
On-demand programme services: who needs to notify to Ofcom?

Draft guidance for consultation

[On-demand programme services: who needs to notify to Ofcom?](#) – Welsh overview

CONSULTATION:

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1. Overview

What we are proposing – in brief

- This document sets out Ofcom’s proposed guidance on the statutory criteria under section 368A of the Communications Act 2003 (“the Act”) for determining whether a service is an on-demand programme service (“ODPS”) and when and how a provider will be expected to notify.
- The proposed guidance reflects changes to the regulatory framework which came into force on 1 November 2020 and will replace Ofcom’s previous guidance on who needs to notify.
- The proposed guidance is intended to help providers assess whether they are providing a service which meets the criteria under the Act and is therefore subject to the regulatory framework for ODPS.
- A service or a ‘dissociable section’ of a service will be an ODPS if:
 - its principal purpose is the provision of programmes with or without sounds which consist of moving or still images, or of legible text, or of a combination of those things;
 - access to it is on-demand;
 - there is a person who has editorial responsibility for it;
 - it is made available by that person for use by members of the public;
 - that person’s head office is in the United Kingdom; and
 - editorial decisions about the service are taken in the United Kingdom.
- Previously, a service could only be an ODPS if the programmes it included were comparable to the form and content of programmes normally included in television programme services. The removal of this requirement is likely to mean that a wider range of services will now fall to be notified.
- The statutory framework has also been amended to make clear that a ‘dissociable section’ of a service, as well as a service as a whole, can be an ODPS if it meets the criteria. Providers will need to consider whether the criteria apply to their whole service or to a ‘dissociable section’ of it.
- The criteria which must be met for an ODPS to fall within UK jurisdiction have also changed under the legislation. A service will be deemed to be established in the UK if the provider has its head office in the UK and editorial decisions about the service are taken in the UK.
- The concept of editorial responsibility is important. Where a provider does not have general control over what programmes are included in the service, they will not be offering an ODPS but the service may need to be notified to Ofcom as a video-sharing platform (“VSP”) if the criteria in section 368S of the Act for determining whether the service is a VSP are met. [Guidance on who needs to notify as a video-sharing platform](#) is available on our website.

Purpose of this consultation

- 1.1 We are seeking views on our proposed guidance (set out below) to help providers understand:
 - a) whether they are providing a service that is subject to the statutory framework for on-demand programme services under the Communications Act 2003; and
 - b) when and how they might need to notify their service to Ofcom.
- 1.2 We are inviting stakeholders, including providers of services that may fall within scope of the regulation, industry and third sector bodies, and other interested parties, to comment on the draft guidance set out in Sections [Three](#) and [Four](#). These sections, along with an amended overview, will form the standalone guidance once finalised. The full list of consultation questions can be found in [Annex Three](#). The closing deadline for responses is **5pm on 26 May 2021**.

Next steps

- 1.3 After considering responses, we plan to issue final guidance in the Summer. In the coming weeks, we will also be consulting on guidance for ODPS providers on regulatory requirements and measures to protect users from harmful material.
- 1.4 Service providers are required to notify Ofcom before providing an ODPS. Services that operated before 1 November 2020 which did not meet the previous definition of an ODPS but do meet the updated definition are now required to notify Ofcom. The notification process is outlined in Section Four of this document and more detail is provided in our [How to Notify](#) guidance document.
- 1.5 Providers can email Ofcom at vod@ofcom.org.uk if they have any questions about the notification and scope requirements. However, we are unable to provide legal advice and it remains the responsibility of each provider to satisfy the relevant legal obligations around notification.

2. Background and legislative context

Purpose of the guidance

- 2.1 This document sets out Ofcom’s guidance on the statutory criteria under [section 368A of the Communications Act 2003](#) (“the Act”)¹ for determining whether a service is an on-demand programme service (“ODPS”) and how Ofcom will apply those criteria. It also sets out when and how a provider will be expected to notify an ODPS service to Ofcom.
- 2.2 The guidance reflects changes to the regulatory framework which came into force on 1 November 2020 and replaces Ofcom’s previous guidance on who needs to notify. In drawing up this guidance we have had regard to relevant Articles and Recitals of the [Audiovisual Media Services Directive](#), from which the changes originate.
- 2.3 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 the application of the statutory criteria in the context of the particular service or services they are providing, 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.
- 2.4 This guidance is designed to help providers in assessing whether their service is in scope and needs to be notified to Ofcom. The guidance also sets out to ensure transparency around how Ofcom is likely to interpret the statutory criteria (for instance, in an enforcement investigation). Ofcom considers the impact of this guidance to be minimal, given that providers are required to comply with the requirements as set out in the Act and the guidance does not add to the regulatory burden under the statutory scheme. Government has previously produced [an impact assessment](#) of the [Audiovisual Media Services Directive Regulations 2020](#).²

Legal framework

- 2.5 On-Demand Programme Services are a category of video on-demand service regulated under Part 4A of the Communications Act 2003. Part 4A, as revised, reflects the EU framework for on-demand services under the Audiovisual Media Services Directive 2018 (the “AVMSD”). The AVMSD governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services, and now also extends to VSPs.

¹ As amended by the Audiovisual Media Services Directive Regulations [2009](#), [2010](#) and [2020](#).

² The [Audiovisual Media Service Directive Regulations 2020](#) is a statutory instrument which transposed revisions to the AVMSD into the original ODPS framework which was first introduced under Part 4A in of the Act in 2009.

- 2.6 The AVMSD regulatory framework under Part 4A of the Act has been retained in UK law following the UK's withdrawal from the EU, although the AVMSD criteria for establishing jurisdiction have been amended to clarify when an ODPS will fall under UK jurisdiction.
- 2.7 Section 368A of the Act sets out the meaning of an “on-demand programme service”. The criteria set out in the Act are applied cumulatively; they must all be met for a service or dissociable section of a service to be considered an ODPS.
- 2.8 A service (or a dissociable section of a service) is an “on-demand programme service” if—
- a) its principal purpose is the provision of programmes with or without sounds which consist of moving or still images, or of legible text, or of a combination of those things;³
 - b) access to it is on-demand;
 - c) there is a person who has editorial responsibility for it;
 - d) it is made available by that person for use by members of the public;
 - e) that person's head office is in the United Kingdom; and
 - f) editorial decisions about the service are taken in the United Kingdom.
- 2.9 In Section Three we discuss in more detail the relevant statutory criteria which cumulatively must be met in order for a service to fall under regulation as an ODPS.

ODPS providers' notification obligations

- 2.10 Service providers are required to notify Ofcom before providing an ODPS. Services that operated before 1 November 2020 which did not meet the previous definition of an ODPS but do meet the updated definition are now required to notify Ofcom. The notification process is outlined in [Section Four](#) of this document and in more detail in our [How to Notify](#) guidance document.
- 2.11 Where it appears to Ofcom that a service meets the statutory criteria but has not been notified, Ofcom has statutory powers to request information in order to make an assessment, and to take enforcement action if a provider has failed to notify. This can include a financial sanction and directing the provider to notify.

Relationship to the VSP regime

- 2.12 The level of control that an online provider exercises over video content available on their service (see [paragraphs 3.25-3.36](#)) is a key factor in assessing whether the service falls to be regulated as an ODPS under Part 4A of the Act or a video-sharing platform (“VSP”) under Part 4B of the Act. Each service will be different and needs to be judged on its own facts, but there may be cases where VSP and ODPS services converge. For instance:

³ See section [368ZA of the Act](#) in relation to “the provision of programmes”.

- a) A provider (i.e. the legal entity providing the service) may offer two services – for one service, it controls both the range of audiovisual content available and its organisation within that range (the service is an ODPS), while for the other, it controls the organisation of that content but not its selection (the service is a VSP);
- b) a VSP may have a ‘dissociable section’ (see [paragraphs 3.15-3.20](#)) that provides videos to members of the public, but that section is an ODPS under Part 4A of the Act; or
- c) VSPs may carry the same content as an ODPS (for example, where media organisations upload individual videos to a VSP like any other user) or, in specific cases, an ODPS may be hosted on a VSP (where an ODPS provided by a media organisation is offered via a video-sharing platform).

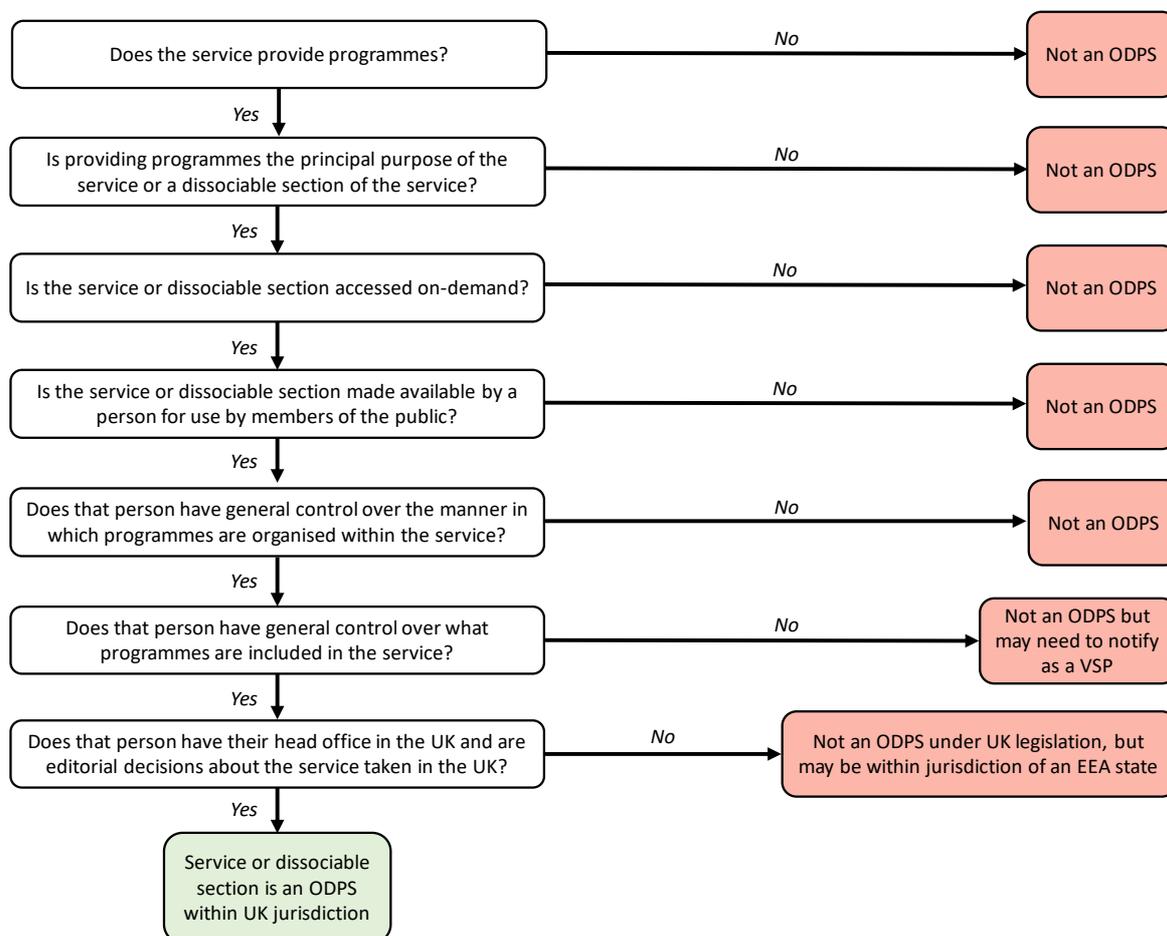
2.13 Where relevant, providers are therefore encouraged to refer to the statutory criteria for VSPs under Part 4B of the Act, as amended by the Audiovisual Media Services Regulations 2020.⁴ Providers may also find it helpful to refer to Ofcom’s guidance documents on [VSP scope and rules](#).

⁴ The regulation of UK-established video-sharing platforms will be superseded by the introduction of the Online Safety Bill. In December 2020, in its [full response to the Online Harms White Paper](#), the Government confirmed its intention to eventually repeal Part 4B of the Act. It also confirmed its intention to appoint Ofcom as the relevant regulator of the new online harms framework. This legislation is expected to apply to a much wider range of online services, including services which are not established in the UK. Ofcom will operate the VSP framework until such time as it is no longer in force and will ensure that there is support for services transitioning between the VSP and online harms frameworks.

3. On-demand programme service criteria

- 3.1 This guidance is structured around the five constituent elements of the definition of an ODPS in section 368A of the Act. This section provides guidance to assist providers in assessing whether a service, or a dissociable section of a service, meets the criteria of an ODPS under the Act. The questions below summarise these criteria and should be considered in relation to the provision of a service:
- a) Is providing programmes the principal purpose of the service or a dissociable section of the service?** (see [paragraphs 3.7-3.20](#))
 - i) Does the service or dissociable section provide “programmes”? (see [paragraphs 3.8-3.11](#))
 - ii) Is providing programmes the “principal purpose” of the service or of a dissociable section of the service? (see [paragraphs 3.12-3.14](#))
 - iii) What is “a dissociable section”? (see [paragraphs 3.15-3.20](#))
 - b) Is the service or dissociable section accessed on-demand?** (see [paragraphs 3.21-3.24](#))
 - c) Are the programmes comprising the service or dissociable section under a person’s editorial responsibility?** (see [paragraphs 3.25-3.36](#))
 - i) Does that person have general control over what programmes are included in the service? (see [paragraphs 3.29-3.32](#))
 - ii) Does that person have general control over the manner in which programmes are organised within the service? (see [paragraphs 3.33-3.36](#))
 - d) Is the service or dissociable section made available by that person for use by members of the public?** (see [paragraphs 3.37-3.40](#))
 - e) Does that person have their head office in the UK and are editorial decisions about the service taken in the UK?** (see [paragraphs 3.41-3.42](#))
- 3.2 These questions should be considered cumulatively as all of the criteria set out in section 368A of the Act must be met for a service to be an ODPS. While many services may be considered to provide programmes on-demand, close consideration should be given to: whether this is the “principal purpose” of the service or dissociable section; the level of control the provider has over the inclusion and organisation of programmes in the service; and the provider’s place of establishment and where editorial decisions are taken.
- 3.3 which must be met for an ODPS to fall within UK jurisdiction. Each of these changes is discussed in greater detail below.
- 3.4 The wide variety of content, services and business models available makes it unrealistic to provide a simple checklist to determine the services within scope. However, the flow diagram set out below may help service providers consider how they might undertake an assessment of the criteria set out under the Act and navigate through this guidance.

Figure 1: ODPS criteria assessment process



3.5 The following (non-exhaustive) list gives some examples of the types of service which may meet the definition of 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 general control over their selection and organisation (see [paragraphs 3.25-3.36](#) for the meaning of “editorial responsibility”), whether via a dedicated website, online aggregated media player service, or through a television platform;
- c) an on-demand film and television service, provided online by a person with “editorial responsibility”;
- d) an on-demand music video service;

- e) a dissociable section of a video-sharing platform which provides selected programmes on-demand for use by members of the public and may be provided on a commercial basis; and
- f) a dissociable section of an otherwise text-based website which has the primary purpose of providing programmes.

3.6 Services which will not meet the definition of an ODPS include:

- a) a service which hosts user-generated videos and allows users to engage with other users' content, supported by advertising or subscriptions (this is likely to be a VSP but a dissociable section of such a service may meet the definition of an ODPS if there is a person who has "editorial responsibility" for it);
- b) an online newspaper, where videos are embedded within the journalistic or editorial content of the service;
- c) a private on-demand service which offers programmes within a business intranet; and
- d) an individual's personal social media account which is used to share video content with friends and family.

Is providing programmes the principal purpose of the service or a dissociable section of the service?

3.7 Under section 368A(1)(a) of the Act, a service cannot be an on-demand programme service unless its principal purpose is providing programmes. A dissociable section of a service, as well as the service as a whole, could be considered to have the principle purpose of providing programmes. The criteria can be broken down into several elements as below.

Does the service or dissociable section provide "programmes"?

3.8 Section 368ZA defines programmes in the context of the ODPS regime as:

"programmes with or without sounds which consist of moving or still images, or of legible text, or of a combination of those things".⁵

3.9 This updated definition significantly broadens the scope of the kind of services that may be considered an ODPS beyond those that provide programmes similar to television.⁶ The revision reflects amendments made to the AVMSD in light of the ongoing convergence of TV and internet services. Recital 1 of the revised AVMSD notes that technical developments have allowed for new types of services and user experiences, and that viewing habits, particularly those of younger generations, have changed significantly. While

⁵ The change in definition of "programmes" is made by paragraphs 22-23 of the [Audiovisual Media Services Regulations 2020](#) which target [section 368A and subsection 368A\(1\) of the Act](#).

⁶ Prior to the 2020 amendments to the Act, the principle purpose criterion required that the form and content of programmes included in an ODPS was comparable to the form and content of programmes normally included in television programme services.

the main TV screen remains an important device for sharing audiovisual experiences, many viewers have moved to other devices to watch audiovisual content.⁷

3.10 As this definition of “programmes” encompasses such a breadth of audiovisual content, for further clarification we have set out below a non-exhaustive list of the kinds of media which are not covered by this definition:

- a) text accompanied by separate still images;
- b) audio content, such as podcasts or on-demand radio programmes, with no associated visual component beyond a single static placeholder image;
- c) music content that may be presented with a single static placeholder image, such as an album cover, or a graphical function of the user interface, such as a visualiser; and
- d) animated images, such as GIFs, in their own right (except where they are used within a programme).⁸ For clarity, cartoons and other forms of animated video content do fall within the definition of “programmes”.

3.11 The audiovisual content made available on ODPS services is likely to be similar to that found on video-sharing platforms.⁹ Therefore, in order to determine what type of service is being provided, a key consideration will be the level of control the provider has over the audiovisual content that may be accessed on the service or dissociable section (see [paragraphs 3.29-3.32](#)).

Is providing programmes the “principal purpose” of the service or a dissociable section of the service?

3.12 “Principal purpose” refers to the main activity of the service or dissociable section, and the extent to which the offering is built around providing programmes. This should also be considered in the context of the intended audience and whether the service is made available for use by members of the public (see [paragraphs 3.37-3.40](#)). It is important to consider both the users’ perspective (for instance, how programmes are presented to them) as well as the wider market context. Relevant indicators could include:

- a) whether the service or dissociable section refers to itself as a providing programmes, and how it markets itself or positions itself against its competitors;
- b) the degree and nature of any linkage between the programmes and other content on a broader service, and the extent to which the programmes are an integral and ancillary element of the broader offering rather than a standalone service;
- c) the extent to which the programmes need to be viewed in order to receive the information, education or entertainment being offered?;

⁷ Recital 1 of the [2018 amending Directive](#).

⁸ Recital 6 of the [2018 amending Directive](#)

⁹ The term “videos” as it relates to audiovisual content provided by VSPs is defined in section [368Z13 of the Act](#) as meaning “a set of moving or still images, or of legible text, or of a combination of those things (with or without sounds), which constitutes an individual item irrespective of its length (and which is not an audiovisual commercial communication)”.

- d) the prominence of the programmes, for example in terms of the branding and structure of the service and their presentation and organisation;
 - e) the quantity and proportion (compared to other forms of content) of programmes in terms of both absolute numbers and viewing time; and
 - f) the relevance, particularly to the consumer, of the programmes within a service or dissociable section – for example, are these programmes the main draw of the service or key benefit of a subscription?
- 3.13 In interpreting our application of this criterion, we will have regard to Recital 54 of the 2018 AVMSD which states that one of the purposes of audiovisual media services is to “serve the interests of individuals and shape public opinion”. Furthermore, Recital 21 of the 2010 AVMSD defines audiovisual media services as services “which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public.”
- 3.14 Accordingly, the availability of a service, the number of viewers it has and the number of views that it generates may be relevant. Similarly, it may also be relevant to consider whether a service is made available with some form of remuneration, such as sponsorship, advertising or subscription fees.

What is “a dissociable section”?

- 3.15 A single service could be an ODPS in its entirety or include one or more dissociable sections which have the principle purpose of providing programmes to members of the public. A provider may offer a programme download or streaming service within a broader, non-audiovisual online offering. This part of the overall service may be considered to be a “dissociable section” and will be an ODPS if it meets the criteria under the Act.
- 3.16 Ofcom acknowledges that this assessment may not always be straightforward and will depend on the particular circumstances of each case. A ‘dissociable section’ might, for instance, include a subdomain of a web property or a distinct part of an app or certain types of user accounts that provide access to a particular category of programmes. However, technical features or product design alone are not the decisive factor in assessing whether part of a service constitutes a ‘dissociable section’.¹⁰
- 3.17 When considering whether a section of a service is ‘dissociable’ from the rest, providers might consider the extent to which programmes within that part are provided for their own value as a standalone feature, rather than as linked or supplementary to other forms of content on the service.
- 3.18 Government has made clear that newspaper websites as a whole are outside the scope of the regulations, except where they provide a dissociable video-on-demand service. Each case will turn on its own facts but, to provide an illustrative example, a standalone section

¹⁰ See [Summary – Judgement of the Court \(Second Chamber\)](#), 21 October 2015 (Case C-347/14, New Media Online GmbH v Bundeskommunikationssenat): “When carrying out the analysis, the fact that the audiovisual offer at issue is presented in the principal domain of the website concerned or in a subdomain of that website cannot be the decisive factor”.

of a newspaper website which is dedicated to hosting programmes might be considered as a dissociable ODPS if the programmes are independent of the written press articles. But, in a scenario where such programmes were embedded in the editorial content, or there were other links between the audiovisual offer and the main activity of providing news in written form, such that the video content was merely an indissociable complement to it, these would not be expected to fall within the ODPS framework.¹¹

- 3.19 It may also be relevant to consider how the service is experienced from a user’s perspective; for instance, a ‘dissociable section’ of a service might feel qualitatively different from other parts. Relevant factors here could include whether the relevant section is distinguished substantively from other parts of the service in terms of its purpose, content and form. Where the information is available, relevant quantitative indicators could include the use, amount and reach of video content compared with the rest of the service.
- 3.20 Where one or more dissociable sections of a service are considered to constitute on-demand programme services, only those sections will be covered by the regulation.

Consultation question 1: Do you have any comments on proposed guidance around subsection 1(a) of section 368A of the Act – whether the provision of programmes is the principal purpose of a service or a dissociable section of a service?

Is the service or dissociable section accessed on-demand?

- 3.21 Access to a service or dissociable section of 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.
- 3.22 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).
- 3.23 This criterion will be interpreted in line with section 32 of the Act¹², for the most part referring to information shared over the internet, inclusive of mobile and fixed networks. Any service provided over the internet will meet this criterion.

¹¹ In line with DCMS, [Consultation outcome: Audiovisual Media Services, Government response to public consultations on the government’s implementation proposals](#), 24 July 2019: ‘The government maintains its position that while newspaper websites remain outside the scope of the 2018 Directive and the future online harms framework, standalone parts of newspapers’ websites providing video services which are independent of the journalistic activities in content and form do fall into scope. The use of videos on websites, blogs and news portals which are connected to the journalistic activities falls outside the scope of the new provisions. This change reflects existing case law of the European Court of Justice on the issue, which found that the concept of a programme within the AVMS Directive includes video under the sub-domain of a newspaper website.’ See also Recitals 3 and 6 of the Directive and Judgment of the Court (Second Chamber), 21 October 2015, [Case C-347/14, New Media Online GmbH v Bundeskommunikationssenat](#).

¹² Under Section 32(1) of the Act, an ‘electronic communications network’ means— (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and (b) such of the

3.24 No distinction is made in the Act between instant streaming, download-to-rent and download-to-own ODPS services. However, a content service that is broadcast or streamed online in a linear form is not covered by the on-demand programme service rules. If that linear service appears on a regulated EPG, it will be subject to the [relevant broadcast regulation](#). Ofcom does not regard linear programmes as becoming on-demand merely because a pause or live restart function is featured or deployed.

Is there a person who has editorial responsibility for the service or dissociable section?

3.25 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. As reflected in section 368A(4) of the Act, editorial responsibility encompasses two elements:

- a) general control over what programmes are included in the range offered to users, and
- b) general control over the manner in which programmes are organised in that range.

3.26 Editorial responsibility does not require the person to have control of the content of individual programmes or the distribution of the service, or dissociable section of the service. Editorial responsibility for the purposes of the Act is determined at the point of the selection of content *and* the organisation of that content.

3.27 In accordance with section 368R(5) of the Act, the person, and the only person, who is to be treated as providing an ODPS is the person who has editorial responsibility for the service. Where the selection and organisation of programmes is divided between two or more persons or companies which sit within a single business, Ofcom will exercise its regulatory judgment to determine which is best seen as having editorial responsibility under the Act.

3.28 Providers are advised, as a matter of good practice and clear allocation of roles, to address the issue of editorial responsibility in their contracts with other entities they may work with on matters such as distribution.

Does a person have general control over what programmes are included in the service?

3.29 Whether a person has general control over the selection of audiovisual content available is a key factor in assessing whether the service or a dissociable section of it is an ODPS or a VSP. General control over selection of programmes means decision-making on which individual programmes are included in the service. The specification of high-level parameters (for example, ethical and legal standards, or type or amount of programming to be offered) does not necessarily constitute general control over selection. If the provider

following as are used, by the person providing the system and in association with it, for the conveyance of the signals— (i) apparatus comprised in the system; (ii) apparatus used for the switching or routing of the signals; and (iii) software and stored data; and (iv) (except for the purposes of sections 125 to 127) other resources, including network elements which are not active.”

has general control over organisation of material on their service but does not have general control over its inclusion, the service is likely to be a VSP rather than an ODPS.

- 3.30 The definition of a VSP reflects the fact that providers typically determine the organisation of video content, including by automatic organisation or organisation by way of algorithms, but not its selection. Generally, VSP services allow users to upload video content without prior approval or intervention, and to share that content (subject to it being in line with that platform’s terms of use). For a full definition of VSPs, providers should refer to the [VSP criteria in Part 4B of the Act](#) and [Ofcom’s published guidance](#).
- 3.31 However, where a VSP’s infrastructure is used by a commercial entity or individuals to offer a range of programmes they select and organise, then such a dissociable section of the VSP will fall within the meaning of an ODPS if it also meets the other criteria laid down in section 368A of the Act.
- 3.32 An aggregated content service, such as the user interface of a smart TV or set top box, may comprise a number of different ODPS, each provided by a different entity exercising “editorial responsibility” over its own on-demand content. The selection of an entire ODPS for inclusion in this aggregated content service would not mean the aggregator is providing an ODPS, unless it has general control over the organisation and selection of programmes included in it.

Does a person have general control over the manner in which programmes are organised within the service?

- 3.33 Broadly, a person will have general control over the manner in which programmes are organised within a service if they control the way in which programmes are made available to viewers. This could, for example, include organising programmes by genre or date of release, or featuring particular programmes in prominent positions on the service.
- 3.34 However, a person may still be regarded as having general control over the organisation of programmes where they simply make them available in the form of a catalogue without utilising any further organisational tools. The key factor is that they have general control over the way in which programmes are organised.
- 3.35 In addition, programmes could also be categorised and sequenced by human curators or the use of automation or algorithms. Programmes may be presented in a generic way that is the same for all users or personalised to each user based on factors known about those users, such as their previous use of the service or their geographical location.
- 3.36 General control does not necessarily constitute total control. For example, if programmes are made available through a third-party outlet there may be more limited tools available to categorise and present them than through a proprietary outlet. Assessment in this area will be guided by the particular facts of each case.

Is the service or dissociable section made available by that person for use by members of the public?

- 3.37 As a general principle, Ofcom considers that available for use by ‘members of the public’ ordinarily refers to content that is openly accessible to the public at large and not limited to particular individuals.
- 3.38 Assessment in this area will be guided by the particular facts of each case; it will be relevant to look at the number of people who access the content, as well as the capacity for the content to be accessed more widely.
- 3.39 The fact that a service or dissociable section may require users to subscribe or register to engage with it, or that it may be subject to access controls or age verification would not, in and of itself, prevent the service from being made available to the public. For example, a service made available to users on a paid-subscription or pay-per-view basis is likely to be considered to be made available for use by members of the public.
- 3.40 By way of contrast, individual accounts on video-based social media sites which are intended for communication between friends and family are not intended to fall within scope of the regulation even if they are technically accessible to members of the public at large. These would not be considered “mass media” and would not meet the principal purpose test (see [paragraphs 3.12-3.14](#)). Similarly, video content which is very narrowly focused on dissemination of information about an organisation to its members is unlikely to be considered within scope. For example, a service providing recordings of lectures for enrolled students at an academic institution are likely to be out of scope. However, a standalone service providing access to a large collection of lectures for general interest would be considered in scope, if the other relevant criteria are met.

Consultation question 2: Do you have any comments on proposed guidance around subsection 1(b)-(d) of section 368A of the Act –

- whether the service or dissociable section is accessed on-demand;
- is there a person who has editorial responsibility for the service or dissociable section?; and

whether the service or dissociable section is made available to the public by that person?

Does that person have their head office in the United Kingdom and are editorial decisions about the service taken in the UK?

- 3.41 Services only fall within the scope of the Act if they are provided by an entity that falls under UK jurisdiction as described in subsections 368A(1)(e) and (f). The [Broadcasting \(Amendment\) \(EU Exit\) Regulations 2019](#) amended the criteria under which service providers are considered to be in UK jurisdiction. In addition to the provisions detailed in the previous sections of this guidance, a service or dissociable section is an ODPS if:

- a) the person with editorial responsibility who makes the service available to the public has their head office¹³ in the United Kingdom, and
- b) editorial decisions about the service are taken in the United Kingdom

3.42 Under 368O of the Act, Ofcom has a power to require a person who appears to be an ODPS provider to provide information for the purpose of carrying out our function in relation to ODPS, including determining whether they fall within UK jurisdiction.

Consultation question 3: Do you have any comments on proposed guidance around assessing whether an ODPS provider is within jurisdiction of the UK?

¹³ 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.

4. Notification requirements

- 4.1 Service providers are required to notify Ofcom before providing an ODPS. Services that operated before 1 November 2020 which did not meet the previous definition of an ODPS but do meet the updated definition are now required to notify Ofcom.
- 4.2 This section of the document provides some high-level information about how to notify an ODPS to Ofcom. For more detailed information on notification, please see our [How to Notify guidance document](#).
- 4.3 Service providers who 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.
- 4.4 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.
- 4.5 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.
- 4.6 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 platforms¹⁴ operated by the service provider and through which the service is provided to consumers.
- 4.7 Where it appears to Ofcom that a service meets the statutory criteria but has not been notified, Ofcom has statutory powers to request information in order to make an assessment, and to take enforcement action if a provider has failed to notify. This can include a financial sanction and directing the provider to notify.
- 4.8 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 a specialist service starts to offer significantly different programming);
 - b) a change to the location of the head office or where editorial decisions are taken that may affect the determination of jurisdiction in accordance with subsection 368A(1)(e) and (f); or

¹⁴ 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.

c) a change to any of the details provided in accordance with paragraph 4.6.

4.9 Service providers will also be required to complete an annual return confirming that the information previously supplied to Ofcom remains accurate and complete. Providers should note that significant differences that require prior notification under section 368BA of the Act must be notified to Ofcom in advance of providing the notified service with those differences, rather than within the annual return).

Consultation question 4: Do you have any comments on proposed guidance around notification of a service?

Consultation question 5: Do you have any comments on any other part of the proposed guidance which is not explicitly set out in questions 1-4?

A1. Responding to this consultation

How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document by 5pm on 26 May 2021.
- A1.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-1/odps-who-needs-to-notify>. You can return this by email.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to vod@ofcom.org.uk, as an attachment in Microsoft Word format, together with the [cover sheet](#).
- A1.4 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL, please upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A1.5 We will publish a transcript of any audio or video responses we receive (unless your response is confidential).
- A1.6 We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.7 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.8 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex Four. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.9 If you want to discuss the issues and questions raised in this consultation, please contact vod@ofcom.org.uk.

Confidentiality

- A1.10 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on [the Ofcom website](#) as soon as we receive them.
- A1.11 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.

- A1.12 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.13 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our [Terms of Use](#).

Next steps

- A1.14 Following this consultation period, Ofcom plans to publish a statement in Summer 2021.
- A1.15 If you wish, you can [register to receive mail updates](#) alerting you to new Ofcom publications.

Ofcom's consultation processes

- A1.16 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex Four.
- A1.17 If you have any comments or suggestions on how we manage our consultations, please email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.18 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:

Email: corporationsecretary@ofcom.org.uk

A2. Consultation coversheet

BASIC DETAILS

Consultation title: On-demand programme services: who needs to notify to Ofcom?

To vod@ofcom.org.uk

Name of respondent:

Representing (self or organisation/s):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts? _____

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

A3. Consultation questions

- A3.1 Please refer to our proposed guidance, aimed at helping providers understand whether they fall within the scope of the definition of an ODPS for the purposes of the Communications Act 2003. You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-1/odps-who-needs-to-notify> to respond to this consultation.

Question 1: Do you have any comments on proposed guidance around subsection 1(a) of section 368A of the Act – whether the provision of programmes is the principal purpose of a service or a dissociable section of a service?

Question 2: Do you have any comments on proposed guidance around subsection 1(b)-(d) of section 368A of the Act –

- whether the service or dissociable section is accessed on-demand;
- whether the programmes comprising the service or dissociable section are under a person’s editorial responsibility; and
- whether the service or dissociable section is made available to the public by that person?

Question 3: Do you have any comments on proposed guidance around assessing whether an ODPS provider is within jurisdiction of the UK?

Question 4: Do you have any comments on proposed guidance around notification of a service?

Question 5: Do you have any comments on any other part of the proposed guidance which is not explicitly set out in questions 1-4?

A4. Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

- A4.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

- A4.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A4.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A4.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A4.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A4.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

- A4.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.