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

Statement

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

STATEMENT:

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1. Overview

Notification requirements – in brief

On 1 November 2020 new regulations applying to UK-based on demand programme services (“ODPS”) came into force. These new rules amended the criteria used to determine whether a service would qualify as an ODPS and therefore fall within the scope of the regulatory framework. ODPS providers in the UK are legally obliged to submit a formal notification of their service to Ofcom and must comply with statutory requirements intended to prevent the inclusion of harmful content and certain types of advertising and sponsorship. Further information on the background and legislative context of the updated regulations can be found in the guidance published alongside this statement.

Providers must make their own assessment of whether their service meets the statutory criteria and should therefore be notified. The guidance, [On-demand programme services: who needs to notify to Ofcom?](#) (“the final guidance”), published alongside this statement is intended to help providers understand whether they fall within scope of the definition of an ODPS for the purposes of the Communications Act 2003 (“the Act”).

Where it appears to Ofcom that a service meets the statutory criteria but has not notified to us, we have 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.

We consulted on draft scope guidance for ODPS providers between 31 March and 26 May 2021 (see: [Consultation: On-demand programme services: who needs to notify to Ofcom?](#)).

The guidance we proposed set out to help service providers understand:

- a) whether they are providing a service that is subject to the statutory framework for ODPS under the Communications Act 2003; and
- b) when and how they might need to notify their service to Ofcom.

We received three responses in total from: Radiocentre; News UK; and Virgin Media. We have carefully considered all responses in finalising our guidance and have published all non-confidential responses at: <https://www.ofcom.org.uk/consultations-and-statements/category-1/odps-who-needs-to-notify>.

We set out the responses in detail, and our conclusions, in Section Two of this document and have published our final guidance alongside this statement.

Providers can email Ofcom at vod@ofcom.org.uk if they have any questions about the final notification and scope requirements. However, we are unable to provide legal advice about individual services and it remains the responsibility of each provider to satisfy the relevant legal obligations around notification.

2. Consultation responses and Ofcom's conclusions

2.1 This section summarises the key issues raised by respondents in relation to our consultation on draft guidance on the scope of the ODPS statutory framework ("[the consultation document](#)") and Ofcom's response to them, including any changes we have made to the [final guidance](#) document ("the final guidance"). The latter has been published alongside this statement on our website.

Our consultation document asked five questions, based broadly on the ODPS criteria set out in the Communications Act 2003 ("the Act") and the process of notification. We also asked respondents whether they had any other comments.

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?

2.2 This statement is structured along the same lines as these questions, taking each of the relevant issues raised by respondents in turn. Respondents only raised issues under Questions 1 and 4.

Providing programmes as the principal purpose of the service or a dissociable section of the service (Question 1)

Provision of ‘programmes’

- 2.3 In paragraphs 3.7 to 3.20 of the consultation document, Ofcom noted that the definition of “programmes” in the Act¹ had been significantly broadened by the removal of the requirement for content to be similar to television². Acknowledging the breadth of the definition, and to provide assistance by way of clarification, the consultation document set out a non-exhaustive list of media which would not be considered to fall within the scope of the description³.

What respondents said

- 2.4 News UK and Radiocentre raised concerns about how the new programme definition would apply to and affect the radio industry. Specifically News UK argued that the exemption specified by Ofcom in paragraph 3.10(b) of the consultation document in relation to radio content was too restrictive. Paragraph 3.10(b) stated that “audio content, such as podcasts or on-demand radio programmes, with no associated visual component beyond a single static placeholder image” would not fall within the definition of “programmes” and would therefore not be considered an ODPS.
- 2.5 News UK referred to the practice of online radio services adding video footage of radio presenters and guests to output originally broadcast on radio as audio only and offering this content on an on demand basis. As these videos did not appear to fall within the “single static placeholder image” exception in paragraph 3.10(b), both News UK and Radiocentre raised a concern that this content could be determined to be “programmes” within an ODPS. This was cause for particular concern for them as sponsorship of current affairs programmes is prohibited on ODPS but not on radio⁴. They therefore argued that this would present a challenge to the monetisation and “visualisation” of radio content and would block innovation in the radio sector.
- 2.6 News UK proposed:
- an explicit exemption to be contained within the final guidance whereby a service providing on-demand video content derived from a live stream of a licensed radio service already regulated by Ofcom be exempted from falling into scope of the ODPS framework; and

¹ Section 368ZA

² Prior to the 2020 amendments to the Act, the principal 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.

³ Paragraph 3.10

⁴ Sponsorship of current affairs programming broadcast via radio is permitted under Rule 10.3 of the Broadcasting Code: https://www.ofcom.org.uk/data/assets/pdf_file/0018/38106/section10_May16.pdf. Conversely, ODPS Rule 2.49 expressly prohibits sponsorship of both news and current affairs programming: https://www.ofcom.org.uk/data/assets/pdf_file/0018/208206/odps-rules-and-guidance.pdf.

- an amendment of the audio content exemption set out in paragraph 3.10(b) of the consultation document to allow video images of studio presenters, guests and associated graphics and branding.
- 2.7 An explicit exemption to be included within the final scope guidance was also proposed for “licensed online audio” to ensure radio stations’ websites and other sites hosting such content would not fall within the scope of the ODPS framework.

Ofcom’s response

2.8 The amended criteria in section 368(1) of the Act provide a broad definition of ODPS. According to the Act, a service will be an ODPS if:

- a) its principal purpose is the provision of programmes (see definition below),
- 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, and
- e) that person is under the jurisdiction of the UK.

In this context section 368ZA defines programmes as “programmes with or without sounds which consist of moving or still images, or of a legible text, or of a combination of those things”.

2.9 To the extent that an offering fulfils the criteria set out above it will be an ODPS. We note that there is no exemption in the Act or elsewhere for content which is derived from material licensed by Ofcom in a different format, and the legislation does not provide for Ofcom to create such an exemption.

2.10 We also recognise that one of the aims of the revisions to the AVMSD, now incorporated into UK law, was to help ensure a level playing field between all media players in audio visual markets. Therefore, should radio broadcasters elect to supplement content, which was originally produced as audio only, with video content, it is consistent with the aims of the legislation that they may be required to comply with different rules that provide for some degree of consistency between traditional TV broadcasters, ODPS and video sharing platforms (“VSPs”).

2.11 However, it should be noted that while the criteria set out in paragraph 2.9 above will operate to bring some services within the ODPS framework there are many which will still fall outside the scope of the rules. Content which is audio only will be exempt from the provisions even if made available on an on-demand basis. Websites which do not offer audiovisual content, or only offer such content as an ancillary element of a service rather than as a principal purpose will also fall outside scope. Consequently, where a radio station operates a website which offers programmes merely as a secondary enhancement to its non-audiovisual primary content the ODPS rules will not apply, although this will be a question of degree in each individual case.

Provision of news content outside of newspaper websites

What respondents said

- 2.12 News UK raised a concern that the news publisher exemption referred to in paragraph 3.6 of the consultation document does not provide sufficient flexibility for news publishers to market their services online. Paragraph 3.6(b) stated that “an online newspaper, where videos are embedded within the journalistic or editorial content of the service” will not meet the definition of an ODPS.
- 2.13 News UK explained that news publishers are in the habit of using short form video content as teasers to entice viewers to their websites. This video content is hosted not only on newspaper websites, but also replicated and distributed on channels on VSPs. News UK raised a concern that whilst the video content included on the newspaper websites would benefit from the exemption set out in paragraph 3.6(b), a news publisher channel hosted on a VSP would fall outside this exemption and therefore require notification and regulation as an ODPS.
- 2.14 News UK was concerned that this would have a detrimental effect on freedom of the press and argued that this was not the intention of Parliament, highlighting comments regarding the exemption of news publisher content made by the Secretary of State⁵. Although these comments were made in relation to the Online Harms legislation rather than the ODPS framework, News UK drew attention to statements made by the UK Government which noted the broadly similar objectives shared by the two regimes⁶.
- 2.15 News UK therefore proposed that in order to ensure news publisher content distributed by VSPs should be considered out of scope within the final guidance, a specific, broad exemption should be introduced.

Ofcom's response

- 2.16 Ofcom acknowledges the comments made by the Secretary of State and the UK Government's policy objective of protecting freedom of the press. We also acknowledge the government's assertion that “the use of videos on websites, blogs and news portals which are connected to journalistic activities falls outside the scope of the new provisions”⁷. This principle is reflected in paragraph 3.6(b) of the final guidance, relating to newspaper websites where videos are embedded with the editorial content.

⁵ Question from Julian Knight, MP to Secretary of State for Digital, Culture, Media and Sport, Rt Hon Oliver Dowden MP, 15 December 2020 on news publishers and exemption on video sharing platforms in Online Harm Legislation: <https://hansard.parliament.uk/Commons/2020-12-15/debates/1B8FD703-21A5-4E85-B888-FFCC5705D456/OnlineHarmsConsultation>

⁶ See paragraph 2.17 of the Explanatory Memorandum to the Negative SI on AVMSD, September 2020: https://assets.publishing.service.gov.uk/media/60196584d3bf7f70be53a452/Proposed_Negative_SI_-_Audiovisual_Media_Services_Amendment_Regulations_2021_EM.pdf

⁷ Audiovisual Media Services, Government response to public consultations on the government's implementation proposals - GOV.UK (www.gov.uk) published 24 July 2019: <https://www.gov.uk/government/consultations/requirements->

- 2.17 However, with regard to further distribution of video content on dissociable services the UK Government has also been clear that “standalone parts of newspapers’ websites providing video services which are independent of the journalistic activities in content and form do fall into scope”⁸. The UK Government has also been clear that “online newspapers are out of scope...except where they provide a dissociable video-on demand service”. The role of Ofcom is to interpret the statutory criteria to give effect to the intention of Parliament and we do not have the discretion to amend the ODPS scope requirements to create an additional exemption; that would be a matter for government and Parliament to decide.
- 2.18 Whether a service carrying videos of news content is dissociated from the newspaper website and therefore within the ODPS regime will be a question of degree and Ofcom will have regard to a variety of factors as set out in paragraphs 3.15 to 3.20 of the final guidance. In each case, it would be necessary to determine whether the video content made available on a website is intrinsically linked to the text articles it appears alongside. If it is, the video content would not be considered independent of the written press articles and the website would not fall within the scope of ODPS regulation. Alternatively, if the video content was dissociable to the written articles and met the principal purpose test, that section of the website would fall to be regulated.
- 2.19 Ofcom acknowledges that any assessment of these issues is likely to be very finely balanced, particularly where the principal purpose of the service is potentially contentious, and will require careful consideration of the facts of each case.

Notification (Question 4)

Reference to notification

- 2.20 In paragraphs 4.1 to 4.9 of the consultation document, we set out the practicalities of the notification requirements, including instructions on notifying more than one ODPS and providing examples of a “significant difference” to a service which would require notifying to Ofcom.

What respondents said

- 2.21 Virgin Media welcomed the further definition of “significant difference” but requested clarity on the requirement to file an annual return confirming that the information supplied to Ofcom remains accurate and complete. The respondent queried the necessity of this additional administrative requirement and asked whether Ofcom would be responsible for reminding providers of this obligation.

[for-video-sharing-platforms-in-the-audiovisual-media-services-directive/outcome/audiovisual-media-services-government-response-to-public-consultations-on-the-governments-implementation-proposals](#)

⁸ Ibid.

Ofcom's response

- 2.22 Ofcom confirms that in accordance with its obligations in the Act⁹ it will require an annual return to be filed. This is to ensure that information held about notified ODPS is accurate. This process is currently being formalised and Ofcom will issue further practical instructions at a later date.

⁹ Section 368C(1) requires the appropriate regulatory authority to take steps to ensure that ODPS providers comply with their obligations.

3. Minor changes

- 3.1 As part of the process of finalising our guidance on which ODPS might fall into scope of the ODPS statutory framework, ([On-demand programme services: who needs to notify to Ofcom?](#) (“the final guidance”), we have made the following minor changes to the final guidance:
- a) a clarification that the definition of members of the public for the purposes of section 368A(d) of the Act only relates to members of the public in the UK or in countries to which the Audiovisual Media Services Directive applies. ODPS which are not available to citizens in those jurisdictions will not fall within the statutory ODPS regime; and
 - b) additional wording to explain Ofcom’s approach to enforcement of the requirement to notify an ODPS. The expanded definition of “programmes” means there could be many thousands of ODPS within Ofcom’s jurisdiction, including many small-scale services operated by individuals. As a result, it would be practically unworkable for Ofcom to ensure that all eligible services are notified. Ofcom’s intention is to focus on larger services or those which are providing content which pose the biggest risk of potential harm to the public, including under eighteens.
- 3.2 Ofcom is required to assess the potential impact of all its functions, policies, projects and practices on the equality of individuals to whom those policies will apply. An equality impact assessment (“EIA”) assists Ofcom in making sure that it is meeting its principal duty of furthering the interests of citizens and consumers regardless of their background or identity. We have given careful consideration to whether or not the final guidance will have a particular impact on race, age, disability, gender, pregnancy and maternity, religion or sex equality. We do not envisage that our final guidance would have a detrimental impact on any particular group of people. We have added this EIA into the text of the final guidance.
- 3.3 Where relevant, we have also made non-substantive changes to our text to better reflect the criteria and wording in the Act.