

APPEAL BY BBC WORLDWIDE AGAINST A NOTICE OF DETERMINATION BY ATVOD THAT THE PROVIDER OF A SERVICE HAS CONTRAVENED SECTION 368BA OF THE COMMUNICATIONS ACT 2003

OFCOM DECISION

Section 1 - Introduction: Scope of this Decision

1. This document sets out Ofcom's Decision in respect of a service on the Mediaset platform which the Authority for Television On Demand ("ATVOD") determined was an "*on-demand programme service*" ("*ODPS*") for the purposes of Part 4A of the Communications Act 2003 ("the Act"). ATVOD found that service to be "BBCW on Mediaset (at <http://nettv.mediasetpremium.it>)" (referred to in, and for the purposes of, this Decision as "the Service") and that BBC Worldwide ("BBCW" or "the Appellant") was its provider. BBCW appealed against that determination.
2. In respect of the Appellant's appeal Ofcom has powers to:
 - a. uphold ATVOD's decision;
 - b. quash ATVOD's decision in whole or in part and remit the decision back to ATVOD with reasons, for it to reconsider in light of those reasons; or
 - c. substitute our decision for ATVOD's.
3. The Appellant wrote to ATVOD on 1 March 2011 requesting confirmation that they do not offer an *ODPS* on the Mediaset platform in Italy. Following further correspondence relating to that request, ATVOD issued a determination ("the Determination") on 11 May 2011 that the Appellant did provide an *ODPS* - the Service - on the relevant platform. The Determination contained a statement of why ATVOD considered the Appellant was the provider of the Service. It relied, in particular, on contractual evidence provided by the Appellant.
4. Having considered the reasons and evidence ATVOD relied upon in reaching its Determination, as well as points made by the Appellant in its appeal submissions, in conjunction with further evidence obtained by Ofcom from the Appellant in the course of our consideration of its appeal (evidence which ATVOD did not have available to

it), Ofcom upholds the appeal. Ofcom substitutes its Decision for ATVOD's. Our Decision is that the Appellant was not, in respect of the Service, the provider of an ODPS.

5. Ofcom's Decision assesses sections 368A (1) (c), (d) and (e) of the Act, namely the issue of "*editorial responsibility*," the identity of the person making the material available to the public, and whether the provider of the service falls within the jurisdiction of the United Kingdom. None of the other provisions of section 368A require consideration in order for Ofcom to dispose of the appeal.

Section 2 - Summary of the Legal Position

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

7. A service is only an ODPS if it satisfies the defining criteria in section 368A of the Act. Key amongst these for present purposes are in sections 368A(1)(c), (d) and (e), that, "... a service is an ODPS if:

..... (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. The concept of *editorial responsibility* is defined in terms of "*general control*" by section 368A(4) which states that,

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

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

*(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.”

9. Also of relevance, section 368R(5) states that:

“The person, and the only 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.”

10. The jurisdictional provisions of the AVMS Directive include the following in Article 2:

“2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following:

(a) those established in that Member State in accordance with paragraph 3;

3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;”

11. 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.²

12. A key purpose of the AVMS Directive is to provide a measure of fair competition between those providing:

² For example, an ODPS must not contain any material likely to incite hatred based on race, sex, religion or nationality

- 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.

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

13. As part of a co-regulatory regime, Ofcom has designated ATVOD as the “*appropriate regulatory authority*” to carry out certain functions under Part 4A of the Act. As part of that designation, ATVOD has powers to decide what is an ODPS and/or which person is its provider (which powers, by virtue of section 368B of the Act, Ofcom retains concurrently). Any such decision is “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.*”³
14. As set out in those procedures, Ofcom’s decision in any appeal, “.... may:
 - a. *uphold ATVOD’s decision;*
 - b. *quash ATVOD’s decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;*
 - c. *substitute Ofcom’s decision for that of ATVOD.....*”
15. The statutory scheme is further explained in Annex 1 to this Decision.

Section 3 - ATVOD’s Determination

16. ATVOD made its Determination that the Service was an ODPS on 11 May 2011. It relied on the points set out in the following paragraphs, which appear concerned primarily with the question of the Appellant’s *editorial responsibility* for the Service. For a service to fall within the scope of regulation it must satisfy each part of the statutory definition in section 368A of the Act. For the reasons set out in this

³ Ofcom’s “*Procedures for handling appeals on scope and for imposing sanctions in relation to On-Demand Programme Services*” were the subject of a consultation (published 17 December 2010) which ended on 11 February 2011: see <http://stakeholders.ofcom.org.uk/consultations/on-demand-programme-services/summary>. Pending Ofcom’s publication of the finalised procedures, and for the purposes of determining this appeal, Ofcom applied the procedures as set out in the consultation.

Decision, it is not, however, necessary for Ofcom to consider each such part in order to decide the present appeal.

17. The points on which ATVOD relied were:

- a. The contract relating to the Service between the Appellant and Mediaset⁴ said, “[redacted commercially confidential provisions].” ATVOD noted that, “Regardless of whether Mediaset has a right not to show these programmes, this seems to clearly place responsibility for selection (of any programmes that do get shown) onto BBCW.”
- b. “The contract also states that, [redacted commercially confidential provisions, which ATVOD described as identifying the Appellant as having editorial control over how the programmes are used and the right of approval over their branding and the environment from which they are assessed].”
- c. In these connections, ATVOD said it noted the Appellant’s assertion that in practice Mediaset had to date organised the relevant material. ATVOD said, “..... it is difficult for this to over-ride the clear facility in the contract for BBCW to have ‘final say’ [sic] over the organisation of its content on the Mediaset service.”
- d. “BBCW provides the metadata relevant to each programme within the service.” ATVOD referred to its “Guidance on who needs to notify,” which says that, “.....in determining the person with general control of the organisation of those programmes it is appropriate to consider who determines the relevant viewing information provided alongside the on-demand programme.”
- e. ATVOD did not accept the Appellant’s representations that the concept of *editorial responsibility* could not be applied because the Appellant does not operate a VOD service in Italy. ATVOD said that:

⁴ The relevant contract is actually made between the Appellant and RTI S.p.A, which latter company is, according to the contract, under Mediaset S.p.A’s direction. That company is referred to in ATVOD’s Determination, the Appellant’s appeal representations and, for consistency, this Decision, as “Mediaset.”

“It is not a point of dispute that the Mediaset platform offers a retail VOD service. The issue is whether that comprises a number of services including one provided by BBCW. ATVOD’s published guidance suggests that “... the extent of a particular on-demand programme service may be determined by other criteria, such as the identity of the service provider. Thus an aggregated retail video on-demand service may be comprised of a number of on-demand programme services from different providers, depending on which undertaking exercises editorial responsibility in respect of the programmes offered to users’ and ‘the extent of a person’s editorial responsibility will be relevant in determining who is to be treated as providing an on-demand programme service.’”

- f. ATVOD had, “.... not been provided with any evidence that Mediaset has accepted editorial responsibility for the service in Italy.” It said, “It is ATVOD’s view that BBCW holds editorial responsibility for an ODPS on the Mediaset platform and therefore that BBCW is the party required to notify the service to ATVOD.”

18. The Determination set out the Appellant’s right to request an appeal to Ofcom and referred to our draft appeals procedures. The Appellant wrote to Ofcom requesting an appeal on 20 May 2011.⁵

19. The Appellant raised the following grounds of appeal:

- a. Section 368A (1) of the Act relates to a “service.” In the present case, there is only one service and it is operated by Mediaset.
- b. The Appellant does not have *editorial responsibility* for the service.
- c. The person with *editorial responsibility* for the service must also make the service available to the public and be based in the UK, and it is difficult to see how the Appellant meets these requirements.
- d. Mediaset has notified “... *the Mediaset service in its entirety*” to the Italian Regulator, AGCOM, so it does not fall within UK jurisdiction.

⁵ Ofcom’s consideration of the Appellant’s appeal was put on hold pending the resolution of a number of appeals against ATVOD determinations made to Ofcom at around the same time.

20. In support of these grounds, the Appellant made the following points:

- a. *“Mediaset operates a VOD service as part of the television service it offers its customers. The VOD service is located at and accessed via the URL above. BBCW supplies some of the programmes included on the BBC Knowledge channel to Mediaset on external hard drives so that Mediaset can include them in the Mediaset VOD service if Mediaset wishes to include them.”*
- b. *“Section 368A (1) clearly relates to a service. In this case, there is only one service and it is operated by Mediaset. ATVOD’s reasoning attempts to apply the rules which govern a service to the selection of programming which the Appellant supplies to Mediaset.”*
- c. *“There are no branded areas [on the Service] and Mediaset has complete control over whether it chooses to include the BBC programming supplied on hard drives on its VOD service.”*
- d. *“BBCW does indeed select some programmes and send them to Mediaset in Italy as digital files on external hard drives but then it is entirely up to Mediaset whether it chooses to include them in its service. Under the terms of the contract, Mediaset has the right but not the obligation to include the programmes in its service – BBCW cannot force Mediaset to include any programmes.”*
- e. *“As Mediaset has complete control as to whether it includes BBC content on its VOD service, it is difficult to see how BBCW can be considered to exercise editorial responsibility in relation to a service that BBCW has no control over whatsoever.”*
- f. *“In order for there to be an ODPS, the party that has editorial responsibility must also make the service available to the public and be based in the UK. Bearing in mind that BBCW only sends external hard drives to Mediaset, it is difficult to see how this act constitutes providing an ODPS. BBCW does not provide a VOD service in Italy.”*

- g. *“The Mediaset service in its entirety has been notified by Mediaset to AGCOM (the Italian VOD regulator). Because of this, the service cannot be regulated by ATVOD under the country of origin principle.”*

21. On 23 March 2012 Ofcom set out its preliminary view on the Appellant’s appeal in a document which we provided to both the Appellant and ATVOD. Ofcom’s preliminary view was that the Appellant’s appeal should be upheld, on the same bases as Ofcom now sets out in this Decision. Ofcom gave the Appellant and ATVOD the opportunity to make representations within 10 days. On 29 March 2012, ATVOD made brief representations, but these did not go to the substance of Ofcom’s preliminary view. On 10 April 2012, the Appellant confirmed it did not wish to make representations. Ofcom therefore adopts in this Decision the preliminary view put to both parties.

Section 4 - Ofcom’s Decision

The Decision

22. In making this Decision, Ofcom has considered in particular:
- a. the reasoning presented by ATVOD in the Determination;
 - b. the evidence and submissions provided to us by the Appellant in its appeal;
and
 - c. further evidence Ofcom sought from the Appellant during the course of its consideration of the appeal.
23. On the basis of those considerations, and in particular the further evidence we obtained from the Appellant (which ATVOD did not have when it made the Determination), Ofcom’s decision is that the Appellant was not, for the reasons set out below, in respect of the Service, the provider of an *ODPS*. Ofcom therefore substitutes its decision for ATVOD’s.

Application of section 368A (1)

24. As Ofcom notes above, to fall within the scope of regulation as an *ODPS* a service must satisfy each part of the statutory definition of such services in section 368A of

the Act. If a service does not satisfy any part of that definition, it is not an *ODPS* and is outside that regulatory scope.

25. In its Decision in the appeal by Nickelodeon UK Limited and others⁶ (“*the Nickelodeon and others decision*”), Ofcom set out in some detail, for the benefit of the appellants in those cases and others, the approach Ofcom applied. In particular, as to the meaning and effect of sections 368A (1) (c) and (d) and the relationship between them, and the approach Ofcom took to the latter.
26. In the present case, it is not necessary to set out the same matters in the same detail in order to decide the appeal. The appeal can be disposed of on the bases that:
 - a. to the extent the Service can be described as a *service* for the purposes of section 368A of the Act (and it is not necessary for Ofcom to decide whether it can), the Appellant did not have *editorial responsibility* for it for the purposes of section 368A (1) (c), Mediaset did; and
 - b. Mediaset was not a *person under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive* so as to fall within section 368A (1) (e).

Since the parts of the statutory definition of an *ODPS* referred to were not met in this case, in respect of the Appellant and the Service, the Appellant did not provide an *ODPS*.

27. Whilst Ofcom does not repeat in full the approach and reasoning in *the Nickelodeon and others decision*, its approach and reasoning in the present appeal are consistent therewith and, to the extent necessary, Ofcom refers to and relies on what it said in *the Nickelodeon and others decision*. In particular, in the respects set out as follows.

⁶ Appeals by (1) Nickelodeon UK Limited (in relation to “Nickelodeon Content On Virgin Media”); (2) The Paramount (UK) Partnership (in relation to “Comedy Central Content On Virgin Media”); and (3) MTV Networks Europe (in relation to “MTV Content On Virgin Media”) against notices of determination by ATVOD that the providers of the services have contravened section 368BA of the Communications Act 2003

Application of section 368A (1) (d)

28. As in *the Nickelodeon and others decision*, Ofcom considers first the application of section 368A (1) (d), which sets out the requirement that there must be a person [with *editorial responsibility* for the *service*] who makes that *service* available for use by members of the public.
29. Ofcom adopts the same approach to this part of the statutory definition as in *the Nickelodeon and others decision*. In particular, that:
- a. more than one person may make a *service* available for use by members of the public; and
 - b. as in those cases, in the present case both the Appellant and Mediaset, on the basis of the provisions of the relevant contract between them and in practice (see further below as to both), made content available for use by members of the public.

The key question, therefore, is whether the Appellant or Mediaset had *editorial responsibility* for the Service in the senses required by section 368A (1) (c).

Application of section 368A (1) (c)

30. Section 368R (5) makes clear that only one person can have *editorial responsibility* for an ODPS. Ambiguity must be settled one way or another. Section 368A(4) sets out the two aspects relevant to assessing *editorial responsibility* for a *service*, namely, and as set out above, “.... *general control*
- a. *over what programmes are included in a range of programmes offered to users; and*
 - b. *over the manner in which the programmes are organised in that range.”*
31. Ofcom considers the application of these points in the present appeal below. In principle, one thing that follows from them is that it is not inconceivable that more than one party may have a role in determining the range of programmes offered and

the organisation of them within that range. As to that, Ofcom again adopts a consistent approach in this appeal to that in *the Nickelodeon and others decision*.

32. In Ofcom's view, the appropriate approach (as applied in *the Nickelodeon and others decision*) is that, in such circumstances, the relevant parties may settle between themselves any ambiguity as to *editorial responsibility*, provided that in doing so they do not frustrate the purposes of the Act and the AVMS Directive by allocating that responsibility where it plainly does not lie. They may settle the ambiguity with contractual wording and/or, more pertinently in the present case, by other agreed conduct and practice (as to which, see further below). In making an assessment of the position it is appropriate:

- a. to consider whether there is contractual wording which expressly contemplates *editorial responsibility* as that term is to be read under the Act and clearly indicates the parties' intentions as to the allocation of that *editorial responsibility*;
- b. in the absence of the kind of wording in (a), to draw closer focus on other terms of any relevant contract (and as to the intentions they disclose);
- c. where those other terms do not settle the position sufficiently clearly, to draw closer focus also on any agreed conduct and practice between the parties; and
- d. if necessary and appropriate, perhaps because ambiguity remains, to look also at other evidence of the position in practice with regard to the relevant service.

It will also usually be necessary to consider whether any contractual provisions and/or agreed conduct and practice seek to allocate *editorial responsibility* where it plainly does not lie in reality.

33. Section 368A (4) also recognises that there may be a division between the person with control of the content of individual programmes on the one hand and broadcasting or distribution on the other. Again as previously set out, it states that the person with *editorial responsibility*, “..... need not have control of the content of individual programmes or of the broadcasting or distribution of the service.”

34. In addition to the point that more than one party may have a role in the selection and organisation of programmes, what Ofcom considers the foregoing points to indicate is that:
- a. what is key is *editorial responsibility* for the *service*, which a person derives from having *general control* from an editorial perspective over what programmes are actually included⁷ in the range of programmes offered to users and the way in which they are organised in that range;
 - b. that *editorial responsibility* and that *general control* is different to controlling the content of individual programmes and/or the broadcasting or distribution of the service; and
 - c. the person with the relevant *editorial responsibility and general control* might not control the content of individual programmes and/or broadcasting or distribution of the service; but
 - d. there may be circumstances where it is necessary to decide whether the person with control of the content of individual programmes or a (different) person with control over distribution has *editorial responsibility*.
35. As to the application of all these points in the present case, it is worth noting certain differences between the circumstances in this case and those in *the Nickelodeon and others decision*.
36. In the latter, the relevant parties entered into a contractual agreement which expressly contemplated *editorial responsibility* as that term is to be read under the Act. They included in the contract a clear statement as to the intention of the parties regarding the allocation of that *editorial responsibility*. They specifically made mention of ATVOD and the responsibility to notify it. These provisions clearly indicated the parties' intentions and settled any ambiguity as to which of them had

⁷ In this connection Ofcom notes the reference in the definition of *editorial responsibility* in Article 1 (1) (c) of the AVMS Directive to (Ofcom's **emphasis**), "..... the exercise of **effective control** both over the **selection** of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services....." Likewise, to the reference in the definition of "media service provider" in Article 1 (1) (d) to, "....the natural or legal person who has **editorial responsibility for the choice** of the audiovisual content of the audiovisual media service and determines the manner in which it is organised."

editorial responsibility in a way that was sufficiently consistent with the points in paragraph 34 above and with the reality of the situation.

37. In the present case, the relevant contract relating to the Service between the Appellant and Mediaset does contain some provisions relevant to the question of which party has *editorial responsibility* and as to the parties' intention in that regard. It does not, however, provide as expressly and unambiguously for an allocation of *editorial responsibility* as that term is used in the Act as did the contract between the parties subject to *the Nickelodeon and others decision*. In those circumstances, it is appropriate to look more closely at both the contract and at the conduct and practice of the parties for relevant evidence of which had *editorial responsibility*.
38. Some of the contractual provisions are consistent with the Appellant having *editorial responsibility* for the Service, others more consistent with Mediaset having that responsibility.
39. In particular, those consistent with the Appellant having the relevant *editorial responsibility* include the contract's:

- a. stipulation that:

"[Redacted commercially confidential provisions relating to the Appellant's role in relation to the selection, scheduling, substitution and withdrawal of programmes]"

- b. provisions that:

"DELIVERY

- *[Redacted commercially confidential provisions relating to the Appellant's obligations to deliver relevant information including metadata to Mediaset]."*

- c. further provisions that:

"EDITORIAL

- *[Redacted commercially confidential provisions relating to the Appellant's rights to select the programmes provided to Mediaset and of editorial control over the use of relevant programmes.]*"

..... and

d. stipulation that:

- *"[Redacted commercially confidential provisions to the effect that the Appellant retained rights over the branding of relevant programmes and the environment from which viewers may select them]."*

40. Those more consistent with Mediaset having *editorial responsibility* include the contract's (Ofcom's **emphasis**):

a. definition of "Non-Linear Content" as:

"[Redacted commercially confidential provisions including references to the licensee's (i.e. Mediaset's) VOD service.]"

b. grant to Mediaset, subject to the terms of the contract, of, ***"[redacted commercially confidential provisions giving Mediaset the "right" to include in its VOD service the programmes provided by the Appellant.....];"***

c. definition of "The "Licensee's VOD Service"" as:

"[Redacted commercially confidential provisions including references to the VOD service operated by the licensee (i.e. Mediaset).]"
"

d. statement that:

"[Redacted commercially confidential provisions relating to the branding of Mediaset's VOD Service by it at its discretion, subject to informing the Appellant.]"

- e. provision that, “[**redacted commercially confident provisions describing the Mediaset’s VOD service as including a service in which programmes, including those provided to it by the Appellant, are made available on demand.**]”

.....

- f. “[**Redacted commercially confidential provisions to the effect that Mediaset is responsible for obtaining any regulatory approval required to operate a VOD service.**]”

- g. further provisions that:

“Editorial

.....

- “[Redacted commercially confidential provisions relating to discussions and agreements between the Appellant and Mediaset about the use in Mediaset’s VOD service of programmes provided by the Appellant]

41. Some of the contractual provisions offer strong indications that the Appellant had (and the parties intended it to have) *editorial responsibility* for the Service. Most of all, those in sub-paragraphs 39 (a) and (c).

42. However, those emphasised in **bold** in paragraph 40 are consistent with:

- a. the possibility that section 368A (4) admits that more than one party may have a role in determining the range of programmes offered and the organisation of them within that range; and
- b. the distinction drawn in that section between (1) *editorial responsibility* for a service, based on *general control* from an editorial perspective over what programmes are actually included in a range of programmes offered to users and the way they are organised in that range; and (2) control of the content of individual programmes.

43. Those latter provisions are consistent with the Appellant providing to Mediaset a collection of non-linear content, with the Appellant deciding what material comprises that overall collection. Mediaset had the *right* to include any of it in the Service. Mediaset did not, however, have any obligation to include any particular piece of that content (nor, on a proper construction of the contract, any of it at all) and chose which it did and how it organised the chosen content in its service.
44. Put another way, those latter provisions are consistent with the proposition that, whilst there is some ambiguity,⁸ in this case Mediaset had (and the parties intended it to have) more of the kind of *general control* that section 368A (4) contemplates the person with *editorial responsibility* for an *ODPS* will have. Those provisions are also consistent with the proposition that the editorial control the Appellant had related more to the content of individual programmes forming part of the collection of non-linear content it provided to Mediaset.
45. If Mediaset had the right to decide which of the collection of relevant non-linear content (selected and provided to it by the Appellant) to include in the Service and how it organised that chosen content in its service, this would more likely, in this case, place *editorial responsibility* in the sense contemplated by section 368A (4) with Mediaset, not the Appellant. This is contrary to ATVOD's finding that, *"Regardless of whether Mediaset has a right not to show these programmes, this seems to clearly place responsibility for selection (of any programmes that do get shown) onto BBCW."*
46. Mediaset appears to have accepted that it would have editorial responsibility for the Service in the sort of senses contemplated by section 368A (4) by virtue of its agreement to the provisions quoted in paragraph 40 above. In particular, to that which said Mediaset will be, "[Redacted commercially confidential provisions to the effect that Mediaset is responsible for any regulatory approval to operate a VOD Service]."⁹ These provisions indicate that both the Appellant and Mediaset intended the latter to have the kind of responsibility the Act requires.

⁸ Both parties have a role and both essentially need to be willing to offer a programme for it to be made available to users.

⁹ Likewise, by virtue of its notification of the Service to the Italian regulatory authority (see further below).

47. The above interpretation of the provisions of the contract is consistent with the representations the Appellant has made to Ofcom in its appeal, as set out above. In light of:

- a. those representations;
- b. ATVOD's finding that it had, "*.... not been provided with any evidence that Mediaset has accepted editorial responsibility for the service in Italy;*" and
- c. our view as to the correct approach where there are contractual provisions that do not settle the matter of *editorial responsibility* sufficiently clearly,

Ofcom asked the Appellant for further evidence of the position in practice. This has given Ofcom the benefit of evidence in making this Decision that ATVOD did not have when it made the Determination.

48. In particular, Ofcom asked the Appellant the following:

"BBC Worldwide's position as set out in your earlier e-mail is that, in practice, "there is one service and it is operated by Mediaset." As we understand it, the implication of this point is that Mediaset has "editorial responsibility" in the sense referred to in the Act and Directive, and that the service (as part of a wider Mediaset on-demand offering) is or should be subject to regulation in Italy.

Since you did not explicitly make the point in your submission, we would be grateful if you could confirm that this is BBC Worldwide's position. If it is, please provide evidence that Mediaset agrees it has editorial responsibility within the meaning of the Directive and plans to notify a service encompassing the BBC Knowledge content in Italy under the Directive as implemented there or, alternatively, with details of why it does not consider this to be necessary."

49. In response the Appellant confirmed in writing its position:

"..... that there is one service available at <http://play.mediasetpremium.it> and that Mediaset has editorial responsibility for it within the meaning of the Directive. The content supplied by BBCW forms part of this offering and is not a separate service in its own right."

It also provided written confirmation from Mediaset that it had applied for and obtained authorisation covering the Service from the relevant Italian regulatory authority.

50. On the bases of:

- a. Mediaset's notification to, and authorisation from, the relevant Italian authority, which indicates the parties' intentions and Mediaset's acceptance that it had *editorial responsibility* for the Service in the terms of the Act (and the AVMS Directive); and
- b. the consistency of that position with:
 - i. at least some of the provisions of the relevant contract between the Appellant and Mediaset; and
 - ii. the Appellant's explanation of the position in its appeal representations,

Ofcom considers that Mediaset, rather than the Appellant, should be regarded as having had *editorial responsibility* for the Service for the purposes of section 368A (1) (c). In line with the position Ofcom adopted in *the Nickelodeon and others decision*, this allocation of such responsibility between the parties in the (albeit themselves ambiguous) provisions of their contract and in practice, did not seek to place that responsibility where it plainly did not lie, nor to inhibit effective enforcement. There is no strong and compelling evidence that the position in practice means the relevant responsibility lay elsewhere. On the contrary, that evidence is consistent with Mediaset having had *editorial responsibility*.

51. On this basis alone, the Appellant did not, in respect of the Service, provide an ODPS within the meaning of section 368A of the Act. Ofcom therefore upholds the Appellant's appeal on that basis and substitutes its decision that the Appellant did not provide such a service for ATVOD's decision to the opposite effect.

Application of section 368A (1) (e)

52. Section 368A (1) (e) of the Act requires that a provider of an *ODPS* – the person who, amongst other things, has *editorial responsibility* for the service - be under the UK's jurisdiction for the purposes of the AVMS Directive. The Directive's jurisdictional provisions provide, so far as relevant, that those under a Member State's jurisdiction include those established in that State. They also provide that those so established include those persons with their head office in, and which take editorial decisions in, that Member State.
53. In the present case, Mediaset had *editorial responsibility* as set out above. As the contract between it and the Appellant demonstrates, Mediaset has its head office in Italy. Some of the provisions of the contract, Mediaset's acknowledgment of the position and evidence of the position in practice indicate that it takes the relevant editorial decisions in Italy.
54. Accordingly, the person with *editorial responsibility* for the Service - Mediaset - was not under the UK's jurisdiction for the purposes of the AVMS Directive. The requirement of section 368A (1) (e) of the Act was not therefore met. This is a second reason why the Appellant did not provide an *ODPS* within the meaning of section 368A of the Act and why Ofcom upholds the Appellant's appeal and substitutes its decision for ATVOD's.

Conclusion

55. The Appellant did not have *editorial responsibility* for the Service. The person who did, Mediaset, is not under the UK's jurisdiction for the purposes of the AVMS Directive. On those bases, the Appellant did not, in the Service, provide an *ODPS* under section 368A of the Act. Ofcom therefore upholds the Appellant's appeal against ATVOD's determination that it did provide such a service and substitutes for ATVOD's Ofcom's Decision that the Appellant did not provide an *ODPS*.

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 programmes¹⁰ the form and content of which are comparable to the form and content of programmes normally included in television programme services;¹¹*
 - 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 use¹² 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 –

¹⁰ 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.”

¹¹ 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.

¹² 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 the only 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 s.368B of the Act to carry out certain functions under Part 4A: see paragraph 5 of Ofcom’s designation of 18 March 2010 (*“the Designation”*).¹³ 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 and/or which person is its provider (which powers, by virtue of section 368B of the Act, Ofcom retains concurrently). Paragraph

¹³ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

6(ii) of the Designation also makes clear that any such decision is “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.*”

Relevant provisions of the AVMS Directive

8. Section 368A of the Act implements the AVMS Directive insofar as that Directive defines the scope of on-demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on-demand services that are subject to it.
9. In interpreting section 368A Ofcom has necessarily had regard to the relevant provisions of the AVMS Directive. Ofcom has done so because Part 4A of the Act is intended to implement the requirements of the Directive.
10. Of the relevant Articles of the AVMS 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). Most relevant for present purposes are Articles 1(1) (c) and (d). They provide definitions of “editorial responsibility” and of a “media service provider:”

“(c) ‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;

(d) ‘media service provider’ means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.....”

11. Article 2 of the AVMS Directive sets out the jurisdictional provisions relevant to section 368A (1) (e) of the Act. It says:

“1. Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system

of law applicable to audiovisual media services intended for the public in that Member State.

2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following:

(a) those established in that Member State in accordance with paragraph 3;

(b) those to whom paragraph 4 applies.

3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;

(b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State.

4. *Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:*

(a) they use a satellite up-link situated in that Member State;

(b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.

5. *If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the media service provider is established within the meaning of Articles 49 to 55 of the Treaty on the Functioning of the European Union.*

6. *This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.”*

12. As to Recitals of the AVMS Directive that describe the general purposes of the regulation for which it provides, Recitals 2, 4 and 11 are relevant. They 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 audiovisual media services that compete with traditional linear television broadcasting.¹⁴

13. 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:

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,*

¹⁴ 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 significant proportion of the general public,” and should not cover services, “which are primarily non-economic and are not in competition with television broadcasting.”¹⁵

- 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 soundWhile 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 of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of ‘effective*

¹⁵ such as services distributing user-generated content

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 21 to 28 should be present at the same time."*

Annex 2

Part 1: Contractual provisions consistent with the Appellant having *editorial responsibility* for the Service

Terms and Conditions:

[Redacted on grounds of commercial confidentiality. Most relevant provision summarised in paragraphs 17, 39 and 40 of the Decision.]

Part 2: Contractual provisions more consistent with Mediaset having *editorial responsibility* for the Service

Commercial terms:

[Redacted on grounds of commercial confidentiality. Most relevant provision summarised in paragraph 40 of the Decision.]