

**Sanction: Decision by Ofcom
Imposed on Satellite Entertainment Limited**

For the broadcast of various adult sex chat advertisements between 5 April 2011 and 14 April 2011.

Consideration

of Sanction against: Satellite Entertainment Limited (“SEL” or “the Licensee”) in respect of its services **Sport XXX Girls** (TLCS-762), **Essex Babes** (TLCS-525) and **Northern Birds** (TLCS-761).

For: Breaches of the UK Code of Broadcast Advertising (“the BCAP Code”) in respect of:

Rule 4.2: “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.”

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.”

Breach of SEL’s Television Licensable Content Service (“TLCS”) Licences (as above) in respect of:

Condition 11:

“(1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...

(2) In particular, the Licensee shall: (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and (b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction.”

On: *Sport XXX Girls, 5 April 2011, 22:00*
Sport XXX Girls, 6 April 2011, 22:00 to 23:00
Sport XXX Girls, 10 April 2011, 21:00 to 22:50
Sport XXX Girls, 13 April 2011, 21:00 to 22:00
Sport XXX Girls, 14 April 2011, 00:00 to 01:00
Essex Babes, 5 April 2011, 22:00 to 23:00
Essex Babes, 7 April 2010, 22:00 to 23:00
Essex Babes, 10 April 2011, 22:00 to 23:00

Northern Birds, 8 April 2011, 22:00 to 00:00
Northern Birds, 10 April 2011, 22:00 to 00:00

Decision:

To impose a financial penalty of **£130,000** on SEL
(payable to HM Paymaster General).

Summary

1. For the reasons set out in this Decision, Ofcom has decided to impose a statutory sanction on the Licensee.
2. The services Sport XXX Girls, Northern Birds and Essex Babes (collectively “the SEL Licences”) all transmit interactive ‘daytime chat’ and ‘adult chat’ advertising. The adult chat material is broadcast from 21:00. In both earlier and later transmissions viewers are invited to contact onscreen female presenters via premium rate telephony services (“PRS”).
3. The licences for Sport XXX Girls, Northern Birds and Essex Babes are owned and operated by Satellite Entertainment Limited (“SEL”). These services are available freely without mandatory restricted access on Sky channel numbers 967, 954 and 955 respectively and are in the ‘adult’ section of the Sky Electronic Programme Guide (“Sky EPG”).
4. Since 1 September 2010 all PRS-based daytime and adult chat television services have been regulated by Ofcom as long-form advertising, i.e. teleshopping. From 1 September 2010 the relevant standards code for such services has been the UK Code of Broadcast Advertising (“the BCAP Code”).
5. On 28 January 2011 Ofcom published detailed guidance¹ on the advertising of telecommunications-based sexual entertainment services and PRS daytime chat services (the “Chat Service Guidance”). The Chat Service Guidance is intended to assist licensees who carry “daytime chat” and/or “adult chat” advertising material to understand how Ofcom is likely to interpret and apply the BCAP Code. The Chat Service Guidance includes references, for example, to the type of images that should not be broadcast as part of daytime chat and adult chat advertising.
6. In Ofcom’s finding published on 18 July 2011 in Broadcast Bulletin 186² (“the 18 July Finding”), the Executive found that ten adult sex chat advertisements broadcast by SEL breached Rule 4.2 of the BCAP Code. In addition, two of those broadcasts also breached Rule 32.3 of the BCAP Code.
7. In addition, SEL was found to be in breach of Licence Condition 11 of its licences, for failing to have acceptable procedures in place to provide recordings of broadcast quality.

Breaches of BCAP Code Rule 4.2

8. Rule 4.2: “Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards.”
9. The 18 July Finding highlighted a number of examples of broadcast material that were clearly inconsistent with the Chat Service Guidance, such as:
 - extremely prolonged and close up images of the genital area;
 - bunching of underwear to simulate masturbation;
 - pouring oil and white cream onto, and massaging it into, the buttocks, anal area and genital area; and

¹ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/bcap-guidance.pdf>. The guidance was updated in July 2011.

² <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb186/obb186.pdf>

- presenters wearing clothing that did not adequately cover their genital and anal area.
10. Ofcom noted that in conjunction with those images the presenters performed various other actions including: opening their legs wide to camera; stroking their bodies; thrusting their buttocks; massaging oil into their breasts; and miming sexual intercourse. The combination of these images and action resulted in prolonged and frequent scenes of a strong sexual nature. Ofcom was also concerned at the degree of offence likely to be caused to viewers who might come across this material unawares. Additionally, Ofcom considered this material should not have been broadcast without mandatory restricted access.
11. Ofcom therefore recorded in the 18 July Finding the following breaches of Rule 4.2 of the BCAP Code:

Office Girls, Sport XXX Girls, 5 April 2011, 22:00
40+ Readers Wives, Essex Babes, 5 April 2011, 22:00 to 23:00
Office Girls, Sport XXX Girls, 6 April 2011, 22:00 to 23:00
40+ Readers Wives, Essex Babes, 7 April 2010, 22:00 to 23:00
Sport XXX1, Northern Birds, 8 April 2011, 22:00 to 00:00
Sport XXX1, Northern Birds, 10 April 2011, 22:00 to 00:00
Office Girls, SportXXX Girls, 10 April 2011, 21:00 to 22:00
40+ Readers Wives, Essex Babes, 10 April 2011, 22:00 to 23:00
Office Girls, SportXXX Girls, 13 April 2011, 21:00 to 22:00
Office Girls, Sport XXX Girls, 14 April 2011, 00:00 to 01:00

Breaches of BCAP Code Rule 32.3

12. 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.”
13. The Chat Service Guidance and a number of previous published findings make clear that stronger material should appear later in the schedule and that the transition to more adult material should not be unduly abrupt at the 21:00 watershed³.
14. In respect of two broadcasts of *Office Girls*, transmitted on Sport XXX Girls on 10 April 2011 between 21:00 and 22:00, and on 13 April 2011 between 21:00 and 22:00, Ofcom noted that on a number of occasions between 21:00 and 21:30 the female presenters adopted sexually provocative positions, for example, lying on their back with their legs wide open to camera, sometimes for prolonged periods. During the broadcasts Ofcom noted the presenters regularly opened their legs wide to camera, stroked and touched their genital areas, thrust their hips to mime sexual intercourse and revealed outer genital detail.

³ For example:

- Red Light Central, Extreme, 23 February 2011, 21:00 to 21:50 (Published 23 May 2011) (<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb182/obb182.pdf>)
- Free Blue 1 Babeworld.tv, 9 July 2010, 21:00 to 21:30 (Published 25 October 2010) (<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb168/issue168.pdf>)
- *Sport XXX Babes*, 16 May 2010, 21:00 to 21:30 (Published 23 August 2010) (<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb164/issue164.pdf>)

15. Ofcom noted that during the broadcast on 10 April 2011, the presenter, whilst positioned lying on a desk with her legs wide open to camera, thrust forward to mime sexual intercourse. In addition, her labia were visible and at times close up and prolonged images of her genital area were broadcast. Ofcom also noted that during the broadcast on 13 April 2011, the presenter adopted various sexual positions, and mimed sexual intercourse, whilst her outer labia were visible and she rubbed and massaged her upper thighs and labial area. In Ofcom's view, the revealing clothing, sexual positions and actions of the presenters were intended to be sexually provocative in nature and Ofcom therefore concluded that under BCAP Code Rule 32.3 the material was unsuitable for children.
16. In Ofcom's opinion, viewers (and in particular parents) would not expect such material to be broadcast so soon after 21:00. Further, the broadcast of such relatively strong sexualised content was inappropriate to advertise adult sex chat so soon after the 21:00 watershed.
17. Therefore, in the 18 July Finding Ofcom also recorded the following breaches of Rule 32.3 of the BCAP Code:

Office Girls, SportXXX Girls, 10 April 2011, 21:00 to 22:00

Office Girls, SportXXX Girls, 13 April 2011, 21:00 to 22:00

Breach of TLCS Licence Condition 11

18. Ofcom broadcasting licences require licensees to keep recordings of their output and make these recordings available to Ofcom on request. The form of licence held by SEL is a 'television licensable content service licence' (TLCS). TLCS Licence Condition 11 states:
- (1) The Licensee shall adopt procedures acceptable to Ofcom for the retention and production of recordings in sound and vision of any programme which is the subject matter of a Standards Complaint ...
- (2) In particular, the Licensee shall:
- (a) make and retain or arrange for the retention of a recording in sound and vision of every programme included in the Licensed Service for a period of 60 days from the date of its inclusion therein; and
- (b) at the request of Ofcom forthwith produce to Ofcom any such recording for examination or reproduction.
19. Further, the TLCS Guidance Notes for Licence Applicants (Paragraph 76)⁴, with regards to "procedures acceptable to Ofcom", set out that:
- "recordings must be of a standard and in a format which allows Ofcom to view the material as broadcast."
20. Notwithstanding these obligations, in Ofcom's view, none of the material requested by Ofcom in respect of the broadcasts listed above was provided to Ofcom in a format which Ofcom considered to be of broadcast quality. Despite stating that it would look into the issue of the quality of the recordings supplied as a matter of urgency, SEL failed by

⁴ http://licensing.ofcom.org.uk/binaries/tv/tlcs_licence.pdf

the deadline set by Ofcom to provide any further recordings to Ofcom that Ofcom considered were of broadcast quality and also provided no explanation as to the reason for this failure.

21. Consequently, in the 18 July Finding Ofcom found that the Licensee was in breach of Licence Condition 11 of the SEL Licences, for failing to have acceptable procedures in place to provide recordings of broadcast quality.

Summary of Ofcom's Sanction Decision

22. Ofcom decided that the breaches recorded in the 18 July Finding were sufficiently serious to be considered for statutory sanction.
23. After considering all the evidence and all the representations made to it by the Licensee, Ofcom decided that the BCAP Code breaches were serious and repeated, and that the breach of Licence Condition 11 was serious, and therefore a financial penalty should be imposed in accordance with Ofcom's Procedures for the consideration of statutory sanctions in breaches of broadcast licences ("Sanction Procedures")⁵. Ofcom then also considered the level of the fine to be imposed, in accordance with Ofcom Penalty Guidelines⁶.
24. Having regard to the serious and repeated nature of the breaches of the BCAP Code, the serious nature of the breach of Licence Condition 11 and having regard to the Licensee's representations and Ofcom's Penalty Guidelines, Ofcom decided it was appropriate in the circumstances to impose a financial penalty of **£130,000** on SEL (payable to HM Paymaster General).

Legal Framework

General

25. In discharging its functions, Ofcom's principal duties set out in section 3(1) of the Communications Act 2003 ("the Act") are to further the interests of citizens in relation to communications matters, and the interests of consumers, and to secure a number of other matters. These include the application in the case of all television and radio services of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services (section 3(2)(e)).
26. Ofcom has a specific duty under section 319 of the Act to set standards for the content of programmes in television and radio services as appears to it best calculated to secure the standards objectives set out in section 319(2). One of those objectives is that "the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented." (Section 319(2)(h)).
27. In performing these duties, Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and any other principles representing best regulatory practice (section 3(3)); and where relevant, to have regard to a number of other considerations including:

⁵ <http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/854750/statutory-sanctions.pdf>

⁶ <http://www.ofcom.org.uk/files/2010/06/penguid.pdf>

- the need to secure that the application in the case of television and radio services of standards relating to harm and offence is in the manner that best guarantees an appropriate level of freedom of expression (section 3(4)(g)); and
- the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection (section 3(4)(h)).

The Human Rights Act 1998

28. Under section 6 of the Human Rights Act 1998, there is a duty on Ofcom (as a public authority) to ensure that it does not act in a way which is incompatible with the European Convention on Human Rights (“the Convention”).
29. Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster’s right to “impart information and ideas” and also the audience’s “right to receive information and ideas without interference by public authority” (Article 10(1) of the Convention). Such rights may only be restricted if the restrictions are, “prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary” (Article 10(2) of the Convention).
30. Ofcom must exercise its duty in light of these rights and not interfere with the exercise of these rights in broadcast services unless it is satisfied that the restrictions it seeks to apply are required by law and necessary to achieve a legitimate aim.

The UK Code of Broadcast Advertising

31. Standards set by Ofcom in accordance with section 319(2)(h) of the Act relating to advertising are set out in the BCAP Code. The BCAP Code is drawn up and published by the Broadcast Committee of Advertising Practice Ltd (“BCAP”) pursuant to contracting out arrangements entered into between Ofcom and BCAP⁷.
32. However, Ofcom remains responsible for the regulation of long-form ‘participation television’ (‘PTV’) advertising. This class of advertising includes telecommunications-based chat services – these are also known as ‘adult chat’ and ‘daytime chat’.
33. As mentioned above, Ofcom has published a guidance note, the Chat Service Guidance, to assist licensees who carry ‘daytime chat’ and/or ‘adult chat’ material to understand Ofcom’s interpretation of the BCAP Code. The Chat Service Guidance includes references, for example, to the type of images that should not be broadcast during daytime chat or adult chat advertising.

Remedial action and penalties

34. Under section 325 of the Act, every programme service licensed under the Broadcasting Act 1990 or 1996 must include conditions for securing that the standards set under

⁷ Further details of the contracting out arrangements are contained in the Memorandum of Understanding between Ofcom and the ASA and BCAP and BASBOF (published May 2004) which can be found at:

http://stakeholders.ofcom.org.uk/binaries/consultations/reg_broad_ad/statement/mou.pdf

section 319 are observed by the licensee. In the case of a television licensable content service (“TLCS”) licence, Condition 6 of the licence requires the licensee to ensure that the provisions of any Code made under section 319 are complied with. Where Ofcom has identified that a Condition of a TLCS licence has been contravened, it may impose sanctions as set out below.

35. Section 236 of the Act provides Ofcom with the power to direct the holder of a TLCS licence to broadcast a correction or statement of findings (or both) or not to repeat a programme on contravention of a Licence condition.
36. Section 237 of the Act provides Ofcom with the power to impose a financial penalty on the holder of a TLCS licence of a maximum of whichever is the greater of £250,000 and 5 per cent of its qualifying revenue on each occasion that a contravention of a Condition of the licence has occurred.
37. Section 238 of the Act provides Ofcom with the power to revoke a TLCS licence where a licensee is in contravention of a condition of a TLCS licence or direction thereunder.

Ofcom’s Decision to Impose a Statutory Sanction

38. As set out in the Sanctions Procedures the imposition of a sanction against a broadcaster is a serious matter. Ofcom may, following due process, impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly, or recklessly breached a relevant requirement.
39. In this case, Ofcom issued a preliminary decision (“Preliminary View”) that the Licensees had seriously and repeatedly breached the BCAP Code, and had committed a serious breach of Licence Condition 11, such that a statutory sanction should be imposed. Ofcom sent a copy of the Preliminary View to the Licensee on 19 October 2011, indicating that it was minded to impose a financial penalty of not less than £130,000 on SEL. The Licensee was given the opportunity to provide written and oral representations on the Preliminary View. The Licensee provided its written representations (“Written Representations”) to Ofcom on 18 November 2011 and attended a hearing at Ofcom on 28 November 2011 to provide oral representations (“Oral Representations”). These are summarised below.
40. In reaching its final decision, Ofcom was not bound by the Preliminary View. Ofcom therefore took into account the Written and Oral Representations of the Licensee, and had regard to the Sanctions Procedures and to Ofcom’s Penalty Guidelines.

Seriousness and repeated nature of the Breaches

Breaches of BCAP Rule 4.2

41. Ofcom considered that all of the breaches of Rules 4.2 were of a sufficiently serious nature as to warrant the imposition of a statutory sanction. The images were strongly sexual, focusing on sexual anatomy and included manipulation of labia by clothing and the use of fluids to further sexualise the imagery.
42. In respect of the material shown after 22:00, the transmissions of 6 April 2011 (*Office Girls*, SportXXXGirls, 22:00–23:00), 7 April 2011 (*40+ Readers Wives*, Essex Babes, 22:00–23:00) and 8 April 2011 (*Sportxxx1*, Northern Birds, 22:00–00:00), were in

Ofcom's view the most serious. Each of these broadcasts contained close up, detailed and prolonged shots of vulval and anal areas.

43. In the broadcast of 6 April 2011, the principal focus of much of the material was the genital and anal area of the presenter. The presenter waved her rear for long sequences at the camera, her buttocks coated with clear fluid, drawing attention to the heavily sexualised display of the genital region. Other sequences contained prolonged very close up shots of the crotch, the labia covered only in the middle, and the surrounding skin coated with fluid. The thin fabric strip was used as a device to manipulate the labia.
44. In the broadcast of 7 April 2011, the presenter's vagina and labia were covered only by a thin strip of material. Close up shots of the presenter's rear placed emphasis on the vaginal area; the presenter also rubbed at the labia, mimicking masturbation. Frontal close ups of the presenter's vulva showed the material being bunched and pulled up and down; a liquid – saliva or oil – was used around the vagina and mons pubis to further emphasise the sexual anatomy.
45. In the broadcast of 8 April 2011, in addition to the strong emphasis on the presenter's barely covered vagina – principally through extended close ups – white cream was used to heighten the effect of the stress on sexual anatomy. This cream resembled seminal fluid and in one shot was seen dripping around the presenter's anus and perineum. In many shots the presenter rubbed or stroked her vulval and anal areas so further emphasising, and sexualising, the explicit imagery.
46. These broadcasts in particular, and the other broadcasts more generally, were in Ofcom's view advertising material which had the potential to cause serious or widespread offence against generally accepted standards. The images of the female presenters broadcast were sexualised and strong and should not have been broadcast within the context of adult chat advertisements that were freely available without mandatory restricted access.
47. In the context of offence that may be caused by these broadcasts, as is noted in the Chat Service Guidance, there is in that respect a significant difference between programming and advertising, in that the advertising content of 'adult chat' services is afforded less latitude than is typically available to editorial material in respect of context and narrative. A primary intent of advertising is to sell products and services; consideration of acceptable standards must take that context into account.

Breaches of BCAP Rule 32.3

48. Further, Ofcom considered that the two breaches of BCAP Rule 32.3, relating to advertising material shown soon after the 21:00 watershed, concerned content which was highly unsuitable for children, containing images of sexual anatomy in a context of sexual arousal. In Ofcom's view, broadcasting such material at that time additionally had the potential to cause distress or harm to any child viewers and each breach is therefore of a particularly serious nature.
49. These two breaches – relating to material broadcast on SportXXX Girls, on 10 April and 13 April 2011, respectively – concerned highly sexualised material which both placed prominence on vulval and anal anatomy and which presented women apparently aroused and seeking to arouse viewers. Although placing less explicit emphasis on labia and anus than the later sequences within the 18 July Finding, these earlier transmissions were nonetheless highly and graphically sexualised.

50. Ofcom regarded these sequences as wholly unacceptable for transmission close to the 9pm 'watershed' because of the potential for harm to younger viewers who may still be available to view, through its presentation of sexual anatomy and sexual behaviour.

Breach of Licence Condition 11

51. In relation to the breach of Licence Condition 11, Ofcom considered that the Licensee's failure to adopt appropriate procedures for the retention of recordings potentially compromised Ofcom's ability to investigate the breaches of the BCAP Code and therefore Ofcom's ability to fulfil its statutory duties.

52. The adoption of procedures for the retention and production of recordings of programmes, and the provision to Ofcom of recordings on request, is important to enable Ofcom to carry out its statutory functions to apply standards that provide adequate protection to members of the public from offensive or harmful material. In the present case, SEL had clearly failed to adopt acceptable procedures, in that it failed to provide Ofcom with copies of the programmes of broadcast quality and did not provide any explanation for this failure. Such actions serve to frustrate the regulatory process and impede Ofcom's functions.

Additional considerations applicable to each of the breaches

53. In addition to the serious nature of the breaches, noted above, Ofcom considered a number of further points relevant to the application of a statutory sanction in this case.

54. First, SEL appeared to have wholly insufficient compliance arrangements in place, as demonstrated by the breaches in this case. Given the extensive information provided to the Licensee about what was acceptable in respect of 'adult chat' content under the BCAP Code (including Ofcom's detailed Chat Service Guidance published on 28 January 2011), the Licensee ought to have known that a breach of the BCAP Code was occurring or would occur, and failed to take appropriate steps to prevent the contraventions happening. This extensive information included the following:

- Broadcast Bulletin 165 published on 13 September 2010⁸. This contained a Note to Broadcasters regarding the new regulatory regime under which long-form advertising predicated on premium rate telephone services (including 'chat' and 'adult sex chat' services) would be regulated by Ofcom from 1 September 2010 under the BCAP Code;
- a meeting for all adult sex chat broadcasters on 14 December 2010 at Ofcom (attended by the Licensee) when Ofcom outlined its forthcoming guidance on the BCAP Code and answered questions from licensees;
- a Note to all broadcasters in the 'daytime' and 'adult chat' sector in Broadcast Bulletin 172 published on 20 December 2010 that stated that Ofcom will not tolerate repeated breaches of the BCAP Code by services operating in the sector of daytime and adult chat and will not hesitate to take appropriate enforcement action where necessary⁹; and

⁸ See Note to Broadcasters, Broadcast Bulletin 165, published on 13 September 2010, available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb165/issue165.pdf>

⁹ See Note to Broadcasters, Broadcast Bulletin 172, published 20 December 2010, available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb172/issue172.pdf>

- Ofcom’s Chat Service Guidance, published on 28 January 2011, gave detailed advice on what type of material is unacceptable during ‘adult chat’ broadcasts.

55. Second, Ofcom took into account the compliance record of the Licensee. Ofcom has imposed two statutory sanctions on SEL previously. On 26 August 2008 a financial penalty of £20,000¹⁰ was imposed for breaches of the Ofcom Broadcasting Code (“the Code”)¹¹. And on 24 June 2011 (“the June 2011 Sanction”)¹² a financial penalty of £90,000 was imposed on SEL for breaches of Licence Condition 11. SEL has also been found to have breached Licence Condition 11 once before, in relation to content broadcast on 10 September 2010¹³. In addition, SEL has had ten breaches of the Code recorded against it in respect of content standards. The first four of these Code breaches occurred between 17 April 2007 and 8 June 2008¹⁴. The further six Code breaches, occurred between 31 March 2010 and 19 May 2010¹⁵.
56. Third, the breaches of Rules 4.2 and 32.3 of the BCAP Code were repeated. The breaches of Rule 4.2 in this case occurred on ten separate occasions between 5 April and 14 April 2011 inclusive.

Licensee’s Written Representations and Oral Representations

57. SEL provided Written and Oral Representations. In its Written and Oral Representations the Licensee did not dispute the content breaches – indeed, in its Oral Representations the Licensee expressly accepted that the content was in breach of Ofcom’s guidelines and said that it was also in breach of its own internal guidelines.
58. The Licensee made arguments in mitigation in relation to the level of financial penalty proposed by Ofcom in its Preliminary View.
59. By way of explanation for the breaches, the Licensee said that the company had endured a difficult period following an abortive sale of the business in early 2011, during which time its studios had been shut down and a number of key staff lost. The Licensee noted that these same difficulties had been behind the breaches that had led to the June 2011 Sanction for not supplying recordings to Ofcom. The Licensee explained that during this period a number of experienced staff had left the company and it was acknowledged that adequate compliance safeguards were not in place.

¹⁰ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/sportxxbabes.pdf>

¹¹ The Code in force at that time can be seen at <http://stakeholders.ofcom.org.uk/binaries/broadcast/Broadcast-Code-2005.pdf>

¹² <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment.pdf>

¹³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf>

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb95/issue95.pdf>;
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb114/issue114.pdf>;
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb118/issue118.pdf>;
<http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb119/issue119.pdf>

¹⁵ <http://stakeholders.ofcom.org.uk/enforcement/broadcast-bulletins/obb164/>

60. The Licensee stressed, however, it believed that before this problem period it had a good compliance record over a number of years, having been fined by Ofcom only once prior to 2011.
61. The Licensee explained that since this problematic period in the business's history steps had been taken to re-employ experienced staff, who had themselves then recruited well-trained, specialist production staff. SEL submitted that it had had to rebuild, amongst other things, its compliance arrangements, but that they were now sound and explained that its approach was to co-operate with Ofcom.
62. The Licensee described what it considered to be the considerable experience of the person in charge of compliance, outlined the structure of the teams of staff who produce daytime and 'adult' output, explained the responsibilities of its producers for compliance with the BCAP Code and confirmed that it has written internal guidance. The Licensee said that its internal guidance was last examined some months ago and confirmed that it had not been updated since the 18 July Finding.
63. The Licensee explained that its producers are primarily responsible for the compliance of the programmes they are in charge of, and that the producers are supervised until around midnight. To the extent that there are any, what the Licensee described as, "grey areas" regarding the compliance of content, reviews of material are on occasion undertaken the following day. The Licensee said, however, that compliance issues can be debatable and that it isn't possible to be 100% certain of a view in some cases.
64. As to the Licensee's failure to provide recordings of acceptable quality, the Licensee said that it was not aware that replacement recordings had not been sent and received by Ofcom. The Licensee did not accept that recordings had not been sent, but explained that its focus in responding to Ofcom had been to accept the content breaches.
65. In respect of the Licensee's current arrangements for making and retaining recordings, the Licensee said that it now employs a third party to undertake this process, in addition to its own in-house system. The Licensee said that in response to recent requests for recordings by Ofcom, it had complied quickly and effectively.
66. Ofcom considered the submissions made by the Licensee, and noted the admissions of fault in respect of the content breaches. In Ofcom's view the difficulties apparently experienced by the Licensee during the aborted sale of the business could not serve to mitigate or excuse the BCAP Code breaches or the breach of Licence Condition 11. For the reasons set out in detail above, Ofcom considered that the material broadcast amounted to a serious breach of the BCAP Code. Ofcom was particularly concerned that the Licensee did not appear to fully understand Ofcom's requirements for adult chat services, as set out in the Chat Service Guidance issued in January 2011, and was concerned that, according to the Licensee's Oral Representations, no further steps had been taken to secure compliance following the 18 July Finding.
67. In relation to the breach of Licence Condition 11, Ofcom was surprised that the Licensee had sought to suggest in its Oral Representations that replacement recordings of the requisite quality may have been sent to Ofcom, notwithstanding the fact that it had been clear since the 18 July Finding, and more recently the Preliminary View, that Ofcom had not received further material of broadcast quality from the Licensee.
68. Ofcom concluded that, in view of the factors set out above, the breaches were sufficiently serious and repeated as to warrant the imposition of a statutory sanction; and sufficiently serious and repeated, for the reasons set out above, that the statutory sanction should be in the form of a financial penalty.

69. Ofcom also considered the arguments made by way of mitigation in relation to the level of the financial penalty proposed. Given the focus of this aspect of the Licensee's submissions, Ofcom's detailed comments in response are set out below in the section entitled *Factors taken into account in determining the amount of a penalty*.

Imposition of a financial penalty

70. Under 237 of the Act, the maximum level of financial penalty that can be imposed on the holder of a TLCS licence in respect of each breach is £250,000 or 5% of the licensee's 'qualifying revenue', whichever is the greater.

71. Qualifying revenue is calculated by adding together revenue gained from advertising, sponsorship and subscription. It does not include revenue gained from interactive services, such as premium rate phone calls.

72. SEL has no declared 'qualifying revenue'. Ofcom therefore considered a financial penalty of up to £250,000 in respect of each breach of the SEL Licences as set out under section 237 of the Act.

73. Ofcom's Penalty Guidelines state that "Ofcom will consider all the circumstances of the case in the round in order to determine the appropriate and proportionate amount of any penalty. The central objective of imposing a penalty is deterrence. The amount of any penalty must be sufficient to ensure that it will act as an effective incentive to compliance, having regard to the seriousness of the infringement." Ofcom has taken full account of the need to ensure that any penalty acts as a deterrent and has also taken account of the specific factors set out at paragraph 4 of the Penalty Guidelines.

Factors taken into account in determining the amount of a penalty

74. In considering the appropriate amount of financial penalty for each of the breaches, Ofcom took account of relevant factors in accordance with Ofcom's Penalty Guidelines, as set out below, and the Licensee's representations:

The degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants.

75. The Code breaches by the Licensee concerned two rules of the BCAP Code, Rule 4.2 and Rule 32.2.

Rule 4.2

76. Under Rule 4.2, broadcasters are required to ensure that advertisements do not cause serious or widespread offence against generally accepted moral, social or cultural standards. Ofcom noted that the material included prolonged and frequent scenes of a strong sexual nature. Ofcom considered this material should not have been broadcast within the context of 'adult chat' advertisements that were freely available without mandatory restricted access and had the potential to cause considerable offence, especially to viewers who came across the material unawares.

Rule 32.3

77. In the published 18 July Finding Ofcom noted that two of the advertisements were broadcast on a channel without mandatory restricted access in the period immediately after the 21:00 watershed, when some children may have been available to view, some unaccompanied by an adult. In Ofcom's opinion, viewers (and in particular parents) would not expect such material to be broadcast so soon after 21:00. Further, the broadcast of such relatively strong sexualised content was inappropriate to advertise adult sex chat so soon after the 21:00 watershed. In particular, the breaches of BCAP Code Rule 32.3 were problematic because inappropriate advertising material was broadcast without access restrictions when children were likely to be available to view.

Licence Condition 11

78. In addition, SEL breached Licence Condition 11 because it failed to adopt appropriate procedures for the retention and production of recordings of a sufficient standard. By failing to have acceptable procedures in place to provide recordings of broadcast quality to Ofcom, SEL potentially compromised Ofcom's ability to investigate breaches of the BCAP Code, and therefore fulfil its statutory duty to secure the standards objectives, as laid out earlier in this decision.

The duration of the contravention.

79. Ofcom noted the recorded breaches were in relation to ten advertisements broadcast between 5 April 2011 and 14 April 2011 inclusive.

Any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention.

80. There is insufficient evidence to show that the Licensee made any financial gain from repeated breaches of the BCAP Code.

Any steps taken for remedying the consequences of the contravention.

81. Ofcom was not aware of any steps taken by the Licensee to remedy any consequences of the content breaches under consideration.

Whether the regulated body in breach has a history of contraventions.

82. Sanction against SEL (under the Broadcasting Code only)

SportxxxBabes, 26 February 2007, 13 March 2007 and 17 March 2007 ("the August 2008 Sanction")¹⁶:

SportxxxBabes broadcast unencrypted 'adult-sex' material, which included sequences apparently showing intercourse, oral-genital contact, masturbation, the use of dildos, a woman gagged with her knickers, and full nudity in breach of Rules 1.24, 2.1 and 2.3.

Fine: £20,000

83. Sanction against SEL (Under Licence Condition 11 only) ("the June 2011 Sanction"):

¹⁶ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/sportxxxbabes.pdf> (Published 26 August 2008).

Essex Babes, Northern Birds and Live XXX Babes, in respect of broadcasts on 9 occasions between 8 September 2010 and 13 October 2010¹⁷:

SEL refused to supply Ofcom with recordings, and for a six week period the Licensee had lost control of its own services.

Fine: £90,000

84. Recorded Broadcasting Code breaches not leading to sanction:

Two breaches were recorded on 22 October 2007 in Broadcast Bulletin 95¹⁸:

Breach of Code Rules: 1.3 (protection of under-18s by appropriate scheduling; 1.24 (adult-sex material); 2.1 (generally accepted standards); and Rule 2.3 (offence): LivexxBabes, 17 April 2007, 21:00 to 01:00 and 18 April 2007, 21:00 to 01:00.

A breach was recorded on 21 July 2008 in Broadcast Bulletin 114¹⁹:

Breach of Code Rule 2.2 (misleadingness): SportxxxGirls, 10 February 2008 at 22:00.

A breach was recorded on 29 September 2008 in Broadcast Bulletin 118²⁰:

Breach of Code Rules: 2.1 (generally accepted standards) and 2.3 (Offence): LivexxBabes, 8 June 2008, 21:00 to 03:00.

Two breaches were recorded on 13 October 2008 on Broadcast Bulletin 119²¹:

Breach of Code Rules 1.24 (adult-sex material); 2.1 (generally accepted standards); and 2.3 (offence): SportxxxBabes, 19 and 20 November 2007 at 22:00.

Six breaches were recorded on 23 August 2010 in Broadcast Bulletin 164²²:

¹⁷ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment.pdf> (Published 24 June 2011).

¹⁸ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb95/issue95.pdf> (Published 22 October 2007).

¹⁹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb114/issue114.pdf> (Published 21 July 2008).

²⁰ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb118/issue118.pdf> (Published 29 September 2008).

²¹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb119/issue119.pdf> (Published 13 October 2008).

Breach of Code Rules: 2.1 (generally accepted standards) and 2.3 (offence): Live XXX Babes, 31 March 2010, 22:00 to 23:00; 1 April 2010, 22:00 to 22:24; 3 April 2010, 22:00 to 02:00; 19 May 2010, 00:00 to 01:00; and Northern Birds, 11 April 2010 22:30 to 23:00; and Breach of Code Rules: 1.6 (transition to adult material after the watershed), 2.1 and 2.3: Live XXX Babes, 16 May 2010, 21:00 to 21:30.

85. Recorded BCAP Code breaches not leading to sanction:

Three breaches were recorded on 4 July 2011 in Broadcast Bulletin 185²³:

Breach of BCAP Code Rule 4.2 (harm and offence): Northern Birds, 12 March 2011, 21:30 to 22:00; and 13 March 2011, 01:00 to 01:20; and Live XXX Babes, 14 March 2011, at 00:00.

86. Recorded breaches of Licence Condition 11 not leading to sanction:

One breach was recorded on 8 November 2011 in Broadcast Bulletin 169²⁴:

Sport XXX Girls, 10 September 2010, 00:00 to 00:30.

Whether in all the circumstances appropriate steps had been taken by the regulated body to prevent the contravention.

87. Ofcom noted the Licensee's submissions regarding the difficulties that the business had been facing at the relevant time and how compliance procedures had been rebuilt in March / April 2011 and were bedding in at the time the breaches occurred. However, Ofcom considered it to be clear, that despite the detailed Guidance given by Ofcom to the Licensee to ensure compliance with the BCAP Code, as outlined in paragraph 54 above, the Licensee did not have adequate compliance arrangements in place, and went on to broadcast material that was manifestly in breach of the requirements of the BCAP Code. In some cases those breaches related to actions or images already highlighted as unacceptable in previous published findings against the Licensee.

88. Similarly, Ofcom is not aware of any detailed evidence to date of any compliance procedures the Licensee had in place, or steps taken, to prevent or reduce the risk of TLCS Licence Condition 11 breaches occurring at this time.

²² <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb164/issue164.pdf> (Published 23 August 2010).

²³ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb185/obb185.pdf> (Published 4 July 2011).

²⁴ <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb169/issue169.pdf> (Published 8 November 2010).

The extent to which the contravention occurred intentionally or recklessly, including the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur.

89. On 14 December 2010 Ofcom invited all licensees in the daytime chat and adult chat sector to a meeting at Riverside House. At that meeting Ofcom reminded licensees of their duties under the BCAP Code, highlighted that Ofcom would take appropriate regulatory action against those licensees that continued to breach the BCAP Code and informed them that Ofcom would shortly be publishing guidance on the BCAP Code to aid daytime and adult sex broadcasters located in the 'adult' section of the Sky EPG. Further, as already pointed out above (paragraph 54), the Licensee should also have been aware of:

- a Note to all broadcasters in the 'daytime' and 'adult chat' sector in Broadcast Bulletin 172 published on 20 December 2010 that stated that Ofcom will not tolerate repeated breaches of the BCAP Code by services operating in the sector of daytime and adult chat and will not hesitate to take appropriate enforcement action where necessary²⁵;
- the Chat Service Guidance published on 28 January 2011, which gave detailed advice on what type of material is unacceptable during 'adult chat' broadcasts.

90. Senior management therefore ought to have been fully aware of the provisions of the BCAP Code and accompanying guidance, and should have ensured that procedures were in place to ensure compliance. Ofcom noted that the Licensee failed to recognise that the material was obviously problematic under the BCAP Code and was in clear contravention of the Chat Service Guidance. In Ofcom's view this demonstrated a poor level of compliance.

Whether the contravention in question continued, or timely or and effective steps were taken to end it, once the regulated body became aware of it.

91. The contraventions continued over a ten day period in April 2011. In its Oral Representations the Licensee explained the steps it had taken once it had been notified of the breaches by Ofcom. The Licensee confirmed that it had taken no further practical steps to improve and/or update its compliance procedures following notification of the breaches.

92. In relation to the breach of Licence Condition 11, Ofcom did not receive and has not since received recordings of acceptable quality from the Licensee in respect of the breaches.

93. The Licensee explained the new arrangements it has put in place with a third party for the provision of broadcast quality recordings. It was noted that, subsequent to the breaches, the Licensee has complied with a number of Ofcom requests for recordings.

The extent to which the level of penalty is proportionate, taking into account the size and turnover of the regulated body.

²⁵ See Note to Broadcasters, Broadcast Bulletin 172, published 20 December 2010, available at: <http://stakeholders.ofcom.org.uk/binaries/enforcement/broadcast-bulletins/obb172/issue172.pdf>

94. The level of the penalty in totality reflects the fact that the Licensee committed twelve separate breaches of the BCAP Code and a further breach of Licence Condition 11. Mindful of this, Ofcom considered the level of financial penalty to be proportionate, both in relation to each individual breach and in totality, as it achieves the appropriate level of deterrence taking into account, in particular, the number of breaches, the very serious nature of the breaches concerned and SEL's compliance record.

Precedent

95. In accordance with the Penalty Guidelines, Ofcom also had regard to relevant precedents set by previous cases.
96. In respect of content standards issues, this is one of the first cases involving 'adult sex chat' referred for consideration of a sanction under the BCAP Code and in the light of the Chat Service Guidance. The only previous case under this regime is as follows:
97. **9 November 2011: Just4Us TV Limited and Playboy TV UK/Benelux Limited (Red Light 1, Red Light 2, Red Light 3)**²⁶ – Sanction against three adult chat channels totalling £110,000 for ten breaches of Rules 4.2 and 32.3 of the BCAP Code. Sanction against three daytime/adult chat services. The material sanctioned was clearly inconsistent with the BCAP Code and the Chat Service Guidance and included such images as presenters spitting on their bodies to simulate ejaculate; using a cupped hand and on one occasion a telephone to cover their genital area, resulting in clear pressure between their hand or telephone and the genital area; pouring oil onto their buttocks and genital area; and wearing clothing that did not adequately cover their genital area (in one case outer labia were clearly visible). Further, on a number of occasions between 21:00 and 21:30 – that is, soon after the watershed – the female presenters adopted sexually provocative positions, sometimes for prolonged periods and regularly stroked and massaged their breasts and mimicked sexual intercourse.
98. In any event, Ofcom's view is that the financial penalty to be imposed should be determined in large part by the particular details of the instant case, including the serious and repeated nature of the breaches and the poor compliance record of SEL. The present case related to material shown on adult chat channels without mandatory restricted access which raised issues of protection of children from offensive sexual material during the period immediately after the 21:00 watershed, and the showing of strong sexual images which breached generally accepted standards.
99. There are, in addition, a number of previous sanction decisions concerning breaches of the Broadcasting Code, prior to the publication of the Chat Service Guidance. These cases raise analogous issues in the context of daytime and adult chat channels without mandatory restricted access. Ofcom considered there to be two relevant precedents in this category – see immediately below. (Ofcom does not consider that sanctions concerning for example 'adult' channels normally showing 'adult sex material' under encryption, free to air trailers for such services shown on these channels, and on screen promotional references to websites containing R18 material are sufficiently analogous to be helpful precedents.)

²⁶ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/Just4Us-Sanction.pdf>

100. **26 February 2010: Springdoo Media Limited/User Generated Broadcasting Ltd (Friendly TV/Bedroom TV)**²⁷ – Sanction against a daytime /‘adult sex chat’ channel of a total £24,000. This figure comprised £6,000 for breaches of Rules 1.6 (transition to more adult material), 2.1 and 2.3 of the Code; and £6,000 and £12,000 for breaches for retention and provision of recordings to Ofcom (under TLCS Licence Condition 11) respectively.
101. **29 July 2010: Bang Channels Limited and Bang Media (London) Limited (Tease Me, Tease Me 2, Tease me 3, Tease Me TV)**²⁸ – Sanction against various daytime/adult sex chat channels controlled by the Bang companies of a total of £157,250 for various breaches of Broadcasting Code Rules 1.3, 1.24, 1.25, 2.1, and 2.3. In this case the Sanctions Committee considered the contraventions committed by the Licensees to be of such a serious and repeated nature as to amount to recklessness. It considered that such recklessness was indicative of a wholly inadequate compliance system. The contraventions referred for sanction took place over a five month period, and the Bang Licensees had previously been found to have breached the Code on five separate occasions. Some of these contraventions occurred despite Ofcom providing the Licensees with clear guidance on a number of occasions. The Committee concluded this sexual material was clearly unacceptable and in breach of generally accepted standards for a licensed service which transmits without restrictions or safeguards.
102. In respect of Licence Condition 11, there is one relevant precedent case, the June 2011 Sanction – see immediately below.
103. **24 June 2011: Satellite Entertainment Limited (Essex Babes, Northern Babes, Live XXX Babes)**²⁹ – Sanction against various daytime/adult sex chat channels controlled by the Licensee of a total £90,000. This comprised £10,000 for each of nine breaches for retention and provision of recordings to Ofcom (under TLCS Licence Condition 11).
104. Ofcom was satisfied that the punitive and deterrent action proposed in this case was consistent with the precedent cases, taking due account of the factors outlined in the Penalty Guidelines and the serious and repeated nature of the breaches in this case.

Co-operation

105. In accordance with the Penalty Guidelines, Ofcom may increase the penalty where a licensee has failed to co-operate with Ofcom’s investigation.
106. Ofcom considered that the level of penalty should not be increased on this ground.

Conclusion

²⁷ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/springdoo.pdf> (Published 26 February 2010).

²⁸ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/bangchannels.pdf> (Published 29 July 2010).

²⁹ <http://stakeholders.ofcom.org.uk/binaries/enforcement/content-sanctions-adjudications/satellite-entertainment.pdf> (Published 24 June 2011).

107. Ofcom concluded that the breaches of Rules 4.2 and 32.3 by the Licensee were serious and repeated and that the breach of Licence Condition 11 was serious for the reasons set out earlier in this decision and therefore merited the imposition of a financial penalty in accordance with section 237 of the Communications Act 2003. In this case the Licensee broadcast material in clear breach of the BCAP Code on ten separate occasions despite clear guidance from Ofcom setting out what is and what is not acceptable in this genre. Moreover, these breaches occurred against a background of poor compliance by the Licensee, as detailed under the section entitled 'history of contraventions' above.
108. The material in question was broadcast unencrypted and was of a nature that it carried strong potential for causing profound offence, especially to viewers who came across the material unawares. In relation to two of the breaches, the material was broadcast close to the 'watershed' and so additionally had the potential to cause distress or harm to any children viewing at that time.
109. Ofcom was also gravely concerned that the Licensees had not had adequate procedures in place to supply recordings of suitable quality, thus creating the prospect of frustration of Ofcom's statutory duties.
110. In view of the factors set out above, Ofcom deemed the breaches sufficiently serious to warrant the imposition of a statutory sanction of **£130,000** on Satellite Entertainment Limited.

20 December 2011