
On-demand programme services guidance

Consultation on guidance for ODPS providers on
measures to protect users from harmful material

CONSULTATION:

Publication date: 20 July 2021

Closing date for responses: 14 September 2021

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1. Overview

This document sets out Ofcom’s proposed guidance on the responsibilities of on demand service providers with regard to harmful material under section 368E of the Communications Act 2003 (“the Act”)¹.

The proposed guidance reflects changes to the regulatory framework which came into force on 1 November 2020 and will replace Ofcom’s existing guidance on harmful material for on-demand programme service (ODPS) providers. These changes include a new requirement on ODPS providers to take appropriate and proportionate measures to ensure that any material that might impair the physical, mental or moral development of persons under the age of 18 is not normally seen or heard by them.

Our proposed guidance is intended to help providers assess whether material they intend to provide on their service meets the statutory definitions of harmful material, and if so, how to take appropriate and proportionate measures to protect users.

What we are proposing – in brief

Ofcom is consulting on draft guidance for ODPS providers on the regulatory requirements. This provides detail about the kinds of material that are prohibited on ODPS (including material likely to incite hatred and material which would be refused a classification by the BBFC). Our guidance also sets out measures which may be appropriate for protecting users from other potentially harmful material, and how these may be best implemented. These include:

- applying robust age verification measures for pornographic material; and
- for other material that may impair the physical, mental or moral development of persons under the age of 18, implementing measures such as age ratings, content warnings and parental controls that are proportionate to the potential harm of the relevant material to under-18s.

Our guidance also sets out our assessment of the likely impact of our proposals.

We are inviting all interested parties, particularly services which may fall within scope of the regulation, the wider industry and third sector bodies, to comment on the draft guidance set out in sections 3, 4 and 5, and on the impact assessment set out in Annex 1.

The full list of consultation questions can be found in Annex 4. The closing deadline for responses is 5pm on 14 September 2021.

Respondents to this consultation can email Ofcom at vod@ofcom.org.uk if they have any questions about the information in this document.

¹ As amended by the Audiovisual Media Services Directive Regulations 2009, 2010 and 2020.

Next steps

After considering responses, we plan to issue final guidance later in 2021. The final guidance will appear in the updated document 'Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services'. This guidance document will incorporate our [pre-existing guidance](#) on the administrative rules (Rules 1-9) and the Rules regarding Sponsorship and Product placement (Rules 13 and 14) for which we are not proposing substantive changes.

We have recently also consulted on guidance for providers on whether their services fall into the scope of the ODPS regulations and how to notify to Ofcom if they are in scope. This scope consultation closed on 26 May 2021 and the final guidance will be published later in the Summer.

Later in 2021, we will also be consulting on guidance in relation to the new obligations relating to European Works in section 368CB of the Act.

2. Background and legislative context

Purpose of the guidance

- 2.1 This document sets out Ofcom’s proposed guidance on the responsibilities of on-demand service providers with regard to harmful material under section 368E of the Communications Act 2003 (“the Act”) ². Ofcom’s final guidance will replace our previous guidance on harmful material for providers of on-demand programme services, which was withdrawn on 1 November 2020.
- 2.2 The proposed guidance reflects changes to the regulatory framework which came into force on 1 November 2020 and sets out how Ofcom will apply the requirements set out in section 368E of the Act. In drawing up this guidance we have had regard to relevant Articles and Recitals of the Audiovisual Media Services Directive³.

Legal framework

- 2.3 On-demand programme services (“ODPS”) are a category of video on-demand service regulated under Part 4A of the Communications Act 2003 (“the Act”). Part 4A has been amended to reflect revisions made to the EU framework for on-demand services under the Audiovisual Media Services Directive 2018 (the “AVMSD”)⁴. The AVMSD governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services, and now also extends to video-sharing platforms (VSPs)⁵.
- 2.4 The AVMSD regulatory framework under Part 4A of the Act has been retained in UK law following the UK’s withdrawal from the EU, although the criteria for establishing jurisdiction have been amended to clarify when an ODPS will fall under UK jurisdiction⁶.
- 2.5 Section 368E of the Act sets out the responsibilities of on-demand service providers with regard to harmful material.
- 2.6 The structure of the proposed guidance presented in this document is as follows:
- Section Three – proposed guidance around subsection 1 of section 368E of the Act, regarding material likely to incite violence or hatred.
 - Section Four – proposed guidance around subsections 2 and 3 of section 368E of the Act, regarding prohibited material.
 - Section Five – proposed guidance around subsections 4-7 of section 368E of the Act, regarding the protection of under-18s from specially restricted material.

² As amended by the Audiovisual Media Services Directive Regulations 2009, 2010 and 2020.

³ <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

⁴ Part 4A was amended by the Audiovisual Media Service Directive Regulations 2020, which came into force on 1 November 2020.

⁵ More information about [VSP regulation](#) is available on our website.

⁶ See [The Broadcasting \(Amendment\) \(EU Exit\) Regulations 2019](#)

- 2.7 As the revisions to the Act have not substantively altered the administrative requirements under section 368D of the Act or the requirements set out in sections 368G and 368H with regard to sponsorship and product placement we do not intend to update [our corresponding guidance](#) in these areas.

Impact assessment and Equality impact assessment

- 2.8 In Annex One of this consultation document, we set out our assessment of the likely impact of our draft ODPS guidance on harmful material. Our ODPS guidance stems from the regulatory requirements in the legislation. Therefore, we assess the impact of those parts of our draft ODPS guidance where we set specific expectations on ODPS providers that we consider are central or strongly encouraged to effectively protect users from harmful material.
- 2.9 In addition, Ofcom is required to assess the potential impact of all its functions, policies, projects and practices on the equality of individuals to whom those policies will apply. An equality impact assessment (“EIA”) assists Ofcom in making sure that it is meeting its principal duty of furthering the interests of citizens and consumers regardless of their background or identity.
- 2.10 We have given careful consideration to whether or not the proposals contained in this document will have a particular impact on race, age, disability, gender, pregnancy and maternity, religion or sex equality. We do not envisage that our draft guidance would have a detrimental impact on any particular group of people.

3. Harmful material: material likely to incite hatred

- 3.1 Section 368E(1) of the Act requires that an ODPS must not contain any material likely to incite violence or hatred against a group of persons or a member of a group of persons based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg on 12 December 2007.

Guidance

- 3.2 The grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg on 12 December 2007 are: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.
- 3.3 Whether content is likely to incite violence or hatred will vary depending on the nature of the protected characteristic, the stereotypes that exist and the social context. Where it relates to a protected group, publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity, war crimes and crimes against peace (the planning or carrying out of a war of aggression) may also amount to incitement to violence or hatred⁷.
- 3.4 “Incitement to hatred” should be understood as having its usual meaning in everyday language⁸. Where appropriate, Ofcom will have regard to relevant European case law on freedom of expression, which includes the case law of the European Court of Human Rights (ECHR)⁹. In September 2020 the ECHR published a [factsheet summarising some of its cases on incitement to hatred](#), which may be helpful to providers.

Consultation question 1: Do you have any comments on proposed guidance around subsection 1 of section 368E of the Act – material likely to incite violence or hatred?

⁷ [European Council Framework Decision 2008/913/JHA](#)

⁸ [Mesopotamia Broadcast A/S METV v Germany C244/10 and C245/10](#)

⁹ A list of cases is available on the [ECHR website](#)

4. Harmful material: prohibited material

4.1 Section 368E(2) of the Act requires that an ODPS must not contain any prohibited material.

4.2 “Prohibited material” is defined in Section 368E(3) of the Act as:

- a) material the inclusion of which in an on-demand programme service would be conduct required by any of the following to be punishable as a criminal offence—
 - i) Article 5 of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism¹⁰,
 - ii) Article 5(4) of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography¹¹, or
 - iii) Article 1 of Council Framework Decision (2008/913/JHA) of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law¹²;
- b) a video work which the video works authority¹³ has determined for the purposes of the 1984 Act¹⁴ not to be suitable for a classification certificate to be issued in respect of it; or
- c) material whose nature is such that it is reasonable to expect that, if the material were contained in a video work submitted to the video works authority for a classification certificate, the video works authority would determine for those purposes that the video work was not suitable for a classification certificate to be issued in respect of it.

4.3 In determining whether any material falls within (c), the Act requires that regard must be had to any guidelines issued by the video works authority (the British Board of Film Classification) as to its policy in relation to the issue of classification certificates.

Guidance

4.4 Material prohibited on ODPS includes:

- material which would be a criminal offence to publish, distribute or disseminate under laws relating to terrorism; child sexual abuse material (CSAM); and racism and xenophobia; and
- video works which have been refused a classification by the BBFC, and material which if included in a video work would be refused a classification by the BBFC.

¹⁰ OJ No. L 88, 31.3.2017, p. 6.

¹¹ OJ No. L 335, 17.12.2011, p. 1.

¹² OJ No. L 328, 6.12.2008, p. 55.

¹³ The British Board of Film Classification (“BBFC”) is currently designated as ‘the video works authority’.

¹⁴ The Video Recordings Act 1984

Terrorism

- 4.5 The ODPS rules refer to Article 5 of [Directive \(EU\) 2017/541](#) of the European Parliament and of the Council of 15 March 2017 on combating terrorism. A person may commit an offence if they publish a statement directly or indirectly encouraging terrorism or that is likely to be understood as such. It is irrelevant whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate a terrorist act.
- 4.6 Statements that are likely to be understood as indirectly encouraging the commissioning or preparation of acts of terrorism include every statement which glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences.

Child Sexual Abuse Material

- 4.7 The ODPS rules refer to Article 5(4) of [Directive 2011/93/EU](#) of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography ("the CSEA Directive").
- 4.8 We consider the offences under the CSEA Directive most relevant for ODPS providers to be related to the distribution, dissemination or transmission of child pornography. The definition of child pornography is set out in Article 2 of the CSEA Directive and extends to the depiction of any person appearing to be a child as well as realistic images. It also includes simulated activity.

Racism and Xenophobia

- 4.9 The ODPS rules refer to Article 1 of Council Framework Decision ([2008/913/JHA](#)) of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.
- 4.10 The offences relating to racism and xenophobia here include publicly inciting violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, and the committing of such an offence by public dissemination or distribution of tracts, pictures or other material.
- 4.11 Also included are offences related to publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity, war crimes and other specified crimes¹⁵, directed against a group or group of persons defined by the characteristics in 4.10 above, where the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

¹⁵ These other specified crimes are crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945.

Material which has been, or would be, refused a classification by the BBFC

- 4.12 Content which complies with the Ofcom Broadcasting Code, or that has been classified by the British Board of Film Classification (BBFC) in any category, including 'R18', would not be considered 'prohibited material'.
- 4.13 Video works which have been refused a classification by the BBFC, and material which if included in a video work would be refused a classification by the BBFC, is 'prohibited material' and cannot be included in an ODPS in any circumstances. All 'material' on the service, including still images and other non-video content is subject to this requirement.
- 4.14 There is no requirement for material being provided on an ODPS to be classified by the BBFC, but where material has not been classified, Ofcom is required to have regard to the BBFC Classification Guidelines when determining whether it is reasonable to expect that such material when included in an ODPS is material which, if contained in a video work submitted to the BBFC, would be refused a classification.
- 4.15 For further information on the guidelines issued by the video works authority, see the [BBFC's website](#). Providers may also contact the BBFC directly via their website for additional guidance.
- 4.16 Having regard to the current BBFC Classification Guidelines, the following comprises a non-exhaustive list of the types of material which **may** constitute prohibited material:
- a) Material in breach of the criminal law (including material judged to be obscene under the current interpretation¹⁶ of the Obscene Publications Act 1959) or that has been created through the commission of a criminal offence¹⁷;
 - b) Material or treatment which risks harm to individuals or, through their behaviour, to society¹⁸. For example:
 - i) material which may actively promote illegal behaviour;
 - ii) detailed portrayals of violent or dangerous acts, or of illegal drug use, which may cause harm to public health or morals;
 - iii) portrayals of potentially dangerous behaviour (especially relating to suicide, self-harm and asphyxiation) which children and young people may potentially copy;
 - iv) material which makes sadistic violence, rape or other non-consensual sexually violent behaviour look appealing; or reinforces the suggestion that victims enjoy rape or other non-consensual sexually violent behaviour; or invites viewer complicity in rape, other non-consensual sexually violent behaviour or other harmful violent activities; and

¹⁶ The Crown Prosecution Service publishes guidance on current interpretation of the Obscene Publications Act at http://www.cps.gov.uk/legal/l_to_o/obscene_publications/#a05

¹⁷ BBFC Classification Guidelines 2019, p28

¹⁸ BBFC Classification Guidelines 2019, pp10, 13, 26 and 31

- v) material which is so demeaning or degrading to human dignity (for example, it consists of strong abuse, torture or death without any significant mitigating factors) that it may pose a harm risk; or
- c) Material in pornographic works¹⁹ which:
- i) is likely to encourage an interest in sexually abusive activity, which may include adults role-playing as non-adults and may include dialogue as well as images;
 - ii) portrays sexual activity which involves real or apparent lack of consent. Any form of physical restraint which prevents participants from indicating a withdrawal of consent;
 - iii) involves the infliction of pain or acts which are likely to cause serious physical harm, whether real or (in a sexual context) simulated. Some allowance may be made for non-abusive consensual activity;
 - iv) involves penetration by any object likely to cause physical harm; or
 - v) involves sexual threats, humiliation or abuse which do not form part of a clearly consenting role-playing game.

Consultation question 2: Do you have any comments on proposed guidance around subsections 2 and 3 of section 368E of the Act – prohibited material?

¹⁹ BBFC Classification Guidelines 2019, p28.

5. Harmful material: protection of under-18s (specially restricted material)

- 5.1 Section 368E(4) of the Act requires that a person providing an on-demand programme service must take appropriate measures to ensure that any specially restricted material is made available by the service in a manner which secures that persons under the age of 18 will not normally see or hear it.
- 5.2 Section 368E(4A) of the Act requires that the measures are to be proportionate to the potential of the material to harm the physical, mental or moral development of such persons.
- 5.3 As the appropriate regulatory authority, Ofcom must draw up, and from time to time review and revise, guidance for providers of on-demand programme services concerning measures that may be appropriate for the purposes of section 368E(4) (ensuring specially restricted material is not available to under-18s).
- 5.4 “Specially restricted material” is defined in Section 368E(5) as:
- a) a video work in respect of which the video works authority²⁰ has issued a R18 classification certificate;
 - b) material whose nature is such that it is reasonable to expect that, if the material were contained in a video work submitted to the video works authority for a classification certificate, the video works authority would issue a R18 classification certificate; or
 - c) other material that might impair the physical, mental or moral development of persons under the age of 18.
- 5.5 In determining whether any material falls within (b), regard must be had to any guidelines issued by the video works authority as to its policy in relation to the issue of classification certificates.

Statutory definitions relevant to Rule 12 – section 368E(7):

- 5.6 As follows:
- “the 1984 Act” means the Video Recordings Act 1984;
 - “classification certificate” has the same meaning as in the 1984 Act (see section 7 of that Act²¹);
 - “R18 classification certificate” means a classification certificate containing the statement mentioned in section 7(2)(c) of the 1984 Act that no video recording containing the video work is to be supplied other than in a licensed sex shop;

²⁰ The British Board of Film Classification (“BBFC”) is currently designated as ‘the video works authority’.

²¹ <https://www.legislation.gov.uk/ukpga/1984/39/section/7>

- “the video works authority” means the person or persons designated under section 4(1) of the 1984 Act as the authority responsible for making arrangements in respect of video works other than video games; and
- “video work” has the same meaning as in the 1984 Act (see section 1(2) of that Act).

Guidance

- 5.7 In considering any particular case, Ofcom’s approach in the first instance will be to determine whether the content in question falls within the definition of “specially restricted material”.
- 5.8 R18 and R18-equivalent material and any other material which might impair the development of under-18s is subject to the requirements of this section. All ‘material’ on the ODPS, including still images and other non-video content is subject to this requirement.

R18 and R18-equivalent material and other sex works

- 5.9 The R18 category is a special and legally-restricted classification issued by the British Board of Film Classification (“BBFC”) primarily for explicit videos of consenting sex or strong fetish material involving adults, and where the primary purpose of the material is sexual arousal or stimulation.
- 5.10 There is no requirement for material being provided on an ODPS to be classified by the BBFC, but Ofcom is required to have regard to the BBFC Classification Guidelines when determining whether material on an ODPS is R18-equivalent. R18-equivalent material is material whose nature is such that it is reasonable to expect that if it was submitted to the BBFC for a classification certificate, the BBFC would issue a R18 classification certificate.
- 5.11 Other material that has either been issued, or would be likely to be issued, an 18 classification certificate as a “sex work” by the BBFC will also be regarded by Ofcom as restricted material of a pornographic nature and should be subject to the same restrictions as R18 or R18-like material.
- 5.12 When an ODPS provider is considering whether its service contains specially restricted material which would be likely to be issued an 18 classification certificate by the BBFC or not, it should have regard to the BBFC’s definition of such material as *works whose primary purpose is sexual arousal or stimulation*.
- 5.13 For more information on the R18 certificate, sex works issued with an 18 classification certificate and the type of content likely to be awarded these certificates, see pages 26 and 28 of the [British Board of Film Classification’s Guidelines](#) on their website. It is the responsibility of ODPS providers to ensure that they are aware of any changes to the BBFC’s guidelines.

Other “specially restricted material”

- 5.14 In assessing the broad range of material that might impair the physical, mental or moral development of under-18s, ODPS providers should also consider whether the material is

age-appropriate for its users. To support this approach, it may be useful to understand the strength and types of material that the BBFC regards as appropriate for different age groups in its classification guidelines²².

- 5.15 Material which might impair the physical, mental or moral development of under-18s is likely to evolve over time and ODPS providers should ensure they remain informed about changing attitudes.
- 5.16 This guidance notes a non-exhaustive range of other material that might impair the physical, mental or moral development of under-18s. ODPS providers should consider, for example, if any of the following could be relevant to the material available on their service:
- Sexual material
 - Violence
 - Depictions of dangerous behaviour (including the use of illegal drugs and the misuse of alcohol)
 - Material promoting eating disorders, self-harm or suicide
 - Abusive and offensive language
 - Exorcism, the occult or the paranormal

Appropriate measures

- 5.17 Provided the material is not illegal or otherwise prohibited (see Section Three), content which is likely to fall under this section (i.e. '**specially restricted material**') may be made available by an ODPS provided access is controlled by appropriate measures to secure that people aged under eighteen '**will not normally see or hear**' such material. The principle applies that specially restricted material that has the most potential to harm must be subject to the strictest access control measures.
- 5.18 An ODPS is defined by reference to it being a service provided by a person with 'editorial responsibility'. A person has editorial responsibility if they have general control over what programmes are included in the service and the manner in which those programmes are organised.
- 5.19 Having general control over the selection of material available on their service means that ODPS providers are in a position to review all their content and identify any content which may meet the definition of specially restricted material ahead of it being made available to users. Accordingly, we expect ODPS providers to consider implementing measures that have a particular focus on preventing children from accessing the strongest specially restricted material and providing parents and carers with the tools to make informed decisions about the content their children are able to access.

²² See age ratings issues in [BBFC Classification Guidelines](#). Providers may also contact the BBFC directly for additional guidance.

Preventing access to specially restricted material of a pornographic nature for under-18s

- 5.20 The Act requires that the measures implemented by ODPS providers to ensure that under-18s will not normally see or hear specially restricted material are proportionate to the potential of the material to harm the physical, mental or moral development of under-18s. Ofcom's interpretation of this requirements is that for pornographic material (including R18 and R18-equivalent material and 18-level "sex works"), there should be in place effective age verification measures that either operate as an age-gate to block users from the entire platform or to filter material in a way that can protect under-18s. This should be an age verification system which verifies that the user is aged 18 or over or an access system that requires the mandatory use of technical tools for age verification and, if age verification does not take place each time the user returns to the service, controls further access to such content when the user returns to the service by the use of mandatory security controls such as passwords or PIN numbers.
- 5.21 Traditional examples of age verification include solutions such as matching a user to their official age on their passport, driving licence or credit card. However, we do not currently recommend or endorse any specific technological tools or methods that an ODPS provider could use to restrict access to the strongest specially restricted material, though the chosen access control measure(s) should be effective in preventing access to that material for under-18s. We expect providers to stay informed of emerging technological developments and solutions for online safety and to consider these as part of their ongoing assessment of the measures that are appropriate for their service.
- 5.22 ODPS providers should seek to provide users with a clear understanding of the age verification method(s) that they are being asked to use on the service and, if more than one method is available, accurate information on the choice of those methods.
- 5.23 Ofcom would *not* consider the following forms of age verification to be appropriate protection measures for the strongest specially restricted material:
- Self-declaration of date of birth or a 'tick box' system to confirm that the user is over the age of 18;
 - General disclaimers asserting that all users should be deemed to be over the age of 18;
 - Relying on age verification through online payment methods which may not require a person to be over 18, e.g. Debit, Solo or Electron cards or any other card where the card holder is not required to be over 18;
 - Relying on publicly available sources or otherwise easily known information such as name, address and date of birth to verify the age of a user.
- 5.24 Where they are required, age verification systems must be fit for purpose and be effectively managed so as to ensure that people aged under 18 will not normally see or hear the strongest specially restricted material. Ofcom will consider the adequacy and effectiveness of age verification systems on a case by case basis and keep them under review in the context of ODPS. Responsibility for ensuring that any required age verification system is in place and is operating effectively rests at all times with the person with editorial responsibility for the ODPS. The 'Guidance on who needs to notify'

document²³ provides further detail on how to determine the person with editorial responsibility for the ODPS.

Other specially restricted material

- 5.25 When considering appropriate measures to ensure that other specially restricted material (ie. material which is not pornographic in nature but which may still impair the physical, mental or moral development of under-18s) will not normally be seen or heard by under-18s, ODPS providers should take into account the following:
- The potential of the material to harm under-18s
 - The likely degree of harm caused
 - The likelihood of under-18s accessing the material
 - The nature of the ODPS and its likely audience
 - The age of any under-18s likely to access the material.
- 5.26 What measures are appropriate and proportionate will vary in each case. However, such measures may include the use of:
- Age ratings or other classification systems
 - Content warnings and information
 - Parental controls, including restricted mode settings and PIN protection
 - Age assurance, including age verification
- 5.27 It is important to note that where a measure is taken, it must be implemented in such a way as to carry out the requirement to protect under-18s from specially restricted material.

Considerations for effective use of age ratings

- 5.28 The most basic way in which ODPS can use ratings systems to aid the protection of under-18s is to have a binary rating system, where content is tagged by the platform as, for example, “Mature” or “Caution”. Some platforms may consider having more sophisticated ratings systems, where content is labelled with age-appropriate ratings.
- 5.29 Where ODPS providers are using their own framework for making rating decisions, the overall basis on which these decisions are made should be made clear to users.
- 5.30 An ODPS may rely on an existing age ratings framework such as the BBFC ratings system. We expect providers who choose to use existing, established age ratings frameworks on their platforms to also ensure that this is done with the knowledge and agreement of the relevant ratings body. This is to promote consistency of established ratings standards, as well as to protect users who will rely on the accuracy of ratings information provided to them by the ODPS.

²³ Ofcom recently held a consultation on its proposed guidance on ‘Who needs to notify’. This consultation closed on 26 May 2021 and the final guidance will be issued later in Summer 2021.

Content warnings and information

- 5.31 Providing warnings and information to users about the content of programmes is another measure that may be appropriate in helping secure that content that may impair the physical, mental or moral development of under-18s will not normally be seen or heard by under-18s. That is because they allow viewers to make more informed decisions about their viewing and the viewing of any under-18s they are responsible for. However, ODPS providers should bear in mind that such protection measures are most effective when combined with other protection measures that more robustly control the content that is available for access by under-18s.

Parental controls, including restricted mode settings and PIN protection

- 5.32 Parental control systems allow an adult responsible for a parent under the age of 18 a degree of control over what content the child can see or hear.
- 5.33 There are a range of parental control features that ODPS can design and implement. Some ODPS have systems which allow the parent or carer to create an account for their child giving the parent or carer control over the type of content that their child can see. These systems may be used alongside age ratings information to allow parents and carers to more carefully tailor the content that is available for their children to view.
- 5.34 Parental control functions should not be easily circumventable by under-18s and ODPS providers should consider the use of passwords or PINs to ensure that the protection provided by parental control systems is robust.
- 5.35 Ofcom commissioned research in 2018 on consumers' use of and attitudes towards mandatory and voluntary PIN protection systems. The research found that awareness and usage of PIN systems was high, along with opinions on their effectiveness. The majority (85%) of parents of 11-15-year olds were confident that the PIN protection they had in place provided adequate protected viewing for their children. Most parents also considered mandatory PINS to be safer than voluntary PINs because with mandatory PINs the responsibility is taken away from the parent to set it up in the first place²⁴.

Considerations for effective age assurance

- 5.36 As set out in paragraph 5.20, ODPS providers are required to have robust age verification measures in place to block under-18s from accessing material of a pornographic nature. For specially restricted material that is non-pornographic in nature, it may be appropriate for ODPS providers to implement age assurance methods in order to protect under-18s.
- 5.37 **Age assurance** is a broad term that refers to the spectrum of methods that can be used to be informed about a user's age online.²⁵ Examples of age assurance cover a range of

²⁴ See [Ofcom's Daytime PIN Research, Kantar Media, 2018](#).

²⁵ The development of the concept and definition of age assurance has been supported by the government-led Verification of Children Online research project (VoCO). More information on age assurance can be found in the [VoCO Phase 2 report \(November 2020\)](#).

potential methods, from users self-declaring their date of birth to the use of face-recognition biometrics and computational methods. Other forms of age assurance may include trusted sources that point to a child's age, such as parental verification tools. Age verification is the most robust form of age assurance where a user's age is established to the greatest degree of certainty practically achievable.

- 5.38 ODPS providers may consider the following factors when establishing and operating age assurance systems:
- a) When implementing age assurance, ODPS providers should consider how reliable and accurate any method is and what level of confidence it provides, in relation to the risk,
 - b) Age assurance measures that are easily integrated into existing platforms and avoid disrupting the user experience are likely to be more widely adopted and sustainable in the long term.
 - c) Some under-18s can provide false information to easily bypass age assurance measures, e.g. self-declaring to be 18 or over. ODPS providers should aim to have a robust and effective age assurance approach to account for and disincentivize this behaviour. Examples of this can range from neutral design of the date of birth request upon sign-up with no further chance to sign in if an underage declaration is made, to introducing hard identifiers or account verification for users who claim to be over 18.
 - d) ODPS providers should consider how different tools such as ratings and parental controls might interact with age assurance to provide greater confidence about the age of under-18 users.
- 5.39 Given the nature of their service, the level of user interaction and the amount of information held about their users, it is likely that age assurance methods may be more commonly used by providers of VSPs rather than ODPS. Given the constantly evolving technology in this area, ODPS providers considering using age assurance methods in order to protect under-18s may wish to refer to Ofcom's guidance to VSP providers²⁶.

Combining the use of multiple measures

- 5.40 The measures set out above may be particularly effective when used in combination with one another. For example, combining parental controls alongside an effective rating system can help ensure that under-18s cannot access restricted material (or parental controls allow the responsible adult to restrict access to the material). More sophisticated ratings systems involving multiple tiers allow the responsible adult to further tailor an appropriate experience on the ODPS.

²⁶ A full version of the [draft VSP guidance](#) is available on the Ofcom website. The consultation on this draft guidance closed on 2 June 2021. The final VSP guidance document will be published later in 2021.

Consultation question 3: Do you have any comments on proposed guidance around subsections 4 - 7 of section 368E of the Act – protection of under-18s (specially restricted material)?

Consultation question 4: Do you have any comments on any other part of the proposed guidance which is not explicitly set out in questions 1-3?

A1. Provisional conclusions on the impact of our draft ODPS guidance

A1.1 In this section we set out our assessment of the likely impact of our draft ODPS guidance. We assess the impact of those parts of our draft ODPS guidance where we set specific expectations on ODPS providers that we consider are central or strongly encouraged to adequately protect users.

Our draft ODPS guidance stems from the regulatory requirements in the legislation

A1.2 The ODPS rules place an obligation on ODPS providers to comply with the requirements in Part 4A of the Act. The Secretary of State carried out an impact assessment of the implementing regulations²⁷ and the European Commission also carried out impact assessments when developing the AVMSD²⁸.

A1.3 This impact assessment considers the potential impact of the draft ODPS guidance concerning new requirements with regard to harmful material under section 368E of the Act. It does not consider the impact of any pre-existing ODPS requirements under the regulatory framework, on which our existing guidance remains unchanged. For example, ODPS providers of pornographic material were already required effectively to implement robust age verification systems under the previous ODPS rules and guidance.

A1.4 The draft ODPS guidance published with this consultation document is designed to help ODPS providers understand the changes to requirements relating to harmful material under section 368E of the Act and their responsibilities with regard to the measures that may be appropriate for the purposes of ensuring specially restricted material is not available to under-18s. In some places it sets out what ODPS providers “should do” or “should consider” when implementing measures. These are not prescriptive requirements but intended as helpful suggestions to aid understanding of how compliance could be achieved. The guidance affords ODPS providers flexibility in how they protect their users. This reflects the diversity of the sector and the importance of technological innovation and is why we have not set prescriptive requirements in the guidance.

A1.5 However, in some areas we have set specific expectations on ODPS providers, where we consider it is unlikely that effective protection of users can be achieved without having a particular measure in place and it being implemented effectively. There are also areas where we strongly encourage certain approaches to effectively protect users. These areas are as follows:

- **Pornographic material:** For ODPS which contain pornographic material, ODPS providers should (as under the previous ODPS rules and guidance) effectively

²⁷ https://www.legislation.gov.uk/ukia/2020/60/pdfs/ukia_20200060_en.pdf

²⁸ <https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-168-F1-EN-MAIN-PART-1.PDF>

implement robust age verification systems. **We consider this central to achieving compliance with the regulatory requirements.**

- **Other specially restricted material:** Where an ODPS contains other specially restricted material, the ODPS provider should implement proportionate and appropriate measures to ensure that any material that might impair the physical, mental or moral development of persons under the age of 18 is not normally seen or heard by them. The ODPS provider should determine what measures are proportionate and appropriate on their service, relative to the potential or harm. The draft guidance seeks to provide assistance in how to make this determination and to suggest possible measures, without being prescriptive.

- A1.6 The impact of these potential activities on ODPS will depend on ODPS providers' existing approaches in these areas and whether they should revise these to ensure that they have taken appropriate measures to protect their users.
- A1.7 We consider that effectively implementing robust age verification systems is proportionate for all ODPS which contain pornographic material given the potential harm from people under the age of 18 accessing the material. We recognise that there is some potential for this to have a negative commercial impact on some ODPS, but we consider this is justified by the potential for harm to under-18s accessing pornographic material. It was also a requirement under the existing rules.
- A1.8 Under the updated rules, ODPS providers must now implement proportionate and appropriate measures to ensure that any material that might impair the physical, mental or moral development of persons under the age of 18 is not normally seen or heard by them. Previously, ODPS providers were required to implement such measures only where the ODPS contained material that might **seriously** impair under-18s. We anticipate that while this change may require ODPS providers to make different decisions about how to classify individual pieces of content on their services, it is not likely to have a substantive impact on their existing processes for assessing and complying content, based on the previous ODPS guidance. It is also the case that many ODPS providers have already implemented the kinds of measures we have described in the draft guidance (such as PIN protection and parental controls). As a result, we do not anticipate that the updated guidance is likely to have a substantive impact on most providers.

Consultation question 5: Do you have any comments on the impact assessment in Annex One, and any of the potential costs incurred (including any we have not identified)?

A2. Responding to this consultation

How to respond

- A2.1 Ofcom would like to receive views and comments on the issues raised in this document by 5pm on 14 September 2021.
- A2.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/category-2/guidance-odps-measures-to-protect-users-from-harmful-material>. You can return this by email to the address provided in the response form.
- A2.3 If your response is a large file, or has supporting charts, tables or other data, please email it to vod@ofcom.org.uk, as an attachment in Microsoft Word format, together with the [cover sheet](#).
- A2.4 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL, either:
- Send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files, or
 - Upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A2.5 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A2.6 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A2.7 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A2.8 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex Four. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A2.9 If you want to discuss the issues and questions raised in this consultation, please contact vod@ofcom.org.uk

Confidentiality

- A2.10 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on the Ofcom website as soon as we receive them.

- A2.11 If you think your response should be kept confidential, please specify which part(s) this applies to and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A2.12 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A2.13 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our Terms of Use.

Next steps

- A2.14 Following this consultation period, Ofcom plans to publish a statement later in 2021.
- A2.15 If you wish, you can register to receive mail updates alerting you to new Ofcom publications.

Ofcom's consultation processes

- A2.16 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex Five.
- A2.17 If you have any comments or suggestions on how we manage our consultations, please email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A2.18 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary:
Email: corporationsecretary@ofcom.org.uk

A3. Consultation coversheet

BASIC DETAILS

Consultation title: On-demand programme services guidance

To: vod@ofcom.org.uk

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts? _____

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

A4. Consultation questions

This consultation is seeking views on our proposed guidance to help ODPS providers understand what material is permitted on ODPS services and how to take with respect to protecting users from harmful material. Ofcom wants to hear from services which may fall in scope of the regulation, the wider industry and third sector bodies.

Question 1: Do you have any comments on proposed guidance around subsection 1 of section 368E of the Act – material likely to incite violence or hatred?

Question 2: Do you have any comments on proposed guidance around subsections 2 and 3 of section 368E of the Act – prohibited material?

Question 3: Do you have any comments on proposed guidance around subsections 4 - 7 of section 368E of the Act – protection of under-18s (specially restricted material)?

Question 4: Do you have any comments on any other part of the proposed guidance which is not explicitly set out in questions 1-3?

Question 5: Do you have any comments on the impact assessment in Annex 1, and any of the potential costs incurred (including any we have not identified)?

A5. Ofcom's consultation principles

Ofcom has seven principles that it follows for every public written consultation:

Before the consultation

- A5.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

- A5.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A5.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A5.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A5.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A5.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.