



Who Needs to Notify

Guidance notes on who needs to notify an on-demand programme service to Ofcom

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1. Introduction

- 1.1 This document provides guidance on the factors and criteria that are applied by Ofcom when determining whether a service falls within the definition of an on-demand programme service (“ODPS”) under section 368A of the Communications Act 2003 (“the Act”)¹ and is therefore subject to the regulatory framework for ODPS. It is also intended to help those involved in providing a service, and with editorial responsibility to comply with the rules, to assess which specific entity (company or individual) is likely to be the provider of a relevant service for these purposes. For example, the statutory obligation to notify the service to Ofcom.
- 1.2 This Guidance applies from 1 January 2016. It closely reflects guidance previously published by the Authority for Television on Demand (“ATVOD”). It is not intended substantively to change the requirement to notify, although it will of course reflect the change that service providers will now have to notify to Ofcom rather than ATVOD. This Guidance is not legally enforceable or determinative and provides only interpretative guidance as to how Ofcom 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. We have made non-material changes to the wording where we consider this provides clarity. We have also removed links to Ofcom appeal decisions on scope. Such decisions continue to provide useful guidance but, given there is an evolving body of cases, providers and their advisors should consult our website for all the most recent decisions.
- 1.3 As explained below, cumulative criteria are set out in section 368A of the Act that determine whether or not a service is within the scope of the regulatory framework. The wide variety of content, services and business models available make it unrealistic to provide a simple checklist for determining 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. 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 ODPS.

¹ As amended by the Audiovisual Media Services Directive Regulations 2009 and the Audiovisual Media Services Directive Regulations 2010.

2. Overview

- 2.1 There are a huge variety of audiovisual services available, and Ofcom realises that it is not always easy to determine whether or not a given service is an ODPS under section 368A of the Act, and therefore requires notification.
- 2.2 This document gives guidance on what constitutes an ODPS by reference to the five criteria listed in section 368A of the Act, but it is also important to step back and take an overview as this provides a useful “sense check” for the conclusions you reach in applying the criteria. It is useful to look at the whole consumer offering you provide via a given outlet or platform (such as a website or set-top box service) in light of what the Directive and Act are seeking to achieve. If all or part of the offering you typically provide to consumers is likely to compete with linear TV, and the nature of the material and means of access would lead users to expect a degree of regulatory protection (see 2.4 below), it is likely you are providing an ODPS.
- 2.3 The following (non-exhaustive) list gives some introductory examples of the types of service which are likely to be considered an ODPS:
- 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’ video on demand);
 - 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;
 - 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;
 - d) an on-demand music video service;
 - e) an audiovisual service solely comprising TV-like self-promotional programmes or ‘advertorials’; and

f) A non-mainstream audiovisual service comprising programmes comparable to equivalent broadcast genres (for example, religion, politics, sport, adult).

2.4 Ofcom advises providers to consider the statutory criteria outlined in this document in light of the intentions of the Directive and Act through which it is implemented, noting particularly two questions derived from Recital 24 of the Directive:

a) Is your service competing for the same audience as television broadcasts?

b) Would a user reasonably expect this service to be regulated?

For example, the Directive excludes services that are primarily non-economic, and which are not in competition with television broadcasting (Recital 21 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. However, it does not include user-generated video content posted by private individuals for non-economic purposes of sharing and exchange within communities of interest. While numbers of subscribers and revenue may be relevant, low figures for either does not necessarily imply a service is "non-economic".

Television broadcasts in this context include the full range of linear TV, not just the "major" channels.

2.5 It may be that a part of your overall consumer offering constitutes an ODPS in its 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 ODPS which falls within the scope of the Act. More generally, a single outlet or platform (for example a website) can be home to one service or several. Ofcom acknowledges that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case. Paragraphs 3.4 - 3.12 of this document give further guidance on identifying a "service" with the principal purpose of providing TV-like content.

2.6 Until 31 December 2015, Ofcom acted as an appeal body for ATVOD determinations as to whether a particular service constituted an ODPS, and we have examined many of the key issues that arise under these headings. The published Ofcom decisions on

appeals² (as well as those determinations by ATVOD which were not subject to an appeal or were upheld) provide more in-depth discussions about some points which are summarised in this document. From 1 January 2016, Ofcom will continue to make such decisions as sole regulator, and these should provide further guidance for service providers.

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

3.1 Under section 368A of the Act, a service will be an ODPS, and therefore subject to notification and regulation, if it meets **all** of the following criteria.

- a) **Its principal purpose is the provision of TV-like programmes:** that is programmes whose form and content are comparable to the form and content of programmes normally included in television programme services;
- b) **It is accessed on-demand:** 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,³ 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;
- d) **It is made available to the public:** the service is made available by that person for use by members of the public; and
- e) **That person is under the jurisdiction of the UK for the purposes of the Directive.**

3.2 These criteria will be interpreted purposively in line with the Directive. By virtue of Recital 24 this will include consideration of whether the service is in competition with linear TV services and generates expectations of regulatory protection of the type provided for under the Directive.

3.3 The term “audiovisual” is adopted in the Directive and used in this document. Audio-only services, such as ‘listen again’ radio services are out of the scope of the Directive and section 368A of the Act, and hence outside the scope of the regulatory framework for ODPS. However, video-only programmes (i.e. without audio) are potentially in scope (subject to the other criteria being met).

² Available at: <http://stakeholders.ofcom.org.uk/broadcasting/on-demand/atvod-archives/scope-appeals/>

³ Defined in section 32 of the Act. See paragraph 3.15 of this Guidance.

Does it include TV-like programmes?

- 3.4 One of the principal aims of the Directive is to create a more level-playing field between traditional linear broadcast television services and emerging on-demand audiovisual media services (Recital 10 of the Directive) and to provide regulatory protection in circumstances where the parallel with television is such that audiences would reasonably expect it (Recital 24). 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 21 and 24), sharing the same key characteristics, namely that they include comparable programmes. Accordingly, a defining characteristic of the definition of an ODPS 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” as that expression is used in Recital 24 of the Directive.
- 3.5 An ODPS will only be caught by the definition in section 368A of the Act if it **provides access to programmes that are comparable to programmes normally included in broadcast television services and thereby compete for the same audience as television broadcasts**. It is, however, necessary to interpret the meaning of *‘programme’* in this context in a dynamic way, taking into consideration developments in television broadcasting.
- 3.6 The comparison with programmes ‘normally included’ in television programme services takes into account the full range of linear TV channels, including low budget channels, adult channels and other special interest channels. The test is whether the programmes are comparable, not whether they are identical. For example, the fact that the substantive rules on content are more extensive for linear television than for VOD means some material on VOD services might not be permitted on linear television, but that is not to say they are not comparable in their form and in the broad type of content included.
- 3.7 Examples of ‘programmes’ given in Article 1(1)(b) of the Directive include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama. It is to be noted that this is not an exhaustive list. Recital 22 makes it clear that the Directive excludes *“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*” on the grounds that their principal purpose is not the provision of ‘TV-like’ programmes.

3.8 In making an assessment of what is ‘TV-like’, Ofcom will compare video content with broadcast television programming of the same or equivalent genre. Factors taken into account will include the following:

- Comparable programmes are more likely to be accompanied by opening and closing title and credit sequences which, amongst other things, create or indicate some degree of separate identity for individual programmes.
- Comparable programmes in genres which typically make use of presenters, voiceovers, commentary and/or captions, are more likely to make use of these features.
- Comparable programmes are more likely to be complete programmes, i.e. programmes in relevant genres are more likely to pursue a dramatic conceit and/or have a narrative arc to convey an idea, analogy or theme, to have a structure of acts and scenes in which a story, theme or sustained purpose is maintained and conveyed, and within which there are dramatic or narrative developments.
- 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 – is likely to satisfy this test.
- Comparable programmes may nevertheless be of short duration and may be derived from longer programmes. Complete programmes (with their own editorial integrity) derived from a longer programme can be contrasted with incomplete clips taken from a longer programme, though the use of a playlist mechanism may be relevant with the latter.
- While the inclusion of TV-like adverts is an indicator that a programme is more likely to be TV-like, the converse is not necessarily true.
- A programme which has been shown on linear TV will normally be considered ‘TV like’ unless its broadcast was wholly exceptional. However, prior broadcast is not a pre-condition of a programme being considered ‘TV like’.

Is the provision of TV-like programmes the principal purpose of the service?

3.9 When an outlet offers ‘TV-like’ programmes among other content (including other video content) Ofcom will consider whether there is a service with the provision of the

'TV-like' content as its principal purpose, rather than being merely incidental or ancillary to a different purpose.

3.10 When considering whether there is a service with the 'principal purpose' of providing TV-like content, Ofcom will take into account factors including the following, each of which may be relevant but none of which is determinative:

- Whether there is a point of entry that is styled as providing, and in practice does provide, a service with its own independent identity.
- Whether videos (and in particular TV-like videos) 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.
- The degree and nature of any linkage between the video on demand content and other content on the broader service.
- The degree and nature of any linkage between TV-like and non-TV-like video content.
- The extent to which the video content, and in particular the TV-like video content, needs to be viewed in order to receive the information, education or entertainment being offered. Which content is the primary means of conveying the information sought to be conveyed?
- The extent to which the video content, and in particular the TV-like video content, is an integral and ancillary element of the broader offering rather than a standalone service. This may also involve considering duration, completeness and independence of the video material and the proportion it comprises.
- The prominence of the 'TV-like' programmes, for example in terms of the branding and structure of the service and their presentation and organisation.
- The quantity and proportion of TV-like programmes in terms of both absolute numbers and viewing time.
- The relevance, particularly to the consumer, of the 'TV-like' programmes within a service – for example, are these programmes the key benefit of a subscription?
- The degree and nature of any linkage between TV-like and non-TV-like video content.

3.11 Recital 28 of the Directive states that electronic versions of newspapers and magazines will not constitute ODPS. However, this is not to say that merely being connected with a newspaper or magazine brand will necessarily take a service out of

scope. The assessment is one of fact, and previous Ofcom decisions have gone into some detail on the issues involved.

- 3.12 As a hypothetical example, there would be 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 dissociable or standalone service.

Is it an on-demand service?

- 3.13 Access to a service is on-demand if the service enables the user to view, at a time chosen by the user, programmes selected by the user from among the programmes included in the service
- 3.14 Section 368A of the Act also states that for access to a service to be ‘on-demand’, the programmes viewed by the user must be received by the user by means of an electronic communications network (whether before or after the user has selected which programmes to view).
- 3.15 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 meet this criterion. The means of delivery is the deciding factor for this criterion, not the means of payment.
- 3.16 No distinction is made in the Act between instant streaming, download-to-rent and download-to-own ODPS services
- 3.17 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.
- 3.18 Ofcom does not regard linear programmes as becoming on-demand merely because a pause or live restart function is featured or deployed.

Is there editorial responsibility?

- 3.19 The exercise of ‘editorial responsibility’ is relevant to scope in two ways. Firstly, an ODPS 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.

- 3.20 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.
- 3.21 However, that is not to say that all content in such sites falls outside the definitions. For example, where ‘hosting’⁴ 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 ODPS for these purposes.
- 3.22 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 content service may comprise a number of different ODPS, each provided by a different entity exercising ‘editorial 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 5).

Is it made available to the public by the person with editorial responsibility?

- 3.23 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 within the EU.
- 3.24 The Directive covers only services which are mass media in their function to inform, entertain and educate the general public. “Mass media” can include material that is highly specialised in nature, or non-mainstream. For example, minority sports are likely to be mass media services despite not having large followings, and pornography is likely to be even though the intention is that under-18s should not have access and even though the interest catered for may be niche amongst adults. If such material is capable of being seen by, and having a clear impact on, a significant proportion of the general public then this will be “mass media” under the terms of the Directive.

⁴ 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.

- 3.25 By way of contrast, 'mass media' would not include, for instance, video content where the content is very narrowly focused on dissemination of information about an organisation to its members, rather than for consumption by the general public. For example, a video of an AGM for shareholders of the company or of a lecture for enrolled students at an academic institution is likely to be out of scope. However, a standalone service providing access to videos of many companies' AGMs, or a large collection of lectures for general interest may be considered 'mass media'.
- 3.26 More than one person, not just the one with the closest relationship with users or subscribers, may be involved in making the service available to the public, even though only one of these can have editorial responsibility for the service. For example, the person with editorial responsibility is likely still to be considered to make the service available to the public even if they do so through a third party – e.g. a content provider may make a service available via a third party distribution platform which manages the everyday relationship with the public.

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

- 4.1 Once it has been determined that there is a relevant ODPS, it is then necessary to determine which single entity should be treated as the provider of that service. By virtue of section 368R(5) of the Act, this is deemed to be the entity which has 'editorial responsibility' for the programmes comprising the relevant ODPS (see paragraph 3.19 above). The entity with editorial responsibility is responsible for notification and compliance with the obligations laid down in the Act.
- 4.2 'Editorial responsibility', in this context, means the exercise of general control over:
- 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 Ofcom recognises that in practice, more than one party may have some editorial role. However, the Act is clear that only one party has editorial responsibility for these purposes. It will not be open to providers to argue that 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, and Ofcom will exercise its regulatory judgment in such cases to determine which is best seen as having editorial responsibility under the Act.

- 4.4 Please note that in cases of dispute or ambiguity, Ofcom may require sight of contracts and any other relevant evidence. For the avoidance of doubt, in such circumstances Ofcom will consider in particular:
- a) whether there is contractual wording which expressly contemplates editorial responsibility as that term is to be read under the Act and clearly indicates the parties' intentions as to the allocation of that editorial responsibility;
 - b) other terms of any relevant contract (and as to the intentions they disclose);
 - c) agreed conduct and practice between the parties outside the formal contractual framework; and
 - d) other evidence of the position in practice with regard to the relevant service.
- 4.5 Providers (and those who are not providers but work closely with them on matters such as distribution) are advised, as a matter of good practice and clear allocation of roles, to address the issue of editorial responsibility in their contracts, **but cannot use a contract to allocate editorial responsibility where it plainly does not lie in reality.**
- 4.6 Where Ofcom needs clarification on the editorial roles of several parties (for example because there is no contractual wording which expressly addresses this issue and available evidence is ambiguous) it will keep the following points in mind:
- a) 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 over content of individual programmes (as a television director might) or distribution of the service (for example physical transmission or retailing of a service to consumers).
 - b) General control over selection of programmes means decision-making on which individual programmes are included in the service, and not on the choice of whole 'channels' of content. Likewise, the specification of high-level parameters (for example, ethical and legal standards, or type or amount of programming to be offered) does not constitute general control over selection, if the content provider retains de facto 'final say' over choice of individual programmes. Usually, the person who has general control over the selection of programmes will be regarded as

maintaining general control over the organisation of the programmes (even if on a day to day basis organisation of the programmes is carried out by a third party).

- c) 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: such information might include, for example, what content information should be attached to a particular programme (e.g. the programme synopsis, rating information and other content warnings). Merely identifying the provider of the metadata will not itself be determinative, since the party with access to that data will by definition be the one that provides it.

- d) The fact that a platform operator may be responsible for the design, branding 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 or organisation of programmes, as these are solely presentational techniques.

- e) 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, and are responsible for ensuring that their own content complies with the statutory requirements. Alternatively, an aggregated service could constitute a single service incorporating content from a variety of different sources, with the aggregator holding ‘editorial responsibility’. Or, somewhere between these two alternatives, an aggregator could hold ‘editorial responsibility’ for some services on its platform, but also on that same platform provide access to others’ services (for which those other parties retain editorial responsibility).

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

5.1 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 relevant provisions of which are summarised below (subject to the exception outlined in paragraph 5.3 of this Guidance). The service provider of an on-demand programme service will fall under the UK's jurisdiction if it is established in the UK.

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

- a) the service provider has its head office⁵ in the UK and the editorial decisions for the relevant on-demand programme service are also taken here;
- b) alternatively, if only one of (i) the head office; or (ii) 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 is 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 is 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) if the head office is in the UK but decisions⁶ 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.

⁵ The 'head office' is not necessarily the registered office, particularly in cases where the registered office is simply a postal address or limited activity takes place there.

⁶ The Directive does not, in this particular case, specify that these need be *editorial* decisions.

- 5.3 The Directive does not apply to services intended exclusively for reception in a third country (i.e. non-EU Member State countries) and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States (even if the provider of the service is within UK jurisdiction).
- 5.4 In accordance with the Directive, these jurisdictional criteria are identical to those applicable to linear services.
- 5.5 If you appear to be providing a service associated with the UK, but do not consider that you are under UK jurisdiction, you should be aware that Ofcom would be likely to enquire as to which country's jurisdiction you believe you are under, why you have arrived at that conclusion, and how you have acted on that by satisfying the legislative requirements in that other jurisdiction.

6. Notification requirements

- 6.1 Service providers are required to notify Ofcom before providing an ODPS.
- 6.2 Service providers which provide an ODPS through multiple outlets or platforms (including third party and proprietary outlets) may be treated as providing a single ODPS and may make a single overarching notification in respect of all those outlets.
- 6.4 However, the service provider should only notify to the extent it meets the definition in section 368A including having editorial responsibility. For example, a content provider may both provide an ODPS itself, and may also make some content available to a third party to distribute via the third party's ODPS. This would require one notification for each ODPS provider.
- 6.5 A service provider may also choose to make two or more separate notifications. For example a service provider whose content is aimed at two or more distinct audiences may choose to notify two or more distinct services rather than group the content together under a single overarching notification.
- 6.6 A notification (whether overarching or not) should be made using the notification form published on the Ofcom website and, among other things, should include full details of

outlets or platforms⁷ operated by the service provider and through which the service is provided to consumers. For further information on what should be provided in the notification form, please see the How to notify document.⁸

- 6.7 Having made a notification, service providers are obliged to inform Ofcom before ceasing to provide the service and before providing the service with any significant differences. A 'significant difference' would include, among other things:
- (a) a fundamental change in the nature of the programmes offered (e.g. if the service starts to offer programmes in a new genre); or
 - (b) a change to any of the details provided in accordance with paragraph 6.6.
- 6.8 Service providers will also be required to complete an annual return confirming that the information previously supplied to Ofcom remains accurate and complete (but this does not mean an ODPS provider can wait until the due date for an annual return to notify Ofcom of relevant changes that occur and that require prior notification under section 368BA of the Act).

⁷ In this context an 'outlet or platform' is normally considered to include: a website, a piece of application software ("app") or mobile portal designed to facilitate access to the on demand content, or a Smart TV or set top box platform.

⁸ Available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/on-demand/rules-guidance/How_to_Notify.pdf