



Proposals for the setting of
regulatory fees for video on
demand services for the period up
to 31 March 2011

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

Consultation

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Section 1

Executive Summary

Introduction

- 1.1 This consultation seeks 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") under section 368A of the Communications Act 2003 ("the Act") and are subject to regulation by Ofcom and the Association for Television on Demand ("ATVOD").
- 1.2 This document is a joint consultation between Ofcom and ATVOD, the body that Ofcom designated on 18 March 2010 as the co-regulator for VOD editorial content. The purpose of this consultation is to consult on options for 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 Act, such fees must be 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 ("the 2010-2011 Fees"), 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 or after 18 March 2010.
- 1.3 The options put forward in this consultation are proposed as the appropriate options to consider for the 2010-2011 Fees. Although this is a joint consultation, the ultimate responsibility for deciding the 2010-2011 Fees remains with Ofcom, since ATVOD's delegated function to set fees to meet their costs, is subject to Ofcom's approval. For the avoidance of doubt, this consultation does not deal with what would be an appropriate amount and structure of regulatory fees beyond 31 March 2011.

Background

- 1.4 In Section 2, we lay out the legislative and regulatory background to this consultation.
 - 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")¹, requires that statutory, television-like regulation is extended to certain types of VOD editorial services. A range of rules also apply to advertising included in VOD services subject to regulation;
 - the 2009 Regulations amend 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

¹ See the Audiovisual Media Services Regulations 2009 (SI 2009/2979) ("the 2009 Regulations"), http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

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”)²;

- on 18 March 2010, a further set of regulations (“the 2010 Regulations”)³ 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 approval⁴.

Background to regulatory fees

- 1.5 In Section 3, we lay out the background to the setting of regulatory fees in this area. As is clear from the legislation the 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. This rationale is in line with the principles⁵ Ofcom applies in setting fees in other sectors that it regulates, such as broadcasting. We believe the same principles should be applied here.
- 1.6 In the Ofcom’s Consultation on the Regulation of VOD Services (“the 2009 Consultation”)⁶, we noted that the ATVOD Proposal suggested the possibility of 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”. Accordingly, the 2009 Consultation stated, amongst other things, that any fees set needed to be proportionate and fair whilst being sufficient to ensure that ATVOD can carry out its regulatory activity efficiently and effectively. The 2009 Consultation also referred to the uncertainty about the number of services that would be subject to regulation.
- 1.7 For the purpose of deciding whether ATVOD would be able to fulfil the Financial Resources Criterion, we accepted that 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 and provide a workable model for the purposes of Ofcom’s

² See section 368B(9)(c) of the Act reproduced in Annex 5.

³ 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

⁴ In accordance with section 368NA of the Act reproduced in Annex 6.

⁵ 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

⁶ For a copy of Ofcom’s Consultation Paper (“the 2009 Consultation”) see:

<http://www.ofcom.org.uk/consult/condocs/vod/vod.pdf>

assessment of the Financial Resources Criterion and whether ATVOD would have access to adequate funding.

- 1.8 Although we did not ask specifically in the 2009 Consultation for responses on the issue of regulatory fees, the issue of a flat-rate fee was included as part of the ATVOD Proposal. The majority of respondents to the 2009 Consultation voiced their support for the ATVOD Proposal without amendment. However, in the 2009 Statement we noted that several respondents raised concerns about the potentially disproportionate and unfair effect of a flat-rate fee on smaller VOD service providers.
- 1.9 Having taken into account all the responses to our 2009 Consultation, we reaffirmed, in our subsequent Statement (“the 2009 Statement”)⁷, that any fee structure had to be proportionate and fair. 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 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.
- 1.10 However, Ofcom was not in a position to carry out a full consultation on fees and therefore make any final decision at the time of the 2009 Statement because the specific legislative provisions relating to the levying of fees were not, at that time, in place.
- 1.11 In section 3, we also provide our up-to-date estimate of the number of services (**150**) which we believe are likely to be subject to regulation, and stakeholders’ views are invited on this estimate.

The relevant criteria for setting regulatory fees

1.12 In the remainder of Section 3 we set out:

- 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. ATVOD’s and Ofcom’s combined estimates for the period 19 December 2009 to 31 March 2011 are £426,388. Of this we have proposed that £375,000 is 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. The balance (£51,388) is attributable to a loan from Government to ATVOD, and is expected to be repaid by ATVOD to the Government, and recovered through regulatory fees, in the period after 31 March 2011;
- Ofcom’s approach to fee setting. In developing a regulatory fees approach, we have taken account of the principles set out in Ofcom’s *Statement of Charging Principles* (“the Charging Principles”)⁸ published on 8 February 2005, which lays out charging principles that Ofcom applies in other sectors it regulates, such as broadcasting. In drawing up the Charging Principles,

⁷ For a copy of Ofcom’s Statement (“the 2009 Statement”) see:

<http://www.ofcom.org.uk/consult/condocs/vod/statement/>

⁸ See footnote 5.

Ofcom applied a number of criteria (“the Fees Criteria”) for framing options for setting fees including: fairness, cost-reflectiveness and simplicity. These were laid out in Ofcom’s consultation *Principles for setting Licence Fees and Administrative Charges* published on 30 September 2004⁹. In particular, the Charging Principles stressed the use of relevant turnover as a common tariff basis or the setting of fixed tariffs where applicable. Whilst the Charging Principles do not apply to the regulatory regime for VOD, we consider that for reasons of consistency and best practice, it is appropriate to take into account the Statement of Charging Principles, and the Fees Criteria when setting fees to be paid by ODPS providers. We ask stakeholders for their views on our approach to fee setting in this area;

- the advantages and disadvantages of various bases that might be applicable for the 2010-2011 Fees. We ask stakeholders for their views on our analysis in this area. In addition, we state our initial analysis that revenue and a flat-rate fee could provide suitably robust bases for the 2010-2011 Fees; 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 ask stakeholders for their views in this area. In addition, we state 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. However, we consider that a minimum fee is one attribute that could provide a suitable feature of a revenue-based approach to the 2010-2011 Fees.

Possible options for the 2010-2011 Fees

- 1.13 In Section 4, we lay out and ask for stakeholders’ views on 3 possible options for the 2010-2011 Fees.
- 1.14 **Option A (Revenue model).** We note that revenue could be a viable basis for calculating a regulatory fee, as it: justifies the statutory tests; fulfils a number of Ofcom’s own Fees Criteria; and is a central component of Ofcom’s Charging Principles. However, we also note that a revenue-based approach for the 2010-2011 Fees has a number of disadvantages, including that there is currently no clear picture of what revenues are being produced in the sector. However, having noted the difficulties outlined above, there are arguments for a revenue-based approach, and in particular that it would match more closely an individual provider’s ability to pay. This leads us to a provisional view that such an approach might be considered further, subject in particular to considering respondents’ views in this area and having sufficient information to enable us to set an appropriate tariff. Despite the practical challenges associated with this model, we lay out and ask stakeholders’ views on five possible tariffs, identified within reasonable parameters, that might be applied to the VOD sector. Our further analysis of this option will be subject to the information we invite stakeholders to submit to this consultation (in confidence) of levels of actual and estimated revenues from ODPS. We also ask stakeholders, if applicable, to suggest alternative tariffs to those that we lay out in Option A.

⁹ Ibid.

- 1.15 **Option B (Revenue model with a minimum payment).** Given the potential issues with applying fees to a sector where there are likely to be many services generating smaller revenues, a possible alternative to Option A would be a revenue model, but with the addition of a minimum payment of a fixed amount. As well as fulfilling the statutory criteria and several of the Fees Criteria, Option B maintains revenue as the key basis for fee-charging, mirroring the approach taken in Ofcom's Charging Principles, and it is based on suggestions Ofcom received from several respondents to the 2009 Consultation. We ask for stakeholders' views on the five possible tariffs laid out in Option A, combined with a minimum fee of £1,000. As indicated above with Option A, our further analysis of this option will be subject to information we invite stakeholders to submit to this consultation (in confidence) of levels of actual and estimated revenues from ODPS. We also ask stakeholders, if applicable, to suggest alternative tariffs and/or minimum fees to those that we lay out in Option B.
- 1.16 **Option C (Flat-rate fees model).** Given the potential problems under Options A and B of formulating a tariff that would guarantee adequate income for the regulator, a third option for the first fifteen months of the regulatory regime would be a flat-rate fee. We propose and ask for stakeholders' views on a possible flat-rate fee of **£2,500** per ODPS. This figure takes into account our estimate as to the likely number of services (150) which would be required to notify the regulator, and the amount we have proposed to be 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. As well as fulfilling the statutory criteria, and several of the Fees Criteria, Option C would, amongst other things, impose minimal administrative costs on regulated services and the regulator.
- 1.17 Each of the 3 options outlined above has its advantages and disadvantages. We therefore welcome comments from stakeholders as to whether a particular option should or should not be adopted as the basis for the 2010-2011 Fees.
- 1.18 There are strong arguments that an option based on an individual provider's revenue would, in principle, be a more equitable funding solution than a flat-rate fee. However, we need to take into account the particular circumstances of this start-up period. We acknowledge that as soon as possible after the initial period of regulation, and in the medium to long term, it may well be appropriate to determine the fee amount to be paid by ODPS providers, based wholly or partly on the revenue of individual providers. Under the relevant legislation ATVOD and Ofcom are required to consult annually on the applicable regulatory fees to be recovered by way of fees payable by ODPS in any given financial year.
- 1.19 However, we are mindful that the purpose of this consultation is to determine 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,
- 1.20 Given the particular challenges involved, we ask for stakeholders to respond with details of either actual revenues related to any ODPS that the relevant stakeholders may operate, or estimates of revenues in the case of new or proposed ODPS. The receipt of such revenue data will enable us to reach a decision. We will then take into account all the relevant data we receive when reaching a final decision on what is the most appropriate option to adopt.
- 1.21 After careful consideration of the above 3 options, we are minded, on balance, to prefer Option C (a flat-rate model) as the appropriate means of achieving 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 reaching this provisional view, we have considered, amongst other things, that:

- although a flat-rate fee is not necessarily the most equitable approach from a theoretical point of view, in the circumstances, it appears to us to be the most practicable;
- we recognise the difficulties in creating a variable-based approach to the 2010-2011 Fees from scratch in relation to a new industry sector, and in establishing a cost-effective and enforceable method of collecting, assessing and verifying the underlying revenue data with sufficient predictability; and
- we recognise that this consultation document only addresses the issue of setting the 2010-2011 Fees.

Approach to impact assessment

- 1.22 This consultation document does not contain a separate impact assessment document. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders, and in particular VOD service providers who will be subject to the new regulatory regime. This assessment has been informed by the information provided to us by a range of industry stakeholders. We invite comments on the potential impacts of the various options.
- 1.23 In Section 4, we invite stakeholders' views as to whether our proposals have any impacts in relation to matters of equality.

Section 2

Background

The purpose of this consultation

- 2.1 This consultation seeks 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")¹⁰ under section 368A of the Communications Act 2003 ("the Act") and are subject to regulation¹¹ 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 principles¹² in the area of fee-setting for other sectors Ofcom regulates (Section 2);
 - set out the factors associated with building a regulatory fees structure for ODPS (Section 3); and
 - seek stakeholders' views on options for the amount and structure of fees to be paid to the regulator by ODPS providers (Section 4).
- 2.3 This document is a joint consultation between Ofcom and ATVOD, the body that Ofcom designated on 18 March 2010 as the co-regulator for VOD editorial content. The purpose of this consultation is only to consult on options for 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 Act¹³, such fees must be 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 ("the 2010-2011 Fees"), 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

¹⁰ 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.

¹¹ See the Audiovisual Media Services Regulations 2009 (SI 2009/2979) ("the 2009 Regulations"), http://www.opsi.gov.uk/si/si2009/ukxi_20092979_en_1

¹² 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

¹³ See the Audiovisual Media Services Regulations 2010 (SI 2010/419) ("the 2010 Regulations"), http://www.England-legislation.hmso.gov.uk/si/si2010/ukxi_20100419_en_1

April 2010 to 31 March 2011¹⁴. However, the regulatory fees are liable to be paid only by service providers who were providing an ODPS on or after 18 March 2010.

- 2.4 The options put forward in this consultation have been agreed by ATVOD, and endorsed by Ofcom, as the appropriate options to consider for the 2010-2011 Fees. Although this is a joint consultation, the ultimate responsibility for deciding the 2010-2011 Fees remains with Ofcom. As indicated above, for the avoidance of doubt, this consultation 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 to publish costs incurred and estimated for each financial year going forward and to set the appropriate fees to be paid for each of those periods, thereafter. Accordingly, the level of fees to be paid after 31 March 2011 will be assessed annually, following the procedure set out in section 368NA of the Act¹⁵.

The legislative and regulatory background

The AVMS Directive and Ofcom's 2009 Consultation

- 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 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.

- 2.6 A range of rules also apply to advertising relating to VOD programmes. The AVMS Directive requires that VOD advertising complies with minimum standards. In brief, these require that VOD advertising:

- should be readily recognisable as such. In particular, surreptitious advertising is prohibited, as are subliminal techniques;

¹⁴ For the relevant provisions see section 368NA(7) and Regulation 13 subsection (2) of the 2010 Regulations, as reproduced in Annex 6.

¹⁵ See reproduced in Annex 6.

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

- should not prejudice respect for human dignity, or include or promote discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
- should not encourage behaviour that is prejudicial to health or safety, or grossly prejudicial to the protection of the environment;
- is not permitted for cigarettes and other tobacco products, or for prescription-only medicinal products or medical treatment;
- advertisements for alcohol products may not be aimed at minors, and shall not encourage immoderate consumption of alcohol; and
- may not cause physical or moral detriment to minors; exploit their inexperience or credulity or the special trust they repose in parent, teachers and others by encouraging them to persuade their parents or others to buy advertised products or services; or unreasonably show minors in dangerous situations.

2.7 The 2009 Regulations set the framework outlined above into UK legislation by introducing a new Part 4A (headed “On-Demand Programme Services”) into the Act. The new provisions set out the requirements that ODPS providers must comply with in relation to VOD editorial content and VOD advertising. The 2009 Regulations amended the Act from 19 December 2009. In particular they:

- give Ofcom functions in relation to the regulation of ODPS;
- give Ofcom power to delegate all or any of these functions to such other body or bodies it chooses to designate as a co-regulator and which meet the statutory criteria for designation (whilst retaining the power to act currently or in place of the co-regulator in relation to any of the functions Ofcom has designated to it);
- set the criteria that that body must fulfil before Ofcom can designate it to be an appropriate regulatory authority;
- set out the parameters for determining whether a VOD service is an “on-demand programme service” that falls within the scope of regulation;
- transpose the minimum requirements of the AVMS Directive which service providers must comply with; and
- set the regulatory framework for securing that ODPS providers comply with the new requirements, including enforcement powers for dealing with non-compliance (e.g. fines).

2.8 On 18 December 2009, Ofcom published its Statement (“the 2009 Statement”)¹⁸ on the Regulation of VOD Services, following its public consultation in September 2009 (“the 2009 Consultation”)¹⁹. In the 2009 Statement we:

¹⁸ For a copy of Ofcom’s Statement (“the 2009 Statement”) see:

<http://www.ofcom.org.uk/consult/condocs/vod/statement/>

¹⁹ For a copy of Ofcom’s Consultation Paper (“the 2009 Consultation”) see:

<http://www.ofcom.org.uk/consult/condocs/vod/vod.pdf>

- finalised guidance to assist stakeholders in determining whether particular services are likely to fall within the scope of regulation ("Scope Guidance")²⁰;
- stated that we would work towards adopting a co-regulatory approach to the regulation of VOD editorial content, with a view to designating the existing industry self-regulatory body, ATVOD, as the co-regulator for VOD editorial content. The duties that might be designated would include:
 - determining the scope of regulation and requirement on VOD service providers to notify their services (see below), as and when these become statutory obligations (including the power to issue enforcement notices against VOD service providers in relation to notification);
 - enforcing VOD editorial content standards and issuing enforcement notices against VOD service providers in relation to contraventions of the standards;
 - encouraging service providers to ensure they make their services gradually more available to people with sight and hearing disabilities; and
 - encouraging service providers to promote production of and access to European works.
- stated that we would work towards adopting a co-regulatory approach to the regulation of video on demand advertising, and continue discussions the Advertising Standards Authority ("the ASA").

Developments since 19 December 2009

2.9 With the implementation of the 2009 Regulations, Ofcom was given new functions in relation to the new regulation of VOD services. As outlined in paragraph 2.7 above, Ofcom was given the power 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 the following criteria, introduced by the 2009 Regulations, into new Section 368B(9) of the Act.

9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—

(a) is a fit and proper body to be designated;

(b) has consented to being designated;

(c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;

²⁰ For a copy of the Scope Guidance see Annex 1. It is also contained on Ofcom's website in *Information for providers of video on demand ('VOD') services, published 12 February 2010*: <http://www.ofcom.org.uk/tv/ifi/vodservices.pdf>

(d) is sufficiently independent of providers of on-demand programme services; and

(e) will, in performing any function to which the designation relates, have regard in all cases—

(i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(ii) to such of the matters mentioned in section 3(4)²¹ as appear to the body to be relevant in the circumstances.

- 2.10 However, Ofcom made clear in its 2009 Statement that it was not in a position at that stage to designate ATVOD as the co-regulatory body for VOD editorial content. As explained in paragraph 2.12 of the 2009 Statement, additional obligations on ODPS providers to notify their ODPS services 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.
- 2.11 Once the 3 month notification period to the European Commission ended 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 fee raising powers which it was then able to decide to designate to a co-regulator as one of the means by which they would be able to satisfy the criteria of having access to sufficient funding (see above).
- 2.12 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 in

²¹ Section 3 of the Act states the general duties of Ofcom. In particular, Section 3(4) of the Act states: “OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

- (a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
- (b) the desirability of promoting competition in relevant markets;
- (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
- (d) the desirability of encouraging investment and innovation in relevant markets;
- (e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
- (f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- (g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;
- (h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
- (i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- (j) the desirability of preventing crime and disorder;
- (k) the opinions of consumers in relevant markets and of members of the public generally;
- (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.”

accordance with Section 368NA of the Act²², subject to Ofcom's prior written approval.

2.13 In accordance with the requirements of the Act, Ofcom and ATVOD are now consulting ODPS providers on what the fee should be²³, final approval of the fee resting with Ofcom. The rest of this Consultation sets out:

- the background for 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
- possible options for the 2010-2011 Fees (Section 4).

Impact Assessment and Equality Impact Assessment

2.14 This consultation document does not contain a separate impact assessment. Instead the consultation document as a whole assesses the impact of the proposed changes on stakeholders, and in particular VOD service providers who will be subject to the new regulatory regime. This assessment has been informed by the information provided to us by a range of industry stakeholders, including in the responses we received to the 2009 Consultation. We have also taken into account the various statutory tests included in the 2010 Regulations, including in particular, that:

- in setting any fee, the regulator must be satisfied that that fee "represents the appropriate contribution of the [VOD service] provider towards the likely costs [of the regulator]" (section 368NA(3)(a) of the Act);
- in setting any fee, the regulator must be satisfied that that fee "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); and
- that a different fee may be required in relation to different cases or circumstances (section 368NA(4) of the Act);

2.15 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 obligation²⁴. 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 consider that our approach to regulation as a result of the current proposals would remain unchanged and therefore we do not consider that our proposals, as outlined in Section 4 would have any particular implications for people to whom these considerations apply. We base this conclusion

²² See Annex 6.

²³ See section 368NA(5)(c) of the Act, as reproduced in Annex 6.

²⁴ See section 71(1) of the 1976 Race Relations Act (as amended), section 49A of the 1995 Disability Discrimination Act (as amended), and section 76A(1) of the 1976 Sex Discrimination Act (as amended).

on the experience gained by Ofcom in setting fees and tariffs across the other sectors that Ofcom regulates.

- 2.16 In Section 4, we invite stakeholders' views as to whether our proposals have any impacts in relation to matters of equality.

Section 3

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

Introduction

3.1 In this Section 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.

3.2 As we made clear in Section 2, it should be noted that this document is a joint consultation between Ofcom and ATVOD, the body that Ofcom designated on 18 March 2010 as the co-regulator for VOD editorial content. The purpose of this consultation is only to consult on options for 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 Act²⁵, such fees must be 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 2011²⁶. However, the regulatory fees are liable to be paid only by service providers who were providing an ODPS on or after 18 March 2010.

3.3 The options put forward in this consultation have been agreed by ATVOD, and endorsed by Ofcom, as the appropriate options to consider for the 2010-2011 Fees. Although this is a joint consultation, the ultimate responsibility for deciding the approach towards deciding the 2010-2011 Fees remains with Ofcom. As indicated above, for the avoidance of doubt, this consultation does not deal with what would be

²⁵ See Annex 6.

²⁶ For the relevant provisions see section 368NA(7) and Regulation 13 subsection (2) of the 2010 Regulations, as reproduced in Annex 6.

an appropriate amount and structure of regulatory fees beyond 31 March 2011. The relevant regulatory authorities are required to publish costs incurred and estimated costs for each financial year going forward and to consult on the appropriate fees to be paid for each of those periods, thereafter. Accordingly, the level of fees to be paid after 31 March 2011 will be assessed annually, following the procedure set out in section 368NA of the Act.

Background to regulatory fees

- 3.4 As is clear from the legislation the 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. This rationale is in line with the principles Ofcom 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"²⁷.

We believe the same principles should be applied here.

- 3.5 As was made clear in the 2009 Consultation, and confirmed in the 2009 Statement, the overwhelming view of stakeholders was that the regulation of VOD services should be delivered through a co-regulatory structure. Furthermore, we highlighted the Government's intention to introduce into law the concept of a regulatory fee to be paid by VOD stakeholders, to meet the costs of the co-regulatory system. Below we consider what we said in the 2009 Consultation and the following 2009 Statement with regard to the fees to fund the co-regulator, in light of the provisions that have been subsequently introduced by the 2010 Regulations.

The 2009 Consultation process

The 2009 Consultation

- 3.6 As mentioned in Section 2, in our 2009 Consultation, published on 14 September 2009, we were consulting on the ATVOD Proposal and considered among other things, whether ATVOD was likely to fulfil the 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 the Financial Resources Criterion")²⁸. 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"²⁹. This suggested approach was endorsed by the industry VOD Editorial Steering Group

²⁷ 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

²⁸ See section 368B(9)(c) of the Act, as introduced by the 2009 Regulations, as reproduced in Annex

6.

²⁹ See paragraph 5.27, and paragraph 4.3.4, Annex 7 of the 2009 Consultation.

(VESG)³⁰. The rationale for a potential flat-rate fee, which was explained in the ATVOD Proposal³¹, was noted by Ofcom in the 2009 Consultation³². 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 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 would be at least 150 notifiable services; and
- ATVOD's estimated budget for its activities was £400,000 for the period 19 December 2009 to 31 March 2011.

3.7 Given the above factors, we agreed that for the purpose of deciding whether ATVOD would be able to fulfil the Financial Resources Criterion, we accepted that 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 and provide a workable model for the purposes of Ofcom's assessment of the Financial Resources Criterion and whether ATVOD would have access to adequate funding:

- if designated, ATVOD planned "to review the fee structure for the financial years after 2010-11 and would consult stakeholders before taking any decisions."³³; and
- ATVOD would set regulatory fees but only subject to Ofcom's approval³⁴.

3.8 It was also stated in the 2009 Consultation, that any fee to be paid by ODPS providers subject to regulation would cover all the costs of regulation, including "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"³⁵.

The 2009 Statement

3.9 Although we did not ask specifically in the 2009 Consultation for responses on the issue of regulatory fees, the potential for a flat-rate fee was included as part of the ATVOD Proposal, as described in paragraphs 3.6 and 3.7 above. The majority of respondents to the 2009 Consultation voiced their support for the ATVOD Proposal

³⁰ The VESG is the industry-led group set up, with the assistance of Ofcom and the DCMS, to work towards developing a proposal to Ofcom, for consultation, for a new co-regulatory body to regulate VOD editorial content. It represents a range of industry stakeholders, including all of the UK's major platform owners and major providers of VOD services.

³¹ See paragraph 4.3.4, Annex 7, 2009 Consultation.

³² See paragraph 5.27, 2009 Consultation.

³³ See paragraph 4.3.4, Annex 7, 2009 Consultation.

³⁴ See paragraph 4.3.5, Annex 7, 2009 Consultation.

³⁵ See paragraph 4.3.3, Annex 7, 2009 Consultation.

without amendment. However, several respondents raised concerns about the proposal for a flat-rate fee. In the 2009 Statement, we summarised the various points made by respondents³⁶, which were 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.

3.10 Some respondents suggested alternative fee structures³⁷. 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".

3.11 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 fair³⁸. 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 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.

3.12 However, Ofcom was not in a position to carry out a full consultation on fees and therefore make any final decision at the time of the 2009 Statement because the specific legislative provisions relating to the levying of fees were not, at that time, in place (see further Section 2 above).

The number of ODPS subject to regulation

3.13 As noted in paragraph 3.6 above, the 2009 Consultation noted that there was uncertainty about the number of VOD services that would be subject to the regulatory framework.

3.14 In order to set the appropriate level of regulatory fees we need to obtain as good an understanding of the likely number of services which will be subject to regulation. It is clearly essential that fees be set on the basis of an estimate which provides reasonable certainty 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 costs³⁹. In order to set the level of fees, Ofcom and ATVOD have undertaken some targeted research which aims to provide a reasonable estimate of the number of notifying services.

³⁶ See paragraph 4.15, 2009 Statement.

³⁷ Ibid.

³⁸ See paragraph 4.32, 2009 Statement.

³⁹ 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 carried forward 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.

3.15 Estimate of services subject to regulation: In order to form an estimate of the number of services subject to regulation, Ofcom and ATVOD undertook three discrete pieces of research during 2009 and 2010. This work started ahead of publication of the 2009 Consultation and has continued since the 2009 Statement:

- we reviewed VOD services emanating from the broadcast television sector. In this piece of research we examined the online offerings from the television channels licensed by Ofcom which target the UK, and made a preliminary and informal assessment as to whether they are likely to be services subject to regulation. In addition, we reviewed the lists of services provided on a set of major VOD platforms: those operated by Sky, Virgin Media, BT, TalkTalk TV, and Top-Up TV. For these, we have assumed that services are typically under the editorial control of the channel operator (e.g. Discovery on SkyPlayer is assumed to be under Discovery's editorial control, and not Sky's). In practice, the detailed operational and contractual arrangements between the operator and channel would need to be considered, to confirm where editorial control actually rests;
- we sought to examine those online services provided by the main pan-EU operators, which are licensed by Ofcom and established in the UK, but only made available outside the UK. As most of these services are made unavailable to UK audiences through the use of IP geolocation⁴⁰, this part of our review was inevitably limited in scope. However, we were able to identify some services which appear to satisfy the definitional criteria laid down in the legislation; and
- we reviewed the customer/partner lists of some of the IPTV⁴¹ and online VOD platforms such as: BrightCove, Narrowstep, Tangy TV and Fetch TV, to try to identify larger UK providers from outside the broadcast sector.

3.16 Providing a strictly accurate number, in advance of all relevant services being required to notify, is not feasible, in light of a number of practical hurdles:

- it would be an inefficient use of resources to try to survey the entire internet in advance, to identify services potentially subject to regulation, when one key activity for the co-regulator during its first year of activity will be to ascertain who will be subject to regulation; and
- even were a comprehensive survey to be possible, it is not always possible to determine the relevant characteristics of a service from a survey alone, and hence whether that service fulfils the criteria laid down in the Act to be a service subject to regulation. Examples of definitional criteria which are difficult to assess over the internet alone include whether a provider is established within the UK, and in the case of a platform offering access to multiple content channels, who actually has editorial control over the service or services being offered.

⁴⁰ "Geolocation" is the identification of the real-world geographic location of an Internet-connected device.

⁴¹ Internet Protocol Television is the term used for television and/or video signals that are delivered to subscribers or viewers using Internet Protocol (IP), the technology that is also used to access the internet. Typically used in the context of streamed linear and on demand content, but also sometimes for downloaded video clips.

- 3.17 As noted above, the above analyses will 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 propose a working assumption of a total of **150** notifiable services.
- 3.18 In order to ensure that service providers are aware of the legal requirement to notify their services and pay a regulatory fee, we wrote to all Ofcom broadcast television licensees 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 Commission⁴², VOD services subject to regulation would be required to fulfil these additional requirements, when they passed into UK law. We also published a note setting out the same information on Ofcom's website for the benefit of other stakeholders, including providers of VOD services not from the broadcast television sector⁴³.
- 3.19 Now that the 2010 Regulations have been made, we are writing again to all Ofcom broadcast television licensees, and publishing a further note on the Ofcom website for other stakeholders 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.

Question 1

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

The relevant criteria for setting regulatory fees

The statutory criteria relating to regulatory fees

- 3.20 As we discussed in Section 2, 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 fee⁴⁴. 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);

⁴² See paragraph 2.10 above.

⁴³ See <http://www.ofcom.org.uk/tv/ifi/vodservices.pdf>

⁴⁴ 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.

- 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 for 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).

3.21 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).

3.22 In addition to the above, the 2010 Regulations provide transitional arrangements in relation to the period 19 December 2009 to 31 March 2010⁴⁵, 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.

The estimates for regulating ODPS

3.23 As outlined in paragraphs 3.20 to 3.22 above, 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, or approve, 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 is required to produce an estimate of the likely costs of regulation for the period 1 April 2010 to 31 March 2011.

3.24 In addition, according to the terms and conditions of the Designation, Ofcom will retain the power of approving ATVOD's proposed approach towards the 2010-2011 Fees. The effect of this is that Ofcom implicitly will retain the ability to approve ATVOD's estimate in relation to paragraph 3.23(b) above. In addition, there will be

⁴⁵ See Regulation 13 of the 2010 Regulations reproduced in Annex 6.

some regulatory costs for Ofcom even after ATVOD has taken on its regulatory responsibilities. Therefore, an element of ATVOD's estimate under paragraph 3.23(b) above includes the amount that Ofcom would expect to be reimbursed for in relation to the activities that Ofcom envisages it will carry out.

- 3.25 As part of the process of designating ATVOD as co-regulator for VOD editorial services, Ofcom analysed and approved the ATVOD estimates produced in relation to paragraph 3.23(a) and (b) above. We set these out in figure 1 below, 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.

Figure 1	
Estimate	Amount
ATVOD – 19 December 2009 to 31 March 2010 ⁴⁶	£86,112
ATVOD – 1 April 2010 to 31 March 2011	£315,276
Ofcom – 19 December 2009 to 31 March 2010	£0 ⁴⁷
Ofcom – 1 April 2010 to 31 March 2011	£25,000
Total	£426,388

- 3.26 It should be noted, that as soon as reasonably practicable after the end of each financial year, ATVOD and Ofcom are required to publish a statement setting out, among other things, the costs to them of carrying out the relevant functions during that year. Any deficit or surplus shown by this statement is to be carried forward and taken into account in determining the fee payable in relation to the following year. These provisions apply also in relation to the costs incurred during the period 19 December 2009 to 31 March 2010
- 3.27 Given that no fee will be payable during the period 19 December 2009 to 31 March 2010, we expect that the costs incurred during the same period will constitute a deficit to be carried forward. Therefore, we consider it appropriate to take such costs into account in determining the fee payable during the financial year 1 April 2010-31 March 2011. We expect to publish the statement required under s.368NA(6) of the Act when we publish our final decision following this consultation.
- 3.28 It should also be noted that the Government has provided a loan to help ATVOD during its start-up phase. Therefore, we propose that 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

⁴⁶ As mentioned in paragraph 3.2 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.

⁴⁷ Ofcom has had formal responsibility for the regulation of ODPS since 19 December 2009, but before the 2010 Regulations came into force, the regulatory activity has been minimal and therefore Ofcom has decided that the minimal associated costs do not have to be reflected in this table.

during the period 19 December 2009 to 31 March 2011, is £375,000 of the total costs of regulation (£426,388), for the period 19 December 2009 to 31 March 2011. The balance (£51,388) is attributable to the loan from Government to ATVOD, and is expected to be repaid by ATVOD to the Government, and recovered through regulatory fees, in the financial year 1 April 2011 to 31 March 2012.

3.29 Given the uncertainties of regulating a new sector and setting up a new co-regulatory body, Ofcom is satisfied that the above estimates represent reasonable estimates of the likely costs of regulation by ATVOD and Ofcom for the period 19 December 2009 to 31 March 2011. It should be noted that these estimates are based on:

- information provided by ATVOD concerning the costs incurred up to the date of publication of this consultation document;
- the fact, as we make clear in footnote 47, that Ofcom has had formal responsibility for the regulation of ODPS since 19 December 2009, but before the 2010 Regulations came into force, the regulatory activity and associated costs have been minimal;
- an estimate of the likely costs that ATVOD and Ofcom expect to incur until 31 March 2010.

Question 2

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

Ofcom's approach to fee setting

3.30 Ofcom, as the industry regulator for the broadcasting and telecommunication sector, has a wealth of experience in setting and administering the regulatory fees that apply to different sectors. In developing an approach towards the 2010-2011 Fees, Ofcom and ATVOD have been mindful of Ofcom's work in relation to setting sectoral fees in other areas. In this regard, we have taken account of the principles set out in *Ofcom's Statement of Charging Principles*⁴⁸ ("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.

3.31 In drawing 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*⁴⁹:

⁴⁸ See http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf

⁴⁹ See paragraph 3.2,

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

- **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 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.

3.32 The Charging Principles identified a number of common principles to setting tariffs for the sectors to which they apply. These are:

- use of Relevant Turnover⁵⁰ as a common tariff basis across all sectors or the setting of fixed tariffs where applicable. Turnover data which is readily obtainable from all licensees and network and services providers and provides a basis for ensuring that the specific fees charged can be derived from a robust source and are broadly proportional to ability to pay;
- collection of turnover data for the last but one calendar year (rather than using licensees’ and network and services providers’ accounting periods). Collecting data for a fixed time period is necessary to support Ofcom’s database of cross-industry data that can be used for market analysis; and
- administrative charges and licence fees are calculated for each Regulatory Sector and for each Regulatory Category within the Regulatory Sector. This ensures reduced fees for Regulatory Categories with lower regulatory costs.

3.33 Ofcom’s Statement of Charging Principles derive from Ofcom’s statutory obligations under the Act⁵¹ to produce a Statement of Principles applying to the fixing of charges in the telecommunications sector (networks and services), and to the fixing of tariffs in the broadcasting sector. Any charges and/or tariffs Ofcom sets must be drawn up according to that Statement of Principles. This statutory requirement has not been extended to the regulatory regime for VOD. Ofcom’s Statement of Charging Principles has no statutory force, therefore, when setting the level of fees to cover Ofcom’s (or ATVOD’s) costs of carrying out the relevant VOD-related functions.

⁵⁰ 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

⁵¹ See section 38(3) of the Act concerning networks and services and section 347(1) of the Act in relation to broadcasting.

3.34 Whilst this statutory requirement to publish a Statement has not been extended to the regulatory regime for VOD, we consider that for the reasons already given, in particular, consistency and best practice, that it is appropriate to take into account 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 3.31 and 3.32 above. Accordingly, we propose 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.

Question 3

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

Different approaches to fee setting

3.35 In considering a possible approach to the 2010-2011 Fees, we have taken into account the various bases that might be applicable for the 2010-2011 Fees. Figure 2 lays out an assessment of the alternative bases of charging VOD regulatory fees.

Figure 2 Possible bases for the 2010-2011 Fees	Advantages	Disadvantages
Revenue	The revenue basis is used by Ofcom in setting fees in some sectors regulated by Ofcom (e.g. broadcasting). In mature markets, the revenue base will not tend to fluctuate significantly from period to period, nor will the number of regulated services change drastically from period to period) and will be relatively simple to administer and verify.	It is more complex than some measures (e.g. flat-rate fee). Some VOD services are provided for free, with no revenues being generated. Revenue is not necessarily a measure of how much regulatory activity will be undertaken as regards each regulated service. Agreement is needed on a definition of relevant revenue and how it is to be reported.
Profit	Arguably a profit measure is more closely linked to the value of having to notify a VOD service (i.e. being a service subject to regulation).	Profit is arguably too volatile a measure to ensure that the regulator can raise its required funding. The VOD sector is a nascent area of audiovisual activity where many VOD providers make

		little or no profit.
Audience (e.g. audience hours of viewing, or numbers of page impressions)	An audience measure can relate to the financial performance of a service and could therefore match a service's success and ability to pay.	There is no central, impartial audience statistics body (such as BARB or RAJAR). Reliable, timely and verifiable audience data may be difficult to obtain. Service providers may use different systems for measuring audience consumption. Agreement is needed on a definition of audience and how it is to be reported.
Amount of regulated content	Arguably the amount of content available on a service correlates to the likely amount of regulatory activity associated with that service.	Well-complied large-scale VOD providers would be penalised simply for providing more content than other services. It would be difficult to define robustly which content would be included for the purposes of calculating the amount of regulated content.
Flat-rate fee	A flat-rate fee would be simple to administer. Total costs of regulating the VOD sector would be divided by the number of regulated operators. Arguably during the initial 15 months of co-regulation, when all services have to notify the regulator, regulatory activity will fall more evenly on regulated services, than after 31 March 2011.	A flat-rate fee would be disproportionate, incurring higher relative costs to smaller regulated services. Some regulatory activities do not fall evenly across individual operators.

Question 4

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

3.36 Figure 2 indicates 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 3.31 above, suggests the following conclusions:

- profit is 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 service 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 consider 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. However, we consider that it is inappropriate 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 is not necessarily fair, as some regulated services would be penalised for making available large amounts of regulated content.

3.37 Based on the initial analysis outlined in paragraph 3.36 above, we consider that revenue and flat-rate fee could provide suitably robust bases for the 2010-2011 Fees. In Section 4, we lay out possible options for the 2010-2011 Fees, based on these two bases.

3.38 If revenue was used as a basis for the 2010-2011 Fees, one approach would 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.

3.39 However, to aid our analysis further, we have 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. These are laid out in figure 3 below.

Figure 3 Possible attributes (as applied to a fees approach based on revenue)	Advantages	Disadvantages
Minimum revenue threshold (i.e. services below a minimum threshold of revenue would not pay a regulatory fee).	Using a minimum revenue threshold removes the smallest regulated entities from having to pay a regulatory fee. Where there are a significant number of smaller regulated services this reduces administrative costs.	The costs of regulation are not recovered from smaller regulated services. A regulatory fee provides a reminder that the regulatory regime is still relevant for smaller regulated services.

<p>0% Allowance</p> <p>(i.e. regulated services with revenues just above zero would be charged in a special band).</p>	<p>A zero-rated revenue band has the same impact as the minimum revenue threshold. But it also introduces a more progressive scale (because regulated services just above the 0% band have much lower average payments than much larger regulated services.</p>	<p>The costs of regulation are not necessarily recovered from smaller regulated services. Could be administratively costly for smaller regulated services that have small revenues.</p>
<p>Number of bands</p> <p>(i.e. introducing separate revenue bands and applying different share of revenue tariffs to each band).</p>	<p>Banding helps to achieve a progressive regulatory fees approach.</p>	<p>Too many bands can introduce unnecessary complexity. Small increases in revenue lead to jumps in regulatory fees when revenue thresholds of bands are exceeded.</p>
<p>Rounding to lowest point within band</p> <p>(i.e. setting all regulatory fees in one band at the same level).</p>	<p>Simplifies billing as many invoices are the same figure. A small inaccuracy in revenue information would have no financial impact.</p>	<p>Creates jumps in regulatory fees, when revenue thresholds of bands are exceeded.</p>
<p>Degree of progression</p> <p>(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).</p>	<p>Marginally reduces entry/exit conditions into the VOD sector and is generally pro-competitive.</p>	<p>Moves away from a strictly proportional tariff basis (i.e. where regulatory fees rise in line with the size of a regulated service's revenues). The degree of progression is subjective.</p>
<p>Progressive Addition</p> <p>(i.e. higher regulatory fees are only charged upon incremental revenues above banding thresholds).</p>	<p>Reduces the jumps in regulatory fees that occur when higher bands are reached because a higher rate is charged only on incremental revenue above the higher threshold. Few bands are required.</p>	<p>Additional complexity to administer.</p>

<p>Maximum revenue threshold</p> <p>(i.e. set a maximum regulatory fee).</p>	<p>Arguably, beyond a certain point, regulatory activities may diminish with size. The maximum revenue threshold mitigates the problems of different overall regulatory fees comparing the situation of one VOD service provider providing a number of small regulated services with one VOD service provider providing one large regulated service.</p>	<p>Increases the financial impact upon medium sized regulated services.</p>
<p>Minimum payment</p> <p>(i.e. all services pay at least a minimum fee, irrespective of their level of revenues).</p>	<p>Ensures that all services subject to regulation contribute to the costs of regulation. Depending at what level a minimum fee is set, the effects of a minimum fee on smaller service operators could be minimal. A minimum payment would give a degree of administrative certainty, and would be cheaper, simpler and more predictable than a wholly progressive system.</p>	<p>Takes no account of services generating zero or little revenues.</p>
<p>'Polluter Pays'</p> <p>(i.e. services would pay an uplifted regulatory fee for engendering regulatory activity).</p>	<p>Would recognise that if a regulated service generates more regulatory activity it should meet the costs of such activity.</p>	<p>Very difficult to implement due to lack of certainty in an immature regulated sector. If a regulated service had to pay for levels of regulatory activity, it could be penalised simply for engendering a large number of complaints even if it was not in breach of the relevant statutory standards. If a regulated service does breach the relevant rules, there is a possibility of 'double jeopardy' if that service paid a 'polluter pays' increment fees as well as (in the case of a serious</p>

		breach) potentially a financial statutory sanction.
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Question 5

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

- 3.40 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 3.31 above, reached the following conclusions:
- due to: the nascent nature of the VOD sector; the lack of financial data from the sector; and the fact that we are designing a 'start-up' regulatory fees approach, we considered that we could not with any certainty or reliability 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 make more than trivial contributions to the costs of the regulatory system, we consider that it might be appropriate to implement a minimum fee on all regulated services.
- 3.41 Based on the initial analysis outlined in paragraph 3.40 above, we considered that a minimum payment mechanism (i.e. where all services pay at least a minimum fee, irrespective of their level of revenues) is the one attribute listed in figure 3 that could provide a suitable feature of a revenue-based regulatory fees approach. In Section 4, we lay out possible options for a regulatory fees approach based on this attribute and the two bases of revenue and flat-rate fees.
- 3.42 Ofcom and ATVOD has only considered the possible bases for a fees approach outlined in figure 2 and the possible attributes for a fees approach outlined in figure 3. However, we welcome responses from respondents to the issues we have laid out in this section.

Question 6

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

- 3.43 Ofcom and ATVOD would like to use 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, whilst at the same time adhering to the legislative criteria laid out in the 2010 Regulations and discussed above. In Section 4, we set out possible options for the 2010-2011 Fees for VOD services, taking into account the various criteria laid out in this Section.

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?

Section 4

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

Introduction

4.1 In this Section we set out three possible options for the 2010-2011 Fees including a discussion of the advantages and disadvantages of each.

Possible options for the 2010-2011 Fees

4.2 In laying out the following options, we have taken into account the legislative criteria for the setting of fees and 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.

4.3 As a result of our analysis, we have developed three possible options for the 2010-2011 Fees. These are:

- **Option A: revenue model;**
- **Option B: revenue model with a minimum payment; and**
- **Option C: flat-rate fees model.**

4.4 We lay out a discussion of the advantages and disadvantages of each the three options below.

Option A – Revenue model

4.5 Revenue could be a viable basis for calculating a regulatory fee for several reasons. In terms of the statutory tests, firstly, it can be seen as being "justifiable and proportionate having regard to the provider who will be required to pay" the regulatory fee⁵², as ODPS generating smaller revenues would be required to pay proportionally lower regulatory fees than ODPS generating more substantial

⁵² See section 368NA(3)(b) of the Act.

revenues. Second, for the same reasons, a proportional regulatory fees approach is permissible by virtue of the power that a different fee may be required in “different cases or circumstances”⁵³.

- 4.6 In terms of the Fees Criteria laid down in paragraph 3.31 above, revenue would fulfil the criteria of: fairness (in that it would more readily match regulated services’ ability to pay); and adaptability (in that such a basis could adapt to changing market developments). In addition, revenue is the key basis for fee-charging contained in Ofcom’s Charging Principles, as outlined in paragraph 3.32 above. Finally, revenue was suggested by a few respondents to the 2009 Consultation as a fairer basis for regulatory fees than a flat-rate fee.
- 4.7 A revenue-based approach has significant disadvantages for the first 15 months of the new regulatory regime for VOD. For example, it is not clear that a revenue-based regulatory fee would be the most likely way to match the particular costs of regulating different services. This is because revenue is not necessarily correlated to the amount of regulatory activity attributable to each regulated service.
- 4.8 More fundamentally, it should be noted that in order for a revenue-based regulatory fees approach to be effective and proportionate, and to be administratively cost-efficient, a widely accepted definition of what constitutes relevant revenue would need to be established, and there needs to be a cost-effective and enforceable method of collecting, assessing and verifying the underlying data with sufficient predictability. However, the difficulty with a nascent VOD industry is that there is currently no clear picture of what revenues are being produced in the VOD sector and there is uncertainty over the full number of services likely to be subject to regulation. At this point of time, therefore, it would be a significant challenge to create an approach to the 2010-2011 Fees that would reliably provide guarantees the appropriate level of income in terms of contributing to the costs of the regulator. Further, anecdotal evidence suggests that even some of the largest VOD services fail to generate substantial revenues. Therefore, it is not totally clear whether a revenue formula approach would produce an appropriate means of producing an 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, depending on what tariff is set.
- 4.9 However, despite the difficulties outlined above, there are arguments for a revenue-based approach as outlined in paragraph 4.6 above, and in particular that it would match a service’s ability to pay. This leads 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.
- 4.10 As mentioned above, a practical issue for a revenue-based approach is choosing an appropriate tariff. However, we are hampered by a lack of market intelligence, and this makes it difficult to draw up an appropriate tariff 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. In this context, it is worth noting that Ofcom’s Charging Principles, in favouring a revenue-based approach, do so in the environment of

⁵³ See section 368NA(4) of the Act.

setting tariffs for mature and developed sectors, such as the broadcast sector. The situation in relation to the VOD sector is different due to the nascent nature of the sector.

4.11 Despite the practical difficulties discussed above, we have outlined below, in figure 4, five possible tariffs that could be applied to the VOD sector, subject to the information on levels of actual and estimated revenues provided in response to this consultation, being at a sufficient level, and sufficiently robust to form a proper basis for charging. Due to the lack of financial data outlined above, we have sought to identify new tariffs within reasonable parameters. In picking these possible tariffs, we have 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 2009/10⁵⁴ (in respect of channels reporting in the range £0-£10million relevant revenue);
- second, Tariff 3 and Tariff 4 are the two possible tariffs suggested by Viasat in their response to the 2009 Consultation⁵⁵; and
- third, Tariff 5 extrapolates a revenue tariff ("Average Revenue Tariff") using estimated total revenue figures for the VOD sector. Given the lack of revenue data at an individual service level, an alternative approach would be to take reliable estimates of total market revenues for the VOD sector and extrapolate a revenue tariff applicable to all ODPS, that would ensure that ODPS providers provide 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. As explained in paragraph 3.28 above, we have proposed that 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 is £375,000. Assuming: current estimated market value ("VOD Total Revenues") of the VOD sector of £81.9 million⁵⁶; and 150 ODPS will be subject to regulation, it is possible to calculate that the Average Revenue Tariff would be **0.46%**. We acknowledge that the weakness of this methodology is that it assumes all of the VOD Total Revenues are generated by ODPS providers (i.e. services subject to regulation). However, given the lack of revenue information at a service level, it is the only meaningful way we can envisage of constructing a revenue-based tariff.

4.12 In figure 4 we have applied these possible Tariffs 1-5 on 4 hypothetical example ODPS to calculate what regulatory fees would be produced in purely hypothetical scenarios.

⁵⁴ See <http://www.ofcom.org.uk/about/accoun/tariffable0910/tariff0910.pdf>

⁵⁵ Viasat were the only the only respondent to the 2009 Consultation, who provided concrete proposals for tariffs in this area.

⁵⁶ Source: *Screen Digest*, 16 February 2010. Estimate of UK VOD revenues for 2009.

Figure 4				
Tariff	Service A	Service B	Service C:	Service D:
	Revenues: £0	Revenues: £20,000	Revenues: £100,000	Revenues: £2,000,000
Tariff 1 Ofcom Category A Tariff (public service broadcasters) 0.18859%	£0	£38	£189	£3,772
Tariff 2 Ofcom Category B Tariff (non-public service broadcasters) 0.04609%	£0	£9	£46	£922
Tariff 3 Viasat Proposal 0.1%	£0	£20	£100	£2,000
Tariff 4 Viasat Proposal 0.07%	£0	£14	£70	£1,400
Tariff 5 Average Revenue Tariff 0.46%	£0	£92	£460	£9,200

[NB: All figures have been rounded to the nearest £]

- 4.13 A striking feature of figure 4 is that under a purely proportional revenue base, given the anecdotal evidence that we have concerning low revenues being generated in the VOD sector, the above figures indicate that there is 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. An alternative would be to set the tariff at a much higher rate. Our current view is 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.

- 4.14 We note that the VOD sector presents opportunities for a range of new business models involving platform operators, ODPS providers, advertisers and advertising networks, giving rise to a complex revenue picture. Therefore, we consider that it is not a trivial task to define revenue. However, we invite stakeholders in their responses to provide, where they can and where appropriate, available information on revenues attributable to any ODPS they may run, or estimated revenues in any ODPS that they are proposing to launch. We will then take into account all the relevant data we receive when reaching a final decision on what is the most appropriate option to adopt.
- 4.15 Therefore, with a view to ascertaining the views of stakeholders as to whether a revenue-based regulatory fee model would be appropriate for the initial months of the new co-regulatory arrangements, and so that we can effectively consider all options, and in particular Option A, we would need those respondents who favour Option A to:
- provide us, in confidence, with details of actual revenues related to any ODPS they may currently operate, and estimates of revenues in the case of new or proposed ODPS. In the absence of such revenue data, it will be hard for us to take the development of Option A any further. In particular, we are mindful that any approach to producing the 2010-2011 Fees has to ensure that ODPS should 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;
 - indicate whether they favour any of Tariffs 1-5 as a means for determining the appropriate 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
 - if applicable, suggest different tariffs to Tariffs 1-5 that we lay out in figure 4 above, giving reasons why they believe such alternative tariffs would be appropriate, and how these tariffs could ensure that ODPS 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.

Option B – Revenue model with a minimum payment

- 4.16 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.

- 4.17 Option B could form a viable basis for calculating a regulatory fee for several reasons. As with option A, in terms of the statutory tests, firstly, it can be seen as being “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” the regulatory fee⁵⁷; and second, a proportional regulatory fees approach is consistent with the regulator exercising the statutory power in a way that recognises a different fee may be required in “different cases or circumstances”⁵⁸.
- 4.18 In terms of the Fees Criteria outlined in paragraph 3.31 above, introducing a minimum payment would fulfil the criteria of: cost-reflectiveness (in that a minimum fee would recognise that all regulated services would engender some form of regulatory activity); simplicity (in that for many services the calculation of the regulatory fee would be simple, and would be straight-forward for the regulator to administer); and adaptability (in that such a basis could adapt to changing market developments). In addition, Option B maintains revenue as the key basis for fee-charging, mirroring the approach taken in Ofcom’s Charging Principles, as outlined in paragraph 3.32 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.
- 4.19 In figure 5 below, we lay out how the regulatory fee payments from the purely hypothetical examples used in figure 4 under Option A would change with the introduction of minimum fee. We have aimed to draw up a possible minimum fee within reasonable parameters. Therefore, we have used a minimum fee of £1,000. 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.

Figure 5				
Tariff	Service A	Service B	Service C:	Service D:
	Revenues: £0	Revenues: £20,000	Revenues: £100,000	Revenues: £2,000,000
Tariff 1 Ofcom Category A Tariff (public service broadcasters) 0.18859%	£1,000	£1,000	£1,000	£3,772

⁵⁷ See section 368NA(3)(b) of the Act.

⁵⁸ See section 368NA(4) of the Act.

Tariff 2 Ofcom Category B Tariff (non- public service broadcasters) 0.04609%	£1,000	£1,000	£1,000	£1,000
Tariff 3 Viasat Proposal 0.1%	£1,000	£1,000	£1,000	£2,000
Tariff 4 Viasat Proposal 0.07%	£1,000	£1,000	£1,000	£1,400
Tariff 5 Average Revenue Tariff 0.46%	£1,000	£1,000	£1,000	£9,200

[NB: All figures have been rounded to the nearest £]

- 4.20 Under Option B, the regulator could be assured of a minimum level of income. However, given the uncertainty over the number of services that will be subject to regulation and the lack of detailed knowledge over the levels of revenues being generated in the VOD sector, we anticipate it will be difficult nevertheless to set a tariff that ensures that ODPS 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.
- 4.21 The disadvantages of Option B would, in the main, be the same as for Option A, and as we lay out in paragraphs 4.7, 4.8 and 4.10 above.
- 4.22 As we mention above, we note that the VOD sector presents opportunities for a range of new business models involving platform operators, ODPS providers, advertisers and advertising networks, giving rise to a complex revenue picture. Therefore, we consider that it is not a trivial task to define revenue. However, we invite stakeholders in their responses to provide, where they can and where appropriate, available information on revenues attributable to any ODPS they may run, or estimated revenues in any ODPS that they are proposing to launch. We will then take into account all the relevant data we receive when reaching a final decision on what is the most appropriate option to adopt.

- 4.23 Therefore with a view to ascertaining the views of stakeholders on a revenue-based regulatory fee model coupled with a minimum payment. As with Option A, however, in order that we can effectively consider all options, we invite stakeholders to:
- provide us, in confidence, with details of either actual revenues related to any ODPS that they may currently operate and estimates of revenues in the case of new or proposed ODPS. In the absence of such revenue data, it will be hard for us to take the development of Option B any further. In particular, we are mindful that any regulatory fee approach has to ensure that ODPS should 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;
 - indicate whether they favour any of Tariffs 1-5 as a means for 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;
 - if applicable suggest different tariffs to Tariffs 1-5 that we lay out in figure 5 above, giving reasons why they believe such alternative tariffs would be means for 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; and
 - if applicable, suggest different levels of minimum fee to that we lay out in this option, giving reasons why they believe such alternative minimum fees would be appropriate and how these alternatives could ensure that ODPS providers 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.

Option C – Flat-rate fees model

- 4.24 Given the potential problems under Options A and B of formulating a tariff that would reliably provide adequate income for the regulator, a third option for the first fifteen months of the regulatory regime would be a flat-rate fee.
- 4.25 In order to calculate a possible flat-rate regulatory fee to be paid by ODPS, we have taken into account the following:
- the estimated cost of regulation outlined in paragraph 3.28 above;
 - our 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 3.31 above.
- 4.26 As explained in paragraph 3.28 above, we have proposed that 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, is £375,000⁵⁹. Given this information, and assuming that 150 ODPS will be subject to regulation, we have calculated a flat-rate fee of **£2,500** as a possible alternative means of ensuring 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.

- 4.27 In terms of the statutory tests, firstly, a flat-rate fee can be seen as being “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”⁶⁰, since in the start-up phase of regulation, it is likely that all ODPS would incur a similar amount of regulatory activity. For example, in the initial period of the regulatory regime, all ODPS providers will be required to notify their services to ATVOD, which will involve a certain amount of administrative activity on the part of the regulator. Further, in this initial period, the regulator will be making decisions that will help delimit the parameters of the regulated sector, such decisions having effect on all regulated services. This situation is likely to be in contrast with future years, where it would be more likely that different regulated services will incur more varied amounts of regulatory activity, the cost of which arguably would be more fairly recouped through a variable basis such as revenue.
- 4.28 In terms of the Fees Criteria, outlined in paragraph 3.31 above, we consider this would fulfil the criteria of: cost-reflectiveness (in that a flat-rate fee would recognise that all regulated services would engender some form of regulatory activity); and simplicity (in that for many services the calculation of the regulatory fee would be simple, and would be straight-forward for the regulator to administer). Arguably this would be particularly so in the first months of the new regulatory regime, when all services will be required to notify to the regulator) and easily verifiable (in that the information required for setting of fees i.e. that a service has notified the regulator, is easily verifiable to ensure industry-wide compliance).
- 4.29 In addition, there are other arguments in favour of a flat-rate fee. It could be argued that a flat-rate fee of £2,500 would amount to under £50 per week, this would not be a disproportionate cost on service providers. Further, a flat-rate fee would impose minimal administrative costs on regulated services and the regulator. In addition, if a flat-rate fee were to be implemented for the initial period of regulation, where all ODPS are entering the regulated space, this would be analogous to the fixed-rate costs of a range of fees that Ofcom charges, for example for its broadcast licensees, for the first year of broadcasting e.g. in terms of application fees and broadcasting licence fees.
- 4.30 In this context, it should be noted that Ofcom’s Charging Principles state: “Tariffs for some categories, where turnover data is inappropriate... may be set as fixed cash sums”. Within Ofcom’s Charging Principles there are several references to flat-rate fee, and some flat-rate fees set by Ofcom, are listed in *Ofcom’s Tariff Tables 2009/10*⁶¹.

⁵⁹ It will be a matter for future consultation at the appropriate time as to what the appropriate contribution by ODPS, towards the cost of regulation, by way of fees is to be for the financial year starting 1 April 2011, and subsequent financial years.

⁶⁰ See section 368NA(3)(b) of the Act.

⁶¹ See <http://www.ofcom.org.uk/about/accoun/tarifftable0910/tariff0910.pdf>

- 4.31 Ofcom's Charging Principles recognise there will be circumstances where a flat-rate fee is appropriate depending on the sector. For example:
- most of the costs connected to radio Restricted Service Licences (RSLs) are incurred in association with the processing of applications for short-term RSLs. Fees for these applications are at present set below cost. The shortfall is recovered from the daily charge paid by short-term RSLs which is above cost⁶²; and
 - flat-rate fees were introduced for teleshopping channels as a recognition that the main regulatory functions relating to such channels passed to the Advertising Standards Authority in 2004⁶³.
- 4.32 There are disadvantages to a flat-rate fee. 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 no account of VOD service providers' business models or ability to pay, and imposes higher relative costs on smaller VOD service providers. It also could be argued that some services which have generated more regulatory activity can 'free-ride' on other services that have not generated the same level of regulatory activity. There is also the issue that the level of a flat-rate fee would be dependent on factors external to the individual ODPS, as the more services that are subject to regulation, the lower the regulatory fee.

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

- 4.33 As we indicate above, all of the 3 options outlined above have disadvantages to varying degrees. We therefore welcome comments from stakeholders as to whether a particular option should or should not be adopted as a possible approach to the 2010-2011 Fees.
- 4.34 We recognise that there are strong arguments that an option based on an ability to pay would, in principle, be a more equitable funding solution than a flat-rate fee. We acknowledge that as soon as possible after the initial period of regulation, and in the medium to long term, the most appropriate basis for 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, might be based on revenue to some extent. We would expect that over the coming year that ATVOD will take the lead in developing this funding option.
- 4.35 However, we are mindful that the purpose of this consultation is to determine the 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, and the decision on fees for this period needs to be reached in a timely manner. Therefore, we recognise the practical issues that have hindered us developing a revenue based approach at this time:

⁶² See paragraph 5.12, *Principles for setting Licence Fees and Administrative Charges*, http://www.ofcom.org.uk/consult/condocs/licence_admin_fee/licence_admin.pdf

⁶³ See paragraph 4.55 of *Ofcom Response to Consultation on Draft Statement of Charging Principles and further consultation*, <http://www.ofcom.org.uk/consult/condocs/socp/main/socp.pdf>

- as mentioned above, the lack of revenue data in the VOD sector;
- the anecdotal evidence that many ODPS generate little or no revenues;
- the fact that prior to 19 December 2009, with the introduction of the 2009 Regulations, Ofcom did not have the ability to require ODPS providers to provide Ofcom with relevant financial information in relation to providers' ODPS, which could be used to draw up any revenue-based regulatory fees approach; and
- the fact that Ofcom has only had the power to share any revenue data it might obtain from ODPS providers: with any regulatory body it might designate, since the implementation of regulations that came into on 9 February 2010⁶⁴, and with ATVOD since the designation of ATVOD on 18 March 2010.

4.36 Despite the practical hurdles outlined in paragraph 4.35 above, we welcome responses from stakeholders, which include details of either actual revenues related to any ODPS that the relevant stakeholders may operate, or estimates of revenues in the case of new or proposed ODPS. The receipt of such revenue data will enable us to take the development of Options A or B further. However, we are mindful that any regulatory fee approach has to ensure that ODPS providers make an appropriate aggregate contribution, to be recovered by way of fees payable 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.

4.37 After careful consideration of the above 3 options, we are minded, on balance, to propose Option C (a flat-rate model) as the appropriate approach for the 2010-2011 Fees⁶⁵. In reaching this provisional view, we have considered the following:

- although a flat-rate fee is not necessarily the most equitable approach from a theoretical point of view, in the circumstances, it appears to us as the most practicable in the circumstances. In particular, anecdotal information about revenues generated in the VOD sector is that few ODPS are currently generating meaningful and predictable amounts of revenues, which indicates that the application of a revenue-based fees approach might be impracticable in the short-term;
- we recognise the difficulties in creating a variable-based regulatory fees approach from scratch for a new industry sector. As mentioned in paragraph 4.34 above, we would envisage that one of ATVOD's tasks in coming months will be to take the lead in developing a revenue-based funding option for the period 1 April 2011 to 31 March 2012 and beyond. This would involve ATVOD gathering information about the range of services that it will be regulating, and the types of business models that exist amongst VOD services. This will enable ATVOD and Ofcom to explore the possibility of developing a variable-based regulatory fees approach for future consultation;

⁶⁴ See The Communications Act 2003 (Disclosure of Information) Order 2010 (SI 2010/282), http://www.opsi.gov.uk/si/si2010/uksi_20100282_en_1

⁶⁵ 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.

- we recognise that this consultation document only addresses the regulatory fees approach for the initial 15 months of regulation i.e. 19 December 2009 to 31 March 2011. It is a statutory requirement that for each future financial year the regulator will need to consult “in such manner as they think appropriate”⁶⁶. Therefore, as we made clear in the 2009 Statement: “we would expect ATVOD to take account of the issues raised by stakeholders concerning the possible introduction of variable elements in ensuring 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. In connection with this, it is worth noting that ATVOD would need to refer any regulatory fee proposal to Ofcom for approval”. Given this we would expect ATVOD, in drawing up a fee proposal for the period 1 April 2011 to 31 March 2012, ahead of joint-consultation by ATVOD and Ofcom to review a flat-rate fee approach, if this is adopted for the 2010-2011 Fees; and
- on a related point, we note that under the 2010 Regulations⁶⁷, if the regulatory fees collected for the first 15 months of regulation exceed the regulator’s actual costs, ATVOD will be required to carry forward this surplus and take it into account in setting the regulatory fee for the period 1 April 2011 to 31 March 2012.

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

⁶⁶ See section 368NA(5)(c) as introduced by the 2010 Regulations reproduced in Annex 6.

⁶⁷ See section 368NA(7)(b) of the Act reproduced in Annex 6.

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.

Question 9

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

Equality matters

- 4.38 As we made clear in Section 2, 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 obligation⁶⁸. 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 consider that our approach to regulation as a result of the current proposals would remain unchanged and therefore we do not consider that our proposals, as outlined in this Section would have any particular implications for people to whom these considerations relate. We base this conclusion on the experience gained by Ofcom in setting fees and tariffs across the other sectors that Ofcom regulates.
- 4.39 On the basis of our initial EIA screening and the information currently available to us, Ofcom considers that it is not necessary for a full EIA to be undertaken as part of this consultation. However, in this document, we are inviting stakeholders to submit responses specifically on any potential impacts relating to equality resulting from the proposed options for the 2010-2011 Fees. This is to ensure that we have not failed inadvertently to consider any possible equality impacts resulting from the proposed arrangements for setting such an approach to regulatory fees.

⁶⁸ See section 71(1) of the 1976 Race Relations Act (as amended), section 49A of the 1995 Disability Discrimination Act (as amended), and section 76A(1) of the 1976 Sex Discrimination Act (as amended).

Question 10

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

Section 5

Next Steps

- 5.1 We welcome responses to this consultation from stakeholders by 7 May 2010. As with any consultation conducted by Ofcom, we undertake a thorough analysis of any response we receive.
- 5.2 However, due to the need of ensuring as much financial certainty for ATVOD for its first months of operation, as well as for regulated ODPS providers (in order that they can adequately forward-plan), we intend to expedite the analysis of any response we receive from stakeholders to this consultation, and publication of our Statement. Our intention, depending on the complexity of the responses we receive, and the issues raised, is to publish a Statement as soon as possible during May 2010. In our Statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions⁶⁹, and in addition, we will set out the regulatory fees to be payable by ODPS for the period 1 April 2010 to 31 March 2011.

⁶⁹ See Ofcom's consultation principles, paragraph A2.8, Annex 2.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 7 May 2010**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at http://www.ofcom.org.uk/consult/condocs/vod_proposals/, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email VODConsultation@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Susan Naisbitt
Ofcom
Content and Standards
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3271
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Adam Baxter on 020 7981 3236.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in May 2010.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation questions

Question 1

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

Question 2

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

Question 3

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

Question 4

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

Question 5

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

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?

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?

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.

Question 9

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

Question 10

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

Annex 5

Extract from the Audiovisual Media Services Regulations 2009

A5.1 The following text sets out the relevant section of the Audiovisual Media Services Regulations 2009 (“the 2009 Regulations”)⁷⁰, relating to the powers Ofcom has to designate some or all of the duties relating to the regulation of video on demand (“VOD”) services, to one or more other bodies. The 2009 Regulations amend the Communications Act 2003.

368B The appropriate regulatory authority

(1) OFCOM may designate any body corporate to be, to the extent provided by the designation, the appropriate regulatory authority for the purposes of any provision of this Part, subject to subsection (8).

(2) To the extent that no body is designated for a purpose, OFCOM is the appropriate regulatory authority for that purpose.

(3) Where a body is designated for a purpose, OFCOM may act as the appropriate regulatory authority for that purpose concurrently with or in place of that body.

(4) OFCOM may provide a designated body with assistance in connection with any of the functions of the body under this Part.

(5) A designation may in particular—

(a) provide for a body to be the appropriate regulatory authority in relation to on-demand programme services of a specified description;

(b) provide that a function of the appropriate regulatory authority is exercisable by the designated body—

(i) to such extent as may be specified;

(ii) either generally or in such circumstances as may be specified; and

(iii) either unconditionally or subject to such conditions as may be specified.

(6) The conditions that may be specified pursuant to subsection (4)(b)(iii) include a condition to the effect that a function may, generally or in specified circumstances, be exercised by the body only with the agreement of OFCOM.

(7) A designation has effect for such period as may be specified and may be revoked by OFCOM at any time.

(8) OFCOM must publish any designation in such manner as they consider appropriate for bringing it to the attention of persons who, in their opinion, are likely to be affected by it.

⁷⁰ SI 2009/2979, http://www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

(9) OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—

(a) is a fit and proper body to be designated;

(b) has consented to being designated;

(c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;

(d) is sufficiently independent of providers of on-demand programme services; and

(e) will, in performing any function to which the designation relates, have regard in all cases—

(i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances.

(10) Subject to any enactment or rule of law restricting the disclosure or use of information by OFCOM or by a designated body—

(a) a designated body may supply information to another designated body for use by that other body in connection with any of its functions as the appropriate regulatory authority;

(b) a designated body may supply information to OFCOM for use by OFCOM in connection with any of their functions under this Part;

(c) OFCOM may supply information to a designated body for use by that body in connection with any of its functions as the appropriate regulatory authority.

(11) In carrying out their functions as the appropriate regulatory authority, a designated body may carry out, commission or support (financially or otherwise) research.

(12) In this section—

“designation” means a designation under this section and cognate expressions are to be construed accordingly;

“specified” means specified in a designation.

Annex 6

Extracts from the Audiovisual Media Services Regulations 2010

A6.1 The following text sets out the relevant sections of the Audiovisual Media Services Regulations 2010 (“the 2010 Regulations”)⁷¹, relating to the fee-raising power that the regulator possesses in relation to video on demand (“VOD”) services. The 2010 Regulations amend the Communications Act 2003.

368NA Fees

(1) In this section “the authority” means each of these—

(a) the appropriate regulatory authority;

(b) (where they are not the appropriate regulatory authority) OFCOM.

(2) The authority may require a provider of an on-demand programme service to pay them a fee.

(3) The authority must be satisfied that the amount of any fee required under subsection (2)—

(a) represents the appropriate contribution of the provider towards meeting the likely costs described in subsection (5)(a), and

(b) 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.

(4) A different fee may be required in relation to different cases or circumstances.

(5) 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;

(b) ensure that the aggregate amount of the fees that are required to be paid to them under subsection (2) during that year is sufficient to enable them to meet, but not exceed, the costs estimated under paragraph (a);

(c) consult in such manner as they consider appropriate the providers likely to be required to pay them a fee under subsection (2) during that year;

(d) publish in such manner as they consider appropriate the amount of the fees they will require providers to pay to them under subsection (2) during that year.

(6) As soon as reasonably practicable after the end of the financial year, the authority must publish a statement setting out, for that year—

⁷¹ SI 2010/419, http://www.England-legislation.hms.gov.uk/si/si2010/uksi_20100419_en_1

(a) the aggregate amount received by them during that year in respect of fees required to be paid under subsection (2);

(b) the aggregate amount outstanding and likely to be paid or recovered in respect of fees that were required to be so paid under subsection (2); and

(c) the costs to them of carrying out the relevant functions during that year.

(7) Any deficit or surplus shown (after applying this subsection for all previous years) by a statement under subsection (6) is to be—

(a) carried forward; and

(b) taken into account in determining what is required to satisfy the requirement imposed by virtue of subsection (5)(b) in relation to the following year.

(8) The authority may repay to a person some or all of a fee paid to them by a person under subsection (2) if—

(a) that person has ceased to provide an on-demand programme service at some time during the period to which the fee relates;

(b) before ceasing to provide that service, that person gave the appropriate regulatory authority a regulatory under section 368BA(2); and

(c) that person did not cease to provide the service following a direction given by the appropriate regulatory authority under section 368K or 368L.

(9) The authority may make arrangements with any body designated under section 368B for that body to provide the authority with assistance in connection with the collection or repayment of fees required by them under this section.

(10) For the purposes of this section—

(a) the authority's costs of carrying out the relevant functions during a financial year include their costs of preparing to carry out the relevant functions incurred during that year; and

(b) the authority's costs of preparing to carry out the relevant functions incurred after 19 December 2009 but before the financial year in which those functions were first carried out by them are to be treated as if they were incurred during that year.

(11) In this section "relevant functions" means—

(a) in relation to the appropriate regulatory authority, their functions as the appropriate regulatory authority;

(b) in relation to OFCOM (where they are not the appropriate regulatory authority), their other functions under this Part.

(12) In this section "financial year" means a period of 12 months ending with 31 March."

.....

Amendments of Part 4A of the Communications Act 2003: transitional provision

Regulation 13

.....

(2) Section 368NA of the 2003 Act (fees) applies in relation to the period beginning with 19 December 2009 and ending with 31 March 2010 as if that period were a financial year but with the following modifications.

(3) Subsection (3)(a) of that section, as it applies in relation to the appropriate regulator authority, has effect as if the reference to the likely costs described in subsection (5)(a) were a reference to the likely costs of carrying out functions as the appropriate regulatory authority set out in any estimate prepared or approved by OFCOM in relation to that period (an “OFCOM estimate”).

(4) Subsection (5) of that section does not apply but paragraphs (5) and (6) below apply instead.

(5) For the purposes of that section as it applies in relation to the appropriate regulatory authority, the appropriate regulatory authority must—

(a) ensure so far as reasonably practicable that the aggregate amount of the fees that are required to be paid to them under section 368NA(2) during that period is sufficient to enable them to meet, but not exceed, the costs set out in any OFCOM estimate;

(b) publish in such manner as they consider appropriate the amount of the fees they will require providers to pay to them under section 368NA(2) during that period.

(6) For the purposes of that section as it applies in relation to OFCOM otherwise than as the appropriate regulatory authority, OFCOM must—

(a) prepare such estimate as it is practicable for them to make of the likely costs of carrying out their functions under Part 4A of the 2003 Act otherwise than as the appropriate regulatory authority during that period;

(b) ensure so far as reasonably practicable that the aggregate amount of the fees that are required to be paid to them under section 368NA(2) during that period is sufficient to enable them to meet, but not exceed, the costs set out in that estimate;

(c) publish in such manner as they consider appropriate the amount of the fees they will require providers to pay to them under section 368NA(2) during that period.

Annex 7

Application and scope of the regulatory framework on VOD services ('Scope Guidance')

Introduction

- 1.1 This section of the guidance is provided as an aid to interpretation of the types of services that may fall within the definition of an 'on-demand programme service' under section 368A of the Communications Act 2003 ("the Act") and therefore will be subject to the regulatory framework for VOD. It is also provided to help assess who is likely to be the provider of a relevant service for these purposes, and therefore the person who is responsible for compliance with the requirements, including the obligation to notify the service to the Regulator, as and when this becomes a statutory requirement. As with other guidance on the application of the statutory requirements, this section of the guidance is not binding nor legally enforceable, and only provides non-determinative, interpretative guidance as to how the Regulator is likely to apply the criteria set out in section 368A of the Act, drawing on the Articles and Recitals of the Audiovisual Media Services Directive ("the Directive") where appropriate. This guidance is subject to review from time to time.
- 1.2 This guidance is intended to help providers of on-demand programme services assess whether they are VOD services (and therefore come under statutory regulation and need to abide by the relevant legislative requirements) and need to notify the Regulator that they provide a relevant on-demand programme service, as and when this becomes a statutory requirement, and need to comply with the requirements. It is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service is subject to the regulatory framework for VOD.
- 1.3 As explained below, there are a number of different cumulative criteria set out in section 368A of the Act that determine whether a service is within the scope of the regulatory framework. At the present time, video on demand services represent an increasingly important part of the audiovisual market. However, the wide variety of content, services and business models available make it difficult to list with any degree of certainty the services that will be within scope, and those that will fall outside scope. Each service provider must make their own assessment of whether they meet the statutory criteria, and act accordingly.
- 1.4 In deciding whether a particular service requires notification, as and when this becomes a statutory requirement, and by whom, the Act requires potential service providers, and ultimately the Regulator, to consider the following questions:
 - a) Is the service an 'on-demand programme service' within the meaning set out in section 368A of the Act? (Section 2 of this Guidance);

- b) Who has 'editorial responsibility' for that service within the meaning of section 368A(4) of the Act? (Section 4 of this Guidance); and
- c) Does that person fall within the jurisdiction of the UK for these purposes? (Section 6 of this Guidance)

1.5 Each of these questions is explored in more detail below.

1.6 References in this guidance to the Directive are to the Audiovisual Media Services Directive. References to Recitals and Articles are to the recitals and articles of the Directive. References to the Act are to the Communications Act 2003, as amended by the Audiovisual Media Services Directive (Implementation) Regulations 2009.

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

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

- a) **It includes TV-like programmes:** the service includes programmes whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services;
- b) **It is a VOD service:** the service enables users the ability to select individual programmes from among the programmes included in the service, to receive the selected programme using an electronic communications network,⁷² and to view the selected programme when the user chooses;
- c) **There is editorial responsibility:** the programmes comprising the service are under a person's editorial responsibility; and
- d) **It is made available to the public:** the service is made available to the public: the service is made available by that person for use by members of the public.

2.2 The intention of the Directive and the Act is to regulate on-demand programme services. This means that a service which falls outside the definition of an 'on-demand programme service', but is bundled with or accompanies an ODPS, would not typically be considered to form part of that ODPS (subject to the provisions dealing with VOD advertising).

The service is 'TV-like'

2.3 One of the principal aims of the Directive is to create a level-playing field as between traditional linear broadcast television services and emerging on-demand audiovisual media services (Recital 6 of the Directive). The Directive, and Part 4A of the Act, are therefore intended to cover on-demand and broadcast television audiovisual media services which compete for the same audiences (Recitals 16 and 17 of the Directive), sharing the same key characteristics, namely that they include comparable programmes. Accordingly, a defining characteristic of the definition of an 'on-demand programme service' in section 368A of the Act is that the principal purpose of the service is "the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television

⁷² Defined in section 32 of the Act.

programme services". In other words, that the programmes are "television-like" (one of the phrases used in Recital 17 of the Directive).⁷³

TV-like programmes

- 2.4 An on-demand programme service will only be caught by the definition in section 368A of the Act to the extent that it provides access to programmes that compete for the same audience as television broadcasts, and therefore, are comparable to the form and content of programmes included in broadcast television services. It is, however, necessary to interpret the meaning of 'programme' in this context in a dynamic way, taking into consideration developments in television broadcasting.
- 2.5 Examples of 'programmes' that are not 'TV-like' might include informational videos directed at a particular group of people, such as an undertaking's employee training videos available online. Short extracts from longer programmes may also not be TV-like, if the content that they comprise does not to make them separate and distinct programmes in their own right (i.e. with their own editorial integrity). Long-form programming is more generally characteristic of TV broadcasting; however, the duration of the pieces of content in a service should not, on its own, determine whether that content is TV-like; some short video content – such as music videos – are likely to satisfy this test.
- 2.6 Clearly the decision as to whether programmes are 'TV-like' will involve consideration of all relevant information, including the availability of comparable programmes in linear broadcast services and the nature of the on-demand programme service as a whole.
- 2.7 Audio-only services, such as 'listen again' radio services are out of the scope of section 368A of the Act, and hence outside the scope of the regulatory framework for VOD. However, video only programmes, supplied on an on demand basis are potentially in scope (subject to the other criteria being met).

It is a VOD service?

- 2.8 The first key issue under this criterion is whether access to the service is the provision of programmes on an on-demand basis. There may be services where the availability of audiovisual content on an on-demand basis is incidental to another service, for example, short video advertising spots accompanying a non-video service, and video elements of online games and gambling services.
- 2.9 The assessment of whether access to the service is on an on-demand basis will take into consideration all relevant materials available to the Regulator, including, for example, the way the service is marketed and presented to users.

⁷³ In light of the use of the phrase 'television-like' in the AVMS Directive, Ofcom commissioned and carried out qualitative research in order to gain an understanding of what consumers consider to be 'television-like' material and what their expectations are in terms of the key characteristics of such material. The research report is at <http://www.ofcom.org.uk/research/tv/reports/vodresearch/> It should be noted that no part of the qualitative research that Ofcom has commissioned is intended, nor should it be interpreted as replacing in any way the powers properly exercisable by Ofcom and its co-regulator, in determining whether or not any particular service falls within the scope of regulation.

- 2.10 The second key issue under this criterion is whether the ‘principal purpose’ of the service is to provide ‘TV-like’ programming. Where relevant on-demand programmes form part of a broader consumer offering, it may be the case that those programmes comprise an on-demand programme service in their own right. For example, where a service provider offers a movie and television programme download service as part of its broader, non-audiovisual online retailing activities, then such a service may be considered to be a distinct on-demand programme service which falls within the scope of the Act.
- 2.11 This will not be the case if the relevant on-demand programmes are included as an integral and ancillary element of the broader offering, for example, where video is used to provide additional material relevant to a text-based news story, or where video forms part of a content service predominantly featuring a range of non-video material.
- 2.12 Similarly, the extent of a particular on-demand programme service may be determined by other criteria, such as the identity of the service provider. Thus an aggregated retail video on-demand service may be comprised of a number of on-demand programme services from different providers, depending on which undertaking exercises editorial responsibility in respect of the programmes offered to users (see section 4 below).
- 2.13 It is acknowledged that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case.
- 2.14 An “*electronic communications network*” is defined in section 32 of the Act and encompasses the communications infrastructure by means of which voice, content and other data are delivered to consumers. Accordingly, delivery of content through other means, for example, a DVD sent through the post having been ordered online, would not meet this criterion. The selection, downloading and viewing of a movie via the internet, paid for using a voucher bought over the counter in a shop, would be caught, if all other criteria were met. The means of delivery is the deciding factor for this criterion, not the means of payment or selection.
- 2.15 A content service that is broadcast or streamed in a linear form is not covered by the on-demand programme service requirements, and may be subject to the relevant ‘broadcast’ regulation. It should be noted that the requirements for broadcast regulation are explicitly extended by the Directive and the Act to cover internet-based television channels.

There is editorial responsibility?

- 2.16 The exercise of ‘editorial responsibility’ is relevant to scope in two ways. Firstly, an ‘on-demand programme service’ is defined in the Act as a service falling under a person’s ‘editorial responsibility’. Therefore, a service which by its nature has no person exercising “editorial responsibility” (as defined in section 368A(4) of the Act) would fall outside the regulatory framework.
- 2.17 An example of such a service, with no-one exercising editorial responsibility might be a catalogue of programmes consisting of user generated content posted to a public website for sharing and exchange, without prior moderation or restriction as to what can be posted.

- 2.18 However, that is not to say that all content in such sites falls outside the definitions. For example, where ‘hosting’⁷⁴ services are used by commercial entities as a means of distributing relevant content, and meet the other criteria laid down in section 368A of the Act, then such content might fall within the meaning of an ‘on-demand programme service’ for these purposes.
- 2.19 Second, the extent of a person’s editorial responsibility will be relevant in determining who is to be treated as providing an on-demand programme service. For example, an aggregated VOD content service may comprise a number of different on-demand programme services, each provided by a different entity exercising ‘editorial responsibility’ over its own on-demand content. How to determine the identity of the person exercising ‘editorial responsibility’ is discussed in more detail below (See section 4 below).

It is made available to the public?

- 2.20 This criterion is satisfied if the service is made available to the general public, and includes subscription services, provided that the subscription is open to members of the public, as well as services that are made available only to the general public located in a particular geographic area.

3 What types of service are in and out of scope of the regulatory framework for VOD?

- 3.1 A non-exhaustive list of types of content which are likely to be considered to be ‘on-demand programme services’ for the purposes of section 368A of the Act (provided those services are established in the UK as explained in section 5), is as follows:

- a) a ‘catch-up service’ for a broadcast television channel whether programmes are made available from the broadcaster’s own branded website, an online aggregated media player service, or through a ‘television platform’ to a set top box linked to a television (whether using broadcast ‘push’ technology, or ‘pull’ VOD);
- b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising ‘editorial responsibility’ over all the programmes (see section 4 below), whether via a dedicated website, online aggregated media player service, or through a television platform; and
- c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising ‘editorial responsibility’ over the content.

- 3.2 The following types of content are outside the scope of Part 4A of the Act and, therefore, the regulatory framework for VOD:

- a) Services that are primarily non-economic, and which are therefore not in competition with television broadcasting (Recital 16 of the Directive). In this context, ‘economic’ is interpreted in the widest sense to encompass all forms of economic activity, however funded, and may include public service material, free to view content, as well as

⁷⁴ Consistent with the definition set out in Regulation 19 of the Electronic Commerce (EC) Regulations 2002, “hosting” refers to the action of the provider of an information society service, which consists of information provided by a recipient or recipients of the service, of storing that information.

advertising-funded, subscription, pay per view and other transactional business models;

- b) services comprising on-demand content that are not “mass media in their function to inform, entertain and educate the general public” (Recital 18 of the Directive);
- c) “*games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services*”, “*on-line games*” and “*search engines*” are all stated to be excluded on grounds that their principle purpose is not the provision of ‘TV-like’ programmes (Recital 18 of the Directive); and
- d) electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines) (Recital 21 of the Directive).

3.3 The following types of content may well be outside the scope of the requirements as they may not meet all of the required criteria:

- a) video content posted by private individuals onto video sharing sites such as Youtube (where the content has been self-generated and is not posted as part of an ‘economic’ purpose on the part of the individual);
- b) video content produced by professional bodies, trade unions, political parties, or religious organisation, where the content is very narrowly focused and is primarily about the dissemination of information about the organisation to members, rather than for consumption by the general public;
- c) video content embedded within a text-based editorial article, such as a written news story on a web site that contains an illustrative video clip; and
- d) video content on corporate websites, where the purpose is to disseminate information about the company’s own operations, products or financial performance (e.g. a video of an AGM, but excluding a standalone service providing access to videos of many companies’ AGMs on a commercial basis, which could fall within scope).

4 Who has ‘editorial responsibility’ for that service within the meaning set out in section 368A(4) of the Act?

4.1 Once it has been determined that there is a relevant on-demand programme service, it is then necessary to determine which single entity should be treated as providing the service, having ‘editorial responsibility’ for the programmes comprising the relevant on-demand programme service, and therefore the exact scope of that service (see paragraph 2.19 above). The body with editorial responsibility would be responsible for notification, as and when this becomes a statutory requirement, and compliance with the relevant standards laid down in the legislation.

4.2 ‘Editorial responsibility’, in this context, means the exercise of general control over both:

- a) the selection of the individual programmes included in the range of programmes comprising the relevant on-demand programme service; and
- b) the manner in which those programmes are organised within that range.

- 4.3 Under section 368A(4) of the Act, it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has control of the “*content of individual programmes or of the broadcasting or distribution of the service*”. This is intended to clarify the degree of ‘control’ required for ‘editorial responsibility’, namely that it is not necessary to control the elements comprising a particular programme (for example, as a television director might), and similarly that it is not necessary to control the actual broadcasting or distribution of the on-demand programme service (i.e. physical transmission, or the retailing of a service to consumers), as these matters are irrelevant to the issue of ‘editorial responsibility’.
- 4.4 In considering who has general control over the selection of programmes, both the Act and the Directive focus on decision-making about individual programmes, and not on the choice of whole ‘channels’ of content. The concept of *selection* in the Directive’s definition of ‘editorial responsibility’ is common to both linear and VOD services (in relation to linear services, the reference is to control over the selection of programmes and “...*their organisation in a chronological schedule...*”). It is certain that, in relation to such linear services, it is the channel operator (i.e. broadcaster) who is selecting the programmes, even if those channels are distributed to consumers as part of a package of channels by a platform operator or retailer. In the context of on-demand programme services, ‘editorial responsibility’ is exercised by the person selecting the programmes to be included in the on-demand programme service in a role comparable to that of the broadcaster in relation to linear channels.
- 4.5 It is, however, recognised that the mere fact that a broadcaster provides content from its linear channel to another undertaking for inclusion in an on-demand programme service does not remove the need to assess which entity has ‘editorial responsibility’ considering all relevant circumstances. It would be possible for an aggregator or platform operator to be responsible for the selection of individual programmes, and thereby acquire ‘editorial responsibility’. Selection of individual programmes may, in this context include, for example, acquiring, commissioning or producing programmes for inclusion in the service. None of these factors is definitive, and each assessment will require consideration of all relevant factors.
- 4.6 In determining the person with effective control of the organisation of those programmes it is appropriate to consider who determines the relevant viewing information provided alongside the on-demand programme that may then be used in listing the programme in an on-demand programme service and which ensures that each individual programme is made available in a manner that secures the relevant standards requirements: such information might include, for example, whether or not access to a particular programme must be restricted; and what content information should be attached to it (e.g. the programme synopsis, rating information and other content warnings). This will typically be the person who selects the individual programmes to be included within a service. (In other words, organisation may be controlled by a service provider through the supply of relevant programme information accompanying each content asset to a platform operator or distributor).
- 4.7 The fact that a platform operator may be responsible for the design or look and feel of the catalogue; or that a platform operator or technical services provider may provide appropriate protection mechanisms allowing access to some content to be restricted; or specify how potentially harmful or offensive content should be indicated, for example, with an age-rating and/or a specific text warning (“sexually explicit”) and/or a logo, does not mean that they necessarily control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as

alphabetical or genre indexing), would not, on their own, constitute 'selection and organisation' of programmes, as these are solely presentational techniques.

- 4.8 These criteria will be applied in a way which provides for a single entity to have 'editorial responsibility'. It will not be open for content and/or service providers to argue that content that they make available or a service that they provide is outside of the scope of section 368A of the Act as a result of responsibility for selection and organisation of programmes being divided between two or more persons.
- 4.9 The parties to commercial agreements in the value chain for the supply and distribution of on-demand programmes may decide to identify the entity with 'editorial responsibility' in respect of the relevant programmes. Whilst not necessarily being determinative, such contractual arrangements will provide useful evidence as to the division of responsibility between the parties.
- 4.10 As noted in paragraph 2.12 the identity of the entity with 'editorial responsibility' will also be relevant to the determination of the extent of the on-demand programme service. Someone who makes relevant content available on an on-demand basis can only be the provider of a service comprising programming over which they exercise 'editorial responsibility'.
- 4.11 Accordingly, aggregated services may comprise a collection of on-demand programme services provided by different service providers (one of which service providers may also be the aggregator), or a single service, incorporating content from a variety of different sources. The outcome will depend on where "editorial responsibility" lies.
- 4.12 In the former case, an on-demand content aggregator might provide access to content provided by a number of different providers, who each retain 'editorial responsibility' for their content, who select which programmes will be made available via the aggregated service and provide the programme information, rating and/or categorisation of those programmes which ensures that each individual programme is made available in a manner that secures the relevant standards requirements (for example, as being appropriate for adults only). In this case, each content provider, as the relevant service provider for their own content, would be responsible for ensuring that their own content complies with the statutory requirements.
- 4.13 In the latter case, the content vendors would not have 'editorial responsibility', as the aggregator would have responsibility for selecting which programmes were included within the service, and for providing the necessary programme information which ensures that each individual programme is made available in a manner that secures the relevant standards requirements, and therefore, would have responsibility for ensuring compliance with the statutory requirements.
- 4.14 Clearly, it is conceivable that content providers, aggregators and service providers may arrive at alternative arrangements that require a more complex analysis as to which party has 'editorial responsibility'. In particular, the fact that an entity is operating as an aggregator in relation to some content services does not preclude the entity from being the content provider in relation to some other elements of the aggregated service. The onus is on the parties to provide the Regulator with all necessary information in support of any notification, as and when this becomes a statutory requirement, to allow the Regulator to assess whether the correct entity has been identified as the provider of the service

5 'Multiple services'

- 5.1 Under the Act, an on-demand programme service comprises all on-demand programmes offered by a service provider. No distinction is made between different channel brands or content genres or other means of sub-dividing services in the same way as linear services. However, it is also possible for a service provider to nominally sub-divide its on-demand programme service into separate services, perhaps based upon linear channel identities for administrative ease (although it is noted that such a strategy would also require each such service to be notified to the Regulator separately, as and when this becomes a statutory requirement).
- 5.2 Similarly, a service provider may provide its on-demand programme content to a number of aggregation or retail platforms for distribution (e.g. on cable and over the internet). If the range of content is substantially the same across all distribution outlets then it would seem reasonable to view the distribution across each service or platform as comprising instances of a single on-demand programme service. In contrast, where the range of programmes offered to different services and platforms is not substantially the same, then each individual catalogue would form a separate on-demand programme service requiring notification, as and when this becomes a statutory requirement.

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

- 6.1 Services only fall within the scope of the Act if they are provided by an entity that falls under UK jurisdiction in accordance with Article 2 of the Directive. The service provider of an on-demand programme service will fall under the UK's jurisdiction if it is established in the UK.
- 6.2 A service provider will be deemed to be established in the UK if:
- a) the service provider has its head office in the UK and the editorial decisions for the relevant on-demand programme service are also taken here;
 - b) alternatively, if only one of the head office or the place where editorial decisions for the relevant service are taken is in the UK, with the other function carried out in a different EU Member State, then the question of where the service provider is established will be determined according to the following principles:
 - establishment will be deemed to be Member State where a significant part of the workforce involved in the pursuit of the on-demand programme service activity operates; or
 - if a significant part of the relevant workforce operates in each of those Member States, then establishment deemed to be where it has its head office; or
 - if a significant part of the relevant workforce operates in a third Member State, then establishment deemed to be in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State

and

c) the head office is in the UK but editorial decisions on the on-demand programme service are taken in a third (non-EU) country, or vice-versa, the service provider shall be deemed to be established in the UK, provided that a significant part of the workforce involved in the pursuit of the on-demand programme service operates in the UK.

6.3 In accordance with the Directive, these jurisdictional criteria are identical to those applicable to linear services.

Annex 8

Estimates of ATVOD's likely costs of regulation for the period 19 December 2009 to 31 March 2011

A8.1 As outlined in paragraphs 3.23 to 3.29 above, 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. Below is a breakdown of the estimate of the likely costs of regulation, provided by ATVOD for the period 19 December 2009 to 31 March 2011.ing obligations:

Estimated Costs	19 December 2009 to 31 March 2010	1 April 2010 to 31 March 2011
Recruitment (executive and non-executive)	£37,000	£11,750
Salary (executive and non-executive)	£44,319	£212,436
Legal advice	£3,543	
Office set-up and running costs (including rent, telephone, IT support, printing and design)		£45,090
Professional fees and insurance (including audit, accountant/bookkeeper, bank fees, insurance)		£28,000
Board expenses/travel	£1,250	£18,000
Recharges from Ofcom		£25,000
TOTALS	£86,112	£340,276
TOTAL (19 December 2009 to 31 March 2011)	£426,388	