



Participation TV: how should it be regulated?

Pre-consultation Issues Paper

Issues Paper

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Section 1

Introduction

Reasons for consulting on Participation TV

- 1.1 Ofcom intends to consult publicly and in detail in early 2007 on how Participation TV should best be regulated, with a view to finding the right balance between protecting viewers and protecting consumers, ensuring consistency with the legal framework and respecting broadcasters' freedom of expression.
- 1.2 For the purposes of this Issues Paper, Participation TV refers to those television services (including but not limited to dedicated channels) that rely wholly or mainly on viewers paying for an opportunity to participate in the service. These services tend to be dominated by repeated messages to viewers – verbal or in on-screen graphics (usually both) – to call a premium rate number¹. This content may take a number of forms, including quiz services, adult chat, psychic readings and dating.
- 1.3 There are a number of drivers behind Ofcom's decision to consult on Participation TV in 2007:

Public and viewer concerns

- 1.4 There is some growing public concern about Participation TV. Viewers are often repeatedly encouraged to spend money to interact with the television service; however, they may not always fully understand the charges involved or indeed what they are getting in return. Of the Participation TV genres, TV quiz services tend to generate the most concerns from viewers. In November 2006, quiz services were the subject of a Culture Media and Sport Select Committee inquiry. Ofcom, ICSTIS² and the Gambling Commission were among the parties asked to provide submissions³.

Appropriate level of consumer protection

- 1.5 Ofcom has a duty under the Communications Act 2003 to further the interests of citizens and consumers. Ofcom's Broadcasting Code (which applies only to editorial and not to advertising) is concerned with editorial standards in programmes, for example, protection of under 18s and accuracy in news. This is in contrast with the BCAP⁴ Television Advertising Standards Code ("the BCAP Advertising Code"), which focuses on consumer protection; for example, to ensure that advertisements do not make misleading claims⁵. It could be argued that it is in the interests of viewers that, where content contains repeated selling messages and commercial transactions are significantly involved, such content should be regulated as advertising, not editorial.

¹ For further discussion of Participation TV, see Section 3.

² Independent Committee for the Supervision of Standards of the Telephone Information Services

³ See Section 3 for further discussion of TV quiz services

⁴ Broadcast Committee of Advertising Practice

⁵ Ofcom's relationship with the advertising regulators is discussed in Section 2

Separation of editorial content and advertising

- 1.6 A fundamental principle of European broadcasting legislation is that advertising and editorial must be kept separate (“the separation principle”)⁶. However, Participation TV services often appear to have characteristics of both. This presents challenges in regulating the sector, both now and in the future. One key question we need to consider is whether Participation TV should be categorised as editorial, advertising or as a “hybrid” of the two, or indeed whether there is some other way forward.

Circumvention of advertising prohibitions

- 1.7 The BCAP Advertising Code prohibits advertisements for live adult chat services on unencrypted channels and for products or services concerned with the occult or psychic practices. However, there are a number of TV services, currently permitted as editorial services, offering adult chat or psychic readings. These services contain repeated invitations to viewers to call a premium rate line. It could therefore be argued that they are essentially commercial in nature and, in effect, a form of advertising. There is therefore also an argument that one of the consequences of broadcasting under the auspices of an editorial service is that these services are circumventing the advertising prohibitions.

Stakeholders’ desire for greater clarity and consistency

- 1.8 From time to time, we receive queries from broadcasters about certain Participation TV content which appears to exceed what is permitted under the Broadcasting Code. Parties interested in applying for a broadcast licence also need to know how the service they intend to provide will be categorised and therefore regulated.

Purpose of this Issues Paper

- 1.9 This Issues Paper is intended to:
- inform stakeholders and the wider public of the reasons for our interest in – and potential concerns regarding - Participation TV;
 - provide an overview for relevant stakeholders, and other interested parties, of the proposed scope and purpose of the formal consultation in 2007; and
 - elicit views and information – on a confidential basis where requested – that will help us with our early thinking, ensuring that we correctly identify the relevant issues and workable regulatory options to consider in the consultation.
- 1.10 This is not intended to be a consultation. Any views expressed or representations made in response to this Issues Paper will help inform the formal consultation in 2007 but will not be taken into account in assessing any policy options proposed in that consultation. Stakeholders will have the opportunity to make written submissions on those matters when the consultation document is issued in 2007.

Developments in the use of premium rate services on TV

- 1.11 Terrestrial channels have been using premium rate telephony for twenty years or so, essentially since premium rate charging mechanisms were introduced. For many years, such use was confined to phone-in competitions for viewers, typically in

⁶ See Section 2 for further discussion of the regulatory background

genres such as sports and magazine programming, including breakfast television. These viewer competitions were generally simply an element of programming, continuing a long tradition of draws and competitions offered by channels and intended to encourage viewer involvement and loyalty.

- 1.12 However, with the advent of multi-channel television in the early 1990s, premium rate competitions and other premium rate applications, such as viewer voting, started to become more common in programming. Since then, digital television, which has greatly increased the capacity for new channels, and declining revenues from traditional spot advertising have sharpened efforts to generate income in an increasingly competitive market and driven the development of new revenue models. Premium rate mechanisms have been prominent among these.
- 1.13 There are now entire programmes and indeed channels dedicated not only to premium rate-based quizzes of varying difficulty (“TV quiz services”), eg ITV Play which launched in April 2006, but also to other genres predicated on the use of premium rate services, for example adult chat and psychic readings. A key characteristic of these Participation TV services is frequent, and sometimes constant, messages to viewers to call (or text) one or more premium rate numbers.
- 1.14 Whilst Participation TV services currently tend to rely on premium rate telephony, there may be other payment mechanisms, eg via credit card, and it is possible that other models may emerge in the future.

Section 2

Regulatory background

Ofcom's statutory duties

- 2.1 In discharging its functions under the Communications Act 2003 ("the Act"), Ofcom's principal duty is to further the interests of citizens and consumers⁷. We are required to secure a number of other matters including maintaining a sufficient plurality of providers of different television services⁸ and the availability throughout the UK of a wide range of television services⁹.
- 2.2 As part of its duties in relation to broadcasting, Ofcom is responsible for setting broadcast standards for the content of programmes. The relevant objectives¹⁰ to be secured by these standards include:
- that persons under the age of eighteen are protected;
 - to prevent the inclusion of advertising which may be misleading, harmful or offensive; and
 - to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material.
- 2.3 In setting standards, Ofcom must have regard to a number of matters¹¹ 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.
- 2.4 Ofcom must secure such other standards applicable to particular descriptions of programmes as may be appropriate for securing the above objectives¹². In addition in securing the objectives, Ofcom may include provisions prohibiting advertisements and methods of advertising in particular circumstances¹³.
- 2.5 In setting standards Ofcom must take account of its obligations under the Television Without Frontiers ("TWF") Directive¹⁴. Ofcom may include conditions in relation to

⁷ section 3(1)

⁸ section 3(2)(d)

⁹ section 3(2)(e)

¹⁰ section 319(2)

¹¹ section 319(4)

¹² section 319(5)(b)

¹³ section 321(1)(b)

¹⁴ Directive (89/552/EEC) as amended by (97/36/EC)

any television licensable content service or any digital television programme service for securing compliance with international obligations¹⁵.

The Co-regulatory System of Broadcast Advertising Regulation

- 2.6 The Act gives Ofcom duties towards the regulation of advertising. However, Ofcom has contracted out day-to-day responsibility for most of those duties to the Advertising Standards Authority (“ASA”) which had previously been responsible for non-broadcast advertising alone¹⁶.
- 2.7 Enabled by a statutory instrument¹⁷ and a Memorandum of Understanding, the co-regulatory arrangements agreed between Ofcom and ASA gave the ASA responsibility for handling complaints and adjudicating on commercials’ compliance with the advertising codes. Ownership of the codes, guidance notes and other rules passed to the Broadcast Committee of Advertising Practice (“BCAP”).
- 2.8 Rules on the amount and distribution of advertising, on programme sponsorship and on the proscription of political advertising remain with Ofcom. The powers of sanction (including fines and the removal of licences) created by the Act are also reserved to Ofcom.
- 2.9 Under the co-regulatory scheme, therefore, ASA is responsible for operating the broadcast advertising standards system for all types of broadcast advertising, including teleshopping and self-promotional channels. Ofcom acts as a statutory backstop, if necessary by enforcing sanctions on broadcasters in the very few cases where ASA is unable to secure a satisfactory outcome. The co-regulatory regime contains all the same regulatory instruments and penalties as did the system when operated solely by Ofcom.
- 2.10 A clear and logical division exists for the roles of Ofcom and ASA in ensuring protection for viewers: editorial and sponsorship content is overseen by Ofcom, advertising by ASA.

European legislation

- 2.11 It is a fundamental principle of European broadcasting regulation that advertising and editorial, that is programming, must be kept separate. 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.
- 2.12 Article 10 (1) of the TWF Directive provides:

¹⁵ section 335 of the Act

¹⁶ To accommodate their new role in regulating broadcast advertising, the pre-existing, self-regulatory ASA, its industry arm the Committee of Advertising Practice (CAP), and the ASA’s separate treasurer, the Advertising Standards Board of Finance (ASBOF) were complemented by broadcast equivalents: ASA(B), BCAP and BASBOF. However, the system is designed to work as a unitary function as far as possible. The councils of ASA and ASA(B) have 10 of 13 members in common, and the memberships of CAP and BCAP, and of ASBOF and BASBOF, also overlap. ASA, ASA(B), CAP and BCAP share a secretariat. For simplicity, we refer in this document just to ASA, BCAP and BASBOF.

¹⁷ The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004

“Television advertising and teleshopping shall be readily recognizable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means.”

- 2.13 Article 18 limits the amount of transmission time that may be used for advertising and teleshopping.
- 2.14 ‘Television advertising’ is defined in Article 1(c) as *“any form of announcement broadcast whether in return for payment or for similar consideration or for broadcast for self-promotional purposes by a public or private undertaking 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.”*
- 2.15 ‘Teleshopping’ is defined in Article 1(f) 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.”
- 2.16 The TWF Directive also refers to ‘programmes’ but does not define the term.
- 2.17 The European Union is currently discussing the revision of the TWF Directive. The European Council, based on proposals of the European Commission, has reached a “General Approach”¹⁸ on amending the present Directive and renaming it the “Audiovisual Media Services Directive”. It is widely expected that agreement on a new Directive will be reached by the first half of 2008. The separation principle remains unchanged in all proposals to amend the TWF Directive, as is the definition of television advertising, which is now one category under the new concept of “audiovisual commercial communications”, the others being sponsorship, teleshopping and product placement.
- 2.18 In addition to reflecting the requirements of the Act and the TWF Directive, the Broadcasting Code has been drafted in the light of the Human Rights Act 1998 and the European Convention on Human Rights (“the Convention”). In particular, the right to freedom of expression, as expressed in Article 10 of the Convention, encompasses the audience’s right to receive creative material, information and ideas without interference but subject to restrictions proscribed by law and necessary in a democratic society.

Types of service that may be provided under a broadcast licence

- 2.19 A service will be licensable if it falls within one of the statutory licence definitions in the Act. Ofcom can only license a service if the provider of that service (“the broadcaster”) falls under UK jurisdiction in accordance with the TWF Directive.
- 2.20 2Television services require different licences depending on delivery platform. Put simply, 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.

¹⁸ “General Approach” means a shared understanding between the Member States on the key features of the proposal that stops short of full political agreement on the text.

- 2.21 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). In each case, the licence obliges the licensee, among other matters, to comply with the Rules on the Amount and Distribution of Advertising (discussed further below). Ofcom's broadcast licensing guidance notes describe these three types of service as set out below:
- 2.22 An editorial service is a "normal" programme service, with conventional programme material and scheduled advertising breaks. The majority of television channels (including electronic programme guides) fall within this category.
- 2.23 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.
- 2.24 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.
- 2.25 If broadcasters wish to change the nature of their service, eg from teleshopping to editorial, or the name of the service the change must be agreed with Ofcom in advance. It will then be regulated by the appropriate body under the relevant code.

Overview of Ofcom's responsibilities

- 2.26 As mentioned above, Ofcom is required under the Act and the Broadcasting Act 1996 (as amended) to draw up a code for television and radio, covering standards in programmes, sponsorship, and fairness and privacy. Ofcom therefore published a new Broadcasting Code in May 2005; this came into force in July 2005.
- 2.27 Section 319 (2) of the Act provides that, in setting standards for broadcast content, Ofcom must have regard to, amongst other things, the desirability of maintaining the independence of editorial control over programme content. Section 10 of the Broadcasting Code (Commercial references in programmes) reflects both this and the requirements of the TWF Directive.
- 2.28 Section 10 of the Broadcasting Code (set out in full at Annex 1 of this paper) 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 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 may be used in programmes only in certain limited circumstances, that is, where:

- the PRS is a “programme-related service” as defined in the Broadcasting Code, ie 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”, eg SMS updates from *Channel 4 News*; or
- the PRS “forms part of the editorial content of the programme”, eg viewer voting in *Big Brother*, viewer competitions on *GMTV*.

2.29 Section 322 of the Act gives Ofcom the power to give directions to its licensees on the amount, scheduling and presentation of advertising. The relevant rules are contained in Ofcom’s Rules on the Amount and Distribution of Advertising. Rules regarding the content of television advertising are administered by the ASA.

BCAP Television Advertising Standards Code and BCAP Rules on the Scheduling of Television Advertisements

2.30 The BCAP Television Advertising Standards Code (“the BCAP Advertising Code”) and the BCAP Rules on the Scheduling of Television Advertisements set 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 Issues Paper, the rules include explicit scheduling restrictions on the advertising of adult chat services (Rule 11.1.2) and particular content limitations on the advertising of psychic reading services (Rule 10.3) and dating services (Rule 11.7).

Amount and distribution of advertising

2.31 The Rules on the Amount and Distribution of Advertising recognise a number of sub-categories of advertising. In particular, they provide for all advertising channels consisting of either teleshopping or self-promotional content. General editorial channels may also carry teleshopping, both in the form of short ‘spot’ advertisements and longer ‘windows’, of a minimum 15 minutes duration. The maximum time per day allowed for such windows is three hours. Self-promotional channels carry a particular kind of advertising in which the broadcaster promotes its own products, services or channels. Both teleshopping and self-promotional channels are prohibited from carrying editorial/programming material.

2.32 The public service broadcasters (“PSBs”) that carry advertising (that is, Channel 3 licensees, Channel 4 and Five) are not permitted the three hour teleshopping windows i.e. there is no additional airtime for teleshopping on these channels. They may run long-form advertisements, including teleshopping, between midnight and 6am. However, during this period they are still limited to a maximum of 12 minutes of advertising in any one clock hour. The minutage also counts towards their hourly average daily spot advertising allowance (seven minutes across the day, eight minutes in peak).

Sanctions

2.33 In respect of advertising, the ASA has the power to require broadcasters to remove or suspend advertisements. In addition, Ofcom has a range of sanctions it may impose on broadcasters found in serious breach of the codes, whether in respect of

editorial or advertisements. These include a direction to broadcast a summary of Ofcom's adjudication, a financial penalty and, in the most serious of cases, the revocation of a licence.

Other regulatory authorities

- 2.34 ICSTIS¹⁹ 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 Practice.
- 2.35 Among other things, ICSTIS requires:
- clear and accurate pricing information;
 - honest advertising and service content; and
 - appropriate and targeted promotions.
- 2.36 ICSTIS 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.
- 2.37 The Gambling Commission (the regulatory body for all commercial gambling in Great Britain with the exception of spread betting and the National Lottery) has an interest in TV quiz services (discussed further in Section 3).

¹⁹ Independent Committee for the Supervision of Standards of the Telephone Information Services

Section 3

Proposed scope of the consultation

Range of Participation TV services to be included in the consultation

- 3.1 We believe that the focus of the formal consultation in 2007 should be: how should the Participation TV sector best be regulated, in order to ensure that consumers are adequately protected and compliance with the law, in particular the separation principle?
- 3.2 The term “Participation TV” is not precise and could be interpreted as covering a very wide range of services. For the purposes of the consultation, we propose to define it as television services (including but not limited to dedicated channels) that rely wholly or mainly on viewers paying for an opportunity to participate in the service. These services tend to be dominated by repeated messages to viewers – verbal or in on-screen graphics (usually both) – to call a premium rate number and, whilst it is of course a subjective judgement, it is sometimes unclear what the editorial content is other than those messages to viewers. Key examples are TV quiz services, adult chat and psychic readings. We also intend to consider television services currently categorised as teleshopping (a form of advertising), such as dating channels, as a form of Participation TV.
- 3.3 At the other end of the spectrum of content based on viewer participation are editorially-driven programmes, where PRS is simply an element of the material and it is clear that the PRS contributes to the editorial content of the programme, eg some music video shows and Channel 4’s *Big Brother*. We therefore do not intend to bring this type of material within the scope of the formal 2007 consultation. Nor are we intending to include within the scope those interactive “red button” services that do not involve viewers making a payment.

Means of participation by viewers

- 3.4 Current Participation TV models tend to be based upon premium rate telephony, including text messaging. We recognise, however, that premium rate telephony is just one form of payment mechanism. Participation TV services may also involve the use of red button interactivity or payment to a call centre via credit card, and it is possible that other models may emerge in the future. For the consultation, we are proposing to develop our understanding of the different models and we would therefore welcome any information in this regard in response to this Issues Paper.

Editorial, advertising, or something else?

- 3.5 Whilst Ofcom wishes to encourage both alternative sources of revenue and diverse, innovative programming, the use of PRS in editorial must be consistent with the separation principle and the specific provisions in the Broadcasting Code. Persistent exhortations – verbal or visual - to viewers to call a PRS could be viewed essentially as selling messages, ie messages selling the PRS. The more prominent the selling messages in a programme - and the less clear the contribution of the PRS to any wider editorial content - the more that the material resembles advertising. This therefore raises questions under Section Ten of the Broadcasting Code.

- 3.6 However, the Broadcasting Code, and indeed the Act and the TWF Directive, were not drafted with Participation TV in mind. The sector has developed rapidly and Ofcom proposes to consider whether:
- particular genres that to date have been categorised as editorial, eg adult chat, are in fact more like advertising, and those that to date have been categorised as teleshopping (ie advertising), eg dating channels, are in fact more like editorial;
 - there is some other, more appropriate means of regulating the sector, taking into account viewer concerns, consumer protection issues and other relevant considerations.

Particular genres of Participation TV

- 3.7 For the purposes of this Issues Paper, it is useful to consider as examples three particular genres of Participation TV, currently categorised as editorial and subject to the Broadcasting Code, in further detail. However, for clarity, we should explain that the consultation will not seek to address potential issues of offence caused by adult content (Ofcom investigates such issues separately), or the specific pricing or information requirements for PRS promotion (this is a matter for ICSTIS, which regulates the PRS industry).

TV quiz services

- 3.8 TV quiz services generally comprise competitions with the following features:
- a puzzle or question is set on air and viewers are repeatedly asked to call a premium rate number in order to solve it;
 - typically (but not always), there is little or no other content than the puzzle and a presenter reiterating the puzzle, the prize, the telephone number and cost of calling;
 - viewers call a premium rate number in order to participate in solving the puzzle. All calls are 'connected' and therefore charged for;
 - free entry via a website is usually also possible - the degree to which this is publicised varies but tends to be somewhat limited compared with the premium rate route;
 - the vast majority of callers do not get an opportunity to give their answer; instead they hear a recorded message telling them they have not been successful on this occasion; and
 - a very small proportion of callers are randomly selected during the course of the show and put through to the studio to give their answer. Successful contestants win prizes.
- 3.9 There is increasing public awareness of, and concerns about, TV quiz services, in particular regarding the way in which they operate, for example the methodologies used to create and solve puzzles and the operation of the phone lines. Concerns include the potential for exploiting vulnerable viewers, the odds of callers being connected to the studio, the possibility of financial hardship, lack of understanding about charging and the total bill being run up. In November 2006, a Culture Media

and Sport Select Committee conducted an inquiry into TV quiz services; Ofcom, ICSTIS and the Gambling Commission provided key submissions.

- 3.10 The Gambling Commission has also been considering whether TV quiz services should be regulated as lotteries under the Gambling Act 2005 (which will be implemented in full in late 2007). If these services are defined as lotteries, they will require a Gambling Commission licence to operate and will have to abide by its licence conditions.
- 3.11 Both Ofcom and ICSTIS, the premium rate services regulator, are determined to set a standard for TV quiz services which, whilst acknowledging that this emerging type of programming is obviously popular with audiences, provides adequate protection for all consumers, including those who are not familiar with the genre. Ofcom and ICSTIS produced detailed new rules and guidance respectively in 2006 as a result of viewer concern, the regulators' own monitoring and the rise in the number of TV quiz services on television platforms. These new regulations were aimed at ensuring best practice in the industry and providing appropriate consumer protection. As a result of the recent Ofcom guidance and ICSTIS rules, there have been significant changes in the way TV quiz services operate and the way they broadcast – with increased transparency for the viewer.
- 3.12 As a consequence of these rules and guidance the following has been achieved, for example:
- greater on-screen and on-air clarity in pricing;
 - greater clarity of call costs when consumer participate;
 - clearer information about the fact that consumers pay for calls whether or not they get through;
 - rules concerning the use of clocks and countdown triggers to ensure viewers are not misled;
 - greater prominence given to free routes to entry; and
 - protections to help ensure that prizes are not presented as solutions to financial hardship.
- 3.13 ICSTIS is currently considering whether further rules are required, and Ofcom is keeping this area under review to ensure that consumers are adequately protected and standards are maintained. Further regulation will be adopted in the area of TV quiz services if it becomes necessary.
- 3.14 To complement this ongoing work on TV quiz services, Ofcom proposes to consider in the 2007 consultation whether any viewer or consumer detriment issues raised by TV quiz services would be addressed differently – and more effectively – if the content were considered to be advertising rather than editorial.

Adult chat

- 3.15 These services usually have the following features:
- they are unencrypted;

- one or more female presenters, often referred to on-air as “babes”, repeatedly asks viewers to call a premium rate number in order to talk to them (or to an off-screen “babe”);
 - the premium rate number is displayed on-screen throughout;
 - on dialling the number, a caller is presented with a number of options, including connecting to the onscreen presenter or connecting to an off-screen “babe”. Before being able to speak to any “babe”, callers are often kept on hold for extended periods or must listen to lengthy recorded messages²⁰;
 - phone conversations with the onscreen presenter are not audible to viewers; while the presenter is on the phone, there is either recorded music or another “babe” talks to viewers, usually doing little more than asking viewers to call in;
 - we are aware that many of the phone calls – whether taken on- or off-air – are adult and sexual in nature, even pre-watershed;
 - the way in which the on-screen presenter is dressed and behaves, and the language used, become increasingly adult and sexual as the day progresses, particularly after the watershed;
 - viewers are also repeatedly asked to send text messages or to text other premium rate numbers; it is often unclear what relation these numbers have to the editorial content of the programme.
- 3.16 The adult chat genre has existed for a few years and pre-dates the Broadcasting Code. However, these services have proliferated and changed in format over recent years – with an increasing emphasis on the PRS element and less on the editorial, and little (if any) direct interaction with the presenter.
- 3.17 Adult chat services are currently categorised as editorial and must therefore comply with the standards set out in the Broadcasting Code; the rules regarding protection of under-18s and ensuring adequate protection against harm and offence are particularly relevant to this genre (however, these issues will be outside the scope of the consultation). With reference to Section Ten of the Broadcasting Code, we currently have concerns about the prevalence in these programmes of messages to viewers to call a premium rate number. It is also unclear how the phone calls made by viewers contribute to the editorial content of the programme. Often the television content appears to be little more than a continuing promotion for an adult chat premium rate service, particularly as most viewers appear not to get through to the on-screen “babe” but instead are connected to an off-screen service.
- 3.18 The BCAP Advertising Code restricts the advertising of premium rate services of a sexual nature to encrypted elements of adult channels only. There is an argument that these adult chat television services are essentially commercial in nature and, in effect, a form of advertising. It could therefore also be argued that one of the consequences of being categorized as editorial is that these services are currently circumventing the advertising prohibition. Categorizing adult chat services as advertising, and therefore making them subject to the BCAP Advertising Code, would therefore have significant consequences for the genre, given that a number of these services are currently operating on open-access, unencrypted channels.

²⁰ This raises issues under ICSTIS’ Code of Practice

Psychic readings

- 3.19 Participation TV services featuring psychic readings, eg tarot readings, or psychic advice are currently not as widespread as either TV quiz services or adult chat services. Typically, they have the following features:
- a presenter repeatedly asks viewers to call a premium rate number for a reading or advice from an in-studio “psychic” (this may be the presenter himself or herself) or from “psychics” based elsewhere, either in a call centre or in their own homes (or indeed from 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; and
 - the premium rate number is displayed on-screen all or most of the time.
- 3.20 In addition to questions of undue prominence and the promotion of products and services in programmes, this genre has the potential to raise concerns regarding vulnerable viewers. The Broadcasting Code seeks to address these concerns; amongst the relevant rules is Rule 2.8 which provides:
- “Demonstrations of exorcism, the occult, the paranormal, divination or practices related to any of these (whether such demonstrations purport to be real or are for entertainment purposes) must not contain life-changing advice directed at individuals.”
- 3.21 Under the BCAP Advertising Code, advertisements for products or services concerned with the occult or psychic practices are not acceptable; there are very limited exceptions only to this prohibition. As it could be argued that psychic television services are essentially commercial in nature and in effect a form of advertising, there is therefore an argument that a consequence of this genre of television content being categorized as editorial is that it circumvents the advertising prohibition. Again, classification as advertising would have a significant impact on the genre.

Betting and gaming services

- 3.22 For the purposes of the formal consultation in 2007, we do not intend to examine television services involving betting and gaming. At the moment, and subject to the requirements of current gambling legislation, we classify these television services as editorial provided that they take care to avoid undue prominence and on-air promotion of gambling-type services. They must therefore take a cautious approach to encouraging viewer participation, for example by avoiding on-air references to stakes and placing bets and instead keeping such references behind the interactive ‘red button’. In addition, these television services do not tend to be predicated on the use of premium rate telephony. This is in marked contrast with other types of Participation TV.

- 3.23 The Gambling Act 2005 will be fully implemented in late 2007. It replaces legislation which imposed significant restrictions on the advertising of gambling services. Rules on the advertising of gambling, proposed by BCAP and agreed by the Gambling Commission and Ofcom, are likely to permit – within certain parameters – the advertisement of gambling services on television. We therefore propose to revisit the question of how betting and gaming channels should be regulated in late 2007.

Section 4

Possible regulatory approaches

4.1 The intention of this Issues Paper is to encourage wide-ranging background comments and information to inform the formal consultation in 2007. It is neither possible nor appropriate to make detailed proposals regarding regulatory options at this time. However, to help stakeholders contribute effectively to our early thinking, we would welcome views first on whether the current regulatory regime is adequate for regulation of the Participation TV sector; and, if not, whether new Ofcom guidance is required on the boundaries between editorial and advertising, or whether a new, bespoke set of rules should be formulated.

4.2 In the broadest terms, possible approaches going forward might include:

A Categorising and regulating all Participation TV services – except those that are clearly teleshopping, eg QVC and other shopping channels - as editorial; and interpreting Section Ten of the Broadcasting Code to accommodate this (this may involve amendment to Section Ten or interpretative guidance).

B Categorising all Participation TV services as advertising. They would therefore need to comply with the BCAP Advertising Code, which would present significant difficulties for adult chat and psychic reading services. A separate issue would arise for TV quiz services broadcast by Channel 3 licensees, Channel 4 and Five, because of the limits on the amount of advertising that they are able to broadcast.

C Defining a set of characteristics that would be used to help determine whether a Participation TV service is more like advertising than editorial (or vice versa) and should therefore be subject to either the BCAP Advertising Code or the Broadcasting Code as appropriate. These characteristics could include:

- The degree of prominence given to the premium rate number (or to any other participation mechanism involving payment by the viewer);
- The proportion of viewer calls to the premium rate number that are handled off-screen;
- The degree to which viewer calls (including text messages) are reflected on-air, eg are callers' conversations with in-studio presenters audible?
- The degree to which the service relies on premium rate calls from viewers.

This approach would have a particular impact where certain services were re-classified as advertising and advertising of those services is prohibited under the BCAP Advertising Code.

D Classifying Participation TV as a hybrid of editorial and advertising, and applying an appropriate mix of rules from the Broadcasting Code and the BCAP Advertising Code in order to ensure an appropriate level of consumer protection. This approach raises issues under the separation principle and, in addition to amendments to the Broadcasting Code, might require changes to the Act itself.

- 4.3 **The above are simply options at this stage, intended to encourage thoughts from respondents, and should not be taken as indicative of Ofcom's intentions. In addition, any other suggestions from interested parties would be welcomed.**

Section 5

Responding to this Issues Paper

Request for comments

- 5.1 It would be helpful to have views from stakeholders and other interested parties on the matters outlined in this Issues Paper. Whilst this is of course not a formal consultation exercise, it will help inform Ofcom's thinking, including the formulation of regulatory options, for the consultation scheduled in early 2007. In particular, we would welcome comments on the following:

Q1 the definition of Participation TV in Section 1 for the purposes of this Issues Paper and the formal consultation;

Q2 the proposed scope of the formal consultation as set out in Section 3;

Q3 the key features identified in Section 3 of TV quiz services, adult chat services and psychic reading services;

Q4 the possible regulatory approaches suggested in Section 4, including any other possible options; and

Q5 in the context of possible options for regulation of Participation TV, what changes (if any) should be made to the Broadcasting Code, the BCAP Advertising Code or other existing relevant rules, or is some new type of regulation needed? If so, what changes or new rules should Ofcom consider in the forthcoming consultation?

- 5.2 Please note that we are not seeking views at this time on whether an individual named service should be classified as editorial rather than advertising or teleshopping, or vice versa; nor are we seeking views on which regulatory approach should eventually be adopted.

- 5.3 As part of the consultation, we propose to seek more detailed information; however, as part of the scoping process and in response to this Issues Paper, we would welcome any information from stakeholders that would help us to build up a picture of this sector and to assess how any changes we propose could affect it. Information on the following matters would be particularly useful:

Q6 payment models used in Participation TV other than premium rate telephony;

Q7 the extent to which Participation TV relies on premium rate telephony (including SMS text messaging) for revenue and how the revenue from the cost of a premium rate call is apportioned between the originating operator, the terminating operator and the service provider;

Q8 the nature of the key costs involved in running a Participation TV service; and

Q9 the competitive and strategic threats faced by the industry going forward.

- 5.4 In addition, we will shortly be sending information requests to broadcast licensees who are providing Participation TV services. The information requested will help us

understand more about licensees' business models and will be a valuable input to the formal consultation. It is also possible that we will invite individual stakeholders to pre-consultation meetings.

How to respond

5.5 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 31 January 2007**.

5.6 Please email yvonne.matthews@ofcom.org.uk attaching your response in Microsoft Word format.

5.7 Responses may alternatively be posted or faxed to the address below, marked with the title of the paper.

Yvonne Matthews
Content and Standards, Floor 5
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3806

5.8 Note that we do not need a hard copy in addition to an electronic version.

5.9 It would be helpful if your response could include direct answers to Questions 1 to 9; it would also help if you can explain why you hold your views.

5.10 As stated in Section 1 of this paper, any views, opinions or representations made will not be taken into account in assessing any policy options proposed in the formal consultation in 2007, although they will help inform that consultation. Stakeholders will be invited and have the opportunity to make written submissions on the specific matters consulted on in the consultation document when issued in 2007.

Confidentiality

5.11 We believe it is important for everyone interested in this issue to see the views expressed by respondents. We therefore intend to 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.

5.12 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will do our utmost to respect this. But sometimes we will be required to publish a response marked as confidential in order to meet legal obligations.

5.13 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/accoun/disclaimer/>

Next steps

- 5.14 As previously discussed, we intend to consult formally in early 2007. We also plan to carry out some viewer research in early 2007. The consultation will propose regulatory options, upon which respondents will be invited to submit comments. Once we have had an opportunity to consider all the responses, we will publish a statement (this is scheduled for summer 2007), confirming the regulatory position.

Annex 1

Extract of the Ofcom Broadcasting Code

Section Ten: Commercial References and Other Matters

(Relevant legislation includes, in particular, section 319(2)(f) and (i) and 319(4)(e) and (f) of the Communications Act 2003, Articles 1(c) and (d), 10(1) and (4) and 18(3) of the Television Without Frontiers Directive, section 21(1) of the Financial Services and Markets Act 2000, and paragraph 3 of the Investment Recommendation (Media) Regulations Act 2005, Article 10 of the European Convention on Human Rights.)

This section of the Code does not apply to BBC services funded by the licence fee or grant in aid, which are regulated on these matters by the BBC Governors.

The rules in this section are subject to, and supplemented by, any Ofcom rules or guidance on cross-promotion.

Principles

**To ensure that the independence of editorial control over programme content is maintained and that programmes are not distorted for commercial purposes.
To ensure that the advertising and programme elements of a service are clearly separated.**

Rules

10.1 Broadcasters must maintain the independence of editorial control over programme content.

10.2 Broadcasters must ensure that the advertising and programme elements of a service are kept separate.

Products or services in programmes

10.3 Products and services must not be promoted in programmes. This rule does not apply to programme related material. (See Rule 10.6.)

10.4 No undue prominence may be given in any programme to a product or service.

Note: “Undue prominence” may result from:

- *the presence of, or reference to, a product or service (including company names, brand names, logos) in a programme where there is no editorial justification; or*
- *the manner in which a product or service (including company names, brand names, logos) appears or is referred to in a programme.*

10.5 Product placement is prohibited.

Meaning of “product placement”:

Product placement is 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). For the purposes of this rule, the following are *not* considered to be product placement:

- References to products or services acquired at no, or less than full, cost, where their inclusion within the programme is justified editorially. On television, a brief, basic text acknowledgement of the provider of these products or services may be included within the end credits of the programme. This is permitted only where the identity of the product is not otherwise apparent from the programme itself.
- For television, arrangements covering the inclusion of products or services in a programme acquired from outside the UK and films made for cinema provided that no broadcaster regulated by Ofcom and involved in the broadcast of that programme or film directly benefits from the arrangement.

Programme-related material

10.6 Programme-related material may be promoted in programmes only where it is editorially justified.

10.7 The broadcaster must retain responsibility for all programme-related material.

10.8 Programme-related material may be sponsored, and the sponsor may be credited when details of how to obtain the material is given. Any credit must be brief and secondary, and must be separate from any credit for the programme sponsor.

Meaning of “programme-related material”:

These are products or services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme.

Premium rate numbers

10.9 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*).

10.10 Any use of premium rate numbers must comply with the Code of Practice issued by the Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS).

Competitions

10.11 References to brands within competitions must be brief and secondary.

(See Rule 1.28 in Section One: Protecting the Under Eighteens and Rule 2.11 in Section Two: Harm and Offence.)

Use of advertisements in programmes

10.12 Advertising must be clearly separated from programmes. Advertisements must not appear in programme time, unless editorially justified.

Charity appeals

10.13 Charity appeals that are broadcast free of charge are allowed in programmes provided that the broadcaster has taken reasonable steps to satisfy itself that:

- the organisation concerned can produce satisfactory evidence of charitable status, or, in the case of an emergency appeal, that a responsible public fund has been set up to deal with it; and
- the organisation concerned is not prohibited from advertising on the relevant medium.

10.14 Where possible, the broadcast of charity appeals, either individually or taken together over time, should benefit a wide range of charities.

Funds for programmes

Television

10.15 Broadcasters must not broadcast appeals for donations to make programmes or fund their services.

Radio

10.16 Broadcasters may broadcast appeals for donations to make programmes or fund their service. The audience must be told of the purpose of the donation and how much has been raised as a result of the appeal. All donations must be separately accounted for and used for the purpose for which they were donated.

Financial promotions and investment recommendations

10.17 When broadcasting financial promotions and investment recommendations broadcasters must comply with the relevant provisions in Appendix 4 to this Code.

Meaning of “financial promotion(s)”:

A financial promotion is an invitation or inducement to engage in investment activity (in accordance with section 21(1) of the Financial Services and Markets Act 2000 (Restrictions on financial promotion).)

Meaning of “investment recommendation(s)”:

An investment recommendation occurs when someone directly recommends a particular investment decision, for example, buying or selling a particular share or underwriting a particular share offer.

Virtual advertising

Television

10.18 The use of electronic imaging systems during broadcast coverage of an event must comply with the following requirements:

Participation TV: how should it be regulated?

- broadcasters and viewers must be informed in advance of the presence of virtual images;
- virtual advertising may only replace existing on-site advertising – virtual advertising messages must not be more visible or conspicuous than the actual advertising at the venue;
- rules relating to prohibited advertisers also apply to virtual advertising; and
- the broadcaster may not trade in virtual advertising.

Meaning of “virtual advertising”:

Virtual advertising normally (but not exclusively) takes place at events, for example, sporting events, and involves altering the broadcast signal to replace existing venue advertising with other advertising in the television picture (potentially targeted at a particular geographical audience).