



Satellite & Cable
Broadcasters' Group

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Response to Ofcom's proposals for the regulation of video-on-demand services

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The SCBG is the trade association for digital programme providers who are independent of one of the main terrestrial broadcasters. Its members are responsible for over 100 channels in the UK. Many member companies are pan-European broadcasters, producing and commissioning content for different national markets.

According to recent Deloitte research, SCBG members made a total economic contribution to the UK economy in 2007 of over £2.2 billion and invested a total of £1.2 billion in programming, employing nearly 25 000 people in skilled jobs.

SCBG member channels provide citizens and consumers with programmes and services for a diverse range of audiences across a wide range of genres and audiences, including entertainment, factual, educational, history, music, nature, art and science. Our member companies make and show programmes for children and young people, and for ethnic minorities in their own languages. SCBG members' channels can be found on all of the UK's major digital pay and free-to-air platforms, which are now available in nearly 90% of UK homes.

For a full list of members and more details about the SCBG please go to

www.scbg.org.uk

Summary

- In most respects, SCBG supports the approach Ofcom proposes for the implementation of the new regulatory framework for VOD;
- SCBG believes that the application of the scope criteria – particularly the definition of “TV like” content – needs to be very tightly focused to prevent over-regulating new forms of broadband content;
- SCBG wishes to see greater flexibility in how breaches of the new guidelines are contextualised and published, so that content providers are not unfairly represented in cases where platform or aggregator failures were to blame;
- SCBG is concerned that the proposed flat-fee structure for ATVOD may be inappropriate for a sector characterised by large-scale VOD services at one end, and small, online experimental services at the other;
- SCBG is also concerned to ensure that the notification regime is as simple as possible, allowing for multiple notifications from a single content provider who may be operating a range of branded VOD services;
- SCBG is supportive of the proposal to designate the ASA as the co-regulator in respect of VOD advertising.

Responses

Question 1

Is the draft Scope Guidance set out above appropriate? If you do not agree that the draft Scope Guidance is appropriate, please explain why and suggest alternative wording where appropriate.

We agree that the draft Scope Guidance is appropriate, subject to two issues.

Firstly, we predict that the question of exactly what content falls within the boundary of “TV like” will be tested vigorously during the first few months of the new regulatory regime. Although we agree with the need to apply notions of “TV like” programming in a dynamic way, we would note that – as the consultation document explains – the primary concern of the Directive is to create a level playing field between traditional linear broadcast television and emerging on-demand services.

The vast majority of services captured by the new regulatory regime will be offering “TV like” content, and in fact, the vast majority will be offering genuine TV content. SCBG members will certainly be active in providing “catch-up” services of their linear schedules, and offering rich libraries of previously broadcast material, like many other broadcasters will. However, many new online content services offered by SCBG members will be experimenting with new forms of video that may share some characteristics and stylistic features akin to television, but which innovate in form and content.

Clearly, these issues will need to be worked through as the new regime is introduced, but we would recommend that the new regulatory body (and Ofcom in its backstop position) should proceed with a bias against regulating nascent services offering content similar to – but not actually – that which would be found on a linear TV channel. In other words, there would need to be exceptional reasons to bring into scope services that are

offering content not previously shown (or intended for broadcast) on a linear television channel. Indeed, recital 17 of the Directive reinforces this intention, in explaining that a service should be regarded as “TV like” if “the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.”

Secondly, although we understand why the new regulations attach full regulatory responsibility to the organisation with editorial control over a VOD service, we note that there may be some failures which are due to circumstances beyond the control of a content provider. The failure of a VOD platform’s PIN protection system would be one obvious example.

Although the ultimate regulatory burden will rest with the organisation with editorial responsibility, we suggest that there should be some means of explaining the circumstances of a breach when it is published. Given that this new regulatory system is supposed to offer consumers greater protection and better information to make informed choices about different VOD services, in the event that editorial responsibility is deemed to be exercised by the broadcaster, there will be instances whereby some failure may be due to circumstances beyond the broadcasters control e.g. the failure of a platforms pin operation system. It would be unfair for a content provider to appear to consumers as negligent in its responsibilities if breaches in its name are beyond its reasonable control.

Questions 2 and 3

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

Do you wish to suggest alternative approaches to either of both the Scope Guidance; and/or the proposed allocation of functions relating to notification?

We agree with the proposed allocation of functions (but please note relevant comments in our other responses).

Questions 4 and 5

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? 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?

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?

We agree with the proposal to designate ATVOD as the co-regulatory body, and note the work currently underway to reshape ATVOD for the requirements of its new role. We wish to raise a question about the fee structure envisaged for the new body (and the

related notification process) – although we acknowledge that this does not specifically relate to the designation of ATVOD.

Ofcom's impact assessment assumes a flat fee of around £2,000 per service, based on an estimated budget for ATVOD of around £320,000 per annum, and a base of around 150 regulated services. We are unsure if a flat fee is an equitable way of funding ATVOD. Many VOD services are in their infancy, and their business models are still unclear. £2,000 may be inconsequential to those organisations offering large VOD services with well-established advertising or subscription models, but to a smaller organisation providing a limited or experimental service, it could be prohibitively high. We would welcome discussion about some alternative options.

We are also unclear about how the notification process will operate – is notification only required once in a service's lifetime, or on an annual basis? What about services which occasionally move into to scope of the regulations, and move out shortly afterwards? We also note the idea that services on different platforms with the same brand that offer largely the same content would be captured by one notification, but we are unclear whether multiple variants of a core "umbrella" brand (such as MTV Base, Discovery Realtime or LIVING2) would require multiple notifications.

Since this new framework imposes new financial and administrative burdens on the industry, we would welcome greater clarity about how this will work in practice.

To summarise, specific areas on which we would welcome engagement from ATVOD would include:

- The notification process;
- The fee structure;
- Governance arrangements (including representation on boards and subcommittees);
- Enforcement procedures and sanctions.

Questions 6 and 7

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? 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?

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?

We agree that the ASA should be designated as the co-regulator for VOD advertising. Such an approach continues the "one stop shop" model that has worked well since its introduction in 2004.

Question 8

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? Do

you agree with our proposal to retain the Access Duty in relation to VOD? Are there any other possible equality impacts that we have not considered?

We agree with Ofcom's analysis of these issues, and have no objection to Ofcom retaining the Access Duty in relation to VOD. We would, however, welcome a discussion about how Ofcom intends to apply this Duty to VOD services. Different approaches will obviously create different resource implications. This applies equally to the issue of promoting European Works, which although not referenced in the consultation paper, is an issue of real concern to SCBG members.

SCBG
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