

REVIEWING THE ITC CODE OF ADVERTISING STANDARDS AND PRACTICE FIRST CONSULTATION PAPER

ADVERTISING PROHIBITIONS

Responses to this consultation should be returned by the end of **Friday 7th July 2000**
They should be addressed to:

Mike Taylor
Head of Advertising Policy
ITC
33 Foley Street
London
W1P 7LB
Fax: 020-7-306-7717
e-mail: review@itc.org.uk

Unless a specific case is made for keeping all or part of any submission confidential, responses to this consultation will be made available by the ITC for public scrutiny.

BACKGROUND

1. This is the first of a series of consultation papers the ITC proposes to launch on advertising issues during the course of 2000, covering both advertising content and rules on the amount and scheduling of advertising. The ITC as a whole has committed itself to reviewing all of its rules and requirements, not just in advertising but across the board. We have a clear commitment to simplify, streamline and modernise our regulatory activities so that they remain relevant to consumers and the industry in the context of rapidly evolving technologies.

2. The ITC's review of television advertising rules has two underlying origins – changes in the market place, and the Audit of Regulatory Requirements.

2.1 Changes in the market place

From the viewer perspective, the format of spot advertising on linear television has changed relatively little in the last couple of decades. But the context has changed substantially – consumer expectations, social and environmental consciousness and above all the flow of information from different sources have all developed rapidly in recent years. The mushrooming growth of the Internet, in particular, is changing the way in which many consumers expect to receive product and service information. In addition, with the growth of interactive services on television – the subject of a separate ITC consultation published in February 2000 – the nature of television viewing, including advertising, could be set to change substantially, away from the largely passive model which has prevailed in the past.

2.2 The Audit of Regulatory Requirements

This audit was promised in the Government's conclusions on the responses to its consultation on "Regulating Communications" in early 1999. The ITC has committed itself to mount a full-scale audit of all the regulatory requirements imposed on commercial broadcasters, including advertising rules. The terms of reference were published on 17 September 1999, and commit the ITC:

- ◆ To identify the requirements and obligations which currently exist.
- ◆ To establish the origin of these requirements (e.g., in terms of UK legislation, EU Directives etc) and the status of the requirements concerned.
- ◆ To consider in consultation with the DCMS whether each regulatory requirement remains an effective and valid means of securing the relevant public policy objectives.
- ◆ To identify changes in requirements, with a view to simplifying, streamlining and modernising regulation.

The current review of advertising rules is designed to provide an important contribution to the Audit, and especially to the identification of possible areas where a lighter touch approach to regulation is appropriate.

3. In addition to the above, the ITC is concerned to establish that its advertising rules conform to the European Convention on Human Rights, which will be brought into effect in the UK as from October 2000. It is not envisaged that major changes will be necessary specifically on this account – the ITC has long been concerned to ensure that any restrictions on freedom of speech imposed by the Advertising Code are proportionate and clearly related to potential viewer detriment. This principle underlies much of the philosophy behind the Convention, and especially the safeguards included in Article 10 on freedom of expression. But content regulators need to be confident that any absolute prohibition on categories of advertising command public support and are consistent with the Convention.

4. As the first paper in a series on the various aspects of advertising, this paper starts by setting out the overall framework the ITC applies to its regulation of advertising content. This framework has two main elements – the rationale for advertising regulation, and the way it is carried out.

THE RATIONALE FOR TELEVISION ADVERTISING REGULATION

5. Advertising regulation has become a hallmark of consumer protection in all advanced Western economies, and increasingly in developing countries too. But it is not in any sense an end in itself. The underlying premise is, and should be, that informed consumers are normally the best judges of their own interests. Their aims are many and varied and the vast majority of day-to-day transactions do not throw up any problems demanding any kind of regulatory response. Regulatory interventions are most effective – and do least economic damage – if they are used sparingly and in relation to specific, well-defined goals.

6. In practice, television advertising regulation is needed to deal with three main types of problem.

6.1 Misleadingness.

Consumers are not in a position to ensure that the information they are given is accurate and sufficient before they make purchasing decisions. Misleading and deceptive practices distort markets and damage the interests of *bona fide* competitors as well as creating consumer detriment.

6.2 Protection of children.

Minors do not have the knowledge or experience to make reasoned decisions for themselves and may be adversely affected by certain kinds of message or portrayal.

6.3 Avoidance of offence and harm.

Advertising regulation cannot be an instrument of social engineering, but advertising needs to respect consensual public concerns about such issues as violence, bad language and social stereotyping.

7. All three of the objectives listed above need to be seen in the context of a dynamic market place, where expectations and concerns are constantly changing. The major premise behind the ITC's current review is that recent social and economic changes have been sufficient to justify significant relaxations of existing rules, whilst requiring others to be clarified and made more transparent.

THE CONDUCT OF ADVERTISING REGULATION.

8. The ITC's conduct of advertising regulation is governed principally by the Broadcasting Act 1990, which sets out a range of obligations, both general and specific. The Act also provides a range of discretionary powers which the ITC can use in pursuit of its general objectives. In addition, the ITC's Advertising Code needs to be consistent with a wide range of other legislation touching on advertising, such as:

The Control of Misleading Advertisements Regulations 1988.

The Consumer Protection Act 1987.

The Fair Trading Act 1973.

The Trade Descriptions Act 1968.

Yet a further set of requirements comes from the TWF Directive (the EU Television Without Frontiers Directive 97/36/EC, amending Council Directive 89/552/EC) which is due for review in 2002.

9. Although numerous, these statutory constraints allow the ITC considerable discretion both as to how it expresses its rules and how it applies them. The ITC has committed itself to carrying out each of these activities in a "lighter touch" manner. The premise underlying this approach is that we should regulate in a way that minimises the burden of detail licensees are expected to comply with and keeps ITC intervention to a minimum. In turn, wherever possible, this implies objectives such as:

- ◆ Shorter, less detailed codes in plain English.
- ◆ A degree of regulatory certainty - about what the rules are, what they mean, and what will happen if they are breached.
- ◆ Less day-to-day involvement of licensees with the ITC.
- ◆ Ensuring that the ITC does not place a brake on developments which will improve the quality, range and diversity of outputs available to viewers.

10. "Lighter touch" will in many circumstances involve deregulation – especially where it can be established that certain rules are no longer needed at all. But this will not always be possible or appropriate – the ITC is concerned to ensure that proportionate thresholds of public protection are retained where necessary, and that clear and effective sanctions are available if these are breached.

11. In assessing individual rules, and the scope for possible changes, the ITC intends to apply seven criteria, corresponding to the "tests of good regulation" developed by the Cabinet Office's Better Regulation Task Force.

11.1 Broad public support.

Advertising rules need to command general public acceptance both in terms of not being too restrictive and in terms of controlling unacceptable messages and images. Both sets of goalposts are moving all the time, and not necessarily in directions which are easy to forecast.

A further issue here is the extent to which advertising rules relate to other aspects of agreed public policy, e.g., healthy eating, safe driving and protection of the environment. It is clearly important that advertising rules should respect such policies and should not encourage actions which contravene them – but advertising is there to sell products, and it is not reasonable, in the ITC's view, to expect advertisers to promote public policies as such.

11.2 Enforceability.

There is little point in setting advertising rules that cannot be made to stick – public support and confidence will soon be lost. Effective mechanisms are needed to get offending advertisements amended or taken off air, as soon as practicable after the problem has been identified.

11.3 Ease of understanding.

Advertising rules are directed at the ITC's licensees in the first instance, and through them to advertising agencies and advertisers. The rules should be as easy as possible to understand for all involved. In addition – and it is a rather more subtle point – there is an issue of understandability to the public at large. Whilst we would not expect viewers to understand the detailed advertising rules, the comprehensibility of general protections such as the watershed provides a very important baseline.

11.4 No knee-jerk reactions.

The ITC frequently has to resist calls from large numbers of complainants and other stakeholders (including advertisers' competitors). The issues always need to be seen in proportion, and over a period of time. The ITC should not and cannot pander to those who shout loudest.

11.5 Balance of cost and practical benefit.

It is neither possible nor desirable for advertising rules to eliminate all forms of risk, e.g., in terms of the possibility of consumers misunderstanding claims made about products or services. For example, there is often little benefit in providing large amounts of superimposed text if this is unlikely to be read.

11.6 Reconciliation of contradictory policy objectives

Advertising spans a vast range of markets and – by implication – has a bearing on many public policy issues. The most recent ITC Code (autumn 1998) lists no less than 58 statutes relevant to advertising in one way or other (and even this list is not comprehensive). In addition, the ITC's rules need to take on board a very wide (and constantly changing) range of other agreed statements of public policy and best practice, on subjects ranging from food labelling to telephone chat lines. But there is a never-ending task of reconciling the widely varying objectives of other public policy makers with the goals and content of the Advertising Code itself.

11.7 Relevance to viewers' concerns and problems

Conditions change over time, and new problems come to light as a result of the ITC's own monitoring and research, and from the complaint caseload. These need to be reflected both in the ITC's published reports of upheld complaints and where appropriate in revised rules. But over the passage of time some regulations become unnecessary, too. Because redundant rules do not normally feature in the complaint caseload it is doubly important that regulators bear in mind the continuing case for reviewing existing rules, and especially prohibitions. These prohibitions form the core of the substantive questions raised in this first consultation paper.

12. We turn now to the specific issues for consultation.

REVIEWING THE PROHIBITIONS IN THE CODE

13 For the purposes of this first consultation the ITC has concentrated on rules that apply a direct prohibition on advertising. We are seeking at this stage to test the continuing necessity for bans on television advertising where similar restrictions do not apply in other media, or where a specific ITC prohibition may be redundant because it derives from a prohibition existing elsewhere, such as in statute or statutory regulation or rules governing the practice of a particular trade or profession. In removing absolute bans that serve no clear public policy purpose it is also likely that any possible clash with human rights requirements will be minimised.

14. We have identified 24 rules where we recommend either deletion or amendment of existing rules to remove an outright prohibition. In five other cases we have set out the arguments but recommended no change, at least in the short term. One of these, Rule 10 dealing with political advertising, is a special case where we have opened a debate on a matter of major public policy and recommended that no change be made pending resolution of that debate.

15. Immediately preceding the main body of the paper we have included a summary of the rules under review and the associated recommendations. The substantive section of the paper takes in turn each rule under review. It sets out the current wording of the rule, its derivation, the outline arguments for and against change and ends in most cases with a recommendation. Where the recommendation is for an amendment, suggestions towards redrafting are offered for comment. Appendix A sets out the arguments underlying the debate on political advertising on

television and should be read in conjunction with the section of the main paper dealing with Rule 10.

16. We are inviting respondents to comment substantively on the arguments set out in the paper for and against change in each case. These are just outline arguments based on the ITC's analysis of the policy considerations underlying the rules in question: we make no claim to have identified all the issues or indeed always to have reached the most appropriate conclusion. However, the paper is written from the starting point that freedom of speech should be the norm and that derogations from it need a clear justification. Where a respondent disagrees with an ITC recommendation to delete an existing prohibition the onus will therefore be on those wanting to retain the restriction to provide a compelling contrary argument.

17. Based on the responses to this consultation, the ITC may announce at some time around October 2000 that certain rules have been removed or amended. Following the completion of the whole review process it is likely that a fully revised set of advertising rules will be published in the second quarter of 2001.

Summary of ITC advertising rules discussed in this consultation.

Rules recommended for removal.

1	18 (a) (i)	Unacceptable products: breath testing devices and products which purport to mask the effects of alcohol.
2	18 (a) (vi)	Unacceptable services: private investigation agencies.
3	18 (a) (vii)	Unacceptable services: commercial services offering advice on personal or consumer problems.
4	18 (a) (x)	Unacceptable service: escort agencies.
5	31	Inertia Selling.
6	34	Homework Schemes.
7	35	Instructional Courses.
8	Appendix 3/10 (i)	Medicines etc.: Unacceptable products: products for the treatment of alcoholism.
9	Appendix 3/10 (ii)	Medicines etc.: Unacceptable services: clinics for the treatment of hair loss.
10	Appendix 3/10 (iii)	Medicines etc.: Unacceptable services: pregnancy testing services.
11	Appendix 3/10 (iv)	Medicines etc.: Unacceptable services: hypnosis, hypnotherapy, psychology, psychoanalysis or psychiatry.
12	Appendix 3/11	Medicines etc.: Impressions of Professional Advice and Support.
13	Appendix 3/13	Medicines etc.: Celebrity Testimonials and Presentations.
14	Appendix 5/12	Religious advertising: Counselling.
15	Appendix 5/15	Religious advertising: Free Offers.
16	Appendix 5/21	Religious advertising: Refusal to Broadcast Religious Advertising.

Rules recommended for amendment.

1	6 (b)	Persons Appearing in Advertisements and Programmes (newsreaders).
2	18 (a) (ii)	Unacceptable services: the occult.
3	Appendix 1/9 (e)	Advertising and children: Restriction on Times of Transmission.
4	Appendix 5/5 (ii)	Religious advertising: Unacceptable Advertisers.
5	Appendix 5/6	Religious advertising: Fund Raising.
6	Appendix 5/7	Religious advertising: Doctrinal References.
7	Appendix 5/11	Religious advertising: Faith Healing and Miracle Working.
8	Appendix 5/19	Religious advertising: Exhortations.

Rules discussed but recommended for no change.

1	10	Politics, Industrial and Public Controversy.
2	18 (a) (viii)	Unacceptable products and services: guns and gun clubs.
3	18 (a) (ix)	Unacceptable products: pornography.
4	Appendix 1/10	Children and advertising: Prices.
5	Appendix 2/6 (b)	Financial advertising: Unacceptable products and services: risk investments etc.

ITC CODE OF ADVERTISING STANDARDS AND PRACTICE.

Review of rules containing prohibitions.

6 Persons Appearing in Advertisements and in Programmes

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- (b) No advertisement may feature, visually or orally, persons who regularly present news or current affairs programmes on any UK television service.

Derivation.

This is an expression of ITC policy, and of the policy of the ITC's predecessor bodies.

Change?

An argument could be mounted to the effect that this prohibition was an unreasonable and disproportionate infringement of the rights of newsreaders and current affairs presenters to find employment as personalities in advertising. Some newsreaders have, and currently are, objecting to this rule on these sorts of grounds.

No change?

The rule is part of the apparatus designed to protect programme integrity. News is by common consent, within Europe at least, identified as a category of programme that requires particular care. For that reason, current newsreaders in the UK have always been prevented from appearing in advertisements. The TWF Directive does not permit news and current affairs programmes to be sponsored for similar underlying reasons. This restriction is part of the apparatus that keeps a clear and visible distinction between commercial concerns and news and current affairs editorial. It is also the case that many news providers require their news presenters to undertake no advertising work.

Recommendation.

The ITC recommends that this rule be amended.

We are unlikely to be persuaded that this restriction should be removed altogether. It is not clear that the degree to which the ability of these individuals to find alternative work may be prejudiced is sufficient to over-ride the public policy objective of the rule.

However, views are invited on whether it would be practicable to construct a workable set of graduated restrictions. Under such a scheme persons who only occasionally present news and current affairs programmes might be able to appear in advertisements if scheduled in breaks not in or adjacent to the programmes concerned. This restriction would be likely to be applied even when the person concerned was not presenting that particular edition of the programme. Presenters who appeared regularly but only in one television region might appear in advertising shown only outside that region. The outright ban would remain for regular presenters of rolling news channels, national and local news programmes and current affairs programmes.

10 Politics, Industrial and Public Controversy

No advertisement may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature, and no advertisement may be directed towards any political end. No advertisement may have any relation to any industrial dispute. No advertisement may show partiality as respects matters of political or industrial controversy or relating to current public policy.

NOTES:

- (i) *The term "political" here is used in a wider sense than "party political". The prohibition precludes, for example, issue campaigning for the purposes of influencing legislation or executive action by central or local government. Where there is a risk that advertising could breach this prohibition prospective advertisers are strongly advised to seek advance guidance from licensees before developing specific proposals.*
- (ii) *The Broadcasting Act 1990 specifically exempts advertisements of a public service nature inserted by, or on behalf of, a government department from the prohibition of advertisements having "any relation to any industrial dispute".*

Derivation.

This rule derives from Section 8(2)(a) of the Broadcasting Act 1990 and the first two sentences of the rule are in effect direct transpositions of the statute. The third sentence of the rule is an expression of ITC policy and derives from legal advice given over an extended period to the ITC and its predecessor bodies on how to give practical effect to the statute. This is further expanded in the first Note to the rule.

Change?

There is a *prima facie* case for believing this rule may be open to challenge as an infringement of the right to freedom of speech. It is not obvious that any of the exclusions listed in Article 10 of the ECHR directly justify the prohibitions in this rule. It also appears that the UK is alone, at least among EU member states, in having such a rule.

No change?

To the extent that this rule is an expression of UK statute, the ITC has no powers to amend it. To the extent that the rule is an expression of ITC policy on how the statute should be interpreted in order to give it practical effect, then any challenge would be to the consistent legal advice upon which the ITC and its predecessors have acted in the past. It is not clear that there are immediate grounds for considering that advice no longer safe.

Recommendation.

The ITC recommends no change at this time.

The ITC is not against liberalisation in this area but it is clear that the underlying policy issue is pre-eminently a matter for Parliament to decide. The ITC is aware that Government intends to review its position on the right of campaigning bodies to broadcast advertisements and we will be actively co-operating in this debate. Views are particularly welcomed on whether any meaningful distinction might be drawn between advertisements aimed at influencing executive as opposed to legislative action. (Refer to Appendix A for a detailed discussion of the issues.)

18 Unacceptable Products or Services

- (a) Advertisements for products or services coming within the recognised character of, or specifically concerned with, the following are not acceptable:
 - (i) breath-testing devices and products which purport to mask the effects of alcohol;

- (ii) the occult (with the approval of the Commission certain publications of general interest are acceptable);
 - (iii) betting tips;
 - (iv) betting and gaming, (except football pools, bingo and lotteries permitted under the National Lottery etc Act 1993 and the Lotteries and Amusements Act 1976* as amended);
- *This Act does not extend to Northern Ireland.*

NOTE:

Broadcast advertising of bingo is not permitted in Northern Ireland.

- (v) all tobacco products;
- (vi) private investigation agencies;
- (vii) commercial services offering advice on personal or consumer problems (this does not preclude advertising by solicitors and by those offering other specific professional services designated from time to time by the Commission);

NOTE:

The prohibition in Rule 18(a)(vii) does not apply to advertisements for financial advice which meet the requirements of Appendix 2 of the Code.

- (viii) guns and gun clubs;
- (ix) pornography

NOTE:

For the purposes of this Code the prohibition in Rule 18(a)(ix) extends to publications of the kind commonly referred to as "top shelf" publications.

- (x) escort agencies.

Derivation.

Only four of these categories ((iii) betting tips, (iv) betting and gaming, (v) tobacco products and (ix) pornography) derive directly from prohibitions in legislation. (Note that the Government has announced a Gambling Review Body to start work by the end of April 2000. Its remit will include the regulation of betting and gaming and will therefore be likely to affect the regulation of advertising). The remainder of the restrictions in Rule 18 are longstanding policies of the ITC or its predecessors.

Change?

The ITC starts from a pre-disposition towards freedom of speech. Therefore, to the extent that the ITC has discretion about whether a product or service should be prevented from being advertised on television, the onus must be on those who would retain any such ban to make a compelling case. In particular, where products may be advertised in other media it must be clear that it is the nature of television advertising that justifies the ban.

18 (a)(i) breath testing devices and products which purport to mask the effects of alcohol.

Change?

If there are concerns about whether the products work then this will be covered by the rules on misleadingness (Code Rule 24) and no separate prohibition is required.

No change?

It is possible that the use of these products could lead to attempts to avoid legal restrictions on drinking, or to a potentially dangerous misplaced confidence, such as in relation to drinking and driving.

Recommendation.

The ITC recommends that this prohibition be deleted.

We are not convinced that preventing the advertising of such products on television will add significantly to consumer safety.

18(a)(ii) the occult.

Change?

The definition of what constitutes “occult” is not clear and that lack of clarity allows things to be banned that might otherwise be advertised with no viewer harm or other disbenefit. If the concern is about possible misrepresentation or exploitation, that is covered by other rules, such as misleadingness (Code Rule 24) and protection of vulnerable sectors of the community (Code Rules 16 – Appeals to Fear and 17 – Superstition).

No change?

There is a strong current of concern about the occult among some religious groups who see any reference to it as deeply offensive to their religious beliefs. There is a parallel concern about moral harm to children who might be exposed to references to the occult.

Recommendations.

The ITC recommends that this rule be amended.

Experience has shown that the term “occult” is unhelpful. It is too ill defined to provide clear guidance to licensees on what may or may not be advertised. The literal meaning, of something hidden or secret, has been superseded in common usage so that the term now is taken primarily to mean knowledge or use of the supernatural. To the extent that such a meaning encompasses a form of faith or belief then the issues raised are best dealt with under the rules in Appendix 5 of the Code which deal with conventional religious and belief systems.

There are, however, things that fall short of being part of a system of belief but are nevertheless associated with the “supernatural”. The most obvious of these is fortune telling. This comes in many guises, from the very general newspaper horoscope, each heading of which covers many millions of people, to predictions made for one particular individual. The ITC has hitherto distinguished between generalised and personalised readings, allowing the former but not the latter. Thus a newspaper horoscope column or a similarly constructed telephone service could be advertised but

readings for individuals could not. However, it is not clear to what extent this distinction is meaningful or what mischief is being prevented, provided that the advertising does not mislead about what the service can provide.

The ITC is minded to liberalise in this area. We are therefore seeking views on where a line can sensibly, and practicably, be drawn between various things simply associated with the supernatural as opposed to more serious manifestations that need to be treated more as belief systems.

Where respondents propose a general prohibition, a clear statement of the mischief that would be prevented should be made and a justification of why such a prohibition should apply specifically to television advertising if it does not exist in other media. It is unlikely that an objection based principally on the grounds that the thing to be prohibited was in some way in conflict with the beliefs of specific religious faiths would alone be sufficient to warrant a ban. Aspects of many religions and belief systems may well be incompatible but that would not justify preventing their being advertised.

18(a)(vi) private investigation agencies.

Change?

The nature of the objection to television advertising for this particular profession is unclear. Provided that advertising in this sector is subject to the generality of the law governing all other trades and professions it is difficult to see any justification for maintaining the ban.

No change?

The origins of this ban are not clear but it is possible that the absence of any meaningful enforceable regulation of the industry played a part. It is also possible that there were concerns that, particularly in relation to some aspects of the work private investigators are asked to do, for example, surveillance, it would often be difficult to offer such services and remain within the law.

Recommendation.

The ITC recommends that this prohibition be deleted.

On the basis that there are many areas of business that operate without any enforceable regulation other than the generality of the law, it is difficult to justify the singling out of one particular profession for special treatment in relation to television advertising alone. Equally, it is not clear why there should be what amounts to an assumption that there is likely to be a breach of the law by such advertisers.

- 18(a)(vii)** commercial services offering advice on personal or consumer problems (this does not preclude advertising by solicitors and by those offering other specific professional services designated from time to time by the Commission);

NOTE:

The prohibition in Rule 18(a)(vii) does not apply to advertisements for financial advice which meet the requirements of Appendix 2 of the Code.

Change?

It is not obvious why services that charge for advice should be prevented from advertising on television. There are perfectly sound reasons for charging for services and properly funded services are likely to be better value. The exceptions listed and the right the ITC has reserved to itself to recognise others indicate that there is no clearly identifiable principle or public good being defended here.

No change?

People in need of advice are frequently vulnerable and may be led into unnecessary expenditure if led to believe that the advertised service could solve their problems.

Recommendation.

The ITC recommends that this prohibition be deleted.

The argument for protecting the vulnerable does not on its own appear sufficiently convincing. If the service is offering more than it could reasonably provide then the advertising would be likely to be considered misleading.

- 18(a)(viii)** guns and gun clubs.

Change?

The statutory control of the sale and use of firearms is now much more stringent than when this rule was introduced. It is not clear what is peculiar to the television medium alone that would justify a ban on advertising related to an activity that is both strictly controlled and free to advertise in other media. The whereabouts of gun shops and clubs has always been public knowledge through being listed in telephone and trade directories. Some people feel particularly sensitive about this issue but an emotive response is not alone a sufficient reason for a sectoral ban on advertising. It is not obvious that a specific ban on television advertising adds anything significant to the sum of public safety.

No change?

At the time this rule was placed on the face of the Code there were concerns about terrorist activity and about the violent misuse of firearms by individuals. In such a context it was considered undesirable that the whereabouts of firearms should be widely advertised and their use seemingly sanctioned. At the same time it was judged that a significant proportion of the audience would see such advertising as inappropriate. To the extent that the same concerns pertain today then these same broad public policy considerations remain relevant.

Recommendation.

The ITC recommends no change at this time.

- 18(a)(ix)** pornography.

Change?

Clearly there can be no case for recommending the removal of a ban on illegal material, and pornography is illegal. Where the ITC may need to reconsider is the manner in which as a matter of policy it extends the definition of pornography to “top shelf publications”, which includes non-print material. Such material is readily and regularly on public sale with no legal action being taken against it except on rare and specific occasions. It is also relevant that material similar to the content of these publications forms the programme content of a number of ITC licensed services and that advertising for this kind of material is already permitted on such services. If advertising for the product category was to be allowed it would be subject to control of content using the rules on offence. Suitable scheduling restrictions would also help keep this material away from those likely to be offended.

No change?

One of the difficulties with restricting the prohibition to simply “pornography” is that there is no clear and workable definition of what the term means. It might therefore be possible to advertise a magazine quite acceptably but to find that one issue might be judged by the courts to fall under the law. It is also the case that the TWF Directive, and UK policy, places particular emphasis on the protection of the moral wellbeing of minors. The consensus of public opinion, in the UK at least, is likely to hold that advertising for such material should not be shown if there were a reasonable expectation that it would be seen by minors. It is also not clear that the publishers of “top shelf” material are materially disadvantaged by the current ban.

Recommendation.

The ITC recommends no change to the basic rule.

However, we invite views on the possibility of applying context-related scheduling restrictions to advertising for “top-shelf” material. By definition, such advertising would not be seen prior to the watershed but it would in addition be restricted to the breaks in and at the end (but probably not the beginning?) of programmes that were clearly flagged in the listings as containing adult material of a sexual nature. Such programmes would be likely to be seen only late at night in line with the ITC Programme Code guidelines.

18(a)(x) escort agencies.

Change?

It is not clear what is specific to such businesses, or what mischief there is to be prevented, that would justify banning these companies from advertising on television.

No change?

When first introduced this ban was probably concerned with preventing the advertising of disguised prostitution services in an area where there was no credible and enforceable regulation. To the extent that this might remain a concern, then by so much might the retention of the ban be justified.

Recommendation.

The ITC recommends that this prohibition be removed.

It is not clear why it should be assumed that advertisers are likely to be acting outside the law, whether or not there is enforceable regulation governing their activity.

31 Inertia Selling

No advertisement may be accepted from advertisers who send the goods advertised, or additional goods, without authority from the recipient.

Derivation.

The origins of this rule are not clear but it does not appear to reflect any existing legal prohibition.

Change?

The activity prohibited by this rule appears not to be illegal and consumers are protected from being forced to pay for things they have not expressly ordered by general consumer protection legislation and specific statutory provisions dealing with unsolicited goods and services.

No change?

It is possible that some more vulnerable members of society might feel pressured into paying for goods they had not ordered notwithstanding there being no legal obligation to do so.

Recommendation.

The ITC recommends that this prohibition be removed.

It is not clear that a blanket ban on television advertising is justified on the basis of concern that some advertisers may act unethically when those same advertisers may freely use other media.

34 Homework Schemes

- (a) Homework schemes are those in which participants, whether employees or not, undertake work at or from home on behalf of someone else, for example, addressing envelopes or making up garments or toys.
- (b) Advertisements are not acceptable for schemes which involve making a charge for the raw materials or components and/or where the advertiser offers to buy goods made by the home-worker, or where a charge or deposit is levied in order to obtain details of the scheme.
- (c) Full particulars of any scheme must be obtained and licensees must satisfy themselves in particular that:
 - (i) no misleading impression is given of how the scheme will work (for example, any obligation for the home-worker to collect or deliver materials must be disclosed);
 - (ii) the advertisement does not convey a misleading impression of the likely remuneration.

Derivation.

The origins of this rule are not clear. In relation to 34(b) at least, it reflects a public policy concern to protect potentially vulnerable people from being exploited.

Change?

The practices banned in 34(b) appear not to be illegal and the issues dealt with in 34(c) are covered elsewhere in the Code, under Rule 24, Misleadingness.

No change?

The exploitation of homeworkers has been an acknowledged social problem for some time. The existing prohibition prevents the authority of television being used to attract the more vulnerable into activities that may be to their detriment.

Recommendation.

The ITC recommends that this prohibition be removed.

The ITC recognises that this is, or was, a problem and invites the views of those persons and agencies most closely involved. However, to the extent that there may be perfectly *bona-fide* companies who wish to contact potential workers, and given that the practices appear not to be illegal, it is not clear what purpose a ban on television advertising serves.

35 Instructional Courses

- (a) Advertisements offering courses of instruction in trades or subjects leading up to professional or technical examinations must not imply the promise of employment or exaggerate the opportunity of employment or remuneration alleged to be open to those taking such courses; neither should they offer unrecognised "degrees" or qualifications.
- (b) Advertisements by correspondence schools and colleges, other than those granted accreditation by the Council for the Accreditation of Correspondence Colleges, are unacceptable except in circumstances approved by the Commission.

Derivation.

The origins of this rule are not clear.

Change?

Rule 35(a) is unnecessary to the extent that it deals with misleadingness, which is covered by Rule 24. In respect of Rule 35(b) it is not clear on what basis accreditation by this body should be the main criterion for acceptance of advertising. Such accreditation is clearly not mandatory as the ITC has given itself the discretion to permit advertising in other circumstances.

No change?

There appear to be no clearly identifiable arguments against change.

Recommendation.

The ITC recommends that this prohibition be removed.

APPENDIX 1 – ADVERTISING AND CHILDREN.

9 Restriction on Times of Transmission

....

- (e) Advertisements for merchandise based on children's programmes must not be broadcast in any of the two hours preceding or succeeding transmission of the relevant programme or of episodes or editions of the relevant programme.

Derivation.

This is an ITC policy that was developed in reaction to the “total marketing” phenomenon. Typically, major toy manufacturers produce not only the merchandise itself and its associated advertising but also programmes featuring the product that are sold to broadcasters. This was, and remains to a certain extent, a focus for concern among some parents and consumer groups. This rule was developed in part to meet this concern but also to meet the ITC’s obligation not to allow advertising that might reasonably be considered likely to encourage children to “pester”.

Change?

Provided the advertisements themselves do not overtly encourage pestering and are in all other respects compliant with ITC rules it is not clear what additional consumer protection this rule provides. It is also the case that with the increase of multi-channel homes and homes with internet access children are increasingly exposed to programme-related merchandising.

No change?

This is not an outright ban and so the damage to commercial interests is minimal. The ITC has a duty to restrict as far as is reasonable methods of advertising that might encourage pestering. The direct juxtaposition of an advertisement for a product with a glamorous presentation of that product in a programme might reasonably be supposed to have some effect on a child’s desire for the product.

Recommendation.

The ITC recommends this rule be amended.

We are not convinced that a two-hour restriction achieves anything more than would result from a less stringent restriction. It is therefore proposed that the standard scheduling restriction be adopted that would, in this case, keep advertising for products which are versions of programme characters and the like away from the breaks within or immediately before or after that programme. Note that this would require a parallel amendment to Section 4.2.2 of the ITC’s Rules on the Amount and Scheduling of Advertising.

10 Prices

- (a) Except in the case of services carrying advertising directed exclusively at audiences outside the UK, advertisements for expensive toys, games and similar products must include an indication of their price.

Derivation.

This is an ITC policy that is in effect a development of the rule against pestering by children. It is aimed at providing additional information, primarily to parents so that they may make an early judgement on whether a particular product is within their purchasing power.

Change?

There is no statutory requirement to price goods and no equivalent ITC rule for other products. The toy industry has, in the past, expressed concern that the requirement to do so could in some circumstances lead to potentially misleading price information, given that the prices of toys in the UK varies widely.

No change?

The ITC has no evidence from the many years that this rule has been in place that it does in fact lead to misleading pricing and the ITC's legal advice has been reassuring. Furthermore, there is evidence from ITC research that parents do use and value this additional information.

Recommendation.

The ITC recommends no change.

We nevertheless welcome comment on our analysis and the underlying principles.

APPENDIX 2 – FINANCIAL ADVERTISING.

6 Investment Advertising

....

- (b) **Unacceptable Categories of Advertising.** Except in circumstances approved by the Commission the following categories of advertisement may not be broadcast:
- (i) advertisements of investments in metals, commodities, futures and options, securities which are not readily realisable, volatile or complex investments such as swaps and currency or interest rate instruments, contracts based on market indices, and such other categories which the Commission may from time to time consider inappropriate for television advertising;
 - (ii) advertisements of the issue of shares or debentures other than advertisements announcing the publication of listing particulars or a prospectus in connection with an offer to the public of shares or debentures to be listed on The Stock Exchange;
 - (iii) advertisements recommending the acquisition or disposal of an investment in any specific company, other than an investment trust company listed on The Stock Exchange;
 - (iv) advertisements which appear to the Commission to have the effect of publicising indirectly any investment which may not be advertised under any provision of this Appendix.

NOTE:

Approval for advertising in categories 6(b)(i) to (iv) above will normally be considered only in respect of special interest financial channels.

Derivation.

To a significant extent these rules reflect those of the financial services industry (e.g.: (ii)). Others were derived as a matter of ITC policy in consultation with the financial services regulatory bodies (e.g.: (i)).

Change?

To the extent that these are absolute bans on television advertising for products or services that may be advertised in other media then there is a *prima facie* case for considering their removal.

No change?

At the time these rules were first developed, the financial regulatory bodies took the view that some at least of the banned activities were not suitable for a mass popular medium. At this time there is a new financial services regime being put in place. Until all the various enabling legislation is enacted and the Financial Services Authority rules are in place it would seem unwise to start amending rules that have remained unchallenged for a number of years.

Recommendation.

The ITC recommends no change at this time.

We will, however, keep this section of the rules under review in the light of developing financial services regulation and with a view to substantial liberalisation as far is practicable, particularly in relation to advertising in and around programmes dealing with financial services and investments.

APPENDIX 3 – MEDICINES, TREATMENTS, HEALTH CLAIMS, NUTRITION AND DIETARY SUPPLEMENTS.

10 Unacceptable Products or Services

Advertisements for products or services coming within the recognised character of, or specifically concerned with, the following are not acceptable:

- (i) products for the treatment of alcoholism;
- (ii) clinics for the treatment of hair loss;
- (iii) pregnancy testing services; (This does not preclude pregnancy testing kits which have been specifically approved on a basis acceptable to the Commission, after consulting its medical advisers);
- (iv) hypnosis, hypnotherapy, psychology, psychoanalysis or psychiatry. (This prohibition does not extend to clinics and institutions and certain types of publications on these matters approved on a basis acceptable to the Commission, after consulting its medical advisers).

Derivation.

These prohibitions are expressions of ITC policy and would have been adopted after consultation with the medical advisors of the ITC's predecessor bodies. It seems likely that they derived from concerns that some areas of activity were outside the mainstream of medical practice and therefore perhaps not in all cases subject to the same degree of professional regulation.

Change?

It is not clear that the probable basis for the original objections is sufficient to maintain these prohibitions. In particular, the ban on (iii), pregnancy-testing services, may well have been based at least in part on a concern that such services might also offer advice on abortion. As abortion is now legal in the UK that head of objection must fall away. With regard to (iv), hypnosis, etc, it is not clear on what basis a ban could be sustained on an individual practising such disciplines when it is clear from the latter part of the rule that the ITC is prepared to accept advertising from clinics and the like which offer the same services. Obviously, no advertising would be possible where the professional body of the discipline concerned did not itself allow this.

No change?

Some of the services that might be offered under these headings could be seen as being suitable only for individuals specifically referred to them by their medical advisors. To that extent at least they would constitute a risk to more vulnerable viewers who could be unduly influenced by the authority of the television medium. In some other cases the services offered may present themselves and be perceived as of a general "medical" character but nevertheless lie outside the remit of the established medical professional codes of conduct. Some more vulnerable viewers might therefore have unrealistic expectations of the services that are actually on offer.

Recommendation.

The ITC recommends that these prohibitions be removed.

We are not persuaded by the arguments identified so far in favour of the *status quo* but would welcome alternative points of view.

11 Impressions of Professional Advice and Support

The following are not acceptable:

- (i) presentations of doctors, dentists, veterinary surgeons, pharmaceutical chemists, nurses, midwives, etc. which give the impression of professional advice or recommendations;
- (ii) statements giving the impression of professional advice or recommendation by persons who appear in the advertisements and who are presented, either directly or by

- implication, as being qualified to give such advice or recommendation. To avoid misunderstanding about the status of the presenter of a medicine or treatment, it may be necessary to establish positively in the course of an advertisement that the presenter is not a professionally qualified person;
- (iii) references to approval of, or preference for, the product or its ingredients or their use by the professions referred to in (i) above.

.....

13 Celebrity Testimonials and Presentations

No advertisement for a medicinal product or treatment may include a testimonial by a person well known in public life, sport, entertainment etc or be presented by such a person.

Derivation.

There is a legal basis for banning medical professional and celebrity endorsement of products with a product licence. The extension of that prohibition to products without a product licence appears to have been ITC policy in an attempt to enforce a commercial level playing field between products in the same area, e.g., toothpastes where some have product licences and some do not.

Change?

In the absence of any legal impediment in respect of products not requiring a product licence from carrying medical professional and celebrity endorsement it is not clear that any of the other arguments (e.g., level playing field) is sufficient to justify the retention of this ban in areas where the ITC has discretion.

No change?

The ITC publicly consulted on this issue in July 1999 (Press release 47/99) and received decidedly mixed, and contradictory, results. Where even the industry is unable to agree on the nature of the issues and the proper course of action, caution is indicated.

Recommendation.

The ITC recommends that these prohibitions be removed.

The ITC is not convinced that the earlier consultation drew out arguments sufficient to justify the retention of these prohibitions beyond what is required by the law. We will therefore again review the consultation responses and if necessary contact respondents again to resolve any outstanding issues.

17 Diagnosis, Prescription or Treatment by Correspondence

No advertisement may contain any offer to diagnose, advise, prescribe or treat by correspondence. (This includes, for example, post, telephone or fax).

NOTE:

At the time of launching this consultation, the ITC was separately consulting on this rule with a view to its amendment to allow such services to advertise, provided they were subject to regulation by relevant medical professional bodies. It is not therefore proposed to invite separate comments on this rule.

APPENDIX 4 – CHARITY ADVERTISING.

The ITC identifies no rule within this Appendix that requires to be consulted on in this phase.

APPENDIX 5 –RELIGIOUS ADVERTISING

Derivation.

With few exceptions the rules in this Appendix are expressions of ITC policy. However, most are simply tailored versions of uncontentious rules in the main body of the Code. Where rules are specific to religious advertising they are derived from the extensive consultation undertaken by the ITC with the various religious communities at the time the rules were drafted. To that extent at least they reflect a consensus of what was considered appropriate to include in the way of consumer protection.

Title of the Appendix.

Experience has indicated that the rules in this Appendix apply rather more widely than a narrow reading of the title “Religious Advertising” might suggest. To the extent that they apply equally to other systems of faith and belief this should be reflected in the title.

Recommendation.

The ITC therefore recommends that Appendix 5 be re-titled to “Religion, Faith and Related Systems of Belief”.

5 Unacceptable Advertisers

No advertising is acceptable from bodies:

-
- (ii) whose rites or other forms of collective observance are not normally directly accessible to the general public.

NOTE:

More detailed guidance on rule 5 is available in ITC Advertising Guidance Note No. 6.

Change?

It is possible that the rule might prohibit advertising by bodies that were not intended to be caught, including some that were very well established. If a religious or quasi-religious organisation is not proscribed by UK law, and may advertise in other media, why should it be prevented from advertising on television? Even if there is sufficient justification for preventing certain organisations from advertising, the rule as currently drafted may be a rather blunt and inappropriate instrument to use.

No change?

The rule emerged from widespread concern, expressed through responses to public consultation, about secretive cults that masqueraded as religions or were suspected of exploiting the vulnerable, especially young people, perhaps by extracting money or splitting families. There is no reason to believe those concerns have diminished.

Recommendation.

The ITC recommends that this rule be amended.

At this time, the ITC does not have a sufficiently in-depth understanding of the current issues to make a firm recommendation on the form of the amendment. We therefore welcome detailed views from interested parties. We recognise that we are unlikely to be able to resolve this complex issue quickly and therefore intend if necessary to continue this debate in future consultation papers.

6 Fund Raising

- (a) Subject only to (b) below, advertisements must not include appeals for funds.
- (b) By prior arrangement, the Commission may exempt from this requirement advertisements from religious charities who can reliably demonstrate that any proceeds from television advertising will be devoted solely to the benefit of identified categories of disadvantaged third parties, and that the conveying of such benefit will not be associated with promotion of any other objective (e.g. proselytising).
- (c) Such advertising must also comply with the rules on charity advertising (Appendix 4).

Change?

Advertising for charities that have no religious connection is not restricted to appealing for funds only for “disadvantaged third parties”. The rule has the side effect of also prohibiting appeals on behalf of, for example, “church roof repair” funds, which many would argue was disproportionate.

No change?

The rule emerged from public concern that bogus religious groups could exploit religious faith and commitment, particularly amongst the more vulnerable viewers, to extract money, possibly on a regular basis. These activities would not necessarily be fraudulent.

A further more technical problem is that at the moment, there is a ban on fund-raising within programmes. If this were to remain then the removal of the advertising ban could effectively circumvent it as advertising by the same undertaking could be placed in and around the programme.

Recommendation.

The ITC recommends that this rule be amended.

We invite comments on allowing advertisements for fund-raising for organisations which fall to be considered under this Appendix, subject to a scheduling restriction that would keep such advertising out of the breaks in or immediately adjacent to any programming featuring the same organisation. Note that before making any change in this case the ITC will need to be certain that it would not undermine any policy requirement that derives from the Programme Code.

7 Doctrinal References

Advertising must not be used to expound religious doctrine. References to matters of doctrine or belief may only be incidental to advertising for one of the purposes in Rule 4 above and should not be expressed as unqualified assertions, but in ways which make it clear to viewers that they represent the advertiser's belief.

.....

19 Exhortations

Advertisements must not directly exhort viewers to change their religious behaviour.

(Note:

These two rules are considered together as they raise essentially the same issues.)

Change?

Particularly for evangelical religions, these restrictions may be seen as a particularly severe limitation. Recipients of evangelical messages may object but do not derive from that the right to curtail the free speech of others.

No change?

The rules prevent, for example, followers of particular faiths, humanists, rationalists, atheists and cultists from presenting their beliefs as established fact in ways that others might find confrontational and that might inflame sectarianism. There is also, under Rule 20 of Appendix 5, an alleviation for specialised religious channels. Thus on such channels, Rule 7 at least does not apply.

Recommendation.

The ITC recommends that these rules be amended.

We anticipate that the amendment would be of the following general character.

Statements of doctrine are permitted provided they are clearly and unambiguously presented as a matter of belief rather than as fact. Such statements must be presented in a restrained way and may not include exhortations to viewers to change their beliefs or religious behaviour.

We are conscious of the difficulties raised by rules that contain potentially ambiguous words such as “restrained” and would particularly welcome views on whether this concept is likely to be workable in this instance.

11 Faith Healing and Miracle Working

No advertisement may promote faith healing or miracle working.

Change?

Belief in faith healing and miracle working is central to some religions and this prohibition is a significant restraint on their ability to express their faith.

No change?

Some observers are concerned that claims of faith healing can be used to exploit the vulnerable and the power of television advertising should therefore not be used for that purpose. There is also concern that claims could not be substantiated.

Recommendation.

The ITC recommends that this rule be amended.

The ITC is not convinced that there is a clear case for retaining the outright ban on all reference to faith healing and miracle working. However, we are also conscious of the potentially harmful effects such references may have on more vulnerable viewers if not used with due restraint. Views are therefore sought on the following reworded rule.

Proposed revised rule:

11 Faith Healing and Miracle Working.

No advertisement may make claims for the efficacy of faith healing or miracle working. This prohibition does not prevent references to faith healing and miracle working as articles of a particular faith but any such references must be made with particular regard to Rule 14 below.

For information, Rule 14 will read as follows:

14 Vulnerable Categories of Viewer

No advertisement may seek to exploit the vulnerability of any particular category of viewer (e.g. the elderly or the bereaved).

12 Counselling

Without the prior agreement of the Commission, no advertisement may offer to provide spiritual, moral or emotional counselling.

NOTE:

Rule 12 mirrors the prohibition on commercial services offering advice on personal or consumer problems in 18 (vii) of the main Code.

Change?

Counselling is a factor in many faiths and beliefs and this prohibition represents a significant restraint on the expression of that element of the faith. Also, if professional counselling in the secular field is allowed it is difficult to justify a restraint in the religious area. Any concern about counselling for medical or mental problems could be addressed by cross-reference to the medical rules in Appendix 3.

No change?

Counselling by religious bodies may not be objective and if applied in cases of serious mental or medical problems the underlying clinical issues may not be addressed.

Recommendation.

The ITC recommends that this prohibition be deleted.

15 Free Offers

Advertisements may offer to send publications (including tapes and videos) free to enquirers but may not contain any other free offers.

Derivation.

This rule was included to reflect concerns by some respondents when the ITC's religious advertising rules were first drafted about the propriety of allowing sales promotion techniques in relation to religious issues.

Change?

It is not clear that the ITC should have any locus in deciding what techniques religious and similar groups choose to put over their message.

No change?

There are no obvious arguments in favour of retaining this rule.

Recommendation.

The ITC recommends that this prohibition be deleted.

21 Refusal to Broadcast Religious Advertising

Licensees who do not wish to carry religious advertising at all are free to adopt this policy. They may also impose such additional, generally applicable requirements as they consider necessary in the interests of viewers provided these do not involve unreasonable discrimination either against or in favour of any particular advertiser.

Recommendation.

The ITC recommends that this prohibition be deleted.

The right to refuse advertising from a particular sector is not specific to religious advertising and does not, therefore, belong under this sub-set of rules.

ADVERTISING GUIDANCE NOTES.

These Notes were originally intended to provide additional guidance to licensees on the interpretation of specific rules. They were not intended to be detailed additional rules in their own right but in some cases (e.g., superimposed text and flashing images) we recognise that they have in effect become so. The ITC intends to review all of these Notes with a view to absorbing those elements which should properly be part of the Code and withdrawing the remainder.

We anticipate that this will occur during the later phases of the review and do not propose to invite comments on specific Notes at this time.

RULES ON THE AMOUNT AND SCHEDULING OF ADVERTISING

The ITC identifies no issues in these rules that require to be consulted on in this first phase. (But see the recommendation for an amendment to Appendix 1 Rule 9, above, and the necessity for a parallel amendment to 4.2.2 of the scheduling rules if this is accepted).

Appendix A to ITC Consultation on Advertising Rules.

Political Advertising.

10 Politics, Industrial and Public Controversy

No advertisement may be inserted by or on behalf of any body whose objects are wholly or mainly of a political nature, and no advertisement may be directed towards any political end. No advertisement may have any relation to any industrial dispute. No advertisement may show partiality as respects matters of political or industrial controversy or relating to current public policy.

NOTES:

- (i) The term "political" here is used in a wider sense than "party political". The prohibition precludes, for example, issue campaigning for the purposes of influencing legislation or executive action by central or local government. Where there is a risk that advertising could breach this prohibition prospective advertisers are strongly advised to seek advance guidance from licensees before developing specific proposals.*
- (ii) The Broadcasting Act 1990 specifically exempts advertisements of a public service nature inserted by, or on behalf of, a government department from the prohibition of advertisements having "any relation to any industrial dispute".*

As stated in the main body of the consultation paper above, the ITC cannot at this time recommend changes to this rule. We do recognise, however, that some may see it as a significant hindrance to free speech that is not necessarily covered by the exclusions listed in Article 10 of the European Convention on Human Rights (ECHR). The ITC sees this as pre-eminently a constitutional matter for Parliament to resolve. We have, however, agreed with Government that we will open the argument and invite detailed comments that we will share with them as part of the process of resolving the issues.

The present situation

Section 8(ii) of the 1990 Act states that a licensed service must not include:-

- (i) any advertisement which is inserted by or on behalf of any body whose objects are wholly or mainly of a political nature;
- (ii) any advertisement which is directed towards any political end or
- (iii) any advertisement which has any relation to any industrial dispute (other than an advertisement of a public service nature inserted by, or on behalf of, a Government Department).

This wording has appeared more or less unaltered in all the successive statutes since the establishment of commercial television. There is a large body of administrative precedent for a wide interpretation of the term "political". This was based on legal advice received by the Independent Television Authority, the Independent Broadcasting Authority, and more recently, by the Independent Television Commission. In 1995 a challenge to this interpretation was defeated in the High Court in a case brought by Amnesty International against the Radio Authority. The provisions in the 1990 Act governing radio are identical to those for television on this point.

The ITC has publicly clarified its interpretation in rule 10 of its Code of Advertising Standards and Practice. This includes the statutory prohibitions referred to above and glosses them with a note which explains that

“the term ‘political’ here is used in a wider sense than ‘party political’. The prohibition precludes, for example, issue campaigning for the purposes of influencing legislation or executive action by central or local government”.

An example of a proposed advertising campaign which was prevented by this interpretation was at the end of the 1980s when the Friends of John McCarthy wished to place advertisements on television drawing attention to the plight of the hostages in Beirut. The IBA took the view that, while the underlying motives of this campaign were undoubtedly humanitarian, the intermediate purpose was to increase pressure on the Government to exert itself more to secure the release of the hostages. The IBA found that this was a “political end” in terms of the statutory prohibitions. In the Amnesty International case referred to above, the High Court explicitly rejected the argument that if an organisation’s objectives could be described as “humanitarian” they could not also be defined as “political” in this context. Another effect of the prohibition has been to restrain to a significant extent the nuclear industry’s use of television advertising to put its point of view on politically sensitive issues such as safety and investment priorities.

During the Bill stage of the Broadcasting Act 1996 amendments to Section 8 of the 1990 Act were moved that sought to narrow the interpretation of the word “political” to “party political”. At the time, the ITC advised that were the amendment to be adopted the ITC would need to interpret it in a straightforward and literal manner in order to avoid the risk of frustrating its intention and thereby, no doubt, also attracting legal challenge. The term “party political” would have to be interpreted as referring to advertisements which were explicitly linked with a particular political party. Mere advocacy for a policy closely associated with a political party would presumably not be caught by this test since such an interpretation could undermine the purpose of the amendment which was presumably to legitimise issue campaigning in television advertising.

If Parliament did wish to adopt the definition “party political” the ITC would welcome their clarification on whether that were intended to embrace advertising which was hostile to an identified political party as well as that which was identifiably in favour of a particular party. It is not unknown, in other media, for non-party political organisations such as trade associations to take out advertising to attack the politics of a political party where these impinge on their interests.

A further amendment sought to limit the prohibition in Section 8 to advertising which was “directly” directed at a political end or had a “direct” relation to any industrial dispute. The ITC thought this was a significant amendment. We believed that it followed from this wording that any of the actions referred to are acceptable provided they are done “indirectly”. Again this would require the ITC to adopt a highly literal approach. The test would not be the meaning conveyed by the advertising but merely the form in which this was expressed. In the ITC’s experience the advertising industry would have no difficulty in devising communication which conveyed meaning effectively while remaining within the formal constraint.

The ITC said that it believed the consequences of adopting the specific amendments suggested in 1996 would, therefore, be a very much-expanded field of opportunity for television advertising on matters of political controversy. The proposed framework appeared to debar only advertising explicitly linked to a political party and direct references to legislation or executive action.

An example of the sort of advertising which the present statute prevents but the amendments would have permitted is that on either side of the abortion or the countryside debates. The objectives of those concerned are clearly not “party political”. While they are very much concerned with legislation this would not remove entitlement to advertise provided the advertisements themselves made no “direct” reference to legislation. The issues underlying debate about legislation could, however, be fully explored and there could be oblique references to the legislative process which presumably would not be lost on most viewers. There would also be nothing to prevent advertising of this kind appearing in the lead-up, for example, to a Parliamentary debate or a General Election.

More generally, it is possible to envisage pre-election situations where there could be quite extensive use made of the opportunities which such amendments appeared to create for surrogate party political advertising, i.e., advertising placed by organisations which are not themselves party political but which express partiality on political issues while staying just within the relatively generous constraints of the Amendment.

One of the arguments deployed in the past in favour of a restrictive approach in this area was that the relatively high costs of television advertising would tend to advantage particularly organisations with greater resources than their opponents. It is certainly the case that commercial advertisers attach importance to the “share of the voice” they are able to purchase and believe that, other things being equal, a larger weight of advertising will increase their market share. On the other hand, some of the less well endowed campaigning groups may have sufficient confidence in the inherent potential persuasiveness of their message to believe it would not necessarily be negated by a greater weight of advertising in favour of a contrary point of view. Whether this confidence would be justified by experience is, of course, a matter for conjecture. Such organisations can also be very resourceful in attracting free publicity on the back of controversies about advertising.

The ITC wishes to re-emphasise that this is an important constitutional matter with far-reaching consequences and one on which it must be for Parliament alone to determine where the line should be drawn. This is not an issue on which it is easy to delegate wide discretion to a regulatory body and it is, therefore, important that the legislation should be as clear-cut as possible.

25 April 2000