

On-demand programme services: Guidance for ODPS providers on measures to protect users from harmful material

Statement

[Statement - On-demand programme services: Guidance for ODPS providers on measures to protect users from harmful material](#) – Welsh overview

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1. Overview

Guidance – in brief

Following consultation, Ofcom is publishing new guidance for On-demand programme service (“ODPS”) providers on their responsibilities with regard to protecting viewers from harmful material under Section 368E of the Communications Act 2003. The new guidance should be read alongside [Ofcom’s Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services \(ODPS\)](#) which sets out in full the statutory requirements which are applicable to ODPS and guidance relating to administrative issues as well as sponsorship and product placement. Ofcom’s guidance in these areas has not been updated.

Under the revised regulatory framework, which came into force on 1 November 2020, ODPS providers are required to take appropriate and proportionate measures to protect under-18s from “**specially restricted material**”. This includes:

- i) material which has, or would likely be given, an R18¹ classification certificate; and
- ii) other material that might impair the physical, mental or moral development of persons under the age of 18.

Ofcom’s new guidance sets out measures which may be appropriate for protecting under-18s. These include:

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

The new guidance is also designed to help providers comply with the requirements to ensure that their services do not contain any:

- material likely to incite violence or hatred against particular groups; and
- “**prohibited material**”. This now includes material which would be considered a criminal offence under laws relating to terrorism; child sexual abuse material; and racism and xenophobia; as well as 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.

It should be noted that although the new guidance is designed to assist service providers in understanding the changes to the regulatory requirements and how compliance can best be

¹ The [British Board of Film Classification](#) (“BBFC”) states: “The R18 category is a special and legally-restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults. Films may only be shown to adults in specially licensed cinemas, and video works may be supplied to adults only in licensed sex shops. R18 video works may not be supplied by mail order”.

achieved, suggestions made by Ofcom are illustrative rather than prescriptive. The guidance affords ODPS providers flexibility in how they protect their users, reflecting the breadth and diversity of the sector and the importance of technological innovation.

Ofcom consulted on its proposed guidance (“the draft guidance”) for ODPS providers in relation to the above regulatory requirements between 20 July 2021 and 14 September 2021.

The draft guidance set out to help service providers understand:

- a) the regulatory requirements under the ODPS Framework which relate to the protection of users from harmful material;
- b) what types of content might constitute harmful material;
- c) measures which may be appropriate for protecting users from specially restricted material; and
- d) how these measures may best be implemented.

We received six responses in total from: BT; the BBC; S4C; the Samaritans; a member of the public; and, on a confidential basis, from the operator of an online identity platform involved in age verification. We have carefully considered all responses in finalising our guidance and have published all non-confidential responses on [our website](#). We received responses on a range of issues across the questions we asked in the draft guidance. We set these out in detail, along with our conclusions, in Section Three of this document.

We have published our [final guidance](#) alongside this statement.

Providers can email Ofcom at vod@ofcom.org.uk if they have any questions about the guidance or other aspects of ODPS regulation. We are unable to provide legal advice about individual services however, and it remains the responsibility of each provider to ensure compliance with applicable regulations.

2. Introduction

Background

- 2.1 On-demand programme services (“ODPS”) are a category of video on-demand service regulated under Part 4A of the Communications Act 2003 (“the Act”). Part 4A was amended on 1 November 2020 to reflect revisions made to the EU framework for on-demand services under the Audiovisual Media Services Directive 2018 (the “AVMSD”)². The AVMSD governs EU-wide coordination of national legislation on all audiovisual media, both traditional TV broadcasts and on-demand services, and now also extends to video-sharing platforms (VSPs)³.
- 2.2 The AVMSD regulatory framework under Part 4A of the Act has been retained in UK law following the UK’s withdrawal from the EU, although the criteria for establishing jurisdiction have been amended to clarify when an ODPS will fall under UK jurisdiction⁴. In this document we refer to the regulatory framework set out in Part 4A of the Act as “the ODPS Framework”. [Ofcom’s Statutory Rules and Non-Binding Guidance for Providers of On-Demand Programme Services \(ODPS\)](#) sets out in full all the rules applicable to ODPS and should be read in conjunction with the new guidance which relates specifically to harmful material and provides additional guidance on the application and interpretation of Rules 10, 11 and 12 only.

The ODPS Framework

- 2.3 Paragraphs 2.4 to 2.7 below set out some of the key features of the ODPS Framework which are relevant to protecting viewers from harmful material.
- 2.4 **ODPS which fall into scope are required to notify to Ofcom.** Service providers will need to consider whether the service they provide meets the scope and jurisdictional criteria set out in the Act. If it does, they are required to submit a formal notification of their service to Ofcom. Ofcom has [published guidance](#) to help providers assess whether their service is in scope and needs to be notified to us⁵. We have published a list of notified ODPS providers on our website and will keep this updated as new services notify⁶.
- 2.5 **ODPS must not contain:**

² Part 4A was amended by the Audiovisual Media Service Directive Regulations 2020 which came into force on 1 November 2020.

³ For more information about VSP regulation see: <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/vsp-regulation>

⁴ See: [The Broadcasting \(Amendment\) \(EU Exit\) Regulations 2019](#)

⁵ All notifications will need to be submitted via a notification form available on Ofcom’s website at <https://www.ofcom.org.uk/tv-radio-and-on-demand/information-for-industry/on-demand/notifying-a-service>.

⁶ The list of notified ODPS is available here:

https://www.ofcom.org.uk/_data/assets/pdf_file/0021/67710/list_of_regulated_video_on_demand_services.pdf.

- **material likely to incite violence or hatred**⁷; or
- **prohibited material.** This is defined as material which:
 - a) it would be a criminal offence to publish, distribute or disseminate under laws relating to terrorism, child sexual abuse material (“CSAM”), and racism and xenophobia
 - b) has, or would be likely to be given, an R18⁸ classification certificate; and
 - c) if included in a video work would be refused classification by the British Board of Film Classification.

The guidance we are publishing today aims to assist service providers in determining the types of material which may fall within these definitions.

2.6 Service providers are required to take appropriate measures to ensure specially restricted material will not normally be seen or heard by persons under the age of 18.

Specially restricted material includes:

- a) material which has, or would likely be given, an R18 classification certificate; and
- b) other material that might impair the physical, mental or moral development of persons under the age of 18.

The guidance we are publishing today is designed to help providers consider what constitutes specially restricted material, which measures might be appropriate and proportionate, and how those measures might be implemented effectively. The guidance on protection measures is not prescriptive but intended to give suggestions to aid understanding of how service providers can comply with their obligations. In some instances, there may be other ways to implement a measure to achieve the same purpose. Where we think users are unlikely to be adequately protected without a specific approach, we say so in our guidance.

2.7 The rest of this document is structured as follows:

- in Section Three we summarise the key issues raised by respondents and Ofcom’s responses to them, including changes we have made to the final guidance document;
- in Section Four we briefly refer to some minor amendments we have made to reflect our recently published guidance on video sharing platforms; and
- in Section Five we lay out our impact assessment regarding our new guidance.

⁷ Under s.368E(1) of the Act ODPS must not include material likely to incite violence or hatred against a group of persons or a member of a group of persons, based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg on 12 December 2007. These grounds are: sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation.

⁸ See footnote 1.

3. Consultation responses and Ofcom's conclusions

3.1 This Section summarises the key issues raised by respondents and Ofcom's responses to them, including changes we have made to the final guidance document. The [final guidance](#) has been published alongside this statement on our website.

3.2 Our consultation document asked five questions, which are copied out in full below.

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

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

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

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

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

3.3 This statement is structured along the same lines as these questions, taking each of the relevant issues raised by respondents in turn and setting out our response.

Harmful Material: Material likely to incite violence or hatred

3.4 In Section Three of the draft guidance we outlined that, in accordance with section 368E(1) of the Act, an ODPS must not include material likely to incite violence or hatred against a person or group of persons based on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union.

3.5 The draft guidance listed the grounds set out in Article 21 and further explained that whether material is likely to incite violence or hatred will vary depending upon the nature of the protected characteristic, the stereotypes that exist and the social context.

What respondents said

3.6 S4C considered the reference to a “protected group” in paragraph 3.3 of the draft guidance should be replaced with “a group of people who share a protected characteristic”.

3.7 S4C also queried whether additional guidance on the meaning of “likely to incite” might be made available on the same or similar terms as those set out in Section 3 of the Broadcasting Code. Rule 3.1 of the Broadcasting Code specifies that “material likely to encourage or incite the commission of crime or to lead to disorder must not be included in television or radio services or BBC ODPS”. The guidance to this rule clarifies that the

likelihood of content inciting crime will depend upon the nature of the material as well as its context and that, in determining context, Ofcom will have regard to factors such as the editorial purpose of the programme, the status of anyone featured in the material, and whether sufficient challenge is provided.

Ofcom's response

- 3.8 Paragraph 3.3 of the guidance has been amended and no longer contains a reference to a "protected group".
- 3.9 Notwithstanding the similar wording, Ofcom considers that it would be unhelpful and potentially misleading to conflate the requirements of the Broadcasting Code with those of the ODPS Regime. While ODPS are prohibited from carrying material that is "likely to incite violence or hatred against a group of persons" who share a particular protected characteristic, the phrase "likely to incite" in Rule 3.1 of the Broadcasting Code is used in the context of commission of crime or disorder. The Broadcasting Code addresses hate speech in Rule 3.2, which is framed as an absolute prohibition except where justified by context. Given the differences between the two regimes, the unfamiliarity of many ODPS providers with the Broadcasting Code and the need for clarity in this area, we have decided not to draw specific parallels between them in the guidance.

Other points raised

- 3.10 One respondent expressed concern about the use of accidental or deliberate sequencing in modern devices as a means of hypnosis or creating mental illness.

Ofcom's response

- 3.11 Ofcom does not consider this submission to be relevant to the current consultation.

Harmful Material: Prohibited material

- 3.12 Paragraphs 4.1 to 4.16 of the draft guidance related to the categories of prohibited material listed in sections 368E(2) and (3) of the Act which must not be included in an ODPS. These are: material which it would be a criminal offence to publish, distribute or disseminate under laws relating to terrorism, CSAM, and racism and xenophobia; 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.
- 3.13 The draft guidance provided further clarification on the scope of these terms. Paragraphs 4.5 and 4.6 related to the rules combating terrorism, explaining that directly or indirectly encouraging terrorism is an offence, even if no terrorist act is committed. Paragraphs 4.7 and 4.8 focussed on the definition of CSAM clarifying that this includes the depiction of a person appearing to be a child as well as simulated activity, and paragraphs 4.9 to 4.11 described material which may constitute forms and expressions of racism and xenophobia.
- 3.14 Paragraphs 4.12 to 4.16 related to material which has been, or would be, refused a classification by the BBFC. The draft guidance explained that this material includes still

images and non-video content and that although there is no requirement for material on an ODPS to be rated by the BBFC, Ofcom will have regard to the BBFC guidelines when determining whether content is in breach of this provision. By way of illustration, the draft guidance included a non-exhaustive list of the types of material which **may** constitute prohibited material.

What respondents said – General

- 3.15 S4C commented that the references to European legislation in the draft guidance should be supplemented by references to the corresponding domestic legislation.
- 3.16 S4C also noted the similarity between the provisions of s368E(5)(c) of the Act relating to the impairment of the physical, mental or moral development of persons under the age of 18, and Rule 1.1 of the Broadcasting Code, and requested clarification on the applicability of Rules 1.2 to 1.27 of the Broadcasting Code to the guidance.

Ofcom's response

- 3.17 Ofcom has included references to the relevant European legislation in the guidance as this reflects the definition of "prohibited material" in s368E(3)(za) of the Act. Any changes to this definition would require further legislation, which would be a matter for Parliament. In contrast to broadcasting, Ofcom has no role in setting content requirements for ODPS.
- 3.18 As set out in paragraph 3.9 above, Ofcom considers comparisons with the provisions of the Broadcasting Code to be confusing and potentially misleading. The standards requirements for broadcasting are more extensive than those under the ODPS Framework, reflecting the different nature of the two types of service and the way in which they are accessed and viewed. The concept of the watershed, for example, is of paramount importance to the protection of under-18s in the Broadcasting Code, but of more limited use in regulating on-demand viewing.

What respondents said – Suicide and self-harm

- 3.19 The Samaritans welcomed the inclusion of the promotion of suicide and self-harm as "specially restricted material" considered unsuitable for those aged under 18 but argued this did not go far enough in protecting the vulnerable. This stakeholder argued there is a potential social contagion effect of portrayals of self-harm and suicide and considered that this content should be removed, and thereby treated as prohibited material, rather than restricted by age verification or other means. While acknowledging that responsible depictions of suicide and self-harm may serve to inform and educate, the organisation nevertheless highlighted the dangers of the 'Werther Effect', where a depicted suicide might serve as a model for imitative behaviour for young people, particularly those with mental health problems or bereaved by suicide.
- 3.20 The Samaritans supported the approach of the BBFC in assessing the risk associated with each individual case to determine age ratings and argued that ODPS targeting UK audiences should be required to adhere to UK domestic regulations rather than being able

to circumvent these by complying with weaker regulatory regimes in the country where their operations are based.

Ofcom's response

- 3.21 The ODPS Framework differentiates between content which may not be included in an ODPS and “specially restricted material”. Under section 368E(4) of the Act, ODPS providers are required to take appropriate measures to ensure that any specially restricted material is made available in a manner which secures that persons under the age of 18 will not normally see or hear it, but such material is not prohibited outright. While Ofcom understands the concerns raised by the Samaritans, any change to requirements set under the ODPS framework would require primary legislation and is a matter for Parliament rather than Ofcom.
- 3.22 Notwithstanding the above, material related to suicide and self-harm which has, or would, be refused a classification by the BBFC is prohibited from inclusion on ODPS. As set out in the BBFC classification guidelines, this may include portrayals of such behaviour that children and young people may potentially copy. In order to better reflect this, Ofcom has amended the list of types of content that may be considered ‘specially restricted material’ to refer to “material **portraying** eating disorders, self-harm or suicide”. We have also included a new footnote noting that material promoting these types of behaviour could constitute ‘prohibited material’ if it has, or would be, refused a BBFC classification.
- 3.23 Ofcom agrees with the Samaritans that the way in which suicidal behaviour is portrayed in the media raises complex and nuanced questions. The guidance already makes clear that providers need to carefully consider the nature of the material they are making available on the service when making decisions about how to best protect their viewers, including those aged under 18. When making determinations about potential breaches of the ODPS rules, Ofcom will carefully review all relevant factors including: the strength of the material in question; the nature of the ODPS; its likely audience; and the sufficiency of any applicable age protection measures.
- 3.24 Ofcom has published [guidance](#) on when an ODPS will be subject to regulation in the UK. In accordance with subsections 368A(1)(e) and (f) of the Act, an ODPS will fall under UK jurisdiction if its head office is in the UK and editorial decisions about the service are made in the UK. Where these criteria are not met, Ofcom will have no authority to regulate or mandate compliance with the UK ODPS rules.

Harmful Material: Protection of under-18s (specially restricted material)

- 3.25 Paragraphs 5.1 to 5.40 of the draft guidance related to “specially restricted material” as defined in s368(4) of the Act. This material includes content which is R18 or R18-equivalent or which might impair the physical, mental or moral development of under-18s. Where it is made available in an ODPS, providers are required to take appropriate measures to ensure that it is not normally seen or heard by persons under the age of 18.

- 3.26 The draft guidance explained Ofcom’s approach to determining whether any particular content is likely to fall within the definition of “specially restricted material” and provided some examples of the type of material that is likely to be caught. In addition to setting out Ofcom’s proposed approach to whether the protection measures a provider has taken are appropriate, the draft guidance also proposed that providers should follow the principle that specially restricted material with the most potential to harm must be subject to the strictest access control measures. In line with this principle, the draft guidance set out that Ofcom expected robust age verification measures to be put in place to restrict access to pornographic material, although providers would be free to determine the specifics of these measures.
- 3.27 The draft guidance also set out other measures that ODPS could consider taking in relation to non-pornographic material, including: age ratings; content warnings; and parental controls such as pin protection.

What respondents said – Age protection measures

- 3.28 The BBC highlighted that parental control functions should be carefully constructed and proportionate to the risk of harm in each case. Emphasising the age protection measures already put in place on BBC iPlayer, they raised a concern that any further mandatory and specific technical requirements would be disproportionate, resource-intensive and would not represent value for money for those who pay the licence fee.
- 3.29 ✂
- 3.30 ✂
- 3.31 ✂

Ofcom’s response

- 3.32 This non-binding guidance is intended to assist ODPS providers in complying with the obligation to take appropriate measures to ensure that under-18s are protected and to explain Ofcom’s likely approach to securing compliance. Ofcom considers that platform operators are best placed to understand the profiles of their users and the risks presented by their content and to make judgements on suitable protections. However, providers should ensure that processes are proportionate and robust, having regard to the corresponding risk of harm and the nature of their service.
- 3.33 Ofcom does not aim to mandate specific technological standards as we recognise that protections will need to be tailored to each service. However, we consider that providers should take on board good practices that are helpful in protecting viewers and are proportionate to the type of material on the service. We have amended Section Five of the guidance to reflect this principle.
- 3.34 ✂

What respondents said – Suicide and self-harm

- 3.35 The Samaritans reiterated their arguments that there is a potential contagion effect of depictions of suicide and questioned whether restricting such content by means of age verification controls was a sufficiently robust response to the potential harm caused by this material. Noting the limitations of age verification tools, and that encouraging suicide is illegal, Samaritans called for Ofcom to have the power to prohibit content rather than limit access.
- 3.36 Samaritans further referenced Rule 2.5 of the Broadcasting Code which allows methods of suicide and self-harm to be included in programmes where they are editorially and contextually justified. Highlighting the danger of this approach, they argued that regulation for on-demand services should move beyond the permissive approach of broadcast media and create a power to remove such content altogether.

Ofcom's response

- 3.37 As outlined in paragraph 3.21 above, the definition of prohibited material is set under the legislation, not by Ofcom. In order to give proper effect to s368(4) of the Act however, Ofcom will expect age verification systems to be managed effectively to protect people aged under 18. When considering whether measures are appropriate, Ofcom will have regard to the potential of the material to cause harm and the degree of harm likely to be caused and will not consider self-declaration tick boxes to be sufficient protection from the most harmful specially restricted material. The adequacy and effectiveness of age verification systems will be considered on a case by case basis.

General comments

What respondents said

- 3.38 S4C queried whether the guidelines would have retrospective effect.
- 3.39 BT requested guidance on the carriage of user-created content platforms such as Twitch, in particular querying whether the platform or the gateway provider would be responsible for putting in place the relevant measures and controls.

Ofcom's response

- 3.40 Ofcom's guidance is intended to assist providers in understanding their legal obligations and Ofcom's likely approach to securing compliance. The guidance is not prescriptive and should not be viewed as imposing additional requirements beyond those set out in the regulatory framework.
- 3.41 Operators will need to take their own legal advice in order to determine liability and responsibilities for content providers and platforms. This guidance should be read in conjunction with the [ODPS scope guidance](#), the [VSP scope guidance](#) and the [VSP measures guidance](#) in order to determine the applicable regulatory regime. However, as the ODPS scope guidance makes clear, the ODPS rules only apply where a provider has editorial

responsibility for the service, defined in section 368A(4) as having general control over what programmes are included in the range of programmes offered to users, and over the manner in which the programmes are organised in that range. Where a provider does not have general control over the selection of programmes the service will be outside the scope of the ODPS framework and may need to be notified as a video sharing platform. Queries relating to ODPS or VSP regulation can be emailed to vod@ofcom.org.uk or VSPRegulation@ofcom.org.uk as appropriate.

4. Minor changes

- 4.1 As part of the process of finalising our guidance on measures to protect users of ODPS from harmful content we have made amendments to reflect the guidance on age assurance measures set out in our recently published VSP protective measure guidance and to highlight the importance of abiding by applicable privacy and GDPR requirements.
- 4.2 Ofcom has inserted a new paragraph 5.28 to clarify that individual providers must determine the measures, or combination of measures, to be put in place on their services in order to protect under-18s.

5. Impact Assessment

- 5.1 This impact assessment considers the potential impact of the ODPS guidance concerning new requirements with regard to harmful material under section 368E of the Act. It does not consider the impact of any pre-existing ODPS requirements under the regulatory framework, on which our existing guidance remains unchanged. For example, under the previous ODPS rules and guidance, Ofcom set out its interpretation of the legislative requirement as being that ODPS providers of pornographic material should have in place robust age verification systems in order to secure that people under eighteen will not normally see or hear such material.
- 5.2 The ODPS guidance is designed to help ODPS providers understand the changes to requirements relating to harmful material under section 368E of the Act and their responsibilities with regard to the measures that may be appropriate for the purposes of ensuring specially restricted material is not available to under-18s. In some places it sets out what ODPS providers “should do” or “should consider” when implementing measures. These are not prescriptive requirements but intended as helpful suggestions to aid understanding of how compliance could be achieved. The guidance affords ODPS providers flexibility in how they protect their users. This reflects the diversity of the sector and the importance of technological innovation and for this reason we have not framed our guidance more prescriptively.
- 5.3 In some areas we have set specific expectations on ODPS providers, where we consider it is unlikely that effective protection of users can be achieved without having a particular measure in place and it being implemented effectively. There are also areas where we strongly encourage certain approaches to protect users effectively. These areas are as follows:
- a) **Pornographic material:** For ODPS which contain pornographic material, ODPS providers should (as under the previous ODPS rules and guidance) effectively implement robust age verification systems. **We consider this central to achieving compliance with the regulatory requirements.**
 - b) **Other specially restricted material:** Where an ODPS contains other specially restricted material, the ODPS provider should implement proportionate and appropriate measures to ensure that any material that might impair the physical, mental or moral development of persons under the age of 18 is not normally seen or heard by them. The ODPS provider should determine what measures are proportionate and appropriate on their service, relative to the potential or harm. The guidance seeks to provide assistance in how to make this determination and to suggest possible measures, without being prescriptive.
- 5.4 The impact of these potential activities on ODPS will depend on ODPS providers’ existing approaches in these areas and whether they should revise these to ensure that they have taken appropriate measures to protect their users.

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