

## Virgin Media response: ‘Specially restricted material’ and Age Verification Guidance for Providers of On-Demand Programme Services

1. Virgin Media welcomes the opportunity to respond to Ofcom’s consultation “‘*Specially restricted material’ and Age Verification Guidance for Providers of On-Demand Programme Services*”. The consultation proposes two significant changes to guidance for Rule 11 of the rules for on-demand programme services (“the ODPS Rules”), underpinned by the extension to the statutory definition of ‘specially restricted material’ introduced in the Digital Economy Act 2017. This includes (1) for Ofcom to have regard to any advice issued by the BBFC on how it will assess whether online adult material falls within the definition of ‘pornographic material’ when assessing if an ODPS constitutes ‘18-equivalent material with a principal purpose of sexual arousal’ and, (2) to harmonise Ofcom’s guidance on age verification with the BBFC’s.
2. Of the 22 Adult ODPS registered providers, Virgin Media is the only Pay TV platform to offer UK customers 18-rated adult content. We do not, however, offer R18 content. Under the current ODPS Rules and Guidance we are not required to age verify our users – we have therefore not invested in this functionality. The extension to the statutory definition of ‘specially restricted material’ to include 18-rated adult content would require us to implement age verification (underpinned by Ofcom’s proposal to align its assessment of what constitutes such content with the BBFC’s Guidance on the definition of ‘pornographic material’). This would represent a significant change to our service and for the experience of > customers who choose to access adult VOD content on the Virgin Media TV platform each month<sup>1</sup>. As such Virgin Media is very concerned about the consequences of the extended definition and does not support the proposed approach. Alongside a number of consumer and market impacts, Virgin Media is concerned about a number of regulatory inconsistencies that these proposed changes would create. We therefore make the following observations.

### Pay TV platforms should be exempt from proposed ODPS Rules and Guidance changes

3. Pay TV platforms should be exempt from the proposed changes to the ODPS Rules and Guidance. The amendments to the Communications Act (2003), which were precipitated by the debate on age verification for commercial pornography websites, were not intended to capture Pay TV. Section 94 as an amendment to Part 6 of the Digital Economy Act (2016) was introduced following lobbying by the Digital Policy Alliance (DPA)<sup>2</sup>, who raised concerns about a potential loophole for non-UK commercial adult websites. In written evidence<sup>3</sup> to the Bill Committee, the DPA identified that there was a risk of adult websites from outside the UK registering as an ODPS with Ofcom. This would have meant that these non-UK companies would have been subject to Ofcom ODPS rules – with a different definition of ‘specially restricted - and as such would not have been subject to the requirements and sanctions of Part 3 of the Act<sup>4</sup>.

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<sup>1</sup> Based on average 2018 viewing activity in year to date.

<sup>2</sup> A significant number of DPA members are from the UK adult on demand industry, their concern was therefore about the potential of a lack of a level playing field in the online environment

<sup>3</sup> DPA written evidence to the Bill Committee for the Digital Economy Bill:

<https://publications.parliament.uk/pa/cm201617/cmpublic/digitaleconomy/memo/DEB46.htm>

<sup>4</sup> Section 14, of Part 3 of the Digital Economy Act specified that “making material available on the internet does not include making the content of an on-demand programme service available on the internet in the course of providing such a service.”

4. While we understand the ‘loophole’ logic behind the DPA’s argument for harmonisation between the on demand regulatory framework and the new BBFC regime for online adult content, a significant unintended consequence has occurred as a result. We do not believe that in accepting an amendment, that Parliament intended to change the way that adult consumers access 18-rated adult content on Pay TV: no comments were made in committee; no parliamentarians spoke out on the floor of the House to support this notion; there was no prior impact assessment undertaken as there had been for other elements of Part 3; and nor did the government’s initial consultation consider such changes<sup>5</sup>. As such we believe Ofcom ought to apply a degree of discretion to the interpretation of the legislation and to exempt PayTV platforms, considering the consumer and market impacts that will follow from adopting a blanket approach.
5. Further, while the aim of the proposed changes to the ODPS Rules and Guidance is to harmonise regimes, a perverse consequence would mean that, if applied, Virgin Media’s adult VOD content would require age verification, whereas the same rules would not apply to linear content broadcast on our platform. Linear broadcast 18-rated adult content would not be defined as ‘specially restricted’ therefore it would not require age verification. This would undoubtedly lead to a confusing experience for customers accessing similar content on the same set top box (STB).
6. Ofcom should be mindful of the current debates regarding content regulation for a range of online harms – a subject of great political interest – and the potential impacts on existing frameworks. In setting a higher bar for the online environment, or changing long-established definitions, policy makers risk undermining current regulatory frameworks and standards.

#### **The risk of harm on Pay TV is negligible**

7. When it comes to Pay TV the current ODPS regime works, so do the controls on our platform. As Ofcom acknowledged in its recent decision to liberalise the pre-watershed rules with mandatory PIN protection<sup>6</sup>, PINs are an effective form of control. It is clear from Ofcom’s recent decision that the regulator is confident in the current application of PINs. Ofcom’s most recent *Media Use and Attitudes* report demonstrates a high knowledge of PINs amongst account holders in Pay TV households, and relatively low knowledge amongst children. STB PINs help to protect children and young people from inappropriate content and secures that they are safeguarded from accessing content that they wouldn’t normally see or hear.
8. Along with providing our customers with technical controls (PINs for our STB) Virgin Media takes a number of measures in the design of our service to safeguard against children and young people inadvertently encountering adult content on our platform, and to empower our customers to make informed decisions about the types of content that is available within the

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<sup>5</sup> DCMS “Child Online Safety, Age Verification for pornography consultation” 2016: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/541366/AV\\_ConsultationDCMS\\_20160216\\_Final\\_4\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/541366/AV_ConsultationDCMS_20160216_Final_4_.pdf)

<sup>6</sup> Ofcom “Statement: Review of the mandatory daytime protection rules in the Ofcom Broadcasting Code” 2018 <https://www.ofcom.org.uk/consultations-and-statements/category-2/mandatory-daytime-protection>

home. When it comes to access to adult content on our set top box – either on demand or linear – Virgin Media:

- a. Places adult channels at the end of the EPG – we provide a parental guidance warning at the top of the section with further information in the ‘help’ section
- b. Provides customers with the ability to ‘lock out’ Adult channels, so they cannot be found when browsing the EPG
- c. Ensures adult content is not easily discoverable. Adult content is not available through search functionality on our STB. It takes a user five steps to get to adult on demand content from the main menu. This means only the determined user will likely locate the content.
- d. Prompts customers with educational warnings before requiring a PIN
- e. Requires payment, meaning that titles appear on customer bills – a clear deterrent for any young person seeking to access the content without their parents’ attention or permission
- f. Allows PIN adult account holder to reset the PIN should they wish. For example if another individual in the household becomes aware of the PIN and the account holder decides they no longer want them to be able to access PIN-protected content

We provide examples of different ways a customer may access Adult content on our STB in Annex A.

9. Each year Virgin Media receives a small number of complaints about children of account holders accessing adult content. We reviewed customer complaints data in the year to date, which showed that we received *[a small number of]* ✕ complaints regarding pay per view and on demand adult content. The majority of these complaints were technical, or related to billing issues. Only nine complaints related to an account holder being billed for their son or daughter accessing the content (note, we do not know the age of these children, therefore they may be aged 18 or over). This is in stark contrast to the evidence presented by the Government’s expert panel, which was tasked to review how children access pornography online. The panel quoted a Nielsen Netview study<sup>7</sup> from 2013 which found that in one month 200,000 children accessed pornography online. As such we contend there is insufficient evidence to suggest a change is required to the rules relating to the level of protection provided on our service for VOD content – the proposed alignment with the BBFC’s age verification guidance is not proportionate to the risk of harm.

### **A consistent approach to changes to ODPS requirements**

10. Should Ofcom disagree with Virgin Media’s assessment of the risk of harm or the intention of Section 94 of the Digital Economy Act set out above, we request that a proportionate approach to the timing of implementation of changes to the ODPS Rules and Guidance and reconsiders the proposed ‘strict harmonisation’ approach to age verification. Pay TV platforms should be given a longer period to comply with the requirements.

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<sup>7</sup> DCMS Expert Panel “Identifying the Routes by which Children View Pornography Online: Implications for Future Policy-makers Seeking to Limit Viewing”  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/500701/Report\\_of\\_DCMS\\_Expert\\_Panel\\_Autumn\\_2015\\_FINAL\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/500701/Report_of_DCMS_Expert_Panel_Autumn_2015_FINAL_.pdf)

11. On direction from the DCMS<sup>8</sup>, we understand the BBFC will give the Adult industry up to three months to comply following the entry into force of Section 3 of the Digital Economy Act (2017). From our discussions with the BBFC as an Internet Service Provider (with a duty to block on notification non-compliant sites), we understand the likelihood is the new regime will come into effect in April 2019. Should Ofcom decide to introduce changes to the ODPS Rules and Guidance to coincide with the timing of the BBFC regime comes into effect, it is likely Virgin Media will be unable to introduce an age verification solution. Assuming Ofcom publishes its decision in the New Year, an April start date would be too short timeline for Virgin Media to implement a proprietary age verification solution on our TV platform.
12. ✂
13. Indeed, in its July 2018 statement “*EPG Accessibility: Improvements for people with visual impairments*” – another requirement from the Digital Economy Act (2017) – Ofcom acknowledged that TV receiver product developments are often subject to global constraints. As such Ofcom took a proportionate approach and determined that only TV receivers beginning development after 27 July 2018 should be subject to the requirements. In practice this means that the four defined accessibility requirements placed on EPGs under Section 93 of the Digital Economy Act (2017) do not have to be implemented on current generation STBs. ✂
14. Further, while it may be attractive for Ofcom to consider coordinating the implementation of changes to the ODPS Rules with the introduction of the BBFC regime to harmonise regimes, we ask that Ofcom notes that the wider adult on demand industry has been engaged in a significant consultative exercise with the BBFC on the design of appropriate age verification guidelines. As the BBFC age verification regime does not apply to Virgin Media as a Pay TV platform, we have not been engaged in this exercise, nor planned for any introduction of age verification functionality. Ofcom should not simply ‘lift and shift’ the BBFC guidance with the expectation that all of the industry is able to comply with the guidelines. The rest of the industry has in effect been given a ‘head start’ on Virgin Media. Further, Ofcom should recognise that the wider adult on-demand industry are web-based platforms and therefore are not subject to the same kinds of development constraints. These online-based platforms can therefore deploy solutions in an agile way.
15. Should Ofcom decide to enforce changes to the ODPS Rules and Guidance for all ODPS providers at the same time that the BBFC online regime comes into effect, Ofcom should be alive to the market impact risks. If we find we are unable to implement a solution for our current platforms, or if a solution is not commercially viable because it either costs too much, or acts as a deterrent to our customers using our adult VOD service, then it is very likely we would have to remove 18-rated adult VOD content from our platform. ✂ Removing Adult Vod content will make us less competitive and reduce consumer choice.
16. Our adult VOD content is popular with a minority of our customer base, ✂. We assume from the skew in our base that this demographic chooses to access pornography through our platform because of a trust they have in the Virgin Media brand. They know the strength of content they will encounter (no risk of R18 material, or extreme pornography), they need not worry about privacy concerns or about the risk of malware, nor does using our TV platform require digital

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<sup>8</sup> DCMS, Press release on 5G capability and age verification, March 2018:

<https://www.gov.uk/government/news/25m-for-5g-projects-on-the-anniversary-of-the-uks-digital-strategy>



literacy. We believe Ofcom ought to undertake an assessment on the potential consumer impact before making such a change.

**Virgin Media**  
**December 2018**

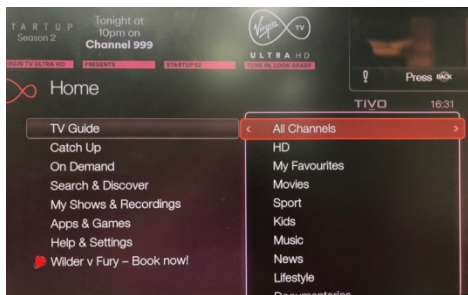
## Annex A: Virgin Media Adult Content – PIN Protected Paths to Purchase

### A. Linear Pay Per Night (PPN) Channels

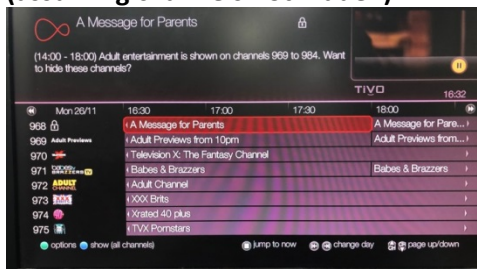
1. Access via EPG – only applicable if the Adult section of EPG is not hidden by the account holder



2. In TV Guide select All Channels



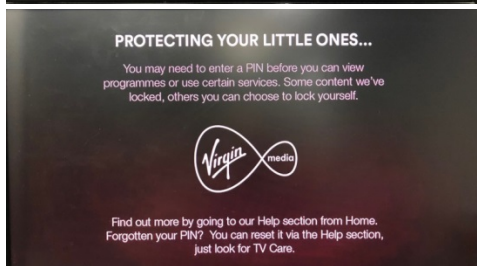
3. Scroll to adult section at foot of EPG (assuming channels not hidden)



4. NOTE: Adult EPG has a buffer channel at top and bottom giving advice on PIN usage/requirements and the ability to hide channels



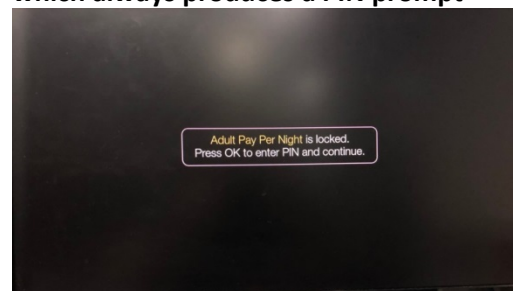
- 5.



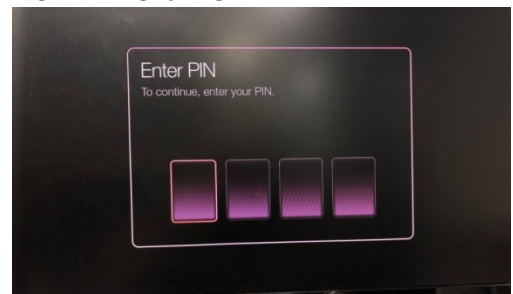
6. Customer selects a PPN Channel and presses Enter



7. Static daytime slates appear with press red for booking instructions which always produces a PIN prompt

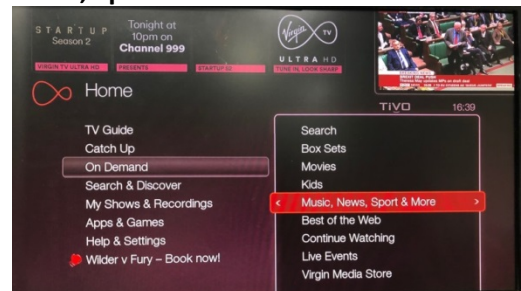


8. PIN must be entered to book and view PPN Channel

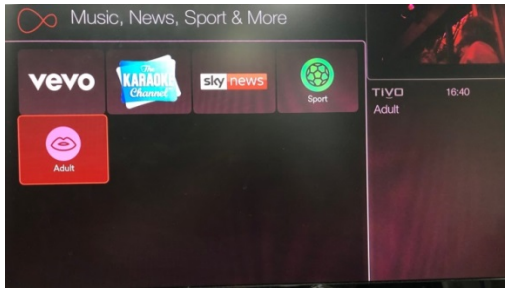


Adult PPN Channels can also be accessed via the Adult section of the On Demand menu

9. Navigating from On Demand > Music, News, Sport & More



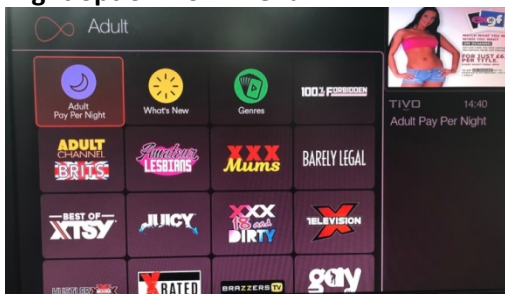
10. Selecting Adult



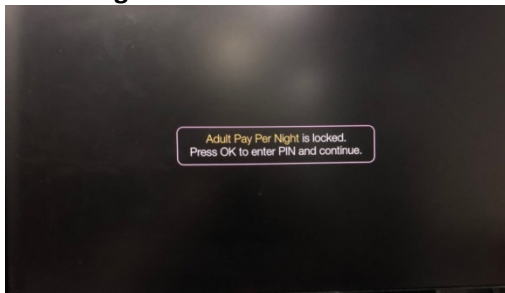
11. To access this area a PIN is required



12. Then customer selects Adult Pay Per Night option from Menu

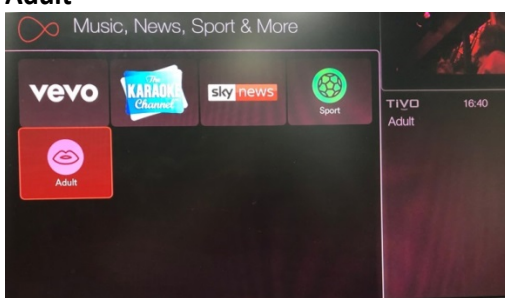


13. A PIN prompt always appears before access is granted

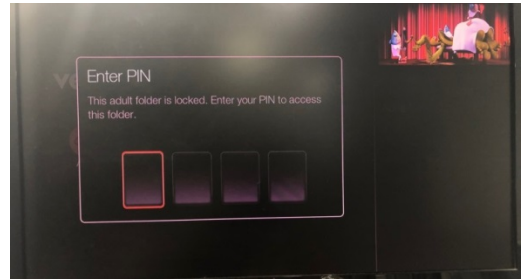


**B. Adult VOD/Pay Per View**

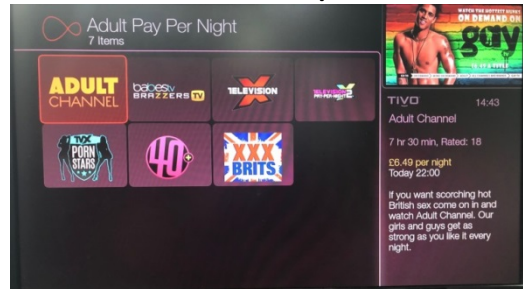
1. Navigating from On Demand > Music, News, Sport & More and selecting Adult



14. Customer enters PIN



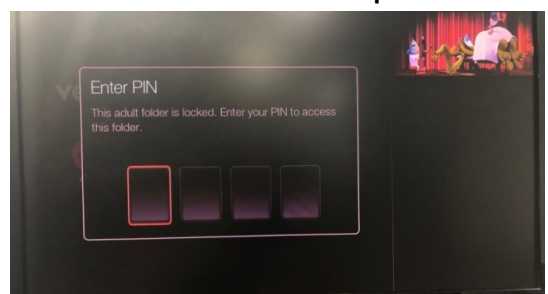
15. Customer selects channel/brand



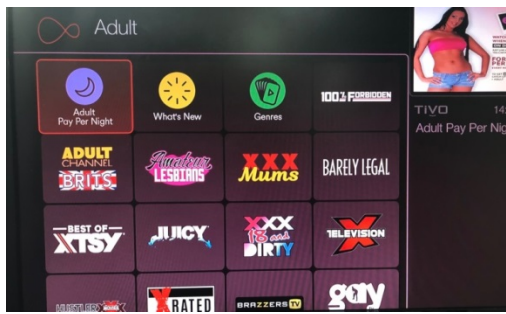
16. Buy prompt and channel info appears then to purchase customer has to enter PIN



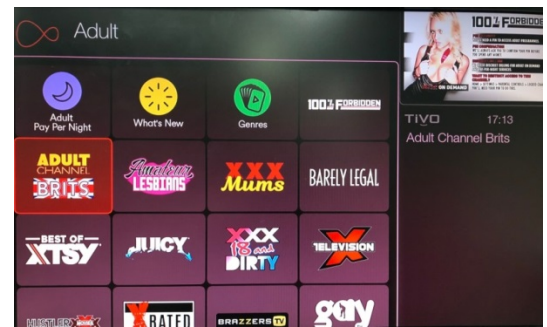
2. To access this area a PIN is required



Then customer selects from brands within the menu

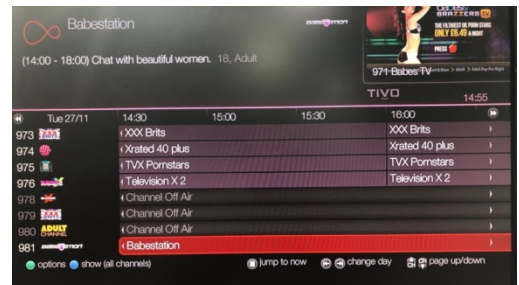
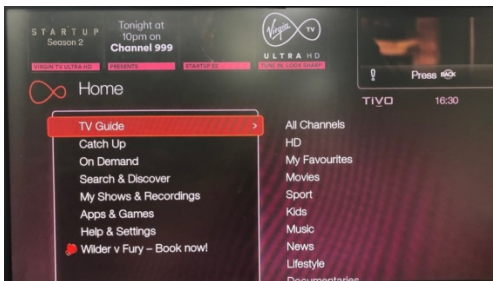


3. Customer selects their content

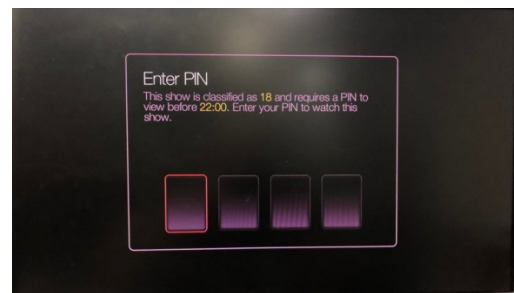
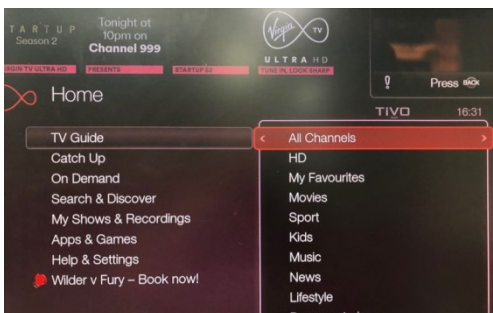


4. The buy screen and programme information appears then customer enters their PIN again to watch the content

**C. Babestation Telephone chat service is on Ch. 981 in the Adult section of the EPG**



1. Selecting channel causes a PIN Prompt. Once entered channel can be viewed



2. Once entered channel can be viewed

