



# The regulation of transactional TV gambling channels

Ofcom regulatory statement on the position of TV  
channels and programmes that offer gambling services to  
viewers

Statement

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## Section 1

# Executive summary

## Introduction

- 1.1 In February 2008 Ofcom issued a consultation addressing the regulatory status of television services and programming that offer transactional gambling opportunities to viewers<sup>1</sup>. This Statement sets out Ofcom's new policy and the terms of its implementation.
- 1.2 Typically, transactional TV gambling output offers roulette, bingo, card games and virtual horse and dog racing. Viewers are able to open accounts and take part in pay gambling. Some services are predicated on this output; other, more general programme services carry extended features or 'windows', usually three or four hours in length, that are usually simultaneous broadcasts of the dedicated channels.
- 1.3 The central issue is whether licensees who operate transactional gambling services should continue to be able to choose whether to hold an 'editorial' licence or a licence granted on the basis of the output being treated as teleshopping. Similarly, whether 'windows' of transactional gambling material, can be treated by host licensees as either programming or teleshopping (i.e. transactional advertising).
- 1.4 Prior to 1 September 2007, betting and gaming advertising was not permitted on UK television. For this reason, and because of the wider legal restriction on the operation of remote gaming (including bingo), gambling-based channels could exist only as "editorial" programme services configured as betting.
- 1.5 These channels were subject to certain restrictions intended to prevent the undue prominence of the gambling activity. This policy was introduced in 2002 by the Independent Television Commission (ITC), in the full knowledge that the gambling law was due to be liberalised by Parliament, so in due course broadening the scope for TV based gambling services. The ITC's interim solution allowed gambling-based TV services to exist that would otherwise have been ruled out by the advertising code, if classed as teleshopping<sup>2</sup> (i.e. advertising).
- 1.6 Since 1 September 2007 – when the Gambling Act 2005 came fully into force – betting and gaming advertising has been allowed on UK television. This has given rise to a situation in which transactional gambling services can choose the form of broadcasting authorisation they apply for from Ofcom (i.e. 'editorial' or teleshopping). Similar channels may therefore be regulated under different codes operated by different bodies: by the Advertising Standards Authority (ASA) under advertising codes or by Ofcom under its Broadcasting Code.
- 1.7 In light of its regulatory duties, Ofcom's policy objective was to ensure that gambling channels operate in a consistent regulatory framework which provides robust protection for consumers. We set out the policy rationale for our proposal to license and regulate transactional gambling services as teleshopping in our consultation

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<sup>1</sup> See <http://www.ofcom.org.uk/tv/ifi/gambling/support.pdf>

<sup>2</sup> For further definition and explanation of teleshopping see Ofcom's Code on the Scheduling of Television Advertising (COSTA) at annex 2 at <http://www.ofcom.org.uk/consult/condocs/rada08/statement>

document. Teleshopping is a form of advertising which consists of direct offers to the public. The key policy considerations were:

- the breadth of the Gambling Act's definition of advertising is very wide and is likely to include the existing editorial gambling channel formats. Aligning the channels' status under Ofcom policy with the Gambling Commission's position under the Gambling Act is therefore logical and consistent;
- advertising rules provide greater consumer protection than do rules for editorial material;
- treating all transactional TV gambling services as teleshopping will provide certainty and consistency in respect of the regulation of TV gambling services – at present a service could be regulated under either the Broadcasting Code or the BCAP Advertising Code;
- any company operating a TV gambling service under authorisation from an EEA or 'white listed' jurisdiction<sup>3</sup> will not be regulated by the Gambling Commission. Therefore the need for the stronger consumer protection provided under advertising rules is even more acute; and
- re-defining transactional TV gambling services as teleshopping is consistent with the broad public policy approach of liberalising gambling advertising and sponsorship opportunities while applying robust regulation.

1.8 Ofcom consulted on three options: maintaining the status quo – i.e. leaving licensees to choose to operate transactional gambling services under advertising or editorial rules; classifying all transactional gambling output as teleshopping; classifying all such output as editorial (programming).

## What are gaming and betting?

1.9 The following explain in plain English what each of these is.

### Betting

1.10 Betting can exist in a wide variety of forms and applications. Its most usual form is betting through bookmakers offering odds (prices) to gamblers through individual contracts on third-party events, typically horse and dog races. But a market can be made from almost any event or outcome: election results, the weather, stock movement, interest rate fluctuation, the Booker Prize and so on.

1.11 Betting can be conducted on premises – betting shops – or remotely through credit accounts. It has been perfectly lawful for many years for a bookmaker to operate a telephone or online business and for gamblers to use it.

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<sup>3</sup> 'White list' territories are those deemed by the Department of Culture, Media and Sport to provide acceptable gambling regulation such that firms authorised in those territories are able to market themselves in the UK.

## Gaming

- 1.12 Broadly, gaming is the playing of a game of chance for money. Its most obvious forms are casino games: roulette, blackjack, dice, sic bo, etc. Bingo is also gaming, as are fruit machines ('gaming machines').
- 1.13 Many casino games are played against a bank, usually the house, and usually with an odds advantage for the bank. All non-banker games, like poker, are 'equal chance games'.
- 1.14 Unlike betting, remote gaming had always been outlawed in Great Britain. This was relaxed under the 2005 Act.

## Policy decision

- 1.15 **Having taken account of all the relevant considerations including the responses to its consultation, Ofcom's conclusions, based on the policy rationale and reasoning set out in this document, are two-fold: firstly, that licensees who choose to provide services comprising transactional gambling should be treated as providing teleshopping, rather than editorial output and licensed accordingly. The same should apply to 'windows'<sup>4</sup> of transactional gambling within an otherwise editorial service.**
- 1.16 **Secondly, licensees should of course continue to be able to choose what output they wish to provide: specifically, whether they wish to provide a purely editorial gambling-themed service, rather than a teleshopping service, and be licensed accordingly. However, to qualify as editorial, any such services should provide genuine programming and not include transactional gambling in which offers are made, express or implied, to viewers to participate in the services on screen.**
- 1.17 For the avoidance of doubt, it should be noted that the Gambling Act 2005's liberalisation of the promotion and advertising of gambling services is only effective within Great Britain. It does not extend to Northern Ireland (N.I.) where the provision and distribution of transactional gaming (as opposed to betting) services remains unlawful. Given this is the case and was raised in various consultation responses, Ofcom has decided to make explicit on the face of all relevant licences that Ofcom's licences do not and cannot authorise the provision of transactional gaming services in the UK outside of Great Britain. This will apply not only to new licences but also existing licences, which will be varied accordingly.
- 1.18 It is a matter for licensees to comply with the relevant legal requirements depending on the nature of the service(s) they choose to provide.

## Implementation

- 1.19 Classification of transactional gambling services: implementation of this new policy will take place quickly. Ofcom will contact the dozen or so licensees concerned, with

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<sup>4</sup> 'windows' of teleshopping are teleshopping features that appear on editorial services – that is, for the most part, 'general entertainment' services – and are usually between 15 minutes and two or three hours long.

draft licence variations to effect the change, giving them a reasonable opportunity to make representations on the wording of the proposed variations. Ofcom will then consider any such representations before issuing the licence variation.

- 1.20 **Re-classification of transactional gambling windows within an otherwise editorial service as teleshopping windows: this new policy will take effect from 1 June 2009.** This will coincide with the coming into force of the new rules set out in Ofcom's Statement issued today on the Code on the Scheduling of Television Advertising (COSTA)<sup>5</sup>. That Statement releases licensees (other than ITV1, Channel 4, five and S4C, which attract lesser liberalisation) from 1 June 2009 from the current restrictions on the number of hours of teleshopping permissible on non-teleshopping channels.
- 1.21 The commercial PSB channels will enjoy a liberalised regime in respect of teleshopping: from 1 June 2009 they will enjoy an entitlement to teleshopping windows at certain times of day, in addition to their spot advertising allowance, which has historically been prohibited.

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<sup>5</sup> COSTA Statement <http://www.ofcom.org.uk/consult/condocs/rada08/statement>

## Section 2

# Background

## History

- 2.1 Prior to 1 September 2007, betting and gaming advertising was not permitted on UK television. For this reason, and because of the wider legal restriction on the operation of remote gaming (including bingo), gambling-based channels could exist only as “editorial” programme services configured as betting.
- 2.2 These channels were subject to certain restrictions intended to prevent the undue prominence of the gambling activity. This policy was introduced in 2002 by the Independent Television Commission (ITC), in the full knowledge that the gambling law was due to be liberalised by Parliament, so in due course broadening the scope for TV based gambling services. The ITC’s interim solution allowed gambling-based TV services to exist that would otherwise have been ruled out by the advertising code, if classed as teleshopping (i.e. advertising).
- 2.3 Certain categories of gambling were allowed to be advertised before 1 September 2007, notably lotteries and bingo (although bingo could not be *conducted* remotely). For the purposes of simplicity this document uses the terms ‘gambling channels’, ‘gambling programmes’ etc to cover services and programmes that make offers to viewers of participation in any sort of authorised gambling activity – in other words transactional TV gambling services and programmes.
- 2.4 The Gambling Act 2005 (the “Gambling Act”) came into effect on 1 September 2007. This brought about a significant liberalisation of the statutory framework around the promotion and advertising of gambling, including the general ban on betting and gaming advertising that had long existed in the statutory codes for broadcast advertising. Broadcast spot advertisements for betting, gaming and spread betting were allowed for the first time. And betting and gaming teleshopping channels became possible. (In the case of gaming this was also an effect of the Gambling Act’s relaxation of the prohibition on the operation of remote gaming)<sup>6</sup>.
- 2.5 Given the lifting of the ban on advertising betting and gaming, the combined effect of new gambling legislation and the ITC legacy policy meant that gambling channels could exist as either editorial or teleshopping services. The potential availability of similar gambling services operating under two different codes operated by two different media regulators raised a number of important consumer protection and policy issues.
- 2.6 Consequently, since the legal and code status of transactional gambling services had changed, Ofcom decided to re-examine its policy in relation to these services and in February 2008 issued a consultation on that subject. Ofcom’s stated position was that services predicated on offering the opportunity to viewers to gamble should in future be treated as teleshopping and, if so treated, such services should where necessary adapt so as to fall within the legal definition of teleshopping – see paragraphs 3.32 to 3.34.
- 2.7 Before 1 September 2007 neither the ITC nor Ofcom had granted a broadcasting licence for a service seeking to conduct gaming within the UK. All the licences

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<sup>6</sup> See, in particular, Sections 67 and 89 of the Gambling Act 2005

issued by the broadcasting regulators until that point had been for ('editorial') services offering betting.

## Definitions and scope of terms within this Statement

- 2.8 In the context of this Statement, 'gambling channels' and 'gambling programmes' are those channels and programmes that offer the opportunity to viewers to take part in remote licensed gambling and whose content is wholly or mainly devoted to that activity.
- 2.9 The terms 'gambling channels' and 'gambling programmes' do **not** for the purposes of this Statement include:
- services and programmes in which reference to gambling is incidental or linked to content but appropriately limited, for example:
    - sports channels on distribution platforms which provide the opportunity to bet interactively during sports events such as football matches and where the sporting event is the principal content; and
    - horse racing where the inclusion of reference to odds, form and the like remain a conventional and subordinate element of the programming
  - gambling services such as bookmaking and gaming 'sites' available on dedicated interactive 't-shopping malls' such as Sky Active, that do not operate as channels in their own right; and
  - 'quiz TV' channels or programmes, and any programming that includes only viewer competitions or other prize schemes that do not require authorisation under the Gambling Act 2005.
- 2.10 Channels and programmes which run virtual (e.g. animated) horse or dog racing or other simulated events with associated gambling opportunities *are* considered to be gambling channels since such content is generated to facilitate gambling.
- 2.11 For clarity, it should be emphasised that genuine editorial that concerns gambling would be unaffected by any change. The position of documentary works, for example, or legitimate coverage of gaming tournaments and the like, which do not act as the basis for transactional output (i.e. whose output is not constructed for the purpose of allowing viewers to gamble) would be unaltered.
- 2.12 Where it is unclear whether a channel or programme should be judged as teleshopping or otherwise, decisions in this area will be made by Ofcom on a case by case basis, depending on the particular facts of any given case.

## Betting and gaming: boundaries

- 2.13 Before the introduction of the Gambling Act 2005, television gambling services had sought to argue that various games and schemes that resemble casino games are in fact betting. However, Ofcom does not accept that proposition. Ofcom's view is in accordance with the Gambling Commission's stated position<sup>7</sup>.

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<sup>7</sup> For further information see

<http://www.gamblingcommission.gov.uk/Client/mediadetail.asp?mediaid=392&id=9>

## Section 3

# Policy decision and effects

## Policy decision

### Gambling services and ‘windows’ to be regulated as teleshopping

3.1 Ofcom has considered in detail the position of transactional gambling channels against the rationale set out below, the relevant law (both broadcasting and gambling law), the codes of practice (that relate to both advertising and programming) and the submissions made by stakeholders<sup>8</sup>. We have decided to treat such output as teleshopping and regulate it accordingly.

### Rationale for policy decision

3.2 In summary, the grounds for considering amendments to our policy and deciding to treat transactional gambling channels and ‘windows’ of this type of output as teleshopping are that:

- the breadth of the Gambling Act’s definition of advertising is very wide and is likely to include the existing editorial gambling channel formats. Aligning the channels’ status under Ofcom policy with the Gambling Commission’s view under the Gambling Act is therefore logical and consistent;
- as output that seeks to ‘sell’ to the viewer, transactional gambling is more appropriately regulated as advertising;
- advertising rules<sup>9</sup> provide greater consumer protection than do rules for editorial material;

Importantly, advertising rules differ from those applied to programmes by dealing extensively with consumer protection, including the concept of misleading advertising. The BCAP TV Advertising Code also contains specific rules on the advertising of gambling, emphasising consumer and societal protection particular to gambling. For example, the rules prohibiting any suggestions that gambling can be a solution to financial concerns, an alternative to employment or a way to achieve financial security; and prohibiting suggestions that someone may have lucky numbers or that there are providential times for gambling.

- treating all transactional TV gambling channels as teleshopping will even out the regulatory position of such services and treat them all consistently so providing certainty for consumers – at present a service could be regulated under either the Broadcasting Code or the BCAP Television Advertising Code, which creates uncertainty for consumers;
- any company operating a TV gambling service under authorisation from an EEA or ‘white listed’ jurisdiction<sup>10</sup> will not be regulated by the Gambling Commission.

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<sup>8</sup> See Section 4

<sup>9</sup> See the BCAP TV Advertising Standards Code, in particular sections 5 and 11.10

<sup>10</sup> See footnote 3

Therefore the need for the stronger consumer protection provided under the advertising rules is even more acute; and

- re-defining TV gambling services as teleshopping is consistent with the broad public policy approach of liberalising gambling advertising and sponsorship opportunities while adopting a robust approach to regulation.

3.3 In its February 2008 Consultation, Ofcom put forward three options:

- Option 1: Do nothing
- Option 2: Re-categorise all editorial gambling channels as teleshopping gambling channels.
- Option 3: Re-categorise all teleshopping gambling channels as editorial gambling channels.

3.4 An impact assessment was published for these options<sup>11</sup>. Further comment on the Impact Assessment can be found in Section 5 of this Statement. The Impact Assessment made clear that Option 3 was not considered viable. There are principally two reasons for this. Firstly, transactional gambling channels are essentially designed to sell opportunities to gamble and are therefore better classed as advertising. Secondly, the terms of the advertising definitions set out in the Gambling Act 2005 are likely to include existing editorial gambling channel formats. Therefore for Ofcom to make a decision that all such output should be classified as editorial would not only fail to recognise the essential nature of these types of service under the new liberalised regime but set up a system of regulation based on two entirely different classifications, one under gambling law and policy and a different one under broadcasting law and policy. Such an outcome would provide neither consistency nor certainty for consumers. For these reasons Option 3 was not analysed.

3.5 Neither does Ofcom believe that Option 1 is satisfactory: it would allow an uncertain regime under which similar channels could be regulated under different codes by different bodies. Those licensees who wished to be regulated as editorial would be regulated by Ofcom under the Broadcasting Code; those who wished to be regulated as advertising would be regulated by the ASA under the BCAP Television Advertising Standards Code. This would create a divergent and uncertain regulatory regime when it is appropriate that policy should increase and improve consumer protection within a clear, consistent and robust regulatory framework.

3.6 Ofcom therefore believes that Option 2 should be adopted. The effects of implementing this option are discussed further below; the impacts of this option are discussed in Section 5 of this Statement.

3.7 Central to the policy decision to adopt Option 2 is the need to place transactional gambling output on a consistent footing both with broadcasting regulation – that is to ensure that commercial material is regulated appropriately – and gambling regulation within the regime established by the Gambling Act 2005. We believe this furthers the interests of consumers as in both cases, for the reasons referred to above, the interests of consumers are better protected under this option.

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<sup>11</sup> See <http://www.ofcom.org.uk/tv/ifi/gambling/support.pdf>

- 3.8 Having considered the merits of the options and taking full account of the responses received (see Sections 4 and 5) our view is that the balance of interest lies heavily in favour of ensuring an appropriate classification of transactional gambling output as advertising and thereby ensuring consistency, enhancing consumer protection and aligning Ofcom and Gambling Commission policy.
- 3.9 Adopting Option 2 will produce consistency and certainty, as was anticipated by the ITC (see paragraphs 2.1 and 2.2 above).
- 3.10 Therefore:
- **licensees who choose to offer transactional gambling content will be classified as providing teleshopping and licences issued for such services will be ‘teleshopping’ licences;**
  - **Ofcom will no longer issue ‘editorial’ licences to providers whose services are predicated on transactional gambling activity and existing licences will be varied accordingly; and**
  - **this re-classification of output also applies to transactional gambling within otherwise genuinely editorial services – often simulcasts carried by general entertainment channels – which will be regulated as teleshopping ‘windows’<sup>12</sup>.**
- 3.11 The process for varying existing licences is described below from paragraph 3.28, and is likely to be in effect by the middle of June 2009. But it should be noted that the change to the classification of gambling teleshopping windows will take place from 1 June 2009. See paragraph 3.36.
- 3.12 Also, when treated as teleshopping, gambling services and ‘windows’ attract certain format requirements. These are discussed further in paragraphs 3.32 to 3.34 below.
- 3.13 For details of the introduction of Policy Option 2, see ‘Implementation’ below.
- 3.14 For the avoidance of doubt, this policy means that services and teleshopping windows that offer transactional gambling opportunities to viewers will be regulated as advertising under the BCAP Television Advertising Standards Code<sup>13</sup>. The Advertising Standards Authority (ASA) is responsible for interpreting and applying the BCAP codes.
- 3.15 **The regulatory framework will therefore operate with first instance regulation of broadcast output falling to ASA/BCAP as Ofcom’s advertising co-regulator. Ofcom remains the broadcast licensing authority and the Gambling Commission (or other, ex-UK gambling regulator<sup>14</sup>) remains the gambling licensing authority.**

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<sup>12</sup> In other words extended features (often simultaneous broadcasts (‘simulcasts’) of third-party services) of such content that are carried on services that hold licences authorising programme services (usually ‘general entertainment’ services).

<sup>13</sup> Available at <http://www.cap.org.uk/NR/rdonlyres/2F6FFB29-614E-4065-A7EA-E41E49BF9CEA/0/BCAPTVAdCode.pdf> BCAP is the Broadcast Committee of Advertising Practice and is responsible for maintaining the broadcast advertising codes. ASA is the adjudicative arm of the BCAP/ASA system.

<sup>14</sup> i.e. those in ‘white list’ territories: see footnote 3

## Transactional gambling v programming (editorial)

- 3.16 Typically, transactional gambling channels and 'windows' offer roulette, games based on card games, virtual dog and horse racing, and bingo. On these services and 'windows' there is little if any material that is 'editorial' in nature.
- 3.17 In such cases Ofcom will regard the content as commercial in nature. Therefore, any gambling-themed service wishing to operate under an 'editorial' licence must be able to demonstrate that its output as a whole conforms to programme formats and does not include transactional gambling as a substantial part of its schedule.
- 3.18 In summary, therefore, where Ofcom believes that a service is primarily or substantially offering transactional gambling it will require it to be licensed as teleshopping, in line with the policy set out in this Statement. Where services are primarily genuine editorial but include 'programming' which includes characteristics of transactional gambling, they would potentially be in breach of the 'undue prominence' rules in Section 10 of the Broadcasting Code<sup>15</sup>. Ofcom would consider this on a case by case basis, but existing licensees and those wishing to offer new services of this type should note the significant restrictions placed on such services by Section 10 of the Broadcasting Code (commercial references) and in particular the undue prominence rules. Opportunities for licensees to offer gambling via properly constructed teleshopping 'windows' are enhanced, however, as described in paragraphs 3.35 and 3.36 below.
- 3.19 In those (very few) cases where the nature of the output falls between that of transactional gambling and genuine editorial material, Ofcom will review the particular service on its facts, taking into account any representations from the licensee. A decision would then be made as to the status of the service in light of all the relevant circumstances, including the nature of the service and Ofcom's statutory duties, including its general duty to act in the best interests of citizens and consumers. However, as indicated above and subject to assessments of individual cases, it is more likely than not that such services would, without suitable change to format, be likely to breach the undue prominence rules. Licensees who wish to operate in this area are therefore strongly advised to take this into account when applying for new licences and when reviewing their existing services.

## Northern Ireland

- 3.20 Some respondents pointed out the existence of a different legal position in Northern Ireland in respect of the advertising of gaming. Essentially, although the Gambling Act 2005 liberalised this aspect (and many others) of gambling activity in Great Britain, it does not extend to Northern Ireland (N.I.)<sup>16</sup>.
- 3.21 In N.I. the *Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985* (as amended) ('the Order') applies. Under the Order it remains an offence to advertise gaming in terms "...inviting the public to subscribe any money or money's worth to be used in gaming whether in Northern Ireland or elsewhere, or to apply for

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<sup>15</sup> See <http://www.ofcom.org.uk/tv/ifi/codes/bcode/bcode.pdf>

<sup>16</sup> Certain, very limited, provisions of the Act do extend to Northern Ireland but are not relevant to this statement.

*information about facilities for subscribing any money or money's worth to be so used.<sup>17</sup>*"

- 3.22 However, the advertising of transactional betting and bingo in NI are not affected by the Order. Services offering only these forms of transactional gambling may broadcast in Northern Ireland.
- 3.23 This issue did not form part of the original consultation but since it was raised by some respondents to the consultation, it is briefly referred to in this Statement to remind those holding Ofcom licences or intending to apply for an Ofcom licence that Ofcom does not and cannot authorise the provision of these services in Northern Ireland and licensees are therefore not authorised under their Ofcom licences to do so. It is the responsibility of licensees to ensure their own compliance with all relevant applicable laws. Further comment is made in Section 5 of this Statement.
- 3.24 Some respondents argued that the effect of introducing a new policy of treating transactional gaming as teleshopping would be to 'criminalise' licensees who were already providing such services. However, this is not the case. Whether the provider of a service has complied with the relevant applicable law is a matter of fact and law in each case. It is not dependent on the effect of Ofcom's treatment of the output for broadcasting regulation which is not determinative of the legal position under the Order. Put another way, the potential offence committed by transactional gambling services and windows exists already and is not affected by Ofcom's new policy.
- 3.25 However, as explained in paragraphs 3.30 and 3.31 below, in light of some respondents to the consultation raising the legal position under the Order, Ofcom has decided, for the avoidance of doubt, to make the extent of Ofcom's authorisation under its broadcasting licences for the provision of transactional gambling services, plain on the face of the licence. This will make explicit what is already the case under the applicable law.
- 3.26 Further, the paragraphs below make clear that decisions about the broadcast distribution of gambling services, or services carrying gambling teleshopping 'windows', are matters for licensees themselves, as are decisions about the nature of the gambling included and the services connected to it.
- 3.27 Stakeholders should bear in mind that the N.I. legal position affects both services and windows containing transactional gaming. The distinction between these is commented on at paragraphs 3.37 and 3.38 below.

## **Implementation**

### **Licence variation**

- 3.28 Under Section 4(1) of the Broadcasting Act 1990 (the "1990 Act") Ofcom has a wide discretion to set licence conditions including such conditions as appear to Ofcom to be appropriate having regard to any duties under the Communications Act 2003 (the "2003 Act") and the Broadcasting Act 1996 and conditions providing for such incidental and supplemental matters as appear to Ofcom to be appropriate.
- 3.29 Under Section 3(4) of the 1990 Act Ofcom can vary a licence, and therefore include new conditions, provided the licensee has been given a reasonable opportunity to

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<sup>17</sup> *Betting Gaming, Lotteries and Amusements (Northern Ireland) Order 1985* (as amended). Bingo is excluded from this prohibition.

make representations about the proposed variation. Ofcom's power to do so is also reflected in broadcasters' licences.

3.30 Ofcom will therefore shortly be writing to all gambling licensees who hold 'editorial' licences and who offer transactional gambling with full details of a proposed licence variation. This variation will change the classification of the output from editorial to teleshopping and will also expressly exclude the provision of transactional services in the UK outside of Great Britain where transactional gaming (excluding bingo) is offered. **Licensees will have three weeks from notification in which to make representations to Ofcom on the wording of the proposed variation.**

3.31 It is apparent from the foregoing that licensees can make various choices:

- they can offer transactional gaming, as authorised for broadcast under their licence, taking suitable steps to exclude themselves from UK regions outside of Great Britain where transactional gaming promotion is unlawful (e.g. Northern Ireland);
- they can offer betting or bingo opportunities which would not attract such an exclusion;

**NB** The absence of authorisation for gaming would apply to any relevant transactional gaming present within the licensed service.

- they can offer genuine gambling-themed programming, and continue to operate under an 'editorial' licence which would not attract an exclusion.

### Teleshopping formats

3.32 It is a necessary feature of teleshopping that material so classed must make direct offers to viewers. This entails that sufficient information is made available to viewers to enable them to purchase directly what is offered, i.e. without having to go elsewhere – say to a shop or website – for further details or payment opportunity<sup>18</sup>.

3.33 Therefore, where licensees choose to carry content that attracts a classification of teleshopping in line with the Ofcom policy described in this Statement – whether as licensed services or as teleshopping windows – the output must contain such details of prices, odds and other information sufficient to allow viewers to decide whether or not to take part, and how to take part, without further enquiry. Teleshopping services and windows must be clear at all times that they are selling directly.<sup>19</sup>

3.34 Licensees should also take care to ensure that they meet any requirements laid down by the Gambling Commission or other relevant gambling regulators – such as those 'white list' territory regulators outside the UK – about disclosure and representation in the conduct or promotion of gambling.

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<sup>18</sup> This does not in any way preclude the need for age verification and account registration on gambling services.

<sup>19</sup> See COSTA sections 3, 9 and 12 at annex 2 at <http://www.ofcom.org.uk/consult/condocs/rada08/statement>

### **Teleshopping ‘windows’: time allowances**

- 3.35 Ofcom is aware that some general entertainment channels may have existing contracts with third party gambling services to provide ‘windows’ of gambling output, usually late at night. This output, often three or four hours long, has in the past been run as editorial, so allowing a licensee to allocate its (previously) maximum three hour teleshopping allowance to other teleshopping activity.
- 3.36 Under the policy set out in this Statement these gambling ‘programmes’ must become teleshopping. However, Ofcom has recently published revisions to the Code on Scheduling of Television Advertising (COSTA)<sup>20</sup>. One important outcome is the removal of the maximum period for teleshopping per day. This change will come into force on 1 June 2009. The change of status of transactional gambling teleshopping windows will coincide with this, so allowing existing gambling ‘programming’ arrangements to be treated as teleshopping ‘windows’ without disturbing other agreements reached for the use of teleshopping allocations. ITV, Channel 4 and Five are subject to a different regime of teleshopping allowances, which again is set out in COSTA.

### **Teleshopping ‘windows’: licensing and legal position**

- 3.37 Under the policy set out in this Statement, it is of course open to broadcasters to operate general programming channels which include windows of teleshopping gambling. Unlike a service wholly or mainly dedicated to gambling, however, windows of this sort would not render a whole service to be re-licensed as teleshopping: the windows would be treated as advertising in the normal way and subject to the BCAP advertising rules.
- 3.38 However, licensees and prospective licensees are reminded that before providing such services, they should carefully consider whether the inclusion of any such advertising would involve committing a criminal offence or otherwise be unlawful under the relevant UK law outside Great Britain (eg N.I. Order – see paragraphs 3.20 to 3.27 above)

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<sup>20</sup><http://www.ofcom.org.uk/consult/condocs/rada08/statement>

## Section 4

# Summary of responses

### Introduction

- 4.1 Ofcom received twelve responses to the February 2008 consultation. Eight respondents requested confidentiality. The others were the Remote Gambling Association (RGA), Information TV, Mason Media Matrix Ltd and the Advertising Standards Authority (ASA).
- 4.2 Responses were provided by terrestrial services and cable & satellite services, by those who presently offer gambling services and by those who carry simulcast gambling windows. Nine responses were from licensees, one from a trade body, one from a regulator and one from a non-licensee company with sectoral interests.
- 4.3 See section 5 for a discussion of responses in respect of the impact of the policy options.

### General

- 4.4 The generality of the proposal to re-classify gambling services as teleshopping (i.e. Ofcom's Option 2) was welcomed by five respondents, including the ASA, and opposed by five others, including Mason Media Matrix.
- 4.5 Two principal reasons were given for opposing the proposal: that confusion might be generated by a change in status, and that greater regulatory burdens would be imposed. A further objection made by a cable & satellite licensee in respect of confusion concerns any move of gambling channels to the 'teleshopping' segments of electronic programme guides (EPGs). In addition, the same respondent questioned the necessity of the proposal given that consumer harm did not seem to be apparent under existing arrangements. Mason Media Matrix argued that were transactional gambling services to be classed as teleshopping, more 'hard sell', and a drop in quality, would result.
- 4.6 Those respondents that supported the proposal did so essentially for the reasons given by Ofcom itself: in brief, consistency of regulation and the obvious fit of transactional gambling and commercial (i.e. advertising) airtime.

#### **Ofcom's response**

We do not believe that any greater confusion is likely as a result of treating transactional gambling as teleshopping. Indeed, to avoid confusion Options 2 or 3 would need to be adopted: as was pointed out in the consultation, gambling services have since 1 September 2007 been able to choose which status to adopt, so making identification of the status of gambling services and windows more problematical.

Neither do we believe that regulatory burden is at all significant. Again as was pointed out in the consultation, if operated as teleshopping gambling output actually enjoys greater freedom to attract participants. Part of the objection on the grounds of burden is likely to have been related to the limits on teleshopping windows and does not now apply – see 'Teleshopping allowances' section below.

As to EPG locations, it is purely a matter for Sky and other EPG operators where they place services. As things have long stood, however, the Sky 'Gaming and Dating' segment already mixes teleshopping and editorial services.

In respect of consumer harm, we do accept that very few problems have arisen over the time that gambling services have been operating. But properly aligning the regulation of this sector with European and domestic broadcasting rules and domestic gambling regulation remains a worthwhile and sensible policy, in Ofcom's view. Further, a regulatory framework should be in place so as to best deal with problems that might arise, however infrequently. We believe Option 2 does this most effectively.

## Teleshopping allowances

- 4.7 Five respondents including Mason Media Matrix pointed out that teleshopping allowances (i.e. the maximum time that can be used for teleshopping windows) would present problems to certain channels. This included the commercial public service broadcasters (PSBs) which did not have any allowance for teleshopping minutage above their spot advertising maximum.

### Ofcom's response

We were aware of the impact such a change would have. But given the removal of limits on teleshopping hours altogether for digital services and the easing of the limits for commercial PSB channels, announced in the new COSTA code, we do not believe that this issue remains problematic.

See Section 5 for further comment.

## Northern Ireland

- 4.8 Three respondents, including the RGA, commented on the law in Northern Ireland (see paragraphs 3.20 to 3.27 for an explanation of Ofcom's view on the effect of the law). These respondents believed that changing the status of transactional gambling to teleshopping would produce unwelcome effects.

### Ofcom's response

We do not agree, for the reasons set out in Section 3. And given that licences will be amended so that the distribution of relevant transactional gaming output will not be authorised in the UK outside Great Britain, it will be the responsibility of licensees to ensure that suitable arrangements for exclusion are made if the licensee chooses to include gaming within its service.

## Other matters

- 4.9 Respondents also raised issues concerning the differences between 'traditional' teleshopping audiences and those for gambling channels; that broadcasters might seek to relocate beyond the UK; that an industry agreement between the gambling industry and government that limits the scheduling of gambling advertising may apply; and that daytime broadcasts may be affected by BCAP gambling scheduling rules.

### **Ofcom's response**

We do not see the differences between viewers of more traditional teleshopping formats – e.g. sales of consumer goods by direct offer – and audiences of transactional gambling services as relevant. The impetus for regulatory change is coherent regulation and protection of the consumer. Creative or thematic similarities of output, and the attendant audiences, are not part of the rationale (although it is reasonable in any event to suppose that viewers are just as likely to perceive transactional gambling output as teleshopping as they are to understand it to be (editorial) programming). Further, various forms of teleshopping that do not resemble consumer sales have been on air for many years, including dating services with which gambling services share a segment of the Sky EPG.

Whether broadcasters choose to operate from inside or outside the UK is a matter for them. Cross-border TV services are regulated under a harmonising European directive.

We understand from the Gambling Commission that the change of policy has no impact as such on the application of the industry agreement as it does not change how transactional gambling services are classified under the gambling legislation.

Similarly, nothing in the BCAP scheduling rules would automatically impinge on transactional gambling teleshopping. The BCAP scheduling rules essentially prevent gambling advertising being aimed at children or appearing when relatively large numbers of children are watching. We are not aware of any gambling services or windows that do this.

## Section 5

# Impact assessment

## Original assessment

5.1 In the February 2008 consultation paper, Ofcom set out an Impact Assessment (I.A.). At that time the IA examined two of the three options:

- Option 1: Do nothing
- Option 2: Re-categorise all editorial gambling channels as teleshopping gambling channels
- Option 3: Re-categorise all teleshopping gambling channels as editorial gambling channels

### Original IA: Ofcom's policy objective

5.2 Having considered our regulatory duties Ofcom believed that the policy objective should be to ensure that gambling channels operate in a consistent regulatory framework which provides robust protection for consumers.

### Original IA: consideration of options

5.3 For the purposes of the previous IA only the advantages and disadvantages of options 1 and 2 were considered. Option 3 was not considered as Ofcom did not believe this option to be viable.<sup>21</sup>

### Original IA: Option 1 – Do Nothing

5.4 The significant points arising from the original analysis of this option were:

- consumers will prefer greater consumer protection and that under the status quo a risk of consumer confusion would exist about the extent and nature of the regulatory framework applying to any particular transactional gambling output;
- Consumers may be in a position where they purchase a less regulated service, therefore in consumer protection terms a 'lower quality' product, unknowingly, as a result of being unable to readily distinguish between the regulatory status of similar gambling channels and windows;
- confidence in the sector may be undermined through uncertainty, so adversely affecting consumer participation; and
- the retention of the option of an 'editorial' licence would allow PSB broadcasters to offer transactional gambling and enjoy an additional revenue stream.

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<sup>21</sup> See paragraph 3.4 and the consultation document at <http://www.ofcom.org.uk/tv/ifi/gambling/support.pdf>

## **Original IA: Option 2 – Re-categorise all editorial gambling channels as teleshopping**

5.5 The significant points arising from the original analysis of this option were:

- consumers would be likely to benefit from the greater regulatory consistency under this option as the option would reduce uncertainty about the degree and extent of protection they can expect to receive;
- those channels that included ‘windows’ of transactional gambling content would face potential revenue loss through newly categorised teleshopping displacing, or at least competing with, existing teleshopping under the then three hours per day maximum teleshopping entitlement;
- re-categorised gambling channels would have faced licence fees of £2k rather than the minimum of £1k or 0.0454% of revenue. For channels with revenue lower than approximately £4.6million this implied a small increase in licence fee and vice-versa;
- re-categorised channels would also have stood to gain as under Ofcom rules editorial gambling channels are required to avoid direct calls to action, which must be concealed behind the ‘red button’, whereas if a gambling channel were regarded as teleshopping direct calls to action would be entirely permissible; and that a consistent regulatory framework could reduce uncertainty in the market and foster demand for their services;
- the net effect on gambling channels was difficult to determine as increased revenue due to direct calls to action may outweigh the “non-trivial” reduction in the simulcast revenue stream and the “trivial” cost of the increased licence fee; and
- PSB channels would not have been able to launch a gambling service under the then advertising rules as PSBs were not granted teleshopping windows in addition to spot minutage. However the IA noted that all advertising entitlement rules were being reviewed.

## **Responses**

5.6 Six respondents commented directly or by implication on the IA and its observations. These responses can be grouped by subject: the impact on transactional gambling channels; the impact on channels carrying teleshopping windows and on those providing such material; and the impact on PSB channels.

### **Responses: transactional gambling channels**

5.7 A cable & satellite licensee suggested that estimated turnover of gambling channels had dropped significantly since 2006, attributing this to regulatory change. Another licensee said that Ofcom had underestimated the impacts on gambling channels. The broadcaster also said that a further piece of ‘quasi-regulation’ the channels are subject to is BSkyB’s policy on genre allocation. Mason Media Matrix pointed out that the negative effect felt by channels carrying windows would also be experienced by those selling them – i.e. the gambling channels themselves – and suggested that simulcasting was economically important to the gambling channels. This point was also made by another licensee who proposed a separate category of gambling teleshopping entitlement in addition to the existing three hour limit.

### **Ofcom's response**

Ofcom does not believe that any deterioration in the economic performance of the sector is attributable to broadcast regulation since there has been no change. And, conversely, the liberalising effects of the Gambling Act 2005 are likely to have had a positive revenue effect. TV distribution platform operators' policies on EPG segmentation and placement are not a matter for Ofcom in the context of this subject.

As set out in this Statement, Ofcom's judgment is that the consumer protection and policy consistency advantages of adopting Option 2 are decisive.

The removal of teleshopping time limits is commented on in the response below.

### **Responses: teleshopping windows – hosting and supplying**

- 5.8 Two respondents argued that the loss to broadcasters would be greater than suggested in the original IA. This applied both to the broadcasters carrying the windows and those supplying them. Further, a licensee pointed out that the loss in teleshopping hours due to re-classification of gambling windows would be about 50%. Mason Media Matrix said that the opportunity to place transactional windows features on channels with more prominent EPG placing is valuable to the gambling channels.
- 5.9 One broadcaster respondent indicated that the existing teleshopping windows were extensively used on its services: to lose them would be costly.

### **Ofcom's response**

We recognise the force of these points. However, with the publication of Ofcom's Statement on the Code on the Scheduling of Television Advertising (COSTA)<sup>22</sup>, published simultaneously with this Statement, the teleshopping time limits have been removed and no substitution need be made.

### **Responses: Public Service Broadcasters**

- 5.10 Five respondents, including three cable & satellite licensees and Mason Media Matrix, commented on the position of PSBs under the new policy. All observed that under the then tight teleshopping restrictions for PSBs<sup>23</sup> this option would not be available to them. (With transactional gambling classed as editorial, these channels could have offered such content.)

### **Ofcom's response**

As above in respect of teleshopping windows, Ofcom believes that these objections no longer stand. The increased opportunities for PSBs to carry teleshopping under the new COSTA rules will include scope for offering gambling services.

<sup>22</sup> <http://www.ofcom.org.uk/consult/condocs/rada08/statement>

<sup>23</sup> PSBs did not enjoy an allowance for teleshopping windows above earned spot minutage

It should be noted that PSB channels' freedom to offer transactional gaming content under their newly available teleshopping entitlement in fact amounts to a theoretically more restrictive regime for these channels: previously, when such content was classed as editorial, they were in principle able to offer as much of this sort of 'programming' as they wished. None chose to do so, although ITV has run free bingo (therefore not commercial, i.e. advertising, output) late at night. Now PSB channels will only be able to show such services between midnight and 6am.