

Title: R18 Content Access Controls (Communications Review) IA No: DCMS073 Lead department or agency: DCMS Other departments or agencies: Ofcom and ATVOD	Impact Assessment (IA)		
	Date: 23/01/2013		
	Stage: Development/Options		
	Source of intervention: Domestic		
	Type of measure: Primary legislation		
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Summary: Intervention and Options	RPC Opinion: RPC Opinion Status
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
N/A	N/A	N/A	Yes IN

What is the problem under consideration? Why is government intervention necessary?
Distribution of material that is R18 rated by the British Board of Film Classification is restricted in 'hard-copy' such as film, video, and DVD by the Video Recordings Act 1984. UK VOD services are co-regulated by the Authority for Television On Demand (ATVOD) and Ofcom, but the legislation that mandates that VOD services must protect people under 18 from R18 material is unclear because it relies on a demonstration that it 'might seriously impair' those under 18, thereby providing scope for interpretation. This creates regulatory inconsistency and, as VOD becomes more prevalent, the lack of clarity increases the risk of people under 18 being able to access R18 rated content. We think all such content should be behind access controls.

What are the policy objectives and the intended effects?
To clarify the laws and bring VOD regulations for R18 material in line with the regulations for 'hard-copy' material as set out in the Video Recordings Act.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 2 Do nothing: This would continue the regulatory inconsistency that gives less certainty to the protection of under 18s from R18 material online than in hard copy. The potential costs of this inconsistency are likely to rise as VOD services become more prevalent.

Option 1 (Preferred): Amend legislation and apply Video Recordings Act regulations to R18 material on notified VOD services. This would require in law that access to any R18 VOD material are protected by Content Access Control (CAC) systems, creating a clear and consistent regulatory regime.

Will the policy be reviewed? It will be reviewed. **If applicable, set review date:** 04/2018

Does implementation go beyond minimum EU requirements?			Yes		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded: n/a	Non-traded: n/a	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible SELECT SIGNATORY: _____ Date: _____

Summary: Analysis & Evidence

Policy Option 1

Description: VOD R18 Regulation

FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			N/A

Description and scale of key monetised costs by 'main affected groups'

Other key non-monetised costs by 'main affected groups'

At present, the cost to VOD service providers is negligible because the industry tends to put R18 material behind CAC systems. There are also no additional costs on ATVOD and Ofcom because the use of CAC systems is already being enforced.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			N/A

Description and scale of key monetised benefits by 'main affected groups'

Other key non-monetised benefits by 'main affected groups'

The measure clarifies what material must be behind CAC systems, thereby reducing potential litigation risk for service providers and their regulators: ATVOD and Ofcom.

Key assumptions/sensitivities/risks	Discount rate (%)	n/a
Current CAC systems are effective in preventing consumption by people under 18 via VOD. That people under 18 are harmed by R18 material. BBFC rating scheme provides clear guidance to industry.		

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: 0	Yes	Zero net cost
Benefits: 0		
Net: 0		

Background:

VOD, BBFC, ATVOD, Ofcom and CAC

- *Video-on-Demand (VOD)* are services that allow users to select and watch video content when selected (i.e. on demand). Television VOD systems either stream content through a media box or other device allowing viewing in real time or by permitting downloading of content to be viewed later.
- *The British Board of Film Classification (BBFC)* is an independent, self-financing and not-for-profit media content co-regulator. In the context of this impact assessment, it provides regulation relating to the rating classification and labelling (U, PG, R, R18 etc...) for the film, video and DVD industry.
- *The Authority for Television On-Demand (ATVOD)* is an independent co-regulator for the editorial content of UK video on demand services that fall within the statutory definition of On-Demand Programme Services.
- *The Office for Communications (Ofcom)* is an independent regulatory body with responsibility, among others, for ensuring competition and consumer interests in the UK broadcasting, telecommunications and wireless communications sectors.
- *Content Access Control (CAC)* are systems that 1) verifies the user is aged 18 and over and 2) each time the user returns a security control, like a password or PIN number, is used.

Video Recordings Act (VRA)

The Video Recording Act gives the Secretary of State power to choose a designated authority to decide what is considered to be R18 material. Currently the designated authority is the BBFC. Material determined by the BBFC as R18 is only allowed to be shown in specially licensed cinemas, or sold in licensed sex shops. It may not be distributed by post (mail order) and can only be seen by, or sold to, adults.

For the purposes of this IA, 'R18' refers to the classification set by the BBFC. More generally this rating classification refers to sex works containing clear image of real sex, strong fetish material, sexually explicit animated images, or other very strong sexual images.

The Video Recordings Act applies to, for example, videos, film and DVDs. It does not apply to broadcast material (or indeed to VOD services which falls under the Communication Act 2003). The measure proposed will subject material supplied by VOD service providers to Video Recordings Act regulations.

Current content regulation applied to VODs

VOD content is currently regulated by section 368E of the Communication Act 2003 inserted by the Audiovisual Media Services Regulations 2009 and states:

Harmful material

- 1) *An on-demand programme service must not contain any material likely to incite hatred based on race, sex, religion or nationality.*
- 2) *If an on-demand programme service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.*

Current legislation requires VOD service providers to implement systems that prevent access to content that *might seriously impair* the physical, mental or moral development of people under 18.

Legal uncertainty from current legal framework

➤ Uncertainty

Current regulation on R18 equivalent material relies on a causal relationship with impairment/harm. The legal test is whether it 'might seriously impair' those under 18, thereby providing scope for interpretation. For VOD service providers it is not clear what might seriously impair/ harm and therefore determine what content will pass or fail this legal test.

This legal uncertainty is likely to grow as the VOD market grows. Increased competition will tend to increase the market pressure to avoid having content behind CAC systems. As such, there will be more pressure to question what *might* seriously impair. It follows that the present lack of clarity may lead to an increase for potential litigation and potential policy objective failure.

➤ Benefit of Video Recording Act content regulations

The legal structure for films, video and DVDs implemented by Video Recording Act and the BBFC has less legal uncertainty regarding what content must be protected from access by people under 18. The use of secondary regulation via the BBFC allows for greater flexibility regarding content restrictions. By using a rating system to categorise content there is less reliance on the causal impact of impairment/harm of R18 equivalent material.

Problem under consideration:

Distribution of material that is R18 rated by the British Board of Film Classification (please see here for more information <http://www.bbfc.co.uk/what-classification/r18>) is restricted in 'hard-copy' such as film, video, and DVD by the Video Recordings Act 1984. UK VOD services are co-regulated by the Authority for Television On Demand (ATVOD) and Ofcom, but the legislation that mandates that VOD services must protect people under 18 from R18 material is unclear because it relies on a demonstration that it 'might seriously impair' those under 18, thereby providing scope for interpretation. This creates regulatory inconsistency and, as VOD becomes more prevalent, the lack of clarity increases the risk of people under 18 being able to access R18 rated content. We think all such content should be behind access controls

The measure proposed is to apply Video Recordings Act regulation to R18 material on notified VOD services, making it clear that access to any material classified as R18 on VOD should be protected by Content Access Control (CAC) systems.

Rationale for intervention:

Ofcom and ATVOD are enforcing CAC systems to protect children from R18 material on material distributed via VOD services. However, the legal position of the regulators in enforcing CAC systems is uncertain.

The result is regulatory inconsistency and intervention is needed to bring VOD regulation on R18 material in line with regulations set for 'hard copy' content governed by the Video Recordings Act.

Policy objective:

- Align the regulation of VOD with the regulations on material R18 under the Video Recordings Act.
- Protect people under 18 from accessing and consuming R18 content via VOD.
- Ensure consistent regulatory framework despite changing technologies and distribution systems.

Description of options considered (including do nothing):

➤ **Option 2: Do nothing**

This would continue the regulatory inconsistency that gives less certainty to the protection of under 18s from R18 material online than in hard copy. The potential costs of this inconsistency are likely to rise as VOD services become more prevalent.

➤ **Option 1 (preferred): Amend legislation and apply Video Recordings Act regulation to VOD**

Amend legislation and apply Video Recordings Act regulations to R18 material on notified VOD services. This would create a clear and consistent regime for service providers and regulators - requiring access to any R18 VOD material to be protected by Content Access Control (CAC) systems.

Monetised and non-monetised costs and benefits of each option (including administrative burden):

➤ **Option 2: Do Nothing**

The existing legislation would remain the same. Therefore for the purposes of this IA the 'do nothing' sets the baseline for the cost and benefit analysis. Without any change to the current regulatory framework economic circumstances remain the same. As such the overall net present value (NPV) is zero.

➤ **Option 1: Alter legislation and apply VRA regulation to VOD**

Costs

- *Cost to business* – All VOD service providers that offer R18 material would have to adjust to the BBFC rating system and ensure CAC systems prevent access R18 material by people under 18. Since ATVOD and Ofcom already enforce the use of CAC systems, the cost of the proposed measure will be negligible. The most common CAC system currently used is a pin code, which is dependent on adults using it effectively. This weakness may result in a more costly and sophisticated CAC system in the future. CAC may act as a barrier to consumption by adults, preventing revenue from being generated from R18 material. Again, the net cost is negligible as this barrier is already implemented. Due to negligible costs it would not be proportionate to monetise.
- *Administrative burden* - The proposal to require R18 material to be placed behind CAC system is not a major change from the administration of current legislation. It would not impact on ATVOD's costs in relation to investigating breaches as this cost has already been incurred due to ATVOD's current interpretation of the existing legislation.

Benefits

- *Preventing harm from demerit good* – According to literature reviews commissioned by Ofcom (Cumberbatch report 2010 and Helsper report 2005) there is inconclusive evidence that R18 equivalent material causes harm to people under 18. This conclusion is arguably the result of the inability to test the harmful effects because of ethical considerations relating to intentionally exposing people under 18 to R18 material. Nevertheless, it draws into question whether or not R18 material "may seriously impair" as per current legislation. The Government is of the view that there is sufficient expert opinion that R18 content causes harm to people under 18 so CAC systems do prevent the consumption of demerit good. Since CAC systems are already enforced

the likely additional benefits resulting from the measure are negligible and therefore not proportionate to monetise.

- *Reduced regulatory uncertainty* – By implementing an R18 rating system rather than a legal test that relies on what ‘might seriously impair’, greater legal certainty is achieved. Enforcement of CAC system can be conducted in a similar manner as film, video and DVDs (hard-copy). As the adoption of VOD technology grows there is greater certainty for the Ofcom, ATVOD and VOD service providers over what content should and should not be placed behind a CAC system. This reduces the risk of litigation for regulators and service providers. For small businesses that intend to enter the market greater, certainty of what content needs to be placed behind CAC systems would reduce business costs and barriers to entry.

Rationale to justify level of analysis (proportionality):

- CAC systems have already been implemented by current VOD service providers and as such the cost to business by the proposed measure is negligible. Although future systems may be more costly, it would not be proportionate to monetise for the current IA.
- Administrative burden is estimated to remain the same and therefore does not need to be monetised.
- Monetising the benefit for people under 18 not being exposed to R18 material is inherently difficult.
- The benefit of legal certainty could potentially be measured by the occurrence of fines and litigations. Since VOD is a new technology there is insufficient evidence to monetise this benefit.

Risk and assumptions

- *Business moving overseas risk* - Restricting access to R18 material may lead to businesses moving outside of UK’s jurisdiction in order to avoid regulation. This would reduce the benefit of CAC systems. Nevertheless, there is public value in ensuring that there is consistency for regulation across platforms so that UK based VOD firms are compliant with the UK’s views on harmful content.
- *CAC system failure risk* – Depending on the system implemented there is a risk that the CACs fail and people under 18 consume the demerit good and its harmful effects.
- *BBFC rating system* – The proposed measure intends to apply the rating system designated by the Secretary of State, in this case the BBFC on VOD. As such, it is dependent on the effectiveness of the rating system supplied by the BBFC.

Direct costs and benefits to business calculation (OITO)

The proposed measure is an IN with zero net business cost because there is no change in enforcement by ATVOD and Ofcom.

Additional considerations include:

- The cost to business from implementation of the measure is negligible since current VOD service providers have already implemented the required CAC systems.
- Regulatory certainty in terms of the legal framework does not provide an additional cost to new entrants, because the CAC systems are already required. Instead it gives new entrants clarity regarding the legal framework and under what circumstances the regulator will issue fines.

- Increased confidence that material available on VOD does not have the potential to expose people under 18 to R18 material may enhance public confidence and may translate into increased demand for VOD services in general.

Wider Impact

Economic and financial

The policy may lead to increased confidence that material available on VOD does not have the potential to expose people under 18 to R18 material. This public confidence and CAC may incentivise the use of VOD services.

Social

Preventing the exposure of R18 material will support the positive development of people under 18.

Environmental

There are no major environmental impacts expected from the preferred option.

Summary, preferred option and description of implementation plan:

Distribution of material that is R18 rated by the British Board of Film Classification is restricted in 'hard-copy' such as film, video, and DVD by the Video Recordings Act 1984. UK VOD services are co-regulated by the Authority for Television On Demand (ATVOD) and Ofcom, but the legislation that mandates that VOD services must protect people under 18 from R18 material is unclear because it relies on a demonstration that it 'might seriously impair' those under 18, thereby providing scope for interpretation.

This imbalance in regulation leaves legal uncertainty that may result in people under 18 exposed to R18 material due to lack of Content Access Control systems. The measure under consideration entails a legislative change that reduces legal uncertainty. The legislative change is, in part, an expansion of existing legislation applied to similar formats.

According to ATVOD, all VOD services providers currently have a pin code system that restricts access to R18 material. Little to no immediate action would be required by business.

We will amend legislation in Parliament to apply Video Recordings Act regulations to R18 material on notified VOD services. This would prevent possible harm to people under 18 by requiring in law that access to any R18 VOD material are protected by Content Access Control (CAC) systems.