

Guidance on who needs to notify

Application and Scope of the Regulations for Video On Demand (VOD) services

PROPOSED NEW SCOPE GUIDANCE

CLEAN VERSION

This document represents DRAFT revised guidance and does not represent current ATVOD policy on scope issues.

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1. Introduction

- 1.1 This document provides guidance as to the factors and criteria that are applied by ATVOD when determining whether a service falls within the definition of an ‘on-demand programme service’ (“ODPS”) under section 368A of the Communications Act 2003 (“the Act”)¹ and is therefore subject to the regulatory framework for VOD. It is also intended to help those involved in providing a service to assess which specific entity (company or individual) is likely to be the provider of a relevant service for these purposes, and therefore the person who is responsible for compliance with the rules, including the statutory obligation to notify the service to ATVOD. This Guidance is not legally enforceable or determinative and provides only interpretative guidance as to how ATVOD is likely to apply the criteria set out in section 368A of the Act, drawing on the Articles and Recitals of the Audiovisual Media Services Directive (“the Directive”) where appropriate. This Guidance is subject to review and may be revised from time to time in light of experience.
- 1.2 It is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service is subject to the regulatory framework for VOD.
- 1.3 As explained below, there are a number of cumulative criteria set out in section 368A of the Act that determine whether or not a service is within the scope of the regulatory framework. At the present time, video on demand services represent an increasingly important part of the audiovisual market. However, the wide variety of content, services and business models available make it difficult to list with any degree of certainty the services that will be within scope, and those that will fall outside scope. Each service provider must make their own assessment of whether they meet the statutory criteria, and act accordingly.
- 1.4 In deciding whether a particular service requires notification, and by whom, potential service providers, and ultimately ATVOD, have to consider the questions set out in the following flowchart, each of which is explored in more detail in this Guidance.
- 1.5 The flowchart overleaf outlines the process of determining whether or not given content would constitute an ODPS. Click on a question to move to the relevant section of the guidance.

¹ As amended by the Audiovisual Media Services Directive Regulations 2009 and the Audiovisual Media Services Directive Regulations 2010.

Is video material available via this service?

NO

Not ODPS

YES

Is the video material comparable to the kind of programmes that might appear on TV?

NO

Not ODPS

YES

Are these 'TV-like' programmes the principal / main purpose of the service? Please note that one outlet (website, set top box, etc.) may offer more than one service, each with its own principal purpose

NO

Not ODPS

YES

Does the service enable the user to select programmes and view them at a time of their choosing?

NO

Not ODPS

YES

Does the user receive the programmes via an "electronic communications network"?

NO

Not ODPS

YES

Is the service made available for use by members of the public (whether for payment or not)?

NO

Not ODPS

YES

Is there a person or body with editorial responsibility for the service (i.e. control over the selection and organisation of the programmes included in the service)?

NO

Not ODPS

YES

Does that person or body with 'editorial responsibility' for the service fall within UK jurisdiction?

NO

Not ODPS

YES

ODPS REQUIRING NOTIFICATION TO ATVOD by the person or body with editorial responsibility

[Click here for the ATVOD notification form](#)

2. Overview

- 2.1 There are a huge variety of Video on Demand services available in the current market, and ATVOD realises that it is not always easy to determine whether or not a given service is an ‘ODPS’ requiring notification.
- 2.2 This document gives detailed guidance on what constitutes an ODPS, but it is important also to step back and take an overview. That is, it is useful to look at the whole consumer offering you provide via a given outlet (such as a website or set-top box service) in the light of what the Directive and Act are seeking to achieve. If all or part of the offering you typically provide to consumers is likely to compete with linear TV, and the nature of the material and means of access would lead users to expect a degree of regulatory protection (see 2.4 below), it is likely you are providing an ODPS.
- 2.3 The following (non-exhaustive) list gives some introductory examples of the types of service which are likely to be considered ODPS:
- a) a ‘catch-up service’ for a broadcast television channel whether programmes are made available from the broadcaster’s own branded website, an online aggregated media player service, or through a ‘television platform’ to a set top box linked to a television (whether using broadcast ‘push’ technology, or ‘pull’ VOD);
 - b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising ‘editorial responsibility’ over all the programmes (see section [4] below), whether via a dedicated website, online aggregated media player service, or through a television platform;
 - c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising ‘editorial responsibility’ over the content;
 - d) A music video VOD service;
 - e) A VOD service solely comprising TV-like self-promotional programmes or ‘advertorials’; and
 - f) A non-mainstream VOD service comprising programmes comparable to equivalent broadcast genres (for example, religion, politics, sport, adult).
- 2.4 ATVOD advises providers to consider the statutory criteria outlined in this document in the light of two broader questions (derived, in particular, from Recital 24 of the Directive):

a) Is your service competing for the same audience as television broadcasts?

b) Would a user reasonably expect this service to be regulated?

For example, the Directive excludes services that are primarily non-economic, and which are not in competition with television broadcasting (Recital 21 of the Directive). In this context ‘economic’ is interpreted in the widest sense to encompass all forms of

economic activity, however funded, and may include public service material, free to view content, as well as advertising-funded, subscription, pay per view and other transactional business models. However, it does not include user-generated video content posted by private individuals for non-economic purposes of sharing and exchange within communities of interest. Television broadcasts in this context include the full range of linear TV, not just the “major” channels.

- 2.5 It may be that a part of your overall consumer offering constitutes an ODPS in its own right². For example, where a service provider offers a movie and television programme download service as part of its broader, non-audiovisual online retailing activities, then such a service may be considered to be a distinct on-demand programme service which falls within the scope of the Act. More generally, a single outlet (for example a website) can be home to one service or several. ATVOD acknowledges that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case. Sections 3.11 and 3.12 of this document give further guidance on identifying a “service” with the principal purpose of providing TV-like content.
- 2.6 ATVOD and Ofcom have examined many of the key issues that arise under these headings. The published ATVOD Determinations and Ofcom Decisions on Appeals against Determinations provide more in-depth discussions about some points which are summarised in this document. We have referred in the text below to particularly relevant cases as at the date of publication (see also the further information section at the end of this document).

3. Is the service an ‘on-demand programme service’?

- 3.1 Under section 368A of the Act, a service will be an ‘on-demand programme service’, and therefore subject to notification and regulation, if it meets **all** of the following criteria.
- a) **Its principal purpose is the provision of TV-like programmes:** that is programmes whose form and content are comparable to the form and content of programmes normally included in television programme services;
 - b) **It is a VOD service:** the service enables users to select individual programmes from among the programmes included in the service, to receive the selected programme using an electronic communications network,³ and to view the selected programme when the user chooses;
 - c) **There is editorial responsibility:** the programmes comprising the service are under a person’s editorial responsibility;
 - d) **It is made available to the public:** the service is made available by that person for use by members of the public; and

² See Ofcom’s Appeal Decision relating to ‘Viva TV’:

http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV_Viva_TV_Decision_Annexes.pdf

³ Defined in section 32 of the Act. See section 3.15 of this Guidance

e) **That person is under the jurisdiction of the UK for the purposes of the Directive**

- 3.2 These criteria will be interpreted purposively in line with the Directive. By virtue of Recital 24 this will include consideration of whether the service is in competition with linear TV services and generates expectations of regulatory protection of the type provided for under the Directive.
- 3.3 Audio-only services, such as ‘listen again’ radio services are out of the scope of section 368A of the Act, and hence outside the scope of the regulatory framework for VOD. However, video only programmes are potentially in scope (subject to the other criteria being met).

Does it include TV-like programmes?

- 3.4 One of the principal aims of the Directive is to create a level-playing field between traditional linear broadcast television services and emerging on-demand audiovisual media services (Recital 10 of the Directive) and to provide regulatory protection in circumstances where the parallel with television is such that audiences would reasonably expect it (Recital 24). The Directive, and Part 4A of the Act, are therefore intended to cover on-demand and broadcast television audiovisual media services which compete for the same audiences (Recitals 21 and 24), sharing the same key characteristics, namely that they include comparable programmes. Accordingly, a defining characteristic of the definition of an ODPS in section 368A of the Act is that the principal purpose of the service is *“the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services”*. In other words, that the programmes are “television-like” as that expression is used in Recital 24 of the Directive.
- 3.5 An ODPS will only be caught by the definition in section 368A of the Act if it **provides access to programmes that are comparable to programmes included in broadcast television services and thereby compete for the same audience as television broadcasts**. It is, however, necessary to interpret the meaning of ‘programme’ in this context in a dynamic way, taking into consideration developments in television broadcasting.
- 3.6 The comparison with programmes ‘normally included’ in television programme services takes into account the full range of linear TV channels, including low budget channels, adult channels and other special interest channels. The test is whether the programmes are comparable, not whether they are identical⁴.

⁴ See Ofcom’s Appeal Decisions on ‘Demand Adult’ and ‘Climax 3 Uncut’:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/DemandAdult.pdf>

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

- 3.7 While a service must be in competition with linear broadcast in order to be an ODPS, the VOD service as a whole does not need to be comparable in form and content to a linear TV service. It is sufficient for the VOD service to be in competition by virtue of the provision of comparable programmes.
- 3.8 Examples of ‘programmes’ given in Article 1(1)(b) of the Directive include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama. It is to be noted that this is not an exhaustive list. Recital 22 makes it clear that the Directive excludes “*games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services*”, “*on-line games*” and “*search engines*” on the grounds that their principal purpose is not the provision of ‘TV-like’ programmes.
- 3.9 In making an assessment of what is ‘TV-like’, ATVOD will compare video content with broadcast television programming of the same or equivalent genre. Factors taken into account will include the following⁵:
- Comparable programmes are more likely to be accompanied by opening and closing title and credit sequences which, amongst other things, create or indicate some degree of separate identity for individual programmes.
 - Comparable programmes in genres which typically make use of presenters, voiceovers, commentary and/or captions, are more likely to make use of these features.
 - Comparable programmes are more likely to be complete programmes, i.e. programmes in relevant genres are more likely to pursue a dramatic conceit and/or have a narrative arc to convey an idea, analogy or theme, to have a structure of acts and scenes in which a story, theme or sustained purpose is maintained and conveyed, and within which there are dramatic or narrative developments.
 - Long-form programming is more generally characteristic of TV broadcasting; however, the duration of the pieces of content in a service should not, on its own, determine whether that content is TV-like; some short video content – such as music videos – is likely to satisfy this test.
 - Comparable programmes may nevertheless be of short duration and may be derived from longer programmes. Complete programmes (with their own editorial integrity) derived from a longer programme can be contrasted with incomplete clips taken from a longer programme, though the use of a playlist mechanism may be relevant with the latter.
 - While the inclusion of TV-like adverts is an indicator that a programme is more likely to be TV-like, the converse is not necessarily true.
 - A programme which has been shown on linear TV will normally be considered ‘TV like’ unless its broadcast was wholly exceptional. However, prior broadcast is not a pre-condition of a programme being considered ‘TV like’.

⁵ See Ofcom’s Appeal Decision relating to ‘Channel Flip’ and BBC Worldwide YouTube sites:

http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel_Flip_scope_appeal.pdf

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/top-gear-youtube-decision.pdf>

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/bbc-food-youtube-decision.pdf>

Is the provision of TV-like programmes the principal purpose of the service?

- 3.10 When an outlet offers ‘TV-like’ programmes among other content (including other video content) ATVOD will consider whether there is a service with the provision of the ‘TV-like’ content as its principal purpose, rather than being merely incidental or ancillary to a different purpose.
- 3.11 When considering whether there is a service with the ‘principal purpose’ of providing TV-like content, ATVOD will take into account factors including the following, each of which may be relevant but none of which is determinative⁶:
- Whether there is a point of entry that is styled as providing, and in practice does provide, a service with its own independent identity
 - Whether videos (and in particular TV-like videos) are grouped together in a distinct area and presented as a catalogue of viewing options which could exist as a coherent consumer offering if removed from the broader service
 - The degree and nature of any linkage between the video on demand content and other content on the broader service.
 - The degree and nature of any linkage between TV-like and non-TV-like video content.
 - The extent to which the video content, and in particular the TV-like video content, needs to be viewed in order to receive the information, education or entertainment being offered. Which content is the primary means of conveying the information sought to be conveyed?
 - The extent to which the video content, and in particular the TV-like video content, is an integral and ancillary element of the broader offering rather than a standalone service. This may also involve considering duration, completeness and independence of the video material and the proportion it comprises.
 - The prominence of the ‘TV-like’ programmes, for example in terms of the branding and structure of the service and their presentation and organisation.⁷
 - The quantity and proportion of TV-like programmes in terms of both absolute numbers and viewing time.
 - The relevance, particularly to the consumer, of the ‘TV-like’ programmes within a service – for example, are these programmes the key benefit of a subscription?
 - The degree and nature of any linkage between TV-like and non-TV-like video content.
- 3.12 Note that Recital 28 of the Directive states that electronic versions of newspapers and magazines will not constitute ODPS. However, a website offering an online newspaper or magazine may also offer an ODPS among other services⁸.

⁶ See Ofcom’s Appeal Decisions relating to The Sun and Everton FC:

<http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/sun-video-decision-appendices/>
<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Everton-TV.pdf>

⁷ See Ofcom’s Appeal Decision relating to The Business Channel:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/business-channel-final-dec.pdf>

Is it an on-demand service?

- 3.13 Access to a service is on-demand if the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service
- 3.14 Section 368A of the Act also states that for access to a service to be ‘on-demand’, the programmes viewed by the user must be received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view).
- 3.15 An “*electronic communications network*” is defined in section 32 of the Act and encompasses the communications infrastructure by means of which voice, content and other data are delivered to consumers. Accordingly, delivery of content through other means, for example, a DVD sent through the post having been ordered online, would not meet this criterion. The selection, downloading and viewing of a movie via the internet, paid for using a voucher bought over the counter in a shop, would meet this criterion. The means of delivery is the deciding factor for this criterion, not the means of payment.
- 3.16 No distinction is made in the Act between ‘instant’ streaming, download- to-rent and download-to-own VOD services
- 3.17 A content service that is broadcast or streamed in a linear form is not covered by the on-demand programme service rules, and may be subject to the relevant broadcast regulation. For further information, providers are advised to contact Ofcom.
- 3.18 ATVOD does not regard linear programmes as becoming on-demand merely because a pause or live restart function is featured or deployed.

Is there editorial responsibility?

- 3.19 The exercise of ‘editorial responsibility’ is relevant to scope in two ways. Firstly, an ‘on-demand programme service’ is defined in the Act as a service falling under a person’s ‘editorial responsibility’. Therefore, a service which by its nature has no person exercising “editorial responsibility” (as defined in section 368A (4) of the Act) would fall outside the regulatory framework.
- 3.20 An example of such a service, with no-one exercising editorial responsibility, might be a catalogue of programmes consisting of user generated content posted to a public website for sharing and exchange, without prior moderation or restriction as to what can be posted.

⁸ For a fuller discussion of these issues please refer to Ofcom’s Appeal Decision relating to The Sun:
<http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/sun-video-decision-appendices/>

- 3.21 However, that is not to say that all content in such sites falls outside the definitions. For example, where ‘hosting’⁹ services are used by commercial entities as a means of distributing relevant content, and meet the other criteria laid down in section 368A of the Act, then such content might fall within the meaning of an ‘on-demand programme service’ for these purposes.
- 3.22 Second, the extent of a person’s editorial responsibility will be relevant in determining who is to be treated as providing an on-demand programme service. For example, an aggregated VOD content service may comprise a number of different on-demand programme services, each provided by a different entity exercising ‘editorial responsibility’ over its own on-demand content. How to determine the identity of the person exercising ‘editorial responsibility’ is discussed in more detail below (see section [5]).

Is it made available to the public by the person with editorial responsibility?

- 3.23 This criterion is satisfied if the service is made available to the general public, and includes subscription services, provided that the subscription is open to members of the public, as well as services that are made available only to the general public located in a particular geographic area within the EU.
- 3.24 The Directive covers only services which are mass media in their function to inform, entertain and educate the general public. “Mass media” can include material that is highly specialised in nature, or non-mainstream. For example, minority sports are likely to be mass media services despite not having large followings, and pornography is likely to be even though the intention is that under 18s should not have access. If such material is capable of being seen by, and having a clear impact on, a significant proportion of the general public then this will be “mass media” under the terms of the Directive.
- 3.25 By way of contrast, ‘mass media’ would not include, for instance, video content produced by professional bodies, trade unions or educational institutions, where the content is very narrowly focused on dissemination of information about the organisation to members, rather than for consumption by the general public (e.g. a video of an AGM, although a standalone service providing access to videos of many companies’ AGMs on a commercial basis may be considered ‘mass media’).
- 3.26 More than one person, not just the one with the closest relationship with users or subscribers, may be involved in making the service available to the public, even though only one of these can have editorial responsibility for the service¹⁰. For example, the person with editorial responsibility is likely still to be considered to make the service available to the public even if they do so through a third party – e.g. a

⁹ Consistent with the definition set out in Regulation 19 of the Electronic Commerce (EC) Regulations 2002, “hosting” refers to the action of the provider of an information society service, which consists of information provided by a recipient or recipients of the service, of storing that information.

¹⁰ See Ofcom’s Appeal Decision relating to the MTV / Nickelodeon / Comedy Central services on Virgin Media: <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/nickelodeon.pdf>

content provider may make a service available via a third party distribution platform which manages the everyday relationship with the public.

4. Who has ‘editorial responsibility’ for the service?

- 4.1 Once it has been determined that there is a relevant on-demand programme service, it is then necessary to determine which single entity should be treated as the provider of that service. By virtue of section 368R (5) of the Act, this is deemed to be the entity which has ‘editorial responsibility’ for the programmes comprising the relevant on-demand programme service (see paragraph 3.19 above). The entity with editorial responsibility is responsible for notification and compliance with the obligations laid down in the Act.
- 4.2 ‘Editorial responsibility’, in this context, means the exercise of general control over:
- a) the selection of the individual programmes included in the range of programmes comprising the relevant on-demand programme service; and
 - b) the manner in which those programmes are organised within that range.
- 4.3 ATVOD recognises that in practice, more than one party may have some editorial role. However, the Act is clear that only one party has editorial responsibility for these purposes. It will not be open to providers to argue that a service that they provide is outside of the scope of section 368A of the Act as a result of responsibility for selection and organisation of programmes being divided between two or more persons.
- 4.4 Please note that in cases of dispute or ambiguity, ATVOD may require sight of contracts and any other relevant evidence. For the avoidance of doubt, in such circumstances ATVOD will apply the following approach¹¹ to determining who holds editorial responsibility for a given service :
- a) consider whether there is contractual wording which expressly contemplates editorial responsibility as that term is to be read under the Act and clearly indicates the parties’ intentions as to the allocation of that editorial responsibility¹²;
 - b) in the absence of the kind of wording in (a), look at other terms of any relevant contract (and as to the intentions they disclose);
 - c) where those other terms do not settle the position sufficiently clearly, look at any agreed conduct and practice between the parties; and

¹¹ See Ofcom’s Appeal Decisions relating to (a) BBC Worldwide on Mediaset and (b) Viacom content on Sky Anytime:

http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/bbc_worldwide_appeal.pdf
<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/bskyb-appeal.pdf>

¹² See Ofcom’s Appeal Decision relating to the MTV / Nickelodeon / Comedy Central services on Virgin Media:

<http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/nickelodeon.pdf>

- d) if necessary and appropriate, perhaps because ambiguity remains, look also at other evidence of the position in practice with regard to the relevant service.
- 4.5 Although providers are advised to address the issue of editorial responsibility in their contracts, **providers cannot use a contract to allocate editorial responsibility where it plainly does not lie in reality.**
- 4.6 Where ATVOD needs clarification on the editorial roles of several parties (usually because there is no contractual wording which expressly addresses this issue) it will, in applying 4.4 b), keep the following points in mind:
- a) Under section 368A(4) of the Act it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has control over content of individual programmes (as a television director might) or distribution of the service (for example physical transmission or retailing of a service to consumers).
 - b) General control over selection of programmes means decision-making on which individual programmes are included in the service, and not on the choice of whole 'channels' of content. Likewise, the specification of high-level parameters (for example, ethical and legal standards, or type or amount of programming to be offered) does not constitute general control over selection, if the content provider retains de facto 'final say' over choice of individual programmes. Ordinarily, the person who has general control over the selection of programmes will be regarded as maintaining general control over the organisation of the programmes (even if on a day to day basis organisation of the programmes is carried out by a third party).
 - c) In determining the person with general control of the organisation of those programmes it is appropriate to consider who determines the relevant viewing information provided alongside the on-demand programme that may then be used in listing the programme in an on-demand programme service: such information might include, for example, what content information should be attached to a particular programme (e.g. the programme synopsis, rating information and other content warnings). Merely identifying the provider of the metadata will not itself be determinative, since the party with access to that data will by definition be the one that provides it.
 - d) The fact that a platform operator may be responsible for the design, branding or look and feel of the catalogue; or that a platform operator or technical services provider may provide appropriate protection mechanisms allowing access to some content to be restricted; or specify how potentially harmful or offensive content should be indicated, for example, with an age-rating and/or a specific text warning ("sexually explicit") and/or a logo, does not mean that they necessarily control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not, on their own, constitute selection or organisation of programmes, as these are solely presentational techniques.

- e) An on-demand content aggregator might provide access to content provided by a number of different providers, who each retain ‘editorial responsibility’ for their content, and are responsible for ensuring that their own content complies with the statutory requirements. Alternatively, an aggregated service could constitute a single service incorporating content from a variety of different sources, with the aggregator holding ‘editorial responsibility’. Or, somewhere between these two alternatives, an aggregator could hold ‘editorial responsibility’ for some services on its platform, but also on that same platform provide access to others’ services (for which those other parties retain editorial responsibility).

5. Does the entity with editorial responsibility fall within the jurisdiction of the UK for these purposes?

- 5.1 Services only fall within the scope of the Act if they are provided by an entity that falls under UK jurisdiction in accordance with Article 2 of the Directive, the relevant provisions of which are summarised below (subject to the exception outlined in section 5.3 of this Guidance). The service provider of an on-demand programme service will fall under the UK’s jurisdiction if it is established in the UK.
- 5.2 A service provider will be deemed to be established in the UK if:
- a) the service provider has its head office¹³ in the UK and the editorial decisions for the relevant on-demand programme service are also taken here;
 - b) alternatively, if only one of (i) the head office; or (ii) the place where editorial decisions for the relevant service are taken is in the UK, with the other function carried out in a different EU Member State, then the question of where the service provider is established will be determined according to the following principles:
 - establishment will be deemed to be Member State where a significant part of the workforce involved in the pursuit of the on-demand programme service activity operates; or
 - if a significant part of the relevant workforce operates in each of those Member States, then establishment is deemed to be where it has its head office; or
 - if a significant part of the relevant workforce operates in a third Member State, then establishment is deemed to be in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State.

and

¹³ The ‘head office’ is not necessarily the registered office, particularly in cases where the registered office is simply a postal address or limited activity takes place there.

- c) if the head office is in the UK but decisions on the on-demand programme service are taken in a third (non-EU) country, or vice-versa, the service provider shall be deemed to be established in the UK, provided that a significant part of the workforce involved in the pursuit of the on-demand programme service operates in the UK.
- 5.3 The Directive does not apply to services intended exclusively for reception in a third country (i.e. non-EU Member State countries) and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States (even if the provider of the service is within UK jurisdiction).
- 5.4 In accordance with the Directive, these jurisdictional criteria are identical to those applicable to linear services.
- 5.5 If you appear to be providing a service associated with the UK, but do not consider that you are under UK jurisdiction, you should be aware that ATVOD would be likely to enquire as to which country's jurisdiction you believe you are under, why you have arrived at that conclusion, and how you have acted on that by satisfying the legislative requirements in that other jurisdiction.

6. Notification requirements

- 6.1 Service Providers are required to notify ATVOD before providing an On Demand Programme Service.
- 6.2 Service Providers which provide VOD content through multiple outlets over which they exercise editorial responsibility and which otherwise meet the requirements of section 368A of the Act, may be treated as providing a single On Demand Programme Service and may make a single overarching notification in respect of all those outlets.
- 6.3 For these purposes it does not matter whether the relevant VOD content is provided on the Service Provider's own platform or proprietary outlets, or on a third party's platform or proprietary outlets. Nor does it matter whether or not the catalogues of programmes made available through the different outlets are the same or substantially similar to each other.
- 6.4 However, where a Service Provider's programmes are provided by a third party, and that third party has editorial responsibility, then such services would not be included within or covered by the Service Provider's single overarching notification. In such circumstances, the duty to notify (and pay the appropriate fee) would instead fall upon the third party. In this scenario the Service Provider's content may be included within the third party's own overarching notification (should the third party have editorial responsibility for two or more outlets).
- 6.5 A Service Provider may also choose to make two or more separate notifications. For example a service provider whose VOD content is aimed at two or more distinct audiences may choose to notify two or more distinct services rather than group the content together under a single overarching notification.

6.6 A notification (whether overarching or not) should be made using the notification form published on the ATVOD website and, among other things, should include:

- a) Full details of outlets¹⁴ operated by the service provider and through which the service is provided to consumers. Such details to include:
 - For any website operated by the ODPS provider: the brand name of the website, its top level URL, and the territories from which the ODPS can be accessed via that website;
 - For any application software platform (“app”) or portal operated by the service provider: the brand name of the “app” or portal and the territories from which the ODPS can be accessed via that application software platform or portal;
 - For any Smart TV or set top box platform¹⁵ operated by the service provider: the brand name of the Smart TV or set top box platform and the territories from which the ODPS can be accessed via that Smart TV or set top box platform.
- b) The brand name of any third party outlet through which the service is provided to consumers, and contact details for the third party operating the outlet.

6.7 Having made a notification, Service Providers are obliged to inform ATVOD before ceasing to provide the service and before providing the service with any significant differences. A ‘significant difference’ would include, among other things:

- a fundamental change in the nature of the programmes offered (eg if the service starts to offer programmes in a new genre, such as hardcore pornography); or
- a change to any of the details provided in accordance with para 6.6.

6.8 Service Providers will also be required to complete an annual return confirming that the information previously supplied to ATVOD remains accurate and complete.

¹⁴ In this context an ‘outlet’ is normally considered to include: a website, a piece of application software (“app”) or mobile portal designed to facilitate access to the on demand content, or a Smart TV or set top box platform.

¹⁵ For these purposes a ‘set top box platform’ includes a cable, satellite or IPTV platform (such as Virgin Media, Sky, BT Vision or TalkTalk), or a service requiring use of a games console or other device specifically designed to be connected to a TV to facilitate on-demand viewing.

7. Further Resources

7.1 Other ATVOD resources:

Guidance on how to notify

http://www.atvod.co.uk/uploads/files/Guidance_on_how_to_notify_Ed_1.2_June_2012.pdf

Notification Form

http://www.atvod.co.uk/uploads/files/Notification_Form_Ed_2.0_May_2013.docx

Guidance on the Rules applying to ODPS

http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf

Fee Tariff

http://www.atvod.co.uk/uploads/files/2013-14_Fee_Tariff.pdf

7.2 General information on Ofcom Appeals and Sanctions Decisions

<http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/>

7.3 Relevant legislation

Audiovisual Media Services Regulations 2009

<http://www.legislation.gov.uk/ukSI/2009/2979/contents/made>

Audiovisual Media Services Regulations 2010

<http://www.legislation.gov.uk/ukSI/2010/419/contents/made>

Audiovisual Media Services Directive

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