

**APPEAL BY MELANIE LUMB AGAINST A NOTICE OF DETERMINATION THAT THE PROVIDER OF THE SERVICE ‘MISTRESS R’EAL’ (AS AT THE SITE <http://clips4sale.com/51929>) HAS CONTRAVENED SECTIONS 368BA (REQUIREMENT TO NOTIFY AN ON-DEMAND PROGRAMME SERVICE), AND 368D(3)(ZA) (REQUIREMENT TO PAY A FEE) OF THE COMMUNICATIONS ACT 2003.**

**OFCOM’S DECISION**

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

1. This document sets out Ofcom’s Decision in respect of the Appeal by Melanie Lumb (the Appellant) against a determination by the Authority for Television On Demand (ATVOD) (the Determination). ATVOD determined on 20 April 2015 that the service Mistress R’éal (the Service) at the site <http://clips4sale.com/51929> was at the relevant time an ‘on-demand programme service’ (ODPS) as defined by Part 4A of the Communications Act 2003 (the Act).
2. Ofcom has reached this Decision in accordance with its relevant procedures<sup>1</sup>. Ofcom has made its own assessment of the Service and considered: ATVOD’s Determination; audiovisual material provided by ATVOD depicting the nature of the services and content it made available; the submissions provided to us by the Appellant in her appeal; relevant legislation including the Act and the Audiovisual Media Services Directive (the AVMS Directive); relevant research by Ofcom including a review of the standard architecture, structure and terms and conditions of services on Clips4sale which would have been the same as those of the Service; and previous Ofcom decisions on appeals regarding ATVOD scope determinations.
3. The Appellant had removed all content from the Service pending the outcome of its Appeal. Consequently Ofcom has, in reaching its Decision, not been in a position to review the “live” site and has instead relied on materials supplied by the Appellant and ATVOD, which includes video material and stills enabling Ofcom to gain an understanding of the look and feel of the live Service. Ofcom was also able to review the Clips4sale website’s general architecture to better understand the nature of the relationship between the Clips4sale website and individual services held on it. This allowed us to compare the structure, navigation and terms and conditions upon which

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

services were organised on Clips4Sale to the evidence presented to us by ATVOD. We were content that the Service's content and organisation and structure were accurately represented within the materials supplied by the Appellant and ATVOD.

4. Ofcom's Decision is that, at the time of ATVOD's Determination, the Service (as described further below) did not fulfil the criteria set out in section 368A(1)(a) of the Act. Ofcom therefore proposes to uphold the appeal and substitute Ofcom's Decision for that in ATVOD's Determination of 20 April 2015.

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

5. The AVMS Directive is a European Directive amongst the purposes of which is to provide a level of protection in accordance with that which consumers of ODPSs might expect; and to provide a measure of fair competition across Member States between those providing:
  - a) traditional (linear) television broadcasting services; and
  - b) on-demand services that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers.
6. The Audiovisual Media Services Regulations 2009 gave effect to the AVMS Directive in the UK by inserting Part 4A into the Act. Part 4A was amended by The Audiovisual Media Services Regulations 2010 and by the Audiovisual Media Services Regulations 2014, and creates the statutory regime for the regulation of ODPSs.
7. A service is only an ODPS if it satisfies the defining criteria in section 368A(1) of the Act which states:

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

- (a) its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;*
- (b) access to it is on-demand;*
- (c) there is a person who has editorial responsibility for it;*
- (d) it is made available by that person for use by members of the public; and*

(e) *that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive*".

8. Section 368A(1)(a) of the Act provides for a composite definition, to be applied in light of the AVMS Directive, to determine whether services are within the scope of regulation. It can be characterised as comprising a "*principal purpose part*" - whether there is a service the "principal purpose" of which is the provision of audiovisual material; and a "*comparability part*" whether the form and content of programmes comprising that service is comparable with the form and content of programmes normally included in linear broadcast television services. In assessing a service we look at what is provided on the services as a whole.
9. 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 so, it is necessary to consider whether, taken as a whole, the service is one whose principal purpose is providing programmes, the form and content of which is comparable to the form and content of programmes normally included in television programme services (which is a question that focuses on the audio visual material that comprises the principal purpose of the service).
10. Section 368BA(1) of the Act provides for an advance notification requirement on the part of persons providing an ODPS.
11. As part of a co-regulatory regime, Ofcom has designated (the "Designation")<sup>2</sup> ATVOD as the "appropriate regulatory authority" to carry out certain functions under Part 4A of the Act<sup>3</sup>. As part of that Designation, ATVOD has power to decide whether a service is an ODPS<sup>4</sup>. Where a service is an ODPS, its provider is subject to a requirement to notify ATVOD and pay a fee. The provider must also ensure the ODPS meets a limited number of regulatory requirements.

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<sup>2</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ATVOD\\_revised\\_Designation.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ATVOD_revised_Designation.pdf)

<sup>3</sup> Under section 368B of the Act: see paragraph 5 of the Designation

<sup>4</sup> Paragraph 6(ii) of the Designation. This also makes clear that any such decision is "subject to appeal to Ofcom in accordance with Ofcom's relevant procedures".

12. 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*”.
13. As set out in those procedures<sup>5</sup>, Ofcom’s decision in any appeal, “... may:
- (a) *uphold ATVOD’s decision; or*
  - (b) *quash ATVOD’s decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;*
  - (c) *substitute Ofcom’s decision for that of ATVOD...*”
14. In interpreting section 368A, Ofcom necessarily has regard to relevant provisions of the Directive. This is because that section of the Act implements the Directive insofar as that Directive defines the scope of on demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on demand services that are subject to it.
15. In particular, Ofcom noted the following Recitals. Recital 21 of the AVMS Directive states that:
- “For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest”.*
16. Recital 22 states that:

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<sup>5</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

*“That definition should 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 animated graphical elements, short advertising spots or information related to a product or non-audiovisual service”.*

17. Recital 24 of the AVMS Directive states that:

*“It is characteristic of on-demand audiovisual media services that they are ‘television-like’, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive”.*

18. 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”.*

19. This Decision also takes into account relevant precedents to inform Ofcom’s assessment of this case. These precedents include our Sun Video decision (the Sun Decision)<sup>6</sup> and other relevant cases referred to within this document.

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

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

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<sup>6</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

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

#### **ATVOD's Determination**

21. On 27 November 2014 ATVOD wrote to the Appellant informing her of her statutory obligation to notify provision of an ODPS and setting out the statutory criteria which define an ODPS. After an initial investigation of the Service the ATVOD Executive considered that the Service raised issues under Rules 1<sup>7</sup> and 4<sup>8</sup> and subsequently conducted a full investigation on 16 December 2014. Following this investigation, on 25 February 2015 ATVOD informed the Appellant of its Preliminary View that the Service was an ODPS in respect of which a notification had not been given and a fee not paid. ATVOD conducted a further investigation on the 17 March 2015 and following this, issued its Determination on 20 April 2015 that the Service was an ODPS for the purposes of Part 4A section 368A(1) of the Act and that a notification had not been given and a fee not paid.
22. ATVOD also considered the remaining criteria of section 368A(1) of the Act, criteria (b) to (e), and set out how the Service fulfilled each of these.
23. In summary, ATVOD's Determination<sup>9</sup> stated that:
- a) the Service contained programmes the form and content of which were comparable to that of programmes included in television programme services; and
  - b) the provision of such videos were the principal purpose of the service;

#### **The Appeal**

24. The Appellant submitted an appeal to Ofcom on 18 May 2015 in response to ATVOD's Determination that the Service was an ODPS. The Appellant stated that she did not consider that the Service constituted an ODPS as defined in section 368A of the Act and she was therefore not the provider of an ODPS, and was not required to notify the Service to ATVOD or pay a fee.

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<sup>7</sup> Notification of intention to provide an ODPS

<sup>8</sup> Payment of required fee

<sup>9</sup> [http://www.atvod.co.uk/uploads/files/Rules\\_14\\_FD\\_Panties\\_Pulled\\_Down\\_FOR\\_PUBLICATION.pdf](http://www.atvod.co.uk/uploads/files/Rules_14_FD_Panties_Pulled_Down_FOR_PUBLICATION.pdf)

25. The Appellant argued that section 368A(1)(a) was not satisfied as the principal purpose of the Service was not 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 summary, the Appellant's arguments were as follows:

- a) By reference to the characteristics identified in the document entitled "*On demand video services: understanding consumer choices*", prepared by Essential Research for Ofcom in October 2012<sup>10</sup>, there were a number of features which made the Service less TV-like. These include that programmes had no script, plot, opening and closing credits, or music; that the "look and feel" was merely a listing rather than a layout akin to other VOD services; that content was updated infrequently; that there was no autoplay function; that substantial effort was required to find the service; that the vast majority of clips were under 10 minutes in duration; that perceived quality was low; and that content was neither previously broadcast material nor did it feature well-known programme titles.
- b) The statutory definition of ODPS should be interpreted purposively in line with the provisions of the Directive, particularly recitals 21 and 24 (quoted above) which relate respectively to only covering services which are "mass media" and which compete for the same audience as linear television.
- c) In relation to whether the Service is "mass media", the videos which comprised the Service were niche (similar to those provided at the service UCSC<sup>11</sup>) and their purpose was to showcase the Service Provider's services as a dominatrix. The very low turnover and user numbers, the Appellant argued, support that view.
- d) In relation to competing with television broadcasting, the viewing figures and turnover are so low and the Service so niche that it cannot be said to compete for television audiences.

#### Ofcom Preliminary view

26. On 28 September 2015, Ofcom set out its Preliminary View on the Appeal, which was that ATVOD's Determination should not be upheld and that the Appellant was not, in respect of the Service, the provider of an ODPS at 16 December 2014 and on the 17

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

<sup>11</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/ucsc.pdf>

March 2015. Ofcom provided the Preliminary View to the Appellant and ATVOD and gave them the opportunity to make representations. In the event neither ATVOD nor the Appellant made representations to Ofcom.

#### **Section 4 – Ofcom’s Decision**

27. As set out above, the substantive 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 specifically dispute ATVOD’s finding that the Service met the other criteria of section 368A(1). Given our Decision as set out below is that section 368A(1)(a) is not satisfied, we do not assess the other parts of section 368A(1).

#### **Ofcom’s Assessment**

28. As noted above (paragraph 2 and 3), Ofcom’s review was based on evidence from ATVOD and the Appellant, and on a review of the general architecture of the Clips4sale website as the Service’s content had been removed by the Appellant pending the outcome of the Appeal.

#### **Principal Purpose Assessment**

29. Ofcom’s approach to applying the principal purpose test in section 368A(1)(a) of the Act is set out in greater detail in the Sun Decision. Our assessment is set out below.
30. The Service is hosted on the “Clips4sale” website, which hosts a large selection of individually controlled services, and within a standardised format provides access and a purchasing mechanism for audio visual content. Each Service has its own extension of the Clips4sale URL and the rest of this assessment relates to the material held at <http://clips4sale.com/51929>. The Appellant did not contest that she had editorial control over the content of the Service, and the terms of the Clips4Sale website confirm that Clips4sale “are merely the hosting provider for our Studio Members to display their content.”
31. The entry page to the Service at <http://clips4sale.com/51929> followed the standard structure of all Clips4sale studios. It included a bespoke image of the Service provider in character as “Mistress R’eal” above brief text describing the dominatrix services she offered.

32. The rest of the page followed the Clips4sale standard format, with information on “Ordering Instructions”, “File Format” and “Refund Policy”. Below this, still images ran down the right of the page with text next to each describing the video content. Images from 10 videos were displayed along with descriptive text, an option to buy and information on video’s length, file type and price.
33. Clicking on an image opened a video player in which a short clip of the relevant content was played rather than the full video. A link below the image allowed a user to purchase the relevant content and then access the full video by clicking on “Buy Now” option. A user could navigate to other pages which each displayed a further 10 videos. More detail on the nature of the video content is given in the comparability assessment below.

#### Overall assessment on principal purpose

34. As described in Section 2, in assessing the principal purpose of any service Ofcom takes into account various factors including the independence, prominence, completeness and presentation of the audiovisual content available as well as all other relevant offerings of the Service.
35. Ofcom noted that the entry page drew attention to the availability of audiovisual material. Furthermore the function of the Clips4sale platform on which the service was hosted is to provide access to video clips. Although the Service was not branded as TV, and was laid out as a basic list of available videos, the overall content, layout and navigation of the site suggested that users were most likely to access the Service with the intention of viewing video content rather than for other reasons. We identified the following factors as being particularly relevant:
- There was a significant volume of regularly refreshed video content, indicating a service on which subscribers could and would expect to be able to access a substantial quantity of audiovisual content.
  - Audiovisual material was the only content available on the Service other than ancillary text describing each video.
  - The Service provided easy access to the video content and allowed users to organise it according to certain categories.

36. For the reasons outlined above, Ofcom formed the Decision that the Service fulfilled the criteria set out in section 368A(1)(a) of the Act, offering a service the principal purpose of which was the provision of audiovisual material.

#### Comparability Assessment

37. Having reached the Decision that the 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), namely whether, taken as a whole, the principal purpose of the Service was 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 including in appeals made by Playboy TV in relation to the service Demandadult.co.uk (the Demand Adult decision)<sup>12</sup>, by Playboy TV in relation to the service ‘Climax 3 Uncut’<sup>13</sup> and by Channel Flip Media Limited in relation to the service www.channelflip.com (the Channel Flip decision)<sup>14</sup>. We were mindful of these appeals when reaching our Decision. Ofcom also looked at content available on other linear UK adult channels, including Television X, XXXCESS and Playboy TV in considering comparability.
38. We considered several distinct aspects of the audiovisual content on the Service in turn:

#### Duration

39. Ofcom noted the Appellant’s submission that the majority of the videos (114 of 128 clips) are between two and nine minutes and that the average video length is 6.7 minutes. As noted above, Ofcom was not in a position to conduct a full analysis of the duration of all clips on the Service but the Appellant’s submission was in line with the duration of the material provided by ATVOD.
40. Ofcom considers that the duration of individual items is a factor in considering whether a service is an ODPS under section 368A(1)(a) of the Act. In the Channel Flip decision, we recognised that “short form content may be more likely to be typical in some genres, such as children’s programming and adult content programming”. Material on the

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<sup>12</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/DemandAdult.pdf>

<sup>13</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

<sup>14</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel\\_Flip\\_scope\\_appeal.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel_Flip_scope_appeal.pdf)

Service falls into the latter category and as such shorter form content is more typical than in other genres. However, Ofcom noted that the duration of clips was relatively brief even in the context of adult content.

#### Titles and Credits

41. Ofcom noted the Appellant's argument that the videos have "no opening or closing credits". This can be a feature of content which makes it less comparable to programmes available on linear services, although it is not determinative and lack of credits is a feature of some linear adult content provision (e.g. material on the XXXCESS service is frequently broadcast without title or credit sequences).

#### Content and Narrative Structure

42. Ofcom noted that the majority of the videos presented in ATVOD's evidence appeared to be excerpts from longer sessions involving a dominatrix and client. Ofcom noted ATVOD's argument in its Determination that "the episodic nature of the scenes lends itself to consecutive viewing" and was thus indicative of a TV-like viewing experience. However, Ofcom considered the scenes did not appear to have been edited into episodes or individual programmes in such a way as to entice a viewer to move from one to the next. As such, Ofcom did not consider that the individual clips constituted complete programmes or an attempt to offer a continuous viewing experience. Ofcom also noted the lack of an autoplay feature which may have knitted together the shorter clips into a more cohesive, TV-like experience for the viewer.
43. Ofcom considered that this point was further illustrated by the lack of any kind of introduction, conclusion or clear narrative structure in the videos. Some videos commence at the beginning of a session but end at an arbitrary point within that session. Others commence mid-way through a session. As such the videos only include a small portion of the narrative and duration of the complete session.
44. Ofcom also noted from ATVOD's evidence that some of the videos on the Service may have consisted of Mistress R'eal speaking into a webcam without any other participants. Such videos are more typical of user generated content than TV-like experience.

#### Production Techniques

45. In its assessment of the video content, Ofcom noted various elements of the videos which were consistent with limited knowledge of and/or funds for the kind of production techniques more usually associated with linear television. For example, the majority of the videos available on the Service were filmed in one location and many were unscripted and lacked any narrative conceit. In addition audio appeared not to have been recorded using professional equipment, there was no music to accompany the scenes, the videos did not appear professionally lit and the content appeared to have been filmed using basic, consumer-grade cameras.
46. Ofcom agrees with ATVOD that some videos on the service were more professional than noted above in certain respects. For example, while some had a purely domestic setting, some others involved more specialist backdrops and equipment. However, even more professional appearing videos such as ‘Doubleeasylumtorture’, differed in important respects from the form and content of programmes normally included in television programme services. For example, this video contained no edits or cuts, but consisted of one continuous shot, and, the dialogue exchanged between the two mistresses appeared unscripted.

#### Overall assessment on comparability

47. Ofcom took the view that the audiovisual content on the Service was not sufficiently comparable in form and content to the type of adult material found on linear UK television programme services to fulfil the ‘TV like’ definition. Ofcom noted some parallels between certain content included in the Service and certain content included on linear television services. For example, adult television services have included “themed” material relating to uniforms and domination. However, there also tend to be relevant differences in programming on linear television including, typically, some or all of: consistency of theme, variety in location, use of scripted dialogue, and a narrative structure within recognisably complete scenes. In particular, it was not comparable to such material broadcast for the primary purpose of sexual arousal or stimulation shown on premium subscription service and pay per view/night services (subject to restrictions)<sup>15</sup>. Accordingly Ofcom has reached the Decision that, at the time of ATVOD’s Determination, the videos in the Service were insufficiently TV-like to meet the comparability part of the statutory definition.

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<sup>15</sup> See Rule 1.18 of the Ofcom Broadcasting Code at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/protecting-under-18s/>

## The Directive

48. As part of our overall assessment of whether the Service was TV-like, as set out in the comparability assessment above, we have 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 have led users reasonably to expect regulatory protection within the scope of the Directive.
49. Ofcom noted the Appellant's comments that the Recitals to the Directive make clear that the scope of audiovisual media services intended to be regulated under the Directive are those that are not "primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange with communities of interest" but are rather "mass media" (Recital 21) and those that "compete for the same audience as television broadcasts" (Recital 24).

## Recital 24 assessment

50. In forming the view that the content on the Service was not TV-like, Ofcom has also taken a step back to consider whether the audiovisual material on the Service was likely to compete for the same audience as linear television broadcasts, and whether the nature of the material, and the means of access to it would lead users to reasonably expect regulatory protection within the scope of the AVMS Directive.
51. 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 service and who, in doing so, provide a measure of specific competition for the attention of viewers and advertisers.
52. In considering whether a user would regard the Service as competing with linear television broadcasts, it is necessary to consider the three questions we set out in the Sun Decision. These were:

- a) would a user wanting to watch programmes normally included in linear television programme services have considered, or consider, audiovisual material on the Service as amongst his competing options;
- b) when viewing such material, would the user have considered, or consider, himself to be watching a programme service competing with linear television; and
- c) when doing so, would that user have expected or expect, what he is viewing to be regulated as television programmes, in the ways provided under the Directive?

53. As regards a) and b) above, we noted that, for the reasons set out above under comparability, a user wanting to watch programmes normally included in linear television programmes would have been unlikely to have considered the audiovisual material as amongst his competing options because it was too dissimilar to such TV-like material. In particular, it was not comparable to ‘adult material’ 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) and that a user of the Service would not consider himself to be watching TV-like content.

54. As to c) above, given the lack of comparability, Ofcom considered that a user would not reasonably expect the material on the service to be regulated as television programmes in the ways provided under the Directive.

#### Recital 21 assessment

55. Recital 21 provides that the definition of an audiovisual media service should only include services which are “mass media” and should not include “activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange with communities of interest”.

56. The Appellant argued that “the limited nature of the video content and context on the MR Website [the Service], and very limited nature of its reach” was a strong indication that the Service was not “comparable to or in competition with linear TV programming”. In support of this she said that the “video content is primarily non-economic, generated by a private user for the purposes of sharing and exchange within communities of interest...” The Appellant stated that “there were 14 members...with monthly gross income of \$124.53” and that “so few members do not accord with part of Recital 21”.

57. We considered the Appellant's observations regarding the membership level and turnover of the Service. We acknowledged that the Service has a low membership and financial turnover. However, Ofcom considers the fact that a service is viewed only by a limited number of people does not necessarily mean that it cannot be in competition with broadcast television. Recital 21 states that the Directive should only cover services which "...are intended for reception by, and which *could* have a clear impact on, a significant proportion of the general public" (emphasis added). In our view the Service was capable of being accessed by a larger audience and was accessible to subscribers as an on demand service and could not be seen as available merely to a closed community of like-minded individuals.
58. Taking all the above factors into account, we took the Decision that the Service was not "primarily non-economic" in nature within the meaning of Recital 21.

#### Essential Research

59. In order to consider the 'stepping back' approach Ofcom commissioned Essential Research to undertake a study of how users regard on demand services. The research looked at which services users did or did not see as competing alternatives to watching linear, scheduled television and their reasons for those views. The study placed different services on a spectrum of comparability based on 10 different factors derived from interviews with, and discussion groups involving, service users. It is important to note that the factors are not exhaustive or determinative, and Ofcom is mindful of the fact that the study is a qualitative 'snap shot' of user attitudes which considered only certain types of content.
60. We noted that the Appellant stated that she considered that eight of the 10 factors identified in the research (purpose of the service, look and feel of service, frequency with which content is refreshed on the service, who controls what is watched, effort expended to find the service, volume of content, perceived quality of content and where the content originated) militated against a conclusion that the content available on the Service was comparable to linear television programming.
61. Ofcom considered that some aspects of the research lent clear support to the Appellant's arguments. The research did not feature any site comparable to the Service, and so a simple comparison of the factors was not productive or relevant but many of

the factors noted on the Service were not comparable to many other notified sites. Ofcom considered that whilst the purpose of the content, of which there was a significant quantity, was to entertain and was refreshed reasonably frequently, the perceived quality of the video was not TV-like.

62. On an overall view and taking into account the factors weighed above, the form of content is not comparable to the form and content of linear television services.

## **Section 5 – Conclusion**

63. For the reasons set out above, Ofcom considered that the form and content of the audiovisual material within the Service, the provision of which is the principal purpose of the Service, was not comparable to the form and content of linear television programme services. Ofcom's Decision is that the Service was not, therefore, an ODPS within the meaning of section 368A(1) of the Act as at the time of ATVOD's Determination.
64. Ofcom's Decision is therefore that the Appellant was not, for the reasons set out above, in respect of the Service, the provider of an ODPS at 16 December 2014 and on the 17 March 2015. We therefore uphold the Appellant's appeal and substitute our Decision for ATVOD's.
65. Consequently, the Appellant was not in breach of the advance notification requirement under section 368BA of the Act, the requirement to pay a fee under section 368D(3)(za), the prohibited material requirements under section 368E (2) and the specially restricted material rules under section 368E (5) .

**28 October 2015**