

Consultation Response: ‘Specially restricted material’ and Age Verification Guidance for Providers of On-Demand Programme Services

Portland TV welcomes this opportunity to respond to Ofcom on its proposed changes to the ODPS age verification guidance, though many of our concerns about the lack of parity in the regulation of adult audiovisual media services, which often disadvantage UK-based providers, have already been articulated in our consultation responses to DCMS and BBFC during the passage of the Digital Economy Act and also in our Joint Letter to Ofcom dated 10 May 2018.

Question 1: Do you agree with our proposal to revise the Guidance for Rule 11 to state that we will have regard to any BBFC Guidance on the definition of ‘pornographic material’ when assessing whether ODPS material falls within the definition of ‘specially restricted material’? No

Maintaining two separate definitions for essentially the same content seems illogical given that the purpose of the Digital Economy Act’s amendment to the Communications Act at Section 94 is to align two pieces of legislation, and that Ofcom’s stated aim in consulting is to promote consistency and provide clarity for industry and consumers.

The function of the Audiovisual Media Services Regulations 2014 in defining ‘specially restricted material’ was principally to remove uncertainty and ensure that hardcore adult content or BBFC R18-classified content, or equivalent, was captured under the definition of ‘material which might seriously impair’ minors as derived from the Audiovisual Media Services Directive 2010. While the definition includes *other material* that might seriously impair the physical, mental or moral development of persons under the age of 18, it is our view the AVMS Regulations have only been applied to date to ‘pornographic’ material.

Maintaining separate standards which have misaligned upper limits or ‘ceilings’ in terms of content strength due to divergent definitions of what is prohibited (i.e. anything which would be refused BBFC classification in the case of the ODPS Rules and ‘extreme pornographic material’ in the case of Digital Economy Act) breeds confusion for merchants and consumers alike.

On this basis, the most sensible approach - rather than redefining ‘specially restricted material’ and having regard to the BBFC Guidance on the definition of ‘pornographic material’ - would be to repeal the AVMS Regulations 2014, and reference the new, broader definition of ‘pornographic material’ laid down in the Digital Economy Act. This would ensure adherence to one common content standard for all material requiring age verification whether offered by an ODPS or other online provider.

Question 2: Do you agree with our proposal to amend our Rule 11 Guidance to replicate the BBFC’s AV Guidance and explain that our assessment of AV solutions will be considered with reference to the BBFC’s published list of assessed AV solutions? No

The BBFC’s Guidance on age verification raises the bar in terms of robustness of approach. While adopting a gold standard is commendable, compliant ODPS will be required to vary their approaches to AV and cease to use effective tools such as electoral roll look-ups and credit data searches which

have adequately protected countless children since mandatory age verification was introduced under ATVOD in 2010. Misappropriation of an individual's personal information, whether reasonably known, readily obtained or predicted, nevertheless amounts to identity theft.

Opting not to build on existing industry good practice seems counterintuitive, not least because the BBFC is basing its approach on a set of as yet unpublished audit or certification protocols in respect of age verification, privacy and security which may ultimately disrupt a merchant's ability to age verify customers in low-friction, low cost environment. Greater detail is required on the specifics of the BBFC's assessment criteria before we can take a clear view on the extent to which this approach may unnecessarily complicate and significantly drive up the cost of age verification.

Question 3: Do you have any other comments regarding our proposed amendments to the Rule 11 guidance?

The current approach to adult audiovisual media services regulation in the UK has become a 'standards lottery' governed by an increasing multiplicity of divergent codes and regulators depending on whether a video work is supplied as a physical recording, via linear broadcast, as a premium rate telephony service, on an on-demand basis or as an online commercial service.

This goes against DCMS's stated goal of creating a 'common framework for media standards' and is contrary to the outcome of the European Commission's review of the Audiovisual Media Services Directive which has concluded that there is a need for alignment in the regulation of linear broadcast and video on-demand services.

In the interests of child protection, consumer confidence and transparency for parents, there is an urgent need for legislative parity, supported by a common regulatory framework.

In the short term, Ofcom and BBFC as joint AV regulators need to promote consumers awareness that different platforms may offer different levels of protection. Similarly, it is key that industry understands that the Digital Economy Act does not supersede Ofcom's Rules & Guidance for UK-based ODPS and that merchants cannot choose by whom and under which regulatory framework they are regulated.

For compliant UK-based ODPS that have been dogged by mandatory age verification since 2010, enforcement under Section 3 of the Digital Economy Act, which will finally curtail the activities of overseas providers, cannot come soon enough, as this will go some way towards levelling the playing field and promoting fairer competition in the marketplace.

Question 4: Do you agree with our assessment of the impact of our proposals on the relevant equality groups? If not, please explain why you do not agree.

Yes