



PROPOSALS FOR THE REGULATION OF VIDEO ON DEMAND SERVICES – RESPONSE BY BRITISH SKY BROADCASTING LIMITED

1. INTRODUCTION

- 1.1. On 14 September 2009, Ofcom published its consultation document entitled “Proposals for the regulation of video on demand services” (the “**Consultation Document**”). This document comprises the response of British Sky Broadcasting Limited (“**Sky**”) to the Consultation Document.
- 1.2. The Consultation Document proposes a new co-regulatory framework for video-on-demand (“**VOD**”) regulation in order to implement the Audiovisual Media Service Directive (“**AVMS**”). The Consultation Document also proposes and sets out guidance on:
 - 1.2.1. which VOD services fall within the scope of the relevant regulation; and
 - 1.2.2. who would be responsible for those services from a regulatory perspective.
- 1.3. Both the co-regulatory framework and the guidance on the scope of the regulation were drawn up (at least in part) in conjunction with an industry steering group in which Sky participated (namely, the VOD Editorial Steering Group (“**VESG**”). Therefore, Sky’s response to the Consultation Document is relatively brief, given its prior involvement.
- 1.4. Sky’s response has been structured as follows:
 - 1.4.1. Section 2 sets out Sky’s views on the proposed co-regulatory framework;
 - 1.4.2. Section 3 sets out Sky’s views on the proposed scope guidance; and
 - 1.4.3. Section 4 sets out Sky’s brief observations as to the various procedural flaws in respect of the process related to the consultation.

2. THE PROPOSED CO-REGULATORY FRAMEWORK

- 2.1. The Consultation Document proposes a new co-regulatory framework for VOD regulation in order to implement part of the AVMS Directive.
- 2.2. More specifically, the Consultation Document proposes:
 - 2.2.1. that the Advertising Standards Authority (“**ASA**”) should act as the co-regulator for VOD advertising (“*Ofcom is...proposing to designate the ASA as the relevant co-regulator for VOD advertising*”¹), with Ofcom retaining

¹ Paragraph 1.17 of the Consultation Document.

backstop powers, e.g. for sanctions, and to resolve disputes as to the scope of the application of the relevant VOD regulations; and

- 2.2.2. that an amended version of the Association for Television on Demand (“**ATVOD**”) should act as the co-regulator for VOD editorial content (“*Ofcom is...proposing to designate ATVOD as the relevant co-regulator for VOD editorial content*”²), with Ofcom retaining backstop powers, e.g. for sanctions, and to resolve disputes as to the scope of the application of the relevant VOD regulations.
- 2.3. Sky considers that a co-regulatory regime, in which the ASA and ATVOD are the bodies responsible for day-to-day regulation of VOD services (with Ofcom retaining ultimate responsibility for regulation of VOD in the UK) is a better outcome, in principle, than one in which Ofcom acts as sole regulator (this being the fall back position if co-regulators are not designated).
- 2.4. Sky supports Ofcom’s proposal to designate the ASA as a co-regulator for VOD advertising. Sky considers that it is sensible for the ASA to assume co-regulatory responsibilities in order to maintain the principle of a ‘one-stop shop’ for advertising regulation. This should reduce the inherent risks of inconsistency between different advertising regulators, as well as having the advantage of continuity, as the non-broadcast part of the ASA currently regulates such advertising.
- 2.5. ATVOD has proposed that it will remodel itself from a self-regulatory, membership-based organisation into an independent industry wide co-regulator for the purpose of carrying out the functions that would be delegated to it by Ofcom.
- 2.6. Sky notes, from the Consultation Document, that Ofcom believes that ATVOD has a considerable amount of work to do in order to be in a position to be designated as co-regulator for VOD editorial content. Whilst Sky supports the designation of ATVOD as a co-regulator for VOD editorial content in principle, this is subject to ATVOD being successful in its transformation, and there being a clear delineation between the ongoing roles of both the new ATVOD and Ofcom. To date, little detail has been made available either as to the exact separation of powers between the two bodies or as to the detailed provisions relating to the governance of the ‘new’ ATVOD, and therefore any support for the proposed scheme must be duly qualified. Ofcom must ensure that there is an open and transparent procedure in respect of negotiations between ATVOD and Ofcom in respect of its revised constitution and the detailed statement of each bodies’ respective duties.
- 2.7. Sky is particularly concerned to avoid the position that has arisen in respect of the co-regulation of advertising, where Ofcom is attempting to expand the scope of services subject to co-regulation (to include certain adult and psychic television services) against the reasonable concerns and opposition of both industry and the ASA. Accordingly, Ofcom should not be able to materially alter the regulatory duties imposed on the co-regulator without the consent of that body.

² Paragraph 1.12 of the Consultation Document.

- 2.8. Sky also recommends that consideration be given to changing ATVOD's name on designation. A name change at the same time as the body is reconstituted, with a new Memorandum and Articles of Association (yet to be drafted) will have the following benefits:
- 2.8.1. it would avoid any 'hangover' between the new and old regimes in terms of changing the role of the body, its rules, governance and 'membership';
 - 2.8.2. the new name would recognise the factual position that the new co-regulator will be a very different entity to ATVOD, with a different role and powers;
 - 2.8.3. there would be no outstanding intellectual property issues around use of the current name and logo; and
 - 2.8.4. the new name would signal a new start for VOD services, encompassing all such services, and not just those 'traditional' providers that formed the membership of ATVOD.
- 2.9. ATVOD's limited publicity to date ensures that consumer confusion will be kept to a minimum.

3. SCOPE GUIDANCE

- 3.1. The consultation proposes guidance on:
- 3.1.1. which VOD services are within scope of the relevant VOD regulation; and
 - 3.1.2. identifying who has regulatory responsibility for those services.
- 3.2. Sky notes that Ofcom is proposing that the following four cumulative criteria (set out in summary below) will need to be present in order for services to fall within the scope of, and thus be subject to, relevant VOD regulation:
- 3.2.1. The service must be a VOD service whose principal purpose is to offer the ability to select, receive and view VOD.
 - 3.2.2. There must be editorial control.
 - 3.2.3. The service must be TV-like.
 - 3.2.4. The service must be widely available.
- 3.3. Sky's views in relation to each of the four cumulative criteria are set out below. Sky adopts the headings for the cumulative criteria as used by Ofcom at pages 21 to 23 of the Consultation Document.

a) Is it a VOD service?

- 3.4. Sky agrees that only VOD services should be caught under the proposed regulation and thus be captured within the scope guidance. In determining whether a service is a 'VOD service' and thus falls within the first criterion Ofcom states:

"4.35 The key issue under this criterion is whether the principal purpose of the service is the provision of programmes on an on-demand basis."

It goes on to state:

“4.37 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...”

4.38 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.”

- 3.5. Sky notes that Ofcom has carved out of the ‘definition’ of a VOD service instances where VOD content is “*integral and ancillary*” to a service, such as a text-based news service. Sky agrees that where VOD content is integrated into a text-based news story, such as a news-based website, and where that VOD content is ancillary to the text-based story, that use of VOD content should not fall within the first criterion.³ However, where VOD programmes, as distinct from VOD content (Sky considers VOD content to be on-demand excerpts or clips, rather than distinct full-length on-demand programmes), are integrated into a service, such VOD programmes should be considered to be part of a VOD service, provided the programmes are not ancillary to a broader offering.

b) Is there editorial control?

- 3.6. Sky agrees that neither the operation of a VOD platform, *i.e.* the distinct system over which TV-like VOD content may be accessed by members of the public, nor the aggregation of VOD programmes provided to the aggregator by third party service providers, should attract regulatory responsibility. Rather, Sky agrees it is appropriate that it is the person who exercises editorial control over the VOD content that is the person who ought to have regulatory responsibility for that content.
- 3.7. Sky notes that to determine who exercises “general control” over VOD content, and therefore who is editorially responsible for that content, the following criteria are proposed:
- 3.7.1. the selection of individual programmes included in the VOD service; and
 - 3.7.2. responsibility for the relevant ‘viewing information’ provided alongside the VOD programme. Such ‘viewing information’ includes determining and controlling whether access to VOD content should be restricted to persons of a particular age and what metadata is associated with the VOD content *e.g.* the synopsis, rating and content warnings.
- 3.8. Sky notes that the above criteria, in effect, mirror regulatory responsibility for content in the broadcast environment, and therefore seek to identify accurately the person with the appropriate degree of control over the content to influence those issues covered by the rules applied to VOD programmes by AVMS.
- 3.9. Sky considers that Ofcom’s proposed approach to determining who has “editorial control” is appropriate given the definition provided in AVMS. Sky therefore agrees with the criteria for determining who is editorially responsible for VOD content, subject to publication of a final version of the Regulations implementing the Directive into UK law (Sky has set out its concerns regarding the process leading to this consultation below in Section 4).

³ For example, the video content included at <http://news.sky.com/skynews/>.

c) Is the service “Television-like”?

- 3.10. Sky notes that the proposed ‘definition’ of “Television-Like”, in essence, is such that it would capture only programmes that compete for the same audiences as linear channels.
- 3.11. Sky agrees that the scope of the regulations should capture only content that competes for the same audience as linear channels.

d) Is the service widely available?

- 3.12. Sky notes that the essence of this criterion is whether or not the VOD service is available to members of the public. Sky agrees with this criterion.

Illustrative (non-exhaustive) application of the proposed scope to some of Sky’s services

- 3.13. Paragraph 4.79 of the Consultation Document contains a table detailing the services Ofcom expects to fall within the scope of the guidance (and thus the services Ofcom expects to be subject to relevant VOD regulation).
- 3.14. Sky notes that Ofcom has not included “Sky Anytime” or “Sky Player” within this list. Sky agrees that the omission of such services is correct, as neither falls within the scope guidance.
- 3.15. Sky acknowledges the fact that certain of its channels (namely those channels whose programmes are provided on a VOD basis) are included in the table *e.g.* Sky Movies and Sky Arts. Sky agrees that programmes from such channels are provided to members of the public in the UK on a VOD basis and that Sky is editorially responsible for the content provided.
- 3.16. Sky also notes that channels which provide programmes on a VOD basis to Sky as an aggregator are included in the services list at paragraph 4.79. For example, Discovery provides such content to Sky for use in Sky’s Sky Anytime and Sky Player services. Sky does not have editorial control over such content, as the broadcaster will provide Sky with content that meets certain criteria (for example, in relation to the quality and type of the content), and Sky will then make available such content via its platform(s). It is clear to Sky that in the aforementioned example, it is Discovery which would be editorially responsible for its VOD programmes and thus it would be Discovery’s responsibility to ensure regulatory compliance.
- 3.17. As noted above, Sky also considers that its Sky News website and its other ‘channel-branded’ websites, which include VOD content, do so in a way that is “an integral and ancillary element of a broader offering”. That broader offering being, for example, either the provision of news, the provision of entertainment news (*e.g.* the Sky Showbiz website), or the provision of information and clips about programmes on linear and VOD services (*e.g.* <http://www.skyarts.co.uk/>). Accordingly, Sky does not consider that the aforementioned websites provide a VOD service which falls within the scope guidance.

4. THE PROCESS OF RESPONDING TO THE CONSULTATION IN THE ABSENCE OF THE KEY IMPLEMENTING LEGISLATION IS INAPPROPRIATE AND THE CONSULTATION PERIOD IS INAPPROPRIATELY SHORT

- 4.1. Consultees are being asked to respond to the Consultation Document without the key implementing legislation having been settled. Indeed, Sky understands that the key implementing legislation is being revisited by the UK Government with a view to imposing stricter regulation in relation to VOD in the UK than is required by AVMS. Given this, the proposals set out in the Consultation Document could be superseded and thus the responses to the Consultation Document could be rendered worthless.
- 4.2. Sky considers the parallel process of the UK Government setting legislation to implement AVMS, whilst Ofcom concurrently seeks to design and implement a co-regulatory framework is flawed. The legislation should have been determined and settled prior to Ofcom consulting upon the design and implementation of the co-regulatory framework and the scope of the regulation.
- 4.3. In the absence of the legislation being settled, consultees will not be in a position to provide definitive a response to the Consultation Document. Sky therefore reserves its position to provide an alternative response to the Consultation Document once the proposed implementing regulation is laid before Parliament and becomes public. The effect of this disconnect are compounded by the recent suggestion from DCMS to VESG members that implementation of the UK regulations may be delayed due to the need to consult the European Commission and other member states on the UK proposals, including aspects of the co-regulatory framework and content rules that will apply to VOD services in scope. Such changes may require further consultation by Ofcom in future.
- 4.4. Separately, Ofcom has allowed only six weeks for consultees to respond to the Consultation Document. Whilst Sky acknowledges that there are time constraints in relation to the implementation of the Directive (Sky notes that Ofcom is not in control of such constraints), Sky considers a period of six weeks to be inadequate in light of the important issues raised by the Consultation Document.⁴
- 4.5. Sky considers that Ofcom should have allowed consultees more time to consider the Consultation Document and the important issues raised by it.
- 4.6. Accordingly, Sky reserves the right to make further written comments on the matters under consultation as and when further details become available. Ofcom must ensure that the procedures that it follows in implementing AVMS

⁴ The House of Lords Select Committee Report on Regulators has recommended, at paragraph 5.34 that “*wherever possible regulators allow for at least a 12 week consultation period in their forward planning to give industry a reasonable amount of time to respond to their papers*”. <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/18904.htm>

The Cabinet Office’s “*Five Principles of Good Regulation*” state that “[s]takeholders should be given at least 12 weeks, and sufficient information, to respond to consultations”. <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principles.pdf>

and the expected regulations are appropriately transparent, and give all stakeholders the opportunity to give their views. The current consultation examines discrete aspects of the proposed regime without giving the whole picture. This is a material failing, which may not be Ofcom's fault, but must be recognised in terms of how Ofcom conducts itself in future.

Sky

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