

## On Demand cases

**APPEAL BY PANDORA BLAKE AGAINST A NOTICE OF DETERMINATION THAT THE PROVIDER OF THE SERVICE “DREAMS OF SPANKING” (AS AT THE SITE [WWW.DREAMSOFSpanking.COM](http://WWW.DREAMSOFSpanking.COM)) HAS CONTRAVENED SECTIONS 368BA (REQUIREMENT TO NOTIFY AN ON-DEMAND PROGRAMME SERVICE), AND 368D(3)(ZA) (REQUIREMENT TO PAY A FEE) OF THE COMMUNICATIONS ACT 2003.**

### **Section 1 – Summary of Ofcom’s Decision**

1. This document sets out Ofcom’s Decision in respect of the Appeal by Pandora Blake (the “Appellant”) against a determination by the Authority for Television On Demand (“ATVOD”) (the “Determination”). On 30 July 2015 ATVOD determined that the service Dreams of Spanking (the “Service”) at the site [www.dreamsofspanking.com](http://www.dreamsofspanking.com) was at the relevant time an “on-demand programme service” (“ODPS”) as defined by Part 4A of the Communications Act 2003 (the “Act”).
2. Ofcom has reached this Decision, in accordance with the relevant procedures<sup>1</sup> which were in place when ATVOD’s Determination was made<sup>2</sup>. Ofcom has made its own assessment of the Service and considered: ATVOD’s Determination; audiovisual material provided by ATVOD; the submissions provided to us by the Appellant in its appeal; relevant legislation including the Act and the Audiovisual Media Services Directive (the AVMS Directive); relevant research by Ofcom; and previous Ofcom decisions on appeals regarding ATVOD scope determinations.
3. Ofcom’s Decision is that, at the time of ATVOD’s Determination, the Service (as described further below) did not fulfil the criteria set out in section 368A(1)(a) of the Act. Ofcom therefore proposes to quash ATVOD’s determination of 30 July 2015 that the Service was at the relevant date an ODPS and replace it with our Decision.

### **Section 2 – Summary of the Legal Framework**

4. The AVMS Directive is a European Directive amongst the purposes of which is to provide a level of protection in accordance with that which consumers of ODPSs might expect; and to provide a measure of fair competition across Member States between those providing:
  - a) traditional (linear) television broadcasting services; and
  - b) on-demand services that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers.
5. The Audiovisual Media Services Regulations 2009 gave effect to the AVMS Directive in the UK by inserting Part 4A into the Act. Part 4A was amended by

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

<sup>2</sup> As discussed in paragraphs 11 and 12 below, the co-regulatory regime for non-advertising content on OPDS ceased to have effect from 31 December 2015.

The Audiovisual Media Services Regulations 2010 and by the Audiovisual Media Services Regulations 2014, and creates the statutory regime for the regulation of ODPSs.

6. A service is only an ODPS if it satisfies the defining criteria in section 368A(1) of the Act which states:

*“... a service is an “on-demand programme service” if –*

- (a) 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;*
- (b) access to it is on-demand;*
- (c) there is a person who has editorial responsibility for it;*
- (d) it is made available by that person for use by members of the public; and*
- (e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive”.*

7. Section 368A(1)(a) of the Act provides for a composite definition, to be applied in light of the AVMS Directive, to determine whether services are within the scope of regulation. It can be characterised as comprising a *“principal purpose part”* - whether there is a service the “principal purpose” of which is the provision of audiovisual material; and a *“comparability part”*- whether the form and content of programmes comprising that service is comparable with the form and content of programmes normally included in linear broadcast television services.

8. All parts of the composite definition referred to above must be considered and met for a service to be an ODPS. There must be a service whose 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.

9. Broadly, the composite definition referred to above requires those assessing a service to:

- a. look at what is provided as a whole and consider whether there is anything which is a service whose principal purpose is the provision of audiovisual material; and
- b. if so, it is necessary to consider whether, taken as a whole, the service is one whose principal purpose is providing comparable programmes<sup>3</sup> (which is a question that focuses on the audiovisual material that comprises the principal purpose of the service).

10. Section 368BA(1) of the Act provides for an advance notification requirement on the part of persons providing an ODPS.

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<sup>3</sup> That is, comparable in form and content to the form and content of programmes normally included in television programme services.

11. As part of a co-regulatory regime that applied until 31 December 2015, ATVOD was designated by Ofcom as the “appropriate regulatory authority” to carry out certain functions under section 368B of the Act<sup>4</sup> (the “Designation”). As part of that Designation, ATVOD had power to decide whether a service was an ODPS<sup>5</sup>. Where ATVOD determined that a service was an ODPS, its provider was subject to a requirement to notify ATVOD and pay a fee. The provider had to also ensure the ODPS met a limited number of regulatory requirements. ATVOD’s decisions on such matters were “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures*”.
12. Whilst Ofcom decided to end the co-regulatory regime for non-advertising content on ODPS with effect from 31 December 2015, ATVOD’s Determination in this case was made on 30 July 2015, whilst the Designation was still in force. That Determination remains valid notwithstanding the end of the co-regulatory regime, and Ofcom now exercises the power to decide whether a service is an ODPS on a sole basis. Consequently, it is appropriate to continue to consider this matter as an appeal under the procedures in place when the decision was made.
13. As set out in those procedures<sup>6</sup>, Ofcom’s decision in any appeal, “... *may*:
  - (a) *uphold ATVOD’s decision; or*
  - (b) *quash ATVOD’s decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;*
  - (c) *substitute Ofcom’s decision for that of ATVOD...*”
14. In interpreting section 368A, Ofcom necessarily has regard to relevant provisions of the Directive. This is because that section of the Act implements the Directive insofar as that Directive defines the scope of on demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on demand services that are subject to it.
15. Recital 24 of the AVMS Directive states that:

*“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. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of a programme should be interpreted in a dynamic way taking into account developments in television broadcasting”.*

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<sup>4</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ATVOD\\_revised\\_Designation.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ATVOD_revised_Designation.pdf)

<sup>5</sup> Paragraph 6(ii) of the Designation. This also makes clear that any such decision is “subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.”

<sup>6</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

16. Recital 21 of the AVMS Directive states:

*“For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”.*

17. This Decision also takes into account relevant precedents to inform Ofcom’s assessment of this case. These precedents include our Sun Video decision (the “Sun Decision”)<sup>7</sup> and other relevant cases referred to within this document.

18. In light of the provisions set out above and following the approach adopted by Ofcom in previous appeals, we also consider it necessary, when considering whether a service is an ODPS, to take a step back and consider in light of all the circumstances:

- a) whether the relevant audiovisual material is likely to compete for the same audience as linear television broadcasts; and
- b) whether the nature of that material and the means of accessing it would lead users to reasonably expect regulatory protection within the scope of the AVMS Directive.

### **Section 3 – Determination under Appeal**

#### **ATVOD’s Determination**

19. On 27 February 2015 ATVOD wrote to the Appellant informing her of her statutory obligation to notify provision of an ODPS and setting out the statutory criteria which define an ODPS. After an initial investigation of the Service the ATVOD Executive considered that the Services raised issues under Rules 1 and 4 of ATVOD’s Rules<sup>8</sup> and subsequently conducted a full investigation between 25 March and 23 April 2015. Following this investigation, on 8 June 2015 ATVOD informed the Appellant of its Preliminary View that the Service was an ODPS in respect of which a notification had not been given and a fee not paid. Following receipt of the Appellant’s submissions on the Preliminary View, ATVOD issued its Determination on 30 July 2015 that the Service was an ODPS for the purposes of Part 4A section 368A(1) of the Act, that the advance notification as required by section 368BA of the Act had not been given, and the fee as required by section 368D(3)(a) had not been paid.

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<sup>7</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

<sup>8</sup> [http://www.atvod.co.uk/uploads/files/ATVOD\\_Rules\\_Guidance\\_Ed\\_3.0\\_May\\_2015.pdf](http://www.atvod.co.uk/uploads/files/ATVOD_Rules_Guidance_Ed_3.0_May_2015.pdf) - Rules 1 and 9 relate to notification of intention to provide an ODPS and the connected requirement to pay a fee.

20. In relation to criterion (a) in section 368A(1) of the Act (which is the key issue in this Appeal) ATVOD's Determination<sup>9</sup> was that:
- a) the Service contained programmes the form and content of which was comparable to that of programmes included in television programme services, specifically on broadcast adult channels;
  - b) the videos did not appear to be ancillary to the still photos or any other part of the sites, and that the principal purpose of the Service was the provision of videos.
21. ATVOD also considered the remaining criteria of section 368A(1)(b) to (e) of the Act and set out how it considered the Service fulfilled each of these. ATVOD concluded the Service was, at the time of assessment, an ODPS.
22. The Determination set out the Appellant's right to request an appeal to Ofcom as set out in paragraphs 6(ii) and 7(xvii) of the Designation. ATVOD also directed the Appellant to Ofcom's appeals procedures.

### The Appeal

23. The Appellant wrote to Ofcom on 27 August 2015 to appeal against the Determination, requesting Ofcom to set aside ATVOD's Determination that the Service is an ODPS falling within the scope of Part 4A of the Act. The Appellant stated that she did not consider that the Service constituted an ODPS as defined in section 368A of the Act and that she was therefore not required to notify the service to ATVOD or pay a fee.
24. The Appellant maintained that the Service did not satisfy the requirements for an ODPS, particularly when considered in the light of Recitals 21 and 24 of the AVMS Directive.
25. In summary, the Appellant argued that:
- a) The definition in section 368A(1)(a) of the Act was not satisfied as the principal purpose of the Service was not the provision of video the form and content of which was TV-like or in competition with linear television, and that the Service was primarily non-economic. Consideration of the characteristics identified in *On demand video services: understanding consumer choices*, prepared by Essential Research for Ofcom in October 2012 (the Essential research)<sup>10</sup> suggests that the form and content of the videos available on the Service were not comparable to the form and content of programmes normally included in adult linear television.
  - b) The Service is primarily non-economic in nature. It is a niche outlet aimed at the distribution of audiovisual content generated by private users for the purposes of sharing and exchanging with a community of interest, and is not mass media within the meaning of Recital 21.

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[http://www.atvod.co.uk/uploads/files/Rules\\_1\\_and\\_4\\_FD\\_Dreams\\_of\\_Spanking\\_300715\\_FO\\_R\\_PUBLICATION.pdf](http://www.atvod.co.uk/uploads/files/Rules_1_and_4_FD_Dreams_of_Spanking_300715_FO_R_PUBLICATION.pdf)

<sup>10</sup> [http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/Research\\_Report.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/Research_Report.pdf)

- c) The Service is not in competition with linear television within the meaning of Recital 24 of the Directive. In 2014 it had a limited subscriber base and generated limited revenue which meant that it cannot be considered to compete for the same audience as television broadcasts.

#### Ofcom's Preliminary View

26. On 3 May 2016, Ofcom set out its Preliminary View on the appeal, which was that ATVOD's final determination should not be upheld and that the Appellant was not, in respect of the Service, the provider of an ODPS on 25 March 2015 and 23 April 2015. Ofcom provided the Preliminary View to the Appellant and gave them the opportunity to make representations. The Appellant did not make any representations.

#### **Section 4 – Ofcom's Decision**

##### Ofcom's Assessment

27. As set out above, the substantive grounds of Appeal were in relation to section 368A(1)(a) of the Act. The Appellant did not specifically dispute ATVOD's finding that the Service met the other criteria of section 368A(1).
28. Ofcom reviewed the whole and constituent parts of the Appellant's website at the time ATVOD made its Determination. Ofcom viewed screen grabs taken by ATVOD at the time of its Preliminary View, video evidence captured by ATVOD at the time of its Determination and documentation provided by the Appellant at the point of its Appeal.
29. Ofcom also undertook a review of the website at [www.dreamsofspanking.com](http://www.dreamsofspanking.com) following receipt of the Appellant's appeal submission. At this time, the design and content of the website did not appear to be significantly different compared to the video capture evidence gathered by ATVOD.

##### Principal Purpose Assessment

30. Ofcom's approach to applying the principal purpose test in section 368A(1)(a) of the Act is set out in greater detail in the Sun Decision, taking as reference the characteristics identified in the Sun Decision as relevant, before drawing conclusions on the service as a whole.

##### Homepage

31. The [www.dreamsofspanking.com](http://www.dreamsofspanking.com) homepage did not change in appearance or layout from pre paywall to post paywall. Once a user had signed in, they were given access to all of the video content and photographic content that had been restricted in the pre-paywall experience. Audiovisual and photographic content was catalogued both pre- and post-paywall in a manner allowing it to be accessed via various tabs on the homepage.
32. The homepage described the service as "Dreams of Spanking: fairtrade spanking, corporal punishment and discipline fantasies by Pandora Blake. Join us". Further down the page, there was text stating "Welcome to the new production studio by UK spanking performer Pandora Blake. Dreams of Spanking offers high-quality, aesthetically beautiful spanking films, photo

galleries and audio stories”. This text would suggest that the Service intended to offer a multimedia experience aimed at those with a fetish interest in spanking. The homepage did not appear to present the Service as solely providing users with audiovisual material; there was reference to videos but also to still images and stories.

33. Further down the homepage, under the heading “Latest Updates”, were links to four separate scenes, featuring a screenshot of the video footage, accompanied by four photographic images taken from that footage, a brief description of the narrative of the story depicted in the footage, and a breakdown of the length of the footage and amount of photographic imagery. Ofcom noted that the audiovisual content was presented alongside the sample photographic content, as complements to each other, with no particular prominence to one piece of content over another, in terms of organisation and layout.
34. Once a user clicked on the screenshot of the video footage or photographic images taken from the footage, it led to a separate scene-specific page that contained text, video footage and photographic material. The organisation and layout of the video and photographs was similar to that on the homepage. The video was presented alongside the sample photographs, in a way that suggested them to complement each other.

#### Cataloguing and accessing

35. Ofcom noted that there were several methods for users to find and access content. The audiovisual material was not catalogued on a separate tab on the website, except for under the “Browse by Keyword” facility on the homepage, which allowed the user to search for content using audiovisual specific terms such as “film”. The results of these searches returned both video and photographic content, with no particular prominence given to either type of media.
36. Ofcom also noted that when users searched for material using the various other methods on the homepage, the search results featured both video and photographic content integrated together, and in some cases results returned only photographic content.
37. Accordingly, Ofcom considered the cataloguing did not suggest that the photographic material was ancillary to the provision of video material. Rather, they were catalogued together in such a way that they appeared complementary to one another.

#### Presentation and Styling

38. As noted above, wording on the homepage suggested an integrated offering of photographic content, audiovisual material and stories, and this was reflected elsewhere on the service.
39. Ofcom noted that audiovisual material featured prominently across the website, such as on the homepage under the “latest updates” headline, discussed in the blog section, and accessible via various methods of searching for content across the website. However, Ofcom did not consider that the Service presented itself as principally a destination for video content (with some ancillary non-audiovisual material). The audiovisual material was integrated together with other types of content, such that it was indissociably complementary to the overall offering of

the Service that is a fetish interest website. For instance, searches for specific content would return results containing video and photographic material, with no greater prominence given to either type of media.

#### Completeness, Independence of Material

40. Ofcom noted that the videos on the Service, of an average length of 10-20 minutes, comprised complete programmes that could be understood and watched fully on their own, rather than “bite sized” extracts of longer programmes or material needing access to supporting material to understand sufficiently, such as text.
41. However, Ofcom did not consider the audiovisual content to be a standalone service. The video content was always accompanied by photographs of the scene depicted in the video, such that the audiovisual material was complemented by photographic content, forming part of an integrated offering of audiovisual and photographic content, together with the blog available on the Service, which discussed the scenes depicted in the videos and photographs, as well as other topics related to the theme of the Service.

#### Content and Access Links

42. Ofcom noted that there were various navigational links to audiovisual material via the different search methods and that audiovisual material was accompanied by photographic material. Additionally, the pages featuring video and photographic content in turn contained links to other pages tagged with keywords, denoting similarly themed audiovisual and photographic content.
43. More importantly, the content of the photographs replicated the content of the video footage, unless the photographic images represented a scene of their own and then did not feature accompanying video footage. This reinforced the view that the audiovisual material was not significantly different or distinct from the photographic material and is part of an integrated service offering a portal for users to access both photographic and video content.

#### Balance of material

44. From the Appellant’s submission, Ofcom noted that the Service included 190 videos of an average length of 10-20 minutes. Ofcom also noted from ATVOD’s submission that there 4971 photographic images. Ofcom considered that the amount of video content was substantial but we noted that it was made available alongside a substantial offering of photographic content, all of which was regularly refreshed. However, when considering the balance of material we do not only consider issues of volume.
45. We did not consider that the videos featured on the Service were the primary means by which it offered a service to its users such that other aspects had a merely ancillary role. For instance, some parts of the website only featured photographic imagery without any accompanying video content. Moreover, the significant blog content led us to conclude that the Service aimed to provide an offering which integrated different types of content rather than having the sole purpose of the provision of audiovisual material.

### Overall preliminary assessment on principal purpose

46. Ofcom's overall view was that characteristics of the material available on the Appellant's website and the manner in which it was provided do not support ATVOD's finding that the site constituted a service a principal purpose of which was providing audiovisual material.
47. Whilst the Service offered a significant number of videos of a substantial duration that could be understood and watched fully on their own, Ofcom did not consider this audiovisual content to be a distinct service from other, similarly prominent aspects of the site. The audiovisual material was integrated together with other types of content, such as photographic material, such that it was indissociably complementary to the overall offering of the Service, that is, a fetish interest website.
48. In light of that assessment, Ofcom did not need to consider in further detail whether the nature of the video content on the Service was comparable to adult linear TV programmes in accordance with the comparability part of the definition in section 368A(1)(a).

### Purposive Assessment: Regard to the AVMS Directive

49. As set out above, Ofcom has had specific regard in this Decision to the provisions of the AVMS Directive. We have also taken a step back, and having more general regard to the relevant provisions of the Directive, considered whether the Service provided a service that the Directive seeks to bring within its regulatory scope.
50. As described in paragraph 14 to 16, the AVMS Directive includes Recitals intended to aid its interpretation. These Recitals make clear that, amongst other things, the scope of audiovisual media services intended to be regulated under the Directive is limited to those services that are "mass media" (Recital 21) and "compete for the same audience as television broadcasts" (Recital 24).
51. We note that the Appellant raised arguments regarding the need to interpret the provisions of section 368A(1)(a) purposively in accordance with the AVMS Directive and in particular in light of Recital 21 and 24. We consider below the arguments the Appellant raised in relation to these recitals.

### Recital 21

52. Ofcom had regard to the Appellant's argument that the Service falls outside the scope of an ODPS because it is not a "mass media" service and is "primarily non-economic" within the meaning of Recital 21 of the Directive.
53. Ofcom noted that the Appellant argued that the "video content is primarily non-economic, generated by a private user for the purposes of sharing and exchange within communities of interest". The Appellant also stated that in 2014, the Service had limited membership and a low monthly turnover.
54. Ofcom considered that the fact that a service is viewed only by a limited number of people does not necessarily mean that it cannot be in competition with linear TV. We also note the wording of Recital 21 states the Directive covers services which "...*could* have a clear impact on, a significant proportion of the general public" (emphasis added). In our view the Service was capable of being

accessed by a larger audience, and as such, the limited audience of the Service should not of itself mean that that the Service was “*primarily non-economic*” in nature within the meaning of Recital 21.

55. However, as we were able to conclude that the Service was out of scope on the basis that the provision of the video content was not in itself a principal purpose of the Service, we did not consider it necessary to come to a conclusion on this point.

#### Recital 24 assessment

56. The Appellant also argued that given the membership and turnover figures of the service, it was unlikely that the website would compete for the same audience as television broadcast or even with any small, niche interest channel. As such, the appellant considered the service fell outside of the scope of Recital 24.
57. Ofcom noted that Recital 24 states that one of the key purposes of the AVMS Directive is to maintain undistorted competition between linear TV broadcasting and ‘TV-like’ non-linear audiovisual services which compete for the same audience.
58. Ofcom took the view that the video content made available on the Service is not a standalone service but is an integrated element of the overall offering which also included the photographic stills and accompanying text. Ofcom therefore considered that, assessing the Service as a whole, it was not likely to directly compete with adult television broadcasting services for the same audience.
59. Ofcom also considered Recital 24’s reference to [whether], “...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.” Ofcom noted Recital 24 makes clear that it is not just the “means of access” which are relevant but also the “nature” of the Service as well. Given that the nature of the Service can be characterised as a web-based portal for accessing both photographic and/or video content of an adult nature depending on the user’s preferences, Ofcom considered that a user would not reasonably expect regulatory protection under the AVMS Directive.

#### Section 5 – Conclusion

60. For the reasons set out above, Ofcom considered that the Service was not a service the principal purpose of which was to provide audiovisual material which was comparable to the form and content of linear television programme services, and which was in competition with linear television programme services. Ofcom’s Decision is that the Service was, therefore, not an ODPS within the meaning of section 368A(1) of the Act as at the time of ATVOD’s Determination.
61. Consequently, Ofcom’s Decision is that the Appellant was not in breach of the advance notification requirement under section 368BA of the Act, and the requirement to pay a fee under section 368D(3)(za).
62. Ofcom’s Decision is therefore that the Appellant was not, for the reasons set out above, in respect of the Service, the provider of an ODPS at 25 March 2015 and 23 April 2015 and that the Appellant’s appeal against ATVOD’s Determination should be upheld and ATVOD’s decision should be quashed.

**APPEAL BY LAURA JENKINS AGAINST A NOTICE OF DETERMINATION THAT THE PROVIDER OF THE SERVICES “CANDY GIRL PASS” AND “ALL TEENS WORLD” (AS AT THE SITES SHOWN IN ANNEXES 1) AND 2) HAS CONTRAVENED SECTIONS 368BA (REQUIREMENT TO NOTIFY AN ON-DEMAND PROGRAMME SERVICE) AND 368D(3)(ZA) (REQUIREMENT TO PAY A FEE) OF THE COMMUNICATIONS ACT 2003.**

**Section 1 – Summary of Ofcom’s Decision**

1. This document sets out Ofcom’s Decision in respect of the Appeal by Laura Jenkins (the Appellant) against a determination by the Authority for Television On Demand (ATVOD) (the Determination). ATVOD determined in its Determination of 23 October 2014, that the service Candy Girl Productions (the Service Provider) consisting of two main outlets [www.allteensworld.com](http://www.allteensworld.com)<sup>1</sup> (as at sites shown in Annex 2) and [www.candygirlpass.com](http://www.candygirlpass.com) (as at sites shown in Annex 1) is (or was at the relevant time) an on-demand programme service (ODPS) as defined by Part 4A of the Communications Act 2003 (the Act).
2. Ofcom has reached this Decision, in accordance with the relevant procedures<sup>2</sup> which were in place when ATVOD’s Determination was made<sup>3</sup>. Ofcom has made its own assessment of the Service and considered: ATVOD’s Determination; audiovisual material provided by ATVOD; the submissions provided to us by the Appellant in its appeal; relevant legislation including the Act and the Audiovisual Media Services Directive (the AVMS Directive); relevant research by Ofcom; and previous Ofcom decisions on appeals regarding ATVOD scope determinations.
3. Ofcom’s Decision is that, at the time of ATVOD’s Determination, [www.candygirlpass.com](http://www.candygirlpass.com) and its linked sites as shown in Annex 1 (the Service) did not fulfil the criteria set out in section 368A(1) of the Act. Ofcom did not consider that the site [www.allteensworld.com](http://www.allteensworld.com) and its linked sites as shown in Annex 2 to be part of the Service Provider; further, we did not consider [www.allteensworld.com](http://www.allteensworld.com) fulfilled the criteria set out in 368A(1) of the Act. Ofcom therefore proposes to quash ATVOD’s determination of 23 October 2014 that the services were at the relevant date ODPS and replace it with our Determination.

**Section 2 – Summary of the Legal Framework**

4. The AVMS Directive is a European Directive amongst the purposes of which is to provide a level of protection in accordance with that which consumers of ODPSs might expect; and to provide a measure of fair competition across Member States between those providing:
  - a) traditional (linear) television broadcasting services; and

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<sup>1</sup> The Service Provider identified to Ofcom that [www.allteensworld.com](http://www.allteensworld.com) was the correct URL, and not [www.allteensworld.co.uk](http://www.allteensworld.co.uk) as noted by ATVOD.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

<sup>3</sup> As discussed in paragraphs 11 and 12 below, the co-regulatory regime for non-advertising content on OPDS ceased to have effect from 31 December 2015.

- b) on-demand services that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers.
5. The Audiovisual Media Services Regulations 2009 gave effect to the AVMS Directive in the UK by inserting Part 4A into the Act. Part 4A was amended by The Audiovisual Media Services Regulations 2010 and creates the statutory regime for the regulation of ODPSs.
6. A service is only an ODPS if it satisfies the defining criteria in section 368A(1) of the Act which states:
- “... a service is an ODPS if –*
- (c) 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;*
  - (d) access to it is on-demand;*
  - (e) there is a person who has editorial responsibility for it;*
  - (f) it is made available by that person for use by members of the public; and*
  - (g) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive”.*
7. Section 368A(1)(a) of the Act provides for a composite definition, to be applied in light of the AVMS Directive, to determine whether services are within the scope of regulation. It can be characterised as comprising a “*principal purpose part*” - whether there is a service the “principal purpose” of which is the provision of audiovisual material; and a “*comparability part*” - whether the form and content of programmes comprising that service is comparable with the form and content of programmes normally included in linear broadcast television services.
8. All parts of the composite definition referred to above must be considered and met for a service to be an ODPS. There must be a service whose 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.
9. Broadly, this composite definition requires those assessing a service to:
- c. look at what is provided as a whole and consider whether there is anything which is a service whose principal purpose is the provision of audio visual material; and
  - d. if so, it is necessary to consider whether, taken as a whole, the service is one whose principal purpose is providing programmes, the form and content of which are comparable to the form and content of programmes normally included in television programme services.<sup>4</sup> (This is a question that focuses on the audio visual material that comprises the principal purpose of the service).

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<sup>4</sup> That is, comparable in form and content to the form and content of programmes normally included in television programme services.

10. Section 368BA(1) of the Act provides for an advance notification requirement on the part of persons providing an ODPS.
11. As part of a co-regulatory regime that applied until 31 December 2015, ATVOD was designated by Ofcom as the “appropriate regulatory authority” to carry out certain functions under section 368B of the Act<sup>5</sup> (the “Designation”). As part of that Designation, ATVOD had power to decide whether a service was an ODPS<sup>6</sup>. Where ATVOD determined that a service was an ODPS, its provider was subject to a requirement to notify ATVOD and pay a fee. The provider had to also ensure the ODPS met a limited number of regulatory requirements. ATVOD’s decisions on such matters were “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures*”.
12. Whilst Ofcom decided to end the co-regulatory regime for non-advertising content on ODPS with effect from 31 December 2015, ATVOD’s Determination in this case was made on 14 October 2014, whilst the Designation was still in force. That Determination remains valid notwithstanding the end of the co-regulatory regime, and Ofcom now exercises the power to decide whether a service is an ODPS on a sole basis. Consequently, it is appropriate to continue to consider this matter as an appeal under the procedures in place when the decision was made.
13. As set out in those procedures<sup>7</sup>, Ofcom’s decision in any appeal, “... *may*:
  - (d) *uphold ATVOD’s decision; or*
  - (e) *quash ATVOD’s decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;*
  - (f) *substitute Ofcom’s decision for that of ATVOD...*”
14. In interpreting section 368A, Ofcom necessarily has regard to relevant provisions of the Directive. This is because that section of the Act implements the Directive insofar as that Directive defines the scope of on demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on demand services that are subject to it.
15. Recital 24 of the AVMS Directive states that:

*“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”. “In the light of this and in order to prevent disparities as regards free movement and competition, the concept of a programme should*

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<sup>5</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ATVOD\\_revised\\_Designation.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ATVOD_revised_Designation.pdf)

<sup>6</sup> Paragraph 6(ii) of the Designation. This also makes clear that any such decision is “subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.”

<sup>7</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

*be interpreted in a dynamic way taking into account developments in television broadcasting”.*

16. Recital 21 of the AVMS Directive states:

*“For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”.*

17. This Decision also takes into account relevant precedents to inform Ofcom’s assessment of this case. These precedents include our Sun Video decision (the Sun Decision)<sup>8</sup> and other relevant cases referred to within this document<sup>9</sup>.

18. In light of the provisions set out above and following the approach adopted by Ofcom in previous appeals, we also consider it necessary, when considering whether a service is an ODPS, to take a step back and consider in light of all the circumstances:

- c) whether the relevant audiovisual material was likely to compete for the same audience as linear television broadcasts; and
- d) whether the nature of that material and the means of access to it would lead users to reasonably expect regulatory protection within the scope of the AVMS Directive.

### **Section 3 – Determination under Appeal**

#### **ATVOD’s Determination**

19. On 20 August 2012 ATVOD wrote to the Appellant informing it of its statutory obligations to notify provision of an ODPS and setting out the statutory criteria that define an ODPS. On 30 January 2014 ATVOD informed the Appellant of its Preliminary View that the Service provided within Candy Girl Productions was an ODPS in respect of which a notification had not been given and a fee not paid. Following receipt of the Appellant’s written submissions on the Preliminary View, ATVOD issued its Determination on 14 October 2014 that the Service was an ODPS for the purposes of Part 4A section 368A(1) of the Act and that a notification had not been given and a fee not paid.
20. ATVOD also considered the remaining criteria of section 368A(1) of the Act (criteria (b) to (e)), and set out how the Service fulfilled each of these. ATVOD

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<sup>8</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

<sup>9</sup> <http://stakeholders.ofcom.org.uk/enforcement/on-demand-standards/scope-appeals/>

therefore concluded the Service was, on 3-8 January and 1-7 October 2014, an ODPS.

21. In summary, ATVOD's Determination<sup>10</sup> stated that:
- a) the Service contained programmes the form and content that were comparable to that of programmes normally included in television programme services, specifically on broadcast adult channels; and
  - b) that the videos did not appear to be ancillary to the still photos or any other part of the sites, and that the principal purpose of the Service was the provision of videos.
22. The Determination set out the Appellant's right to request an appeal to Ofcom as set out in paragraphs 6(ii) and 7(xvii) of the Designation. ATVOD also directed the Appellant to Ofcom's appeals procedures<sup>11</sup>.

### The Appeal

23. The Appellant wrote to Ofcom on 18 November 2014 requesting an appeal against the Determination. The Appellant stated that ATVOD had incorrectly determined that the Service was an ODPS fulfilling each of the statutory criteria set out in section 368A of the Act.
24. The Appellant argued that section 368A(1)(a) was not satisfied as the principal purpose of the Service was not the provision of video. The Appellant stated that:
- a) the main purpose of the sites were a fan site. The images and video content were included as proof that the models were real;
  - b) members of the websites were more interested in seeing images and in talking to the models via forums/ diaries and social media platforms, instead of watching the videos; and
  - c) that "less than 1% of the content inside the members area is video", and that CandyGirlPass contained "95893 images" in the gallery, and only "270 videos."
25. The Appellant also argued that the content was not comparable to TV-like programmes; that the videos on the websites are much lower quality to those found on TV (at 640x480 pixels), and much shorter in length at an average of 3-5 minutes long. The Appellant also said the Service offered non-nude/ implied nude content, and could not be compared to the adult content typical of adult television programme services.
26. The Appellant finally argued that section 368A(1)(b) was not satisfied and queried whether the service could be considered an on-demand service, stating that the limits on download speed affected the consumption of the audiovisual material.

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<sup>10</sup> Full details can be found at:  
[http://www.atvod.co.uk/uploads/files/Rules\\_1&4\\_FD\\_Candy\\_Girl\\_Productions\\_FINAL\\_FOR\\_PUBLICATION.pdf](http://www.atvod.co.uk/uploads/files/Rules_1&4_FD_Candy_Girl_Productions_FINAL_FOR_PUBLICATION.pdf)

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

### Ofcom's Preliminary View

27. On 3 May 2016, Ofcom set out its Preliminary View on the appeal, which was that ATVOD's final determination should not be upheld and that the Appellant was not, in respect of the Service, the provider of an ODPS on 3-8 January 2014 and 1-7 October 2014. Ofcom provided the Preliminary View to the Appellant and gave them the opportunity to make representations. The Appellant did not make any representations.

### **Section 4 – Ofcom's Decision**

28. As set out above, the substantive grounds on which the Appellant based its Appeal to Ofcom were in relation to section 368(1)(a) of the Act, and questioned if the download speed it imposed on access to content might mean the service was not 'on-demand'.

### Ofcom's Assessment

29. Taking the approach outlined above, Ofcom has reviewed the whole and constituent parts of the Appellant's websites at the time ATVOD made its Determination. Ofcom viewed screen grabs gathered by ATVOD at the time of its Preliminary View, video evidence captured by ATVOD at the time of its Determination and documentation provided by the Appellant at the point of its appeal.

### The Service

30. Ofcom undertook a review of the websites listed under Annex 1 between November –April 2014 following receipt of the Appellant's appeal submission. At this time, the design and content of [www.candygirlpass.com](http://www.candygirlpass.com) and [www.allteensworld.com](http://www.allteensworld.com) and their linked sites did not appear to be significantly different compared to the video capture evidence gathered by ATVOD. When reviewing these sites, Ofcom identified significant factors that led it to conclude that [www.candygirlpass.com](http://www.candygirlpass.com) and [www.allteensworld.com](http://www.allteensworld.com) were not part of the same service for the reasons outlined in paragraph 30.
31. Ofcom noted that:
- a) Although there were similarities in the way both [www.allteensworld.com](http://www.allteensworld.com) and [www.candygirlpass.com](http://www.candygirlpass.com) were set up (a main site featuring models, some of whom had their own linked sites; the apparent use of the same website template with tabs for each section and a space for banner advertising), they required separate paid subscriptions to view different content. Ofcom considered that this indicated distinct services.
  - b) Furthermore, the two sites were not navigationally linked. [www.candygirlpass.com](http://www.candygirlpass.com) served as the single route to all the models featured on its site, and when navigating the linked URLs, the subscriber was re-directed to [www.candygirlpass.com](http://www.candygirlpass.com) to access the content for the model, as well as to view additional models. However, this did not include any models featured on [www.allteensworld.com](http://www.allteensworld.com). This suggested that [www.candygirlpass.com](http://www.candygirlpass.com) served as the repository of pictures and videos for the models featured on Candy Girl Pass-

irrespective of whether they were accessed through www.candygirlpass.com or its linked URLs - but that the content on www.allteensworld.com and its linked URLs were not part of this Service.

- c) This separation of navigation was supported by the marketing and presentation of materials on each site. For example, the pre pay wall homepage of www.candygirlpass.com described itself as a 'mega site...updated daily with content from ALL of our sites', indicating the provider considered www.candygirlpass.com and its linked URLs to be part of one service. But this did not link back to www.allteensworld.com and its linked URLs.
32. Ofcom therefore considered that www.candygirlpass.com and its linked URLs were one and the same service, but that www.allteensworld.com and its linked URLs should be considered separately for the purposes of this appeal.
33. After establishing that the two services should be considered separately, Ofcom first evaluated www.candygirlpass.com (as at Annex 1).

#### Principal Purpose Assessment: www.candygirlpass.com

34. Ofcom's approach to applying the principal purpose test in section 368A(1)(a) of the Act is set out in greater detail in the Sun Decision. Taking as reference the characteristics identified in Sun Video, Ofcom's assessment of the Service against those criteria is as follows:

#### Pre-pay wall Homepage

35. Ofcom looked at the www.candygirlpass.com homepage before the pay wall. It featured images of semi-nude models and some text, and included one embedded video. At the bottom of the page, several 'branded models' were also identified. Five icons at the top of the page served as tabs to 'Join Now', access 'Members login', view 'Photos' and 'Videos' and 'Continue'. Text in the middle of the page stated "*It's finally come to the time where we've decided to launch a mega site full of the hottest girls, pictures and videos that we just know you all love!*" Text at the bottom of the page stated "*Get Instant access to all of our pictures and videos*". This emphasised the website was a destination for photographic and video content for branded models. The branded models were the main theme of the website and the purpose of the Service was to provide different media content for these models.

#### After the pay wall Homepage and tabs

36. This homepage changed upon entering details of the paid membership, and a different landing page appeared. The homepage after the pay wall had eleven tabs—"Home", "Pictures", "Video", "Forum", "Blog", "Friends", "Webcam", "Store", "Chat", "Free video", and "Bonus sites".
37. The "Home" tab showed 20 collages of branded models and represented the landing page of the post paywall homepage; each collage was composed of the name and several images of the particular model. Clicking on one of these collages lead to a different page with a selection of pictures and some videos of the model, and included additional links to view more photographic content. Greater prominence was given to the photographic content than video content in

terms of the presentation of material on these pages and additionally the volume of photographic content was greater than video content on these pages.

38. The “Video” tab on the homepage showed a matrix of videos, organised by date and across 18 pages which could be selected by ‘branded model’ name or categories such as “Lesbo Brits” or “Test Shot Teens” from a drop down list at the top.
39. The “Pictures” tab on the homepage showed a matrix of photographs, organised by date. The photographs could be selected by ‘branded model’ name or categories such as “Lesbo Brits” or “Test Shot Teens” from a drop down list at the top.
40. There were additional videos in the “Free Video” and “Bonus sites” tabs, which offered links to what appeared to be linked URLs of branded models (see sites shown in Annex 1.)
41. Ofcom also reviewed the activities of the site under the tabs, which the Appellant indicated were the ‘fan’ aspects of the site in support of its argument that the principal purpose of the site was one of connecting users to the models. Ofcom noted that the “Webcam” tab showed pictures of models that were not the same as the ‘branded models’ of the Service, and led to what appeared to be a wholly separate web chatting service called IMLive.
42. In addition, the “Store” tab showed three images of models who were featured on the site, but offered very limited options to purchase items of their underwear. The “Blog” section only had three text entries and one image. The “Forum” to interact with models was not working at the time tested. The “Chat” tab had very few chat entries that were dated in 2011.
43. Ofcom noted that the ‘fan’ aspects of the site, like the store, blog and chat sections were inactive by comparison to the regular updating of the video and photographic material, and the “Webcam” tab led to a completely different site unrelated to the branded models. On this basis, we considered that the ‘fan’ aspects of the website were not the main proposition of the site.

#### Cataloguing and accessing

44. Ofcom noted that audiovisual material was accessible through various routes. A user could access audiovisual content by clicking on a model’s profile from the collage of catalogued models on the home page. When the results of this selection were returned, they included both video and photographic content of the same model integrated together. Likewise, users would see this integrated content when they were re-directed from one of the linked URLs of a specific model to view the video and photographic content for her on [www.candygirlpass.com](http://www.candygirlpass.com).
45. The option to view either photographic or video content of branded models was also made available to users simultaneously on different tabs on the post paywall homepage. We noted that users were able to access either type of content dependent on their preference for video content or photographic content of a specific branded model.
46. Ofcom considered that the cataloguing of material did not suggest that photographic material was ancillary to the provision of video material, but they

were catalogued in a way that they appeared complementary to each other and users could access content dependent on their navigational choice and preference.

### Presentation and Styling

47. Both photographic and video content were promoted to be an attraction of the service on the home page both before and after the pay wall, and in different sections of the site (e.g. written messages from the branded models such as *Inside my site, you've probably already noticed that I have lots of very sexy pictures that you're sure to love! You can also get your hands on my exclusive videos*). We considered that the service presented itself as a destination for photographic content and audiovisual content as opposed to a destination solely for viewing audiovisual content.

### Completeness and Independence of Material

48. Ofcom considers that while the videos were of short duration, (the average length being 4 minutes) they were self-contained and could be understood and watched fully on their own. The Service had videos for all the models profiled on [www.candygirlpass.com](http://www.candygirlpass.com) and each depicted an independent pornographic storyline or narrative that offered a stand-alone entertainment experience (e.g. a sexual act from start to finish; a scene of sexy undressing until full nudity).

### Content and Access Links

49. We noted that audiovisual material was linked to non-audiovisual material dependent on user navigation. If a user chose to click directly on the video tab from the homepage without navigating through a model profile there weren't any navigational links between the audiovisual material in the "Video" tab and other non-audiovisual content (i.e. under the other tabs). However, if the user selected the option to view a model profile from the collage on the homepage (or under the "home" tab), there were navigational links between photographic and audiovisual material since they were integrated on this page. Additionally, once they had selected to view a model profile in this manner, they could freely navigate to the pictures tab or the video tab, and by clicking on a tab, all the photographic content or audiovisual content for that particular model would be displayed.
50. This led us to conclude that the Service was offering different types of content in an integrated fashion and both photographic and audiovisual content could be accessed depending on user preference and navigation of the website.
51. Ofcom noted that the content of photographic footage did not replicate that of the video footage. Apart from the model herself, the content of the videos and photographs were different – for instance the clothing and backdrop of the pictures and the model's poses varied in the photographic content and was different to the video content. This reinforced that the branded model was the unifying theme of the service.

### Balance of material

52. Ofcom noted [www.candygirlpass.com](http://www.candygirlpass.com) gave access to 306 videos with an average length of 4 minutes. Ofcom also noted that there were 10,500 pictures (consisting of 105 sets of pictures, each with around 20 images) with a selection

of these same videos and pictures available in the linked URLs according to the featured model, and all of which could be accessed with one subscription. Ofcom considered this amount of video content a substantial offering but noted it was made available alongside a substantial offering of photographic content and both the video and photographic content were regularly updated.

53. The photographic material did not appear to be ancillary to the provision of video material. Selecting to view a branded model profile from the homepage collage would lead the user to a page that featured video content complementing a greater volume of photographic content. This led us to conclude that the videos featured on the Service were not the primary means by which it offered a service to users; instead the Service aimed to provide an offering of integrated content.

Overall preliminary assessment on principal purpose: [www.candygirlpass.com](http://www.candygirlpass.com)

54. As described in Section 2, in assessing the principal purpose of any service Ofcom takes into account various factors including the independence, prominence, completeness, presentation and substance of the AV content available as well as all other relevant offerings of the Service.
55. Ofcom considers that in this case it was finely balanced as to whether or not it could be said that the 'principal purpose' of the Service was to offer audiovisual material.
56. We did not accept the Appellant's arguments that the 'fan' aspects of the site, such as the store, blog and chat sections were the main propositions of the Service.
57. We noted that the Service offered that video content was regularly refreshed and could be watched on its own which suggested that the provision of audiovisual material could be seen as a key purpose of the Service.
58. However, we also consider that in this case, there was no greater prominence given on the Appellant's website, in terms of cataloguing or accessing of the content, or the presentation or style of the Service, to the photographic or video content. We consider the Service serves as a portal for accessing both photographic and/or video content of branded models depending on the user's preferences.
59. The video content made available on the Appellant's website is one integrated element of the overall offering for branded models which also included a substantial quantity of photographic stills and both elements are complementary to each other. Ofcom considers that the provision of the video content made available through [www.candygirlpass.com](http://www.candygirlpass.com) does not in itself constitute a service having the required principal purpose.
60. In light of that assessment, Ofcom's overall view is that the appellant did not provide a service with the principal purpose of providing audiovisual material.
61. Ofcom did not need to consider in further detail the appellants arguments in relation to whether the nature of the video content on the service was comparable to adult linear TV programmes in accordance with the comparability part of the definition in section 368A(1)(a).

### On-Demand

62. Regarding the Appellant's query of criteria 368A(1)(b), on whether the offering might not be considered on-demand due to the limits they impose on download speeds, Ofcom notes that it did not experience any download limitations when it reviewed the Service.
63. In this respect, Ofcom considers that the Service meets the legislative criteria for what constitutes an on-demand service. This is defined under 368A (2), and states that access to a service is on-demand if –
- e) 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; and
  - f) the programmes viewed by the user are received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view).

### Purposive Assessment: Regard to the AVMS Directive

64. Ofcom has, as set out above, had specific regard in this Decision to the provisions of the AVMS Directive. We have also taken a step back, and having more general regard to the relevant provisions of the Directive, considered whether the Service provided a service that the Directive seeks to bring within its regulatory scope.
65. As described in paragraph 14 to 16, the AVMS Directive includes Recitals intended to aid its interpretation. These Recitals make clear that, amongst other things, the scope of audiovisual media services intended to be regulated under the Directive is limited to those services that are “mass media” (Recital 21) and “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” (Recital 24).

### Recital 24 assessment

66. With regard to the question of competition, the Appellant submitted that the Service did not intend to compete with companies that offer “high quality, HD videos (that are) very costly, and near impossible (to recreate)... with a low budget and mediocre tools”, and offered examples such as pornhub, youporn, redtube and xhamster. The Appellant argued that the Service was therefore not in competition with such services. However, a key purpose of regulation, and a guide as to its scope, is to provide a measure of fair competition for those providing linear television broadcasting services, from those providing on-demand audiovisual media services. That is, from those who provide similar services and who, in doing so, provide a measure of specific competition for the attention of viewers and advertisers. Therefore, Ofcom considered that the online services referred to by the Appellant were not relevant to our considerations of comparability as they do not relate to linear broadcasting.
67. Ofcom took the view that the video content made available on the website [www.candygirlpass.com](http://www.candygirlpass.com) is not a standalone service but is an integrated element of the overall offering which also included photographic stills and a limited amount of text. Ofcom considered that, assessing the Service as a whole, it was

not likely to directly compete with adult television broadcasting services for the same audience.

68. Ofcom has also considered Recital 24's reference to [whether], "...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." Ofcom notes Recital 24 makes clear that it is not just the "means of access" which are relevant but also the "nature" of the Service as well. Given that (as described above) the nature of the Service can be characterised as a web-based portal for accessing both photographic and/or video content of an adult nature depending on the user's preferences, Ofcom considered that a user would not reasonably expect regulatory protection under the AVMS Directive.

69. We will now apply the principal purpose test to [www.allteensworld.com](http://www.allteensworld.com).

#### Principal Purpose Assessment: [www.allteensworld.com](http://www.allteensworld.com)

70. Ofcom applied the principal purpose test, as described in paragraph 33 to [www.allteensworld.com](http://www.allteensworld.com) (as at Annex 2) and its linked URLs. Ofcom considered that [www.allteensworld.com](http://www.allteensworld.com) appeared to use the same website template and linked URL network as [www.candygirlpass.com](http://www.candygirlpass.com). Whilst the website characteristics and interface were similar to [www.candygirlpass.com](http://www.candygirlpass.com), the content itself was different in several aspects as detailed in the following paragraphs.

#### Pre-pay wall Homepage

71. Before the pay wall, the website featured images of semi-nude models and some text, and included one embedded video. At the bottom of the page, several branded models were also identified. Five icons at the top of the page served as tabs to 'Join Now', access 'Members login', view 'Photos' and 'Videos' and 'Continue'.

#### After the pay wall Homepage and tabs

72. After entering the paid membership details, this homepage changed to a different landing page; it had eleven tabs.

73. The "Home" tab showed 14 collages of branded models; each collage was composed of the name and several images of a particular model. Clicking on one of these collages lead to a different page with a selection of pictures and some videos of the model, and included additional links to view more content. Ofcom noted that of the 14 models, only half had video included in their profile page.

74. The "Video" tab on the homepage showed a matrix of videos, organised by date and across three pages that could be selected by branded model name from a drop down list at the top of the videos. Ofcom noted there were only 39 videos corresponding to 7 different models, lasting an average of 4 minutes, and refreshed infrequently (see paragraph 63 for more analysis). Further videos could be found in the "Free Video" and "Bonus sites" tabs, which linked to the URLs of branded models or repeated the same collages available on the Home tab (see sites shown in Annex 1.)

75. Ofcom also reviewed the 'fan' aspects of the site made by the Appellant and noted that the "Webcam" tab led to a separate web chatting service called IMLive, as with [www.candygirlpass.com](http://www.candygirlpass.com).
76. In addition, the "Store" tab announced 'amazing discounts to our customers for some really hot sites'. These sites were depicted as collages of the models from [www.candygirlpass.com](http://www.candygirlpass.com), indicating that this was a separate service that required additional payment. The "Blog" section only had three text entries and one image. The "Forum" to interact with models was not working at the time tested and the "Chat" interface was blank and did not allow posting messages.
77. Ofcom noted that all of the 'fan' aspects described above were inactive and therefore did not appear to be a proposition of the site.

#### Cataloguing and accessing

78. Ofcom noted that the available audiovisual material was catalogued and accessible through its own unique section. The "Video" tab catalogued the audiovisual material by date under each image, as did the drop down list of branded model or theme above the videos. Ofcom noted that 7 of the 14 options on the drop down list (for example 'Heidi Harper' or 'Young Chloe') returned no video. The home page of [www.allteensworld.com](http://www.allteensworld.com) also acted as the repository of video content for the network of linked URLs, as listed in Annex 2, by bringing back paid members to [www.allteensworld.com](http://www.allteensworld.com) to view the content.
79. The lack of video results in the drop down catalogue in the video tab indicated that the AV material was not likely to be an attraction of the site. Similarly, the lack of video results for all of the branded models and themes presented is unlikely to meet the expectations of a user searching for such material.

#### Presentation and Styling

80. Ofcom noted that the audiovisual material was sign posted in different parts of the website, but that this was not actually the case. The pre-pay wall home page included an embedded video that could be played, the website had different text mentioning the availability of videos of the branded models (e.g. in messages from models in the collage section, and on the membership sign-up page). However, there was very little video content on the site.

#### Completeness and Independence of Material

81. Ofcom noted that the video content that was present, whilst lasting an average of 4 minutes, did consist of complete programmes that could be understood and watched fully on their own. As with [www.candygirlpass.com](http://www.candygirlpass.com), they were not snippets from longer programmes and each depicted an independent pornographic storyline.
82. Similarly, no relationship was established between the two types of content apart from the model herself.

#### Content and Access Links

83. Content and access links operated in the same way as on [www.candygirlpass.com](http://www.candygirlpass.com), as per paragraph 48.

### Balance of material

84. Ofcom noted [www.allteensworld.com](http://www.allteensworld.com) gave access to 39 videos and approximately 25,984 pictures (available in sets of approximately 232 pictures) with a selection of these same videos and pictures available in the linked URLs of featured models.
85. The website did not have videos for all the models profiled on [www.allteensworld.com](http://www.allteensworld.com). For example, no videos appeared when selecting models 'Heidi Harper', 'Young Chloe', 'Sophie Ellison', 'Abigail Raye' or 'Kayla Louse' in the category list in the "Videos" tab or in the model's own collage on the homepage.
86. Ofcom did not consider the range of video content to be of a substantial offering. We also noted the videos had not been refreshed since January 2014. In contrast, the picture sets on [www.allteensworld.com](http://www.allteensworld.com) were updated at least twice a month, and often more frequently. This led Ofcom to conclude that the images and not the 39 videos was the main offering of the site and that the provision of video was not its principal purpose.

### Overall assessment on principal purpose: [www.allteensworld.com](http://www.allteensworld.com)

87. After reviewing [www.allteensworld.com](http://www.allteensworld.com) and its linked URLs, Ofcom considered there were significant factors suggesting the service could not be considered as a destination to watch video content:
  - a) 39 videos is not a significant offering of AV material, and the volume and frequency of new pictures available suggested that this, and not the videos, had a significant presence;
  - b) this video content was not refreshed, indicating that the benefit of a paid membership was not to have access to a regular stream of new videos;
  - c) in addition, not all branded models featured on the site and the linked URLs had videos; only 7 of 14 models did. In contrast, sets of photographs were available for all models. Ofcom considered that this implied that the appeal of the different models was not the offering of their videos;
  - d) the lack of content mean that the catalogue system was ineffective.
88. Given all of these reasons, Ofcom has concluded that the principal purpose of [www.allteensworld.com](http://www.allteensworld.com) was not the provision of audiovisual material.
89. Therefore, we will not assess the form and content of this material as the first part of the composite definition under Section 368A(1)(a) of the Act was not met.

### Purposive Assessment: Regard to the AVMS Directive

90. We have also taken a step back, and having more general regard to the relevant provisions of the Directive, considered whether the Service provided a service that the Directive seeks to bring within its regulatory scope. Ofcom took the view that the video content made available on the website [www.allteensworld.com](http://www.allteensworld.com) is not likely to be an attraction of the site and therefore, it was not likely to directly

compete with adult television broadcasting services for the same audience. Given that (as described above) the nature of the Service can be characterised as a portal for accessing photographic content, Ofcom considered that a user would not reasonably expect regulatory protection under the AVMS Directive.

### **Section 5 – Conclusion**

91. For the reasons set out above, Ofcom has reached the Decision that [www.candygirlpass.com](http://www.candygirlpass.com) and its linked sites as shown in Annex 1 (the Service), and furthermore [www.allteensworld.com](http://www.allteensworld.com) did not at the relevant time, meet the definition of an ODPS in section 368A(1) of the Act. Consequently, the Appellant was not in breach of the advance notification requirement under section 368BA of the Act, and the requirement to pay a fee under section 368D(3)(za).
92. Ofcom's Decision is therefore that the Appellant was not for the reasons set out above, in respect of the Service, the provider of ODPS at 3-8 January 2014 and on 1-7 October 2014 and that the Appellants appeal against ATVOD's Determination should be upheld and ATVOD's decision should be quashed.