

The logo for the Authority for Television On Demand (ATVOD) consists of the letters 'ATVOD' in a bold, white, sans-serif font, centered within a solid black rectangular background.

ATVOD

THE AUTHORITY FOR TELEVISION **ON DEMAND**

Procedure for determining breaches of ATVOD rules relating to VOD services

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Contents

Introduction	Page 3
Responsibility for dealing with potential breaches	Page 3
VOD services subject to the statutory requirements	Page 4
Rules applying to regulated VOD services	Page 4
Pro-active breach investigations	Page 5
Complaining about VOD services	Page 5
How to complain	Page 6
Initial assessment of complaints	Page 7
Potential breaches: reaching a Preliminary View	Page 8
Determination	Page 9
Publication	Page 10
Requesting an Appeal or Review	Page 10
Enforcement Notifications and Sanctions	Page 11
Material likely to encourage or incite the commission of crime or lead to disorder	Page 11
Complaints outside ATVOD's statutory remit	Page 12

Introduction

1. As a result of the Audiovisual Media Services Directive 2007 (“the Directive”), providers of certain VOD services are required to follow specified administrative procedures and to ensure that editorial content complies with minimum standards set under the Directive. These requirements were implemented into UK law through various amendments to the Communications Act 2003 (“the Act”). Ofcom has delegated powers and duties to ensure compliance with the requirements to ATVOD.
2. The requirements are set out in detail in the ATVOD Rules which can be found, along with related guidance, on the ATVOD website: “*Rules and Guidance - Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services (ODPS)*”¹. The rules are comprised of two sections: Administrative Rules and Editorial Rules. Administrative Rules detail the duties of operators of VOD Services in relation to the notification of services to ATVOD, the conduct of the regulatory relationship and the provision of information to VOD users. Editorial Rules specify the standards which operators must apply to content in relation to harmful material, the protection of minors, sponsorship and product placement
3. The Rules reflect the words of the legislative requirements. Any breach of the Rules is therefore likely to constitute a contravention of the statutory requirements, and will be treated as a failure to comply with the corresponding requirements under section 368D of the Act.
4. ATVOD is committed to the investigation and determination of potential breaches fairly, efficiently and proportionately. This document outlines the procedures ATVOD will normally follow, whether prompted by a complaint or following its own inquiries.

Responsibility for dealing with potential breaches

5. All action ATVOD takes in respect of potential breaches is subject to the oversight of the ATVOD Board of Directors (“the Board”). The Board receives regular reports in relation to potential or actual breaches, and will be the Review body in relation to a challenge to any Determination².
6. Other than in exceptional circumstances, investigation and determination will be carried out as follows: (a) an initial assessment will be carried out by the Executive; (b) where merited, the circumstances will be fully investigated by the Executive; (c) in the event that it appears a breach has occurred a Preliminary View will be issued to that effect and given to the service provider; (c) after considering any representations in relation to the Preliminary View a Determination will be issued.
7. The Board delegates the consideration and determination of breaches to a Determinations Committee. The Committee has a majority of independent members at all times, one of whom chairs the Committee. No director of ATVOD who is employed by a service provider subject to an investigation of a potential breach, or is otherwise subject to any actual or potential conflict of interest, may take part in such consideration.

¹ See <http://www.atvod.co.uk/rules-and-guidance>

² NB a service provider may also appeal to Ofcom in the case of a Determination that a service is an ODPS or that an ODPS is being provided by a particular entity.

8. The Determinations Committee may delegate to the Executive consideration and issue of Preliminary Views in relation to certain types of potential breach: see further in Paragraphs 34 to 36.
9. All Determinations of breach are made by the Determinations Committee or by the full Board.
10. These procedures come into effect on 1st January 2014.

VOD Services subject to the statutory requirements

11. Not all providers of VOD services are subject to the requirements set out in the Act. Only VOD services which fulfil all the criteria laid out in section 368A of the Act are 'on-demand programme services' (ODPS). ODPS have to comply with the statutory requirements as set out in the ATVOD Rules, breaches of which are dealt with under this Breach Procedure.

The criteria set out in section 368A of the Act defining an on-demand programme service ("ODPS") are as follows:

- the principal purpose of the service is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;
 - access to the service is on-demand;
 - there is a person who has editorial responsibility for the service;
 - the service is made available for use by members of the public; and
 - the service provider is within UK jurisdiction.
12. Detailed non-binding guidance on the scope of the regulations is provided on the ATVOD website in the document "*Guidance on who needs to notify: Application and Scope of the Regulations for Video On Demand (VOD) services*"³. The ATVOD Executive will also provide informal and non-binding guidance on request. However, it is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service falls within the scope of the regulatory framework for VOD and, if it does, to comply with the ATVOD Rules.
 13. Failure to notify a service which appears to the ATVOD Executive to be an ODPS will be dealt with under this procedure as a potential breach.

Rules applying to regulated VOD services

14. The ATVOD Rules fall into two sections ('Administrative Rules' and 'Editorial Rules', and together, 'the Rules').

Administrative Rules can be summarised as follows:

³ See <http://www.atvod.co.uk/regulated-services>

- Rule 1: Notification of intention to provide an ODPS;
- Rule 2: Notification of intention to make significant changes to a notified service;
- Rule 3: Notification of intention to cease providing a notified service;
- Rule 4: Payment of required fee;
- Rule 5: Retention of programmes for at least 42 days;
- Rule 6: Provision of information (to ATVOD);
- Rule 7: Cooperation (with ATVOD);
- Rule 8: Compliance with enforcement notifications;
- Rule 9: Supply of information to service users.

Editorial Rules can be summarised as follows:

- Rule 10: Harmful Material: Material Likely to Incite Hatred;
- Rule 11: Harmful Material: Protection of Under Eighteens;
- Rule 12: Sponsorship;
- Rule 13: Product Placement.

15. As noted above, further details of the Rules and non-binding guidance on how they are likely to be interpreted are published on the ATVOD website⁴.

Pro-active breach investigations

16. ATVOD may decide to investigate a potential breach of the Rules in the absence of a complaint. Such pro-active breach investigations will follow the procedure set out in Paragraph 25 and following in relation to complaints, with suitable adjustments to reflect the absence of a complainant.

Complaining about VOD services

17. The contact details of notified service providers are published on ATVOD's website⁵. In addition, regulated services are required to make available to their users contact details about themselves and who they are regulated by in order to assist potential complainants.
18. If a complaint relates to a VOD service that has not been notified to ATVOD, before considering the complaint ATVOD will consider, under this procedure, whether the VOD service is an ODPS within the scope of section 368 and subject to the statutory duties.

⁴ <http://www.atvod.co.uk/rules-and-guidance>

⁵ See <http://www.atvod.co.uk/regulated-services/directory-of-notified-services>

Pending ATVOD's Determination as to whether the VOD service is within scope, the procedures for dealing with the substance of the complaint may be put on hold⁶.

How to complain

19. For a complaint about a potential breach of the Editorial Rules to be considered by ATVOD, the complainant must normally have first tried to resolve the complaint with the VOD service provider directly. (If details of the VOD service provider are not already on the ATVOD website, ATVOD will endeavour to direct the complainant to the relevant service provider or notify the service provider of the complaint.) However, if the complainant considers that a service provider may be including material likely to encourage or to incite the commission of crime or to lead to disorder, the complaint should be made directly to ATVOD so that urgent consideration can be given to whether there is a need for Ofcom to take urgent action to suspend or restrict access to the service.
20. Complainants should note that VOD service providers are obliged to retain a copy of every programme included in their service for only 42 days after the day on which the programme ceases to be available for viewing. In order to enable ATVOD to investigate properly a complaint where the service provider is unable to resolve it to the complainant's satisfaction, complainants should always provide ATVOD with a copy of any complaint they make to a service provider at the same time as making the complaint to the service provider. ATVOD will then request a copy of the programme so that it can pursue the complaint should the issue not be resolved by the service provider.
21. If the complaint is not resolved satisfactorily by the service provider, or the service provider has indicated in writing that the complaint should be settled by ATVOD, then the complainant may refer the complaint to ATVOD. ATVOD will normally only consider a complaint in these circumstances if it was first made to the service provider no more than one calendar month after the content was first provided to the complainant, and the complaint was submitted to ATVOD no more than one calendar month after (a) the service provider had provided its response to the complainant or (b) the complaint was first made to the service provider, if the complainant has received no response. Complaints that raise issues which may amount to a serious breach of the Rules may be considered by ATVOD without the complainant having first attempted to resolve the matter with reference to the service provider. Such cases include, but are not limited to, those in which the complaint raises concern that the service provider may be including material likely to encourage or to incite the commission of crime or to lead to disorder; and those in which there is a risk of serious harm, such as the provision of hardcore pornography to minors.
22. To make a complaint, complainants are advised to use the online complaints facility at www.atvod.co.uk/complaints/submit-a-complaint. Alternatively, complainants can either email ATVOD at complaints@atvod.co.uk or write to ATVOD Complaints, 27 Sheet Street, Windsor, Berkshire, SL4 1BN. All complaints should include sufficient details for ATVOD to be able to investigate, i.e. the name, series number, and episode number or

⁶ Any determinations by ATVOD as regards scope can be appealed to Ofcom, by the VOD service or a sufficiently interested third party

title of the programme complained about, the date and (if relevant) the time it was provided, the service on which it was provided, the nature of the complaint, and the complainant's full contact details. Failure to provide these details may mean that it is not possible to identify the programme or the service within a reasonable time and as a result ATVOD may not be able to investigate the complaint. If the complainant has already had any communication relevant to the complaint from the service provider, details of this should also be provided. ATVOD may contact the complainant to ask for more information. ATVOD may request the service provider to provide a recording of the programme within 10 working days.

23. ATVOD will usually not consider anonymous complaints. Unless a complainant specifically requests at the time a complaint is made that his/her name and contact details should remain confidential, ATVOD reserves the right to disclose these to the VOD service provider. ATVOD will publish its reasoned Determination in relation to any breach of the Rules. Details of ATVOD's investigation, Preliminary View and any submissions and representations regarding the complaint will otherwise remain confidential between ATVOD and the service provider.
24. Each complaint will be acknowledged and the complainant will be given a reference number. All complainants will receive a response, even if their complaint does not require further investigation or does not fall within ATVOD's regulatory remit.

Initial Assessment of Complaints

25. As explained in Paragraph 18 above, the procedure followed by ATVOD on receipt of a complaint will depend on whether the service complained about is notified to ATVOD (notified services are listed in ATVOD's Directory of Notified Services⁷) or whether it is a non-notified service. This is because on receipt of a complaint about a non-notified service, ATVOD must determine whether the service is an ODPS within the scope of section 368 and subject to the statutory duties. Complaints about non-notified services are therefore likely to take significantly longer to resolve.
26. ATVOD may request the service provider to provide a recording of any programme which is the subject of a complaint or a pro-active investigation within 10 working days. Such a request will normally be made immediately following an initial assessment that a breach may have occurred, but may also be made at any other stage of the process.

Complaints about notified services

27. If the complainant has not already attempted to resolve the issue with the service provider, ATVOD will normally forward the complaint to the service provider in the first instance so that an attempt can be made to resolve the issue without the need for a formal investigation by the regulator. The complainant will be informed that the complaint has been forwarded to the service provider and of the deadline for referring the matter to ATVOD if the service provider does not respond or if the complainant is not satisfied with the response of the service provider. If the complaint is clearly outside the remit of the ATVOD Rules (see Paragraph 14), ATVOD will make a Determination to

⁷ <http://www.atvod.co.uk/regulated-services/directory-of-notified-services>

this effect and inform the complainant and the case will be closed. The complainant may request a Review of such a Determination in accordance with the procedure outlined below in Paragraphs 44 and following.

28. If the complainant has already attempted to resolve the issue with the service provider (e.g. by submitting a complaint to a notified service using the ATVOD online complaints facility, or by contacting the service provider directly) the ATVOD Executive will carry out an initial assessment to decide whether the complaint raises a potential breach of the ATVOD Rules. If it determines that the complaint cannot amount to a contravention of those Rules, it will inform the complainant and the complaint will then be closed. The complainant may request a Review of such a Determination in accordance with the procedure outlined below in Paragraphs 44 and following.
29. If an initial assessment concludes that the complaint may amount to a potential breach of the Rules, ATVOD will proceed to reach a Preliminary View (see Paragraphs 34 to 36 below).

Complaints about non-notified services

30. The ATVOD Executive will carry out an initial assessment to decide whether the complaint raises a potential breach of the ATVOD Rules. If it determines that the complaint cannot amount to a contravention of the Rules, it will inform the complainant and the complaint will then be closed. The complainant may request a Review of such a Determination in accordance with the procedure outlined below in Paragraphs 44 and following.
31. In circumstances where the complaint potentially concerns a breach of the Rules, but concerns a VOD service which has not been notified to ATVOD, the complainant will be informed that no decision on the complaint will be taken until a scope investigation has been concluded. The service provider will be informed that, following a complaint, the service is subject to a breach investigation.
32. A breach investigation regarding a non-notified service may consider potential breaches of the Editorial Rules at the same time as considering potential breaches of the Administrative Rules (including the question of whether the service is an ODPS, or whether a particular entity is the provider of the ODPS). Alternatively ATVOD may reach a decision on scope and then proceed to determine whether a breach of the Editorial Rules has taken place.
33. If an initial assessment concludes that the complaint may amount to a breach of the Rules, ATVOD will proceed to reach a Preliminary View.

Potential breaches: reaching Preliminary View

34. Where after the initial assessment the Executive concludes a breach of Administrative Rules may have occurred, the Executive will investigate further and may proceed to formulate and issue to the service provider a Preliminary View (in accordance with the delegated powers described in Paragraphs 5 to 10). Alternatively, the Executive may refer the matter to the Determinations Committee for formulation of a Preliminary View. If the further investigation does not disclose a potential breach the Executive will close

the case, and inform the service provider and complainant⁸. The complainant may request a Review of such a Determination in accordance with the procedure outlined below In Paragraphs 44 and following.

35. Where after the initial assessment the Executive concludes a potential breach of Editorial Rules may have occurred, the Executive will investigate further. In a case where there is clear precedent, drawn from previous Determinations, the Executive may proceed to formulate and issue to the service provider a Preliminary View. In the absence of clear precedent, the Executive will refer the matter to the Determinations Committee for formulation of the Preliminary View. If the further investigation does not disclose a potential breach the Executive will close the case, and inform the service provider and complainant⁹. The complainant may request a Review of such a Determination in accordance with the procedure outlined below In Paragraphs 44 and following.
36. A Preliminary View indicates ATVOD's belief that there may be a case to answer in relation to a breach, and the Preliminary View will be given to the service provider in writing, setting out the applicable Rule and corresponding statutory requirement under which it is considering the complaint, together with its grounds for believing that a contravention of the Rule (and, accordingly, of section 368D) is occurring or has occurred and requesting a written response normally within 10 working days. ATVOD may raise issues other than those raised by the complainant, and may correspond with the service provider more than once in the course of the investigation. The Preliminary View and any correspondence relating to it remains confidential and is not provided to the complainant.

Determination

37. The Determinations Committee will then consider any response(s) of the service provider and decide whether or not a contravention has occurred.
38. Where ATVOD considers that no contravention has occurred, it will notify the complainant and relevant service provider. The complainant may request a Review of such a Determination in accordance with the procedure outlined below In Paragraphs 44 and following.
39. Where ATVOD determines there has been a contravention of the Rules (and so of the Act), it will issue a Determination to the complainant and to the service provider, together with details of how to request an Appeal (if the Determination relates to whether an ODPS is being provided, or whether a particular entity is the provider of an ODPS) or a Review (if the Determination relates to any other matter).
40. Before publication of the Determination (or a summary of the Determination) on ATVOD's website, the service provider will have the opportunity to provide written comments on factual and typographical errors, or to request redactions on grounds of confidentiality.

⁸ A formal Determination is not published when investigations are closed at this stage

⁹ A formal Determination is not published when investigations are closed at this stage

Publication

41. Having taken account of any such comments, ATVOD will normally publish its reasoned Determination in full on its website. In some circumstances ATVOD may publish a summary of the Determination instead.
42. In some cases ATVOD may publish a Determination that no breach has occurred.
43. If the complainant or service provider seeks a Review of ATVOD's Determination or lodges an Appeal (see "Requesting an Appeal or Review" below), this fact will be published on the ATVOD website alongside the Determination. Any subsequent Review or Appeal decision will also be published on the ATVOD website.

Requesting an Appeal or Review

44. The procedure for challenging a Determination is different depending on whether it relates to the scope of the Regulations (generally, Rule 1) or to the application of the regulations to a regulated service (generally, Rules 2 – 13)
45. If the Determination relates to whether an ODPS is being provided, or whether a particular entity is the provider of an ODPS¹⁰, the service provider (or a sufficiently interested third party) can appeal against the Determination to Ofcom¹¹.
46. If the Determination relates to any other matter, the complainant and the service provider each have the right to seek a review of ATVOD's Determination by the full ATVOD Board of Directors. The full board shall for this purpose exclude any directors who sat on the Determinations Committee that first considered and determined the complaint and any director who is employed by the service provider subject to the complaint or subject to any actual or potential conflict of interest.
47. A request for a Review must be made to ATVOD in writing within 10 working days of the date of ATVOD's Determination.
48. A request for a Review must set out the ways in which the party believes that the Determination is materially flawed (material grounds for Review), for example if it is believed that the Determination is: obviously wrong in substance; or contains a significant mistake of fact; or has been reached following a failure of process.
49. The ATVOD Board will consider the request for Review. The Board may decide not to entertain the request, on the grounds that the request does not disclose any material grounds for Review. If the Review is entertained, the party which has not sought Review will be given an opportunity to make a further written submission on the grounds for Review.
50. The ATVOD Board will then reconsider the Determination and consider the grounds for Review in the light of the submissions of both parties. The ATVOD Board may at its sole discretion refer the matter to an independent complaints reviewer for advice, but any

¹⁰ Such issues will normally be central to all Rule 1 breaches. ATVOD may also make a Determination that a service is an ODPS, and/or that an entity is the provider of an ODPS, without Determining a breach – for example, if a provider of a notified service requests withdrawal of the notification on the grounds that the service has changed or that editorial responsibility has now passed to a third party.

¹¹ See <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

recommendation of the independent reviewer shall not be binding on ATVOD. ATVOD will then take a final decision, having taken account of any recommendation of the independent complaints reviewer (where applicable), either to uphold or to vary or reverse the original Determination. The final decision will be published on the ATVOD website.

51. Following this decision, ATVOD will treat the complaint as closed, and may decline to enter into any further correspondence or communication concerning the dispute in question.

Enforcement Notifications and Sanctions

52. Where ATVOD issues a Determination that a breach has occurred, it may at the discretion of the Board, issue an Enforcement Notification under the Act. This may require the service provider to, among other things:
 - cease providing or restrict access to a specified programme or programmes of a specified description;
 - provide additional information to users of the service;
 - publish a correction;
 - publish a statement of ATVOD's findings; and/or
 - notify and pay the required fee.
53. An Enforcement Notification will not normally be issued until the deadlines for submitting an Appeal or a request for a Review have passed. However an Enforcement Notification is likely to be issued at the same time as a Determination where there is a continuing risk of serious harm resulting from the contravention of the Rules¹².
54. As an alternative to the issuing of an Enforcement Notification ATVOD may at its Board's discretion refer the VOD service provider to Ofcom to consider the imposition of a financial penalty or suspension of the service.
55. Where a service provider does not comply with an Enforcement Notification, ATVOD will inform Ofcom so that they may consider the imposition of a statutory sanction. ATVOD may also provide Ofcom with a view of the type and level of any sanction which may be appropriate to impose.

Material Likely to Encourage or to Incite the Commission of Crime or Lead to Disorder

56. Where ATVOD considers that a service provider may be including material likely to encourage or to incite the commission of crime or to lead to disorder and that there may be a need for Ofcom to take urgent action to suspend or restrict access to a service ATVOD will immediately refer the complaint to Ofcom for consideration without reference to the service provider.

¹² In such circumstances any deadline set in the Enforcement Notification will be suspended until the Appeal or Review has been resolved.

Complaints Outside ATVOD's Statutory Remit

57. ATVOD cannot consider complaints about the following:

- VOD services which are subject to any jurisdiction other than the UK;
- matters already being dealt with by the courts;
- internet access, telephone or television services which are not supplied on demand or are otherwise outside ATVOD's remit;
- any decision by a service provider whether or not to supply any product or service and the terms under which any product or service is supplied; or
- hardware (such as the set-top box) or software supplied by a service provider to a user to enable use of a VOD service.
- non-programme related issues (for example, billing, service contracts, or technical issues)
- advertising (such complaints are dealt with by the ASA, see www.asa.org.uk) other than product placement and sponsorship (which are dealt with by ATVOD)

58. ATVOD may also decline to consider complaints:

- which, in the opinion of ATVOD, are frivolous, vexatious or which have been made persistently in the past without reasonable grounds or which contain language which is unnecessarily offensive, obscene or profane;
- where insufficient information about the complaint is provided;
- made outside the time limits set out in these procedures; or
- if the complaint concerns matters which ATVOD considers would be more properly dealt with by the courts or another complaints procedure.

THIS DOCUMENT REPLACES “*PROCEDURES FOR COMPLAINTS ABOUT EDITORIAL CONTENT ON VOD SERVICES, ED 1.2*”, PUBLISHED 25 JUNE 2012. THE PROCEDURES DESCRIBED HERE COME INTO FORCE ON 1ST JANUARY 2014

Complaints can be submitted online:

<http://www.atvod.co.uk/complaints/submit-a-complaint>

By email:

complaints@atvod.co.uk

Or by post:

ATVOD Complaints, 27 Sheet Street, Windsor, SL4 1BN