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## How to Notify

Guidance notes on how to notify an On Demand Programme Service to Ofcom

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# Introduction

## General disclaimer

- 1.1 These notes are intended to help on-demand programme service (“ODPS”) providers understand the notification process. The guidance notes should not be relied upon as legal advice, nor be understood as modifying the effect of the statutory requirements for notification of a service.
- 1.2 Service providers should seek their own legal advice on the notification process and requirements.
- 1.3 In providing the information in these guidance notes, Ofcom is not making, nor implying, any judgements on the commercial prospects (or otherwise) of notified services, or that they will be profitable.
- 1.4 It is the responsibility of the service provider to consider, having taken its own legal advice if appropriate, whether the service it intends to provide, or a dissociable section of the service it intends to provide, is an ODPS. The statutory definition is set out in section 368A of the Communications Act 2003 (as amended).

ODPS are defined by reference to a cumulative set of criteria, all of which must be met for a service to come within the scope of the framework in Part 4A of the Communications Act.

Section 368A of the Act (as amended), which sets out the criteria, is amended by the Audiovisual Media Services (AVMS) Regulations which came into force on 1 November 2020.<sup>1</sup> From this date, a service, or a dissociable section of a service, falls within scope of Part 4A if:

- i) its principal purpose is the provision of programmes with or without sounds which consists of moving or still images, or of legible text, or a combination of those things;
- ii) access to it is on-demand (in the sense of being viewed at a time of the user’s choosing as opposed to a linear schedule);
- iii) there is a person with editorial responsibility for it;
- iv) it is made available by that person to members of the public; and
- v) that person is under UK jurisdiction.

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<sup>1</sup> The regulations implement certain provisions of Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU, which sets the regulatory framework underpinning the audiovisual services single market in the European Union. Under the terms of the Withdrawal Agreement, the UK committed to implementing EU legislation up until the end of the transition period. The transition period is expected to end at 11pm on 31 December 2020. Although the UK will no longer be within the EU after the transition period, alignment with the AVMSD will remain in place.

- 1.5 Any ODPS provider is subject to various legal obligations. A summary of these obligations is available on the Ofcom website in Ofcom’s Rules and Guidance for on-demand service providers<sup>2</sup>. They include the obligation to notify the service in advance to Ofcom (see paragraph 11 below). Statutory sanctions, including the imposition of a financial penalty, may be imposed if a provider fails to notify an intended service prior to its commencement.
- 1.6 Ofcom makes no representation or warranty, express or implied, about the information contained in these guidance notes or with respect to any written or oral information made available to any potential service provider or its professional advisers. Any liability therefore is expressly disclaimed.
- 1.7 These guidance notes may be updated from time to time. ODPS providers should check Ofcom’s website to make sure they are using the most recent version. ODPS providers should also be aware that certain key features may change in the future.
- 1.8 Notification forms must be signed by the duly authorised individual on behalf of the service provider<sup>3</sup>, scanned and submitted by email to [ODPSnotifications@ofcom.org.uk](mailto:ODPSnotifications@ofcom.org.uk). Alternatively, you can post your notification form to the following address:
- Ofcom  
ODPS Notifications  
Broadcasting & Online Content Group  
Riverside House  
Southwark Bridge Road  
London  
SE1 9HA
- 1.9 If you have any queries you can contact the ODPS team by email at: [ODPSnotifications@ofcom.org.uk](mailto:ODPSnotifications@ofcom.org.uk).

## Before a notification is made

- 1.10 As noted above, the provider of the service (i.e. the person with editorial responsibility) will need to consider whether the service is an ODPS, as defined in section 368A of the Act (as amended).
- 1.11 Notifications of ODPS should be made to Ofcom at least 10 working days before the launch of the ODPS.<sup>4</sup>
- 1.12 Before reaching a decision on whether or not a service or a dissociable section of the service, will be within scope as an ODPS, those intending to provide services may be able

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<sup>2</sup> Available at: [http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules\\_and\\_Guidance.pdf](http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/Rules_and_Guidance.pdf)

<sup>3</sup> In the case of: a) a company, this will be the company secretary or clerk; b) a partnership, this will be a partner or another person who is in control of the business; and c) an unincorporated body or association, this will be a member of the organisation’s governing body.

<sup>4</sup> The obligation covers ODPS providers who were providing a service prior to 1 November 2020 which meets the definition of an ODPS under Part 4A of the Act as a result of changes to section 368A following the Audiovisual Media Services Regulations 2020, and in relation to services commencing after that point.

to informally discuss the position with Ofcom by contacting [ODPSnotifications@ofcom.org.uk](mailto:ODPSnotifications@ofcom.org.uk). However, the responsibility to satisfy the relevant legal obligations remains at all times with the provider. You may wish to take your own professional advice in order to ensure that you comply with the obligations.

- 1.13 You must fill in all sections of the notification form. If a section is not applicable, you should indicate this by writing “N/A”. The declaration and the end of the notification form must be signed and dated.

## Making a notification

- 1.14 In order to satisfy the obligation to notify, an ODPS provider must complete a notification form. We require that you do this using the notification form available on the Ofcom website<sup>5</sup>.

## Failure to notify an ODPS

- 1.15 If any person appears to Ofcom to be providing an ODPS which has not been notified, Ofcom has the power under the Act to request any information that would allow it to establish whether or not this is the case. On receipt of this information, Ofcom will reach a decision on whether the service (or a dissociable section of the service) does in fact fall under the Regulations. If it does, the ODPS provider may be found in breach of the obligation to notify an ODPS and will be required to complete the notification process. Ofcom considers that notification is a very important part of the rules applying to ODPS; it is a clear statutory requirement and allows consumers to know what to expect in terms of minimum standards in relation to content. In some cases the matter may be referred for consideration of the imposition of a statutory sanction.

## Additional notifications in relation to significant changes

- 1.16 Service providers are also required to make additional notifications to Ofcom where, having already notified a particular service, they intend to:
- make changes that would result in the ODPS being significantly different (including any change that may affect the determination of the jurisdiction that the ODPS falls under); or
  - cease the provision of the ODPS.
- 1.17 In such circumstances, the notification must clearly identify the service in question and explain how the ODPS will be significantly different or state the ODPS provider's intention to cease to provide the ODPS (as the case may be). “Ceasing” encompasses ceasing provision of a service altogether or ceasing in the sense that the definition of ODPS no longer applies as a result of relevant.

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<sup>5</sup> Available at: <http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/notification.rtf>

## Completing your Notification form

1.18 This section of the guidance notes provides information on the corresponding sections of the ODPS notification form, to help you fill in your notification form correctly.

### Service provider's contact details

1.19 In this section, you must insert the contact details of the ODPS provider's company along with the company number, where applicable. In most cases this will be a limited company, although it could be another type of organisation, or an individual.

1.20 Providing correct contact information is important as Ofcom needs to know precisely who to contact at the ODPS provider's company for various matters.

1.21 The service provider must provide contact details for the following contacts<sup>6</sup>:

- **Primary Contact:** the person to whom Ofcom should address inquiries about the notification, and the day-to-day contact for Ofcom on regulatory matters.
- **Compliance Contact:** the person to whom Ofcom should contact regarding any compliance issues. This may be the same as one of the other contacts if appropriate.
- **Public Contact:** the person whose details will be published on the Ofcom website. When a service is notified, this contact, along with the name of the service, contact details for the ODPS provider are published on the Ofcom website. Ofcom may also publish a brief description of the service.

### Jurisdiction of the service provider

1.22 Part of the definition of an ODPS under section 368A of the Act is that the provider is under UK jurisdiction. Until the end of the Brexit transition UK jurisdiction is determined by the criteria set out in Article 2 of the AVMS Directive. After the transition period has ended<sup>7</sup>, a provider will be under UK jurisdiction and be regulated by Ofcom if their head office is in the UK and editorial decisions about the service are taken in the UK.<sup>8</sup>

1.23 Ofcom would expect, in circumstances where the provider of a service (or dissociable section of a service) would otherwise be an ODPS but for claiming to be outside UK jurisdiction, that the provider would be in a position to answer the question of whose jurisdiction they are under and demonstrate that they have complied with the rules of that country (including notification where this is required by national law).

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<sup>6</sup> Please see Ofcom's General Privacy Statement (available on our website at: <https://www.ofcom.org.uk/about-ofcom/foi-dp/general-privacy-statement>) for information about how Ofcom handles your personal information and your corresponding rights.

<sup>7</sup> The transition period is expected to end at 11pm on 31 December 2020.

<sup>8</sup> See Schedule 1, paragraph 29 of the Broadcasting (Amendment) (EU Exit) Regulations 2019 (2019/224), which amends the jurisdictional criteria in section 368(A)(e) of the Act.

## The proposed service

### Name of the service

- 1.24 The ODPS provider chooses the name for their proposed service. It is the responsibility of the provider to ensure the name can be used<sup>9</sup>.
- 1.25 It is the responsibility of the ODPS provider to enter into agreements with the appropriate copyright licensing bodies before commencing the service. The notification does not constitute a right to use a particular name.

### Nature of service (or dissociable section of a service)

- 1.26 This should be a brief description of the service, which will be entered into our database as a record of the service. This section asks for information on whether the service or a dissociable section of it is catch-up, archive, includes original content shown on it for the first time or a mix of some or all of those. In addition, we ask for information on whether the service or dissociable section will be free-to-view, conditional on user payment (either by pay per view or ongoing subscription) or a combination.
- 1.27 Free-to-view means that a viewer would be able to receive the service or dissociable section (with the correct equipment) without any further subscription or payment. Free-to-view also refers to service providers providing content for which no payment is expected, even though they may be delivered to the viewer by another carrier for which a payment is required.
- 1.28 A subscription-based service has technology in place to prevent a user from receiving the service or dissociable section unless the user has paid for a regular subscription to receive it.

### Own retail outlets or platforms

- 1.29 This should be a list of all websites, apps, portals, Smart TVs or set top box platforms which are under the direct control of the ODPS provider.

### Third Party retail outlets or platforms

- 1.30 This should be a list of all websites, apps, portals; Smart TV's or set top box platforms which are under the direct control of the ODPS provider.

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<sup>9</sup> Ofcom's statutory remit does not extend to intellectual property matters and it is for the provider to satisfy itself that the proposed name of the service will not cause problems, from their own point of view, with (for example) a similar name for an existing service.

## Confidentiality requests

### Publication of information about notifications of on demand programme services

- 1.31 Please complete the question at the end of the notification form telling us if you consider any of the information you have provided is confidential. If an ODPS provider asks us to keep part or all of a notification form confidential, we will treat this request seriously and will try to respect this. However, sometimes we will need to publish such notifications, including those that are marked as confidential, in order to meet legal obligations, for example under the Freedom of Information Act 2000.
- 1.32 Ofcom is a Data Controller under the Data Protection Act 2018 and is committed to protecting and processing any personal information shared with us in a manner which meets the requirements of the Data Protection Act 2018 as outlined in the statement on our website at: <https://www.ofcom.org.uk/about-ofcom/foi-dp/general-privacy-statement>.
- 1.33 When a service has been notified, the name of the service, contact details for the ODPS provider and a brief description of the service are published on the Ofcom website. These are the details supplied in the notification form. If you have any questions about the information that we publish, or there are any changes to this information, you should contact the ODPS team by email [ODPSnotifications@ofcom.org.uk](mailto:ODPSnotifications@ofcom.org.uk).