



Department for Digital, Culture Media & Sport

Guidance from the Secretary of State for Digital, Culture, Media and Sport to the Age-Verification Regulator for Online Pornography

*Presented to Parliament pursuant to Section 27 of the
Digital Economy Act 2017*

January 2018

Purpose of this document

Part 3 of the Digital Economy Act 2017 gives powers to an age-verification regulator to take action where a person is making pornographic material available on the internet in the United Kingdom on a commercial basis and does not have age-verification measures in place. The regulator will also have powers to take action where a person is making available extreme pornographic material on the internet in the United Kingdom. The Act includes powers for the Secretary of State to designate a person, or persons, to be the age-verification regulator.

[Section 27](#) of the Act provides that the Secretary of State may issue guidance to the age-verification regulator in relation to the exercise of the regulator's functions, to which the regulator must have regard. The Secretary of State must lay the guidance before both Houses of Parliament.

A first draft of this guidance was published in March 2017 during the passage of the Bill to assist Parliament and stakeholders in understanding how the regulation of online pornography is intended to operate.

This revised version has been informed by discussions with key stakeholders.

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1. Guidance summary

Introduction

1. A person contravenes Part 3 of the Digital Economy Act 2017 if they make pornographic material available on the internet on a commercial basis to persons in the United Kingdom without ensuring that the material is not normally accessible to persons under the age of 18. Contravention could lead to a range of measures being taken by the age-verification regulator in relation to that person, including blocking by internet service providers (ISPs).
2. Part 3 also gives the age-verification regulator powers to act where a person makes extreme pornographic material (as defined in section 22 of the Digital Economy Act 2017) available on the internet to persons in the United Kingdom.

Scope of the guidance

3. The Act provides that the Secretary of State may designate one or more persons to be the age-verification regulator. That designation is subject to a Parliamentary procedure, as set out in section 17 of the Act. Those who are designated as the regulator must have regard to this guidance.
4. Where there are joint regulatory arrangements in place, a revised version of this guidance will address those as necessary. The Secretary of State may from time to time revise this guidance.

Purpose

5. This guidance is issued by the Secretary of State under section 27 of the Digital Economy Act 2017. Section 27(3) requires that 'The regulator must have regard to the guidance.'
6. This guidance has been written to provide the framework for the operation of the age-verification regulatory regime in the following areas:
 - Regulator's approach to the exercise of its powers;
 - Age-verification arrangements;
 - Appeals;
 - Payment-services Providers and Ancillary Service Providers;
 - Internet Service Provider blocking; and
 - Reporting.
7. The regulator can evidence their adherence to the duty to have regard to this guidance in a number of ways, including the production of its own guidance and in an annual report (see Chapter 7 of this guidance).

Enforcement principles

8. This guidance balances two overarching principles in the regulator's application of its powers under sections 19, 21 and 23 - that it should apply its powers in the way which it thinks will be most effective in ensuring compliance on a case-by-case basis and that it should take a proportionate approach.
9. As set out in this guidance, it is expected that the regulator, in taking a proportionate approach, will first seek to engage with the non-compliant person to encourage them to comply, before considering issuing a notice under section 19, 21 or 23, unless there are reasons as to why the regulator does not think that is appropriate in a given case.

2. Regulator's approach to the exercise of its powers

1. The age-verification consultation '[Child Safety Online: Age verification for pornography](#)' identified that an extremely large number of websites contain pornographic content - circa 5 million sites or parts of sites. **All providers of online pornography, who are making available pornographic material to persons in the United Kingdom on a commercial basis, will be required to comply with the age-verification requirement.**¹
2. Section 14(2) of the Digital Economy Act 2017 allows the Secretary of State to make regulations specifying, for the purposes of this Part, circumstances in which material is or is not to be regarded as made available on a commercial basis.
3. In exercising its powers, the regulator should take a proportionate approach. Section 26(1) specifically provides that the regulator may, if it thinks fit, choose to exercise its powers principally in relation to persons who, in the age-verification regulator's opinion:
 - (a) *make pornographic material or extreme pornographic material available on the internet on a commercial basis to a large number of persons, or a large number of persons under the age of 18, in the United Kingdom; or*
 - (b) *generate a large amount of turnover by doing so.*
4. In taking a proportionate approach, the regulator should have regard to the following:
 - a. As set out in section 19, before making a determination that a person is contravening section 14(1), the regulator must allow that person an opportunity to make representations about why the determination should not be made. To ensure clarity and discourage evasion, the regulator should specify a prompt timeframe for compliance and, if it considers it appropriate, set out the steps that it considers that the person needs to take to comply.
 - b. When considering whether to exercise its powers (whether under section 19, 21 or 23), including considering what type of notice to issue, the regulator should consider, in any given case, which intervention will be most effective in encouraging compliance, while balancing this against the need to act in a proportionate manner.
 - c. Before issuing a notice to require internet service providers to block access to material, the regulator must always first consider whether issuing civil proceedings or giving notice to ancillary service providers and payment-services providers might have a sufficient effect on the non-complying person's behaviour.

¹ Under section 14(6) of the Digital Economy Act, making material available for the purposes of Part 3 of the Act does not include making the content of an on-demand programme service available on the internet in the course of providing an on-demand programme service as defined by Section 368A of the Communications Act 2003.

5. The regulator should report child sexual abuse images, and non-photographic child sexual abuse images hosted in the UK, which it finds in the course of its investigations, to the Internet Watch Foundation. The regulator should seek to agree a Memorandum of Understanding with the IWF and, if possible, make this publicly available.
6. To help ensure transparency, the regulator should publish on its website details of any notices under sections 19, 21 and 23.

3. Age-verification arrangements

1. The legislation makes it a requirement that:

A person contravenes this subsection if the person makes pornographic material available on the internet to persons in the United Kingdom on a commercial basis other than in a way that secures that, at any given time, the material is not normally accessible by persons under the age of 18.

2. 'Not normally accessible' concerns the types of arrangements to prevent under 18s from accessing pornography. Section 25(1) provides that the regulator must publish guidance about the 'types of arrangements for making pornographic material available that the regulator will treat as complying with section 14(1).' This guidance is subject to a Parliamentary procedure (see section 25).
3. A person making pornographic material available on a commercial basis to persons in the United Kingdom must have an effective process in place to verify a user is 18 or over. There are various methods for verifying whether someone is 18 or over (and it is expected that new age-verification technologies will develop over time). As such, the Secretary of State considers that rather than setting out a closed list of age-verification arrangements, the regulator's guidance should specify the criteria by which it will assess, in any given case, that a person has met with this requirement. The regulator's guidance should also outline good practice in relation to age verification to encourage consumer choice and the use of mechanisms which confirm age, rather than identity.
4. The regulator is not required to approve individual age-verification solutions. There are various ways to age verify online and the industry is developing at pace. Providers are innovating and providing choice to consumers.
5. The process of verifying age for adults should be concerned only with the need to establish that the user is aged 18 or above. The privacy of adult users of pornographic sites should be maintained and the potential for fraud or misuse of personal data should be safeguarded. The key focus of many age-verification providers is on privacy and specifically providing verification, rather than identification of the individual.
6. The role of the regulator should be to focus on the ability of arrangements to verify whether someone is 18 or over. The regulator should not duplicate the role of the Information Commissioner's Office (ICO), the UK's independent body set up to uphold information rights.
7. With regards to privacy, the age-verification regulator's guidance should include:

- a. information about the ICO's role and the actions the ICO will take to ensure organisations meet their information rights obligations;
 - b. the expectation that age-verification services and online pornography providers should take a [privacy by design](#) approach as recommended by the ICO;
 - c. the expectation that age-verification services and online pornography providers should have regard to the ICO's guidance on (among other things) data minimisation, privacy by design and security.
 - d. the requirements to which age-verification services and online pornography providers will have regard under data protection legislation.
8. The age-verification regulator should inform the ICO where concerns arise during its assessment of the age verification effectiveness that the arrangement does not comply with data protection legislation. The ICO will consider if further investigation is appropriate. In addition, the age-verification regulator should inform an online commercial pornography provider that it has raised concerns with the ICO.
9. The age-verification regulator should agree these arrangements with the ICO in a Memorandum of Understanding to be made publicly available.
10. It should be noted that regulations 17 to 20 and 22 of the Electronic Commerce (EC Directive) Regulations 2002 apply to Part 3 (online pornography) of the Digital Economy Act 2017 (see section 14(5)).

4. Appeals

1. The Act provides that as part of the designation process the Secretary of State must be satisfied that:

arrangements will be maintained by the age-verification regulator for appeals—

(a) by a person on whom a financial penalty has been imposed under section 19(1) or (10), against the imposition of that penalty;
(b) by a person to whom an enforcement notice has been given under section 19(2), against the giving of that notice;
(c) by a person identified as the non-complying person in a notice given under section 21, against the giving of that notice;
(d) by an internet service provider to whom a notice has been given under section 23(1), against the giving of that notice; and
(e) by a person identified as the non-complying person in a notice given to an internet service provider under section 23(1), against the giving of that notice.

2. A person designated to be the age-verification regulator will only need to maintain arrangements for appeals for the respective sections of the Act that person is designated to undertake.
3. In addition to being satisfied with the appeals arrangements the Secretary of State must be satisfied that any person hearing an appeal under those arrangements will be sufficiently independent of the age-verification regulator.
4. The regulator's appeals arrangements should specify the process for appeals including:
 - a. Right to appeal;
 - b. Grounds to appeal;
 - c. Appeal procedure;
 - d. Independent Appeal Panel;
 - e. Costs.
5. The regulator's appeals process may include, as a first step, an internal review stage. Any such internal review should be conducted by someone senior to the person who made the initial decision. The review should be undertaken in a prompt and timely manner, and the regulator may require that this internal process should be completed before an appeal mechanism to an Independent Appeal Panel can proceed.
6. The Secretary of State considers that to be sufficiently independent, appeals should be heard by an Independent Appeals Panel. The Chair and Members of the Independent Appeals Panel should be appointed by an Appointments Board. Once appointed, the Independent Appeals Panel shall appoint any further members and the Appointments Board will no longer be required.

7. The Chair of the Appointments Board should be engaged by the regulator, who should have regard to the following:
 - The Chair of the Appointments Board should be appointed through open competition;
 - The Appointments Board should be able to demonstrate a commitment to the standards of conduct set out in the Committee on Standards in Public Life's Seven Principles of Public Life;
 - The Appointment Board should have the necessary skills and expertise to appoint an Independent Appeals Panel as set out in paragraph 4.9.
8. In the first instance, the Chair of the Appointments Board will choose the other members of the Appointments Board, if required. The Chair will then convene the Board to make appointments to the Independent Appeals Panel. Thereafter, future appointments will be made by the Independent Appeals Panel.
9. Appointments to the Independent Appeals Panel should be made via an open and transparent process and should have regard to the following:
 - The Chair and members of the Independent Appeals Panel should be independent of the regulator, Government and the industries that are most likely to submit an appeal;
 - The Appointments Board (in the case of initial appointments) and subsequently the Independent Appeals Panel will seek to ensure that the members of the Independent Appeals Panel represent a broad spectrum of experience and that each is respected in their field;
 - All members should be able to demonstrate a commitment to the standards of conduct set out in the Committee on Standards in Public Life's Seven Principles of Public Life;
 - Members should be appointed on such terms and conditions as secures their independence.
 - The Chair and Members should serve no more than 2 terms, up to a maximum of 10 years.
10. The Independent Appeals Panel should comprise the Chair and at least 2 members in order to make a decision on an appeal.
11. The appeals arrangements should include provisions on how the Independent Appeals Panel will consider frivolous or disruptive appeals.

5. Payment-services providers and ancillary service providers

1. Section 21 provides for the age-verification regulator to give notice to payment-services providers and ancillary service providers, where it considers that a person is making pornographic material available on the internet in the United Kingdom on a commercial basis and does not have age-verification measures in place, or is making extreme pornographic material available on the internet to persons in the United Kingdom. There is no requirement in the Digital Economy Act for payment-services providers or ancillary service providers to take any action on receipt of such a notice. However, Government expects that responsible companies will wish to withdraw services from those who are in breach of UK legislation by making pornographic material accessible online to children or by making extreme pornographic material available.
2. The regulator should consider on a case-by-case basis the effectiveness of notifying different ancillary service providers (and payment-services providers).
3. Section 21(4) provides a definition of payment-services provider:

In this section a “payment-services provider” means a person who appears to the age-verification regulator to provide services, in the course of a business, which enable funds to be transferred in connection with the payment by any person for access to pornographic material or extreme pornographic material made available on the internet by the non-complying person

4. Section 21(5) provides a definition of ancillary service provider:

In this section an “ancillary service provider” means a person, other than a payment-services provider, who appears to the age-verification regulator to—

*(a) provide, in the course of a business, services which enable or facilitate the making available of pornographic material or extreme pornographic material on the internet by the non-complying person; or
(b) advertise, on or via any internet site operated by the non-complying person or via any other means of accessing the internet operated or provided by that person, any goods or services provided in the course of a business.*

5. Section 25(1) requires the regulator to publish guidance ‘about the circumstances in which it will treat services provided in the course of a business as enabling or facilitating the making available of pornographic

material or extreme pornographic material.’

6. The regulator should consult stakeholders before submitting this guidance to the Secretary of State.
7. There are a wide-range of providers whose services may be used by pornography providers to enable or facilitate making pornography available online and who may therefore fall under the definition of 'ancillary service provider' in section 21(5)(a). Such a service is not limited to where a direct financial relationship is in place between the service and the pornography provider. Section 21(5)(b) identifies those who advertise commercially on such sites as ancillary service providers. In addition, others include, but are not limited to:
 - a. Platforms which enable pornographic content or extreme pornographic material to be uploaded;
 - b. Search engines which facilitate access to pornographic content or extreme pornographic material;
 - c. Discussion fora and communities in which users post links;
 - d. Cyberlockers' and cloud storage services on which pornographic content or extreme pornographic material may be stored;
 - e. Services including websites and App marketplaces that enable users to download Apps;
 - f. Hosting services which enable access to websites, Apps or App marketplaces; that enable users to download apps
 - g. Domain name registrars.
 - h. Set-top boxes, mobile applications and other devices that can connect directly to streaming servers
8. As a specific provision is included in respect of internet service providers (section 23), it is not expected that the regulator will notify internet service providers under section 21.
9. The regulator should carry out a review of potential classes of ancillary service providers. The regulator's guidance should include a list of the classes of ancillary service providers it will consider under section 21, but this does not need to be an exhaustive list. The regulator should work with the industries concerned to aid transparency on what circumstances a person will be considered to provide an ancillary service.
10. The regulator should seek to inform those that provide ancillary services that they are being considered under the powers of the Digital Economy Act, and wherever possible agree the notification arrangements.
11. The age-verification regulator should consider representations from ancillary service providers where they state they have been incorrectly notified. The regulator should withdraw notification if an ancillary service provider is able to demonstrate to the regulator's satisfaction, that a notification is incorrect.

6. Internet Service Provider blocking

1. Section 23 provides the regulator with the power to give a notice to any internet service provider requiring it to prevent access by persons in the UK to material that the regulator considers to be in contravention of section 14(1) or is extreme pornographic material (as defined in section 22) that the person is making available on the internet to persons in the United Kingdom.
2. The regulator should only issue a notice to an internet service provider having had regard to Chapter 2 of this guidance. The regulator should take a proportionate approach and consider all actions (Chapter 2.4) before issuing a notice to internet service providers.
3. In determining those ISPs that will be subject to notification, the regulator should take into consideration the number and the nature of customers, with a focus on suppliers of home and mobile broadband services. The regulator should consider any ISP that promotes its services on the basis of pornography being accessible without age verification irrespective of other considerations.
4. The regulator should take into account the child safety impact that will be achieved by notifying a supplier with a small number of subscribers and ensure a proportionate approach. Additionally, it is not anticipated that ISPs will be expected to block services to business customers, unless a specific need is identified.
5. The regulator should issue notifications to ISPs on a scheduled basis in the expectation that ISPs will implement a blocking order within 3 working days. In recognition that the introduction of the requirement is a new system, 6 months after the introduction of the requirement, the notification arrangements should be reviewed by the regulator, ISPs and Government with due consideration to the ongoing requirements placed on ISPs.
6. Under section 23(8) it is the duty of an internet service provider to comply with any requirement imposed on it by a notice under subsection 23(1). The regulator should act reasonably at all times in considering what steps to require an ISP to take, or what arrangements it should put in place for the purposes of the ISP meeting its duty in section 23(8).
7. The regulator should take into account technological developments and efficacy, with the presumption that DNS blocking of an ISP's DNS will meet the requirements of section 23(2)(c). ISPs will not be expected to block third-party DNSs. It is recognised that blocking solutions can never be 100% effective, and those determined to access sites may still do so via other means.
8. Section 23(6) provides that a blocking notice may be varied or revoked by a further notice under subsection (1). Where non-compliant sites have been

blocked and subsequently become compliant, the regulator should notify ISPs that the notice has been revoked.

9. ISPs are encouraged, where they become aware that there is a risk of over-blocking as a result of action taken pursuant to a notice from the regulator, to inform the regulator of this. The regulator should then review the notice, consulting the relevant ISPs on an appropriate resolution, which may include varying the notice.
10. Section 23(4)(a) specifies that a blocking notice may require the ISP to provide information to users where a non-compliant site has been blocked. The regulator should consult ISPs to establish best practice on these customer notices '(splash pages)'.
11. The regulator should establish a Memorandum of Understanding with Government, to be published, to ensure that requirements under section 24 are appropriately met.

7. Reporting

1. In order to assist with the ongoing review of the effectiveness of the new regime and the regulator's functions, the Secretary of State considers that it would be good practice for the regulator to submit to the Secretary of State an annual report on the exercise of its functions and their effectiveness. This report should include, but is not limited to the:
 - a. Number of persons it has investigated;
 - b. Number of persons (of those it has investigated) it has determined to be compliant;
 - c. Number of persons (of those it has investigated) it has determined non-compliant including details of the grounds of non-compliance;
 - d. Notices issued to payment-services providers, ancillary service providers and internet service providers including recipients' response to those notices;
 - e. The type of material it has investigated, determined non-compliant and issued notices against;
 - f. Number of appeals heard, including internal review, Independent Appeals Panel hearings and Judicial Reviews;
 - g. Consultations and research carried out, commissioned or supported under section 26(2);
 - h. The regulator's views on the impact and effectiveness of the regulatory framework; and
 - i. If appropriate, changes in the industry or to technology which might, in the regulator's view, recommend alternative or additional means of achieving the objectives of the legislation.