

APPEAL BY NEWS GROUP NEWSPAPERS LIMITED AGAINST A NOTICE OF DETERMINATION BY ATVOD THAT THE PROVIDER OF THE SERVICE “SUN VIDEO”¹ HAS CONTRAVENED SECTION 368BA OF THE COMMUNICATIONS ACT 2003

OFCOM DECISION

Section 1 - Introduction: Scope of this Decision

1. This document sets out Ofcom’s Decision in respect of News Group Newspapers Limited’s (“News Group”) appeal against the determination by the Association for Television On Demand² (“ATVOD”) that “Sun Video” is³ an “on-demand programme service” (“ODPS”) for the purposes of Part 4A of the Communications Act 2003 (“the Act”).
2. In respect of News Group’s appeal Ofcom has powers to:
 - a. uphold ATVOD’s decision;
 - b. quash ATVOD’s decision in whole or in part and remit the decision back to ATVOD with reasons, for it to reconsider in light of those reasons; or
 - c. substitute our decision for ATVOD’s.
3. On 25 October 2010 ATVOD informed News Group of its preliminary view that the “*Sun Video*” section of The Sun’s website may be an ODPS. ATVOD’s initial letter did not set out reasons or evidence for this view (see paragraph 17 below). News Group made detailed representations in response on 10 December 2010 (see paragraph 18 below). On 11 February 2011 ATVOD issued its determination (the “Determination”) that the “Sun Video” service was an ODPS.⁴ The Determination contained a statement of why ATVOD considered the service was an ODPS. It relied as evidence on references to three pieces of audio visual material in the relevant section of the website and screen grabs of two pages taken from that section. News Group appealed on 22 March 2011, making detailed appeal submissions (see paragraphs 21 - 33 below).
4. Ofcom acknowledges that News Group’s appeal is made against one of the first of a number of determinations ATVOD made in similar cases involving audio visual material on newspaper and magazine providers’ websites. They raise important and difficult questions under complex new legislation and for which no precedents exist.

¹ www.thesun.com.uk/sol/homepage/video

² As it was named at the time of its determination. It is now the Authority for Television On Demand

³ Or was at relevant times

⁴ and determined that, as the provider of the ODPS, News Group was contravening or had contravened section 368BA of the 2003 Act by failing to notify ATVOD of the service.

5. Ofcom has decided that the reasons and evidence ATVOD relied upon in its Determination were not sufficient for it to decide that the Video section of The Sun's website was an ODPS. In addition, Ofcom considers that, in the Determination, too much focus was placed on the "Sun Video" section of The Sun's website. Ofcom notes ATVOD's comments of 7 December 2011 on Ofcom's Preliminary View document issued on 9 November 2011 (see below), that its original consideration of The Sun's website was based on the site as a whole. However, in the determination it appears to have considered that section of the website, and certain material in it, without looking enough at the whole of what was provided on the website and considering whether there is anything amongst that material which is a service whose principal purpose is the provision of *TV-like* programmes.⁵ Ofcom therefore upholds News Group's appeal, and sets aside ATVOD's Determination.
6. Ofcom has sought to recover additional evidence of the contents of The Sun's website at the time ATVOD considered it. This should not normally be part of Ofcom's appellate function. We have done so, exceptionally, in this appeal, because there are not enough reasons and evidence in the Determination and because this is the first appeal by a content provider of this kind (i.e. a newspaper provider) that Ofcom has considered.
7. Ofcom's view, applying the statutory scheme, and taking account of the reasoning and evidence relied upon by ATVOD, together with the evidence it subsequently provided to Ofcom, the evidence (and submissions) from News Group and the evidence found by Ofcom, is that the Video section of The Sun's website was not a service having the principal purpose of providing audio visual material. Ofcom's Decision that the relevant section was not an ODPS should, therefore, be substituted for ATVOD's.
8. Ofcom has also, given the importance of the issues raised, considered the current⁶ contents of The Sun's website. Ofcom's assessment is that, in itself, the Video section of the site is not⁷ an ODPS. Ofcom also makes a Decision to that effect.
9. In order to provide some guidance for ATVOD to develop and apply in similar cases in the future, the following sections of this Decision explain the approach Ofcom has taken and which, in Ofcom's view, was the appropriate approach for ATVOD to have taken. In doing so, Ofcom notes that other audio visual material is also, or has also been, provided on The Sun's website.⁸ It is for News Group to consider whether any of the audio visual material provided now or in the future is an ODPS and to notify ATVOD if

⁵ The full statutory test is set out in paragraph 52 below

⁶ As of 14 and 15 September (where in this Decision we refer to the current position we mean as relevant material was presented at the time Ofcom reviewed the relevant website, mainly on these dates)

⁷ As the material in it is currently provided

⁸ Such as, "Rugby World Cup 2011 TV channel" at

http://www.thesun.co.uk/sol/homepage/sport/rugby_union/3798355/Rugby-World-Cup-2011-TV-channel-showing-highlights-and-previews.html, which appears to have been added after ATVOD's determination (though appears no longer to be available in precisely the same form), and the video showing Premier League football news and match highlights on the front page of the site's Sport section at <http://www.thesun.co.uk/sol/homepage/sport/>

appropriate. If it does not do so, it is for ATVOD, applying the approach set out in this Decision, to determine if News Group is providing an ODPS.

Section 2 - Summary of the Legal Position

10. Part 4A of the Act is a new statutory regime for the regulation of “ODPSs.” It was inserted into the Act by the Audiovisual Media Services Regulations 2009 (“the 2009 Regulations”), to implement the requirements of the Audiovisual Media Services Directive⁹ (the “AVMS Directive”). It was amended by The Audiovisual Media Services Regulations 2010 (“the 2010 Regulations”).

11. A service is only an ODPS if it satisfies the defining criteria in section 368A of the Act. Key amongst these for present purposes is that in section 368A(1)(a), that, “... a service is an “ODPS” if -

..... its principal purpose is the provision of programmes¹⁰ the form and content of which are comparable to the form and content of programmes normally included in television programme services.”

12. Where a service is an ODPS, its provider is subject to a requirement to notify ATVOD and pay a fee. The provider must also ensure the ODPS meets a limited number of regulatory requirements.¹¹

13. A key purpose of the AVMS Directive, in the present context, is to provide a measure of fair competition between those providing:

- a. traditional (linear) television broadcasting services; and
- b. on-demand services that are essentially the same, or sufficiently similar, and which compete for viewers and advertisers.

The requirements of Part 4A of the Act reflect this.

14. As part of a co-regulatory regime, Ofcom has designated ATVOD as the “appropriate regulatory authority” to carry out certain functions under Part 4A of the Act. As part of that designation, ATVOD has power to decide what is an ODPS (which power, by virtue of section 368B of the Act, Ofcom retains concurrently). Any such decision is “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.*”¹²

⁹ The 2009 Regulations originally implemented a former version of the AVMS Directive: Directive 2007/65/EC. However, that Directive has since been consolidated with other Directives into Directive 2010/13/EU, with the result that the relevant recitals and articles have changed in their numbering.

¹⁰ Section 405 of the Act defines “programme” for the whole Act (except in so far as the context otherwise requires) as including “*an advertisement and, in relation to a service, anything included in that service.*”

¹¹ For example, an ODPS must not contain any material likely to incite hatred based on race, sex, religion or nationality

¹² Ofcom’s “*Procedures for handling appeals on scope and for imposing sanctions in relation to On-Demand Programme Services*” were the subject of a consultation (published 17 December 2010) which ended on 11 February 2011: see <http://stakeholders.ofcom.org.uk/consultations/on-demand-programme-services/summary>. Pending Ofcom’s publication of the finalised procedures, and for the purposes of determining this appeal, Ofcom applied the procedures as set out in the consultation.

15. As set out in those procedures, Ofcom's decision in any appeal, "... may:
- *uphold ATVOD's decision;*
 - *quash ATVOD's decision in whole or in part and remit the decision back to ATVOD with reasons for it to reconsider in light of those reasons;*
 - *substitute Ofcom's decision for that of ATVOD....."*
16. Amongst other things Ofcom has designated to ATVOD is the production of guidance on how it will perform certain of its functions (see paragraph 56 below). The guidance ATVOD has produced includes "*Guidance on who needs to notify*" (the "*Notification Guidance*").¹³ This contains guidance on its approach to identifying ODPSs whose providers need to notify their service to ATVOD (see paragraphs 57 - 58 below).

Section 3 – Chronology and ATVOD's Determination

17. On 25 October 2010 ATVOD informed News Group by letter that its preliminary view was that the *Sun Video* section of The Sun's website may be an ODPS in respect of which the required notification had not been given. ATVOD's letter did not set out any reasons or evidence for its preliminary view. It invited News Group's representations within 21 days.
18. News Group made representations on 10 December 2010. These included:
- a. *The Video section of the website, "... is not an ODPS. It is part of an electronic version of The Sun newspaper; it is not a service in its own right; and the video material is not TV-like."*
 - b. *"The home page on the Site is the entry point to an electronic version of The Sun, which is what the Site consists of. The Site is designed primarily as a text-based experience, supplemented by still and moving pictures, sound and various interactive features. The video element is a part, but not at all the principal part, of the offering."*
 - c. *"The home page presents the main editorial material, such as Latest News and Showbiz Gossip, in a central column surrounded by a very wide variety of navigation and other options for users. Video is among the navigation options in the column to the left of the screen together with, in equal size and style of type, News, Sport, Showbiz, TV, Woman, Fun & Games, Virals, Page 3, Dear Deidre, Mystic Meg, Motors and so forth."*

¹³ See http://www.atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf

- d. *“A story or other article will typically appear as a picture and headline on the home page from which the user clicks through to a page on which the article appears in full. It is presented primarily as text An article will frequently have a video clip embedded in it containing material which supplements it. The clip varies in length but is typically around 30 seconds although sometimes may run for a few minutes.”*
 - e. *“As a convenience to users, links to the embedded video items are also collected together [in the Video section].”*
 - f. *“The [Video section], and which you suggest is itself an ODPS, is a page which forms part of the Site and which offers a collection of video material. Its principal purpose is to supplement the text element of the Site, which is why there are links back to the original article ... It is properly regarded as an integral part of the service provided by our clients by means of the Site not a separate service in its own right.”*
 - g. *“Some clips appear on or may be found via [the Video section] without a related article. These are exceptions to the general rule”*
 - h. *“For these reasons, the [the Video section] is part and parcel of the Site which is an integrated offering It is an integral part of the Site and, with its links to other pages, is a means of navigating around it. In effect it gathers together the subsidiary materials that appear elsewhere on the Site and they make complete sense only when viewed in that context.”*
 - i. *“.... the nature and means of access to the service, where the newspapers’ name and masthead appears on every page, must lead the user to understand that he or she is in an online newspaper environment and not one which would attract broadcasting or ODPS regulatory protection.”*
19. On 11 February 2011 ATVOD made its Determination that what it found to be the *Sun Video* service was an ODPS.¹⁴ It relied on the reasoning in the following paragraph, which drew on what it had said in the *Notification Guidance*. It relied as evidence on references to three pieces of audio visual material in the relevant section of the website and screen grabs (annexed to the Determination) of two pages taken from that section (which are at Appendices 6 and 7 to this Decision). ATVOD said these showed that:

“.... the URL and title of the section have been changed since our original correspondence, from ‘Sun TV’ to Sun Video,’ and from <http://www.thesun.co.uk/sol/homepage/video/300101/Sun-TV-Video.html> to <http://www.thesun.co.uk/sol/homepage/video/>.”

¹⁴ and determined that, as the provider of the ODPS, News Group was contravening or had contravened section 368BA of the 2003 Act by failing to notify ATVOD of the service.

20. In the Determination ATVOD sought to address the operation of *Sun Video* under each of the defining statutory criteria in section 368A(1) of the Act. It focussed in particular on the criterion in section 368A(1)(a) of the Act, and the main grounds on which ATVOD decided that *Sun Video* was an ODPS were:
- a. *“... [a] single website or domain may contain more than one service”*
 - b. *“Sun Video section does appear to ATVOD to constitute a service in its own right, albeit a service which sits alongside an electronic version of a newspaper.”*
 - c. *“The video content is aggregated on a discrete section of the website providing a catalogue of viewing options.”*
 - d. *“... the viewer is not invited to consider the content as subsidiary or ancillary to the online version of the print newspaper.”*
 - e. *“Sun Video is presented as a consumer destination in its own right ...”*
 - f. *“... the programmes provided within Sun Video service can be viewed, enjoyed and made sense of without reference to the newspaper offering”*
 - g. *“..... a thematic or topical connection to the (online or offline) newspaper offering is not sufficient to make the video service an integral and ancillary part of the online version of the magazine [sic], given the presentation of the service as a video on demand service in its own right.”*
 - h. *“The programmes themselves are comparable to the form and content of programmes normally included in television programme services, in that they follow the conventions of TV programmes, with edited opening sequences, on-screen captions, music soundtrack and presenters (for example ‘Exclusive Jay Kay chat’ which is over 13 minutes long)”*
21. The Determination also set out News Group’s right to request an appeal to Ofcom and referred to our draft appeals procedures.¹⁵ By letter dated 22 March 2011, News Group¹⁶ wrote to Ofcom to request an appeal, raising two grounds:

¹⁵ It also informed News Group that if it did not appeal, or if any such appeal were unsuccessful, ATVOD may issue an enforcement notice under s.368BB(1)(a) of the 2003 Act following consultation with Ofcom. It further advised News Group that ATVOD could refer the matter to Ofcom for consideration of the imposition of a financial penalty under s.368BB(1)(b) of the Act.

¹⁶ via Harbottle & Lewis, its legal representatives at that time

- a. that the Video section of The Sun newspaper's website is not a *service* within the meaning of section 368A(1); and
- b. even if that Video section is a *service*, its principal purpose is not the provision of *TV-like programmes* as set out in section 368A(1)(a).

News Group did not dispute ATVOD's application of any other criterion under section 368A(1).

22. In support, News Group provided a description of The Sun's website and the Video section as of 18 March, with nine screen grabs providing examples of how to access material. It noted that pages containing audio visual material clearly displayed the masthead of The Sun (as did the rest of the online newspaper) with "Video" used as a generic descriptor, not a trade name. It also noted that navigation, and particularly the extensive cross-linking between material, is one feature that distinguishes online versions from printed newspapers. It stated that the arrangement of audio visual material into a discrete section is merely part of enhancing the browsing experience and is an "*integral part of the online newspaper service.*"

23. In particular, News Group provided a screen grab of The Sun website's homepage on 18 March 2011 (see Appendix 8 to this Decision) and said of its contents:

"The link to the "Video" section appears in the main menu bar on the left of the screen.

Clicking on the "Video" link either there or on other pages of the site, or on a link within an article, or on a link in the footer of a page, takes the user to a page on which the active part of the page is headed simply "VIDEO". In other words, the title of the active part of this page in this section of the site is not a trade name but is simply generic. The title of the page itself is unambiguously "The Sun". How it appears is illustrated on the next page."

24. It also provided three screen grabs of the front page of the Video section as of the same date (Appendix 9). These showed thumbnail links to individual pieces of audio visual material organised into sub-sections.¹⁷ Each of the thumbnail links shown also contained a link to "*Read full article*" related to the audio visual material.

25. News Group also made specific submissions in support of each ground of appeal. As to the first ground, it noted that section 368A(1) does not define "*service.*" So, it is necessary to define the scope of a service before applying the defining criteria in that section. News Group stated that, "*..... the definition is plainly not intended to be applied to individual parts of a service or*

¹⁷ Such as, "*The Sun Today,*" "*News*" etc.,

to permit a service to be divided up into a potentially unlimited number of subdivisions to which the statutory criteria may then be applied.”

26. News Group also noted that Recitals 21 to 28 of the AVMS Directive explain the characteristics of an audio visual media service. Likewise, that Recital 29 states that all those characteristics, “*should be present at the same time.*” It said section 368A must be interpreted in light of the Directive.¹⁸
27. News Group drew particular to Recital 22’s exclusion of services where “*any audiovisual content is merely incidental to the service and not its principal purpose.*” It also commented on Recital 28’s statement that “*electronic versions of newspapers and magazines*” are excluded from the Directive’s scope. It said this cannot refer simply to “*e-text or e-paper versions*” as these are manifestly not audio visual. It concluded that Recital 28 excludes online versions of newspapers “*that include audiovisual elements.*”
28. News Group cited parts of paragraphs 2.11 to 2.16 of ATVOD’s *Notification Guidance* that it considered support its position.¹⁹ And, it took issue with specific assertions in the Determination as follows:
 - a. “*The viewer is not invited to consider the content as subsidiary or ancillary to the online version of the newspaper*” – News Group said, “*A visitor to each site cannot conceivably be in any doubt that he or she is anywhere other than on a site which is the online version of The Sun The masthead of the ... newspaper is on the Home page and on every other page. The Home page makes the nature of the site as an online version of the newspaper clear beyond doubt. The video option is one among many.*” It provided a further three screen grabs of The Sun website’s home page and the front page of the Video section which it said showed, “*The Video option is one amongst some 14 headline options in the navigation column on the left of the main item, along with other related options as well.*”
 - b. The Video section, “*is presented as a consumer destination in its own right*” – The video option is one amongst several, and readers of the printed newspaper are commonly invited to visit the website’s main URL, not the Video section specifically.
 - c. “*The programmes... can be viewed, enjoyed and made sense of without reference to the newspaper offering*” – This is a purely hypothetical point, ignoring the reality that the relevant audio visual material has not been separated from the online newspaper (it is The

¹⁸ In accordance with case law, in particular, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1992] 1 CMLR 305

¹⁹ Particularly to the extent it distinguishes between (1) audiovisual material as a supplementary part of an online newspaper and (2) “*giving over a distinct section of its [the newspaper’s] website to TV like programmes which have no clear and direct link to the broader ‘newspaper’ offering*” (paragraph 2.12). Likewise, where it states that sections of websites will not be seen as discrete services where the audio visual elements are, “*.... an integral and ancillary element of the broader offering.*”

Sun's policy not to include any videos without an associated article). Nonetheless, many of the videos take their meaning from the context of the written text articles in which they appear, a "*very large proportion*" would not make sense on their own, without this context, and, as a whole, the material would not "*exist as a coherent consumer offering*" shorn of its connection with the newspaper.

- d. "*A thematic or topical connection to the (online or offline) newspaper offering is not sufficient to make the video service an integral and ancillary part of the online version*" – Connections between the relevant audio visual material and written content are more than merely thematic or topical. News Group included ten bullet points in support of this submission, including that, "*Each video item on The Sun website is linked to the related article by the "Read full article" link illustrated above.*"
29. As to the second ground of appeal, News Group said the comparability of the form and content of the relevant audio visual material to that of programmes normally included in television programme services is only in issue if The Sun's website's principal purpose is the provision of audio visual material. It nonetheless denied the material had the required comparability.
30. News Group referred to Article 1(1)(b) of the AVMS Directive which defines a "*programme*" and to Recital 24. News Group argued that the relevant audio visual material "*cannot readily*" be said to fall within the examples of "*programmes*" in Article 1(1)(b). That is so even with the need to interpret "*programme*" in a "*dynamic*" way as set out in Recital 24.
31. News Group gave examples of the shortest and longest audio visual material on the website. It said the briefest (a five second sequence of a light fitting falling unexpectedly on a reporter) is clearly not the sort of material that would appear as a television programme "*in its own right*," while the longest (a "*web-chat*" with a pop group) is "*a creature of the internet*" and not the sort of material likely to feature in that form on a television programme. It further noted that many clips are "*virals*," that programmes are not made using "*storyboarding*," a separate sound department, script supervisors and a range of other features associated with traditional television programmes.
32. News Group also relied on the argument that audiovisual material on the website is not comparable in form and content to that of items scheduled for broadcast on (linear) television as required in Article 1(1)(b), that they are not in "*competition*" with television broadcasts as set out in Recital 24, and the nature and means of access does not give rise to a user expectation of regulatory protection.
33. News Group concluded its submissions by responding to other points made by ATVOD in the Determination. These included points about the use of

“Sun-TV” in the URL for pages of the relevant Video section and the titling of that section as “Sun TV:”

- a. *“So far as the inclusion of ‘TV’ in the URL of the video section is concerned, ... our clients are puzzled by ATVOD’s evidence. the URL does not and did not end “... Sun-TV-Video.html”. “TV” did not form part of it. The URL ended “Sun-Video.html”. When the original correspondence was received from ATVOD, we found, however, that if the URL was adapted within the browser to include Sun-TV-Video.html, it was possible to navigate to the site, notwithstanding that it did not correspond with the actual URL of the page. We found that that was also so if any other word were substituted for “Sun-TV” in the syntax of the URL. The expressions before the hyphen were evidently not an essential part of the syntax.”*
 - b. *“..... contrary to what ATVOD says in its letter, the title of the video section was not Sun TV. That expression appeared only as a call to action on Twitter only.”*
34. In light of the limited evidence and reasoning in ATVOD’s Determination, and given the importance of this appeal, which is the first of its kind that Ofcom has considered, we took the view that we should, exceptionally, seek additional evidence of the contents of The Sun’s website at the time ATVOD considered the Video section of it. We therefore requested from ATVOD in June 2011 evidence (screen grabs) of the material it considered when making the Determination. On 29 June, ATVOD provided to Ofcom the following 12 screen grabs taken from the website, two of which it had relied upon in its Determination.
35. The first set of screen grabs were taken on 25 October 2010. They related to three pieces of audio visual material,²⁰ the first and third of which were also annexed to ATVOD’s Determination. They are Appendices 10 - 12 to this Decision. As shown in those Appendices, the screen grabs were accompanied by these lines of commentary by ATVOD (some but not all of which form part of the specific reasoning in its Determination):
- a. *“SunTV logo, Sun-TV-Video URL, prominence of video material on pages where videos played”* (Appendix 10);
 - b. *“Promotional material around content”* (Appendix 11); and
 - c. *“Description of programme as a ‘show’ and one ‘episode’ in a series”* (Appendix 12).

²⁰ “Hollie rocks our World,” “Harry Hill’s Little Internet Show,” and “Insider’s Guide to London fashion.”

36. The second set of screen grabs were taken on 31 January 2011. They related to three other pieces of audio visual material.²¹ They are Appendices 13 - 15 to this Decision. As shown in those Appendices, the screen grabs were accompanied by commentary by ATVOD (some but not all of which are part of the specific reasoning in its Determination):
- a. *“References to ‘TV’ (in title and URL) now removed. Link only to ‘motorsport’ in general”* (Appendix 13); and
 - b. *“‘Babes’ and ‘Page 3’ programmes linking only to other similar programmes”* (Appendices 14 and 15).
37. The third set of screen grabs were taken on 8 February 2011. They related to four further pieces of audio visual material²² and to two other more general points. They are Appendices 16 - 21 to this Decision. As shown in those Appendices, the screen grabs were accompanied by commentary by ATVOD (some but not all of which are part of the specific reasoning in its Determination):
- a. *“Appearance of videos grouped into categories. Links to sub-sections of videos”* (Appendix 16);
 - b. *“Jay Kay programme. Link to related text article”* (Appendix 17);
 - c. *“TV-like title”* (Appendix 18);
 - d. *“General nature of link to ‘Sky News’ videos”* (Appendix 19);
 - e. *“TV-like interview set-up with on-screen captions”* (Appendix 20); and
 - f. *“Lack of prominence of PCC notice at bottom of page (note scale)”* (Appendix 21).

Ofcom itself also searched The Sun’s website for other material, relating to this further evidence provided by ATVOD, from around the time ATVOD considered the Video section. In addition, and exceptionally, we viewed and assessed the material provided on the website at the time Ofcom was considering the appeal, in particular on 14 and 15 September.

38. On 7 October Ofcom issued to News Group a Preliminary View to the effect that we were was provisionally minded to uphold its appeal. News Group was given 10 working days in which to make representations in response to the Preliminary View.

²¹ *“Original Stig’s top 5 go-karting tips,” “Picture Perfect,” and “My Sexiest Shoot.”*

²² *“Exclusive Jay Kay Chat,” “Victoria’s Fitness Secrets,” and “Video Nikitta murder latest,”* parts of the front page of the Video section showing the *“Virals”* and *“Lifestyle”* sub-sections and a page showing reference to regulation of The Sun website by the Press Complaints Commission.

39. At the same time, Ofcom provided the Preliminary View to ATVOD and gave it the opportunity to comment on it.
40. ATVOD responded on 20 October that it considered that the Video Section of The Sun’s website was an ODPS at the time ATVOD considered it and in respect of which it had made its Determination. It said Ofcom should further consider the position as at that time.
41. News Group responded on 21 October. It made no substantive comments on Ofcom’s Preliminary View.
42. Ofcom considered ATVOD’s comments. In light of them, we amended the Preliminary View to make clearer our view of the position at the time ATVOD considered and made its Determination about the relevant Video section. We maintained the provisional view that that section of The Sun’s website was not (and is not) an ODPS, and that the appeal should be upheld and ATVOD’s Determination set aside.
43. Ofcom issued the amended Preliminary View to News Group (to its solicitors, Davenport Lyons) and ATVOD on 9 November. We gave each 10 working days in which to comment on it.²³ News Group made no comments. Having sought more time to do so, ATVOD made comments on 7 December.
44. ATVOD’s comments on the amended Preliminary View were to effects including the following:
 - a. It did not misapply the relevant statutory scheme. In particular:

“It is clear from the Determination that ATVOD did not take as its starting point the video section of the website and that this was not the main or only focus of its inquiry. The Determination states that “[a] single website or domain may contain more than one service” precisely because ATVOD had looked at the whole website and concluded that there was amongst the audio visual material a service whose principal purpose was the provision of “TV-like” programmes ATVOD’s conclusion was therefore that the Sun website contained both an online version of The Sun newspaper and also a service whose principal purpose was the provision of “TV-like” programmes. This is clear from the description of Sun TV/ Sun Video as “a service which sits alongside an electronic version of a newspaper.””

²³ Again, we did so, exceptionally, in light of the novelty, difficulty and importance of the matters covered by ATVOD’s Determination and the decision Ofcom proposed to make in the appeal. We would not necessarily do so in other cases.

- b. The reasons and evidence it set out in its Determination were sufficient for discharging its function of determining that Sun Video was an ODPS.
- c. ATVOD properly applied the relevant parts of the *Notification Guidance* to News Group's provision of audio visual material on The Sun website at the time ATVOD considered it. That material met the "*principal purpose*" and "*comparability tests*" Ofcom had set out in the Preliminary View (see below). The submissions ATVOD made on these points included, in particular:
- i. The Sun's website underwent significant changes between the time ATVOD considered it and when it was reviewed by Ofcom.
 - ii. In relation to the time ATVOD considered the website, "*....the evidence available to Ofcom demonstrates the relevant section:*"
 - *... had a separate identity (if not a homepage) as "Sun TV"*
 - *.... comprised a catalogue of audio visual material*
 - *... provided access to that catalogue of material*
 - *.... presented and styled that audiovisual content collectively as a TV-like service called "Sun TV" [see Appendix 12]*
 - *[was] marketed as a separate service as "Sun TV" and later as "Sun Video"²⁴*
 - *.... organised the content into TV-style "channels" [see Appendix 12]*
 - *.... included a significant amount of audio visual content of substantial duration – i.e. lasting more than "a very small number of minutes"²⁵*
 - *..... contained only a limited number of links to non-audiovisual content*

²⁴ by, "*....inviting users of the service to "follow Sun TV on Twitter" [see Appendix 12] and to "follow Sun Video on Twitter" [see Appendix 13]*)

²⁵ "*.... including the soft "adult" videos on the "Page 3" channel or sub-section and videos such as "Exclusive Jay Kay Chat" which is referred to in ATVOD's Final Determination letter and runs at over 13 minutes*"

- *on an overall assessment could not be said to be integrated into, nor ancillary to, another service*²⁶
- iii. The evidence in Appendices 12 – 20²⁷ of the amended Preliminary View does not show links between audio visual material in the Video section of The Sun’s website and written content elsewhere on the site. ATVOD included an analysis of those parts of these Appendices which are screen grabs from the Video section and said these, “... *show examples of the layout where a selected video appears alongside links which take the viewer only to other video subsections and not to a related article.*”
 - iv. [By way of a summing up], “... *a significant amount of the relevant audio visual material was catalogued and accessed via a separate section of the relevant website; a significant amount of the audio visual material appeared to be of substantial duration; there were few links between the audio visual material and the electronic newspaper articles.*”
- d. On the *comparability* part of the statutory definition of an ODPS, ATVOD also submitted that, if Ofcom maintained our view that the Video section of The Sun’s website was not (and is not) a service having the required *principal purpose* (see below), our Decision should not include any view on the *comparability* of relevant audio visual material. Such a view would not, in those circumstances, be necessary. It would be more appropriate for further guidance on comparability to be the product of consultation between Ofcom, ATVOD and relevant stakeholders.
 - e. News Group’s provision of audio visual material on the Sun website at the time ATVOD considered it was likely to compete for the same audience as television broadcasts. The nature of the material and the means of access to it would lead users reasonably to expect regulatory protection within the scope of the AVMS Directive. In particular on these points ATVOD said:
 - i. It is not, as Ofcom proposed, appropriate also to consider²⁸ whether a user of a service, “...*when viewing such material, would have considered, or consider, himself to be watching a television programme service competing with linear television programme services.*”
 - ii. The prominent branding and marketing of the relevant audio visual material as “*Sun TV*,” its organisation into channels or

²⁶ “(in this case the electronic newspaper provided elsewhere on the website)”

²⁷ and now this Decision

²⁸ In addition to points of Ofcom’s analysis that ATVOD agreed with

sub-sections of VOD content such as “*Sky News*” (showing footage from a broadcast TV channel), the use of TV personalities such as Harry Hill and Stig, the high, professional quality of much of the video, the inclusion of pre-roll TV-like advertising and, in some cases, TV-like programme sponsorship announcements, and the use of conventions such as captions, mean a user wanting to watch, for example, a rolling news programme, or a soft-core “*erotic*” TV programme, may well have considered The Sun’s videos to be among his competing options. Some of these factors also go to, and should be given more weight in, any consideration of the question of whether a viewer, when watching the material, would consider himself to be watching a television programme service competing with linear television programme services.

- f. ATVOD’s application of the statutory scheme was properly conducted, its Determination was rational and was correctly arrived at in accordance with the *Notification Guidance*. The Video section of The Sun’s website was an ODPS at the time ATVOD considered it. The Determination should therefore be upheld.

Section 4 - Ofcom’s Decision

The Decision

45. The powers Ofcom has in an appeal like the present²⁹ mean we may review the decision ATVOD made and/or consider the matter under appeal afresh and on its merits, and decide to remit the matter to ATVOD or make our own decision in place of ATVOD’s.
46. Ofcom’s starting point will be to consider the position at the time ATVOD made its determination. However, we recognise that the provision of audio visual material may be constantly evolving. It may, therefore, be appropriate for Ofcom also to consider material offered by a provider subsequently to ATVOD’s determination. In particular, where an appellant has made representations to us about the material it offers both at the time of ATVOD’s determination and later.
47. In making this Decision, Ofcom has considered in particular:
 - a. ATVOD’s preliminary view that “*Sun Video*” was an ODPS, issued to News Group on 25 October 2010
 - b. News Group’s representations to ATVOD on 10 December 2010, about ATVOD’s preliminary view;

²⁹ by virtue of the Act, the Designation and our (draft) appeals procedure

- c. the reasoning and two screen grabs of evidence (taken from The Sun website on 25 October 2010) relied upon by ATVOD in its Determination on 11 February 2011;
- d. the appeal submissions and accompanying evidence provided to us by News Group in March 2011;
- e. the 12 screen grabs ATVOD provided to us in June 2011 (variously taken from The Sun website on 25 October 2010, 31 January 2011 and 8 February 2011), ten of which were additional to those it relied upon in the Determination;
- f. evidence of the audio visual material provided in the Video Section of The Sun's website at the time Ofcom considered the appeal (mainly as at 14 and 15 September 2011); and
- g. the evidence from Ofcom's searches of The Sun's website, in October and November 2011, of the service(s) provided on the website at (or around) the time ATVOD considered the Video section (between 25 October 2010 and 8 February 2011).³⁰

We have also considered ATVOD's *Notification Guidance* and its comments of 20 October and 7 December 2011 on Ofcom's Preliminary View.

48. In light of this consideration, Ofcom has decided that the reasons and evidence ATVOD relied upon in its Determination were not sufficient for it to decide that the Video section of The Sun's website was an ODPS. In addition, Ofcom considers that, in the Determination, too much focus was placed on the "Sun Video" section of The Sun's website. Ofcom notes ATVOD's comments of 7 December 2011 on Ofcom's Preliminary View document issued on 9 November 2011 (see above and below), that its original consideration of The Sun's website was based on the site as a whole. However, in the determination it appears to have considered that section of the website, and certain material in it, without looking enough at the whole of what was provided on the website and considering whether there is anything amongst that material which is a service whose principal purpose is the provision of *TV-like* programmes.³¹ Ofcom therefore upholds News Group's appeal and sets aside ATVOD's Determination.
49. Further, Ofcom's view, applying the statutory scheme, and taking account of the reasoning and evidence relied upon by ATVOD, together with the evidence it subsequently provided to Ofcom, the evidence (and submissions) from News Group and the evidence found by Ofcom, is that the Video section of The Sun's website was not a service having the principal purpose of

³⁰ In light of the fact that the provision of audio visual material is likely constantly to evolve, Ofcom considers that ATVOD, as the body which makes initial determinations, should seek to preserve sufficient images (or other evidence) of relevant material at the time of its determination. We also acknowledge that the decision making and appeal process, including Ofcom's role in it, should be conducted in a timely manner.

³¹ The full statutory test is set out in paragraph 52 below

providing audio visual material. Ofcom's Decision that the relevant section was not an ODPS should, therefore, be substituted for ATVOD's.

50. In addition, applying the statutory scheme to the written content of The Sun's website and the audio visual material in the Video section at the time Ofcom considered the appeal, Ofcom does not, for the reasons set out in this Decision, consider that the relevant section of the site, in itself, is now³² an ODPS.³³

Section 5 – The Statutory Scheme

51. The provisions of Part 4A of the Act and of the AVMS Directive relevant to the present appeal are as follows. Relevant provisions of ATVOD's *Notification Guidance* are also referred to.

"ODPSs"

52. Section 368A of the Act sets out the meaning and defining criteria of an "ODPS." Specifically, section 368A(1)³⁴ provides that, for the purposes of the Act, "a service is an "ODPS" if--
- a. *its principal purpose is the provision of programmes³⁵ the form and content of which are comparable to the form and content of programmes normally included in television programme services,³⁶*
 - 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 use³⁷ by members of the public; and*
 - e. *that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive".*

Of these, only that in (a) is in contention in this appeal.

³² As the relevant audio visual material is currently provided (or, more specifically, was at the time of Ofcom's review of the website on 14 and 15 September)

³³ And, again, if The Sun website comprised only its written content and the Video section, the latter is an ancillary part of an electronic version of The Sun newspaper.

³⁴ The remainder of section 368A are supplementary provisions not directly relevant for the purposes of the present appeal.

³⁵ Section 405 of the Act defines "programme" for the whole Act (except in so far as the context otherwise requires) as including "an advertisement and, in relation to a service, anything included in that service."

³⁶ Section 362 of the Act defines "television programme service" as meaning any of (a) a television broadcasting service; (b) a television licensable content service; (c) a digital television programme service; (d) a restricted television service.

³⁷ Section 368R provides relevant definitions for terms in Part 4A of the Act and, so far as material, provides (at subsection (4)) that "The services that are to be taken for the purposes of this Part to be available for use by members of the public include any service which— (a) is made available for use only to persons who subscribe to the service (whether for a period or in relation to a particular occasion) or who otherwise request its provision; but (b) is a service the facility of subscribing to which, or of otherwise requesting its provision, is offered or made available to members of the public."

Requirement of Advance Notification to ATVOD

53. Section 368BA(1) of the Act provides for an advance notification requirement on the part of persons providing an ODPS. It says, “*A person must not provide an on-demand programme service unless, before beginning to provide it, that person has given a notification to the appropriate regulatory authority of the person’s intention to provide that service.*”
54. For the purposes of that section, the “*appropriate regulatory authority*” is ATVOD, which has been designated by Ofcom under s.368B of the Act to carry out certain functions under Part 4A: see paragraph 5 of Ofcom’s designation of 18 March 2010 (“the Designation”).³⁸ One such function is to determine whether providers of ODPSs have complied with the notification requirement in section 368BA: see paragraph 5(ii) of the Designation.
55. In order for ATVOD to fulfil that function, it has power under paragraph 6(ii) of the Designation to decide, amongst other things, what constitutes an ODPS in accordance with section 368A of the Act. Paragraph 6(ii) of the Designation also makes clear that any such decision is “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures.*”

ATVOD’s Notification Guidance

56. The Designation also provides for ATVOD to produce guidance. Paragraphs 6(v) and 7(vii) and (viii) say as follows:

[Paragraph 6(v)]

“In carrying out the Designated Functions ATVOD shall exercise the following Powers in accordance with the Obligations and Conditions set out in Paragraph 7 of this Designation:

- (v) *to prepare and to publish accompanying guidance as a non-binding aid to interpretation of those Rules.....”*

[Paragraphs 7(vii) and (viii)]

“In carrying out the Designated Functions and in exercising the Powers set out in Paragraph 6 above ATVOD shall comply with the following Obligations and Conditions:

- (vii) *to consult with Ofcom in preparing non-binding interpretative guidance to the Rules (and any subsequent material changes to that guidance), and to obtain Ofcom’s prior written approval of such guidance before publishing it or any changes to it;*

³⁸ <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/designation180310.pdf>

- (viii) *to ensure that in drawing up any guidance referred to in this Designation, such guidance reflects the following:*
- (a) *that it is provided as non-binding guidance only in order to aid interpretation of the Rules;*
 - (b) *that it will be the Rules themselves, rather than the guidance, which determine whether a contravention of the Rules has taken place;*
 - (c) *that compliance with the guidance does not itself confer a presumption of conformity with the Rules; and*
 - (d) *that non-compliance with the Rules will be taken to be non-compliance with the relevant requirements in the Act;*

57. Pursuant to these provisions, ATVOD has produced the *Notification Guidance*, paragraph 1.1 of which says:

“This guidance is provided as an aid to interpretation of the types of services that may fall within the definition of an “on-demand programme service” under section 368A of the Communications Act 2003 (“the Act”) and are therefore subject to the regulatory framework for VOD. It is also provided to help assess who is likely to be the provider of a relevant service for these purposes, and therefore the person who is responsible for compliance with the rules, including the statutory obligation to notify the service to The Authority for Television On Demand (ATVOD). This guidance is not legally enforceable, and only provides non-determinative, interpretative guidance as to how ATVOD 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.”

58. Other relevant paragraphs of the *Notification Guidance* in turn say:

“2.8 The first key issue under this criterion is whether access to the service is the provision of programmes on an on-demand basis. There may be services where the availability of audiovisual content on an on-demand basis is incidental to another service

.....

2.10 The second key issue under this criterion is whether the “principal purpose” of the service is to provide “TV-like” programming. Where relevant on-demand programmes form part of a broader consumer offering, it may be the case that those programmes comprise an on-demand programme service in their own right.

- 2.11 *For instance, on demand programmes which form part of a broader consumer offering may be considered to be a distinct on-demand service in their own right where they 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. Thus, there is 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 stand-alone service.*
- 2.12 *In general, a section of a broader, non-VOD service will be considered to have as its principal purpose the provision of TV-like programmes if:*
- a) *TV- like video on demand programmes are grouped together and/or presented as a catalogue of viewing options; and*
 - b) *the catalogue of viewing options could exist as a coherent video on demand consumer offering if removed from the broader service.*
- 2.13 *This will not be the case if the relevant on-demand programmes are included as an integral and ancillary element of the broader offering, for example, where video is used to provide additional material relevant to a text-based news story, or where video forms part of a content service predominantly featuring a range of non-video material.*
-
- 2.15 *It is acknowledged that this assessment may not be straightforward in certain cases and will depend on the particular circumstances in each case.”*

Relevant provisions of the AVMS Directive

59. Section 368A of the Act implements the AVMS Directive insofar as that Directive defines the scope of on-demand services which should be subject to regulation. The Directive contains both operative provisions (Articles) and explanatory provisions (Recitals) which define and explain both the purpose of regulation and the scope of on-demand services that are subject to it.
60. In interpreting section 368A Ofcom has necessarily had regard to the relevant provisions of the AVMS Directive. Ofcom has done so because Part 4A of the Act is intended to implement the requirements of the Directive, and because News Group’s appeal submissions specifically relied on those provisions.

61. Of the relevant Articles of the AVMS Directive, Articles 1(1) (a), (b) and (g), in particular, provide the basis for the definition of an ODPS in section 368A(1). Most relevant for present purposes is Article 1(1) (b).³⁹ It provides a definition of “programme,” which refers to comparability with television, and which applies for the purpose of defining “*on-demand audiovisual media services*” under Article 1(1) (g). It says:

“programme’ means a set of moving images with or without sound constituting an individual item within a schedule or catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children’s programmes and original drama.”

62. As to Recitals of the AVMS Directive that describe the general purposes of the regulation for which it provides, Recitals 2, 4 and 11 are relevant. They explain that the Directive recognises that technological advances allow for the provision of audio-visual media services across national frontiers by a range of technological means. They say that aims of the Directive include completing the internal market and providing for at least a basic measure of regulation to apply to on-demand audio-visual media services that compete with traditional linear television broadcasting.⁴⁰

63. Recitals 21 to 29 of the Directive, meanwhile, provide further explanation of its intended scope, and are particularly relevant to the interpretation of “ODPSs” under section 368A of the Act. In particular:⁴¹

- a. Recital 21 states that the Directive should cover only “*mass media*” services, “*which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public,*” and should not cover services, “*which are primarily non-economic and are not in competition with television broadcasting.*”⁴²

³⁹ Article 1(1) (a) provides the definition of “*audiovisual media services,*” both linear television broadcasting and on-demand services, covered by the Directive. It refers to a “*principal purpose*” test: “*audiovisual media service’ means a service... .. the principal purpose of which is the provision of programmes* Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph.”

Article 1(1) (g) provides that:

“on-demand audiovisual media service’ (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider.”

⁴⁰ Recital 11, for example, says:

“It is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services).”

⁴¹ Recitals 25 – 27 are not specifically relevant to the present appeal. 25 clarifies what is meant by “*editorial responsibility*” and provides scope for member states to further specify aspects of the definition. 26 states that the definition of “*media service provider*” should not cover mere transmission where editorial responsibility lies elsewhere. 27 clarifies the position where the same service provider makes available on demand services and also makes available linear television services.

⁴² such as services distributing user-generated content

- b. Recital 22 states that the Directive should only cover services where the “*principal purpose*” is the provision of programmes and, “... *exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as ... information related to a .. non-audiovisual service.*”
 - c. Recital 23 confirms that “*audiovisual*” covers silent moving images and accompanying text such as subtitles and EPGs, but stand-alone text-based services fall outside the scope of the Directive, “*For the purposes of this Directive, the term ‘audiovisual’ should refer to moving images with or without soundWhile the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive.....*”
 - d. Recital 24 states that, “*It is characteristic of on-demand audiovisual media services that they are ‘television-like,’ i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.*” The recital also notes that, “*In the light of this and in order to prevent disparities as regards free movement and competition, the concept of a programme should be interpreted in a dynamic way taking into account developments in television broadcasting.*”
 - e. Recital 28 states that, “*The scope of this Directive should not cover electronic versions of newspapers and magazines.*”
 - f. Recital 29, as is indicated above, states that, “*All the characteristics of audiovisual media services set out in its definition and explained in recitals 21 to 28 should be present at the same time.*”
64. Other Recitals offer some indications of the meaning of parts of those referred to above. For example, Recital 98 indicates a meaning of “ancillary,” which term is in Recital 22, when it says, “*The term ‘ancillary’ refers to products intended specifically to allow the viewing public to benefit fully from, or to interact with, these programmes.*”

Section 6 - Applying the Legislative Provisions

Approach to Section 368A(1)

General

65. As Ofcom understands News Group’s position, it is that, in applying section 368A(1) of the Act, it is necessary first to define the scope of the service in question. Only then can the five defining criteria in sections 368A(1)(a) to (e) be applied.
66. Ofcom does not consider that segmenting the definition of an *ODPS* in the way News Group contends is correct. In particular, where audiovisual material is provided amongst other things, it is incorrect to separate the question of whether there is a “*service*” from that of the “*principal purpose*” of what is provided.
67. Rather, there is a composite definition, to be applied in light of the AVMS Directive, to determine whether services are within the scope of regulation. All parts of that definition must be met.
68. Applying the statutory scheme, the approach that should be taken, as ATVOD acknowledged in its comments on Ofcom’s amended Preliminary View, is to consider the whole of what is provided: in this case the written content⁴³ and audio visual material on The Sun website. The question to consider is whether there is anything amongst that material which is a service whose *principal purpose* is the provision of *TV-like* programmes.⁴⁴ In other words, it is only possible to define the scope of a service, and whether it could be an ODPS, by identifying the principal purpose(s) of what is provided (and any ancillary purposes).
69. It is also necessary to take a step back and, having regard to the AVMS Directive, consider whether:
- a. the material⁴⁵ is likely to compete for the same audience as (linear) television broadcasts; and
 - b. the nature of the material, and the means of access to it,⁴⁶ would lead users reasonably to expect regulatory protection within the scope of the Directive.
70. The key provision⁴⁷ for present purposes⁴⁸ is sub-section 368A(1)(a). As far as that sub-section can be broken down into constituent parts, there are two such parts that might be described as:
- a. “*the principal purpose part;*” and
 - b. “*the comparability part.*”

⁴³ Where, in this Decision, we refer to The Sun’s “written” content, we mean both written and pictorial content unless the context requires otherwise.

⁴⁴ The full statutory test is set out in paragraph 52 above

⁴⁵ As a whole

⁴⁶ Again, as a whole

⁴⁷ To be read in light of the AVMS Directive

⁴⁸ And in other cases raising the same issues

71. These two parts of the statutory definition should be applied to what is provided as a whole. Ofcom has identified characteristics that could be considered when applying the first of them (and which we have applied in this case: see further below). That is, characteristics of a service more likely to have the required *principal purpose*. It is not necessary, in light of the decision Ofcom has made, to consider characteristics relevant to the *comparability part* (again, see further below).
72. Where audio visual material is provided amongst other things, the *principal purpose part* of the statutory definition means it is necessary to ask whether, considering what is provided as a whole, any of the audio visual material:
- a. comprises something that in its own right is a “service” whose “*principal purpose*” is the provision of that material; or
 - b. is ancillary to the provision of some other service.

Characteristics of the sort Ofcom has applied in this case can be used in making this assessment.

73. If the answer to (a) is in the affirmative, it is necessary to apply the *comparability part* of the statutory definition. That is a question of whether, taken as a whole,⁴⁹ the audio visual material comprising the service is comparable in form and content to the form and content of programmes normally included in television programme services.
74. Applying this to The Sun’s website, the appropriate approach was to have begun by considering whether there was anything on it that was a service whose principal purpose was providing audio visual material. Having made that assessment, it may have been that what was provided was more than one service, each with its own principal purpose. For example, one having the principal purpose of providing an electronic version of The Sun newspaper, *and* another whose principal purpose was providing audio visual material. The *comparability part* of the statutory definition of an ODPS should then have been applied to the latter. It may have been an ODPS⁵⁰
75. Recital 22 of the AVMS Directive confirms this approach. As indicated above, it says the definition of an audiovisual media service, “.... *should exclude all services the principal purpose of which is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service*”

⁴⁹ That is, whether, considering all the relevant audio visual material, it comprises a service whose principal purpose is the provision of *programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services* (as opposed to having the main purpose of providing some other programmes or audio visual material, such as material lacking the required comparability)

⁵⁰ Alternatively, the audio visual material may not have comprised a service whose principal purpose was providing that material. There may, for example, have been a single service having the principal purpose of providing an electronic version of The Sun newspaper, an ancillary part of which was the audio visual material.

76. Likewise, Recital 28 as far as newspapers and magazines are concerned. Again as indicated, it states that, “*The scope of this Directive should not cover electronic versions of newspapers and magazines.*”
77. These Recitals should be read together, in light of Recital 29’s explanation that, “*All the characteristics of audiovisual media services set out in its definition and explained in recitals 21 to 28 should be present at the same time.*” Accordingly, Recital 28 means no more than this: a service whose principal purpose is the provision of the electronic version of a newspaper, an ancillary part of which is the provision of some audiovisual material, is not an ODPS.
78. It is important to note that Recital 28 is not a blanket exclusion of any material linked to a newspaper or magazine, or which appears on websites belonging to their publishers. The AVMS Directive distinguishes between types of services. It contains nothing to distinguish between levels of regulation depending on the identity of service providers. Ofcom does not understand News Group to suggest that this Recital specifically, or the Directive generally, creates such an exclusion or distinction.⁵¹
79. Rather, Recital 28 is an explicit recognition of the fact that newspapers and magazines are a particular category of information provision which *may* include some audiovisual material which is merely ancillary (and is not therefore an ODPS⁵²). It is nonetheless possible an electronic newspaper or magazine provider could provide an ODPS through the provision of audio visual material, even on the same website as the electronic version of its newspaper or magazine, if the provision of that material could itself be identified as a service whose principal purpose was such provision.⁵³

The Notification Guidance

80. In reaching this view about the correct approach, Ofcom has considered the *Notification Guidance*, which ATVOD applied in making the Determination. The *Guidance* is an aid to the interpretation of the statutory scheme and a (general) guide to the approach ATVOD is likely to take. It is the statutory scheme which is definitive.
81. In deciding an appeal, Ofcom must, therefore, apply the statutory scheme. We have set out what we consider is the appropriate approach to the statutory definition of an ODPS in section 368A(1)⁵⁴ in order to help us⁵⁵ apply that scheme. We have gone on to identify characteristics of a service more

⁵¹ We note that, in the representations it made to ATVOD on 10 December 2010, prior to the latter making the Determination, News Group referred to, “..... *the point that Recital 28 makes, which is not concerned with the identity of the service provider but with the nature of the service. It is concerned with electronic versions of newspapers and magazines.*”

⁵² To use the language of the Act, nor an *on-demand audio visual media service*, to use that of the AVMS Directive

⁵³ The key issue is whether, as News Group put it in its appeal submissions, “... *the use of video material in an online version of a newspaper creates a pocket of TV-like territory which should be subject to regulation pursuant to the AVMS Directive.*”

⁵⁴ In light of the AVMS Directive

⁵⁵ As well as ATVOD and service providers

likely to satisfy the *principal purpose* part of the definition to assist us further in applying that definition in this appeal.

82. Ofcom has identified the *principal purpose* characteristics in light of the provisions of both the Act and the AVMS Directive. Our aim in doing so is not to produce an exhaustive or definitive list of all the characteristics a service must possess to be an ODPS, nor to reduce the matter to a checklist exercise. It would not necessarily be determinative that material provided has, or does not have, any particular characteristic. Neither are the characteristics necessarily listed in order of relevance, importance or weighting.
83. Rather, the aim is to enable a judgment to be made, in the present appeal at least, about whether, at a particular time, a particular service is an ODPS within the scope of regulation, based on an overall assessment of the extent to which, and the way in which, at that time, it possesses relevant characteristics (as well as having made the necessary purposive assessment). That is a question of considering all relevant parts of what is provided and all the relevant characteristics in the round.
84. We do not consider that this approach is inconsistent with the *Notification Guidance*. In particular, the view we take as to the *principal purpose part* of the statutory definition is, in general terms, reflected in the *Notification Guidance*.
85. However, the difficulty and importance of a case like the present appeal throws into focus the general provisions of that *Guidance* which cannot deal with every point of every case likely to come before ATVOD. It appears to Ofcom helpful, in this case, to identify a more detailed approach to the way the principles of the statutory scheme reflected in the *Notification Guidance* can be applied.
86. In our Preliminary View document, Ofcom had also identified characteristics that could be used in applying the *comparability* part of the statutory definition of an ODPS. Our intention was to provide some useful guidance for future cases.
87. However, we accept ATVOD's comments that:
 - a. if Ofcom maintained our view that the Video section of The Sun's website was not (and is not) a service having the required principal purpose, it is not necessary for Ofcom to comment on *comparability*; and
 - b. in those circumstances, it would be more appropriate for any further guidance on *comparability* to be the product of consultation on revised *Notification Guidance* involving Ofcom, ATVOD and relevant stakeholders.

Ofcom is not, therefore, setting out characteristics relating to the *comparability part* of the statutory definition of an ODPS. Ofcom recommends that ATVOD considers developing the *Notification Guidance* generally in light of this Decision.

Principal Purpose: Relevant Characteristics

88. To help apply the above approach in this appeal, Ofcom considers that the following would be characteristic of a service whose principal purpose is the provision of audio visual material (as opposed, in the present context, to one whose principal purpose is the provision of an electronic newspaper or magazine).
89. These characteristics link generally to Recital 22 of the AVMS Directive's references to the "*principal purpose*" of a service. Likewise, to its reference to the exclusion from the scope of regulation of services whose principal purpose is not providing programmes. And, to the examples it provides of the exclusion of websites that contain audiovisual elements only in an ancillary manner.⁵⁶ They also link to Recital 28's indication that the Directive's scope should not cover electronic versions of newspapers and magazines, read in light of Recital 22 as indicated above. We indicate where Ofcom considers the characteristics link to other provisions of the Directive.
90. A service having the required principal purpose, in the context of this appeal, is, in Ofcom's view, more likely to possess some or all of these characteristics:
 - a. The service would be more likely to have its own homepage, through which it is accessed. By contrast, audiovisual material whose provision is merely ancillary to another service is more likely⁵⁷ to be accessible via a homepage that is styled as providing, and in practice does provide, some other service with its own independent identity.⁵⁸
 - b. Where it is made available on a website providing other content, such as written articles, a significant amount of the relevant audio visual material is catalogued and accessed via a separate section of the relevant website.⁵⁹ Audiovisual material provided on an ancillary basis is less likely to be so catalogued.
 - c. The audio visual material is presented or styled (and marketed) as a television channel. So, for example, whilst its names, labels and logos

⁵⁶ Such as those which provide information related to a non-audiovisual service

⁵⁷ This is an example of a characteristic that is not in itself determinative. A website could provide a number of distinct services under cover of a single homepage.

⁵⁸ This characteristic, and each of the two following, also links to Recital 24 of the AVMS Directive's reference to the means of access to a service leading the user reasonably to expect regulatory protection under the Directive.

⁵⁹ This characteristic also draws on the reference, in the definition of "*on-demand audiovisual media services*" in Article 1(1)(g) of the Directive to, "*a catalogue of programmes selected by the media service provider.*"

are not determinative, a service presented as “X TV” may be more likely a service having the required principal purpose. The ancillary provision of audio visual material is less likely to be so presented.

- d. It is more likely that a significant amount of the audio visual material is of a substantial duration and/or comprises complete programmes, rather than “bite-sized” clips or extracts from longer programmes,⁶⁰ and has an independence that means it is watched and fully understood on its own.⁶¹ By contrast, such material comprising clips of short duration whose context, meaning and significance is only properly or fully be understood by reading accompanying written material is more likely to be ancillary to some other service.⁶²
- e. There are more likely to be no, or only a limited number of, access links between the relevant audio visual material and other content. For example, in the context of audio visual material on a website containing an electronic newspaper, no or few links between that material and written articles in the nature of “*click to read story/view video*” and no or few videos embedded in written articles. Such material that is an ancillary part of an electronic newspaper is more likely to contain a significant number of such links and/or be embedded in written articles.
- f. There are more likely to be no, or a limited number of, content links between the audio visual material and other content. For example, in the context of audio visual material on a website containing an electronic newspaper, little or none of that material is the basis or subject matter of written articles, provides an audiovisual version of the written article or is an amplified or enhanced experience of that article, and the audio visual material needs to be watched for the user to receive the information⁶³ the service seeks to convey.⁶⁴ The opposite is more likely to apply, in each respect, where the audio visual material is an ancillary part of another service like an electronic newspaper.
- g. Where the service provides audio visual and written material:
 - i. the balance of the material is more likely significantly to lean towards the audio visual,⁶⁵

⁶⁰ Though, as with other of the characteristics, the duration of pieces of audio visual material is also not in itself determinative. There might, for example, still be a service with the required principal purpose notwithstanding that the audio visual material provided in it is of short duration. It depends on a consideration of all the circumstances and characteristics of what is provided.

⁶¹ Without, for example, accompanying written material to explain its context, meaning and/or significance

⁶² Such as an electronic newspaper.

⁶³ Such as the news story

⁶⁴ That is, it is not conveyed by the written information/articles.

⁶⁵ There is more likely to be significantly more of the audio visual material and/or it is likely to be the most prominent part of what is provided

- ii. the written material is brief and/or merely an introduction to, or summary of, the audio visual material; and
- iii. the audio visual material is the primary means of conveying to users the information sought to be conveyed.⁶⁶

Where the written material is the most prominent part of what is provided, has significant length and depth, goes beyond introducing or summarising the audio visual material and is the primary means of conveying information, the audio visual material is more likely ancillary to the written.

- h. On an overall assessment the audio visual material cannot be said to be integrated into, nor ancillary to, another service. In particular, the material cannot reasonably be described as intended specifically to allow the viewing public to benefit fully from, or to interact with, information provided as part of some other, primary, service.⁶⁷ If, by contrast, the audio visual material can reasonably be so described, it is more likely an ancillary part of another service.

Analysis of the Application of Section 368A(1)(a) to The Sun's Website

- 91. Accordingly, in assessing the application of section 368A(1)(a) to the audio visual material on The Sun's website, the appropriate approach was for ATVOD to have considered the website as a whole, to determine whether any of the audio visual material on the site comprised a service having the principal purpose of providing that material.⁶⁸
- 92. Ofcom has noted ATVOD's comments on our Preliminary View that it had looked at the whole website (see Section 3 above). We agree with its general observation that, "*A single website or domain may contain more than one service.*" We also note that in its Determination it drew the conclusion that the Video section of The Sun's website was, "*...a service which sits alongside an electronic version of the newspaper.*"
- 93. This conclusion may indicate that ATVOD considered the whole of the website and the service(s) provided on it. The reasoning and evidence in the Determination, however, particularly when considered together with the evidence which it subsequently provided to Ofcom, the evidence (and submissions) provided by News Group and the evidence found by Ofcom, do not support this.
- 94. The Determination suggests that ATVOD placed too much focus on the *Sun Video* section of The Sun's website. It suggests ATVOD considered that

⁶⁶ This would be the case, for example, where the written material forms part of an Electronic Programme Guide. This draws on the indication in Recital 23 of the AVMS Directive that the definition of on-demand audiovisual media services covers text-based content which accompanies programmes.

⁶⁷ Such as the electronic version of a newspaper

⁶⁸ It should then, if necessary, have applied the *comparability part* of the statutory definition of an ODSP.

section of the website, and certain material in it, without looking enough at the whole of what was provided on the site.

95. In particular, it made statements about the organisation and content of *that section*. It referred to examples of three pieces of audiovisual material in that section and appended screen grabs relating to two others, and made some general reference to its connections to the content of the online The Sun newspaper.
96. ATVOD's Determination therefore demonstrates a consideration of the Video section and part of its relationship with other content on the site. However, it does not go further and show ATVOD's consideration of the other and, in this context, key⁶⁹ dimensions of the appropriate analysis of the site. That is, consideration of the other parts of the site, principally the written content of the electronic version of The Sun newspaper, their purpose(s) and presentation, their relationship with the audio visual material in the Video section and their effect on what should properly be regard as the *principal purpose* of the service(s) News Group provided on The Sun's website.
97. Ofcom's view, therefore, is that ATVOD did not make sufficiently clear that it made a rounded analysis of the whole of The Sun's website, in order properly to decide if any of the audio visual material on the site comprised a service having the principal purpose of providing that material.
98. Ofcom has considered all the evidence and submissions, applying the approach to the statutory scheme described in this Decision. We have done so, first, considering The Sun's website at the time(s) ATVOD considered the Video section. Our analysis is set out below.
99. The evidence, in our view, is not enough to support a decision that the Video section of the website was, in itself, an ODPS (and the reasons and evidence ATVOD set out in its Determination are not enough to support a decision to that effect). On the basis of that evidence and those submissions, Ofcom considers that that section was not a service having the principal purpose of providing audio visual material.
100. We have also gone on to apply the statutory scheme to the material now provided on The Sun's website and set out our analysis below. On the basis of that evidence, Ofcom considers that the Video section of The Sun's website is not, in itself, an ODPS. It is not a service having the principal purpose of providing audio visual material.

The Earlier Position: The Principal Purpose Part of the Statutory Definition

⁶⁹ Given that it is beyond dispute that the most significant part of The Sun's website is the electronic version of that newspaper.

101. Ofcom has applied the *principal purpose part* of the statutory definition of an ODPS, using the characteristics identified, to The Sun's website, and its Video section, as at the time of, and prior to, ATVOD's Determination, based on the available evidence. On the following bases in particular, Ofcom does not think that evidence supports a decision that the Video section of The Sun's website was, in itself, an ODPS. On the basis of that evidence Ofcom considers that that section was not a service having the principal purpose of providing audio visual material.
102. In taking this view we have considered ATVOD's comments on our Preliminary View. We agree with some of its assessments of the Video section. For example, that that section, "... comprised a catalogue of material," and "... provided access to that catalogue of material." We similarly agree that those parts of Appendices 12 - 20 which are screen grabs from the Video section do not themselves contain explicit access links to written articles (or other non-audio visual content).
103. We also agree there is some evidence of significant changes to The Sun's website between the time ATVOD considered it and the time Ofcom considered News Group's appeal. Likewise, that there is some evidence of the presentation and marketing of the audio visual material as "*Sun TV*."
104. We agree that these points indicate that the relevant section of the website had some of the characteristics that might be expected of a service whose principal purpose was providing audio visual material. However, we do not think they are sufficient to support a decision that the Video section of The Sun's website was such a service.
105. Neither is there enough evidence to support ATVOD's comment that the Video section, "..... included a significant amount of audio visual content of substantial duration – i.e. lasting more than "a very small number of minutes." Nor that, when fully considered, "... there were few links between the audio visual material and the electronic newspaper articles."
106. We explain why, on the appropriate overall assessment, we do not think the evidence supports a decision that the Video section of The Sun's website was, in itself, an ODPS, and instead points to that section not being a service having the principal purpose of providing audio visual material, as follows. We return to some of the points in ATVOD's comments.
107. There is no evidence that the home page of The Sun's website⁷⁰ was previously arranged or presented significantly differently, nor that, at any earlier time, it was anything other than the relevant home page for content provided by The Sun online. On the contrary, there is evidence from News Group that previously, as now, it was the page that indicated and summarised the main parts of the site, principally its written content.

⁷⁰ <http://www.thesun.co.uk/sol/homepage/>

108. It appears to Ofcom unlikely, based for example on News Group's representations and submissions, that a national newspaper like The Sun would in the period before February 2011 have presented its online offering under cover of a home page significantly different to those in March 2011 (at the time of News Group's appeal submissions) and September 2011 (at the time Ofcom reviewed the website). That is, one that indicated that what the site contained was the electronic version of that newspaper. It is similarly unlikely that the home page would then have played a different role, and not been the main initial destination of most users of the site. Whilst not determinative, these characterisations would suggest it is unlikely the Video section was itself a service having the required principal purpose.
109. The evidence also indicates that the relevant audio visual material was of generally short duration and lacked independence of the other content of the electronic version of The Sun newspaper. It also indicates that there were access and content links between other content on the website and that material, and that the amount and substance of any accompanying written material was significant.
110. For example, the screen grab at Appendix 12 to this Decision, provided by ATVOD to Ofcom in June 2011, shows the audio visual material of "*Harry Hill's Little Internet Show – Episode 2*" as presented in the Video section on 25 October 2010. Ofcom's recent search of The Sun's website found that this material was embedded in a written article of the same date in a similar way to material now on the site (and is accessible via the Video section with a *Read full article* link) (see screen grabs at Appendix 12a).
111. The same, or similar, is also true of the following pieces of audio visual material also provided by ATVOD to Ofcom in June:
- a. "*Original Stig's top 5 go-karting tips*" (ATVOD's screen grab at Appendix 13), taken from the Video section on 31 January 2011 (see screen grabs found by Ofcom at Appendix 13(a));
 - b. "*Exclusive Jay Kay chat*" (ATVOD's screen grab at Appendix 17), taken from the Video section on 8 February 2011 (see Ofcom's screen grabs at Appendix 17(a));
 - c. "*Victoria's Fitness Secrets*" (ATVOD's screen grab at Appendix 18), also taken from the Video section on 8 February 2011 (Ofcom's screen grabs at Appendix 18(a));
 - d. "*Video Nikitta murder latest*" (ATVOD's screen grab at Appendix 19), again taken from the Video section on 8 February 2011 (Ofcom's screen grabs at Appendix 19(a)); and

- e. *“Meet the Page 3 Idol finalists”* (ATVOD’s screen grab at Appendix 20), taken from the Video section on 8 February 2011 (Ofcom’s screen grabs at Appendix 20(a)).
112. Similarly, another of the screen grabs ATVOD provided to Ofcom in June 2011, taken from the Video section in October 2010, related to the *“Insider’s guide to London fashion”* (see Appendix 11). Although it appears this material was not itself linked to, nor embedded in, a written article, Appendix 11(a)⁷¹ suggests it was part of a sub-section of the Video section containing audio visual material that was so linked and embedded.
113. Ofcom has considered this evidence together with relevant points in News Group’s representations to ATVOD,⁷² its appeal submissions and its supporting evidence. In particular:
- a. the representations to ATVOD that:
 - i. *“A story or other article is presented primarily as text An article will frequently have a video clip embedded in it containing material which supplements it.....;”*
 - ii. *“The [Video section] is a page which forms part of the Site and which offers a collection of video material. Its principal purpose is to supplement the text element of the Site, which is why there are links back to the original article;”* and
 - iii. *“Some clips appear on or may be found via [the Video section] without a related article. These are exceptions to the general rule;”*
 - b. the screen grabs of the front page of the Video section (Appendix 9) showing links between the audio visual material and written content; and
 - c. the appeal submissions, supported by the evidence, that:
 - i. *“Each video item on The Sun website is linked to the related article by the “Read full article” link illustrated above;”* and
 - ii. the audio visual material was (and is) not in fact provided separately from the written and content and much of it takes its meaning from the context of the written articles in which it appears.
114. We have also considered that evidence in light of ATVOD’s analysis of those parts of Appendices 12 – 20 which are screen grabs from the Video section.

⁷¹ A screen grab resulting from Ofcom’s search of the website

⁷² In response to ATVOD’s preliminary view and before it made the Determination.

Likewise, in light of ATVOD's observation that those Appendices contain links only to other audio visual material.

115. Ofcom agrees with ATVOD that it is not correct that each piece of audio visual material was linked to written content in the way News Group submits.⁷³ ATVOD's analysis of Appendices 12 – 20 may also indicate that, in some respects, the Video section of The Sun's website was closer than it *is now* to being a service having the required *principal purpose*.
116. However, Ofcom believes that ATVOD's analysis places too much focus on the Video section of The Sun's website, without the appropriate consideration of the overall content of the site and the relationship between it and the audio visual material in the Video section. This consideration is reflected in Ofcom's analysis above of Appendices 12 – 20 considered with Appendices 12a – 20a. Taken together, all the above points in paragraphs [109 – 115] go to the view that it is unlikely that the Video section of The Sun website was previously itself a service whose principal purpose was providing audio visual material.
117. Ofcom also considers the evidence to indicate that, as far as the Video section of the website is concerned, the audio visual material in it was, on an overall assessment, more likely integrated into, and an ancillary part of, an electronic version of The Sun newspaper. On the basis of the evidence available, most users, considering The Sun website as a whole, would have been unlikely to have seen it as providing anything other than an electronic version of the newspaper, with some integrated and ancillary audio visual material in the Video section.
118. The evidence pointing to this view includes that described in the preceding paragraphs and that provided by News Group in its representations to ATVOD and its appeal submissions as to the means of access, content, organisation and styling of the website. Ofcom notes, in particular, News Group's representations and submissions that:
 - a. *"The home page on the Site is the entry point to an electronic version of The Sun, which is what the Site consists of. The Site is designed primarily as a text-based experience, supplemented by still and moving pictures, sound and various interactive features. The video element is a part, but not at all the principal part, of the offering....;"*
 - b. *".... the nature and means of access to the service, where the newspapers' name and masthead appears on every page, must lead the user to understand that he or she is in an online newspaper environment and not one which would attract broadcasting or ODPS regulatory protection.....;"* and

⁷³ Even now, the Video section contains material not so linked.

- c. *“A visitor to each site cannot conceivably be in any doubt that he or she is anywhere other than on a site which is the online version of The Sun The masthead of the ... newspaper is on the Home page and on every other page. The Home page makes the nature of the site as an online version of the newspaper clear beyond doubt. The video option is one among many.”*
119. As we note above, Ofcom agrees that the Video section was, as it is now, a collation of the relevant audiovisual material in one place of audio visual material available on The Sun’s website. Likewise, that there is some evidence of the presentation and marketing of the audio visual material as “Sun TV.”
120. Ofcom’s view, however, is that that these points are not enough to change the position (that the Video section was not itself a service having the required principal purpose). It is debatable whether either point, or both together, would, in any event, be sufficient. We do not think they are in this case, given the relative strength of other evidence (see above).
121. As to the collation of the relevant material in the Video section, we have noted above that this is a characteristic that might be expected of a service whose principal purpose was providing audio visual material. However, in this case the evidence more strongly suggests that:
- a. even if its presentation might have been different to some extent, the Video section has always⁷⁴ been a collation in one place of audio visual material much of which was (and is) available in different parts of the site; and
 - b. much of which material was (and is) linked to, and in support of, the site’s written content (in the ways described above).
122. As to the evidence of The Sun presenting, marketing and providing the material as *Sun TV*, Ofcom agrees there is some (though it is disputed by News Group). And that, again, this is a characteristic that might be expected of a service whose principal purpose was providing audio visual material.
123. Even putting it at its highest, however, it is only evidence that The Sun presented, marketed and provided that material under that banner. The appropriate approach involves weighing it against the evidence of the content and purpose of other material on The Sun’s website and its substantive relationship with the audio visual material in the Video section. Such evidence as there is tends to indicate that the latter was generally ancillary to the former.

⁷⁴ At all relevant times

The Earlier Position: Conclusion on Principal Purpose

124. In light of the above, Ofcom's view is that there is not enough evidence for a finding that the Video section of The Sun's website was, in itself, an ODPS. Rather, on the basis of the evidence available, Ofcom considers that that section was not a service having the required principal purpose. If the audio visual material in that section were the only such material on the website, and that site comprised only its written content and that material, it is unlikely the latter should properly have been regarded as anything other than an ancillary part of an electronic version of The Sun newspaper.

125. Ofcom's Decision, therefore, is that the Video section was not an ODPS.

The Current Position: Description of The Sun's Website

126. As noted above, for the purposes of this analysis, and of determining News Group's appeal, on 14 and 15 September 2011 Ofcom viewed The Sun's website, both its written content and audio visual material. It is free to view.

127. The home page of the website is at <http://www.thesun.co.uk/sol/homepage/>. A detailed description of the way the written content and audio visual material was presented on the site is set out in Appendix 1. Ofcom has taken that into account in making this Decision.

128. That presentation means users access audio visual material in the Video section in at least three ways described in Appendix 1:

- a. "Route 1:" by clicking thumbnail links to individual written articles on The Sun's home page (and on the front pages of other sections), in some of which the material is embedded;
- b. "Route 2:" by clicking a link to "Video" in the main left hand menu on The Sun homepage. This takes the user to the front page of the Video section of the website, which is a collection of the site's audio visual material. As set out in the Appendix, that material is accessible by clicking on the thumbnail still frame or title of the material or by clicking an accompanying "Read full article" link which takes the user to an article in which the material is embedded; and
- c. "Route 3:" via other links in that same menu on The Sun's homepage, which links take the user to sub-sections of the Video section.⁷⁵

129. The website also includes⁷⁶ audio visual material not as part of the Video section. One example is the "*Rugby World Cup 2011 TV channel*"⁷⁷

⁷⁵ For example, the "Motors" link in that menu also contains a link to the "Motors Videos" sub-section of the Video section

⁷⁶ Or did, at the time of Ofcom's review

accessed via a link on the front page of the “*Rugby World Cup*” sub-section of the site. Another is the video showing Premier League football news and match highlights on the front page of the site’s Sport section.⁷⁸

The Current Position: Principal Purpose Part of the Statutory Definition

130. Using the characteristics we have identified, we have applied the *principal purpose part* of the statutory definition of an ODPS described above to what is currently provided on The Sun’s website. Having done so, our view, at least as far as the Video section is concerned, is that, in its current form,⁷⁹ it is not in itself a “service” whose “*principal purpose*” is the provision of audio visual material.
131. The relevant homepage is that of The Sun’s website at <http://www.thesun.co.uk/sol/homepage/>. It indicates and is a summary of the main parts of the site (the electronic version of the newspaper). By contrast, the Video section does not have its own homepage in any real sense.
132. It appears reasonable to Ofcom, in light of its URL, branding, presentation and content (see Appendix 1), that The Sun homepage would be the main initial destination of most users of the website. Or, alternatively, that, in light of those factors, most users would regard this as the site’s “front page,” whose contents would, in this case, be a key factor in establishing what the rest of the website provides – what its principal purpose(s) is or are - and what they might expect from it.
133. Of course, neither characterisation in the previous paragraph would, alone, necessarily be determinative. They are, nonetheless, an indication that, the Video section itself is not a service having the required principal purpose.
134. The Video section is a collection of a large amount of audio visual material. It is accessible via a separate section of The Sun website (as well as via other parts of the site). It is arranged into different categories within this section and each video is dated.
135. The material therefore has a means of access and organisation (cataloguing) that would be characteristic of a service having the required principal purpose. This is despite the fact that the material is also made available in other ways via a website providing other content (in this case, written content).
136. In Ofcom’s view, this is the position notwithstanding News Group’s description of the Video section as merely, “.... *a means of navigating around the site....*”

⁷⁷ At http://www.thesun.co.uk/sol/homepage/sport/rugby_union/3798355/Rugby-World-Cup-2011-TV-channel-showing-highlights-and-previews.html, and via which video about 19 other sports can be watched (and which can also be viewed via other sections of the website other than as part of the video in the Video section). This video is no longer available in connection with the Rugby World Cup, but a similar collection of video remains available elsewhere on the website (for example, at <http://www.thesun.co.uk/sol/homepage/sport/football/>).

⁷⁸ At <http://www.thesun.co.uk/sol/homepage/sport/>

⁷⁹ At the time of Ofcom’s assessment

Organising the relevant material into a discrete section may well help that navigation. But, it is also what might be expected of a service whose principal purpose is providing audio visual material.

137. Some of the audio visual material on the website is, or has at times been, named, styled and presented as a television channel.⁸⁰ As far as the Video section in itself is concerned, however, it is not so named, styled or presented.
138. The current section itself is not a service named or styled as “*The Sun TV*” or anything similar. There are no logos or styling to that or similar effect. Ofcom agrees with News Group that the use of the term and heading “*Video*” in the section is merely a descriptor. It appears beneath the main “*The Sun*” newspaper masthead. It is not styled or presented as a discrete or specific video on demand service.
139. In this connection, Ofcom notes News Group’s submission that it disagrees in particular with ATVOD’s assertion in the Determination that the Video section of The Sun website “..... *is presented as a consumer destination in its own right.*” That submission noted that the use of the generic name “*Video*” (under a prominent The Sun masthead) does not indicate any branding or promotion of a service separate from the online newspaper, and that readers of the printed newspaper are typically directed to the newspaper’s home page if a story has associated audiovisual material, not to “*Video.*” Whilst, again, neither of these elements is determinative in itself, Ofcom considers there is⁸¹ limited evidence that the Video section of The Sun’s website is presented as a destination in its own right.
140. Other relevant characteristics relate to the duration of the audio visual material and its independence, the access and content links between it and other content, and the amount and substance of any accompanying written material. Ofcom has considered these by reference, in particular, to written content on the website and audio visual material in the “*All today’s video*” sub-section of the Video section⁸² on 14 and 15 September.⁸³
141. There were 20 such pieces of audio visual material in the relevant sub-section, some of which are described in Appendix 1.⁸⁴ These were between 18 seconds and six minutes 41 seconds long, and 16 of the 20 were between one and three minutes long. Each contained a “Read full article” link, enabling each to be viewed as part of the written article to which it related, as

⁸⁰ The “*Rugby World Cup 2011 TV channel,*” for example

⁸¹ At most

⁸² Described in detail in Appendix 1

⁸³ We have done so in order to undertake a reasonably manageable, but nonetheless instructive, analysis, in light of the amount of material on the website

⁸⁴ These were entitled: “*Amy on set of last recording*” (appearing twice), “*Russian teens’ crazy bridge climb,*” “*Laidback Luke ft Example,*” “*Amy Winehouse Foundation,*” “*Unions threaten winter strikes,*” “*First full Twilight 4 trailer,*” “*Joe le taxi! Get that man a cab,*” “*Carjacker stabs man to death,*” “*UN team visit travellers’ site,*” “*Winkelvoss twins ‘go nuts,’*” “*We could have scored more,*” “*Ton of Cash Werewolf’s exit,*” “*I’ve solved the Torres problem,*” “*Bird confused by escalator,*” “*Kabul siege ends after 19 hours,*” “*Bystanders lift car off biker,*” “*Memorial site cyber bully jailed,*” “*Walliams tames Thames,*” and “*Kabul rocked by explosions.*”

well as within the Video section.⁸⁵ And, in each case,⁸⁶ the user could access and view the relevant audio visual material by accessing the written text article in another part of the website.

142. In terms of content, most of the audio visual material – in 18 of the 20 cases⁸⁷ – related directly to the written text to which it was linked. In general, that material either provided the subject matter or was source of the article, was about the same subject, or provided the same content as the article in audiovisual form, or amplified or enhanced what was written.
143. To illustrate, clicking the “*Read full article*” link for “*Amy on set of last recording*,” took the user to a 16-paragraph written article whose presentation and structure was the same as those described in Appendix 1. It was about the filming and recording of Amy Winehouse’s final song and video with Tony Bennett, featuring quotes from Amy Winehouse, her father and Tony Bennett. Embedded within it were two pieces of audio visual material. One was the three minutes and 21 seconds long promotional video for the relevant song. The other comprised two minutes and 13 seconds of clips of the recording and comments from Amy Winehouse about the song, the recording and Tony Bennett, some of which quotes were included in the written article.
144. A similar position applied when clicking the “*Read full article*” links for, to give further examples, “*Carjacker stabs man to death*,” and, “*Memorial site cyber bully jailed*,” as described in Appendix 1.⁸⁸ Likewise, clicking that link in relation to, “*UN team visit travellers’ site*,” took the user to a similarly presented and structured eight-paragraph written article about the visit of a United Nations delegation to a traveller site from which travellers were to be evicted. Embedded in the article was a clip of four minutes 24 seconds from Sky News reporting on the eviction and the UN visit.
145. In none of these examples was the audio visual material itself the subject of the written text article. That is, the written text article was not simply about the existence of the material and merely the platform for its provision.
146. Rather, the audio visual material had the direct relationship with the written content described in paragraph 142 above. That relationship, in Ofcom’s view, is more characteristic of audio visual material that is an ancillary part of another service, the electronic newspaper, not of a service in its own right having the required principal purpose.
147. That same position also generally applied to clicking the “*Read full article*” links for audio visual material that took the user to less substantial written

⁸⁵ as described above and in more detail in Appendix 1. Copies of relevant written articles are at Appendix 4 to this Decision.

⁸⁶ in line with what is explained in Appendix 1

⁸⁷ Including, in relation to the audio visual material, “*Russian teens’ crazy bridge climb*,” a written text article and a “*Read full article*” link that was put on the site shortly after the audio visual material.

⁸⁸ Under the heading “*Route 2*”

content and shorter pieces of video.⁸⁹ So, for example, clicking that link for “*Russian teens’ crazy bridge climb*,” took users to a six-paragraph article about Ukraine teenagers climbing a 377 feet-high bridge. Embedded in it was a one minute and 8 seconds video extract of them doing so, from YouTube.

148. Clicking the same link for “*Laidback Luke ft Example*,” had a similar effect, taking the user to a six-paragraph article about the new song and video by the artists, “*Example*” and “*Laidback Luke*.” Embedded in the article was the three-minute long promotional video for the song.
149. In these latter examples, the audio visual material played a more prominent role in the presentation of information to the user. In some cases, the written articles were almost as much about the existence of the audio visual material itself as about explaining what it contained and meant. But, they nonetheless described and provided an enhancement of the audio visual materials’ content, albeit in a more limited way, and were not, in Ofcom’s view, untypical of the sort of articles often found in a tabloid newspaper.
150. As to the independence (or otherwise) of the relevant audio visual material from other content, and to the substance of the written content accompanying that material, Ofcom’s observations are as follows.
151. With regard to independence, it is important to keep in mind how the written and much of the audio visual material, in the Video section at least, is provided together. The written text generally provides context and gives meaning to, and enhances the information provided by, that audio visual material in the same way that, for example, the whole of a Sky News bulletin might do for a clip featured in that bulletin. The text explains its content and/or meaning, comments on it and/or offers views on its implications.
152. In some cases at least, that text might be said, in general, to take the audio visual material and give it a context and meaning that turns it into part of a fuller piece of news information (or enhanced news information).⁹⁰ Put another way, the audio visual material is fully understood as part of the overall story when presented with the text. The audio visual material in turn enhances the user’s experience of the written content, providing in some cases the source on which the text is based, in others more information relating to the text.
153. These points suggest to Ofcom that, in this context, some of the material in the Video section, at least, has limited independence of the written text. Though not so in all cases, in many it comes close, in its presentation as part of a newspaper story, to being mainly short clips whose context, meaning and significance is only fully understood by reading accompanying written

⁸⁹ Though it would not be correct to describe all the audio visual material on the website, or in the Video section, as being about precisely the same subject as a written article, or as an alternative presentation of the precisely same news in an article. In some cases, the associations between the material are looser, and are less characteristic of audio visual material that is an ancillary part of another service.

⁹⁰ Rather than simply a piece of audio visual material only providing more limited or part information

material, and which is provided as an enhancement of that written material. But, the opposite is not true. The written text material does not generally need the audio visual material to be so understood.⁹¹

154. Turning to the amount and substance of the written content provided on The Sun's website, descriptions of the amounts of written text and the sorts of such content that accompanies the audio visual material are in Appendix 1.⁹² Copies of examples are in Appendix 4.
155. As to the amount of written content, Ofcom notes that it accounts for most of the more prominent content of the website.⁹³
156. As to substance, Ofcom considers that the style, presentation and length of much of the written content, as described in Appendix 1, means it should properly be considered as newspaper articles providing information, context and meaning in their own right (in the context of a tabloid newspaper). As previously described, where they contain audio visual material they generally build on and enhance that material to provide the relevant information, context and meaning. In general, they do not merely introduce that audio visual material and leave it to stand alone.
157. Ofcom would agree that this view is more difficult to sustain in some cases where the relevant written material is itself very short. The articles accompanying the *Ukraine bridge climbers* and the *Example music video*, to give examples, are short and do not convey much more than a description of the audio visual materials' contents. Nonetheless, Ofcom considers that, generally, the written text has sufficient length and depth, and adds sufficiently to the audio visual material, properly to be described as an "article" that would be found in a tabloid newspaper.^{94 95}
158. Given the foregoing analysis,⁹⁶ Ofcom considers that, at least as far as the Video section of the website is concerned, the generally limited duration of the audio visual material, the significant access and content links between that material and written articles (in both directions), the limited independence that can properly be ascribed to the audio visual material as it is presented in this context, and the amount, length and substance of the accompanying written articles,⁹⁷ tend to indicate that the Video section does not itself comprise a service having the required principal purpose.

⁹¹ This is not to say that at least some of the audio visual material in the Video section and embedded in written articles could not have an independent identity if presented in other contexts. For example, if presented without express links to written text articles.

⁹² See under the heading "Route 1"

⁹³ See descriptions in Appendix 1 and further analysis below

⁹⁴ Rather than mere introductory words for a video

⁹⁵ One exception to this analysis relates to two "Virals" videos in the relevant sub-section ("*Winkelvoss twins 'go nuts,'*" and "*Bird confused by escalator*"). These were short video clips in connection with which clicking the "Read full article" link takes the user to very short text introducing viral video sourced from the internet, but about which there is no news as such. This written material could not in Ofcom's view properly be called an "article." It is merely text to introduce videos found on the internet.

⁹⁶ Of the fourth to seventh characteristics

⁹⁷ In the context of a tabloid newspaper

159. Turning towards a conclusion, Ofcom considers that, again at least as far as the Video section of The Sun website is concerned, the audio visual material in that section⁹⁸ is, on an overall assessment, more likely integrated into, and an ancillary part of, an electronic version of The Sun newspaper. It appears to Ofcom reasonable to conclude that, considering The Sun website as a whole, most users would more likely regard significant, if not most, parts⁹⁹ as providing an electronic version of the newspaper.¹⁰⁰ And, that it has some integrated and ancillary audio visual material included in the Video section.
160. As described in Appendix 1, the opening, and central,¹⁰¹ homepage of the website, contained¹⁰² links to around 185 written articles and to the different sections of the site. Almost none of those links made reference to articles' incorporation of audio visual material in the Video section.¹⁰³ This gives users a strong indication that what significant, if not most,¹⁰⁴ parts of the website offer is an online newspaper. That is, those parts offer them the opportunity to consume written newspaper articles about the relevant stories.
161. Also as described, the audio visual material in the Video section is generally embedded within the written articles, including some of the 185 or so linked on the homepage. In terms of both access to and the content of that material there is a significant inter-relationship between it and the associated written articles. In the significant majority of cases, each is accessible via the other. In terms of content, the significant majority of the audiovisual material relates directly to the written articles it accompanies. This, in Ofcom's view, indicates an integration of the written and the audio visual material.
162. Moreover, the overall content, styling and means of accessing most of The Sun's website and its Video section, in Ofcom's view, indicate that the audio visual material included in the latter is integrated into, and an ancillary part of, an electronic version of the newspaper, rather than vice versa.
163. Most notably, the website is styled as the online Sun newspaper, and its URL addresses indicate that it is such. Again, the home page (and the sections of written material linked from it) gives users the chance to access and read written articles. As we have noted, most of the more prominent material on the website is written content. That written content in many cases has significant length, depth and prominence, and is in the style of articles that would appear in a tabloid newspaper. The audiovisual material, in the Video section at least, is integrated into, and in support of, that written material.
164. In the terms of the AVMS Directive's Recital 22, that audio visual material is included only in an ancillary manner, as information related to a non-audio

⁹⁸ In its present form

⁹⁹ Comprising mainly written material

¹⁰⁰ Even if other parts, such as the *Rugby World Cup 2011 TV channel* are, or were, not part of that service

¹⁰¹ In this particular case

¹⁰² At the time of Ofcom's assessment

¹⁰³ Or video included anywhere on the site

¹⁰⁴ Even if not all

visual service. In terms that reflect Recital 98, that audio visual material is ancillary to the written content in that it operates, and appears intended to operate, to allow users to benefit fully from, or to interact with, that content.

165. Ofcom again considers that this is so notwithstanding the collation of the relevant audiovisual material in the Video section of the website.¹⁰⁵
166. Again, we agree such collation is generally one characteristic of a service which in itself has the principal purpose of providing audio visual material. However, Ofcom does not consider this to be so in the present case, where the written and audio visual material is organised, accessed and styled as set out in this Decision.
167. Rather, in this case, the Video section is a collation in one place of audio visual material available in different parts of the site, and which is linked to, and in support of, its written content. In this case, that material, as currently organised and presented to users, retains those links, and sufficient of that supporting role, even when organised and accessible via the Video section.

The Current Position: Conclusion on Principal Purpose

168. Given all the above, Ofcom does not consider that, in its present form, the Video section of The Sun's website is, in itself, a "service" having the required "principal purpose." On the contrary, again if the audio visual material in that section were the only such material on the website, and that site comprised only its written content and that material,¹⁰⁶ the latter should properly be regarded as an ancillary part of an electronic version of The Sun newspaper. The Video section is not, therefore, an ODPS.

Purposive Assessment: Regard to the AVMS Directive

169. Ofcom has, as set out above, had specific regard in this Decision to provisions of the AVMS Directive. As we also indicate is necessary, we have also taken a step back and, having more general regard to relevant provisions of the Directive, considered whether The Sun's website provided, or provides, a service that the Directive seeks to bring within its regulatory scope.
170. In particular, Ofcom has had such regard to Recitals 2, 4, 11, 21 and 24. We have also taken into account, as set out below, ATVOD's comments on Ofcom's Preliminary View on this point. However, in our view, this purposive assessment also indicates that, at least as far as the Video section, in itself, is concerned, it was not, and is not, an ODPS within the scope of regulation.
171. As to Recitals 2, 4 and 11, Ofcom has had regard to their references to the Directive's general purposes. For example, Recital 11's that one such

¹⁰⁵ So that the material is accessible via *Route 2* described above and in Appendix 1

¹⁰⁶ Though, as we note, that is not so now, and we refer elsewhere in this Decision to the possible implications of that.

purpose is, “.... *to avoid distortions of competition,*” by ensuring, “... *at least a basic tier of co-ordinated rules apply to all audio visual media services.*”

172. Ofcom has likewise had regard to Recital 21’s and 24’s more specific references to competition. In particular, that regulation should not cover services, “..... *which are primarily non-economic and are not in competition with television broadcasting, such as services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.*” And that, “*It is characteristic of on-demand audiovisual media services that they compete for the same audience as television broadcasts.*”
173. Ofcom considers that these provisions do not necessarily require a market definition and a precise assessment of competition between services in a market in the way competition law might. But, they do require a degree of specific competition between services that fall within the scope of regulation.¹⁰⁷
174. A key purpose of regulation, and a guide as to its scope, is to provide a measure of fair competition for those providing linear television broadcasting services from those providing on-demand audio visual media services. That is, from those who provide similar services and who, in doing so, provide a measure of specific competition for the attentions of viewers and advertisers. That is to be achieved, in Recital 11’s terms, by providing for, “.... *at least a basic tier of co-ordinated rules [to] apply to all audio visual media services.*”
175. Alongside these provisions, Ofcom has also considered Recital 24’s reference to [whether], “.... *the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.*” Ofcom takes this to mean that, amongst other things, there is only a service within the scope of regulation if what is provided, and the way users obtain it, would lead them to expect that what is provided is regulated, as television programmes, in the ways prescribed by the Directive.¹⁰⁸
176. One appropriate way to consider these provisions further, Ofcom considers, which we have done in this appeal, is to consider these questions:¹⁰⁹
- a. would a user wanting to watch programmes normally included in television programme services have considered, or consider, audio visual material on The Sun’s website as amongst his competing options;¹¹⁰

¹⁰⁷ That is suggested, for example, by Recital 21’s reference to the exclusion from that scope of, “.....*services consisting of the provision or distribution of audiovisual content generated by private users*” This tends to suggest the required competition is not simply for the time and attention of consumers of audio visual information.

¹⁰⁸ Or, alternatively, would they regard it as content regulated in some other way or not at all?

¹⁰⁹ In the present case, Ofcom considers it sufficient to dispose of the appeal to consider these questions only from the perspective of users/viewers of the relevant service. In others, it may be necessary to consider similar questions from the perspective of advertisers and advertising.

¹¹⁰ alongside, say, linear television programme services

- b. when viewing such material, would the user have considered, or consider, himself to be watching a programme service competing with linear television programme services;¹¹¹ and
 - c. when doing so, would that user have expected, or expect, what he is viewing to be regulated as television programmes, in the ways provided for under the Directive?
177. We have considered ATVOD's comment that the second of these questions is neither necessary nor appropriate. On this point we disagree. Ofcom takes the view that, in light of the references in Recitals 21 and 24 to competition and to users' expectations, considering whether a user would regard a service as competing with linear television programme services is an appropriate part (though part only) of the analysis of that service.
178. Given the foregoing points, and considering these questions, Ofcom's view is that, at least as far as the Video section of The Sun website, in itself, is concerned, it was not, and is not, a service within the scope of regulation.
179. In particular, in light of the overall features, characteristics, content, means of access and presentation of much of:
- a. the audio visual material in that section of the website; and
 - b. the written content in other parts of it,¹¹²

Ofcom considers it unlikely that a user of the website, in its earlier forms (to the extent there is evidence of them) or its current form, would have regarded, or regard, the audio visual material in the Video section as amongst his options for watching television programmes. Neither would he have expected, or expect, the audio visual material in that section, as previously or currently presented, to be regulated as television under the Directive. Rather, as far as the written contents of the website and the Video section are concerned, the user would likely have regarded, or regard, himself as viewing the electronic version of The Sun newspaper.

180. The appropriate assessment involves a consideration of all the relevant factors. When that is done, taking into account in particular the overall features, characteristics, content, means of access and presentation of much of the material on The Sun's website, as set out in this Decision, Ofcom considers that the appropriate overall view is the one we have reached.

Section 7 - Conclusion

¹¹¹ As he would when watching the latter

¹¹² As set out in this Decision, including the site's URL addresses, its clear styling as The Sun newspaper online, its predominantly written content into, and support of, which the audio visual material is integrated.

181. For the reasons given, Ofcom has decided that the reasons and evidence relied upon in ATVOD's Determination were not sufficient for it to decide that the Video section of The Sun's website was an ODPS. Ofcom also considers that, in the Determination, too much focus was placed on the "Sun Video" section of The Sun's website. On the basis of the evidence available to us, Ofcom's view, as set out above, is that the Video section of that website, in itself, was not and is not such a service. Our Decision, therefore, is to replace ATVOD's decision with our own to that effect.

182. In particular, as far as the Video section is concerned, it was not,¹¹³ in itself, a service having the required principal purpose. If The Sun's website comprised only its written content and the Video section, the latter would have been an ancillary part of a service the principal purpose of which was the provision of an electronic version of The Sun newspaper. Ofcom considers that this remains the position applies as of the time of our re-assessment of the website on 14 and 15 September 2011.

183. In making this Decision, Ofcom has well in mind that:

- a. the material provided¹¹⁴ could develop to a point where the principal purpose of what is provided changes;
- b. The form and content, or the balance, of material within a service could also become more *TV-like*; *and/or*
- c. *television broadcasting can itself evolve such that "the concept of 'programme' should be interpreted in a dynamic way,"*¹¹⁵

This could mean a service not presently within the scope of regulation could in future be so.

184. Indeed, it appears The Sun's website may have developed since ATVOD's Determination. The "*Rugby World Cup 2011 TV Channel*,"¹¹⁶ if not also the Premier League football news and match highlights, previously described, are or were additions to the site after ATVOD made its decision.

185. It is for News Group to consider whether any of the audio visual material provided now or in the future on its website is an ODPS.¹¹⁷ If it is, News Group should notify ATVOD. If it does not do so, it is for ATVOD, in light of the approach set out in this Decision, to determine if News Group is providing an ODPS.

¹¹³ On the basis of the relevant evidence

¹¹⁴ On a website, for example

¹¹⁵ As recognised in Recital 24 of the AVMS Directive

¹¹⁶ And the related audio visual material covering other sports

¹¹⁷ It might be, for example, that the inclusion of other material changes the position in relation to the Video section, and that all the audio visual content on the website together comprises an ODPS. Alternatively, all or parts of the material other than that included in the Video section might comprise such a service.

186. Even if it is not doing so now, News Group's provision of audio visual material might develop further still. Though by no means an exhaustive indication, that provision would be more likely to fall within the scope of regulation if, for example:
- a. it continues to be a separate collation or catalogue of audio visual material available on its own section of The Sun's website;
 - b. it is presented to users as a distinct television service;
 - c. there are fewer access and content links¹¹⁸ between the written content and the audio visual material; and
 - d. more of the audio visual material was of greater duration and/or included complete programmes of the kind broadcast on linear television programme services.

¹¹⁸ of the kinds described in this Decision