



# CONSULTATION RESPONSE

## PROPOSALS FOR REGULATORY FEES FOR ON-DEMAND PROGRAMME SERVICES (“ODPS”) FOR THE PERIOD 1 APRIL 2011 TO 31 MARCH 2012 (“YEAR 2”)

JOINT CONSULTATION BY THE AUTHORITY FOR TELEVISION ON DEMAND (“ATVOD”) AND THE OFFICE OF  
COMMUNICATIONS (“OFCOM”) PUBLISHED 18 FEBRUARY 2011 (COLLECTIVELY THE “CONSULTATION”)

RESPONSE FROM UNITED FOR LOCAL TELEVISION (“ULTV”)

### ATVOD’S WAR ON ENTERPRISE

1. The Prime Minister, Rt Hon David Cameron MP, has promised to “take on” the bureaucrats who damage and destroy enterprise:

*“Every regulator, every official, every bureaucrat in government has got to understand that we cannot afford to keep loading costs on to businesses, because frankly they cannot take it any more. And if I have to pull these people into my office to argue this out myself and get them off the backs of business then I will do it.”<sup>1</sup>*

2. ULTV believes ATVOD should be high on the list of those to be hauled into Downing Street. ULTV believes ATVOD embodies the “enemies of enterprise” the Prime Minister had in mind when he said:

*“I can announce today that we are taking on the enemies of enterprise...The bureaucrats in government departments who concoct those ridiculous rules and regulations that make life impossible for small firms.... Believe me, we are taking them on.”<sup>2</sup>*

3. ULTV understands the frustration of the Prime Minister that the “doers, the grafters, the entrepreneurs...the wealth creators, the job creators, the ones who will drive Britain’s prosperity in the years to come” risk being crushed and potentially driven out of business as a result of excessive costs unashamedly imposed by state-imposed bureaucrats. Many ULTV members are frustrated about it too – and do not apologise for refusing to accept it quietly.
4. In this document, ULTV is conscious it is abandoning the moderate language typical of consultation responses often submitted to regulatory bodies. ULTV is simply expressing the consensus views of its management committee. It is doing so because it is seriously concerned the UK is preparing to press the ‘self-destruct’ button on its video-on-demand (“VOD”) sector at a time when technology should be encouraging a proliferation in creativity, employment and innovation.

### STANDING UP FOR SMALL BUSINESSES

5. ULTV feels compelled to condemn, in the strongest possible terms, any attempts to appropriate material amounts of money from entrepreneurial businesses to fund unnecessary and excessive bureaucratic costs.

<sup>1</sup> ITV News (March 2011): <http://www.itv.com/news/pm-vows-to-back-business59681/>

<sup>2</sup> BBC News (March 2011): <http://www.bbc.co.uk/news/uk-politics-12657524>

6. ULTV believes small businesses are not in a position to tolerate waste and inefficiency in their own companies and cannot be expected to accept it from a state-imposed quasi autonomous non-governmental organisation (“quango”).
7. ULTV believes small businesses should not accept unfair taxes being imposed by unelected and unaccountable quango chiefs taking many multiples of the pro-rata UK average salary at the expense of the private sector.

### THE EMPEROR WITH NO CLOTHES

8. It appears to ULTV that law-abiding VOD operators are being compelled to pay excessive fees to maintain a new quango which is wholly unnecessary. Whilst ATVOD describes itself as a ‘co-regulator’ it seems to ULTV that ATVOD has no serious intention of expending material time and resources regulating the VOD industry.
9. ATVOD appears to ULTV primarily as though it is concerned with tax assessment – focusing its limited resources on identifying ODPS providers. ULTV does not believe that compiling a database of service providers and sending out occasional paperwork constitutes meaningful regulation.
10. ULTV believes that “*regulation*” in common English refers to the state of being controlled or governed. ULTV does not believe any informed consumer would be likely to conclude that the behaviour of a notified ODPS is controlled or governed by ATVOD. ULTV is concerned that ATVOD’s self-description as a ‘co-regulator’ risks creating a false impression to consumers that VOD editorial is substantially regulated by one or more independent bodies even though there is no virtually no day-to-day regulation currently in place.
11. ULTV believes it is likely a typical consumer (e.g. finding ATVOD through an internet search engine) will assume from the manner in which ATVOD describes itself as a ‘regulator’ that it is supervising editorial standards. For example, ATVOD’s published guidance requests ODPS inform consumers that:
 

*“ATVOD regulates the editorial content of on-demand programme services”*.<sup>3</sup>
12. ULTV believes it would be more balanced if ATVOD were to advise service providers to inform consumers that:
 

*“With the exception of content which (i) promotes racial hatred; (ii) might seriously impair the development of children and is unencrypted; and (iii) is not permissible under product placement and sponsorship regulations, ATVOD does not regulate the editorial content of on-demand programme services.”*
13. ULTV assumes it is because some consumers have been misled into believing ATVOD is a ‘regulator’ with material responsibilities that fifteen of the eighteen complaints cases closed by ATVOD to date have been outside of its remit, only two of these investigated and none upheld.<sup>4</sup>
14. ULTV notes ATVOD has a small number of other responsibilities including powers to “*encourage*” (but not require) ODPS to offer access services.
15. ULTV regards ATVOD as the emperor with no clothes – ULTV believes all those who investigate this quango’s activities quickly recognise it has little or no useful contribution to make to the advancement of consumer protection.

### MINIMUM FEE OF ONE THOUSAND POUNDS

<sup>3</sup> ATVOD Rules and Guidance: [http://www.atvod.co.uk/uploads/files/ATVOD\\_Rules\\_and\\_Guidance\\_Ed1.1\\_Mar\\_2011.pdf](http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed1.1_Mar_2011.pdf)

<sup>4</sup> Questions and answers at ATVOD industry forum, 7 March 2011

16. ULTV has sought, patiently since 2009, to explain to Ofcom/ATVOD why small businesses cannot afford to pay punitive new regulatory fees. Despite this effort, the Consultation suggests a minimum non-concessionary ODPS notification fee of ONE THOUSAND POUNDS.<sup>5</sup>
17. ATVOD is proposing £307,000 of staff costs in year two. ULTV does not imagine ATVOD would describe itself as a large company. So why do Ofcom/ATVOD regard a company with £100,000 of turnover as a business large enough to afford a 'full' (rather than concessionary rate)? Why does the Consultation state it has "*no preference*" between a flat-rate fee and a fee more reflective of a provider's ability to pay? Why do Ofcom/ATVOD suggest a commercial company with a turnover of just £100,000 – the same amount as the consideration paid to ATVOD's chief executive – can afford to contribute towards ATVOD management costs to the tune of no less than ONE THOUSAND POUNDS?
18. Do Ofcom/ATVOD truly believe a business with a turnover of the salary of ATVOD's chief executive can easily find ONE THOUSAND POUNDS (let alone circa FOUR THOUSAND POUNDS the Consultation says it is willing to levy as an alternative)? On what basis has Ofcom/ATVOD calculated such a fee is reasonable and proportionate for a company as small as this? Where is the assessment that business will not be damaged as a consequence? Why does the Consultation negate to include a single specific question on whether this minimum fee is fair and reasonable?
19. ULTV has argued over an extensive period that a tax of ONE THOUSAND POUNDS on a company with a turnover of as little as £100,000 could damage or even destroy small VOD services and impede innovation. The fact that this is not an early stage proposal but is offered with no alternative options suggests to ULTV that Ofcom/ATVOD may not be willing or able to listen and respond to the legitimate concerns of small businesses.

## PAYING FOR REGULATION

20. ULTV is not anti-regulation. On the contrary, ULTV supports many of the principles underlying the European Union's Audiovisual Media Services Directive (the "**Directive**").<sup>6</sup>
21. ULTV does not take issue with arms-length bodies attracting high calibre staff by paying competitive salaries with a view to delivering high-quality regulation. ULTV has no objection to arms-length bodies, including Ofcom, paying senior staff salaries commensurate with their responsibilities. ULTV believes that those who dedicate their working lives to public service should be properly remunerated for their skills.
22. ULTV is broadly supportive of Ofcom and its work and congratulates it on the very considerable efforts made to reform its structure and costs in recent months. ULTV believes Ofcom should be seeking to radically reduce the regulatory cost-burden across all the areas for which it is responsible, including any areas of co-regulation. ULTV believes it is unreasonable for ATVOD to seek to compare its own staff and other costs to Ofcom or other regulators with far more material responsibilities.

## EUROPEAN CONVENTION ON HUMAN RIGHTS

23. ULTV believes that the freedom to communicate and impart ideas, in video as well as in text and pictures, is a fundamental human right. ULTV believes the state should never interfere with this freedom without clear justification. ULTV believes that imposing unfair and disproportionate fees on companies seeking to distribute VOD editorial is an unacceptable restriction and incompatible with the European Convention on Human Rights (article 10 of which protects freedom of expression).
24. ULTV is confident any attempt by Ofcom/ATVOD to fine or close small ODPS to whom a notification fee would cause hardship will not succeed in court. ULTV believes any such

---

<sup>5</sup> The Consultation: <http://stakeholders.ofcom.org.uk/binaries/consultations/atvod/summary/atvod.pdf>

<sup>6</sup> The Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

enforcement action would be incompatible with Ofcom’s statutory duties (which require it to encourage the provision of a diverse range of television services) and would be in clear breach of the law.

**EU DEFINITION OF SMEs**

25. On 8 May 2003, the European Commission (“EC”), following extensive consultation, adopted Recommendation 2003/361/EC which provides a new definition of micro, small and medium sized enterprises (“SMEs”) in the European Economic Area. The EC’s stated intention was to seek to ensure that public policies applied in favour of SMEs would benefit from a common and consistent definition.

26. The EC’s definition of SMEs differs from Ofcom/ATVOD’s in material respects. In particular, the EC made clear its desire to “prevent circumvention” of the definition of SME by stating that enterprises may lose SME status if forming part of a larger group of companies:

*“Enterprises which draw up consolidated accounts or which are included in the accounts of an enterprise which does so are usually considered as linked.”<sup>7</sup>*

27. Under the EC’s definition, an enterprise qualifies as an SME if it meets a staff headcount ceiling and either a turnover ceiling or a balance sheet ceiling. A summary of the EC’s main criteria are set out in the table below.

**TABLE 1  
EC definition of SME**

Enterprise category	Headcount	Turnover	or	Balance sheet total
medium-sized	< 250	≤ €50m		≤ €43m
Small	< 50	≤ €10m		≤ €10m
Micro	< 10	≤ €2m		≤ €2m

28. ULTV would understand if Ofcom/ATVOD had, for administrative ease or other defined rationale, sought to simplify the criteria for assessing SMEs recommended by the EC when considering potential tariff options. However, ULTV finds it surprising Ofcom/ATVOD do not appear to have considered widely-accepted European criteria for defining SMEs anywhere in the Consultation.

**INDUSTRY GIFTS**

29. ULTV understands that at a time when much of the public sector is under pressure, ATVOD entered into arrangements with regulated parties to support an increase its own cost-base.

30. ULTV believes that, if the directors and staff of ATVOD look to industry to supply their remuneration in the event of any cash-flow shortage, then ATVOD cannot be considered an independent regulator.

31. ULTV believes that many organisations (in both the public and private sector) face cash-flow challenges, but they generally must live within their means by making difficult resource-allocation decisions. One option, for example, may have been for ATVOD to continue to allow Ofcom to handle all complaints as occurred during a large part of year one (with no apparent harm to UK consumers or incremental costs to industry).

32. It is not clear to ULTV whether ATVOD would accept direct funding from an ODPS supplying extreme pornography or whether ATVOD is selective from whom it solicits voluntary gifts. ULTV regards the decision by ATVOD to accept any direct funding from industry, in order to pay its own staff and director fees, as an effective admission that the ATVOD board do not consider they have any useful role to play in independently regulating the industry.

<sup>7</sup> Full EU definition of SMEs: [http://ec.europa.eu/enterprise/policies/sme/files/sme\\_definition/sme\\_user\\_guide\\_en.pdf](http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf)

33. ULTV cannot imagine Ofcom entering into voluntary funding arrangements with BT, Virgin Media or other parties it regulates. ULTV assumes the board of Ofcom would recognise that to accept such funding would compromise its ability to be seen to arrive at objective conclusions. It appears to ULTV the ATVOD board cannot expect to have any useful role to fulfill if it is willing to enter into private funding arrangements with regulated parties.
34. ULTV believes that Ofcom/ATVOD had a duty, prior to designating ATVOD as a 'co-regulator' (the "**Designation**"), to agree funding arrangements in the event of a significant variance against budget in ODPS numbers (an event ULTV notes did not occur in year one). For example, if ATVOD has a requirement for a loan then it might approach a third party lender (secured by an Ofcom guarantee if necessary). ULTV does not believe there is any reasonable justification for ATVOD comprising its independence by becoming directly indebted to regulated parties.
35. In ULTV's view, it is when facing financial challenges that a quango must be most careful to be seen to behave appropriately. ULTV believes if ATVOD is insolvent it should cease trading – not accept funds which conflict with the basic core principles of independent regulation.

### MISUSE OF PUBLIC RESOURCES

36. The Consultation does not set out in detail how ATVOD apports its hours against its designated functions or what areas of work ATVOD plans to prioritise in year two. Therefore, unlike with Ofcom (which is open and transparent about its work and priorities), it is difficult to comment in detail on ATVOD's use of public resources. However, the Consultation states:
- "ATVOD has devoted **considerable time and resources** to investigating whether there are other VOD services which are ODPS and may be in breach of their obligation to notify. So far it has investigated over 1,100 services. Of these, 325 investigations remain open."* (our emphasis)
37. The law requires ATVOD to carry out its regulatory activities in a manner which is "*transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*". It appears to ULTV that investigating 1,100 VOD services, of which 775 have been closed, cannot be described as "*proportionate*" or "*targeted only at cases in which action is needed*".
38. ULTV believes that ATVOD's decision to investigate hundreds of VOD services which do not have any requirement to notify constitutes a misuse of financial resources. ULTV assumes such a large quantity of investigations never formed part of ATVOD's original business plan. ULTV is confident ATVOD's budget did not allow for hundreds of untargeted investigations because such activity would have been viewed as grossly disproportionate.
39. ULTV does not believe that engaging in hundreds of speculative investigations in order to fill the time of a team of bureaucrats is a reasonable use of administrative resource at an unnecessary quango. ULTV finds it difficult to imagine an objective organisation with appropriate controls and procedures would undertake such activity.
40. ULTV believes that ATVOD should generally assume that companies are behaving within the law unless it has compelling evidence for commencing investigations, not simply scour search engines in search of any website carrying VOD. ULTV finds it difficult to imagine ATVOD directors sincerely believe that investigating hundreds of services is a proportionate use of public resources at a time when senior and respected officials are leaving Ofcom and the Department of Culture, Media and Sport ("**DCMS**") to reduce administrative cost burdens.
41. Ofcom/ATVOD appear to have a very low expectation of any of these ongoing 325 investigations (or any new investigations) bearing fruit. ULTV notes Ofcom/ATVOD's projection for ODPS in year two is just 130 (only one more than the Consultation expects in year one). ULTV queries why, if Ofcom/ATVOD expects these investigations to be so unproductive, "*considerable time and resources*" are being devoted to them. For

Ofcom/ATVOD to attempt to now recover a fee in relation to flagrantly untargeted activity is, in ULTV's judgement, wholly unacceptable.

## INTERPRETATION OF SCOPE

42. Recital 37 of the Directive confirms that:

*"Restrictions on the free provision of on-demand audiovisual media services should only be possible in accordance with conditions and procedures replicating those already established by Article 3(4), (5) and (6) of Directive 2000/31/EC."*

43. Clause 368A of the Communications Act 2003 (the "**Act**") defines a service as an ODPS if, inter alia:

*"its principal purpose 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"*

44. ULTV notes that the Act refers to "*programmes*" in the plural and requires the provision of programmes to be "*comparable to the form and content*" normally associated with linear "*television programme services*".

45. ULTV acknowledges that the Act uses a different form of wording to the Directive although ATVOD makes over twenty references to the Directive in its own notification guidelines<sup>8</sup>. ULTV believes the courts can be expected to look through to the underlying Directive to work out where the boundaries for an ODPS lie to achieve the result intended by the Directive.

46. Recital 29 of the Directive states:

*"**All** the characteristics of an audiovisual media service set out in its definition and explained in recitals 21 to 28 should be present at the same time."* (our emphasis)

47. Recital 24 of the Directive states, inter alia:

*"It is characteristic of on-demand audiovisual media services that they are 'television-like', i.e. that they **compete for the same audience** as television broadcasts, and **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."* (our emphasis)

48. ULTV believes a website containing a number of short films or even full-length programmes is generally unlikely to constitute an ODPS e.g. it does not generally "*compete for the same audience as television broadcasts*" and the "*means of access to the service*" would not "*lead the user reasonably to expect regulatory protection*". ULTV might expect, for example, that a service available direct via a television set through a service such as Virgin Media's interactive platform could be treated differently from a collection of VOD material on a website.

49. ULTV has seen recent correspondence which leads it to strongly believe ATVOD has undertaken extensive investigations against small VOD services which, in ULTV's judgement, are not "*television-like*" i.e. they do not compete for the same audience as linear television broadcasts and the nature and means of access to the services could not reasonably lead a user to expect regulatory protection.

50. ULTV does not accept that the provision by a website of a small number of videos or short-films makes a service "*television-like*". On this basis any website showing a small number of videos comparable to those that might sometimes be found within a wider television channel could be regarded as television-like.

---

<sup>8</sup> ATVOD guidelines: [http://www.atvod.co.uk/uploads/files/Guidance\\_on\\_who\\_needs\\_to\\_notify\\_Ed3.1\\_Mar\\_2011.pdf](http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf)

51. UDTV is clear the intention of policy makers was only to capture services “*which compete for the same audience as television broadcasts*”. UDTV does not believe this applies to large number of the services to which ATVOD has commenced investigations.

#### DEFINITION OF ‘TELEVISION-LIKE’

52. UDTV is concerned that ATVOD is using the loose drafting of parts of the Act in order to fail to distinguish between television-like content and television-like services – despite the fact that the Directive makes clear that it is only television-like services which fall under the scope of the Directive.
53. UDTV acknowledges there are many items which have appeared on television at some point and which may also be available to view via a website. UDTV believes this does not make that website television-like. Rather, UDTV believes a VOD service is only television-like if, inter alia, it competes against traditional mass-market television channels with a quantity, quality, range, substance, distribution, presentation, form and nature of programming which makes it comparable to (and competing with) a mass-market television channel scheduling a normal variety of full-length programmes covering a diversity of matters.
54. UDTV believes that ATVOD’s failure to distinguish between television-like content and television-like services has led it to launch hundreds of unwarranted and unjustified investigations. UDTV expected Ofcom/ATVOD to consult openly on robust and transparent tests for identifying ODPS. UDTV regards it as disgraceful there has been no consultation on notification guidance since ATVOD was designated.
55. UDTV does not believe any objective user of many of the websites which ATVOD has targeted for investigation would regard these as:
- comparable to a mass-market television channel;
  - competing with a mass-market television channel;
  - comprising a range or substance of programming normally found on a mass-market television;
  - or likely to be ODPS.
56. UDTV believes the purpose of the Act and the Directive was only ever to protect consumers from wholly inappropriate material being delivered in a form similar to television, not to extend costly regulation to large quantities of law-abiding VOD services. If this were the case, UDTV believes the Act and the Directive would have been drafted in very different language.

#### ATVOD’S APPROACH

57. UDTV fears the contents and tone of correspondence which it has seen originate from ATVOD is at risk of misleading an ill-informed website operator into believing that they fall under the scope of the Act. UDTV considers there is a risk such correspondence will lead some website operators to acquiesce to the provision of a notification and subsequent fee to which ATVOD is (in UDTV’s judgement) not entitled.
58. UDTV believes the threats contained in ATVOD correspondence to “*refer the matter to Ofcom for consideration of the imposition of a financial penalty....or of suspension or restriction of the service*” are unlikely to be compatible with the European Convention of Human Rights (article 10 of which protects freedom of expression).
59. The 2010 Ofcom/ATVOD consultation estimated only 150 services are likely to be subject to regulation under the Act (with not a single newspaper website identified). This was revised down to 129 in the subsequent statement issued by Ofcom/ATVOD.<sup>9</sup> This statement raised the serious prospect that no small-scale ODPS providers would come forward with notifications at all. UDTV queries how ATVOD subsequently considered it would be

---

<sup>9</sup> 2010 fees statement: [http://www.atvod.co.uk/uploads/files/2010\\_fee\\_consultation\\_statement\\_0610.pdf](http://www.atvod.co.uk/uploads/files/2010_fee_consultation_statement_0610.pdf)

*“proportionate, consistent and targeted only at cases in which action is needed”* to launch 1,100 investigations.

60. UDTV fears the basis upon which ATVOD is seeking to arrive at scope determinations is fundamentally flawed.
61. UDTV is confident neither policy-makers or public expect hundreds of websites with short-form VOD content to be regulated and co-regulated by Ofcom/ATVOD at a cost of thousands of pounds to these services. It appears to UDTV that ATVOD’s attempts in year one to issue threatening correspondence to many VOD services which cannot, in UDTV’s judgement, be considered to be *“television-like”* is reprehensible.
62. UDTV is able to supply examples of the threatening correspondence to very small websites which (in UDTV’s judgement) cannot reasonably be considered television-like upon request.
63. UDTV does not expect many small companies to be in a position to expend any time or resources in obtaining legal advice or participating in correspondence with Ofcom/ATVOD. UDTV is concerned the tactics used by ATVOD could pressurise some VOD providers, not well versed in the Act or Directive, to supply a notification to which ATVOD is not entitled.

### ULTV OFFER OF SUPPORT

64. UDTV is not confident ATVOD possess the legal resource, good judgement or requisite objectivity to carry out the designated functions, least of all a robust and impartial assessment of whether a VOD service constitutes an ODPS.
65. As Ofcom/ATVOD are aware, UDTV has sought to provide considerable support over an extensive period to help to devise a more legally-sustainable notification fee structure than the flat-rate levy originally implemented. As in the past, UDTV remains ready to offer its constructive assistance to support Ofcom in its statutory duties. In particular, UDTV would be delighted to help to develop a legally-sustainable policy for the identification of ODPS to replace ATVOD’s current approach.

### STATUTORY CRITERIA FOR CO-REGULATION

66. Section 368B(9) of the Act states:

*“OFCOM may not designate a body unless, as respects that designation, they are satisfied that the body—*

- (a) is a fit and proper body to be designated;*
- (b) has consented to being designated;*
- (c) has access to financial resources that are adequate to ensure the effective performance of its functions as the appropriate regulatory authority;*
- (d) is sufficiently independent of providers of on-demand programme services; and*
- (e) will, in performing any function to which the designation relates, have regard in all cases—*
  - (i) to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and*
  - (ii) to such of the matters mentioned in section 3(4) as appear to the body to be relevant in the circumstances.”<sup>10</sup>*

67. UDTV fails to see how these statutory criteria are met by ATVOD. UDTV understands that ATVOD was on the brink of insolvency during year one. This suggests to UDTV that ATVOD does not have *“access to financial resources that are adequate to ensure the effective performance of its functions”*. Further, UDTV understands ATVOD averted insolvency by arranging a cash bail-out on non-commercial terms from regulated parties. This suggests to

<sup>10</sup> The Audiovisual Media Services Regulations 2009: <http://www.legislation.gov.uk/uk/si/2009/2979/regulation/2/made>

ULTV that ATVOD is not “*sufficiently independent of providers of on-demand programme services*”.

68. ULTV queries whether any member of the public can have faith in a regulator which accepts voluntary payments from industry to pay its director fees and staff and, therefore, whether ATVOD is a “*fit and proper body*” to perform the functions designated to it by Ofcom.
69. ULTV is in possession of an email from ATVOD in which it claims to be exempt from Freedom of Information legislation and to only therefore disclose the information it self-selects. ULTV queries how ATVOD can fulfill the statutory obligation to be “*transparent*” or “*accountable*” in these circumstances. ULTV notes no public statement was issued by ATVOD at the time of accepting direct payments from industry to fund its own offices.
70. ULTV notes Ofcom has staff specialising in dealing with Freedom of Information requests. ULTV believes there is widespread acceptance that Freedom of Information is important to protect against abuses of power by those who hold public office, extending to elected representatives in Parliament. ULTV sees no justification for ATVOD exempting itself from comparable levels of transparency. ULTV questions whether ATVOD has adequate resources to comply with requests for information in the transparent manner the public is entitled to expect under the Act.
71. ULTV notes that Ofcom has publicly stated it generally expects to approve significant modifications to a co-regulator’s funding arrangements. Ofcom has stated:
- In general, we expect to approve the co-regulatory body’s governance and funding arrangements, and any significant modifications to them.”<sup>11</sup>*
72. ULTV assumes that a decision by a co-regulator to stave-off insolvency by soliciting gifts from industry constitutes a “*significant modification*” to a funding arrangement. ULTV queries how this action is considered consistent with the requirements for being the appropriate regulatory authority set out in Section 368B(9) of the Act.

## **ATVOD BOARD MINUTES OF FEBRUARY 2011**

### ***Remuneration review***

73. ULTV notes the statement in the February 2011 ATVOD board minutes that:
- “remuneration of staff and Board Members would be frozen with one exception, the reasons for which were explored and accepted. Remuneration would be reviewed once market conditions permitted”<sup>12</sup>*
74. ULTV notes that ATVOD is a quango whose income is related to the number of services fulfilling a statutory obligation to notify and pay a fee, rather than “*market conditions*”.
75. ULTV fears the ATVOD board’s decision to review its own remuneration “*once market conditions permit...*” reflects an aspiration to increase its own remuneration as soon as cash-flow allows.
76. ULTV queries why the ATVOD board has approved any increases in remuneration over the past year. ULTV notes that increases in remuneration for ATVOD board and staff in year one were not funded by “*market conditions*” at all but, rather, by ATVOD soliciting direct payments from regulated parties.
77. ULTV would regard any increases in remuneration for bureaucrats paid-for by additional notifications above the number budgeted as an abuse of public funds. ULTV believes public

---

<sup>11</sup> Ofcom co-regulation statement: <http://stakeholders.ofcom.org.uk/binaries/consultations/coregulation/statement/statement.pdf>

<sup>12</sup> ATVOD February 2011 board minutes: [http://www.atvod.co.uk/uploads/files/ATVOD\\_Minutes\\_Feb\\_2011.pdf](http://www.atvod.co.uk/uploads/files/ATVOD_Minutes_Feb_2011.pdf)

servants should be seeking to reduce cost-burdens, not to exploit a growing sector for their own financial benefit.

78. In response to questions at an industry forum held on 7 March 2011, ATVOD's chairman indicated she was unaware whether the terms of her engagement stipulated a particular number of hours to be worked.
79. ULTV assumes Ofcom will not wish to allow part-time bureaucrats, taking no capital risk, to pay themselves salary increases using the fruits of labour of entrepreneurs launching new businesses and submitting new notifications.
80. It is a matter of public record that the ATVOD board intends to review its own remuneration when "conditions" permit. The evidence from ATVOD's 1,100 investigations leads ULTV to fear that one the quango's main priorities may be to seek to create these "conditions".
81. ULTV expects Ofcom to ensure public funds are not misappropriated by any co-regulator and to withhold any funding until it is satisfied appropriate financial controls and procedures are in place, including a cap on any expenditure above agreed levels.

### **Key man insurance**

82. ULTV notes the statement in the February 2011 ATVOD board minutes that:

*"there was a strong case to take out key man insurance and PHI insurance in relation to the Chief Executive, the reasons for which were explored and accepted"*<sup>13</sup>

83. ULTV regards key man insurance as standard for a substantial company competing in the market for contracts and revenue. ULTV understands the purpose of key man insurance is often to protect the profits of a business that may see a serious fall if a key sales person were to become unavailable.
84. ULTV fails to comprehend why ATVOD feels it is appropriate to expend public funds securing key man insurance for a bureaucrat implementing regulations in an administrative role. ULTV assumes that the vast majority of notifications in 2011/12 will be renewals (in practice requiring no new administrative work) and this could be undertaken with minimal effort without key man insurance.
85. ULTV does not see why ATVOD should believe it requires key man insurance assuming its desire is to implement the law proportionately rather than adopt high-pressure tactics to maximize incremental revenue for appropriation by directors.

### **PHI insurance**

86. ULTV notes from the February 2011 board minutes that personal health and injury ("PHI") insurance is being purchased by ATVOD on behalf of its chief executive. ULTV understands that PHI insurance exists to protect the personal income of a person should they suffer from long-term sickness or injury. ULTV believes it is common practice for employees in many firms to pay for their own PHI insurance (alongside other living expensive) from personal taxed income.
87. ULTV regards it as a misuse public funds for PHI insurance for an administrator at a state-imposed quango to be paid-for through a compulsory tax. In the absence of full disclosure it is impossible to comment on all of ATVOD's budgetary decisions. However, with these examples of expenditure, it is no surprise to ULTV that ATVOD appears to have lost control of its costs in year one.

---

<sup>13</sup> February 2011 board minutes: [http://www.atvod.co.uk/uploads/files/ATVOD\\_Minutes\\_Feb\\_2011.pdf](http://www.atvod.co.uk/uploads/files/ATVOD_Minutes_Feb_2011.pdf)

88. ULTV does not believe that key man and PHI insurance for the ATVOD chief executive (already earning £100,000 per annum) represents expenditure necessary to the proper implementation of the designated functions. ULTV does not believe such expenditure can be regarded as essential or be legitimately funded through the imposition of compulsory fees. ULTV is confident Ministers in the last government never contemplated such use of funds when drafting the Act or endorsing ATVOD's original anticipated budget of circa £300,000.
89. ULTV does not believe there would be any negative impact on consumers if ATVOD's directors and staff were to withdraw their services, allowing Ofcom to undertake the statutory duties on a much more proportionate cost base. ULTV expects Ofcom to ensure that the contractual terms offered to bureaucrats working for co-regulators, including notice terms and benefits, are fair, reasonable and proportionate to the role fulfilled.

### **COSTS OF REGULATORY FUNCTIONS**

90. ULTV believes ATVOD's costs and fees are grossly disproportionate to its highly-limited functions and workload. ULTV notes that Ofcom handled all ten complaints received from the public in relation to ODPS editorial content between 19 December 2009 and 20 September 2010 (with no apparent harm to the public).
91. ULTV believes if Ofcom has determined the fair re-charge for its significant contribution to ODPS regulation in 2010/11 is £25,000 then, in ULTV's view, ATVOD's projected £467,000 of expenditure, largely for the benefit of its own staff and directors, is impossible to justify. ULTV does not see any reasonable basis for Ofcom approving ATVOD's year one expenditure or current year two budget.
92. ULTV believes a very high proportion of ATVOD's work-load is likely to relate to disagreements about scope which could often be easily resolved if there were a low fee structure which does not discourage notification. ULTV notes ultimate decisions on scope are taken by Ofcom in any case, substantially undermining the case for ATVOD's existence.

### **REVOKING ATVOD'S DESIGNATION**

93. In response to a Freedom of Information request from a ULTV member, Ofcom has confirmed it is able to revoke the Designation at any time, for example if it is no longer satisfied the criteria for co-regulation set out in the Act are being met. According to Ofcom:

*"The Designation is stated to be for a period up to 18 March 2020. However, Clause 13 of the Designation, provides that the Designation shall be subject to a formal review by Ofcom by 18 March 2012. In addition, Ofcom may revoke the Designation at any time, if it is no longer satisfied that ATVOD is able to satisfy the statutory criteria set out in section 368B(9) of the 2003 Act."*

94. ULTV notes Ofcom's Draft Annual Plan 2011/12<sup>14</sup> includes:
- no reference to review the Designation, despite Ofcom's commitment to do so "by 18 March 2012"; and
  - no commitment to consult openly and transparently on the Designation or solicit the views of UK consumers.
95. ULTV does not believe Ofcom can reasonably consider that ATVOD is able to satisfy the statutory criteria set out in section 368B(9) of the Act. ULTV believes that:
- Ofcom has a duty to protect its own good name and reputation and to take all appropriate actions to protect the interests of citizens and consumers when under threat;
  - simply continuing with the current co-regulatory arrangements for a further year would be incompatible with Ofcom's responsibilities under the Act; and

---

<sup>14</sup> Draft annual plan 2011/12: <http://stakeholders.ofcom.org.uk/binaries/consultations/draftap1112/summary/ap201112.pdf>

- to guarantee the provision of high-quality and proportionate regulation, Ofcom should immediately revoke the Designation forthwith.

96. ULTV believes the immediate revocation of the Designation would remove duplication in regulatory costs; prevent further damage to UK competitiveness; enable Ofcom to benefit from direct links with ODPS providers and minimise consumer confusion by ensuring there is a single point of contact for any person concerned about non-BBC television editorial.

#### A SIMPLE REGISTRATION SCHEME

97. A pre-consultation meeting on year two fees was held at Ofcom on 13 December 2010.<sup>15</sup> Attendees at that meeting expressed extensive concerns regarding ATVOD's cost levels, fees and bureaucracy and a number of attendees suggested an Ofcom-led notification process could be expected to be preferable. ULTV is disappointed the views expressed at this meeting do not appear to have influenced the Consultation proposals.

98. ULTV believes many consumers using internet-connected television devices will not know whether the content they are viewing is delivered via broadband or broadcast – and therefore who to complain to about editorial content.

99. ULTV finds it difficult to understand why Ofcom rushed through a six-week consultation to designate ATVOD without conducting a single piece of research on whether consumers and citizens wished to have a second television regulator imposed on them.<sup>16</sup> ULTV would expect Ofcom to put the interests of consumers and citizens first, in line with its statutory duties, and to take precautions to ensure it is not 'captured' by industry interests.

100. ULTV believes current arrangements for VOD editorial regulation are unhealthy for industry, for consumers and for the reputation of UK communications sector and its regulator. ULTV believes that Ofcom should immediately revoke the Designation, fulfil all necessary functions in-house, and ensure there is high quality and independent implementation of the Act at a proportionate cost, ensuring Ofcom's regulatory expertise is put to most productive and cost-effective use.

101. ULTV does not believe it is appropriate to transform a simple notification procedure into an ideological debate about the merits of co-regulation of television editorial. In ULTV's view, if there is ever a licensing regime for ODPS (as opposed to merely a notification procedure) then that will enable a decision to be taken on the most appropriate form this regime should take. In the meantime, ULTV believes ODPS providers should remain unlicensed and simply notify Ofcom of their existence, paying a modest fee to cover the costs of administering the scheme.

#### FURTHER CONSULTATION

102. ULTV is concerned that Ofcom/ATVOD have waited until the end of the financial year to consult on budgets and fee structures for year two. ULTV understands this leaves little time for further consultation on alternative options which may be suggested in the Consultation process.

103. ULTV recognises Ofcom/ATVOD may have been motivated by a desire to collect fees as quickly as possible in year one, leading to a shorter-than-ideal consultation period in 2010. ULTV notes the statement in the minutes of Ofcom's Policy Steering Group from the meeting of 18 May 2010 which says that the meeting:

*“noted that if the proposed date of publication for the Statement slipped from 4 June, ATVOD would not be able to collect fees.”<sup>17</sup>*

<sup>15</sup> Advanced Television report: <http://www.advanced-television.tv/index.php/2010/12/15/bitter-spat-at-atvod-uk-meeting/>

<sup>16</sup> 2009 pre-Act consultation: <http://stakeholders.ofcom.org.uk/binaries/consultations/vod/summary/vod.pdf>

<sup>17</sup> Copy obtained from Ofcom by a ULTV member under Freedom of Information

104. ULTV trusts Ofcom will want to give full and detailed consideration to all of the concerns and suggestions put forward by respondents to the Consultation and not feel pressurised into reaching a prompt decision in order to continue with the status quo. ULTV believes that, this year, it is important to get the policy right – regardless of how long this takes.

### **OPPORTUNITY TO REVOKE NOTIFICATIONS**

105. ULTV notes that it is challenging for companies to plan service provision and budget when Ofcom/ATVOD fail to announce fee decisions in advance of the commencement of the financial year. ULTV believes that, once final fee levels are arrived at, ODPS providers must be given the right to decide whether these are affordable or whether they wish to revoke their notification(s). ULTV understands this would be in line with existing Ofcom policy which allows licences to be surrendered within a period of time following new invoicing each year.
106. ULTV assumes Ofcom/ATVOD will allow all service providers (whether or not currently notified) a reasonable period of time to withdraw their service and, if appropriate, leave the UK if they consider the new fees imposed to be unacceptable.
107. ULTV responds to the Consultation questions below. ULTV requests these responses are read in conjunction with the whole of the contents contained within this submission.

#### **Question 1**

**Do you agree that we should take account of Ofcom's Charging principles in setting fees for ODPS providers?**

#### ***A notification process***

108. ULTV does not believe it is helpful to seek to make a comparison between VOD notification fees and Ofcom licence fees or their underlying charging principles.
109. ULTV notes that ATVOD does not issue any licences. A licence confers a benefit or privilege to the licence-holder. However, ODPS operators are not licensed. The only requirement is for ODPS providers to notify the appropriate regulatory body of their existence. This is a simple reporting requirement.
110. ULTV is concerned that Ofcom/ATVOD has started to discuss fee structures for VOD editorial as though there is some form of licensing regime in place. ULTV regards any comparison between a "*licence*" and a "*notification*" as misleading and does not believe it is fair or reasonable to compare charging principles for one with the other.
111. As Ofcom/ATVOD is aware, any person is free to provide an ODPS so long as they comply with basic notification procedures and laws. No consent or authorisation is required from Ofcom/ATVOD. This is the opposite of a licensing regime where Ofcom has a duty to only issue a licence after conducting appropriate due diligence on the provider.
112. The Ofcom licensing regime creates the opportunity for services to broadcast by, inter alia, identifying frequencies, issuing licences and enforcing strict standards. ATVOD is not creating opportunities for businesses to operate through any comparable systems or procedures.

#### ***Encouraging VOD provision***

113. ULTV is concerned that Ofcom/ATVOD may have framed the Consultation in a manner which objective market research analysts could argue is leading a respondent to give the answers which Ofcom/ATVOD seek to obtain. Ofcom/ATVOD firstly explain Ofcom charging principles and then explain the fee proposals – linking the arguments in order to present a case for transferring underlying principles relating to a licensing regime into a notification procedure.
114. ULTV believes that there may be some similarities between different fee structures in certain instances. ULTV notes that Ofcom implements minimum and/or fixed-rate fees for certain categories of licence. However, these are generally still designed to be fair and proportionate

for the holders of these licences. ULTV believes there are many companies which could not afford Ofcom licence fees but which may still be expected to prosper in the unlicensed world of VOD provision.

115. ULTV notes that Ofcom/ATVOD uses the Consultation to propose fees for ODPS at levels which are often materially higher than radio and television broadcast licences. ULTV regards this as perverse. ULTV believes the UK should be aiming to create an environment in which VOD provision can thrive and prosper.

### ***Fair and proportionate***

116. It appears to ULTV that Ofcom's charging principles have no direct relevance to this Consultation. What is more, many Ofcom licence fees increase progressively so that companies with the largest turnover pay a greater percentage of revenue in fees. For example, Ofcom Category B television licence fees are based on bands where the rate increases progressively, rising from, 0.03% to 0.2% of relevant turnover in 2011/12.<sup>18</sup> This ensures companies with the greatest revenue pay the highest proportion of fees.
117. All proposals set out in the Consultation reject the progressive principle – Ofcom/ATVOD use the Consultation to suggest the UK's smallest companies should pay the highest percentage of turnover in fees.
118. ULTV believes Ofcom/ATVOD has only one basis for implementing ODPS registration fees and that is the law of the land. ULTV is concerned Ofcom/ATVOD do not evade the law by reference to charging principles which have no basis in statute. Ofcom/ATVOD have a statutory obligation to impose ODPS notification fees which are "*fair and proportionate*".
119. ULTV believes a reasonable notification fee and proportionate implementation should be the goal – not simply recouping sufficient funds to keep ATVOD staff and directors in employment. If this was the basis upon which Ofcom set its own fee-levels then it would not have achieved a 40% reduction in television licence fees in 2011/12.
120. ULTV believes that there are certain basic principles which should apply to all quangos. This includes a firm commitment to freedom of information and appropriate independence from industry. ULTV finds it curious that Ofcom/ATVOD appear to be considering transposing charging principles which have no relevance to ODPS but not the basic principles of good governance which ULTV believes should apply to all quangos.

### **Question 2**

**Do you have any comments on the costs of performing the designated functions in Year One ("the Estimated Year One Costs")?**

### ***A text-book quango***

121. The Consultation implies that ATVOD incurred an over-spend of £127,000 in year one post-designation because staff were over-stretched as a result of, inter alia:
- awarding concessionary rates to three organisations;
  - investigating two complaints;
  - drafting a report for Ofcom; and
  - compiling a database of notified service providers.
122. ULTV regards ATVOD as a text-book example of how an unaccountable quango can suddenly 'discover' non-productive work in an attempt to justify its unnecessary existence.
123. The Designation states:

<sup>18</sup> Ofcom tariff tables 2011/12: [http://stakeholders.ofcom.org.uk/binaries/research/Tariff\\_Tables\\_2001112.pdf](http://stakeholders.ofcom.org.uk/binaries/research/Tariff_Tables_2001112.pdf)

*“ATVOD is only empowered to carry out the Designated Functions and exercise the powers specifically designated to them in this Designation.”<sup>19</sup>*

124. ULTV queries how the following constitute functions “*specifically designated*” to ATVOD:

- producing a report on sexually explicit material for Ofcom to submit to DCMS;
- issuing a press release (21 March 2011) stating that Frankie Boyle Tramadol Nights is “*likely to offend*” (ULTV does not see how this is a judgement ATVOD is qualified to make);
- trawling the internet to speculatively / randomly seek potential investigations to commence against hundreds of law-abiding firms.

### **Over-spend**

125. ULTV notes that Ofcom/ATVOD did not issue a statement on year one fees until 17 June 2010 – a considerable period of time after the date of Designation. If the new ATVOD board had wanted to revise its budget upwards at this time, for example to reflect commitments made to the ATVOD chief executive to increase his hours and remuneration, it was clearly able to do so.

126. ULTV queries why the Consultation implies that the decision to increase the ATVOD chief executive’s hours was the result of unexpected external factors if it was simply the implementation of a commitment made to him by the chairman when he was appointed.

127. ULTV regards it as unacceptable for the ATVOD board to use under-spends in certain areas such as travel as an opportunity to expand staff and director fees. ULTV expects Ofcom to put in place procedures to ensure that material variations to any co-regulator’s budget require its prior written approval and for Ofcom to only release funds it has collected on behalf of a co-regulator intermittently as required.

128. ULTV queries the wisdom of compelling industry members in 2010 to pay thousands of pounds in advance to a quango whose financial procedures and controls may not have been in line with the expectations of many ODPS. ULTV assumes Ofcom will want to fully review what lessons can be learnt from this experience.

### **ATVOD costs**

129. ULTV does not believe ATVOD’s costs and structures have ever been properly consulted on with industry. ULTV believes the Consultation should have included a detailed profit and loss forecast (breaking down in detail the variances against the original budget) to allow respondents to respond fully to this question.

130. ULTV does not believe that the simple administrative functions of ATVOD justify a full-time chief executive on c.£100,000; a part-time chair on c.£40,000; a part-time deputy chair on c.£15,000; three independent directors on c.£10,000 each; a part-time company secretary; a part-time policy and investigations manager; a full-time policy and investigations officer; a part-time personal assistant; a head office; associated travel and expenses and further significant fees adding up to a total cost (with Ofcom cross-charges) of c.£467,000.

131. According to a recent report in the Guardian, staff between pay grades 7 and 9 at the BBC’s operation’s department (responsible for strategy, property and legal affairs) earn an average of £46,916.<sup>20</sup> This is broadly in line with A Grade 7 in the DCMS which pays in the range of £45,380 to £54,959. ULTV notes recent confirmation that the director of media policy at DCMS is in the £90,000-£94,999 pay bracket. The director of evidence and analysis at DCMS is in the £65,000-£69,999 bracket.<sup>21</sup> Members of Parliament earn £65,738.<sup>22</sup> All of these senior public positions are less well remunerated than the chief executive of ATVOD.

<sup>19</sup> The Designation: <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

<sup>20</sup> Media Guardian: <http://www.guardian.co.uk/media/2011/mar/16/bbc-waste-staff-management>

<sup>21</sup> DCMS organogram: [http://www.transparency.culture.gov.uk/wp-content/uploads/2010/10/DCMS\\_organogram\\_30JUN10.pdf](http://www.transparency.culture.gov.uk/wp-content/uploads/2010/10/DCMS_organogram_30JUN10.pdf)

<sup>22</sup> Pay and allowance for MPs: <http://www.parliament.uk/about/mps-and-lords/members/pay/mps/>

- 132. ULTV believes that to pay a bureaucrat in a relatively simple administrative role a pro-rata salary in excess of that of senior DCMS civil servants is absurd.
- 133. ULTV believes that to enter into back-room deals with regulated entities to fund additional remuneration for ATVOD staff / directors will be widely seen as incestuous and improper. ULTV is concerned that if Ofcom acquiesces to this unacceptable increase in costs in year one then there may never be any incentive on a co-regulator to exercise appropriate cost-controls and procedures.
- 134. It remains unclear to ULTV what proportion of ATVOD's time is expended on each of its core designated functions. However, ULTV is clear ATVOD cannot justify anything close to its current cost levels for what was intended to be a super-light-touch regime with minimal regulation.
- 135. ULTV notes only five board meeting minutes are currently available on the ATVOD website (July 2010, September 2010, October 2010, December 2010, February 2010). ULTV is concerned the part-time directors of ATVOD already have very little useful work to do and it is not transparent the hours they are working.
- 136. In ULTV's view, there is no reasonable justification in law for the imposition of a compulsory tax to fund ATVOD's excessive and unnecessary cost levels as set out in Table 2 below.

**TABLE 2:  
ATVOD expected costs against budget**

Estimated costs	BUDGET April 2010 to 31 March 2011	ACTUAL (ESTIMATE) April 2010 to 31 March 2011	BUDGET April 2011 to 31 March 2012
Recruitment (executive and non-executive)	£11,750	£52,248	£2,500
Remuneration (executive and non-executive)	£212,436	£275,323	£306,940
Legal advice	£3,543		£20,000
Office set-up and running costs (including rent, telephone, IT support, printing and design)	£45,090	£26,186	£27,620
Professional fees and insurance (including audit, accountant/bookkeeper, bank fees, insurance)	£28,000	£56,233	£30,160
Board expenses/travel	£18,000	£7,077	£10,000
Insurance and bank charges		£3,426	£7,800
Independent complaints adjudicator		£2,919	£2,000
Strategic planning		£1,763	£2,000
IT and website support		£16,130	£3,600
Contingency			£25,000
Recharges from Ofcom	£25,000	£25,000	£25,000
<b>TOTAL</b>	<b>£340,276</b>	<b>£467,307</b>	<b>£467,620</b>

**Question 3  
Do you have any comments on the estimated fee income for Year One?**

- 137. ULTV has no comment as year one revenues will be known by the time any statement is issued by Ofcom/ATVOD.

**Question 4**

**Do you have any comments on the projected deficit for Year One?**

138. Please see response to question 2 above and question 5 below.

**Question 5**

**Do you agree that the Year Two Fees should be set at a level to ensure that all of any Year One Deficit is recouped?**

**If you do not agree, please state an alternative approach.**

139. ULTV believes that the original budget of £340,000 included more than enough 'slack' (some of which was identified by ATVOD itself) to allow for full performance of the designated functions, not least since many of these functions were not implemented until later than first anticipated. ULTV does not believe any of the new funding from industry should have been taken or was necessary to fulfil the designated functions.
140. ULTV believes a principal duty of the ATVOD board is to retain control of costs within budget and protect the good name and reputation of the organisation as an independent regulator.
141. ULTV believes that to levy a compulsory tax on ODPS providers to repay loans from regulated parties which were used to fund unnecessary increases in ATVOD costs would not be an appropriate use of tax-raising powers. ULTV is not aware of any public sector organisation that is simply free to run-up a deficit of its own free volition. ULTV believes ATVOD should abide by the same rules and principles as other quangos.
142. ULTV believes there is a simple and straightforward means to eliminate the deficit and that is to recognise the fact that it represents unnecessary and inappropriate expenditure, unrelated to any proportionate performance of the designated functions.
143. ULTV believes voluntary gifted loans from industry should not be refunded but written-off in full, not least to make clear that Ofcom will not tolerate inappropriate financial relationships between its 'co-regulators' and regulated parties.

**Question 6**

**Do you have any comments on the estimate of the likely costs of performing the designated functions in Year Two?**

**Cost inflation**

144. ULTV recognises it was never the intention of DCMS to introduce a new quango unaccountable to industry. DCMS originally stated in its regulatory impact assessment that "*it will be in the interests of industry – which will run any co-regulatory system – to keep its costs down*". This has not happened. The ATVOD board has not consulted industry on its detailed budget (beyond a 'chosen few') and is now planning to increase its costs by more than a third, £127,000, over its original post-designation year one budget.
145. ULTV notes that the law allows Ofcom/ATVOD to levy fees that are "*justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is proposed*". The purpose of the fee is to undertake the functions relating to ODPS set out in the Act. The purpose of the fee is not to maintain unnecessary bureaucracy at excessive cost to industry.
146. ULTV notes the ATVOD board are planning to increase the remuneration paid to themselves and staff by £95,000 in year two on that originally budgeted in year one post-designation. ULTV would find this difficult to understand even if the quantity of complaints investigated by ATVOD to date were substantial and there was a significant purpose to ATVOD.
147. ULTV assumes there will be little or no material work-load for ATVOD in year two given that ODPS notifications are already in place (renewals requiring no material administrative

resource). ULTV comprehensively fails to understand what ATVOD's proposed c£0.5m of expenditure is required for.

**Data Protection Fee**

- 148. ULTV believes that the nearest equivalent to the notification fee adopted by ATVOD is not an Ofcom licence fee but, rather, the notification fee required to be listed on the Data Protection Register maintained by the Information Commissioners Office. Under the Data Protection (Notification and Notification Fees) (Amendment) Regulations 2009, SI 2009/1677, there are two tiers of fees. Tier 1 is £35 and Tier 2 is £500. The fee relates, inter alia, to whether the company concerned had a turnover in its last accounting period of greater or less than £25.9m.
- 149. ULTV believes that data protection regulation is, in many respects, of much greater importance to the interests of citizens or consumers than notification to ATVOD. Data protection comes with real obligations on companies to protect personal data and make it available upon request. In contrast, ULTV considers that ATVOD registration comes with minimal practical protection or benefits to the public.
- 150. ULTV believes that any ODPS notification fee significantly above comparable data protection notifications cannot be objectively described as fair and proportionate in relation to *“the functions in respect of which it is proposed”*.

**Determining fee levels**

- 151. ULTV is concerned that Ofcom/ATVOD appear to have firstly determined the costs of maintaining a significant bureaucracy and then sought to determine the level of notification fee. ULTV believes the opposite approach would be more appropriate – Ofcom/ATVOD should determine a level of fee that is proportionate and fair for ODPS and then use all reasonable endeavours to ensure that administrative functions can be delivered cost-effectively. If a funding shortfall is anticipated, ULTV believes Ofcom/ATVOD should consider whether further savings are possible before increasing notification fees.
- 152. ULTV believes ATVOD costs have inflated out of all proportion to a level which is affordable to many ODPS providers or necessary to perform the designated functions. ULTV believes ATVOD is expending no material resource regulating notified providers. ULTV believes the year two budget proposal demonstrates ATVOD's desire to have all the trappings of a regulator, despite having almost none of the workload.
- 153. ULTV does not believe Ofcom/ATVOD can justify the costs incurred in year one as reasonable or proportionate. Nevertheless, it could at least be argued that year one involved setting up *“processes, procedures and reporting arrangements”*<sup>23</sup> (none of which ULTV regards as especially onerous tasks) including, remarkably, £52,248 of recruitment costs. It is clear this justification can only be used once, and should imply a significant reduction in resource required in year two.

**Question 7  
Do you have any comments on the aggregate amount of fees required in Year Two?**

- 154. Please see response to Question 6 above.

**Question 8  
Do you have any comments on our estimate of the number of services in Year Two?**

- 155. ULTV queries why Ofcom/ATVOD are seeking to set notification fees on the assumption of c.130 ODPS (c.75 providers) if there are hundreds of ongoing investigations of other ODPS who have not currently notified.

---

<sup>23</sup> The Consultation

156. ULTV notes there is a legal obligation on Ofcom/ATVOD to not recoup a higher level of fees than is absolutely necessary. ULTV does not believe it is reasonable for Ofcom/ATVOD to seek to budget for a contingency in case of a short-fall in ODPS numbers at the same time as assuming no growth in ODPS over the coming twelve months.
157. ULTV would ordinarily assume that the number of services in year two will increase on year one as the market grows exponentially and new distribution mechanisms increase their penetration.
158. ULTV believes Ofcom/ATVOD have failed to date to put in place a legally-sustainable methodology for rigorously and robustly assessing what VOD service constitutes an ODPS. ULTV suggests that only when this process is completed should a prediction of ODPS numbers in year two be finalised. Importantly, to minimise disputes, ULTV believes revenue projections should be based on the expected number of ODPS provider groups, not number of ODPS, as set out in response to Question 9 below.

### Question 9

#### Do you have any comments on our analysis of the various bases that might provide a basis for a fee structure for Year Two?

159. In ULTV's view the Act is clear and unambiguous – any notification fee imposed on ODPS must be "*justifiable and proportionate having regard to the provider who will be required to pay it*". ULTV is clear the law does not allow for:
- any flat-rate fee unrelated to ability to pay; or
  - fees to solely reflect the audience or revenue level of an ODPS regardless of the circumstances of the provider paying the fee.
160. Moreover, ULTV is not convinced that even if the law did allow Ofcom/ATVOD to set fees based on VOD audience size it would generally result in very different fees being paid to a levy based on more readily-available metrics such as group turnover, given that the largest group's might often be expected to have the most resources to invest in developing and promoting their VOD offerings (ULTV does note there may be exceptions).
161. ULTV believes Ofcom has a duty to only ever approve a fee structure which is "*proportionate having regard to the provider who will be required to pay it*" (i.e. in due proportion to a providers' circumstances).
162. ULTV notes the law specifically states that Ofcom/ATVOD can levy different fees "*in relation to different cases or circumstances*". ULTV therefore cannot understand why Ofcom/ATVOD should not consider the very different case and circumstance of a company which is part of a large corporate group to another which stands alone.

#### **Comparing a newsagent to a global media group**

163. Two companies may both have a turnover of £100,000. However, where one of these companies is owned by a major broadcaster such as ITV plc it clearly has a different circumstance to another company whose main trading activity is as a corner shop. ULTV believes it is unfair and unreasonable for Ofcom/ATVOD to base fees purely on the turnover of the provider, without taking into consideration any the circumstances of that provider.
164. Ofcom/ATVOD is aware that VOD is likely to contribute a very small proportion of turnover to many media companies. These companies often choose to provide VOD services which they cross-promote and cross-fertilise with material from their wider media businesses. ULTV does not believe it would be fair, reasonable or proportionate to consider VOD (or other) turnover in isolation from the overall business of a group.
165. In ULTV's view, one of the most important circumstances of a provider which Ofcom/ATVOD must taken into account, when setting regulatory fees, is whether or not it forms a part of a

wider group of companies. It is possible for a company with a very small turnover to belong to a highly-profitable group with substantial financial resources.

- 166. ULTV notes Ofcom/ATVOD would appear to agree that any failure to take into account the full circumstances of a provider, including whether it is part of a wider group, would lead to fees being paid which are unfair and arbitrary – this point is made consistently by Ofcom/ATVOD throughout the Consultation document.
- 167. ULTV believes the arguments used by Ofcom/ATVOD against assessing group turnover are unreasonable. ULTV responds to each of Ofcom/ATVOD’s main arguments further in Table 3 below.

**TABLE 3:  
Ofcom/ATVOD arguments against using group turnover**

Ofcom/ATVOD assertion	ULTV response
<p><i>“would further weaken the relationship between the fee to be paid and the underlying cost of regulating each category of stakeholder”</i></p>	<p>As with all forms of progressive taxation, a progressive fee structure may not be intrinsically linked to the underlying costs of regulation or service provision (although this is not a requirement of the Act). However, a company which belongs to a well-resourced group may have access to cross-promotion and support which allows it to market and develop a much more significant VOD offering than a service which is operated by a pure stand-alone company.</p> <p>Since VOD editorial content is substantially unregulated by ATVOD the relationship between regulatory fee and cost is extremely weak on all fee proposals. ULTV believes that the only <u>legal</u> option is a fee structure which is “proportionate” i.e. <u>not-regressive</u>.</p> <p>ULTV maintains that basic principles of justice and equity require turnover (including for any concessionary rates) to be assessed at a group level to create a fair and level playing field so that all companies are assessed on an <u>equal</u> basis regardless of their corporate structures.</p>
<p><i>“would be less simple to administer and verify than other structures”</i> <i>“would be likely to involve an additional, costly regulatory burden on ATVOD”</i></p>	<p>For UK-based groups, precisely the same level of information is in the public domain as for other Consultation proposals. This information is simple to obtain from Companies House.</p> <p>However, ATVOD could place the onus on the provider to supply the data (as is necessary in <u>many</u> fee structures reflecting ability to pay including <u>all</u> existing Ofcom revenue-related tariffs).</p> <p>For non-UK based companies, or organisations with accounts that are otherwise not public, the provider would have to provide evidence of its group turnover to Ofcom/ATVOD’s satisfaction as with the existing proposals.</p> <p>ULTV believes that using group turnover will discourage companies from structuring their groups to minimise fees – reducing the need for ATVOD to investigate where ‘control’ over a service genuinely resides. This would therefore be an administrative cost-saving.</p>
<p><i>“may be considered unfair, particularly where a subsidiary receives no financial support from a parent company and where the activity of the parent company is unrelated to the provision of VOD services”</i></p>	<p>This argument equally applies to a single company which has more than one trading activity.</p> <p>ULTV argues that Ofcom/ATVOD’s proposal is unfair because it treats one party differently from another on the basis of its corporate structure, rather than its true case and circumstances.</p> <p>ULTV maintains natural justice requires that all parties are treated equally – and Ofcom/ATVOD does not impose fees in a manner which leads to amounts charged being arbitrary and unfair purely because one company has a different corporate structure to another.</p>
<p><i>“we do not believe it would be consistent with the requirements of the Act to set fees on the basis of a</i></p>	<p>ULTV does not propose that Ofcom/ATVOD take “<i>at its starting position the revenue of an entity other than the provider</i>”. Rather, ULTV proposes the starting position would <u>always</u> be the accounts of the provider. Only <u>if</u> (i) the provider’s accounts demonstrate revenue</p>

<p><i>structure which took as its starting position the revenue of an entity other than the provider”</i></p>	<p>below the threshold for the maximum fee and (ii) <u>if</u> this provider has an ultimate parent company named in its accounts would it be necessary to review consolidated group accounts.</p>
	<p>ULTV regards looking at an ultimate parent company’s accounts as normal and standard every-day business practice. ULTV believes it is impossible to consider the circumstances of a provider, as the law allows, without considering the financial circumstances of the group to which it belongs.</p>

**Examples of Ofcom considering ultimate parent company**

- 168. ULTV notes that Ofcom frequently, when carrying out its duties, considers not just the legal entity which is a provider of a service but, rather, the ultimate company which has control of this provider. For example, whenever a Channel 3, Channel 5 or local radio licensee undergoes a ‘change of control’, Ofcom is required by statute to review the effects of this.
- 169. Ofcom also has a duty to enforce the statutory media ownership rules and to determine whether a party is a “fit and proper” person to hold a broadcast licence. In each case, Ofcom requires information to be supplied on the ultimate controlling shareholder in an enterprise.
- 170. Not only does ULTV believe it would be wrong to attempt to assess the circumstances of a provider by examining it in isolation from its ultimate parent company but so does Ofcom, the Office of Fair Trading, the Competition Commission, European Commission and Parliament when framing and implementing broadcasting regulation and competition law. ULTV believes Ofcom cannot have it both ways – either an ultimate parent company is a fundamental concern or it is irrelevant – it cannot be both.

**The purpose of consolidated accounts**

- 171. ULTV believes the reason why companies which form part of a group consolidate their revenues in a single set of group accounts is to enable all interested parties to review the overall performance of the business in one document. ULTV believes that for Ofcom/ATVOD to ignore widely accepted accounting principles and to claim that group turnover is not something it can consider, despite the legislation allowing Ofcom/ATVOD to set different fees in “*different cases or circumstances*” has no reasonable basis.
- 172. The Consultation does not state how Ofcom/ATVOD would assess the turnover of an ODPS provider which itself is the parent to a group of subsidiary companies – whether it would take into account the consolidated turnover of all of these subsidiaries or whether it would simply base its assessment on the turnover of the parent company itself (even if it is a holding company with very few revenues of its own).

**Effective control**

- 173. ULTV notes the concept of “*effective control*” is enshrined in the Directive which states:
 

*“Member States may further specify aspects of the definition of editorial responsibility, notably the concept of ‘effective control’, when adopting measures to implement this Directive”<sup>24</sup>*
- 174. Any person can, for about £25, set up a new company and use this as a vehicle for ODPS editorial compliance. Revenues could then be invoiced through an entirely separate sales company. No laws would be broken. Absolutely any company could therefore, for no more than about £25, potentially qualify for the lowest commercial company concessionary rate through a legal loophole which Ofcom/ATVOD appear to have written-into their proposed fee structures.

<sup>24</sup> The Directive: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

175. The legal and administrative resource which may be required by Ofcom/ATVOD to attempt to challenge where editorial control lies within a group of companies could be significant. That is no doubt why the Directive specifically made reference to where “*effective control*” lies – allowing member states to target the ultimate parent which controls a company.
176. ULTV believes a basic principle of equitable taxation is that taxes should equally burden all individuals or entities in similar economic circumstances. ULTV believes that Ofcom/ATVOD have a duty to act in a manner which is fair and proportionate and, therefore, to create a level playing field where all parties are treated equally regardless of their corporate structure.

### **Multiple notifications**

177. As Ofcom/ATVOD is aware, if one single group notifies each of its ODPS through a separate subsidiary company they could be required to pay multiple notification fees at a full rate under the three ‘B’ proposals set out in the Consultation. ULTV regards Ofcom/ATVOD’s desire not to consider common ownership of these subsidiaries as a relevant “*case*” or “*circumstance*” as unreasonable and unfair.
178. ULTV believes that a disproportionate amount of time is expended by ATVOD and industry analysing services on alternative platforms for multiple notifications.
179. ULTV believes that a single group of companies should never pay more than one material notification fee, regardless as to how many ODPS the group provides and whether these services are offered by one subsidiary or many. ULTV believes that any requirement for further notification fees from an ODPS provider or a company within the same group should only ever be at the lowest concessionary rate available.
180. ULTV does not believe it is appropriate for a regulator to consciously and deliberately penalise a business on the basis of its corporate structure as the Consultation currently proposes.
181. ULTV believes that reducing fees for multiple notifications to a nominal level would eliminate a large proportion of the current workload involved in implementing an ODPS notification procedure. ULTV also believes this would allow incumbent groups and new entrants to launch new services (through subsidiaries if they so wish) on an experimental basis, testing concepts and models without incurring disproportionate fees.

### **The case for group turnover is made by Ofcom/ATVOD**

182. The Consultation states:
- “We would envisage that “small-scale” ODPS providers might include small-scale commercial entities, with no links to established television broadcasters, and who may be in the start-up phase”*
183. Ofcom/ATVOD explicitly proposes a concessionary rate on the assumption that the applicant will not be associated with an existing television broadcaster. This appears to confirm to ULTV that, far from ignoring whether a provider belongs to an established group, this is uppermost in Ofcom/ATVOD’s minds in the setting of regulatory fees.

### **Flat-rate fee**

184. For the avoidance of doubt, in line with its previous communications with Ofcom/ATVOD, ULTV continues to believe a flat-rate fee (set at any higher than a nominal level) would be unfair, unreasonable, disproportionate, untargeted, highly-damaging and illegal.
185. ULTV notes that a small business seeking to provide three ODPS would be required to pay a fee of circa TWELVE THOUSAND POUNDS under the flat-rate proposal set out in the Consultation. This could be three times higher than a billion+ turnover group paying just a single fee.

186. Without prejudice to ULTV's view that a flat-rate fee of circa FOUR THOUSAND POUNDS is unfair, unreasonable and illegal, ULTV believes that if it is decided to proceed with such a levy there must be concessionary rates for SMEs with a consolidated gross annual turnover of under £6.5m.

### **EU definition of SMEs**

187. ULTV notes the EC recommends basing qualification for SME status on whether a company forms part of a larger group of companies. Given that this is a definition used by the EC for assessing access to structural funds, the framework programme for research and development and state aid, ULTV is disappointed Ofcom/ATVOD appear to have rejected any formal consideration of group status in the setting of notification fee levels for ODPS.
188. ULTV expects many SME's to choose to trade through one company (rather than establishing many subsidiaries) to minimise administrative/accounting costs. ULTV therefore expects that any decision to ignore group turnover in tariff structures will be of greatest advantage to large-scale groups and penalise many SMEs.

### **Concessionary rates**

189. ULTV notes the Consultation includes three 'concessionary' rates in an attempt to comply with the legal requirement to only impose fees which are "*fair and proportionate*". However, ULTV regards the qualification criteria for these concessions as inappropriate and the fees proposed as excessive. ULTV sees no evidence of any objective assessment to ensure these fees are fair and proportionate.
190. ULTV assumes Ofcom/ATVOD will want to make all necessary arrangements to ensure any groups who may have suffered hardship as a result of paying the flat-rate in year one are able to apply for a (partial) refund on the basis of Ofcom/ATVOD's subsequent decision to approve lower rates.

### **Further refunds / discounts**

191. ULTV does not believe it is fair, proportionate or legally sustainable for Ofcom/ATVOD to require ODPS to contribute towards the cost of ODPS-related functions at a time when they are not providing any ODPS. ULTV therefore believes:
- appropriate discounts should be applied to any new ODPS providers launching services after the first quarter of the financial year (excluding those entitled to concessionary rates); and
  - appropriate refunds should be available to a group if withdrawing all ODPS services (from UK jurisdiction) before the end of the final quarter of the financial year (excluding those entitled to concessionary rates).
192. ULTV believes it would be disproportionate, unreasonable and illegal to seek to collect THOUSANDS OF POUNDS from ODPS launching in the final weeks of the financial year.
193. ULTV does not believe it is reasonable for any quango to seek to benefit from the interest payments on cash collected from industry in advance of using this cash. ULTV proposes that all ODPS paying non-concessionary rates should be free to pay by quarterly direct debit so that cash is available only when required. ULTV suggests consideration is given to offering modest discounts to encourage prompt payment of the full year's tariffs to ODPS willing to pay in advance.

### **ULTV proposals**

194. As set out in this submission, ULTV believes:

- consolidated group turnover from all business activities is the most simple, proportionate, practical and legal method for determining notification fee levels for any commercial companies not paying the maximum fee (although this could be supplemented by additional tests if Ofcom/ATVOD were to seek to develop a more sophisticated approach in the future);
- charities, community interest companies and not-for-profit entities (with suitable commitment to public service) should be granted a concessionary rate at a nominal level reflecting their commitment to social gain and likelihood that many of these organisations will have very limited funds; and
- incremental ODPS notifications from within a single group of companies already providing a notified service should never be charged at more than a nominal fee level.

195. ULTV sets out its proposals further in response to questions 15 and 17 below.

**Question 10**

**Do you agree with the criteria we have proposed in Proposal 1 in relation to qualification for a concessionary rate for non-commercial ODPS providers?**

196. ULTV agrees with the criteria proposed in this category namely, that a non-commercial rate should be set for entities which can demonstrate they are constituted as:

- charities
- Community Interest Companies; and/or
- non-profit distributing with the intention of contributing towards public purposes.

197. ULTV would expect an assessment of public service objectives to be fair and proportionate. ULTV believes it is important any party concerned it has not been fairly assessed for any concessionary rate, including as a non-commercial body with public service objectives, has a right of appeal to a suitable independent body.

198. In addition, ULTV believes that ODPS providers which do not carry any editorial content (i.e. are teleshopping only) should also pay the non-commercial fee if required to notify, regardless of their size or status, as their content is wholly regulated by the Advertising Standards Authority and not by Ofcom/ATVOD. A similar argument may apply to S4C whose ODPS editorial content is regulated by the Welsh Authority.

**Question 11**

**Do you agree that £150 per service would be a justifiable and proportionate contribution from such ODPS providers to the cost of regulation?**

199. ULTV is disappointed ATVOD is proposing to appropriate ONE HUNDRED AND FIFTY POUNDS from charities and community groups. ULTV believes many of these organisations contribute to civil society by providing valuable services which provide a voice to communities and communities of interest. ULTV believes that to impose an onerous notification fee on these services would be incompatible with the European Convention on Human Rights, article 10 of which protects freedom of expression.

200. ULTV assumes Ofcom/ATVOD are aware many not-for-profit companies are partially or wholly supported by donations and voluntary contributions and expend considerable effort organising events in their communities to raise funds. ULTV believes that if a notification fee of £35 is regarded by the Information Commission's Office as appropriate for data protection, then it should equally be accepted as fair and reasonable as a contribution towards a registration scheme for ODPS.

201. ULTV believes that volunteers working with community groups and charities should not be seeking to raise ONE HUNDREDS AND FIFTY POUNDS in donations from the public in order to subsidise the salaries of part-time bureaucrats. ULTV does not believe the poorest

and neediest in society should suffer because donations and public funds intended to support good causes are being diverted to subsidise expensive and unjustifiable bureaucratic costs.

202. ULTV believes it is important to set a fee at level which even the smallest and most hard-pressed non-commercial ODPS providers (potentially facing funding reductions) can reasonably pay. ULTV believes that for Ofcom/ATVOD to require groups in the community to seek to raise ONE HUNDRED AND FIFTY POUNDS purely in order to notify an ODPS is unreasonable and unfair and at risk of impeding freedom of expression.

#### Question 12

**Do you agree with the criteria we have proposed in Proposal 2 in relation to qualification for a concessionary rate for “micro-scale” commercial ODPS providers?**

203. ULTV note Ofcom/ATVOD claim to have based the criteria for this band on “*the anecdotal evidence we have received of actual revenues generated by commercial “micro scale” ODPS providers; and the information we received from small-scale ODPS providers and potential ODPS providers...*” ULTV queries precisely what “*anecdotal evidence*” Ofcom/ATVOD are relying upon and whether this is a sound basis for policy-making.
204. ULTV does not believe it is acceptable for any evidence-based policy-maker to base fee structures on “*anecdotal evidence*” rather than objective research and analysis. ULTV further believes that relying purely on a voluntary request for information, to which many organisations are unlikely to have taken the risk of participating, is dangerous. Furthermore, ULTV is aware that a number of the organisations which supplied information to Ofcom/ATVOD in 2010 made clear they have a current or projected turnover of c.£500,000 from all business (including non-VOD) activities – ten times the figure used in the criteria.
205. ULTV believes the question for Ofcom is whether it wishes to make it challenging for small companies to offer an ODPS. The EC defines “*micro-enterprise*” as an enterprise which, inter alia, has a turnover or annual balance sheet that does not exceed €2m (approx. £1.8m at current exchange rates).
206. It is not clear to ULTV why Ofcom/ATVOD are now seeking to create their own definition of turnover for ‘micro-enterprises’ rather than relying on the recommendation of the EC devised for the specific purpose of implementing public policy to support micro-businesses.
207. ULTV recognises that the very smallest ‘micro-enterprises’ may find it challenging to pay even a modest concessionary rate. ULTV therefore proposes two concessionary rates for commercial micro-enterprises; one for the very smallest companies with a turnover below £300,000 and another for other micro-enterprises with a turnover below £1.8m.

#### Question 13

**Do you agree that £250 per service would be a justifiable and proportionate contribution from such ODPS providers to the cost of regulation?**

208. ULTV assumes that few directors of companies with a gross turnover of £25,000 per annum, can dream of paying themselves £100,000 a year. ULTV does not believe it is fair and reasonable to ask directors of a micro-enterprise with a turnover of just £25,000 to potentially give up essential day-to-day living items in order to transfer 1% of their company’s turnover to subsidise a bureaucrat earning a salary FOUR TIMES this company’s entire annual sales revenue.
209. ULTV believes that to tax a modest company, with a turnover of c.£25,000, at 1% of its revenue in order to fund excessive administrative costs would be disproportionate and unfair.
210. ULTV believes many small companies are only likely to obtain £25,000 in turnover through extraordinary hard work and dedication. ULTV believes a 1% tax on revenue is not a cross-subsidy from large to small ODPS, as Ofcom/ATVOD seeks to imply in the Consultation, but a substantial cross-subsidy from hard-working entrepreneurs to part-time bureaucrats earning many multiples of the UK average salary.

211. To date, ULTV has discovered no small-scale services with a turnover of c.£25,000 who:
- have expressed any preference for notifying ATVOD rather than Ofcom;
  - feel any effort was made to consult them on the establishment of ATVOD;
  - are represented on the board of ATVOD;
  - believe they have gained any benefit from ATVOD or see a useful purpose for its continuation;
  - have any desire or intention to provide content damaging to the interests of citizens or consumers;
  - regard ATVOD as conducive to lowering barriers to entry and enhancing UK competitiveness; or
  - otherwise approve of the manner in which ATVOD operates and behaves.
212. ULTV believes small-scale groups must be free to communicate using video without facing the threat of closure for failing to pay excessive fees potentially leading to severe suffering for their own directors/staff. ULTV believes that a fee of TWO HUNDRED AND FIFTY POUNDS (a figure apparently chosen randomly without any explanation as to how it was calculated) is unfair and unreasonable. ULTV does not believe there is any acceptable justification for such a punishing fee on law-abiding entrepreneurs seeking to provide material which promotes civil society and supports community development.
213. ULTV believes that companies whose entire turnover from all (VOD and other) business activities is under £50,000 should not be denied their right to freedom of expression by bureaucrats seeking to collect disproportionate fees.
214. ULTV notes that the 2010 Ofcom/ATVOD fees consultation suggested the possibility of a fee of £46 per annum for groups with revenue from VOD provision of up to £100,000 per annum (figure 4 of the 2010 consultation).<sup>25</sup> ULTV queries why no similar option is consulted upon in the 2011 Consultation.

**Question 14**

**Do you agree with the criteria we have proposed in Proposal 3 in relation to qualification for a concessionary rate for “small-scale” commercial ODPS providers?**

215. Please see response to question 12 above.

**Question 15**

**Do you agree that £500 per service would be a justifiable and proportionate contribution from such ODPS providers to the cost of regulation**

216. ULTV does not imagine many small businesspeople who achieve turnover of just £50,000 (from all trading) can afford to lose 1% of this revenue to help pay for the salary of a bureaucrat earning £100,000.
217. ULTV believes that for Ofcom/ATVOD to impose a notification fee based on 1% of revenue on SME's with a turnover of just half the salary of ATVOD's chief executive would be widely regarded as a misuse of power by those implementing such a tax for their own financial benefit.
218. ULTV believes Ofcom/ATVOD cannot have any confidence, in the absence of research and analysis, that a small company can afford a fee of FIVE HUNDRED POUNDS to subsidise an aggregate wage bill proposed by ATVOD at more than SIX TIMES the amount this company turns over in sales revenue.
219. ULTV believes it is perverse to ask very small traders, potentially struggling to make a living and keep a business afloat, to pay a penalty of FIVE HUNDRED POUNDS to support

<sup>25</sup> 2010 fees consultation: [http://stakeholders.ofcom.org.uk/binaries/consultations/vod\\_proposals/summary/vod\\_proposal.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/vod_proposals/summary/vod_proposal.pdf)

ATVOD's part-time directors working a few days a year. ULTV regards this fee as grossly disproportionate for a company of this size relative to the costs and functions for which it is imposed.

### ***Unfair and regressive***

220. The tax rates contained in the Consultation are wholly regressive.
221. ULTV questions why Ofcom/ATVOD are proposing the greatest proportionate revenue contribution is made by small companies whose entire turnover, from all business activities, is so much lower than ATVOD seeks to pay its own staff and directors. ULTV believes it is unacceptable for Ofcom/ATVOD to propose to place the greatest proportionate burden of administrative costs on those who may be considered least likely to be able to afford it.
222. ULTV sees no evidence Ofcom/ATVOD have assessed the strain a small business would suffer by being forced to pay ONE PER CENT of its entire turnover (and potentially more than ONE HUNDRED PER CENT of its profits) in a compulsory fee which confers no benefits or privileges. ULTV regards this fee as likely to form a significant barrier to entry for SME's considering launching VOD services (especially given the current uncertainty about who may constitute an ODPS in light of ATVOD's untargeted investigative activity).
223. ULTV believes the proposed fees put forward in the Consultation have no foundation in logic or reason and are neither legally or morally justifiable.

### ***ULTV proposals***

224. ULTV supports the principle of two bands of concessionary rates for SMEs but believes the proposals contained within the Consultation would be unaffordable or challenging to many.
225. ULTV believes it would be unfair and inequitable to fail to ensure that businesses which are only marginally profitable (or loss-making) do not suffer more than a nominal fee which encourages, rather than discourages, ODPS provision (including experimental services). ULTV believes that to deny these companies their right to launch an ODPS by imposing a disproportionate fee would be an unacceptable infringement on freedom of expression.
226. ULTV believes that companies with a turnover below £300,000 may sometimes have even more limited resources available to them as some non-commercial groups and it would be unreasonable to impose higher fees simply because of their company status/structure. ULTV therefore believes any commercial company with a consolidated group turnover below £300,000 should pay the same level of fee which ULTV proposes for non-commercial companies (i.e. £35).
227. ULTV believes that other micro-enterprises (i.e. with a gross annual turnover of between £300,000 and £1.8m) should pay a concessionary rate of no more than £100.
228. ULTV sets out its proposals further in response to question 17 below.

#### **Question 16**

**Do you have any comments on the figures set out in Figure 1?**

229. Please see response to question 17 below.
230. ULTV's views on a minimum fee of £1,000 for commercial companies with a turnover in excess of £100,000 is set out in paragraphs 16-19 above.

#### **Question 17**

**Which of the options set out in Part Two (of Section 4) would provide the most appropriate structure and level of fees for Year Two?**

**If you do not agree with any of the options please set out an alternative, giving reasons why this would be appropriate.**

**Regressive fee proposals**

231. ULTV notes Ofcom/ATVOD are not proposing any tax structures which are progressive, or even proportionate, but rather only those which are regressive as set out in Table 4 below.

**TABLE 4  
Ofcom/ATVOD proposals for fee for ‘first’ ODPS**

Rate	Turnover	Example fee*	Example fee as percentage of turnover
B1 Super A Rate	£25.9m+	£12,330	0.048% of £25.9m
B1 A Rate	£6.5-£25.9m	£6,165	0.095% of £6.5m
B1 B Rate	£100k-£6.5m	£1,000	1% of £100k
B2 Super A Rate	£100m+	£13,950	0.014% of £100m
B2 A Rate	£6.5m-£100m	£6,975	0.11% of £6.5m
B2 B Rate	£100k-£6.5m	£1,000	1% of £100k
B3 Super A Rate	£75m+	£14,580	0.019% of £75m
B3 A Rate	£35m-£75m	£7,290	0.021% of £35m
B3 B Rate	£10m-£35m	£3,645	0.036% of £10m
B3 C Rate	£6.5m-£10m	£1,823	0.028% of £6.5m
B4 D Rate	£100k-£6.5m	£1,000	1% of £100k
Small business concession	£50k to £100k	£500	1% of £50k
Micro business concession	£0 to £50k	£250	1% of £25k
Non-commercial concession	N/A	£150	N/A

\*Based on assumptions made in paragraph 1.7 of the Consultation

**The ULTV proposal**

232. ULTV recognises there is a requirement, under the Act, to implement an ODPS notification procedure and to require providers to pay an appropriate fee to cover (but not exceed) the fair and reasonable costs of implementing the relevant regulations.

233. ULTV believes that if Ofcom chooses to continue to implement a high-cost regulatory regime (a decision ULTV will not hesitate to strongly oppose with or without co-regulation in some form) then Ofcom has a duty to minimise the damage caused to the UK’s smallest businesses and ensure that, proportionately, the greatest burden is placed on those whose size means they are most likely to be able to bear these costs.

234. ULTV believes the Ofcom/ATVOD ‘B3’ proposal is, of all the proposals contained in the Consultation, the one which offers the greatest level of graduation and is therefore the fairest. ULTV accepts there may only be a small number of companies in some categories but would argue that fairness and justice should not be dependent on how many companies currently exist in a particular band, especially in a fast-growing sector. ULTV notes that the more bands are offered the less ‘steep’ the climb for smaller companies on the margins of different rates.

235. Reflecting EC definitions, ULTV suggests an enterprise should qualify as a ‘micro business’ if its consolidated gross annual turnover from all trading is under €2m (circa £1.8m at current exchange rates). ULTV proposes two concessionary rates for micro-businesses conforming to this definition. Other bands proposed by ULTV are based on the ‘B3’ proposal set out in the Consultation. ULTV believes the fee paid should be based on a fixed proportion of revenue relating to the band, not simply an arbitrary tax-rate unrelated to the size of turnover of the provider or its wider group.

236. ULTV believes the ‘B3’ proposal set out in the Consultation should therefore be modified as follows:

- any group of company’s first ODPS to be charged using revised banding proposed by ULTV in TABLE 5 below (actual rates to be adjusted downwards to cover costs of implementing regulations in proportionate and targeted manner);
- all subsequent ODPS provided by any member of the same group of companies charged at the lowest commercial concessionary rate (£35);
- companies supplying services containing no editorial content (teleshopping only) charged at lowest commercial concessionary rate (£35) if required to notify;
- 25% discount to tariff provided to all new ODPS launching after 30 June 2011; 50 per cent discount applied to all new ODPS launching after 31 September 2011 and 75 per cent discount applied to all new ODPS launching after 31 December 2011 – discounts do not apply to concessionary rates or services on air before date of notification;
- all turnover tests apply to both ODPS provider and consolidated accounts of ultimate parent company of that provider (if it has one) so that no group can ‘hide’ turnover – based on last set of filed accounts (or if this is for a period other than 12months other suitable evidence to be accepted by Ofcom using its reasonable discretion);
- any company in its first twelve months of trading to be able to apply for the lowest commercial concessionary rate so long as it does not belong to a larger group of companies which would bring it within an existing turnover band;
- ultimate parent company based on ownership control on date of fees statement or date of notification by an ODPS provider (whichever is later);
- for non-UK registered companies, turnover based on exchange rate at high street bank on date of fees statement;
- services paying a non-concessionary rate to be entitled to pay by quarterly direct debit and cease all payments from the following quarter if withdrawing the ODPS (e.g. moving from UK jurisdiction) – please see paragraphs 190-192 above;
- onus to be placed on each provider to produce suitable evidence if seeking any discount to the highest tariff – Ofcom to invoice all providers the Super A Rate for their first ODPS and £35 for all other notified services – a company which believes it is entitled to a discount based on published criteria (e.g. due to its group turnover not passing the Super A rate threshold or company status) to be granted a reasonable period of time to apply for a credit note by producing suitable evidence (full details to be sent out with all invoices); and
- an independent appeals procedure to be put in place for any party concerned they have not been treated fairly under the terms set out above.

**TABLE 5**  
**ULTV proposed bands (first ODPS only, all subsequent ODPS at non-commercial rate)**

Rate	Group turnover	Example fee	Example fee as percentage of turnover
Super A Rate*	£75m+	c.£22,500	<b>0.03%</b> of £75m
A Rate	£35m to £75m	c.£10,500	<b>0.03%</b> of £35m
B Rate	£10m to £35m	c.£3,000	<b>0.03%</b> of £10m
C Rate	£6.5m to £10m	c.£1,950	<b>0.03%</b> of £6.5m
D Rate	£1.8m to £6.5m	c. £540	<b>0.03%</b> of £1.8m
Micro business concession A	£300k to £1.8m	c. £100	<b>0.03%</b> of £300k
Micro business concession B	£0 to £300k	c. £35	N/A
Non-commercial concession	N/A	c. £35	N/A

\*Super A Rate would only be imposed if necessary – ULTV anticipates a significant reduction in regulatory costs would make it redundant and also allow other rates to be lowered

237. The banding proposed by ULTV in Table 5 is based on the same number of bands proposed in the Consultation (B3 proposal) but the tax rate adjusted to make the fee structure proportional rather than regressive.

238. Whilst ULTV believes the banding it is proposing is reasonable, ULTV does not seek to argue that the level of the tax-rate (based on 0.03% of turnover) is reasonable – merely that it is important to set a rate and not simply adopt arbitrary fee levels. ULTV proposes the actual tax rate is adjusted following an assessment of the likely number of ODPS falling within each category (which will require some limited additional evidence gathering).
239. ULTV notes that a fee of circa £20,000 is broadly in line with the costs voluntarily paid by the members of ‘pre-designation’ ATVOD (and those industry members who made voluntary payments on top of their fees to ATVOD in 2010). However, ULTV is concerned that such a high rate could drive many businesses outside the UK and severely impede the development of new services. ULTV would hope that a radical reduction in administrative costs would mean that a Super A Rate is not necessary and other rates could be reduced.
240. ULTV acknowledges that any fee structure which is “*fair and proportionate*” (i.e. reflecting ability to pay) is likely to involve some additional administrative resource to a flat-rate levy. ULTV does not believe this is a good justification for adopting an unfair fee structure. ULTV believes the proposals contained within this submission are unlikely to involve any material administrative resource for industry or for regulator, being based on data which is readily available.
241. ULTV is confident the time and effort involved in administering the proposals set out within this submission would be minimal and would be happy to respond to any queries Ofcom may have in this regard.
242. To further reduce administrative costs, Ofcom may wish to consider offering a modest discount to any provider willing to make full annual payment within 30 working days of an accurate final invoice being issued. ULTV would not expect any discount issued to be refundable if a service subsequently closes.

**Question 18**

**Are there any potential impacts arising from the options we have laid out in Section 4 that we have not considered?**

***Consultation timescales***

243. ULTV does not believe many SMEs generally have sufficient time or resources to read and respond to lengthy Ofcom consultations or participate in central-London industry forums (especially when based outside of central London). ULTV believes Ofcom should make more effort to engage with those services unlikely to be in a position to employ full-time regulatory affairs executives to respond to consultations and argue their cause.
244. ULTV believes that it is inappropriate for Ofcom/ATVOD to issue a six week consultation on an issue of such magnitude as fee systems and structures, particularly when it includes new proposals which, as far as ULTV is aware, have not been subject to any material pre-consultation. ULTV believes a first-phase Consultation should have been issued several months ago to allow for proper discussion with industry and all necessary research and evidence to be gathered.

***Lack of impact assessment***

245. ULTV notes the claim within the Consultation that the body of the document incorporates an impact assessment but ULTV sees no evidence to substantiate this claim. ULTV has not managed to identify any attempt by Ofcom/ATVOD to assess the impact of their fee proposals on industry or consumers. ULTV is of the view that, if such an assessment had even been made and good judgement exercised, the proposals contained within the Consultation would never have made it to publication.
246. ULTV believes that a Consultation which fails to consider the impact on the UK’s competitiveness of imposing one of the most onerous VOD regulatory fees in the democratic

world cannot responsibly claim to be meeting its statutory obligation to incorporate a regulatory impact assessment.

### ***Ofcom's general duties***

247. Ofcom has a statutory duty to seek to secure the provision of a variety of television and radio services catering for a wide range of tastes and interests. The Consultation does not explain whether and how a tax which disproportionately impacts on small-scale VOD services would be compatible with this duty.
248. ULTV believes that Ofcom would be acting in a manner that is irresponsible and irrational as well as disproportionate and illegal by approving a tax based on a percentage of company turnover which is so high that it is unaffordable for some VOD providers (1%) whilst for others it is relatively insignificant (as little as 0.014%).
249. ULTV believes there is considerable evidence that Parliament never expected Ofcom to approve a fee likely to cause serious damage to many current or prospective VOD service providers. ULTV is concerned Ofcom is now proposing to act in a manner incompatible with its core statutory duties to citizens and consumers

### ***House of Commons Culture, Media and Sport Committee***

250. ULTV notes the concern raised at the House of Commons Culture, Media and Sport Committee regarding ODPS fees when taking evidence from Rt Hon Jeremy Hunt MP, Secretary of State for Culture, Olympics, Media and Sport on 30 March 2011. At this session, the Secretary of State expressed the view that in some areas of the UK there might ultimately be as many as sixty local/community TV services delivered via internet protocol technology.
251. ULTV is aware of serious concerns of senior parliamentarians at the manner in which Ofcom/ATVOD have implemented ODPS regulations. ULTV believes that the government's ambition for the development of a thriving VOD sector is now being placed in serious jeopardy.

### ***UK economy***

252. ULTV fears growth in the UK's VOD sector is placed in danger by the proposals set out in the Consultation. ULTV does not see any evidence that Ofcom/ATVOD have considered the impact of their proposals on employment or competitiveness in the UK VOD sector or have any intention to put in place a strategy to encourage, rather than impede, new jobs and creativity in convergent media provision.
253. ULTV believes that the UK should be setting an example by reducing regulatory costs to encourage enterprise and innovation, not hounding small website providers and imposing new fees at a level unparalleled in the entire democratic world, potentially foreclosing hundreds of new VOD initiatives before they have launched or had an opportunity to develop.

### ***The Directive's purpose***

254. ULTV understands the Directive's purpose was to ensure a properly functioning internal market in television services – not the decimation of a new tier of VOD services on multiple platforms and devices.
255. ULTV does not believe that limited support for ATVOD from incumbent major broadcasters who may have a direct interest in erecting new barriers to entry in media provision should be used as justification for ATVOD's continuation. As Tony Ghee of Taylor Wessing wrote in a recent article:

*“This may suit some larger VOD operators as they colonise the on demand world, but it will not encourage new entrants or new services.”<sup>26</sup>*

### **Ofcom’s good name**

256. ULTV does not wish to see Ofcom’s good name tarnished by support for a co-regulator which is not fit for purpose. ULTV does not believe any objective person could conclude that ATVOD satisfies either Ofcom’s published criteria for co-regulation or the criteria set out in the Act.
257. ULTV does not see any advantage in the current arrangements which involve two organisations regulating ODPS over the alternative – one organisation regulating ODPS, removing duplication of many costs. ULTV assumes there would be a considerable resource-saving to Ofcom in not having to ‘regulate the regulator’. ULTV does not believe Ofcom/ATVOD can reasonably claim current arrangements are justified by consultations held with a small number of parties before the ‘new’ ATVOD’s structures were ever agreed or implemented.
258. ULTV trusts the Ofcom board will wish to uphold the highest standards of public office and effective control over all the areas for which it has responsibility.
259. ULTV calls upon Ofcom to take immediate action to:
- cease from its war on enterprise;
  - to abolish excessive tax levels from hard-working entrepreneurs;
  - to withdraw the threats causing concern and stress to many operators of SMEs;
  - to cast away unwarranted costs and unnecessary bureaucracy; and
  - to implement a fair and reasonable fee structure proportionate to the functions to which the fee relates.
260. ULTV believes the serious concerns raised in this submission demand immediate action and cannot responsibly be ‘swept under the carpet’. ULTV remains, as always, available to offer its support to assist Ofcom in its implementation of effective regulatory systems and procedures and the securing of its statutory duties to citizens and consumers.

### **Question 19**

#### **Do you believe that our proposals have any impacts in relation to matters of equality?**

261. To avoid repetition, ULTV refers to paragraphs 168-171 (page 26-27) its previous submission to Ofcom/ATVOD dated 7 May 2010 provided in response to the 2010 consultation.<sup>27</sup>

United for Local Television  
1 April 2011

*ULTV is the industry association for local television in the UK.*

*The views expressed in this submission represent the policy of the ULTV Management Committee and may not reflect the views of any other individuals.*

*For further information on ULTV please see [www.unitedforlocaltv.com](http://www.unitedforlocaltv.com)*

<sup>26</sup> ATVOD – land grabber or just plain needy: [http://www.taylorwessing.com/download/article\\_atvod.html#top](http://www.taylorwessing.com/download/article_atvod.html#top)

<sup>27</sup> ULTV 2010 response: [http://stakeholders.ofcom.org.uk/binaries/consultations/vod\\_proposals/responses/ULTV.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/vod_proposals/responses/ULTV.pdf)