

Reference: 1-257602252



22 May 2014

Alistair Hall  
Information requests  
[information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk)

### **Freedom of Information: Right to know request**

Thank you for your request for information, which we received on 24 April 2014 and have considered under the Freedom of Information Act 2000 ('the Act').

You requested information concerning actions by Ofcom in relation to Cellcast Group (and Babestation and BSX or similar branded services) including:

- All relevant communications with Commissariaat voor de Media (CvDM), the European Commission, the service providers themselves (and other relevant parties such as Arqiva, Digital UK and/or ATVOD);
- The extent to which Ofcom has undertaken or procured an investigation of the activities of Cellcast Group and the jurisdiction of its UK-based and overseas operations;
- The regulatory review of adult-sex services set out in Ofcom's 2012/13 annual plan; and
- Any other comments relevant to the issues previously raised.

Before dealing with the specific parts of your request, I would like to set out some background to Ofcom's regulation of this area. This is in response to the concern you express at the end of your email "at the apparent long-standing lack of effective regulatory control of adult-sex services on Freeview and other platforms." Ofcom strongly disagrees with this assessment. We regulate these services robustly and effectively as I will now explain.

### **Ofcom regulation of adult sex material and of 'adult chat' services**

I would like to reassure you that Ofcom considers the protection of children from unsuitable content in television programmes to be one of our most important duties. It is important to distinguish between our regulation of pornography and 'adult sex material' in adult television services (which is subject to the Broadcasting Code, "the Code"), and 'adult chat' services which is regulated as advertising under the BCAP Code. I will deal with these separately.

## Pornography and 'Adult sex material'

There are specific rules in Section One of the Code (Protecting the Under Eighteens) that regulate this sort of material.

- Rule 1.17 “Material equivalent to the British Board of Film Classification (‘BBFC’) R18-rating<sup>1</sup> must not be broadcast at any time”.
- Rule 1.18 “Adult sex material” – material that contains images and/or language of a strong, sexual nature which is broadcast for the primary purpose of sexual arousal or stimulation – must not be broadcast at any time other than between 2200 and 0530 on premium subscription services and pay per view/night services and must operate *with* mandatory restricted access<sup>2</sup> In addition, measures must be in place to ensure that the subscriber is an adult”.

Under the Code therefore R18 pornographic material must not be shown at any time, even when the content is encrypted. In addition, ‘adult sex material’ (material that contains images and/or language of a strong sexual nature for the primary purpose of sexual arousal or stimulation) is only allowed under encryption between the hours of 2200 and 0530 and provided the service operates as a subscription or pay per view service, with extra safeguards to ensure under eighteens cannot have access to it. These services are therefore tightly restricted and subject to effective regulatory control.

### 'Adult chat' services

Since these services work through promoting PRS calls to the female presenters (which in turn generate PRS income for the broadcaster), they are regulated as advertising. They are therefore not regulated by Ofcom under the Code but under rules in the Broadcast Code of Advertising Practice (“BCAP Code”). These rules ensure ‘adult chat’ broadcasters protect children from harmful material and comply with generally accepted standards:

- Rule 4.1: “Advertisements [i.e. the ‘adult chat’ service] must contain nothing that could cause physical, mental, moral or social harm to persons under the age of 18”.
- Rule 4.2: “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards”.
- Rule 23.3: “Television only – Advertising for telecommunications-based sexual entertainment services must not be broadcast before 9pm or after 5:30am. On Digital Terrestrial Television, advertising for telecommunications-based sexual entertainment services must not be broadcast before 12am or after 5:30am”.
- Rule 30.3: “Television only – Advertisements for products coming within the recognised character of pornography are permitted behind mandatory restricted access on adult entertainment channels only”.
- 30.3.1: “Television only – Advertisements must not feature R18-rated material or its equivalent. That does not preclude advertisements for R18-rated material or its equivalent behind mandatory restricted access on adult entertainment channels”.

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<sup>1</sup> The ‘R18’ category is a special and legally restricted classification primarily for explicit works of consenting sex or strong fetish material involving adults. Films may only be shown to adults in specially licensed cinemas, and video works may be supplied to adults only in licensed sex shops.

<sup>2</sup> Mandatory restricted access means there is a PIN protected system (or other equivalent protection) which cannot be removed by the user, that restricts access solely to those authorised to view.

30.3.2: "Television only – Advertisements permitted under rules 30.3 and 30.3.1 must not feature material that comes within the recognised character of pornography before 10.00pm or after 5.30am".

Rule 32.3: "Relevant timing restrictions must be applied to advertisements that, through their content, might harm or distress children of particular ages or that are otherwise unsuitable for them".

Importantly the effect of Rule 23.3 is that 'adult chat' services can only broadcast from 9pm on the Sky digital satellite platform and only from midnight on Freeview. The effect of Rule 32.3 is that stronger material is allowed to be broadcast closer to or only after 10pm (although it must at all times comply with Rules 4.1 and 4.2).

In addition, Ofcom has published guidance for broadcasters on the BCAP Code<sup>3</sup>, which sets out in detail what is not acceptable on 'adult chat' services to ensure that broadcasters of 'adult chat' content can be in no doubt as to what content is, and is not, permitted.

#### Encryption and parental controls

Certain other measures are in place which help to protect children which are supported by Ofcom. For example all adult services (including 'adult chat' services), whether on Freeview or on cable or satellite platforms are placed in an adult section of the electronic programme guide. This is because there are strict rules in place to regulate 'adult sex material' and 'adult chat' services as I have made clear above. In addition, many Freeview set top boxes and integrated receivers have controls installed which allow viewers and parents to block the various adult channels which may cause you concern.

#### **Enforcing the Code**

I would like to reassure you that Ofcom enforces all these Code and BCAP Code rules rigorously. We do not recognise any "apparent long-standing lack of effective regulatory control of adult-sex services on Freeview and other platforms" as you suggest in your email of 24 April 2014.

We assess all complaints we receive to decide whether they raises potential issues under the Code or BCAP Code. Where a potential issue is raised, we start an investigation. If a code has been contravened, we record a breach of the relevant code which is held on the broadcaster's compliance record.

Where there is a serious breach of the Code we may impose a statutory sanction such as a financial penalty. Statutory sanctions are a very serious matter and often result in financial penalties, or even revocation of a broadcaster's licence. Further information on Ofcom's sanction process is available on our website at:

<http://www.ofcom.org.uk/radio/ifi/figuidance/sanctions/procedures.pdf>

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<sup>3</sup> See <http://www.cap.org.uk/Advertising-Codes/~media/Files/CAP/Codes%20BCAP%20pdf/BCAP%20Code%200712.ashx>

Ofcom has in recent years imposed a series of sanctions against broadcasters for a variety of breaches of the Code and BCAP Code in relation to inappropriate sexual material, pornography and 'adult chat' services. Some examples are:

- A financial penalty of £27,500 on Portland Enterprises for broadcasting R18 material.  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/rhfportland.pdf>
- A financial penalty of £60,000 imposed on *Just4Us* and a fine of £40,000 imposed on *Playboy TV* for inappropriate content on 'adult chat' services.  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Just4Us-Sanction.pdf>
- A financial penalty of £130,000 on Satellite Entertainment Limited in respect of various breaches of the BCAP Code by its daytime and 'adult chat' services broadcasters who provide daytime and adult chat services.  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment-ltd.pdf>

Ofcom has continued in 2014 to regulate 'adult chat' services robustly, recording breaches of the BCAP Code for example against:

- Red Light Central (on 6 January 2014):  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/245/obb245.pdf>
- Get Lucky TV, Lucky Star and Party (on 17 February 2014):  
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb248/obb248.pdf>

Turning to your specific requests for information:

**All relevant communications with CVDM, the European Commission, the service providers themselves (and other relevant parties such as Arqiva, Digital UK and/or ATVOD).**

On 27 February 2012 you requested information from Ofcom, including "...all correspondence in Ofcom's possession in relation to Dutch licensed porn on Freeview between Ofcom and the relevant Dutch authorities". We responded to that request on 18 April 2012 with relevant correspondence. Information we have received since that date is being withheld.

Ofcom is unable to provide this information as it falls under section 44 of the Act. Under this section information which we hold on this subject is exempt from disclosure since it was shared with us under our regulatory power and disclosure is prohibited under section 393(1) of the Communications Act 2003. Section 44 is an absolute exemption under the Act and does not require a public interest test.

Other exemptions may also apply. Such exemption is section 31 of the Act.

Section 31 of the Act relates to law enforcement and the functions of a public authority. For further information on section 31 of the Act, please see:

<http://www.legislation.gov.uk/ukpga/2000/36/section/31>

In addition, some information has been redacted under section 40 of the Act. Section 40 relates to personal information. Section 40 is an absolute exemption under the Act and does not require a public interest test.

For further information on section 40 of the Act please visit:

<http://www.legislation.gov.uk/ukpga/2000/36/section/40>.

### **The extent to which Ofcom has undertaken or procured an investigation of the activities of Cellcast Group and the jurisdiction of its UK-based and overseas operations.**

It is our understanding that Game Network BV, which holds the licences concerned, is not owned by Cellcast. We have been in correspondence with CVDM regarding the licences concerned and CVDM remain satisfied that these services fall within their jurisdiction as defined within the Audio Visual Media Services Directive.

### **The regulatory review of adult-sex services set out in Ofcom's 2012/13 annual plan.**

Ofcom's Annual Plan 2012/13 stated that over the previous 12 to 18 months there had been a number of compliance failures involving 'adult' programming and 'adult chat' content, in light of which Ofcom considered at that time that it was appropriate to review the regulatory arrangements for such services during 2012/13 to ensure that they remained fit for purpose.

In the period covered by Ofcom's Annual Plan 2012/13, we carried out further investigations in this area; took enforcement action against some licensees providing adult services; and, further clarified what activities were and were not acceptable. In the circumstances, we concluded that it would be prudent to keep compliance in this sector under review following this activity rather than undertaking a wholesale review of the regulatory framework for adult services. We continue to keep compliance in this sector under review and are committed to ensuring that the sector is robustly regulated and that audiences are provided with appropriate levels of protection.

I hope this information is of assistance.

If you have any queries then please contact [information.requests@ofcom.org.uk](mailto:information.requests@ofcom.org.uk). Please remember to quote the reference number above in any future communications.

Yours sincerely

### **Alistair Hall**

If you are unhappy with the response or level of service you have received in relation to your request from Ofcom, you may ask for an internal review. If you ask us for an internal review of our decision, it will be treated as a formal complaint and will be subject to an independent review within Ofcom. We will acknowledge the complaint and inform you of the date by which you might expect to be told the outcome.

The following outcomes are possible:

- the original decision is upheld; or
- the original decision is reversed or modified.

### **Timing**

If you wish to exercise your right to an internal review **you should contact us within two months of the date of this letter**. There is no statutory deadline for undertaking internal reviews and it will depend upon the complexity of the case. However, we aim to conclude all such reviews within 20 working days, and up to 40 working days in exception cases. We will keep you informed of the progress of any such review. If you wish to request an internal review, you should contact:

Graham Howell  
The Secretary to the Corporation  
Ofcom  
Riverside House  
2a Southwark Bridge Road

London SE1 9HA

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF