

**Sanction: Decision by Ofcom
To be imposed on HardGlam**

For the provision of the On-Demand Programme Service “HardGlam” (as at hhardglam.com, {www.} bigobjectsluts.com, {www.} hardcoremachines.com, {www.} onlycfnm.com, {www.} slutsincostumes.com, {www.} ukfacesittingsluts.com, {www.} ukfootsluts.com, {www.} ukhardcorefucking.com, {www.} ukhardcorelesbians.com, {www.} uknylonsluts.com, {www.} ukpantiesluts.com, {www.} smokeymouths.com, {www.} ukstockingsluts.com, {www.} watersportssluts.com) from 25 February 2014 until 18 November 2014.

**Consideration of a sanction
against:**

Mr James Farey (the “Service Provider”) in respect of the On Demand Programme Service(s) (“ODPS”) **“HardGlam”** (as at {www.} hardglam.com, {www.} bigobjectsluts.com, {www.} hardcoremachines.com, {www.} onlycfnm.com, {www.} slutsincostumes.com, {www.} ukfacesittingsluts.com, {www.} ukfootsluts.com, {www.} ukhardcorefucking.com, {www.} ukhardcorelesbians.com, {www.} uknylonsluts.com, {www.} ukpantiesluts.com, {www.} smokeymouths.com, {www.} ukstockingsluts.com,

For:

Breaches of the Authority for Television On Demand (“ATVOD”) Statutory Rules for Providers of ODPS (the “ATVOD Rules”)

- Rule 1: “A person must not provide an on-demand programme service unless, before beginning to provide it, that person has given notification to the appropriate regulatory authority of the person’s intention to provide that service. A notification must be sent to the appropriate regulatory authority in such manner as the authority may require and must contain all such information as the authority may require”.
- Rule 4: “The provider of an On-Demand Programme Service must pay to the appropriate regulatory authority such fee as that authority may require under section 368NA of the Act”.
- Rule 11: “If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it”.

Thereby being in contravention of sections 368BA(1), 368D(3)(za) and 368E(2) of the Communications Act 2003 (the “Act”).

Dates of contravention:

From 25 February 2014 and on-going

Decision:

To impose a financial penalty (payable to HM Paymaster General) of not less than **£1,500**

Executive Summary

The Service and regulatory regime

1. For the reasons set out in this Decision, Ofcom has decided to impose a statutory sanction of **£1,500** on Mr James Farey (the Service Provider) in relation to the Services provided at HardGlam (the Service).
2. The Service has been determined by the Authority for Television on Demand (ATVOD) in its Final Determination of 25 April 2014 to be an On-Demand Programme Service ("ODPS") as defined by section 368A of the Communications Act 2003 (the "Act"), which is in breach of ATVOD's Rules in relation to such services.
3. ODPS are regulated under the terms of the Communications Act 2003 as part of a co-regulatory regime. Ofcom has designated ATVOD as the appropriate regulator in respect of editorial content for on-demand programme services.

Breaches of the ATVOD rules: Rules 1, 4 and 11

4. ATVOD has published Rules and Guidance (the Rules) to ensure compliance of ODPS with certain minimum standards in a document called "Statutory Rules and Non-Binding Guidance for Providers of ODPS"¹. ATVOD's Rules reflect the provisions of the Act and ATVOD's Guidance forms a non-binding aid for interpretation of those rules. Rules 1, 4 and 11 are relevant to the present case (see "Legal Framework" below).
5. ATVOD wrote to the Service Provider on 30 May 2012 informing him of the statutory obligation to notify provision of an ODPS and setting out the relevant statutory criteria. ATVOD did not receive a response.
6. After further assessments of the Service in February 2014, ATVOD issued a Preliminary View on 20 March 2014, setting out its view that the Service may be in breach of the Rules. The Service Provider wrote to ATVOD on 21 March 2014. ATVOD undertook a further period of monitoring, in light of the Service Provider's representations, in April 2014. ATVOD sent Final Determinations to the Service Provider on 25 April 2014, stating that ATVOD's Rules 1, 4 and 11 had been breached.
7. Also on 25 April 2014, ATVOD issued an Enforcement Notification in relation to the breaches. This instructed the Service Provider to bring the Service into compliance within 10 working days, by notifying the Service in accordance with Rule 1, paying the required fee under Rule 4 and either removing R18 material or ensuring under 18s could not access such material under Rule 11. The Enforcement Notification also drew the Service Provider's attention to ATVOD's power to refer the matter to Ofcom for further enforcement action including the imposition of a financial penalty.

Referral to Ofcom

8. On 14 May 2014, ATVOD asked Ofcom to consider imposing a sanction on the Service Provider, on the basis that the Service was in breach of Rules 1, 4 and 11 and

¹ See http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf

the Service Provider had failed to comply with the Enforcement Notice by 14 May 2014.

9. On 23 May 2014, Ofcom issued a Notice to the Service Provider informing him of its intention to give a Direction under section 368K of the Act unless he took steps to remedy contraventions of section 368D of the Act by 3 June 2014. Those steps were not taken and on 9 June 2014 Ofcom issued a Direction requiring the Service Provider to:
 - i) Remove from the Service all R18 equivalent material (still images or audiovisual content) that is currently available to view without restriction; or
 - ii) Put into operation an effective Content Access Control system (“CAC system”) at the point of membership purchase that verifies that an individual user is 18 years of age or over at the time of registration before access is given to all R18 equivalent material, and remove from the Service all R18 equivalent material (still images or audiovisual content) that is currently available to view until such a CAC system can be put into place. The Service Provider failed to comply with the Direction and continues to this date to fail to comply.
10. The Service Provider failed to comply with the Direction until on or shortly before 18 November 2014.

Ofcom’s Sanction Decision

11. On 1 October 2013, Ofcom published procedures for the consideration of statutory sanctions arising in the context of ODPS (the “Sanctions Procedures”)². In line with these procedures, Ofcom considered whether the breaches were sufficiently “serious, repeated and reckless” as to warrant the imposition of a statutory sanction on the Service Provider in this case. It concluded that the imposition of such a sanction was warranted.
12. **Having regard to the nature and circumstances of the breaches and Ofcom’s Penalty Guidelines, Ofcom has decided that it is appropriate and proportionate in the circumstances to impose a financial penalty of £1,500 (total) in respect of the Service.**

Legal Framework

General

13. In discharging its functions, Ofcom’s principal duties set out in section 3(1) of the Act are to further the interests of citizens in relation to communications matters and the interests of consumers and to secure a number of other matters.
14. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).

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

15. Part 4A of the Act sets out a co-regulatory statutory regime for the regulation of ODPS. Specifically, under section 368B, Ofcom may designate an “appropriate regulatory authority” for the purposes of any provision in Part 4A. Accordingly, Ofcom has designated ATVOD to carry out certain functions under Part 4A of the Act, but Ofcom has retained both concurrent powers and the backstop power to levy sanctions. ATVOD’s original designation as the “appropriate regulatory authority” took effect on 18 March 2010, and an amended designation (the “Designation”) was issued on 14 September 2012³.
16. Under section 368BA of the Act, a person intending to provide an ODPS must notify ATVOD before starting to provide the ODPS. Under section 368D(3)(za) of the Act, the provider must also pay such fee to ATVOD as may be required under section 368NA (which provides for the levying of justifiable and proportionate fees to contribute towards regulatory costs).
17. Under section 368C(1) of the Act, ATVOD is under a duty *“to take such steps as appear to them best calculated to secure that every provider of an ODPS complies with the requirements of section 368D”*. Section 368D in turn requires providers of ODPS to comply with the requirements of sections 368E to 368H and these include, of particular relevance to the present case, a requirement under section 368E(2) that: *“If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it”*.

ATVOD’s Rules

18. In pursuance of its duty, and in accordance with its Designation, ATVOD published version 2.1 of its Rules and Guidance on 26 February 2014. The Rules are made for the purpose of securing that service providers comply with the relevant requirements of the Act, including those set out above. ATVOD’s Guidance is a non-binding aid to interpretation of those Rules. Rules 1, 4 and 11 are of relevance in this case.

Rule 1

19. Rule 1 reflects section 368BA(1) of the Act and states that:

“A person must not provide an on-demand programme service unless, before beginning to provide it, that person has given a notification to the appropriate regulatory authority of the person’s intention to provide that service. A notification must be sent to the appropriate regulatory authority in such manner as the authority may require and must contain all such information as the authority may require [...]”.

20. ATVOD’s Guidance includes information in relation to the notification process.

Rule 4

21. Rule 4 reflects section 368D(3)(za) of the Act and states that:

“The provider of an On-Demand Programme Service must pay to the appropriate regulatory authority such fee as that authority may require under section 368NA of the Act”.

22. ATVOD’s Guidance provides information on the payment process and the consequences of non-payment.

³ See <http://www.atvod.co.uk/uploads/files/amended-designation140912.pdf>.

Rule 11

23. Rule 11 reflects section 368E(2) of the Act and states that:

“If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it”.

24. Adopting a precautionary approach, ATVOD’s Guidance is that such material, when provided as part of an ODPS, may include content that has been classified R18 by the BBFC or material equivalent to content classified in that category. Therefore R18 or R18 equivalent material should only be made available in an ODPS in a manner which secures that persons under the age of 18 will not normally see or hear it.
25. ATVOD’s Rules and Guidance state that ATVOD will interpret Rule 11 as requiring an effective CAC system verifying the user is aged 18 or over where R18 equivalent material⁴ is made available. They state that confirmation of ownership of a card where the card holder does not need to be 18 or over (such as a Debit, Solo or Electron card) would not be sufficient for this purpose. They also state that, if age verification does not take place each time the user returns to the service, further access to such R18 content when the user returns to the service should be controlled by the use of mandatory security measures such as passwords or PIN numbers.

Sanctions

26. The “appropriate regulatory authority” may do one or both of two things under section 368I(1) of the Act where it determines that the provider of an ODPS is contravening or has contravened section 368D. Firstly, it may give an enforcement notice, which is a power designated to ATVOD under paragraph 6(xi) of the Designation. Secondly and additionally, it may impose a financial penalty in accordance with section 368J, such power being reserved to Ofcom, also under paragraph 6(xi) of the Designation. Where an enforcement notice issued under section 368I(1)(a) has not been complied with, it may impose a financial penalty under section 368I(9). Again, this power is reserved to Ofcom under paragraph 6(xi) of the Designation and must be exercised in accordance with section 368J.
27. Section 368J states that the amount of any financial penalty shall be that which the “appropriate regulatory authority” (in this case, Ofcom) considers appropriate and proportionate to the contravention in respect of which the financial penalty is imposed. It also states that the penalty must not exceed 5% of the provider’s “applicable qualifying revenue” as defined in section 368J(3) or £250,000 (whichever is the greater amount).
28. Ofcom’s Sanctions Procedures set out the information Ofcom will provide when writing to a service provider setting out a preliminary view that sanctions may be appropriate, normally where Ofcom considers the service provider to have seriously, deliberately, repeatedly or recklessly contravened a relevant requirement.
29. The Procedures also set out the Service Provider’s opportunity to make written representations. The Procedures state that the time period for representations is 15 working days unless otherwise specified, but note that the time frame will depend on

⁴ “R18 equivalent” indicates sex works the primary purpose of which is sexual arousal or stimulation usually involving clearly unstimulated sexual activity. Further detail on what material is considered to be R18 or R18 equivalent is at paragraphs 65 and 66 below.

the nature and circumstances of the case and state that, in urgent cases, allowing 24 hours may be appropriate. Following the period for representations, the Procedures provide for either a disposal notification (where no sanction is considered appropriate), or a sanctions decision setting out what sanction Ofcom considers appropriate in the light of all the evidence and representations.

30. Ofcom has a duty under section 392 of the Act to publish a statement containing guidelines it proposes to follow in determining the amount of any penalty imposed under the Act. Section 368J(2) requires that, in determining the amount of a penalty under section 368J, the appropriate regulatory authority (Ofcom) must have regard to that statement. The most recent version of Ofcom's Penalty Guidelines was published on 13 June 2011⁵.

Human Rights Act 1998

31. Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights ("the Convention").
32. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to "impart information and ideas" and also the audience's "right to receive information and ideas without interference by public authority" (Article 10(1) of the Convention). Such rights may only be restricted if the restrictions are: "prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).
33. Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services and ODPS unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

Summary of Ofcom's Preliminary View

34. Ofcom sent its Preliminary View on sanctions to the Service Provider on 22 October 2014. It noted Ofcom's view (subject to any representations from the Service Provider) that:
 - a. the Service was, at the relevant time, an ODPS (that is a television-like on-demand service in relation to which audiences expect a degree of protection) to which ATVOD's Rules applied, and the Service Provider had breached Rules 1, 4 and 11;
 - b. the provision of R18 material was the principal purpose of the Service and the breach of Rule 11 in particular allowed access to a significant quantity of sexually explicit material without the protection of an adequate paywall to restrict access to under 18s; and
 - c. the breach was for a prolonged period and occurred despite ATVOD having taken steps to inform the Service Provider of relevant requirements; indeed, the Service Provider had appeared to disengage from the process from 20 May 2014 when

⁵ See <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>.

he responded to ATVOD informing him that it would be publishing its Final Determinations on its website with an email simply stating, “*Excellent, go for it...*” – there was no further contact from the Service Provider until publication of Ofcom’s Preliminary View.

35. Overall, the Preliminary View proposed to find that the breach occurred, was serious, and warranted a financial penalty. It commented on factors in the Penalty Guidelines and reached a provisional view on the appropriate level of such a penalty.
36. The Preliminary View invited representations from the Service Provider.

The Service Provider’s representations and Ofcom’s response

37. The Service Provider submitted written representations to Ofcom on 13 November 2014. The Service Provider also attended an oral hearing on 2 December 2014, supported by two family members.
38. Firstly, the Service Provider apologised for previous lack of engagement with ATVOD and Ofcom. He explained he had not intended to delay or impede the regulatory process and that there were a number of exceptional personal circumstances which had led to him (in his words) putting his, “head in the sand”. He noted that he was not well connected in the adult or video on demand industries and had run a business focusing on niche fetishes (principally women smoking) for nine years without realising compliance with ATVOD rules was required. When ATVOD contacted him, he had not known where to turn for advice and, having previously fallen victim to scams, had erroneously believed registration with ATVOD was either a scam or at least not a legal requirement. He said that Ofcom’s involvement had alerted him to the seriousness of the situation and, following receipt of documents from Ofcom on 26 October 2014, he had taken steps to disable the websites under referral pending the outcome of Ofcom’s sanctions process. Ofcom had noted this on 18 November, and also noted that the services remained unavailable as at the date of the oral hearing.
39. Secondly, the Service Provider noted that his was a very small business and provided turnover details which were not available to Ofcom at the time of its Preliminary View. The Service Provider said that he had struggled to make a profit with his original company, J&L Visuals Limited, and had liquidated that company in October 2010. He said that with so much content available free over the internet, subscription based providers were now struggling to cover costs. After seeking alternative employment, the Service Provider explained he had returned to the internet business, as sole trader under the “HardGlam” name. The Service Provider said that he did not have full accounts for the relevant period but he provided information about his very modest sales during the period from 26 April to 13 November 2014 and on his monthly running costs. The Service Provider said the assumptions in Ofcom’s Preliminary View “massively overstated” the size of his business and expressed concerns about his ability to continue the business were a fine over four figures to be imposed.
40. Thirdly, the Service Provider noted the impact of the steps taken by Ofcom and of his own failure to engage earlier with the process on himself and his business. He said that since Ofcom had taken action in relation to the Service, his main payment provider had suspended payment provision in relation to the Service and he had not been able to receive any income or publish new content, leaving him with the costs for the premises he used for filming but no income to cover those costs. He indicated that he had to borrow money to cover these costs..

41. Finally, the Service Provider explained that he took the protection of children from potentially harmful material seriously and had mistakenly presumed payment processors for adult services would take a more proactive role in implementing checks than was in fact the case. He expressed a wish to restart his business, once he had notified the Service to ATVOD and committed to full compliance with ATVOD's Rules, including putting appropriate paywalls in place.
42. In relation to the Service Provider's previous lack of engagement, whilst this remains a serious matter, Ofcom was satisfied that the lack of engagement was not part of a strategy to evade regulation and instead represented a genuine lack of appreciation of the seriousness of the situation and status of ATVOD. Ofcom accepted that the Service Provider was a sole trader disconnected from the wider adult content industry and so lacked some of the resources that might have provided reliable information on how to respond appropriately. Ofcom also accepted exceptional personal circumstances contributed to the failure and took account of the Service Provider's positive engagement from 13 November, including his attendance at the oral hearing.
43. Ofcom noted that the consequences of lack of engagement in the process had been serious for the Service Provider quite apart from any financial penalty. The suspension of service by payment providers illustrated the impact of Ofcom steps following referral from ATVOD and the importance of early and effective engagement by service providers generally.
44. In relation to the size of the Service Provider's business, Ofcom had not had information available at the time of issuing the Preliminary View (due to the above point) but accepted that the turnover of the business was small and that even a modest fine would account for a substantial proportion of turnover and of running costs.
45. Ofcom accepted that the Service Provider understood the relevance of the child protection principles involved in the Rule 11 breach.
46. The Service Provider said that, following the hearing, he intended to take all the necessary steps to comply with Rules 1, 4 and 11 and to avoid further breaches.

Ofcom's Decision to impose a Statutory Sanction

Details of the contravention

47. As set out in paragraph 1.5 of the Sanctions Procedures, the imposition of a sanction against an ODPS is a serious matter. Ofcom may, following due process, impose a sanction if it considers that an ODPS provider has seriously, deliberately, repeatedly or recklessly breached a relevant requirement. Ofcom considers that the breaches in this case were sufficiently serious, repeated and reckless to warrant the imposition of a statutory sanction for the reasons set out below.

Chronology

48. The case has a fairly complex chronology, key elements of which are summarised below:
49. On 30 May 2012, ATVOD wrote to the Service Provider informing him of the statutory obligation of providers of ODPS to notify ATVOD. The Service Provider did not respond.

50. ATVOD conducted a new, full investigation between 25 and 27 February 2014. Having applied the statutory criteria, ATVOD wrote to the Service Provider on 20 March 2014 stating that it had come to the preliminary view that the Service was an ODPS to which the ATVOD rules applied, and that this raised issues under Rules 1, 4 and 11.
51. On 21 March 2014 the Service Provider submitted representations to ATVOD by email and stated that the *"websites do not offer on demand so I really do not see why I need to pay you anything at all...Members pay a monthly fee to access my members area which they have been doing for 7 years without having to pay anyone"*.
52. ATVOD's further investigation concluded that the service was an ODPS offering R18 videos resembling television programmes on adult linear services, on a subscription basis. ATVOD was satisfied that the content met the statutory test of material which might *"seriously impair the physical, mental or moral development of persons under the age of eighteen"*, and that an effective CAC system was required to restrict access to under 18s. The payment system did not constitute a CAC system verifying that the user was aged 18 or over at the time of registration/subscription, because the methods of payment did not use any or any adequate age verification process. Additionally, some R18 material was freely available, including to under 18s, before the paywall.
53. On 25 April 2014, ATVOD issued Final Determinations to the Service Provider, finding that he was in breach of Rules 1, 4 and 11 in respect of the Service. ATVOD informed the Service Provider of his right to appeal to Ofcom against the Determinations within 20 working days and the steps required to request an appeal. Also on 25 April 2014, ATVOD issued the Service Provider with Enforcement Notifications in respect of the Services. These required the Service Provider to submit a completed Notification Form in relation to the Service and pay the required fees within 10 working days. It also required either the removal of all R18 equivalent images from the Service or the taking of steps to ensure that persons under 18 could not normally see or hear R18 equivalent images when accessing the service. The Service Provider did not respond to these Enforcement Notifications.
54. On 14 May 2014 ATVOD invited Ofcom to consider imposing a sanction or taking other such steps as it considered appropriate to secure compliance. In its referral ATVOD noted that the Service Provider had failed to take any action designed to bring the Service into compliance since the issue of ATVOD's preliminary view on 20 March 2014.
55. Ofcom reviewed the evidence provided by ATVOD and conducted its own review of the Service after the referral by ATVOD, between 19 and 23 May 2014. Ofcom concluded that the evidence of ATVOD's assessment and of its own review supported the conclusion that the Service was an ODPS. On 23 May 2014, Ofcom issued a Notice to the Service Provider informing him of its intention to give a Direction under section 368K of the Act unless he took steps to remedy contraventions of section 368D of the Act by 3 June 2014. The Service Provider did not take those and on 9 June 2014, Ofcom issued a Direction requiring the Service Provider to:
- i) remove from the Service all R18 equivalent material; or
 - ii) put into operation an effective CAC system at the point of membership purchase that verifies that an individual user is 18 years of age or over at the time of registration before access is given to all R18 equivalent material, and remove from the Service all R18 equivalent material (still images or audiovisual content) in the interim.

56. The Service Provider failed to comply with the Direction. In light of this, Ofcom contacted the payment providers listed on the Service and asked them if they could take steps to stop processing the payments as the failure to comply with the Direction was a criminal offence. During October 2014, payments to the Service Provider were stopped and new subscriptions to the Service could not be set up.
57. Ofcom noted that on or shortly before 18 November 2014, the Service Provider took steps to disable access to his website, so that none of the content on any of the sites offered by the Service was accessible.

Details of the contraventions

58. We now consider each of the contraventions referred to Ofcom for consideration.

Breach of ATVOD's Rule 1 and 4: Notification of an ODPS and Payment of a fee

59. As noted above, Rule 1 relates to notification of provision of an ODPS and relates to payment of a fee to ATVOD by a provider of an ODPS.
60. As the Service Provider has not provided notification to ATVOD under Rule 1 or paid a fee to ATVOD under Rule 4, Ofcom's conclusion is that the Service Provider was in breach of those Rules from 25 February until on or shortly before 18 November 2014.
61. Ofcom has considered the seriousness or otherwise of these breaches and notes, in particular, that:
 - a. Ofcom was satisfied that the Service Provider received the correspondence from ATVOD. The Service Provider did not appeal to Ofcom against ATVOD's Determination, nor did he take the necessary steps to notify the Service or pay the fee. The system for regulation of ODPS relies on notification of services to ATVOD, and the payment fees (which are graduated according to the size of providers) to cover costs of regulation in accordance with Rules 1 and 4..
 - b. The Service Provider then did not respond to further communications from ATVOD and Ofcom, despite the use of both correspondence addresses and email address from which he had previously responded. This failure to engage with regulators and with the legal requirements of the legislation that these authorities promote resulted in an extended duration of the breach of Rule 11, from 25 February until on or shortly before 18 November 2014.
 - c. Taking these factors into account, Ofcom concluded that the breaches were serious and repeated. However, Ofcom accepted the Service Provider's representations that he was initially unaware of the regulatory regime and then, for personal reasons, ignored the situation, in the hope that it would resolve itself. Ofcom accepted that the Service Provider did not appreciate the importance and statutory standing of the correspondence he had received from ATVOD and Ofcom. Once he received Ofcom's Preliminary View from the process server, he did, albeit belatedly, engage with Ofcom in correspondence and take steps to prevent further access to the Service. In these circumstances, Ofcom considered that the Service Provider's failure to engage with the regulatory process was not deliberate or intended to frustrate that process, but was reckless and was as a result of the Service Provider's lack of understanding of the process.

62. For the above reasons, Ofcom considers that the breaches of Rules 1 and 4 were serious and repeated. However Ofcom considered that the breaches were reckless and not deliberate.

Breach of ATVOD's Rule 11: Harmful material: Protection of under 18s

63. Ofcom reviewed the evidence supplied by ATVOD as regards the nature of the material included on the Service. Ofcom also carried out its own review on 19 to 23 May 2014 and has continued to review the Service from time to time. These reviews confirmed ATVOD's findings that the Service held a wide extent of R18 equivalent material in both video and photographic form. Ofcom noted that there was no warning page alerting users to the nature of the content of the Service.
64. The first issue under Rule 11 was whether the material included in the Service is, *"material which might seriously impair the physical, mental or moral development of persons under the age of eighteen"*.
65. Ofcom noted that the relevant material included, and includes, numerous depictions of unstimulated sexual activity for the purposes of sexual arousal or stimulation. In interpreting the question of whether such content may *"seriously impair the physical, mental or moral development of minors"* ATVOD's Guidance states that:
- "Content whose broadcast complies with the Ofcom Broadcasting Code, or that has been classified by the BBFC in any category except 'R18', would not be considered material that "might seriously impair" and would not therefore be subject to the requirements of Rule 11. However, adopting a precautionary approach, ATVOD's guidance is that "material which might seriously impair the physical, mental or moral development of minors" when provided as part of an on-demand programme service may include content that has been classified 'R18' by the BBFC⁶, or material equivalent to content classified in that category"*.
66. In relation to this therefore Ofcom has considered the BBFC's R18 classification guidance, namely its:
- a. Description of *"Sex works (whose primary purpose is sexual arousal or stimulation)..."*;
 - b. Guideline that *"Sex works containing clear images of real sex...or other very strong sexual images will be confined to the 'R18' category..."*; and
 - c. Description of the R18 category as, *"...a special and legally restricted classification primarily for explicit works of consenting sex...involving adults. Films may only be shown to adults in specially licensed cinemas, and video works may be supplied to adults only in licensed sex shops"*.
67. Taking this into account, it was clear to Ofcom that both the free content available without subscription and paid for content included material equivalent to the BBFC's R18 classification and did not comply with ATVOD's Rules and Guidance. Ofcom considered that it was clear the material, *"...might seriously impair the physical, mental or moral development of persons under the age of eighteen"*.

⁶ British Board of Film Classification.

68. In adopting this view, Ofcom took account of its statutory duty under Section 3 of the Act to further the interests of citizens and consumers and in doing so, to have regard to the vulnerability of children. In fulfilling this duty, Ofcom (like the Government and ATVOD) endorses the adoption of a precautionary approach to protecting minors from the risk of harm from accessing R18 material on ODPS.
69. Ofcom also considered the BBFC's approach to its R18 classification, under which the material would be classified by the BBFC as R18 on the basis that it should not be seen by those under that age (and only in restricted circumstances by those above it). That classification would take into account:
 - a. The BBFC's guiding principle that, "... works should be allowed to reach the widest audience that is appropriate for their theme and treatment...."; and
 - b. Its qualification of that principle, that in making a classification it will consider "...whether the material... may cause any harm at the category concerned. This includes...any 'moral harm' that may be caused...Especially with regard to children, harm may also include retarding social and moral development..."
70. In other words, material would be classified by the BBFC as R18 because of its potential for harm, including moral harm, to those under 18, who should therefore not see it. Ofcom considered that the same principle would apply in its consideration of R18 equivalent material in relation to ATVOD's Rules and Guidance.
71. The second issue for Ofcom to consider under Rule 11 was whether the material involved had been "*made available in a manner which secures that such persons [persons under the age of eighteen] will not normally see or hear it*". Ofcom noted in particular that both at the time of ATVOD's review and during Ofcom's on-going review:
 - a. R18 equivalent material was available to view without subscription. ATVOD's review found that a person under the age of 18 could access R18 equivalent material, specifically free-to-view trailer videos accessible through the outlets' respective homepages (by clicking on R18 equivalent still images, which acted as links through to the trailer videos), unprotected by any form of CAC system. The presence of this material was also confirmed by a later Ofcom investigation between 19 and 23 May 2014.
 - b. There was no effective CAC system with regard to further R18 material available to purchase. During its investigation between 25 and 27 February 2014, ATVOD test-purchased a subscription/membership to the {www.}hardglam.com outlet using a debit card (noting that debit cards are available to people under the age of 18). Having obtained membership, ATVOD could access R18 equivalent material. As part of its subsequent investigation in April 2014, ATVOD test-purchased a further subscription/membership to the {www.}hardglam.com outlet using a debit card. The sign-up process remained unchanged and videos considered to be R18 equivalent could be accessed. On both occasions, this payment process could be easily circumvented by minors and could therefore not be regarded as being effective in securing that such person will not normally see or hear the relevant material, which included R18 equivalent video content. Ofcom has examined the evidence provided to it by ATVOD in its referral and conducted its own investigation of the Service between 19 and 23 May 2014 which confirmed the lack of an effective CAC system.

72. For the above reasons, Ofcom agrees with ATVOD that the Service was in breach of Rule 11.
73. Ofcom considered the seriousness of the breach and noted that:
- a. The provision of R18 equivalent material appeared to be the principal purpose of the Service, and consequently the breach allowed unrestricted access to a significant quantity of sexually explicit material delivered via what should have been a regulated ODPS (noting that the aim of relevant provisions in the Act is, as set out in the recitals to the AVMS Directive, to provide the regulatory protection audiences reasonably expect in relation to television-like on-demand services). Ofcom noted that the Service offered access on its homepage and on all links from that to the sites within the Service a large number of still and moving images that contained R18 or R18 equivalent content. This included images of vaginal penetration and fellatio that were clearly unsimulated and were available prior to any effective CAC system. In general, Ofcom noted that the large majority of the content both before and after subscription/membership, both still and moving images, was R18 or R18 equivalent. In Ofcom's view the provision of such content without an effective CAC system was a serious breach of Rule 11.
 - b. The breach was systemic, rather than one (or more) isolated event(s) and was a failure to meet requirements to have in place systems and procedures that should apply to the basic operation of the Service for every user. The breach was also prolonged, as the Service Provider failed to meet these requirements from 25 February until on or shortly before 18 November 2014.
 - c. Taking these factors into account, Ofcom concluded that the breaches were serious and repeated. However, for the reasons set out above in Ofcom's consideration of the breaches of Rules 1 and 4, Ofcom accepted that the Service Provider's failure to engage with the regulatory process was not deliberate or intended to frustrate that process, but was reckless and was as a result of the Service Provider's lack of understanding of the process.
74. For the above reasons, Ofcom considers that the breaches were serious and repeated. However it considered that the breach was reckless and not deliberate.

Details of relevant cases on which Ofcom has already adjudicated

75. Ofcom has adjudicated a number of cases, including Demand Adult⁷, Strictly Broadband⁸ and Playboy⁹ involving provision of R18 services with no or inadequate systems to prevent access for under 18s. In these decisions Ofcom imposed a statutory sanction on the relevant service provider for breach of Rule 11. In each case the service was providing R18 or R18 equivalent material without adequate measures to ensure that those under 18 would not normally see or hear it.
76. However, having carefully considered the Service Provider's representations, we consider there are a number of exceptional aspects of the present case (discussed above) that diminish the direct relevance of those cases to the present situation.

⁷ See http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Demand_Adult.pdf

⁸ See <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Strictly-Broadband.pdf>

⁹ See http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Playboy_TV_Sanction.pdf

Ofcom's decision on the type and level of any sanction considered appropriate and proportionate

77. As set out in paragraph 1.6 of the Procedures for the consideration of statutory sanctions arising in the context of ODPS, the statutory sanctions available to Ofcom include:

- *The imposition of a financial penalty; and*
- *The issuing of a direction to suspend or restrict the entitlement to provide the ODPS.*

78. As regards the question of suspension and restriction, Ofcom noted that the Service Provider did not initially respond to a Direction issued by Ofcom on 9 June 2014 directing that the Service Provider's entitlement to provide the Service or any other ODPS was therefore suspended. However the Service Provider did then respond, on or shortly before 18 November 2014, when he took steps to disable access to the Service.

Factors taken into account in determining the amount of the penalty

79. As to a financial penalty, under section 368J(1) of the Act, the amount of the penalty must be such as Ofcom determines to be appropriate and proportionate to the contravention for which it is imposed. The maximum level of financial penalty that can be imposed on a Service Provider is an amount not exceeding five per cent of the provider's applicable qualifying revenue or £250,000, whichever is the greater.

80. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription; and any charges made for the provision of programmes included in that service. However, ATVOD does not currently collect qualifying revenue figures and therefore the maximum level of penalty that could be imposed in this case is £250,000.

81. Ofcom's Penalty Guidelines state that: *"Ofcom will consider the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that we will act as an effective incentive to compliance, having regard to the seriousness of infringement"*. In reaching this decision, Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out (non-exhaustively) in the Penalty Guidance, as well as any other factors we consider may be relevant. Our assessment is set out below.

The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants

82. ATVOD set out in its Rules and Guidance that it would adopt the "precautionary approach" to ensure that children remain adequately protected under the Rules. Ofcom has made it clear that it supports ATVOD's approach. As set out in ATVOD's Guidance "material which might seriously impair the physical, mental, or moral development of minors" when provided as part of an ODPS may include content that has been classified R18 by the BBFC, or material equivalent to content classified in that category.

83. Government has confirmed that there is a good case that the existing regulations require a precautionary approach and requested that Ofcom and ATVOD take any

steps necessary to ensure that children remain adequately protected under the ATVOD Rules, in the knowledge that Government could bring forward further regulations in the short term if it proved necessary to support this position.

84. For these reasons, and those set out above relating to the nature of the content available on the Service, which would be classified as R18 equivalent, Ofcom is minded to view the material included as part of the Service as having the potential for harm.
85. Ofcom notes, however, the very small scale of the business as set out in the Service Provider's representations. Whilst the potential for harm remains an important factor even for small services, the low volume of traffic does place an upper limit on degree of harm.

Duration of the contravention.

86. Since the Service continued to include material of the kinds described in ATVOD's Preliminary View and Final Determination and to make use of inadequate measures to restrict access to it by those aged under 18 (as set out above), Ofcom considers the contravention to have continued from the date of ATVOD's initial assessment on 25 February 2014 until on or shortly before 18 November 2014, when access to the Service was disabled.

Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention.

87. The Service Provider was a sole trader, operating a small business, in effect a "one man band". He provided Ofcom with information on the very low level of turnover of the business. In these circumstances, the relevant fee under Rule 4 would have been £145.
88. Ofcom also noted the Service Provider's representations that, as a result of Ofcom's Direction to the Service Provider, payments to the Service stopped being processed by payment providers. The Service Provider detailed the significant financial and other impact on him and his family. Ofcom considered that financial gain was not a relevant factor giving rise to the breach in the circumstances of the case.

Any steps taken for remedying the consequences of the contravention.

89. Ofcom noted that, although the Service Provider did not initially engage with either ATVOD or Ofcom, he did, on or shortly before 18 November 2014, take steps to disable access to the Service.

Whether the regulated body in breach has a history of contraventions.

90. This is the first recorded breach in relation to the Service Provider's provision of an ODPS.

Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.

91. We have detailed the process followed by ATVOD in reaching its Determination, and the opportunities given to the Service Provider to bring the Service into compliance with Rules 1, 4 and 11. We do not consider appropriate steps were taken by the regulated body to prevent the contravention until Ofcom's Preliminary View was served

on the Service Provider on 26 October and he then took steps to disable the Service on or shortly before 18 November 2014.

92. Ofcom notes, however, that the Service Provider had a poor understanding of the regulatory regime and had erroneously believed payment providers would play a greater role than they do in restricting access. The Service Provider was not a sophisticated provider within the sphere of adult ODPS services and found it particularly difficult to access advice. Whilst this does not excuse the lack of appropriate steps, the individual circumstances were such that some credit is appropriate for having engaged and taken steps once the seriousness of the situation was explained further to the Service Provider.

The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur.

93. Having carefully considered the Service Provider's written and oral representation on the exceptional circumstances of the case, Ofcom accepted on balance his submissions that he had not heard of ATVOD and did not think the initial communications he received from them were genuine. It noted that the Service Provider had few links in the adult industry and a relative lack of sources of appropriate advice. While Ofcom considered that the Service Provider should have taken more proactive steps to find out whether he was required to take action in respect of the Service and, if so, what that action was, it did not consider that the evidence amounted, in this case, to intent to commit the contravention.

Whether the contravention in question continued, or timely or and effective steps were taken to end it, once the regulated body became aware of it.

94. Ofcom considers that the Service Provider did not initially take steps to comply with the substantive requirements of Rules 1, 4 and 11, but that, once he received Ofcom's Preliminary View, he took steps to disable access to the Service and therefore to remedy the breach of that rule. Whilst failure to engage until receipt of the Preliminary View was a concern, in the exceptional circumstances of the case, some credit is given for accepting responsibility and taking action upon realising the gravity of the position.

The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.

95. The Service Provider provided information on the very small scale of turnover relating to the Service. Ofcom accepted that, taking account of the turnover of the regulated body, a four figure fine would reflect a substantial penalty reflecting the seriousness of the case and the need for effective deterrence. Taking into account this, and the other particular factors outlined above in relation to this case, Ofcom takes the view that the financial penalty imposed in this case is proportionate.

Other relevant factors

96. Ofcom noted the action taken by the payment providers, as a result of Ofcom's communication with them, which prevented the Service Provider receiving any income from provision of the Service. Quite apart from the fine, this had clearly had a significant impact on the Service Provider and represents a deterrent to other service providers who may consider (in a more calculated way than the Service Provider in

this case) failing to engage in the regulatory process in the hope that the matter will melt away.

Conclusion

97. Ofcom concludes that the breach of the ATVOD Rules by the Service Provider was sufficiently serious, repeated and reckless to merit the imposition of a financial penalty in accordance with section 368J of the Act.
98. Ofcom considers the financial penalty to be appropriate in relation to the seriousness of the breach and taking into account the Service Provider's financial circumstances and other exceptional circumstances relevant to the case. Ofcom considers that, to the extent it represents an interference with the Service Provider's rights to freedom of expression, its view is formed in accordance with the relevant provisions of the law (on the bases set out above). Likewise, Ofcom considers that the proposed penalty is proportionate for the reasons given and thereby is necessary (and no more than necessary) to pursue a legitimate aim, namely of protecting the physical, mental or moral development of persons aged under 18 in accordance with the statutory scheme set out above.
99. Having regard to all the factors referred to above and all the representations from the Service Provider, Ofcom concluded that an appropriate and proportionate sanction would be a financial penalty of **£1,500**.

11 December 2014