

The logo for The Authority for Television On Demand (ATVOD) features the letters 'ATVOD' in a bold, white, sans-serif font, centered within a solid black rectangular background.

ATVOD

THE AUTHORITY FOR TELEVISION **ON DEMAND**

Guidance on who needs to notify

**Application and Scope of the
Regulations for Video On Demand
(VOD) services**

Edition 3.1

Originally published 19 October 2010

Re-published 21 March 2011

Contents

Section 1	<i>Introduction</i>	p 3
Section 2	<i>Is the service an ‘on-demand programme service’?</i>	p 4
Section 3	<i>What types of service would, and would not, be considered ‘on-demand programme services’?.</i>	p 8
Section 4	<i>Who has ‘editorial responsibility’ for the service?</i>	p 9
Section 5	<i>‘Multiple services’</i>	p 12
Section 6	<i>Does the entity with editorial responsibility fall within the jurisdiction of the UK for these purposes?</i>	p 13

Note: References in this guidance to a service being provided are references to:

- services that were already being provided on 18 March 2010; and
- services that are intended to be provided but had not commenced by 18 March 2010 in respect of which advance notification is required.

Note on this Edition: This Edition differs from Edition 3.0 in the following material respects only:

- (i) all references to The Association for Television On Demand have been replaced by references to The Authority for Television On Demand; and
- (ii) all references to ATVOD, PO BOX 561, Walton on Thames, Surrey, KT12 9DA have been replaced by ATVOD, Thames Court, 1 Victoria Street, Windsor, Berkshire, SL4 1YB.

1. Introduction

- 1.1 This guidance is provided as an aid to interpretation of the types of services that may fall within the definition of an ‘on-demand programme service’ under section 368A of the Communications Act 2003 (“the Act”) and are therefore subject to the regulatory framework for VOD. It is also provided to help assess who is likely to be the provider of a relevant service for these purposes, and therefore the person who is responsible for compliance with the rules, including the statutory obligation to notify the service to The Authority for Television On Demand (ATVOD). This guidance is not legally enforceable, and only provides non-determinative, interpretative guidance as to how ATVOD is likely to apply the criteria set out in section 368A of the Act, drawing on the Articles and Recitals of the Audiovisual Media Services Directive (“the Directive”) where appropriate. This guidance is subject to review and may be revised from time to time in light of experience.
- 1.2 It is the responsibility of service providers, taking independent legal advice where necessary, to assess whether their service is subject to the regulatory framework for VOD.
- 1.3 As explained below, there are a number of different cumulative criteria set out in section 368A of the Act that determine whether a service is within the scope of the regulatory framework. At the present time, video on demand services represent an increasingly important part of the audiovisual market. However, the wide variety of content, services and business models available make it difficult to list with any degree of certainty the services that will be within scope, and those that will fall outside scope. Each service provider must make their own assessment of whether they meet the statutory criteria, and act accordingly.
- 1.4 In deciding whether a particular service requires notification, and by whom, the Act requires potential service providers, and ultimately ATVOD, to consider the following questions:
- a) Is the service an ‘on-demand programme service’ within the meaning set out in section 368A of the Act? (Section 2 of this Guidance);
 - b) Who has ‘editorial responsibility’ for that service within the meaning of section 368A(4) of the Act? (Section 4 of this Guidance); and
 - c) Does that person fall within the jurisdiction of the UK for these purposes? (Section 6 of this Guidance)
- 1.5 Each of these questions is explored in more detail below.
- 1.6 References in this guidance to the Directive are to the Audiovisual Media Services Directive. References to Recitals and Articles are to the recitals and articles of the Directive. References to the Act are to the Communications Act 2003, as amended by the Audiovisual Media Services Directive Regulations 2009 and the Audiovisual Media Services Directive Regulations 2010.

2. Is the service an ‘on-demand programme service’?

- 2.1 Under section 368A of the Act, a service will be an ‘on-demand programme service’, and therefore subject to notification and regulation, if it meets **all** of following criteria.
- a) **It includes TV-like programmes:** the service includes programmes whose form and content are comparable to the form and content of programmes of a kind normally included in television programme services;
 - b) **It is a VOD service:** the service enables users to select individual programmes from among the programmes included in the service, to receive the selected programme using an electronic communications network,¹ and to view the selected programme when the user chooses;
 - c) **There is editorial responsibility:** the programmes comprising the service are under a person’s editorial responsibility; and
 - d) **It is made available to the public:** the service is made available by that person for use by members of the public.
- 2.2 The intention of the Directive and the Act is to regulate on-demand programme services. This means that a service which falls outside the definition of an ‘on-demand programme service’, but is bundled with or accompanies an ODPS, would not typically be considered to form part of that ODPS (subject to the provisions dealing with VOD advertising).

Does it include TV-like programmes?

- 2.3 One of the principal aims of the Directive is to create a level-playing field as between traditional linear broadcast television services and emerging on-demand audiovisual media services (Recital 6 of the Directive). The Directive, and Part 4A of the Act, are therefore intended to cover on-demand and broadcast television audiovisual media services which compete for the same audiences (Recitals 16 and 17 of the Directive), sharing the same key characteristics, namely that they include comparable programmes. Accordingly, a defining characteristic of the definition of an ‘on-demand programme service’ in section 368A of the Act is that the principal purpose of the service 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”. In other words, that the programmes are “television-like” (one of the phrases used in Recital 17 of the Directive).²

¹ Defined in section 32 of the Act.

² In light of the use of the phrase ‘television-like’ in the AVMS Directive, Ofcom commissioned and carried out qualitative research in order to gain an understanding of what consumers consider to be ‘television-like’ material and what their expectations are in terms of the key characteristics of such material. The research report is at <http://stakeholders.ofcom.org.uk/market-data-research/tv-research/vodresearch/> It should be noted that no part of the qualitative research that Ofcom has commissioned is intended, nor should it be interpreted as replacing in any way the powers properly exercisable by Ofcom and its co-regulator, in determining whether or not any particular service falls within the scope of regulation.

- 2.4 An on-demand programme service will only be caught by the definition in section 368A of the Act to the extent that it provides access to programmes that compete for the same audience as television broadcasts, and therefore, are comparable to the form and content of programmes included in broadcast television services. It is, however, necessary to interpret the meaning of '*programme*' in this context in a dynamic way, taking into consideration developments in television broadcasting.
- 2.5 Examples of 'programmes' that are not 'TV-like' might include informational videos directed at a particular group of people, such as an undertaking's employee training videos available online. Short extracts from longer programmes may also not be TV-like, if the content that they comprise does not serve to make them separate and distinct programmes in their own right (i.e. with their own editorial integrity). Long-form programming is more generally characteristic of TV broadcasting; however, the duration of the pieces of content in a service should not, on its own, determine whether that content is TV-like; some short video content – such as music videos – are likely to satisfy this test.
- 2.5 Clearly the decision as to whether programmes are 'TV-like' will involve consideration of all relevant information, including the availability of comparable programmes in linear broadcast services and the nature of the on-demand programme service as a whole. However, a programme which has been shown on linear TV will normally be considered 'TV like' unless its broadcast was wholly exceptional.
- 2.6 Prior broadcast is not a pre-condition of a programme being considered 'TV like'. Programmes which have not been broadcast on linear TV, but which match the form and content of programmes shown on linear TV, will be considered 'TV-like' unless comparable linear broadcast(s) can be shown to be wholly exceptional. The form and content of programmes included in linear TV services covers an extremely broad spectrum, and any determination as to whether a programme or programmes are 'TV-like' must take account of this breadth. To be considered **not** "TV-like", a programme must be clearly distinguishable from those which are "normally included in television programme services" (see Communications Act, 368A).
- 2.7 Audio-only services, such as 'listen again' radio services are out of the scope of section 368A of the Act, and hence outside the scope of the regulatory framework for VOD. However, video only programmes, supplied on an on demand basis are potentially in scope (subject to the other criteria being met).

Is it a VOD service?

- 2.8 The first key issue under this criterion is whether access to the service is the provision of programmes on an on-demand basis. There may be services where the availability of audiovisual content on an on-demand basis is incidental to another service, for example, short video advertising spots accompanying a non-video service, and video elements of online games and gambling services.

- 2.9 The assessment of whether access to the service is on an on-demand basis will take into consideration all relevant materials available to ATVOD, including, for example, the way the service is marketed and presented to users.
- 2.10 The second key issue under this criterion is whether the 'principal purpose' of the service is to provide 'TV-like' programming. Where relevant on-demand programmes form part of a broader consumer offering, it may be the case that those programmes comprise an on-demand programme service in their own right. For example, where a service provider offers a movie and television programme download service as part of its broader, non-audiovisual online retailing activities, then such a service may be considered to be a distinct on-demand programme service which falls within the scope of the Act.
- 2.11 For instance, on demand programmes which form part of a broader consumer offering may be considered to be a distinct on-demand service in their own right where they are grouped together in a distinct area and presented as a catalogue of viewing options which could exist as a coherent consumer offering if removed from the broader service. Thus, there is a difference between (a) an online newspaper offering video reports which supplement and sit alongside text based news stories, and (b) an online newspaper giving over a distinct section of its website to TV like programmes which have no clear and direct link to the broader 'newspaper' offering and which could exist as a stand alone service.
- 2.12 In general, a section of a broader, non-VOD service will be considered to have as its principal purpose the provision of TV-like programmes if:
- a) TV- like video on demand programmes are grouped together and/or presented as a catalogue of viewing options; and
 - b) the catalogue of viewing options could exist as a coherent video on demand consumer offering if removed from the broader service.
- 2.13 This will not be the case if the relevant on-demand programmes are included as an integral and ancillary element of the broader offering, for example, where video is used to provide additional material relevant to a text-based news story, or where video forms part of a content service predominantly featuring a range of non-video material.
- 2.14 Similarly, 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 (see section 4 below).

- 2.15 It is acknowledged that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case.
- 2.16 An “*electronic communications network*” is defined in section 32 of the Act and encompasses the communications infrastructure by means of which voice, content and other data are delivered to consumers. Accordingly, delivery of content through other means, for example, a DVD sent through the post having been ordered online, would not meet this criterion. The selection, downloading and viewing of a movie via the internet, paid for using a voucher bought over the counter in a shop, would be caught, if all other criteria were met. The means of delivery is the deciding factor for this criterion, not the means of payment.
- 2.17 A content service that is broadcast or streamed in a linear form is not covered by the on-demand programme service rules, and may be subject to the relevant ‘broadcast’ regulation. It should be noted that the rules for broadcast regulation are explicitly extended by the Directive and the Act to cover internet-based television channels.

Is there editorial responsibility?

- 2.18 The exercise of ‘editorial responsibility’ is relevant to scope in two ways. Firstly, an ‘on-demand programme service’ is defined in the Act as a service falling under a person’s ‘editorial responsibility’. Therefore, a service which by its nature has no person exercising “editorial responsibility” (as defined in section 368A (4) of the Act) would fall outside the regulatory framework.
- 2.19 An example of such a service, with no-one exercising editorial responsibility might be a catalogue of programmes consisting of user generated content posted to a public website for sharing and exchange, without prior moderation or restriction as to what can be posted.
- 2.20 However, that is not to say that all content in such sites falls outside the definitions. For example, where ‘hosting’³ services are used by commercial entities as a means of distributing relevant content, and meet the other criteria laid down in section 368A of the Act, then such content might fall within the meaning of an ‘on-demand programme service’ for these purposes.
- 2.21 Second, 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. For example, an aggregated VOD content service may comprise a number of different on-demand programme services, each provided by a different entity exercising ‘editorial

³ Consistent with the definition set out in Regulation 19 of the Electronic Commerce (EC) Regulations 2002, “hosting” refers to the action of the provider of an information society service, which consists of information provided by a recipient or recipients of the service, of storing that information.

responsibility' over its own on-demand content. How to determine the identity of the person exercising 'editorial responsibility' is discussed in more detail below (see section 4).

Is it made available to the public?

2.22 This criterion is satisfied if the service is made available to the general public, and includes subscription services, provided that the subscription is open to members of the public, as well as services that are made available only to the general public located in a particular geographic area.

3. What types of service would, and would not, be considered 'on demand programme services'

3.1 A non-exhaustive list of types of service which are likely to be considered to be 'on-demand programme services' is as follows:

- a) a 'catch-up service' for a broadcast television channel whether programmes are made available from the broadcaster's own branded website, an online aggregated media player service, or through a 'television platform' to a set top box linked to a television (whether using broadcast 'push' technology, or 'pull' VOD);
- b) a television programme archive service comprising less recent television programmes from a variety of broadcasters and/or production companies, made available by a content aggregator exercising 'editorial responsibility' over all the programmes (see section 4 below), whether via a dedicated website, online aggregated media player service, or through a television platform; and
- c) an on-demand movie service, provided online via a website or using other delivery technology by a provider exercising 'editorial responsibility' over the content.

3.2 The following types of service are not likely to be considered to be 'on-demand programme services':

- a) Services that are primarily non-economic, and which are therefore not in competition with television broadcasting (Recital 16 of the Directive). In this context, 'economic' is interpreted in the widest sense to encompass all forms of economic activity, however funded, and may include public service material, free to view content, as well as advertising-funded, subscription, pay per view and other transactional business models;
- b) services comprising on-demand content that are not "mass media in their function to inform, entertain and educate the general public" (Recital 18 of the Directive);
- c) "*games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services*", "*on-line games*" and "*search engines*" are all stated to be excluded on grounds that their principle purpose is not the provision of 'TV-like' programmes (Recital 18 of the Directive); and

- d) electronic versions of newspapers and magazines (excluding any on-demand programme services offered by newspapers and magazines) (Recital 21 of the Directive).
- 3.3 Services comprised of the following types of video content may not be considered to be 'on-demand programme services' (depending on the particular circumstances):
- a) video content posted by private individuals onto video sharing sites (where the content has been self-generated and is not posted as part of an 'economic' purpose on the part of the individual);
 - b) video content produced by professional bodies, trade unions, political parties, or religious organisation, where the content is very narrowly focused and is primarily about the dissemination of information about the organisation to members, rather than for consumption by the general public;
 - c) video content embedded within a text-based editorial article, such as a written news story on a web site that contains an illustrative video clip; and
 - d) video content on corporate websites, where the purpose is to disseminate information about the company's own operations, products or financial performance (e.g. a video of an AGM, but excluding a standalone service providing access to videos of many companies' AGMs on a commercial basis, which could fall within scope).

4. Who has 'editorial responsibility' for the service?

- 4.1 Once it has been determined that there is a relevant on-demand programme service, it is then necessary to determine which single entity should be treated as the provider of that service. This is deemed to be the entity which has 'editorial responsibility' for the programmes comprising the relevant on-demand programme service (see paragraph 2.19 above). The entity with editorial responsibility is responsible for notification and compliance with the obligations laid down in the legislation.
- 4.2 'Editorial responsibility', in this context, means the exercise of general control over both:
- a) the selection of the individual programmes included in the range of programmes comprising the relevant on-demand programme service; and
 - b) the manner in which those programmes are organised within that range.
- 4.3 Under section 368A(4) of the Act, it is made clear that a person may be regarded as having editorial responsibility for a particular service irrespective of whether that person has control of the "*content of individual programmes or of the broadcasting or distribution of the service*". This is intended to clarify the degree of 'control' required for 'editorial responsibility', namely that it is not necessary to control the elements comprising a particular programme (for example, as a television director might), and similarly that it is not necessary to control the actual broadcasting or distribution of the on-demand programme service (i.e. physical transmission, or the retailing of a service to consumers), as these matters are irrelevant to the issue of 'editorial responsibility'.

- 4.4 In considering who has general control over the selection of programmes, both the Act and the Directive focus on decision-making about which individual programmes are included in the service, and not on the choice of whole ‘channels’ of content. The concept of *selection* in the Directive’s definition of ‘editorial responsibility’ is common to both linear and VOD services (in relation to linear services, the reference is to control over the selection of programmes and “...*their organisation in a chronological schedule...*”). It is certain that, in relation to such linear services, it is the channel operator (i.e. broadcaster) who is selecting the programmes, even if those channels are distributed to consumers as part of a package of channels by a platform operator or retailer. In the context of on-demand programme services, a person has ‘editorial responsibility’ for a service if he has general control over what programmes are included in the range of programmes offered and over the manner in which the programmes are organised. As the provider of the service, that person’s role is comparable to that of the broadcaster in relation to linear channels.
- 4.5 It is, however, recognised that the mere fact that a broadcaster provides content from its linear channel to another undertaking for inclusion in an on-demand programme service does not remove the need to assess which entity has ‘editorial responsibility’ considering all relevant circumstances. Depending on the circumstances of the case, an aggregator or platform operator may be responsible for the selection of individual programmes and their organisation, and thereby acquire ‘editorial responsibility’. However, it is unlikely to be the case that the platform operator will have general control, and therefore be the provider of the service, if it merely indicates some high level parameters, (for example, the type or amount of programming to be offered), provided this does not prevent the content provider maintaining general control over which programmes are selected (i.e. having the ‘final say’). Because the Act and the Directive focus on decision making about individual programmes, and not on the choice of whole channels of content, a platform operator will not normally be assumed to have general control over the selection of programmes merely by virtue of a contractual arrangement which obliges a content provider to provide to a platform all of the content provider’s content, or all the content that appears on a particular channel or service under the control of the content provider, unless the platform operator has a power of veto over individual programmes (i.e. having the ‘final say’). Selection of individual programmes may, in this context include, for example, choosing a programme or a range of programmes from a larger catalogue of programmes or commissioning or producing programmes for inclusion in the service. None of these factors is definitive, and each assessment will require consideration of all relevant factors.
- 4.6 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 that may then be used in listing the programme in an on-demand programme service and which ensures that each individual programme is made available in a manner that secures the relevant standards requirements: such information might include, for example, whether or not access to a particular programme must be restricted; and what content information should be

attached to it (e.g. the programme synopsis, rating information and other content warnings). This will typically be the person who selects the individual programmes to be included within a service. (In other words, organisation may be controlled by a service provider through the supply of relevant programme information accompanying each content asset to a platform operator or distributor).

- 4.7 The fact that a platform operator may be responsible for the design or look and feel of the catalogue; or that a platform operator or technical services provider may provide appropriate protection mechanisms allowing access to some content to be restricted; or specify how potentially harmful or offensive content should be indicated, for example, with an age-rating and/or a specific text warning (“sexually explicit”) and/or a logo, does not mean that they necessarily control the organisation of the content. Techniques used by aggregators to facilitate the location of content (such as alphabetical or genre indexing), would not, on their own, constitute ‘selection and organisation’ of programmes, as these are solely presentational techniques.
- 4.8 These criteria will be applied in a way which provides for a single entity to have ‘editorial responsibility’. It will not be open for content and/or service providers to argue that content that they make available or a service that they provide is outside of the scope of section 368A of the Act as a result of responsibility for selection and organisation of programmes being divided between two or more persons.
- 4.9 The parties to commercial agreements in the value chain for the supply and distribution of on-demand programmes may decide to identify the entity with ‘editorial responsibility’ in respect of the relevant programmes. Whilst not necessarily being determinative, such contractual arrangements will provide useful evidence as to the division of responsibility between the parties.
- 4.10 As noted in paragraph 2.12 the identity of the entity with ‘editorial responsibility’ will also be relevant to the determination of the extent of the on-demand programme service. Someone who makes relevant content available on an on-demand basis can only be the provider of a service comprising programming over which they exercise ‘editorial responsibility’.
- 4.11 Accordingly, aggregated services may comprise a collection of on-demand programme services provided by different service providers (one of which service providers may also be the aggregator), or a single service, incorporating content from a variety of different sources. The outcome will depend on where “editorial responsibility” lies.
- 4.12 In the former case, an on-demand content aggregator might provide access to content provided by a number of different providers, who each retain ‘editorial responsibility’ for their content, who select which programmes will be made available via the aggregated service and provide the programme information, rating and/or categorisation of those programmes which ensures that each individual programme is made available in a manner that secures the relevant statutory requirements (for example, as being for

adults only). In this case, each content provider, as the relevant service provider for their own content, would be responsible for ensuring that their own content complies with the statutory requirements.

- 4.13 In the latter case, the content vendors would not have 'editorial responsibility', as the aggregator would have responsibility for selecting which programmes were included within the service, and for providing the necessary programme information which ensures that each individual programme is made available in a manner that secures the relevant standards requirements, and therefore, would have responsibility for ensuring compliance with the statutory requirements.
- 4.14 Clearly, it is conceivable that content providers, aggregators and service providers may arrive at alternative arrangements that require a more complex analysis as to which party has 'editorial responsibility'. However, in doing so, they should ensure that the relevant statutory criteria as to who is providing the service, are taken into account and the question of who is to have editorial responsibility, as the provider of the service, has been carefully considered.
- 4.15 In particular, the fact that an entity is operating as an aggregator in relation to some content services does not preclude the entity from being the content provider in relation to some other elements of the aggregated service. The onus is on the parties to ensure that before they enter into such arrangements, they have given careful consideration to the relevant statutory criteria and to who the provider of the service is to be. All necessary information in support of any notification to allow ATVOD to assess whether the correct entity has been identified as the provider of the service should be provided. We would expect the person who has general control over the selection of programmes to maintain general control over their organisation (even if on a day to day basis organisation of the programmes is carried out by a third party).

5. 'Multiple services'

- 5.1 The Act makes no distinction between different channel brands or content genres or other means of sub-dividing a service. However, it is possible for a service provider to package its on-demand programme service in different ways and as separate services.
- 5.2 Whether two or more versions of a service are to be treated as a single service, or as separate services, will depend on whether they are substantially the same. In assessing whether two versions of an on demand service (for example, on two different platforms), are substantially the same and count as a single service for the purposes of notification, one version should normally include the substantial majority of the programmes on the other version (i.e. there should be no significant differences in substance between them when looking at the totality of the programmes available on each version). Decisions in individual cases may also take into account any facts and circumstances of the particular case which may be considered relevant including, for instance, whether the second version comprises only programmes included in the first version, and/or whether the proportions of types of programmes are substantially the

same on each version, and/or where there are additional programmes included in the second version, whether they are materially different in nature from those included in the first version. But generally, the greater the overlap of programmes between them, the more likely they are to be treated as a single service, rather than separate services.

- 5.3 The fact that the same offering may be available in different foreign languages should not in itself lead to those offerings being treated as separate on-demand services.

6. Does the entity with editorial responsibility fall within the jurisdiction of the UK for these purposes?

- 6.1 Services only fall within the scope of the Act if they are provided by an entity that falls under UK jurisdiction in accordance with Article 2 of the Directive. The service provider of an on-demand programme service will fall under the UK's jurisdiction if it is established in the UK.

- 6.2 A service provider will be deemed to be established in the UK if:

- a) the service provider has its head office in the UK and the editorial decisions for the relevant on-demand programme service are also taken here;
- b) alternatively, if only one of the head office or the place where editorial decisions for the relevant service are taken is in the UK, with the other function carried out in a different EU Member State, then the question of where the service provider is established will be determined according to the following principles:
 - establishment will be deemed to be Member State where a significant part of the workforce involved in the pursuit of the on-demand programme service activity operates; or
 - if a significant part of the relevant workforce operates in each of those Member States, then establishment deemed to be where it has its head office; or
 - if a significant part of the relevant workforce operates in a third Member State, then establishment deemed to be 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

and

- c) the head office is in the UK but editorial decisions on the on-demand programme service are taken in a third (non-EU) country, or vice-versa, the service provider shall be deemed to be established in the UK, provided that a significant part of the workforce involved in the pursuit of the on-demand programme service operates in the UK.

- 6.3 In accordance with the Directive, these jurisdictional criteria are identical to those applicable to linear services.