

**APPEAL BY PLAYBOY TV AGAINST A NOTICE OF DETERMINATION BY
ATVOD THAT THE SERVICE “CLIMAX 3 UNCUT”
([HTTP://WWW.CLIMAX3.CO.UK/UNCUT](http://www.climax3.co.uk/uncut)) HAS CONTRAVENED SECTION 368BA
OF THE COMMUNICATIONS ACT 2003**

OFCOM DECISION

Introduction: the statutory context

The Audiovisual Media Services Regulations 2009 introduced a new part (Part 4A) into the Communications Act 2003 (“the Act”) to implement the requirements of the Audiovisual Media Services Directive¹ (the “AVMS Directive”). Part 4A enacted a new statutory regime for the regulation of “On-Demand Programme Services” (as defined by s.368A of the Act).

The Audiovisual Media Services Regulations 2010 then came into force on 18 March 2010 and introduced additional provisions under Part 4A into the Act.

“On-demand programme services”

Section 368A sets out the meaning and defining criteria of an “on-demand programme service”. Specifically, section 368A(1) provides that, for the purposes of the Act, “a service is an “on-demand programme service” if--

- (a) its principal purpose is the provision of programmes² the form and content of which are comparable to the form and content of programmes normally included in television programme services³;*
- (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 use⁴ 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”.*

¹ The 2009 Regulations originally implemented a former version of the AVMS Directive: Directive 2007/65/EC. However, that Directive has since been consolidated with other Directives into Directive 2010/13/EU, with the result that the relevant recitals and articles have changed in their numbering.

² 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.”

³ 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.

⁴ 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.”

Section 368A(2)-(4) then make supplementary provision in relation to the above criteria. In particular, section 368A(2) provides that “Access to a service is on-demand if--

- (a) *the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service; and*
- (b) *the programmes viewed by the user are received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view)."*

Section 368A(3) provides that “*For the purposes of a subsection (2)(a) [above], the fact that a programme may be viewed only within a period specified by the provider of the service does not prevent the time at which it is viewed being one chosen by the user.*”

Section 368A(4) provides that “*a person has editorial responsibility for a service if that person has general control—*

- (a) *over what programmes are included in the range of programmes offered to users; and*
 - (b) *over the manner in which the programmes are organised in that range;*
- and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the service [...].”*

Requirement of Advance Notification to ATVOD

Section 368BA(1) of the Act then provides for an advance notification requirement on the part of persons providing an on-demand programme service. It provides 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.*”

For the purposes of that section, the “appropriate regulatory authority” is the Association for Television On Demand (“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 designation of 18 March 2010 (“the Designation”).⁵

One such function is to determine whether providers of on-demand programme services have complied with the notification requirement in section 368BA (set out above): see paragraph 5(ii) of the Designation.

In order for ATVOD to fulfil that function, it has power under paragraph 6(ii) of the Designation to decide:

- (a) what constitutes an ‘on-demand programme service’ in accordance with section 368A of the Act and/or who the provider of that service is; and
- (b) what constitutes a ‘programme included in an on-demand programme service’ in accordance with section 388R(2) of the Act.

⁵ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

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

In relation to the notification requirement under s.368BA, Rule 1 of ATVOD’s Rules and Guidance requires that where, on 18 March 2010, an on-demand programme service is already being provided by a person, that person’s obligation to give a notification before beginning to provide that service has effect as an obligation to give a notification before 30 April 2010 and that notification must state that the person is already providing the service (rather than that the person intends to do so).⁷

By virtue of section 368BB(1)(a)⁸ of the Act, and paragraph 6(viii) of the Designation, where ATVOD determines that the provider of an on-demand programme service has contravened the advance notification requirement in s.368BA, it may give the provider an “enforcement notification”.⁹

However, section 368BB(2) requires that ATVOD must not make such a determination “*unless there are reasonable grounds for believing that a contravention of section 368BA has occurred and [ATVOD has] allowed the provider an opportunity to make representations about that apparent contravention.*”

Determination under Appeal

By a written “Notice of Determination” dated 21 December 2010 (the “Determination”), ATVOD informed Playboy UK TV Limited (“Playboy TV”) that – for the reasons set out in the Determination – the service ‘Climax Uncut 3 / Climax 3 Mobile Downloads’ (“the Service”) constituted an on-demand programme service (“ODPS”) under s.368A of the Act, and that Playboy TV was therefore contravening (or had contravened) the advance notification requirement under s.368BB(1).

The Determination started by explaining that ATVOD had written to Playboy TV on 28th July 2010 and 6 October 2010 to inform Playboy TV that ATVOD had considered the Service and formed a “preliminary view” that the Service may be an ODPS in respect of which Playboy had failed to provide advance notification (under section 368BA). It had therefore invited Playboy TV to make written representations before it proceeded to make its Determination. Playboy TV duly provided representations by letter dated 25 October 2010 which were set out in the Determination. (Those submissions were substantially similar to the

⁶ Ofcom’s “*Procedures for handling appeals on scope and for imposing sanctions in relation to On-Demand Programme Services*” were the subject of a consultation (published 17 December 2010) which ended on 11 February 2011: see <http://stakeholders.ofcom.org.uk/consultations/on-demand-programme-services/summary>. Pending Ofcom’s publication of the finalised procedures, and for the purposes of determining this appeal, Ofcom applied the procedures as set out in the consultation.

⁷ See Regulation 13 of the Audiovisual Media Services Regulations 2010.

⁸ Section 368BB(1)(b) additionally confers a power on the “appropriate regulatory authority” to impose a financial penalty on the provider (in accordance with section 368J). However, by virtue of paragraph 6(viii) of the Designation, ATVOD has not been given this power.

⁹ Section 368BB(3) provides that an “enforcement notification” under that section is a notification which specifies the determination made and imposes a requirement on the provider to take all such steps for remedying the contravention of section 368BA as may be specified in the notification. By virtue of paragraph 7(xii) of the Designation, ATVOD is required to consult Ofcom before any such enforcement notice is issued to a provider.

representations which Playboy TV made to Ofcom in this appeal and which are summarised below).

In the light of those 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. Accordingly, it considered that there were reasonable grounds for believing that a contravention of section 368BA had occurred since, before beginning to provide the Service, Playboy TV (as its provider) had failed to notify ATVOD of its intention to do so, or, if the Service was already being provided on 18 March 2010, Playboy TV did not give ATVOD notification before 30 April 2010.

ATVOD then set out Playboy TV'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 explained the procedures for making an appeal, which included a requirement to set out the grounds on which the appeal is sought and an explanation as to why, in respect of each ground, ATVOD's decision in the Determination was materially flawed.

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

Appeal by Playboy TV

By a letter dated 5 January 2010, Playboy TV wrote to Ofcom to request an appeal of the Determination. Playboy TV submitted that ATVOD incorrectly determined that the Service is an ODPS fulfilling each of the statutory criteria set out in section 368A(1) of the Act. Playboy TV specifically focussed its submissions on the first criterion in section 368A(1)(a), and did not set out any grounds to dispute ATVOD's findings under the other criteria in s.368A(1). (Playboy TV also did not dispute that it was the relevant provider of the Service).

In that connection, Playboy TV specifically disputed that the Service satisfies the requirement under section 368A(1)(a) that *"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"*.

Playboy TV explained that the content of the Service is all "R18"¹⁰ or equivalent in nature, and is strictly prohibited to air on television under the Ofcom Broadcasting Code¹¹.

¹⁰ The "R18" category is a special and legally restricted (adult) classification applied by the British Board of Film Classification ("BBFC") primarily to *"explicit works of consenting sex or strong fetish material involving adults..."*: see the BBFC's Classification Guidelines in relation to R18: <http://www.bbfc.co.uk/classification/guidelines/r18>. The "Main Issues" section of the Guidelines additionally explains that *"Sex works (works whose primary purpose is sexual arousal or stimulation) are likely to be passed only in the adult categories. Sex works containing only material which may be simulated are generally passed '18'. Sex works containing clear images of real sex, strong fetish material, sexually explicit animated images, or other very strong sexual images will be confined to the 'R18' category..."*

¹¹ Rule 1.17 of the Ofcom Broadcasting Code provides that *"Material equivalent to the British Board of Film Classification ("BBFC") R18-rating must not be broadcast at any time"*. Rule 1.26 further provides that *"BBFC R18-rated films must not be broadcast"*.

Therefore, it argued, the content cannot be construed as “normally included in the television programming services” within the terms of s.368A(1)(a).

In support of that submission, Playboy TV relied on the AVMS Directive¹², and on Recital 17 (now Recital 24 of the consolidated AVMS Directive) 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.”

By reference to that Recital, Playboy TV maintained that the Service is not “television-like” since, given its classification as R18, *“it is aimed at consumers looking for hardcore material, rather than the softcore content on our television channels.”* It contended that the Service is a website *“designed to complement our television channels, rather than compete”* with them. It maintained that the *“marked difference in compliance levels between the Service and our channels also demonstrates the lack of competition”*, and asserted that it was *“reasonable to suggest that the soft content shown on UK TV cannot possibly compete with R18 content on a website.”*

Playboy TV further argued, again in reliance on the terms of Recital 17 (now 24) of the AVMS Directive, that since the “means of access” to the Service is only via the internet, *“it would seem reasonable that the user would not ‘expect regulatory protection’ when accessing”* the Service. Playboy TV asserted that *“the internet contains a wealth of unregulated content, and users do not expect sites such as ours to be regulated.”*

By letter dated 11 February 2011, Ofcom informed Playboy TV that it had granted its request for an appeal of the Determination. Ofcom set out a summary of the procedures which would apply to its handling of the instant appeal and confirming that Playboy TV’s specific ground of appeal was that the Service did not satisfy the first defining requirement of an ODPS under s.368A(1)(a).

Ofcom Decision

The Service

For the purpose of determining this appeal, Ofcom itself viewed the Service with temporary login details provided to it by Playboy TV at Ofcom’s request, and has set out below a brief summary of the Service as it was available to users at the time¹³. However, on an initial review of the Service, it appeared to Ofcom that the Service did not continue to operate in the same manner as it did when ATVOD had assessed it. Accordingly, Ofcom requested Playboy TV to confirm if this was the case.

Following an email from Playboy TV on 14 March 2011, Playboy TV informed Ofcom that the Service (and in particular the “headings” under which the Service was offered) *“had changed slightly”* as Playboy TV had ceased to provide “mobile downloads” (since 1 November 2010). Nevertheless, Playboy TV confirmed that the Service was that which operated at www.climax3.co.uk/uncut, although it further explained that it is *“phasing this site out and*

¹² Playboy TV specifically referred to EU Directive 2007/65/EC. But, as explained in the first footnote above, it has been consolidated into EU Directive 2010/13 EU.

¹³ Ofcom viewed the Service on 14 and 15 March 2011.

expect[s] to close it in the next month or so.” Consequently, Ofcom was required to consider this appeal by reference to the operation of the Service at the time Ofcom viewed it.

When users seek to access the Service at www.climax3.co.uk/uncut, they are met by a prompt to “Login to Climax 3 Uncut” by entering a “viewing card number”. (The webpage is otherwise black save for a “CLIMAX3” logo in pink letters in the top left-hand corner and a background pink neon sign saying “Ladies”).

Once users input a valid viewing card number, there appears a webpage featuring a main window (with the words “Network Performance” in the top left-hand corner) showing fully explicit pornographic video content in progress. Next to the window is a menu (which can be scrolled up and down) with links headed “Schedule”, “Search” “Settings” and “Help”. The “Schedule” link lists video content with titles such as “Sex Cells Ep 2”, “Sex and Cocktails ep1”, “Jo’s Sexy College Diaries 01”, “Sex With Strangers ep1”, and the main window plays video content which is listed in the “Schedule”.

Beneath that, there are three pink boxes under the heading “Channels” which are individually marked “CLIMAX 3-1”, “CLIMAX 3-2” and “CLIMAX 3-3”. Clicking on “CLIMAX 3-1” produces a list of video content (in a running order) with titles and descriptive subtitles such as “UK Vice Girls II ep5. [Chuck is home feeling frustrated so he calls a vice girl]”, “Threesomes ep2. [Melissa gets dirty with her boyfriends best friend]”, “Orgy ep5. [A 6 people orgy full of big, juicy tits]”, “Barely 18 01b Karla St James. [Fresh and juicy young girls get it on with themselves and some...]”, “Anal Babes ep6. [More hot anal action with these gorgeous but filthy girls]” and “About Lust Night ep2. [Cassandra tells the girls how she gave Miles the ride of his life]”. (At the bottom of the webpage in small text there is a direction to “Visit other Playboy TV sites: [Playboy TV](#) | [Adult Channel](#) | [Extreme](#) | [Climax](#) | [Girl Girl](#).”

Selecting “UK Vice Girls II ep5”, for example, initiates video content (lasting almost 26 minutes) which begins with a music and titles sequence stating (over shots of London landmarks at night) “MSS INTERACTIVE presents...UK Vice Girls 2 Vol 5...Starring...”. The sequence introduces a participant named “Chuck Loads” who is shown sitting on a sofa dressed in clothes stimulating his erect penis and looking at his mobile telephone. The sequence also introduces “Renee” who is shown (in close-up) montage footage performing fellatio and then having penetrative vaginal sex naked with a man. The title sequence further states that the video content is “Filmed & Directed by...Freddie Morse & Bob Bennett”, and “Produced by MSS INTERACTIVE.”

The video content then proceeds to show (in full graphic detail) the male and female participants engaging in fully explicit sexual activities including: fellatio, cunnilingus, oral stimulation of the anus, penetration of the vagina (in different positions) and open ejaculation. The video content then ends with a music and credits sequence stating the “Cast”, “Crew” and by whom the video was filmed, directed, edited and produced. (That video content is then immediately followed by the next film in the running order on channel “CLIMAX 3-1”, i.e. “Me & My Pussy #01 – Nadia”, which also starts and ends with a music and title / credit sequence.)

Selecting the other video content referred to above (eg. “Orgy ep5.”, “Barely 18 01b Karla St James” and “About Lust Night ep2.”) gives users access to video content which follows a similar format with the inclusion of start and end title / credit sequences and equally graphic sexual content in between. (“About Lust Night ep2” and “Anal Babes ep2” in particular show full graphic anal penetration). Video material on “CLIMAX 3-1” also lasts for sustained

durations (eg. “Orgy ep5.” (25:50); “DP Fantasies ep.8” (26:58)) and appear to take an episodic form (i.e. as part of wider series).

Similar content is further available on channels “CLIMAX3-2” and “CLIMAX3-3”. The latter in particular includes video content entitled “Ashes to Ashes ep1 Fire and Vanity”, which takes the form of a fictional detective story (set in the past) about “the Book of Sins” involving a private detective named “John Ash” and a lady named “Veronica Lake”.

Application of Section 368A(1)(a)

As set out above, the specific ground of appeal referred to Ofcom by Playboy TV 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). (Playboy TV did not dispute the application of any other criterion under s.368A(1)).

Section 368A(1)(a) requires that a 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*”.

In determining that the Service satisfied the above requirement, ATVOD explained its reasoning as follows:

“The service located at <http://www.climax3.co.uk/> offers ‘adult’ programmes to view online or following download to a mobile phone. Although the website also acts as a promotional vehicle for related linear TV channels, the videos are not an integral and ancillary element of the broader offering. The on demand programmes are grouped together and presented as a catalogue of viewing options in their own right.

The ‘adult’ on demand programmes included in the service are offered under the headings ‘Climax3 Uncut’ and ‘Climax 3 Mobile Downloads’. The programmes are comparable in form and content to ‘adult’ programmes normally included as programmes in television programme services. Although the content may be more explicit than is currently permitted on linear TV services in the UK, the form and content is nevertheless comparable to ‘adult’ programmes which are frequently broadcast on linear TV channels in other EU jurisdictions.”

As explained above, Playboy TV informed Ofcom that the Service is no longer offering “mobile downloads”, which explains why Ofcom was unable to locate the “headings” to which ATVOD referred in its reasoning above. Nevertheless, Ofcom has been able to consider for itself the application of s.368A(1)(a) to the current functioning of the Service which Ofcom has independently reviewed.

Based on that review, Ofcom considers that the “principal purpose” of the Service is plainly the provision of video content, and specifically ‘adult’, highly explicit pornographic video film material, made available on-line to users of the Service on a ‘streaming’ basis. (The content can also be separately downloaded). That much is clear from the fact that when users login to access the Service, the ‘Home’ page is already featuring what is called a “Network Performance” of specific video content from the adjacent “Schedule”.

The central question is whether, on a proper construction of s.368A(1)(a), the form and content of that (adult pornographic) video material is “comparable to the form and content of programmes normally included in television programme services.” On that issue, Ofcom has carefully considered the arguments advanced by Playboy – summarised above – as to why the programmes included in the Service are not “comparable” to those of “programmes normally included” on UK television channels. However, in Ofcom’s view, those arguments are incorrect for the following reasons.

Considering first the wording of s.368A(1)(a) of the Act on its own terms, Ofcom considers it important to bear in mind that subsection (1)(a) requires the form and content of relevant programmes to be “comparable”, but not “identical”. (The same word is adopted in the definition of “programmes” in Article 1(b) of the AVMS Directive – see below). In Ofcom’s view, the form of the video material available for viewing on the Service is clearly “comparable” to the form of programmes normally included in general television programme services. The video content is offered in self-contained items for selection under individual titles which are of sustained durations (as opposed to brief ‘clips’). These items are arranged into “schedules” which follow specific running orders. They are further arranged under what the Service labels “Channels”: i.e. “Climax3-1”, “Climax3-2”, and “Climax3-3”. The video material also features title sequences (often with music), and ends with credit sequences to acknowledge the participants and programme-makers. It also features video content which is episodic and part of wider series, and includes material which adopts dramatic/fictional conceits or plots (as in the case of “*Ashes to Ashes ep1 Fire and Vanity*” described under “The Service” above.)

In Ofcom’s view, these factors make the form (and format) of the video material available on the Service clearly “comparable” to the form of programmes normally included on television programme services, and television broadcasting in general: see the definition of “programmes” in the AVMS Directive below.

As for the particular content of the video material, Ofcom fully appreciates Playboy TV’s submission that “*the content on the Service is all R18 or equivalent in nature*” and that such material is prohibited under Ofcom’s Broadcasting Code¹⁴. However, Ofcom considers that the video content nevertheless remains “comparable” to the sort of adult sexual content which is permitted to be included in UK television programme services. In particular, it is comparable to “Adult sex material” which is permitted to be shown (albeit subject to restrictions) on “premium subscription services and pay per view/night services” and has, like the content on the Service, the primary purpose of sexual arousal or stimulation: see Rule 1.18 of the Ofcom Broadcasting Code¹⁵. The British Board of Film Classification regards material with that purpose as “sex works” (likely to be rated 18 or R18). The content on the Service and “Adult sex material” on television are therefore comparable on that basis.

¹⁴ See footnotes 10 and 11 above.

¹⁵ Section 1 of the Broadcasting Code (“Protecting the Under-Eighteens”) makes specific provision in respect of “Adult sex material”, which is defined in Rule 1.18 as “*material that contains images and/or language of a strong sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation*”. In particular, Rule 1.18 provides that “‘Adult sex material’...must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services which operate with mandatory restricted access. In addition, measures must be in place that the subscriber is an adult”. Rule 1.19 further provides that “Broadcasters must ensure that material broadcast after the watershed which contains images and/or language of a strong or explicit sexual nature, but is not ‘adult sex material’ as defined in Rule 1.18 above, is justified by the context.” For further Guidance on Ofcom’s application of these Rules, see <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/section1.pdf>

In Ofcom's view, the fact that the content of programmes included in the Service may be stronger and more explicit (in that they feature, among other things, close-up footage of vaginal / anal penetration, and shots of fellatio and cunnilingus) than that which can currently be shown on UK television is a matter of degree. It does not, however, lead to the conclusion that those adult programmes are not still substantially "comparable" in content within the meaning of s.368A(1)(a).

Whilst s.368A(1)(a) goes on to provide that the relevant comparison is with the format and content of programmes "*normally included*" on television programme services, Ofcom considers that that phrase, properly construed, simply refers to the general type of broadcasting / programming normally included in the range of television programme services. It does not necessarily exclude the application of subsection(1)(a) to those programmes which would and could "normally" be included on UK television programme services but for the operation of other (more strict) legal provisions specifically regulating the extent of particular content on television.

Were that not the proper construction, then service providers who would otherwise be caught by the criteria in s.368A(1) could simply seek to evade any provisions designed to regulate its programme material by maximising the extremity (eg. in sex / violence) of its video content.

Regard to the AVMS Directive

In interpreting s.368A(1)(a) in that way, Ofcom has necessarily had regard to the AVMS Directive itself since Part 4A of the Act is intended to implement the requirements of that Directive, and Playboy TV itself specifically placed reliance on it in its submissions (albeit in relation to Recital 17 – now Recital 24 – which is considered below).

Article 1(1)(g) provides that an "*'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".

In defining what constitutes a "programme" for the purposes of the AVMS Directive, Article 1(1)(b) provides that it means "*a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting...*" (emphasis supplied) (The ensuing examples provided in the definition indicate the broad spectrum of programmes contemplated.)¹⁶ There is no requirement in the latter part of that definition that programmes in audiovisual media services (and specifically those on-demand) be comparable in form and content to those "normally included" in specific television services. The form and content of relevant programmes must only be

¹⁶ Article 1(1)(b) goes on to provide that "*Examples of programmes include*" (and are not therefore necessarily limited to) "*feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;*"

comparable to “television broadcasting” generally.¹⁷ In Ofcom’s view, the Service as described above would satisfy the terms of these definitions in Article 1(1)(g) and (b).

In this respect, Ofcom has also had specific regard to the guidance in Recital 24 (formerly Recital 17), on which Playboy TV relied in its submissions. 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 means of access to the service would lead the user reasonably to expect regulatory protection within the scope of [the] Directive’*. The Recital also states that *“...the concept of ‘programme’ should be interpreted in a dynamic way taking to account developments in television broadcasting.”*

In Ofcom’s view, contrary to the case advanced Playboy TV, the Service is indeed “television-like” within the contemplation of Recital 24. First, at the domestic level of the UK, for all the reasons that Ofcom has explained above in relation to why the form and content of programmes on the Service can be properly regarded as “comparable” to those of programmes in UK television programme services, it appears to Ofcom that the provision of the sort of “hardcore” sexual programme content as is made available by the Service is likely to appeal to, and compete for, the type of audience who likes to watch (and is similarly prepared to pay for) adult sex material broadcast on relevant licensed UK television channels, and seeks to view even more explicit pornographic material which is available on-line. Whilst Playboy TV maintains that the Service is simply designed to “complement” (rather than compete with) “*our television channels*”, Ofcom considers that the particular video content on the Service would be likely to attract this type of audience precisely because it offers more explicit content. (In this respect, Ofcom notes the link which is provided on the Service – both on the initial login page and thereafter once users have accessed the Service – to the “Adult Channel” site also provided by Playboy TV. That site makes clear its association with the television channel broadcast by Playboy TV on “Sky Channel 901”, “Virgin TV 497” and “Tiscali TV 902” and refers to the television content offered on that service. The “Adult Channel” site itself features numerous links back to the Service. In Ofcom’s view, that tends to indicate that, whilst these services may be meant to “complement” each other, they are seeking to attract (and compete for) the same audience as is generally served by Playboy TV and potentially other such service providers.)

Additionally, at the wider European level addressed by the AVMS Directive, Ofcom considers that the provision of “hardcore” sexual programmes by the Service on-line is likely to compete for the same type of audience as likes to watch adult pornographic television programmes broadcast in other EU jurisdictions which do not restrict (in their domestic law provisions) the inclusion of “hardcore” sexual content on their television channels..

Insofar as Playboy further argues that the *“marked difference in compliance levels between the Service and our channels also demonstrates the lack of competition”*, Ofcom considers that that is a point which is specifically contemplated and dealt with by the AVMS Directive itself, and not an argument as to why the Service does not fall within the proper scope of the Directive. As its Recitals make clear, the policy and purpose of the AVMS Directive is (among other things) to achieve a level of harmonisation in the co-ordinated regulation of “audiovisual media services” across the European Union, which applies both to (linear) television broadcasting and to (non-linear) on-demand services: see, for example, Recital 11.

¹⁷ Article 1(1)(e) provides that *“‘Television broadcasting’ or ‘television broadcast’ (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”*.

To that end, both the AVMS Directive and Part 4A of the Act set out (among other requirements) certain basic content standards with which on-demand services within their scope have to comply: see, eg., the prohibition of material inciting hatred based on race, sex, religion or nationality under Article 6 / section 368E(1), and the protection of minors under Article 12 and section 368E(2) of the Act. But the Directive also makes clear that Member States are free to make more restrictive provision in their national law for regulating audiovisual media services (see Recital 41 / Article 4), whilst acknowledging that on-demand services justify the “*imposition of lighter regulation*” under the Directive since they are “*different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society*”: see Recital 58. That explains why there may legitimately be a “*marked difference in compliance levels*” or regulatory control between ODPSs and (linear) UK television channels in our domestic law. It does not, however, indicate that programmes included in the two types of service may not come within the scope of the main provisions of the Directive and the terms of Recital 24.

Second, Ofcom considers that (again contrary to Playboy TV’s submission) “*the nature and means of access to [the Service] would lead the user reasonably to expect regulatory protection within the scope of [the] Directive*” within the meaning of Recital 24. Ofcom does not accept Playboy TV’s submission that “[a]s the means of access to the service is only via the internet, it would seem reasonable that the user would not ‘expect regulatory protection’ when accessing [the Service]. The internet contains a wealth of unregulated content, and users do not expect sites such as ours to be regulated.”

Recital 24 makes clear that it is not just the “means of access” to the Service which are relevant but also the “nature” of the Service as well. Given that (as described above) the nature of the Service is to provide “hardcore” pornographic film material to its on-line users, Ofcom considers that a user would reasonably be led to expect at least the base level of “regulatory protection” afforded under the AVMS Directive, specifically (for example) in respect of material inciting hatred based on sex/race (Article 6 / section 368E(1)), and particularly the availability of content which might seriously impair the physical, mental or moral development of minors (Article 12 / s.368E(2)).

With that in mind, Ofcom considers that the additional “*means of access*” to the Service via the internet (as a particularly widespread and accessible medium) would also lead a user of it reasonably to expect basic “regulatory protection” under the AVMS Directive. (In this respect, Ofcom acknowledges the login restriction on accessing any part of the Service which has been put in place at Playboy TV’s own instigation. But, in Ofcom’s view, it is relevant to consider the general “*means of access*” in the absence of voluntary restrictions.)

Accordingly, whilst it may be the case (as Playboy asserted) that the internet generally “*contains a wealth of unregulated content*”, Ofcom is not persuaded that users of the Service would therefore not expect any degree of regulatory protection at all within the proper scope of the AVMS Directive and the basic requirements for which it provides.

Conclusion

For all the above reasons, Ofcom has concluded that, on a proper construction of s.368A(1)(a) (having regard to the AVMS Directive), the Service does indeed satisfy the requirement in section 368A(1)(a) of the Act. Ofcom’s Decision is therefore not to uphold Playboy TV’s appeal in this case and to substitute this Decision for that of ATVOD’s.