

# RESPONSE OF CHANNEL 5 BROADCASTING LTD (FIVE) TO THE OFCOM CONSULTATION ON REGULATION OF VIDEO ON DEMAND SERVICES

## INTRODUCTION

Five welcomes the opportunity to respond to this consultation. As a member of ATVOD, through our representation on the video on demand editorial steering group (VESG) and our membership of the Advertising Association, Five has been closely involved in the drawing up of the proposals on which Ofcom is now consulting.

Five has been a provider of on-demand versions of our programmes since 2006. Our Demand Five service currently has three million video views a month. We are also in the process of implementing, agreeing or exploring ways in which Demand Five content can be available on a wide range of on-demand platforms and devices.

Since 2008, Five has been an active member of ATVOD, the Association for Television On-Demand, the industry body that provides regulatory oversight for the on-demand industry. We believe this industry-based self-regulatory approach has proved successful in safeguarding the interests of viewers. However, we recognise that the introduction of the Audio Visual Media Services (AVMS) Directive means a legislative approach is now obligatory, although we believe industry should remain closely involved in its administration. As we said in response to last year's DCMS consultation, "we believe an industry-based approach to implementation will be the most effective and least disruptive approach"<sup>1</sup>.

Five believes the general approach set out in the Ofcom consultation should be endorsed. However, we have some significant objections to what is proposed, which we set out in response to the consultation questions.

Because we broadly endorse Ofcom's approach, we have not provided answers to questions 3, 5 and 7.

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<sup>1</sup> *Response of Channel 5 Broadcasting Ltd (Five) to the DCMS Consultation on Implementation of the AVMS Directive, October 2008*

## CONSULTATION QUESTIONS

### **Question 1**

a) *Is the draft Scope Guidance set out above appropriate?*

Five supports the draft Scope Guidance except in one area. The question as to which body has editorial control over a collection of programmes is a complicated one, given the propensity of content originators to want their material made available on a wide range of platforms and the desire of platform operators to aggregate large amounts of such content. However, we do not believe the present Guidance is drafted in a way that accurately reflects the Directive, nor does it cater adequately for the potential wide range of relationships between content providers and aggregators. It is weighted too heavily towards deeming content providers to have editorial responsibility, in a way that does not reflect the spirit or letter of the Directive.

In particular, we disagree with the statement at paragraph 4.61 of the draft Guidance that "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". The Directive contains no obligation on service providers to make any viewing information available to consumers, and we do not believe it is helpful to suggest that the provision of content information such as programme synopsis or rating information is relevant in determining the identity of the person with editorial responsibility for the service.

Article 1 of the Directive makes clear that, in the case of on-demand audiovisual media services, editorial responsibility rests with the person who exercises "effective control both over the selection of the programmes and over their organisation in a catalogue". As "selection" and "organisation" are not defined further in the Directive, they must be given their natural and ordinary meanings. The natural and ordinary meaning of "organisation" does not extend to the provision of associated information. The reference to the service that provides the "programme information, rating and/or categorisation of those programmes (for example, as being appropriate for adults only)" in paragraph 4.67 is similarly unhelpful and misleading, as there is no obligation to provide any such information to users.

We also disagree with the suggestions in paragraph 4.62 as to why a content aggregator should not be deemed to have editorial responsibility. We believe that if platform operators are responsible for the design or look and feel of a catalogue, or provide appropriate protection mechanisms allowing access to some content to be restricted, or specify how potentially harmful or offensive content should be indicated, this does tend to indicate that they control the organisation of content. In our view, techniques used to facilitate the location of content (such as alphabetical or genre indexing) may well constitute "organisation" of programmes in a catalogue. Nor do we believe it is helpful to classify "selection and organisation" together in one conjoined phrase, as at the end of paragraph 4.63; the two are separate and distinct functions.

The realities of some commercial partnerships between content providers and content aggregators may well be that the content provider simply supplies the aggregator with programmes. The content provider may also supply information that would enable the aggregator to organise those programmes in its service. But ultimate responsibility for the organisation of those programmes, including the responsibility to ensure certain content is subject to mandatory access controls, will often rest with the content aggregator. The content supplier will often have no control over the content aggregator's access control mechanisms and so will have no responsibility for how its content is organised within the aggregator's catalogue or how and whether any content access controls are applied.

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

Ofcom rightly believes there are a number of potential commercial models for VOD services. In some cases, a content provider may make available its entire catalogue and retain responsibility for its organisation, in which case editorial responsibility should rest with it; in other cases, an aggregator will select some programmes from a content provider's catalogue and organise them itself, in which case it would have editorial responsibility.

What is at issue is how to define editorial responsibility. We believe the Scope Guidance could be amended by deleting paragraphs 4.61 and 4.62, plus the first sentence of 4.63, and replacing them with the following: "The person who exercises editorial responsibility will typically be the person who selects the individual programmes to be included within the service". In addition, paragraph 4.67 should be amended by deleting "who select the programme information, rating and/or categorisation of those programmes (for example, as being appropriate for adults only)" in the opening sentence.

## **Question 2**

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

*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.*

Five believes that for the new co-regulatory body to be an effective co-regulator, it should take the lead in dealing with scope notifications. However, if it is to be a body with real authority, then it must be able to impose some sanctions of its own without resort to Ofcom. Therefore, we believe it should be empowered to issue an enforcement notice and to impose a financial penalty, the lowest of the three sanctions available.

The co-regulator would still have to forward to Ofcom any cases justifying the most serious sanction of a notice to suspend a service; and putative service providers would be able to appeal to Ofcom against an enforcement notice or financial penalty. We believe this arrangement would provide a sensible balance between giving the

co-regulator real power and authority to carry out and enforce its functions and Ofcom retaining responsibility for adjudicating in the most serious cases.

**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?*

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

Five fully supports Ofcom's proposals for ATVOD to become the co-regulatory body, and believe that continued good progress can be made in ensuring ATVOD is ready to take on this task at the appropriate time. We are confident the revised structure for ATVOD will meet the requirements set out by Ofcom and have the support of consumers and industry.

**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?*

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

Five supports the planned designation of the ASA as the co-regulatory body for VOD advertising. We believe the transfer of advertising regulation to the ASA has been a great success, creating a "one-stop shop" in the minds of consumers and benefitting advertisers and media owners. It is the obvious body to have responsibility for the regulation of advertising on VOD services, not least as the ASA already regulates VOD advertising at present.

**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 coregulatory regime for VOD editorial content and VOD advertising have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity?*

We believe Ofcom is right in thinking there are no further implications.

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

Five is strongly opposed to this proposal, and does not understand why Ofcom is putting this idea forward. Ofcom has "expertise and a proven track record" in many areas that will become the responsibility of the co-regulator, in particular its expertise

in setting rules for and adjudicating on editorial standards. We do not understand why Ofcom should be content to delegate this responsibility to the co-regulator, but wish to retain an access services responsibility.

Furthermore, there is an absolute responsibility to maintain certain minimum standards – but only an obligation to encourage media service providers to make their service gradually more accessible. We do not see why the obligation to “encourage” should reside with the parent regulator and not be trusted to the co-regulator.

We do not understand the logic behind Ofcom’s argument that its experience of dealing with broadcasters over access services justifies it overriding the co-regulatory principles on which the rest of its proposal is based. For broadcasters who are also VOD providers, access services created for linear versions of programmes can be made available on demand; it is not clear what Ofcom involvement would add. For VOD providers which are not broadcasters and so not subject to Ofcom’s Access Services Code, it will be confusing and unnecessarily bureaucratic to have a regulatory relationship with the co-regulator over compliance with rules on scope, notification, standards, sponsorship, product placement, HFSS food and drink - and to have a separate relationship with a separate regulator over access services.

We do not deny that Ofcom can have a useful dialogue with the co-regulator about how it might fulfil its duties in this area and share some of its undoubted expertise – but we think it would be perverse for Ofcom to insist on a direct relationship with all the providers of on-demand services.

c) *Are there any other possible equality impacts that we have not considered?*

No

*Channel 5 Broadcasting Ltd*

*October 2009*