

EXPLANATORY MEMORANDUM TO
THE DRAFT ONLINE PORNOGRAPHY (COMMERCIAL BASIS) REGULATIONS
2018

[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 instrument specifies, for the purposes of Part 3 of the Digital Economy Act 2017 (“the Act”), the circumstances in which pornographic material is to be regarded as made available on a commercial basis.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 instrument includes Scotland and Northern Ireland.
- 3.3 The powers under which this instrument is made cover the entire United Kingdom (see section 14 and section 119(1) of the Digital Economy Act 2017) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

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:

“In my view the provisions of the draft *Online Pornography (Commercial Basis) Regulations 2018* 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 14(2) states that “the Secretary of State may 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”.

- 6.2 During the passage of the Bill the intention behind the Regulations was explained, with two principles in particular being identified. Firstly, that commercial providers of online pornography include persons that do not charge customers for providing access to the pornographic material but nevertheless receive a commercial benefit (for example through advertising) for doing so. Secondly, the focus of the legislation should be pornographic websites, rather than popular social media platforms on which pornographic material is only a small part of the overall content.
- 6.3 This will be the first time that regulations have been made under 14(2) of the Act.
- 6.4 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.
- 6.5 These Regulations are part of a broader legislative package to bring into force the age verification requirement under Part 3 of the Act. The British Board of Film Classification draft guidance on age verification and ancillary service providers requires Parliamentary approval (section 25) and is being laid alongside these regulations.

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 online pornographic material available 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 Regulations set out, for the purposes of Part 3 of the 2017 Act, the circumstances in which pornographic material is to be regarded as made available by a person on a commercial basis.
- 7.3 A person that charges for access to the pornographic material will be regarded as making pornographic material available on a commercial basis.
- 7.4 A person who makes pornographic material available free of charge, but expects to receive a payment or other commercial benefit such as advertising revenue in connection with making the pornographic material available will also be regarded as making available pornography on a commercial basis.
- 7.5 However, where pornographic material had been made available free of charge, it is necessary to set a threshold below which that material should not be regarded as made available on a commercial basis. Section 14(3) of the Act provides that the regulations may prescribe circumstances in which material made available free of charge is or is not to be regarded as made available on a commercial basis.
- 7.6 In establishing this threshold, the regulations set out that where pornographic material makes up less than a third of content on the internet site or other means of accessing the internet (such as an application program), it should not be regarded as making available on a commercial basis. If more than a third of material on a means of accessing the internet is pornographic then that material may be regarded as providing a significant proportion of the overall commercial benefit that the person receives in connection with operating that means of accessing the internet.

7.7 However, there is an exception to this in regulation 2(5) of the regulations which states that where the internet site or other means of accessing the internet is marketed as pornographic, it will be treated as a provider of online pornography on a commercial basis even if less than a third of the content is pornographic. For the purposes of regulation 2(5), "marketed" should be understood as its definition in the Oxford English Dictionary: "Of a manufacturer, advertiser, etc.: to place or establish (a product) on the market; esp. to seek to increase sales of (a product) by means of distribution and promotion strategies. Also (in extended use): to promote the public image of (a person, organization, etc.)." In practice this may include, but is not limited to, the overall presentation, promotion, or placement of a product or service, and the presentation, promotion, and placement of any pornographic material within a product or service.

7.8 The British Board of Film Classification 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 (sections 23 and 24). Although the Act also provides for the age-verification regulator to issue financial penalties to a non-compliant person (see section 19(1), section 19(10) and section 20), the British Board of Film Classification has not been designated for this purpose.

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

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

9. Consolidation

9.1 This is the first time Regulations are being made under section 14(2) 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 A draft of this instrument was published in March 2017 for consideration alongside the Digital Economy Bill. Subsequently, DCMS engaged with key stakeholders in

Parliament, industry and charities on the draft and this final version takes account of the feedback received.

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, or no significant, impact on business, charities or voluntary bodies. The Regulations provide detail as to the meaning of “on a commercial basis” for the purposes of Part 3 of the Act. Those persons who make pornographic material available to persons in the UK on a commercial basis, as defined in the instrument, will need to secure that, at any given time, the material is not normally accessible to persons under the age of 18 (in order to comply with section 14(1) of the Act).
- 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.