

APPEAL BY PLAYBOY TV UK / BENELUX LIMITED AGAINST A NOTICE OF DETERMINATION BY ATVOD THAT IT WAS THE PROVIDER OF THE SERVICE “PLAYBOY TV” (WWW.PLAYBOYTV.CO.UK) AS AT 14 SEPTEMBER 2012

OFCOM DECISION

Section 1 – Introduction: Scope of this Decision

1. This document sets out Ofcom’s decision (the “Appeal Decision”) in respect of the appeal by Playboy TV UK / Benelux Limited (“the Appellant”) against the determination (the “Determination”) by the Authority for Television On Demand (“ATVOD”) that the service “Playboy TV” (ODPS00213) at www.playboytv.co.uk (“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 making this Appeal Decision, Ofcom has, in accordance with Ofcom’s relevant procedures,¹ considered ATVOD’s Determination; the submissions provided to us by the Appellant; relevant legislation including the Act and the Audiovisual Media Services (“AVMS”) Directive; and previous Ofcom decisions on appeals regarding ATVOD scope determinations.
3. Ofcom’s Appeal Decision is that the Appellant was not, at the time of the Determination, and for the reasons set out below, in respect of the Service, the provider of an ODPS.

Section 2 – Summary of the Legal Position

4. The Audiovisual Media Services Directive (the “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

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

- b. on-demand services that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers.
- 5. The Audiovisual Media Services Regulations 2009 gave effect to the Directive in the UK by inserting Part 4A into the Communications Act 2003 ("the Act"). Part 4A was amended by The Audiovisual Media Services Regulations 2010 and creates the statutory regime for the regulation of "ODPSs".
- 6. According to Part 4A a service is only an ODPS if it satisfies each defining criterion in section 368A of the Act. Of particular relevance to the Appeal Decision, section 368A(1)(c) states:

(c) there is a person who has editorial responsibility for it;

- 7. The concept of editorial responsibility is further explained in section 368A(4) which states:

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

(a) over what programmes are included in the range of programmes offered to users; and

(b) over the manner in which the programmes are organised in that range;

and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the service.

- 8. Of further 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 (see section 368A(4)).

9. As part of a co-regulatory regime, Ofcom has designated (the “Designation”)² ATVOD as the “appropriate regulatory authority” to carry out certain functions under Part 4A of the Act. As part of that Designation, ATVOD has power to decide what is an ODPS. 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.
10. The 2009 Regulations and the provisions they inserted into Part 4A of the Act came into force on 19 December 2009. The 2010 Regulations and their amendments of Part 4A came into force on 18 March 2010.
11. Ofcom’s Designation of ATVOD as the appropriate regulatory authority took effect on the latter date. Those providing ODPSs as at that date were required to notify them to ATVOD by 30 April 2010. Those intending to start providing them after 18 March 2010 were (and are) required to notify ATVOD before providing the service. Ofcom reviewed the Designation of ATVOD in August 2012 and confirmed ATVOD’s continuing Designation as co-regulator of editorial content on 14 September 2012.
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 procedures³, 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...*”

(which power, by virtue of section 368B of the Act, Ofcom retains concurrently).

The statutory scheme in relation to Ofcom’s co-regulatory role and the statutory definition of an ODPS is further detailed in Annex 1 to this Appeal Decision.

² <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

³ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

14. The present Appeal relates to editorial control under section 368A(1)(c).

Section 3 – Determination under Appeal

ATVOD's Determination

15. On 31 January 2012 the Appellant notified the Service to ATVOD. On 19 June 2012, the Appellant wrote to ATVOD and stated that they intended to move editorial responsibility for the Service to Montreal, Canada. On 21 June 2012, ATVOD requested further information from the Appellant regarding editorial responsibility and jurisdiction; this was received on 11 July 2012. On 24 July 2012, the Appellant informed ATVOD that the 'transfer of [editorial] responsibility' to Montreal was complete. On 10 and 11 September 2012, the Service Provider provided further email correspondence to ATVOD to confirm its position. On 17 September 2012, ATVOD issued its Determination that as at 14 September 2012 the Service remained an ODPS for the purposes of Part 4A section 368A(1) of the Act.
16. In its Determination ATVOD stated that the evidence provided by the Service Provider indicated that a "process of transfer" to Montreal had begun, but concluded that this had not yet completed.
17. In particular, ATVOD noted the following features of the website as evidence that the Service remained within UK jurisdiction:
- a. The contact information (as at 14 September 2012) on the Service was for the UK address of the company "Playboy TV UK / Benelux Ltd".
 - b. Terms and Conditions on the Service refer to being governed by "English Law".
 - c. Domain registration data suggested that the Service is not registered in Canada, but in America.
 - d. The overall design and layout of the Service had not changed since the apparent transfer to Canada.
18. ATVOD also noted an email of 10 September 2012, provided by the Service Provider, from the Head of Digital and New Media at Playboy TV UK / Benelux

Limited to the Canadian Product Manager. ATVOD argued this email suggested that the Service Provider retained “editorial responsibility” for the Service. It was this conclusion – that “editorial responsibility” within the meaning of section 368A(1)(c) of the Act was retained by a business operating out of the UK – on which ATVOD’s Determination hinged.

19. The Determination set out the Appellant’s right to request an appeal to Ofcom as set out in paragraph 6(ii), and 7(xvii) of the Designation. ATVOD also directed the Appellant to Ofcom’s appeals procedures⁴. 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 they 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 Appeal

20. The Appellant wrote to Ofcom on 4 October 2012 requesting an appeal of the Determination. The Appellant submitted that ATVOD had incorrectly determined that editorial responsibility remained with the UK company Playboy TV UK / Benelux Limited and had relied on evidence which did not support their conclusion.
21. In particular, the Appellant noted that:
 - a. The fact that the Services’ Terms and Conditions referred to are bound by “UK Law” and payments taken by a UK company had no bearing on “editorial control”.
 - b. The Services’ American Domain registration, again, had no bearing on “editorial control”.
 - c. The Montreal-based company had decided the current design of the Service was sufficient and the redesign of a website is a lengthy process.
22. In relation to the email of 10 September 2012 cited by ATVOD, the Appellant stated that ATVOD had misrepresented its position and that, in fact, it uploaded videos to

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

the Service as they become available and, as such, no “editorial decisions” are taken in the UK.

23. Ofcom wrote to the Appellant on 25 October 2012 seeking further information on the allocation of responsibilities between personnel in the UK and Canada, and corporate documents relating to the reorganisation. The Appellant responded with this information on 8 November 2012.
24. Following this, the Appellant informed Ofcom on 15 November 2012 that, as a result of a decision taken in Canada, the Service was in the process of being closed down. As at 2 September 2013 this had not taken place. Clearly, were the Service to cease operating, it would not be an ODPS from that date (whether or not it was before). Services change in a variety of ways over time, and it is a matter for service providers and ATVOD to monitor this. Ofcom’s Decision relates to the status of the service at the time of ATVOD’s Determination and the Appellant’s Appeal.
25. Since the Appellant argued editorial responsibility now resided in Montreal, Canada, Ofcom also wrote, on 30 January 2013, to the holding company of the corporate group, Manwin Holding SARL in Montreal, to request further information about the organisation of the broader corporate group. Manwin Holding SARL replied via its office in Luxembourg, which it described as its “head office”.

Ofcom’s Preliminary View

26. On 2 September 2013 Ofcom set out its Preliminary View on the Appellant’s Appeal: that it should be upheld, on substantively the same basis as Ofcom now sets out in this Appeal Decision. Ofcom provided the Preliminary View to the Appellant and ATVOD and gave them the opportunity to make representations. ATVOD made written representations on 16 September 2013, Ofcom’s consideration of which is set out below. The Appellant did not make any representations.

Section 4 – Ofcom’s Decision and Reasons

27. The point of Appeal which Ofcom must determine in relation to the Appellant is whether the Appellant had, at the relevant time, “editorial responsibility” for the

Service, as that term is defined in section 368A(4) of the Act. If it does not, section 368R(5) makes clear that the Appellant is not to be treated as providing the ODPS.

28. Ofcom's conclusion is that the Appellant's appeal should be upheld on the basis that it did not have "editorial responsibility" under section 368A(1)(c) of the Act.
29. ATVOD's Determination hinged on the conclusion that "*Playboy TV UK/Benelux Ltd retains editorial responsibility for the Service*" rather than it having been transferred to Playboy Plus Entertainment Inc in Montreal, Canada. This conclusion rested on references to that company on the website, to terms and conditions for users being governed by English law, and domain name registration being registered to a third US company. As set out in paragraph 18 above ATVOD also relied on an email of 10 September 2012 from the Appellant which ATVOD said demonstrated that it was still uploading new material to the Service after redundancies at the UK office had taken place. The Appellant's Appeal likewise focuses on "editorial" issues, and providing explanations for the matters referred to by ATVOD.
30. Ofcom agrees with the Appellant's position that the identity of the person with "editorial responsibility" within the meaning of sections 368A(1)(c) and 368A(4) had indeed changed. In particular, in response to questions from Ofcom, the Appellant provided job descriptions of individuals based in Montreal and the UK, as well as information about redundant posts in the UK.
31. In light of these Ofcom considers, in line with ATVOD's finding, that whilst a limited number of individuals within the UK business continue actively to be involved in the provision of the Service in this particular case Ofcom also accepts there was a genuine reallocation of responsibility within the corporate group. Key individuals were made redundant in the UK and their responsibilities were taken on by individuals in Canada in the employ of Playboy Plus Entertainment Inc.
32. It is also noted that much key information enabling Ofcom to reach its conclusion, namely evidence on the actual allocation of responsibilities between different corporate entities in different locations needed to be obtained at Ofcom's request on appeal. In particular, Ofcom carefully considered the information supplied by the Service Provider and noted that the most senior member of staff in relation to the everyday running of the Service was the Product Manager, who was based in Montreal. A range of other important responsibilities of an editorial nature are also evidently carried out by staff outside the UK. Overall, the evidence indicates that

“general control over what programmes are included in the range of programmes offered to users; and over the manner in which the programmes are organised in that range” (section 368A(4)) ceased to be exercised by Playboy TV UK / Benelux Limited.

33. In relation to the points cited by ATVOD, Ofcom broadly accepts the Appellant’s explanations for the features noted by ATVOD. In particular, although the features noted could be indicative, cumulatively, of a service editorial responsibility for which has not changed, it is not determinative and evidence that there had been a genuine reorganisation including redundancies in the UK and the taking on of responsibilities by staff in Montreal is persuasive.
34. It is noted that the Appellant has indicated that the reasons for the corporate reorganisation were purely commercial and not related to any attempt to evade regulations. Whilst motivation is not relevant to the present assessment, Ofcom recognises that there is no evidence the changes were driven by consideration of the regulatory regime.

ATVOD’s representations

35. ATVOD’s representations on Ofcom’s Preliminary View were to the affect that:
 - a. Ofcom had not set out in paragraph 29 above, the full list of factors on which ATVOD had rested its conclusions, specifically by reference to the email correspondence between ATVOD and the Appellant and appended to ATVOD’s Determination; and
 - b. Ofcom’s Preliminary View was based on significant additional evidence, specifically the job description of the Product Manager employed by Playboy Plus Entertainment Inc. in Canada, which was supplied to Ofcom during the course of its enquiries. ATVOD argued that a Preliminary View based on new evidence should quash ATVOD’s Determination and remit it back to ATVOD. ATVOD was concerned that reaching a fresh decision might discourage service providers from fully engaging with ATVOD leading up to its scope determination.
36. As to head a) above, Ofcom has amended paragraph 29 of this Appeal Decision to reflect ATVOD’s consideration of email correspondence to the extent it was referred to and relied upon in ATVOD’s Determination.

37. Ofcom carefully considered the arguments put forward by ATVOD in relation to head b) above. Ofcom recognises the importance of full information being supplied by service providers to ATVOD in the first instance and agreed that, in a case where it appeared information had been held back or an appellant had not engaged, this may well be a reason to remit back. However, we also noted that the Appellant had co-operated to a large extent with ATVOD during the period leading up to ATVOD's Determination. It had for example offered the job descriptions of those who remained in the UK (this did not explicitly refer to Canadian employees, but did indicate the Appellant's engagement in the process). We further noted the period of time that has now elapsed since the issue of ATVOD's Determination, and the desirability of bringing the matter to a prompt conclusion, limiting further cost. On balance, therefore, Ofcom considered it appropriate to substitute ATVOD's Determination with its own, rather than to quash ATVOD's Determination and remit back.

Section 5 – Conclusion

38. On the basis of the above, Ofcom upholds the Appellant's appeal and substitutes it with Ofcom's Decision, that the Appellant did not fulfil the criterion in section 368A(1)(c) of the Act as at 24 July 2012 and therefore was not the provider of an ODPS, for that of ATVOD.
39. Finally, it is noted that this Decision is limited to the point of appeal which relates to the position of the Appellant (Playboy TV UK / Benelux Limited, the UK subsidiary). In the course of the Appeal, two other businesses, namely Manwin Holding SARL and Playboy Plus Entertainment Inc, have been mentioned. Ofcom does not rule out that either of those companies, or another within the Manwin group, may be providing an ODPS within the jurisdiction of the UK (or another EU country), noting that we understand from our enquiries that the service is not registered with the appropriate Video On-demand regulatory body in Luxembourg.

23 September 2013

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 programmes⁵ the form and content of which are comparable to the form and content of programmes normally included in television programme services;⁶
 - 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 use⁷ 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 –

⁵ Section 405 of the Act defines “programme” for the whole Act (except insofar as the context otherwise requires) as including “*an advertisement and, in relation to a service, anything included in that service.*”

⁶ 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.

⁷ 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”).⁸ 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

⁸ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/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 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. 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 audio-visual media services that compete with traditional linear television broadcasting.⁹

12. Recitals 21 to 29 of the Directive, meanwhile, provide further explanation of its intended scope, of particular relevance to section 368A(4):
 - a. 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 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)”.
 - b. 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.”
 - c. 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.”

⁹ 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).”