



**DRAFT**

**Guidance on Ancillary Service  
Providers**

**Digital Economy Act – Part 3  
Online Pornography**

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## 1. Introduction

1. Part 3 of the Digital Economy Act 2017 (the Act) provides for the regulation, through age-verification, of online pornography. The primary purpose of this Part is the protection of children from pornographic content online.

2. Section 14(1) of the Act provides 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.*

“Pornographic material” is defined in section 15 of the Act (Annex 1)

The Online Pornography (Commercial Basis) Regulations 2018 (Annex 2) determine whether a person is making pornographic material available on a commercial basis.

3. On 21 February 2018 the British Board of Film Classification was designated by the Secretary of State to be the age-verification regulator responsible for:
  - identifying and notifying non-compliant providers of online commercial pornography (section 19)
  - notifying ancillary service providers and payment-services providers (section 21) and directing internet service providers to block access to non-compliant pornography services (section 23)
4. Under the terms of the Act, a provider of online commercial pornography will be deemed non-compliant if they fail the requirements of section 14(1) of the Act to secure that pornographic material is not normally accessible by those under 18, and/or provide content which is deemed to be extreme pornographic material as defined in the Criminal Justice and Immigration Act 2008 (Annex 3).
5. Section 21 of the Act provides for the Age-verification Regulator to give notice to any ancillary service provider or payment-services provider where it considers that a person is non-compliant with section 14(1) or is making extreme pornographic material available on the internet to persons in the United Kingdom.

Section 21(4) of the Act defines a payment-services provider as:

*'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.'*

Section 21(5) of the Act defines an ancillary service provider as:

*'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.'*

6. Section 25(1) of the Act requires the BBFC 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. Prior to publication, this guidance must be submitted to the Secretary of State for approval and be laid before both Houses of Parliament in accordance with the procedure set out in section 25.
7. Section 27 of the Act provides that the Secretary of State may issue guidance to the Regulator in relation to the exercise of the Regulator's functions. The Secretary of State issued "Guidance from the Secretary of State for Digital Culture Media and Sport to the Age-verification Regulator for Online Pornography" in January 2018<sup>1</sup>. This guidance on ancillary service providers, has been drafted having had regard to the guidance issued by the Secretary of State.
8. This guidance will have effect from the date on which Part 3 of the Act comes into force. The BBFC may from time to time revise this guidance, in particular in the light

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/673425/Guidance\\_from\\_the\\_Secretary\\_of\\_State\\_for\\_Digital\\_\\_Culture\\_\\_Media\\_and\\_Sport\\_to\\_the\\_Age-Verification\\_Regulator\\_for\\_Online\\_Pornography\\_-\\_January\\_2018.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/673425/Guidance_from_the_Secretary_of_State_for_Digital__Culture__Media_and_Sport_to_the_Age-Verification_Regulator_for_Online_Pornography_-_January_2018.pdf)

of technological developments and experience of the operation of the regulatory regime. Any changes to this guidance will be laid before parliament in line with section 25 of the Act.

9. This guidance adopts and applies the definitions of various terms used in the Act. In the event of any unintended conflict in meaning or interpretation between this guidance and the Act, the Act shall prevail.
10. The BBFC will report annually to the Secretary of State on the regulatory regime. In accordance with 7.1 of the Secretary of State's Guidance to the Regulator, these reporting requirements include:
  - the impact and effectiveness of the regulatory framework and recommendations for the revision of the scope if appropriate
  - the number of persons it has investigated and determined to be compliant or non-compliant (including details of the grounds of non-compliance)
  - the number of ancillary service providers, payment-services providers and internet service providers it has notified, and responses to such notification
11. In accordance with section 26(2)(b) of the Act the BBFC will, from time to time, carry out research to gain insight into the effectiveness of the regime with particular reference to the protection of children and to determine the effectiveness of age-verification systems.
12. This guidance sets out the BBFC's approach and powers in relation to ancillary service providers and considerations in terms of enforcement action. As specified in chapter 5.9 of the Secretary of State's Guidance to the Regulator, this guidance includes a non-exhaustive list of the classes of ancillary service providers that the BBFC will consider under section 21 of the Act.
13. In some circumstances the BBFC may be willing to respond to requests for additional general guidance on its interpretation of the statutory requirements where such requests raise issues of general concern to stakeholders. Any such additional guidance given is informal only and is without prejudice to the BBFC's powers under the Act. Stakeholders must ensure they comply with their statutory obligations under the Act. They should seek their own legal and technical advice on any issues. The BBFC does not accept liability for any loss or damage alleged to result from reliance

placed either on its published guidance or any supplementary informal guidance it may give.

## 2. The BBFC's Approach and Powers under Part 3 of the DEA

1. 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. The method by which an internet connection or access can be obtained is irrelevant.
2. The BBFC will approach the discharge of its functions under the Act in an objective, consistent and transparent manner to achieve the primary purpose of the Act; that is the protection of children.
3. The BBFC will adopt a proportionate regulatory approach in relation to the discharge of its functions under the Act in accordance with section 26 and in accordance with chapter 2 of the Secretary of State Guidance to the regulator.
4. This proportionate approach consists of:
  - deciding which services that provide online pornographic material on a commercial basis it will investigate
  - assessing whether an age-verification arrangement complies with the provisions of section 14(1) of the Act to secure that pornographic material is not normally accessible by those under 18
  - assessing whether the service contains extreme pornographic material
  - determining the most effective course of enforcement action to take
5. When deciding which services to investigate, and in order to allow the BBFC to maintain as its priority the protection of those aged under 18 from accessing pornographic content online, the type of factors it will take into account may include, but will not be limited to, services which:
  - are most frequently visited, particularly by children, in the UK
  - are most likely to be sought out by children (for example because they have attracted media or social media attention)
  - contain extreme pornographic material
  - contain potentially indecent images of children or raise other child protection concerns

6. The BBFC will seek to encourage compliance with s14(1) of the Act before using the powers listed in paragraph 9 below. It will issue a provisional determination of non-compliance before an enforcement notice under section 19(2) of the Act.
7. In accordance with chapter 2.4.a of the Secretary of State's guidance, the BBFC will, in any such provisional determination of non-compliance, specify a prompt timeframe for compliance and, if it considers appropriate, set out the steps that it considers that the person needs to take to comply.
8. If no satisfactory steps are taken following the provisional determination of non-compliance, the BBFC will give a person an enforcement notice where it determines that the person is contravening section 14(1). This is subject to the requirement that the person concerned be given the opportunity to make representations to the BBFC prior to such a determination (section 19(3)).
9. Once an enforcement notice has been issued, the BBFC has available a number of powers:
  - to give notice to any payment-services provider that the BBFC considers that a person is contravening section 14(1) and/or is making extreme pornographic material available on the internet to persons in the UK (section 21)
  - to give notice to any ancillary services provider that the BBFC considers that a person is contravening section 14(1) and/or is making extreme pornographic material available on the internet to persons in the UK (section 21)
  - to give notice to an internet service provider that the BBFC considers that a person is contravening section 14(1) and/or is making extreme pornographic material available on the internet to persons in the UK and require the internet service provider to take further steps as may be specified in order to prevent access to the offending material by persons in the UK (section 23)
  - to institute civil proceedings against a person to whom an enforcement notice has been issued (section 19(11))
10. Before beginning notification action under section 21 and/or section 23, the BBFC will, on a case-by-case basis, determine which notification action or actions to take. When making a determination, the BBFC will be guided by its assessment of which course of action will be most effective in achieving the child protection goals of the legislation, and will consider whether a notice to payment-services providers and/or ancillary



service providers and/or internet service providers will have an effect on the non-compliant person's behaviour.

11. When deciding the most effective course of enforcement action, and therefore which notice or notices to issue, the BBFC may, among other considerations, assess whether non-compliant pornographic services have:

- content or services that require payment
- links to the non-compliant service on platforms such as social media
- advertising on or by the pornographic service
- a presence on search engine results
- significant visitor numbers in the UK

12. The BBFC will take a case-by-case approach, and will also consider what enforcement action has proven to encourage compliance in previous cases of non-compliance.

13. If a non-compliant pornographic service becomes compliant by securing that the material is not normally accessible to those under 18 and/or by removing extreme pornographic material, then all enforcement action will cease and any notices will be withdrawn.

14. The BBFC will inform any recipient of a notice under section 21 that the relevant pornographic service has become compliant so that the relevant ancillary services provider or payment-services provider will be aware that there is no longer a request to withdraw services.

15. The BBFC will inform any recipient of a notice under section 23 that the relevant pornographic service has become compliant so that the relevant ISP will be aware that they are no longer required to prevent access to the service by persons in the UK.

16. The BBFC will publish on its website details of notification action taken and the outcome of any appeals. All interested parties should regularly refer to the BBFC's website to keep up to date on action taken.

### 3. Classes of Ancillary Service Provider

1. There is 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) of the Act:

*'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.'*

2. As stated in chapter 5 of the Secretary of State's Guidance to the Regulator, such a service is not limited to where a direct financial relationship is in place between the ancillary service provider and the provider of commercial online pornography.
3. The following are classes of ancillary service provider that the BBFC may consider under section 21(5). This is not an exhaustive list.
  - a. online platforms, including social media, on which a non-compliant person has a presence
  - b. search engines which facilitate access to non-compliant services
  - c. providers of IT services to a non-compliant person
  - d. third parties who provide advertising space to the non-compliant person
  - e. third parties who provide advertising space on a website, app or other service belonging to a non-complaint person
  - f. 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
4. It is not possible to provide an exhaustive list of the various ancillary service providers that the BBFC may consider under section 25. Individual cases may give rise to new

classes of ancillary service provider. However, the BBFC will seek to inform ancillary service providers that they are being considered under the Digital Economy Act and wherever possible, agree on notification arrangements. All ancillary service providers will be subject to the same notification process.

5. When the BBFC notifies an ancillary service provider under section 21(1), that notice will:
  - identify the non-complying person
  - state whether the non-complying person is contravening section 14(1) or is making extreme pornographic material available or both
  - provide any further information as appropriate
6. In a notice under section 21, the BBFC will request that ancillary service providers withdraw their services to non-compliant persons.
7. When the BBFC notifies an ancillary service provider under section 21, it will also inform the non-complying person that it has done so under section 21(3).
8. The BBFC will inform any recipient of a notice under section 21 that the relevant pornographic service has become compliant so that the relevant ancillary services provider or payment-services provider will be aware that there is no longer a request to withdraw services.
9. The BBFC will consider representations made by an ancillary service provider where they state they have been incorrectly notified. The BBFC will withdraw notification if an ancillary service provider is able to demonstrate, to the satisfaction of the BBFC, that a notification is incorrect.
10. The BBFC will publish on its website details of notification action taken and the outcome of any appeals. All interested parties should regularly refer to the BBFC's website to keep up to date on action taken.

## Annex 1 – Definition of Pornographic Material

Section 15 of the **Digital Economy Act 2017** states that:

(1) In this Part “pornographic material” (except in the expression “extreme pornographic material”) means any of the following—

(a) a video work in respect of which the video works authority has issued an R18 certificate;

(b) material that was included in a video work to which paragraph (a) applies, if it is reasonable to assume from its nature that its inclusion was among the reasons why the certificate was an R18 certificate;

(c) any other material if it is reasonable to assume from its nature that any classification certificate issued in respect of a video work including it would be an R18 certificate;

(d) a video work in respect of which the video works authority has issued an 18 certificate, and that it is reasonable to assume from its nature was produced solely or principally for the purposes of sexual arousal;

(e) material that was included in a video work to which paragraph (d) applies, if it is reasonable to assume from the nature of the material—

(i) that it was produced solely or principally for the purposes of sexual arousal, and

(ii) that its inclusion was among the reasons why the certificate was an 18 certificate;

(f) any other material if it is reasonable to assume from its nature—

(i) that it was produced solely or principally for the purposes of sexual arousal, and

(ii) that any classification certificate issued in respect of a video work including it would be an 18 certificate;

(g) a video work that the video works authority has determined not to be suitable for a classification certificate to be issued in respect of it, if—

(i) it includes material (other than extreme pornographic material) that it is reasonable to assume from its nature was produced solely or principally for the purposes of sexual arousal, and

(ii) it is reasonable to assume from the nature of that material that its inclusion was among the reasons why the video works authority made that determination;

(h) material (other than extreme pornographic material) that was included in a video work that the video works authority has determined not to be suitable for a classification certificate to be issued in respect of it, if it is reasonable to assume from the nature of the material—

(i) that it was produced solely or principally for the purposes of sexual arousal, and

(ii) that its inclusion was among the reasons why the video works authority made that determination;

(i) any other material (other than extreme pornographic material) if it is reasonable to assume from the nature of the material—

(i) that it was produced solely or principally for the purposes of sexual arousal, and

(ii) that the video works authority would determine that a video work including it was not suitable for a classification certificate to be issued in respect of it.

(2) In this section—

“18 certificate” means a classification certificate which—

(a) contains, pursuant to section 7(2)(b) of the Video Recordings Act 1984, 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 that 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 Video Recordings Act 1984 (see section 7 of that Act);

“material” means—

(a) a series of visual images shown as a moving picture, with or without sound;

(b) a still image or series of still images, with or without sound; or

(c) sound;

“R18 certificate” means a classification certificate which contains the statement mentioned in section 7(2)(c) of the Video Recordings Act 1984 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 Video Recordings Act 1984 as the authority responsible for making arrangements in respect of video works other than video games;

“video work” means a video work within the meaning of the Video Recordings Act 1984, other than a video game within the meaning of that Act.

## Annex 2 – The Draft Online Pornography (Commercial Basis) Regulations 2017

The Draft Online Pornography (Commercial Basis) Regulations 2017 can be found at the following link:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/600735/Draft\\_Online\\_Pornography\\_Commercial\\_Basis\\_Regulations\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/600735/Draft_Online_Pornography_Commercial_Basis_Regulations_2017.pdf)

## Annex 3 – Definition of Extreme Pornographic Material

Section 22 of the **Digital Economy Act 2017** states that:

- (1) In this Part “extreme pornographic material” means (subject to subsection (3)) material—
  - (a) whose nature is such that it is reasonable to assume that it was produced solely or principally for the purposes of sexual arousal, and
  - (b) which is extreme.
- (2) For the purposes of subsection (1)(b), material is extreme if—
  - (a) its content is as described in section 63(7) or (7A) of the Criminal Justice and Immigration Act 2008, and
  - (b) it is grossly offensive, disgusting or otherwise of an obscene character.
- (3) Material to which paragraphs (a) and (b) of subsection (1) apply is not “extreme pornographic material” if it is or was included in a classified video work, unless it is material to which subsection (4) applies.
- (4) This subsection applies to material—
  - (a) which has been extracted from a classified video work, and
  - (b) whose nature is such that it is reasonable to assume that it was extracted (with or without other material) solely or principally for the purposes of sexual arousal.
- (5) In this section—
  - (a) “classified video work” means a video work in respect of which a video works authority has issued a classification certificate;
  - (b) “video work” means a video work within the meaning of the Video Recordings Act 1984;
  - (c) “video works authority” means a person designated under section 4(1) of the Video Recordings Act 1984;
  - (d) “classification certificate” has the same meaning as in the Video Recordings Act 1984 (see section 7 of that Act);
  - (e) “material” means—
    - (i) a still image or series of still images, with or without sound; or
    - (ii) a series of visual images shown as a moving picture, with or without sound.



Section 63 of the **Criminal Justice and Immigration Act (2008)** states that:

(7)An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following—

- (a) an act which threatens a person's life,
- (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
- (c) an act which involves sexual interference with a human corpse, or
- (d) a person performing an act of intercourse or oral sex with an animal (whether dead or alive),

and a reasonable person looking at the image would think that any such person or animal was real.

(7A)An image falls within this subsection if it portrays, in an explicit and realistic way, either of the following—

- (a) an act which involves the non-consensual penetration of a person's vagina, anus or mouth by another with the other person's penis, or
- (b) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else,

and a reasonable person looking at the image would think that the persons were real.