

APPEAL BY HARRY BARRETT AGAINST A NOTICE OF DETERMINATION BY ATVOD THAT THE PROVIDER OF THE SERVICE “FRANKIE AND FRIENDS” (WWW.FRANKIEANDFRIENDS.NET) HAS CONTRAVENED SECTIONS 368BA AND 368D(3)(ZA) 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 the appeal by Harry Barrett (“the Appellant”) against the determination (“the Determination”) by the Authority for Television On Demand (“ATVOD”) that the service “Frankie and Friends” at www.frankieandfriends.net (“the Service”) 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 reaching this Decision, Ofcom has, in accordance with Ofcom’s relevant procedures¹, considered the Determination; the submissions provided to us by the Appellant; relevant legislation including the Act and the Audiovisual Media Services Directive (the “Directive”); previous Ofcom decisions on appeals regarding ATVOD scope determinations; Ofcom’s assessment of the site; and research commissioned by Ofcom into consumer behaviour and choices in relation to on-demand services².
3. Ofcom’s Decision is that the Appellant was at the time stated in the Determination, and for the reasons set out below in respect of the Service, the provider of an ODPS. Ofcom therefore upholds ATVOD’s Determination.

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

² This research includes “On-demand services: understanding consumer choices” at http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/Research_Report.pdf?utm_source=updates&utm_medium=email&utm_campaign=vod-research-oct12 which complements earlier research from 2009 (<http://stakeholders.ofcom.org.uk/binaries/research/tv-research/vod.pdf>)

Section 2 - Summary of the Legal Position

4. The AVMS Directive is a European Directive amongst the purposes of which is to provide a measure of fair competition across Member States between those providing:
 - i. traditional (linear) television broadcasting services; and
 - ii. on-demand services that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers.

It seeks to provide a level of protection in accordance with that which consumers of ODPSs might expect.

5. The Audiovisual Media Services Regulations 2009 gave effect to the AVMS Directive in the UK by inserting Part 4A into the Act. Part 4A came into force on 19 December 2009. It was amended by The Audiovisual Media Services Regulations 2010, which came into force on 18 March 2010. Part 4A of the Act creates the statutory regime for the regulation of ODPSs.
6. A service is only an ODPS if it satisfies the defining criteria in section 368A of the Act. Key amongst these for present purposes is that in section 368A(1)(a)³, it states 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. 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 (the “Designation”)⁴. As part of that Designation, ATVOD has power to decide what is an ODPS. Where a service is an ODPS, its provider is subject to a requirement to notify

³ The full provisions of s.368(1) are set out in Annex 1.

⁴ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

ATVOD and pay a fee. The provider must also ensure the ODPS meets a limited number of regulatory requirements.

8. Ofcom's Designation of ATVOD as the appropriate regulatory authority took effect on 18 March 2010. 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. Ofcom reviewed the Designation in August 2012 and confirmed ATVOD's continuing Designation as co-regulator of editorial content on 14 September 2012⁵.
9. By virtue of section 368B of the Act, Ofcom retains the power concurrently with ATVOD to determine what is an ODPS and any decision by ATVOD on such matters is "*subject to appeal to Ofcom in accordance with Ofcom's relevant procedures.*"
10. As set out in those procedures⁶, 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...*"

The statutory scheme and the statutory definition of an ODPS are further detailed in Annex 1 to this Decision.

Section 3 – Determination under Appeal

ATVOD's Determination

11. On 1 October 2012 ATVOD wrote to the Appellant informing it of its statutory obligations to notify the provision of an ODPS and setting out the statutory criteria which define an ODPS. On 2 and 3 April 2013 ATVOD conducted a site review and took evidence including video capture of the layout and content of the site. (This evidence is outlined where necessary from paragraph 42 onwards, in the Ofcom

⁵ <http://stakeholders.ofcom.org.uk/consultations/on-demand-programme-services/statement>

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

Assessment section of this Decision). On 21 May 2013, ATVOD informed the Appellant of its preliminary view that the Service was an ODPS at the time of the site review, in respect of which a notification had not been given (on 2 and 3 April 2013) and a fee not paid and that as the provider of the Service the Appellant had ten days in which to make written representations.

12. Following receipt of the Appellant's written submissions on ATVOD's preliminary view, in which it stated all video content from the site was to be removed in order to bring the Service into compliance, ATVOD conducted a further site review on 1 July 2013 and noted the video content had been removed. ATVOD then issued a written "Notice of Determination" on 9 August 2013 which stated that ATVOD accepted, on the basis of the site review of 1 July 2013 and consequent to the removal of video material, the Service was no longer an ODPS under section 368A of the Act. However it also informed the Appellant that – for the reasons set out in the Determination – as at 2 and 3 April 2013, the Service had constituted an ODPS under section 368A of the Act, and that the Appellant had contravened the advance notification requirement under section 368BA as well as the requirement to pay a fee under section 368D(3)(za) and was therefore in breach of Rule 1 and Rule 4 respectively of ATVOD's Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services⁷.
13. ATVOD considered that, as at 2 and 3 April 2013, the Service fulfilled each of the relevant criteria set out in section 368A(1) of the Act and that the principal purpose of the Service was the provision of videos, and that the non-audio-visual elements of the Service appeared to be ancillary to the provision of programmes on the Service. In particular, ATVOD's Determination noted that the videos on the Service as at 3 April 2013 were comparable to the form and content of programmes normally included in linear broadcast television programme services.
14. In relation to section 368A(1)(a) of the Act, ATVOD referred, by way of example, to the following programmes which appeared on the Service:
 - i. The Nurse
This programme lasted for four minutes and 46 seconds. Once the user had clicked on the video a larger screen appeared. Explicit sexual activity (vaginal

⁷ http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf

penetration using a dildo) was portrayed within a narrative about a nurse and her patient.

ii. 2 for 1

This programme lasted for nine minutes and 57 seconds. A female model was portrayed in two different settings and outfits (lingerie and school uniform) while masturbating.

15. ATVOD also considered the remaining criteria of section 368A(1) of the Act i.e. criteria (b) to (e) (Annex 1), and set out how the Service fulfilled each of these. ATVOD consequently concluded the Service was, at the relevant time, an ODPS.
16. The Determination set out the Appellant's right to request an appeal to Ofcom as set out in paragraphs 6(ii), and 7(xvii) of the Designation. ATVOD also directed the Appellant to Ofcom's appeals procedures⁸. ATVOD further noted that if the Appellant chose not to lodge an appeal with Ofcom, ATVOD may proceed to issue an Enforcement Notification under section 368BB(1)(a) or 368I(1) of the Act. ATVOD noted that, in respect of the breaches referred to above, it may also refer the matter to Ofcom for consideration of a financial penalty under section 368BB(1)(b) of the Act or of suspension or restriction of the Service under 368K of the Act.

The Appellant's Appeal

17. The Appellant wrote to Ofcom on 5 September 2013 requesting an Appeal of the Determination. As ATVOD had determined that the Service was not an ODPS at the time of the Determination (9 August 2013), but had been at 2 and 3 April 2013 and was in breach of Rules 1 and 4 on those dates, Ofcom has taken the Appeal to be in respect of those aspects of the Determination that relate to the period during which ATVOD indicated that the Service had been an ODPS, i.e. the Service as described and reviewed at 2 and 3 April 2013.
18. The Appellant submitted that ATVOD had incorrectly determined that the Service was an ODPS fulfilling each of the statutory criteria set out in section 368A(1) of the Act, specifically that the principal purpose of the Service was not the provision of video content and that the video content provided was not comparable to the form

⁸ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

and content of programmes normally included in linear television content. In support of this it noted the amount of photographic images available on the site (12,000) and that these were not stills taken from the video content. It noted the positions on the site of the links to the photographic content (i.e. placed at the top of the page) and the position of these links relative to the links to the video content (i.e. above them). Further the Appellant noted the duration of the video content on the site and that of a typical programme on an adult linear TV channel.

19. The Appellant's points in more detail were:

- i. The Appellant disputed ATVOD's argument that the "non-audio-visual elements of the Service appeared to be ancillary to the provision of programmes...". In support of this the Appellant cited a previous ATVOD Determination in relation to www.englishmilf.com in which the Appellant claimed ATVOD argued that the prominence given to the availability of video content during the free tour of that site indicated the videos "relative expected value in terms of selling membership"⁹. The Appellant argued that given this 'precedent' ATVOD should have concluded that the provision of photographic content was the principal purpose of the Service due to the link for the "Photo Galleries" being placed above that to the "Video Galleries" on both the free sample page and the members' page.
- ii. The Appellant further disputed ATVOD's claim that the still images available on the site "were stills taken from the video sessions and appeared to be subsidiary to the provision of the video content." The Appellant stated: "there are over 12,000 images on the site in the Photo Galleries section. None of which are video grabs."
- iii. The Appellant also argued that "the videos available on Frankie and Friends are not 'typical' in terms of running times compared to broadcast adult programmes." It stated "Frankie and Friends has 79 videos available to view. 62% are less than 5 minutes in duration. 92% are less than 10 minutes in duration." In support of this view the Appellant again referenced ATVOD's Determination for www.englishmilf.com which states "in terms of running

⁹ ATVOD's arguments in relation to englishmilf.com are set out in full in the relevant determination which can be found on the ATVOD website at the following address.
<http://www.atvod.co.uk/complaints/determinations/2012-determinations/english-milf>

times, a random (and apparently typical) selection from the schedule for 'The Adult Channel' on 5 April 2012 includes the following: Mothers and Daughters (15 mins); Fresh Faced F (25 mins); Toy Stories – Boys Not Included (20 mins); Big T***** MILFs (30 mins); Uniform Perv II (10 mins); Ben Dover Classics (20 mins); Dirty Squirty Filthy MILFys (25 mins)".

"A similar look at the schedule for 'Television X' includes the following: regular Freeview bulletins (10 mins); Mature Castings 4 (25 mins); Jim Slip's Euro Matures 4 (25 mins); ditto (5 mins); Pervacious Mind of Angel Long 4 (20 mins); Frustrated Housewives 4 (25 mins); Pimp Mummy Returns 4 (25 mins); Lara's UK Swingers 4 (25 mins)."

20. Following receipt of the Appeal Ofcom prepared its Preliminary View that upheld ATVOD's Determination that the Service was at the relevant time an ODPS for the purposes of Part 4A of the Act. This was sent to ATVOD and the Appellant on the 11 December 2013 and both were asked for their representations. The Appellant made no representations.

Section 4: ATVOD's Representations

21. ATVOD's representations on Ofcom's Preliminary View noted that we agreed with the outcome of its decision, which identified the provision of an ODPS as one of the Service's principal purposes. ATVOD expressed concern that it was possible to interpret this conclusion as indicating that the website contains two or more services, one of which is an ODPS. It indicated a further concern that if this were the case future scope determinations could "have an impact on the application of Rule 11, the requirement to ensure that material which might seriously impair the development of under 18s is provided in a manner which secures that they do not normally see or hear it."
22. In the consideration of this Appeal Decision, we have carefully considered ATVOD's representations. Ofcom has set out in previous appeal decisions,¹⁰ (and at paragraphs 37 to 39 below of this decision) what we consider to be the correct approach to determine if a website, or any part of a website, comprises a service

¹⁰ See for example paragraph 5 of the *Viva TV Music* decision http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV_Viva_TV_Decision_Annexes.pdf and Paragraph 48 of the *Sun Video* decision <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

whose principal purpose is the provision of audiovisual material. In applying that approach, it may be that what is provided on a website as a whole is more than one service, each with its own principal purpose (or, for example, there may be a single service having principal and ancillary purposes). The comparability part of the statutory definition should be applied to any service the principal purpose of which is the provision of audiovisual material.

23. This decision is consistent with that approach. The assessment undertaken by Ofcom included consideration of all elements of the site, with an assessment of the audiovisual material to determine if it is sufficient to constitute an ODPS that is not ancillary to another service on the website. Our conclusion that all the visual content falls within the scope of an ODPS is due to the strong thematic links between the photographic material and the video material (see paragraph 53 of this Decision) and the manner in which it was accessed on the service, i.e. behind one main homepage (see paragraph 47 of this Decision). As such the site as a whole should be under consideration. This point is demonstrated by the evidence ATVOD submitted of the site as it was after the video content had been removed, i.e. on the 1 July 2013. This evidence shows examples of the kind of photographic content made available on the site. From this Ofcom noted that the still images portrayed similar acts of sexual activity often with the same participants during the same sessions of activity as was portrayed by the video content.
24. This decision is also consistent with the manner in which Ofcom has approached the enforcement of ATVOD's Rule 11¹¹ in relation to ODPS which provide non audiovisual material alongside material which has been assessed as sufficient to constitute an ODPS. Ofcom has previously considered a similar argument in its consideration of sanction against Playboy TV/Benelux Limited (the "Service Provider") for the provision of the On-Demand Programme Service "Demand Adult" (www.demandadult.co.uk) from 31 May 2012 to 24 July 2012. In that case the Service Provider argued that still images on its website should not form part of Ofcom's sanctions consideration concerning provision of material which breached ATVOD's Rule 11. It argued this both on the grounds that they were still images rather than audiovisual material and so were not "material" within the meaning of section 368E(2) of the Act as they were provided in a separate "free" section of the Service.

¹¹ http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.1_February_2014.pdf

25. Ofcom did not accept either of these arguments. It noted, in regards to the nature of material within an ODPS that reference to “programmes”, as defined in Article 1(b) of the Directive, involves “a set of moving images”. However, it also noted that the Act specifically chooses to use the word “material” rather than “programmes” in section 368E(2). Ofcom considers the intention and effect of the wording is that all material, **whether or not it consists of moving images**, is covered if a service is an ODPS. This puts ODPSs in an analogous position to linear broadcast television services, where still images included as part of such services are regulated.
26. We hope that paragraphs 47 and 53 clarify our conclusion that the stills and text before and behind the paywall were part of a service the principal purpose of which was the provision of “TV-like” programmes. In other words, the fact that the still images were held in a separate section of the website did not sever them from consideration under section 368E(2)¹².

Section 5 – Ofcom’s Decision and Reasons

27. Having carefully considered the representations of both ATVOD and the Appellant and the evidence as set out in this document, and for the reasons given, Ofcom’s Decision is to uphold ATVOD’s Determination that the Service, as at 2 and 3 April 2013, was an ODPS. On 2 and 3 April 2013, the Service was a website-based service accessible via the url <http://www.frankieandfriends.net/>. The Service offered still images and videos which contained explicit sexual activity. The following sections of this Decision set out Ofcom’s approach to the relevant legislation and our assessment of the Service.

Approach to relevant legislative provisions

28. As set out in section 2 above, the Directive and the Act seek through regulation to provide a measure of fair competition between those providing traditional (linear) 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. They seek to provide a level of protection in accordance with that which consumers of ODPSs might expect.

¹² http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Demand_Adult.pdf

29. As also set out above, the principal grounds on which the Appellant based its appeal to Ofcom were in relation to section 368A(1)(a) of the Act. The Appellant did not dispute ATVOD's finding that the Service met the other criteria of section 368A(1) ((b) to (e)).
30. Section 368A(1)(a) of the Act provides for a composite definition, to be applied in light of the Directive, to determine whether services are within the scope of regulation. It can be characterised as comprising a "*principal purpose*" part – whether there is a service the "principal purpose" of which is the provision of audiovisual material; and a "*comparability*" part – whether the form and content of programmes comprising that service is comparable with the form and content of programmes normally included in linear broadcast television services.
31. All parts of that definition must be considered and met for a service to be an ODPS. There must be a service whose principal purpose is the provision of programmes, the form and content of which are comparable to the form and content of programmes normally included in television programme services.
32. Ofcom's approach to applying section 368A(1)(a) of the Act is set out in greater detail in two previous appeal decisions in particular, concerning "Sun Video"¹³ and "Viva TV Music"¹⁴. Broadly, the composite definition requires those assessing a service to:
- a. look at what is provided as a whole and consider whether there is anything which is a service whose principal purpose is the provision of audiovisual material; and
 - b. if 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 programmes¹⁵ (which is a question that focuses on the audiovisual material that comprises the principal purpose of the service).

¹³ See, for example, Ofcom's decision in relation to Sun Video at http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf

¹⁴ See, for example, Ofcom's decision in relation to Viva TV Music http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV_Viva_TV_Decision_Annexes.pdf

¹⁵ That is, comparable in form and content to the form and content of programmes normally included in television programme services.

33. In interpreting section 368A in this way, Ofcom necessarily has regard to relevant provisions of the Directive. This is because that section of the Act implements the Directive insofar as that Directive defines the scope of on-demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on-demand services that are subject to it.

34. In the circumstances of this appeal, Ofcom draws attention to Recital 24 of the 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.”

35. The same 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.”

36. Ofcom also draws attention in this appeal to Recital 22 of the Directive which says the definition of an audiovisual media service “...should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audio visual content is merely incidental to the service...”

37. Therefore where audiovisual material is provided amongst other things, it is necessary to consider what is provided as a whole and to ask whether any of the audiovisual material: (a) comprises something that in its own right is a “service” whose “principal purpose” is the provision of that material; or (b) is ancillary to the provision of some other service (the principal purpose part of the statutory definition). If the answer to (a) is in the affirmative, it is necessary also to go on to consider the “comparability” part of the statutory definition for that “service.” If, however, (b) applies and the audiovisual material is not itself a service but is ancillary to another service, it is not an ODPS.

38. Applying that approach, it may be that what is provided on a website as a whole is more than one service, each with its own principal purpose (or, for example, there may be a single service having principal and ancillary purposes). The comparability part of the statutory definition should be applied to any service the principal purpose of which is the provision of audiovisual material.
39. Finally in Ofcom's Sun Video decision¹⁶, to assist in applying the principal purpose part of the statutory definition of an ODPS, we identified features we consider to be characteristic of a service more likely to have as its principal purpose the provision of audiovisual material and, by contrast, characteristics of a service in which the provision of audiovisual material is more likely to be merely ancillary. These were directed mainly to the issues in the Sun Video appeal, but are also relevant to this appeal, and we take them into account as set out below. They are described in the Sun Video decision and state:
- a. Homepage: the service would be more likely to have its own homepage, through which it is accessed. By contrast, audiovisual material whose provision is merely ancillary to another service is more likely to be accessible via a homepage that is styled as providing, and in practice does provide, some other service with its own independent identity.
 - b. Cataloguing and accessing: where it is made available on a website providing other content, such as written articles, a significant amount of the relevant audiovisual material is catalogued and accessed via a separate section of the relevant website. Audiovisual material provided on an ancillary basis is less likely to be so catalogued.
 - c. Presentation and Styling: the audiovisual material is presented or styled (and marketed) as a linear television channel. So, for example, while its names, labels and logos are not determinative, a service presented as "X TV" may be more likely to be a service having the required principal purpose. The ancillary provision of audiovisual material is less likely to be so presented.
 - d. Duration, completeness and independence of material: it is more likely that a significant amount of the audiovisual material is of a substantial duration and/or

¹⁶ <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

comprises complete programmes, rather than “bite-sized” clips or extracts from longer programmes, and has an independence that means it is watched and fully understood on its own. By contrast, such material comprising clips of short duration whose context, meaning and significance is only properly or fully understood by reading accompanying written material is more likely to be ancillary to some other service.

- e. Access links: there are more likely to be no, or only a limited number of, access links between the relevant audiovisual material and other content. For example, in the context of audiovisual material on a website containing an electronic newspaper, no or few links between that material and written articles in the nature of “click to read story/view video” and no or few videos embedded in written articles. Such material that is an ancillary part of an electronic newspaper is more likely to contain a significant number of such links and/or be embedded in written articles.
- f. Content links: there are more likely to be no, or a limited number of, content links between the audiovisual material and other content. For example, in the context of audiovisual material on a website containing an electronic newspaper, little or none of that material is the basis or subject matter of written articles, provides an audiovisual version of the written article or is an amplified or enhanced experience of that article, and the audiovisual material needs to be watched for the user to receive the information the service seeks to convey. The opposite is more likely to apply, in each respect, where the audiovisual material is an ancillary part of another service like an electronic newspaper.
- g. Balance of material: where the service provides audiovisual and written material:
 - i. the balance of the material is more likely significantly to lean towards the audiovisual;
 - ii. the written material is brief and/or merely an introduction to, or summary of, the audiovisual material; and
 - iii. the audiovisual material is the primary means of conveying to users the information sought to be conveyed.

Where the written material is the most prominent part of what is provided, has significant length and depth, goes beyond introducing or summarising the audiovisual material and is the primary means of conveying information, the audiovisual material is more likely ancillary to the written.

- h. Overall assessment: on an overall assessment, the audiovisual material cannot be said to be integrated into, nor ancillary to, another service. In particular, the material cannot reasonably be described as being intended specifically to allow the viewing public to benefit fully from, or to interact with, information provided as part of some other, primary service. If, by contrast, the audiovisual material can reasonably be so described, it is more likely an ancillary part of another service.
40. In light of these provisions, and following the approach adopted by Ofcom in previous appeals,¹⁷ Ofcom also considers it necessary, when considering whether a service is an ODPS, to consider in light of all the circumstances:
- i. whether the relevant audiovisual material was likely to compete for the same audience as linear television broadcasts; and
 - ii. whether the nature of that material, and the means of access to it would lead users to reasonably expect regulatory protection with the scope of the Directive (see paragraph 65).
41. The focus of the Appellant's submissions in regard to the Service as it was on the 2 and 3 April 2013 was both in relation to the principal purpose and comparability part of the statutory definition in section 368A(1)(a).

Ofcom's Assessment – Principal Purpose

42. Ofcom's main observations as to the principal purpose part of the statutory definition relate to the Appellant's submission that ATVOD should have concluded that the provision of photographic content was the principal purpose of the Service.
43. Ofcom noted and accepted that the website compromised of a very large volume of photographic material in addition to the video material and that although there are

¹⁷As set out in further detail in Ofcom's decision in relation to "Sun Video," for example, at http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf

strong thematic connections between the two, we accept that most of the photographic images were not still frames taken from the videos themselves.

44. As to this, we make two main points: first as described in paragraphs 37 to 39, and more fully in Ofcom's Sun Video Decision, a website may contain a number of services, each of which has a principal purpose, or it may indeed be that a website provides a single service with principal and ancillary purposes.
45. Second it appears to us that ATVOD did adopt the correct approach in considering the website as a whole.
46. Applying that approach and taking account of the characteristics identified in Ofcom's Sun Video Decision, Ofcom's assessment of the Service against those criteria is as follows:
47. a. Homepage
Ofcom noted that the website's homepage displayed a large image placed in the middle of the screen of a female reclining on a bed with her breast exposed. Below this were four smaller images under each of which was text stating in turn "Tour", "Updates", "Banners" and "Members".

The evidence showed that after clicking on the "Tour" link the user was taken to a landing page with four headings, entitled "Photo Galleries", "Video Galleries", "Photo Samples" and "Video Samples" below each of which were further images acting as hyperlinks to relevant content. At the top of the page were four smaller images with text below each stating in turn "Updates", "Banners", "Members" and "Join".

The "Members" link took a user to a landing page offering three further options headed:

- "Members Photo Galleries": Below this heading were seven still thumbnails with subheadings denoting the relevant genre.
- "Members Video Galleries": Below this heading were seven still thumbnails with subheadings denoting the relevant genre.
- "Latest Updates": Below this heading were nine still thumbnails with text below each indicating the number of images available via that link.

The evidence shows that, on clicking on a thumbnail and genre below the “Members Video Galleries” heading, a user was navigated to a page with the relevant genre displayed as a heading and a series of thumbnail links each taking a user to a video in that genre. The branding and styling of this page was identical to the rest of the website.

In Ofcom’s view, these features suggest that:

- i. the website homepage was likely to have been the main initial destination of users of the website; and
- ii. the homepage summarised the main parts of the site, namely the Members’ section, the Tour and the update facility indicating the new material available on the site.

As such Ofcom concluded that the video galleries, while separately catalogued (see below for further detail) did not have a separate homepage from the rest of the site. Further Ofcom concluded that once a user had entered either the photographic or video galleries via the homepage, then that user could navigate from one to the other and experience the two as one service.

48. b. Cataloguing and accessing

Once a user had accessed the service through the main homepage as described above, all video material on the site (other than free sample video available on the “Videos Samples” page) was then solely accessed through the Members’ Video Galleries and appeared nowhere else on the site. As such, Ofcom concluded that the video galleries were not ancillary to the provision of photographic material but had been catalogued in a manner that allowed the user to easily navigate to video items which suggested that the site had a purpose of providing an ODPS.

49. c. Presentation and Styling

As described above, the still images and videos were accessed through the free Tour or Members’ Galleries landing pages. We acknowledged the Appellant’s argument that the precedent set in *ATVOD’s englishmilf.com* Determination, whereby the prominence of content during a free tour was a determining factor in establishing a principal purpose, should be applied to the Service and in this context, Ofcom noted that on both the “Members” page and the free “Tour” page, the “Photo Galleries”

heading was placed above the “Video Galleries” heading. However the video capture evidence shows the headings identifying the different galleries appeared in the same font, colour and size as one another. While a user may have scanned down the page from top to bottom, the layout did not attempt to make one gallery more prominent than the next.

Therefore the availability of video content could not be claimed to constitute a less significant part of the Service than the provision of photographic content. Rather, the presentational layout of the site offered clear navigational options to the different content on the site, with both types equally accessible from the free Tour and Members’ area landing page. As such Ofcom concluded that the placement of the categories of content on this website gave no indication that one had precedence over the other in terms of the choices the user might make.

50. d. Duration, completeness and independence of material.

Ofcom noted that the quantity of the video content on the Service – 79 videos as stated by the Appellant, 30 of which are over five minutes in duration – was a significant offering. Ofcom also noted that the videos shown in the evidence were not clips or extracts from longer content and could be fully understood and appreciated without accompanying material. Ofcom considered that this evidence, together with the layout and navigation described below would provide a user with a standalone viewing experience from this video content on the Service alone, regardless of its quantity compared to the photographic content.

51. e. and f. Access and Content Links

We noted first of all that:

- i. the audiovisual material in the Members’ Video galleries section was not accompanied by any significant amount of text;
- ii. nor were there navigational links between the audiovisual material in the Members’ Video galleries and the other non-audiovisual content, namely photographs. Once a user had selected a genre under the Videos Galleries heading, in order to then navigate to a genre under the Photo Galleries heading that user would have to first return to the members’ landing page; and

- iii. all of the material was presented for consumption on a standalone basis, distinct from that contained in the photographic section of the site (it was not accompanied by, and nor did it need, any accompanying material fully to convey its content and be understood).

Ofcom considered that each of these would be characteristics pointing towards a service having a principal purpose of providing audiovisual material. However Ofcom noted that a user would not have to return to the main homepage of the service when navigating from the photographic content to the video content and would thus be likely to consider the different types of content part of one service.

52. g. Balance of material

It is also important to consider the balance of the material on the website as a whole (in light of any relationship between that material) and in this context Ofcom acknowledged the Appellant's statement that "The evidence provided by ATVOD in Annex 2, contains a 12 minute 36 second video capture of the site taken on the 4th April 2013", and specifically that: "at no time during the capture do ATVOD show any of the photographic images available on the site." Ofcom further accepted that the website held a large volume of photographic material in addition to the video material, and also accepted the Appellant's indications that this may have amounted to up to 12,000 stills. However when considering the balance of material, we do not only consider issues of volume alone. In terms of the audiovisual material being a "means of conveying to users the information that is sought to be conveyed" (see paragraph 39(g) point (iii) above,) the 79 videos (as described by the Appellant) were clearly one of the primary means by which the website offered a service to users. Whilst it is not possible to say whether any one user, on any particular occasion, would have chosen to engage with the photographic material or video material, what is clear is that they had a choice of equal value in terms of accessing the *information that is sought to be conveyed* between the audiovisual and non-audiovisual material available.

53. h. Overall assessment

Ofcom's overall view was that characteristics of the material available on the Appellant's website and the manner in which it was provided support the finding ATVOD made, that the site constituted a service a principal purpose of which was providing audiovisual material. Whilst the large volume of non-TV like material available demonstrated that the Service sought to make use of still images as well as

video in providing its service, Ofcom nevertheless considered that the catalogue of a significant amount of audiovisual material available which did not require accompanying information to be fully appreciated did amount to a service the principal purpose of which was to provide an ODPS. The strong thematic connection between the two bodies of content on the site supports the conclusion that the website as a whole had a principal purpose of providing an ODPS in relation to adult content.

54. For the reasons outlined above, Ofcom concluded that the principal purpose of the Service was the provision of audiovisual material on 2 and 3 April 2013.

Ofcom's Assessment – Comparability

55. Having concluded that a principal purpose of the site was the provision of audiovisual material, Ofcom considered the comparability part of the definition of an ODPS in section 368A(1)(a), i.e. is the principal purpose the provision of programmes “the form and content of which are comparable to the form and content of programmes normally included in television programme service.” Ofcom has considered this issue in several previous appeals and, in particular, in previous appeals made by Playboy TV in relation to the service demandadult.co.uk¹⁸ and by Channel Flip in relation to the service channelflip.com¹⁹ and was mindful of these appeals in reaching our Decision.

56. In the Playboy TV appeal noted above Ofcom concluded that:

“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).²⁰ There is no requirement in the latter

¹⁸ <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/DemandAdult.pdf>

¹⁹ http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel_Flip_scope_appeal.pdf

²⁰ 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;”

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 comparable to ‘television broadcasting’ generally”.²¹

57. Having conducted a review of the video capture evidence from ATVOD, Ofcom considered the nature of the content available on the site and concluded that, in general, the video content was “comparable” to the type of adult material permitted to be included in UK linear broadcast television programme services. In particular, it is comparable to adult material which is broadcast for the primary purpose of sexual arousal or stimulation which may be shown on “premium subscription services and pay per view/night services” (albeit subject to restrictions)²².
58. Specifically, Ofcom noted that the evidence showed the Service offered two sample videos, the first of which was one minute and 55 seconds in duration, and the second which was 53 seconds in duration. Each comprised various short clips taken from typical video content available on the Service. For example; three actresses sitting together on a table dressed as school girls kissing one another; two naked actresses lying on a bed masturbating; and two actresses engaged in sadomasochistic sexual acts.
59. Further, Ofcom noted the evidence showed two typical videos available in the members’ section. The first of these depicted a naked actress tied to a bed while a second actress stimulated and penetrated her with a vibrator. The second video depicted the fictional conceit of a female patron in a strip club receiving a striptease and lap dance from a female dancer.
60. By way of a comparison, Ofcom noted similar content broadcast in the programme *XXX First Timers* on Playboy TV on 24 September 2013 at 22:00. The first section of this programme depicted a behind-the-scenes interview with an actress prior to taking part in a shoot in which she was depicted stripping, masturbating and stimulating herself with a vibrator. This was followed by a scene in which she was

²¹ 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”.

²² see Rule 1.18 of the Ofcom Broadcasting Code

<http://stakeholders.ofcom.org.uk/binaries/broadcast/831190/section1.pdf>

joined by a second actress and the two engaged in sexual acts including stimulating and penetrating one another with a dildo.

61. Ofcom acknowledged the submission by the Appellant that the duration of the majority of videos on the site was shorter than is typical of programming on comparable adult TV channels. The Appellant submitted that of the 79 videos available to view 49 were under 5 minutes, 24 were between 5 and 10 minutes, four are between 10 and 15 minutes, one was between 15 and 20 minutes and one was over 20 minutes. This means that “62% are less than 5 minutes duration” and “92% are less than 10 minutes duration.”
62. Ofcom considered that the length of individual items is a factor in considering whether a service is an ODPS under section 368A(1)(a) of the Act. However in the channelflip.com determination, we stated that “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.”
63. Further, Ofcom reiterated the point made at paragraph 32(d) of this Decision that, in the Sun Video determination, Ofcom concluded that a service having the required principal purpose, is more likely to also possess the following characteristic: “It is more likely that a significant amount of the audio visual material is of a substantial duration and/or *comprises complete programmes, rather than “bite-sized” clips or extracts from longer programmes, and has an independence that means it is watched and fully understood on its own.*” [Emphasis added]. In assessing the evidence, Ofcom noted that while individual videos on the Service were not all of comparable length to those found on adult channels, each was self-contained and did not require additional material to be fully understood.
64. Furthermore, the duration of the content is only one relevant aspect, and in its review of the evidence Ofcom noted other comparable elements. For example a video was made available on the Service that depicted a narrative of a patron in a lap dancing club purchasing a lap dance. Ofcom noted that such fictional narratives are common on linear adult TV channels. For example, Ofcom noted a further extract of *XXX First Timers* broadcast on Playboy TV in which a female TV presenter was depicted carrying out ‘vox pop’ interviews regarding people’s experiences of life in the town where the filming was taking place. While some of those interviews were genuine, the programme concluded with one female interviewee, that Ofcom took to be a

professional actress, being supposedly seduced by the interviewer. The scene then cut to a hotel room where the two engaged in sexual acts with each other.

65. Ofcom also noted that other elements of the video content on the Service, such as staging and costume, were used to enhance the fictional narratives. For example one video which depicts adult school girls, includes two actresses sitting at what appears to be school desks whilst wearing school uniforms.
66. Ofcom also noted that the production values of much of the content were aimed at enhancing the viewer experience and creating a more TV-like experience. For example, backdrops such as red and white glossy wall hangings were used in one scene depicting the two naked females masturbating on a bed, while others with a sado-masochistic theme took place in what appeared to be a mock dungeon setting with painted brick walls and a cell door.
67. In addition, elements such as lighting had been considered in the context of improving the viewer experience as the majority of scenes were front lit giving greater definition.
68. In reaching the view that the Service was television-like, Ofcom has also considered whether the relevant audiovisual material was likely to compete for the same audience as linear television broadcasts, and whether the nature of that material, and the means of access to it, would lead users to reasonably expect regulatory protection within the scope of the Directive.
69. With regard to the question of competition, the Appellant did not submit any representations to Ofcom that disputed that the content available on the Service would appeal to (and therefore compete for) viewers of adult content on TV. However a key purpose of regulation, and a guide as to its scope, is to provide a measure of fair competition for those providing linear television broadcasting services, from those providing on-demand audiovisual media services. That is, from those who provide similar services and who, in doing so, provide a measure of specific competition for the attentions of viewers and advertisers.
70. In conclusion, it appeared to Ofcom that, as the form and content of the video material on the Service could be regarded as “comparable” to those of relevant programming on UK linear broadcast television, the content provided by the Service

was likely to appeal to, and compete for, the type of audience who likes to watch (and are prepared to pay for) such material via linear TV services.

71. Ofcom also considered Recital 24's reference to [whether], "*...the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.*" Ofcom notes Recital 24 makes clear that it is not just the "means of access" which are relevant but also the "nature" of the Service as well. Given that (as described in this Decision) the nature of the Service is to provide "adult material", Ofcom considered that a user would reasonably be led to expect the minimum level of regulatory protection afforded under the Directive for such an ODPS.
72. Accordingly, Ofcom considered that the form and content of the audiovisual material, the provision of which is a principal purpose of the Service, was comparable to the form and content of linear television programme services. The Service was therefore an ODPS within the meaning of section 368A(1) of the Act on 2 and 3 April 2013.

Research into on-demand programme services

73. In light, in particular, of the fact that Recital 24 makes reference to competition between on-demand services and linear broadcast television services, and whether the nature and means of access to a service gives rise to users reasonably expecting regulatory protection, Ofcom commissioned Essential Research to undertake a study of how users regard on-demand services.²³ The research looked at which services users did or did not see as competing alternatives to watching linear, scheduled television when they want to watch television programmes, and their reasons for those views.
74. To that end, the study placed different services on a spectrum of comparability (between highly comparable with linear television and not closely comparable) based on ten different factors which were derived from interviews with, and discussion groups involving, service users.
75. 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 "snapshot" 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*

²³ http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/Research_Report.pdf

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, to the extent set out, as a piece of evidence assisting us to reach our Decision.

Section 6: Decision

76. For the reasons set out above, Ofcom has concluded that the Service did, at the relevant time, meet the definition of an ODPS in section 368A(1)(a) of the Act. Consequently, the Appellant was in breach of the advance notification requirement under section 368BA of the Act and the requirement to pay a fee under section 368D(3)(za).
77. Ofcom's Decision is therefore that the Appellant was, for the reasons set out above, in respect of the Service, the provider of an ODPS on 2 and 3 April 2013. Ofcom therefore upheld ATVOD's Determination.

Annex 1: The Statutory Scheme

1. The provisions of Part 4A of the Act and of the AVMS Directive 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) provides that, for the purposes of the Act, “a service is an “ODPS” if--
 - a. *its principal purpose is the provision of programmes²⁴ the form and content of which are comparable to the form and content of programmes normally included in television programme services;²⁵*
 - 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 use²⁶ 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”.*
3. Section 368A(4) defines the concept of editorial responsibility in terms of “general control.” It states:

“A person has editorial responsibility for a service if that person has general control –

²⁴ 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.”

²⁵ 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.

²⁶ 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.”

*(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.”

4. Section 368R(5) provides further detail in relation to editorial responsibility and the identity of the provider of an ODPS. It says:

“The person, and only the person, who is to be treated for the purposes of this Part as providing an on-demand programme service is the person who has editorial responsibility for the service (see section 368A (4)).”

Requirement of Advance Notification to ATVOD

5. 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.”
6. For the purposes of that section, the “appropriate regulatory authority” is ATVOD, which has been designated by Ofcom under section 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”).²⁷ 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.
7. 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

²⁷ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

makes clear that any such decision is “subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.”

Relevant provisions of the Directive

8. Section 368A of the Act implements the Directive insofar as that Directive defines the scope of on-demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on-demand services that are subject to it.
9. In interpreting section 368A, Ofcom necessarily has regard to the relevant provisions of the Directive. Ofcom has done so because Part 4A of the Act is intended to implement the requirements of the Directive.
10. Of the relevant Articles of the Directive, Articles 1(1)(a) to (g), in particular, provide the basis for the definition of an ODPS in section 368A(1) and of editorial responsibility in section 368A(4).
11. As to Recitals of the Directive that describe the general purposes of the regulation for which it provides, Recitals 2, 4 and 11 are relevant. They explain that the Directive recognises that technological advances allow for the provision of audiovisual 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.²⁸
12. 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:

²⁸ 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).”

- 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.”*²⁹
- 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 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 25 states: *“The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition*

²⁹ such as services distributing user-generated content.

of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of 'effective control', when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)".

- f. Recital 26 states: *"For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties."*
- g. Recital 28 states that: *"The scope of this Directive should not cover electronic versions of newspapers and magazines."*
- h. 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."*