



Dutch Media Authority Regulation of 22 September 2011 providing policy rules on the classification of on-demand commercial media services, as referred to in Article 1.1(1) of the 2008 Media Act (2011 Policy rules on the classification of on-demand commercial media services)

The Dutch Media Authority,

Having regard to Article 4:81 of the General Administrative Law Act (Awb);

Decrees:

Article 1 Purpose

This Regulation lists the criteria pursuant to which the Dutch Media Authority will determine the existence of an on-demand commercial media service that is under its supervision, as referred to in Article 1.1(1) and Article 3.29a of the 2008 Media Act.

Article 2 Definitions and Scope

The following terms employed in this Regulation shall have the following meaning:

- a. *moving visual content*: A series of consecutive images experienced by the user as a single flowing entity;
- b. *catalogue*: The ordering of the available video content inside a database enabling the user to access the video content;
- c. *Directive*: The Audiovisual Media Services Directive (Directive 2010/13/EU);
- d. *video*: A media type consisting of an electronic product displaying moving visual content in such a way that the content shown is coherent, recognisable as such, and disseminated under an individual title;
- f. *Act*: The 2008 Media Act.

Article 3

The Authority shall supervise any on-demand commercial media service referred to in Article 1.1(1) and Article 3.29a of the 2008 Media Act, insofar as said service is also meets all of the criteria listed in Articles 4-8 of these policy rules.

Article 4 Catalogue

The on-demand commercial media service is based on a catalogue.

Article 5 Primary Objective

1. The on-demand commercial media service's primary objective is the provision of video content. This implies that the video content provided does not serve any subordinate interest and that the on-demand commercial media service itself is a fully-fledged service in and of itself that can be used independent of others.
2. The provisions of paragraph 1 are expressed by the functionality the service offers and the way in which the service itself is presented, and, with it, its recognisability to the general public.

Article 6 Massmedial Nature

The on-demand commercial media service is of a massmedial nature. Such a characteristic will be deemed to exist if the service is found to primarily focus on informing, entertaining, or educating the general public, or sections thereof. This means that the service must be able to be received using standard consumer equipment.

Article 7 Economic Service

The on-demand commercial media service is an economic service. This means that



the on-demand commercial media service participates in the economy.

Article 8 Editorial Responsibility

1. Notwithstanding the provisions of Article 1.1(1) of the 2008 Media Act on the definition of editorial responsibility, this Regulation shall only apply where editorial responsibility for any on-demand commercial media service is borne by no more than one provider.
2. In the event that more than one provider were to enjoy influence over the choices and organisation, the provider enjoying decisive influence over the video content offered shall be deemed to bear editorial responsibility.

Article 9 Right to set up an Advisory Committee

The Authority reserves the right to set up an Advisory Committee in the event that questions of principle were to arise in respect of certain decisions made pursuant to this Regulation.

Article 10 Final Provision

1. This Regulation will enter into force on 1 November 2011.
2. This Regulation shall be referred to as the 2011 Policy rules on the classification of on-demand commercial media services.
3. This Regulation shall be made public by its publication both in the Government Gazette and on the Dutch Media Authority's website (www.cvdm.nl).

*Dutch Media Authority,
T. Bahlmann,
President.*

*M. de Cock Buning,
Commissioner.*



ANNEX TO THE 2011 POLICY RULES ON THE CLASSIFICATION OF ON-DEMAND COMMERCIAL MEDIA SERVICES

Article 1.1 of the 2008 Media Act

media service: A service which is under the editorial responsibility of a media service provider and has as principal purpose the provision of media content using public electronic communications networks as referred to in Article 1.1(h) in the Telecommunications Act [Dutch: Telecommunicatiewet].

media content: One or more electronic products containing audio or visual content intended for consumption by the general public or a section thereof;

commercial media service: A media service provided pursuant to Chapter 3 of the 2008 Media Act;

commercial media institution: A person or legal person providing commercial media services and for the purposes of the application of the Media Act falling under Dutch jurisdiction;

on-demand media service: A media service providing media content that is consumed at the individual request of the user and at a time of his choosing;

programme: An electronic product consisting of audio or visual content that is clearly delineated, recognisable as such, and disseminated by a broadcasting service under an individual title;

programming: All media content disseminated by a broadcasting service;

broadcasting service: A media service related to the provision of media content determined pursuant to a chronological schedule drafted by the institution responsible for the media content and which a broadcasting transmitter or broadcasting network disseminates in encrypted or non-encrypted form for its simultaneous reception by the general public or a section thereof;

broadcasting network: A public electronic communications networks as referred to in Article 1.1(h) of the Telecommunications Act, either solely, or mainly, used for the dissemination of programmes and mainly done with the aid of cables;

broadcasting transmitter: A radio transmitting device as referred to in Article 1.1(kk) of the Telecommunications Act, either used or also used for the dissemination of programmes;

advertising announcement: Any expression, regardless of its form and which isn't a teleshopping announcement, that is unmistakably aimed at getting the public to either buy a particular product or to make use of a particular service, or which attempts to have the public look favourably upon a particular company, industry, or institution, with the aim of promoting the sale of a particular product, or use of a particular service;

editorial responsibility: Exercising effective control over:

- a. the media content offered; and
- b. the ordering of media content into either a chronological programming schedule, or, in the case of on-demand media services, a catalogue;

television broadcaster: A broadcasting service broadcasting television programming;

television programme: A programme containing visual content, with, or without accompanying audio content;

public media service: A media service provided pursuant to Chapter 2 of the 2008 Media Act;

Article 1.2 of the 2008 Media Act

1. Those public or commercial media institutions deemed by Article 2 of the European Directive as under the jurisdiction of the Netherlands, are under the jurisdiction of the Netherlands.
2. The previous paragraph equally applies to any institution producing radio programmes, with the added connotation that any institution producing radio programmes that are transmitted across the Netherlands via a non-satellite broadcasting transmitter, always falls under the jurisdiction of the Netherlands.

Article 3.29a of the 2008 Media Act

This title defines a commercial on-demand media service as: An on-demand media service provided by a commercial media institution, where the media content relates to products containing moving visual content, with or without accompanying audio content. Such is deemed to also include any related subtitling services and electronic programme guides.

Article 1.1(h) of the Telecommunications Act

public electronic communications network: An electronic communications network that is either solely, or mainly, used for the purpose of providing public electronic communications services, which is to be understood as to include a network intended for the dissemination of programmes, insofar as done to the general public.

Audiovisual Media Services Directive - Article 2

1. Each Member State shall ensure that all audiovisual media services transmitted by



- media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.
2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are any of the following:
 - a) those established in that Member State in accordance with paragraph 3;
 - b) those to whom paragraph 4 applies.
 3. 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.
 4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:
 - a) they use a satellite up-link situated in that Member State;
 - b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.
 5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, 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.
 6. This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.

Audiovisual Media Services Directive - Consideration (21)

For the purposes of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty on the Functioning of the European Union and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and 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.

Audiovisual Media Services Directive - Consideration (22)

For the purposes of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition 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 and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other



forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.

Audiovisual Media Services Directive - Consideration (23)

For the purposes of this Directive, the term 'audiovisual' should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While 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, which should not affect the freedom of the Member States to regulate such services at national level in accordance with the Treaty on the Functioning of the European Union.

Audiovisual Media Services Directive - Consideration (24)

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. In the light of this and in order to prevent disparities as regards free movement and competition, the concept of 'programme' should be interpreted in a dynamic way taking into account developments in television broadcasting.

Audiovisual Media Services Directive - Consideration (25)

The concept of editorial responsibility is essential for defining the role of the media service provider and therefore for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the concept of 'effective control', when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

Audiovisual Media Services Directive - Consideration (26)

For the purposes of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.

Audiovisual Media Services Directive - Consideration (27)

Television broadcasting currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on-demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast, i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

Audiovisual Media Services Directive - Consideration (28)

The scope of this Directive should not cover electronic versions of newspapers and magazines.



EXPLANATORY MEMORANDUM TO THE 2011 POLICY RULES ON THE CLASSIFICATION OF ON-DEMAND COMMERCIAL MEDIA SERVICES

General

1. The 2008 Media Act was amended in 2009 to meet the requirements of the Audiovisual Media Services Directive (hereinafter: the Directive). Matching the approach employed in the Directive, the Dutch legislator also elected to take a platform-neutral and technology-independent approach to the 'media service' concept. On-demand services have also come to be included in the legislation. This has not only led to regular broadcasting services (broadcasting via cable, ether, or satellite) to be brought within the scope of the Dutch Media Authority's oversight, but also to services similar to television, but disseminated in a different manner (e.g. via the internet, or via a mobile phone). This has created a level playing field for providers of comparable services using different platforms. At the same time, users of all these platforms are now guaranteed a certain level of protection under the 2008 Media Act.
2. These policy rules are limited to on-demand commercial media services, as public media services already enjoy a more comprehensive regulatory regime. The Authority's oversight of on-demand commercial media services is limited to the videos provided through a catalogue, along with any subtitling, pre-rolls, or overlays that may accompany them, as well as the programme information included in the catalogue. What the viewer sees when watching a video in full-screen mode (by selecting full-screen mode in his video player) can offer substance to the determination of what does, and doesn't, belong to the video in the on-line environment. These are the images a viewer is unable to avoid if he wants to watch the video in question.
3. Both the 2008 Media Act as well as the Directive make a distinction between broadcasting services (also referred to as linear media services or television broadcasting) and on-demand media services (also referred to as non-linear media services). Decisive viewer discretion as to when the viewer is sent the information is a characteristic trait of the latter category. This in contrast to broadcasting services, where the provider determines when a programme is aired. A less strict regime applies to on-demand services, as it is assumed that the consumer enjoys more freedom of choice and greater user influence than he does in respect of (linear) broadcasting services. Moreover, the Directive works off of the assumption that broadcasting services are able to reach a far greater audience and consequently enjoy a far greater impact than on-demand media services do, leaving less of a necessity for extensive regulation of on-demand services. On-demand media services could for example take the form of deferred television viewing services, on-demand video services electronically providing access to movies, and websites aimed at providing news videos. Any service provider subjected to media oversight under the 2008 Media Act will have to observe certain regulations in respect of advertising, sponsoring and product placement, as well as register his service with the Authority. The Authority will monitor the service provider's compliance with these regulations.
4. These policy rules list the criteria pursuant to which the Dutch Media Authority determines the existence of an on-demand commercial media service that is under its supervision, as referred to in Article 1.1(1) and Article 3.29a of the 2008 Media Act. These policy rules can also be found announced in the explanatory memorandum to the 2008 Media Act Amendment and the Tobacco Act [Dutch: Tabakswet], implementing the Audiovisual Media Services Directive, hereinafter: the Implementation Act¹. One of the principles the Authority employed in drafting these policy rules is that its determination as to which on-demand commercial media services fall within the scope of its oversight regime shall remain independent of the manner of its transmission, its dissemination platform, or the background of a particular service provider (such as whether a provider had previously operated as a media institution).
5. These policy rules also apply to on-demand media services providing videos aimed at either directly or indirectly promoting the products, services or image of any natural or legal person engaged in any economic activity.
6. Article 1.1(1) of the 2008 Media Act provides that the services concerned in this regard are services provided using public electronic communications networks as referred to in Article 1.1(h) of the Telecommunications Act. These are services that are disseminated electronically, e.g. via cable, ether, or satellite, the internet, or a mobile network. Any service selling videos on-line, but only distributing them by sending a physical data carrier (e.g. a DVD), is not deemed an on-demand media service under the 2008 Media Act.
7. The country of origin principle employed in the Directive provides that the media institution's country of residence enjoys jurisdiction over that media institution. Article 2 of the Directive provides how jurisdiction over media service providers is established.
8. Video content providers, in particular those doing so via the internet, may, over time, well be subjected to all manner of changes in their set-up and appearance. As such, the

¹ See Kamerstukken II, 2008/2009, 31876, nr. 3.



determination that a particular service is deemed a media service, will always be linked to a certain point in time. Services not deemed a media service at a certain point in time, may be subjected to a periodic review of their status. It is for this reason that the Authority shall at all times reserve the right to, in the event of a change of circumstances and even in contrast to its earlier assessment, determine that a particular service is deemed an on-demand commercial media service.

9. The Authority is aware that not even the provisions of these policy rules can prevent debate from arising on the extent to which a service meets the criteria. The rulings we will issue on such matters will offer clarity in this respect and will follow legal development in the various cases and policies employed in other EU Member States.

Notes by Article

Article 1 (Purpose)

10. This article indicates the purpose for which the Authority employs these policy rules. These policy rules were drafted with an eye on promoting the legal certainty enjoyed by parties who may be deemed an on-demand commercial media service provider.

Article 2 (Definitions and Scope)

11. The policy rules define 'catalogue' as the ordering of the available video content in a database enabling the user to access to the video content. The main function of a catalogue is making the videos on offer available. In that sense, it enjoys a function similar to that enjoyed by the broadcasting services' chronological schedule. The database referred to here is to be understood as a collection of data, arranged to a certain order, for the user to consult. The simplest of ordering arrangements will suffice in that respect. An on-demand commercial media service providing video content that can only be accessed by the user by way of a text-based search query function, will be deemed a catalogue-based service.
12. The Authority is expected to observe the definitions framework listed in the 2008 Media Act where it can. The 2008 Media Act exclusively links the concept of 'programme' to (linear) broadcasting services only. This is why the Authority elected to introduce the term 'video' when speaking of on-demand media services. The meaning of the term video in the non-linear domain is similar to that enjoyed by programme in the linear domain, although, whereas a video will always contain moving images, programmes may solely consist of audio content (e.g. radio programmes). As such, one will find a video always consisting of moving images, with, or without accompanying audio content. That means that any commercial party providing on-demand (non-linear) soundbites (i.e. without moving images), will not be deemed an on-demand commercial media service (see Article 3.29a of the 2008 Media Act). In order to be considered a video, a set of moving images must carry an individual title. An individual title will be deemed as such if it carries significant meaning to the user and distinguishes that video from the other available videos. It should be added that there's no requirement for displaying said title in the video itself; a mere listing in the catalogue will suffice.
13. The Authority has elected not to employ, or to award any further substance to, the term 'televisionesque,' as this term was shown to offer insufficient potential for delineating the scope of these policy rules in practice.

Article 3 (Definitions and Scope)

14. The Authority will assess a service providing video content according to five criteria. These criteria have a cumulative character, i.e. the on-demand commercial media service will have to meet all five criteria, in order for the Authority to enjoy oversight over it. These criteria are the following:
 - The videos are made available using a catalogue (see Articles 2 and 4 of these policy rules);
 - The service's primary objective is the provision of video content (see Article 5 of these policy rules);
 - The video content is made available under the editorial responsibility of the media institution providing the service in question (see the definition listed in Article 1.1(1) of the 2008 Media Act, taking into account Article 8 of these policy rules);
 - The service is of a massmedial nature (see Article 6 of these policy rules);
 - The service may be deemed to constitute an economic service (see Article 7 of these policy rules);

These criteria were taken from the 2008 Media Act and the Directive and are explained in more detail by way of these policy rules.



Article 4 (Catalogue)

15. The criterion that an on-demand media service is based on a catalogue, presupposes that its provider is tasked with the indexing or categorising of the videos it is providing. The term catalogue is interpreted in a broad sense. A catalogue will be deemed to exist if as little as a search feature (with which to search among the videos contained in the catalogue), or a categorisation of sorts is found (such as one based on content, e.g. sports, news, entertainment, etc., or an alphabetical, or chronological, order). The setting up of a catalogue presupposes the existence of a certain amount of videos and consequently the need for making them accessible. An on-demand media service based on a catalogue may also be deemed to exist if a catalogue is not (fully) visible to the user, yet entering a search query will nevertheless bring up a number of videos.

Article 5 (Primary Objective)

16. The primary objective criterion detailed in this article implies that services among which the provision of videos is of secondary importance aren't governed by these policy rules. One example of this could be on-line stores employing videos to support the sale of their products, or which are intended to assist customers in using the products they purchased (e.g. clothing retail websites providing video presentations of garments they sell).
17. The second paragraph provides more detail on the aspects considered in the determination of whether the criterion referred to in the first paragraph is met. This matches what is indicated in the explanatory memorandum to the Implementation Act² (page 6): "The following indicators may be employed in the determination of [a service's] primary objective: presentation, recognisability to the general public, and the relationship between the component part in question and the service's other component parts." One factor in determining recognisability to the general public is whether or not the videos are made available as an independent unit. Considerations in assessing the existence of such will include whether the on-line video catalogue is made available under its own, recognisable URL (domain name) and whether it is also presented as an independent service to the wider public.
18. The Authority will consider a service related to the catalogue with videos as an on-demand service. The simple fact that a service based on a video catalogue is a component part of a larger unit, e.g. a website that also comprises other activities, will not prevent such a service from being considered an on-demand commercial media service that can be used independently.
19. In practice, one will quite often encounter a situation in which a provider offering an originally non-audiovisual service will later decide to have that service include some audiovisual material. Such a service will not be classified as a media service, if the primary purpose of that audiovisual material is the fulfilment of a supportive role. Such situations will require an assessment to be made of the extent to which the provision of videos may be deemed a stand-alone service. Videos containing content that is related to other component parts of a particular service (e.g. a written news article and/or a product page) and/or is derived thereof, indicate that the videos provided are of a supportive nature.

Article 6 (Massmedial Nature)

20. The service will be deemed to be of a massmedial nature if the service focuses primarily on informing, entertaining or educating the general public, or sections thereof. The explanatory memorandum to the Implementation Act³ (page 5) provides that the distribution of audiovisual media content in private communication, e.g. in web-cam chat groups, or an
21. e-greeting card with moving imagery cannot be deemed a media service, as it lacks a massmedial nature.
22. Matching that which is provided in the explanatory memorandum to the Implementation Act (page 5), equipment will be deemed 'standard consumer equipment' if, depending on the state of the art and the price and availability of the software and hardware it requires, it is available to the consumer. Equipment which - due to its high price, or the required software - is normally only used by professionals, is not deemed standard consumer equipment.
23. On-line video services tend to be of a massmedial nature as they can be viewed using standard consumer equipment. The same applies to on- or off-line video services that can be accessed through distribution platforms such as digital cable, a mobile data network, or IPTV. Services that can only be accessed via devices, such as a set top box, tablet computer, or a game console

² See Kamerstukken II, 2008/2009, 31876, nr. 3.

³ See Kamerstukken II, 2008/2009, 31876, nr. 3.



tend to also be of a massmedial nature. The fact that access to them is password, PIN-code, or otherwise protected does not detract from their massmedial nature.

24. The Authority is aware of the fact that technological developments have enabled non-professional parties to now also become able to set up (on-demand) video services at a limited cost. The Media Act does not apply to on-demand video services which are aimed at the common interests of a limited group only, do not seek to make a profit, and do not feature any advertising or offer any paid services. Such an exception could potentially apply to more locally-oriented video services, such as those of a church community, a drama club, a school, sports club, hospital, or local council, as well as to services of which both its users as well as its providers belong to the same family or group of friends, or other such groups.

Article 7 (Economic Service)

25. It should be noted first and foremost that both natural and legal persons have the capacity to provide economic services. Having said that, one would expect videos made available on websites owned by natural persons would not quite as quickly be deemed an 'economic service'. This, of course, all changes once the videos are offered in return for money, and/or contain advertising and/or sponsoring. Legal persons may, in absence of any advertising or sponsoring, already be deemed to be providing an economic service if the videos support the company or brand engaging in economic activity. This approach matches that provided in the Directive at both Consideration 21 and Article 1(a), where the term audiovisual media service is defined and where reference is made to Articles 56 and 57 of the Treaty on the Functioning of the European Union. The latter articles mentioned basically state that this concerns services that are normally provided for remuneration.
26. The absence of a profit motive in itself will not suffice to have an activity deemed non-economic. Also not relevant is whether the user or a third party pays for the activity in question, unless the service is provided by a natural person (see point 25).

Article 8 (Editorial Responsibility)

27. This article adds more detail to the criterion of the provider carrying editorial responsibility for the service. The explanatory memorandum to the Implementation Act⁴ allows editorial responsibility to be understood as meaning that the media service provider exercises effective control over the videos offered and how they are organised. Effective control requires the potential for decisive influence to be had over both the videos offered and how they are organised. The organising of videos at least includes the manner in which they are placed inside the catalogue and the manner in which they are presented. Placement inside the catalogue adds an added value to the service. Added value will, for example, be deemed to exist in situations where the provider adds meta data to the videos that contain additional information that is relevant to the manner in which they are presented in the catalogue. One such example could be the addition of an index.
28. A clear distinction should be made between the service provider's legal and social responsibility and his editorial responsibility. For instance, editorial responsibility in the sense of the 2008 Media Act may not be automatically derived from the ability of a provider of user-generated video content to delete, or refuse to delete, videos that are in violation of criminal law, or which infringe upon intellectual property rights. Editorial responsibility needs to specifically relate to the choice of audiovisual media content and the manner in which it is presented. The mere transmission of videos for which a third party is editorially responsible will not bring the organisation transmitting these videos within the scope of the 2008 Media Act. Examples of these are cable companies, and cable service providers, provided that they merely forward the signals they are offered for transmission by third parties.
29. The editorial responsibility criterion will in principle prohibit video hosting sites (like YouTube and Vimeo) from being deemed on-demand commercial media services. Any person uploading a video to YouTube is required to also submit a title, description and tags for the video in question. The uploader will also have to indicate a category to which his video is to be uploaded under. YouTube has, to date, not exercised any editorial responsibility over its videos, and if it is seen taking measures, this will be the exception to the rule and may, for example, involve, discontinuing the availability of such content. That situation may change if, say, for example, the video hosting site were to decide to enter into agreements with certain content providers about providing a specific type of content. Such a situation could see a video hosting site take on an editorial role and may cause it to be considered a media service provider. Third parties making their own channel available via

⁴ See Kamerstukken II, 2008/2009, 31876, nr. 3.



- a video hosting site may in certain instances also be considered a media service provider, provided they exercise editorial responsibility over their channel.
30. Article 8(1) was included in these policy rules to prevent ambiguity from arising as to the question of who is providing a particular media service. One would in any event want to avoid two countries from exercising their jurisdiction at the same time in cases where two EU-based parties are collaborating in providing a media service. Article 8(2) was added in to offer greater certainty in answering the question as to which party would in such a case carry editorial (final) responsibility.
 31. More significance, as also stipulated in Article 8(2), whenever two or more parties are involved in providing videos, is attributed to the level of influence on editorial choices than is attributed to how the videos are hosted. That is due to the fact that whoever has the greatest influence on the editorial choices made, will enjoy the greatest impact on the media service's content. One would also expect it more likely for such a party to be addressed in the event of any violations of media laws. For example, the Authority considers a cable company's deferred viewing portal for television programmes a service provided under the editorial responsibility of the media institution that decided which videos it would include in the catalogue.
 32. There are also video aggregation services. These automatically gather and bundle whole collections of videos from certain sources and make them available as a single unit. Such services, too, may, in principle, be deemed on-demand commercial media services. Plank to that determination is the question as to whether the video aggregation service provider carries editorial responsibility for the videos provided.
 33. One factor in determining whether the aggregator carries any editorial responsibility is whether the aggregator himself makes any changes to the videos he obtained from his source (whether he emblazons them with his own logo, for example). Making changes to videos, or adding pre-rolls, for example, will (certainly in respect of the content of the pre-rolls) see editorial responsibility more easily presumed.
 34. Should the aggregator, however, be found to merely be offering links to videos made available by others, then he would not be deemed to be providing any videos himself, and will consequently not be deemed an on-demand media service. The aggregator will in that respect, be required to show that he is referencing another service, and also, which service that is.

Article 9 (Right to set up an Advisory Committee)

35. The Authority is aware that disputes may arise with regard to so-called grey areas (for more information, see the general part of this explanatory memorandum). In order to enable itself to arrive at a balanced ruling that takes all perspectives into account and which enjoys broad backing, the Authority reserves the right to set up an Advisory Committee to advise it in certain matters of principle. Said Advisory Committee will be made up of independent members who do not have any (commercial) interests in the recommendations the Committee issues. Members of the Committee are required to be familiar with what goes on in the on-demand commercial media services market.