



## Virgin Media's response to Ofcom's proposals for the regulation of video on demand services

### Executive Summary

- Virgin Media supports Ofcom's approach to implementation of the Audiovisual Media Services Directive ("**the Directive**") through a co-regulatory structure with ATVOD and the ASA respectively appointed as the co-regulatory bodies for editorial and advertising content.
- Ofcom should further consider how best to appropriately allocate regulatory functions between the co-regulatory bodies and Ofcom. Although Ofcom has considerable expertise in regulating and enforcing content standards within linear services, the co-regulatory bodies are dealing with a new and evolving medium and, if they are to have credibility, must be seen as effective co-regulators in their own right.
- Although the Scope Guidance necessarily cannot indicate a definitive line as to which services are in scope, the new co-regulatory body should proactively try to ensure that like services are regulated in the same way.
- We understand that DCMS will need to notify the European Commission about some aspects of its implementation plans. Virgin Media may want to supplement this submission once the industry has clarity over how the revised plans will impact the implementation of the Directive.

### About Virgin Media

Virgin Media owns and operates the vast majority of the UK's cable network and is active in the provision of four principal communication and media services in the UK:

- Multi-channel television (including the provision of Video On Demand ("**VOD**") content);
- Fixed and mobile telecommunications;
- Internet access; and

- The commissioning, creation and packaging of audiovisual content for television (through Virgin Media Television Limited and the UKTV joint venture) and for broadband (through the virginmedia.com portal).

Virgin Media also owns Interactive Digital Sales (ids), which is the advertising sales house for Virgin Media Television, UKTV, virginmedia.com, Virgin Mobile and a number of third party TV and online clients. ids offers advertisers a combined TV, mobile, on-demand and online advertising proposition, which allows advertisers to deliver integrated campaigns across these converging media.

The development and offering of VOD services is part of a general, and continuing, trend to provide consumers with more choice and flexibility in the entertainment options available to them. Consumers are increasingly demanding the ability to choose a wider range of content, at a convenient time to view. Accordingly, Virgin Media expects VOD services to become an increasingly important means by which to deliver content to customers.

Virgin Media's VOD service was launched four years ago in 2005 and is currently offered exclusively over Virgin Media's cable network to subscribers' television screens. Virgin Media has the largest installed base of TV VOD-enabled customers in the UK. Our second quarter 2009 results highlight that Virgin Media has 3.67 million digital customers, each with access to on-demand programming. On average over the second quarter, there were 62 million views of on-demand programmes per month and our customers can access over 4,500 hours of content provided by numerous content providers ranging from UK and European programmes through to Hollywood blockbuster pay-per-view movies.

The most recent development on Virgin Media's platform has been the launch of the ITV Player which further enhances Virgin Media's on-demand offering, which includes programming from a huge number of mainstream and niche content providers including the BBC, Channel 4, Virgin Media TV, National Geographic, the History Channel, FX, Disney and HBO.

### **Virgin Media's Response**

Virgin Media welcomes the opportunity to comment on the consultation on the proposals for the regulation of video on demand services dated 14 September 2009 ("**the Consultation**").

Virgin Media has been a key contributor to the development of co- and self-regulatory systems in the UK. It was a founder member of the Internet Watch Foundation. It played a role in the setting up of the BCAP co-regulatory system for broadcast advertising and is a member of the BCAP board. Virgin Media is also a founder member of the Association for Television On-Demand ("**ATVOD**"), the proposed co-regulatory body for VOD editorial content. Virgin Media has also been an active participant in the Video Editorial Steering Group ("**the VESG**"). In light of our heavy engagement with this process, Virgin Media has limited its comments to those which have not yet been discussed as part of the VESG working groups.

Although the precise terms of the Designation Agreement are still very much in the early phase of discussion, Virgin Media is keen to ensure that regulatory functions are appropriately allocated between Ofcom and the editorial co-regulator. The proposal within this Consultation and early indications of how the Designation Agreement will allocate functions seems to suggest that Ofcom's role will not be limited to that of a backstop regulator to step in if there is systemic failure of the co-regulatory system. Although Ofcom has the parallel right to exercise every power of the co-regulator, each duty which Ofcom allocates to itself needs to be justified and consistent with a light-touch regime. In particular, Virgin Media questions whether it is necessary for Ofcom to retain the right to:

- encourage access services;
- promote European works;
- final approval of appointments to the Board;
- final approval of the Chief Executive;
- final approval of any rules and guidance and any changes to these documents; and
- impose the most serious of penalties (i.e financial, suspension and restriction of service).

Although, in principle, there should be little discrepancy between the co-regulator's and Ofcom's approach to regulating these areas, the industry will need more clarity around Ofcom's proposals to ensure that an appropriate regime is developed for "TV-like" on-demand services and that the proposed level of oversight by Ofcom does not increase costs. Likewise, Ofcom needs to be minded that if the co-regulatory bodies are seen merely as arms of Ofcom, rather than as autonomous and successful co-regulatory authorities in their own right, this is likely to undermine the success of any future co-regulatory arrangements.

In relation to the specific questions of the Consultation, Virgin Media responds as follows:

#### **Question 1**

- a) Is the 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***

Subject to the points raised below, Virgin Media broadly agrees that the Scope Guidance is appropriate and correctly identifies the key elements of an on-demand programme service and the intended meaning of "editorial responsibility" as defined in the Directive and the draft Regulations.

#### **Editorial responsibility**

The Scope Guidance provides a useful set of criteria for aggregators and content providers to assess which entity has “editorial responsibility”. It is Virgin Media’s view, in relation to its own cable platform, that subject to contractual provisions to the contrary, the vast majority of content providers on the Virgin Media platform, will be deemed to be “editorially responsible” for their content as they have (i) general control over the selection of individual programmes included in the range of programmes offered; and (ii) effective control over the organisation of those programmes. However, Virgin Media acknowledges that the decision of which entity has “editorial responsibility” may not always be clear-cut especially when there is a blurring of functions. We therefore consider that the Scope Guidance should be clearer that contractual arrangements, rather than just “useful evidence” of determining “editorial responsibility”, may be the only way to determine this issue. We suggest that the wording in the Scope Guidance should be amended to highlight the importance of contractual provisions. This will help to create further certainty for industry participants.

#### Development of scope over time

Given that the parameters of scope will only become more defined post 19 December as service providers and the co-regulator become clearer about the type and nature of services which will need to be regulated, Virgin Media considers that the Scope Guidance will need to evolve fairly quickly. Although Virgin Media fully concurs with Ofcom that it is impossible to determine the totality of services which will fall under the new regime, this should not prevent a detailed analysis on scope being undertaken as soon as possible post implementation of the legislation.

The purpose of the Directive is to ensure the harmonisation of a basic tier of minimum content standards across all audiovisual media services such that a viewer watching a “TV- like” programme via linear television, VOD, mobile or over the internet should be assured that the programme complies with minimum content standards. Therefore any implementation should not distort competition between the various different providers of VOD content. It will therefore be key that the co-regulator ensures that similar types of services are regulated. Virgin Media suggests that shortly after the regime comes into force, and periodically afterwards, the regulator should undertake an audit of on-demand programme service providers to ensure there is consistency of notification.

#### Multiple services

In relation to multiple services, the Scope Guidance states that separate notification may be required where a service provider distributes a service which is not “substantially the same” as an existing service.

Virgin Media considers that extra work may need to be undertaken by the co-regulatory body to determine:

- (i) what “substantially the same” means in practical terms; and

- (ii) whether a separate notification will be required for a smaller subset of a larger on-demand programme service. For example, would a smaller subset of a larger service also need to be notified on the basis that that smaller catalogue is not “substantially the same” as the larger catalogue, even though it contains identical programmes?

### **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.**

### **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?**

Paragraph 4.91 of the Consultation sets out the procedure for Ofcom’s involvement in decisions concerning scope. Ofcom will engage on borderline scope questions and the enforcement of decisions surrounding notification and scope. Virgin Media agrees that Ofcom should only exercise any decision making or enforcement powers if a case is referred to it either by the service provider or the co-regulator. However, the Consultation does not cover a scenario where the co-regulator believes a particular service or class of service is out of scope and this differs from Ofcom’s view or a competing service provider. It needs to be clarified whether Ofcom would have any powers in relation to this scenario.

Aside from the comments made above in relation to scope, and that the timetable under which relevant services will need to notify may need to change due to DCMS’ implementation plans, Virgin Media does not have any further comments on the Scope Guidance and proposed allocation.

### **Question 4**

**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?**

As a member of ATVOD, Virgin Media has been involved in its reconfiguration from a self-regulatory body to a co-regulatory one. Virgin Media fully supports

ATVOD's designation as the co-regulatory body by Ofcom. Virgin Media considers that a successful co-regulatory system will be one where there is a balance between Ofcom, the co-regulator and industry's involvement in shaping the regulatory landscape for on-demand programme services. Virgin Media is very keen to ensure that in addition to the few industry players appointed to the ATVOD board, broader industry participation continues. We understand that this is ATVOD's intention, as per paragraph 4.22(vi) of its proposal, however, we consider that rather than ad hoc industry participation, industry should meet with the ATVOD board on a regular basis (we suggest once every other month) to share knowledge and developments.

In relation to designation on 19 December 2009, as stated in the Executive Summary, we understand that this may not be possible and therefore await further clarification from DCMS.

#### **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.***

Virgin Media does not wish to suggest any such alternative approach.

#### **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 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?***

Virgin Media considers that it would be appropriate to designate co-regulatory functions to the ASA in relation to advertising that appears within VOD services, and that doing so will effectively secure Ofcom's statutory duties under the Regulations.

Research indicates that UK consumers have a high awareness of the ASA, and the self- and co-regulatory structures that sit behind the "one stop shop" have proved themselves adaptable to the type of rapid change that currently characterises the VOD industry.

We note that the CAP Codes already apply to VOD advertisements, and therefore appreciate why BASBOF has been able to give assurances – as

outlined in Stuart Purvis' letter of 7<sup>th</sup> August 2009 to Guy Parker – that the ASA will be adequately funded to fulfil its duties if designated as the co-regulator. Virgin Media concurs with the view (at 11.3 of the Consultation) that any resource implications in establishing a co-regulatory system for VOD are therefore likely to be minimal.

Today, the limited amount of advertising within UK VOD services has usually been screened previously on linear TV services. Virgin Media TV, along with other broadcasters, has been involved in the development of Clearcast's new voluntary clearance service for advertisements within on-demand services. This may be particularly helpful to broadcasters who need to clear the same commercials for both linear and non-linear services.

However, as we have outlined above, while nascent "TV like" VOD services display many of the characteristics of linear television, it is important to recognise that non-linear services differ fundamentally linear ones in a multitude of ways; not least in how they are perceived by viewers. Virgin Media considers this distinction will become increasingly apparent over the next few years as new advertising forms evolve, unfettered by the detailed scheduling and placement rules that have traditionally applied to licensed linear TV services.

If VOD services are to flourish and become commercially viable, it is important that they retain as much flexibility as possible. For that reason we believe it is right that the Directive's minimum requirements for VOD advertising are incorporated as a co-regulatory annex to the self-regulatory non-broadcast (CAP) code. We consider this will provide the co-regulator as much flexibility as possible in handling complaints relating to VOD advertising.

Ultimately nascent VOD services will continue to develop in line with consumer preferences. As such Virgin Media considers it important that the designated co-regulatory authority for VOD advertising retains as much freedom and flexibility as possible under the Regulations in order to adapt swiftly to such change.

### **Question 8**

- a) Do our proposals, as outlined in Sections 4, 5 and 6 concerning: draft Scope Guidance; delegations 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 of gender, disability or ethnicity?**
- b) Do you agree with our proposal to retain the Access Duty in relation to VOD**
- c) Are there any other possible equality impacts that we have not considered?**

We believe that the co-regulator should hold responsibility for administering the Directive's requirement that VOD service providers are encouraged to

provided access services. The fact that Ofcom, in this respect, already has committees and processes responsible for the oversight of its duties outlined in the Communications Act is likely, in our view, to unhelpfully conflate linear broadcasting with video-on-demand services. As previously stated, while “TV like” on-demand services may share some of the form and characteristics of linear broadcasting, it is important to recognise that they differ significantly in terms of their technical delivery to viewers.

Virgin Media takes its corporate responsibilities seriously and is already working hard behind the scenes to deliver access services on its VOD platform. We nevertheless consider that, as the access requirements for VOD services are significantly - and appropriately - different from linear TV services, the issue should be handled by the co-regulator.

Virgin Media does not intend to respond to the other parts of this section.

October 2009