

**APPEAL BY VICE UK LIMITED AGAINST A NOTICE OF DETERMINATION THAT THE PROVIDER OF THE SERVICE “VICE (VIDEO)” ([WWW.VICE.COM/EN UK/VIDEO](http://www.vice.com/en_uk/video)) HAS CONTRAVENED SECTIONS 368BA (REQUIREMENT TO NOTIFY AN ON-DEMAND PROGRAMME SERVICE) AND 368D(3)(ZA) (REQUIREMENT TO PAY A FEE) 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 the appeal by Vice UK Limited (the Appellant) against the determination (the Determination) by the Authority for Television On Demand (ATVOD) that the service referred to by ATVOD as Vice (Video) in its Determination of 14 August 2013 at [http://www.vice.com/en\\_uk/video](http://www.vice.com/en_uk/video) was at the time of ATVOD’s Determination, an “on-demand programme service” (ODPS) for the purposes of Part 4A of the Communications Act 2003 (the Act).
2. In reaching this Decision, Ofcom has, in accordance with its relevant procedures<sup>1</sup>, considered ATVOD’s Determination; the submissions provided to us by the Appellant in its appeal and in further information provided at Ofcom’s request; relevant legislation including the Act and the Audiovisual Media Services Directive (the AVMS Directive); and previous Ofcom decisions on appeals regarding ATVOD scope determinations.
3. Taking ATVOD’s case that the Vice (Video) tab is a service, it appears on the basis of new information provided to Ofcom by the Appellant that the person with editorial responsibility for the Vice (Video) tab is established in the United States and outside the jurisdiction of the Act. Therefore our Decision is to uphold the appeal, quash ATVOD’s Determination and substitute our decision for that of ATVOD. In doing so we make some observations on ATVOD’s Determination that the Vice (Video) tab is an ODPS. We also observe that even on a broader assessment of all the audiovisual material on the Vice.com website, it appears that at the relevant time the entity with editorial responsibility, Vice Media Inc., was established in the US and therefore outside the jurisdiction of the UK.

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

## **Section 2 – Legal Framework**

4. The AVMS Directive is a European Directive amongst the purposes of which is to provide a level of protection in accordance with that which consumers of ODPSs might expect; and to provide a measure of fair competition across Member States 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.

5. The Audiovisual Media Services Regulations 2009 gave effect to the AVMS Directive in the UK by inserting Part 4A into the Act. Part 4A was amended by The Audiovisual Media Services Regulations 2010 and creates the statutory regime for the regulation of ODPSs.

6. A service is only an ODPS if it satisfies the defining criteria in section 368A(1) of the Act which states:

*“... a service is an ODPS if –*

*(a) its 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;*

*(b) access to it is on-demand;*

*(c) there is a person who has editorial responsibility for it;*

*(d) it is made available by that person for use by members of the public; and*

*(e) that person is under the jurisdiction of the United Kingdom for the purposes of the Audiovisual Media Services Directive”.*

7. The concept of editorial responsibility is further explained in section 368A(4):

*“A person has editorial responsibility for a service if that person has general control –*

*(a) over what programmes are included in the range of programmes offered to users;  
and*

*(b) over the manner in which the programmes are organised in that range;*

*and the person need not have control of the content of individual programmes or of the broadcasting or distribution of the service”.*

8. Of further relevance, section 368R(5) states that:

*“The person, and the only person, who is to be treated for the purposes of this Part as providing an on-demand programme service is the person who has editorial responsibility for the service (see section 368A(4))”.*

9. 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.

10. In relation to jurisdiction under section 368A(e) of the Act, the relevant part of the AVMS Directive is Article 2 and particularly Article 2(3) which states:

*“For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:*

*(a) ...the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;*

*(b) ...if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the*

*pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;*

*(c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State”.*

11. Additionally, Article 2(5) states:

*“If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4<sup>2</sup>, the competent Member State shall be that in which the media service provider is established within the meaning of Articles 49 to 55 of the Treaty on the Functioning of the European Union”.*

12. Most relevant for present purposes are Articles 1(1) (c) and (d). They provide definitions of “editorial responsibility” and of a “media service provider”:

*“(c) ‘editorial responsibility’ means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;*

*(d) ‘media service provider’ means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised...”*

13. Recital 24 of the AVMS Directive states that:

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<sup>2</sup> Article 2(4) deals with satellite services and is not directly relevant to on-demand services.

*“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”.*

14. The same 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”.*

15. Recital 28 of the Directive states that:

*“The scope of this Directive should not cover electronic versions of newspapers and magazines”<sup>3</sup>.*

16. In light of the provisions set out above and following the approach adopted by Ofcom in previous appeals, we also consider it necessary, when considering whether a service is an ODPS, to take a step back and consider in light of all the circumstances:

- a. whether the relevant audiovisual material was likely to compete for the same audience as linear television broadcasts; and
- b. whether the nature of that material and the means of access to it would lead users to reasonably expect regulatory protection within the scope of the AVMS Directive.

17. Section 368BA(1) of the Act provides for an advance notification requirement on the part of persons providing an ODPS<sup>4</sup>.

18. As part of a co-regulatory regime, Ofcom has designated (the Designation)<sup>5</sup> ATVOD as the appropriate regulatory authority to carry out certain functions under Part 4A of

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<sup>3</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

<sup>4</sup> 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”.

<sup>5</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

the Act<sup>6</sup>. As part of that Designation, ATVOD has power to decide whether a service is an ODPS<sup>7</sup>. 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.

19. By virtue of section 368B of the Act, Ofcom retains the power concurrently with ATVOD to determine what is an ODPS and any decision by ATVOD on such matters is “*subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures*”.
20. As set out in those procedures<sup>8</sup>, Ofcom’s decision in any appeal, “... may:
  - (a) *uphold ATVOD’s decision; or*
  - (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;*
  - (c) *substitute Ofcom’s decision for that of ATVOD...*”
21. This Decision considers issues relating to editorial responsibility under section 368A(1)(c) and jurisdiction under section 368A(1)(e) of the Act.

### **Section 3 – Determination under Appeal**

#### **ATVOD’s Determination**

22. On 4 May 2012 ATVOD wrote to the Appellant informing it of its statutory obligations to notify provision of an ODPS and setting out the statutory criteria which define an ODPS. On 20 July 2012 ATVOD informed the Appellant of its Preliminary View that the service provided within the Vice (Video) section of the Vice.com website was an ODPS in respect of which a notification had not been given and a fee not paid. Following receipt of the Appellant’s written submissions on the Preliminary View, ATVOD issued its Determination on 14 August 2013 that the Service was an ODPS for

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<sup>6</sup> Under section 368B of the Act: see paragraph 5 of Ofcom’s designation of 18 March 2010

<sup>7</sup> Paragraph 6(ii) of the Designation. This also makes clear that any such decision is “subject to appeal to Ofcom in accordance with Ofcom’s relevant procedures”.

<sup>8</sup> <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/appeals-procedures.pdf>

the purposes of Part 4A section 368A(1) of the Act and that a notification had not been given and a fee not paid.

23. ATVOD's Determination stated that it had undertaken assessments of the service prior to the issue of its Preliminary View in July 2012 and on 24 May 2013 and 1 August 2013. ATVOD also stated it had taken account of the appeal decisions published by Ofcom since the Preliminary View was issued.
24. In its Determination, ATVOD noted that the Appellant, in its representations on ATVOD's Preliminary View, had disputed that it fulfilled criteria 368A(1)(a) of the Act but did not dispute that it fulfilled the other criteria set out in 368A(1)(b) – (e).
25. ATVOD's Determination summarised the Appellant's representations on section 368A(1)(a) of the Act as being that:
  - "The "video" tab is just one element of the service operated by Vice. ATVOD's Preliminary View *"appears to be based upon the misconceived notion that the content within the video tab comprises a service within its own right"*.
  - "The video section of the website is anyway *"not principally designed to provide television-like programmes such that it would constitute an ODPS within the statutory parameters of S368A(1)(a) of the Act"*.
26. The Determination contained a brief description of the Appellant's website. It noted that the website identified at [http://www.vice.com/en\\_uk](http://www.vice.com/en_uk) (referred to by ATVOD as the "Vice website" or "UK Vice") contained a video section at [http://www.vice.com/en\\_uk/video](http://www.vice.com/en_uk/video) (referred to in this Decision as "Vice (Video)"). Vice (Video) could be accessed via a tab on the homepage of the UK Vice website, identified by ATVOD as the first of 10<sup>9</sup> such tabs across the UK Vice website. ATVOD indicated that in its view Vice (Video) formed a "pocket of TV-like territory which constitutes a service in its own right with the principal purpose of providing audiovisual material, it is not simply an integral and ancillary part of the broader website".
27. In identifying Vice (Video) as a service having the principal purpose of providing audiovisual material, ATVOD made the following observations.

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<sup>9</sup> Ofcom notes that there were 11 tabs across the Vice website as a whole.

28. ATVOD acknowledged that there were links between the Vice (Video) section and [http://www.vice.com/en\\_uk/](http://www.vice.com/en_uk/). However it made several observations as to the nature of those links and concluded that they did not suggest that the Vice (Video) section was an ancillary mode of communicating or enhancing the information and entertainment in the broader site. For example, when accessed through the Vice (Video) section, the audiovisual material appeared alongside links only to generic sections of the broader website, such as “travel and “fashion” and did not link to specific text or stills galleries which it might otherwise be considered to supplement or enhance.
29. ATVOD also concluded that audiovisual content from the Vice (Video) section was not embedded in the other sections of the site and that its presentation elsewhere merely served to direct the user to the Vice (Video) section. By way of contrast, ATVOD said that the audiovisual content which was embedded in text articles within the broader site appeared to be content that was not present in the Vice (Video) section. This content was embedded within the text article as an ancillary aid to illustrating a point being made. ATVOD concluded that there was therefore a clear distinction between the audiovisual material found within the Vice (Video) section described above and the other audiovisual content embedded as an integral part of the broader site.
30. ATVOD noted that, since issuing its Preliminary View, it had become apparent that the Vice (Video) section could be accessed via the YouTube platform (<http://www.youtube.com/vice>). This version of the service appeared to contain much of the same material as was provided in the Vice (Video) section. ATVOD said that on the YouTube platform the provision of the video material was clearly the principal purpose, as the videos appeared without any significant broader context. ATVOD concluded that the provision of the video material on the YouTube platform provided further evidence that its presentation in the Vice (Video) section of the Vice website was not integral or ancillary to the non-audiovisual material made available on other parts of the website.
31. ATVOD set out how it had applied the criteria in section 368A(1)(a) of the Act. It said that the description and derivation of the content gave rise to the expectation of regulatory protection, noting that the Vice (Video) section used the language of “shows”, “series” and “trailers”. It also referred to the fact that some of the content derived from the Vice magazine show had been broadcast on HBO, although noting that this content tended to be broken up for the website. ATVOD concluded that, although some content that featured in the Vice (Video) section was less TV-like, such

as the “Pornification” series, as at 24 May 2013 approximately 56% of videos (750 videos) were “TV-like”. As these tended to be longer programmes, this percentage equated to a “far larger percentage” of the total running time of audiovisual material in the Vice (Video) section.

32. ATVOD specifically noted that it had taken into account Ofcom’s appeal decisions relating to the Sun decision<sup>10</sup>, Everton TV<sup>11</sup> and Channel Flip<sup>12</sup>.
33. ATVOD stated that, in the terms of the characteristics identified in the Sun decision, the content on the Sun website did not constitute a service the principal purpose of which was the provision of audiovisual material. Although the Vice (Video) section did not have its own homepage, its independent identity and function appeared to be established, for example, by the prominence of the video section, the styling of the audiovisual material as television “shows”, “series” and “trailers”, the prominence of complete programmes of substantial duration and the relationship of the Vice (Video) section to other parts of the site. On an overall assessment, the audiovisual material appeared to offer a distinct consumer offering, rather than simply enhancing or supplementing material available in other sections of the site.
34. ATVOD distinguished the service offered by the Vice (Video) section from that provided by Everton Football Club and referred to in the Everton decision in that the Vice (Video) section appeared to have a specific independent identity due to its TV-related branding and the significantly TV-like nature of many of its programmes, which provided differentiation from the broader website, which was more analogous to an online version of a print magazine. There was no other section on the broader Vice website that contained substantial audiovisual content and the nature of any links from TV-like content were not comparable to those on the Everton website. The fact that many of the programmes made available in the Vice (Video) section also appeared in a branded Vice channel on the YouTube platform which did not form part of a broader Vice offering was further evidence that the Vice (Video) section constituted a pocket of TV-like territory which constituted a service in its own right.

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<sup>10</sup> [http://www.atvod.co.uk/uploads/files/Ofcom\\_Decision\\_-\\_SUN\\_VIDEO\\_211211.pdf](http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf)

<sup>11</sup> <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Everton-TV.pdf>

<sup>12</sup> [http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel\\_Flip\\_scope\\_appeal.pdf](http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/Channel_Flip_scope_appeal.pdf)

35. ATVOD also distinguished the Channel Flip decision, on the basis that the majority of the material in the Vice (Video) section was closely comparable to material normally included in television broadcast services and that the programmes in the Vice (Video) section were clearly distinguishable from the simple, short-form content which characterised Channel Flip.
36. ATVOD noted that all three decisions emphasised the need to step back and consider whether the material was likely to compete for the same audience as linear television broadcasts and whether the nature of the material and the means of access to it would lead users reasonably to expect regulatory protection. For the reasons set out above, ATVOD believed that the majority of the videos provided in the Vice (Video) section closely resembled those in particular broadcast genres, such as documentary, travel, feature films, in terms of subject matter, structure, production quality, in a manner such that the Vice (Video) section competed for the same audience as linear television broadcasts. ATVOD concluded therefore that users would reasonably expect regulatory protection of the type provided for in the AVMS Directive.
37. ATVOD therefore concluded that the broader Vice website included a service, namely the Vice (Video) section, which had as its principal purpose the provision of audiovisual material and that a version of this service was also provided on the YouTube platform.
38. ATVOD noted briefly that the other criteria in section 368(A)(1) of the Act were satisfied, stating that the service provided in the Vice (Video) section was provided by the Appellant which has its registered office at New North Place, London, EC2A 4JA. ATVOD also noted as evidence that the service was in UK jurisdiction, that the UK address was identified on the “Contact” and “About Us” sections of the broader website, that ATVOD had corresponded with the Appellant in matters relating to the service and that the Appellant was the entity which had provided representations in relation to the service.
39. On the basis of the factors above, ATVOD concluded that the Vice (Video) section was an ODPS, of which the Appellant was the provider, and in respect of which a notification had not been given and a fee not paid. It therefore concluded that between 20 July 2012 and 5 August 2013 the Appellant was in breach of sections 358BA and 368D(3)(za) of the Act.

## The Appeal

40. The Appellant wrote to Ofcom on 12 September 2013 requesting an appeal against the Determination. The Appellant submitted that ATVOD had incorrectly determined that the Vice (Video) service was an ODPS fulfilling all of the statutory criteria set out in section 368A(1) of the Act, specifically criteria (a), (c) and (e). It accepted that the other criteria were met.
41. By way of background, the Appellant stated that Vice started life as a print magazine and now had a circulation of over 1.2 million in 25 countries. The parent company was Vice Media Inc. and there were around 15 regional subsidiaries which were established for “corporate and financial purposes” and provided “local presences for the key activities of sales, marketing and distribution of the magazine and website”, as well as providing “local cultural insight...[for] the creation of localised content targeted at a specific regional market”. It stated that the magazine and website had the same brand values and editorial direction and that all content from the print version appeared on the website. It added that the website was essentially an “electronic version of the magazine” and that the website, in limited circumstance, used video to “tell the story” or to support the text.
42. The Appellant noted that the Vice.com website was reorganised in September 2011 as a “beta” version and, following refinement, was re-launched on 10 August 2013. It added that ATVOD’s assessment of the website was based on the beta version but that the site was “essentially the same” and “any changes are mainly user enhancements”. The Appellant stated that the overall purpose of the video section was to aggregate all of the video content from across the site as an aid to navigation and to promote its appearance in the original source genre areas.

### Section 368A(1)(a) – principal purpose

43. In relation to the principal purpose of providing audiovisual material, the Appellant argued that, looking at what was provided on the Vice.com website as a whole, there was nothing which was a service whose principal purpose was the provision of audiovisual material. The video content that was available was provided amongst other things, namely text and photos. As a whole none of the audiovisual material comprised something that in its own right was a “service” whose “principal purpose” was the

provision of that material and that it was in fact ancillary to, or merely incidental to the provision of an overall text and photo based magazine style service.

44. The Appellant put forward the following points.

#### The “homepage” through which the material is accessed

As ATVOD noted, the Vice (Video) section was one of 11 tabs across the homepage of the website as a whole. The Appellant said that this was pertinent as evidence that it was not its own service within a service, as it did not have any more precedence than the other tabs, which were all simply part of the overall website. Further, the Appellant argued that it was relevant that there was no separate homepage for the Vice (Video) section and no separate “banner heading” below the leading or promoted article as with other tabs, indicating that it was not a “genre destination” in its own right.

It argued that the Vice (Video) section was not a “location in its own right” but a “collection of videos promoted from other sections”. It was styled and structured to provide access to the overall magazine style, text and photos. It noted, by way of example, that the programme “White Student Union”<sup>13</sup> was from the Vice (News) section of the broader website and was “merely promoted” in the Vice (Video) section. It added that all of the programmes in the “Shows” subcategory in the Vice (Video) section existed in other genre tabs and that the new version of the website made this clearer.

#### The cataloguing and accessing of the material

The audiovisual material was not catalogued in the Vice (Video) section but “merely selectively promoted”. Only a small amount of audiovisual material was stored in the “Featured” subcategory of the Vice (Video) section. Material was not accessed in the Vice (Video) section, as it was located and accessed in the relevant genre tab.

#### The presentation and/or styling of the material

The Vice (Video) section was not styled or marketed as a television channel and the word “video” was used purely as a generic descriptor.

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<sup>13</sup> This featured in ATVOD’s video capture of the Service taken on 30 May 2013.

### The duration, completeness and independence of the material

The Appellant argued that it was too limiting to see the concept of ancillary as being solely related to short form, embedded content linked to a single full text article. It added that Ofcom should look at the “overall genre strands as an on-going publishing stream of connected and related articles”.

### The access and content links between the Vice (Video) section and the broader website

The Appellant said that the number of access or content links between text and video was not relevant to this type of magazine publishing and that all the audiovisual material in the Vice (Video) section was linked to other genre tabs and made sense as pieces of content in the editorial of the genre and the stream of content published there daily. It added that the links to related text stories or being embedded in text articles was not “relevant to this style of publishing”. It also confirmed that all of the content in the Vice (Video) section was in fact available on the broader site because this was where it resided. The Appellant also disputed ATVOD’s conclusion that, as clicking on videos took the user to the Vice (Video) section, audiovisual content was therefore not embedded in the other sections of the site but merely served to direct the user to the video section. The Appellant said that this was supported and emphasised by the site redesign, which made the navigation and presentation even clearer, with the same navigation, video location and play mechanic occurring but with the tabs highlighting to further demonstrate the location.

The Appellant said that the Determination suggested that, because some video content was embedded in and directly supported text articles, video for which this was not the case was distinct and had a distinct section. The Appellant argued that the distinction between embedded and standalone video was irrelevant. It said that on some websites video was only used to supplement a text article, whereas in others it appeared as standalone narrative that did not need text to contextualise it, but that this did not mean it amounted to a separate service and could not be ancillary to the overall principal purpose of the text site.

### The balance and nature of the audiovisual material and other material

The Appellant said that it was pertinent to look at the volume of text and video content published: on average the site published around fifteen new written articles each day across all genres and between one and two new video articles each day. The total percentage of video content to written material was 10% and was therefore low in volume and frequency.

### Overall assessment

The Appellant argued in summary that the Vice.com website as a whole was an electronic magazine, with elements of video integrated throughout but ancillary to the magazine style text and photos. The principal service was therefore an electronic magazine and the audiovisual material was ancillary to that overall magazine offering.

### Comparability

45. As to the comparability of the form and content of the relevant audiovisual material on the Vice.com website, the Appellant noted that Ofcom had published research entitled “On-demand services: understanding consumer choices” (“the Essential Research”) which set out ten factors which were helpful in assessing the comparability of video on demand with linear TV services. The Appellant submitted that eight out of the ten factors would put the Vice.com website on the “non-substitutional” end of the scale. In particular it noted:
- a. Purpose of the service: it accepted that the Vice.com website provided entertainment and/or information.
  - b. Look and feel of the service: the Vice.com website had the design, format and layout of a website and did not feature an Electronic Programme Guide, schedule or any other TV channel design features.
  - c. Frequency with which content is refreshed on the service: between one and two videos were added per day and a further 15 text articles across all genre tabs.
  - d. Who controls what is watched: users had control over what was watched and the listing of all ‘shows’ in the Vice (Video) section aided this user-led choice.
  - e. Effort expended to find a service: the broader website was only available on computer and mobile devices and so would tend to be accessed on small (non-TV) screens and on the move.

- f. The viewing experience: the Vice website was only available on computer and mobile devices, with a keyboard being required to access the content.
- g. Length of content: the Appellant noted that ATVOD's Determination set out its analysis of content over ten minutes in length, however the Appellant noted that the Essential Research found that content shorter than 20 minutes tended not to be considered a reasonable substitute for linear TV. In relation to the example cited by ATVOD in its Determination, "Doin' it Baja", the Appellant noted that, although the final episode in this series was 23 minutes in duration, the previous seven parts were between six and 13 minutes long. It added that this variable length was unlike TV, which was presented in episodes of a common and consistent length. The Appellant analysed the video which appeared on the broader website's homepage as at 11 September 2013 and noted that the average length was about eight minutes. Further, it noted that the first ten titles listed under the "Shows" sub-tab on the Vice (Video) section as at 11 September 2013 were about nine minutes long. It added that although there were "isolated pieces of longer content" the average video content was less than ten minutes long.
- h. Volume of content: around eight ten-minute videos were published every week, which was "relatively limited" compared to linear TV.
- i. Perceived quality of the content: the Appellant accepted that the content was of a high quality and professionally produced.
- j. Where content originated: the Appellant stated that Vice was extremely popular in its niche and highly trusted, but that it produced original content and was probably not yet what the Essential Research categorised as a familiar brand and content that would emanate from linear TV.

Sections 368A(1)(c) and (e) of the Act

- 46. The Appellant also made representations that sections 368A(1)(c) and (e) of the Act had not been fulfilled as the service provider had been wrongly identified by ATVOD as Vice UK Limited. It stated that almost all editorial decisions were taken by the parent/holding company Vice Media Inc., the sole shareholder in Vice UK Limited, and the owners of the website and web business.
- 47. In support of this the Appellant cited the following features of the website:
  - a. The site footer showed the copyright notice as "© Vice Media Inc. 2013".

- b. The Terms of Use stated: “The Sites are owned or controlled by Vice Media, Inc.”; that “Vice controls and operates the Sites from its offices in the United States...”; and governing law is listed as in New York.
  - c. The Privacy Policy noted that “The Sites are operated in the United States. If you are located in the European Union...please be aware that the information we collect will be transferred to and processed in the United States”.
  - d. The UK specific information on the website had the main purpose of giving information about where to obtain Vice magazine, how to source and distribute the magazine and commercial contacts for sales and distribution.
48. Ofcom noted that the Appellant had raised a new and significant argument concerning the jurisdiction of the service provider and accordingly, on 14 November 2013, Ofcom requested further information from the Appellant. Ofcom asked for information on the relationship between the US site, Vice.com, and the UK entity in terms of how decisions on which US content appeared on the UK site were made and by whom. Ofcom asked to see any contract setting out editorial responsibility between Vice UK Limited and Vice Media Inc. We also requested a list of relevant job posts and job descriptions for employees based in the UK, the job descriptions of senior US-based staff and supporting evidence that the head office of Vice Media Inc. was in New York.
49. The Appellant responded to Ofcom’s request for further information on 28 November 2013. The Appellant acknowledged that section 368A(1)(c) was fulfilled, since there was a person who had editorial responsibility for the service. The Appellant noted that ATVOD’s Guidance stated that there must be a single entity with editorial responsibility but argued that that entity was Vice Media Inc., not Vice UK Limited, and offered further evidence in relation to that argument as follows.

#### Editorial responsibility for content

##### *Commissioning and production*

50. The Appellant stated that the primary source of content for the Vice.com website in general was the US and the US team, i.e. US employees of Vice Media Inc., and that all content was principally made for a US/global audience. The Appellant explained that the UK Editor in Chief (based in the UK) reported to the Global Editor in Chief in the US (based in the US). Whilst the UK team advised on what content to produce to fit with local tastes and produced such content, the decision on whether or not that

content was to be made was determined by the US. Similarly whilst the UK team may advise on the selection and arrangement of content, actual decision making responsibility remained with the US. UK employees of Vice UK Limited did not have responsibility for the selection and arrangement of the US video content that appeared on the UK site. Ultimate sign-off and decisions regarding production and selection of content came from the US.

51. The Appellant indicated that there was also locally produced content, “UK-specific videos”, produced under the editorial direction of the UK staff, but that the material was also subject to US team sign off throughout. It outlined that only 5 to 15% of the video on the site was made specifically for the UK. Whilst this material was commissioned by the UK team, within the reporting structure as between Vice.com Ltd and Vice Inc, “overall control, final say so and right of veto, all lie in the US”. The Appellant argued that even if the UK team had editorial responsibility for the 5 to 15% of content made for the UK, as 85-95% of the video content was selected and organised by the US, on balance editorial responsibility must lie in the US.
52. The Appellant indicated that the UK team provided advice on local requirements and that, in practice, some day-to-day decisions about the selection of some content were made by the UK team if the content was deemed to be “uncontroversial”. It added that fewer decisions in relation to the video content (as opposed to the text content) were made by the UK team as with video content the volumes of the material were low and carried a perceived higher editorial risk.

*Selection and release and promotion of content*

53. The Appellant explained that the site’s content was managed and published on to the US site via a central/global Content Management System (“CMS”) and then released on to the other local sites. Once content had been signed-off for publication, it was loaded into the CMS ready for publishing on the US site and then the US team made the content live by activating the link from the CMS to the public website. The CMS also facilitated the content release for all the local versions of the site. Each territory had its own local duplicate but separate site, which allowed content to be released from the CMS onto the local site in accordance with local time zones, so as to maximise its exposure and views as against all other publishers’ content.

54. There were different processes for text and videos. The Appellant said that the UK Online Managing Editor and the UK Deputy Online Editor decided which US text articles would be appropriate for the UK audience. About 40%-50% of the articles that the US produced would remain on the UK site and therefore about 50% of the UK site would be new UK text articles produced and selected by the UK team. The UK team decided on the genre/vertical that UK text content should appear in and the description that was to be applied to it, but for US text content, the genre/vertical and description or extract were decided by the US team. On occasion, the description or extract may be edited by the UK team to make it read more appropriately for a UK audience, for example for context, spelling or cultural reasons, but this was a minor tailoring activity, rather than a responsibility for the actual content.
55. However all US video content was made available on the UK site. As detailed above, the Appellant argued that editorial responsibility for selecting the US video content for the UK site lay with the US team. The UK team did not select US video content and had no editorial discretion, as all US video content was created for a global audience and was published on all the international iterations of the service, including the UK site. There was a degree of local UK control in relation to the timing of release of material from the CMS onto the UK site's servers to fit local time zones. The Appellant said that the UK Editor in Chief had a failsafe legal and policy veto in relation to the US video content in circumstances where he considered that the US video content would be culturally offensive or legally problematic if published in the UK. This happened rarely, with only two such incidents in the last year.
56. In terms of arranging the video content (whether US or UK) on the UK site, the basic architecture and layout of each international iteration of the service in terms of the genre/vertical layout and the video description or written extract was decided by the US team. On occasion, the description or written extract may be edited by the UK team to make it read more appropriately for a UK audience. The Appellant described this as a minor tailoring activity, rather than a responsibility for the actual content. The Appellant said that, in these circumstances, in relation to video, Vice.com was a global proposition selected and arranged by the US team.
57. The Appellant said that the local team had authority to decide how content was promoted on the site, for example whether it was chosen as a featured article or whether it appeared as a standard thumbnail or larger tile in the timeline. The Appellant described this as a type of local marketing service to ensure that the relevant

content was optimised properly for local tastes and local events to maximise viewing and said that it did not impact on the selection or organisation of the content on the site.

58. In response to Ofcom's request for additional information, the Appellant said that there was no contract setting out editorial responsibility between Vice UK Ltd and Vice Media Inc., as these were two companies within the same group. The Appellant also said that not all employees had formal written job descriptions. One reason for this was that the company had a strong cultural element from the US parent where job descriptions (and contracts) were less formalised. In addition, the UK operation was still in start-up mode and had almost doubled in size in the last two years, meaning that HR processes were still being implemented. Where job descriptions in the key departments of production, editorial and news were available, the Appellant said that they all had practical production roles with no reference to discretion around selection or arrangement of the content on the site, nor in relation to the video content that was produced. Senior members of the production and editorial teams reported for creative and editorial purposes to their US managers, where editorial responsibility lay. The Appellant said that an example of a senior employee was the Head of News in the UK, who reported on editorial matters to the Chief Creative Officer in the US and to one of the co-founders, also based in the US. The Head of News in the UK reported on operational matters to the EMEA MD.
59. By way of background, the Appellant said that the founders of the company were the creative heart and voice of the company and that this explained the degree of US editorial control retained over the local sites, especially relating to video. On the print and text side, there had to be some practical delegation to regional teams due to scale, however transitioning the brand and editorial values to video required a significant degree of input and control from the founders and their core US leadership team, to ensure the Vice voice and direction were maintained, especially in non-US versions of the site.

### Jurisdiction

60. As set out above, the Appellant made submissions to Ofcom to the effect that the service provider was Vice Media Inc. It submitted that the head office for Vice Media Inc. was in New York and that editorial decisions were made in the US. It added that it was therefore not necessary to explore a scenario regarding a split of head office and

decision-making, nor the proportion of the workforce that were based in the UK as, if it was accepted that head office was in the US, it was not possible on the facts for editorial decisions to be taken in the UK.

61. The Appellant also noted that Recital 28 of the Directive stated that online versions of newspapers and magazines were not intended to fall under the regulatory regime and that the Vice.com website was an online version of Vice magazine.
62. In light of the Appellant's submissions to it, Ofcom sought further evidence from the Appellant. In response the Appellant provided further evidence that the head office of Vice Media Inc. was in New York, a copy of a standard US job offer letter, a US letter head, US business cards and a copy of the publisher information from the inside cover of the UK magazine. It drew Ofcom's attention to the current list of job vacancies, showing the HR address and job location, and to the "about us" link from the US site. The Appellant also provided a list of all UK employees, which indicated that around 100 staff were based in the UK, two thirds of whom work in editorial and production roles.
63. On 24 March 2015, Ofcom set out its Preliminary View on the Appeal: that the Appeal should be upheld, ATVOD's Determination quashed and Ofcom's decision substituted for that of ATVOD. Ofcom sent the Preliminary View to the Appellant and to ATVOD and asked for their representations. The Appellant made no representations. ATVOD made representations, in light of which Ofcom sought additional information from the Appellant.

#### **Section 4 – ATVOD's Representations**

64. ATVOD's representations on Ofcom's Preliminary View related to three aspects of the Preliminary View, namely:
  - the decision not to refer the matter back to ATVOD;
  - the application of the jurisdiction test, especially as it related to the part of the workforce operating in the UK; and
  - the observation that it might be helpful in future scope decisions such as this for ATVOD to seek evidence of actual consumer behaviour in relation to the website in question.

65. In relation to Ofcom's Preliminary View not to refer the matter back to ATVOD for a Determination, ATVOD said that the Appellant had relied to a significant extent on evidence and grounds that had not been presented to ATVOD. This was despite the fact that the Appellant had been given, and took, an opportunity to make representations on ATVOD's preliminary view. The Appellant had not questioned ATVOD's preliminary view that the Appellant was the provider of the service and was within the UK jurisdiction.
66. While ATVOD accepted that referring the case back at this late stage would cause unwelcome delay, it argued that the interests of timely, effective and efficient regulation of the video on-demand sector would be best served if the matter was referred back to ATVOD where substantial new grounds or evidence are advanced on appeal.
67. In relation to the jurisdiction test in section 368A(1)(e) of the Act, ATVOD queried whether Ofcom had correctly applied the "*significant part of the workforce*" test at Article 2(3)(c) of the AVMS Directive. ATVOD stated that the Appellant had not provided significant parts of the evidence requested by Ofcom on 14 November 2013. ATVOD asked whether the Appellant had provided information as to the number of staff comprised within the Vice group's global workforce and involved in the pursuit of the service. It did not feel able to make a "considered submission" on that question without knowing the total numbers involved or how Ofcom reached a Preliminary View on this without such information.
68. Ofcom sought and received further information on this point as summarised below.
69. Finally, ATVOD queried Ofcom's observation that it might be helpful in future scope decisions such as this for ATVOD to seek evidence of actual consumer behaviour in relation to the website in question.

#### **Section 5 – Further information from the Appellant and ATVOD's response**

70. Ofcom requested confirmation of the number of the total workforce of Vice Media Inc involved in working on the audiovisual content on Vice.com at the relevant time. The Appellant replied that 175 people world-wide were involved in the production of audiovisual content, with 17 in the UK. It submitted that this did not amount to a "significant part" either quantitatively by number (as it was less than 10%) or qualitatively by function (not being the ultimate editorial decision makers).

71. The Appellant reiterated its position as set out in its Appeal that it did not believe that the criteria in Article 2(3)(c) of the AVMS Directive was relevant. It noted that the editorial decision making discretion resided with Vice Media Inc in the US, and that Vice Media Inc had its headquarters in the US. It reiterated that none of the UK team were Vice Media Inc employees, but were employed by Vice UK Limited. It did not see how the application of "significant part" test in Article 2(3)(c) was relevant.
72. Ofcom issued a revised Preliminary View to the parties based on the further information provided by the Appellant noted at paragraph 70 above. The Appellant made no further comments however ATVOD noted an inconsistency in the wording used by Ofcom in that document.
73. As reported at paragraph 70, the Appellant had stated in its response to Ofcom that 175 people world-wide were involved "*in the production of audio visual content*", with 17 in the UK. However later in Ofcom's revised Preliminary View it had concluded that, given that out of the 175 staff involved "*in the pursuit of the audiovisual media service activity*", only 17 operated from the UK, it appeared to Ofcom that a significant part of the workforce involved in the pursuit of the audiovisual media service activity did not operate in the UK.
74. ATVOD submitted that this suggested that Ofcom regarded "*the production of the audiovisual content*" and "*the pursuit of the audiovisual media service*" as synonymous and sought clarification as to why non-production staff were considered to be irrelevant to the test set out in Article 2(3)(c) of the AVMS Directive.
75. Ofcom wrote to the Appellant noting that it had provided figures for the total Global and UK workforce and for those involved in both "Global AV production" and "UK AV production". Ofcom stated that "the pursuit of the audiovisual media service activity" at Article 2(3)(c) was wider than the production of audiovisual material and that it considered that the workforce involved in the pursuit of the audiovisual media service activity included, but was not limited to, various other activities (such as editing, marketing and distribution) relating to such audiovisual content.
76. Ofcom asked for clarification of the numbers *involved in the pursuit of the audiovisual media service activity* for the global workforce of Vice Media Inc and the UK workforce of Vice Media Inc.

77. In response, the Appellant identified the relevant roles and estimated that on average the additional non-video production roles spent less than 10% of their time involved in the pursuit of the audiovisual media service activity (and as such the 10% figure was likely to be a high estimate averaged across all roles).
78. Taking into account the extra roles it identified, the Appellant estimated that the global number for all relevant employees would rise by 175 to 350, but assuming that only a maximum of 10% of time was relevant for the additional people, this gave an adjusted total of 192.5. The Appellant estimated that the UK number for all relevant employees would rise by 12 to 29, but assuming that only a maximum of 10% of the time was relevant for the additional people, this gave an adjusted total of 18.2.

## **Section 6 – Ofcom’s Decision and Reasons**

79. In reaching this Decision, Ofcom carefully considered ATVOD’s representations and the additional information provided by the Appellant.
80. Ofcom reviewed the whole and constituent parts of the Appellant’s website at the time ATVOD made its Determination, including the Vice (Video) section. Ofcom viewed screen grabs gathered by ATVOD at the time of its Preliminary View, video evidence captured by ATVOD at the time of its Determination and video capture provided by the Appellant at the point of its appeal.
81. Ofcom undertook a review of the website in October 2013 following receipt of the Appellant’s appeal submission. At this time some changes to the design of the website had taken place. Ofcom carefully compared the website at that time with the video capture provided by ATVOD of the “beta” version. We noted that the specific audiovisual items referred to by ATVOD in its Determination and the Appellant in its appeal submissions and provided in evidence to us remained on the site in the same form.
82. Ofcom reviewed the new submissions and evidence which had not previously been provided to ATVOD under section 368A(1)(c) and (e) as to whether Vice Media Inc. and not Vice UK Limited was the person with editorial responsibility for Vice (Video) and under the jurisdiction of the UK for the purposes of the AVMS Directive.

83. Ofcom recognised the importance of full information being supplied by service providers to ATVOD in the first instance and agreed that, in a case where it appeared that information had been held back or an appellant had not engaged, this may well be a reason to remit back. We noted that the Appellant had engaged with ATVOD during the period leading up to ATVOD's Determination. We further noted the period of time that had elapsed since the issue of ATVOD's Determination and the desirability of bringing the matter to a prompt conclusion, limiting further cost. Taking all of this into account and in the particular circumstances of this case, Ofcom considered it appropriate to substitute ATVOD's Determination with its own, rather than to remit the decision back to ATVOD for it to reconsider.
84. Ofcom noted the Appellant's argument that Vice Media Inc., the parent company, was the entity with editorial responsibility for video content rather than Vice UK Limited. Ofcom noted that the role of the UK based team of employees differed depending on whether it was dealing with text or video content. In relation to video content, Ofcom noted that the UK team had no role in selecting which video content to include at the Vice (Video) tab and that all US video content had to be included (except if it was culturally offensive or legally problematic). Decisions on arranging this content were also made by the team based in the US. A small amount of UK-originated video content was included at the Vice (Video) tab, but this was subject to sign-off by the team based in the US. In these circumstances, Ofcom considered that Vice Media Inc. was the entity with editorial control over the video content at the Vice (Video) tab.
85. Ofcom noted that the overall approach to text material on Vice.com differed from the approach to video material. The UK team produced and selected around half the text material and was responsible for deciding which genre/vertical the UK generated material appeared in and the description applied to that material. However, the genre/vertical and description for US text material was decided by the US team and the UK team did not have editorial responsibility for this material.
86. Taking ATVOD's case that the Vice (Video) tab is a service the principal purpose of which was the provision of TV-like programmes (see paragraphs 95 to 99 below for Ofcom's observations on this view), it appeared to Ofcom that the new information provided by the Appellant suggested that the entity with editorial responsibility for the audiovisual material at the Vice (Video) tab was Vice Media Inc. and not the Appellant.

87. Ofcom considered whether Vice Media Inc. would fall within the jurisdiction of the UK under section 368A(1)(e) of the Act. In accordance with Article 2(3)(c) of the AVMS Directive, Ofcom first considered the location of the “head office”. On the basis of the material provided by the Appellant in response to Ofcom's request for further information, and from the information on the Vice website, Ofcom was satisfied that the head office of Vice Media Inc. was in the US.
88. As noted at paragraph 10 above, that provision of the AVMS Directive says:
- “if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or vice versa, it shall be deemed to be established in the Member State concerned, provided that a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in that Member State”.*
89. We agreed with the Appellant's submission that the "significant part" test is not to determine who has editorial responsibility (and is therefore the service provider), but rather to determine if that service provider is based in a Member State. The Appellant also argued that *“none of the US employees are based in the UK and none of the UK employees are employed by Vice Media Inc; and as such Vice Media Inc is the service provider and none of the editorial decisions are made in a Member State”.*
90. Ofcom agreed that Vice Media Inc is the person with editorial responsibility. However, the reason why Ofcom considered that the jurisdiction test at Article 2(3)(c) was relevant was that, whilst the Service Provider's head office was in a “third country” (the US), “decisions” on the audiovisual media service were taken in a Member State (the UK).
91. The UK team had a decision making role, for example in relation to the commissioning and production of UK content, the selection of US text material for the UK website, the production of UK text articles, the timing and promotion of video content. It was also clear from job descriptions provided by the Appellant to Ofcom that, while editorial responsibility lay with the US office, a number of members of the UK team had decision making roles in other areas, such as financial, client service, policy and strategy. Ofcom therefore considered that decisions relating to the audiovisual media service were made in both the US and the UK. In such circumstances, it was necessary for Ofcom to look at the “significant” part test at Article 2(3)(c) of the AVMS

Directive to determine whether or not the service provider was deemed to be established in a Member State.

92. The question then to be considered would be whether a significant part of the workforce involved in the pursuit of the audiovisual service activity operated in the UK. Ofcom noted, on the basis of the information provided by the Appellant and the further clarification sought, that out of the estimate of 192 staff involved in the pursuit of the audiovisual media service activity, only an estimated 18 operated from the UK, and that the authority held by the US head office in its decision making capacity greatly limited the decision making capacity of the UK based staff. In these circumstances, it appeared to Ofcom that a significant part of the workforce involved in the pursuit of the audiovisual media service activity did not operate in the UK.
93. Ofcom's Decision is that, based on the information provided by the Appellant (and as recorded at paragraph 58 of the Decision), the person with editorial responsibility for the service as decided by ATVOD was in fact Vice Media Inc. in the US and that this person did not fall within the jurisdiction of the UK for the purposes of the AVMS Directive.
94. Ofcom's Decision therefore is to uphold the appeal, quash ATVOD's Determination and substitute our decision for that of ATVOD.
95. In light of this Decision, we do not need to go on to determine whether ATVOD's decision that Vice (Video) is a service meeting the criteria in section 368A(1)(a) of the Act was correct. However, we make a number of observations on this issue for future reference.
96. We noted the approach taken by ATVOD as described above in determining that the Vice (Video) tab was a service the principal purpose of which was the provision of TV-like programmes. ATVOD's Determination said that in its view Vice (Video) formed a "pocket of TV-like territory which constitutes a service in its own right with the principal purpose of providing audiovisual material, it is not simply an integral and ancillary part of the broader website". Its overall assessment was that the content at the Vice (Video) tab was a "distinct consumer offering rather than simply enhancing or supplementing material available in other sections of the site".
97. In our view it was necessary to look at the offering provided by the website as a whole: the written content and the audiovisual material on the Vice.com website. Ofcom observed that ATVOD may not have had, at the time of the Determination, sufficient

information to conduct the broad assessment of all of the material at Vice.com, outside of the Vice (Video) tab required.

98. We were also mindful of the particular provisions of Recital 28 of the AVMS Directive as regards the provision of electronic versions of newspapers and magazines. Ofcom observed that it is possible for a video tab or section of a website to be ancillary or merely incidental to the provision of an overall text and photo based magazine style service.
99. In future scope decisions such as this, we observe that it may be helpful for ATVOD to seek and/or for the service provider to provide evidence of actual consumer behaviour to illustrate how consumers in fact access, view and use the audiovisual material on the site in question. We noted ATVOD's representations on this point. However we considered that this paragraph makes it clear that such evidence *may* be useful and could be provided by either the Appellant or ATVOD.
100. However, in considering the new information on jurisdiction provided by the Appellant, Ofcom also observed that it appeared that Vice Media Inc. was the entity with editorial responsibility over all the audiovisual material across the entire Vice.com website. Therefore on the same basis as set out above at paragraph 92, even on a broader assessment of all the audiovisual material on the Vice.com website, it appears that at the relevant time the entity with editorial responsibility, Vice Media Inc., was established in the US and therefore outside the jurisdiction of the UK.

## **Section 7 – Conclusion**

101. In light of the new evidence provided by the Appellant to us which was not before ATVOD when it made its Determination, Ofcom's Decision is to uphold the appeal, quash ATVOD's decision and substitute our decision for that of ATVOD. In doing so, we make some observations on ATVOD's Determination that the Vice (Video) tab is an ODPS. We also observe that even on a broader assessment of all the audiovisual material on the Vice.com website, it appears that at the relevant time the entity with editorial responsibility, Vice Media Inc., was established in the US and therefore outside the jurisdiction of the UK.
102. Ofcom has noted that, since ATVOD made its Determination, Vice Media Inc. has made changes to the layout and design of Vice.com and Vice (Video) and has

launched a new venture, Vice News. Consistent with previous appeals, Ofcom has only considered evidence of the site as it was at the time of ATVOD's Determination.

**21 July 2015**