

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

Changes to the Guidance

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1. Overview

On-demand programme service providers (“ODPS providers”) regulated by Ofcom are required to place ‘specially restricted material’ (which includes certain pornographic content) behind age-verification controls to restrict access to over 18s. The Digital Economy Act 2017 increases the scope of content that has to be placed behind age-verification controls on ODPS, and we are changing Rule 11 of Ofcom’s Rules for ODPS to reflect this stricter requirement.

The Digital Economy Act also introduced new duties for the British Board of Film Classification (“BBFC”) to regulate ‘*pornographic*’ content online on commercial adult websites. In light of this, and following our consultation in October 2018, this document sets out our decisions regarding changes to Ofcom’s Guidance for Rule 11.

How Rule 11 is changing – in brief

The changes to Rule 11 extend the meaning of ‘*specially restricted material*’ for which ODPS must provide age-verification (“AV”) controls. The definition will now include material whose principal 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.

What we have decided about the Rule 11 Guidance – in brief

Our changes to the Guidance aim to promote consistency between our approach to regulating ‘specially restricted material’ on ODPS, and the approach of the BBFC to regulating ‘pornographic material’ on online adult websites. This will provide clarity for both industry and consumers, with a common approach to AV across all regulated online adult content.

Guidance on ‘specially restricted’ material

In assessing whether ODPS content falls within the definition of ‘*specially restricted material*’ we will have regard to any advice that the BBFC issues on how it will assess whether online adult content falls within the definition of ‘*pornographic material*,’ including advice on what content can be displayed in front of AV.

Guidance on Age Verification

We have decided to adopt the BBFC’s AV principles for assessing the compliance of AV measures on online adult websites. These include the principles that AV measures:

- cannot be reasonably known by another person (without theft of data or identification documents) or be readily obtained or predicted by another person.
- should authenticate age-verification data and be effective at preventing use by non-human operators including algorithms.

We will have regard to the BBFC’s published assessments of the compliance of AV solutions on online commercial services.

This overview is a simplified high-level summary only. Our decisions and reasoning are set out in full in [Section 3](#) and the revisions to Rule 11 and the Guidance in [Section 4](#).

What happens next?

- 1.1 The changes to Rule 11 and the accompanying Guidance will be brought into effect when the relevant DEA provisions commence – at the time of writing this date is yet to be determined.
- 1.2 Ofcom will be conducting stakeholder engagement with ODPS providers of adult content to help promote awareness and understanding of the changes to Rule 11 and the accompanying guidance.

2. Background

What are the current rules?

- 2.1 Ofcom regulates on-demand programme services (“ODPS”) through a series of rules (“the ODPS Rules”)¹ 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)². 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 jurisdiction³. Ofcom currently regulates around 16 ODPS providers of adult content.
- 2.2 The ODPS Rules are set out as part of Ofcom’s Broadcasting Code⁴, 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.⁵ Rule 11 of the ODPS Rules states that an ODPS must not contain any ‘*specialty 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 ‘*specialty 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.⁶ 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*” ‘*specialty 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

¹ See Ofcom’s [ODPS rules](#)

² [Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010](#)

³ See Ofcom’s [Guidance notes on who needs to notify](#)

⁴ See [Part 3 of the Ofcom Broadcasting Code](#)

⁵ See Ofcom’s [Rules and Guidance](#)

⁶For 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.

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 explaining that we will assess compliance on a case by case basis.

What are the statutory changes to Rule 11?

- 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 ‘*specialty restricted material*’ for which ODPS providers must provide AV controls (see Annex 1). As a result, the definition of ‘*specialty restricted material*’ now includes material whose principal 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.⁷ 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.
- 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 ‘*specialty restricted material*’ in section 368E of the Act. See Section 4 for the new wording of Rule 11, which will come into effect when the relevant DEA provisions commence.
- 2.8 Additionally, we are changing the Rule 11 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 principal 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 principal purpose is sexual arousal or simulation) containing only material which may be simulated are generally passed as an 18.⁸ These changes to the Rule 11 Guidance were not subject to consultation as they reflect the above changes to the statutory framework.

Why did we consult on changing the Rule 11 Guidance?

- 2.9 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.⁹ Online adult content within the BBFC’s remit explicitly excludes ODPS regulated by Ofcom.
- 2.10 In outline, the new AV requirements for adult sites state that ‘*pornographic material*’ must not normally be accessible to under 18s. As with ‘*specialty restricted material*’ on ODPS, ‘*pornographic material*’ is defined to include both R18 and R18-equivalent

⁷ The relevant extract from the DEA is set out in our Legal Background annex, and can also be found [here](#)

⁸ For more information on the 18-Certificate, see the British Board of Film Classification’s website

⁹ The requirements are set out in [Part 3 of the DEA](#)

material, and 18 and 18-equivalent material whose principal purpose is to cause sexual arousal.

- 2.11 Having consulted in March 2018¹⁰, the BBFC's draft Guidance on how it will assess the compliance of AV measures taken by online providers was laid before Parliament on 10 October 2018. The guidance was approved by Parliament on 17 December 2018.¹¹
- 2.12 In light of these developments, we ran a [consultation](#) in October 2018 to seek stakeholder views on our proposals to make changes to the Rule 11 Guidance. Our proposed changes aimed to promote consistency between Ofcom's approach to regulating '*specially restricted*' material on ODPS and the approach of the BBFC to regulating '*pornographic material*' on online adult services. We considered that a closer alignment with the BBFC's approach would help to ensure that ODPS providers and other online providers of adult content are subject to consistent standards for assessing AV. We considered that this would help to provide coherence and clarity for both industry and UK consumers who will only need to understand one approach to AV across all regulated online adult content.
- 2.13 We received 4 responses to our consultation: from [Portland TV](#), [The Children's Media Foundation](#), [Virgin Media](#) and [Mediawatch UK](#). In Section 3, we set out our consideration of these responses and the changes we have decided to make to the Rule 11 Guidance.

¹⁰ See the BBFC's [DEA consultation](#)

¹¹ See the BBFC's [Guidance on age verification arrangements](#)

3. Decisions on Changes to the Guidance

- 3.1 This section sets out our consideration of consultation responses and our reasoning for the changes we have decided to make to the Rule 11 Guidance. Section 4 presents the revisions to the Rule 11 guidance, which will come into force when the relevant DEA provisions commence.
- 3.2 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.¹²

Guidance on ‘Specially restricted material’

What we proposed

- 3.3 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 principal purpose of sexual arousal. The BBFC will produce advice for the purpose of its regulation of online providers of commercial adult material on what content can be displayed in front of age verification (i.e. is not ‘*pornographic material*’)¹³.
- 3.4 We proposed to change our Guidance for Rule 11 to state that, when assessing whether ODPS content falls within the definition of ‘*specially 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*.’

What respondents said

- 3.5 **Portland TV** stated that there are different ‘upper limits’ for content which is permitted to be shown behind age-verification controls on ODPS and on online commercial websites, which causes confusion for consumers and industry. Content which is refused BBFC classification is prohibited on ODPS¹⁴ under the Act, while ‘*extreme pornographic material*’ is prohibited on online adult websites under the DEA¹⁵.

¹² 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

¹³ See the BBFC’s [FAQs](#)

¹⁴ Under Section 368(E) of the Act, Rule 14 of the ODPS Rules prohibits the inclusion on ODPS of 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. See Rule 14 of our [ODPS Rules](#)

¹⁵ See Part 3 (15) and Part 3 (22) of the [Digital Economy Act](#).

- 3.6 **Mediawatch UK** agreed with Ofcom’s approach to have regard to any advice the BBFC issues on how it will assess whether online adult material is ‘pornographic material’. It said this will promote a consistency of regulatory approach and enhance clarity for consumers and ODPS providers.

Our reasoning and decisions

- 3.7 The statutory definitions of ‘*specially restricted*’ material on ODPS and ‘*pornographic content*’ on online adult websites are very similar – both include R18 and R18-equivalent material and 18 and 18-equivalent material with a principal purpose of sexual arousal. At the ‘upper limits’ of this material, all ‘extreme pornographic material’ would be refused BBFC classification and therefore prohibited on an ODPS. There is therefore a significant crossover in the material prohibited on ODPS and on commercial adult websites. We note also that if industry members are producing adult DVDs these would have to comply with the same ‘upper limit’ as on ODPS. We therefore do not believe that the upper limits will cause significant confusion to consumers and industry.
- 3.8 Ofcom considers it should have ‘regard to’ any advice the BBFC issues on how it will assess whether online adult material is ‘pornographic material’ but will ultimately apply the statutory definition of ‘specially restricted material’ as it sees fit. This will allow us to follow developments of BBFC policy in this area where possible, while also having regard to the BBFC’s Classification Guidelines for video works and Ofcom’s regulatory principles.¹⁶
- 3.9 In particular, Ofcom considers it should have regard to advice given by the BBFC for online commercial services on what content can be displayed online without age verification (i.e. is not ‘pornographic material’).¹⁷ This will promote consistency of approach across ODPS regulated by Ofcom and online commercial services regulated by the BBFC, and so aid clarity to industry and consumers around which content can appear without AV controls.

¹⁶ See [Ofcom’s regulatory principles](#)

¹⁷ In addition to the drafting proposed in the consultation, for clarity we have decided to state in the guidance that Ofcom will have regard to advice issued by the BBFC on how it assesses whether content is ‘pornographic material’ ‘including advice on what content can be displayed without age-verification’.

Guidance on 'specially restricted' material

In assessing whether ODPS content falls within the definition of 'specially restricted material' we will have regard to any advice that the BBFC issues for online commercial services on how it will assess whether online adult content falls within the definition of 'pornographic material,' including advice on what content can be displayed without AV.

Guidance on Age Verification

What we proposed

- 3.10 We proposed to replace our current AV Guidance for Rule 11 with the BBFC's AV principles on how it will assess compliance with the requirement for providers of online adult content to ensure '*pornographic material*' is not normally accessible by under 18s.¹⁸
- 3.11 Both our current AV guidance and the BBFC's AV principles require providers to verify that the user is aged 18 or over at the point of registration or first 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.
- 3.12 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 AV¹⁹ 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.
- 3.13 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 be readily obtained or predicted by another person.
 - should authenticate age-verification data and be effective at preventing use by non-human operators including algorithms.
- 3.14 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

¹⁸ See the BBFC's [Age-Verification Guidance](#)

¹⁹ These include confirmation of credit card ownership or forms of payment where the holder must be 18 or over¹⁹ 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.

- 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.

3.15 The BBFC's AV guidance also explains that the BBFC will assess AV arrangements, in order to ensure that online adult services using those arrangements will meet the DEA requirements, and publish the results of these assessments on its website.²⁰ Along with adopting the BBFC's AV principles, we also proposed to state in our Guidance that, when considering the compliance of age-verification solutions with Rule 11, we will take account of the BBFC's published assessments of AV solutions for online adult services.

What respondents said

- 3.16 **The Children's Media Foundation** questioned how age-verification algorithms are monitored for effectiveness as the use of 'non-human operators' increases. It said that Ofcom should commit to regularly reviewing its Guidance, and to collaborating with the BBFC to ensure the effectiveness of AV arrangements.
- 3.17 **Portland TV** said that adopting the BBFC's AV guidance will require compliant ODPS to cease to use effective tools such as electoral roll look-ups and credit data searches. It said that *"greater detail is required on the specifics of the BBFC's assessment criteria before we can take a clear view on the extent to which the approach may unnecessarily complicate and significantly drive up the cost of age verification"*.
- 3.18 **Virgin Media** stated that the on-demand industry regulated by the BBFC are web-based platforms, which are not subject to the same kinds of development constraints as ODPS on pay-TV platforms. It also said that customers may choose to access its pay-TV platform in part due to not having to worry about privacy concerns, the risk of malware or the need for digital literacy.
- 3.19 **Mediawatch UK** said that it agrees with Ofcom's proposal to adopt the BBFC's AV principles and have regard to its assessments of AV solutions. It requested more detail on the cases where Ofcom would choose not to follow the BBFC's assessments.

Our reasoning and decisions

- 3.20 We believe that a closer alignment with the BBFC's approach to assessing AV solutions will avoid duplication of effort between the BBFC and Ofcom and help to achieve a more efficient and proportionate regulatory regime. In particular, it will help to ensure that both ODPS providers and other online providers of adult content are subject to

²⁰ See Section 3, paragraph 13 of the BBFC's [Age-Verification Guidance](#).

more consistent standards for assessing AV. This will 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 will provide greater clarity for UK consumers who will only need to understand one approach to AV across all regulated online adult content.

- 3.21 We believe the BBFC's AV principles to be robust, and acknowledge that the BBFC has investigated the latest AV methods and recently consulted on its Guidance to take account of stakeholder views. The BBFC recognises that AV is an evolving and fast changing technology, and so has adopted a principle-based approach to regulation²¹. The BBFC will also publish its assessments of individual AV arrangements on an ongoing basis. Adopting the BBFC's AV principles and having regard to its assessments will assist Ofcom in evaluating the adequacy of AV arrangements on ODPS over time.
- 3.22 However, Ofcom will reach its own independent view and will not be bound by the BBFC's assessments. Ofcom has statutory duties in relation to media literacy which it currently fulfils in part through an extensive research programme which includes following children's access to online media²². Ofcom also always welcomes input from interested parties on how best to ensure that AV is working effectively. Ofcom's Guidance on Rule 11 is subject to review, and Ofcom will update it if necessary.
- 3.23 As an additional measure to ensure that age-verification providers maintain high standards, including on privacy and data security, the BBFC is developing a voluntary certification scheme for age-verification providers in cooperation with industry, with the support of government and the Information Commissioner's Office. Under the scheme, age-verification providers may choose to be independently audited by a third party and then certified by the BBFC. The third party's audit will include an assessment of an age-verification solution's compliance with strict privacy and data security requirements. The results of this certification scheme will be reported on the BBFC's website.²³ Ofcom encourages ODPS providers to have regard to this scheme, to assist them in adopting good practice regarding data protection in the design and implementation of AV solutions. In addition to the drafting proposed in our consultation, Ofcom will add a footnote to our guidance which will encourage ODPS providers to have regard to the BBFC's voluntary certification scheme for AV solutions.
- 3.24 Ofcom will state in the Guidance that we recommend that ODPS providers adopt good practice regarding data protection. We will make clear that the Information Commissioner's Office (ICO) is responsible for enforcing data protection legislation and that providers should have regard to its guidance in this area.²⁴
- 3.25 In our Equality Impact Assessment (Annex 1), we assess the impact of our proposals on consumers who may be less digitally literate. However, we note here that we do not

²¹ See Section 3, paragraph 3 of the BBFC's [Age Verification Guidance](#).

²² See our [Media Literacy Research](#) pages

²³ See information on the BBFC's [AV website](#).

²⁴ More information about the requirements of data protection legislation can be found on the ICO's [website](#)

have any reason to believe that the AV controls permitted under the BBFC's principles would be more challenging to navigate than those permitted under our current guidance. We also consider 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. We acknowledge that 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 be 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 or electoral roll look ups, would not satisfy the BBFC's AV principles. We are not able to comment on whether or not the BBFC would consider a particular method of age verification to meet its AV principles for its regulation of adult content providers. The BBFC has not yet begun to publish its assessment of AV solutions because Part 3 of the Digital Economy Act is not in force. We will take into account that these changes to the AV standards are new and take a proportionate approach in how we enforce them.

- 3.26 It is not appropriate for Ofcom to evaluate the compliance of individual AV arrangements in this statement. However, we do not believe that this development in our approach to AV is in practice likely to result in a significant change for adult ODPS providers who are currently compliant with Rule 11. In our experience, providers who are currently compliant use AV methods which would also satisfy the BBFC's AV principles.
- 3.27 We consider that the majority of development work for providers which become subject to Rule 11 for the first time (e.g. new ODPS providers of adult content or providers whose content is subject to the revised definition of '*specialty restricted material*') will be incurred regardless of whether we were to maintain our current guidance on AV or adopt the BBFC's AV principles. Providers who become subject to Rule 11 may also already be providing some form of AV or PIN protection on their platforms, either of their own initiative or to satisfy requirements from elsewhere²⁵, potentially reducing any development work required to satisfy the new AV principles.
- 3.28 We recognise that the BBFC's principles were designed in relation to online adult services. However, the BBFC's approach is principle-based, and these principles can apply to all ODPS regardless of the platform through which AV solutions are delivered. We acknowledge that implementation of AV solutions may necessarily be different on

²⁵ For instance, any ODPS providers which also have pay TV or premium subscription broadcast channels could be subject to Rule 1.18 of Ofcom's Broadcasting Code. This states that pay TV or premium subscription channels can broadcast 'adult sex material' between 2200 and 0530 provided mandatory restricted access is in place and measures are in place to ensure the subscriber is an adult. See the full wording in Rule 1.18 of Ofcom's Broadcasting Code.

different platforms (for example, Pay TV accessed via a television set). For the sake of clarity, we have decided to state this explicitly in the Guidance²⁶.

- 3.29 Overall, we do not consider that adopting the BBFC’s AV principles is likely to incur a significantly higher burden for ODPS providers than maintaining our current AV guidance. In light of this, and the benefits outlined above (see 3.18 to 3.20), we consider it is proportionate for Ofcom to adopt the BBFC’s AV principles and have regard to the BBFC’s published assessments of AV solutions. We have amended slightly the wording proposed in our consultation to state that we will ‘have regard to’ the BBFC’s assessments of AV solutions which makes clear that we will not be bound by these assessments.²⁷ When the revised guidance comes into effect, we will take a proportionate approach in how we enforce the AV standards.

Guidance on Age Verification

We have decided to adopt the BBFC’s AV principles for assessing the compliance of AV measures on online adult websites. These include the principles that AV measures:

- cannot be reasonably known by another person (without theft of data or identification documents) or be readily obtained or predicted by another person
- should authenticate age-verification data and be effective at preventing use by non-human operators including algorithms.

We will have regard to the BBFC’s published assessments of the compliance of AV solutions on online commercial services.

Stakeholder Comments on Equality Impact Assessment

What we proposed

- 3.30 Annex 3 to our 2018 Consultation contained our Equality Impact Assessment (‘EIA’) for the proposals set out in that consultation document. 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. 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 or identity.
- 3.31 In summary, we considered that our proposals may have a positive impact on children (under the protected characteristic of “age”) by reducing the risk that they might view

²⁶ In our [2018 Consultation](#), our proposed changes to the Guidance did not specify that the BBFC’s AV principles apply to ODPS regardless of the platform through which it is delivered, but we have decided to add this for the sake of clarity.

²⁷ In our consultation, we proposed to state in the guidance that we will ‘take account of, but not be bound by’ the BBFC’s assessments of age-verification solutions.

unsuitable content on ODPS. We did not consider that our proposals were likely to have a detrimental impact on any of the relevant equality groups, including older people and people with disabilities.

What respondents said

- 3.32 **Portland TV** said that it agreed with our assessment of the impact of our proposals on the relevant equality groups.
- 3.33 **Mediawatch UK** said that it agreed with our equality impact assessment, and particularly welcomes the *“boost in protection for children, as well as the greater uniformity of approach to assist families in their media choices”*.
- 3.34 **The Children’s Media Foundation** questioned whether the proposals *“go far enough to be genuinely effective”* in safeguarding children as *“pornographic content...is far from the only type of inappropriate content online”*.

Our reasoning and decisions

- 3.35 The EIA looks at the impact of the proposed changes relative to the status quo, rather than to a range of alternative changes. We remain of the view that the changes that we proposed and have decided to make to the Guidance on Rule 11 will have a positive impact on children, as set out in the EIA accompanying this statement (Annex 1).

Other Issues

- 3.36 In this Section, we deal with other issues raised by respondents.

Scope of ‘Specially Restricted Material’

What respondents said

- 3.37 **Virgin Media** stated that ODPS providers on pay TV platforms should be exempt from the extended definition of *‘specially restricted material’*; Parliament did not intend for the revised definition to apply to pay TV²⁸, and the risk of harm is much lower on pay TV as PINs are an effective form of control. It stated that otherwise ODPS 18-rated adult content on its platform will be subject to stricter requirements than its linear 18-rated adult content.
- 3.38 **The Children’s Media Foundation** stated that the definition of *‘specially restricted material’* includes *‘other material that might seriously impair the physical mental or moral development of persons under the age of 18’* but that Ofcom’s guidance ignores this broader definition of harm. It stated that the guidance should be more closely aligned to Ofcom’s broadcast guidance to consider other content, including violence or

²⁸ Virgin Media stated that the extensions of the DEA to the definition of ‘specially restricted material’ was introduced to address a potential loophole whereby non-UK based adult commercial websites could register as an ODPS with Ofcom to avoid being regulated by the BBFC.

content that could encourage imitative behaviour. It also stated that the guidance treats children as a broad group of under 18s, but that the expectations and media literacy of children vary depending on their age.

- 3.39 **Mediawatch UK** said that Ofcom’s guidance lacks clarity on the type of material Ofcom considers ‘*might seriously impair*’ under 18s other than that which is equivalent to “R18” or a ‘sex work’ at “18”. Mediawatch UK also questioned whether Ofcom seeks advice about the ‘*physical, mental or moral development*’ of under 18s from an independent expert.

Our response

- 3.40 We did not consult on the statutory changes to the definition of ‘*specially restricted material*’, which Ofcom must carry across to the ODPS rules (see 2.6-2.8). The extension in the definition of ‘*specially restricted material*’ to include 18-rated and 18-equivalent material with a principal purpose of sexual arousal applies to all ODPS, regardless of the platform through which the service is delivered. It is not for Ofcom to make exemptions from the statutory requirements.
- 3.41 We do not consider that the new definition of ‘*specially restricted material*’ will lead to adult content on ODPS being subject to stricter regulations than those that apply to adult content on broadcast TV. Rule 1.18 requires that ‘adult sex material’ (material that contains images and/ or language of a strong sexual nature) can only be broadcast on premium subscription and pay per view channels between 2200 and 0530 behind mandatory restricted access²⁹, and that measures must be in place to ensure the subscriber is an adult.³⁰ Content which is equivalent to material that would be classified as a ‘sex work’ at 18 by the BBFC would normally constitute ‘adult sex material’³¹.
- 3.42 As pointed out by The Children’s Media Foundation and Mediawatch UK, the current definition of specially restricted material includes material that might ‘seriously impair the physical, mental or moral development of persons under the age of 18’, and this will be continue to be the case. However, we would not normally consider non-adult content to constitute such material unless it was material which the BBFC has refused to classify or would refuse to classify if it were contained in a video work. In these circumstances the material would not be permitted on an ODPS at all under Rule 14 of the ODPS Rules.³²
- 3.43 The statutory framework requires that ‘*specially restricted material*’ must not normally be accessible to under 18s (see the wording of Rule 11 in Section 4). It does not make

²⁹ Mandatory restricted access means there is a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.

³⁰ See Rule 1.18 of Ofcom’s [Broadcasting Code](#).

³¹ For more information on the type of content likely to be classified as a ‘sex work at 18’, see the British Board of Film Classification’s website: www.bbfc.co.uk.

³² See Rule 1.14 of the [ODPS Rules](#).

provision for Ofcom's Guidance to apply additional access restrictions for younger children.

- 3.44 Ofcom's approach to protecting audiences, and under 18s in particular, from harm and offence is informed by research evidence and input from interested parties including, where appropriate, from independent experts. Ofcom's extensive research programme, which includes following children's access to online media,³³ ensures that we have a thorough, robust, and up-to-date understanding of key issues and concerns affecting young audiences. As mentioned earlier, Ofcom always welcomes input from interested parties on how best to ensure that the AV rules are working effectively. Ofcom's Guidance on Rule 11 is subject to review, and Ofcom will update it if necessary.

Timings for Implementation

What respondents said

- 3.45 **Virgin Media** said that it has content which will be subject to the revised definition of '*pecially restricted material*', and that Ofcom should allow it to delay its implementation of an AV solution. It said that the rest of the adult on-demand industry was given a '*head-start*' on preparing for implementation by being involved in the BBFC's consultation on its AV guidance³⁴.

Our response

- 3.46 It is not for Ofcom to allow for delayed implementation for any provider when the statutory DEA provisions come into effect. We also do not agree that the rest of the adult on-demand industry was given a "*head-start*"; not all ODPS providers will have necessarily engaged with the BBFC over the new scheme. The DEA was passed into law in April 2017, and since then Ofcom has been talking to ODPS providers about the new requirements and ran a consultation which raised awareness of the new definition of '*pecially restricted material*'.³⁵ However, we recognise that these are new requirements and we will take a proportionate approach in how we enforce them.

Wider Regulation of Adult Content

What respondents said

- 3.47 **Portland TV** stated that there is a need for legislative parity in the regulation of adult content across different platforms (e.g. via physical recording, premium rate telephony service, linear broadcast, on-demand or online). It stated that Ofcom and the BBFC need to promote consumer and industry awareness that different platforms may be subject to different legislation and offer different levels of protection.

³³ See our [Media Literacy Research](#) pages

³⁴ The BBFC published its [consultation on its AV guidance](#) in March 2018.

³⁵ See Section 3 of our [Consultation on the Rule 11 Guidance](#)

Our response

- 3.48 The statutory framework for regulating adult content is a matter for government. As explained above, one of our key aims in making changes to the Rule 11 guidance is to aid consumer and industry understanding by promoting a consistency of approach towards the regulation of '*specialty restricted*' material on ODPS and '*pornographic material*' on online adult websites. Ofcom will be conducting stakeholder engagement with ODPS providers of adult content to help promote awareness and understanding of the changes to Rule 11 and the accompanying guidance.

4. Revised Rule 11 and Guidance

- 4.1 This section sets out the changes to Rule 11 and the associated Guidance which will come into effect when the relevant DEA provisions commence – at the time of writing this date is yet to be determined.
- 4.2 Changes to Rule 11 are set out in red (e.g. **example**). These reflect statutory changes as explained in Section 2.
- 4.3 Changes to the Guidance are set out as follows: insertions are set out in underlined red text and highlighted (e.g. **example**), and 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' includes sex works that contain only sexual material which 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). **Ofcom must also have regard to the BBFC Classification Guidelines when determining whether material on an ODPS is equivalent to sex work material at 18 (i.e. it is reasonable to assume that its principal 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.uk³⁶.

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).³⁷ 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 '**sexually 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**', including advice on what content can be displayed without age-verification.

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. '**sexually restricted material**') may be made available **in on** an ODPS, provided access is controlled in a manner which secures that people aged under eighteen '**will not normally see or hear**' such material.

In assessing age-verification arrangements under Rule 11, Ofcom will follow the BBFC's principle-based approach for assessing the compliance of age-verification solutions on online commercial services available in the UK.³⁸ Ofcom recognises that the BBFC's principles were designed in relation to online services, and that age-verification solutions on ODPS in practice may vary across different

³⁶ 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.

³⁷ **The relevant requirements are set out under Part 3 of the Digital Economy Act 2017.**

³⁸ **The relevant requirements are set out under Part 3 of the Digital Economy Act 2017.**

platforms. However, the same principles apply on ODPS regardless of the platform on which the service is delivered.

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

- 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 or be 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 issue³⁹.

³⁹ 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.

- ~~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 phone⁴⁰.~~

When considering the compliance of age-verification solutions with Rule 11, we will have regard to the BBFC's assessments of age-verification used by online adult services to ensure compliance with the regulatory requirements⁴¹, as published on its website⁴².

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.⁴³

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 notify⁴⁴' 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 Act²⁴);

"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;

⁴¹ *The relevant requirements are set out under Part 3 of the Digital Economy Act 2017*

⁴² *See Section 3, paragraph 13 of the BBFC's Age-Verification Guidance. As an additional measure to ensure that age-verification providers maintain high standards, including on privacy and data security, the BBFC is developing a voluntary certification scheme for age-verification providers in cooperation with industry, with the support of government and the Information Commissioner's Office. Under the scheme, age-verification providers may choose to be independently audited by a third party and then certified by the BBFC. The third party's audit will include an assessment of an age-verification solution's compliance with strict privacy and data security requirements. The results of this certification scheme will be reported on the BBFC's website. Ofcom encourages ODPS providers to have regard to this scheme, to assist them in adopting good practice regarding data protection in the design and implementation of AV solutions. See more information on the BBFC's website*

⁴³ *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 Age-verification Guidance*

⁴⁴ See Ofcom's [Guidance on who needs to notify](#)

“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;”.

“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).”

A1. Equality Impact Assessment

Introduction

- A1.1 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 orientation⁴⁵. We refer to groups of people with these protected characteristics as ‘equality groups’.
- A1.2 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.
- A1.3 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 the changes to the guidance would not have a differential impact in Northern Ireland compared to consumers in general.

Equality Impact Assessment

- A1.4 This assessment considers the potential impact of the changes to the Guidance on Rule 11 (as set out in Section 3) to bring a closer alignment between Ofcom’s approach to ‘specially 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.
- A1.5 We have identified that the changes to the Guidance 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.
- A1.6 The amendments to the Guidance may reduce the risk of children viewing unsuitable, and potentially harmful content. As discussed in Section 3, 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 AV guidance, and therefore that aligning our approach where possible with that of the BBFC may boost the protection offered to children.
- A1.7 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 3, 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

- A1.8 Overall, we consider that the changes to the Guidance may have a positive impact on children by reducing the risk that they might view unsuitable content on ODPS. We do not consider that the changes to the Guidance are likely to have a detrimental impact on any of the relevant equality groups, including older people and people with disabilities.

⁴⁵ As defined in the Equality Act 2010

A2. 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](#).