



Participation TV

Rules on the promotion of premium rate services

Regulatory statement
and further Consultation

Publication date: 03 November 2009

Closing Date for Responses: 15 January 2010

Contents

Section		Page
1	Executive summary	1
2	Background on participation TV and regulatory issues	9
3	Comments on Ofcom's 2008 Participation TV consultation and Ofcom responses	12
4	Statement on changes to Broadcasting Code rules	21
5	The effect of changes to the Broadcasting Code	24
6	PTV stakeholder interests: viewer research and industry information	31
7	Options for advertising rules and assessment of impact on stakeholders	45
8	Proposed changes to the TV Advertising Code	56
9	Next steps	61
Annex		Page
1	Responding to this consultation	62
2	Ofcom's consultation principles	64
3	Consultation response cover sheet	65
4	Consultation questions	67
5	Relevant regulatory duties, legislation and bodies	68
6	Guidance to rules 10.10 and 10.11 in the Broadcasting Code	74
7	Impact assessment of options for TV promotion of PRS of a sexual nature	77
8	Impact assessment of options for TV promotion of psychic practices	94
9	Glossary of terms	101

Section 1

Executive summary

Introduction

- 1.1 This document is a final regulatory statement on changes to the Broadcasting Code rules on Premium Rate Services (10.9 and 10.10), and a further consultation on proposals for changes to relevant Advertising Code rules.
- 1.2 This consultation follows Ofcom's previous consultations in 2007 and 2008 on the regulation of Participation TV ("PTV") services¹. Those consultations proposed revised rules in Ofcom's Broadcasting Code to make the distinction between content considered to be editorial material and content considered to be advertising clearer when broadcasters promote Premium Rate Services ("PRS").
- 1.3 Ofcom has decided on the new rules and associated guidance to be included in the Broadcasting Code. These are set out in this document in Section 4 and Annex 6 respectively. The effect of this change will be to make clear that the promotion of certain PRS-based content will no longer be considered as acceptable under the Broadcasting Code as editorial content. Such services wishing to continue with their current formats will be considered as advertising and regulated as teleshopping, under the Television Advertising Standards Code ("the Advertising Code").
- 1.4 We consider that these changes will benefit viewers of editorial programmes, consumers of PRS and broadcasters in general.
- 1.5 For PTV broadcasters specifically, our impact assessment shows that relatively few services will be significantly affected by this change and need to modify their services. For example, it will not be necessary for Quiz PTV services to change their content in order to continue as teleshopping since the provisions of the Advertising Code would not affect Quiz PTV programming in its current format.
- 1.6 However, two categories of service – Adult Chat² PTV and Psychic PTV - could not continue to operate as they do currently if classified as advertising since the promotion some categories of PRS featured on these services is heavily restricted under the Advertising Code. Prior to Ofcom's changes to the Broadcasting Code, broadcasters of such programming may have considered their promotion of PRS to be editorial in nature. However, the changes to the Broadcasting Code which we have concluded are necessary make clear that such programming amounts to teleshopping. The rules in the Advertising Code in respect of PRS featured on these services would not permit much of their current content to be broadcast as advertising.
- 1.7 However, our audience research shows that viewers are generally tolerant of such services being allowed to continue, subject to certain safeguards. We are therefore considering changes to the Advertising Code to ensure that the regulation of those services remains proportionate to the aim of protecting the viewing public from harm and offence. The purpose of this consultation is to seek views on this approach and on the specific proposed changes to the Advertising Code.

¹ <http://www.ofcom.org.uk/consult/condocs/participation2/>

² In this document we use the generic term 'Adult Chat PTV'. Adult Chat PTV channels promote PRS services of a sexual nature, and non-sexual PRS services or what is sometimes called 'flirtatious' chat. These terms are explained at relevant points in the document and defined further in the Glossary.

Background on the current position

- 1.8 Viewers and listeners enjoy taking part in programmes and having an opportunity to win a competition, influence the outcome of a programme or otherwise contribute to the programme. Increasingly, audience participation (particularly in television programmes) involves payment by viewers, usually by means of premium rate services. Participation in this context does not tend to raise questions as to the appropriate means of regulation as the premium rate element clearly and directly influences the editorial content, thus making it subject to the Broadcasting Code.
- 1.9 However, there are now entire programmes, blocks of programmes and indeed channels predicated – in terms of both the content itself and the funding of that content – on the promotion of PRS. These include a range of services such as Dating, Adult Chat, Psychic, and Quiz channels. Collectively, these are referred to in this document as Participation TV (PTV).
- 1.10 The number of PTV services operating has increased significantly in recent years. The promotion and use of PRS services within PTV channels has become more prevalent and prominent, and in many cases the content appears not to be editorial but in fact advertising, with the sole purpose of promoting PRS. Where this occurs in channels that are currently licensed as editorial, not as advertising (known as teleshopping), there is a risk that advertising regulation may not be followed.
- 1.11 As part of its duties and functions in relation to broadcasting under the Communications Act 2003 (“the Act”), Ofcom is responsible for setting standards for broadcast content (programmes and advertisements) and for regulating the amount and scheduling of advertising on television. In doing so, Ofcom must ensure that regulation is consistent with relevant European legislation including the Television Without Frontiers Directive³ (“The TVWF Directive”) as amended by the Audiovisual Media Services Directive⁴. The TVWF Directive states at Article 10 that “Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content”.
- 1.12 Ofcom must therefore ensure that this distinction is clearly made in respect of PTV and more generally. Programming which is subject to the Broadcasting Code must not be used as a vehicle for the promotion of products and services. Where broadcast content does amount to the promotion of products and services, such content should be considered as advertising subject to the Advertising Code. Both Codes classify PRS as a product or service and therefore, in order for content to be classified as editorial in nature, any programme must not be a vehicle for its promotion.

We have concluded that there should be changes to the Ofcom Broadcasting Code rules to make clear when PRS promotion will be considered to be for editorial purposes

- 1.13 Ofcom has considered the promotion of PRS within programmes at length and has publicly consulted on proposals for its regulation in 2007 and 2008. Our consistent view has been that the promotion of PRS may only be considered editorial in nature where there is clear editorial justification.

³ Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

⁴ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

- 1.14 In the 2008 consultation, we proposed changes to the Broadcasting Code rules and proposed guidance to clarify where the promotion of PRS will be considered to form part of the editorial content of programming. Since then, we have taken into account stakeholders' comments, monitored broadcast content and closely examined the significance of a recent European Court of Justice Judgment⁵.
- 1.15 We have concluded that the Broadcasting Code should be amended with a new rule added to make clear how PRS can be used to form part of the programme so that the content remains editorial, thus making the boundary with advertising clear. Explanatory guidance is also provided, to make the circumstances in which PRS may legitimately be considered to form part of the editorial content of programmes clearer.
- 1.16 We consider that the changes as proposed to the Broadcasting Code will benefit viewers, consumers and broadcasters.
- For viewers, it will maintain the distinction between editorial and advertising, and ensure that programmes must not be vehicles for the promotion of PRS services.
 - For consumers, it will ensure that services predominantly advertising PRS will be regulated under the Advertising Code which offers enhanced protection for consumers against misleading content and unfair trading practices.
 - For broadcasters in general, it will provide increased clarity on what comprises acceptable use and promotion of PRS in editorial content. In doing so this will create consistency and fair competition for broadcasters and PRS providers wishing to promote PRS services on television.
- 1.17 The wording of the amendments to the Broadcasting Code and the guidance has been revised following stakeholder comments. The new rules can be found in Section 4, and guidance found in Annex 6.
- 1.18 The general principle that requires advertising to be distinguished and regulated as such applies to radio as well as to television. We have therefore concluded that the new rules on the promotion of PRS should be applicable to radio as to television. We have taken into account stakeholders' comments on differences between radio and television but consider the proposed amendments to the Broadcasting Code are sufficiently flexible to recognise any relevant differences between the promotion of PRS on radio and on television.

Options available to broadcasters following changes to the Broadcasting Code

- 1.19 Under the changes to the Broadcasting Code, certain content and/or services currently available will not comply with the Broadcasting Code in their current form. Where the amount of promotion of the PRS element is significant, this may be considered as unduly prominent which would mean that such content in future falls to be regulated as advertising under the Advertising Code. Broadcasters whose programming currently contains a high level of PRS promotion which is not linked to editorial content could therefore be in breach of the new Broadcasting Code rule unless, as advertising, they were compliant with the Advertising Code.
- 1.20 Broadcasters will therefore need to consider whether to:

⁵ case C-195/06 *Kommunikationsbehörde Austria v Österreichischer Rundfunk (ORF)*

- change the service appropriately to comply with the Broadcasting Code; or
 - broadcast their services as advertising to comply with Advertising Code.
- 1.21 Some PTV broadcasters may find the first course of action unattractive as their business model is predicated on the prominent promotion of PRS. They may therefore prefer to broadcast their content as advertising which is permitted to contain direct offers, calls to action and prominent promotion for commercial products and services. There is also no requirement for promoted products or services to be editorially justified.
- 1.22 Although the Broadcasting Code rule changes apply equally to radio services, we are not aware of any radio services currently broadcast which would be affected by the changes since the promotion of PRS through radio is limited. In this document, we have therefore focussed on the effect of the rule changes on PTV broadcasters.

The impact on PTV broadcasters of opting to be regulated under the Advertising Code is limited: except for Adult Chat PTV and Psychic PTV broadcasters

- 1.23 Many PTV broadcasters – including Dating and Message Chat broadcasters – already operate as long form advertising, known as teleshopping. Following recent changes to Ofcom’s advertising scheduling rules⁶, teleshopping can be carried without restriction by non-Public Service Broadcasters, and between midnight and 6am by commercial Public Service Broadcasters.
- 1.24 However, the Advertising Code contains a number of restrictions on the promotion of certain types of products and services that may be advertised on TV which could have an impact on the options of some PTV channels. Specifically, the Advertising Code currently prohibits advertisements for PRS of a sexual nature unless they are on encrypted TV channels. It also currently prohibits advertisements for products or services concerned with the occult or psychic practices, with limited exceptions for pre-recorded psychic PRS of general appeal.
- 1.25 Under the current rules, Adult Chat PTV services considered as advertising would be able to broadcast promotion for non-sexual PRS: however, they would only be able to broadcast content promoting PRS of a sexual nature if they were to be encrypted. Psychic PTV services which are considered as advertising would only be able to promote certain pre-recorded psychic PRS and not promote live reading services. Therefore, under the current Advertising Code rules, services promoting live psychic services or PRS of a sexual nature on a free to air basis would not be permitted.
- 1.26 Ofcom recognises that, prior to bringing into effect the Broadcasting Code rule which makes clear the distinction between content of an editorial nature and advertising, PTV broadcasters may have considered the services they broadcast to fall under and be permitted by the Broadcasting Code.
- 1.27 Ofcom therefore considers in these circumstances that it is important to consider the impact of the regulatory framework as a whole in order to ensure that it remains appropriate and proportionate. In particular, we consider that the regulatory decisions in this area need to achieve the right balance between the interests of consumers and the interests of providers. Our relevant regulatory duties are set out in Annex 5. In summary these are:

⁶ See Ofcom’s Code on the Scheduling of TV Advertising at http://www.ofcom.org.uk/tv/ifi/codes/code_adv/

- **Consumer and viewer protection.** Consumers and viewers benefit from the clear distinction between editorial and advertising, and general consumer protection in the advertising of products or services. Consumers and viewers also need adequate protection from harmful or offensive content.
- **Ensure the freedom, availability and competition between different audio-visual services.** Equally, consumers and viewers benefit from the availability of a range of different services, and competition and innovation among suppliers of these. Broadcasters, advertisers and service providers have a right to either supply these or to promote them on broadcast platforms provided they meet the rules of the relevant Codes.
- **That regulation should be proportionate to relevant objectives.**

We consider that, based on evidence and options available, changes to the relevant Advertising Code rules should be made

- 1.28 To achieve the right balance in making these decisions, and assessing different options and their impact, we have used three primary sources of information:

1.29 **Responses from stakeholders to Ofcom's 2008 Participation TV consultation (see Section 3)**

A number of respondents to the Ofcom consultation suggested that any changes to the Broadcasting Code should only be made in conjunction with decisions on changes to the Advertising Code and that a full assessment of the impact of any changes on current services was required. Some respondents argued that the current Advertising Code rules affecting PRS of a sexual nature and psychic services were not appropriate, as these PRS products were freely promoted in non-broadcast media; there was a lack of evidence that such products or promotional content for them causes harm or offence; and they attracted limited complaints from viewers or consumers. Other respondents suggested that the current rules to prevent harm and offence from promotion of these products remain relevant.

1.30 **Consumer and viewer research on the promotion of Adult Sexual and Psychic premium rate services on TV (see Section 6)**

Ofcom has conducted research on viewer attitudes to the promotion on television of PRS of a sexual nature and Psychic PRS. Participants considered that these products, while not of broad appeal, attract consumers who want to have access to them. Participants recognised that they are widely promoted in other media and could also be promoted on TV if their presence was controlled, contained and clearly labelled. As such, participants considered that the promotion of these services was acceptable, but only on channels dedicated to them which were clearly identifiable in an appropriate section of an electronic programme guide ("EPG"). The majority did not want the services to be promoted in either spot advertising or in extended "slots" on other channels, where they may come across them unawares.

1.31 **Industry information to inform Ofcom's impact assessment (see Section 6)**

Adult Chat PTV and Psychic PTV broadcasters have indicated that they generate almost all of their revenue from the promotion of PRS on their channels. As a result, restrictions on the ability to promote certain PRS services would have very significant impact on the economic viability of the Adult Chat PTV and Psychic PTV

broadcasters, and, to a lesser extent, the telecom and PRS service providers who supply these services to them.

We have considered whether, in relation to Adult Chat PTV and Psychic PTV channels, when coupled with changes to the Broadcasting Code, the retention of the current rules in the Advertising Code would be proportionate, or whether it is appropriate to amend the Advertising Code rules to take into account the changes to the regulatory environment and the research findings.

- 1.32 We have considered four options for the future regulation of PTV services. In summary:
- 1.33 **Option 1 – retaining in full the current Advertising Code restrictions on premium rate services of a sexual nature and psychic practices** - may protect against any risk to minors and vulnerable viewers from harm, and general viewers from the risk of offence, on a full and precautionary basis. But in doing so it would prevent viewers and consumers of the PTV services from continued access to channels which have been on air for a number of years without evidence of harm or many complaints of offence arising. It would also prevent broadcasters and service providers from meeting this demand and significantly impact their financial viability. As a result, Ofcom does not consider that the restrictions contained in the current Advertising Code represent the most proportionate means of ensuring that the interest of viewers and broadcasters are met.
- 1.34 **Option 2 – lifting the current Advertising Code restrictions** – would allow broadcasters and service providers to promote PRS of a sexual nature or psychic services on a wide basis, and allow those consumers who wish to access to services. But it would not provide adequate protection from offence for viewers. In particular, research suggests that viewers strongly reject the idea of promotion for these products in spot advertising or on general channels. Ofcom does not consider that such an outcome would be consistent with its duties to ensure adequate protection from the inclusion of offensive material in television and radio services.
- 1.35 **Option 3 – allowing promotion of PRS of a sexual nature and specific psychic services in spot advertising only** – would allow PRS service providers to advertise to consumers. However, Ofcom's research shows that it would not provide adequate protection for viewers from offence from promotion of such services. It would also restrict PTV broadcasters with significant impact on their financial viability. Ofcom therefore considers that this option would not achieve the outcomes sought.
- 1.36 **Option 4 – allowing promotion of premium rate services of a sexual nature and specific psychic services as teleshopping in dedicated channels only, subject to scheduling restrictions and channel positioning and labelling** – would in Ofcom's view be the most proportionate option in meeting the requirements of stakeholders with least adverse impact. The continuation of promotion on PTV services in long form on dedicated channels that are clearly labelled and identified would limit the risk of offence for general audiences. Consumers and viewers, and broadcasters and providers, of these services would benefit from their continued provision. However, under this option other broadcasters simulcasting PTV or broadcasters operating on Freeview would not meet the conditions relating to appropriate labelling and positioning and may need to consider alternatives.
- 1.37 Based on the options outlined above, **Option 4 is Ofcom's preferred option for regulation of promotion of these services**. We believe amendments to the existing

relevant Advertising Code rules - 11.1.2 (premium rate adult sexual entertainment services) and 10.3 (psychic practices) - would therefore be merited.

PRS of a sexual nature and specific psychic services could be allowed to be promoted on dedicated channels, subject to rules in the Advertising Code governing product type, scheduling, positioning and labelling

- 1.38 In light of the above, Ofcom is proposing that revised rules should be introduced into the Advertising Code at the same time as the changes to the Broadcasting Code come into force.
- 1.39 We consider revised rules should reflect rules already included in the Broadcasting Code and the Advertising Code in relation to risk of harm. These include the PhonepayPlus rules governing live PRS services, scheduling of adult-sex content only between 9pm and 5:30am, and the promotion of certain non-occult psychic practices only being permitted.
- 1.40 We consider that, in order to protect against the risk of offence, the revised rules should reflect the principles identified under option 4: that promotion should only be allowed on channels that are licensed for the purpose of promotion of the relevant PRS service and appropriately positioned and labelled within the relevant section of an Electronic Programme Guide (EPG).
- 1.41 Our proposed new rules can be found in Section 8.
- 1.42 Under the revised rules set out in Section 8, in order for channels to be “appropriately positioned and labelled” as required they should be included only in an ‘Adult’ or ‘Specialist’ EPG section on any platform. Due to the lack of a segregated EPG on most set-top boxes, channels on the Freeview platform would currently be unable to meet the conditions for promotion.

Following consultation, any rule changes adopted will be made to the Advertising Code

- 1.43 Given the need to consider the appropriate means of regulation of such services through the Advertising Code, Ofcom does not intend to bring into effect the changes to the Broadcasting Code in respect of PRS until the conclusion of this consultation process. The new Broadcasting Code rule set out in Section 4 will therefore enter into force at the same time as any changes which may be necessary to the Advertising Code.
- 1.44 The proposals for rule changes to the Advertising Code set out in this document are now open to consultation for a period of 10 weeks. Consultation responses should be made by **15 January 2010**.
- 1.45 After this period, Ofcom will publish a statement bringing into force the changes to the Broadcasting Code set out in the document and concluding on the appropriate changes to the Advertising Code.
- 1.46 The changes to the Broadcasting Code discussed in this document are likely to come into effect ahead of changes concerning commercial references in television and radio discussed in Ofcom’s Broadcasting Code review⁷. That is because Ofcom has decided to re-evaluate these issues, and consult again, in light of the Government’s

⁷ <http://www.ofcom.org.uk/consult/condocs/bcode09/>

announcement that it is minded to permit product placement on commercial television.

- 1.47 The Advertising Code is also currently under separate review⁸, and a revised version of the Code is due to be published in 2010. Any changes following this consultation will be incorporated into the revised Advertising Code.

⁸ <http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation/>

Section 2

Background on participation TV and regulatory issues

Introduction

- 2.1 This section considers the particular issues in regulating participation TV. It sets out the proposals made in the previous consultations on Participation TV, and Ofcom's regulatory duties and considerations in this consultation.
- 2.2 The key developments that have taken place, and are explained further in this chapter, are:
- 2007: Ofcom launches consultation on use of PRS in programmes, following serious compliance failures in, for example, quizzes on mainstream channels
 - 2007: European Court of Justice issues Judgment, setting out that promotion of PRS which represents a "real offer of services" must be clearly identifiable as advertising.
 - 2008: Ofcom concludes that changes to all broadcast TV licences are required, together with amendment to Broadcasting Code Rules, and launches a consultation on new Code Rules, designed to draw a clear distinction between editorial and advertising involving PRS.
 - 2009: In this current document, Ofcom issues final statement on Broadcasting Code Rules.

Why does PRS need particular rules?

- 2.3 Viewers and listeners enjoy taking part in programmes and having an opportunity to win a competition, influence the outcome of a programme or otherwise contribute to the programme. Increasingly, audience participation (particularly in television programmes) involves payment by viewers, usually by means of premium rate telephony services (PRS). PRS-based interaction is used mainly on television services, although it is occasionally used for radio programming.
- 2.4 PRS has long been used in mainstream entertainment content such as reality shows (e.g. *Big Brother*), game shows (e.g. *Who Wants to be a Millionaire?*, *Deal or No Deal*) and magazine-format programmes (e.g. *Loose Women*). Participation in this context does not tend to raise fundamental regulatory questions under the Broadcasting Code as the PRS element clearly and directly influences the editorial content, is just one element of the overall content and is not unduly or inappropriately promoted on-screen.
- 2.5 There are now entire programmes, blocks of programmes and indeed channels predicated – in terms of both the content itself and the funding of that content – on the use of PRS. These include a range of services such as Dating, Adult Chat, Psychic, and Quiz channels. Collectively, these are referred to in this document as Participation TV (PTV).

- 2.6 The number of Participation TV services operating has increased significantly in recent years. The promotion and use of PRS services within PTV channels has become more prevalent and prominent, but in some cases it is difficult to identify editorial intent for this.
- 2.7 Some PTV services, for example dating or text message-based chat channels are broadcast not as editorial services but as teleshopping (effectively long form advertising). In their operation, any editorial involvement is not the primary purpose for participation, and/or they include straightforward offers of goods or services for sale.
- 2.8 However, other PTV services are currently broadcast as editorial services. Examples include adult-themed chat (referred to in this consultation as Adult Chat PTV), psychic readings (referred to in this consultation as Psychic PTV) and standalone quizzes (Quiz PTV). These services often include advertising-type elements, such as the prominent (if not constant) display of PRS numbers, repeated calls to action, and the promotion of revenue-generating services e.g. personal calls which do not appear to influence editorial content.
- 2.9 Ofcom recognises that, prior to Ofcom's conclusions on changes to the Broadcasting Code, it may not have been clear to such broadcasters in certain circumstances whether or not promotion of PRS in this context could be considered to contribute to the editorial content of programming.
- 2.10 Article 10 of the TVWF Directive requires that advertising (including teleshopping, essentially long-form advertising including direct offers) must be "readily recognisable and distinguishable from editorial content", and "kept quite distinct". Editorial programmes must not be vehicles for the promotion of products and services.
- 2.11 This legislation is important for citizens and consumers as it helps to ensure:
- Transparency: viewers know whether they are watching an advertisement, and are aware of the context and intention of the content; and
 - Consumer protection: advertising regulation seeks to protect consumers from, amongst other things, the advertising of harmful products and services, and misleading claims. Therefore in some instances the rules on content of advertising are stricter than the rules for editorial programming.
- 2.12 There are also strict rules on the amount of advertising that may be broadcast on TV, and product placement in editorial programming is currently prohibited.⁹ The use and promotion of a revenue-raising service within programmes – as opposed to commercial advertising airtime – is only permissible in limited circumstances.
- 2.13 It is therefore important – for both viewers and all broadcasters – to ensure that broadcasters are not permitted to circumvent these rules by advertising products and services within programmes.

⁹ Product placement is defined as "the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme maker or broadcaster (or any representative or associate of either)." The government has announced a consultation on product placement in programming.

Ofcom's 2007 and 2008 consultations on Participation TV

- 2.14 This consultation follows Ofcom's consultation in 2007 Participation TV Part 1 ('the 2007 Consultation')¹⁰ and Ofcom's consultation in 2008 Participation TV Part 2 ('the 2008 Consultation').¹¹
- 2.15 In those consultations Ofcom considered the promotion of PRS within programmes at length and consulted on proposals for its regulation.
- 2.16 Ofcom's Broadcasting Code already requires that products and services are not promoted within programmes. Under the Broadcasting Code, PRS is considered to be a product or service. Our consistent view in these consultations has been that PRS may only be used within programmes where there is clear editorial justification.
- 2.17 The 2007 Consultation set out proposals for new rules to be added to the Broadcasting Code to clarify the extent and circumstances of acceptable PRS promotion in programmes. One of the other options considered was that all programmes predicated on the use of PRS should no longer be classified as editorial but as teleshopping. However, stakeholders favoured Ofcom's preferred option for clearer rules to be added to the Broadcasting Code.
- 2.18 Shortly after the 2007 Consultation, the European Court of Justice ("ECJ") published its Judgment in the ORF case on 18 October 2007 ("the ORF Judgment")¹². That Judgment set out clearly that promotional activity should be kept separate from those covered by other parts of the programme broadcast to make them unambiguously identifiable. It goes on to consider that a quiz PTV programme amounts to teleshopping where the broadcast represents a "real offer of services" and amounts to television advertising where it consists of an announcement which "seeks to encourage viewers to buy the goods and services presented as prizes" or "seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self promotion."
- 2.19 Ofcom considered that the ORF Judgment applies not only to quiz TV but also other genres of PTV displaying similar characteristics and has taken this into account in considering regulatory options.
- 2.20 Ofcom's 2008 Consultation considered both the stakeholder responses to the 2007 Consultation and the ORF Judgment. The consultation proposed new rules in the Broadcasting Code to ensure that programmes only promote PRS where there is sufficient editorial justification for its use and are not simply vehicles for the promotion of what are essentially non-editorial revenue-generating services. We also consulted on whether the new rules should also apply to radio.
- 2.21 Stakeholder responses to this consultation are summarised in the next section of this document.

¹⁰ <http://www.ofcom.org.uk/consult/condocs/participationtv/>

¹¹ <http://www.ofcom.org.uk/consult/condocs/participation2/>

¹² case C-195/06 *Kommunikationsbehörde Austria v Österreichischer Rundfunk (ORF)*

Section 3

Comments on Ofcom's 2008 Participation TV consultation and Ofcom responses

Introduction

- 3.1 In the 2008 Consultation we set out proposals for clarifying the separation of advertising from editorial content, including proposed changes to the Broadcasting Code rules and guidance.
- 3.2 We also asked for views on whether the proposed rules should apply to radio as well as to television, and whether alternative payment methods to PRS should be allowed from consumers to pay to participate in editorial programmes at this time.
- 3.3 Ofcom received 58 responses in total (44 from companies and organisations, and 14 from individuals) on the matters discussed in the 2008 Consultation. Of these, 20 respondents requested that their responses be kept confidential. All non-confidential responses are available on Ofcom's website¹³.
- 3.4 The responses from stakeholders represented a diverse range of views, which required considerable further consideration and, in some areas, prompted further analysis and research. We have summarised responses below and included Ofcom's responses where relevant. The key themes to stakeholders' responses are listed below and then examined in turn:
- The ORF Judgment;
 - Separation principle;
 - Alternative payment methods;
 - Application of the rules to radio;
 - Broadcasting Code rules and guidance;
 - Adult and Psychic PTV services and consumer harm;
 - Impact assessment.

The ORF Judgment

Summary of comments

- 3.5 The ORF Judgment set out clearly that promotional activity should be kept separate from other parts of the programme broadcast to make them unambiguously identifiable. It went on to consider that a quiz PTV programme amounts to teleshopping where the broadcast represents a "real offer of services". The ECJ considered that such broadcasting would amount to television advertising where it consisted of an announcement "which seeks to encourage viewers to buy the goods

¹³ <http://www.ofcom.org.uk/consult/condocs/participation2/responses/>

and services presented as prizes” or “seeks to promote the merits of the programmes of the broadcaster in question indirectly in the form of self promotion.”

- 3.6 In the 2008 consultation Ofcom set out that it considered that the effect of the judgment extended beyond Quiz TV to other genres of PTV displaying similar characteristics, for example Adult Chat PTV and Psychic PTV. As a result, other forms of PTV could be considered to be teleshopping where the broadcasting content amounted to a “real offer of services”.
- 3.7 Several companies, including Com and Tel and Peripatos and organisations representing member companies - including the Association for Interactive Media and Entertainment (AIME) and the Participation Television Broadcasters Association (PTVBA) - that operate PRS or PTV services strongly disagreed with Ofcom’s interpretation of the ORF judgment. Com and Tel and two individuals who responded suggested that Ofcom’s interpretation was not in line with that of other European countries. Another stakeholder, who did not wish its identity to be disclosed, argued that the judgment was not a direction.
- 3.8 Buongiorno (a PTV content provider) and Five commented that the judgment was of narrow application to Quiz PTV. Triple Media Communications (a TV business consultancy) agreed that participation should only be sought where directly relevant to editorial content as broadcast, but was concerned about the proposed application to Quiz PTV.
- 3.9 However, there was some support for Ofcom’s interpretation. The Electronic Retailing Association (Europe), a trade association for TV, radio and internet retailers, commented that the ORF judgment has a direct bearing on PTV. A stakeholder who responded in confidence said that it agreed with Ofcom’s interpretation of the judgment and its general proposals. Another stakeholder who replied in confidence agreed that Ofcom’s proposed approach should correctly identify predominantly transactional content as opposed to editorially driven content.

Ofcom response

- 3.10 Ofcom agrees that the ORF Judgment is not a direction. However, the principle of the primacy of European law¹⁴ means that Ofcom must take full account of European legislation. That includes any interpretation of European legislation made by the ECJ. In this case Article 10 of the Television Without Frontiers Directive¹⁵ provides that television advertising and teleshopping must be readily recognisable and distinguishable from editorial content. It is therefore necessary for Ofcom to consider what constitutes television advertising and what constitutes teleshopping under the Directive. The ORF Judgment spells out the interpretation which is to be given to each of these terms under the Directive in respect of quiz PTV. Ofcom considers that the interpretation is of more general import and, in considering the Directive as applied to PTV more generally, full account should be taken of the ORF Judgment.

¹⁴ recognised by the ECJ and United Kingdom Courts, notably in the *Factortame* cases; Case C-213/89 *The Queen v Secretary of Transport ex parte Factortame* ECR 1990 I-2433; *R v Secretary of State for Transport (ex parte Factortame)* [1990] 2 AC 85

¹⁵ Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended

- 3.11 Ofcom agrees that cases should be considered on a case by case basis. However, we remain of the view that the ORF Judgment is relevant to a consideration of the regulation of all PTV on the basis that the principles set out therein, in particular that PTV representing a “real offer of services” be classified as teleshopping, and announcements which seek to encourage viewers to buy goods or services are to be considered advertising, are of wider relevance.

Separation of editorial and advertising

Summary of comments

- 3.12 Several stakeholders who responded, including AIME, MX Telecom and the Mobile Data Association (MDA), acknowledged that the commercial nature of certain PTV content distinguishes it from editorial content.
- 3.13 AIME said that consumer confusion must be avoided, and was in favour of labelling PTV content for the benefit of viewers. It felt that existing regulations should adapt and that a new category of ‘advertorial’ should be created. Other stakeholders, including Absolute Live (a PRS service provider) and MDA, also suggested ‘advertorial’ as a solution. The MDA said that consumers need not be confused regarding the nature and content of interactive services, but that they do need to understand when they are exposed to a “sales based proposition”. MX Telecom said that the purpose of the separation principle is to ensure that audiences recognise when they are watching editorial and when they are watching advertising. However, it argued that if there is no editorial content (as Ofcom had previously suggested sometimes appeared to be the case) then the separation principle becomes academic.
- 3.14 Others, including the Premium Rate Association and Harvan Europe, argued that whether content is editorial or advertising is subjective. Some stakeholders referred in this context to Ofcom’s own research in 2007 amongst regular viewers of Psychic PTV and Adult Chat PTV which noted that “regular viewers of Psychic PTV, particularly female viewers, felt the content could be very engaging” and “respondents who watched Adult Chat PTV had pragmatic views...and expressed very few concerns about content or practices”. Opera Interactive Technology Group questioned the validity of any regulatory change designed to limit the degree of commercial activity within programmes, and suggested that instead regulation should adapt. The PTVBA suggested that the web environment makes distinctions between editorial, advertising and teleshopping increasingly irrelevant. It also argued that mainstream programmes using PRS (such as *X Factor* and *Saturday Kitchen*) generate revenue and involve repeated selling messages, and said its members would not distinguish between such content, and Adult Chat PTV and Psychic PTV. Com and Tel suggested that PhonepayPlus requirements, e.g. the need to provide regular pricing information on air, have contributed to the sense of the services being in a teleshopping environment.

Ofcom response

- 3.15 As respondents have indicated, the boundaries between editorial and commercial content are blurring – particularly on new platforms that facilitate interactive response from consumers. While consumers of particular services may be content with such blurring, it presents risks for consumer protection in general. If a service is advertising then it must be recognisable as such in order for consumers to benefit from the appropriate kind of consumer protection.

- 3.16 We consider that the provisions of the TVWF Directive, which require advertising be recognisable and distinguished from editorial for broadcasting services, are important to uphold and enforce and therefore consider it appropriate to continue to ensure that advertising remains distinguishable by the viewing public.

Alternative payment methods

Summary of comments

- 3.17 In the 2008 Consultation, we proposed that a new rule should be added to the Broadcasting Code to ensure that only PRS could be used as a means of charging audiences to participate in editorial programmes.
- 3.18 A wide range of stakeholders, including BT, Five, GCAP and AIME, disagreed with this approach. Arguments included that consumers should have freedom of choice and that limiting payment to PRS would inhibit future investment. BT felt that convergence, and the emergence of new payment methods, such as PayPal and Pay4it, should be recognised. GCAP suggested that if the payment mechanism is limited to PRS, broadcasters could lose out to other media that can adopt new technology rapidly. WIN Plc, a provider of mobile and data services, argued that allowing PRS only is not technology neutral and suggested it may be anti-competitive. Another respondent suggested that credit/debit card billing has advantages over PRS, e.g. improved child protection.
- 3.19 BT also asked whether it was currently acceptable for broadcasters to use other entry or voting mechanisms besides PRS, provided they are not promoted on air.

Ofcom response

- 3.20 We have taken account of views that the means by which audiences can both participate with editorial programming and pay to do so are multiplying. We recognise that this could bring consumer benefits in terms of competition, customer convenience and security in having available different payment methods and providers across platforms. However, it is equally likely to create greater complexity in participation, and risk exclusion or unrecognised participation, for some consumers. The use of PRS for the limited participation opportunities available in editorial programmes, e.g. voting, is far better understood by general audiences,
- 3.21 Consumer protection is of prime importance for Ofcom in considering appropriate payment mechanisms for viewer participation. PRS must comply with specific rules, including the nature of the product, how it is described, how much it may cost, and how it is billed. It is not yet clear that a similar degree of consumer protection for audiences would currently be available for services using alternative payment methods to PRS.
- 3.22 We therefore are going ahead with an amendment to the Broadcasting Code to limit participation in editorial programmes to PRS only, and not to permit the promotion of alternative payment methods.
- 3.23 To be clear, this limitation applies solely to *editorial programmes covered by the Broadcasting Code*. All broadcasters are already free to promote alternative means of participating on their websites or in other material. Channels broadcasting as teleshopping would be subject to the Advertising Code which does not constrain the methods of payment that may be referred to within teleshopping or other

advertisements. The Advertising Code contains additional consumer protection safeguards that are not included in the Broadcasting Code.

Application of the rules to radio

Summary of comments

- 3.24 The 2008 Consultation requested views on whether the proposed changes to the rules should apply to radio as well as to television.
- 3.25 Several radio stakeholders felt that radio needed different rules and guidance to television.
- 3.26 Global Radio said that PTV characteristics such as off-screen services and prominent display of PRS numbers do not apply to radio, and questioned what benefit the proposed rules would have for listeners. It also considered, as did a radio stakeholder who responded confidentially, that telephone services using 084 and 087 prefixes are not truly products or services, and should therefore not be caught by the proposed rules, as suggested in the 2008 Consultation. Bauer Radio said that radio should have separate rules and/or guidance as it entails programming, not programmes within a schedule. Box Television also thought that a separate consultation and guidance were needed for radio. GCAP said that the ECJ ruling did not apply to radio, and that the draft rules and guidance proposed in the 2008 Consultation should be clearer. In any event, it considered that a wider review of Sections 9 (sponsorship) and 10 (commercial references in programmes) of the Broadcasting Code was required for radio. GCAP also pointed out that an impact assessment had not been conducted for radio. Another radio stakeholder commented that it was difficult to assess the implications of Ofcom's proposals for radio.
- 3.27 UTV was concerned about the possible impact of the proposed rules and guidance on phone-in talk shows, and queried what would be considered to amount to 'undue prominence'. It said that the frequent repetition by a presenter of the phone number is a primary editorial function without which there would be no content.
- 3.28 Channel 4 thought that in principle the proposed rules should extend to radio but that differences in respect of radio should be recognised in guidance.
- 3.29 Other respondents, e.g. the Trading Standards Institute, saw no reason for radio to be treated differently.

Ofcom response

- 3.30 As noted in the consultation responses, the use of PRS in radio is far more limited than in television. PRS revenues account for a small and declining part of licensee revenues. It tends to be used in listener competitions and for fixed price text messages from listeners, rather than for the core phone-in shows or on-air conversations, which typically use non-PRS phone lines.
- 3.31 Ofcom has taken on board stakeholders' comments that the majority of phone services operated by radio stations are used mainly to allow audiences to interact with the station's broadcast output and are not revenue-generating private call services in the same way as some PRS on PTV channels. In practice there is little radio programming that uses and promotes PRS to the extent that we have observed in some television content.

- 3.32 However, the general principle for advertising to be recognisable and distinct from editorial content applies to radio as well as to television, and we believe that there is justification for radio to be subject to the same rules regarding promotion of PRS as television.
- 3.33 In the vast majority of cases we expect that the changes to the Broadcasting Code will not affect the use of PRS for legitimate editorial purposes on radio, and that radio broadcasters will not need to modify their services to comply with them. Ofcom considers that its amendments to the Broadcasting Code and the accompanying guidance are sufficiently flexible to recognise any relevant differences between the use of PRS on radio and on television. We are not aware of any current radio format featuring PRS that would have greater restriction on its use under the Radio Advertising Standards Code.
- 3.34 Most of the formats predicated on PRS services developed for PTV are not present on radio. However, radio stations have occasionally broadcast dedicated quiz shows, involving the promotion of a PRS line where only a small percentage of the calls generated are in fact put through to the studio. We are also aware of radio shows involving discussions with ‘psychics’, but these tend to be clearly editorial content and do not currently involve PRS. However, it is possible that broadcasters may innovate and develop more formats featuring PRS as they explore new revenue streams and it is important that both Codes should be able to address such future developments.
- 3.35 We have therefore concluded that the changes to the Broadcasting Code should also be applicable to radio. We consider that this will benefit listeners, as they will be aware of when PRS promotion is for editorial or advertising purposes, and in the latter instance consumers using the services will benefit from the protection that the Advertising Code affords. We do not believe that application of the revised rules and guidance set out in this document will constrain the legitimate use of PRS in radio. We have therefore not conducted an impact assessment specifically for radio services.

Broadcasting Code rules and guidance

The proposed revised rules on which we consulted in the 2008 consultation were:

Premium rate numbers

Premium rate numbers

- 10.9 Where a broadcaster invites viewers or listeners to take part in or otherwise interact with its programmes, it may only charge for such participation or interaction by means of premium rate telephone services or other telephony services based on similar revenue sharing arrangements.
- 10.10 Premium rate services, and other telephony services based on similar revenue-sharing arrangements, will normally be regarded as products or services, and must therefore not appear in programmes, except where:
- they are both directly derived from a particular programme and enable viewers or listeners to participate directly in or contribute directly to the editorial content of the programme; or
 - they fall within the meaning of programme-related material.

10.11 When a premium rate service (or such other telephony service as described in Rule 10.9) is included within a programme to allow viewers or listeners to participate or otherwise interact with the programme, broadcasters must ensure that:

- the service is directly derived from the particular programme;
- the service enables viewers or listeners to participate directly in or contribute directly to the editorial content of the programme;
- the service is not given undue prominence within the programme;
- the programme consists primarily of content other than the promotion and use of the service; and
- the primary purpose of the programme is editorial, and any commercial activity associated with the service (including but not limited to the generation of call revenues) is secondary to that purpose.

10.12 Any use of premium rate numbers or services must comply with the Code of Practice issued by PhonepayPlus.

Summary of comments

- 3.36 The 2008 Consultation suggested draft wording for rules requiring any commercial activity associated with the promotion of PRS to be secondary to a primary editorial purpose. We suggested guidance on this which included a consideration of how much money the PRS generated and how the broadcast content was funded (e.g. by traditional spot advertising or by PRS revenue).
- 3.37 Some stakeholders argued that, aside from the practical difficulties of differentiating between revenues generated by different means, the key question should be whether there is editorial justification for the use of a PRS within a programme. If so, then it should be irrelevant in deciding compliance under the Broadcasting Code to consider what the broadcaster does with the PRS revenues generated.
- 3.38 Some respondents, including SBS Broadcasting Network (a European broadcaster), Promo Veritas (a promotional consultancy) and a stakeholder who replied confidentially, felt that the draft rules and guidance proposed in the 2008 Consultation were sound in principle, but suggested some drafting amendments. S4C was generally content with the proposed guidance but wanted clarification of the proposed rules.
- 3.39 However, other stakeholders, including Box Television, BT, Channel 4, and Five commented that greater clarity was needed.

Ofcom response

- 3.40 We have taken account of comments about the drafting of the rule and guidance. Revised wording, and the reason for particular amendments, is set out in Section 4.
- 3.41 We believe that the revised wording set out in Section 4 provides greater clarity to stakeholders. Rules 10.10 and 10.11 incorporate the essential elements of the draft

rules issued for consultation, but in light of stakeholder comments have been revised into a more concise and user-friendly form.

- 3.42 We are also not implementing at this stage the detailed change to the meaning of “programme related material” that was proposed. This rule is not particular to PRS or PTV, and is being considered in the context of potential changes to Section 10 overall in Ofcom’s Broadcasting Code Review.

Treatment of Adult Chat and Psychic PTV services and consumer harm

Summary of comments

- 3.43 Ofcom recognised in the 2008 Consultation that a number of services as currently broadcast would not fall within the Broadcasting Code since they would be classified as advertising and therefore subject to the Advertising Code. The Advertising Code has particular restrictions on the promotion of PRS of a sexual nature (featured in Adult Chat PTV) and psychic practices (featured in Psychic PTV) which are based on a precautionary approach to the risk of consumer harm.
- 3.44 The PTVBA said that Ofcom has been actively and extensively enforcing the requirements of the Broadcasting Code to guard against public harm; in addition, Ofcom and PhonepayPlus have enhanced regulatory measures around PTV and PRS. Similarly, MX Telecom and Opera Interactive Technology Group (telecoms service providers) considered that consumers are already adequately protected, through PhonepayPlus regulations and the broadcast licence condition on the use of PRS in programmes.
- 3.45 Several respondents involved in the Adult Chat and Psychic PTV industries, including Absolute Live, Com and Tel and Fierce Media (a TV broadcaster), argued that there was no evidence of consumer harm arising from such services and they should therefore continue to be broadcast in their current form. Com and Tel said that all calls to Adult Chat and Psychic PTV channels are “fulfilled” (meaning that the caller is connected to an operator), unlike quizzes which it considered to be similar to lotteries.
- 3.46 Several respondents argued that there is consumer demand for Adult Chat and Psychic PTV services. Absolute Live suggested that if consumers felt that they were being misled, or that such services were detrimental to them in any way, they would not repeatedly call such services and complaint volumes would be considerably higher. It also referred to steps that it takes to protect consumers, including terminating calls from customers under the age of 18. Some other stakeholders involved with the Adult Chat and Psychic PTV industries also referred to their efforts to ensure consumers are protected.
- 3.47 Some stakeholders, in particular the PTVBA, Com and Tel and Opera Interactive Technology Group, referred specifically to the restrictions on the advertising of sexual entertainment services and psychic practices in the TV Advertising Standards Code. They did not consider that the application of these restrictions to Adult Chat PTV and Psychic PTV was appropriate, and argued that there was a lack of evidence that such content causes harm or offence.

Ofcom response

- 3.48 Consumer harm and offence are clearly very important considerations in any area of broadcasting, including participation TV. Ofcom considers that there are potentially

two separate risks: of harm from use of the PRS element itself, and of offence from exposure to content promoting or incorporating the PRS element.

- 3.49 On the risk of harm, there is no evidence that would suggest widespread harm to legitimate consumers from use of PRS of a sexual nature or most types of psychic PRS. Consumers of these services are self-selecting and able to exercise their choice, with existing rules in place operated by PhonepayPlus to control the risk of harm from use of the products.
- 3.50 On the risk of offence, we have taken on board comments from stakeholders about a lack of research in this area, particularly in relation to the promotion on TV of PRS of a sexual nature or featuring psychic practices. We have therefore commissioned independent research for this consultation to assess the risk of offence in these particular areas. The key findings of the research are set out in Section 6, and published as a separate report to this consultation.

Impact assessment

Summary of comments

- 3.51 Of the companies and organisations who responded, 15 said that a full assessment of the impact of decisions was required. Most of the individuals who replied also asked for an impact assessment.
- 3.52 Several companies and organisations, including AIME, Com and Tel, MDA and Opera Interactive Technology Group, suggested that if Psychic PTV and Adult Chat PTV ceased to broadcast, this would result in £60 -100m lost annual revenues across the entire value chain and the loss of over 2000 jobs. Another respondent said that there would be a significant loss of revenue for aggregators and mobile networks. However, the calculations behind these estimates were not detailed.
- 3.53 Three companies said that if such content were no longer able to be broadcast businesses would need sufficient time to prepare. Two individuals referred to the need for phased-in implementation by Ofcom of any proposals.

Ofcom response

- 3.54 The 2007 Consultation included an impact assessment ('IA') of its proposals on the Broadcasting Code, and on the advertising of adult sexual entertainment services and of psychic practices. The IA was based both on information provided directly to Ofcom by broadcasters and on an analysis of the market that Ofcom commissioned from an independent consultancy. The 2008 Consultation referred back to the 2007 IA and did not include a further IA.
- 3.55 We have decided that it is appropriate to conduct a further IA on the impact of the changes to the regulatory framework. In particular, we have considered the impact on each stakeholder of a range of options for regulation of the promotion of PRS of a sexual nature and psychic services. Stakeholders are invited to comment on the IA contained in this consultation, which is summarised in Section 7 and set out in full in Annex 7 and 8.

Section 4

Statement on changes to Broadcasting Code rules

Introduction

- 4.1 In the 2008 Consultation, we proposed changes to the Broadcasting Code rules and the introduction of new guidance to make the separation between editorial and advertising clearer. We invited stakeholder comments on these changes and the proposed draft wording.
- 4.2 This section sets out our conclusions on changes to the Broadcasting Code, and revised wording of the rules and guidance, following the consultation process.

Following consultation, we have concluded that the Broadcasting Code should be changed to make the separation between editorial and advertising clear

- 4.3 The existing Broadcasting Code already prohibits the promotion of products and services and unduly prominent references in editorial programmes. It also requires advertising elements of a service to be recognisable and distinguished from editorial content. PRS is considered to be a product or service and therefore programmes should only be permitted to ask audiences to call or use a premium rate service (which is a form of commercial transaction) where there is clear editorial justification.
- 4.4 At the time of the 2007 Consultation, it was not wholly clear to what degree PRS promoted by some broadcasters contributed to editorial content or otherwise complied with the requirements of the Broadcasting Code. As a result of the fact that the distinction between editorial and advertising in relation to the promotion of PRS may not have been clear, we considered it important to give stakeholders a reasonable opportunity to make representations on this matter in order to ensure that boundaries were appropriately drawn. We have now consulted on this issue¹⁶, monitored broadcast content and taken into account stakeholders' comments. We have also closely examined the significance of the ORF Judgment.¹⁷
- 4.5 On the basis of all of the above, we have concluded that the Broadcasting Code should be amended with a new rule added, together with explanatory guidance to make clearer the circumstances in which PRS may be used legitimately in editorial programmes.
- 4.6 The amendment to Section Ten of the Broadcasting Code is intended to make absolutely clear the need to ensure direct contribution to editorial content. The new rule in this section will ensure that, where programmes feature PRS, they do not become vehicles for the promotion of that PRS but remain clearly editorial in substance and purpose.
- 4.7 We consider that the changes as proposed to the Broadcasting Code will benefit viewers, consumers and broadcasters.

¹⁶ <http://www.ofcom.org.uk/consult/condocs/participationtv/>

¹⁷ See Section 3 (The ORF Judgement) and Annex 5

- 4.8 For viewers, it will maintain the distinction between editorial and advertising, and ensure that programmes are not simply vehicles for the promotion of PRS services.
- 4.9 For consumers, it will ensure that services predominantly advertising PRS will be regulated under the Advertising Code, which offers enhanced protection for consumers against misleading content and unfair trading practices.
- 4.10 For broadcasters in general, it will provide increased clarity on what comprises acceptable use and promotion of PRS in editorial content. In doing so this will create consistency and fair competition for broadcasters and PRS providers wishing to promote PRS services on television.

Following stakeholder comments, we have revised the wording of the Section Ten rule and guidance

- 4.11 The final wording of the relevant Broadcasting Code rules are set out in the shaded boxes below, preceded by the existing rules (in italic text) for ease of reference.
- 4.12 The existing Rules 10.9 and 10.10 are as follows:

Premium Rate Numbers

“Premium rate numbers will normally be regarded as products or services, and must therefore not appear in programmes, except where:

- they form part of the editorial content of the programme; or*
- they fall within the meaning of programme-related material (see above)” (10.9).*

“Any use of premium rate numbers must comply with the Code of Practice issued by PhonepayPlus” (10.10).

- 4.13 The new Broadcasting Code rules are as follows:

Premium rate numbers

10.9 Where a broadcaster invites viewers or listeners to take part in or otherwise interact with its programmes, it may only charge for such participation or interaction by means of premium rate telephone services or other telephony services based on similar revenue-sharing arrangements.

10.10 Premium rate services will normally be regarded as products or services, and must therefore not appear in programmes, except where:

- they enable viewers/listeners to participate directly in or otherwise contribute directly to the editorial content on the programme; or
- they fall within the meaning of programme-related material.

Each of the above exceptions is subject to the undue prominence rule.

10.11 Where a premium rate service is featured in a programme, the primary purpose of the programme must continue to be clearly editorial. Promotion of the featured premium rate service must be clearly subsidiary to that primary

purpose.

10.12 Any use of premium rate numbers must comply with the Code of Practice issued by PhonepayPlus.

- 4.14 The text of guidance to be published alongside the revised Broadcasting Code rules has also been revised. It is set out at Annex 6, and is included to allow respondents to understand Ofcom's thinking as clearly as possible.
- 4.15 The changes to the Broadcasting Code discussed in this document are likely to come into effect ahead of any changes resulting from Ofcom's more general Broadcasting Code Review which commenced in June 2009¹⁸. This consultation proposed changes to the rules on commercial references in television and radio, and separate rules for radio and television. If, following the Broadcasting Code Review, separate sections were to be established for radio and television, the above rule will be included in both sections.
- 4.16 However, the Government has announced that it is minded to permit product placement on commercial television and is itself consulting on this issue. Ofcom is therefore extending its review of Sections Nine and Ten of the Code which include the rules on commercial references.¹⁹

¹⁸ <http://www.ofcom.org.uk/consult/condocs/bcode09/>

¹⁹ <http://www.ofcom.org.uk/consult/condocs/bcode09/extension/>

Section 5

The effect of changes to the Broadcasting Code

Introduction

- 5.1 Ofcom recognises that the changes to the Broadcasting Code may have an impact on certain stakeholders. We have therefore considered the impact of the change to the Broadcasting Code on stakeholders and whether the regulatory framework for PTV programming as a whole (including the provisions of the Advertising Code) is proportionate to the regulatory objectives pursued.
- 5.2 This section sets out the options available to PTV broadcasters following changes to the Broadcasting Code, and the effect on PTV broadcasters if the provisions of the Advertising Code remain the same. It identifies that the impact of the changes is likely to be very limited for most broadcasters, except for Adult Chat PTV and Psychic PTV broadcasters.

Options available to broadcasters following changes to the Broadcasting Code

- 5.3 The Broadcasting Code changes apply to the programming output of *all broadcasters* of editorial content under the Broadcasting Code and, as outlined above, to both television and radio broadcasters.
- 5.4 Broadcasters should make themselves aware of the revised rules and guidance. For the vast majority of broadcasters, there will be no material effect as promotion of PRS in their services is likely to comply with the revised rules.
- 5.5 Once the Broadcasting Code is changed, a number of PTV services which may have previously considered their content to be subject to the Broadcasting Code might not comply in their current form if the PRS element is not subsidiary to the primary editorial purpose of the programme, or directly linked to the editorial content, and/or is unduly prominent. There may be particular PTV broadcasters whose current operating model may therefore be affected by the changes, and would need to consider whether the services offered can comply with the revised Broadcasting Code rules.
- 5.6 If a service is using PRS in editorial airtime in a manner that does not comply with the revised Broadcasting Code, the broadcaster would then be obliged to make a choice to either:
- change the service appropriately to comply with the Broadcasting Code; or
 - consider the possibility of broadcasting the service as advertising, rather than editorial, in compliance with the TV Advertising Code.
- 5.7 PTV licensees – like all licensees – can exercise a choice about the configuration of their output, and the terms of their licensing authorisation, mindful of the rules that apply to editorial and advertising material. Therefore, if licensees wish their programming to be considered to be editorial in nature, that programming must comply with the Broadcasting Code rules, in particular revised rule 10.11 (see

Section 4) which requires the promotion of PRS services to be subordinate to the editorial content of programming.

- 5.8 Where licensees wish to maximise the exposure given to PRS – and benefit from the income so derived – by promoting PRS which does not contribute to the editorial content of programming or is not subordinate to editorial considerations or is unduly prominent - they would not comply with the Broadcasting Code rules, and would therefore be considered as advertising. Long-form advertising or promotion is known as teleshopping, and is a particular category of broadcast licence for services that consist of direct offers of goods or services in return for payment. A variation on teleshopping also recognised by Ofcom is a self-promotional service, in which a broadcaster may only promote its own products or services. Ofcom provides guidance for licensees on the difference between editorial services, and teleshopping and self-promotional services.²⁰
- 5.9 Teleshopping, as with more traditional spot advertising (also known as short-form advertising) on general entertainment channels, is regulated under the Television Advertising Standards Code (the “Advertising Code”) and is permitted to contain direct offers, calls to action and prominent promotion for commercial products and services.

The potential impact on PTV broadcasters of broadcasting as advertising content subject to the Advertising Code

- 5.10 Teleshopping can be broadcast as either an entire channel or a delineated “block” on an editorial channel. A concern previously expressed was that broadcasting as teleshopping would limit the availability of PTV services to particular scheduled slots on editorial channels since Ofcom’s rules on the amount and frequency of advertising would have restricted the amount and timing of such material.
- 5.11 However, following recent changes to Ofcom’s rules on the amount and frequency of advertising²¹, teleshopping can be carried between midnight to 6am for commercial public service broadcasters (Channel 3, Channel 4, S4C, Five) and without restriction for all other broadcasters. We consider that this concern has therefore effectively been removed.
- 5.12 We consider that, in many cases, the regulation of PTV as advertising would not have an impact on PTV broadcasters since the nature of their services and the PRS featured would already comply with the Advertising Code, irrespective of the changes to the Broadcasting Code.
- 5.13 For some genres of PTV such as Quiz TV, we do not consider that the Advertising Code would require broadcasters to have to change the nature of their services in order to comply with it, even where such broadcasters previously considered their content to be subject to the Broadcasting Code.
- 5.14 However, the current Advertising Code contains restrictions on the type of products and services that may be advertised on TV which could impact on certain PTV broadcasters who may previously have considered their content to be subject to the Broadcasting Code.

²⁰ http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance_notes_and_apps/tlcs/

²¹ <http://www.ofcom.org.uk/consult/condocs/rada08/>

- 5.15 Specifically, the Advertising Code currently prohibits advertisements for premium rate services of a sexual nature on unencrypted TV channels under rule 11.1.2:

Rule 11.1.2

Premium rate services of a sexually explicit nature (i.e. those which operate on the 0909 dialling code) may not be advertised. An exception is made for premium rate voice services of a sexual nature, which may be advertised on encrypted elements of adult entertainment channels only.

- 5.16 Adult Chat PTV services broadly feature two types of PRS products:
- Non-sexual premium rate services. These are also known as flirt lines or chat lines. These may be advertised under current Advertising Code rules provided they meet PhonepayPlus rules on live PRS.
 - Premium rate services of a sexual nature, also known as adult sexual entertainment PRS. Under PhonepayPlus rules, their numbers must be prefixed to distinguish them from other chat lines. Under current Advertising Code rules, premium rate services of sexual nature can only be advertised on encrypted elements of adult entertainment channels.
- 5.17 Therefore, under the current Advertising Code rules Adult Chat PTV services would be able to broadcast advertising for non-sexual PRS. However, they would only be able to broadcast as teleshopping or advertising for PRS of a sexual nature if they were encrypted.
- 5.18 The Advertising Code also currently prohibits advertisements for products or services concerned with the occult or psychic practices under rule 10.3.

Rule 10.3 The occult, psychic practices and exorcism

With very limited exceptions, advertisements for products or services concerned with (a) the occult or (b) psychic practices are not acceptable.

- 5.19 Under current Advertising Code rules, only specific pre-recorded PRS designed for general appeal are excepted from the prohibition.
- 5.20 Psychic PTV services currently feature a number of PRS products related to the psychic practices they feature: in the main these are live personal tarot, astrology, palmistry or horoscope readings with psychic practitioners.
- 5.21 Therefore, under the current Advertising Code rules, Psychic PTV services would not be able to continue in their current form as live psychic readings may not be promoted. Their choices would therefore be to either modify their services as editorial to comply with the revised Broadcasting Code rules; operate as advertising with promotion of permitted psychic practices only (i.e. offering no live personal readings) or ceasing broadcasting entirely.

The BCAP 2009 Review of the Advertising Code

- 5.22 The Advertising Code is operated by the Broadcasting Committee of Advertising Practice (BCAP) and Advertising Standards Authority (ASA) under a contracting-out

agreement with Ofcom. Under that arrangement, Ofcom must approve the Advertising Code, which can include the amendment or introduction of rules.

- 5.23 BCAP has recently consulted on a general review of the Advertising Standards Codes for television and radio²² (“the BCAP Advertising Code review”). It expects to publish a revised version of the Advertising Code in 2010.
- 5.24 In anticipation of the present consultation, the BCAP Advertising Code review noted that some rules with relevance to PTV services may be changed following this consultation. As the BCAP Advertising Code review notes, the Advertising Code rules were last reviewed in 2002. This was before the development of PTV services, and relevant rules are not particular to the PRS services that these channels provide. However, they would have the effect of restricting promotion of some PRS products promoted in PTV services.
- 5.25 In its consultation document, BCAP set out the current position on advertising rules on quizzes, psychic practices and PRS of a sexual nature, but made clear that the proposals were subject to change following its own consultation, and separate consultation and proposals by Ofcom.
- 5.26 With specific reference to Quiz PTV, the BCAP Code review has proposed a rule that would reproduce the rule in the Broadcasting Code that specifically covers competitions which requires that:
- “Competitions should be conducted fairly, prizes should be described accurately and rules should be clear and appropriately made known.”
- 5.27 BCAP also intend to supplement the rule with guidance similar to that under the Broadcasting Code.
- 5.28 With reference to Adult Chat PTV²³ that include PRS of a sexual nature, the BCAP Code review suggested retaining rule 11.1.2, pending the outcome of the Ofcom consultation, but updating the definition of from premium rate services to “telecommunications-based” services (as below) to reflect the range of products, platforms and payment options now available²⁴.

The proposed rule

Definitions

Telecommunications-based sexual entertainment services are voice, text, image or video services of a sexual nature that are made available to consumers via a direct-response mechanism and are delivered over electronic communication networks.

Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Broadcasting Code.

Television

²² <http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation/>

²³ See Paragraphs 22.22 to 22.71 of the BCAP Advertising Code Review

²⁴ However, in this consultation, we refer to the definition of premium rate services of a sexual nature in the current BCAP Code.

Advertisements for telecommunications-based sexual entertainment services are acceptable on encrypted elements of adult entertainment channels only.

- 5.29 The BCAP Code review considered that there may be a number of possible alternative approaches in the regulation of 'telecommunications-based sexual entertainment services' (referred to in this consultation as PRS of a sexual nature). These included:
- A total prohibition of advertisements on all TV channels, including encrypted channels;
 - Allowing advertisements on unencrypted channels subject to content rules and scheduling restrictions, such as after 9pm, 10pm, 11pm, 12am;
 - Differentiating between, and applying different rules to, long-form and short-form advertising, allowing one or the other to broadcast on unencrypted channels subject to scheduling restrictions;
 - Removing the rules altogether and relying on the Advertising Code's general provisions for misleading, harmful and offensive material.
- 5.30 The principle objectives of the rule were the protection of under-18s from potentially being harmed and the potential for serious or wide-spread offence for general audiences. BCAP considered that the current rule best met this objective. The BCAP Code Review recognised that the existing policy was probably formulated for spot advertising, rather than long-form promotion. It noted that spot-advertising represented particular and specific risks in part because they arrive unannounced and are uninvited by the audience. The BCAP Code review noted, however, that long-form promotion of premium-rate sexual entertainment services shared those risks (because evidence showed viewers happened on these channels by channel flicking) and had demonstrably included sexual content that went beyond generally accepted standards on open access UK television.
- 5.31 With reference to Psychic PTV²⁵, the BCAP Code Review suggested, pending the outcome of the Ofcom consultation, retaining the current rule 10.3 (which would become 15.4 in the new Code) that currently prohibits advertisements for products that rely on belief in psychic or occult phenomena, with specified exceptions as in the current code.

Rule 15.4

Television advertisements must not promote psychic practices or practices related to the occult, except those permitted by rule 15.5. Radio advertisements may promote psychic and occult practices but must not make efficacy claims.

Psychic and occult-related practices include astrology, personalised horoscopes, palmistry, fortune-telling, tarot, attempts to contact the dead, divination, clairvoyance, clairaudience, the invocation of spirits or demons and exorcism.

Rule 15.5 – Television only

Television and television text advertisements may promote services that the audience is likely to regard merely as entertainment and that offer generalised advice

²⁵ See Paragraphs 15.58 to 15.65 of the BCAP Advertising Code review

that would obviously be applicable to a large section of the population, for example, typical newspaper horoscopes.

Rule 15.5.1

Advertisements may promote a pre-recorded tarot-based prediction service if:

15.5.1.a the service includes no content that respondents might feel to be threatening and

15.5.1.b both the advertisement and the service state clearly that the service is pre-recorded and qualify references to “tarot” to make clear that the predictions are not based on live readings.

- 5.32 BCAP considered that there may be a number of options in relation to the advertising of psychic and occult practices:
- Maintain the existing prohibition on advertisements for products and services relating to the psychic or occult with the present exceptions;
 - Maintain the prohibition on advertisements for products and services relating to the psychic or occult but add a category of exempted products: premium-rate telephone services operating with prior permission from PhonepayPlus;
 - Maintain an explicit prohibition on advertisements for occult products; allow advertisements for psychic products in principle but draft rules designed to prevent the most harmful psychic products from being advertised, and limit the claims that can be made for the products that can be advertised.
- 5.33 BCAP’s principal objective in the rule was to protect vulnerable people from harm or exploitation; a further relevant factor was that some psychic products and services were, by their nature, offensive to some people. BCAP suggested that the current prohibition was appropriate to meeting this aim. However, BCAP considered that, although it possibly did not envisage long-form television advertisements for products and services that rely on belief in psychic or occult phenomena, the policy underpinning the present TV rule is as relevant to those advertisements as to TV spot advertisements for those products and services.
- 5.34 The BCAP Code review also considered that the stricter restriction on TV advertising than radio advertising should be maintained. This was because of TV’s broad reach, its place in the family home and its audio-visual impact can, in combination, have a powerful impact on society at large and on individuals. It considers the impact of TV advertisements for those products and services on viewers who have an underlying vulnerability to the advertised product is likely to be much greater than the impact of radio advertisements on listeners with the same underlying vulnerability.
- 5.35 The BCAP consultation invited comments from stakeholders on the current rules that, unless confidentiality to BCAP only was requested, have been shared with Ofcom. BCAP intend to publish a full analysis of these responses in advance of a revised version of the Advertising Code.

Regulation of Adult Chat PTV and Psychic PTV under the Advertising Code

- 5.36 In light of the potential effect of the changes to the Broadcasting Code on Adult Chat and Psychic PTV broadcasters, Ofcom’s considers it important to consider the appropriate regulation for such services and the PRS they feature. Ofcom has therefore considered whether the regulatory framework provided by the Broadcasting

Code and Advertising Code provides a proportionate means of regulation of those services.

- 5.37 In the remainder of this document we consider options for the regulation of Adult Chat PTV channels that feature premium rate services of a sexual nature and Psychic PTV channels that feature premium rate live personal reading services. We also consider the impact of the different options on broadcasters of the services, the viewing public, consumers of the services, the telecoms and premium rate service providers who supply them, and other broadcasters who may wish to carry the services.

Section 6

PTV stakeholder interests: viewer research and industry information

Introduction

- 6.1 In considering the appropriate regulation for Adult Chat PTV and Psychic PTV, Ofcom must ensure that regulation is proportionate to the objectives it seeks to achieve. In doing so, Ofcom must take into account its duties under the Communications Act 2003 and the impact of regulatory options on stakeholders who may be affected – either positively or negatively – by regulatory change in this area.
- 6.2 This section sets out Ofcom's duties under the Communications Act 2003 in considering the appropriate regulation in this area. It then sets out the background information that has informed our consideration of the issues, including an overview of the Adult Chat PTV and Psychic PTV sectors and key findings from independent viewer research on attitudes to these services and the promotion of PRS they feature.

Ofcom's duties

- 6.3 Ofcom's duties in this area, and the considerations it must have regard to in carrying these out, are set out in the Communications Act 2003. Those duties and considerations are set out in detail in Annex 5.
- 6.4 In summary, we consider those duties cover three main areas:
- i) **To ensure the protection of viewers and consumers, in particular that:**
 - the application of standards provide adequate protection to members of the public from the inclusion of offensive and harmful material in television and radio services;
 - the nature of content is brought to the attention of the audience and that audiences unaware of it are not unintentionally exposed to it;
 - persons under the age of eighteen and others whose circumstances put them in need are protected;
 - the inclusion of advertising which may be misleading, harmful or offensive in television and radio services is prevented;
 - advertising is readily recognisable and distinct from programme content.
 - ii) **To ensure the protection of freedom of expression, and the availability and competition of different audio-visual services, in particular:**
 - the right to freedom of expression, as expressed in Article 10 of the European Convention on Human Rights;

- the maintenance of a range, quality and appeal of television services available throughout the UK including a sufficient degree of plurality of providers of television services; and
 - the desirability of promoting competition and innovation in relevant markets.
- iii) **To ensure that regulation is appropriate to these objectives and proportionate, in particular that it:**
- is evidence-based, transparent, proportionate, consistent and limited to the measures needed to achieve the objectives above; and
 - avoids the imposition or maintenance of regulation that is unnecessary and takes account of effective self-regulation where appropriate.

6.5 In deciding upon the appropriate regulatory approach to Adult Chat and Psychic PTV, Ofcom has carefully considered its duties to stakeholders. To inform that consideration, Ofcom has conducted viewer research and taken into account the likely effect of any regulatory change on broadcasters and service providers.

Viewer research

- 6.6 In responses to Ofcom's 2008 Consultation certain stakeholders considered that there was a lack of research into general viewer opinion on adult sexual entertainment PRS and psychic products, and their promotion on TV and other media.
- 6.7 While research completed for Ofcom's 2007 Consultation included active consumers' opinions on PTV services, this was based on a limited sample and addressed issues in relation to the use of the PRS product rather than its promotion. Other studies into TV programmes featuring adult content (Ofcom's research into sexual imagery for the Broadcasting Code Review, 2009) and psychic content (ITC's research into alternative beliefs, psychic and occult phenomena, 2001) have been based on these subjects in editorial programming.
- 6.8 Ofcom has therefore commissioned independent primary viewer research from Essential Research on these particular issues. This research was specifically focused on the promotion of relevant PRS products on TV: it was not designed to research generally accepted standards in either editorial or advertising content on TV. Essential Research's full report is published separately with this consultation. A summary of the approach, methodology and key findings is set out below.

Approach and methodology

- 6.9 Ofcom identified two key areas to explore in relation to the general viewing public's attitude towards the promotion of Adult sexual entertainment and Psychic PRS:
- What are viewers' attitudes towards the promotion of Adult sexual entertainment PRS and Psychic PRS on television?
 - What are viewers' attitudes towards the content of the channels or programmes featuring promotion of Adult sexual entertainment PRS and Psychic PRS?

- 6.10 The complexity and relative unfamiliarity of the subject matter necessitated a semi-deliberative approach, consisting of spontaneous discussion and considered responses to information about the services.
- 6.11 A total of 20 discussion groups were conducted during June 2009 at five locations across the UK: London, Belfast, Glasgow, York and Bristol. Ten groups with a representative sample of the general public focused on Psychic PRS and Psychic PTV and ten groups focused on Adult sexual entertainment PRS and Adult Chat PTV. Each session involved 8-12 participants (total sample size: 222 of which 113 made up the 'Psychic' discussion groups and 109 made up the 'Adult' discussion groups). Each session comprised single sex groups from similar age bands, with same gender moderators for the groups.
- 6.12 Each discussion group lasted 2 hours. A similar discussion flow was used across both 'adult' and 'psychic' research groups.
- 6.13 Following a general exploration of people's awareness and attitudes towards different PTV services, participants were prompted with descriptions of either adult sexual entertainment or psychic PRS (depending on the group). A discussion about these services was followed by consideration of the promotion of these services across different media and specifically on television. Following discussion of various options for the promotion of this type of service, participants were asked to consider appropriate conditions for the promotion of these types of products on TV.
- 6.14 The format of the sessions included a mix of facilitated group discussions and self-completion questionnaires. Where necessary, participants were read scripts provided by Ofcom that explained Ofcom's role and duties and an introduction to the products (in general) and the products on television. Verbal descriptions and stimulus videos were used to inform respondents about the nature of such broadcasts.
- 6.15 All data mentioned in this summary (and in the wider report) was gathered as part of a qualitative process and is intended to give an overall sense of the balance of opinion across groups.

Key findings: PTV in general

- 6.16 Overall, there was a high level of awareness of participation services on TV, largely driven by Reality TV voting. Awareness of entire PTV channels such as Quiz, Gambling or Adult Chat or Psychic was lower.
- 6.17 Participants identified two PTV types:
 - 1) Those with entertainment at the heart e.g. mainstream appeal shows such as *Big Brother*, *I'm a Celebrity*
 - 2) Those with participation at the heart e.g. niche appeal shows such as gambling, dating, psychic, adult chat.
- 6.18 The ability to participate in entertainment-based programming was felt to offer a number of advantages - the possibility of participation meant a greater degree of interaction and sense of involvement.
- 6.19 However, where participation-centric programmes were concerned, discussion tended to centre on their disadvantages. Such services were widely regarded as cynical 'revenue generators' at the expense of better quality TV content. Ultimately,

however, it was felt that the choice to call a PTV service was - and should remain - the individual's decision, and that therefore the facility for them to do so should be available.

Key findings: Adult sexual entertainment PRS and participation TV services

- 6.20 Amongst the 109 participants that took part in the 'Adult' group discussions, spontaneous awareness of any 'Adult' chat line product across media was high. Prompted awareness showed that around half of those who participated in the research were aware of Adult sexual entertainment PRS. However, actual usage of the product was relatively low.
- 6.21 Most participants were of the opinion that the product does have a right to exist as they argued in favour of freedom of choice and resisted the idea of a 'nanny' state. Views towards the product differed, with men and those in the younger age groups (20-29 yrs) more accepting of the product than their female and older counterparts.
- 6.22 A small minority of participants – who tended to be older and female - believed the product to be harmful. They worried about the impact the product would have on users (regular callers), those providing the services, as well as others (children and young people) exposed to the product.
- 6.23 Given that the majority of participants said that the product has a right to exist for those who want it, they agreed that it also has a right to be promoted. However, the media routes through which this promotion was acceptable was a matter of debate. In the main, it was considered acceptable to promote the product in places where people would expect to find it (magazines and the internet) rather than in places where the product finds people (outdoor advertising or on the radio).
- 6.24 Overall, participants did not object to the promotion of the product on TV per se, but they considered that this should not be without restriction. In the right place and at the right time promotion of the product on TV would be acceptable. The principles underpinning this view were the need for:
- Control: allowing viewers to make the choice over whether they want to be exposed to this kind of product, on behalf of themselves and others (particularly children).
 - Containment: keeping such promotions away from mainstream audiences.
- 6.25 Most participants were against the idea of short form promotion of adult sexual entertainment PRS in spot advertising, primarily because it would directly conflict with their desire for control and containment of promotion. The vast majority of participants did not want any short form promotion on Channel 3, Channel 4 or Five or other general entertainment channels. By far the most acceptable route for short form promotion on TV was promotion on a dedicated Adult TV channel in the 'Adult' section of the Electronic Programme Guide (EPG).
- 6.26 Overall, most participants accepted the availability of long form promotion in its current form on dedicated channels. As with short form promotion, the vast majority of participants did not want to see promotion outside an Adult TV channel in the Adult section of the EPG. Out of a number of possible restrictions, participants put them into the following order of priority:

- Must only appear on a dedicated Adult TV channel in the 'Adult' section of an EPG;
 - Must not be carried on Freeview, unless there is a facility to have a genre-driven EPG and parental PIN control as is the case for other digital platforms;
 - Must have appropriate limits on language and nudity;
 - Must feature warning about risk of offence to some viewers and minors.
- 6.27 A very small number of participants felt any promotion of the product on TV was unacceptable and as a result they said it should be banned from TV. This view was equally held by men and women from the two oldest age groups: those aged 50-59 yrs and those aged 60-75 yrs. These participants felt promotion of the 'Adult' PRS products could lead to more harm than good and as a result they felt it should be promoted exclusively in the media where users would expect to find it (specialist magazines).

Key findings: Psychic PRS and participation TV services

- 6.28 Amongst the 113 participants that took part in the 'Psychic' group discussions, spontaneous awareness of a 'Psychic' chat line services was high (driven mainly by people's exposure to promotions in the back of newspapers, in newspaper supplements and in popular print magazines). Prompted awareness showed that around one in five who participated in the research were aware of any Psychic PRS featuring on TV. However, actual consumption and usage of the product was low.
- 6.29 Overall, participants held mixed views towards the product. Almost no participants believed the product was genuine, and most were of the view that it was a relatively harmless form of entertainment.
- 6.30 However, according to some the product was visibly harmful, especially as it was considered to be a product that would largely be used by those in need of professional support. To a lesser extent the protection of minors was also a consideration, although most were of the view that they would not be interested in the product.
- 6.31 Nevertheless, most participants were of the opinion that the product does have a right to exist as they argued in favour of freedom of choice and resisted the idea of 'nanny' state restrictions.
- 6.32 In the main, it was considered more acceptable to promote the product in places where people would expect to find it (magazines and newspapers) rather than in places where the product finds people (TV or on the radio). In spontaneous discussion TV was considered the least acceptable of the six media routes through which to promote the product, as it was felt to be more powerful and persuasive than other media.
- 6.33 Overall, participants did not object to the promotion of the product on TV per se. In the right place and at the right time promotion of the product on TV would be acceptable. The principles underpinning this view were the need for:
- Control: allowing viewers to make the choice over whether they want to be exposed to this kind of product, on behalf of themselves and others (particularly children).

- Containment: keeping such promotions away from mainstream audiences
- 6.34 The majority of participants did not want any short form promotion on the main terrestrial channels (Channel 3, Channel 4, Five) or other general entertainment channels.
- 6.35 Despite negative views towards the product, the majority supported the continuation of long form promotion on dedicated channels. As with short form promotion, the vast majority did not want to see promotion outside a Psychic TV channel in the Specialist section of EPG. Out of a number of possible restrictions, participants put them into the following order of priority:
- Must only be on a Psychic TV channel in the Specialist section of an EPG;
 - Must feature disclaimer about the advice given (and it must be made clear that the product is for entertainment purposes only);
 - Must not feature on Freeview, unless there is a facility to have a genre-driven EPG and parental PIN control as is the case for other TV platforms.

Additionally, some participants also spontaneously considered that there must be appropriate limits on psychic practices shown. By this restriction participants were referring to any psychic practices relating to the occult, i.e. Voodoo, Devil worship.

- 6.36 A minority of participants felt that any promotion of the product on TV was unacceptable and as a result they said it should be banned from TV. This view was highest amongst older women. These participants felt exposure to 'Psychic' products could do more damage than good and as a result they felt it should be promoted exclusively in the media where users would expect to find it (specialist magazines), rather than on TV where it might attract a wider, potentially vulnerable, audience.

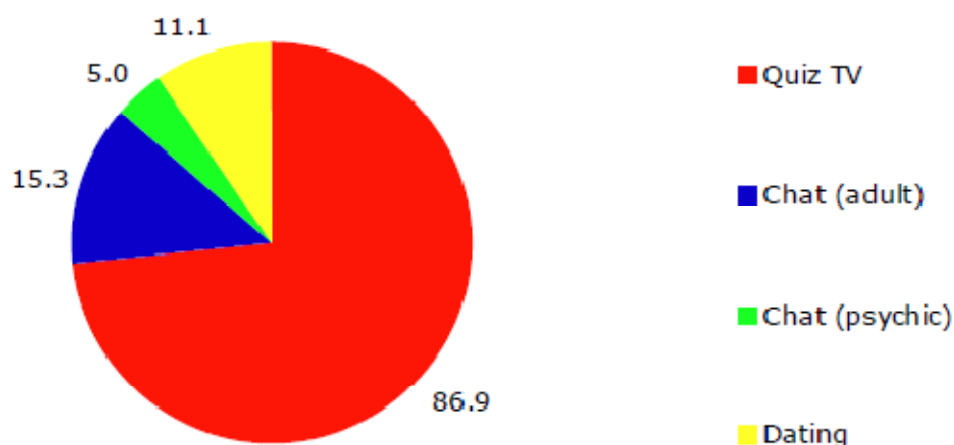
Industry information

- 6.37 This section sets out our understanding of the PTV industry, specifically Adult Chat PTV services and Psychic PTV services. This information has been used to inform our assessment of options for advertising rules for both PRS of a sexual nature and psychic services.
- 6.38 This overview is informed by the 2007 Mediatique report for Ofcom. In 2007, as part of the first Participation TV consultation, Ofcom asked Mediatique to provide an overview of the Participation TV market. The report includes information on the industry value chain, which we have used to help identify stakeholders likely to be affected by changes to the regulatory system.
- 6.39 This overview is also informed by information provided by the industry to Ofcom in response to information requests conducted in the course of the project. In 2008, Ofcom requested a range of information from channels providing Adult Chat and Psychic PTV services. The information requested included financial information, staff numbers, and calling volumes by time of day. We also requested information from other potential stakeholders such as PRS providers and non-PTV broadcasters who could also be affected.

Participation TV industry size and structure

- 6.40 The 2007 Mediatique report²⁶ estimated that the total value of the revenues generated from calls to PTV Adult Chat services²⁷ and Psychic services was in the region of £20m.

Total revenues for PTV services, by category (£m)



Source: Mediatique

Note: All revenues relate to current year

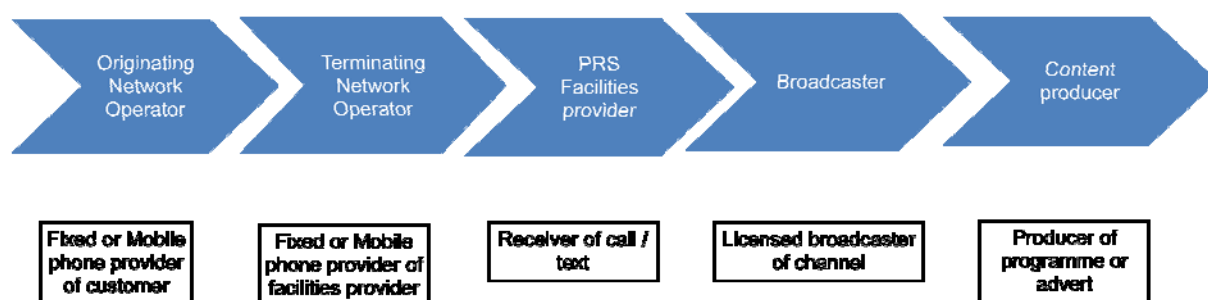
- 6.41 In their responses to the 2007 Consultation, some members of the industry claimed that the real scale of the value of the sector is in the region of £60-100m. However, there has been no substantiation of these claims or indeed any explanation as to how they have been derived. Given this disparity between these estimates of the value of the sector, we sought information from the broadcasters directly concerned with these areas of activity so that we can make a more detailed assessment of the impact of any potential changes to the existing regulatory structure.

Participation TV value chain

- 6.42 The PTV value chain varies from case to case and often involves many different parties. Given the number of firms involved at the different stages of the value chain, we are not in a position to assess the financial impact on each individual firm in the supply chain. We have focussed on the key categories of stakeholders who are most directly affected. We consider that the value chain for the provision of these broadcasting services can be represented in terms of five stages – as set out in the figure below.

²⁶ Mediatique “Participation TV: Market Overview” (March 2007)

²⁷ It should be noted that the Mediatique report and Ofcom’s 2007 impact assessment did not distinguish between sexual and non-sexual PRS.



- 6.43 We recognise that different players may be active at more than one stage of the value chain e.g. terminating operators who also offer PRS facilities or broadcasters operating PRS facilities for themselves and for other third parties. We also recognise that it is possible to describe the different stages in the industry value chain in different ways but we consider that the above approach is sufficient to capture the essential elements of the value chain for the purposes of this consultation.
- 6.44 A key aspect of the business model is the revenue sharing arrangements with other companies along the supply chain. The flow of funds along the industry supply chain is determined by the nature of these revenue sharing arrangements. The table below sets out the proportions for the split of revenue from a typical voice call as set out in the 2007 Mediatique report.

Share of revenue, split by operator, for a typical fixed line voice call²⁸

Typical fixed line voice call	% revenue share	Share of £1.50
Originating network operator	3%	£0.04
Terminating network operator	4%	£0.06
Transaction network operator	3%	£0.04
PRS provider	4%	£0.06
Broadcaster	69%	£1.04
VAT ²⁹	17.5%	£0.26

- 6.45 We have assumed that the revenue share arrangements would apply to the typical call rates – typically £1.50 per minute from a fixed line – that are used by the PTV service providers. In a number of cases we recognise that some providers operate a range of (lower) voice call rates but we have calculated the impact of any change in regulation based upon the £1.50 call rate so as not to understate the impact of any proposed changes. We have not made a distinction between calls from fixed and mobile networks.

Adult chat PTV broadcasters

- 6.46 As of September 2009, there are currently 28 dedicated channels broadcasting Adult Chat PTV. Adult Chat PTV services are usually (if not always) unencrypted, i.e. they

²⁸ Percentages do not sum to 100% exactly due to rounding.

²⁹ We recognise that VAT has now been temporarily reduced to 15% but for the purposes of our modelling we have used the standard 17.5% figure.

are available on open access channels, without the need for special subscriptions or conditional access using PIN Codes.

- 6.47 Currently the Adult Chat PTV channels that are licensed in the UK are available in the 'Adult' section of the EPG on the Sky satellite platform. The channels are not currently available on the Virgin Media cable platform. Three Adult Chat PTV channels broadcast between midnight and 5:30am on Freeview - Smile TV2, Smile TV3 and Babestation. These channels are not licensed in the UK, but originate from the Netherlands and are not therefore subject to the UK Broadcasting or Advertising Codes. A fourth Adult Chat PTV channel on Freeview – Partyland – broadcasts between 1am and 5:30am and is licensed in the UK.
- 6.48 Adult Chat PTV channels are not typically BARB³⁰ registered and so it is not possible to quantify the number of viewers to them. However broadcasters have estimated that the number of viewers is significantly higher than the number of actual callers to the channels, with many assuming a 5% participation rate i.e. only 5% of viewers actually call the channel. Online quantitative research commissioned by Ofcom for the 2007 consultation³¹ to measure viewers of, and callers to, different PTV formats found that only 1% of all television viewers watch Adult Chat PTV regularly, and less than 1% of all television viewers had called an Adult Chat PTV programme.
- 6.49 The majority of Adult Chat PTV broadcasters identify other Adult Chat PTV services as their primary competitors due to the unique element of the interaction with presenters. However, some have suggested that they are also in direct competition with encrypted sexual movie channels (pay per view and subscription), the more main stream broadcasters who show editorial programming with sexual content, as well as the print media industry and the internet.

Operating model of Adult Chat PTV channels

- 6.50 The operation of Adult Chat PTV channels that promote adult sexual entertainment PRS appears to follow a common approach across the broadcasters who provided information. The channels are based on viewer participation, deriving revenue from viewer interaction through both voice calls and SMS/MMS messages, and occasionally online. This interaction with the presenters is usually paid for by the viewer via premium rate telephony services or credit card³².
- 6.51 The channel content typically will involve one or more female presenters who ask viewers to call them – or another presenter who is not visible on screen. When a presenter takes a call, neither side of the conversation is audible on air (other than, occasionally, the presenter's initial greeting to the caller). Instead, while the presenter takes a call, either background music is played or another presenter talks to viewers. One or more PRS numbers are displayed on screen almost permanently; viewers may call in or text the presenters.
- 6.52 Callers to the PRS numbers will typically be presented with three options when they call: speak to an on-screen presenter in the studio; speak to an off-screen operator; or listen-in to an ongoing conversation with the on-screen presenter. Due to the large

³⁰ BARB (Broadcasters Audience Research Board) provides the industry standard system of measuring audience reach, size and share for UK TV channels

³¹ <http://www.ofcom.org.uk/consult/condocs/participationtv/research/>

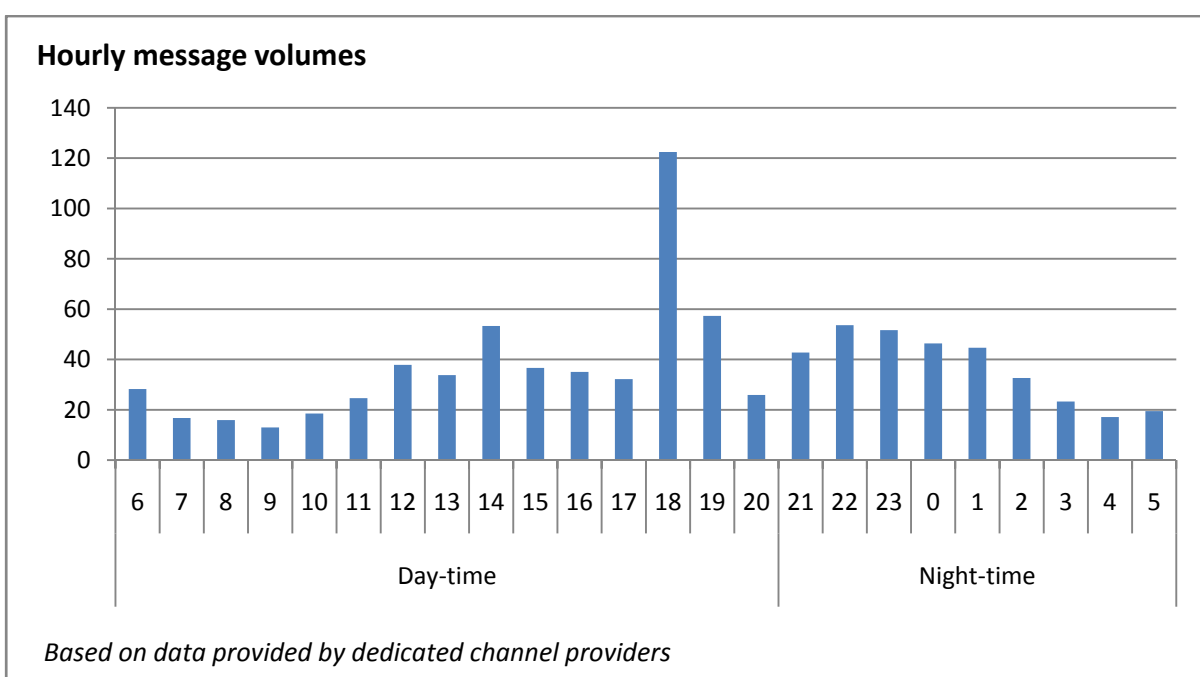
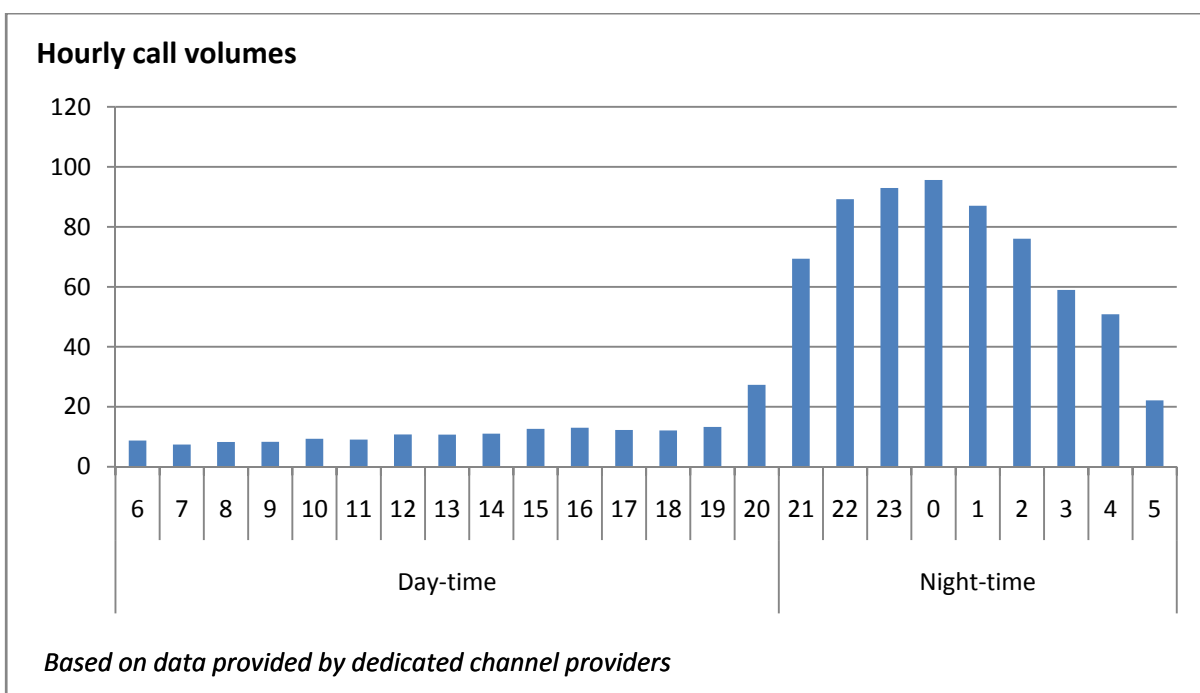
³² We note that, based on PhonepayPlus rules, where a call is paid for by credit card rather than via the phone bill it is not technically a PRS call. However, for the purposes of our modelling we do not make a distinction between the methods of payment.

volume of voice calls received in the late night hours (typically between 9pm and 5am) and the limited number of presenters available on-screen at any one time, it is inevitable that not all calls can be transferred to the studio and therefore not all callers can chat with the presenter on screen. As a result, broadcasters of these channels will transfer callers who are unable to speak directly with the presenter to an off-screen operator. However, this does not appear to represent a significant source of revenue generation as according to the data we have collated from the broadcasters, approximately 90% of callers are put through to the studio on average per day, implying only 10% use the off-screen service³³.

- 6.53 According to the information provided by broadcasters, the majority of costs can be broadly split into operating costs (production, broadcasting, procurement of PRS services) and fixed costs. The projections for future revenues and costs provided by the broadcasters suggested that – going forward at least – operating costs are largely variable with output. That is, the cost base is assumed to increase in proportion to the projected increase in revenue. As such, it would also seem reasonable to assume that at least a proportion of cost base should be variable downwards as well if call volumes were reduced. That is, it is also possible that the broadcasters will be able to reduce some of their costs in order to mitigate the impact of a fall in revenue.
- 6.54 For the majority of Adult Chat PTV channels, the service offered varies across the hours of broadcast. Typically, channels operating twenty four hours a day will broadcast flirtatious or suggestive content promoting non-sexual PRS between 5:30am - 9pm. Between 9pm – 5:30am, the broadcast content becomes more overtly sexual (in terms of visual content and language) and promotes PRS of a sexual nature. Some channels - such as those on the Freeview platform - operate in late night hours only e.g. from midnight to 5am.
- 6.55 Although channels may make use of these two different types of PRS, the pricing of the products is typically the same.
- 6.56 We note that – based on data from the dedicated channel providers - call volumes tend to vary across the day according to the type of content being broadcast. The highest call volumes are associated with the night time sexual content when PRS of a sexual nature are promoted and the largest audience is available. To a lesser extent, the same is true for text messaging, although higher volumes of messages are also seen in the early evening. The charts below show average hourly call and message volumes received by a channel calculated using data from the dedicated channel providers.³⁴

³³ We note that the industry trade body – the Association for Interactive Media & Entertainment (AIME) – have suggested that this figure could be significantly higher (in the region of 20-30%).

³⁴ We note that the peak in message volumes between 6pm and 7pm is common to a number of channels.



Psychic PTV broadcasters

- 6.57 As of September 2009, there are two dedicated Psychic PTV channels – Psychic TV and Psychic & Soul. Both channels broadcast on the Sky Digital Satellite platform only.
- 6.58 In general terms, Psychic PTV has a similar format to Adult Chat PTV with viewers being encouraged to phone to speak to either an on-screen or off-screen psychic using a PRS number. The pricing of the PRS number used by this service is also currently the same as that used for Adult Chat channels (i.e. £1.50 per minute for a voice call) and there would then be a series of revenue shares between channel

operator, telecoms network operator and PRS facilities provider. For the purposes of our modelling, we have assumed the same structure of revenue sharing arrangements as for Adult Chat PTV services.

- 6.59 However, there are also some differences. In the case of Psychic PTV the conversation between the caller and the on-screen psychic can sometimes be heard by the viewer. The channel is also sometimes hosted by a presenter who will lead a discussion with the psychic if there are no in-coming calls. There are also typically split screen shots of a number of other “resident” psychics that are waiting to take calls. Callers to the Psychic PTV services also have the option of being put through to a panel of other psychics that are located around the country and are available “off-screen”. Ofcom understands that the nature of the service is such that a greater proportion of calls go “off-screen” than is the case with Adult Chat PTV channels.
- 6.60 Viewers are invited to call in for advice or a reading (e.g. using tarot cards or astrological symbols) from the in-studio ‘psychic’ or from the ‘psychics’ visible on-screen but based outside the studio (either in a call centre or in their own homes), or from the off-screen ‘psychics’. Viewers are also asked to text in; their text messages appear on screen from time to time. The in-studio ‘psychic’ responds to calls or text messages on-air, by giving advice or a reading. The other ‘psychics’ are sometimes shown on-air in split-screen but their conversations with callers are not audible to viewers. Ofcom understands the nature of the service provided does not alter during the course of the broadcast period i.e. it does not become more serious during the night-time. The nature of the advice provided by psychics is described as not being “life-changing” in nature.
- 6.61 Again, Psychic PTV channels are not BARB registered and so it is not possible to quantify the number of viewers. Psychic TV has estimated that it has around 10,000 viewers per week. The online quantitative research commissioned by Ofcom for the 2007 consultation suggested that Psychic PTV was regularly viewed by 3% of all television viewers, and 1% of all television viewers had called a Psychic PTV channel.

Other broadcasters carrying PTV

- 6.62 Some PTV broadcasters already simulcast their channel and its content on other channels as “blocks” of programming.
- 6.63 Usually in such cases, the broadcaster carrying the simulcast has not produced the content and is simply paid a flat fee (by the party who has produced the content, e.g. another broadcaster or a PRS provider) for the provision of airtime³⁵. However, in some cases, revenues take the form of a share of call revenues, with the originator of the content typically taking the greater share.

PRS service providers

- 6.64 The PRS service providers will typically offer a range of services including: PRS numbering, call management software, IVR³⁶ software applications and related services to support two-way or multi-way live conversations. They may also provide

³⁵ Practice varies from case to case, and it may be that some broadcasters who simulcast PTV content take payment from the originating broadcaster/producer in the form of a share of call revenues.

³⁶ Interactive Voice Response: the technology which allows a call answering system to detect voice and keypad inputs.

training for presenting or call operators, handle payment allocations and provide administration services to their clients.

- 6.65 There are a number of PRS service providers which support the Adult Chat and Psychic PTV channels – in a number of instances, working for both types of broadcaster. However, it does appear - from the information we have received - that there can be an element of specialisation between PRS service providers as between voice and text-based services. That is, a broadcaster may use one PRS provider for the provision of SMS/MMS services and use another for the provision of services based on the traditional PRS number ranges.
- 6.66 Another important feature is that in some cases the PRS providers appear to specialise in the provision of services to Adult Chat and Psychic PTV channels: that is, the majority of their income is derived from these channels. In such instances, the PRS facility provider would obviously be exposed to changes in the way in which the channels are regulated. Other PRS providers serve a broader range of clients and therefore are not so exposed to such changes.

Summary of relevant stakeholders

- 6.67 We have identified a number of stakeholders which may be affected by changes to the regulatory framework for Adult Chat and Psychic PTV services:
- i) Viewers: general TV viewers who may come across PTV content or promotion of PRS products.
 - ii) Consumers: viewers who specifically choose to watch and/or interact with PTV content, or the PRS products they feature.
 - iii) PTV broadcasters: broadcasters operating one or a number of dedicated PTV channels.
 - iv) Other (non-PTV) broadcasters: broadcasters operating other channels but who have the option of simulcasting PTV or other services.
 - v) PRS providers: providers who facilitate interactivity with PTV content and PRS products, including phone network operators.

Non-UK stakeholders

- 6.68 The changes to regulation envisaged in this consultation document will apply to all broadcasters licensed in the UK whether they are broadcasting to UK audiences or audiences in other Member States. However, the focus of our analysis is on channels licensed in the UK and broadcasting to UK audiences.
- 6.69 We are aware that there are already at least two broadcasters providing Adult Chat PTV services to UK audiences who are not licensed in the UK. We have not taken account of the impact of the proposed regulatory option on such broadcasters since, as they are not licensed in the UK, they are not subject to, and therefore would not be affected by any changes to, the Broadcasting Code or Advertising Code.

Equality impact assessment of stakeholders

- 6.70 Ofcom is required to have due regard to any potential impacts our proposals in this consultation may have on race, disability and gender equality, and under the equality

schemes particular to Northern Ireland. An Equality Impact Assessment (EIA) is our way of fulfilling this obligation. Ofcom has undertaken a general EIA at this stage.

- 6.71 In our assessment, we do not consider that the proposals in this document would have a differential impact on different racial groups, on people in Northern Ireland or on disabled people compared to people in general. Similarly we do not consider that stakeholders in different parts of the UK will be any more affected than others. We also do not consider that the proposals under consideration will have a particular effect on one group of stakeholders over another. The independent viewer research conducted for this consultation had a representative sample for all UK viewers, and did not suggest specific issues for these particular groups.
- 6.72 However, we recognise that – given the composition of their audiences – the proposals in respect of Adult Chat PTV channels are likely to have a particular impact on men and the proposals in respect of Psychic PTV services are likely to have particular impact on women viewers. Additionally, Ofcom’s research identified that some issues are likely to be more important, or some views felt more strongly, by women viewers in general. These are identified in the full research report and have been taken into account in options and our impact assessment (see Section 7 and Annex 7 and 8).
- 6.73 In the following section, for each of the stakeholder groups identified we set out the particular considerations to regulation in this area, and consider the impact of potential options for regulation.

Questions for stakeholders

- 6.74 Ofcom invites stakeholders’ comments on the information in this section.

Question 1:

a) Do you agree with Ofcom’s assessment of those stakeholders likely to be affected by changes to the regulatory framework for Adult Chat and Psychic PTV services?

b) Do you agree with our understanding of the industry and operators?

Section 7

Options for advertising rules and assessment of impact on stakeholders

Introduction

- 7.1 In considering the appropriate form of regulation for Adult Chat and Psychic PTV services, Ofcom must take into account the impacts on all stakeholders (including viewers and consumers; PTV broadcasters; PRS providers; and non-PTV broadcasters) of any changes to the Broadcasting Code and the Advertising Code.
- 7.2 The current rules on advertising of PRS services of a sexual nature and psychic practices would limit the operation of PTV channels featuring these products.
- 7.3 This section, drawing on the sources of information outlined previously, sets out a range of options for the appropriate regulation under the Advertising Code, and the impact of those options on relevant stakeholders.

Stakeholder interests in the regulation of promotion of PRS of a sexual nature

- 7.4 In considering options for regulation, we have drawn up potential options based on our regulatory duties and considerations as set out in the previous section, which are in summary:
 - i) Consumer and viewer protection;
 - ii) Ensuring the freedom, availability and competition of different audio-visual services;
 - iii) Regulation should be appropriate and proportionate to these objectives.
- 7.5 As set out in the previous section, we have identified six distinct groups of stakeholders, which may be affected by changes in the regulation of Adult Chat PTV services. We set out below the considerations which we believe are relevant to each of these groups below:
- 7.6 **Viewers – general TV viewers, who may come across PTV content or promotion of PRS products. These include minors, other vulnerable groups, and those responsible for their viewing.**

Adult-sex content on TV is recognised under both the Broadcasting Code and Advertising Code as being of potential harm to minors.

The viewer research suggests that there is a high risk of offence to general audiences, and perceived risk for minors, from promotion of PRS of a sexual nature due to the nature of the product and the graphic images and language of content which may feature in their promotion.
- 7.7 **Consumers – viewers who have specifically chosen to watch and/or interact with PTV content, or consume PRS products.**

Use of the product by minors is prohibited by the PhonepayPlus rules for live PRS providers. There is little evidence of consumer harm to adults from use of the product. However, in the viewer research a minority of participants who tended to be female and older felt that the product could be harmful to regular users and call-operators supplying the service.

In quantitative research for the 2007 Consultation, 1% of TV viewers claimed to have viewed Adult Chat PTV regularly, and 1% of TV viewers claimed to have called a PRS promoted on a PTV service. TV viewers claiming to have viewed or called an Adult Chat PTV service were more likely to be male. We assume that these consumers derive benefit from access to these services in that they are prepared to pay for services promoted on the TV channels.

7.8 PTV broadcasters – broadcasters operating one or a number of dedicated PTV channels.

The information supplied by Adult-Chat PTV broadcasters suggests that a very high proportion of their current revenue results from the promotion of adult sexual entertainment chat lines. Therefore, there would be a significant impact on their economic viability if they were unable to promote such services at all.

7.9 Non-PTV broadcasters – broadcasters operating other channels, which could have the option of simulcasting or broadcasting PTV services in teleshopping slots or showing spot advertising for PRS.

As of September 2009, a relatively small number of non-PTV broadcasters currently carry Adult Chat PTV services featuring adult sexual entertainment PRS. A number of encrypted channels carry spot advertising for such PRS, but information provided suggests that this does not represent a significant part of their business.

7.10 PRS providers – providers who facilitate interactivity with PTV content and PRS products, including phone network operators.

The information supplied by the PRS providers suggests that the majority are relatively diversified suppliers of PRS products, with a range of clients in broadcasting and other industries. However, a minority of providers are relatively specialised in PRS products for PTV and could be significantly affected by restrictions on TV promotion.

Options for advertising rules for PRS of a sexual nature

7.11 In considering the appropriate regulatory framework for the promotion of PRS of a sexual nature under the Advertising Code, we consider that there are four options:

- 1. Retain the current rules, allowing promotion of PRS of a sexual nature on encrypted channels only;**
- 2. Allow promotion of PRS of a sexual nature on open access channels in spot advertising and teleshopping, subject to scheduling restrictions;**
- 3. Allow promotion of PRS of a sexual nature in spot adverts subject to scheduling restrictions, but with teleshopping promotion only allowed on encrypted channels;**

4. Allow promotion of PRS of a sexual nature on dedicated teleshopping channels subject to scheduling restrictions and labelling rules, but spot advertising remains only on encrypted channels.

Scheduling restrictions

- 7.12 Under options 2, 3 and 4, where advertising of PRS of a sexual nature may be allowed on unencrypted channels - whether in spot adverts, or teleshopping, or both - this would be subject to a scheduling restriction.
- 7.13 The Advertising Code currently requires that advertisements which refer to sexual matters or portray sexual activity are not scheduled before 9pm or after 5.30am. These restrictions are made to protect minors from adult or sexual content that is likely to feature sexual imagery and language by reducing exposure to audiences where children may be present.
- 7.14 The current Adult Chat PTV channels currently operate PRS of a sexual nature between 9pm and 5:30am. None of the evidence reviewed or stakeholder comments have argued that this is an inappropriate restriction.
- 7.15 In the viewer research, some participants suggested that a later restriction of, for example 10pm, 11pm or midnight, on the broadcast of content featuring PRS of a sexual nature could be considered, due to the imagery and language that may feature in it. We have included consideration of a later restriction than 9pm in our assessment of options.

Labelling rules

- 7.16 If advertising of PRS of a sexual nature were to be allowed on unencrypted channels, the viewer research indicates that, in order to provide protection against offence resulting from viewers unintentionally coming across such promotion, the nature of the content would need to be clearly labelled as “Adult” content.
- 7.17 This labelling would be achieved by positioning the channels in the “Adult” section of an EPG. We are aware that the current convention is for Adult Chat PTV channels on the Sky platform to be grouped under the “Adult” section of the EPG, whether they feature either or both non-sexual or sexual PRS. Within the EPG, the title of the channel normally indicates that it is of an Adult nature, as does the programme information in the EPG, although we consider that this should make clear, as well as on-screen, when the PRS promoted are of a sexual nature. We consider that these measures would constitute suitable labelling and sign-posting to viewers and consumers.
- 7.18 Under option 4, promotion in teleshopping would only be allowed on open access channels in an Adult section of an EPG. Under options 1 and 3, promotion in teleshopping would only be allowed on encrypted adult-sexual entertainment channels. As many Freeview set top boxes are unable to support access to encrypted channels and do not feature a segregated EPG, this would mean that Adult Chat PTV featuring PRS of a sexual nature could not be carried on that platform.

Summary of impact assessment of options for advertising rules for PRS of a sexual nature

- 7.19 A detailed assessment of the impact of potential options on the stakeholders groups identified, based on analysis and modelling undertaken by Ofcom, is set out in Annex 7. This assessment is summarised below for each option.

7.20 **Option 1 – Retain the current rules, allowing promotion of sexually explicit PRS on encrypted channels only**

This option would all but eliminate the risk of unwanted exposure to promotion for such products for both minors and general viewers, since promotion for those services would be unavailable for broadcast by a UK licensed broadcaster unless on encrypted channels. It would also make such content and services much less accessible to its active consumers as it would only be available on encrypted channels. As consumers of the services tend to be male, this would have a greater impact on males.

The option would have a significant financial impact on PTV broadcasters. Those opting to encrypt channels would see increased operating costs and reduced call volumes. PTV broadcasters opting to promote non-sexual PRS only would be likely to see a reduction in call volumes of 50 to 56%, and potentially a reduction of 32 to 50% of revenues, which may lead to channels becoming financially unviable.

PRS providers to PTV broadcasters would also suffer a reduction in revenues due to the revenue share arrangements in place.

There would be a limited effect on non-PTV broadcasters, but those simulcasting Adult Chat PTV featuring PRS of a sexual nature would no longer be able to do so.

7.21 **Option 2 – Allow promotion of PRS of a sexual nature on open access channels in spot advertising and teleshopping, subject to scheduling restrictions;**

This option would allow PTV broadcasters to promote PRS of a sexual nature on a wide basis on TV in addition to continuing to operate their existing services in their current form. Short form or long form promotion could also be carried by any broadcaster, with potential financial benefits. Consumers of these services would benefit from the wider promotion of the services: PRS providers would also benefit from wider promotion of services to these consumers.

However, advertising that is generally available will risk offence as by nature it is not sign-posted, appears out of context, and does not allow viewers to make effective use of the controls available to prevent exposure to it. The viewer research suggested a high risk of offence from such forms of promotion.

Scheduling restrictions may in part limit this risk (particularly for minors). However, in the absence of any other form of labelling or information, stricter scheduling restrictions than the current convention of 9pm - for example, 11pm or midnight - would be required by viewers to limit the risk of offence in general peak time viewing. The introduction of stricter scheduling restrictions than the current ones would reduce the revenues to PTV broadcasters for each later hour where they were unable to promote PRS of a sexual nature.

7.22 Option 3 – Allow promotion of PRS of a sexual nature in spot adverts subject to scheduling restrictions, but with teleshopping promotion only allowed on encrypted channels

Under this option, viewers would be at increased risk of offence by chancing upon spot adverts for PRS of a sexual nature on general channels, without any context, sign-posting or means of control. Only very strict scheduling restrictions could protect against such risk of offence.

PTV broadcasters would experience higher operating costs and significantly lower revenues in opting either to become encrypted or to promote non-sexual PRS. Their consumers would have reduced access to the services. As consumers of the services tend to be male, this would have a greater impact on males.

Telecoms and PRS providers servicing Adult Chat PTV broadcasters would experience a reduction in revenues, although this may be offset by promotion of PRS from other providers in spot adverts. Similarly, broadcasters carrying simulcasts of Adult Chat PTV would lose this revenue, but could instead carry spot advertising for the PRS.

7.23 Option 4 – Allow promotion of PRS of a sexual nature on dedicated teleshopping channels subject to scheduling restrictions and labelling rules, but spot advertising remains only on encrypted channels.

Under this option, the risk of offence for viewers from spot advertising on general channels would continue to be prevented. Any services featuring promotion of PRS of a sexual nature would be clearly labelled and positioned as “Adult” services including adult content, lessening the risk of unwarranted offence and allowing viewers to choose to exclude such services from viewing. With such labelling information available, a scheduling restriction of 9pm (to limit risk of exposure to minors) would therefore be sufficient.

Consumers would continue to have access to services and benefit on the same basis as today. PTV broadcasters and the PRS providers would continue to offer services to customers in an appropriate and clearly defined context. Though non-PTV broadcasters may no longer carry services promoting PRS of a sexual nature this would be offset by revenues from alternative options.

However, under the labelling rules proposed, broadcasters operating on Freeview would not currently be able to carry promotion for PRS of a sexual nature, since Freeview does not currently offer clear labelling of channels in a separate “Adult” EPG section. Broadcasters may therefore need to modify services to promote non-sexual PRS only, which may lead to a reduction in revenues.

Summary of analysis and conclusion

- 7.24** In considering the needs of different groups of stakeholders, our analysis of the extent to which each option would meet the needs of individual groups of stakeholders is summarised in the table below.

Options	Viewers	Consumers	PTV Broadcasters	Non-PTV Broadcasters	PRS providers
1. Retain current rules	Yes	No	No	No	No
2. Remove restrictions	No	Yes	Yes	Yes	Yes
3. Allow in spot adverts only	No	No	No	Yes	Yes
4. Allow in dedicated teleshopping channels only	Yes	Yes	Yes	No	Yes

- 7.25 In light of the above, Ofcom considers that Option 4 represents the appropriate means of regulation. We consider that this option would have the least impact on all stakeholders affected by regulatory change in this area.
- 7.26 In particular, Option 4 would ensure that the interests of viewers would be met. The scheduling restriction to 9pm to 5:30am on promotion of PRS of a sexual nature would greatly limit any risk of exposure to minors who may otherwise actively view the service. Adult viewers would not be at risk of offence from exposure to promotion since it would be clearly identified as such, and viewers could therefore choose to avoid or exclude such services. Consumers of such services would, however, be able to access services by seeking out appropriately labelled services.
- 7.27 Option 4 would also not have an adverse impact on the majority of existing broadcasters of Adult Chat PTV services and PRS providers since they will be able to broadcast Adult Chat PTV in a similar format to that in which they do so currently. However, PTV broadcasters wishing to promote PRS of a sexual nature outside of an “Adult” section of an EPG, including on Freeview, would need to alter their service. This may negatively impact on revenues, depending on alternatives available.
- 7.28 Whilst Option 4 might not meet the needs of non-PTV broadcasters since they would be unable to simulcast PTV featuring PRS of a sexual nature unless they chose to become dedicated Adult Chat PTV broadcasters, Ofcom considers that the extent of this impact is likely to be small since very few non-PTV broadcasters currently broadcast simulcasts of Adult Chat PTV channels during separate time slots. Given Ofcom’s duties in respect of viewers’ interests and the outcome of the viewer research, Ofcom does not consider that this impact is sufficient to outweigh the viewer concerns identified.

Stakeholder interests in the promotion of psychic practices on TV

- 7.29 In considering options for regulation of Psychic PTV, we have drawn up potential options based on our regulatory duties and considerations as set out in the previous section, which are in summary:
- i) Consumer and viewer protection;
 - ii) Ensuring the freedom, availability and competition of different audio-visual services;
 - iii) Regulation should be appropriate and proportionate to these objectives.
- 7.30 As set out in the previous section, we have identified six distinct groups of stakeholders, which may be affected by changes in the regulation of Psychic PTV services. We set out below the considerations which we believe are relevant to each of these groups below:

7.31 Viewers – general TV viewers, who may come across PTV content or promotion of PRS products. These include minors, other vulnerable groups, and those responsible for their viewing.

The viewer research suggests that Psychic PTV has a risk of offence to some viewers from some of the psychic practices it features.

7.32 Consumers – viewers who have specifically chosen to watch and/or interact with PTV content, or consume PRS products.

The ITC *Beyond Entertainment* (2001) research³⁷ identified a potential risk of harm to some vulnerable people from services that feature occult practices or offer life-changing advice. The viewer research for this consultation suggested that a minority of participants who were mainly female perceived that any psychic practice posed a risk of harm due to the vulnerable nature of callers.

The risk of harm to minors is limited by the PhonepayPlus rules for live PRS providers, which prohibits use of live PRS by under-18s.

The number of viewers to Psychic PTV cannot be fully quantified. In quantitative research for the 2007 Consultation 3% of TV viewers claimed to have viewed Psychic PTV regularly. These viewers derive a benefit from the availability of Psychic TV channels in terms of viewer choice. 1% of TV viewers claimed to have called a service promoted on the PTV channels. TV viewers claiming to have viewed or called an Adult Chat PTV service were more likely to be female. These consumers derive benefit from access to these services in that they are prepared to pay for services promoted on TV.

7.33 PTV broadcasters – broadcasters operating one or a number of dedicated PTV channels.

The information supplied by the Psychic PTV broadcasters suggests that almost all of their current revenue results from the promotion of live personal psychic readings via PRS. There would therefore be a significant impact on their economic viability were they unable to promote such services.

7.34 Non-PTV broadcasters – broadcasters operating other channels, which could have the option of simulcasting or broadcasting PTV services in teleshopping slots or showing spot advertising for services.

A small number of non-PTV broadcasters currently carry Psychic PTV services.

7.35 PRS providers – providers who facilitate interactivity with PTV content and PRS products, including phone network operators.

The information supplied by the PRS providers suggests that the majority are relatively diversified suppliers of PRS products, for whom Psychic PTV channels represent one relatively small source of business.

Options for advertising rules for psychic practices

7.36 In considering the appropriate regulatory framework for the regulation of Psychic PTV under the Advertising Code, we consider that there are four options:

³⁷ www.ofcom.org.uk/static/archive/itc/.../beyond_entertainment.pdf

- 1. Retain the current rules, prohibiting promotion of psychic and occult practices (with exceptions for general pre-recorded PRS)**
- 2. Extend the exceptions to allow promotion of live personal psychic services, subject to restrictions on the specific type of practice;**
- 3. Allow promotion of these specific live personal psychic services in spot adverts only;**
- 4. Allow promotion of these specific live personal psychic services only in dedicated channels, subject to labelling rules.**

Exceptions for specific psychic practices only

- 7.37 Under Option 2, 3 and 4 a general prohibition on psychic and occult products would be maintained, but there would be an expanded category of specific exceptions based on the type of psychic practice involved. This would extend the existing exceptions for particular general pre-recorded PRS for specific psychic practices - tarot, astrology and horoscopes – under the Advertising Code rule 10.4 to live personal readings delivered via PRS in the same practices. Other psychic and occult practices would remain prohibited from advertising on TV.

Labelling rules

- 7.38 If advertising of specific live individual psychic services were to be allowed, the viewer research indicates that, in order to provide protection against offence resulting from viewers unintentionally coming across such promotion, the nature of the content would need to be clearly labelled and sign-posted
- 7.39 We are aware that, while there is no specific EPG section for the psychic genre, the current convention is for Psychic PTV channels to be grouped under the “Specialist” section of the Sky EPG. Within the EPG, the title of the channel normally indicates its nature, as does the information in the EPG, although we consider that this should make clear in the EPG and on-screen that calls involve live psychic practices for entertainment purposes only. We consider that these measures would offer suitable labelling and sign-posting to viewers and consumers.

Summary of impact assessment of options for advertising rules for psychic practices

- 7.40 A detailed assessment of impact of potential options on the stakeholders groups identified, based on analysis undertaken by Ofcom, is set out in Annex 8. This assessment is summarised below.

7.41 Option 1 – retaining the current rules prohibiting promotion of psychic practices, with limited exceptions

The current rules protect against risk of harm of services to vulnerable people and minors on a full and precautionary basis. However, research suggests the risk of harm and offence does not apply equally to all psychic practices.

A blanket prohibition on the promotion of live personal psychic services would deprive consumers of access to them, and prevent service providers from meeting this demand. As consumers of the services tend to be female, this would have a greater impact on females.

In particular, Psychic PTV channels would be very restricted in their current operation and would be likely to become financially unviable.

7.42 Option 2 – extend the exceptions also allow promotion of specific live personal psychic services

The extension of the exceptions to specific live personal psychic services would allow popular services with little risk of harm to be promoted on TV. This would benefit consumers and providers of these services, and Psychic PTV and other broadcasters who could carry promotion for them.

However, the research suggests there would be a risk of offence to general viewers if promotion of live personal psychic services – either in long form or short form - is allowed without restriction. In particular, the risk of offence from promotion would be higher on general entertainment channels or in spot advertising.

7.43 Option 3 – allowing promotion of specific live personal psychic services in spot advertising only

Under this option, promotion of psychic practices will appear out of context and cannot be controlled by viewers. The research identified a high risk of offence to general viewers and concern – mainly from female participants - about exposure to vulnerable people and minors from promotion.

In principle service providers could promote specific psychic services to consumers via spot advertising. However, Psychic PTV channels would have to modify their operations to the extent that they would become financially unviable. This would have acute impact on consumers and viewers of these particular channels. As consumers of the services tend to be female, this would have a greater impact on females.

This would also impact on PRS providers servicing the channels, although this could be partially offset by availability of spot advertising promotion for psychic services.

7.44 Option 4 – allowing promotion of specific live personal psychic services in dedicated channels only, subject to labelling rules.

This option would allow consumers' access to specific popular live psychic services with low risk of harm and within a well-regulated environment. It allows Psychic PTV broadcasters to continue to promote these services to them under their current operating model; their service providers will also continue to benefit.

The risk of offence to general viewers will be reduced by the limitation of promotion to channels with clear labelling of the nature of services, which can then be avoided or excluded from viewing.

Under the labelling rules, broadcasters not meeting the terms of the rule would no longer be able to simulcast long form promotion for psychic practices. However, broadcasters wishing to promote live personal psychic services outside of a Psychic PTV channel in the "Specialist" section of an EPG, including on Freeview, would need to alter their service. This may negatively impact on revenues, depending on alternatives available.

Summary of analysis

- 7.45 In considering the needs of different groups of stakeholders, our analysis of the extent to which each option would meet the needs of individual groups of stakeholders is summarised in the table below.

Options	Viewers	Consumers	PTV Broadcasters	Non-PTV Broadcasters	PRS providers
1. Retain current rules	Yes	No	No	No	No
2. Also allow promotion of specific psychic PRS	No	Yes	Yes	Yes	Yes
3. Allow in spot adverts only	No	No	No	Yes	Yes
4. Allow in dedicated teleshopping channels only	Yes	Yes	Yes	No	Yes

- 7.46 In light of the impact assessment which Ofcom has carried out, Ofcom considers that Option 4 represents the appropriate means of regulation. We consider that this option would have the least impact on all stakeholders affected by regulatory change in this area. In particular, Option 4 would ensure that the interests of viewers would be met in ensuring that they were not subjected to the risk of offence from exposure since promotion of psychic services would be clearly identified as such and viewers could therefore choose to avoid or exclude such services from viewing.
- 7.47 Additionally, by ensuring that only a limited range of popular psychic services could be promoted through Psychic PTV, vulnerable people and minors would be protected from exposure to those practices which research indicates would be of concern. Consumers of Psychic PTV services would be able to access those services by seeking out appropriately labelled services whilst the risk of harm for those consumers would be limited by the restrictions on the range of psychic practices which would be able to be promoted.
- 7.48 Option 4 would also not have an adverse impact on the current broadcasters of Psychic PTV services and PRS providers since they will be able to broadcast Psychic PTV in a similar format to that in which they do so currently. However, other broadcasters simulcasting Psychic PTV services would need to alter their services.
- 7.49 Whilst Option 4 might not meet the needs of non-PTV broadcasters since they would be unable to broadcast Psychic PTV material unless they chose to become dedicated channels for those services, Ofcom considers that the extent of this impact is likely to be small since very few non-PTV broadcasters currently broadcast simulcasts of Psychic PTV channels during separate time slots. Given Ofcom's duties in respect of viewers' interests and the outcome of the viewer research, Ofcom does not consider that this impact is sufficient to outweigh the viewer concerns identified.

Questions for stakeholders

7.50 Ofcom invites stakeholders' comments on the options for regulation in this section.

Question 2:

Do you agree with our analysis of the options available for regulation of the promotion of premium rate services of a sexual nature, and

- a) that on the basis of options, a change to the existing rules appears merited?*
- b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?*
- c) that the scheduling restrictions of 9pm to 5:30am and requirements for labelling and EPG position under Option 4 offer appropriate protection for viewers?*

Question 3:

Do you agree with our analysis of the options available for regulation of the promotion of live personal psychic services, and

- a) on the basis of the options, that a change to the existing rules appears merited?*
- b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?*
- c) that the restriction to specific live personal psychic services and the requirements for labelling and EPG position provide appropriate protection for viewers?*

Section 8

Proposed changes to the TV Advertising Code

Introduction

- 8.1 Based on the options outlined above, we believe a change to the existing relevant rules in the Advertising Code would be merited in order to ensure appropriate regulation, taking into account Ofcom's duties towards viewers and the need to ensure that regulation remains proportionate to those aims.
- 8.2 This section sets out changes which Ofcom proposes to make to the Advertising Code for the regulation following the changes to the Broadcasting Code in light of the considerations set out in the previous section.

Rules already in place in relation to risk of harm

- 8.3 We consider that the relevant rules should include principles already identified in the Broadcasting Code and the Advertising Code in relation to risk of harm to minors and vulnerable people.
- 8.4 **Live PRS services must comply with PhonepayPlus rules.** These require that live services may only operate with prior permission from PhonepayPlus, must give call cost and service provider information, and must prevent people from under 18 from using the services.
- 8.5 **The scheduling of adult-sex content post watershed.** The Advertising Code requires that advertisements which refer to sexual matters or portray sexual activity are not scheduled before 9pm or after 5.30am.
- 8.6 **The exceptions for specific psychic products for entertainment purposes only.** The specific psychic services excepted from prohibition would be limited to pre-recorded or live personal astrology, horoscopes and tarot-based services. These practices were identified in the ITC's Beyond Entertainment research as distinct from other psychic and occult practices. Other psychic and occult practices would remain prohibited to protect vulnerable people from promotion of practices with greater risk of harm or malevolent intent.

Any excepted psychic practices, under the current Advertising Code guidance, need to be clearly advertised as for entertainment purposes only and must also not contain any material that may harm, offend or distress viewers. We consider that the guidance under the Broadcasting Code governing demonstrations of psychic practices - that they cannot make claims for efficacy or accuracy and that they do not feature life-changing advice directed at individuals, including advice related to health or financial situation - should also be included in the revised rules.

Principles identified in this consultation in relation to risk of offence

- 8.7 We consider that rules and guidance should include the principles set out under option 4 in this consultation in relation to risk of offence:

- Spot advertising or short form promotion of adult sexual entertainment PRS and live psychic services should not be available on any open access TV channel.
- Teleshopping or long form promotion of these premium rate services should be available only on dedicated Adult chat PTV and Psychic PTV channels that are clearly labelled and positioned in an appropriate EPG section.

8.8 These restrictions are to limit the risk of offence to general viewers, and particularly minors, from promotion of these services and their accompanying promotional content where there is no prior expectation, context or warning of them and where they cannot be reliably avoided, controlled or blocked by viewers.

Proposals for changes to the Advertising Code rules

- 8.9 On the basis of these principles, we have presented proposals for amended rules below. We would welcome any comments on drafting in the consultation period.
- 8.10 The proposed amendment to rule 11.1.2 in the Advertising Code reflects the change to the definition of premium rate services of a sexual nature as “telecommunications-based sexual entertainment services” as proposed by BCAP in its Code Review (see Section 5).
- 8.11 The revised rule maintains the position that advertising for these services is acceptable on encrypted elements of adult entertainment channels. It extends this acceptability to other channels that may be broadcast unencrypted, provided that they meet the conditions set out for licensing, labelling and positioning of the channel. Adverts for these services on these channels would be subject to a scheduling restriction of 9pm to 5:30am.

Proposal for revised rule on PRS of a sexual nature in Advertising Code (to replace current rule 11.1.2)

Telecommunications-based sexual entertainment services are voice, text, image or video services of a sexual nature that are made available to consumers via a direct-response mechanism and are delivered over electronic communication networks.

- 1) Advertising for telecommunications-based sexual entertainment services is only acceptable on:
 - i) Encrypted elements of adult entertainment channels, or
 - ii) Channels that are licensed for the purpose of the promotion of the services and are appropriately positioned and labelled within an “Adult” or similar section of an Electronic Programme Guide.
- 2) Advertising for telecommunications-based sexual entertainment services must not be broadcast before 9pm or after 5:30am.

Note: Encrypted elements of adult channels are interpreted with reference to rule 1.24 of the Broadcasting Code.

- 8.12 The proposed addition to rule 15.5 would extend the list of exceptions to the general prohibition on promotion of psychic and occult practices (in rule 15.4) on television.

- 8.13 The current exceptions for pre-recorded services under 15.5 and 15.5.1 would be maintained. Under the additional rule (15.5.2), services permitted for advertising would be extended to include personalised and live reading services (i.e. between a caller and a call operator) that feature astrology, horoscopes, tarot and derivative practices, provided that the promotion met the conditions set out for licensing, labelling and positioning of the channel.
- 8.14 Promotions for permitted services would be subject to the conditions of the content of the advert set out in additional rule 15.5.3.

Proposal for addition to rule on psychic practices in the Advertising Code (to be added to rule 15.5)

Rule 15.4

Television advertisements must not promote psychic practices or practices related to the occult, except those permitted by rule 15.5. Radio advertisements may promote psychic and occult practices but must not make efficacy claims.

Psychic and occult-related practices include ouija, satanism, casting of spells, palmistry, attempts to contact the dead, divination, clairvoyance, clairaudience, the invocation of spirits or demons and exorcism.

Rule 15.5 – Television only

Television advertisements may promote services that the audience is likely to regard merely as entertainment and that offer generalised advice that would obviously be applicable to a large section of the population, for example, typical newspaper horoscopes.

Rule 15.5.1

Advertisements may promote a pre-recorded tarot-based prediction service if:

15.5.1.a the service includes no content that respondents might feel to be threatening and

15.5.1.b both the advertisement and the service state clearly that the service is pre-recorded and qualify references to “tarot” to make clear that the predictions are not based on live readings.

15.5.2

Advertisements for personalised and live services that rely on belief in astrology, horoscopes, tarot and derivative practices are acceptable only on channels that are licensed for the purpose of the promotion of such services and are appropriately positioned and labelled in a “Specialist” or similar section of an Electronic Programme Guide. Both the advertisement and the product or service itself must state that the product or service is for entertainment purposes only.

15.5.3

Advertising permitted under rule 15.5 may not:

- Make claims for efficacy or accuracy;
- Predict negative experiences or specific events;
- Offer life-changing advice directed at individuals – including advice related to health (including pregnancy) or financial situation;
- Appeal particularly to children;
- Encourage excessive use.

- 8.15 Broadcasters will also need to comply with all other Advertising Code rules. This includes Section 22 rules governing the promotion of live PRS services, and rule 6.1 under which advertisements must not cause serious or widespread offence against generally accepted moral, social or cultural standards, or offend against public feeling.
- 8.16 The Advertising Code guidance draws attention to generally accepted standards for sex, nudity and offensive language. Ofcom has previously issued specific guidance to Adult Chat PTV broadcasters under the Broadcasting Code. Similar specific guidance for Adult Chat PTV may be appropriate under the Advertising Code.

Explanation of appropriate licence, positioning and labelling of channels in the revised rules

- 8.17 The revised rules would make promotion of the particular service conditional on the channel being licensed for this purpose and appropriately labelled and positioned within an Electronic Programme Guide. This is in order that viewers wishing to control, avoid or block viewing of such services are able to do so.
- 8.18 We consider that channels licensed for the purpose of promotion would mean that only channels licensed as teleshopping and with the main purpose of promoting the relevant telecommunications-based service could meet the conditions for the rule. This purpose must be set out by licensees in the Annex to their TLCS licence, either at the time of application or by amendment. This purpose need not be exclusive, and the channels may feature advertising for other products.
- 8.19 We consider that any labelling information should make clear, on-screen and in the EPG, the nature of the content i.e. featuring telecommunications-based services of a sexual nature or featuring psychic practices.
- 8.20 We consider that the proposed rule would mean that only channels within an “Adult” EPG section or “Specialist” section would be able to meet the conditions for promotion. We do not consider that other sections of the EPG, for example “general entertainment”, or where the EPG is not segregated, would meet the conditions for promotion. This is appropriate due to the insufficient viewer labelling and sign-posting that these could offer.
- 8.21 The proposed rule may represent a particular issue for broadcasters wishing to operate Adult Chat PTV featuring telecommunications-based sexual entertainment services on Freeview. Our understanding is that the majority of Freeview set top boxes in use do not have a segregated EPG with an ‘Adult’ section. Therefore we consider that channels on the Freeview platform would currently be unable to meet the conditions for promotion of under these particular rules.
- 8.22 We note that the DTT Multiplex Operators Limited (DMOL) – the body that allocate channel numbers on Freeview – has recently decided, following consultation, to classify an Adult channel genre – including Adult Chat PTV – and group such

channels from Channel number 93 toward the end of the Freeview EPG. Although this may reduce the risk of unintended viewing, it does not in our view allow sufficient labelling and sign-posting for viewers and therefore in itself would not allow channels to meet the conditions of the Advertising Code rules proposed above. However, as platforms evolve and segregated and customisable EPGs become more widely available, it is possible that channels could satisfy the principle in time.

Questions for stakeholders

- 8.23 Ofcom invites stakeholders' comments on the proposed Advertising Code rules in this section.

Question 4:

- a) Do you agree with the principles identified for changes to the Advertising Code rules on promotion of PRS of a sexual nature (rule 11.1.2) and psychic practices (rule 15.5)?*
- b) Do you agree with the wording of the proposed rules? If not, please suggest alternative wording.*

Section 9

Next steps

- 9.1 Ofcom recognise that if the changes to the Broadcasting Code now decided upon were implemented immediately, it could mean that certain PTV broadcasters would not be able to broadcast in their current format.
- 9.2 Given the need to consider the appropriate means of regulation of such services under the Advertising Code, Ofcom does not therefore intend to implement changes to the Broadcasting Code until the conclusion of this consultation process. However, Ofcom is not consulting on the rule changes to the Broadcasting Code on which it has now concluded.
- 9.3 The proposals for rule changes to the Advertising Code set out in this document are now open to consultation for a period of 10 weeks. Consultation responses should be made by **15 January 2010**.
- 9.4 After this period, Ofcom will publish a consultation statement bringing into force the changes to the Broadcasting Code set out in the document and concluding on the appropriate changes that are required to the Advertising Code.
- 9.5 The changes to the Broadcasting Code discussed in this document are likely to come into effect ahead of changes to the Code concerning commercial references in television and radio, a subject on which Ofcom previously consulted³⁸. That is because Ofcom has decided to re-evaluate these issues, and consult again, in light of the Government's announcement that it is to consult on product placement on commercial television.
- 9.6 The Advertising Code is also currently under separate review³⁹, and a revised version of the Advertising Code is due to be published in 2010. Any changes to the Advertising Code following this consultation would be incorporated into the revised Code.

³⁸ <http://www.ofcom.org.uk/consult/condocs/bcode09/>

³⁹ Available at <http://www.cap.org.uk/CAP-and-BCAP-Consultations/Closed-consultations/BCAP-Code-Review-consultation>

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 15 January 2010**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/participationtv3/howtorespond/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email Yvonne.Matthews@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Yvonne Matthews
5th Floor
Content & Standards
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 306 3806
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish

all responses, including those that are marked as confidential, in order to meet legal obligations.

- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/account/disclaimer/>

Next steps

- A1.10 Following the end of the consultation period, Ofcom intends to publish a statement in early 2010.
- A1.11 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

Annex 4

Consultation questions

A4.1 Ofcom invites responses from stakeholders, particularly on the following questions:

Question 1:

- a) Do you agree with Ofcom's assessment of those stakeholders likely to be affected by changes to the regulatory framework for Adult Chat and Psychic PTV services?
- b) Do you agree with our understanding of the industry and operators?

Question 2:

Do you agree with our analysis of the options available for regulation of the promotion of premium rate services of a sexual nature, and

- a) that on the basis of options, a change to the existing rules appears merited?
- b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?
- c) that the scheduling restrictions of 9pm to 5.30am and requirements for labelling and EPG position under option 4 offer appropriate protection for viewers?

Question 3:

Do you agree with our analysis of the options available for regulation of the promotion of live personal psychic services, and

- a) on the basis of the options, that a change to the existing rules appears merited?
- b) of the options presented, Option 4 meets the regulatory duties and suggests least potential impact on stakeholders?
- c) that the restriction of promotion to specific live personal psychic services and the requirements for labelling and EPG position provide appropriate protection for viewers?

Question 4:

- a) Do you agree with the principles identified for changes to the Advertising Code rules on promotion of PRS of a sexual nature (rule 11.1.2) and psychic practices (rule 15.5)?
- b) Do you agree with the wording of the proposed rules? If not, please suggest alternative wording.

Annex 5

Relevant regulatory duties, legislation and bodies

A5.1 This annex sets out relevant background information to this consultation on:

5.1.1 Ofcom's statutory duties in regulation

5.1.2 Ofcom's duties relating to standards in broadcasting

5.1.3 how advertising and editorial content are regulated, and the relevant codes and legislation

5.1.4 the roles of the different regulatory bodies

Ofcom's statutory duties

A5.2 Under Section 3(1) of the Communications Act 2003 Ofcom's principal duty in carrying out its functions shall be to further the interests of:

- citizens in relation to communications matters, and
- consumers in relevant markets, where appropriate by promoting competition.

A5.3 Section 3(2) specifies matters which Ofcom must secure in carrying out its functions. These include:

- the availability throughout the UK of a wide range of television and radio services which (taken as a whole) are both of high quality and designed to appeal to a variety of tastes and interests;
- the maintenance of a sufficient plurality of providers of different television and radio services; and
- the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services.

A5.4 Section 3(3) and section 3(4) further provide that in performing the duties set out in section 3(1), Ofcom must have regard to a variety of other factors, including:

- the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed;
- any other principles appearing to Ofcom to represent best practice;
- the desirability of promoting competition in relevant markets;
- the opinions of consumers in relevant markets, and of members of the public generally; and

- the vulnerability of children and of others whose circumstances appear to Ofcom to put them in need of special protection.
- A5.5 In performing the duties under section 3(1)(b) to further the interests of consumers, Ofcom must also have regard to the interests of those consumers in respect of choice, price, quality of service and value for money.
- i) In carrying out our functions, we must also have regard to the need to secure that regulation by Ofcom does not involve the imposition of burdens that are unnecessary, or the maintenance of burdens which have become unnecessary (section 6(1)); and
 - ii) to carry out an assessment of the impact of a change in the way we carry out our activities where this would have a significant impact on persons carrying on businesses in markets that we regulate (section 7).
- A5.6 In addition to our responsibilities under the Act, as a public authority we have a duty under the Human Rights Act 1998 to ensure that we do not act in a way which is incompatible with the European Convention of Human Rights ('the Convention').
- A5.7 Article 10 of the Convention provides for the right to freedom of expression. It encompasses the broadcaster's right to "impart information and ideas" and also the audience's "right to receive information and ideas without interference by public authority". Such rights may only be restricted if the restrictions are:
- "prescribed in law and necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary" (Article 10(2) of the Convention).

Ofcom's duties relating to standards in broadcasting

- A5.8 As part of its duties in relation to broadcasting, Ofcom is responsible for setting broadcast standards for the content of programmes. The relevant objectives to be secured by these standards under section 319(2) of the Act include:
- that persons under the age of eighteen are protected;
 - that generally accepted standards are applied to the contents of television and radio services to provide adequate protection for members of the public from offensive and harmful material; and
 - that the inclusion of advertising which may be misleading, harmful or offensive is prevented.
- A5.9 In relation to those specific standard objectives, Ofcom:
- must include general provision governing standards and practice in advertising and sponsorship;
 - may include provision prohibiting adverts and forms and methods of advertising and sponsorship.

A5.10 In setting standards, we must have regard to a number of matters under section 319(4) including:

- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes;
- the likely size and composition of the potential audience;
- the likely expectation of the audience as to the nature of a programme's content and the extent to which it can be brought to the attention of potential members of the audience; and
- the desirability of maintaining the independence of editorial control over programme content.

How advertising and editorial content are regulated

A5.11 Television services require different licences depending on delivery platform. In summary, Television Licensable Content Services ('TLCS') licences are for services made available using either satellite, an electronic communications network (such as cable), or a radio multiplex. Services made available on a television multiplex (digital terrestrial television) are licensed as Digital Television Programme Services ('DTPS') or Digital Television Additional Services ('DTAS'). Channels 3, 4, 5 and Public Teletext hold individual licences.

A5.12 Ofcom recognises three types of service which can be provided under a TLCS, DTPS or DTAS licence: editorial, teleshopping or self-promotional (these latter two are specific types of advertising). Ofcom's broadcast licensing guidance notes describe these three types of service as set out below.

A5.13 An editorial service is a 'normal' programme service, with conventional programme material and scheduled advertising breaks (normally containing short 'spot' advertisements, and sometimes segments of teleshopping). The majority of television channels (including electronic programme guides) fall within this category.

A5.14 A teleshopping service is a service which consists entirely of teleshopping. Teleshopping is a particular form of advertising involving the broadcast of direct offers to the public with a view to the supply of goods or services in return for payment. Spot advertising and teleshopping for other products and services are permitted on teleshopping services up to the same limits as for editorial services. For the avoidance of doubt, teleshopping services may not broadcast material (other than permitted advertising) which does not contain direct offers to the public. A teleshopping service may therefore not contain any conventional programme elements such as news, sport, films, documentaries or drama, etc.

A5.15 A self-promotional service is a service which consists entirely of self-promotional material. Self-promotional material is a particular kind of advertising in which the broadcaster promotes its own products, services or channels. Spot advertising and teleshopping for other products and services are permitted on self-promotional services up to the same limits as for editorial services. For the avoidance of doubt, self-promotional services may not broadcast material (other than permitted advertising and teleshopping) which does not promote the broadcaster's own goods or services. A self-promotional service may not therefore contain any conventional programme elements such as news, sport, films, documentaries or drama, etc.

- A5.16 If broadcasters wish to change the name of their service or its nature, e.g. from teleshopping to editorial, the change must be agreed with Ofcom in advance. It will then be regulated by the appropriate body under the relevant code.
- A5.17 Broadcast standards are maintained by means of codes. The Broadcasting Code identifies the standards that apply to editorial content (i.e. programming) and sponsorship arrangements, and the Advertising Standards Codes applies to the content of advertisements (for TV, advertising includes teleshopping).

The Broadcasting Code

- A5.18 In accordance with the standards objectives set out in section 319(2) of the Act above, Section 10 of the Broadcasting Code⁴⁰ includes rules to ensure that products and services are not promoted within programmes, except in limited and defined circumstances, and to prevent unduly prominent references to products and services in programmes. In essence, this is to maintain independence of editorial control and prevent programmes becoming advertisements for products and services. Under Rule 10.9 of the Broadcasting Code, a premium rate telephone service ('PRS') will normally be regarded as a product or service and consequently may be only be used in programmes in certain limited circumstances. These are where:
- the PRS is a 'programme-related service' as defined in the Broadcasting Code, i.e. it is "both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme", e.g. SMS updates from *Channel 4 News*; or
 - the PRS "forms part of the editorial content of the programme", e.g. viewer voting in *I'm a Celebrity Get Me Out Of Here*.

Advertising Standards Code

- A5.19 The Television Advertising Standards Code⁴¹ ('the Advertising Code') sets out the rules that govern advertisements on television channels licensed by Ofcom. The rules are based on enduring principles: that advertising should not mislead, cause deep or widespread offence or lead to harm, particularly to the vulnerable. Of particular relevance to this consultation, the Advertising Code includes restrictions on the advertising of PRS sexual entertainment phone lines (Section 11.1.2) and of psychic practices (Section 10.3).

Code on the Scheduling of Television Advertising

- A5.20 All licensed TV services are obliged, among other matters, to comply with Ofcom's Code on the Scheduling of Television Advertising ('COSTA').
- A5.21 Earlier this year, Ofcom liberalised the rules on teleshopping limits set out in COSTA. Commercial public service channels are now permitted to broadcast up to six hours of teleshopping a day, to be scheduled between midnight and 6am. Other channels (i.e. non-public service) are now allowed to broadcast teleshopping content without restriction.

⁴⁰ Available at: <http://www.ofcom.org.uk/tv/ifi/codes/bcode/>

⁴¹ Available at: <http://www.asa.org.uk/asa/codes/>

European legislation

- A5.22 The Television without Frontiers Directive ('the TWF Directive') was adopted by the then European Economic Community in 1989⁴². The purpose of the TWF Directive was to require Member States to adopt minimum common standards of advertising regulation in order to facilitate a single market in broadcasting services in accordance with the Treaty of Rome.
- A5.23 The Directive was amended first in 1997⁴³. Then, on 18 December 2007, the European Union adopted amendments to the TWF Directive, which became the Audiovisual Media Services Directive ('the AVMS Directive'). The UK has two years from this date to implement the AVMS Directive, i.e. 18 December 2009.
- A5.24 It is a fundamental principle of European broadcasting regulation that advertising and editorial, that is programming, must be distinct and recognisable. This ensures that viewers understand when they are being sold to, that appropriate regulatory safeguards are in place, that editorial integrity is protected and that a broadcaster's maximum daily advertising minutage is properly calculated.
- A5.25 Article 10 of the AVMS Directive states:
- "Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means."
- A5.26 Article 18 limits the amount of transmission time that may be used for advertising and teleshopping.
- A5.27 'Television advertising' is defined under the AVMS Directive as:
- "any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment"
- A5.28 'Teleshopping' is defined as:
- "direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment"

⁴² Council Directive (89/552/EEC) of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (known as the Television without Frontiers Directive).

⁴³ Directive 97/36/EEC of the European Parliament and of the Council of 19 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

Co-regulation of broadcast advertising

- A5.29 Ofcom has contracted out certain functions in relation to the regulation of broadcast advertising. These functions are performed by a co-regulatory system run by the Advertising Standards Authority ('ASA'), which is an independent body set up by the advertising industry.
- A5.30 The rules governing broadcast advertising are set by Broadcast Committee of Advertising Practice ('BCAP') with the approval of Ofcom. BCAP performs this function by setting, monitoring and amending the Advertising Code as necessary. However, before amending the Advertising Standards Code, BCAP must consult and obtain the agreement of Ofcom⁴⁴.
- A5.31 The Advertising Code rules are enforced by Advertising Standards Authority (Broadcast) with Ofcom using its additional sanctions powers if necessary. Should the ASA find that there has been a breach of the Code, it can issue directions to broadcasters requiring them to take certain actions, for example to stop screening a particular advertisement. Ofcom retains an important role in the regulation of broadcast advertising: there are a number of functions that Ofcom has not contracted out, such as those relating to political advertising. In addition, Ofcom has 'back-stop' enforcement powers, for example it can issue fines for serious breaches of the Code, or as a last resort it can withdraw a broadcaster's licence for failing to comply with directions issued by the ASA.

Other regulatory authorities

- A5.32 PhonepayPlus regulates premium rate services as defined in the Act. Its role is to prevent consumer harm and it regulates premium rate services in their entirety - their content, promotion and overall operation - through a Code of Practice⁴⁵. PhonepayPlus are currently reviewing this Code.
- A5.33 Among other things, PhonepayPlus rules require:
- clear and accurate pricing information;
 - honest advertising and service content; and
 - appropriate and targeted promotions.
- A5.34 PhonepayPlus investigates complaints, and has the power to fine companies and bar access to services if the Code of Practice is breached. It can also bar the individual(s) behind a company from running any other premium rate services under any company name on any telephone network for a defined period.

⁴⁴ Paragraph 33 of the Memorandum of Understanding between Ofcom, BCAP and the ASA(B)

⁴⁵ <http://www.phonepayplus.org.uk/CodeOfPractice/default.asp>

Annex 6

Guidance to rules 10.10 and 10.11 in the Broadcasting Code

- A6.1 The following guidance, to be published alongside the revised Broadcasting Code, has also been revised to allow respondents to understand Ofcom's thinking as clearly as possible.

Guidance to relevant rules in Section Ten

Promotion of PRS within programmes

Rule 10.3 provides that products and services must not be promoted in programmes (with the exception of programme-related material).

Rule 10.10 of the Broadcasting Code prohibits programmes from featuring PRS except where either:

- the PRS in question enables viewers/listeners to make a direct contribution to the programme's editorial content; or
- the PRS in question satisfies the definition of programme-related material. This is a strict test (see the guidance on programme-related material for further discussion). Even where this test is met, references to programme-related material within programmes are subject to undue prominence; depending on the facts, repeated or prolonged references may be considered unduly prominent.

Contribution to editorial content

Each case must be assessed on its particular facts. However, in considering whether a particular instance of promotion of PRS complies with the requirement regarding direct contribution to editorial content, the following questions are likely to be relevant:

- Is it clear that the PRS enables viewers/listeners to participate directly in or contribute directly to the editorial content of the programme? Such interaction could include voting, competition entry, or texting in views on a particular issue.
- Is the degree to which a PRS is referred to within the programme clearly justified by the degree to which the PRS contributes to editorial content? If, for example, there are very frequent and prominent messages to viewers or listeners to call a premium rate number to give their views on air on a particular issue, but the programme in fact includes little or no discussion of views submitted by callers, then this tends to suggest that the PRS does not satisfy the requirement for direct contribution to editorial content.
- Does the PRS involve the provision of a private consultation or conversation similar in nature to other commercial services provided by non-broadcasters, typically promoted in newspapers, magazines, or broadcast advertising (as opposed to programming)? If so, then this tends to suggest that the PRS is a commercial service rather than a genuine means of contributing to editorial

content, and should therefore not be referred to within programming (unless it satisfies the strict definition of programme-related material – see the guidance on programme-related material for further discussion).

Rule 10.11: Primary purpose of the programme must be editorial

Under Rule 10.11, broadcasters must ensure that a programme is clearly editorially-driven. It must not be essentially a vehicle for the promotion of PRS. This is entirely consistent with the principles set out in Section Ten of the Broadcasting Code, i.e.:

- the independence of editorial control over programme content must be maintained and programmes must not be distorted for commercial purposes; and
- the advertising and programme elements of a broadcast service must remain distinct.

In interpreting Rule 10.11, we consider it relevant to take into account a Judgment by the European Court of Justice ('ECJ') on 18 October 2007⁴⁶ regarding interpretation of the TWF Directive, where the ECJ ruled that:

“a broadcast or part of a broadcast during which a television broadcaster offers viewers the opportunity to participate in a prize game by means of immediately dialling a premium rate telephone number, and thus in return for payment, is covered by the definition given by Article 1(f) [of the TWF Directive] of teleshopping if that broadcast or part of a broadcast represents a real offer of services having regard to the purpose of the broadcast of which the game forms part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions which the candidates are asked”

Whilst the ECJ's ruling was made in the course of proceedings between the Austrian communications authority and an Austrian broadcaster regarding a particular quiz show broadcast by that broadcaster, Ofcom considers that the ruling is of wider significance. If it is possible for a quiz show, which invites viewers to call a premium rate number for a chance of answering a question and winning a prize, to represent “a real offer of services”, then it follows that other genres of broadcast content predicated on the use and promotion of premium rate services may – depending on the particular facts – also represent a “real offer of services” and therefore be a form of advertising.

In assessing compliance with Rule 10.11, broadcasters should therefore consider each of the following questions:

- What is the nature of the programme? If a programme consists primarily of promotional messages for the PRS and there is little recognisable editorial content, then this is unlikely to be consistent with Rule 10.11. If, however, PRS is only one element of the broadcast content, e.g. as may be the case in a studio-based game show, a magazine-format show, a sports discussion show, or a reality show, then references to it within the show are more likely to be acceptable (provided they are not unduly prominent).

⁴⁶ Judgement of the Court, 18 October 2007, in Case C-195/06, reference for a preliminary ruling under Article 234 EC from the Bundeskommunikationssenat (Austria), made by decision of 4 April 2006, received at the Court on 27 April 2006, in the proceedings *Kommunikationsbehörde Austria (KommAustria) v Österreichischer Rundfunk (ORF)*

- Is the degree to which the PRS is referred to within the programme clearly justified by the degree to which it contributes to editorial content? If, for example, a programme includes frequent and prominent exhortations to viewers to call a premium rate number in order to speak to a presenter on air but, of the calls received, disproportionately few are in fact put through to the studio (and therefore the contribution to editorial content is minimal), this may well be problematic. To take a contrasting example, where the presenter is seeking input from listeners but in fact few people are calling the show, there may be editorial justification for the presenter to repeatedly ask listeners to call (or text) a PRS, in order to generate sufficient editorial content for the show.
- What is the cost to an audience member of calling the PRS? This may be relevant in considering whether a PRS is genuinely intended to encourage audience participation or whether a viewer or listener is in effect purchasing a service or product, e.g. a private consultation.

Even where the PRS does clearly contribute to editorial content, broadcasters must take care to ensure compliance with other aspects of the Broadcasting Code. For example, if on calling the PRS number promoted in the programme, a caller is presented with advertising messages or with options other than direct participation as promoted within the programme, this would tend to suggest that the programme is seeking to promote a product or service (other than the legitimately promoted PRS) and be in breach. Advertising-type claims about the PRS that go beyond what is editorially justified (and what is required under PhonepayPlus regulations) are also likely to be in breach e.g. “cheaper call rates”.

Broadcasters should also note that particular care must be taken with pre-recorded broadcast content which encourages viewers or listeners to call a PRS, as this has the potential to mislead viewers/listeners about the nature of the interaction. In addition to raising issues under Section Nine/Ten, such content may also raise questions of fairness and audience trust. See also Rule 2.2.

Where PRS is used and promoted in a programme in a way that is not consistent with the rules in Section Ten, then – in addition to being in breach of the Code and depending on the individual circumstances – it may be that such content is in effect advertising (more specifically in the case of television, teleshopping, that is, long-form advertising containing direct offers). It is therefore subject to the relevant advertising content and scheduling codes for that medium.

Each case must be assessed on its individual facts and Ofcom is unable to provide a definitive view here on whether a so-called ‘programme’ is in fact advertising (in the case of television, teleshopping) or editorial.

The Broadcasting Code rules regarding PRS (and this interpretative guidance) apply to both television and radio. In practice, however, radio programming currently does not tend to use premium rate telephony to the same extent as does television; for example, many radio shows ask listeners to call a non-premium rate number.

See also our existing guidance on Programme Related Material (Code sections 10.6 – 10.8).

Annex 7

Impact assessment of options for TV promotion of PRS of a sexual nature

Introduction

- A7.1 Ofcom must take into account the impacts on all stakeholders, including viewers and consumers; PTV broadcasters; telecoms networks and PRS providers; and non-PTV broadcasters, of any changes to the Broadcasting Code and the Advertising Code.
- A7.2 The current Advertising Code rules on advertising of PRS services of a sexual nature would limit the operation of PTV channels featuring these products. Ofcom must consider whether a restriction of this kind would be proportionate to the objectives pursued and the objective of protection of viewers from harmful or offensive material.
- A7.3 This section, drawing on the sources of information outlined previously, sets out Ofcom's assessment of the options for regulation under the Advertising Code, and the impact of those options on relevant stakeholders. This section therefore forms part of Ofcom's impact assessment: it should be read in conjunction with other sections and annexes of this document.

Stakeholders affected by potential regulatory changes

- A7.4 As set out in section 6 and 7, Ofcom has considered a range of options for regulation. In considering those options, Ofcom has identified the following stakeholders which we consider are likely to be directly affected by the impact of any changes to the regulatory framework, as follows:
- A7.5 **Viewers – general TV viewers, who may come across PTV content or promotion of PRS products. These include minors, other vulnerable groups, and those responsible for their viewing.**

The viewer research suggests that there is a high risk of offence to general audiences, and particularly minors, from promotion of adult sexual entertainment PRS due to the nature of the product and the graphic images and language of content which may feature in their promotion.

Adult-sex content is recognised under both the Broadcasting Code and Advertising Code as being of potential harm to minors.

- A7.6 **Consumers – viewers who have specifically chosen to watch and/or interact with PTV content, or consume PRS products.**

Use of the product by minors is prohibited by the PhonepayPlus rules for live PRS providers. In relation to adult sexual entertainment PRS, there is little evidence of consumer harm to adults from use of the product. However, in the viewer research a minority of participants who tended to be female and older felt that the product could be harmful to regular users and call-operators supplying the service.

In quantitative research for the 2007 Consultation, 1% of TV viewers claimed to have viewed Adult Chat PTV regularly, and 1% of TV viewers claimed to have called a PRS promoted on a PTV service. We assume these consumers derive benefit from access to these services in that they are prepared to pay for services promoted on the TV channels.

A7.7 PTV broadcasters – broadcasters operating one or a number of dedicated PTV channels.

The information supplied by Adult Chat PTV broadcasters suggests that a very high proportion of their current revenue results from the promotion of adult sexual entertainment PRS. Therefore, there would be a very significant impact on their economic viability if they were unable to promote such services.

A7.8 Non-PTV broadcasters – broadcasters operating other channels, which could have the option of simulcasting or broadcasting PTV services in teleshopping slots or showing spot advertising for services.

A relatively small number of non-PTV broadcasters currently carry Adult Chat PTV services featuring adult sexual entertainment PRS, but this does not represent a significant part of their business. A number of encrypted channels carry spot advertising for adult sexual entertainment PRS, but information provided suggests that this does not represent a significant part of their business.

A7.9 PRS providers – providers who facilitate interactivity with PTV content and PRS products, including phone network operators.

The information supplied by the PRS providers suggests that the majority are relatively diversified suppliers of PRS products, with a range of clients in broadcasting and other industries. However, a couple of providers are relatively specialised in PRS promoted by PTV and could be significantly affected by restrictions on TV promotion.

Information from stakeholders informing the impact assessment

A7.10 Ofcom requested a range of information from channels providing dedicated Adult Chat PTV services including a range of financial information (both historical and projected performance), data on staff numbers and information on calling patterns and call volumes by time of day. We also requested information from other potential stakeholders such as PRS providers.

A7.11 In all, seven broadcasters representing eleven channels responded to the information requests at the end of 2008. Given the deteriorating economic climate since then, in mid-2009 we invited respondents to provide updated information if they wished to.

A7.12 Most of the data provided to Ofcom is commercially confidential and data is therefore presented in aggregated form rather than on the basis of individual broadcasters.

A7.13 For the Adult Chat PTV channels, we have chosen to use the information to develop a 'composite' channel using averages of the data provided. We have then used this 'composite' channel as the basis for assessing the impact of changes to the regulatory framework, e.g. considering the impact on revenues and the operation of the service as a result of any change to the regulations.

A7.14 As well as estimating the impact of any change on the composite channel, where relevant we also provide a range for our estimates, to take account of the impact on the smaller and larger channels i.e. those with relatively low and high volumes of calls and revenues. To do this, we present figures for a low volume channel and high volume channel based on the data submitted in response to our information requests.

Impact of options for advertising rules for PRS of a sexual nature

A7.15 Ofcom has identified the following four options under the Advertising Code:

1. Retain the current rules, allowing promotion of PRS of a sexual nature on encrypted channels only;
2. Allow promotion of PRS of a sexual nature on open access channels in spot advertising and teleshopping, subject to scheduling restrictions;
3. Allow promotion of PRS of a sexual nature in spot adverts subject to scheduling restrictions, but with teleshopping promotion only allowed on encrypted channels;
4. Allow promotion of PRS of a sexual nature on dedicated teleshopping channels subject to scheduling restrictions and labelling rules, but spot advertising remains only on encrypted channels.

A7.16 The following sections set out Ofcom's assessment of the impact of those options on affected stakeholder groups.

Option 1: Retain the current rules, allowing promotion of PRS of a sexual nature on encrypted channels only

A7.17 Under the current rules in the Advertising Code, the advertising of premium rate services of a sexual nature – whether in spot advertisements ('spot ads') or teleshopping – is prohibited except on encrypted adult sexual entertainment channels. Under Option 1, this position would continue to be the case.

A7.18 Under this option, two choices would be available to broadcasters of Adult Chat PTV channels wishing to feature premium rate services of a sexual nature:

- i) They could maintain the current Adult Chat PTV content (i.e. promoting premium rate adult sexual entertainment services) but encrypt such content.
- ii) They could choose to extend the promotion of their more general non-sexual PRS to operate on a 24-hour-a-day basis. Non-sexual PRS can already be advertised.

Viewers

A7.19 In the 2009 viewer research approximately half of the participants claimed to be unaware of Adult Chat PTV services. Of those who are aware of them, only half claim to have ever seen one of the channels, and very few have done so on a repeat basis. Arguably, viewers in general would be largely unaffected were the channels to be modified or removed by broadcasters.

- A7.20 This option all but eliminates the risk of unwanted exposure to promotions for adult sexual entertainment PRS for both minors and general viewers, as under the encryption system viewers would have to register and enter a PIN before being able to view channels carrying such promotion.
- A7.21 However, the viewer research indicates that while many participants considered the content of Adult Chat PTV channels distasteful, most would accept that they should be allowed to continue to broadcast as now. Very few participants argued that the channels or their content should be banned outright, or placed behind encryption. This suggests that the current restrictions on promotion of PRS of a sexual nature could be regarded as disproportionate and beyond the requirements necessary for protection of viewers from offensive material.

Consumers

- A7.22 Some viewers choose to watch Adult Chat PTV services and a proportion of those viewers also choose to call the adult sexual entertainment PRS being promoted. Ofcom's quantitative survey for the 2007 Consultation suggested that 1% of TV viewers were regular viewers of Adult Chat PTV, and 1% of TV viewers had ever called a PRS featured on the PTV channel.
- A7.23 Consumers (i.e. both viewers of Adult Chat PTV channels and callers) derive benefit in terms of viewing choice from being able to access a range of services. Although we are unable to quantify how highly they might value access to any particular service, we assume they would they would suffer detriment from a reduction in choice.
- A7.24 Therefore the actual impact on consumers under Option 1 depends on whether the broadcasters choose to just encrypt their content, or change their content to promoting non-sexual PRS on a 24-hour-a-day basis.
- A7.25 If Adult Chat PTV channels choose to operate behind encryption, consumers who wished to access this content would need to register with the platform operator (e.g. Sky) to obtain a viewing card and PIN code which they would need to enter in order to be able to access such content. They would not necessarily have to pay a subscription to be able to access such services on an encrypted basis – that would be a business decision for the channel.
- A7.26 Consumers that regularly engage with Adult Chat services and value them highly would therefore be able to register in order to continue using them.
- A7.27 Even though such services are still available to those viewers who choose to register, there would be a detriment to those casual viewers that might previously have accessed this content on an ad hoc basis: they would no longer have the choice to do this. However, if those casual consumers (e.g. those that watch and/or call in on an irregular, ad hoc basis) are not prepared to go through a registration process it would suggest that they do not value these services very highly. We therefore consider that the detriment would be low.
- A7.28 If, alternatively, Adult Chat PTV broadcasters choose to promote the non-sexual adult chat phone lines across all broadcast hours (and therefore modified their onscreen content to retain milder, flirtatious content), the enjoyment of some viewers and consumers could still be reduced.

- A7.29 We note the difference in volumes of calls and texts to the Adult Chat PTV channels promoting PRS of a sexual nature compared to non-sexual PRS. As well as reflecting the difference in the available audience it also suggests that the products may not be direct substitutes for consumers. This would suggest some consumer detriment from moving away from promotion of these services.

Adult Chat PTV Broadcasters

- A7.30 As stated above, there would be two choices available to the providers of Adult Chat PTV:
- maintain the current Adult Chat PTV content featuring PRS of a sexual nature, and encrypt such content; or
 - extend the provision of content featuring non-sexual PRS to operate on a 24-hour a day basis.
- A7.31 If Adult Chat PTV broadcasters continued to offer the same content behind encryption, they would first of all have to incur the additional costs of encryption. The exact costs of encryption per broadcaster would depend on the nature of the contract negotiated with the encryption provider.
- A7.32 For services using the Sky satellite platform, encryption services are provided by SSSL, a subsidiary of BSkyB. SSSL publishes a ratecard which provides an indication of the scale of costs that could be incurred in providing encryption for sexual content but this is the basis for a negotiation rather than a final tariff. Broadcasters have used the SSSL ratecard to provide an estimate of the nature and scale of costs that they might incur in adopting a system of encryption. This suggests that there could be one-off (non-recoverable) set up costs in the region of £100,000 per broadcaster. In addition there would then be an annual Conditional Access (CA) fee in the order of £25,000 per broadcaster. There may then be additional costs on a per subscriber and/or per call basis. Broadcasters have indicated that SSSL's terms would be likely to require 5% of the call revenue.
- A7.33 Taking these factors into account, encryption would be likely to result in an increase in the fixed cost base of these broadcasters. Based on the information provided by broadcasters on their total cost base, we estimate that the cost of encryption could raise operating costs for different broadcasters by between 10 and 33% in 1st year, and 2 and 7% in subsequent years.
- A7.34 At the same time, Adult Chat PTV broadcasters have argued that if encrypted there would be a large reduction in call volumes because they would no longer benefit from casual viewers to their channels, or from viewers 'flicking' between similar channels. However, broadcasters have not been able to assess the extent of such a drop off in call volumes. Research carried out by Ofcom in the past has suggested that casual viewers could be an important component of the audience of these channels and so this would tend to support the position of broadcasters⁴⁷.
- A7.35 Alternatively, Adult Chat PTV broadcasters could choose to extend the provision of their non-sexual PRS to operate on a 24-hour a day basis. The content currently provided which promotes adult sexual entertainment PRS would be replaced with

⁴⁷ 2007 Consultation: Attitudes to Adult Chat PTV. "Respondents tended not to exhibit loyalty to particular channels, but instead "flicked" between channels looking for content that particularly appealed".

the content currently provided which promotes non-sexual PRS. The on-screen content therefore is less explicit.

- A7.36 However, as call and text volumes tend to be higher between 9pm-5:30am when the PRS of a sexual nature is promoted, it is likely that broadcasters would experience a reduction in revenue.
- A7.37 We have attempted to model this effect by assuming that the average call volume between 7pm - 9pm – the hours adjacent to the period in question, but only carrying non-sexual PRS - is maintained over the period 9pm - 5:30am for our “composite” channel.

Revenue impact on channels

	High Volume Channel	Composite Channel	Low Volume Channel
Percentage reduction in volume of voice calls	50%	56%	56%
Reduction in revenue excl. VAT	£710,927	£763,808	£369,681
% Reduction in revenue excl. VAT	32%	46%	50%

- A7.38 We note that the percentage reduction in revenue is less than the percentage reduction in call volumes. This is because the revenue effect is a combination of the effect on call revenues and text message revenues. Text message volumes peak in the early evening (7-9pm), such that the average number of text messages per hour is higher in the early evening than over the period 9pm - 5am. Therefore, when we assume that early evening average text volumes are maintained over the period 9pm - 5:30am, message revenues actually increase. This partially offsets the reduction in voice call revenues.
- A7.39 Under our model, the change to promotion of non-sexual PRS only would reduce the volume of calls by over 50% for different Adult Chat PTV broadcasters. In turn this would reduce revenue from PRS promoted on Adult Chat PTV channels by 46% for our composite channel. Assuming charges are £1.50 per minute for a voice call, this implies a reduction in revenue of £764k for the composite channel.
- A7.40 For illustration purposes only, if we assume that all Adult Chat PTV channels make the same choices under the option and are impacted in the same way, grossing this figure up by 28 channels implies a reduction in revenue of £21m per annum. Based on the revenue share arrangements provided in the industry information, this would suggest a reduction in revenue for the Adult Chat PTV broadcasters collectively of approximately £15m per annum. In practice, variation among channels in operating hours and their choice of promotion would be likely to affect the scale of reduction.
- A7.41 The actual final impact on the broadcaster in terms of profitability and economic viability would then depend on what changes they could make to mitigate this significant loss of revenue. Given the nature of the cost base of PTV broadcasters, we consider that – at least for some reductions in call volumes – there would be scope for broadcasters to reduce their variable cost base to mitigate the impact of any reduction in revenues. However, we recognise that this option would still be likely to have a significant impact on most channels.

Telecoms/PRS Provider

- A7.42 Due to the revenue share arrangements between broadcasters and the PRS providers, any reduction in call volumes to channels would result in a decrease in revenues for PRS providers and telecoms network operators.
- A7.43 As indicated above, we have only been able to quantify the impact of broadcasters opting to change to provide non-sexual PRS services. Based on our composite channel, that would suggest a reduction in call volumes of around 56%.
- A7.44 We have applied the effect of this change to Telecoms and PRS providers operating services promoted on the PTV channel. The different service providers involved are Originating Network Operators (ONO), Terminating Network Operator (TNO) and the PRS service provider. The impact on each related to a composite, high and low volume channel is summarised in the table below.

Revenue impact on Telecoms /PRS provider

	High Volume Channel	Composite Channel	Low Volume Channel
Percentage reduction in voice calls	50%	56%	56%
Originating Network Operator Reduction in revenue excl. VAT % Reduction in revenue excl. VAT	£11,443 4%	£25,270 17%	£16,841 30%
Terminating Network Operator Reduction in revenue excl. VAT % Reduction in revenue excl. VAT	£40,580 37%	£42,654 50%	£20,309 52%
PRS provider Reduction in revenue excl. VAT % Reduction in revenue excl. VAT	£25,381 27%	£28,097 42%	£13,893 47%

- A7.45 Using the indicative revenue shares arrangements, this would imply a reduction in revenue from services provided to Adult Chat PTV channels of between 27 - 47% for the PRS facility providers, 4 - 30% for the originating network operators, and 37 - 52% for the terminating network operators.
- A7.46 We note that these figures again combine the impact of falling voice call revenues with the impact on text message revenues that result from extending the provision of non-sexual PRS to operate on a 24 hour-a-day basis.
- A7.47 We recognise that there could be a particular effect on providers of PRS facilities where those firms support a number of Adult Chat PTV channels and where the revenue from these channels accounted for a significant proportion of the providers' revenues. For those PRS providers that do specialise in provision to PTV broadcasters, the impact could be more significant.

Other Broadcasters

- A7.48 The option would remove any actual or potential revenues broadcasters might realise by altering the nature of their service to carry long form promotion of content promoting PRS of a sexual nature. It would also continue to prevent unencrypted channels from carrying short-form advertisements for these PRS.
- A7.49 This would leave current spot advertising revenues from promotion of PRS of a sexual nature concentrated in the encrypted channels. Data from broadcasters operating encrypted channels, where advertising is permitted, suggests that the

value of advertisements for adult sex chat lines is relatively low, representing less than 1% of their total turnover.

Option 2: Allow promotion of PRS of a sexual nature on open access channels in spot advertising and teleshopping, subject to scheduling restrictions

- A7.50 Under this option the Advertising Code would be changed to allow promotion of PRS of a sexual nature in both long form and short form on open access channels, subject to scheduling restrictions. Scheduling restrictions could mean that PRS of a sexual nature could not be advertised before 9pm, or potentially 10pm, 11pm or 12am.
- A7.51 Therefore, under this option, Adult Chat PTV channels will be able to operate the sorts of services they operate at present as teleshopping services. PRS providers would also be able to use spot advertising on other general channels to advertise PRS services.

Viewers

- A7.52 The viewer research suggests that most participants do not want the promotion of adult sexual entertainment PRS outside of the current specialist channels, due to the potential offence to either themselves or others, particularly minors, from exposure to it. (Though in the viewer research male participants and those in younger age-groups tended to be more accepting of promotion than female and older participants).
- A7.53 Spot advertising was thought by participants to be too difficult to avoid or control and that therefore it should not be allowed outside of dedicated adult channels. Viewers were also averse to long form advertising of the PRS being featured on mainstream or general entertainment channels without significant additional restrictions. Without other information or labelling being available, a stricter schedule restriction than the current convention would be required to protect most viewers in most of their viewing.

Consumers

- A7.54 Under this option, the promotion of adult sexual entertainment PRS would continue to be available on unencrypted channels. Therefore, we consider that the impact on the majority of existing consumers of such services would be negligible since those consumers would continue to be able to access services and view content currently available. There could be a potential benefit for consumers not already aware of these services from the wider promotion of such services.

Adult Chat PTV Broadcasters

- A7.55 Under this option, the format of the Adult Chat PTV services provided by broadcasters would not need to change. Therefore, for these broadcasters, the impact of this option depends on the appropriate scheduling restrictions for promotion of PRS of a sexual nature. Broadcasters are currently only permitted to broadcast content of a sexual nature to the period 9pm - 5:30am.
- A7.56 In the context of the teleshopping format we have assessed the impact on broadcasters' call (and text) volumes of the effect of different scheduling restrictions. In order to assess this we have used the 'composite' channel and

applied a series of scheduling restrictions, in terms of the time⁴⁸ at which PRS of a sexual nature could start to be advertised (e.g. 9pm, 10pm, 11pm etc).

- A7.57 Using our composite channel, we have modelled the impact of different scheduling restrictions on the revenues the broadcasters generate on the assumption that they maintain the current format of their service. We have not made any offsetting adjustment to allow for a potential increase in call volumes due to the wider promotion of these services via spot advertising.
- A7.58 We have assumed that, where there are scheduling restrictions the promotion of PRS of a sexual nature would be replaced with promotion of non-sexual PRS that are currently promoted before 9pm. For instance, if there were a scheduling restriction so that PRS of a sexual nature could not be promoted before 10pm, we assume that call volumes in the 9 - 10pm slot would mirror the average level currently experienced in the 7 - 9pm slot.
- A7.59 In the first instance we examine the impact of changed call or message volumes on the revenues of our composite channel using the revenue share arrangements referred to in the previous section.
- A7.60 The results for the composite channel are shown in the table below. Note that all figures shown are relative to the current convention in place (9pm - 5.30am).

Revenue impact of scheduling restrictions on composite broadcaster

Start time:	22:00	23:00	00:00
End time:	05:30	05:30	05:30
Percentage reduction in voice calls	6%	14%	23%
Percentage reduction in SMS	0%	1%	3%
Reduction in revenue excl. VAT	£83,170	£203,252	£329,105
% Reduction in revenue excl. VAT	5%	12%	20%

- A7.61 For the composite channel, each hour between 9pm and 12am accounts for 6-9% of the total daily call volumes. The same hours account for a much smaller proportion of message volumes. In terms of channel revenues, each hour between 9pm and 12am accounts for 5-8% of total daily revenues.
- A7.62 The analysis shows that the later the scheduling restrictions become (i.e. the fewer hours available to channels in which to promote PRS of a sexual nature), the greater the net impact on a broadcaster. For example, a later schedule restriction to 10pm would therefore reduce the volume of calls by around 6%. Later schedule restrictions would reduce call volumes cumulatively, from 6% for 10pm to 23% for 12am restriction
- A7.63 The reduction in the volume of calls will have a similar reduction in revenues of 5% for 10pm restriction, to a cumulative reduction of 20% for a 12am restriction. For the composite broadcaster, this would represent a reduction in revenue per annum of £83k for 10pm restriction to £329k for 12pm.

⁴⁸ We have only modelled a series of hourly restrictions (e.g. 10pm, 11pm etc) rather than taking into account restrictions which could take effect on the half-hour (9:30pm, 10:30pm etc).

A7.64 For illustration purposes only, if we assume that all Adult Chat PTV channels make the same choices under the option and are impacted in the same way, grossing this figure up by 28 channels implies a potential reduction in revenue from later scheduling restrictions of £2m to £9m per annum. Based on the revenue share arrangements provided in the industry information, this would suggest a reduction in revenue for the Adult Chat PTV broadcasters collectively of approximately £1.5m from a 10pm restriction to £6.3m for a 12am restriction. In practice, variation among channels in operating hours and their choice of promotion would be likely to affect the scale of reduction.

A7.65 We have also modelled the revenue impact for high and low volume channels. These results are shown below.

Revenue impact of scheduling restrictions on high volume channel

Start time:	22:00	23:00	00:00
End time:	05:30	05:30	05:30
Percentage reduction in voice calls	9%	19%	30%
Percentage reduction of SMS	0%	1%	2%
Reduction in revenue excl. VAT	£138,987	£304,449	£476,670
% Reduction in revenue excl. VAT	6%	14%	21%

Revenue impact of scheduling restrictions on low volume channel

Start time:	22:00	23:00	00:00
End time:	05:30	05:30	05:30
Percentage reduction in voice calls	10%	20%	33%
Percentage reduction of SMS	1%	4%	8%
Reduction in revenue excl. VAT	£65,956	£133,578	£215,843
% Reduction in revenue excl. VAT	9%	18%	29%

A7.66 The 9pm-12am slot accounts for a high proportion of total daily call volumes for both the low and high volume channels (30-33%). Notably, this time slot also accounts for a higher proportion of message volumes for the low volume channels and therefore a greater potential reduction for the low volume channel (8%) than for the composite channel (3%).

A7.67 The revenue impact of tighter scheduling restrictions (in percentage terms) is greater for the low volume channel than the composite channel (around 50% greater). The revenue impact on the high volume channel is very similar to the composite channel (in percentage terms).

A7.68 Given the nature of the cost base of broadcasters, we consider that – at least for some reductions in call volumes – there may be some scope for broadcasters to reduce their variable cost base to mitigate the impact of any reduction in revenues. The actual final impact on channels in terms of profitability would depend on what

changes they could make to mitigate loss of revenue. However we recognise that overall a reduction in revenues is likely to lead to a reduction in profitability.

Telecoms/PRS Provider

- A7.69 Due to the revenue sharing arrangements in place between broadcasters and telecoms / PRS providers, any reduction in call volumes will also result in a decrease in the providers' revenues from PRS promoted on PTV. Obviously, this decrease in revenues will be smaller in monetary terms, as the providers take a lower share of the call revenue.
- A7.70 As stated above, under this option revenues of broadcasters would only be affected by potential tighter scheduling restrictions. Therefore, as above, we have estimated the impact that scheduling restrictions would have on the operators providing services for a composite channel. We have also estimated the different revenue impact if they are providing services for a high or low volume channel.
- A7.71 The different service providers involved are Originating Network Operators (ONO), Terminating Network Operator (TNO) and the PRS service provider. This impact on each related to an average, high and low volume channel is summarised in the table below.

Revenue impact of scheduling restrictions on Telecoms / PRS providers per broadcaster (based on Composite channel)

Start time:	22:00	23:00	00:00
End time:	05:30	05:30	05:30
Revenue impact on ONO			
Reduction in revenue excl. VAT	£3,191	£8,779	£14,397
% Reduction in revenue excl. VAT	2%	6%	10%
Revenue impact on TNO			
Reduction in revenue excl. VAT	£4,612	£11,201	£18,123
% Reduction in revenue excl. VAT	5%	13%	21%
Revenue impact on PRS provider			
Reduction in revenue excl. VAT	£3,087	£7,608	£12,330
% Reduction in revenue excl. VAT	5%	11%	18%

- A7.72 Tightening the restrictions by an hour, from 9pm to 10pm, reduces the revenue the PRS provider earns from the channel by 5%. Tightening restrictions further to 11pm reduces the revenues earned by a further 6%. If the restrictions are tightened to 12am, revenue earned from this channel declines by a further 7%, so a cumulative 18% decline in total.
- A7.73 For the terminating network operator, tightening scheduling restrictions would reduce revenues earned from the composite channel by 5-8%, for each additional hour restricted between 9pm and 12am. For originating network operators, tighter schedule restrictions would reduce revenues by 2-4% reduction in revenues earned

from this channel's operations, for each additional hour restricted between 9pm and 12am.

A7.74 We have also estimated the revenue impact if they are providing services for a high or low volume channel.

Revenue impact of scheduling restrictions on Telecoms / PRS providers serving per broadcaster (based on High Volume channel)

Start time:	22:00	23:00	00:00
End time:	05:30	05:30	05:30
Revenue impact on ONO			
Reduction in revenue excl. VAT	£4,815	£13,262	£20,924
% Reduction in revenue excl. VAT	2%	5%	7%
Revenue impact on TNO			
Reduction in revenue excl. VAT	£7,746	£16,769	£26,244
% Reduction in revenue excl. VAT	7%	15%	24%
Revenue impact on PRS provider			
Reduction in revenue excl. VAT	£5,126	£11,403	£17,863
% Reduction in revenue excl. VAT	5%	12%	19%

Revenue impact of scheduling restrictions on Telecoms / PRS providers serving per broadcaster (based on Low Volume channel)

Start time:	22:00	23:00	00:00
End time:	05:30	05:30	05:30
Revenue impact on ONO			
Reduction in revenue excl. VAT	£2,783	£6,080	£10,228
% Reduction in revenue excl. VAT	5%	11%	18%
Revenue impact on TNO			
Reduction in revenue excl. VAT	£3,639	£7,339	£11,829
% Reduction in revenue excl. VAT	9%	19%	30%
Revenue impact on PRS provider			
Reduction in revenue excl. VAT	£2,465	£5,020	£8,137
% Reduction in revenue excl. VAT	8%	17%	28%

A7.75 For telecoms operators providing services for the high volume channel, the percentage impacts on operators' revenues earned from the channel are very similar to the composite channel. For each additional hour restricted between 9pm and 12am, the PRS provider's revenues from the channel falls by 5-7%. For the

terminating network operator, and originating network operators, this figure is 7-9% and 2-3% respectively.

- A7.76 For telecoms operators providing services for the high volume channel, the percentage impacts on operators' revenues earned from the channel are greater. For each additional hour restricted between 9pm and 12am, the PRS provider's revenues from the channel falls by 8-11%. For the terminating network operator, and originating network operators, this figure is 9-11% and 5-7% respectively.
- A7.77 This suggests that the loss of revenue due to schedule restriction would follow a similar pattern as for PTV broadcasters, but obviously for lower overall monetary amounts as the telecoms providers take a lower share of the call revenue.
- A7.78 These figures are based on the impact along the industry supply chain for parties serving one PTV broadcaster. We recognise that there could be a particular effect on providers of PRS facilities where those firms support a number of Adult Chat PTV channels and where the revenue from these channels accounted for a significant proportion of the PRS facility provider's revenue. In such cases, the revenue impact would be multiplied by how many channels the PRS provider services. For those PRS providers that do specialise in Adult Chat PTV services, the impact could therefore be more significant.

Other Broadcasters

- A7.79 Under this option, it might be possible for other broadcasters to carry Adult Chat PTV featuring the promotion of PRS of a sexual nature, subject to schedule restrictions. This could potentially increase revenues to both Adult Chat PTV and other broadcasters for carrying services which may be distributed on a wider range of channels. Equally, this could simply cannibalise call revenues of the existing PTV channels, particularly if more broadcasters enter the market.
- A7.80 Also, some broadcasters might wish to carry spot adverts for PRS of a sexual nature, resulting in increased advertising revenues for some broadcasters. To the extent that sexual entertainment service providers choose to advertise the availability of their services on other channels, this could result in some additional advertising revenue. Data from broadcasters operating encrypted channels, where advertising of PRS of a sexual nature is permitted, suggests that the value of revenue from carrying adverts for these products was relatively low (less than 1% of their revenue). The impact of allowing other channels to carry advertisements might be to both grow revenues overall and/or cannibalise from encrypted channels. However, as these figures are relatively low in proportion to the revenues for the channels overall, we consider that the change will have limited financial impact on the channels concerned.

Option 3: Allow promotion of PRS of a sexual nature in spot adverts subject to scheduling restrictions, but with teleshopping promotion only allowed on encrypted channels

- A7.81 Under Option 3, the Advertising Code rules would allow for spot adverts for such services to be broadcast on general open access channels, subject to scheduling restrictions. However, promotion in long form would remain prohibited except on encrypted channels (as they would be under current rules).

- A7.82 This would mean that Adult Chat PTV channels would need to be encrypted in order to promote PRS of a sexual nature. They could, however, continue to promote non-sexual PRS if broadcast unencrypted.

Viewers

- A7.83 As with option 1, the modification or removal of Adult Chat PTV channels would not affect general viewers, few of whom come across them. However, the risk of offence from spot-advertising of adult sexual entertainment services, which under this option might replace long form promotion or substitute for spot advertising of non-sexual PRS, would be considerably increased.
- A7.84 In the viewer research the prospect of spot adverts for adult sexual entertainment PRS was rejected by almost all participants as exposure to it could not be controlled or contained. Only a minority of participants (primarily male) supported short form advertising as they felt the product was principally entertainment and in demand by consumers.
- A7.85 Spot adverts are not scheduled or otherwise listed in EPGs, and therefore have the potential to take viewers by surprise. Equally, it would be possible for broadcasters to schedule adverts that lasted several minutes in length which again could not be appropriately controlled or avoided in viewing. The research suggested that even for the minority who found spot advertising acceptable, extensive further restrictions would be required around the scheduling, duration, frequency and content of the adverts. It would be unlikely that general broadcasters could satisfy these conditions without significant resource and monitoring.

Consumers

- A7.86 The impact on existing consumers of Adult Chat PTV would be similar to Option 1. The impact on consumers depends on whether broadcasters choose to just encrypt their content, or change their content to promote non-sexual PRS on a 24-hour-a-day basis.
- A7.87 If Adult Chat PTV channels operate under encryption, those consumers that value the services highly enough are likely to be willing to register in order to continue using them, and therefore will not suffer significant detriment.
- A7.88 Casual consumers (who may value these services less) might not register, suggesting that they do not value these services as highly. Any detriment is likely to be small and offset at least in part by alternative viewing choices.
- A7.89 If, instead, Adult Chat PTV broadcasters chose to promote non-sexual PRS across all broadcast hours, the enjoyment of some consumers of content promoting PRS of a sexual nature would be reduced.

Adult Chat PTV Broadcasters

- A7.90 Adult Chat PTV broadcasters could either encrypt their service or move to promoting non-sexual PRS 24-hours-a-day.
- A7.91 In the same way as under Option 1, if they continued to offer PRS of a sexual nature behind encryption, broadcasters would need to pay to encrypt their service, increasing their cost base by 10-33% in the first year and 2-7% in subsequent

years. It is likely that there would also be a reduction in call volumes and therefore revenues at the same time.

- A7.92 Alternatively, Adult Chat PTV broadcasters could choose to extend the provision of non-sexual PRS to operate on a 24-hour-a-day basis. However, similarly to Option 1, this would be likely to result in a reduction of revenues of 46% for the average broadcaster.
- A7.93 However, under this option, spot advertising could now be provided on unencrypted channels. It is possible that PTV broadcasters could try to adapt their services to make use of spot advertising. For example, they could shift away from the current format of long form promotion and instead carry short-form adverts for services that are provided off-screen. However, Adult chat PTV broadcasters have suggested that many viewers enjoy watching the current format and viewing figures and call volumes would be significantly reduced if only spot adverts for PRS of a sexual nature could be broadcast.

Telecoms/PRS Provider

- A7.94 As under Option 1, any change in call volumes would affect the revenue of other parties in the PRS value chain. Under option 1, we estimated a reduction in revenue of £28,000 per annum for PRS facility providers, and £25,000 and £43,000 respectively for the originating and terminating network operators. As before, the impact could be more significant for PRS providers that do specialise in providing for Adult Chat PTV services.
- A7.95 However, this option would allow the promotion of PRS of a sexual nature which may be currently promoted in other media, to be advertised on TV. These services might benefit in increased call volumes from promotion in spot adverts on TV, allowing telecoms networks and PRS providers to offset losses connected with reduced calls to Adult Chat PTV.

Other Broadcasters

- A7.96 As under Option 2, it is possible that some broadcasters would choose to carry spot adverts for PRS of a sexual nature. This option might therefore lead to increased advertising revenues for some broadcasters, particularly if promotional activity was switched from long-form Adult Chat PTV to short form adverts.

Option 4: Allow promotion of PRS of a sexual nature on dedicated teleshopping channels subject to scheduling and labelling rules, but spot advertising remains only on encrypted channels

- A7.97 Under Option 4, spot adverts for PRS of a sexual nature would remain prohibited except on encrypted adult entertainment channels. The present scheduling restriction to 9pm would also continue to apply. However, the Advertising Code rules would be changed to allow teleshopping in respect of such services to be broadcast on open access channels licensed for the promotion of the services. The nature of the channels and content would need to be clearly indicated by positioning the channels in the "Adult" section of an Electronic Programme Guide.
- A7.98 This would mean that Adult Chat PTV channels could become teleshopping channels and promote PRS of a sexual nature, subject to scheduling restrictions and labelling conditions, without needing to be encrypted.

Viewers

- A7.99 The viewer research suggests that the majority of general viewers would find promotion of PRS of a sexual nature acceptable subject to certain restrictions, instead of either an outright ban or allowing relatively unrestricted promotion of the products on TV.
- A7.100 Viewers considered that Adult Chat PTV featuring PRS of a sexual nature was acceptable on channels dedicated to these services provided they could be clearly labelled and positioned in a specific part of the EPG. Adult Chat PTV channels are currently only found in a specific part of the EPG which is clearly labelled as “Adult” content. Therefore, viewers to these channels would have an expectation of what sort of material they are likely to encounter, and have the facility to avoid or block access to these channels.

Consumers

- A7.101 Under this option, PRS of a sexual nature would be available on unencrypted channels. Therefore, we consider that the impact on the majority of existing consumers of such services would be negligible since those consumers would be able to access such services in the same manner as they are currently able.

Adult Chat PTV Broadcasters

- A7.102 Under this option and the revised Advertising Code rules, the format of the service provided by Adult Chat PTV broadcasters would not need to change.
- A7.103 A channel opting to remain as editorial and comply with the Broadcasting Code would be significantly more limited in terms of the promotional activity of the channel than one under the Advertising Code.
- A7.104 For most broadcasters, the impact of this option on broadcasters depends only on the appropriate scheduling restrictions under the Advertising Code for promotion. Broadcasters currently restrict overtly sexual content (within which they promote adult sexual entertainment PRS as opposed to non-sexual PRS) to the period 9pm - 5:30am. Given the additional labelling and positioning requirements under this option, the existing scheduling restriction of 9pm (i.e. post-watershed) would be sufficient.
- A7.105 However, in the case of Adult Chat PTV channels wishing to operate on the Freeview platform, the requirement for an appropriate labelling and EPG position would mean that they are unable to meet the conditions of the revised rule for promotion of PRS of a sexual nature. The impact of this option therefore depends on whether they were to choose to broadcast on other platforms or change their format to promote non-sexual PRS and content only on Freeview. The impact under each of these choices would be as outlined in Option 2.

Telecoms/PRS Provider

- A7.106 The impact for telecoms networks and PRS providers would be negligible as Adult Chat PTV broadcasters would continue to offer their current format for promotion of PRS.

Other Broadcasters

- A7.107 The effect on other broadcasters would be to limit potential revenues from simulcasting or carrying content promoting PRS of a sexual nature if they are not licensed for the purposes of promoting the services and are not in the Adult section of the EPG.
- A7.108 This might result in a loss of revenue to some broadcasters either currently or anticipating carrying Adult Chat PTV featuring PRS of a sexual nature, depending on alternatives available. However, we consider that other broadcasters could equally enter the market as an Adult Chat PTV channel.
- A7.109 The option would also restrict the potential for future revenues from spot advertising from PRS of a sexual nature on unencrypted channels. However, such revenue is not currently available under the Advertising Code since spot advertising is only permitted under encryption. Revenues from spot advertising would therefore remain consolidated with encrypted channels.

Annex 8

Impact assessment of options for TV promotion of psychic practices

Introduction

- A8.1 Ofcom must take into account the impacts on all stakeholders (including viewers and consumers; PTV broadcasters; telecoms networks and PRS providers; and non-PTV broadcasters) of any changes to the Broadcasting Code and the Advertising Code.
- A8.2 The Advertising Code rule 10.3 currently prohibits advertisements for products that rely on belief in psychic or occult phenomena. It exempts three types of product from that prohibition: pre-recorded tarot PRS, publications that discuss tarot without recommending it and PRS that readers are likely to regard as entertainment and that offer advice that would obviously apply to large sections of the population (e.g. newspaper horoscopes). Therefore, the advertising of live psychic readings on TV - whether in long form or short form - is currently prohibited under the Advertising Code.
- A8.3 As set out in section 7, Ofcom has identified a range of options for regulation. In considering those options, Ofcom has assessed the impact of such options on affected stakeholders.
- A8.4 There are currently only two dedicated Psychic PTV channels, and therefore any financial information about the impact of changes could have been readily attributable to the individual channels. Ofcom is required to ensure that confidential information which relates to a business is not disclosed and therefore we have not presented any quantitative assessment of the impact of potential changes to the regulatory system either on an individual or aggregated basis in this impact assessment.

Stakeholders affected by potential regulatory changes

- A8.5 In considering the impact of the identified options, Ofcom has identified the following groups of stakeholders as those likely to be affected by regulation in this area:
- A8.6 **Viewers – general TV viewers, who may come across PTV content or promotion of PRS products. These include minors, other vulnerable groups, and those responsible for their viewing.**
- The viewer research suggests that psychic content on TV has a risk of offence to some viewers from some of the practices it portrays. It is therefore appropriate to consider the extent to which any option for the regulation of Psychic PTV is sufficient to meet the requirements of viewers in line with Ofcom's duties.
- A8.7 **Consumers – viewers who have specifically chosen to watch and/or interact with PTV content, or consume PRS products.**

The ITC Beyond Entertainment (2001) research⁴⁹ identified a potential risk of harm to some vulnerable people from services that include occult practices or offer life-changing advice.

The viewer research for this consultation suggested that a minority of participants who were mainly female perceived that any psychic reading posed a risk of harm due to the vulnerable nature of callers.

The risk of harm to minors is limited by the PhonepayPlus rules for live PRS providers, which prohibits use of live PRS to under-18s.

The number of viewers to Psychic PTV cannot be fully quantified. In quantitative research for the 2007 Consultation, 3% of TV viewers claimed to have viewed Psychic PTV regularly. Viewers derive a benefit from the availability of Psychic TV channels in terms of viewer choice. 1% of TV viewers claimed to have called a service promoted on the Psychic PTV channels. These consumers derive benefit from access to these services in that they are prepared to pay for services promoted on TV.

A8.8 PTV broadcasters – broadcasters operating one or a number of dedicated PTV channels.

The information supplied by the Psychic PTV broadcasters suggests that almost all of their current revenue results from the promotion of live psychic readings delivered via PRS. There would therefore be a significant impact on their economic viability were they unable to promote such services.

A8.9 Non-PTV broadcasters – broadcasters operating other channels, which could have the option of simulcasting or broadcasting PTV services in teleshopping slots or showing spot advertising for services.

A small number of non-PTV broadcasters currently carry Psychic PTV services.

A8.10 PRS providers – providers who facilitate interactivity with PTV content and PRS products, including phone network operators.

The information supplied by the PRS providers suggests that the majority are relatively diversified suppliers of PRS products, for whom Psychic PTV channels represent one relatively small source of business.

Options for advertising rules for psychic practices

A8.11 In considering the appropriate regulatory framework for the regulation under the Advertising Code, we consider that there are four options:

1. Retain the current rules, prohibiting promotion of psychic and occult practices (with the current exceptions for general pre-recorded PRS)
2. Extend the exceptions to allow promotion of live personal psychic services, subject to restrictions on the specific type of practice;
3. Allow promotion of these specific live personal psychic services in spot adverts only;

⁴⁹ www.ofcom.org.uk/static/archive/itc/.../beyond_entertainment.pdf

4. Allow promotion of these specific live personal psychic services only in dedicated teleshopping channels, subject to labelling rules.

Ofcom has assessed the impact of each option on affected stakeholders.

Option 1 – retaining the current rules prohibiting promotion of psychic practices, with limited exceptions

- A8.12 Under Option 1, the prohibition on occult and psychic products except for the current excepted services would be maintained.

Viewers

- A8.13 In the viewer research approximately most participants said they are unaware of Psychic PTV services, and only a small minority of participants claimed to have viewed the channels more than once. Arguably, viewers in general would therefore be largely unaffected were the channels to be modified or removed by their broadcasters.
- A8.14 The viewer research also indicates that most participants felt that Psychic PTV should be able continue to broadcast, subject to appropriate restrictions. A few participants (who were predominantly women) argued that the content on the channels should be banned outright.

Consumers

- A8.15 Research for the 2007 Consultation suggested that about 3% of TV viewers regularly watch Psychic PTV services, with 1% of TV viewers having called into one of the channels. We assume that these viewers and consumers derive benefit from watching Psychic PTV and calling the PRS promoted therein. A prohibition on promotion of all live psychic services would therefore reduce this benefit. Many psychic reading services are long-established, legal, harmless entertainment and promoted in a number of other media.

Psychic PTV Broadcasters

- A8.16 Without changes to the Advertising code, the two Psychic PTV channels currently broadcasting would not be able to continue to operate. Their choices would be limited to either bringing their services into compliance with the revised Broadcasting Code rules as editorial, to operate as teleshopping but promoting excepted products only, or to cease operations altogether.
- A8.17 It is likely that Psychic PTV services would have to alter their operating model considerably under either choice. The information provided suggests that the reduction in call volumes could reduce revenues to the extent that the services become unviable. As explained above, we are unable to set out the financial impact for two particular broadcasters, to protect confidential data.

Telecoms/PRS Provider

- A8.18 Due to the revenue share arrangements between PTV broadcasters and PRS providers, any reduction in call volumes would result in a decrease in their revenues from this service. However, it is limited compared with the PTV broadcasters, as PRS providers have a diverse client base and some may also operate psychic readings via PRS that are advertised in other media.

Other Broadcasters

- A8.19 We understand that other broadcasters currently earn fees from simulcasting parts of the main Psychic PTV channels. Under this option, this content and revenue from it would not be available. It may be that other broadcasters could mitigate this reduction in revenue by broadcasting other programming or simulcasting other services.

Option 2 – extend the exceptions to also allow promotion of specific live personal psychic services

- A8.20 Under Option 2, the general prohibition on psychic and occult products would be maintained, but all products excepted from the prohibition and could be promoted in either teleshopping or spot adverts.

Viewers

- A8.21 As set out in option 1, most general viewers are unaware of Psychic PTV. The majority are not opposed to its operation, subject to restrictions that allow it to be controlled and contained. However, under this option, wider viewing audiences – including minors and vulnerable people - would be likely to come across increasing amounts of promotion of psychic practices in spot advertising on general channels, without necessarily the context that the dedicated channels provide.
- A8.22 In the viewer research, the majority of participants expressed particular reservations about the promotion of psychic practices on mainstream channels, as it would conflict with their wish to control and contain exposure to them.

Consumers

- A8.23 Under this option, the promotion of specific psychic services would continue to be possible. The current PRS products would continue to be promoted in long form on Psychic PTV, and potentially in short form adverts. Consumers would therefore continue to be able to access Psychic PTV in the form currently available and may in fact obtain access to additional spot advertising of psychic services. Access to products for such consumers would not therefore be adversely affected by such a change in regulation.

Psychic PTV Broadcasters

- A8.24 Under this option, the format of the service provided by broadcasters would not need to change, and would allow Psychic PTV to continue to broadcast under its current operating model as teleshopping. The psychic services promoted would be limited to the excepted categories: these tend to be the most prevalent services on the existing Psychic TV channels.
- A8.25 Under this option, spot advertising of psychic services would be permitted. If PTV broadcasters also made use of this, it could lead to higher call volumes and therefore revenues. On the other hand, it is possible that other providers could promote themselves via spot advertising, thereby increasing competition for callers, and possibly depressing call volumes for the existing broadcasters.

Telecoms/PRS Provider

- A8.26 Providers of psychic services in the excepted categories may benefit from wider availability of promotion for the products, and a potential uplift in calls to their PRS.
- A8.27 However, an indirect effect of greater competition between broadcasters and providers might be to depress call pricing and revenues in the longer term.

Other Broadcasters

- A8.28 Broadcasters that earn fees from simulcasting the main two Psychic PTV channels would continue to receive this benefit. Additionally, broadcasters could potentially carry spot advertising for services. Advertising for live psychic reading services is commonplace in other media, particularly newspapers and magazines, and has the potential to be an additional source of revenue.

Option 3: Allow promotion of specific live personal psychic services in spot adverts, but with teleshopping promotion prohibited;

- A8.29 Under this option, specific live personal psychic services could be promoted in spot adverts, but not in long form as teleshopping. This option would limit the Psychic PTV channels from operating as they do currently.

Viewers

- A8.30 The viewer research suggests that the majority of participants would not accept spot advertising for psychic services outside of channels that are dedicated to featuring psychic practices and are clearly labelled as such. Of the participants who would accept spot advertising (who were predominantly men) of psychic services this was largely on the basis that they considered the product to be no different to any other entertainment chat line service.

Consumers

- A8.31 Under this option, psychic services could be promoted through spot adverts to consumers who would then be able to access them as before.
- A8.32 However, as the Psychic PTV channels would have to modify their services and may become unviable, they may lose access to Psychic PTV and its particular products. This would also result in a reduction in choice for viewers.

Psychic PTV Broadcasters

- A8.33 Under this option, the two Psychic PTV channels currently broadcasting would not be able to operate as now. Their choices would be limited to bring their services into compliance with the Broadcasting Code or to cease operations.

Telecoms/PRS Provider

- A8.34 Due to the revenue share arrangements between broadcasters and the telecoms / PRS providers, a reduction in call volumes from changes by Psychic PTV broadcasters would have a negative on service providers, albeit more limited in terms of percentage of revenues as they are more diversified.

- A8.35 However, this may be offset where other service providers are able to advertise excepted products via spot adverts.

Other Broadcasters

- A8.36 As in option 1, the revenue earned by other broadcasters from simulcasting the main two Psychic PTV channels may no longer be available. The financial impact would depend on revenues from alternatives.

Option 4: Allow promotion of specific live personal psychic services in dedicated teleshopping channels subject to labelling restrictions, but spot advertising remains prohibited

- A8.37 Under this option, specific live personal psychic services could be promoted in teleshopping, but not in spot adverts. This would allow the promotion of live personal tarot, horoscope and astrology readings via PRS to be promoted in long form on channels dedicated to this purpose, but not in spot advertising (which would only be available to the current pre-recorded excepted services). Under this option, long form channels wishing to promote the specific psychic services would be clearly labelled and sign-posted within an appropriate section of an Electronic Programme Guide.

Viewers

- A8.38 In the viewer research, the majority of participants supported an option where psychic services would be limited to specialist channels clearly marked within the EPG. According to participants, promotion should only be allowed in clearly sign-posted areas so as to reduce exposure to general and vulnerable viewers.

Consumers

- A8.39 Under this option, specific psychic services would be available to consumers. The products would be those considered for entertainment purposes only and non-harmful, and offered in a well-regulated environment. Therefore the potential risk of harm to vulnerable consumers would be very limited.

Psychic PTV Broadcasters

- A8.40 This option would allow Psychic PTV broadcasters to continue to broadcast under their current operating model as teleshopping.
- A8.41 However, they will no longer be able to simulcast on other channels due to the requirements about clear signposting and labelling. Call volumes (and therefore revenues) might be lower as a result.

Telecoms/PRS Provider

- A8.42 Providers of these services would benefit from availability of and promotion for specific psychic services to customers.

Other Broadcasters

- A8.43 Broadcasters that currently earn fees from simulcasting the main two Psychic PTV channels would no longer be able to do so, as the channels would not be clearly

labelled as featuring promotion of psychic practices and in an appropriate position in the EPG.

- A8.44 However, the lost revenues might be offset (at least in part) by simulcasting other content. Other broadcasters also have the opportunity to introduce their own dedicated Psychic PTV services.

Annex 9

Glossary of terms

Premium rate services (PRS)	Premium rate services offer consumers some form of content, product or service accessed via fixed or mobile telephones. These are charged to the user's phone bill at a premium to their normal call rate, or can be paid for via credit-card or similar payment method.
Premium rate services (PRS) of a sexual nature	Premium rate services that include sexual content and material, also known as adult sexual entertainment PRS. Under PhonepayPlus rules, these must be prefixed to distinguish them from other chat lines.
Non-sexual entertainment premium rate services (PRS)	Non-sexual premium rate services. These are also known as flirt lines or chat lines. These may be advertised under current Advertising Code rules, subject to PhonepayPlus rules.
Psychic live personal services	Services featuring live personal tarot, astrology, palmistry or horoscope readings with psychic practitioners. These are typically provided via PRS.
Participation TV	Ofcom's term for TV services including entire programmes, blocks of programmes and indeed channels predicated – in terms of both the content itself and the funding of that content – on the use of premium rate services. Examples include Dating, Quiz, Adult chat and Psychic PTV.
Adult chat PTV	Participation TV services that typically feature non-sexual PRS in daytime hours and PRS of a sexual nature from 9pm to 5:30am.
Psychic PTV	Participation TV services that feature live personal psychic readings or practices that are typically provided via PRS.
Long form promotion	Long-form advertising for a product or service, across an entire programme, block of programmes or entire channel or promotion, is known as teleshopping. Teleshopping is a particular category of broadcast licence for services that consist of direct offers of goods or services in return for payment.
Short form promotion (spot advertising)	An advert for a product or service, typically 10-30 seconds in length, that is broadcast in scheduled advertising breaks on any TV channel.
PhonepayPlus	PhonepayPlus is the organisation that regulates phone-paid products and services (including premium rate services) in the UK
Broadcasting Code	The Broadcasting Code is a Code of Practice for UK licensed broadcasters for the editorial content that they carry. It is operated by Ofcom.
Advertising Code	The Television Advertising Standards Code is a Code of Practice for UK TV broadcasters for the advertising content that they carry. It is operated by BCAP and the Advertising Standards Authority under a co-regulatory agreement with Ofcom.
Terrestrial channels	BBC1, BBC2, ITV1, Channel 4, S4C and Five
General entertainment channels	Channels that show general entertainment programming i.e. the four public service channels (BBC, ITV, Channel 4 and Five) or digital only channels (ITV2, Living TV, Virgin 1 etc). Most general entertainment channels are broadcast free-to-air. However, this also includes channels that are available in a digital or cable TV package the subscriber has

	purchased with no further charges or protection systems built-in for viewing any one particular channel or programme.
Sky	Digital satellite television that requires a subscription. You need to buy a satellite dish and digital set top box. You can choose from a number of packages which provide a variety of television and radio programmes.
Freeview	Digital television which involves no subscription. You can either buy a set-top box and plug it into the TV aerial socket or buy a digital TV with a built in set-top box. Freeview provides approximately 50 free-to-air digital television channels including BBC, ITV, Channel 4 and Five as well as channels such as Sky News, Virgin1, E4, CBeebies etc, and approx.25 radio stations.
FreeSat	Digital television which involves no subscription. You buy a satellite dish, and digital set top box and plug it in to your aerial. FreeSat provides over 140 television and radio channels.
Cable	You subscribe to a package with a provider such as Virgin. Television is provided via cable and you also need to buy a set-top box. You can choose from a number of packages which provide a variety of television and radio programmes.
Electronic Programme Guide (EPG)	<p>The Electronic Programme Guide is a menu system which users can scroll up or down to select a channel they want to watch. It also contains the title and brief information about the channel or programme being viewed.</p> <p>The Electronic Programme Guide on Sky, Cable and Freesat groups channels together by theme. There are for example headings for general entertainment channels, Adult Channels, children's channels, music and teleshopping channels and radio.</p>
Optional PIN protection /Parental Pin control	An optional form of protection which enables users to make access (through their set top box) conditional on entering a PIN. This can be applied to particular categories of programmes and/or channels or whole areas of the EPG. These are also known as parent controls, for example, to restrict adult channels.
Mandatory or Broadcaster PIN protection	A form of protection where it is mandatory for the broadcaster to tag particular channels or content as suitable for "15" and "18" which will require a user PIN to allow access to this content. Broadcaster PIN protection is used for rated films broadcast in daytime hours, or for 'Adult-sex' channels at any time of day.