

# **‘Specially restricted material’ and Age Verification Guidance for Providers of On-Demand Programme Services**

Consultation on proposed changes to the Guidance

**CONSULTATION:**

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## About this document

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This document sets out our proposed amendments to the Guidance for Rule 11 of the rules for on-demand programme services (“the ODPS Rules”). The changes we are consulting on aim to promote consistency between our approach to regulating ‘*specially restricted material*’ on ODPS, and the approach of the British Board of Film Classification (“BBFC”) to regulating ‘*pornographic*’ content online on commercial adult websites.

Separately, and for information only, this document also sets out the changes which we will be making to Rule 11 to reflect the amendments to the definition of ‘*specially restricted material*’ introduced by the Digital Economy Act 2017.

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# 1. Summary

## Why are we consulting?

- 1.1 On-demand programme service providers (“ODPS providers”) regulated by Ofcom are required to place some content (including certain pornographic content) behind age-verification controls (“AV” controls) in order to restrict access to over 18s.
- 1.2 The Digital Economy Act 2017 (“DEA”) amends section 368E of the Communications Act 2003 (“the Act”) to increase the scope of material that needs to be placed behind AV controls on ODPS.
- 1.3 The DEA has also introduced new AV requirements for other providers of online commercial adult content available in the UK. The British Board of Film Classification (“BBFC”) is responsible for enforcing these requirements<sup>1</sup>. Its [guidance](#) on age-verification arrangements was laid before parliament on 10 October 2018.
- 1.4 For information, and to provide context for the proposals on which we are seeking stakeholder views, this document sets out the changes we are making to Rule 11 of the rules<sup>2</sup> applying to ODPS providers (“the ODPS Rules”). These changes reflect the amendments to section 368E of the Act and are not subject to consultation.
- 1.5 The proposals on which we are seeking stakeholder views relate to Ofcom’s approach to applying the AV requirements. This will be set out in Ofcom’s Guidance on the ODPS rules. Our proposals aim to promote consistency between Ofcom’s approach to the AV requirements for ODPS, and the BBFC’s approach to similar requirements for other providers of online adult content. We consider that aligning our approach with that of the BBFC where possible will help provide clarity for industry and consumers.

## What happens next?

- 1.6 We welcome input on Ofcom’s proposed approach to applying the AV requirements by 3 December 2018. Ofcom will then consider the responses and aim to publish a statement of our decisions and the revised Guidance in early 2019. The changes to the Guidance will be brought into effect when the relevant DEA provisions commence – at the time of writing this date is yet to be determined.
- 1.7 Alongside the publication of the statement, Ofcom will conduct stakeholder engagement with ODPS providers of adult content to help promote awareness and understanding of the changes to Rule 11 and the accompanying Guidance.

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<sup>1</sup> See the BBFC’s [‘age verification regulator’](#) website.

<sup>2</sup> See Ofcom’s [Rules and Guidance](#)

## 2. Background

### Current Rules

- 2.1 Ofcom regulates on-demand programme services (“ODPS”) through a series of rules (“the ODPS Rules”)<sup>3</sup> which reflect the requirements set out in Part 4A of the Communications Act 2003 (“the Act”). These largely derive from the Audiovisual Media Services Directive (AVMS Directive)<sup>4</sup>. Whether an on-demand service is regulated by Ofcom depends on a number of factors including whether it includes ‘television-like’ content and whether it is within UK jurisdiction<sup>5</sup>. Ofcom currently regulates around 16 ODPS providers of adult content.
- 2.2 The ODPS Rules are set out as part of Ofcom’s Broadcasting Code<sup>6</sup>, and are accompanied by guidance (“the ODPS Guidance”) published by Ofcom to assist ODPS providers in their understanding of the Rules and how Ofcom applies them.<sup>7</sup> Rule 11 of the ODPS Rules states that an ODPS must not contain any ‘*specially restricted material*’ unless the material is made available in a manner which secures that persons under the age of 18 “*will not normally see or hear*” it.
- 2.3 The definition of ‘*specially restricted material*’ includes material which has been issued an ‘R18’ Certificate by the British Board of Film Classification (“BBFC”) or would be likely to be issued an R18 certificate if it were submitted to the BBFC as a video work. It also includes any other material that might seriously impair the physical, mental or moral development of persons under the age of 18.
- 2.4 The Guidance for Rule 11 explains that Ofcom has regard to the BBFC Classification Guidelines when determining whether material on an ODPS is R18-equivalent.<sup>8</sup> The R18 certificate is issued by the BBFC in respect of video works being supplied on a physical video recording such as a DVD. It is a special classification for pornographic works, primarily for explicit works of consenting sex or strong fetish material involving adults.
- 2.5 Ofcom’s Guidance on Rule 11 also sets out our expectations for how providers may use age-verification controls (“AV” controls) to ensure that under 18s “*will not normally see or hear*” ‘*specially restricted material*’. This states that ODPS providers should verify that the user is aged 18 or over at the point of registration or first access, and control further access to such content either by the use of AV each time the user returns or by the use of security controls, such as passwords or PIN numbers. The Guidance also sets out certain AV methods which we consider may secure the necessary level of AV controls, while

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<sup>3</sup> See Ofcom’s [ODPS rules](#)

<sup>4</sup> [Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010](#)

<sup>5</sup> See Ofcom’s [Guidance notes on who needs to notify](#)

<sup>6</sup> See [Part 3 of the Ofcom Broadcasting Code](#)

<sup>7</sup> See Ofcom’s [Rules and Guidance](#)

<sup>8</sup>For more information on the R18 certificate, and the type of content likely to be awarded this certificate, see the British Board of Film Classification’s website: [www.bbfc.co.uk](http://www.bbfc.co.uk).

explaining that we will assess compliance on a case by case basis. (See Part Annex 2 for the full text of the current Guidance.)

## Digital Economy Act

### Extension to the statutory definition of ‘specially restricted material’

- 2.6 Section 94 of the Digital Economy Act 2017 (“DEA”) amends section 368E of the Communications Act 2003 (“the Act”) to expand the scope of ‘*specially restricted material*’ for which ODPS providers must provide AV controls (see Annex 1). As a result, the definition of ‘*specially restricted material*’ now includes material whose principle purpose is to cause sexual arousal and which has been issued an ‘18’ Certificate by the BBFC, or would be likely to be issued an ‘18’ if it were submitted to the BBFC in a video work.<sup>9</sup>
- 2.7 As the ODPS Rules set out the requirements ODPS providers must comply with under sections 368E to 368H of the Act, Ofcom must ensure that any amendments made by Parliament to those sections are carried across to the ODPS Rules. Accordingly, we are revising Rule 11 to incorporate the new definition of ‘*specially restricted material*’ in section 368E of the Act. For reference, we set out the revised Rule 11 in Section 3.

### New Age Verification requirements for providers of online adult content

- 2.8 At the same time as amending section 368E of the Act in relation to adult content included in ODPS, Part 3 of the DEA introduces new AV requirements for online providers of commercial adult material to be regulated by the BBFC.<sup>10</sup> Online adult content within the BBFC’s remit explicitly excludes ODPS regulated by Ofcom.
- 2.9 In outline, the new AV requirements for adult sites state that ‘*pornographic material*’ must not normally be accessible to under 18s. As with ‘*specially restricted material*’ on ODPS, ‘*pornographic material*’ is defined to include both R18 and R18-equivalent material, and 18 and 18-equivalent material whose principal purpose is to cause sexual arousal.
- 2.10 The BBFC has the power to notify payment service providers or ancillary service providers (like search engines)<sup>11</sup> of non-compliant services, and request that they withdraw their services. The BBFC can also require Internet Service Providers to block any ‘*pornographic*’ material provided without appropriate AV measures in place.
- 2.11 In March 2018, the BBFC consulted<sup>12</sup> on its proposals for assessing whether AV measures taken by the online providers to be regulated comply with the DEA requirements for online adult content. The BBFC’s draft Guidance was laid before Parliament on 10 October 2018.<sup>13</sup>

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<sup>9</sup> The relevant extract from the DEA is set out in our Legal Background annex, and can also be found [here](#)

<sup>10</sup> The requirements are set out in [Part 3 of the DEA](#)

<sup>11</sup> For more information on what constitutes an ‘ancillary service provider’ see the BBFC’s [Guidance on ancillary service providers](#)

<sup>12</sup> See the BBFC’s [DEA consultation](#)

<sup>13</sup> [Guidance on age verification arrangements](#)

- 2.12 In brief, the BBFC Guidance sets out the following criteria for determining effective AV<sup>14</sup>:
- a) use of an effective control mechanism to verify that the user is aged 18 or over at the point of registration or access;
  - b) use of AV data that cannot be reasonably known or be readily obtained or predicted by another person;
  - c) users age-verify each visit or access is restricted by controls such as passwords or personal identification numbers; and
  - d) measures which authenticate AV data and measures which are effective in preventing use by non-human operators including algorithms.
- 2.13 The BBFC Guidance also indicates features which the BBFC does not consider constitute effective AV (e.g. relying solely on 'tick box' system or requiring use to input only their date of birth).

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<sup>14</sup> See Section 3 of the BBFC's [guidance on age verification arrangements](#)

## 3. Changes to Rule 11

3.1 In light of the changes to the statutory framework for the regulation of adult content which we have described in Section 2, this section explains our revisions to Rule 11 of the ODPS Rules which will be brought into effect when the relevant DEA provisions commence – at the time of writing this date is yet to be determined. These changes are described for information only.

### Changes to Rule 11

3.2 The definition of '*specialty restricted material*' in Rule 11 currently includes R18 and R18-equivalent material and material that might seriously impair under 18s. In line with the amendments to section 368E of the Act, the changes to Rule 11 will extend the meaning of '*specialty restricted material*' to also include:

- a video work (i) in respect of which the BBFC<sup>15</sup> has issued an 18 certificate, and (ii) whose nature is such that it is reasonable to assume that its principal purpose is to cause sexual arousal,
- material whose nature is such that it is reasonable (i) to assume that its principal purpose is to cause sexual arousal, and (ii) to expect that, if the material were contained in a video work submitted to the BBFC for a classification certificate, the BBFC would issue an 18 certificate. In determining whether any material falls within these criteria, Ofcom must have regard to any guidelines issued by the BBFC as to its policy in relation to the issue of classification certificates.

3.3 See Annex 2 for detail of the new wording of Rule 11, set out in red (e.g. **example**).

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<sup>15</sup> The BBFC is the designated video works authority

## 4. Draft Amendments to Ofcom's Guidance on Rule 11

- 4.1 This section sets out the changes which we are proposing to make to Ofcom's Guidance on Rule 11, with the aim of promoting consistency between Ofcom's approach to the AV requirements for ODPS and the BBFC's approach for similar requirements for other providers of online adult content. We are inviting stakeholders to comment on these proposals, and Annex 2 presents the current guidelines alongside the proposed changes.
- 4.2 Additionally, in line with the revisions to Rule 11 (set out in Section 3), we need to amend our Guidance to reflect changes to the statutory framework. Section 94 of the DEA amends Section 368E of the Act to set out that, in determining whether any material whose principle purpose is to cause sexual arousal is such that the BBFC would issue an 18 certificate, regard must be had to any guidelines issued by the BBFC as to its policy in relation to the issue of classification certificates. This mirrors the existing requirement to have regard to the BBFC's policy in determining whether the nature of the material is such that the BBFC would issue an R18 certificate.
- 4.3 We therefore need to amend our Guidance to explain that, in assessing compliance by ODPS providers with Rule 11, Ofcom will have regard to the BBFC's Classification Guidelines when determining whether material whose principle purpose is to cause sexual arousal is 18-equivalent. The BBFC's current guidelines on the 18 certificate states that sex works (defined as works whose principle purpose is sexual arousal or simulation) containing only material which may be simulated are generally passed as an 18.<sup>16</sup>
- 4.4 The analysis presented in this section constitutes an impact assessment as defined in section 7 of the Communications Act 2003 (the "Act"). Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making.<sup>17</sup>
- 4.5 Separately, in Annex 3, we assess the impact of our proposals on specified equality groups, in an 'Equality Impact Assessment'.

### Guidance on 'Specially restricted material'

- 4.6 As explained in Section 2, Part 3 of the DEA introduces a new requirement for providers of online commercial adult content available in the UK (aside from the ODPS regulated by Ofcom) to place AV controls on '*pornographic material*'. As with '*specially restricted material*' in ODPS, '*pornographic material*' is defined to include both R18 and R18-equivalent material and 18 and 18-equivalent material with a principle purpose of sexual

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<sup>16</sup> For more information on the 18-Certificate, see the British Board of Film Classification's website

<sup>17</sup> For further information about Ofcom's approach to impact assessments, see the guidelines Better policy-making: Ofcom's approach to impact assessment, which are on Ofcom's website: Better policy making

arousal. The BBFC will produce advice on what content can be displayed in front of age verification (i.e. is not ‘pornographic material’)<sup>18</sup>.

- 4.7 We are proposing to state in our revised Guidance for Rule 11 that in assessing whether ODPS content falls within the definition of ‘*specialty restricted material*’ we will have regard to any advice that the BBFC issues on how it will assess whether online adult material falls within the definition of ‘*pornographic material*.’ This will allow us to follow developments of BBFC policy in this area as far as possible, while also having regard to the BBFC’s Classification Guidelines for video works, along with Ofcom’s regulatory principles.<sup>19</sup> It will promote a consistency of approach across online ‘*pornographic*’ and ‘*specialty restricted*’ material where possible, aiding clarity to industry and consumers around which material will be subject to AV controls.
- 4.8 An alternative option would be for Ofcom not to have regard to the BBFC’s policy on the type of material it considers should be restricted. However, we do not see any advantage to this approach. We acknowledge that Ofcom should ultimately enforce the ODPS rules as it sees fit. However, if we were not to have any regard to the BBFC’s policy, this may give rise to inconsistent standards, with different material restricted on ODPS and in other online ‘pornographic material’. We believe that this risks unnecessary complications for ODPS providers in implementing the requirements and increases the chances that breaches of the requirements will occur. It may also lead to a lack of clarity for consumers over the levels of protection afforded. We note also that the Act requires us to have regard to the BBFC’s Classification Guidelines specifically in relation to what is or is not R18-equivalent material or 18-equivalent material with a principal purpose of sexual arousal (see para 4.3).
- 4.9 Ofcom will be conducting stakeholder engagement with ODPS providers of adult content to promote understanding of the material which we consider is likely to fall within the definition of ‘*specialty restricted*.’

Question 1: Do you agree with our proposal to revise the Guidance for Rule 11 to state that we will have regard to any BBFC Guidance on the definition of ‘*pornographic material*’ when assessing whether ODPS material falls within the definition of ‘*specialty restricted material*’?

## Guidance on Age Verification

- 4.10 The BBFC has recently laid before parliament its AV Guidance which sets out the principles by which it will assess compliance with the requirement for providers of online adult content to ensure ‘*pornographic material*’ is not normally accessible by under 18s.<sup>20</sup> We are proposing to replicate the BBFC’s AV Guidance in our own AV Guidance for Rule 11.

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<sup>18</sup> See the BBFC’s [FAQs](#)

<sup>19</sup> See [Ofcom’s regulatory principles](#)

<sup>20</sup> [BBFC guidance on age verification arrangements](#)

- 4.11 Both our current Guidance for Rule 11 and the BBFC's AV Guidance require providers to verify that the user is aged 18 or over at the point of registration or access, and to control further access to such content by requiring the user to age-verify each visit or by the use of security controls, such as passwords or personal identification numbers.
- 4.12 Ofcom's current Guidance differs from the BBFC's AV Guidance in that our Guidance gives examples of tools which Ofcom considers may be acceptable for AV<sup>21</sup> whereas the BBFC's AV Guidance sets out principles by which it will assess the compliance of AV arrangements and details of features which it does not consider in isolation to comply with its requirements.
- 4.13 The principles set out in the BBFC's AV Guidance include that AV measures:
- cannot be reasonably known by another person (without theft of data or identification documents) or readily obtained or predicted by another person.
  - should authenticate age-verification data and be effective at preventing use by non-human operators including algorithms.
- 4.14 The BBFC gives details of the following features which it does not consider, in isolation, to comply with its requirements:
- relying solely on the user to confirm their age with no cross-checking of information, for example by using a 'tick box' system or requiring the user to only input their date of birth
  - using a general disclaimer such as 'anyone using this website will be deemed to be over 18'
  - accepting AV through the use of online payment methods which may not require a user to be over 18. (For example, the BBFC will not regard confirmation of ownership of a Debit, Solo or Electron card or any other card where the card holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over.)
  - checking against publicly available or otherwise easily known information such as name, address and date of birth.
- 4.15 We propose to change our current AV guidance to reflect the BBFC's approach. We therefore propose to remove the examples included in Ofcom's Guidance and follow a principles-based approach which is aligned to the principles set out in the BBFC's AV Guidance.
- 4.16 The BBFC's AV guidance also explains that the BBFC will assess the compliance of AV arrangements and report the results of these assessments on its website. We propose to state in our Guidance that when assessing AV solutions in relation to ODPS Rule 11 we will

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<sup>21</sup> These include confirmation of credit card ownership or forms of payment where the holder must be 18 or over<sup>21</sup> and use of a reputable personal digital identity management service which makes checks on an independent and reliable database, such as the electoral roll or other comparable proof of account ownership which effectively verifies age (such as possession and ownership of an effectively age-verified mobile phone). For a phone to be effectively age-verified the account holder must have presented proof of identity and age (for example driving licence or valid passport) to the mobile phone operator. The age-verification system must establish that the owner of the effectively age-verified phone is the person attempting to access content – for example by demonstrating possession of the phone and awareness of the attempted access.

take into account the BBFC's assessments of AV solutions by reference to the list of AV solutions published on its website. However, we will also make it clear that Ofcom will reach its own independent view and will not be bound by the BBFC's assessments.

- 4.17 An alternative option would be for Ofcom not to follow the BBFC's AV guidance. We acknowledge that from an industry perspective there may appear to be some advantage to this approach, as the BBFC's AV principles may set a higher bar for the compliance of AV solutions than Ofcom's current Guidance. In particular, the BBFC's principles explicitly require that AV measures cannot be reasonably known or readily obtained or predicted by another person and must be effective at preventing use by non-human operators including algorithms. It is therefore possible that some AV solutions which may be passed under our current Guidance, such as solutions based on the use of passport numbers, would not satisfy the BBFC's AV principles.
- 4.18 However, we believe the BBFC's AV principles to be robust and recognise that the BBFC has investigated the latest AV methods and recently consulted on its Guidance to take account of stakeholder views. We do not believe that this development in our approach to AV would in practice result in a significant change for those providers of adult ODPS who are currently subject to Rule 11. In our experience, providers who are currently compliant with Rule 11 use AV methods which would also satisfy the BBFC's AV principles.
- 4.19 We believe that a closer alignment with the BBFC's approach to assessing AV solutions would avoid duplication of effort between the BBFC and Ofcom and help to achieve a more efficient and proportionate regulatory regime. In particular, it would help to ensure that both ODPS providers and other online providers of adult content are subject to more consistent standards for assessing AV verification. It would also help to provide coherence and clarity for industry, especially for some ODPS providers who may also be subject to the BBFC's AV scheme. We also believe it would provide greater clarity for UK consumers who will only need to understand one approach to AV across all regulated online adult content.
- 4.20 Conversely, if we were not to amend our guidance, we believe that both the adult industry and consumers would be subject to inconsistent standards of age verification. This would again make the requirements more difficult for the adult industry to implement effectively and more difficult for UK consumers to understand and anticipate (a) the levels of protection on offer and (b) the AV information they will be expected to supply to access adult material online.
- 4.21 We will also state in our Guidance that we recommend that ODPS providers adopt good practice regarding data protection in the design and implementation of AV solutions. The Information Commissioner's Office (ICO) is responsible for enforcing data protection legislation and providers should have regard to its guidance in this area.<sup>22</sup>
- 4.22 We set out these proposed amendments to the Guidance in Annex 2.

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<sup>22</sup> More information about the requirements of data protection legislation can be found on the ICO's [website](#)

Question 2: Do you agree with our proposal to amend our Rule 11 Guidance to replicate the BBFC's AV Guidance and explain that our assessment of AV solutions will be considered with reference to the BBFC's published list of assessed AV solutions?

Question 3: Do you have any other comments regarding our proposed amendments to the Rule 11 guidance?

# A1. Legal Background

## Section 368E of the Communications Act 2003 (as amended by section 94 of the Digital Economy Act 2017)

### 368E Harmful material

*[Note subsections (1) to (3) are omitted for the purposes of this consultation.]*

(4) An on-demand programme service must not contain any specially restricted material unless the material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it.

(5) “Specially restricted material” means—

(a) a video work in respect of which the video works authority 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,

(c) other material that might seriously impair the physical, mental or moral development of persons under the age of 18.

(d) a video work—

(i) in respect of which the video works authority has issued an 18 certificate, and

(ii) whose nature is such that it is reasonable to assume that its principal purpose is to cause sexual arousal, or

(e) material whose nature is such that it is reasonable—

(i) to assume that its principal purpose is to cause sexual arousal, and

(ii) 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 an 18 certificate a video work(6)

In determining whether any material falls within subsection (3)(b) or (5)(b) or (e), 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.

(7) In this section—

“the 1984 Act” means the Video Recordings Act 1984;

“18 certificate” means a classification certificate which—

(a) contains, pursuant to section 7(2)(b) of the 1984 Act, a statement that the video work is suitable for viewing only by persons who have attained the age of 18 and that no video recording containing that work is to be supplied to any person who has not attained that age, and

(b) does not contain 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;”.

“classification certificate” has the same meaning as in the 1984 Act (see section 7 of that Act);

“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;

“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;

“video work” has the same meaning as in the 1984 Act (see section 1(2) of that Act)

## Digital Economy Act 2017

### Part 3: Online Pornography

For provisions relating to the BBFC’s Age Verification scheme see Part 3 of the DEA [here](#).

## A2. Changes to Rules and proposed amendments to Guidance

- A2.1 This Annex sets out the changes to Rule 11 which we will be implementing when the relevant DEA provision come into force and the changes to the associated Guidance which we are proposing to make, and which we are inviting stakeholders to comment on.
- A2.2 Changes to Rule 11 are set out in red (e.g. **example**). As we explained in Section 2 these reflect statutory changes and are provided for information only as they are not subject to consultation.
- A2.3 Changes to the Guidance are set out as follows: proposed insertions are set out in underlined red text and highlighted (e.g. **example**) and our proposed deletions are marked in strike-through and highlighted (e.g. ~~example~~).

### *Rule 11: Harmful Material: Protection of Under-18s (Specially Restricted Material)*

*An ODPS must not contain any specially restricted material unless the material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it.*

*“Specially restricted material” means—*

- (a) a video work in respect of which the video works authority 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 seriously impair the physical, mental or moral development of persons under the age of 18.*
- (d) a video work—*
  - (i) in respect of which the video works authority has issued an 18 certificate, and*
  - (ii) whose nature is such that it is reasonable to assume that its principal purpose is to cause sexual arousal, or*
- (e) material whose nature is such that it is reasonable—*
  - (i) to assume that its principal purpose is to cause sexual arousal, and*
  - (ii) 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 an 18 certificate*

*In determining whether any material falls within (b) ~~or~~ (e), 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.*

### Guidance on ‘Specially restricted material’:

*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**’.*

Content which complies with the Ofcom Broadcasting Code, or that has been classified by the British Board of Film Classification (BBFC) in any category except 'R18' **or as a 'sex work' at '18'**, would not normally be considered as material that "might seriously impair" and would not normally be subject to the requirements of Rule 11.

R18 and R18-equivalent material, **sex works at 18 and material equivalent to sex works at 18**, and any other material which might seriously impair under 18s is subject to the requirements of Rule 11. All 'material' in the ODPS, including still images and other non-video content is subject to this requirement.

**By 'sex works' we mean works whose primary purpose is sexual arousal or stimulation. Sex works at '18' can contain sexual material only if it may be simulated.** The R18 certificate is ~~a special classification for pornographic works~~, primarily for explicit works of consenting sex (including non-simulated sexual activity) or strong fetish material involving adults. **The R18 certificate and the 18 certificate are** ~~It is~~ issued by the British Board of Film Classification in respect of video works being supplied on a physical video recording such as a DVD. There is no requirement for material being provided on an ODPS to be classified by the BBFC, but Ofcom ~~is required to~~ **must** have regard to the BBFC Classification Guidelines when determining whether material on an ODPS is R18-equivalent (i.e. if it was contained in a video work submitted for classification it is reasonable to assume that the BBFC would issue an R18 certificate) or **equivalent to sex work material at 18 (i.e. it is reasonable to assume that its principle purpose is to cause sexual arousal and if it was contained in a video work for classification the BBFC would issue an 18 certificate).**

For more information on the R18 certificate **and the 18 certificate for sex works**, and the type of content likely to be awarded ~~this certificate~~ **these certificates**, see the British Board of Film Classification's website: [www.bbfc.co.uk](http://www.bbfc.co.uk)<sup>23</sup>.

**We note that the BBFC has regulatory duties to assess whether 'pornographic material' is not normally accessible by under 18s on online commercial services available in the UK (excluding the ODPS regulated by Ofcom).**<sup>24</sup> In outline, 'pornographic material' includes both R18 equivalent material, and 18-equivalent material with a principal purpose of sexual arousal. In assessing whether content falls within the definition of '**specialty restricted material**' under Rule 11, Ofcom will have regard to any advice issued by the BBFC on its approach to assessing whether content is '**pornographic material**'.

#### **Guidance on Age Verification:**

Provided the material is not illegal or otherwise prohibited (see Rule 14), content which Ofcom considers to fall under this Rule (i.e. '**specialty restricted material**') may be made available in an ODPS provided access is controlled in a manner which secures that people aged under eighteen '**will not normally see or hear**' such material.

**The criteria against which Ofcom will assess whether an age-verification solution secures that 'specialty restricted material' is not normally seen or heard by those under 18 are set out below:**

<sup>23</sup> The BBFC's guidelines are published on its [website](#). It is the responsibility of ODPS providers to ensure that they are aware of any changes to the BBFC's guidelines.

<sup>24</sup> **The relevant requirements are set out under Part 3 of the Digital Economy Act 2017:**

- a. An effective control mechanism at the point of registration or access to the specially restricted material by the end-user which verifies that the user is aged 18 or over at the point of registration or access
- a. Use of age-verification data that cannot be reasonably known by another person, without theft or fraudulent use of data or identification documents nor readily obtained or predicted by another person
- b. A requirement that either a user age-verify each visit or access is restricted by controls, manual or electronic, such as, but not limited to, password or personal identification numbers. A consumer must be logged out by default unless they positively opt-in for their log in information to be remembered
- c. The inclusion of measures which authenticate age-verification data and measures which are effective at preventing use by non-human operators including algorithms

The following are features which Ofcom does not consider, in isolation, comply with the age-verification requirement under this Rule:

- a. relying solely on the user to confirm their age with no cross-checking of information, for example by using a 'tick box' system or requiring the user to only input their date of birth
- b. using a general disclaimer such as 'anyone using this website will be deemed to be over 18'
- c. accepting age-verification through the use of online payment methods which may not require a user to be over 18. (For example, Ofcom will not regard confirmation of ownership of a Debit, Solo or Electron card or any other card where the card holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over.)
- d. checking against publicly available or otherwise easily known information such as name, address and date of birth

*Ofcom's interpretation of this requirement is that there should be in place an effective Content Access Control System ("CAC System") which verifies that the user is aged 18 or over at the point of registration or access by 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.*

*Technical tools which may be acceptable for age verification purposes include:*

- *Confirmation of credit card ownership or other form of payment where mandatory proof that the holder is 18 or over is required prior to issue<sup>25</sup>.*
- *A reputable personal digital identity management service which uses checks on an independent and reliable database, such as the electoral roll.*
- *Other comparable proof of account ownership which effectively verifies age. For example, possession and ownership of an effectively age-verified mobile phone<sup>26</sup>.*

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<sup>25</sup> Ofcom will not regard confirmation of ownership of a Debit, Solo or Electron card or any other card where the card holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over.

The BBFC has regulatory duties to assess whether age-verification solutions secure that 'pornographic material' is not normally accessible by under 18s in online commercial services available in the UK.<sup>27</sup> When considering the compliance of age-verification solutions with Rule 11, we will take account of, but will not be bound by, the BBFC's published assessments of age-verification solutions on online commercial services.

Ofcom recommends that ODPS providers adopt good practice regarding data protection in the design and implementation of age-verification solutions. The Information Commissioner's Office (ICO) is responsible for enforcing data protection legislation and providers should have regard to its guidance in this area.<sup>28</sup>

Where they are required, CAC Systems age-verification solutions must be fit for purpose and effectively managed so as to ensure that people aged under eighteen will not normally see or hear specially restricted material. Ofcom will consider the adequacy and effectiveness of CAC Systems age-verification solutions on a case by case basis and keep them under review in the context of ODPS. Responsibility for ensuring that any required CAC System age-verification solution 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'<sup>29</sup> document explains how to determine the person with 'editorial responsibility' for the ODPS.

#### **Statutory definitions relevant to Rule 11 - section 368E(7)**

"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 Act<sup>24</sup>);

"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;

"18 certificate" means a classification certificate which—

- a) contains, pursuant to section 7(2)(b) of the 1984 Act, a statement that the video work is suitable for viewing only by persons who have attained the age of 18 and that no video recording containing that work is to be supplied to any person who has not attained that age, and
- b) does not contain 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;"

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<sup>27</sup> The relevant requirements are set out under Part 3 of the Digital Economy Act 2017

<sup>28</sup> More information about the requirements of data protection legislation can be found on the ICO's website. Guidance on data protection in relation to AV solutions can be found in Section 4 of the BBFC's guidance on age verification arrangements

<sup>29</sup> See Ofcom's [Guidance on who needs to notify](#)

“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;

“video work” has the same meaning as in the 1984 Act (see section 1(2) of that Act).”

## A3. Equality Impact Assessment

### Introduction

- A3.1 Ofcom is required by statute to assess the potential impact of all our functions, policies, projects and practices on the following equality groups: age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation<sup>30</sup>. We refer to groups of people with these protected characteristics as ‘equality groups’.
- A3.2 We fulfil these obligations by carrying out an Equality Impact Assessment (“EIA”), which examines the impact our policy is likely to have on people, depending on their personal circumstances. EIAs also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers, regardless of their background and identity.
- A3.3 We have not considered it necessary to carry out separate EIAs in relation to the additional equality groups in Northern Ireland: political opinion and dependents. This is because we anticipate that our proposals would not have a differential impact in Northern Ireland compared to consumers in general.

### Equality Impact Assessment

- A3.4 This assessment considers the potential impact of our proposals (as set out in Section 4 above) to bring a closer alignment between Ofcom’s approach to restricted material on ODPS and the approach of the BBFC to ‘pornographic material’ on other online adult content. It does not consider the potential impact of the changes to Rule 11 on the equality groups as these implement statutory changes as explained in Section 2.
- A3.5 We have identified that our proposals might have greater implications for the following equality groups: children, older people whose age-related conditions may make them vulnerable (both under the protected characteristic of “age”) and disabled people.
- A3.6 Our proposals to align our approach to assessing AV methods with the BBFC’s approach may reduce the risk of children viewing unsuitable, and potentially harmful content. As discussed in Section 4, we consider the BBFC’s AV principles to be robust, and we recognise that the BBFC has investigated the latest AV methods. We note that the BBFC may set a higher bar for the compliance of AV solutions than our current ODPS guidance, and therefore that aligning our approach where possible with that of the BBFC may boost the protection offered to children.
- A3.7 We have also considered whether our proposals might have greater implications for some older people (whose age-related conditions may make them vulnerable) or some people with disabilities (for instance, some people with visual impairments or learning disabilities). We have considered whether the AV solutions likely to be approved by the BBFC might be more challenging or complicated for these groups to navigate in order to access restricted content (for instance, by requiring users to input more data or by

requiring a less accessible visual layout). However, as noted in Section 4, we expect that the majority of ODPS providers who are currently compliant with the ODPS rules and guidance will not need to alter their AV controls. Further, where ODPS are required to change their AV methods, we do not have any reason to believe that the new controls would be more challenging to navigate (for example entering credit card details rather than a passport number). We also note that ODPS providers have a commercial incentive to make it as easy as possible for all adults to access restricted content regardless of the AV method used.

## Conclusions

- A3.8 Overall, we consider that our proposals may have a positive impact on children by reducing the risk that they might view unsuitable content on ODPS. We do not consider that our proposals are likely to have a detrimental impact on any of the relevant equality groups, including older people and people with disabilities.
- A3.9 We invite stakeholders to respond to the following question:

Question 4: Do you agree with our assessment of the impact of our proposals on the relevant equality groups? If not, please explain why you do not agree.

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<sup>30</sup> As defined in the Equality Act 2010

## A4. Responding to this consultation

### How to respond

- A4.1 Ofcom would like to receive views and comments on the issues raised in this document, by 5pm on 3 December 2018.
- A4.2 You can download a response form from <https://www.ofcom.org.uk/consultations-and-statements/XXX>. You can return this by email or post to the address provided in the response form.
- A4.3 If your response is a large file, or has supporting charts, tables or other data, please email it to [AVconsultation@ofcom.org.uk](mailto:AVconsultation@ofcom.org.uk), as an attachment in Microsoft Word format, together with the cover sheet (<https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet>). This email address is for this consultation only, and will not be valid after 31 December 2018.
- A4.4 Responses may alternatively be posted to the address below, marked with the title of the consultation:
- ODPS Rule 11 consultation  
Standards and Audience Protection  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A4.5 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- 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.
- A4.6 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A4.7 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.
- A4.8 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.
- A4.9 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 7. 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.

- A4.10 If you want to discuss the issues and questions raised in this consultation, please email [AVconsultation@ofcom.org.uk](mailto:AVconsultation@ofcom.org.uk)

## Confidentiality

- A4.11 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 our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), as soon as we receive them.
- A4.12 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.
- A4.13 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.
- A4.14 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 at <https://www.ofcom.org.uk/about-ofcom/website/terms-of-use>.

## Next steps

- A4.15 Following this consultation period, Ofcom plans to publish a statement in early 2019.
- A4.16 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details please see <https://www.ofcom.org.uk/about-ofcom/latest/email-updates>

## Ofcom's consultation processes

- A4.17 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex x.
- A4.18 If you have any comments or suggestions on how we manage our consultations, please email us at [consult@ofcom.org.uk](mailto: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.
- A4.19 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporate secretary:

Consultation on proposed changes to the ODPS age verification guidance

Corporation Secretary  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA  
Email: [corporationsecretary@ofcom.org.uk](mailto:corporationsecretary@ofcom.org.uk)

## 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

- A5.7 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.

## A6. Consultation coversheet

### BASIC DETAILS

Consultation title: organisation realise

To (Ofcom contact):

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? \_\_\_\_\_

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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)

## A7. Consultation questions

Question 1: Do you agree with our proposal to revise the Guidance for Rule 11 to state that we will have regard to any BBFC Guidance on the definition of '*pornographic material*' when assessing whether ODPS material falls within the definition of '*specially restricted material*'?

Question 2: Do you agree with our proposal to amend our Rule 11 Guidance to replicate the BBFC's AV Guidance and explain that our assessment of AV solutions will be considered with reference to the BBFC's published list of assessed AV solutions?

Question 3: Do you have any other comments regarding our proposed amendments to the Rule 11 guidance?

Question 4: Do you agree with our assessment of the impact of our proposals on the relevant equality groups? If not, please explain why you do not agree.