



CHANNEL 4 RESPONSE TO THE OFCOM CONSULTATION ON PROPOSALS FOR THE REGULATION OF VIDEO ON-DEMAND SERVICES

Introduction

Channel 4 welcomes the opportunity to respond to the consultation on proposals for the regulation of video on-demand services.

For some years Channel 4 has been developing a range of on-demand services, both through our own on-demand service 4oD, available at channel4.com and in partnership with a range of third parties.

4oD enables consumers to access a comprehensive catch-up on-demand service, making available the majority of Channel 4 programmes from across our digital channel portfolio, typically for 30 days after original linear transmission. In almost all cases the on-demand programmes are identical to those originally shown in linear TV form. The 4oD service also offers access to films and Channel 4 archive.

Channel 4 has relationships with a number of third party on-demand providers, including Sky, Virgin Media, BT, YouTube and Tiscali. The detail of each of these relationships varies, but ranges from small selections of content to levels of around 50 titles per week to larger on-demand providers.

Channel 4 provides content information to ensure that users of its on-demand service are appropriately informed as to the nature of the programmes available. On 4oD, this includes text based information and a "G" for guidance symbol. To access "G" content users are required to confirm that they are over 18 when first using the site. In addition, channel4.com operates a "Parental Control" system which provides an optional PIN system to enable adults to control access by children to the 4oD service.

Channel 4 supports the overall intention behind the AVMS Directive and subsequent implementation into UK law to ensure that consumers are adequately protected when they are accessing content on-demand, and that such regulations should take into account the characteristics of on-demand content and the online experience. Channel 4 has developed a range of ways to ensure that consumers are given information about our on-demand content, and that we provide appropriate information to third party aggregators.

Since 2006 Channel 4 has been member of ATVOD, the self-regulatory body committed to protecting consumers of on-demand content. Channel 4 adheres to ATVOD's Code of Practice.

Question 1

(a) Is the draft Scope Guidance appropriate?

Channel 4 believes that much in the approach outlined by Ofcom broadly reflects the intentions of the AVMS Directive and identifies the range of services that are likely to be in scope.

It has been clear throughout discussions around scope that this is a highly complex area. While we recognise that Ofcom's approach attempts to tackle this complexity, we are concerned that the proposed regulations do not fully reflect who has editorial responsibility for those services that fall within scope. The determining criteria for who has editorial responsibility remains too heavily biased towards content providers – and arguably is based too heavily on the traditional linear TV broadcasting model rather than the different types of services and contractual agreements that exist in the on-demand world. In particular, we believe that too much emphasis is placed on the provision of content information, with insufficient regard to how and by whom content is selected and organised.

Furthermore, given the fast-changing nature of on-demand content provision, it is important that the new regulatory framework is future-proof and provides both sufficient clarity and flexibility to respond to new services as they emerge.

(b) If you do not agree that the draft Scope Guidance is appropriate, please explain why and suggest alternative wording where appropriate.

The approach taken in the proposed Scope Guidance suggests that the overriding criterion for determining who has effective control of the organisation of programmes is the provision of relevant viewing information alongside the on-demand programmes. Paragraph 4.61 states:

“The person with effective control of the organisation of those programmes is the person 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.”

Channel 4 believes that this approach places a disproportionate onus on content providers based around the provision of content information. In Channel 4's view, the act of selecting and organising content should be the determining factor in establishing who has editorial responsibility.

The nature and selection of content and the way it is organised for the consumer are key to the overall user experience. We believe these factors should determine who has editorial responsibility, if the Scope Guidance is to be properly consistent with the Directive.

The provision of content information is clearly an important means of ensuring that the objectives of the Directive to protect consumers are met. However, it would be wrong for this to be the determining factor for who has effective control of the organisation of programmes. While content providers are generally responsible for providing metadata to the service provider, such as text information about the content (e.g. programme warnings) and/or PIN

protection information, content providers have little or no control over how platform operators organise such systems or, indeed, whether and how the information will be made available to the platform operator's consumers.

An approach led by the provision of content information could have some potentially perverse outcomes. It could lead to a confusing position in relation to film. For example, if the primary consideration for 'effective control' is the provision of content information, would the BBFC as a body which classifies films and provides consumer information be responsible for on-demand film content which is supplied to a service provider with those classifications and consumer information?

Furthermore we believe there is a risk that this approach may disincentivise some operators from adhering to the spirit and the letter of the regulations, by placing such an onus on them that they might seek not to provide content information.

Finally, we are unclear as to the legal basis for making content information the key determinant in who has editorial control, when the definition of "editorial responsibility" under the Directive refers only to the "effective control" of the selection and organisation of the programmes.

Channel 4 recommends that an arrangement should be put in place that takes into account the significance of the appropriate criteria by which editorial responsibility should be determined. Channel 4 agrees that a single entity should be identified, but is concerned that the current approach is overly simplistic and would tend to place the burden on content providers when actual editorial control – either through the selection of content or the way in which it is organised or the way and form in which content information is presented by them to their consumers – lies with the aggregator.

In order to achieve the above, Channel 4 would propose that the Scope Guidance in Section 4 is varied as follows:

- Paragraph 4.61 should be deleted in its entirety.
- The final four lines of paragraph 4.62 are amended to read: *"...and/or logo, does not necessarily mean that they control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not necessarily constitute 'selection and organisation' of programmes, as these are presentational techniques which may not constitute selection and/or organisation of programmes."*
- The words *"...,and for the providing the necessary programme information, ..."* should be deleted in paragraph 4.68 (since provision of information is not the appropriate criteria for determining editorial responsibility and reflects the fact that content providers do provide programme information to aggregators in circumstances where the aggregator maintains editorial responsibility).

Question 2

- (a) Is the proposed allocation of functions relating to [notification] set out in paragraphs 4.87 to 4.91 appropriate?**

Channel 4 broadly agrees with the proposed allocation of functions identified. However, we believe that a clearer definition of the powers to be designated to the co-regulator should be provided, outlining its powers in respect of alleged breaches of rules which do not entail the most serious sanctions such as a fine or withdrawal of service, which would rightly fall to Ofcom. For example, it is not clear what powers to intervene the co-regulator would have in the early stages of identifying a failure to notify or an alleged breach of the Code. Channel 4 believes that if the co-regulator is to be effective it needs to have 'teeth' to make regulatory interventions and seek to address less serious issues, and that this needs to be clearly articulated to ensure that the consumers, regulated parties—and the regulators themselves—have clarity.

- (b) If you do not agree that the proposed allocation of functions relating to notification is appropriate, please explain why and suggest an alternative, where appropriate.**

Please see answer to question 2(a) above.

Question 3

Do you wish to suggest alternative approaches to either or both:

- (a) the Scope Guidance and/or**
(b) the proposed allocation of functions relating to notification?

Please see answer to question 1 above.

Question 4

- (a) Do stakeholders agree with Ofcom's proposal that, subject to the necessary progress being made over the consultation period, it would be appropriate for Ofcom to designate co-regulatory functions to ATVOD on 19 December 2009, or thereafter when all relevant aspects of the ATVOD proposal have been agreed, in relation to the regulation of VOD editorial content?**

Channel 4 believes that ATVOD is the appropriate organisation to assume co-regulatory functions.

Channel 4 agrees that, subject to necessary progress being made over the consultation period and legislative steps being completed, it would be appropriate for Ofcom to designate co-regulatory functions to ATVOD on 19 December 2009 or as soon as possible thereafter.

- (b) If you do not agree that it would be appropriate for Ofcom to designate ATVOD as the co-regulator for VOD editorial content, please explain why?**

N/A

Question 5

Do you wish to suggest alternative approaches to Ofcom's proposal to designate ATVOD as the co-regulatory body for VOD editorial content, and if so what are these?

No

Question 6

- a) **Do stakeholders agree with Ofcom's proposal that it would be appropriate for Ofcom to designate co-regulatory functions to the ASA on 19 December 2009, in relation to the regulation of VOD advertising?**

Channel 4 agrees with Ofcom's proposal to designate the co-regulatory functions in relation to VOD advertising to the Advertising Standards Authority (ASA).

The ASA currently regulates advertising on video on-demand services through the Committee of Advertising Practice (CAP) Code for non-broadcast advertising. It therefore has valuable experience in this area, which would be retained should Ofcom designate the co-regulatory functions to the ASA. In addition, assigning responsibility to the ASA would continue to provide consumers with a one-stop shop for all advertising concerns, and have the additional benefit of providing industry with consistency and clarity in the regulatory regime.

Channel 4 notes that the co-regulatory framework proposed by the ASA would involve modifications to the Committee of Advertising Practice. In particular, CAP has undertaken to broaden its membership to include representation from the VOD industry, and plans to introduce an annex to the CAP Code with the relevant provisions from the AVMS Directive for the ASA to enforce.

Finally, Channel 4 welcomes the statement in Ofcom's consultation document that "the proposed legislation will apply regulation only to those advertisements that can be viewed by a user as a result of his selecting a particular programme to watch". Channel 4 has long held the view that the proposed legislation should cover only advertisements which appear as a result of the user accessing a particular video on-demand programme—rather than a video on-demand service—so Ofcom's statement is particularly welcome.

- b) **If you do not agree that it would be appropriate for Ofcom to designate the ASA as the co-regulator for VOD advertising, please explain why.**

N/A

Question 7

Do you wish to suggest alternative approaches to Ofcom's proposal to designate the ASA as the co-regulatory body for VOD advertising, and if so what are these?

No

Question 8

- (a) **Do our proposals as outlined in Sections 4, 5 and 6 concerning: draft Scope Guidance; delegation of functions relating to notification; and the implementation of a new co-regulatory regime for VOD editorial content and VOD advertising have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity?**

The AVMS Directive requires that video on-demand services that fall within scope must meet minimum standards to ensure that they do not discriminate or contain any incitement to hatred based on race, sex, religion or nationality.

Channel 4 welcomes the Directive's requirement that on-demand services should meet these standards.

Channel 4 does not believe that Ofcom's proposals for editorial content and VOD advertising are likely to have an impact on matters of equality in relation to gender, disability or ethnicity. Indeed we hope that the successful implementation of the Directive will have a positive impact in terms of ensuring that on-demand content and advertising will not discriminate or incite hatred.

- (b) **Do you agree with our proposal to retain the Access Duty in relation to VOD?**

Ofcom proposes to retain the Access Duty in relation to VOD, stressing its expertise and track record in applying access service regulations to existing linear broadcasters.

Channel 4 questions whether, in looking to establish a co-regulatory framework designed to respond to the characteristics of on-demand services, this is the right approach.

We believe that ATVOD, as a co-regulator with representation and expertise from across the on-demand industry, would be better placed to understand the opportunities and limitations of the provision of access services on on-demand services. ATVOD does not have the history of regulating broadcasting which we believe would result in a more even-handed approach that reflects the on-demand sector. With a broad set of stakeholders across the on-demand world, we believe this approach would be more likely to encourage on-demand providers to look at providing access services in a voluntary, non-prescriptive way. Further, we believe that for ATVOD to be as credible a regulator as possible it should have a broad range of responsibilities, and that the Access Duty for VOD would sit comfortably alongside ATVOD's other responsibilities.

Channel 4 therefore recommends that the Access Duty for VOD should reside with the new co-regulator.

27 October 2009