

2022 Classification of On-Demand Commercial Media Services Policy Rule

Dutch Media Authority Policy Rule on the Qualification of On-Demand Media Services (2022 Qualification of On-Demand Commercial Media Services Policy Rule)

The Dutch Media Authority,

Having regard to Article 3.29a of the 2008 Media Act and Article 4:81 of the General Administrative Law Act,

Decrees:

Article 1. Definitions

The following terms as used in this policy rule will have the following meanings:

a. *decision tree*:

the flow chart as included in the annex to this policy rule;

b. *commercial media institution*:

a commercial media institution within the meaning of Article 1.1(1) of the Act;

c. *Directive*:

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive);

d. *video platform service*:

a video platform service within the meaning of Article 3a.1 of the Act;

e. *Act*:

the 2008 Media Act.

Article 2. Qualification

1. A media service will qualify as an on-demand commercial media service if it satisfies the definition of Article 3.29a in conjunction with the relevant provisions of Article 1.1(1) of the Act. This policy rule provides a clarification of certain criteria that are not identified in those articles, but must be met pursuant to the law and the Directive for a media service to qualify as an on-demand commercial media service.
2. An on-demand commercial media service may be provided by:
 - a. a commercial media institution with its own platform on which audiovisual media content is provided for which the commercial media institution bears editorial responsibility; or
 - b. a commercial media institution which, through a third-party video platform service, provides audiovisual media content for which it (the video uploader) bears editorial responsibility.

3. A service provided by a commercial media institution within the meaning of paragraph 2, under a or b, will qualify as an on-demand commercial media service if, in addition to the provisions of Article 3.29a of the Act, it also meets the requirements of articles 3 up to and including 6 of this policy rule.
4. An on-demand commercial media service provided by a commercial media institution within the meaning of paragraph 2(b) (video uploader) will be governed by the notification duty referred to in Article 3.29b(1) of the Act only if the commercial media institution must answer all the questions in the decision tree in the annex in the affirmative.

Article 3. Catalogue

The on-demand commercial media service is based on a catalogue. A catalogue is understood as the arrangement of the audiovisual media content in a database making audiovisual media content accessible to the user.

Article 4. Principal purpose

1. An on-demand commercial media service is a media service the principal purpose or an essential function of which is to provide audiovisual media content for purposes of informing, entertaining or educating the general public.
2. Providing audiovisual media content for purposes of informing, entertaining or educating the general public as part of a broader set of activities will be deemed to be a separate media service within the meaning of paragraph 1 if the provision of such media content has autonomous content and function as compared to the other activities of the provider.

Article 5. Mass media nature

An on-demand commercial media service is of a mass media nature. A mass media nature will be deemed to exist if a service can be received directly or indirectly by the general public in one or more European Union Member States by consumers using standard equipment and could have a clear impact on a significant proportion of the public.

Article 6. Economic service

An on-demand commercial media service is an economic service. This means that the service will normally be provided for remuneration or that the provision of the service will normally otherwise yield a material advantage.

Article 7. Editorial responsibility

For purposes of this policy rule, where more than one party should enjoy influence over the choice of the substance and organisation of the media content, the party enjoying decisive influence over the choice of the substance of the audiovisual media content will be deemed to bear editorial responsibility.

Article 8. Short title and effective date

1. This policy rule will be referred to as the 2022 Qualification of On-Demand Commercial Media Services Policy Rule.
2. The 2011 Classification of On-Demand Commercial Media Services Policy Rule will be repealed.

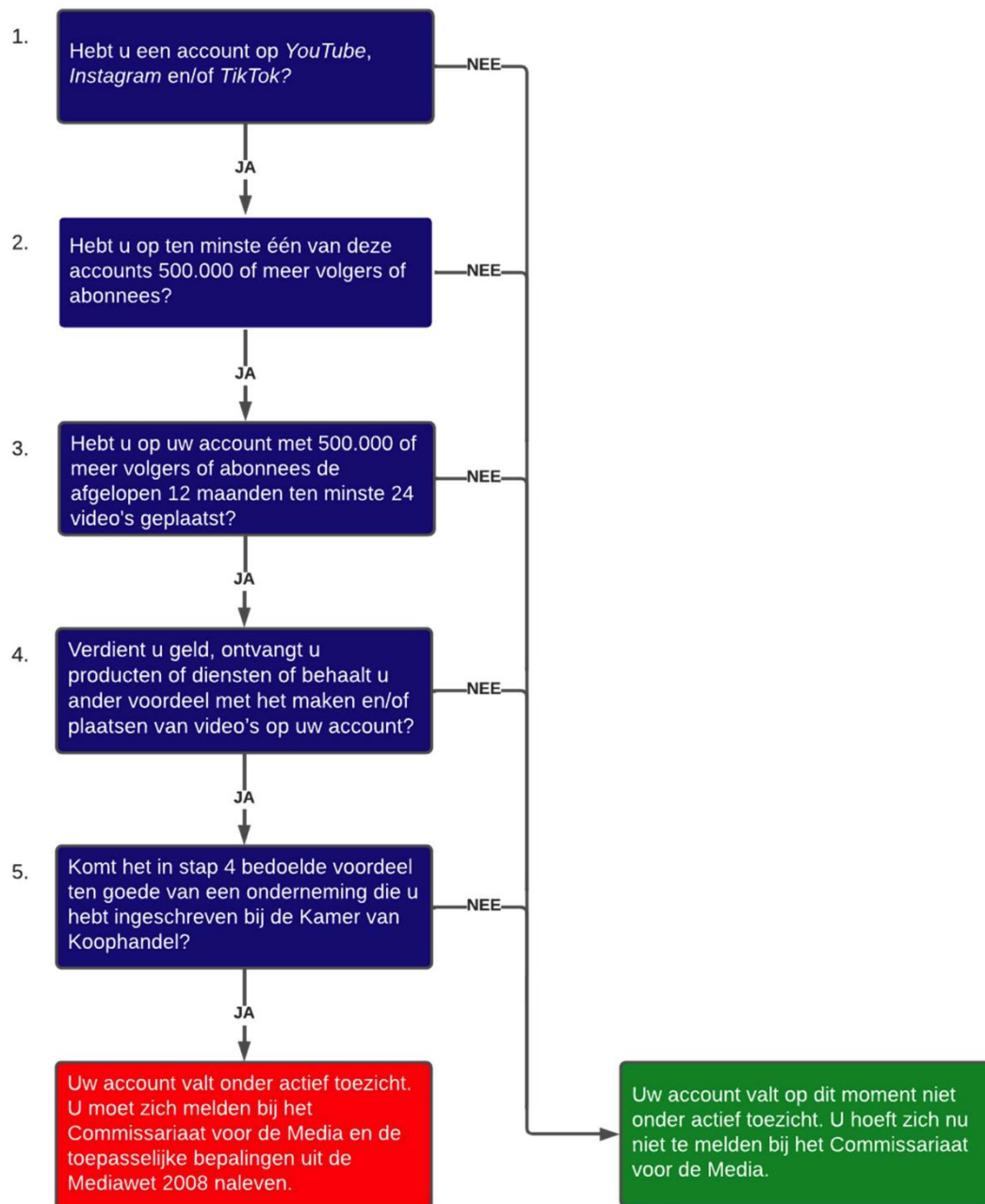
3. This policy rule will be made public by its publication in the Government Gazette and on the Dutch Media Authority website ([External link:www.cvdm.nl](http://www.cvdm.nl)).
4. This policy rule will come into effect on 1 July 2022.

Dutch Media Authority, R. Eringa-Wensing, President

P.V. Eijssvoegel, Commissioner

ANNEX

Decision tree as referred to in article 2(4)



EXPLANATORY NOTES

1. General

Background

On 1 November 2020, the 2008 Media Act was amended in view of the implementation of the 'Revision Directive'.¹ This amendment of the Act has led to the adoption of the 2022 Qualification of On-Demand Commercial Media Services Policy Rule. The 2011 Classification of on-demand commercial Media Services Policy Rule is thereby repealed.

The Revision Directive was brought about because of the drastic changes that the European media landscape had seen since the original Directive came into effect in 2010. Technical developments and changing consumer needs have led to new types of media content, which saw substantial growth over a short period of time. Providers of on-demand media services are ubiquitous in today's media landscape, as are video uploaders and the platforms that they use. In light of these developments, the Directive needed to be updated. The revised Directive intends to create a more level playing field for the European media industry and, thus, to improve its competitiveness. At the same time, media users, and particularly minors, will be better protected.

In 2010, on-demand media services were included in the scope of the Directive. This was a first, principle step of regulating new media services. With the recent revision of the Directive and its implementation in the 2008 Media Act, the regulatory framework for these non-linear media services was shaped and tightened further, to bring it in line with the regulations for traditional broadcasting services where possible.

Another important change ensuing from the Revision Directive is the fact that video platform services now come under the scope of the Directive as well. The low-threshold facility that they offer users to distribute media content (that they have created themselves) using their platforms and the increased relevance of these platforms in the general media and information provision have led the European legislator to decide to require video platform services to take appropriate measures to protect the general public. These measures must be included in the terms of use of the video platform service and must be enforced by the provider of the service.

It can meanwhile be established that some users are so successful at creating and distributing media content through video platform services that, over time, they have become a fully-fledged alternative to many viewers for the content offered by the established audiovisual media services (broadcasting services and video on-demand services). Given the relevance and reach of these relatively new services, it would be obvious and advisable for the public to be entitled to the same level of protection as for the established media services. Therefore, some video uploaders will not only be required to comply with the terms of use of the video platform on which they are active, but also with the 2008 Media Act. Moreover, this will guarantee the (continued) existence of a level playing field.

Video uploaders come under the scope of the Directive and the Media Act if the services that they provide qualify as audiovisual media services - a possibility that is expressly referred to in Recital 3 to the Revision Directive - and more specifically as on-demand commercial media services. This policy rule elaborates on the requirements to be met for a media service to qualify as an on-demand commercial media service.

For the media services that already qualified as on-demand commercial media services under the 2011 policy rule, the new policy rule does not contain any material changes as compared to the previous policy rule and the regime will remain unchanged.

Video uploaders

New in this policy rule is the fact that it is now expressly included that on-demand commercial media services cannot just be provided by providers that make media content available on their own platforms, such as Netflix and Disney+, but also by providers that, for the distribution of their media content, use and depend on video platform services, such as YouTube (Google), Instagram (Meta) and TikTok (ByteDance). The latter providers are referred to by the Authority as 'video uploaders'. Although the services of both types of providers must meet the same requirements in order to qualify as on-demand commercial media services, there are clear differences between providers that have their own platforms on the one hand and video uploaders on the other. Video uploaders usually operate independently or within a small organisation, they use limited resources to create their media content, and their media content not nearly always has an impact that would warrant regulation pursuant to the 2008 Media Act. Therefore, video uploaders have to meet specific requirements in order to determine whether they are actively regulated by the Authority. These requirements have been worked out in a decision tree based on which video uploaders can determine whether they are required to notify the Authority of the media service that they provide. This is to avoid the situation where video uploaders with limited activities, a limited reach or activities of a hobby nature will find themselves actively regulated and confronted with the associated administrative and financial obligations.

General principles

With this policy rule, the Authority gives shape to the practice of determining whether a media service qualifies as an on-demand commercial media service regulated by it within the meaning of Article 3.29a of the Act. In principle, every commercial media service providing an on-demand media service, within the meaning of Article 1(1) of the Act, comes under the scope of this policy rule. The basic principle here is that this is independent of the provider's broadcasting technology, distribution platform or background. For example, it is irrelevant in this respect whether a service is distributed via satellite, ether, cable network, the Internet or mobile networks. It is also irrelevant whether a media institution has been active before, for example as a provider of a linear media service.

The provisions of the Directive and the Act on on-demand commercial media services specifically regard audiovisual media. This means that the provision of media content consisting solely of audio, such as podcasts, or still images, such as photographs, does not qualify as provision of an on-demand media service. Moreover, the media service must be available on demand, i.e. it can be accessed at the consumer's individual request and at a moment of their choice.

On-demand commercial media services are, by definition, provided by a commercial media institution within the meaning of Article 1.1(1) of the Act, namely 'a natural person or legal entity who provides a commercial media service and who falls under the jurisdiction of the Netherlands for the purpose of this Act'.

Who has jurisdiction over a commercial media institution, i.e. which European Member State will be the regulatory authority, is determined on the basis of the provisions of Article 1.2 of the Act. That article, in its turn, refers to Article 2 of the Directive, which article is based on the country-of-origin principle. This means, *inter alia*, that the Member State where the provider of the on-demand commercial media service is established will ensure compliance with the rules of the Directive.

In conclusion

Especially when provided via the Internet, services providing audiovisual media content can, over time, undergo the necessary changes in terms of setup, method of presentation, reach and impact. The assessment of whether a certain service meets the requirements as set forth in this policy rule is, therefore, by definition, a snapshot. Services may be reassessed from time to time. The Authority may thereby, even after a different previous decision, still qualify a specific service as an on-demand commercial media service (which is subject to a notification duty) on the basis of changed circumstances or insights.

The Authority is aware that, even with the provisions elaborated on in this policy rule, for example in borderline situations, there may always be room for debate as to whether the criteria for qualification as an on-demand commercial media service have been met. In such situations, the Authority will act as it sees fit, taking into account the facts and circumstances of the concrete case. The ERGA consultative body of European media regulators (European Regulators Group for Audiovisual Media Services), whose objective it is to promote consistent application of the harmonised rules in Europe, may also contribute to more clarity and legal certainty on the qualification as an on-demand commercial media service. If necessary, the Authority will adjust the policy rule accordingly.

2. Article-by-article explanatory notes

Article 1 (Definitions)

The terms as used in this policy rule have the same meanings as described in Article 1.1 of the Act. For the sake of clarity, two of these terms (commercial media institution and video platform service) are expressly stated. To the extent that any terms are used in this policy rule that are not described in Article 1.1 of the Act, those terms are defined in the policy rule.

Article 2 (Qualification)

For purposes of determining whether (a provider of) an on-demand commercial media service is established in the Netherlands, the Authority will apply the five criteria on which the definition of the term on-demand commercial media service of Article 3.29a of the Act is based. These criteria are derived from the Act and the Directive. The criteria apply cumulatively, i.e. all the criteria must be met for a media service to qualify as an on-demand commercial media service. These criteria are as follows:

- the audiovisual media content is provided on the basis of a catalogue (article 3);
- the principal purpose or an essential function of the service is to provide audiovisual media content for purposes of informing, entertaining or educating the general public (article 4);
- the audiovisual media content comes under the editorial responsibility of the commercial media institution providing the service (article 7);
- the service is of a mass media nature (article 5);
- the service can be considered to be an economic service (article 6).

Paragraph 2 of this article distinguishes between on-demand commercial media services that distribute audiovisual media content through their own platforms, as is the case for the well-known streaming services (such as Netflix, Videoland, Disney+, etc.) on the one hand and on-demand commercial media services distributing audiovisual media content through a third-party video platform service, as the 'video uploaders' do, on the other. This distinction is relevant because,

although both types of providers must meet the same basic requirements for their services to qualify as on-demand commercial media services, for video uploaders these requirements have been worked out in further detail in the decision tree. This means that all media services that meet the criteria will qualify as on-demand commercial media services, while at the same time avoiding the situation where all video uploaders are required to register with the Authority, after which they will be actively regulated. The registration or notification duty applies only to those video uploaders that answer all the questions in the decision tree in the affirmative, so that only that group of video uploaders will be actively regulated by the Authority.

Article 2(3) refers to the requirements to be met for a media service to qualify as on-demand commercial media service. These are worked out in further detail in articles 3 up to and including 6.

If a service qualifies as an on-demand commercial media service, Article 3.29b(1) of the Act requires the provider to register such service with the Authority. For video uploaders, it may not always be clear whether they meet the applicable criteria and, thus, provide an on-demand commercial media service within the meaning of the Act. Moreover, the statutory obligations to be complied with by providers of on-demand commercial media services may be disproportionately onerous on some video uploaders, for example because of their limited activities or impact. Therefore, video uploaders are required to register their services, and will be actively regulated by the Authority, only if they meet the principal purpose requirement of article 4 and if they answer all the questions of the decision tree in the affirmative. The criteria of the decision tree qualify as a (policy) differentiation of the criteria of articles 3, 5 and 6 of the policy rule, taking into account the special situation of video uploaders.

Article 3 (Catalogue)

The term catalogue is described as the arrangement of the audiovisual media content in a database making the audiovisual media content accessible to the user. Making the audiovisual media content provided accessible is the most important function of a catalogue. In that sense, the function of a catalogue is similar to that of the chronological schedule used by broadcasting services. The term database is used here in the sense of a data collection to be consulted by the user on the basis of a certain arrangement. In this respect, a simple arrangement is sufficient. An on-demand commercial media service with audiovisual media content that is made accessible solely by way of a text-based search function will also qualify as a catalogue-based service.

The criterion that an on-demand media service must be based on a catalogue presumes that the provider is responsible for indexing or categorising the audiovisual media content provided. The term catalogue is interpreted broadly. This means that a catalogue can also exist if a video uploader posts content on a video platform service, where the video uploader enjoys less influence over the exact categorisation and indexation. In principle, the existence of a certain coherence between the uploaded content or the possibility to attach 'tags' to the content for identification purposes and the findability thereof is sufficient.

The existence of a catalogue will in any event be accepted if there is a search function (on the audiovisual media content in the catalogue), a certain categorisation (for example on the basis of content such as sports, news, entertainment, etc., or in alphabetical or chronological order), or a categorisation on the basis of popularity or date of posting of the media content (based on an algorithm). As such, setting up a catalogue presumes a certain amount of audiovisual media content and, thus, the need to make it accessible with any tool. If the catalogue is not, or not entirely, visible to the user, but certain audiovisual media content is displayed after, e.g., entering search terms, there may still be a catalogue-based on-demand media service.

A provider of an on-demand media service may have more than one catalogue. An example are the catalogues of streaming services, which are composed differently for each national market targeted.²

Article 4 (Principal purpose)

The principal purpose or an essential function of the on-demand commercial media service must be the provision of audiovisual media content for purposes of informing entertaining or educating the general public. Audiovisual media content is also understood to include videos generated by video uploaders. After all, those videos are also electronic products with moving video content, as referred to in the definition of an 'on-demand commercial media service' in Article 3.29a of the Act.

The requirement of article 4, paragraph 1, means that the provision of audiovisual media content should be the principal purpose, or at least have a qualitatively clear and independent function and meaning, rather than purely serve to support possible other activities. Therefore, the simultaneous provision of videos together with non-audiovisual content, such as photographs or podcasts, may still meet the requirement of article 4, even if the share of such other content may exceed the audiovisual media content. This is relevant because ongoing developments in that field show that providers of on-demand commercial media services increasingly present a hybrid offering, not only providing audiovisual media content but also photographs or other content. A clear example are video uploaders who use Instagram. Instagram started out as a platform on which only photographs could be posted, but has meanwhile developed to a platform on which videos take a prominent place. As a result, a provider that is active on Instagram can still provide a service that qualifies as an on-demand commercial media service, even if the provider's account contains more photographs than videos. For purposes of that assessment, the Authority is guided, *inter alia*, by the guidelines drawn up by the European Commission to determine whether a video platform service meets the requirement that an essential function of the service is the supply of programmes or user-generated videos.³ Although these guidelines have been written with a view to video platform services, they also contain very useful instructions for the assessment of new forms of audiovisual media services. One may, for example, think of the quantitative and qualitative relevance of the available audiovisual content, the generation of income from the audiovisual content and the availability of tools intended to increase the visibility or attractiveness of audiovisual content.

In situations where a provider purely provides a clearly defined stand-alone audiovisual media service, there will be little doubt as to the principal purpose. Where, however, the provision of the audiovisual media service is part of a broader set of activities, it is conceivable that this may be less clear. To counter this obscurity, paragraph 2 expresses that the provision of media content with autonomous content and function as compared to the provider's other activities qualifies as a separate on-demand commercial media service. In this respect, the scope and economic relevance of the media service as compared to the provider's other activities are not important. Even if these are relatively minor, the service may still have autonomous content and function. This will typically be the case where the relevant media service can meaningfully be consulted independently of the other activities. A video section forming part of the website of a newspaper, featuring videos that can be separately viewed will, therefore, easily be deemed to have autonomous content and function. On the other hand, no such content and function will be deemed to exist if the audiovisual media service has an ancillary and purely illustrative role. In this respect, one may think of web shops that use short animations or videos to demonstrate the external characteristics, functions and use of a product. This follows from the *New Media Online* judgment (CJEU 21 October 2015, C-347/14, ECLI:EU:C:2015:709) in conjunction with Recital 22 to the Directive and Recital 3 to the Revision Directive. In this respect, Recital 3 to the Revision Directive states that the media service must have audiovisual content and form which are dissociable from the main activity of the provider of the services, such as stand-alone

parts of online newspapers featuring audiovisual programmes or user-generated videos. In this respect, it is irrelevant whether the media content is distributed through the provider's own platform or by using third-party services, such as (channels on) video platforms. Even if a provider provides its service through a third-party platform and the media content can be found among the offerings of numerous other providers, the media service may still have independent meaning.

The assessment of the question as to whether it is a stand-alone service with autonomous content and function takes place on the basis of the circumstances of the case. The aspects that may play a role in that respect – as they follow from the explanatory memorandum to the Act – include presentation, recognisability for the public, and the proportion of the relevant element to other elements of the service (*Parliamentary Papers II* 2008/09, [31 876, no. 3](#), p. 6). In terms of recognisability for the public, the question as to whether the audiovisual media content is presented as an independent whole plays a role. In this respect, it is weighed, *inter alia*, whether a catalogue provided on the Internet has its own recognisable domain name and is also presented in publicity as a stand-alone service. If the audiovisual media content is distributed via a video platform service, the use of a specific channel or other identifying characteristics may be reviewed. Those are, however, not decisive. In the end, it is about a weighing of all the relevant circumstances. In this respect, although presentation and structure play a role, it will certainly also be ensured that these are not used in order to circumvent the statutory rules.

The principal purpose criterion further entails that the audiovisual media content of (a provider of) an on-demand commercial media service must serve to inform, entertain or educate the general public. For that reason, purely commercial videos, such as commercials or other short advertising videos that are completely stand-alone and do not form part of any other media content, do not come under the scope of the definition of 'audiovisual media service' (CJEU 21 February 2018, C-132/17, ECLI:EU:C:2018:85 *Peugeot Deutschland*). Commercial communications, such as advertising, sponsoring or product placement, which are included in or around other (editorial) media content, however, do qualify as an audiovisual media service. This follows from Article 1(a)(ii) and (h) of the Directive, which provides that advertising accompanying or forming part of a programme or a user-generated video qualifies as an audiovisual media service. The foregoing means that video uploaders who are sponsored when creating videos or who include advertising in their videos provide an audiovisual media service beyond any doubt, even if the commercial aspect may be the dominant element.

Article 5 (Mass media nature)

The media service is of a mass media nature if it can be directly or indirectly received by the general public in one or more Member States by consumers using standard equipment. This means that the threshold for being of a mass media nature is easily achieved. Only where there is private communication or communication that is available solely to a limited and defined group will a service generally not be of a mass media nature. See the explanatory memorandum to the Act (*Parliamentary Papers II* 2008/09, [31 876, no. 3](#), p. 5) and Recital 22 to the Directive.

In line with the explanatory memorandum to the Act (*Parliamentary Papers II* 2008/09, [31 876, no. 3](#), p. 5) standard consumer equipment is understood as equipment that is available to the consumer, depending on the state of the art, the cost price and the availability of the necessary software and hardware. Equipment that - for example due to the high cost price or connections, technology or required software that are available to a limited extent only - is normally used only by professional parties is, in principle, not considered to be standard consumer equipment. Audiovisual media services that are provided on the Internet can be received using standard consumer equipment. The

same holds true for audiovisual media services, whether or not distributed on the Internet, to which access is gained through distribution platforms, such as digital cable, mobile data networks or IPTV, and services that can only be received using devices such as a set-top box, tablet computer or video game player. This is not altered by the fact that services may be restricted by a password, PIN code or otherwise.

The mass media nature of a media services also entails that it must be capable of having a clear impact on a significant proportion of the public. Providers which have their own platforms will, given the setup and purpose of their service, easily meet this criterion. For video uploaders, however, this is not self-evident, even if they use a video platform service that, in principle, is accessible to anyone. Therefore, the decision tree elaborates on this criterion for this category of providers. For more information on this subject, see the explanatory notes to the decision tree as set forth in section 3 below.

Article 6 (Economic service)

An on-demand commercial media service must (of course) be an economic service. To put it simply, this means that the provision of the service will normally yield a cash or other material advantage. This follows from Article 1(a) of the Directive, which describes the term 'audiovisual media service' as a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU). Article 57 TFEU provides that services are considered to be "services" where they are normally provided for remuneration. According to established CJEU case law, the essential characteristic of the remuneration is that it is the economic consideration for the relevant service. Such consideration will normally consist of payment in cash, but this is not necessary. It may also take place in another form that represents value in trade. One may think, for example, of the provision or giving in use of free products or services, or other payments in kind. Court of Justice case law also shows that it is not required that the provider of a service have a profit motive (EUCJ 18 December 2007, C-281/06, ECLI:EU:C:2007:816 *Jundt*). Nor is it relevant whether the consideration is provided by the parties at whom the service is directed (the general public) or by third parties, such as sponsors or advertisers. This means that providers that generate income by including advertising or sponsoring in or around their media content just as much provide an economic service as providers that make their media content available against payment.

Article 7 (Editorial responsibility)

This article further elaborates on the criterion that the provider must bear editorial responsibility for the service. On the basis of Article 1(1) of the Act in conjunction with the explanatory memorandum (*Parliamentary Papers II* 2008/09, [31 876, no. 3](#)), it may be stated that editorial responsibility means that the provider of the on-demand media service exercises effective control over the choice of content and the organisation of the audiovisual media content. The organisation of the audiovisual media content is in any event understood as the way in which it is posted in the catalogue and the method of presentation.

A clear distinction must be made between legal liability and social responsibility of service providers on the one hand and editorial responsibility on the other. If a third party, such as the provider of a video platform service, has the possibility to refuse or remove media content created by others because it is contrary to criminal law or copyright law, that does not mean that such third party will, thus, also bear editorial responsibility within the meaning of the Act. The editorial responsibility must specifically regard the choice of the content and the organisation of the audiovisual media content. Note that the requirements set in respect of the latter criterion (organisation) are not very strict. In principle, the existence of a certain coherence between the offered content or the possibility to

attach 'tags' to the content for identification purposes and the findability thereof is sufficient (see the explanatory notes to article 3).

Providers of a video platform service do not bear editorial responsibility for the audiovisual media content on their platforms and, thus, not for the user-generated videos on their platforms either. Based on the criterion of 'editorial responsibility', (providers of) video platform services are excluded from the definition of on-demand commercial media services. The situation may change if, for example, (a provider of) a video platform service should enter into agreements with content providers about the supply of specific content. In such event, the provider could play an editorial role and might qualify as a provider of an audiovisual media service.

In the event that more than one party plays a role in the provision of the audiovisual media content, the influence over the choice of content of the audiovisual media content will outweigh its organisation. Therefore, it would be obvious to hold the party that decides on the content of the media content accountable in the event of non-compliance with media law provisions. For example, the Authority sees the media content in a portal of a cable company for time-shifted television as a service that comes under the editorial responsibility of the media institution that has decided which audiovisual media content is offered in the catalogue. The same holds true for video uploaders of media content on a video platform: the video uploader, rather than the provider of the video platform service, has decided which audiovisual media content is offered in the catalogue.

There are 'video aggregation services' that automatically bundle all or part of the collection of audiovisual media content from certain sources and provide as a whole. These services do not provide the audiovisual media content themselves, but make the links available that directly link to the website of the provider of the media content. This type of services, which should be distinguished from video platform services, may, in principle, be on-demand commercial media services. When assessing this, the key question is whether the provider of the video aggregation service bears editorial responsibility for the audiovisual media content provided.

3. Explanatory notes to the decision tree

Who should answer the questions in the decision tree?

The decision tree is intended for all the video uploaders that fall under the jurisdiction of the Netherlands. The term 'video uploaders' is understood by the Authority as any natural persons or legal entities which, through a third-party video platform service, provide audiovisual media content for which they bear editorial responsibility. This means that anyone who posts videos on a platform such as YouTube, Instagram or TikTok is a video uploader. The purpose of the decision is to enable video uploaders to determine whether they are required to register their service with the Authority and whether they will be actively regulated by the Authority.

The Authority only regulates media institutions, including video uploaders, which fall under the jurisdiction of the Netherlands. This jurisdiction is provided for in Article 1.2(1) of the Act in conjunction with Article 2 of the Directive. It is an extensive provision that is not easily summarised. The basic principle is that a video uploader falls under the jurisdiction of the Netherlands if they have their head office in the Netherlands and/or makes the editorial decisions in the Netherlands. In addition, the Directive provides for the situation where the services provided by a media institution are spread over multiple (Member) States. This situation is not easily expected to occur in relation to video uploaders, as their activities are often of a relatively small-scale nature and are not spread over multiple countries within the meaning of Article 2 of the Directive. The rules applicable to such a situation will, therefore, be disregarded here. Video uploaders with establishments in more than one

(Member) State are advised to consult, or have an adviser consult, Article 2 of the Directive to verify whether they fall under the jurisdiction of the Netherlands.

Step 1 – Do you have an account on YouTube, Instagram or TikTok?

For purposes of its active regulation, the Authority currently only targets video uploaders that are active on YouTube, Instagram or TikTok. At least for now, the Authority limits itself to providers on these three video platform services because both these video platform services and the video uploaders active on them are currently the largest and most socially relevant players on the market.

Step 2 – On at least one of those accounts, do you have 500,000 or more followers or subscribers?

The threshold of 500,000 followers or subscribers per account is a further specification of the requirement that an on-demand commercial media service must be of a mass media nature, which means that it must be capable of having a clear impact on a significant proportion of the public. According to the Authority, this is in any event the case where an account has 500,000 or more followers or subscribers. The Authority has chosen to use the number of followers as the criterion here, because that is unambiguous and public data which provides a reliable indication of the likely reach and potential impact of a media service. This makes it transparent and easily verifiable for all those involved, a quality that other possible criteria, such as the average number of (unique) views or user engagement lack due to the absence of reliable, unambiguous and simply accessible data.

If a video uploader has multiple accounts on one or more platforms, they have to register with the Authority only once if all the accounts belong to the same business. In such event, the Authority will consider all those accounts jointly (even if they have been created on more than one platform) as one on-demand commercial media service. If a video uploader has multiple accounts which belong to more than one business, each business will individually be required to register its on-demand commercial media service(s) with the Authority, because each business will be considered as a separate commercial media institution. Of course, this only applies to the extent that the accounts of the various business have at least 500,000 followers or subscribers and meet the other criteria of the decision tree.

If a video uploader is not active on any of the video platforms named, they need not register their services with the Authority for the time being, even if the other criteria are met. If, in the future, the Authority should decide that video uploaders that are active on video platforms other than YouTube, Instagram and TikTok will be actively regulated as well, that decision will be published in good time.

Step 3 – On your account with 500,000 or more followers or subscribers, have you posted at least 24 videos in the past 12 months?

The account that reaches the follower threshold must be used to post videos, because an account can only qualify as an on-demand commercial media service if it contains audiovisual media content. This means that the content must consist of products with moving images with or without sound. This will, in principle, be the case for accounts on YouTube or TikTok. For Instagram, however, this is not self-evident, because this service also offers the possibility to post exclusively photographs. Instagram accounts containing exclusively photographs do, therefore, not come under the scope of this provision.

The requirement that at least 24 videos must have been posted on the account in the past 12 months is connected with the fact that the Authority wishes to regulate services of active providers only. Inactive accounts or accounts with minor activity will (for now) not be actively regulated. In addition, this requirement is a further specification of the catalogue requirement of article 3 of the policy rule.

The term catalogue presumes that the media content is of a certain size, but neither the Directive nor the Act contain any clear indications to determine the minimum size of a catalogue. The Authority is of the opinion that, for video uploaders, a catalogue will in any event be deemed to exist if they post an average of two videos per month on an account over a period of 12 months. Hence, the number of 24 videos as the basic principle in the decision tree. This will include the videos that are removed within 12 months of being posted, which is rather common practice. Therefore, to answer the question as to whether the account will be actively regulated by the Authority, the removal of videos is irrelevant. Relevant is the number of videos posted in any given period.

Step 4 and step 5 – Do you earn money, do you receive products or services, or do you obtain any other advantage as a result of the creation and/or posting of videos on your account? Does the advantage referred to in step 4 accrue to a business that you have registered with the Chamber of Commerce?

The requirements that an advantage is obtained from the posting of videos (step 4) that accrues to a business that the video uploader has registered with the Chamber of Commerce (step 5) is used to determine whether the uploading of videos is an economic service of sufficient size to warrant active regulation by the Authority. It is a further specification of the criterion of article 6 of the policy rule and intends to prevent that persons who generate no, or negligible, income from the uploading of videos, for example because they do this merely as a hobby and, thus, do not have a business that is listed in the business register, will be actively regulated by the Authority.

The term 'advantage' is interpreted broadly. It includes both direct and indirect advantages. Examples of direct material advantages are income from advertisements, sponsoring deals, affiliate marketing or income from the platform, such as the fee that a video uploader may receive in consideration of their use of advertising functionalities provided by the video platform, such as Google AdSense in the case of YouTube. Income as a direct result of the advertising or promotion of the video uploader's own products or services (self-promotion) is also considered to be a direct material advantage. This may include merchandise of the video uploader or the call on the public to visit the video uploader's own performance. Direct material advantages also include considerations received in kind, such as free products or services received in exchange for a reference in a video. Indirect material advantages are all those advantages that a video uploader receives as a result of their videos, even if obtaining those advantages was not the primary purpose of the video uploader when posting the videos. These may include videos that are posted primarily to give the public an impression of the video uploader's own skills or performances or simply to entertain the public, but that, nevertheless, increase the video uploader's popularity and goodwill. This may, for example, be the case for DJs or musicians. By posting their songs on their account, they increase their popularity, which will eventually translate into more streams on services such as Apple Music or Spotify or more concert tickets sold.

The advantage referred to in step 4 of the decision tree must accrue to a business that the video uploader has registered with the Chamber of Commerce. This will usually be a sole proprietorship or a private company with limited liability, but other legal structures are possible as well. An entry in the business register is set as an additional requirement because this is a deliberate act on the part of the video uploader towards entrepreneurship and a clear indication of an economic service of a more than occasional nature or minor scope. Such a registration must also relate to a business within the meaning of Article 5 of the Business Register Act, rather than to an entity which, although listed in the business register, does not operate a business (Article 6 of the Business Register Act). One may think of certain associations, civil-law foundations and public-law entities. The assessment of the question as to whether there is a business takes place on the basis of the criteria as set forth in the

2008 Business Register Decree (particularly Article 2) and in the Business Register (Concept of a Business) Policy Rule.⁴

Consequences of answering the questions in the decision tree

Answering the questions in the decision tree will lead to one of two outcomes. If all the questions are answered in the affirmative, the video uploader must register its media service with the Authority. Subsequently, the video uploader will be actively regulated by the Authority. This means that the video uploader will be required to comply with the applicable rules of the 2008 Media Act, and that the Authority will actively monitor such compliance. Where necessary, the Authority will take enforcement action. Only those accounts that meet the criteria of the decision tree must be registered, and only those accounts will be actively regulated by the Authority.

Video uploaders who answer one or more questions in the decision tree in the negative will, for the time being, not be required to register their media service with the Authority and not be actively regulated by the Authority. The Authority expects them to take responsibility for the content that they provide, taking into account the interests of their viewers in general and young viewers in particular. This responsibility applies to every video uploader, but increases as a video uploader has more viewers or followers, or if their media content otherwise has more impact. Although, the Authority will initially not actively regulate this group of video uploaders, that does not mean that they do not have our attention. The Authority monitors the entire media landscape and will, where necessary, make adjustments. For the group that are not actively regulated, this will, however, not be by way of formal enforcement instruments, such as a fine or an order subject to a penalty. The Authority may, however, do so by entering into a dialogue with video uploaders that structurally provide harmful content.

Finally, it is important to emphasise that video uploaders, whether or not actively regulated, must comply with other regulations. Without being exhaustive, for example, video uploaders are bound by rules to protect the economic and financial interests of consumers, such as the Unfair Commercial Practices Act and the Financial Supervision Act. Criminal law sets boundaries for the behaviour of video uploaders as well. In addition, video uploaders must comply with the Dutch Advertising Code if they use their accounts to disseminate advertising.

1

Directive (EU) 2018/ 1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

2

Guidelines pursuant to Article 13(7) of the Audiovisual Media Services Directive on the calculation of the share of European works in on-demand catalogues and on the definition of low audience and low turnover (2020/C 223/03), OJEU 2020, C 223/10.

3

Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive (2020/C 223/02), OJEU 2020, C 223/3.

Policy Rule of the State Secretary for Economic Affairs of 23 June 2008, no. WJZ 8074645, on the concept of a business in the business register ([Government Gazette 2008, 123](#)).

