

## **VLV's Response to Ofcom Proposals for the regulation of video on demand services**

(Numbers refer to relevant sections within the Ofcom consultation document unless otherwise stated).

1.1 VLV welcomes Ofcom's proposal to regulate Video on Demand services for the first time in accordance with the provisions of the Audio Visual Media Services Directive which will be laid before Parliament in December. However VLV is concerned that the AVMS Draft Regulations relating to VoD will now be delayed. Since Ofcom's proposed Regulations for services depends heavily upon the provision of the proposed AVMS Regulations, and, particularly, often to the minimum requirements of that Directive, it is not clear in all respects what the combined result of the AVMS (Implementation) Regulations and Ofcom's VoD proposed Regulations will finally be.

1.2 An issue of particular concern to VLV is the manner in which Product Placement will be regulated. At no stage do the Ofcom proposed Regulations address this issue. Is VLV correct to assume that the AVMS Directive (Implementation) Regulations on Product Placement (which as yet are completely unclear following the consultation document on the Product Placement rules in TV Programmes which was mooted by the Secretary of State in September) will apply equally to both TV programmes and VoD services, or will separate provisions apply?

1.3 In either case, VLV would wish the Ofcom proposed regulations for both TV programmes and VoD services explicitly to prohibit Product Placement in all news and current affairs programmes.

1.4 Neither the Draft AVMS Directive (Implementation) Regulations nor the Ofcom proposed Regulations have given any consideration to the needs of the consumer to be provided with an electronic programme guide to the programmes available in a given VoD service, which, VLV would argue, is necessary if the UK is to implement properly articles 1 (a) and 1 (g) of the AVMS Directive. Given that Ofcom's principal regulatory duties, as defined in article 3 of the 2003 Communications Act, are to further the interests both of the citizen and the consumer, it is essential for the Ofcom proposed Regulations to ensure that users of VoD services are properly informed

(a) about the genre of programme which they are about to purchase (e.g. is it a children's programme?) and

(b) whether or not it contains product placement or other forms for audiovisual commercial communication, before the moment at which the consumer has to decide to pay for the right to watch the programme.

Although the citizen and consumer are getting important, but indirect, benefits from the regulations as proposed a direct and crucial requirement to meet the duties of transparency, consistency, targeting and even accountability (5.17) would be to provide a comprehensive electronic programme guide under the auspices of ATVOD.

1.5 VLV also considers that there is a lack of clarity surrounding the duties of the regulatory body to levy fees from participants. The funding at £400,000 for the first 15 months (5.27) already looks very optimistic but if membership fees do not provide that revenue flow where is it proposed that the funding for ATVOD should come from? The ASA is already funded in that fashion and as Recital 36

of the AVMS Directive states it is not intended that the Directive should disrupt existing satisfactory co-regulatory procedures.

1.6 For this reason, VLV questions why ATVOD will not be established on exactly similar lines to the ASA, which has been a proven, effective, even popular, co-regulatory body. Although the ASA reports directly to Ofcom, it appears that ATVOD will not be reporting to Ofcom in the same manner. It would seem that Ofcom can only intervene with ATVOD when requested by them or by use of 'back-up powers to meet desired objectives' (5.8) - whatever that may mean. Enforcement provisions are only referred to as 'at this point' (5.34) exposing the fact that the avowedly 'lighter touch regulation' (5.33 ii) could easily become no regulation at all.

1.7 It also appears that the obligation on VoD providers to notify the co-regulators of their existence is unclear under the EU rules. This will severely disadvantage the citizen and consumer in not having transparency of availability. If neither this requirement nor the fees provision were permitted VLV would question the validity of the whole co-regulatory process. In that eventuality VLV would recommend that Ofcom assume duties closely following those already established for the ASA by which Ofcom assumes responsibilities 'in parallel' with ASA (6.10) and retains a role in 'supervising the effectiveness of the system' (6.17).

1.8 Although ATVOD is charged with making its own reviews after 2 years (5.34) there appears to be no requirement to report these to Ofcom for action or for Ofcom to review the overall effectiveness of the co-regulator. Some provision for regular review by Ofcom must be ensured, preferably along the lines of the reporting and reviews required from the ASA.

1.9 None of these issues fit satisfactorily with the Questions posed in the Consultation document and so are shown separately above. In addition the following specific answers are given to selected questions:

**Question 1a) Is the draft Scope Guidance set out above appropriate?**

Scope provisions are limited by being interpretative rather than prescriptive. Although 4.75 relates the statutory limitation of the AVMS, which makes this necessary, the approach does not sit comfortably with a duty that is transparent, consistent and accountable; nor does it sit comfortably with the requirements on organisations of unspecified scope to meet subsequent regulations on editorial content and advertising objectives; nor with the enforcement provisions in 4.91. It also leaves considerable interpretative power relating to 150-200 notifiable services (4.86) in the hands of AVTOD at an early stage. VLV suggests that Ofcom assume licensing powers which avoid conflict with the statutory requirements of AVMS to ensure application and participation in the EPG.

**Question 1b) If you do not agree that the draft Scope Guidance is appropriate, please explain why and suggest alternative wording where appropriate.**

The procedure would benefit from regular review directly by Ofcom as happens with the ASA. This similarly applies to Question 4a) as the reviews would then have to be spelled out in detail.

**Question 4a) 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?**

No – because it is unclear why a system similar to the ASA with Ofcom in overarching control is not used. See 1.6 above.

**Question 4b) 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?**

See 1.6 above

**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 1.7 to 1.9 above.

**Question 6a** 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?

VLV supports this approach. VLV would also strongly recommend that any proposal for Product Placement which might be applied to VoD should be placed under the aegis of the ASA and not ATVOD.

**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?

VLV strongly disagrees with the delegation of functions relating to notification in the manner outlined – see 1.6 above

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

VLV supports the retention of Access Duty by Ofcom

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