Consultation on Ofcom's Proposals for the regulation of Video on Demand Services

Response from the Mobile Broadband Group

Summary

- The MBG does not believe the case has been made for co-regulation. It will not add value and could lead to duplication of work. ATVOD performs an excellent job as a self-regulatory organisation and should continue in this role, with Ofcom directly regulating formal aspects.

- If appointed, ATVOD needs to be clearer how it will split self-regulatory and co-regulatory role

- The proposed fees for small VOD providers are high and a flat fee structure is not appropriate

- The Advertising Standards Authority and CAP should be given responsibility for the co-regulation of VOD advertising, as proposed

- The scope guidance needs to give greater clarity on excluded services, particularly clip and extract services delivered over mobile

Question 1

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

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

Specific comments on the text are attached as an Annex.

During the discussions with DCMS about AVMS Directive, it was has always been made clear to us that there is no intention on the part of the Directive or the Government to include within regulation mobile entertainment services such as video clips and programme extracts, for the perfectly logical reason that they are not TV-Like or target the same audience as traditional TV. Evidence shows that content is downloaded for short periods whilst on the move or to fill down time. Our overall comment is that the Guidance needs to give more clarity and comfort on these points. In the attached mark-up, the MBG has indicated how this might be achieved.

Question 2

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

Consistent with the line taken during the VESG discussions, the MBG's preference is for formal regulation of VOD services to remain with Ofcom. Please see response to Question 4.

c) *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.*

Question 3

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

a) *the Scope Guidance; and/or*

The MBG is content with the approach of having Scope Guidance. Our comments on the document itself are attached in an Annex.

b) *the proposed allocation of functions relating to notification?*

See response to Question 4

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 co-regulator for VOD editorial content, please explain why?*

The MBG's preference is for formal regulation of VOD services to remain with Ofcom and for ATVOD to continue its self-regulatory role for the large mains-stream VOD service providers currently in their membership.

In this way there will be clear separation between the legal requirements of the Directive and self-regulatory aspects targeted at family friendly VOD services. While ATVOD's proposal is generally appropriate for a co-regulatory regime (with some caveats set out elsewhere), the argument has not been made as to what added value will be derived from co-regulation as opposed to direct regulation by Ofcom.

The main prohibitions of the Directive (e.g. not to provide content that would seriously impair the development of children) are not complicated policy areas where industry input and expertise (the main benefit of co-regulation) would add significant value. This is in contrast to the regulation of advertising, where the input from practitioners (through CAP) adds value and the economies of scale derived from outsourcing regulation to an expert body (ASA) is beneficial.

As far as we can see, the main task of ATVOD will be trying to work out who should be notifying VOD services and collecting notification fees. We fear that Ofcom will

spend as much time supervising and assisting the work of ATVOD as it would if it were to carry out the task directly.

ATVOD has been a successful self-regulatory body for its members and we are unclear to what extent it will continue to carry out the self-regulatory role. The MBG strongly urges that, if it is to be approved by Ofcom, ATVOD makes it clear to what extent it will continue with the self-regulatory aspects and how the costs will be divided between the formal and self-regulatory roles.

With respect to the specific question, in the scenario that ATVOD is approved, the proposed allocation of duties as set out in 4.87-4.91 is appropriate.

Nevertheless, we remain concerned about the costs of operation. The co-regulatory body must have a key goal to keep costs down.

The resources and costs needed to comply with the requirements of the AVMS directive must be and remain transparent and separate from ATVOD's other non-AVMS business and self regulatory activities. Those additional activities should be separately funded and the fees for notified VOD services should be ring-fenced for regulatory activities.

Flat fees are not appropriate. Costs of regulation should be born by those who need to be regulated. Fees should be proportionate to a service's viewing audience, possibly with an uplift for repeat offenders (similar to the new PP+ model – the offender pays principle). For small content providers an administration cost of £2k per service is significant and may result in some services being financially unviable.The MBG is conscious that many of the smaller providers that are potentially caught by the regulations have not been engaged in consultation and will not have argued this point themselves.

ATVOD suggests that there are two phases of organisational change. There should be a review after phase one or after 6 months to see if further expansion is needed (based on a Board of 10 members). It should not be an automatic assumption. It would be good to have organisational charts setting out the proposed structures for phase 1 and phase 2.

In summary, the MBG feels there is still some work to do to:

- Make the value added case for co-regulation
- In the event that ATVOD is approved: to clarify the boundary between its formal role and its self regulatroy role and to explain how each will be funded.
- To come up with a funding structure that is fairer to the smaller VOD service providers.

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?

See MBG response to Question 4

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?

Yes.

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?

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?

No comments

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

Yes.

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

No comments.

Proposed guidance on scope of VOD programme services to be subject to regulation (“Scope Guidance”)

APPLICATION AND SCOPE OF THE REGULATIONS
Introduction

1.1 This section of the guidance explains the types of services that may have to comply with the rules. It also provides guidance on who the provider of a relevant service is for these purposes, and therefore who is responsible for compliance with the rules, including the obligation to notify the service to the Regulator. As with other guidance on the application of the Regulations, this section of the guidance is not binding nor legally enforceable, and only provides interpretative guidance as to how the Regulator is likely to apply the rules, drawing on the Articles and Recitals of 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 and need to comply with the rules. It is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service is subject to the VOD regulations.

1.3 As explained below, there are a number of different cumulative criteria that determine whether a service is within the scope of the Regulations. 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 criteria laid down by the Regulations and act accordingly.

1.4 In deciding whether a particular service requires notification, and by whom, the Regulations require potential service providers, and ultimately the Regulator, to consider the following questions:

a) Is the service an ‘on-demand programme service’ within the meaning of the Regulations? (Section 2 of this Guidance)

b) Who has ‘editorial responsibility’ for that service within the meaning of the Regulations? (Section 4 of this Guidance)

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 Regulations are to the Audiovisual Media Services Directive (Implementation) Regulations 2009. .

2 Is the service an 'on-demand programme service' within the meaning of the Regulations?

2.1 Under the Regulations, a service will be an 'on-demand programme service', and therefore subject to notification and regulation, if it meets **all** of following criteria.

a) **It is a VOD service:** its principal purpose is to offer users the ability to select individual programmes from a range of programmes, to receive the selected programme using an electronic communications network,53 and to view the selected programme when the user chooses.

b) **There is editorial responsibility**: the programmes comprising the service are under a person's editorial responsibility.

c) **It is 'TV-like'**, to the extent that:

☐**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 ; and

☐**it competes for the same audience** as television broadcasts, and

d) **It is widely available:** the service is made available by that person for use by members of the public.

2.2 The intention of the Directive and Regulations 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).

It is a VOD service?

2.3 The key issue under this criterion is whether the principal purpose of 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.

2.4 The assessment of whether the principal purpose of the service is the provision of relevant programmes 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.

2.5 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 Regulations.

2.6 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.

2.7 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).

2.8 It is acknowledged that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case.

2.9 An "*electronic communications network*" is defined in section 32 of the Communications Act 2003 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.

2.10 A content service that is broadcast or streamed in a linear form is not covered by the on-demand programme service rules, and may be subject to the relevant 'broadcast' regulation. It should be noted that the rules for broadcast regulation are explicitly extended by the Directive and Regulations to cover internet-based television channels.

There is editorial responsibility?

2.11 The exercise of 'editorial responsibility' is relevant to scope in two ways. Firstly, an 'on-demand programme service' is defined in the Regulations 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) would fall outside the Regulations.

2.12 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.

2.13 However, that is not to say that all content in such sites falls outside the definitions. For example, where 'hosting' services are used by commercial entities as a means of distributing relevant ~~content~~programmes, and meet the other criteria laid down by the Regulations,
then such content might fall within the meaning of an 'on-demand programme service' for these purposes.

2.14 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).

The service is 'TV-like'

2.15 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). The Directive, and the Regulations, are therefore intended to cover on-demand and broadcast television audiovisual media services which compete for the same audiences (Recitals 16 and 17), sharing the same key characteristics, namely that:

a) they include comparable programmes.

It would not include such services as video clips on mobiles, which are used by people for snacking on the move and do not compete for the same audience as television broadcasts.

~~a)~~ .

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TV-like programmes

2.16 An on-demand programme service will only be caught by the Regulations 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.

2.17 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, and short extracts from ~~longer~~ programmes~~, to the extent that such extracts are not such a significant part of the programme as to be considered to be a programme in their own right.~~ *(note – this additional point is just confusing)*

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2.18 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.

2.19 Audio-only services, such as 'listen again' radio services are out of the scope of the Regulations. However, video only programmes, supplied on an on demand basis are potentially in scope (subject to the other criteria being met).

It is widely available?

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 Regulations?

3.1 A non-exhaustive list of types of content which are likely to be considered to be 'ondemand programme services' for the purposes of the Regulations (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 the Regulations:

a) Services that are primarily non-economic, and which are therefore not in competition with television broadcasting (Recital 16). 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 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);

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); and

d) electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines) (Recital 21).

e) video clips on mobiles, such as extracts for feature films, and programmes and music videos.

3.3 The following types of content may well be outside the scope of the rules 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 of the Regulations?

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 ondemand programme service, and therefore the exact scope of that service (see paragraph 2.15 above). The body with editorial responsibility would be responsible for notification 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 the Regulations, it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has 'general control' of the "*content of individual programmes or of the 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 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 Regulations 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 ondemand 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 The person with effective control of the organisation of those programmes is the person who determines the relevant viewing information provided alongside the ondemand programme that may then be used in listing the programme in an on-demand programme service: 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 makes the day to day decisions and 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 control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not 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 the Regulations 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 determinative, such contractual arrangements will be accorded due weight by the Regulator as providing ~~provide~~ useful evidence as to the division of responsibility between the parties.

4.10 As noted in paragraph 2.7, 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, or a single service offered by the aggregator, incorporating content from a variety of different sources. The outcome will depend on where "editorial responsibility" lies. ***Note: this seems rather a circular definition – perhaps better to refer to 'effective control' It would be very helpful to have some potential examples.***

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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 (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 Regulation.

4.13 In the latter case, the content providers 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, and therefore, would have responsibility for ensuring compliance with the Regulations.

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'. The onus is on the parties to provide the Regulator with all necessary information in support of any notification 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 Regulations, an on-demand programme service comprises all on-demand programmes offered by a service provider. No distinction is made between different channel brands or content genres or other means of sub-dividing services in the same way as linear services. However, it is also possible for a service provider to nominally sub-divide its on-demand programme service in to separate services, perhaps based upon linear channel identities for administrative ease (although it is noted that such a strategy would also require each such service to be notified to the Regulator separately).

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

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

6.1 Services only fall within the scope of the Regulations 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.

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.