

DETERMINATION THAT THE PROVIDER OF “SAINSBURY’S ENTERTAINMENT VIDEO ON DEMAND” WAS IN BREACH OF ATVOD’S RULES 1 & 4 AND THEREBY HAS CONTRAVENED SECTION 368BA (REQUIREMENT TO NOTIFY AN ON-DEMAND PROGRAMME SERVICE) AND SECTION 368D(3)(ZA) (REQUIREMENT TO PAY A FEE) OF THE COMMUNICATIONS ACT 2003

1. Summary of final determination

- i. BREACH OF RULE 1 (Requirement to notify a service): ESTABLISHED BY ATVOD INQUIRY This breach constitutes an infringement of the statutory requirements set out in Section 368BA of the Communications Act 2003 (“the Act”).
- ii. BREACH OF RULE 4 (Requirement to pay a fee): ESTABLISHED BY ATVOD INQUIRY This breach constitutes an infringement of the statutory requirements set out in Section 368BA and Section 368D(3)(za) of the Act.

2. Service

Sainsbury’s Entertainment Video on Demand (“the Service”)

In this Determination we refer to the service made available through the following outlets:

<https://www.sainsburysentertainment.co.uk/en/Rent-Video-On-Demand/specialFormat.html?format=filmstv/dtr&specialSection=entertainmentondemand>

<https://www.sainsburysentertainment.co.uk/en/Buy-Video-On-Demand/specialFormat.html?format=filmstv/dto&specialSection=entertainmentondemand>

3. Service Provider

Sainsbury’s Supermarket Ltd (“the Service Provider”)

4. Background

- 4.1 The Audiovisual Media Services Regulations 2010 came into force on 18 March 2010, introducing additional provisions into the Act in relation to video on-demand services. Section 368BA of the Act requires that every provider of an On-Demand Programme Service (“ODPS”), as defined in section 368A of the Act, must notify the appropriate regulatory authority of its intention to provide the service. For an ODPS which was already being provided on 18 March 2010, notification should have been made before 30 April 2010. For an ODPS beginning after 18 March 2010, notification should have been made before the service began. Section 368D(3)(za) requires that a provider of an ODPS must pay to the appropriate regulatory authority such fee as that authority may require under section 368NA of the Act.
- 4.2 The Authority for Television On Demand (“ATVOD”) has been designated as the appropriate regulatory authority for editorial content in an ODPS and also for

determining whether the provider of an ODPS has complied with its obligation to notify¹.

5. Introduction

5.1 ATVOD sent a letter to the Service Provider on 18th October 2013, however this does not appear to have been received by the appropriate personnel. Following telephone calls on 5th November 2013 and 6th November 2013, the letter was resent on 6th November 2013 informing them of the statutory obligation to notify provision of an ODPS, and setting out the statutory criteria which define an ODPS. The letter advised them to refer to ATVOD's 'Guidance on who needs to notify' which is available on our website (www.atvod.co.uk) and to seek legal advice if appropriate. The letter also invited the Service Provider to contact ATVOD to discuss how various elements of a service might affect whether or not that service falls within the definition of an ODPS.

5.2 After further telephone conversations with ATVOD on 13th November and 19th November, on 21st November the Service Provider gave the following response by email:

- *“As discussed our view is still that we are not a “TV-like” service and therefore we do not need an ATVOD licence. We are a retailer that operates a transactional a la carte service that allows customers to browse for and then either buy or rent a digital copy of a movie.*
- *As a transactional retail service we do not compete for the same audience or advertisers as traditional television broadcasting services and a customer would not reasonably expect regulatory protection within the scope of the Audiovisual Media Services Directive when buying or renting a movie from our service.*
- *We have a Digital Licence with the BBFC which allows us to show the BBFC classifications against each film that we make available on the service (we would not make available a film without a BBFC classification) these classifications are recognizable symbols that our customers can trust. As a family service we do not include any “Adult” content.*
- *Obviously we want to ensure that we are complying with all the necessary laws and regulations but our view is simply that services like ours are not the intended target of this legislation.”*

6. Initial Assessment

6.1 After an initial assessment of the Service, the ATVOD Executive considered that the Service raised issues under Rule 1 and Rule 4 and therefore conducted an investigation on 2nd December 2013. Having applied the statutory criteria to the Service, we wrote to the Service Provider on 10th December 2013 stating that we had come to a preliminary view that the Service was an ODPS in respect of which a

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

notification has not been given and in respect of which a fee has not been paid, and that our preliminary view was that the Service Provider was in contravention of sections 368BA (Requirement to notify an ODPS) and 368D(3)(za) (Requirement to pay a fee) of the Act. Video capture evidence of the service at the time of ATVOD's initial investigation is set out in ANNEX 1.

- 6.2 In accordance with our powers under section 368BB(1) of the Act, we invited the Service Provider to make representations within 10 working days.

7. Provider Representations

- 7.1 On 23rd December 2013, ATVOD received a telephone call from the Service Provider requesting an extension to the period allowed for responses to ATVOD's Preliminary View. An extension was granted to 10th January and then to 13th January 2014.
- 7.2 On 13th January 2014, the Service Provider wrote to ATVOD agreeing with and accepting ATVOD's preliminary view, and attaching a Notification Form in relation to the Service.

8. Further Assessment

- 8.1 Since the date of ATVOD's original investigation the Service has been notified to ATVOD with the intention to pay the resulting invoice, and has therefore ceased to be in breach. However, it remains ATVOD's view that at 2nd December 2013 the Service was an ODPS which had not been notified to ATVOD, for the reasons outlined in our Preliminary View and set out again below:

8.2 Application of s368A(1) at 2 December 2013

As at 2nd December 2013, the Service fulfilled each of the relevant criteria set out in section 368A(1) of the Act as follows:

- (a) *its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;*

Are there TV-like programmes?

The Service does contain programmes the form and content of which are comparable to that of programmes normally included in television programme services among other video content. The Service primarily offers (for download or streaming) feature films which clearly resemble the form and content of feature films found on mainstream broadcast channels and film channels, and in many cases have themselves been broadcast as programmes on such channels (e.g. 'Babe', 'Cruel Intentions').

The Service also includes trailers for feature films. ATVOD notes that under Article 1 of the Audiovisual Media Services Directive Section 1(b) gives examples of TV-like programmes and lists among other things ‘feature-length films’

Is there a service with the provision of these TV-like programmes as its principal purpose?

ATVOD believes the principal purpose of the Service is the provision of the TV like programmes described above. The ‘Sainsbury’s Entertainment’ website as a whole (www.sainsburysentertainment.co.uk) offers a variety of services, including rental / purchase of physical films, music and books, and online download/streaming of the same. It is ATVOD’s view that these services co-exist within a single interface (in much the same way as some linear and non-linear audiovisual services co-exist, for example within the iPlayer interface). The Service provided via the URLs specified above (<https://www.sainsburysentertainment.co.uk/en/Rent-Video-On-Demand/specialFormat.html?format=filmstv/dtr&specialSection=entertainmentondemand> and <https://www.sainsburysentertainment.co.uk/en/Buy-Video-On-Demand/specialFormat.html?format=filmstv/dto&specialSection=entertainmentondemand>) allows customers to stream or download TV-like programmes. This is a service in it’s own right, independent of other services on the site and capable of standing alone. This analysis is further supported by a prominent announcement on the wider Sainsbury’s Entertainment website which states “*Due to the rise in demand for downloading and streaming films and music, from March 2014 Sainsbury’s Entertainment will become a completely entertainment on demand site. From 28 February 2014 we will no longer accept online orders for physical products.*”

With reference to the film download / streaming service, it appears that other content (including other audio-visual content) is purely subsidiary to the aim of supplying TV-like programmes e.g. textual descriptions and film trailers which facilitate choice of programme.

(b) access to it is on-demand;

Programmes on the Service can be watched at a time of the viewer’s choosing and are received by the viewer by means of an electronic communications network.

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

The programmes on the Service have been selected and organised into a coherent catalogue of viewing options with a distinct editorial proposition.

(d) it is made available by that person for use by members of the public; and

The Service is made available on the open internet. Anyone with access to the internet and who pays the required fee can view the programmes

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

The privacy policy published on the Service states that the Service is operated by Sainsbury's Supermarkets Limited which has its registered office at 33 Holborn, London, EC1N 2HT. Correspondence has been sent to this address and subsequent conversations with staff involved in the Service have not suggested that any other entity has editorial responsibility for the Service.

8.3 These criteria have been applied purposively in line with the Audiovisual Media Services Directive² as implemented in s368A(1) of the Act. It is ATVOD's view that the Service meets the criteria in such a way that:

- a) the Service competes for the same audience as television broadcasts; and
- b) a user would reasonably expect the Service to be regulated under the Directive

Contrary to the correspondence received from the Service Provider, ATVOD does believe that the Service competes for the same audience as television broadcasts by virtue of its fulfilment of the criteria outlined above. Should a viewer wish to watch a film without physically purchasing one, their competing options would include broadcast film channels, VOD services available through a set top box (such as Virgin Movies as provided by FilmFlex) and online services such as LoveFilm, Clubcard TV (provided by Blinkbox for Tesco), and the Sainsbury's service under discussion. It is worth noting that the other services mentioned have all been notified to ATVOD as ODPS. ATVOD therefore does believe that a user would *reasonably expect* regulation of the Service as an ODPS.

Regarding the Service Provider's Digital Licence with the BBFC, this is a voluntary scheme which is not a replacement for the statutory regulatory regime. Use of the BBFC classifications does not provide an exemption from regulation in the Section 4A of the Communications Act. We would also point out that the provision of adult content is not one of the criteria that define an ODPS. The lack of such content on the Service is therefore not relevant to whether the Service is an ODPS.

9. Determination

9.1 ATVOD's view is that on 2nd December 2013 the Service was an ODPS in respect of which a notification was not given, and in respect of which a fee was not paid.

9.2 **ATVOD's Determination is therefore that**

On 2nd December 2013 Sainsbury's Supermarket Ltd was in breach of Rule 1 in relation to the Service. This breach constitutes an infringement of the statutory requirement set out in section 368BA (Requirement to notify an ODPS).

On 2nd December 2013 Sainsbury's Supermarket Ltd was in breach of Rule 4 in relation to the Service. This breach constitutes an infringement of the statutory requirement set out in section 368D(3)(za)(Requirement to pay a fee) of the Act.

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

- 9.3 ATVOD acknowledges that the Service has been notified to ATVOD following the issue of ATVOD's Preliminary View on 10 December 2013 and that this brought the service into compliance with Rule 1 on 13 January 2014. However, the action taken by the Service Provider following receipt of ATVOD's preliminary view does not alter the facts relating to the Service as it existed on 2 December 2013.