

Response to OfCom “Participation TV: Part 2” Consultation

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1. INTRODUCTION

This response focuses on options for the regulation of adult-chat television services, the so-called “babe” channels. Two related proposals are suggested.

Over the past few years a distinctive programme genre has become established and popular, the late-night free-to-air adult-chat channels (“babe channels”). This genre is popular in some quarter and unpopular in others. It is highly distinctive and fundamental features include viewer responsiveness and the ease with which viewers may “surf” until they find a channel they like. The distinctiveness is in accord with Section 3.2c of the Communications Act 2003, which **requires** OfCom to secure a wide range of television services calculated to appeal to a variety of tastes and interests.

These channels have been innovative, and very responsive to viewer’s interests as they depend exclusively on shared premium rate telephone services for income. This is also in agreement with Section 3.2c of the Act. Regulatory pressures have stifled innovation.

At times there has been a wide range to independent providers, in accord with Section 3.1b which **requires** promotion of competition. Regulatory pressures have resulted in smaller operators being forced out and consolidation, with almost all of these channels now owned by just two companies.

Current BCAP rules prevent advertising of adult sex phone services.

Legal requirements exist to enforce a distinction between editorial content and advertising. The rationale behind these is to prevent abuses, confusion or loss of impartiality among trusted broadcasters. “Babe” channels are not in the same category as News At Ten, Tomorrows World or The Gadget Show, and viewers understand that they exist to generate income for a single business per channel.

The current situation favours the disabled, who may have restricted access to high-street top-self magazines and sex-shops, combined with low incomes. It also favours the unemployed and people on low incomes, who can “surf” 19 free-to-air channels at zero cost until they find a programme that they like.

The current situation provides choice and value for money. Subscription channels vary, but many “lock-in” subscribers to 12 month contracts, and have been known to drop precisely the genre or show that prompted a subscriber to signup in the first place. The minimum current subscription fee is £10.99 a month, or £4.99 for per-night channels, and this soon mounts up if a channel is uninteresting and alternatives are tried.

2. OFCOM PROPOSALS

OfCom proposes that the only acceptable form of revenue sharing is premium rate telephony (banning credit card billing etc).

OfCom proposes that rule changes that would require Adult Chat channels to be classified as Shopping channels, be encrypted, require registration and subscriber management systems:

- A recent European Court ruling means that channels with a substantial revenue generating element unconnected not directly connected to programme content must be classified as shopping channels, and regulated accordingly.
- OfCom states that BCAP rules prevent adult chat lines being advertised, except on encrypted channels.
- OfCom also states that section 1.24 of the current Broadcasting Code requires adult services to be encrypted, subject to registration and have subscriber management systems in place.

3. COMMENTARY

3.1 Revenue Generation

Agreed that billing methods designed to circumvent controls on premium phone lines should be banned. Premium phone line services are subject to maximum costs and cut-offs, unlike credit card billing.

Payment by premium rate phone services, credit card or any other method for goods (clothing, DVDs, pictures, presents for presenters, calendars, etc) should be discouraged. The best way to do this may be to impose a cost-cap.

However limited use of text services should be permitted, either to send (and receive) text messages, or to contribute a modest cost towards an on-screen service, eg vote for a particular presenter or scenario, or a striptease is performed when enough contributions have been received. This should be subject to usual premium-rate usage caps.

3.2 BCAP Rules

BCAP rules are not set in stone and can be changed.

They are substantially different for print and broadcast media, with no ban on print adverts for premium rate sex lines or escort agencies. Local papers commonly carry adverts for escort agencies (strongly associated with prostitution), while popular national papers such as the Sun and Mirror carry ads for premium rate sex lines, and are easily accessed by children in most houses, unlike late night television channels on blockable parts of the programme guide.

BCAP rules are a form of industry self-regulation, and can be amended to reflect changed climates and responsible practices.

Research by OfCom's predecessor, the ITC, showed that a major factor determining the acceptability or otherwise of sexual material in adverts was context (see Appendix III). Using sex to advertise non-sexual items (yoghurt) was seen as unacceptable, but sex was generally felt to be acceptable when advertising sex or nudity-related items (shower gel, men's underwear). It would be to argue that sexually explicit content on a channel selling telephone sex services was not justified by context.

BCAP itself states that it is “contracted by the broadcast regulator, Ofcom, to write and enforce the codes of practice that govern TV and radio advertising”. Although OfCom cannot determine the results of consultation, it would seem that OfCom has the authority to request that BCAP consult on advertising code changes.

OfCom should require BCAP consult on advertising code changes to permit adverts for telephone sex services and to permit sexually explicit adverts, in context and with suitable protection.

It is also clear that operators of “babe channels” should be represented on BCAP, both as broadcasters and advertisers.

3.3 Section 1.24

In the consultation document, OfCom states that Section 1.24 of the Broadcast Code requires adult services to be encrypted, subject to registration and have subscriber management systems in place.

It does no such thing – Section 1.24 is permissive rather than banning content. What it does it to provide a degree of protection to broadcasters, for example protection against complaints about Generally Accepted Standards. Broadcasters who operate without encryption and subscriber management do so at more risk, and may have to justify the acceptability of programme content.

It is worrying that OfCom appears confused about it’s own rules, and represents them in a way that is the direct opposite of what they actually mean.

3.4 Adult Content

While it is agreed that sexual material should not be shown before 10 or even 11pm, nothing within the Communications Act or OfCom’s published research appears to explain why OfCom imposes tighter restrictions on sexual material than other “adult” material, as defined by the BBFC, for example strong violence, horror, strong language, imitable techniques (crime, suicide, drug taking).

As such the BBFC cannot justify it’s stance, and risks being accused of imposing it’s members moral views on the general population, contrary to provisions of Human Rights legislation and the provisions of the Communications Act.

Despite this, “babe” channels have been subject to a high and disproportionate level of scrutiny, with channels assigned their own compliance officers and, in some cases, having to discuss and agree content in advance of transmission.

Risque material has been hounded out, resulting in a loss of diversity and innovation as broadcasters increasingly play it safe. It is now commonplace, for example, for presenters to wear 3 pairs of underpants to avoid any risk of brief exposure, despite full nudity being acceptable in BBFC 18 material.

4. PROPOSAL

4.1 Operators of “babe channels” should be represented on BCAP, both as broadcasters and advertisers.

4.2 OfCom should require BCAP to consult on advertising code changes to permit adverts for telephone sex services and to permit sexually explicit adverts, in context and with suitable protection.

4.3 There should be a grace period during which this consultation takes place, and to allow implementation of resulting changes.

4.4 “Babe” channels are registered as Shopping channels, but subject to revised content guidance permitting sexual content, as per 4.1 to 4.3.

4.5 The adult section of the Programme Guide should be blocked out by default, and only enabled if the subscriber specifically enables it (the opposite of the current situation).

4.6 A form of soft-encryption should be provided for “adult” channels otherwise free. Each day the entire section is blocked. After a suitable watershed the subscriber can enter a PIN which unlocks all the free to air channels. Having entered the PIN once it is not required again if changing channels. This should not require registration or subscriber management. The adult section is locked again at 05:30 and cannot be unlocked until after the evening watershed.

APPENDIX I LEGAL FRAMEWORK

A recent European Court judgement tightened the definition of shopping channels.

OfCom is required to adhere to the European Convention of Human Rights. OfCom must 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. As such, any interference must be **necessary**, rather than simply desirable.

OfCom derives its authority from the Communications Act 2003.

Among other things, under the Act, OfCom is required to –

- Promote competition (Sections 3.1b and 3.4.b)
- Make available a wide range of television services calculated to appeal to a variety of tastes and interests (Section 3.2.c)
- Maintain plurality of providers of different services (Section 3.2.d)
- Activities should be proportionate (Section 3.3.a)

OfCom must have regard to -

- Promoting self-regulation (Section 3.4.c)
- Encouraging investment and innovation (Section 3.4.d) [arguably this refers only to development of new technologies, rather than programme content.]
- Vulnerability of children (Section 3.4.h)
- Needs of persons with disabilities, and on low incomes (Section 3.4.i)

OfCom must have regard to choice, price and value for money (Section 3.5)

The Broadcast Code seeks to encapsulate requirements of the Communications Act relevant to television, particularly protection of children.

Advertising is subject to the BCAP Advertising Code.

OfCom has a Regulatory Principle that it “will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required”, so-called “light-touch regulation.

APPENDIX II

BROADCAST CODE

This details some circumstances when sexual material is and is not permitted. Under the British legal tradition, something is permitted unless specifically banned.

Section 1.17 states

“Representations of sexual intercourse must not occur before the watershed, or when children are particularly likely to be listening, unless there is a serious educational purpose. Any discussion on, or portrayal of, sexual behaviour must be editorially justified if included before the watershed, or when children are particularly likely to be listening, and must be appropriately limited and inexplicit.”

This section **does not** actually ban sexual material on any channel, after a suitable watershed.

Section 1.21 states (in full):

“BBFC 18-rated films or their equivalent must not be broadcast before 2100 on any service (except for pay per view services), and even then they may be unsuitable for broadcast at that time.”

While establishing a general watershed, this section **does not** define sexual material unsuitable for broadcast after a suitable watershed on any service.

The meaning of *“even then they may be unsuitable for broadcast”* is that the watershed is subject to an introduction period – extreme violence, swearing and realistic occult films are not considered acceptable at 2101, but become more acceptable as the evening wears on.

Section 1.23 permits broadcast of BBFC 18 certificate material, or equivalent, at any time of day on encrypted channels subject to mandatory PIN access and itemised billing if accessed before the watershed.

It **does not** state that encryption, PIN protection or itemised billing is required for sexual material **after** the watershed, it simply permits broadcast before the watershed subject to restrictions.

Section 1.24 states (in full):

“Premium subscription services and pay per view/night services may broadcast ‘adult–sex’ material between 2200 and 0530 provided that in addition to other protections mentioned above:

- there is a mandatory PIN protected encryption system, or other equivalent protection, that seeks satisfactorily to restrict access solely to those authorised to view; and*
- there are measures in place that ensure that the subscriber is an adult.”*

As such this section removes restrictions that might otherwise apply, for example general standards and justification within context, by specifically permitting “Adult-Sex” material in return for access control. Arguably PIN protection also provides bill-payers with protection against misuse of pay per view services.

This section **does not** ban this “Adult-Sex” material from unencrypted channels, however they may be subject to the usual range of restrictions – not starting immediately after the watershed, general standards (s2.1), context and so on.

It should be noted that the BBFC defines “Adult-Sex” material specifically to avoid any risk that material designed for sexual arousal might be certified 15 rather than 18. It does not impose stricter conditions than on other cert 18 material, for example films containing horror, violence or strong language.

Section 2.1 states that “*Generally accepted standards must be applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and/or offensive material.*”

It is arguable that broadcasting sexual material late at night in an adult section of the programme guide (900s) provides adequate protection against offence, particularly as the entire section can be blocked. It is arguable that sexual material is no more offensive than foul language, cage fighting, depictions of risky behavior (Jackass) or extreme horror films (Hellraiser, Texas Chainsaw Massacre, etc), shown on unencrypted channels without encumbrance. However some people would dispute these points, claiming this to be a grey area, and the absence of encryption leaves broadcasters open to risk that they may be found in breach of section 2.1.

The combined effect of the above sections of the Broadcast Code, and other more general sections, is that:

Sexual material CAN be broadcast on unencrypted channels after the watershed, subject to the watershed taking gradual rather than instant effect,

APPENDIX III BCAP Broadcast Advertising Code

One difficulty cited is the BCAP advertising code (also referred to as CAP ~ Committees of Advertising Practice)

The advertising codes are examples of self-regulation. The CAP Broadcast Committee “comprises representatives of broadcasters licensed by Ofcom, advertisers, agencies, direct marketers and interactive marketers”. It should be noted that the CAP Broadcast Committee is “contracted by the broadcast regulator, Ofcom, to write and enforce the codes of practice that govern TV and radio advertising.” In other words, OfCom could instruct the committee to review and update the code. The code is not something set in stone and external to OfCom.

There are two versions of the Codes, broadcast and non-broadcast. The non-broadcast version does not actually ban sexually explicit advertising. What it actually says is:

CAP Code (Non-Broadcast) Section 5 - Decency

http://www.cap.org.uk/cap/codes/cap_code/ShowCode.htm?clause_id=1496

DECENCY

(ie avoiding serious or widespread offence)

5.1 Marketing communications should contain nothing that is likely to cause serious or widespread offence. Particular care should be taken to avoid causing offence on the grounds of race, religion, sex, sexual orientation or disability. Compliance with the Code will be judged on the context, medium, audience, product and prevailing standards of decency.

5.2 Marketing communications may be distasteful without necessarily conflicting with 5.1 above. Marketers are urged to consider public sensitivities before using potentially offensive material.

5.3 The fact that a particular product is offensive to some people is not sufficient grounds for objecting to a marketing communication for it.

This is not an absolute ban on sexually explicit advertising. Instead advertising should contain nothing likely to cause serious or widespread offence, and compliance will be judged on various grounds including context.

It would, for example, be difficult to justify a ban on sexually explicit advertising in a sexually explicit magazine.

Likewise, it would be hard to argue that sexually explicit adverts in otherwise sexually explicit publications would cause widespread offence – people likely to be offended tend not to read these publications, and are more likely to be offended by the publication rather than the adverts.

In addition to this the audience tends to be smaller than for main daily newspapers, television pages or women's weeklies, hence publication would not be likely to cause widespread offence.

It is also noticeable that the non-broadcast code does not contain any "unacceptable categories". Indeed adverts for escort agencies, sometimes equated with prostitution, are a common feature of local newspapers available to family members of all ages. Blatant adverts for telephone sex lines are now common in mass-circulation family newspapers including the Daily Mirror and Sun.

By contrast, the Television version of the code specifically outlines "unacceptable categories" and "harm and offence".

CAP Code (Broadcast) Section 3 – Unacceptable Products and Services

http://www.cap.org.uk/cap/codes/broadcast_codes/tv_code/Section+3+-+Unacceptable+Products+and+Services.htm

3.1 (h) pornography

Note to 3.1(h):

This includes publications of the kind commonly referred to as 'top shelf'.

Encrypted elements of adult entertainment channels may however carry advertising for categories of 'top shelf' publications designated from time to time by BCAP.

CAP Code (Broadcast) Section 6 – Harm and Offence

http://www.cap.org.uk/cap/codes/broadcast_codes/tv_code/Section+6+-+Harm+and+Offence.htm

6.1 Offence

Advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards, or offend against public feeling

Notes:

(1) *Although no list can be exhaustive, and values evolve over time, society has shared standards in areas such as: ...*

(d) sex and nudity, and the use of offensive language. (For further information see the ITC research reports [Nudity in Television Advertising](#) and the [ASA/ITC report Delete Expletives](#). The latter reports on attitudes to swearing and offensive language.)

Note that there is not an absolute ban on violence or cruelty. Section 6.2 Violence and Cruelty permits violence in some contexts and states that "Timing restrictions are necessary for advertising featuring violence. See 7.4.6 (Distress) and 7.4.7 (Scheduling) below.". The CAP code implies that violence in adverts may be acceptable subject to scheduling protection.

ITC Research

The 1994-1995 ITC research (http://www.cap.org.uk/NR/rdonlyres/A9D4F1F4-E34B-44D2-8B28-43348F30D435/0/Nudity_in_Television_Advertising.pdf) concluded that there were two major factors determining acceptability or otherwise of nudity in advertising. One was **personality**, with “Puritans” and “Moralists” opposed to it. So called “Liberals” formed the largest single group in the study, and were more blasé about nudity. “Crusaders” and “Libertines” were in favour of it.

The other major factor was **context**, so-called Environmental factors. These included time and the presence or absence of company. Specifically the research found that “The channel broadcasting the advertisement was also part of the equation, with many respondents saying that Channel 4 had less mainstream programming and may appeal to viewers who were less likely to be offended. This was even truer for satellite and cable output, particularly the foreign channels, which were perceived (or known) to be more risqué.”

In other words, risqué advertising was more acceptable on channels with a reputation for risqué content.

Content found to be acceptable after a later watershed included:

Acceptable After Later Watershed		
Neutria shower gel	Woman rubbing nibbles in masturbatory pleasure.	“for the majority, it was considered permissible after a later watershed, since the use of nudity was justified by the nature of the product field.”
Dim (men’s underwear)	Nude man, almost full frontal. Close up of crotch while wearing underwear. Close-up of moving crotch (in underwear)	

Adverts described as unacceptable included

Described as Unacceptable		
Bio yoghurt	nude woman’s backside, used to emphasise slimming effect	Felt to be gratuitous.
MR coffee	A couple make love (very little nudity) then have a coffee. The message is “real pleasure does not come in an instant”, a dig at instant coffee and	Regarded as an attempt to sexualise a non-sexual product. Despite the absence of nudity, this advert fell in the unacceptable category.

Note that the issue seems be whether the sexual content is justified as much as whether it is sexual – the non-explicit MR coffee advert produced as strong a response as the Bio woman's bottom.

The broadcast code is much more restrictive than the non-broadcast code, despite the wider availability of local and national newspapers in most homes. This may be because the broadcast code is heavily orientated towards the traditional must-carry broadcasters watched by all the family (ITV, Channel 4) and has not moved with the times to reflect niche late night channels that can be locked out.

Conclusions

Sexual advertising is considered unacceptable when unrelated to the product.

Sexual advertising may be acceptable when a clear connection can be established.

A degree of sexual content was regarded as acceptable 14 years ago. Attitudes have become more tolerant since.

Some viewers do not like sexual content in any form. These viewers are unlikely to watch sexually orientated programmes.

There is a clear inconsistency between BCAP broadcast and non-broadcast codes.

The BCAP broadcast code is out of date.