House of Lords
House of Commons

Joint Committee on Statutory Instruments

Thirty-ninth Report of Session 2017–19

Drawing special attention to:

Draft Guidance on Age Verification Arrangements

Draft Guidance on Ancillary Service Providers

Social Security (Updating of EU References) Amendment) Regulations 2018 **(S.I. 2018/1084)**

Chemical Weapons (Asset-Freezing) and Miscellaneous Amendments Regulations 2018 **(S.I. 2018/1090)**

Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) (Amendment) (EU Exit) Regulations 2018 **(S.I. 2018/1093)**

Special Fissile Materials (Right of Use and Consumption) (EU Exit) Regulations 2018 **(S.I. 2018/1094)**

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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 73, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

i that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;

ii that its parent legislation says that it cannot be challenged in the courts;

iii that it appears to have retrospective effect without the express authority of the parent legislation;

iv that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;

v that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;

vi that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;

vii that its form or meaning needs to be explained;

viii that its drafting appears to be defective;

ix any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are Jeanne Delebarre (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

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Instruments reported

At its meeting on 28 November 2018 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to six of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 Draft Guidance: Reported for unexpected use of powers

Draft Guidance on Age Verification Arrangements; Draft Guidance on Ancillary Service Providers

1.1 **The Committee draws the special attention of both Houses to these two draft instruments on the ground that, if approved and published, they would appear to constitute an unexpected exercise of the duty imposed on the age-verification regulator to publish guidance.**

1.2 Part 3 of the Digital Economy Act 2017 ("the 2017 Act") contains provisions designed to prevent persons under the age of 18 from accessing internet sites which contain pornographic material. An age-verification regulator[1] ("the regulator") is given broad powers to enforce the requirements of Part 3, including the power to impose substantial fines.[2]

1.3 Section 14(1) is a key requirement. It provides:

> "A person contravenes [Part 3 of the 2017 Act] 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".

1.4 Where the regulator considers that section 14(1) is being contravened, it may give notice under section 21(1) to any "ancillary service provider" which is defined in section 21(5) to mean (in broad terms) internet service providers or persons who advertise on the internet sites operated by the non-compliant person.

1.5 Section 25(1) requires the regulator to publish, and revise from time-to-time:

a) guidance about the types of arrangements for making pornographic material available on the internet that the regulator will treat as complying with section 14(1) **("the age-verification guidance"**); and

b) guidance for the purposes of section 21(1) and (5) about the circumstances in which the 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 **("the ancillary services guidance"**).

1 The Secretary of State has designated the British Board of Film Classification to be the age-verification regulator.
2 See sections 19 and 20 of the 2017 Act.

1.6 The regulator must submit its proposed guidance to the Secretary of State, who is then required to lay it in draft before both Houses of Parliament.[3] The Secretary of State has no power to modify the age-verification guidance, but he may make modifications to the ancillary services guidance before it is laid in draft.

1.7 These two draft instruments are the first age-verification guidance and the first ancillary services guidance laid under section 25 of the 2017 Act.[4]

1.8 The Committee was surprised to find that the instruments appear to contain little, if any, guidance of the type required by section 25(1)(a) and (b), as well as seemingly irrelevant material about (for example) data protection and the regulator's policy on enforcement of its powers. The Committee therefore asked the Department for Digital, Culture, Media and Sport (i) to identify the paragraphs in the two instruments which provide the guidance required by section 25 of the 2017 Act, and (ii) to explain the inclusion of apparently extraneous material.

1.9 The Department's memoranda in response are printed at Appendices 1 and 2.

Age verification guidance required by section 25(1)(a)

1.10 The memorandum identifies paragraphs 5 and 6 in Part 3 of the age-verification guidance as providing the guidance required by section 25(1)(a). Paragraph 5 sets out "the criteria against which [the regulator] will assess that an age-verification arrangement meets the requirement under section 14(1) to secure that pornographic material is not normally accessible by those under 18". Four such criteria are specified, including "[whether there is] an effective control mechanism at the point of registration or access to pornographic content by the end-user which verifies that the user is aged 18 or over at the point of registration or access".

1.11 Paragraph 6 sets out four features which the regulator will not consider, in isolation, to comply with the section 14(1) requirement, including "relying solely on the user to confirm their age with no cross-checking of information, for example by using a 'tick box' system or requiring the user to only input their date of birth".

1.12 The memorandum goes on to refer to section 27 of the 2017 Act which allows the Secretary of State to give guidance to the regulator about whether arrangements comply with section 14(1) and about the preparation and publication of guidance by the regulator. Section 27(3) requires the regulator to have regard to the Secretary of State's guidance.

1.13 The guidance given by the Secretary of State to the regulator under section 27[5] includes the following paragraph:

> "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

3 See sections 25(3) and (6) of the 2017 Act.

4 The affirmative procedure applies to the first guidance which means that it not be published until it has been approved in draft by each House (see section 25(10) and (11) of the 2017 Act). The negative procedure applies to subsequent guidance: the regulator must publish it 40 days after it is laid unless either House resolved during that period not to approve the draft (see section 25(7) and (8)).

5 While the Secretary of State's guidance must be laid before Parliament, it is not subject to any Parliamentary scrutiny.

> 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."

1.14 The memorandum explains the Department's reasoning:

> "It is important that the [regulator's] guidance does not lock in a set of arrangements which would prevent innovation and development in the fast-moving age-verification industry. This is an area where the regulator needs flexibility and the ability to respond nimbly to advances.
>
> Our view is that the [regulator's] draft guidance on age verification arrangements fulfils the requirements of the Act and shows regard to this guidance from the Secretary of State in respect to these points."

1.15 Section 25(1)(a) requires the regulator to publish guidance about the types of arrangements for making pornographic material available [on the internet] that the regulator will treat as complying with section 14(1). In the Committee's view, the regulator does not comply with that requirement by publishing guidance which simply provides a non-exhaustive[6] list of criteria that will be applied by the regulator in assessing age-verification arrangements. The draft guidance laid before Parliament reads more like a statement of the regulator's policy rather than statutory guidance. It fails to provide clarity to persons operating internet sites as to what arrangements the regulator will regard as compliant with section 14(1), and it does not allow Parliament properly to scrutinise whether the regulator's assessment is appropriate.

1.16 The Department argues that the regulator, through its guidance, should not be locked into a set of arrangements that would prevent innovation and development, and that the regulator needs flexibility to respond to advances. The Committee considers, however, that if the regulator were to find that guidance already published had become out-of-date, it should prepare revised guidance and submit it (via the Secretary of State) for Parliamentary scrutiny under section 25.

1.17 The guidance given to the regulator by the Secretary of State under section 27, which the regulator appears to have followed faithfully, does not fall within the Committee's scrutiny remit. Nonetheless the Committee questions whether the paragraph in that guidance quoted above properly reflects the duty imposed on the regulator by section 25(1)(a). While the regulator must have regard to the Secretary of State's guidance when preparing the age verification guidance, the regulator is not required to follow section 27 guidance which is incorrect.

Age verification guidance: extraneous material

1.18 The Committee questioned the inclusion in the draft guidance of:

- Part 2 which sets out the regulator's proposed approach to the exercise of its enforcement powers under Part 3 of the 2017 Act;

6 Paragraph 4 in Part 3 of the age-verification guidance says "As envisaged in the Secretary of State's guidance to the regulator, this guidance does not provide an exhaustive list of approve age-verification solutions, but sets out the criteria by which the [regulator] will assess that a person has met the requirements of section 14(1) …".

- Part 4 which concerns the protection of the personal data of adults using pornographic sites; and
- paragraph 11 of Part 3 and Annex 5 which refer to a voluntary, non-statutory scheme to be established by the regulator under which age-verification providers may be independently audited by a third party and then certified by the regulator.

1.19 The Department's memorandum explains that Part 2 is included because the regulator considered it important that its guidance "set out the wider context in which it will carry out regulation of this policy". Part 4, paragraph 11 of Part 3 and Annex 5 are justified essentially on the basis that they reflect the guidance given by the Secretary of State to the regulator under section 27 of the 2017 Act.

1.20 In the Committee's view, the inclusion of this material in the age-verification guidance is wholly inappropriate. Section 25(1)(a) requires the regulator to prepare guidance only about the types of arrangements for making pornographic material available on the internet that the regulator will treat as complying with section 14(1). This is then subject to Parliamentary scrutiny before it may be published. It is wrong in principle to invite Parliament to give approval to the regulator's enforcement policy, data protection arrangements or proposed non-statutory certification scheme with a view to bestowing on this material the status of statutory guidance endorsed by Parliament.

Ancillary services guidance

1.21 The Committee considers that the ancillary services guidance is defective for similar reasons.

1.22 The Department identifies paragraphs 3 and 4 of Part 3 as providing the guidance required by section 25(1)(b) of the 2017 Act. Paragraph 3 contains a non-exhaustive list of the classes of ancillary service provider that the regulator may consider under section 21(5), for example search engines which facilitate access to internet sites with inadequate age-verification arrangements. Paragraph 4 of the guidance asserts that it "is not possible to provide an exhaustive list of the various ancillary providers that the [regulator] may consider under section 25. Individual cases may give rise to new classes of ancillary service provider".

1.23 Section 25(1)(b) requires the regulator to publish guidance about the circumstances in which the 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". In the view of the Committee, that requirement is not fulfilled by publishing a non-exhaustive list of classes of provider which the regulator *may* consider to be ancillary service providers.

1.24 The memorandum explains that the regulator's approach is consistent with the guidance issued by the Secretary of State under section 27 of the 2017 Act. However, the Committee is very doubtful whether that section 27 guidance correctly reflects section 25(1)(b).

1.25 The memorandum justifies the inclusion of Part 3 of the guidance, which deals with the regulator's approach to its enforcement powers, on the basis that it provides "essential wider context about how the regulator will use [its] powers". For the same reasons that are

given above regarding extraneous material in the age-verification guidance, the Committee considers it inappropriate to include in the ancillary services guidance information about the regulator's policy on enforcement.

1.26 **The Committee accordingly draws the special attention of both Houses to these two draft instruments on the grounds that they appear to constitute an unexpected exercise of the duty imposed on the age-verification regulator to publish guidance. This is because: (i) they fail to contain the guidance required by section 25(1) of the 2017 Act; and (ii) they contain material that should not have been included.**

2 S.I. 2018/1084: Reported for requiring elucidation

Social Security (Updating of EU References) Amendment) Regulations 2018

2.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in one respect.**

2.2 These Regulations update cross-references to EU legislation in social security legislation in advance of exit day, and make certain references ambulatory (i.e. inclusive of future amendments). The Committee asked the Department for Work and Pensions to explain the purpose of making references to the listed enactments ambulatory, given that retained EU law will not be ambulatory. In a memorandum printed at Appendix 2, the Department explains that "in the event that the Withdrawal Agreement is ratified and there is an implementation period, the ambulatory references will also ensure that any changes to EU law are reflected within the domestic framework without the need for further amendment". It adds that it "has in some instances not updated references to directly applicable EU law in its domestic legislation (although the EU law itself has been applied correctly and references in domestic legislation interpreted to give effect to EU law) and making the references ambulatory will reduce the risk of this happening in future. It will also limit the number of further amending instruments that may be required. The Committee is grateful for this explanation of the approach being taken in this (and presumably other) instruments to preparation both for the application of the concept of retained EU law and for the implementation of any withdrawal agreement; and it **accordingly reports the Regulations as requiring elucidation, provided by the Department's memorandum.**

3 S.I. 2018/1090: Reported for requiring elucidation

Chemical Weapons (Asset-Freezing) and Miscellaneous Amendments Regulations 2018

3.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in one respect.**

3.2 These Regulations make provision relating to the enforcement of Council Regulation (EU) 2018/1542 of 15th October 2018 concerning restrictive measures against the proliferation and use of chemical weapons. The measures include the freezing of funds. Regulation 8 deals with credits to a frozen account; paragraph (3) says: "A relevant institution must inform the Treasury without delay if it credits a frozen account in

accordance with paragraph (1)(b) or (c) or paragraph (2)". The Committee asked HM Treasury to identify the sanction applicable to a contravention of regulation 8(3). In a memorandum printed at Appendix 3, the Department explains that "There is no criminal sanction in relation to this obligation in the relevant S.I. However, there is the availability of a sanction in the Policing and Crime Act 2017, section 146. That section enables the Treasury to impose a monetary penalty in cases where it is satisfied that, on the balance of probability, a person has breached a requirement or prohibition of any 'financial sanctions legislation'. This statutory instrument falls within the meaning of that term in section 143(4)(b)." The Committee agrees that this provides an appropriate enforcement mechanism and **accordingly reports Regulation 8 for requiring elucidation, provided by the Department's memorandum.**

4 S.I. 2018/1093: Reported for defective drafting

Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) (Amendment) (EU Exit) Regulations 2018

4.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in one (repeated) respect.**

4.2 These Regulations are made in exercise of the powers conferred by section 8(1) of the European Union (Withdrawal) Act 2018; they amend the Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) Regulations 2003 and the Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) Regulations (Northern Ireland) 2003. The Regulations make changes to reflect the fact that the United Kingdom will not be a member State of the EU.

4.3 In paragraph 2(2)(b) of each Schedule the Regulations provide a definition including the expression "body or person". The Committee asked the Department for Business, Energy and Industrial Strategy what that expression achieves that would not be achieved by "person" alone. In a memorandum printed at Appendix 4, the Department: "acknowledges there is an overlap between "body" and "person"" but asserts that ""body" is not a complete subset of "person""; it adds that "there are numerous instances in the statute book of "person" and "body" being used as alternatives" and gives examples, including the assertion that "a government department is a "body" but not a "person"".

4.4 The Committee agrees that legislative references to "person or body" have proliferated in recent years and is taking this opportunity to draw attention to the dangers of this practice. The Interpretation Act 1978 provides in Schedule 1 that ""person" includes a body of persons corporate or unincorporated". It is unarguable that this includes government departments (which indeed do not have legal personality, but if they are caught by the word "body" must be unincorporated bodies of persons and therefore within the definition of "person") as well as everything else that the Department wants to include. The Committee is concerned that while some legislation uses "person" alone and presumably relies on the 1978 Act, other legislation chooses to use both words, which is unnecessary (and therefore confusing) and casts doubt on the scope of references elsewhere to "person" alone. The Committee therefore invites the Government to consider on a Government-wide basis its practice in relation to reliance on the Interpretation Act 1978's definition of "person",

and to publish and apply a consistent practice throughout all legislation. In the meantime, the Committee believes that the expression "body or person" here is unnecessary, and it **accordingly reports Schedules 1 and 2 on the grounds of defective drafting.**

5 S.I. 2018/1094: Reported for requiring elucidation

Special Fissile Materials (Right of Use and Consumption) (EU Exit) Regulations 2018

5.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in one respect.**

5.2 These Regulations are made under section 8(1) of the European Union (Withdrawal) Act 2018. Article 87 of the Euratom Treaty confers an unlimited right of use and consumption over special fissile materials (plutonium and enriched uranium) owned collectively by the Euratom Community in accordance with Article 86 of the Treaty on the lawful holders of those materials, subject to obligations to comply with Treaty provisions. Regulation 2 ends any right, and any obligation associated with any right, under Article 87 of the Treaty which would otherwise be preserved under the 2018 Act, as the collective ownership of special fissile materials under Article 86 will cease to be effective on the date the UK withdraws from the Treaty and the related right of use and consumption under Article 87 will become redundant. Regulation 2 says: "any rights, powers, liabilities, obligations, restrictions, remedies and procedures which—(a) continue by virtue of section 4(1) of the European Union (Withdrawal) Act 2018; and (b) are derived from Article 87 (right of use and consumption) of the Euratom Treaty, cease to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)".

5.3 The Committee asked the Department for Business, Energy Industrial Strategy: whether the words "and to be enforced" in regulation 2 are intended to prevent the enforcement after exit day of rights and liabilities accrued and incurred before that day; whether it is assumed that section 16 of the Interpretation Act 1978 (which preserves accrued rights and liabilities, and allows them to be enforced, on and after repeal or expiry of enactments) applies in this situation; and if it does, whether the words "and to be enforced" are intended as a contra-indication of that section.

5.4 In a memorandum printed at Appendix 5, the Department confirms that the words "and to be enforced" in regulation 2 are indeed intended to prevent the enforcement after exit day of rights and liabilities, even if accrued and incurred before that day", and asserts that section 16(1)(c) of the Interpretation Act 1978 does not apply.

5.5 The Committee notes the Department's assumptions as to the effect of disapplying the 2018 Act's post-Brexit continuation effect in relation to a specific piece of retained EU law, believes that it will be helpful for readers of legislation to see those assumptions, and hopes that the Government will adopt a consistent approach in this respect across all instruments under the 2018 Act. **The Committee accordingly reports regulation 2 as requiring elucidation, provided by the Department's memorandum.**

Instruments not reported

At its meeting on 28 November 2018 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft instruments requiring affirmative approval

Draft S.I.	Humane Trapping Standards Regulations 2019
Draft S.I.	Capital Requirements (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Gaming Machine (Miscellaneous Amendments and Revocation) Regulations 2018
Draft S.I.	Human Fertilisation and Embryology (Parental Orders) Regulations 2018
Draft S.I.	Blood Safety and Quality (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Human Fertilisation and Embryology (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Human Tissue (Quality and Safety for Human Application) (Amendment) (EU Exit) Regulations 2019
Draft S.I.	Quality and Safety of Organs Intended for Transplantation (Amendment) (EU Exit) Regulations 2019

Instruments subject to annulment

S.I. 2018/1128	Local Government (Boundary Changes) Regulations 2018
S.I. 2018/1134	National Health Service (General Medical Services Contracts) (Prescription of Drugs etc.) (Amendment) Regulations 2018
S.I. 2018/1136	Plant Health (England) (Amendment) (No. 5) Order 2018
S.I. 2018/1151	Greater London Authority (Consolidated Council Tax Requirement Procedure) Regulations 2018
S.I. 2018/1153	Geo-Blocking (Enforcement) Regulations 2018
S.I. 2018/1164	Carcase Classification and Price Reporting (England) Regulations 2018
S.I. 2018/1165	Rail Passengers' Rights and Obligations (Amendment) (EU Exit) Regulations 2018

Instruments subject to annulment (Northern Ireland)

S.R. 2018/187 Universal Credit and Jobseeker's Allowance (Miscellaneous Amendments) Regulations (Northern Ireland) 2018

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2018/1150 Income Tax (Indexation) Order 2018

S.I. 2018/1157 Trade Marks (Isle of Man) (Amendment) Order 2018

Appendix 1

Draft Guidance

Guidance on Age Verification Arrangements

1. The Committee has asked the Department for Digital, Culture, Media and Sport ("the Department") for a memorandum on the following points:

> *i) "Indicate the paragraphs in the document which provide the guidance that the age-verification regulator is required to publish under section 25(1)(a) of the Digital Economy Act 2017."*
>
> *ii) "2. Explain why the document includes—*
> *(a) the Parts headed*
> *"2. The BBFC's Approach and Powers under Part 3 of the DEA", and*
> *"4. Data Protection and the Information Commissioner's Office", and*
> *(b) paragraph 11 of Part 3 and Annex 5;*
> *and how they meet the requirements of section 25(1)(a) of the Digital Economy Act 2017."*

2. The Department's response to the Committee's query is set out below.

3. In response to the first point, as the Committee will be aware, section 25(1)(a) states 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) of the Digital Economy Act. The Secretary of State does not have the power to modify or approve this guidance.

4. That guidance is in Part 3, paragraphs 5 and 6 of the draft guidance.

5. In paragraph 5, the BBFC have set out the criteria on age-verification arrangements which they will treat as complying with Section 14(1) of the DEA:

> *"A) An effective control mechanism at the point of registration or access to pornographic content by the end-user which verifies that the user is aged 18 or over at the point of registration or access.*
>
> *B) Use of age-verification data that cannot be reasonably known by another person, without theft of fraudulent use of data or identification documents nor readily obtained or predicted by another person.*
>
> *C) A requirement that either a user age-verify each visit or access is restricted by controls, manual or electronic, such as, but not limited to, password or personal identification numbers. A consumer must be logged out by default unless the positively opt-in for their log in information to be remembered.*
>
> *D) The inclusion of measures which authenticate age-verification data and measures which are effective at preventing use by non-human operators including algorithms."*

6. The guidance then goes on, in paragraph 6, to give examples of features, which in isolation, do not comply with the section 14(1) requirement. They include:

> *"A) Relying solely on the user to confirm their age with no cross-checking of information, for example by using a 'tick box' system or requiring the user to only input their date of birth.*
>
> *B) Using a general disclaimer such as 'anyone using this website will be deemed to be over 18'*
>
> *C) Accepting age-verification through the use of online payment methods which may not require a user to be over 18. (For example, the BBFC will not regard confirmation of ownership of a Debit, Solo or Electron card or any other card where the card holder is not required to be 18 or over to be verification that a user of a service is aged 18 or over.)*
>
> *D) Checking against publicly available or otherwise easily known information such as name, address and date of birth."*

7. The Secretary of State produced Guidance to the AV Regulator which was laid before Parliament and Section 27(3) of the DEA states that 'the regulator must have regard to the guidance'. A draft of this Guidance was made available during the passage of the Digital Economy Bill.

8. Paragraph 3.3 of the Guidance from the Secretary of State to the AV Regulator states that:

> *"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."*

9. It is important that the BBFC guidance does not lock in a set of arrangements which would prevent innovation and development in the fast moving age-verification industry. This is an area where the regulator needs flexibility and the ability to respond nimbly to advances.

10. Our view is that the BBFC's draft Guidance on age verification arrangements fulfils the requirements of the Act and shows regard to this Guidance from the Secretary of State in respect to these points.

11. In response to your second query, the guidance includes the section on the "BBFC's Approach and Powers under Part 3 of the Digital Economy Act" as the regulator considered that it was important that their guidance set out the wider context in which they will carry out regulation of this policy. As such, the inclusion of the introduction and the material in Section 2 strengthens the guidance.

12. The guidance on age verification arrangements also includes the section on "Data Protection and the Information Commissioner's Office" as this addresses paragraph 3.7 of the Guidance from the Secretary of State to the AV Regulator which states that:

> *With regards to privacy, the age-verification regulator's guidance should include:*
>
> - *Information about the ICO's role and the actions the ICO will take to ensure organisations meet their information rights obligations;*
> - *The expectation that age-verification services and online pornography providers should take a privacy by design approach as recommended by the ICO;*
> - *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.*
> - *The requirements to which age-verification services and online pornography providers will have regard under data protection legislation.*

13. It is crucial that users are able to verify their age in a way that protects their privacy. Our view is that the BBFC's draft Guidance on age verification arrangements shows regard to this Guidance from the Secretary of State in respect to these points.

14. Finally, paragraph 11 of Part 3 and Annex 5 refer to the Voluntary Certification Scheme which will test providers of age verification solutions against an even higher standard than that offered by the GDPR. This scheme will ensure that consumers are able to choose age verification solutions with the most robust data protection conditions. These aspects were included further to 3.7 of the Guidance from the Secretary of State on the privacy considerations.

Department for Digital, Culture, Media & Sport

20 November 2018

Appendix 2

Draft Guidance

Guidance on Ancillary Service Providers

1. The Committee has asked the Department for Digital, Culture, Media and Sport for a memorandum on the following points:

> *i) "Indicate the paragraphs in the document which provide the guidance that the age-verification regulator is required to publish under section 25(1)(b) of the Digital Economy Act 2017."*
>
> *ii) "Explain why the document includes the Part headed—*
>
> *'2. The BBFC's Approach and Powers under Part 3 of the DEA'; and how it meets the requirements of section 25(1)(b) of the Digital Economy 2017."*

2. The Department's response to the Committee's query is set out below.

3. In response to the first point, as the Committee will be aware, section 25(1)(b) puts a duty on the regulator to publish guidance on 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. To note - the Secretary of State has the power to modify and approve the Ancillary Service Providers Guidance.

4. Part 3, paragraphs 3 and 4 of the draft guidance address this point. Paragraph 3 contains a non-exhaustive list of classes of providers which the BBFC may consider as within scope under S25(1)(b):

> *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-compliant person.*
>
> *f) Third parties advertising on or via any internet site operated by the noncompliant person or via any other means of accessing the internet operated by the non-compliant person.*

5. In order to ensure that this policy remains flexible to future developments, it is necessary that this is a non-exhaustive list. Where new classes of ancillary services appear in the future, Part 3, paragraph 4 of the BBFC's Guidance explains the process by which these services will be informed.

6. This is consistent with the guidance issued by Secretary of State[7] to the AV Regulator (under section 27 of the DEA) which was laid before Parliament in January 2018. Section 27(3) of the DEA states that 'the regulator must have regard to the guidance' and this Guidance was made available during the passage of the Digital Economy Bill.

7. Paragraphs 5.9-5.10 of the Guidance from the Secretary of State to the AV Regulator states that:

> *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.*

8. In response to your second query, the guidance includes the section on the "BBFC's Approach and Powers under Part 3 of the Digital Economy Act" provides essential wider context about how the Regulator will use their powers.

Department for Digital, Culture, Media & Sport

20 November 2018

7 https://assets.publishing.service.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

Appendix 3

S.I. 2018/1084

Social Security (Updating of EU References) Amendment) Regulations 2018

1. In its letter to the Department of 14 November 2018, the Committee requested a memorandum on the following point:

> *Explain the purpose of making references to the listed enactments ambulatory given that retained EU law will not be ambulatory.*

2. The Department's response to the Committee's point is set out below.

3. The Department is taking this opportunity to ensure that domestic legislation refers to the most recent versions of directly applicable EU legislation before exit day. In the event that the Withdrawal Agreement is ratified and there is an implementation period, the ambulatory references will also ensure that any changes to EU law are reflected within the domestic framework without the need for further amendment. The Department has in some instances not updated references to directly applicable EU law in its domestic legislation (although the EU law itself has been applied correctly and references in domestic legislation interpreted to give effect to EU law) and making the references ambulatory will reduce the risk of this happening in future. It will also limit the number of further amending instruments that may be required.

4. The Social Security (Updating of EU References) (Amendment) (Northern Ireland) Regulations 2018 (S.I. 2018/1085) make similar amendments to social security legislation in Northern Ireland for the same reasons.

Department for Work and Pensions

20 November 2018

Appendix 4

S.I. 2018/1090

Chemical Weapons (Asset-Freezing) and Miscellaneous Amendments Regulations 2018

1. The Committee asks:

> *What sanction is applicable to a contravention of regulation 8(3) and where is this made clear?*

2. There is no criminal sanction in relation to this obligation in the relevant S.I. However, there is the availability of a sanction in the Policing and Crime Act 2017, section 146. That section enables the Treasury to impose a monetary penalty in cases where it is satisfied that, on the balance of probability, a person has breached a requirement or prohibition of any 'financial sanctions legislation'. This statutory instrument falls within the meaning of that term in section 143(4)(b).

3. Regulation 8 is an exception to the prohibition on dealing with frozen funds, breach of which would otherwise be a serious criminal offence. This obligation on relevant institutions to report to the Treasury when it has credited a frozen account helps the Treasury to monitor compliance by institutions with financial sanctions, and the amount of funds that are frozen in the UK. Obligations to report transactions are viewed as an important part of the overall framework of sanctions and monitoring in this field.

HM Treasury

20 November 2018

Appendix 5

S.I. 2018/1093

Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) (Amendment) (EU Exit) Regulations 2018

1. In its letter to the Department of 14 November 2018, the Joint Committee requested a memorandum on the following point in relation to the Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) (Amendment) (EU Exit) Regulations 2018 ("the Regulations"):

> *Explain what "body or person" in paragraph 2(2)(b) of each Schedule achieves that would not be achieved by "person" alone*

2. Paragraph 2(2)(b) of Schedule 1 to the Regulations substitutes the following definition in regulation 2(1) of the Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) Regulations 2003:

> *"non-Great Britain authority" means—*
>
> *(a) a member State; or*
>
> *(b) a body or person in Northern Ireland or in a member State corresponding to a competent authority*

3. "Competent authority" is defined in regulation 2(1) to mean "(a) the Authority[8]; and (b) any Minister, government department, public body of any description or person holding a public office".

4. Whilst the Department acknowledges there is an overlap between "body" and "person" as those terms are used in the definition of "non-Great Britain authority", "body" is not a complete subset of "person". There are numerous instances in the statute book of "person" and "body" being used as alternatives. For example, section 81(2)(d) of the Localism Act 2011 provides that "relevant authority" means inter alia "such other person or body carrying on functions of a public nature as the Secretary of State may specify by regulations". Section 81(3) of that Act makes it clear that a government department may be specified by such regulations; and the Department considers that a government department is a "body" but not a "person".[9]

5. Further, section 2(1) of the Civil Contingencies Act 2004 imposes obligations on "a person or body listed in Part 1, 2 or 2A of Schedule 1" to that Act. Those Parts include references to organisations (to use a neutral term) such as "authority", "council", "board", "trust" and "service". It would not have been necessary to include both "person" and "body" in section 2(1) unless at least one organisation referred to in those Parts were a "body" but not a "person".

6. The use of "person" and "body" as alternatives recognises that there are organisations in the United Kingdom that are "bodies" but not "persons". Given the many different legal

8 The Gas and Electricity Markets Authority: see regulation 2(1).

9 See also the definition of "appropriate person" in section 9(5) of the Human Rights Act 1998.

systems of member States of the European Union, continuing to refer to both "person" and "body" in the definition of "non-Great Britain authority" ensures that any organisation in Northern Ireland or in EU member States corresponding to a competent authority in Great Britain now or in the future that is a "body" but not a "person" will remain a "non-Great Britain authority". Use of "person" alone would mean that such an organisation would not be a "non-Great Britain authority" (unless it could be said to fall within paragraph (a) of the definition). This would not maintain the current position pre-Exit day.

7. The same considerations arise in relation to the use of "body or person" in the definition of "non-Northern Ireland authority" substituted by paragraph 2(2)(b) of Schedule 2 to the Regulations in regulation 2(1) of the Electricity (Guarantees of Origin of Electricity Produced from Renewable Energy Sources) Regulations (Northern Ireland) 2003.

Department for Business, Energy and Industrial Strategy

20 November 2018

Appendix 6

S.I. 2018/1094

Special Fissile Materials (Right of Use and Consumption) (EU Exit) Regulations 2018

1. Please find below explanations in response to your letter to the Department dated 14 November 2018.

a) whether the words "and to be enforced" in regulation 2 are intended to prevent the enforcement after exit day of rights and liabilities accrued and incurred before that day.

2. Yes, the words "and to be enforced" in regulation 2 are intended to prevent the enforcement after exit day of rights and liabilities accrued and incurred before that day.

3. Article 87[10] of the Treaty establishing the European Atomic Energy Community Euratom Treaty ("the Treaty") confers an "unlimited right of use and consumption" over special fissile materials - which under Article 86[11] of the Treaty are owned collectively by the Euratom Community - onto the legal holders of those material. However, Article 87 provides that this right is subject to the holders of the materials complying with the obligations imposed on them by the Treaty. On exit day, the right is retained in domestic law as a result of the European Union (Withdrawal) Act 2018, but the obligations on which the right is contingent cease to apply in the United Kingdom. The intended effect of the words "and to be enforced" is that all and any rights derived from Article 87 (including accrued rights) cease to be enforceable in domestic law on exit day because the conditions under which those rights are available (compliance with the Treaty obligations) no longer apply. Furthermore, the collective ownership of the materials under Article 86, which gives rise to the need to set out in Article 87 the extent of the rights and obligations of the legal holders, also ceases on exit day.

b) whether it is assumed that section 16 of the Interpretation Act 1978 applies in this situation;

4. We assume that this is a reference to section 16(1)(c)[12] of the Interpretation Act 1978. It is not assumed that this applies for the reasons set out below.

5. Article 87 is retained EU law by virtue of section 4(1) of the European Union (Withdrawal) Act 2018 (saving for rights etc. under section 2(1) of the European

10 Article 87 of the Treaty: Member States, persons or undertakings shall have the unlimited right of use and consumption of special fissile materials which have properly come into their possession, subject to the obligations imposed on them by this Treaty, in particular those relating to safeguards, the right of option conferred on the Agency and health and safety.

11 Article 86 of the Treaty: Special fissile materials shall be the property of the Community. The Community's right of ownership shall extend to all special fissile materials which are produced or imported by a Member State, a person or an undertaking and are subject to the safeguards provided for in Chapter 7.

12 Section 16(1)(c) of the Interpretation Act 1978 sets out that the repeal of an enactment does not (unless the contrary intention appears) affect any right privilege, obligation or liability accrued or incurred under that enactment.

Communities Act 1972). The effect of section 4(1)[13] is that rights which were available in domestic law by virtue of the European Communities Act 1972 before exit day continue to be available and enforceable after the United Kingdom has left the European Union and the Treaty. Regulation 2 in this instrument disapplies the savings made by section 4(1) in respect of any rights derived from Article 87 to ensure that those rights cease to be available and enforceable on exit day for the reasons set out above.

c) if it does, whether the words "and to be enforced" are intended as a contra-indication of that section.

6. As explained above it is not assumed that section 16(1)(c) of the Interpretation Act 2016 applies. Accordingly, the words and "to be enforced" are not intended as a contra-indication of that section.

Department for Business, Energy and Industrial Strategy

19 November 2018

13 Section 4 of the EU (Withdrawal) Act 2018:
(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—
(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
(b) are enforced, allowed and followed accordingly, continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).