.13 BT said that after 31 March 2011 greater knowledge will be available about the number of VOD services that will have notified ATVOD. However, BT stated that ATVOD and Ofcom should ensure that all relevant VOD services have been notified to the regulator and that effective systems are in place to ensure payment of all regulatory fees, so that regulatory fees in the future are not unnecessarily higher for the community of ODPS paying regulatory fees after 31 March 2011.
- 5.14 Virgin Media stated that, as a pre-existing member of the self-regulatory predecessor of ATVOD ('old ATVOD'), it had already paid £5,000 to old ATVOD as its contribution to regulatory fees for the two financial years to 31 March 2012. According to Virgin Media, this payment was to help ATVOD's cash-flow in the period before designation and was in lieu of the first two years of regulatory fees. It stated it would be extremely concerned if further regulatory fees were demanded from it for the period up to 31 March 2012.
- 5.15 S4C noted that according to the 2009 Regulations⁷⁴, although it would be required to notify any of its ODPS to ATVOD, the editorial content of these services would not be regulated by ATVOD, but by the Welsh Authority. In such circumstances, S4C argued that it should not be required to pay a regulatory fee to ATVOD for its ODPS.
- 5.16 One confidential response asked for clarification about issues surrounding notification, including: whether platforms would need to pay a regulatory fee; whether a VOD service with multiple brands should only require one notification to the regulator; whether a service starting during the financial year 1 April 2010 to 31 March 2011 should pay a full flat-rate fee; and whether in future the establishment

⁷² See paragraphs 4.83 to 4.88 above.

⁷³ See section 368C(2) of the Act.

⁷⁴ See http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

costs of the regulator could be recouped by those ODPS subject to the 2010-2011 Fees.

- 5.17 Another confidential response queried what Ofcom had written in its 2009 Statement⁷⁵ concerning reversioned VOD services provided in different languages. This respondent noted that the 2009 Statement had presumed that foreign language versions of an original English-language VOD services, should be notified to the regulator separately, because they would differ by virtue of the different advertising they would carry. The respondent said that this approach would penalise business models where such reversioned VOD services are provided without advertising. The respondent cited the example of Ofcom's linear licensing regime, where different language versions of an original English-language linear broadcast service are not required to be licensed separately by Ofcom, if they carry the same advertising or no advertising. This respondent also expressed the view that if a service provider is, in its VOD service, merely making available content that has been broadcast on an Ofcom-regulated linear service, the regulatory framework for VOD editorial content is unnecessary regulatory duplication.

Our response

5.18 The following areas of concern were raised by respondents:

- a) whether a flat-rate fee should remain in place after 31 March 2011;
- b) the collection of regulatory fees;
- c) the payment of regulatory fees by pre-existing members of the self-regulatory predecessor of ATVOD;
- d) whether S4C should pay regulatory fees;
- e) whether multiple services should separately notify VOD services;
- f) whether the establishment costs of the regulator should be recouped by current ODPS;
- g) whether ODPS that launch during the year 1 April 2010 to 31 March 2011 can pay a reduced regulatory fee pro-rated according to when the service is launched; and
- h) the applicability of Ofcom's approach to licensing reversioned multi-language linear channels to the regulation of ODPS.

Regulatory fees after 31 March 2011

- 5.19 We note the argument made by one respondent that a flat-rate fee should be applied for the 2010-2011 Fees and beyond. However, as we made clear in paragraph 2.4 of the VOD Fees Consultation, that consultation did not deal with what would be an appropriate amount and structure of regulatory fees beyond 31 March 2011 (nor, therefore, does this Statement). It is a legal requirement⁷⁶ that the regulator consults stakeholders when setting the regulatory fees ahead of each financial year.

⁷⁵ See paragraph 3.109, 2009 Statement.

⁷⁶ See section 368NA(5)(c) of the Act.

Therefore, the issue of the relative burden of future regulatory fees across ODPS in the years after 31 March 2011 would be a matter for future consultations. In this regard we note Channel 4's desire to work towards the possible adoption of a variable element to regulatory fees in the period after 31 March 2011, reflecting the different sizes and business models of ODPS.

The collection of regulatory fees

- 5.20 We agree with BT that a key task for ATVOD, with the help of Ofcom, is to ensure that all relevant VOD services have been notified to the regulator. ATVOD is currently seeking to fulfil this task, and is liaising with Ofcom as appropriate. In addition, to ensuring efficient collection of regulatory fees, Ofcom is assisting ATVOD in the invoicing and collection of the 2010-2011 Fees. We discuss this process in more detail in paragraph 4.82 above.

Pre-existing members of the self-regulatory predecessor of ATVOD

- 5.21 We understand that members of 'old ATVOD' voluntarily made an advance payment to that body of £5,000 ("Advance Payment") to help with ATVOD's cash-flow prior to Ofcom designating ATVOD as its co-regulator. However, old ATVOD did not have any power to give assurances to its existing members about the potential level of regulatory fees that might subsequently be levied by its successor (should that successor be designated as a co-regulator). Nor did it have any power to bind a future co-regulator in relation to the treatment of any fees that might be set going forward. As we have explained earlier in this document and in the VOD Fees Consultation, the power to set and approve regulatory fees was not introduced until March this year after the 2010 Regulations had been made and had come into force and it was only after this that Ofcom designated ATVOD as its co-regulator, giving it the legal power to set the fees to be paid by providers of ODPS.
- 5.22 It is our understanding that the arrangement between old ATVOD and its members was for their Advance Payments to be off-set against the regulatory fees payable by them for the first two years of co-regulation. However, at that time, it could not have been known what the amount of the eventual regulatory fee (per service) would be and therefore over what period the Advance Payments should be taken into account.

S4C and regulatory fees

- 5.23 Under the Act, specific provision is made to make the Welsh Authority the appropriate regulatory authority in relation to all editorial content included in ODPS that it provides. However, advertising included in such services remains subject to regulation by Ofcom or any authority it designates for that purpose. As a result, sections 368BA and 368Q(A1) of the Act require the Welsh Authority to notify every service that includes advertising. We consider it appropriate, therefore, that the Welsh Authority should be required to pay an appropriate contribution⁰, by way of a regulatory fee in respect of each ODPS that requires to be notified, towards the administrative costs incurred by ATVOD as the body designated by Ofcom for the purpose of receiving notifications from providers. Exceptionally, therefore, in the case of the Welsh Authority, we consider it appropriate that a lower fee should be set for each service it has to notify in accordance with the statutory provisions referred to above. We intend to hold discussions with S4C on this point as soon as possible.

Multiple services and notification

5.24 One confidential respondent raised several queries about notification. With regard to whether a VOD service with multiple brands should only require one notification to the regulator, this will depend on the facts of each individual case and any VOD service provider should consult the Scope Guidance⁷⁷, approved and published in the 2009 Statement says on the issue of 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 ATVOD separately).

5.2 Similarly, a service provider may provide its on-demand programme content to a number of aggregation or retail platforms for distribution (e.g. on cable and over the internet). If the range of content is substantially the same across all distribution outlets then it would seem reasonable to view the distribution across each service or platform as comprising instances of a single on-demand programme service. In contrast, where the range of programmes offered to different services and platforms is not substantially the same, then each individual catalogue would form a separate on-demand programme service requiring notification.

Pro-rata regulatory fees

5.25 One respondent also raised the issue of whether the regulatory fee would be pro-rated for any ODPS commencing service during the period 1 April 2010 to 31 March 2011. As we noted in paragraphs 3.26 and 3.27 of the VOD Fees consultation, the legislation provides that any costs incurred after 19 December 2009 but before 1 April 2010 in relation to preparing to carry out the relevant functions during the period 1 April 2010 to 31 March 2011 are to be carried forward as a deficit and taken into account in determining the appropriate fee for the financial year 1 April 2010 to 31 March 2011 (see Regulation 13 of the 2010 Regulations and section 368NA of the Act). Given these statutory provisions, we are unable to pro-rate the regulatory fee for notifications made after 1 April 2010. As we also made clear in the consultation, the regulatory fees for the current financial year are liable to be paid by all service providers providing an ODPS on or after 18 March 2010.

Recoupment of ATVOD's establishment costs

5.26 In addition, this respondent asked whether ATVOD's establishment costs could be recouped and repaid to those ODPS providers who have paid the 2010-2011 Fees. We consider that this would be matter for future consultations on regulatory fees covering the period 1 April 2011 and beyond.

⁷⁷ The Scope Guidance is available in the document *Guidance on who needs to qualify*, available on the ATVOD website (See: http://www.atvod.co.uk/downloads/who_should_notify.pdf).

Licensing of reverted linear channels

- 5.27 We note the argument made by a confidential respondent, who provides multiple language versions of an English-language VOD service to third party platforms in the EU. Please see paragraph 3.58 above for our response on this point.

Annex 1

Statement of regulatory costs for the period 19 December 2009 to 31 March 2010

- A1.1 As required under section 368NA(6) of the Act, ATVOD and Ofcom are required as soon as practicable after the end of each financial year to publish a statement setting out for the that year: (a) the aggregate amount received in regulatory fees from ODPS during that year; (b) the aggregate amount of regulatory fees outstanding fro ODPS for that years ; and (c) the costs of ATVOD and Ofcom carrying out the relevant statutory functions during that year.
- A1.2 Under the 2010 Regulations the period from 19 December 2009, the date when the regulatory regime for VOD services was introduced, to 31 March 2010 is to be considered as a financial year for the purposes of section 368NA(6). As we make clear in paragraph 2.3 above the costs incurred by ATVOD and Ofcom for carrying out the relevant functions (and in the case of ATVOD preparing for designation) in the period 19 December 2009 to 31 March 2010, can be recouped from the regulatory fees set for the period 1 April 2010 to 31 March 2011. Since no regulatory fees are being set or collected from ODPS specifically in relation to the period 19 December 2009 to 31 March 2010. The amounts under both section 368NA(6)(a) and (b) above for this period are zero.
- A1.3 The statement of the costs incurred by ATVOD and Ofcom for carrying out the relevant statutory functions for the period 19 December 2009 to 31 March 2010 is as follows:
- ATVOD: £86,112
 - Ofcom: £0⁷⁸

⁷⁸ As we made clear in footnote 47 of the VOD Fees Consultation, Ofcom had formal responsibility for the regulation of ODPS from 19 December 2009 to 18 March 2010, the date on which ATVOD was designated as the co-regulator for VOD editorial content. In that period the regulatory activities were minimal and therefore Ofcom decided that the minimal associated costs should be reflected as above in paragraph A1.3.

Annex 2

Flat-rate regulatory fees paid by a range of Ofcom licensees

A2.1 In the table below, we set out flat-rate fees paid by different Ofcom licensees. Where appropriate, the fees include Wireless Telegraphy Act (WTA)⁷⁹ fees. In addition, the application fees for each type of licence are listed.

Licence Type	Flat-rate Fee (including where appropriate WTA fee payments)
Community Radio Licence	£950 (and £600 application fee)
Radio Restricted Service Licence	Up to £1,960 (and £400 application fee)
Television Restricted Service Licence	£500 (No application fee)
Television Multiplex Licence	£10,000 (and £25,000 application fee)
National Radio Multiplex Licence	£10,000 (and £50,000 application fee)
Local Radio Multiplex Licence	£500 (and £1,000 application fee)
Radio Licensable Content Services Licence	£575 (and £250 application fee)
Digital Sound Programme Licence	£100 (and £250 application fee)

⁷⁹ The Wireless Telegraphy Act 2006 and its predecessors regulate radio communications in the UK. A Wireless Telegraphy Licence permits a broadcaster to transmit its service via wireless telegraphy. Broadcasters are required under this legislation to pay the appropriate WTA fees.