

**EXPLANATORY MEMORANDUM OF THE
DRAFT BRITISH BOARD OF FILM CLASSIFICATION (BBFC) GUIDANCE ON
ANCILLARY SERVICE PROVIDERS**

2018 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport (DCMS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This guidance from the British Board of Film Classification (BBFC), for the purposes of Part 3 of the Digital Economy Act 2017 (“the Act”), sets out the circumstances in which the British Board of Film Classification (BBFC) as the age verification regulator will treat businesses facilitating the availability of online pornography as ancillary service providers (“ASPs”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The guidance from the BBFC is not a statutory instrument but is subject to the affirmative procedure the first time it is laid as required under section 25(11) of the Act.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 The territorial application of this guidance from the BBFC covers the entire United Kingdom.

4. Extent and Territorial Application

- 4.1 The territorial extent of this guidance is the United Kingdom.
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5. European Convention on Human Rights

- 5.1 The Secretary of State for Digital, Culture, Media and Sport has made the following statement regarding Human Rights:
5.2 “In my view the provisions of the draft *BBFC guidance on ancillary service providers* are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Part 3 of the Act concerns age-verification measures for commercial online pornography. Section 21 of the Act enables the age verification regulator to notify ancillary service providers of those persons who are in breach of section 14 (1) or

who are making extreme pornographic material as defined in section 22 available on the internet to persons in the United Kingdom.

- 6.2 Section 21 (5) of the Act defines ASPs as those who in the course of their business provide a service that enables a person or persons to provide online pornography.
- 6.3 Section 25 (1)(b) requires the regulator to publish guidance on the circumstances in which the regulator will treat services as ASPs. The regulator's guidance must be laid before Parliament subject to the affirmative procedure for first exercise of the power and the negative procedure thereafter. The guidance must be approved by the Secretary of State before it is laid.
- 6.4 This will be the first time that the guidance will be laid under section 25(6) of the Act. It has been approved by the Secretary of State.
- 6.5 DCMS intends to bring sections 14, 15 and 19 (partial) fully into force as soon as possible. Within section 19, it is not the intention to bring the power to impose financial penalties into force at this stage.
- 6.6 This guidance is part of a broader legislative package to bring into force the age verification requirement under Part 3 of the Act. The draft BBFC Guidance on Age-Verification Arrangements requires Parliamentary approval (section 25) and is being laid alongside this guidance. Similarly the Online Pornography (Commercial Basis) Regulations 2018 (section 14 (2)) requires Parliamentary approval and is being laid alongside the two pieces of BBFC guidance.

7. Policy background

What is being done and why?

- 7.1 In order to protect children from exposure to pornographic material online, the Act introduced a requirement that a person making available pornographic material online on a commercial basis to persons in the United Kingdom should ensure that the material is not normally accessible by persons under the age of 18.
- 7.2 The BBFC has been designated as the age-verification regulator for certain functions under the Act. Where a person is non-compliant with the requirement in section 14(1), the age-verification regulator can issue an enforcement notice to that person (section 19), notify payment-services providers and ancillary service providers to that person so that those services can be withdrawn (section 21), or require internet service providers to block access to material made available by that person (sections 23 and 24). Although the Act also provides for the age-verification regulator to issue financial penalties to a non-compliant person (section 20), the BBFC has not been designated under this section.
- 7.3 The BBFC's draft guidance sets out the proposed regulatory approach, including the notification and enforcement regime. It also confirms that the BBFC will take a proportionate approach in ensuring compliance by focusing on those services which generate the most traffic by users in the United Kingdom.
- 7.4 The draft guidance confirms the circumstances in which the BBFC will treat persons as ASPs. Section 21 (5) of the Act defines an ASPs as a person, other than a payment-services provider, who appears to the age-verification regulator to—

- i) provide in the course of a business as enabling or facilitating the making available of pornographic material or extreme pornographic material by the non-complying person; or
- ii) 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.

7.5 There are a wide range of providers who may meet this definition and so the BBFC's draft guidance provides a non-exhaustive list of classes of ASP (paragraph 3.3):

- i) online platforms, including social media, on which a non-compliant person has a presence
- ii) search engines which facilitate access to non-compliant services
- iii) providers of IT services to a non-compliant person
- iv) third parties who provide advertising space to the non-compliant person
- v) third parties who provide advertising space on a website, app or other service belonging to a non-compliant person
- vi) third parties advertising on or via any internet site operated by the non-compliant person or via any other means of accessing the internet operated by the non-compliant person

7.6 The guidance confirms the information that will be provided in a notice to an ASP, including a request that the ASP withdraws its services to a non-compliant person or takes other appropriate action. There is no requirement in the Digital Economy Act for ASPs to take action on receipt of a notice but Government expects that responsible companies will wish to withdraw services from providers who are in breach of UK legislation by making pornographic material accessible online to children.

7.7 The guidance confirms that the BBFC will consider representation from ASPs where they state that they have been incorrectly notified.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This guidance does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 This will be the first time that the guidance will be laid under section 25(6) of the Act.

10. Consultation outcome

10.1 In February 2016, the Government published a [Consultation](#) setting out a preferred approach to delivering its manifesto commitment on age verification, and inviting views. The consultation ran for 8 weeks, until 12 April 2016, and received a total 3,764 responses. 3,454 responses were recorded on the online survey platform, 306 submitted via email and 4 responses through the postal system. The consultation document set out the Government's preferred approach to delivering on the above

manifesto commitment, by establishing a new requirement in law for commercial providers to have in place robust age verification controls for online pornographic content in the UK, backed by a new regulatory framework.

- 10.2 Overall, there was a roughly even split between those supporting age verification (44%) and those not in favour (48%). Many of the key organisations involved in online child protection indicated their support for the proposals, and the overriding policy goal of protecting children online. For full details, please see [Government response](#).
- 10.3 The BBFC published a draft of its guidance on age verification arrangements for a public consultation that ran for 4 weeks from 26 March - 23 April 2018. The BBFC received a total of 624 responses with the vast majority (584) submitted by individuals and the remaining 40 from organisations. The BBFC made a number of changes to their draft guidance based on the feedback received from stakeholders, as set out in their consultation response paper. This is the final agreed version of their guidance.

11. Guidance

- 11.1 Section 27 of the Act provides for the Secretary of State to issue guidance to the age-verification regulator in relation to the exercise of the regulator's functions. This guidance must be laid before both Houses of Parliament. The [guidance](#) was made in January 2018.

12. Impact

- 12.1 There is no impact on business, charities or voluntary bodies. The guidance provides details about the circumstances in which the age verification regulator will treat services provided in the course of a business as enabling or facilitating the making available of pornographic material or extreme pornographic material.
- 12.2 The impact on the public sector is that the functions of Part 3 of the 2017 may be fulfilled and government delivers on its manifesto commitment to introduce age verification controls to prevent children and young people accessing pornography.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burden on small businesses. Given the nature of the online adult industry and the importance of the overriding child protection aims it would not be appropriate to exempt small companies from the scope of the legislation.

14. Monitoring & review

- 14.1 Section 29 of the Act provides that within 18 months, but not before 12 months, of the coming into force of Part 3 of the Act, the Secretary of State must produce a report on the impact and effectiveness of the regulatory framework provided for in Part 3 of the Act. Before publishing this report, the Secretary of State must consult on the definitions used within this Part and the report must be laid before each House of Parliament.

15. Contact

- 15.1 Basit Ahmed at the Department for Digital, Culture, Media and Sport. Telephone: 07519 292 851 or email: basit.ahmed@culture.gov.uk can answer any queries regarding the designation proposal.
- 15.2 Orla MacRae Deputy Director for Online Harms at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Margot James, Minister for Digital and Creative Industries at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.