

APPEAL BY CHANNELFLIP MEDIA LIMITED AGAINST A NOTICE OF DETERMINATION BY ATVOD THAT THE SERVICE “CHANNEL FLIP” (WWW.CHANNELFLIP.COM) HAS CONTRAVENED SECTION 368BA OF THE COMMUNICATIONS ACT 2003

OFCOM DECISION

Section 1 - Introduction: Scope of this Decision

1. This document sets out Ofcom’s Decision in respect of an appeal by Channel Flip Media Limited (“CML”) against the determination by the Authority for Television On Demand (“ATVOD”) that “Channel Flip” is (or was at the relevant time) an “on-demand programme service” (“ODPS”) for the purposes of Part 4A of the Communications Act 2003 (“the Act”).
2. In respect of CML’s appeal, Ofcom has powers to:
 - a. uphold ATVOD’s decision;
 - 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; or
 - c. substitute our decision for ATVOD’s.
3. Ofcom’s Decision is to uphold CML’s appeal and substitute our Decision for ATVOD’s. There were certain factors which, at the time of ATVOD’s Determination, tended to support the view that Channel Flip was an ODPS. Nonetheless, on an overall assessment, Ofcom’s Decision is that Channel Flip was not at the relevant time an ODPS as the form and content of the audio visual material included in that service was not comparable to the form and content of programmes normally included in television programme services.
4. In making this Decision, Ofcom notes that a significant period has elapsed since the original ATVOD Determination and subsequent appeal, during which time there have been a number of changes in the presentation of material on the Channel Flip website (and also in the ownership of the service, which has been acquired by Shine Group, a subsidiary of News Corporation). Ofcom’s Decision

is based on its review of the service at the time of the original Determination and appeal, and it is for Channel Flip and its owners to consider, on an ongoing basis and in light of this Decision, whether it starts to provide an ODPS at some point and to notify ATVOD if appropriate. Likewise, it is for ATVOD to determine in the first instance whether Channel Flip is complying with its regulatory obligations to notify any ODPS.

Section 2 - Summary of the Legal Position

5. Part 4A of the Act is a statutory regime for the regulation of “ODPSs”. It was inserted into the Act by the Audiovisual Media Services Regulations 2009 (“the 2009 Regulations”), to implement the requirements of the Audiovisual Media Services Directive¹ (the “AVMS Directive”). It was amended by The Audiovisual Media Services Regulations 2010 (“the 2010 Regulations”).

6. A service is only an ODPS if it satisfies the defining criteria in section 368A of the Act. Key amongst these for present purposes is in section 368A(1)(a), that:

“... a service is an “ODPS” if –

..... 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.”

7. Where a service is an ODPS, its provider is subject to a requirement to notify ATVOD and pay a fee. The provider must also ensure the ODPS meets a limited number of regulatory requirements.

8. A key purpose of the AVMS Directive, alongside audience protection, is to provide a measure of fair competition 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.

¹ Directive 2010/13/EU

The requirements of Part 4A of the Act reflect this.

9. As part of a co-regulatory regime, Ofcom has designated ATVOD as the “appropriate regulatory authority” to carry out certain functions under Part 4A of the Act. As part of that designation, ATVOD has power to decide what is an ODPS. Any such decision is “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures*”.
10. As set out in those procedures, Ofcom’s decision in any appeal, “.... may:
 - a. *uphold ATVOD’s decision;*
 - 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.....*”

Section 3 - Chronology and Determination under Appeal

11. The 2009 Regulations and the provisions they inserted into Part 4A of the Act came into force on 19 December 2009. The 2010 Regulations and their amendments of Part 4A came into force on 18 March 2010.
12. Ofcom’s designation of ATVOD as the appropriate regulatory authority took effect on the latter date. Those providing ODPSs as at that date were required to notify them to ATVOD by 30 April 2010. Those intending to start providing them after 18 March 2010 were (and are) required to notify ATVOD before providing the service.

ATVOD’s Determination

13. By a written “Notice of Determination” dated 26 April 2011 (the “Determination”), ATVOD informed CML that – for the reasons set out in the Determination – the service ‘Channel Flip’ (the “Service”) constituted an ODPS under s.368A of the Act, and that CML had contravened the advance notification requirement under s.368BA as well as the requirement to pay a fee under s.368D(3)(za).

14. The Determination noted that ATVOD had written to CML on 28 January 2011 informing it of the statutory obligation to notify, referring it to ATVOD's "Guidance on who needs to notify" and the applicable fees. The Determination further stated that ATVOD had written to CML on 14 March 2011 to inform it that ATVOD had reached a preliminary view that the service was an ODPS. It noted that CML had made representations to the effect that the Service does not compete with broadcast television, that it is not "TV-like" and that ATVOD's approach hamstrings small, innovative and entrepreneurial businesses.
15. In light of CML's representations, the Determination addressed the operation of the Service under each of the applicable statutory criteria in s.368A(1) which (as set out above) define the meaning of an ODPS. It concluded that each of the statutory criteria had been met, setting out its reasons under each criterion.
16. In particular ATVOD concluded that the principal purpose of the Service was the provision of programmes the form and content of which were comparable to the form and content of programmes normally included in television programme services. It referred by way of example to one episode each of the following two audio visual titles found on the site: *"FC Dave – Episode 1 – Sex Lies and Digital Video"* and *"Beasthunters – Episode 1 – Archituthius Slimbus"*
17. ATVOD concluded that the content of these titles was comparable in particular to comedy programmes, and that the form was comparable "to that of programmes normally included in television services", noting in particular their generic opening sequences, which included a music soundtrack; their linear narrative or plot; and their end credits or end pictorial logo.
18. Accordingly, ATVOD considered that there were reasonable grounds for believing that a contravention of s.368BA had occurred and that, given a fee had not been paid for the year to 31 March 2011, there were also reasonable grounds for believing that a contravention of s.368D(3)(za) had occurred.
19. ATVOD set out CML's right to request an appeal to Ofcom (as provided for in paragraph 6(ii), and required by paragraph 7(xvii), of the Designation) and referred to Ofcom's draft procedures for handling appeals on scope and for imposing sanctions.

20. ATVOD concluded the Determination by informing CML that if it did not lodge an appeal to Ofcom, or if any such appeal were unsuccessful, ATVOD may issue an enforcement notice under s.368BB(1)(a) or s.368I(1) of the Act following consultation with Ofcom. It further advised CML that ATVOD could refer the matter to Ofcom for consideration of the imposition of a financial penalty under s.368BB(1)(b) of the Act or of suspension or restriction of the service under s.368K of the Act.

CML's appeal

21. By e-mail dated 3 May 2011, CML wrote to Ofcom to request an appeal of the Determination. CML submitted that ATVOD incorrectly determined that the Service is an ODPS fulfilling each of the statutory criteria set out in s.368A(1) of the Act.
22. CML's submission focussed on the first criterion in s.368A(1)(a) of the Act, and consisted of a restatement of its submission to ATVOD dated 24 March 2010. It did not set out specific grounds to dispute ATVOD's findings under the other criteria in s.368A(1), although it did make more general points on regulatory burdens on small businesses.
23. CML's points are summarised below:
- a. Referring to ATVOD's *Guidance on who needs to notify v3.1*², which expresses the aim, "*to create a level-playing field as between traditional linear broadcast television services and emerging on-demand audiovisual media services*", CML noted it is a small, start-up business with 15 employees which does not compete with existing broadcast services.
 - b. Referring to a published report prepared by Essential Research for Ofcom³ ("the 2009 research"), CML noted that the Service met fewer than half the "*key drivers*" of what is "*TV-like*" (page 6 of the report). Specifically, the Service was not broadcast on TV, had amateur production values (a few

² http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf

³ The regulation of video-on-demand: consumer views on what makes audiovisual services "TV-Like" – a qualitative research report: <http://stakeholders.ofcom.org.uk/binaries/research/tv-research/vod.pdf>

hundred pounds per production), had relatively unknown programme titles, a relatively unknown service provider brand and involved short-form content only. CML accepted that the Service's target audience was a mainstream one, and that producers and presenters were professional and reputable.

- c. The £2900 fee was excessive for the Service given its revenues.
- d. The Government has a stated aim of reducing red-tape and regulation for small, innovative, entrepreneurial businesses.

Subsequent events

- 24. CML's appeal, along with two other appeals Ofcom was adjudicating at the time⁴, raised some important issues of wider relevance to the industry and ATVOD regarding comparability of form and content between television and on-demand services. Ofcom therefore decided to commission some additional research into consumers' attitudes and behaviour towards different services in order to assist it in deciding this and future appeals.
- 25. The research sought to explore the factors which consumers see as particularly important in determining where different on-demand services fall in a spectrum ranging from closely comparable alternatives to linear, scheduled television to services which are not comparable. The objective of the research, drawing on the definition of ODPS in s.368A of the Act and relevant provisions of the AVMS Directive (including as to its purpose), was to help Ofcom determine which services, by virtue of the audio visual material they provide, fall within the scope of regulation: in particular, which services are regarded by users as sufficiently similar to linear television services that, when they want to watch television programmes, they regard them as competing alternatives or substitutes. A research report was prepared by Essential Research, and this was published on 23 October 2012 ("the 2012 research")⁵. The extent to which Ofcom uses this research as evidence to help us form our view in this Decision is set out below.

⁴ Ofcom was also considering appeals against determination by BBCWW in relation to its Food and Top Gear sites on Youtube

⁵ http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/Research_Report.pdf

26. CML was informed of the decision to deliberate the issues that would be addressed by the research, in conjunction with other appeals which raised similar questions, on 21 July 2011 by Ofcom. On 13 July 2012 Ofcom informed Channel Flip (which had by then been acquired by Shine) that the research project was nearing an end and that active consideration of the issues raised by the appeal would recommence in the light of that research. In keeping with paragraph 1.13 of Annex 1 to Ofcom's "Procedures for handling appeals of ATVOD decisions in relation to what constitutes an On-Demand Programme Service"⁶ any enforcement action was suspended pending the outcome of the appeal.
27. On 25 October 2012, Ofcom set out its preliminary view on CML's appeal: that it should be upheld, on substantially the same bases as Ofcom now sets out in this Decision. Ofcom provided the preliminary view to CML and ATVOD and gave them the opportunity to make representations within 10 working days. CML did not make any representations. Having sought additional time for response, ATVOD provided its representations on 30 November 2012 (see below).

Section 4 - Ofcom's Decision

28. Having carefully considered ATVOD's representations and the evidence as set out in this document, and for the reasons given, Ofcom's Decision is to uphold CML's appeal and to substitute our Decision for ATVOD's. Our Decision is that Channel Flip, as it was at the time of ATVOD's Determination and the subsequent appeal, was not an ODPS.
29. For the purposes of reaching this decision, Ofcom itself viewed the service immediately following its receipt of CML's appeal submission. ATVOD has also provided screen grabs captured at the time of its Determination, being a series of 12 screen grabs taken on 31 March 2011 and a series of seven screen grabs taken on 12 April 2011.

⁶ <http://stakeholders.ofcom.org.uk/binaries/consultations/on-demand/statement/statement-procedures.pdf>

30. At the time of ATVOD's Determination and the subsequent appeal, Channel Flip was a free to view service marketing itself as, "the UK's finest video shows". The home page of its website, www.channelflip.com, featured a drop-down menu of "Shows", below which was a revolving selection of "Featured Videos" and further menus of "Our Shows" and "Popular Videos". Clicking on an option took the user to a page featuring the selected video, which could be viewed. The viewing page provided links to other episodes in the series (where relevant), other shows and an opportunity to comment or share via sites like Facebook. Videos could be viewed on the viewing page or enlarged to view full-screen.
31. Shows included comedy material (e.g. *"David Mitchell's Soapbox"* and *"F.C. Dave"*) and other light entertainment material (e.g. *"Richard Hammond's Tech Head"*). Individual items were typically preceded by an advertisement or commercial sponsorship message and brief title sequence.
32. Most of the individual items were short in duration; *Richard Hammond's Tech Head* and *David Mitchell's Soapbox* episodes were each around 3 to 4 minutes in length for example. However, a few were longer; as noted in the Determination, for example, episodes of *F.C. Dave* had a duration of about 10 minutes. Individual items ended with brief credits.
33. Items were arranged into series and some followed a narrative, episodic approach; for example, *F.C. Dave* was a "mockumentary" style comedy series set around an amateur football team.
34. In relation to the specific points raised by CML about the Service, it is noted that the particular items were not also broadcast on traditional television. It is further noted that series titles were consequently not likely to be very well known, although several titles featured the names of well known individuals like David Mitchell and Richard Hammond. The style of the material was not "amateur" (the word used by CML in its appeal request) in the sense of a home movie posted on a website like YouTube for example, but it is fair to say material appeared to be professionally made but on a limited budget (with simple, cheap graphics, for example).

Section 5 – The Statutory Scheme

35. Provisions of Part 4A of the Act and of the AVMS Directive relevant to the present appeal are the same as laid out in Ofcom's Decisions in relation to "Sun Video" and "Viva TV Music." We refer to the more detailed explanations in those Decisions⁷, and also in the Annex to this decision. In summary, the key provisions for present purposes are:
- a. section 368A(1)(a) of the Act, which requires that an ODPS's "*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. of the relevant Articles of the AVMS Directive, Articles 1(1) (a), (b) and (g), in particular, which provide the basis for the definition of an ODPS in section 368A(1);
 - c. of the Recitals of the Directive that describe the general purposes of the regulation for which it provides, Recitals 2, 4 and 11; and
 - d. Recitals 21 to 29 of the Directive, which provide further explanation of its intended scope, and are particularly relevant to the interpretation of "ODPSs" under section 368A of the Act.

Section 6 – Reasons for Ofcom's Decision

Approach to relevant legislative provisions

36. Ofcom's approach to relevant legislative provisions is, again, explained in some detail in our Decisions in relation to Sun Video and Viva TV Music, which also focussed on the application of section 368A(1)(a) of the Act. We refer to those Decisions for a fuller discussion of what we consider to be the correct approach to applying that section.
37. In summary, the AVMS Directive and the Act seek through regulation to provide a measure of fair competition between those providing traditional (linear)

⁷ see <http://stakeholders.ofcom.org.uk/enforcement/video-on-demand-services/sun-video-decision-appendices/> and http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV_Viva_TV_Decision_Annexes.pdf

television broadcasting services and those providing services on an on-demand basis that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers.

The Act

38. 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 of a “*principal purpose part*” and a “*comparability part*”. All parts of that test must be considered and met, however. 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.

39. Broadly, as set out in the Sun Video and VIVA TV decisions, that means:

- a. looking at what is provided as a whole and considering whether there is anything which is a service whose principal purpose is the provision of audio visual material; and
- b. if the answer to (a) is in the affirmative, it is necessary to consider whether, taken as a whole, the service is one whose principal purpose is providing comparable programmes;⁸ which is a question that focuses on the audio visual material that comprises the principal purpose of the service.

AVMS Directive

40. Section 368A of the Act implements the AVMS 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.

⁸ That is, comparable in form and content to the form and content of programmes normally included in television programme services.

41. In interpreting section 368A, therefore, Ofcom has necessarily had regard to relevant provisions of the AVMS Directive. Ofcom draws attention in particular to two such provisions which are of most relevance to the present case:

a. Article 1(b) which gives a non-exhaustive list of examples of “programmes”, namely *“feature-length films, sport events, situation comedies, documentaries, children’s programmes and original dramas”*, each of which are recognisable genres seen in television broadcasting; and

b. Recital 24 which 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.”

The Recital also notes that, *“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.”*

42. Having regard to these provisions, Ofcom also considers it necessary, when considering whether a service is an ODPS, to take a step back and consider whether in light of all the circumstances:

- a. the relevant audio visual material is likely to compete for the same audience⁹ as (linear) television broadcasts; and
- b. whether the nature of that material, and the means of access to it, would lead users reasonably to expect regulatory protection within the scope of the Directive.

⁹ And, in appropriate cases, advertisers

Applying these provisions

43. The most relevant part of the statutory definition of an ODPS in a case like the present is (for the reasons set out below) the comparability part. Applying the relevant provisions in such a case is a question of considering all those factors relevant to the comparability of the form and content of the relevant material and whether, given that material, there is sufficient similarity between the service and (linear) television broadcasting services that they are likely to compete for audiences.

Research into on-demand programme services

44. Given points 42(a) and 42(b) above, and in light in particular of the fact that Recital 24 makes reference to competition between on-demand services and linear television services, and to the expectations of users as regards regulatory protection, Ofcom commissioned Essential Research to undertake a study of how users regard on-demand services. In particular, the research looked at which services users did or did not see as competing alternatives to watching linear, scheduled television.
45. The study placed different services on a spectrum of comparability (between those highly comparable with linear television and those not closely comparable) based on ten different factors which were derived from interviews with, and discussion groups involving, service users.
46. It is important to note that the factors are not exhaustive or determinative, and Ofcom is mindful of the fact that the study is a qualitative “snap shot” of user attitudes. Likewise, that Recital 24 contains a reminder that *“the concept of a programme should be interpreted in a dynamic way taking into account developments in television broadcasting”*. Nevertheless, the study provides a useful framework and, in Ofcom’s view, the factors are indicative, in certain relevant respects, of what users consider important in assessing comparability. We have therefore used the study as a piece of evidence assisting us to reach our Decision whilst being clear that it is not determinative.
47. One of the services specifically discussed with users in interviews and discussion groups was Channel Flip. It is noted that the study took place several

months after the Determination and receipt of the appeal, and the changes to the design and functionality of the Channel Flip website had occurred by this point. However, the views of users towards Channel Flip remain relevant (although not determinative) in this case, particularly in relation to that audio visual content which remained the same between the site design changes (such as *David Mitchell's Soap Box*), and factors that emerged from the research that are particularly relevant to the content as it was at the time of determination are referred to below.

48. On balance, users considered Channel Flip to be at the lower end of the spectrum of comparability with linear television. In particular, users cited the prevalence of short-form content and the fact that *"the service felt like a vehicle to sell particular TV personalities"*. Other factors also made the service less comparable to television from the point of view of users, particularly the "look and feel" of the website, the relatively low (production) quality of material in terms of length, simple cheap graphics, and reliance on single camera, single authored content in the main. Users did not associate the short form content with the sort of thing they would associate with linear television, notwithstanding the recognisability of hosts such as David Mitchell and Richard Hammond.
49. This 2012 research follows other research Essential conducted for Ofcom in 2009. The earlier research was concerned with the phrase "TV-like" in the AVMS Directive. Again without being determinative of any point, it sought to help Ofcom gain an understanding of what at that time consumers considered to be "TV-like" material and what characteristics such material possesses.
50. This earlier research involved participants being asked to place different examples of on demand audio visual material on a spectrum according to how "TV-like" they were considered to be, and to identify the factors which led them to their views. The factors identified included whether the material had been broadcast on television before, the quality of its production values, the "programme" title and its content format (whether it was feature length/a full programme or short form). Not having been previously broadcast, having lower or amateur production values, unknown programme titles and short form content were all seen as characteristics of less TV-like material.

Ofcom's assessment

51. As set out above, CML's principal ground of appeal against the Determination was in respect of ATVOD's application to the Service of the first defining requirement of an ODPS in s.368A(1)(a). CML did not dispute the application of any other criterion under s.368A(1) although it made some general points about regulatory burden as referred to below.
52. More specifically, CML did not agree that Channel Flip met the comparability part of the statutory definition of an ODPS (that it was "*TV-like*"). It did not comment directly on the "*principal purpose*" part of the definition. Nor did it suggest an alternative "*principal purpose*" for the service other than the provision of audio visual material.
53. In the absence of a realistic alternative principal purpose, Ofcom considers it is apparent that provision of audio visual material was indeed the purpose of Channel Flip as it was constituted at the time of the Determination and appeal. This was clear from the website itself which featured video content to the exclusion of other services (other than a limited amount of banner advertising which was clearly ancillary to the service offered). This aspect of Ofcom's finding is in line with ATVOD's.
54. The issue on which the appeal turns, therefore, is whether (or the extent to which) the audio visual material, the provision of which was the principal purpose of Channel Flip, was comparable in form and content to that of programmes normally included in television programme services. In considering this issue, Ofcom has applied the approach described above and taken into account the research referred to (to the extent we consider it relevant).
55. At this point, it is appropriate to note ATVOD's representations on Ofcom's preliminary view. These related to:
- a. Ofcom's use of the 2012 research as evidence in support of our view;
 - b. our consideration of the relevance of the duration of the material in the service (in which connection ATVOD made submissions about the numbers of programmes in (linear) television programme services of 5 minutes' duration or less);

- c. the extent to which Ofcom regarded the statutory definition of ODPS as requiring programmes or services to be comparable to programmes and services on linear television; and
- d. remitting the service to ATVOD for re-consideration (in the event that we did not uphold its Determination).

We comment in response to these representations in paragraphs 70 – 72 below.

- 56. As to the application of what we consider the correct approach, Ofcom notes that some of the series included in Channel Flip at the time of the Determination, for example “*The Very Real Adventures of Batman and Robin*,” shared some characteristics with an established genre of linear television programmes identified in Article 1(d) of the AVMS Directive (“*situation comedies*”). There was some overlap with other common genres popular in the UK (e.g. sketch comedies).
- 57. However, Ofcom considers that, taken as a whole, the form and content of Channel Flip material at the relevant time was not sufficiently comparable with that of programmes normally included in (linear) television programme services. It was, consequently, relatively unlikely to be associated by users with linear television and would not, therefore, compete for audiences with such services. Ofcom considers the views of users as set out in the research, and the 2012 research in particular, as instructive.
- 58. In particular, although presenters such as David Mitchell and Richard Hammond are recognisable to users from (linear) television, users’ views in the 2012 research indicated that they did not view the form of the series they presented on Channel Flip (essentially short monologues to camera which the users perceived to be of relatively low (production) quality) as associated with, or an alternative to, television programmes. Such items made up a large amount of material on the Channel Flip website at the relevant time. We note, too, the consistency of these views with those in the 2009 research.
- 59. The length of individual items was a matter which users in both the 2009 and 2012 research saw as relevant. This is also a matter Ofcom considers

particularly important in this case. Although some of them were longer, items on Channel Flip generally had a duration of between 3 and 4 minutes, which is not typical of comedy and light entertainment programmes normally included in television programme services (although Ofcom recognises that short form content may be more likely to be typical in some genres, such as children's programming and adult content programming).

60. Accordingly, while some items echoed some characteristics of television programmes, for example by the inclusion of brief opening and closing credits, in most cases their form and content was not sufficiently comparable to a class of programmes commonly seen on television. The 2012 research tended to confirm users did not see a strong parallel with television programmes. Rather, they saw a stronger parallel with short-form clips on websites such as YouTube, which may lack things like credit sequences. Ofcom agrees.
61. User views as set out in the 2012 research as to the closest alternatives to Channel Flip aligns with Channel Flip's own description in the "*About Us*" section of its website. This describes the service as providing programmes "*produced specifically for web-based, snack-sized consumption*". Again, Ofcom broadly agrees with this characterisation of the service.
62. In its Determination, ATVOD cited episodes of *F.C. Dave* and a science fiction spoof called *Beasthunters* which are featured on Channel Flip. These particular programmes have a duration of around 10 minutes and around 6-7 minutes respectively, follow a dramatic, episodic structure and have relatively high production values. Ofcom agrees that these particular programmes are more closely comparable with television programmes than many other programmes on Channel Flip. There are still differences (particularly in duration) with typical television programmes in the comedy genre, but the comparison is, nonetheless, closer.
63. However, while the comparisons made by ATVOD are relevant to an overall assessment, the extent to which the examples chosen were typical of Channel Flip as a whole needs to be put into context. When Ofcom reviewed Channel Flip, there were five episodes of *F.C. Dave* and two of *Beasthunters* on the website, compared with, for example, 62 of *David Mitchell's Soap Box* and 23 of *Rob Llewelyn's Machine of the Week*, both of which are towards the other end of

the spectrum of comparability on the bases of factors such as their short duration, their production quality (in terms of things like their simple cheap graphics) and their use of single camera, single authored content. Such material was, in Ofcom's view:

- a. far more typical of the audiovisual material which it was the principal purpose of Channel Flip to make available to users; and
- b. not, on the bases of the factors described, comparable within the meaning of section 368A(1) (a) of the Act.

64. There were, therefore, certain factors, as described, that tended to support the determination ATVOD made. Ofcom's overall assessment, however, taking a purposive approach to the interpretation of the relevant provisions of the Act, having regard to provisions of the AVMS Directive, and taking account of the research as described, is that:

- a. the form and content of the audiovisual material provided by Channel Flip at the relevant time was not comparable to the form and content of programmes normally included in television programme services; and
- b. given that material, there is not sufficient similarity between the service and (linear) television broadcasting services that they are likely to compete for audiences in a relevant sense.

Ofcom accordingly concludes that Channel Flip was not an ODPS at the time of ATVOD's Determination and the appeal. Channel Flip did not meet the criterion in section 368A(1)(a) of the Act.

Other points raised by CML

65. Given the foregoing conclusion, it is not strictly necessary to address other points raised in CML's appeal, but we do so briefly below to provide further guidance.

66. CML's appeal request states that it is not a commercial competitor of existing broadcasters on the basis that it is a small, start-up business employing fewer

than 15 employees. Ofcom does not consider that the size of the organisation is determinative of the existence of commercial competition, and indeed there are some small television broadcasters, particularly on satellite and cable platforms.

67. CML also noted the Government's aim in reducing red tape and the size of the fee levied by ATVOD.

68. In relation to the size of the fee, this was not the subject of the ATVOD Determination under appeal. It is therefore not a relevant question for appeal.

69. In relation to the Government's aim of reducing red tape, this is recognised but, as noted in Recital 24 to the AVMS Directive and embodied in the Act, the purpose of the legislation is to extend regulatory protection to on-demand programme services where, "*the nature and the means of access to the service would lead the user reasonably to expect regulatory protection.*" There is a process for setting fees under the Designation which involves a consultation process whereby the position of smaller providers can be, and is, taken into account.

ATVOD's representations

70. As to ATVOD's representations on Ofcom's preliminary view (see above), that preliminary view and this Decision are clearly about whether the Channel Flip service was an ODPS. As set out above, it was a service comprising some material more closely comparable to linear television programmes but mainly short comedic monologues.

71. In considering whether the service was an ODPS, we have considered the characteristics of the relevant material. We have had regard to the short duration of much of it, its production quality (in terms of things like their simple cheap graphics) and its use of single camera, single authored content. We have also considered the evidence provided by participants in relevant research.

72. The fact the short duration of much of the material in the service was a relevant factor in our Decision here clearly does not mean all services comprising material of a particular duration are necessarily in or out of the scope of

regulation as ODPSs. There is a large amount of material on on-demand services with many different characteristics. A service of similar type and content to Channel Flip may be subject to a similar analysis. This Decision cannot, however, be read as extending a general principle to all services that, if they comprise short-form material, they are not ODPSs under the Act. Any service would need to be considered on all the basis of all its relevant characteristics and all the relevant evidence.

Section 7 - Conclusion

73. For the above reasons, Ofcom has concluded that, on a proper construction of s.368A(1)(a) (having regard to the AVMS Directive), the service did not at the relevant time meet the definition of an ODPS in s.368A(1)(a) of the Act. Consequently, CML were in breach of neither the advance notification requirement under section 368BA of the Act, nor the requirement to pay a fee under section 368D(3)(za).
74. Ofcom's decision is therefore to uphold CML's appeal in this case insofar as it relates to the Service's designation as an ODPS and to substitute this Decision for ATVOD's.

Annex: The Statutory Scheme

1. The provisions of Part 4A of the Act and of the AVMS Directive particularly relevant to the present appeal are as follows.

“ODPSs”

2. As indicated above, section 368A of the Act sets out the meaning and defining criteria of an “ODPS.” Specifically, section 368A(1)¹⁰ provides that, for the purposes of the Act, “a service is an “ODPS” if--
 - a. *its principal purpose is the provision of programmes¹¹ the form and content of which are comparable to the form and content of programmes normally included in television programme services;¹²*
 - 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 use¹³ 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”.*

Of these, only that in (a) is in contention in this appeal.

Requirement of Advance Notification to ATVOD

3. Section 368BA(1) of the Act provides for an advance notification requirement on the part of persons providing an ODPS. It says, “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.”
4. For the purposes of that section, the “appropriate regulatory authority” is ATVOD, which has been designated by Ofcom under s.368B of the Act to carry out certain functions under Part 4A: see paragraph 5 of Ofcom’s

¹⁰ The remainder of section 368A are supplementary provisions not directly relevant for the purposes of the present appeal.

¹¹ Section 405 of the Act defines “programme” for the whole Act (except in so far as the context otherwise requires) as including “an advertisement and, in relation to a service, anything included in that service.”

¹² Section 362 of the Act defines “television programme service” as meaning any of (a) a television broadcasting service; (b) a television licensable content service; (c) a digital television programme service; (d) a restricted television service.

¹³ Section 368R provides relevant definitions for terms in Part 4A of the Act and, so far as material, provides (at subsection (4)) that “The services that are to be taken for the purposes of this Part to be available for use by members of the public include any service which— (a) is made available for use only to persons who subscribe to the service (whether for a period or in relation to a particular occasion) or who otherwise request its provision; but (b) is a service the facility of subscribing to which, or of otherwise requesting its provision, is offered or made available to members of the public.”

designation of 18 March 2010 (“the Designation”).¹⁴ One such function is to determine whether providers of ODPSs have complied with the notification requirement in section 368BA: see paragraph 5(ii) of the Designation.

5. In order for ATVOD to fulfil that function, it has power under paragraph 6(ii) of the Designation to decide, amongst other things, what constitutes an ‘ODPS’ in accordance with section 368A of the Act. Paragraph 6(ii) of the Designation also makes clear that any such decision is “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.*”
6. The provider of an ODPS must, pursuant to section 368D(3)(za) of the Act, pay such fee as ATVOD may require in accordance with section 368NA.

Relevant provisions of the AVMS Directive

7. Section 368A of the Act implements the AVMS 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.
8. In interpreting section 368A Ofcom has necessarily had regard to the relevant provisions of the AVMS Directive. Ofcom has done so because Part 4A of the Act is intended to implement the requirements of the Directive.
9. Of the relevant Articles of the AVMS Directive, Articles 1(1) (a), (b) and (g), in particular, provide the basis for the definition of an ODPS in section 368A(1). Most relevant for present purposes is Article 1(1) (b).¹⁵ It provides a definition of “programme,” which refers to comparability with television, and which applies for the purpose of defining “*on-demand audiovisual media services*” under Article 1(1) (g). It says:

“‘programme’ means a set of moving images with or without sound constituting an individual item within a schedule or catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama.”

10. As to Recitals of the AVMS Directive that describe the general purposes of the regulation for which it provides, Recitals 2, 4 and 11 are relevant. They

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

¹⁵ Article 1(1) (a) provides the definition of “audiovisual media services,” both linear television broadcasting and on-demand services, covered by the Directive. It refers to a “principal purpose” part of the statutory definition:

“‘audiovisual media service’ means a service... the principal purpose of which is the provision of programmes Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph.”

Article 1(1) (g) provides that:

“‘on-demand audiovisual media service’ (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.”

explain that the Directive recognises that technological advances allow for the provision of audio-visual media services across national frontiers by a range of technological means. They say that aims of the Directive include completing the internal market and providing for at least a basic measure of regulation to apply to on-demand audio-visual media services that compete with traditional linear television broadcasting.¹⁶

11. Recitals 21 to 29 of the Directive, meanwhile, provide further explanation of its intended scope, and are particularly relevant to the interpretation of “ODPSs” under section 368A of the Act. In particular:¹⁷

- a. Recital 21 states that the Directive should cover only “*mass media*” services, “*which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public,*” and should not cover services, “*which are primarily non-economic and are not in competition with television broadcasting.*”¹⁸
- b. Recital 22 states that the Directive should only cover services where the “*principal purpose*” is the provision of programmes and, “*... exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as ... information related to a ... non-audiovisual service.*”
- c. Recital 23 confirms that “*audiovisual*” covers silent moving images and accompanying text such as subtitles and EPGs, but stand-alone text-based services fall outside the scope of the Directive, “*For the purposes of this Directive, the term ‘audiovisual’ should refer to moving images with or without sound...While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive.....*”
- d. Recital 24 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*

¹⁶ Recital 11, for example, says: “*It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).*”

¹⁷ Recitals 25 – 27 are not specifically relevant to the present appeal. 25 clarifies what is meant by “*editorial responsibility*” and provides scope for member states to further specify aspects of the definition. 26 states that the definition of “*media service provider*” should not cover mere transmission where editorial responsibility lies elsewhere. 27 clarifies the position where the same service provider makes available on demand services and also makes available linear television services.

¹⁸ such as services distributing user-generated content

means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.” The Recital also notes that, “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.”

- e. Recital 28 states that, *“The scope of this Directive should not cover electronic versions of newspapers and magazines.”*
 - f. Recital 29, as is indicated above, states that, *“All the characteristics of audiovisual media services set out in its definition and explained in Recitals 20 to 27 should be present at the same time.”*
12. Other Recitals offer some indications of the meaning of parts of those referred to above. For example, Recital 98 indicates a meaning of “ancillary,” which term is in Recital 22, when it says, *“The term ‘ancillary’ refers to products intended specifically to allow the viewing public to benefit fully from, or to interact with, these programmes.”*