

**APPEAL BY ITZIAR BILBAO URRUTIA AGAINST A NOTICE OF DETERMINATION BY  
ATVOD THAT THE PROVIDER OF THE SERVICE “THE URBAN CHICK SUPREMACY  
CELL” (<http://uc-sc-femdom.com>) HAS CONTRAVENED SECTION 368BA AND  
368D(3)ZA OF THE COMMUNICATIONS ACT 2003 WHILST OPERATING AN ODPS**

**OFCOM DECISION**

**Section 1 - Introduction: Scope of this Decision**

1. This document sets out Ofcom’s Decision in respect of the appeal by Itziar Bilbao Urrutia (“the Appellant”) against the determination (“the Determination”) by the Authority for Television On Demand (“ATVOD”) that the service “The Urban Chick Supremacy Cell” (“UCSC”) at <http://uc-sc-femdom.com> (“the Service”) 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 Decision, Ofcom has, in accordance with our relevant procedures<sup>1</sup>, made its own assessment of the relevant website; considered ATVOD’s Determination; the submissions provided to us by the Appellant; relevant legislation including the Act and the Audiovisual Media Services Directive (“the Directive”); relevant previous Ofcom decisions on appeals regarding ATVOD scope determinations; and research commissioned by Ofcom into consumer behaviour and choices in relation to on-demand services<sup>2</sup>.
3. Ofcom’s Decision is that the Appellant was not at the time of the Determination, for the reasons set out below, the provider of an ODPS. Ofcom therefore upholds the appeal and substitutes Ofcom’s Decision for that of ATVOD.

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

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

## **Section 2 - Summary of the Legal Position**

4. The AVMS Directive is a European Directive amongst the purposes of which is to provide a measure of fair competition across Member States between those providing:
  - 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.

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

5. The Audiovisual Media Services Regulations 2009 gave effect to the Directive in the UK by inserting Part 4A into the Communications Act 2003 ("the Act"). Part 4A came into force on 19 December 2009. It was amended by The Audiovisual Media Services Regulations 2010, which came into force on 18 March 2010. Part 4A of the Act creates the statutory regime for the regulation of ODPSs.
6. A service is only an ODPS if it satisfies the defining criteria in section 368A of the Act. Key amongst these for present purposes is that in section 368A(1)(a)<sup>3</sup>:

*"... a service is an ODPS if –*

*..... its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services."*

7. As part of a co-regulatory regime, Ofcom has designated ATVOD as the "appropriate regulatory authority" to carry out certain functions under Part 4A of the Act (the "Designation")<sup>4</sup>. 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.

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

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

8. Ofcom's Designation of ATVOD as the appropriate regulatory authority took effect on 18 March 2010. Those providing ODPSs as at that date were required to notify them to ATVOD by 30 April 2010. Those intending to start providing them after 18 March 2010 were (and are) required to notify ATVOD before providing the service. Ofcom reviewed the Designation of ATVOD in August 2012 and confirmed ATVOD's continuing Designation as an appropriate regulatory authority on 14 September 2012.
9. By virtue of section 368B of the Act, Ofcom retains the power concurrently with ATVOD to determine what is an ODPS and any decision by ATVOD on such matters is "*subject to appeal to Ofcom in accordance with Ofcom's relevant procedures.*"
10. As set out in those procedures<sup>5</sup>, Ofcom's decision in any appeal, ".... may:
  - a. *uphold ATVOD's decision;*
  - b. *quash ATVOD's decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;*
  - c. *substitute Ofcom's decision for that of ATVOD.....*"

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

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

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

11. On 6 June 2013 ATVOD wrote to the Appellant informing it of its statutory obligations to notify provision of an ODPS and setting out the statutory criteria which define an ODPS. On 6 September 2013 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.

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

12. ATVOD issued a written “Notice of Determination” on 6 January 2014 which stated that, following the removal of public access to the Service’s audiovisual content, the Service was no longer an ODPS under section 368A of the Act. However it also informed the Appellant that – for the reasons set out in the Determination – as at 19 and 20 August 2013, the Service had constituted an ODPS under section 368A of the Act, and that the Appellant had contravened the advance notification requirement under section 368BA, as well as the requirement to pay a fee under Section 368DE(3)(za) and was therefore in breach of Rule 1 and Rule 4 respectively of ATVOD’s Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme services.<sup>6</sup>
13. ATVOD considered that, as at 19 and 20 August 2013, the Service fulfilled each of the relevant criteria set out in Section 368A(1) of the Act and that the principal purpose of the Service was the provision of on-demand videos. ATVOD’s Determination also noted that the form and content of programmes on the Service was comparable to the form and content of programmes normally included in television programme services.
14. In relation to section 368A(1)(a) of the Act ATVOD referred, by way of example, to the following programmes which appeared on the Service:
- a. “Red Hoodie Chick  
*The duration of the video was 11 minutes and 54 seconds. Once the user had clicked on the video it began with the title “The Urban Chick Supremacy Cell No Mistress Red Hoodie Chick Transformation” in red text being displayed on screen. The video portrayed a woman applying lipstick and removing parts of her clothing to change into another set of clothing, a red hoodie and a mask. A caption with an image of a female holding a gun was displayed on screen at the end of the video.*
- b. Anal Occupation-Anal Hook  
*The duration of the video was 10 minutes and 23 seconds. The video began with red text being displayed on screen which read “Anal Occupation Anal Hook”. The text [www.uc-sc.com](http://www.uc-sc.com) appeared in the bottom left hand corner throughout the video. The video portrayed a man whose arms and hands*

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<sup>6</sup> [http://www.atvod.co.uk/uploads/files/ATVOD\\_Rules\\_and\\_Guidance\\_Ed\\_2.0\\_May\\_2012.pdf](http://www.atvod.co.uk/uploads/files/ATVOD_Rules_and_Guidance_Ed_2.0_May_2012.pdf)

*were tied, a woman then places an anal hook with a ball attached to it into his anus. Another woman is seen sitting on a chair near the man and is occasionally seen pointing the gun in his direction. A caption with an image of a female holding a gun was displayed on screen at the end of the video.”*

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

#### The Appellant’s Appeal

17. The Appellant wrote to Ofcom on 30 January 2014 requesting an Appeal of the Determination. The Appellant submitted that ATVOD had incorrectly determined that the Service was an ODPS fulfilling all of the statutory criteria set out in section 368A(1) of the Act, specifically criterion (a). It accepted the other criteria were met.
18. The Appellant submitted that ATVOD had incorrectly determined that the Service was an ODPS fulfilling each of the statutory criteria set out in section 368A(1) of the Act, specifically that the content provided by the service was not comparable to the form and content of programmes normally included in television content. In support of this the Appellant said that the average duration of the 91 videos available on the site was seven minutes and 53 seconds. The Appellant also referred to factors proposed in Ofcom’s 2012 Essential Research Report for indicating whether an on-demand service is considered by its audience to be a reasonable substitute for linear TV. The Appellant gave the example of six factors (duration of content, look and feel of the service, who controls what is watched, effort expended to access the service,

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<sup>7</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

perceived quality of content and where the content originated) which it said indicated that UCSC was not a reasonable substitute for linear TV. The Appellant also argued that, due to UCSC's limited customer base and turnover (58 paid customers and a turnover of \$2,193 in approximately two years), the website could not be considered to be in competition with linear TV.

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

- i) The Appellant disputed the videos on UCSC were comparable with the examples of programmes set out in Article 1(1)(b)8 of the Directive. In support of this assertion the Appellant stated:

*"There are 91 videos available on the UCSC website. The average length of the videos is approximately 7 minutes 53 seconds in length [...] with the longest, namely 'The Ulrike Technique 02' being 18 minutes 44 seconds and the shortest, namely 'Surrender under her tough boots and arse', being 2 minutes 23 seconds. The videos have limited narrative content, predominantly consisting of individual scenes of female domination".*

- ii) The Appellant also referred to "On demand services: understanding consumer choice"<sup>9</sup> ("the Essential Report"), a research report for Ofcom prepared by Essential Research in which one of the key factors related to determining whether a service is in competition with linear TV was the length of content. The report stated that "content that was around 20 minutes tended not to be considered as a reasonable substitute for linear TV". The Appellant stated that all video on UCSC was of less than 20 minutes in duration.
- iii) The Appellant referenced a number of the other factors set out in the Essential Report which it said also militated against the conclusion that USCS video content was comparable to linear television programming. Firstly, the Appellant stated that "UCSC has the distinctive look and feel of a website, with viewers clicking on a thumbnail image to access content. The content is not represented in a schedule format in contrast to, for example, the content on the BBC iPlayer or Channel 4oD services".

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<sup>8</sup> Examples of programmes given in the Directive include "feature length films, sports events, situation comedies, documentaries, children's programmes and original drama".

<sup>9</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)

- iv) The Appellant stated: “the user has full control of the viewing experience – which video to watch, when and for how long. The Essential Report indicates that increased user control over viewing tends to diminish the “TV-like” experience”.
- v) The Appellant said that the Essential Report indicates that the “TV-like” experience is diminished by increased effort required to access video online. The Appellant stated that: “UCSC can only be accessed on the internet whether by typing in the website’s URL into the browser bar or using a search engine to search for appropriate terms”.
- vi) The Appellant also argued that “whilst UCSC strives to achieve high production values, the typical budget available for each video is in the range of £150, which is significantly lower than the production budgets associated with mainstream television production”. The Appellant stated that disparity in budgets between UCSC and the videos featured on mainstream adult linear television “is likely to affect at least the perceived quality of production values”.
- vii) The Appellant stated that “all content on the UCSC website is produced specifically for the website, by relatively unknown producers. The content has not previously been broadcast on linear TV and does not feature well-known programme titles”. The Appellant argued that the Essential Report indicates these factors tend to diminish the “TV-like” nature of the viewing experience.
- viii) The Appellant argued that UCSC could not be considered to be in competition with linear television broadcasts and disputed ATVOD’s suggestion that as “long as video content is capable of being accessed by a large audience, it is in competition with television regardless of how limited actual viewership figures and turnover for the content may be”. The Appellant said that “there must come a point at which video content is so niche [...] that it cannot be sensibly considered to be “in competition with” linear television...”. As UCSC has only 58 customers and generated a total revenue of \$2,193 since mid-2011 this “is, on any reasonable view, far too limited a viewership and turnover to be considered in competition with linear TV broadcasting”.

20. Following receipt of the Appeal Ofcom prepared a document setting out its Preliminary View that the Service was not at the relevant time an ODPS for the purposes of Part 4A of the Act. This was sent to the ATVOD and the Appellant on 18 June 2014 and both were asked for their representations. The Appellant made no representations in regard to the substance of the Appeal.

#### **Section 4: ATVOD's Representations**

21. ATVOD provided representations on Ofcom's Preliminary View which were to the effect that whilst ATVOD did not wish to comment on the conclusion reached by Ofcom, it did wish to raise certain considerations in relation to the discussion of certain features of the Service, as included in Section 5 below. We have reflected some of these comments which we considered pertinent to this decision at paragraphs 30 and 55 to 56.
22. We also wish to clarify that, although the consideration of a service's particular characteristics is a necessary part of Ofcom's consideration of the relevant criteria, our analysis of any such criteria must always be considered in the wider context of the service in which they appear. On-demand services, and the material featured on them, may display many different characteristics, which must be considered as a whole in order to reach a view as to 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. Every service must be considered on the basis of all its relevant characteristics and all the relevant evidence in the round.

#### **Section 5 – Ofcom's Decision and Reasons**

23. Having carefully considered the representations of both ATVOD and the Appellant and the evidence as set out in this document, Ofcom's Decision is to uphold the Appellant's appeal and substitute our own Decision for ATVOD's. While there were certain factors that tended to support the view that the UCSC Service was an ODPS, on a balanced consideration of all the evidence, our Decision is that the Service at the time of ATVOD's Determination and the subsequent appeal was not an ODPS. The Appellant did not, at those times, provide an ODPS on its website. The following

sections of this Decision set out again Ofcom's approach to the relevant legislation and how we have applied that approach in our assessment of the Service.

#### Approach to relevant legislative provisions

24. As set out in section 2 above, the Directive and the Act seek through regulation to provide a measure of fair competition between those providing traditional (linear) television broadcasting services and those providing services on an on-demand basis that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers. They seek to provide a level of protection in accordance with that which consumers of ODPSs might expect.
25. As also set out above, the principal grounds on which the Appellant based its appeal to Ofcom were in relation to section 368A(1)(a) of the Act. The Appellant did not dispute ATVOD's finding that the Service met the other criteria of section 368A(1) ((b) to (e)).
26. Section 368A(1)(a) of the Act provides for a composite definition, to be applied in light of the Directive, to determine whether services are within the scope of regulation. It can be characterised as comprising a "*principal purpose*" part – whether there is a service the "principal purpose" of which is the provision of audiovisual material; and a "*comparability*" part – whether the form and content of programmes comprising that service are comparable with the form and content of programmes normally included in linear broadcast television services.
27. All parts of that definition must be considered and met for a service to be an ODPS. There must be a service whose principal purpose is the provision of programmes, the form and content of which are comparable to the form and content of programmes normally included in television programme services.
28. Ofcom's approach to applying section 368A(1)(a) of the Act, which it appears to us is the kind of approach ATVOD adopted in this case, is set out in greater detail in our Sun Video<sup>10</sup> and Viva TV Music<sup>11</sup> Appeal decisions in particular. Broadly, the composite definition requires those assessing a service to:

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<sup>10</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/sunvideo.pdf>

<sup>11</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV\\_Viva\\_TV\\_Decision\\_Annexes.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/MTV_Viva_TV_Decision_Annexes.pdf)

- a. look at what is provided as a whole and consider whether there is anything which is a service whose principal purpose is the provision of audiovisual material; and
  - b. if the answer to a. is in the affirmative, it is necessary to consider whether, taken as a whole, the service is one whose principal purpose is providing comparable programmes<sup>12</sup> (which is a question that focuses on the audiovisual material that comprises the principal purpose of the service).
29. In Ofcom's Sun Video Decision, to assist in applying the principal purpose part of the statutory definition of an ODPS, we identified features we consider to be characteristic of a service more likely to have the principal purpose of the provision of audiovisual material and, by contrast, characteristics of a service in which the provision of audiovisual material is more likely to be merely ancillary. These were directed mainly to the issues in the Sun Video appeal, but in our view are also relevant to this appeal, and we take them into account as set out below. They are described more fully in the Sun Video Decision, but in brief they relate to:
- a. the "homepage" through which the audiovisual material is accessed;
  - b. the cataloguing and accessing of the material;
  - c. the presentation and/or styling of the material;
  - d. the duration, completeness and independence of the material;
  - e. the access links between the relevant audiovisual material and other content;
  - f. the content links between the relevant audiovisual material and other content;
  - g. the balance and nature of the audiovisual and other material; and

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<sup>12</sup> That is, comparable in form and content to the form and content of programmes normally included in television programme services.

- h. whether, on an overall assessment, the audiovisual material could be said to be integrated into, and ancillary to, another service.
30. Similarly, in decisions such as that relating to the Channel Flip service<sup>13</sup>, Ofcom has indicated characteristics we have taken into account in considering the comparability part of the definition. These include the duration of audiovisual items, the use of opening and closing credits, any narrative structure and the production values. No one single characteristic of those discussed in paragraphs 35 to 68 is of, and in itself determinative, but they are considered as a whole when reaching conclusions about the nature of the particular service. Again, the extent to which these and other characteristics are relevant to this appeal is set out below.
31. In interpreting section 368A in the way set out, Ofcom necessarily has regard to relevant provisions of the Directive. This is because section 368A implements the Directive insofar as the 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.
32. In the circumstances of this appeal Ofcom draws attention in particular to Recital 24 of the Directive which states that:
- “It is characteristic of on-demand audiovisual media services that they are ‘television-like’, i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.”*
33. 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.”*

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<sup>13</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)

34. In light of these provisions, and following the approach adopted by Ofcom in previous appeals, Ofcom also considers 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 Directive.

#### Ofcom's Assessment

35. Taking the approach outlined above, Ofcom has reviewed the whole and constituent parts of the Appellant's website including the homepage, various genre tabs and a variety of audiovisual and non-audiovisual material across the site. In doing this, Ofcom viewed the screengrab and video evidence captured by ATVOD at the time of its Determination, as well as undertaking a number of reviews of the website subsequent to the receipt of the Appellant's appeal submission. All of Ofcom's reviews of the video content of the website showed that it was substantively similar as at the time of ATVOD's Determination.<sup>14</sup>
36. Ofcom noted that there were many and varied examples of audiovisual material, from acts of sado-masochism recorded in interior rooms to sado-masochistic role play filmed outdoors in streets to experimental videos such as those seemingly attempting to induce hypnosis. In the main all material, written and audiovisual, featured the same individuals connected with the editorial curation of the site who were also the principal actors in the sado-masochistic activity featured on the site. This activity was in the main sado-masochistic role-playing centred on the notion of the "Urban Chick Supremacy Cell". Full details of Ofcom's assessment follow in paragraphs 38 to 68.
37. Having considered all of the material on the website, our overall assessment on the facts is as follows:

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<sup>14</sup> Subsequent to ATVOD's Determination, public access was removed to all audiovisual content available on the UCSC Service but the site itself was made available to Ofcom for the purposes of this Appeal.

- a. The Appellant did provide a service the principal purpose of which was providing audiovisual material.
- b. However, Ofcom considered as a whole that the relevant material was not comparable in form and content to the form and content of programmes normally included in television programme services (i.e. it was not sufficiently TV-like to meet the comparability part of the statutory definition).
- c. Stepping back and having regard to the Directive, and in particular the guidance in Recital 24, Ofcom considered, in light of all the circumstances, features and characteristics of the relevant website, that the relevant audiovisual material was not likely to compete for the same audience as (linear) television broadcasts and that the nature and the means of access to it would not lead users of the service reasonably to expect regulatory protection within the scope of the Directive.

We set out below the reasons for our assessment.

#### Application of Section 368(1)(a)

##### Principal Purpose.

- 38. Taking into account the characteristics identified in Sun Video (as set out in paragraph 29 above), Ofcom's assessment of the Service against those criteria is as follows:
- 39. a. Homepage  
Ofcom noted that the website's main homepage displayed a large image, divided into four sections, depicting a topless woman wearing a balaclava, torn tights, army boots and pointing a gun. Below this image were three links, directing users to "Join Now", "Enter" and "Take a look". A further series of links, placed in the top right-hand corner of the homepage, stated in turn: "UCSC Home", "Featured Videos", "Clips 4 Sale Studio", "Members Area", "Video and Photo", "Archives", "Agitprop Blog" and "Links".

40. The evidence showed that the site's main homepage was primarily used to guide users to the paid content available on the "Members' Homepage". This paid content was promoted as "Over 10 hours of relentless, no mercy Hard Edge, high resolution Femdom clips".
41. Assessing the evidence of the Members' Homepage, Ofcom noted that its layout and interface were not indicative of a service whose principal purpose was the provision of audiovisual material because video and photographic material appeared as a series of blog-style posts (although the majority did not include text), laid out in chronological order.
42. b. Cataloguing and accessing
- As stated above, the members' section of the Service presented its entire library of content, unsorted between video material and stills, in chronological order. Whilst there was no robust cataloguing feature, by using a "Members' Menu" to the right of the members' homepage users were able to select either "Members' Videos" or "Members' Galleries". Depending on the user's selection, this would then present either just the video or the photographic material, in chronological order.
43. Using a further 'Categories' menu on the right hand side of the Members' Homepage, enabled users to select from a number of categories (e.g. Anal Occupation, Arse Worship and Ballbusting). This would then present another chronological list of all content (video and stills) related to that category. In order to view just video material, users were able to select a 'Video' category, which presented the entire video library chronologically across a number of pages. This was just one out of 41 selections and was not presented more prominently than any other. It was not possible to then further filter the content in order to aid the user to find a particular video.
44. A "Categories" menu on the right of the Members' homepage included links such as "Anal Occupation" and "Boot Licking". Upon making a selection, users were presented with all content (both video and photographic stills) relating to that subject, again presented in chronological order.
45. The lack of a robust method for users to find and access specific types of content was indicative of a service that did not have the principal purpose of the provision of audiovisual material.

46. c. Presentation and styling

We set out in Sun Video our view that the styling and marketing of a service as a “TV” service was a characteristic which was indicative (though not determinative) of a service having the required principal purpose of the provision of audiovisual material. Whilst the UCSC service does not market its audiovisual content as a “TV” service, this paid-for audiovisual content is promoted as “Over 10 hours of relentless, no mercy Hard Edge, high resolution Femdom Videos” and is the key benefit of purchasing membership. We would view this type of promotional claim as indicating a service which has the principal purpose of providing audiovisual content

47. d. Duration, completeness and independence of the material

The nature of the material is dealt with fully in paragraphs 55 to 68. In short, Ofcom considered that the volume of audiovisual material was sufficient to indicate a significant offering and a principal purpose of the supply of audiovisual content.

48. e. and f. Access and Content Links

Material was presented for consumption on a standalone basis. Whilst some videos were accompanied by a small amount of text, this text was not required for the audiovisual material to convey its content and be understood. Ofcom considered that material presented independently in this way was indicative of a service which had the principal purpose of supplying audiovisual material.

49. g. Balance of Material

The members’ site offered 91 videos and 107 photo galleries. Such a substantial video offering is an indicator that the Service had the principal purpose of providing audiovisual material.

50. h. Overall Assessment

Following our own assessment, Ofcom noted ATVOD’s Determination that the non-audiovisual elements of the service were ancillary to the provision of video. Ofcom accepted the volume of video content was sufficient to indicate a service with the principal purpose of providing audiovisual content. Whilst some aspects of the Service did indicate a purpose other than the supply of video content, such as the volume of still photographs and the lack of robust cataloguing of video content, on the balance of our assessment, Ofcom agreed with ATVOD’s conclusion that the principal purpose of the Service was the provision of audiovisual material.

51. As such, Ofcom concluded that the Service had a principal purpose of the provision of audiovisual material, both in terms of the quantity available to view but also the manner in which it was promoted on the site.

#### Comparability (“TV-Like”)

52. Having concluded that a principal purpose of the site was the provision of audiovisual material, Ofcom considered the comparability part of the definition of an ODPS in section 368A(1)(a) i.e. is the principal purpose the provision of programmes “the form and content of which are comparable to the form and content of programmes normally included in television programme services.” As in previous appeals (in particular Playboy TV in relation to the service Demandadult.co.uk<sup>15</sup> and by Channel Flip in relation to the service ChannelFlip.com<sup>16</sup>), Ofcom considered a number of features of the Service which were of particular relevance. These are summarised below.

53. In its Determination, ATVOD stated:

*“The Service Provider’s representations suggest that there are not comparable programmes on broadcast television. ATVOD acknowledges that broadcast sadomasochistic/fetish material tends to include only mild fetish material. However, it is ATVOD’s view that this is a difference of degree rather than type. Broadcast television certainly included programmes which take a bondage/sadomasochistic/fetish theme, for example the Television X’s ‘Lara’ series ‘Lara’s World of Uniforms/Nylon’. These channels do not broadcast ‘R18’ equivalent material as this is prohibited by the Ofcom Broadcasting Code. Nevertheless broadcast programmes remain comparable to strong material in broadly the same genre.”*

54. In its considerations, Ofcom made note of the following conclusions made in its Decision in the Appeal by Playboy TV relating to the Service “Climax 3 Uncut”<sup>17</sup>.

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<sup>15</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/DemandAdult.pdf>

<sup>16</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)

<sup>17</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Climax3Uncut.pdf>

*“Considering first the wording of s.368(1)(a) of the Act on its own terms, Ofcom considers it important to bear in mind that subsection (1)(a) requires the form and content of relevant programmes to be “comparable”, but not “identical” [...] In Ofcom’s view, the fact that the content of programmes included in the Service may be stronger and more explicit [...] than that which can currently be shown on UK television is a matter of degree. It does not, however, lead to the conclusion that those adult programmes are not still substantially comparable in content within the meaning of s.368A(1)(a).”<sup>18</sup>*

The Decision then went to note certain factors in the form (and format) of the video material available on the Playboy Service that it stated were “clearly “comparable” to the form of programmes normally included on television”. These factors included evidence that:

- video content was offered in self-contained items for selection under individual titles which are of sustained durations (as opposed to brief clips”);
- these items were arranged into “schedules” which followed specific running orders;
- they were further arranged under what the Playboy Service labelled “Channels”: i.e. “Climax3-1”, “Climax3-2”, and “Climax3-3”;
- the video material also featured title sequences (often with music), and ends with credit sequences to acknowledge the participants and programme-makers; and
- it also featured video content which was episodic and part of a wider series, and included material which adopted dramatic/fictional conceits or plots.

Bearing these factors in mind Ofcom noted the following:

#### Duration

55. Audiovisual material that has an extended duration can be indicative, but not determinative of that material being comparable to programmes normally included on

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<sup>18</sup> Article 1(1)(e) provides that: “‘Television broadcasting’ or ‘television broadcast’ (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”.

linear services. Ofcom noted that the audiovisual material contained on the UCSC Service varied widely in duration from two minutes and 23 seconds to 18 minutes and 44 seconds. The average duration of the video content was seven minutes and 53 seconds. While shorter video material may be indicative, but not determinative, of material that may tend to be viewed as less TV-like, material of this length can be considered as TV-like in some genres. For example, in the Channel Flip Appeal, Ofcom recognised that “short form content may be more likely to be typical in some genres, such as children’s programming and adult content programming”.

56. Ofcom therefore considered the duration of the audiovisual content was broadly consistent and comparable with that of some adult content programming found on linear services.

#### Titles and Credits

57. The majority of videos began with the title displayed in a simple red font. While none of the videos had credits, many concluded with the image of a UCSC logo, featuring a black and white image of a woman holding a gun. There were no production credits of the type that were on the Playboy service (i.e. listing key production talent). Whilst not determinative, this can be a feature of material more likely to be viewed as comparable to programmes available on linear services.

#### Content and Narrative Structure.

58. The majority of the videos were not self-contained, nor episodes from wider series, but took the form of individual acts edited from longer single fetish sessions. For example, the videos Regulation Bover Boots Arse Kicking, You Call Yourself a Man? Nipple Torment Wimp, The UC-SC’s Secret Archives: Whipping, The UC-SC’s Secret Archives: Single Tail Whipping 01, The UC-SC’s Secret Archives: Bover Boot Licking, The UC-SC’s Secret Archives: Single Tail Whipping 02 and The UC-SC’s Secret Archives: Single Tail Whipping 03 (which had varying durations between three minutes and 43 seconds, and 11 minutes and 23 seconds) all appeared to have been filmed during one fetish session with each video only including a small portion of the narrative and duration of the complete session.
59. The narrative of many of the videos was also not typical of programmes comparable to those on linear television. For example, the video Ulrike Technique Hypno

Brainwash Communique, which had a duration of three minutes and 35 seconds, consisted of a woman showing a faux hypnosis video on a laptop. The video included swirling red and black patterns, scrolling text of female domination messages, and sequences of rapidly flashing images and text. Ofcom considered that this experimental video material was further evidence that the site's content was not comparable to the kind of programmes included either on adult linear services or linear services more generally.

### Production Techniques

60. In its assessment of the video content, Ofcom noted various elements of the videos which were indicative that they had been made with a limited production budget. For example, the majority of videos available on the UCSC service were filmed in one location and many appeared unscripted and lacked any narrative conceit. In addition, audio had not 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. The production values of the material presented on the UCSC Service were accordingly not closely comparable to professional content broadcast on linear services.

### Comparison of material on linear broadcast services

61. Having considered whether the material available on the UCSC Service was comparable to audiovisual material available on linear services generally, Ofcom then went on to consider specific examples of potentially comparable material broadcast on linear services.
62. Ofcom viewed the programme 'Lara's World of Uniforms' (a programme provided on a linear service that ATVOD considered in its Determination was comparable to the material available on the UCSC Service). We noted that it featured a mixture of scenes, some of which featured 'Lara' on location, dressed in uniform, either talking to camera or conducting an interview. Other scenes featured adult performers, typically dressed in uniform, engaging in sexual acts. Ofcom considered that this material was clearly distinguishable from the material available on the UCSC Service, not only in terms of its degree, but also its type, for the following reasons:

63. The programme included a title sequence which had been stylised to reflect the vintage, World War II theme of the programme. This included the use of: a sepia tone; music from the era; and, an effect to age and degrade the image. This contrasted with the very basic title sequences and lack of production techniques included in the UCSC material which only featured the name of the video in static red text.
64. The programme began with the host addressing the viewer in what appeared to be a scripted monologue. The programme then cut to a sequence involving Lara and another actress performing a scripted scene which culminated in them engaging in various sexual acts. Ofcom noted that contrastingly, the videos available on the UCSC Service featured very little use of scripted material. For example, Ofcom noted that the dialogue between the participants in the videos featuring sexual activity on the UCSC Service did not appear to have been rehearsed and was not obviously scripted.
65. The scenes in 'Lara's World of Uniforms' of sexual activity were also framed within a narrative structure. In many instances this involved people who were presented as members of the public (who Ofcom took to be professional adult actors) being interviewed about their fetishes before engaging in them with Lara. As previously noted, the material available on the UCSC Service featured very little narrative structure.
66. Ofcom also viewed material available on the broadcast channel XXCESS and broadly agreed with ATVOD's conclusions that it includes programmes which often constitute individual 'scenes' which appear without introduction, narrative context, or closing credits. However, Ofcom considered the material available on the two services was not sufficiently comparable. Ofcom noted that the programmes included on the XXCESS service, although brief, did show a complete narrative, namely a sexual act until the point of its completion. Contrastingly, Ofcom considered many of the videos on the UCSC Service did not contain a complete narrative and, as noted above, were frequently short sections of longer sessions of sado-masochistic activity.
67. Ofcom also considered there would be a difference in a typical viewing experience of the two services. In Ofcom's opinion, the manner in which XXCESS broadcasts its programming (i.e. very short scenes of pornography shown uninterrupted) meant that viewers were able to watch a number of scenes consecutively, and accordingly, despite the short length of each show, to gain a longer uninterrupted viewing

experience. Ofcom also noted that the UCSC Service included no auto-play functionality and users were required to manually select another video upon the conclusion of the one they were viewing.

68. Having conducted a review of both the video capture evidence from ATVOD, and the video content still available on the UCSC Service, in addition to the linear television programmes referred to by ATVOD in its Determination, Ofcom concluded that the specific video content on the UCSC Service was not “comparable” to the type of adult material which is broadcast on linear television.

#### Regard to the Directive

69. As part of our overall assessment, Ofcom has also considered whether the relevant audiovisual material was likely to compete for the same audience as linear television broadcasts, and whether the nature of that material, and the means of access to it, would have led users reasonably to expect regulatory protection within the scope of the Directive. For the reasons that follow, our view on the facts of this case is that the material would not have so competed nor generated such expectations.
70. 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 is limited to those services that are “*mass media*” (Recital 21) and “*compete for the same audience as television broadcasts*” (Recital 24). Ofcom also noted ATVOD’s comments in its Determination which said it “did not accept that a service cannot be in competition with broadcast television based simply on the limited number of people who have viewed it”.
71. Ofcom has had regard to the specific references to competition in Recitals 21 and 24 and in particular, that regulation should not cover services, “... *which are primarily non-economic and are not in competition with television broadcasting, such as... 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.*” And that, “*It is characteristic of on-demand audiovisual media services that they... compete for the same audience as television broadcasts.*”

72. Ofcom has said in previous decisions<sup>19</sup> that it considers that these provisions do not necessarily require a market definition and a precise assessment of competition between services in a market in the way competition law might. But they do require a degree of specific competition between services that fall within the scope of regulation. Taking these references to competition together with Recital 24's reference to whether a user would regard a service as competing with linear television broadcasts, it is therefore necessary to consider the three questions we first 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?;<sup>20</sup>
  - b. when viewing such material, would the user have considered, or consider, himself to be watching a programme service competing with linear television programme services?;<sup>21</sup> 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?
73. In response to question a), for the reasons set out in paragraphs 38 to 68, Ofcom did not consider that the UCSC Service was a competitive option for a user wanting to watch programmes normally included in linear television programme services.
74. In consideration of question b), Ofcom noted that the Service had been constructed using a 'blogging' template and therefore could only be navigated in a traditional web-like manner. This rudimentary, non-TV like navigation was demonstrated by the members' homepage, which consisted of 20 chronologically presented posts, each with an attached photo gallery or individually embedded video. Consequently, Ofcom considered that a user viewing material on the UCSC Service would be unlikely to

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<sup>19</sup> In particular, see Ofcom's decision in relation to "Sun Video", for example at: [http://www.atvod.co.uk/uploads/files/Ofcom\\_Decision\\_-\\_SUN\\_VIDEO\\_211211.pdf](http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf)

<sup>20</sup> Alongside, say, linear television programme services.

<sup>21</sup> As he would when watching the latter.

consider themselves to be watching a programme service competing with linear television programme services.

75. In response to question c), Ofcom considered that the content available on the UCSC Service was of particularly niche appeal, made for and consumed by a very limited audience. This, together with the small user base and turnover made it less likely, in Ofcom's view, to be a service that was in competition with linear television programme services, and users were unlikely to have regarded the audiovisual material in the Service to be regulated as television under the Directive.
76. Accordingly, taking account of all the above factors, Ofcom considers that the form and content of audiovisual media material on the Service, provision of which is its principal purpose, is not comparable to the form and content of linear television programme services. The Service was not, therefore, an ODPS within the meaning of s.368A(1)(a) of the Act.

#### Research into on-demand programme services

77. In light, in particular, of the fact that Recital 24 of the Directive makes reference to competition between on-demand services and linear television services, and whether the nature and means of access to a service gives rise to users reasonably expecting regulatory protection, in 2012 Ofcom commissioned the Essential Report 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 when they want to watch television programmes, and their reasons for those views.
78. To that end, the study placed different services on a spectrum of comparability (between (1) highly comparable with linear television; and (2) not closely comparable). It did so based on ten different factors which were derived from interviews with, and discussion groups involving, service users.
79. It is important to note that the factors are not exhaustive or determinative, and Ofcom is mindful of the fact that the study is a qualitative "snapshot" of user attitudes. Likewise that, as previously described, Recital 24 contains a reminder that *".... the concept of a programme should be interpreted in a dynamic way taking into account developments in television broadcasting"*.

80. Nevertheless, the study provides a useful framework for assessment and, in Ofcom's view, the factors may be indicative, in certain relevant respects, of what users consider important in assessing comparability. We noted that in its Request for Appeal, the Appellant stated that it considered six of the factors (duration of content, look and feel of the service, who controls what is watched, effort expended to access the service, 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.
81. Ofcom considers that many of the facilities which were identified by research participants as being typical of the kind of audiovisual services they might view as offering a comparable choice when looking for television programmes, such as those identified by the Appellant and in addition the frequency with which the content is refreshed, were not offered by the site. The volume of content on the UCSC Service was considerable, and this was one important factor the research identified as relevant to users in deciding whether to choose a website offering audiovisual content as a destination to view programmes. However, on an overall view, there was nothing in the research which, when applied to the Appellant's Service, would have outweighed the conclusions drawn, namely that the form and content of audiovisual media material on the UCSC Service, provision of which is its principal purpose, is not comparable to the form and content of linear television programme services.

## **Section 6: Decision**

82. Accordingly, Ofcom's Decision is that the Appellant's website did not at the relevant time meet the definition of an ODPS in s.368A(1)(a) of the Act. Consequently, the Appellant was not in breach of either the advance notification requirement under section 368BA of the Act, nor the requirement to pay a fee under section 368D(3)(za).
83. Ofcom's Decision is therefore to uphold the Appellant's appeal and substitute our Decision for ATVOD's.

## **Section 7: Other matters - clips4sale**

84. Ofcom noted that ATVOD's Determination referred to a service made available through the URL <http://clips4sale.com/studio/50745>. As the audiovisual material available on that service appeared to be shared with the Service which is the subject of this Decision, Ofcom considered that the material was not suitably TV-like to satisfy the relevant requirement in the Directive and meet the definition of an ODPS.

## **Annex 1: The Statutory Scheme**

85. The provisions of Part 4A of the Act and of the Directive relevant to the present appeal are as follows.

### **"ODPSs"**

86. 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 programmes<sup>22</sup> the form and content of which are comparable to the form and content of programmes normally included in television programme services;<sup>23</sup>*
  - 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<sup>24</sup> by members of the public; and*

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<sup>22</sup> 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."

<sup>23</sup> 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.

<sup>24</sup> 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.*"

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

87. 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 –*

*(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."*

88. 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

89. 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."*

90. 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").<sup>25</sup> One such function is to determine whether providers of ODPSs

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<sup>25</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

have complied with the notification requirement in section 368BA: see paragraph 5(ii) of the Designation.

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

#### Relevant provisions of the Directive

92. Section 368A of the Act implements the Directive insofar as that Directive defines the scope of on-demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on-demand services that are subject to it.
93. In interpreting section 368A Ofcom necessarily has regard to the relevant provisions of the Directive. Ofcom has done so because Part 4A of the Act is intended to implement the requirements of the Directive.
94. Of the relevant Articles of the Directive, Articles 1(1)(a) to (g), in particular, provide the basis for the definition of an ODPS in section 368A(1) and of editorial responsibility in section 368A(4).
95. As to Recitals of the Directive that describe the general purposes of the regulation for which it provides, Recitals 2, 4 and 11 are relevant. They explain that the Directive recognises that technological advances allow for the provision of audiovisual media services across national frontiers by a range of technological means. They say that aims of the Directive include completing the internal market and providing for at least a basic measure of regulation to apply to on-demand audiovisual media services that compete with traditional linear television broadcasting.<sup>26</sup>

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<sup>26</sup> 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).”*

96. 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, 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.”*<sup>27</sup>
  - b. Recital 22 states that the Directive should only cover services where the “principal purpose” is the provision of programmes and, *“... exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as .... information related to a ... non-audiovisual service.”*
  - c. Recital 23 confirms that “audiovisual” covers silent moving images and accompanying text such as subtitles and EPGs, but stand-alone text-based services fall outside the scope of the Directive, *“For the purposes of this Directive, the term ‘audiovisual’ should refer to moving images with or without sound ...While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive...”*.
  - d. Recital 24 states that: *“It is characteristic of on-demand audiovisual media services that they are ‘television-like,’ i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.”* The Recital also notes that: *“In the light of this and in order to prevent disparities as regards free movement and*

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<sup>27</sup> such as services distributing user-generated content.

*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 control’, when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)”*.
- f. Recital 26 states: *“For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.”*
- g. Recital 28 states that: *“The scope of this Directive should not cover electronic versions of newspapers and magazines.”*
- h. Recital 29, as is indicated above, states that: *“All the characteristics of audiovisual media services set out in its definition and explained in recitals 20 to 27 should be present at the same time.”*